

**CHALLENGES and DIRECTIONS
in
JUSTICE ADMINISTRATION**

Essays edited by
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With Introduction by
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South Australian Institute of Justice Studies

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DREAMS

At night, snuggled up in bed
I fall asleep with the same
Dream in my head.
A peaceful world with nice clean air
And brightly coloured flowers everywhere.
People are laughing
And children are playing.
This is what my dream is saying,
"Look after the world and all be friends,
With peace in our hearts the dream never ends."

Danielle O'Connell, 1995 (8 years old)

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- Correctional Services Advisory Council
- Offenders Aid and Rehabilitation Service

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Preface

Challenges and directions in concepts of justice and the way in which those concepts are expressed are as old as human civilisation. They are the basis of social coherence and security and the vehicle of human rights and welfare. The Englishmen who devised the policies and programmes which led to the settlement of the Colony of South Australia were determined that problems of penal settlements in other colonies in Australia would not be allowed to arise in Adelaide. Under a gum tree at beachside Glenelg, on 28th December 1836, Governor Hindmarsh said:

In announcing to the colonists of His Majesty's Province of South Australia, the establishment of the government, I hereby call upon them to conduct themselves on all occasions with order and quietness, duly to respect the laws, and by a course of industry and sobriety, by the practice of sound morality, and a strict observance of the ordinances of religion, to prove themselves worthy to be the founders of a great and free colony.

The provision for justice administration and relevant services such as police, courts and prisons was not high on the list of priorities. However, shortly after the arrival of the Governor, it became necessary to take emergency measures to deal with problems of disorder. It was not possible to isolate South Australia from 'undesirable' immigrants who travelled across the borders from the Eastern States. Nor was it possible to maintain a 'crime free' community for long, no matter how carefully the early settlers had been selected. A regular police force quickly became a necessity, and at least one Governor got into difficulties because he allowed too much of the Colony's scarce finance resources to be diverted into the building of the Adelaide Gaol. A problem arose in South Australia in the second half of the 19th Century when Justice Boothby maintained English Law without allowance for mitigating circumstances because of the nature of the Colony, the different environment to that in which English law had evolved, and the different concepts of justice and the way it should be administered which were held by the Parliament of South Australia. Boothby J held to the independence which he believed was his under the 'doctrine of the separation of powers, and it was only after considerable difficulty for the Parliamentarians and the Government that he was removed from office. Successive generations of South Australians have encouraged innovations in justice administration, and insisted on their right to demand that the justice system should be responsive to changing social and economic conditions and community requirements consistent with the maintenance of law and order.

At the beginning of the 1980's South Australia was in the mood for progress in many areas. A series of dramatic events in the conducting of prisons and law enforcement gave rise to awareness of the need for change in the way in which justice was administered and the prisons and juvenile offenders' institutions were being conducted. In 1982, John Dawes had been appointed as Chief Executive Officer of the Department of Correctional Services. With a good academic background and wide range of relevant experience. John had been a senior executive in the administration of prisons in Victoria. He and I had associations in the Eastern States, particularly during the time when I was Foundation Secretary of the Australian Institute of Criminology in Canberra. After a career change I had retired to Adelaide a year or so before John's arrival, and when he came, I was involved in a new programme of education in justice administration.

Towards the end of 1982, John Dawes and I met in his cramped little office in the unfashionable end of King William St., and inevitably we talked about the need for

improvements in justice administration in South Australia. We agreed that little could be done without public awareness of the problems and willingness to explore possible improvements. John suggested that one way of achieving this could be through public meetings in which recognised scholars and practitioners of national and/or international status might be invited to present an oration on issues of justice administration. That is how the series of presentations brought together in this book arose. Associate Professor Ray Molloy, at that time Head of the Elton Mayo School of Management within the South Australian Institute of Technology, responded enthusiastically to the suggestion that his School should host the first of the proposed public orations. The Institute of Technology had a reputation for responsiveness to community education needs.

The School of Management was named after the world famous pioneer in management innovation, Elton Mayo. It had been approached by the South Australian Police Department requesting the provision of appropriate tertiary education programmes for police officers, with particular emphasis on 'man management'. This request led to an invitation to both the Courts and Correctional Services Departments to join a project to develop a justice administration component in the course, leading to the associate diploma in business management. In preparation for the change to the University of South Australia, some associate diploma courses were later abandoned and the justice administration programme was taken over by Adelaide College of Technical and Further Education (now Adelaide Institute of TAFE). During the years in which the Elton School of Management ran the justice administration tertiary level programme it attracted a steady inflow of students a number of whom are now in high positions in justice administration departments and agencies in South Australia. The course had bi-partisan support from Government Ministers and Shadow Ministers, and one of its bi-products was the beginning of regular consultations between the heads of relevant Government Departments.

In 1987, the Justice Administration Foundation became an incorporated body and in the course of time, sponsorship of the public Oration, and the venues where it was held, changed.

The Foundation, consistent with its objectives, expanded its activities to include regional seminars, lunchtime and evening symposiums on topical issues, and a variety of publications and recognised international status. Its individual and corporate membership also grew, and continues to grow, to include members of the judiciary, the Law Society, academics and a wide range of practitioners.

In 1997 the Foundation began to examine its strategic directions. An opportunity arose for the Foundation to enter into a 'Memorandum of Understanding' with the Adelaide Institute of TAFE and the University of South Australia and, in so doing, establish the South Australian Institute of Justice Studies. At the Foundation's Annual General meeting that year it was agreed that the Foundation would change its name to the South Australian Institute of Justice Studies. The Institute will continue the Foundation's activities, but also play a more intimate role in the development justice studies programs and research. The essays in this volume, provided by outstanding academics and practitioners, mark the first decade and half of deliberations, and provide a foundation for further development.

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Gerard M. McGrath (1989)
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INTRODUCTION

John Dawes

The twelve papers in this book were given in Adelaide as public orations. Each of the papers can be seen as not only a reflection of the scholars' or practitioners' interests of the time, but also a reflection of the interests of the Committee of the South Australian Justice Administration Foundation Inc. who invited the various Orators to come to Adelaide. The interests of the Committee were no doubt informed by the responsibilities of those people in their work in justice administration and by their professional interests, and therefore these ten orations can be seen to provide a window into justice administration concerns and interests of the times.

William Clifford, Director of the Australian Institute of Criminology from 1974 to 1984, and our first Orator (1983) was committed to improving our prisons. He said, '...rights and obligations in a prison setting are in a constant state of flux and concepts and standards change – giving new meaning to old conditions and procedures. Yesterday's privileges become today's rights' and one could add, are lost tomorrow. Many of the gains of the eighties are now being challenged as Governments and their administrations grapple with fewer resources in a framework of economic rationalism and new managerialism. Punishment and prisons were discussed in the work of Professor James Munro (1984), Ian Temby (1986), Professor Duncan Chappell (1988), Dr G McGrath (1989), the Hon Justice Michael Kirby (1990), and David Biles (1995).

Public sector reform in the late 1980's and 1990's was, and continues to be, predicated on the principles of effectiveness, efficiency and economy. The criminal justice system began to explore user-pays, outsourcing, privatisation and commercialisation. Indicative of this trend, David Biles commented on the privatisation of prisons.

Crime and its impact on victims has become a major interest of scholars during the eighties as well as for police and other carers who struggle to identify those responsible for the crime and support the victims through their harrowing experiences. Victimology, as this discipline is now called, featured in the papers of Professor James Munro, Professor Duncan Chappell and especially in the orations given by Dr G McGrath, Professor Beverley Raphael (1992), and Helen Reeves (1994). Dr McGrath used some of the words of the parents who had lost young members of their families through abduction and murder committed during a series of horrendous crimes around Adelaide during the seventies and eighties. Professor Raphael outlined many ways in which people can be victimised through acts of violence and the resultant trauma. Helen Reeves described the growth of victim services in the United Kingdom.

Patrick Dodson (1993) whose oration unfortunately was not available for publication in this volume provided a passionate yet insightful critique of the findings of the *Royal Commission into Aboriginal Death in Custody*. He challenged all involved in the administration of justice to examine the 'case studies' of the people who died in custody with a fair and unprejudiced mind. This volume would not be complete without some record of Patrick Dodson's oration; hence Michael O'Connell presents an overview of the central themes.

Australian people all suffered through the late seventies and during the eighties as a result of greed and corporate crime. In 1991, Frank Costigan QC spoke of the 'despair and anger' felt when looking back over the eighties, of the 'opportunities lost during this decade when vast amounts of money were brought into the country, not for sensible investment purposes, but to gratify the egos and greed of non-productive scoundrels'.

Education and training for those who work in justice administration featured in the work of Professor James Munro, the Hon Justice Richard McGarvie (1985) and Professor Dorothy Bracey (1987).

The Hon Len King (1996), former Chief Justice for South Australia, presented an expose on the public opinion and its influence on the administration of justice (in particular the courts) in South Australia. His judicial perspective included a reflection on the independence of the judiciary, the right of victims to participate in sentencing and the media.

Justice administration is a topic that is usually discussed with passion. It was the hope of the South Australian Justice Administration Foundation Inc that these orations would be delivered with passion, as indeed they were, and inform the passion of those who listened and of those who have read the Orations. It is the present hope of the Foundation that by producing this book, the Orations will be made available to a wider audience, and perhaps inform present passions and encourage the development of new passions.

I would like to conclude by once again thanking our very distinguished Orators and the Foundation for making these orations possible, the committee of the foundation for its support and organisational accomplishments and to the public who attended.

RIGHTS & OBLIGATIONS IN A PRISON

William Clifford

INTRODUCTION

First let me dispel any idea that I come with a panacea for our prison problems. I don't believe that there is one without a change in society itself. Instead I am seeking to address the confrontation which exists in our institutions and to suggest that in a conflict situation in which we cannot ever agree and in which polarisation is likely to substitute muscle or a biased media for reasonableness and justice, it is important to seek common ground on fundamentals - on rights and obligations. Paradoxically, we move to rights simply because we don't know what is right - and when we don't know what we should do we take refuge in what we must do. Certainly rights and obligations are going to characterise our future concerns with the prisons - and maybe not only with the prisons.

We have had so many upheavals and have become so accustomed to referring to the crisis in modern prisons that we have usually overlooked the fact that the real crisis of our time is in western society itself. If you don't believe it, then look at the relative absence of turmoil in the prisons of some other cultures across the world. This does not mean that their prisons are better - only that they are less confused because they are less frequently used as political footballs or to provide inexpensive drama for the media. Like it or not, it is obvious that from now on a modern democracy is going to fight its wars, debate its policies and run its prisons under the ubiquitous camera. That doesn't really matter if there is a consensus on what we really value. It matters greatly if we have to depend on the media to provide for the public the kind of education and coverage which people need in order to make-up their minds on fundamental values.

There is undoubtedly a crisis in our Western prisons simply because our western society doesn't know any more what it really wants its prisons to do. And it doesn't know how to guide the prisons because it no longer knows how to guide itself. For generations now its own values have been slipping or changing and this shows itself nowhere more dramatically than in the prisons. It is there that the challenge to authority and the flaunting of all the expectations of others is most conspicuous. And the defiance and self-protection is not only on the side of the prisoners - it permeates the system, leaving no principle unquestioned and no practice secure.

Tightening the administration, developing a series of more creative programmes, liberalising the procedures, exposing prisoners and staff to community influences are usually nothing more than preoccupations with symptoms. The real disease is the loss of direction and it seems to get worse in the future with the human rights campaign and activism amongst prisoners on the one hand and political clout of prison officers' unions on the other. Both have their constituencies amongst the general public and both sides will vie for equal time on television. Yet, as we all know, direction from society is lacking simply because there is no longer a consensus. So, if we do not know where we are going, we should at least know where we stand. Hence the growing importance of rights and obligations: our generalised uncertainty of values makes it necessary to spell out what we can do and what we can't do, i.e. to specify that basic minima for all concerned - the rights and obligations.

But let there be no misapprehension - we are talking of bottom lines - of the minima - of legal expectations and constraints not of either Christian concern or the humanitarian ideals. In this

connection it is worthwhile recalling a comment of the Rev. Canon Sydney Hall Evans (1973) in his study of human rights:

“Talk of rights is lawyers language, not the language of theologians. Theologians talk of love and of love as a duty... The Christian language about human relationships focuses on the other as the subject of rights.”

No one should get less than his rights then: but he remains poor in this life if it becomes true that he can expect no more.

GETTING IT RIGHT IN PRISON

Contrary to much of the current debate, exacerbated by special pleading in the media, human rights and human dignities in a prison setting are not always protected or provided. For most efficiently simply by expanding facilities for grievance procedures, exposing the institutions to indiscriminate media surveillance, appointing royal commissions, extending the powers of ombudsmen or providing for legal aid on all sides.

These are all useful and sometimes very necessary when powers have been abused or rights ignored. It is contrary to the interests of all concerned, however, to overlook the fact that the prison by definition is a very special type of social environment within which prisoners, officers and administrators are thrown together by circumstances not always of their own making or to their own liking. They inter-relate and to a great extent they depend upon each other for the enjoyment of what they have a right to. Whether prisoners or staff they fill a variety of different roles, and in given situations each group feels itself misunderstood, neglected and badly treated by society at large and the authorities in particular. There is a hierarchy of status amongst the prisoners themselves and a subtle psychology of ratings amongst staff of equal rank which determines the extent to which rights are going to be enjoyed or obligations imposed. The more formal structure of inalienable rights, laws, and detailed regulations merely provides a context for all this. Those in a prison spend hours together, sometimes years, and they rely upon the interplay of their human and social relations (much more than they are sometimes prepared to admit) for satisfaction, security and peace of mind - all of which are related of course to the development of that understanding and consideration which is necessary for the real (as opposed to the purely formal) protection of human rights.

As the various groups which make up this prison community learn to use the media, exploit the law or to flex their industrial muscle without regard for others, there is a progressive and dangerous polarisation; and each group tends to rely more on conflict than on cooperation to get its way and to promote sectional interests. There is of course a school of thought that argues that conflict is essential to change: only by conflict are those in authority forced to act to reduce the tension. Always the claim is for justice. Justice is an elusive as well as an expensive mistress, however. Sometimes the benefits obtained from vindication may be of questionable value to the enjoyment of human rights in general in a prison setting. Scoring points at the expense of others can lead to intensified conflict and less harmony. When the staff has made a point by locking in the prisoners and going on strike - or when the prisoners succeed in humiliating their guards, the results for both could be a costly standoff that could be less comfortable. Working to the book can be more stressful than confidence in each other and the proper use of discretion. If, as a result of continuing conflict, conditions and relationships in the prison begin to deteriorate, there are likely to be few winners. That is why conflict has to be balanced by cooperation and rights by obligations. Let it not be forgotten that when conflict continues, the situation in a prison can deteriorate - even where physical conditions, educational or vocational programmes and the officers' terms of service are unexceptional. There are subtle ways of denying rights (or making them not worth having)

that cannot be proved or captured by the camera. These can poison the atmosphere even in a prison, which cannot be faulted for its overt respect of minimum rules.

Moreover, the risks in prison are growing as the prisons are used less for general offenders and more for those who have to be segregated for the security of society - or who are there because there is no other way of expressing the public repudiation of their conduct. With the death sentence abolished or rarely used and with exile or corporal punishment discontinued the prison, as a last resort becomes increasingly difficult to administer. There are far more prisoners requiring special attention. The variety and status of inmates and their attitudes to law breaking are different in a society of plural values. Sophisticated drug traffickers with access to funds outside or professional corporate offenders who still have extensive business interests are only two of the special groups. Psychologically disturbed, homosexual, or physically disabled inmates present classification problems; and the risks which a prisoner may run of being attacked by other prisoners has to be a constant concern of those responsible for the institutions. Prison officers too, no longer disappear into uniformity behind their insignia. They differ in the extent of their experience, in their levels of education and training for the variety of special skills that are needed to cope with situations in a modern prison. They too have diverse attitudes to the requirements of their job, and they vary in the extent of their industrial militancy.

Of course, rights and obligations in a prison setting are in a constant state of flux and concepts and standards change - giving new meanings to old conditions and procedures. Yesterday's privileges become today's rights; and ideas on necessities are affected by lifestyles outside. However inappropriate and in bad taste it may be to refer to happiness in prisons, there are indeed levels of minimum contentment and order which all groups in prison know about - and to which they directly contribute by the way in which they prosecute their rights and fulfil their obligations.

THE PRISONERS

The *International Covenant on Civil and Political Rights* will apply to prisoners as to anyone else (subject only to the precise terms of the sentence) include:

- privacy;
- marriage and family;
- their own language, culture and religion;
- participation in public affairs;
- freedom of expression, movement, association and assembly;
- protection of their inherent right to life;
- liberty and security of person;
- freedom from degrading treatment, or punishment;
- equal treatment with others under the law.

The time has gone when a prison sentence meant a loss of civic rights. The doctrine that the real punishment is the loss of freedom was endorsed by the Nagle Royal Commission but it was made subject to the removal of any rights by the sentence itself. In fact, the implications of the strict sentence have frequently been removed administratively. The life sentence, for instance, is rarely a life sentence, hard labour disappeared in fact long before it was repealed in law. Remission and parole affect the length of the sentence; and the provisions for sentences to run concurrently affect their lengths. Though all other rights are retained these are obviously affected by the loss of freedom in ways which only prisoners can understand. And they have not been worked out in detail. The freedom to move has very different meanings for those in maximum security and those on work release. There are prisoners moving freely in the community and others considered such a risk that they are frequently

separated by electronic controls even from the guards. Human dignity must be preserved without security being jeopardised, accommodation kept sufficient without the comforts exceeding those available to the average of law-abiding citizens. The right to life or to freedom from personal attack or homosexual rape is affected by imprisonment. The risks are greatly increased for prisoners as compared with those of people in the world outside - an aggravation of a sentence that was never intended. As in society outside, prison laws may have to constrain the freedom of some to assure freedom for the majority.

Prisoners can protect their rights by the access they have to the authorities and ultimately to the ordinary courts. The general remedies such as *habeas corpus*, *certiorari* and *mandamus* are available to prisoners. Though courts in Australia are not yet as ready to involve themselves in the administration of the prisons as they are in the USA, the High Court in the New South Wales case of *Forster v Jododex Australia Pty Ltd* (1972) 127 C.L.R., 42. held statutory provisions did not oust the Supreme Court's jurisdiction to grant declaratory relief and that the discretion to grant relief should be exercised. His Honour Sir Anthony Mason (1980), a Justice of the High Court of Australia, has shown that Australia is likely to go further than the English courts have done in granting relief in Declarations. He has also referred to the very wide powers to grant injunctions available through the Judicature Acts.

More than this, the recent decision in the *Koowata* case makes the Federal government responsible for legislating to honour any international treaties. This covers human rights and it may be only a matter of time before the human rights of prisoners become an issue. There is a need therefore to consider uniform standards for prisoners across Australia: and shortly the Ministers of Corrections meeting in Hobart will be considering a resolution to provide for this. There are of course the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, but these are still too general and dated 'to provide what is needed.

THE PRISON OFFICERS

Uniform standards for prisons should not overlook of course the standards for those who work in prisons. It is true that they applied for the job and like racing drivers or skyscraper builders they put their lives and comforts on the line when they apply. They do it for the benefits which they see accruing - and as we know these expected rewards may not always be measured in terms of money. There are people who like the excitement, the authority or maybe the chance to do something for people more unfortunate than themselves. Taking such risks however does not mean that they relinquish their human rights or lose the respect to which they are entitled in human dignity. They too are covered by the *Universal Declaration of Human Rights*. Their right to form a trade union is enshrined in Article 23(4) of the *Universal Declaration*. They have a right to reasonable protection - from obvious dangers and a right to a citizen's redress if they are maligned unfairly or unjustifiably defamed.

Whilst they are in the institution however, the prison officers' rights are not only inextricably interwoven with their powers defined by the prison statutes and the subsidiary prison legislation - they are also morally and legally limited by the rights of those committed to their custody. For example, a prison officer can use handcuffs to protect him/herself from violence - but only usually where such a use of handcuffs is not considered unreasonable or undignified for the prisoners. It is not always appreciated that with prisoners known to be psycho-pathologically violent, the prison officer's fundamental right to life might well be used to justify a variety of types of remote electronic controls or forms of isolation which have already been condemned as inhuman for prisoners. Again, it is the balance of rights and obligations that becomes important.

There is, at the extreme, a confrontation of the rights of prisoners and their guards. In practice where there is no bitter defence of strict rights regardless of each other it is resolved by trust and the taking of risks. The risk implied in the relaxation, of security for prisoners could

infringe the extent of protection to which not only prison officers but also members of the public are entitled. It is on that basis that discussions rage on parole or early release - and it has been rendered more acute by the experimental evidence that it is not possible to predict dangerousness with any degree of accuracy. It is a debate that has crystallised into industrial action where the interests of prison officers seemed to have been subordinated to the interests of the prisoners. On the other hand, the officer made conscious of his strict rights seeks to avoid all risks since he is generally the one to answer if anything goes wrong.

Risks cannot ever be avoided in prisons if there is to be any semblance of humanity and concern for the prisoners. And risks have been taken - sometimes beyond the strict letter of the law. Only in this way has it been possible to reduce life imprisonment, to institutionalise open camps, to develop work release, to organise attendance at outside educational institutions, to permit home leave and the rest. These may now be allowed by law but they had to be pioneered administratively long before they were brought into the legislation. The risks have been justified by the results for the vast majority of prisoners, but where there was a failure there has always been a victim of crime or his relatives to complain that his rights to life or security of person were sacrificed for the sake of humanity to others. Without such risks being taken from time to time, life is going to become unbearable in prisons for the inmates and those employed to guard them. That is why the rights and obligations debate has to be resolved in a way that will permit flexibility.

Whether an officer should be armed, whether he should carry a baton or a gun is often a question of how the prison should be built - with what constraints there may be in the layout to protect the officer and to grant freedom of movement to the prisoner. Electronic controls to avoid personal contact can be degrading and inhuman - making the prison more like a zoo than a place where thousands of human beings may have to spend a large part of their lives. Yet, as discipline in society breaks down and prisons receive more difficult types of violent individuals a decision has to be taken between risk and humanity.

THE ADMINISTRATORS

Prison commissioners or directors today occupy a hot seat which is becoming less and less attractive to the younger people who are either coming up through the service or are looking for opportunities to use their knowledge of people for the improvement of a service which has not been particularly famous for its gentility. It is not difficult to sneer at their modern discomfort, to point to the high salary and all the fringe benefits and status that come with the job and to list the occasions on which prison administrators have been authoritarian, bull-headed, neglectful or have tolerated abuse. But when we think of human rights it is not so much the legislators and the demonstrators who have the ultimate responsibility for seeing they are respected in extreme cases, but those who are charged with the care of those deprived of liberty. In the entire history of prison improvement there has been more dependence on creative, imaginative and considerate prison directors than on anyone or anything else. It was prison directors who organised in 1846 the first ever inter-national congress to improve prison conditions - long before there was a Red Cross, an ILO or indeed any functioning international agency to share ideas on social improvement. It was the International Penal and Penitentiary Commission that got the United Nations interested in crime and presented them with the body of rules now known as the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. It was Sir Alexander Paterson, a British prison administrator who led the first dacoit prisoners into Malaysian jungle to set up their own camps without guards and who advised the French on the closing of Devil's Island, and it was Zebulon Reed Brockway in the USA who started the reformatory movement there. Here in Australia, Maconochie and Watmore are famous names. Reformers have come and gone, generations of prison officers have come and gone, but these names abide because they stand for prisoners' champions at all stages of penal development who had the courage and confidence to bring into practice their ideas on reform despite powerful opposition.

Take away or destroy this leaven of enlightened administrators from the heavy conflicting lump of vested interests which constitute our modern prisons and we will have all the elements in place for the implosion which produced the atomic bomb. Several of their careers have already been sacrificed on the altar of political expediency. Keep it up and the prisoners and guards will become involved in a war, which can only subordinate one to the other to the detriment of both and to the peril of the population at large.

To avoid this exodus of administrators we must secure their positions as long as they preserve their integrity. Let us lambaste the neglectful, brutal bull-headed administrators and dismiss them because of their insensitivity; but let's be careful not to throw out the gold with the swill. Let's train better administrators, let's give some credit to the honest, genuine and considerate administrators. We have to protect them from shouldering all the blame for governmental budgetary neglect extending over decades before they were appointed - and we have to permit, in their defence, publication of their past recommendations to government which have been shelved or ignored. When they make a mistake, we have to take into account their role in the balancing of rights and duties in a prison not once but regularly - every day.

THE SENTIMENTALITY OF PENAL REFORM

It is a sobering thought that most, if not all, of our modern problems with the prisons have come from the sentimentality of penal reform.

Hillarie Belloc once defined sentimentality as contradictory concern, i.e. trying to have one's cake and eat it. We are sorry for the victim but we can't bear the thought of punishing the offender. We object to having people caged like animals, but we get upset when there are too many escapes. We believe in discipline but not in sanctions, in the value of industry, but not if it is not entirely voluntary.

Something like this has characterised the history of Western prisons. Note that I specify western prisons because a similar inconsistency does not always apply in other less value-divided cultures across the world. In a Western setting however, much the same divided feelings are conspicuous when we campaign for effective crime control and untrammelled liberty at one and the same time - for it must surely be clear that more of one has to mean less of the other. Fundamentally our task in modern society is to determine the balance between control and liberty, i.e. the extent of public toleration. There is a similar task to be performed inside a prison if the rights of all are to be enjoyed to the maximum extent. Respecting rights means respecting the rights of all. It means protecting some inmates from others, avoiding the risk to life and limb which some of the inmates and staff are obliged to run: and it means reducing the opportunities for arbitrary action by either staff or inmates.

If we are not careful however, the very same sentimentality of the old reformers which led us into the evils of inordinate imprisonment and rehabilitation will lead us into such a pre-occupation with abstract rights that all legitimate obligations will be submerged: and if this happens then our rescue ship of commonsense and compassion may once again founder on the sharp rocks of uncompromising rights, regardless of consequences. Individual rights for everyone in all circumstances regardless of their social effect and regardless of their interrelationships can again mean the unreality of wanting the best of all worlds at the same time and that way madness lies.

RIGHTS AND OBLIGATIONS

Some of the difficulties with the way the world is turning to human rights either because it can find nothing more uplifting or because it seeks to justify its grievances, is that it has usually been given only a half of the blueprint for justice that the United Nations originally

intended. The proliferation of agencies, organisations, meetings, treaties and human rights laws and procedures across the world, sometimes clouds the fact that they are most prominent, vociferous and active in the countries where they are least needed. There is, for obvious reasons, the least clamour for human rights where those rights are being most denied, indeed the power to protest at all is eloquent testimony that at least some rights are being respected. In a similar but perhaps not identical way we need to examine carefully, in our own societies and inside our own prisons, the areas of silence as well as the areas of protest to appreciate the true state of our implementation of human rights. It isn't always those who shout loudest who suffer most. Secondly, it is a peculiarity of the western world that it nearly always places the emphasis on rights and so rarely comments on the corresponding duties or obligations. You would imagine that the *Universal Declaration of Human Rights* had been such an extreme statement of stark individualism that in championing inalienable individual rights it had never acknowledged any duties to the group. Yet Article 29 of the Declaration clearly states:

“Everyone has duties to the community in which alone the free and full development of his personality is possible.”

And Article 8(2) of the *International Covenant on Economic, Social and Cultural Rights* is quite explicit that:

“This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.”

Similar provisions may be found in Article 10 of the *European Convention on Human Rights* and in Article 32 of the *American Convention on Human Rights*. In fact, obligations are probably an inevitable feature of any conception of human rights that claims to be universal. This is not only because rights-themselves impose obligations but also because - believe it or not - the greater part of the world is really far more at home with the concept of obligations than it is with the concept of rights. Once we look beyond the individualistic, competitive, self-centred Western culture we find that the group too assumes importance and that duties to others are the means by which one's own rights are earned.

The individualistic interpretation of rights in the West is due essentially to Rousseau's rights of man enshrined in the American and French Revolutions. This has been derived from the Greek and medieval thinking about natural law, but, to derive the self-evident notion of rights from the older ideas of law, the traditional doctrine that might possibly have promoted the rights of men was deliberately individualised. It was concentrated on the rights of man as if he could stand-alone.

Perhaps the best way of showing the limitations of this is to take Rousseau's opening phrase which became famous, 'Man was born free', he wrote, 'but is everywhere in chains'. But how can we say that man is born free when from the moment of birth, he depends on others for his survival - for his food, for his care, even for his next breath? The infant is proof of our dependence on the obligations of others for the enjoyment of our own rights. Yet this group approach seems almost anathema in the modern West where the individual, his rights and fulfilment, have become the very centre of our universe.

There are all kinds of tribal and simply organised people across the world, which subsist as social and political entities by means of reciprocal obligations with rights only being understood as entitlements to the obligations of others. And even these entitlements are lost if one does not fulfil one's own obligations. Again, looking back through history, group or class rights have always taken precedence over individual rights. This does not mean that individual rights were not respected - only that they were always qualified by the rights of

everyone else. In Japan where obligations have always given meaning to life itself there was no Japanese character for rights until westernisation. Even then the Japanese understanding of rights was so imperfect that the newly invented character implied more privilege than rights.

The evidence is clear then that rights, to be meaningful, need to be balanced by obligations. One without the other means repression or injustice. If this is true of society at large it is a truth that becomes critical for the world inside the walls of a prison. Indeed, in our type of value-riven society there is really no other basis on which we can improve our existing institutions or erect our prisons of the future. But, by the same token, justice demands that no group in the prison can be omitted from our respect for rights or our insistence on obligations. Not only the prisoners but the staff and the administrators have both rights and obligations. Their contacts and interrelationships are the proper concern of our general quest for better standards.

SYSTEMS AND SOLUTIONS

It is important that the formal dependence on rights and obligations does not become a ritual that tries to ignore the humanity of their application. The policy must not become a disembodied principle because it has no magic beyond its humanitarianism.

Our post-industrial society has for long been characterised by a vacuum of faith, by chaos of convictions in a virtual cavern of apathy. We are so far adrift from reality and so despondent about ever-changing human nature that we are tending to rely more and more on a variety of conjuring tricks to extricate ourselves from our own inability to come to grips with our personal and social problems. We can't solve the human problems, so we look for means of neutralising the human element. That is what I mean by conjuring tricks. They may often be scientific or technological conjuring tricks which fascinate and divert us: but they are still attempts at short-cut solutions, which typically seek procedures that are capable of discounting the troublesome prevalence and perversity of human nature. Sometimes as programmes, projects, or schemes approved by law, these attempts at impersonal or neutral systems manage to persuade us that we are 'doing something' or else they help us to rephrase the question or even to pretend that the problems don't exist at all. But when we are just acquiring confidence in our new human-factor-neutralising systems, the human factor suddenly reappears to confound our best hopes.

That is why we were surprised that the nuclear bomb did not end all violence by making it too dangerous. That is why the pill alone could not resolve all our sex problems. And it explains the disappointment we have felt that the camera can give us much more fantasy than fact. Health care schemes, social security and technical assistance have all been abused because they tried hopefully to ignore the realities of human perversity.

The movement towards technology in the prison is a species of this genus. It matches the movement towards gadgetry outside the walls. Ingenious building designs, vandal-proof materials, camera surveillance, force fields around the perimeter, special alarms, are all designed to ensure security and harmony. But again, we are becoming aware that these supposedly subservient technical processes do not transform the human reality; they only make it more remote and perhaps more intractable. Moreover, efficiency and humanity, economy and consideration cannot always be reconciled or even balanced satisfactorily. Yet the faith in 'systems' persists. We have had a surfeit of pundits and opportunities bringing their nostrums to the relief of our prison crises. From the tough, no-nonsense authoritarian through the man-management experts, the systems specialists and the empirical criminologists to those radicals who would abolish all prisons anyway, there is evidence of a greater faith in method than in man himself. Even those who have faith in the humanising conditions may expect too much of 'process'. So personal belongings in the cells, encounter groups, therapy sessions, and the like may still be far from reaching out to the real human

problem of direction. Whilst all such systems are working themselves out, the daily routine in prison demands attention to definable standards - to rights and obligations. Systems alone won't solve our problems because our dilemma is in the ends rather than the means.

THEORIES OF THE PRISON

There are three basic explanations of our modern prison system - progressive, radical and contextual, the progressive has dominated the literature so far and this is the explanation with which we are most familiar. This presents prisons, reformatories, juvenile courts, probation and parole as advances in humanity simply because they were improvements upon the scaffold, the pillory, transportation, the lash and other sanguinary and repressive ways of dealing with offenders. They brought in a reformatory and rehabilitative structure to replace revenge and retribution. This progressive theory of prisons is the only theory incidentally which pays tribute to the early prison administrators who were pioneers of reform and humanitarianisms. Not only Alexander Maconochie on Norfolk Island but Sir Evelyn Ruggles-Brise who created Borstal, and George Michael Von Obermaier who took chains off the prisoners in Munich, dismissed the soldiers guarding them, and employed humane guards. Their personal dedication and concern for the prisoners committed to their care make sense only if the prisons were creations of a hopeful band of understanding reformers. We are now more aware of the injustices that were often perpetrated in the name of reform and rehabilitation, which later became the medical model. But at least these philosophies had hope and an unbounded confidence in the person's ability to do better - even if their own self-righteousness or idealism sometimes blinded them.

The second theory - the radical Marxist theory - is far more cynical. It holds that the prisons are part of a total structure of inferior class control by the superior upper classes. The upper classes use the penal institutions as efficient forms of social control and fill them with anyone regarded as 'dangerous'. Prison staff are - almost by definition - either brutal agents of capitalist masters or at least insensitive to prisoner's needs. Prisoners are unfortunate scapegoats - representatives of a class repressed. This theory derives its greatest corroboration not from its political configuration but from the undeniable facts that those coming before the courts are predominantly lower class; that so many offences are not even reported to the police and that so little is done to bring the higher level corporate and organised criminals to book. Though not radical in any political sense, Thorsten Sellin held in 1944 that the Houses of Correction built in Amsterdam in the sixteenth and seventeenth centuries were an attempt by the powerful to control the rapidly growing and threatening proletariat as feudalism receded. So, there can be little doubt that there is a political element - that prisons serve policies determined by whoever wields the power. However some crimes like murder, robbery, rape, and housebreaking occur whatever the political system. So the radical theory is weakened by the evidence that so-called classless societies also have prisons and have criminal justice systems which weigh heavily on the powerless - and by the fact that some of the most serious crimes are universally punished by societies at all stages of their development.

The third theory, the contextual approach, combines such simpler interpretations. It finds the radical construction too narrow in its addiction to economic determination and the class war, and the progressive interpretation too naive in its belief in moral uplift and its neglect of political and historical reality. Instead the contextualists argue for penological change, reflecting at any time the total context - social, political, religious and cultural. Only the progressive theory had any legitimate place for the prison in a social context, and with the decline of rehabilitation as a possibility the legitimacy of the prison has become difficult to maintain. Yet it does not go away. If we take into account the imperatives of this last quarter of the twentieth century, we can see the prison as an unwanted last resort in dealing with crime; gradually it has become an unfortunate necessity. A place we have to have but which we don't want to know about. This is a great change in its social status and community role, a

change that has affected both prisoners and staff. The prisoners feel themselves much more outcast, the staff feel they are doing a job no one else wants, and administrators are constrained to simply evolve policies designed to avoid trouble by keeping events out of the public eye as much as possible. The prisoner's aim by contrast, is the very opposite - not to allow themselves to be forgotten, i.e. to keep in the public eye as much as possible.

CONCLUSIONS

Assuming then that we are going to be obliged to continue running prisons that no one wants, it should be clear that regimes based on rights and obligations offer a way out of our present problems if the approach is right. Rights and obligations will dictate not merely the routine of the prison but its design and extent of accommodation, not merely the handling of grievances but the equipment supplied or permitted, not merely the access to legal aid but the lengths of sentences and the access to remission and parole, not merely the standards of food and medical care, but the use of batons, guns, dogs, insulting language and the relationships between inmates. Maybe in years to come rights and obligations will determine whether there should be any prison at all - or merely a range of what we now call alternatives. Meanwhile let us recognise our prison for what it is - a little unwanted world made safe and tolerable only by its respect for reciprocal rights and obligations.

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CRIMINAL JUSTICE MANAGEMENT - TOWARDS THE YEAR 2000

James L. Munro

INTRODUCTION

In Australian criminal justice the year two thousand began in 1980, for that was the year of first employment for the law school graduates, the corrections personnel and the constables who will be the managers of the courts, the correctional institutions and the police forces in the year 2000. That should be a rather sobering thought for it means that only a few more years are available to shape the occupational mindset of those young men and women. Only a few more years to prepare them to be 21st century managers, instead of 1980 managers grown old.

While it is difficult to predict with much accuracy specific crime trends 16 years in the future, it is a reasonable assumption that the environment of criminal justice agencies will be more complex and volatile than is presently the case. Consequently, the demands on the agencies will be for decision making, at all levels of the organisation, that is faster, more aware of societal constraints and more fully informed concerning possible consequences. This will be true whether one is a police officer dealing with street crime or the manager of a prison pondering her next budget.

Let us examine some of the management issues and skills that need to be in place soon if criminal justice agencies are to be effective in the year 2000 and then we will note some of the overarching societal considerations to which those systems and skills must be addressed.

RESOURCE MANAGEMENT SYSTEMS

Considering the fact that thousands of people are involved in the Australian criminal justice system spending many millions of dollars per year it seems only prudent to spend more time dealing with the issue of resource management in criminal justice agencies. Three aspects of resource management are examined here:

- programme budgeting,
- strategic planning, and
- information technology.

Let us begin with programme budgeting. It is sometimes alleged that the only thing duller than a budget is the accountant who prepares it. However, if you want to know the real distribution of power in an organisation, one need only look at the budget. Eventually, all plans, programmes, innovations, people and equipment are reduced to budgetary figures.

The traditional budget style in Australian criminal justice agencies has been the simple line item budget. D.J. Hardman, a prominent exponent of budgetary reform from the New South Wales Institute of Technology, has labelled such budgets as being deficient in both logic and utility. Increasingly Governments are moving to programme budgeting. South Australia led the way in 1981 closely followed by New South Wales and Victoria. The difficulty is that programme budgeting makes data demands on the organisation to which criminal justice

agencies are poorly prepared to respond. To use the police as an example. One of the basic goals of a programme budgeting system is to create a decision making structure that focuses on fundamental objectives. This simple sounding (but difficult to accomplish) goal is the key to an effective programme budgeting system; anything less is simply the exchange of one set of budgetary forms for another - a rather costly and hollow exercise. The stated goal of a police force is frequently something like the following:

To protect life and property and to maintain public order.

Few would quarrel with such a motherhood and apple pie objective, but such a general statement of objectives is valueless for the creation of a programmed budgeting system. The goals must be spelled out in much more detail and in a quantifiable manner. Thus, the general policy of protecting life and property will be broken down into various areas of police action. The general goal statement of protecting property would become programmes:

- Commercial Fraud,
- Residential Burglary,
- Commercial and Industrial Burglary, etc.

The goal of providing personal security might result in programmes:

- Muggings,
- Victim Assistance,
- Family Disputes,
- Serious Personal Assault,
- Sex Crimes, etc.

Obviously, each police force would have its own constellation of programme categories and subcategories. Under each category would be a statement of the level of service desirable (or feasible) and the resources in terms of manpower, cars, clerical assistants, etc that would be necessary to reach that level of activity.

In order for the police to formulate a programme budget they first must have a good idea of what it is they want to accomplish, and how they want to go about accomplishing it. This calls for a degree of planning that most forces have been slow to engage in. The example may readily be extended to other criminal justice agencies.

What is needed is strategic planning that goes beyond short-term operational concerns. Unlike the standard planning units of a corrections or policy agency which inevitably become bogged in a quagmire of short term, urgent operational matters, strategic planning concerns itself with events at least one budgetary cycle away and preferably more. Such planning would produce reasonably hard data about alternative strategies to achieve given levels of crime control in specific programme form, including the associated costs. An important consequence of this would be that management decision making would be based on programme needs, rather than on externally set budgetary limits. This would ultimately impose responsibility on both the appropriate Minister and on the criminal justice manager, since given levels of service would be tied to given levels of funding.

The point that most needs to be heard is this: In this time of budgetary transition from line to programme budget, the need for reliable data is essential. Such data are most likely to come from strategic planning units. The year 2000 will be a most wasteful one indeed if financial resources are not effectively harnessed to managerial decision-making long before then.

INFORMATION TECHNOLOGY

In the management literature it is popular to talk about the 'Computer Revolution' or the 'Information Revolution'. From the perspective of criminal justice managers, however, it might well be better to think of these innovations as the decision making revolution; for it is not just the manipulation of data which makes the computer an invaluable decision making tool, it is the increased accessibility to information which really creates the decision making revolution. The accessibility is also what creates a managerial opportunity and a managerial crisis in criminal justice. An opportunity, in so far as never before have criminal justice managers had so much information at their immediate command. The video display and keyboard should be as much a part of a manager's desk as the telephone now is. Even senior managers may now have virtually instant access to data that will allow him or her to check their instincts born of long experience against hard data. Manipulating the data in novel ways can lead experienced managers to see solutions that go beyond the conventional wisdom.

The managerial crisis inherent in having such vastly increased accessibility to information is more difficult to see, but it is nonetheless real. With management decision making information potentially available to every member of a criminal justice agency quite substantial pressures must inevitably arise within the agency to push decision making down the organisational pyramid to the lowest practical operating level. This radical decentralisation of decision-making is a crisis for which few high-ranking administrators are presently prepared. The implications for the higher ranks are tremendous, though the lower ranks will not be spared their share of trauma either. As an illustrative example (and using technology which has been available and in use for more than a decade) let it be assumed that most urban patrol cars are equipped with computer terminals that are linked by radio to their headquarters.

A call is received by the police dispatcher from Citizen X that a domestic disturbance is occurring at 33 Allen Road. The dispatcher contacts by voice the nearest available car on patrol, at the same time feeding the information into the police computer. The dispatcher then goes out of contact with the patrol officer, but the computer searches its files and automatically sends to the car information about the location, including the fact that in the past eighteen months the police have received four calls for assistance from the address, that the husband is a security guard and has a registered handgun. Further the computer files show that across the street lives an ex convict who only recently was released from prison on parole for a conviction stemming from a violent assault on a police officer.

The police driver's partner reads aloud the information as they are headed for the scene and they decide to call for two back up cars, one a back up for the call they are on, and one to check across the street to make sure that the officers on the original call are not walking into an ambush.

What is significant in the above scenario, in addition to the civil liberties issue, is not the facts of the case, but rather that no senior police officer was ever contacted, or, indeed, needed to have been contacted. The first line officers had all the information they needed to make a tactical decision. Any referral to a senior officer, such as a field sergeant, would have slowed up the police response and would have been quite redundant. The obvious managerial question arises: Do you really need a field sergeant under such conditions, and if you do need him, how have his duties been changed? Much the same question could be asked about officers at other various levels in the command structure. That certainly constitutes a crisis in criminal justice management. The lesson is clear: Computers introduce a potential for qualitative changes in criminal justice agency management and structure, for the decision-making process does not stand-alone, it is defined by the command structure itself. With the widespread use of computers in criminal justice management, senior officials are going to increasingly be faced with the necessity of bringing formal command structure and decision

making together. This brings us to a discussion of the structural changes for which one might hope in criminal justice agencies as we approach the year 2000.

STRUCTURAL CHANGE

In the year 2000 criminal justice agencies may well look like they look today, but if so, they are likely to be inefficient, ineffective, and staffed by highly stressed, disgruntled employees. This will happen because the employees of criminal justice agencies are changing, the society is changing, and the technology is changing. Indeed, everything is changing except the formal paramilitary structure of corrections and police agencies. Employees are increasingly better educated - even a trickle of tertiary qualifications are beginning to appear, and this will become a torrent by the turn of the century. Australian society is more heterogeneous in virtually every aspect than it was when this generation of managers was gaining their experience, and technological change has already been briefly noted. The net result of these changes is an increasingly poor fit between employee expectations and workplace realities. Today that poor fit produces stress and inefficiency; if the fit is not improved over the next sixteen years, the result will be institutional breakdown resulting from industrial action on the one hand and managerial ineffectiveness on the other.

The villain is hierarchy. The rigid multi ranked system encourages the repression of positive activity, the avoidance of responsibility, the veneration of the status quo and mindless, if minimal, obedience. As a current example of the mischief caused by hierarchy let us consider occupational stress among police and corrections personnel.

A decade ago when concern with occupational stress in police and corrections agencies became popular it was immediately assumed by researchers that, in the case of the police, stress was caused by street activity and the capricious dangerousness to which the police were subjected. In like manner correctional conventional wisdom held that a chief source of stress for corrections employees was the prison population. It was not until some years later when researchers began to ask a somewhat different set of questions that the discovery was made that corrections and police personnel learned to cope with on-the-job street or prison dangerousness and hostility quite well; what they have great difficulty in coping with is the formal organisation. If a policeman was assaulted he could at least hit back; when a corrections officer was faced with an unruly prisoner she could at least send him to the disciplinary cells; but does one do with an unruly administrative superior? You cannot send them away, nor can you hit them; there are in fact only two things you can do; sabotage the work effort or internalise the anger, frustration and anxiety. Because of the sense of responsibility most employees have, reinforced by peer pressure, employees tend to internalise their reactions to the organisation and develop various symptoms of stress.

Just as we researchers were looking in the wrong place for the source of stress, so we were giving the wrong prescription for its cure. We offered training and stress reduction techniques and hours of therapeutic counselling. What was needed was a move away from such palliatives to a direct assault on the cause - hierarchy. Structural change which involves an elimination or at least a lessening of the hierarchical nature of police and corrections organisations with a concomitant sharing of organisational power would go far towards reducing stress to acceptable levels.

What has been said concerning stress can also, with slight variations, be said of human relations, communications, decision-making and other organisational problem areas. Instead of always focussing on the people involved, attention should be given to organisational structure and the dynamics that flow from that structure. The charge to those of us concerned with preparing criminal justice agencies to cope with the demands to be made on them sixteen years hence is to start now to experiment with alternative forms of organisation so that we

may experience an evolutionary development of our institutions, rather than await institutional failure, and then revolutionary change.

CRIMINAL JUSTICE LEADERSHIP

The last management issue that I would like to address is perhaps the most difficult of all. The question is the nature of criminal justice leadership. What kinds of leaders are needed, where are they going to come from and how do we train them?

Since there are many different tasks in criminal justice agencies there is a need for different kinds of managers - especially at the crucial, but currently neglected, middle management level. Managers will be needed who have specialist qualifications (computer systems, forensic science, counselling, accounting) combined with generalist management abilities. As agencies shift to programme budgets, some considerable pressures may arise, especially in the large urban areas, to have programme managers, in which case each programme type may well demand its own style of management. As an imperfect example, a remand centre and a maximum-security prison put different pressures on staff and that creates the need for differing styles of management. A police commissioner is not simply an Inspector grown old; nor is a keeper a guard with more years of experience. The very nature of the position creates different demands, which require different skills. The human relations skills essential to the first line supervisor, need to be replaced by political skills for a Commissioner. Consequently, it is impossible to be very specific about the characteristics of a criminal justice leader, although several do come to mind; a tolerance for ambiguity is essential, the ability to be analytical is crucial and a strong sense of the absurd is certainly helpful!

Where are going to find these paragons of public virtue who are able to be managerially flexible, yet with a dedication to the maintenance of legal due process in their dealings with citizens and subordinates? Some of Australia's outstanding criminal justice leaders have come from military and commerce directly into ranking positions in agencies; others have moved laterally interstate; but the fact of the matter is that the overwhelming majority of criminal justice leaders are home grown in their own agencies.

Thus, the question of how they are going to be trained becomes a crucial one. While the broader issue of criminal justice education will be addressed later, it is appropriate here to briefly mention criminal justice training. Standardised training may be quite appropriate at the entry level but from first line supervision onwards training needs to be tailored to the job, to the career track and to the individual. At the least this means a much more sophisticated training programme developed and in place over the next sixteen years than is currently available. At the most it means the adoption of part of the military career model, which provides for 20% or more of one's career to be spent in being trained. If innovative management is to be the rule, rather than the exception, in-service training in management cannot be considered for only the lower ranks; but, in appropriate variations, it should be seen as the norm for the Minister on through the rest of the organisation. Irrespective of what specific form the training of managers takes, it must be realised that the quality of managerial leadership is crucial to the future functioning of the institutions of criminal justice.

INDUSTRIAL ORGANISATIONS

A concern of major proportions that is neither quite managerial nor societal, but rather a blend of both, is the role of industrial organisations in criminal justice. One of the maxims of industrial relations is that organisations get the kind of unions that they deserve; secretive, manipulating and power hungry managers elicit conspiratorial, combative, and rigidly ideological union activity.

It is frequently assumed by criminal justice managers that they cannot use modern organisational and technological methods because the union will oppose them out of hand. One rather suspects that occasionally the unions are a convenient scapegoat for a manager's own conservatism. In any case, the manager's task is a clear one - create the organisational conditions that will elicit union co-operation. What are those conditions and how are they obtained? Fortunately, industrial relations research and management human behaviour research converge in this area to give us a clear answer.

The single most important condition for union management co-operation is a history of trust; the longer the history the better. Obviously, some criminal justice agencies are going to have to hurry if they want co-operation by the year 2000. Secondly, both managers and union officials need to understand and appreciate their different, but complementary roles. If either participant believes that essentially the role of the other is illegitimate, then no basis for building trust will exist. The third condition is the establishment of a continuing dialogue among the parties. When communications are limited to only those occasions when grievances are being discussed or working conditions are being negotiated, then the interactions will always be negatively charged.

The condition of full communication, role understanding and mutual trust can be brought about through the process of consultative management. In the police field Victoria and South Australia have already made significant progress in this direction. Such labour management consultations, to be effective, must cover all areas of policy making that may have an impact on personnel. To me, this means all upper level management decisions. Consultative management does not mean that management relinquishes its responsibilities, or that the union becomes co-opted by the agency. It does mean that a full and frank exchange of views occurs with the underlying motivation, on both sides, being one of promoting the good of the force first and minimising conflict secondly.

Since only an irresponsible or corrupt union leader would sacrifice the interests of his membership, one of the costs of union co-operation is the occasional sacrifice of short-term efficiency for effectiveness, with, in some instances, the promise of long-term efficiency. That is a relatively small cost and one that an agency should be ready to pay.

As we move towards the close of this century there is no reason to believe that industrial organisations will either disappear or go docile. Quite the contrary, faced with rapid societal changes and the normlessness that is frequently a result of such changes, unions may well be ever more a service in an effort to protect their members from uncertainty. Management must take the initiative to ensure that the unions are forces for change, rather than bulwarks of the status quo.

OVERARCHING SOCIETAL CONSIDERATIONS

Police and corrections efficiency and effectiveness are not ends in themselves. A sadistically efficient prison or an effective, but lawless, police force is hardly tributes to management science. One should not forget that one of the pioneers of consultative management was Rudolph Hess when he was marshalling the industrial might of the Third Reich. So let us turn our attention to two of the overarching societal considerations that must occupy the attention of criminal justice managers today, if they are going to be prepared for tomorrow's claims of their agencies.

The social end towards which the managerial means must be directed in criminal justice agencies is certainly the protection of society through a dedication to legal due process. In a democratic country no other end is acceptable, nor can the value of protection be divorced from due process without threatening the very basis of democracy. This view could be examined in a number of operational contexts; police relations with political protesters, the

treatment of ethnic minorities in prisons, and the sentencing practises of judges. However, let me address only one issue, the administration of summary justice by police and corrections personnel. By summary justice, I simply mean the administration of punishment, usually physical, to suspects and citizens, such punishment being officially unsanctioned and divorced from all notions of legal due process. The severity of such punishment ranges from the administration of a spanking by police to a child brought in by its parents - something frequently found in some of the old ethnic neighbourhoods of Chicago thirty years ago, to the murder of a person by corrections or police personnel, ala South Africa.

Most summary punishment, in practise, involves the denial of an amenity to a prisoner or the beating of a suspect or prisoner. Such activities are almost always done without the direct knowledge of any superior officer and are frequently carried out despite good faith attempts by criminal justice managers and most personnel to put a stop to the practice. One of the ironies of summary justice is that attempts to protect the rights and privileges of suspects and prisoners, by enacting formal and quite limited disciplinary procedures in prison, for example, often have the effect of increasing the use of summary justice, consequently reducing rather than enhancing the protection of detained or incarcerated people; for in operational terms, the fact of the matter is that prisoners will be controlled - through established and legitimate means if possible, through the administration of summary justice if legitimate means fail or are perceived to be unavailable to the operating officers.

If we demand the maintenance of legal due process in prisons, and from my value perspective we should, then we must give officers the tools necessary to adequately accomplish their societally defined tasks. This may mean enacting rules and procedures granting the officer more discretion with respect to curtailing prisoner privileges or may entail abandoning prison facilities that are so antiquated that the only way that the physical safety of prisoners and officers alike is maintained is through the use, or the threat of use, of summary punishment. Let me cite one tragi-comic example.

Some years ago, I was touring the prison on Saint Croix in the US Virgin Islands. The prison had been built in the seventeen hundreds by the Danes and in two hundred and fifty years of its existence the town of Christiansted had grown around the prison so that security was quite impossible to maintain. The amount of contraband thrown into the prison, combined with racial friction among prisoners, made the situation very volatile. I asked the captain of the guards how he protected his men and his answer was a classic of summary justice, "Jim, I show each new prisoner my shot gun, and tell him if any of my men are touched I will kill the prisoner". I believed him, so must have the prisoners for no guards were hurt in the year I lived on the island.

The illustration goes to the heart of the due process problem. When we appropriate public funds for performing art centres while prison facilities are in a state of considerable neglect then we are giving a message to the prison guards endorsing summary justice, irrespective of whatever civil rights posturing our politicians and civil libertarians may engage in. The achievement of legal due process and the elimination of summary justice is a worthy and necessary goal of police and corrections managers, but a goal that can only be achieved with the co-operation of citizens and politicians.

ACCOUNTABILITY

A further overarching societal consideration that is of substantial importance now and is almost sure of being of vital importance in the future, is the accountability of criminal justice agencies. For good reasons discussion of accountability usually revolve around police forces. They are, after all, the agency that comes into contact with the most citizens in the greatest variety of circumstances. However, the other agencies of criminal justice are no less part of the same democratic state and should be subjected to some form of accountability. Prison

must meet certain minimal, often times far too minimal, standards of operation. Even the judiciary, as important as its independence is, needs some form of accountability superior to media circuses. Public accountability is so fundamental to the democratic process that some type of oversight function must be in place for every part of the system.

Because of its size and scope in criminal justice let us look particularly at police accountability. Generally, when the layperson thinks of police accountability they think exclusively of some process for the handling of public complaints against the police. The procedure varies from the aggrieved citizen calling the person in charge of a police station in a small community, to highly formal external review boards with their own staffs of investigators, which may hold a quasi judicial hearing of the complaint. The actual procedure used is less important than the result, which should be the resolution of the complaint in a manner that meets the criteria of fairness, reasonableness and openness. While such complaint review procedures are essential, accountability goes considerably further.

Perhaps before I discuss kinds of accountability, I should note what accountability is not. It most assuredly is not operational control. This, of course, is what bothers criminal justice managers most concerning accountability. The police represent a power far too easily abused to be open to the operational control of either bureaucrat or politician. In our cynical age idealism is usually dismissed as simple naiveté, but it still seems worth saying that the ideal towards which police organisations must strive is the administration of the law and the maintenance of public order in as dispassionate and faithful manner as is humanly possible. Converting the police into a partisan instrument has in the past, and most assuredly would in the future, destroy the credibility of the police in the eyes of the citizens and would eventually eliminate due process as the foundation stone of police activity.

Having said that, one must plunge on to say that the police are politically accountable and, in any system of representative government, that means that the police should be accountable to parliament through the Minister who holds that particular portfolio. While exercising no operational control the Minister must formulate broad policy and maintain oversight of the police function. Where policy ends and operations begins is determined only with difficulty, consequently the relationship of a Commissioner to his Minister is always one of some tension - we hope creative not destructive tension.

In addition to political accountability there is what might well be called effectiveness accountability. This would be the responsibility of the police to explain and justify their level of effectiveness to specific interested parties. Thus, the retail merchants' association might well want to review police performance with respect to retail thefts and hold-ups or a social welfare organisation might wish to examine police action relative to juveniles. Whatever the specific case might be the police should feel obligated to explain their effectiveness level to the affected parties. A smart Minister would have his office serve as a forum for such discussions; an even smarter commissioner would beat the Minister to the punch by opening up police operations to far more public scrutiny than has traditionally been the case.

As the population becomes better educated and as interest groups become ever more assertive, both political and effectiveness accountability are bound to be increasingly demanded of all of our government agencies, with criminal justice agencies being no exception to this trend. The wise criminal justice manager, long before the year 2000 comes, will have institutionalised agency relationships with the "outside" world and will have effectively come to grips with accountability.

THE ROLE OF EDUCATION IN CRIMINAL JUSTICE MANAGEMENT

Given the above management needs and the overarching societal concerns of due process and accountability, if the criminal justice system is to cope with the year 2000 what role should we expect tertiary education to play? The response is at least three-fold.

First, criminal justice education, like any education, should be a process that will develop the individual's ability to think critically and analytically. The formal imparting of academic, discipline-based knowledge is both the context for that development and a tool to be used in analytical thinking. The disciplines involved now are probably the disciplines that need to be involved both in the near term and in the year 2000. However, certainly some change in emphasis should be encouraged from general studies in criminology to more time spent in policy and management studies. Especially if students move past the undergraduate level it would be hoped that diploma and master's degree level education would be offered within generic schools of management and policy studies. This would avoid not only the excessive cost of course duplication but would ensure a high level of cross fertilisation among private and public sector students and faculties. With the powerful forces of parochialism at work in criminal justice agencies, future criminal justice managers need all the help they can get in order to break down the old intellectual and organisational isolation.

A second function of criminal justice education is to create a pool of men and women who see themselves as having moved past the craft stage to professionalism in criminal justice. As professional members of the criminal justice system first, and police, corrections and courts personnel second, they should be able to bridge the chasm that frequently separates the various parts of the criminal justice system. Presumably, improved understanding and communication among the component parts might facilitate better co-ordination and co-operation. This socialisation function could also play a most significant role in improving the whole of criminal justice management as the development of values and norms of behaviour held in common by criminal justice professionals would increase the probability of the successful implementation of new management systems and structures which depend on self supervision for most of their success.

The third function is education in criminal justice management is to contribute to the creation of an expanding body of research, which applies particularly to Australian criminal justice agency and society needs. Presumably such research could be carried out in both academic and applied settings - the important thing to note is that whatever the setting, tertiary criminal justice education would provide an excellent source of competent people.

RESEARCH IN CRIMINAL JUSTICE MANAGEMENT

And what kind of management research needs to be done? Virtually every kind. The pre-occupation of Australian academics with broad criminological concerns means that few management issues have been addressed. While avoiding a laundry list of research needs, let me mention just a few critical areas. What might be the organisation impact of extending the policy consultation process to public interest groups? What will the increasing complexity of criminal justice bureaucrat and his minister, how can ministerial oversight be meaningful in the face of such complexity? On a somewhat different level, management research might well spend considerable resources investigating the meaning and measurement of agency productivity - when is a judge earning his keep? How much public order do we purchase with our correction or police dollar? The list could go on. The result of research into criminal justice should be better political accountability, more effective operations and better internal working conditions.

CONCLUSION

As we move towards the year 2000 it is not enough to simply develop good management. As important as resource management systems with programmed budgeting and strategic planning are, even considered with information technology, the structural change of agencies and a changing criminal justice leadership all appropriately aware of due process and accountability - all of these things are still not enough to ensure viable criminal justice agencies properly serving the nation, their clients and their own employees. What needs to be developed is an Australian Management Ethos that will guide the education and training of criminal justice practitioners.

For too long Australians have felt that the key to managerial effectiveness was an around the world aeroplane ticket. Some financial administration from the UK, a large dose of continental technology, mixed well with US marketing and Japanese management systems was thought to provide all the answers to Australian management. If one dared to question this multi cultural salad one would be accused both of provincialism and/or reinventing the wheel. To which I can only reply, if the wheel breaks down under Australian conditions, then it needs to be reinvented for Australia and that invention is no more provincial than the development of managers in any other cultural setting.

What that Australian managerial ethos might be in its criminal justice manifestations certainly cannot be predicted by an American. But if the lucky country of two decades ago is to be transformed into the effective country of the year 2000 then systematic attention must be paid to the development of Australian criminal justice managers informed by an Australian managerial ethos.

Further Reading

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CHALLENGES DIRECTIONS AUSTRALIAN ADMINISTRATION ***& IN COURT***

Richard E. McGarvie

THE THIRD BRANCH OF GOVERNMENT

In recent years a great deal of community interest and concern has focused upon the branch of government that was once taken for granted - the judicial branch. This is likely to continue.

Last year the subject of Legal Studies was amongst the three optional subjects being studied by the highest numbers of Victorian High School students in years 11 and 12.

While deep and long-standing challenges face the judicial system today, the last few years have seen the beginning of a number of systematic initiatives to overcome them. There has been a dramatic increase in the thought and effort directed to making the court systems more effective, efficient and economical.

It is an encouraging omen that a sponsor of this Oration is the Elton Mayo School of Management. It is significant that its course for Associate Diploma in Business (Justice Administration) is designed for the development needs of administrators involved in the administration of the system of justice in South Australia.

Elton Mayo

Fifty years ago, Elton Mayo, who grew up and received his education in Adelaide, was at the height of the career in which he pioneered the field of industrial human relations. He was then a Professor and head of the Department of Industrial Research in the Business School at Harvard University. He is acknowledged as having established the scientific study of organisational behaviour. It has recently been said that what he then urged in broad outline has become the orthodoxy of modern management. (Zaleznik 1984, p1)

Recently, Dr Richard Trahair, a distinguished scholar of the University of which I have the honour to be Chancellor, La Trobe University, published his biography of the life and work of Elton Mayo, *The Humanist Temper*. That account of Mayo's approaches and ideas encourages me to assess in the light of his principles, the directions which court administration is currently taking in Australia.(1)

It was Mayo's practice to look at an enterprise in the context of all the social groupings involved in its operation. I will look at court administration in a similar way. I will consider the directions to be taken in judicial administration in the widest sense.

I mention briefly the purpose of the judicial system, remembering that administration is always ancillary to that purpose (Frieson 1982,p7).

PURPOSE OF JUDICIAL SYSTEM

Confidence in its laws is a vital ingredient of a civilised community (Clark 1969, p4). Lasting disputes weaken the cohesion of the community through the production of discord and even violence. There must be social mechanisms to resolve the disputes that arise from the conflicts of interest inherent in society. One of the most important mechanisms is the judicial system. It must be able to determine the disputed rights and obligations of citizens in a way that will be accepted as fair and authoritative by all concerned. The service of justice, which the courts are to provide, is an essential need of civilised people.

WHAT IS JUDICIAL ADMINISTRATION?

There are three basic components in the working of a judicial system.

There is the factual function - the finding of the facts established by the evidence. In analysing imperfect evidence to decide what happened a long time ago, a judge performs a function similar to that of an historian. It is usually the most important and difficult part of a judge's function.

Then there is the legal function in which the relevant principles of law are ascertained and applied to the facts found, either directly or through the exercise of discretion.

The third function I call the operative function. It comprises all the other activities of judges and everyone else involved in the working of the judicial system, which together determine whether the system in practice operates fairly, effectively and efficiently. It is this operative function which is encompassed by the expression "judicial administration".(2) I treat judicial administration as covering all of the working of a judicial system except the intellectual functions of the finding of facts by the judge (or jury) and the ascertainment and application of principles of law.

Most organisational and operational aspects that affect the functioning of the judicial branch of government are included in the concept of judicial administration. It includes the organisational relationships between judiciary, executive and legislature, involving such questions as the responsibility for the provision, control and economical use of funds, resources and administrative personnel, and the responsibility and accountability for the management, running and performance of the courts; organisational safeguards to judicial independence; the selection, tenure, training and conduct of judges; providing judges with support services and a program of judicial work to enable cases to be heard with a minimum of delay; the use of sound and efficient systems of court management, administration and information; the training of court administrators; procedures, rules and practices for the orderly, prompt and efficient disposition of cases; and the training, organisation and practices of the legal profession.

I suggest that while occasionally an honest error in the performance of one of the first two functions causes disquiet, the failures that produce the greatest concern within a community are failures of judicial administration.

What would a community think of a judicial system if judges, while intellectually finding the correct facts and principles of law, did not decide in accordance with those findings but bent to the pressures of government, big business, big unionism or public opinion and reached another decision, or did the same thing through corruption? How can people have confidence in a system of justice where, although the facts are ultimately correctly found and the law correctly applied, inefficiencies in the system cause such delays that acquitted persons have spent long periods in prison; parties are forced by economic pressures to accept totally

inadequate settlements; or damages are received so long after the death of a father, that the children have been deprived of the education the damages could have supported?

As one looks around the world at countries that have a low standard of applied justice, one almost always concludes that the deficiency is not in its laws or the ability of its courts to find the facts, but in its standards of judicial administration.

Another social ill results if, through inefficiency, courts become overloaded and unduly expensive. Community pressures force governments to intervene through legislative or administrative change. The intervention will usually be of a type that quickly and demonstrably reduces the overload or cost. This will almost always reduce the quality of justice available to citizens from the court system.

Clearly, if a judicial system falls down in its judicial administration it leads to loss of community confidence in the courts. A loss of confidence in its courts inevitably means a loss of confidence in its law. Poor judicial administration leads the judicial system to fail its community.

There is a word of caution. In assessing whether a court system operates well or badly we are concerned with questions of applied justice not theoretical justice. The test is not to ask what could be achieved in a perfect world inhabited by perfect people. The test is to compare the operation of our system with that achieved by other systems existing in comparable circumstances, at other times or in other places, in the real world of fallible human beings.

THE OBJECTIVE

The basic challenge is to achieve a position where, in the actual conditions of today, the judicial system operates with the maximum economy, efficiency and effectiveness, which is consistent with the maintenance of an independent judiciary and high standards of justice.

Most judicial systems have been taken for granted and neglected. A great deal of change is required to bring them to a pitch of efficiency. The changes must be such as will not impede their primary responsibility, the provision of justice.

THE MECHANICS OF CHANGE

A judicial system will achieve its desired objective if the groups who between them can influence and alter the system and the way it works, see the problems, accept a responsibility for overcoming them and are convinced that they can take practical steps to do so; if there are the organisational and financial facilities available to recommend in a convincing way the changes which should be made and feasible ways of making them; and if there are available the organisational facilities to make effective decisions to implement the changes and the funds, legal authority and administrative machinery and techniques to make and implement the changes.

THE GROUPS OF INFLUENCE

To operate efficiently courts need to be well managed. The management of a court system presents particular challenges. Unlike some private enterprises, court management cannot concentrate primarily on efficiency. The overriding objective is the achievement of justice. The system does not have unitary management; but rather the judiciary and executive share responsibility. It is not only the court staff who are to be managed. The effective functioning of a court depends on the co-ordination of the activities of judges, legal practitioners, court staff and departmental officers at the least. It also involves the co-operation of police, witnesses, jurors and others.

The making of changes to meet new conditions is a primary function of management. Management must scrutinise performance, seek ways of improvement, make improvements and monitor their operation.

In 1974, in addressing the Supreme Court Judges' Conference on the need for an Australian Institute of Judicial Administration, the Hon. Mr Justice Fox (in Pullen 1983, p20) said:

"In the present context it (judicial administration) has a wide meaning so as to encompass all matters which concern the system by which justice is administered; it is not confined to matters relating to the administration of the courts by judges. It follows that in bringing about improvements in judicial administration ... it is not the task of judges alone - others, and more particularly governments, the profession, and academic lawyers, have important roles."

There are several reasons why all those groups must be involved. They have between them an enormous amount of knowledge of the way the system works, its problems, their reality and dimensions. They will have some idea of some of the causes of a problem and a good idea of the way in which a proposed change would work in practice and whether a recommended method of implementing the change is feasible.

The value of any recommendation for change varies directly with its potential for being adopted and actually implemented. A change needs to be of such a nature and the report recommending it must be sufficiently convincing to persuade those who operate the system that the change is desirable because it would have the intended effect; that the recommended way of implementing it is feasible; and that it is worth the effort and inconvenience to them of learning and following new practices and contributing their own initiatives in making the adjustments and modifications which experience will show to be necessary to enable a new method to work well.

History is replete with examples of reforms that were by-passed because those operating the judicial system were resistant to them. The *Statute of Uses* is a good example (Windeyer 1957, p167-170). On the other hand, the extension of jurisdiction without legal authority by the use of fictions shows what can be achieved where all those operating the particular judicial system desire it (Windeyer 1957, p117-121).

Mayo found that in industry there was resistance to change by those who were too much devoted to rituals (Trahair 1984, p207). The justice system is an industry with a very long history and with deeply ingrained rituals. There is a particular reluctance to change practices and procedures of long standing. One often feels that the doctrine of precedent, useful in its proper area, has strayed to the area of judicial administration where it does not belong. In dealing with resistance to change in criminal trials, I said in a paper earlier this year:

"The difficulty is that all the practices and procedures of a criminal trial have tended to become articles of the common law faith. Procedures, which have outlived their useful service to the cause of justice, are still regarded as sacrosanct. A proposal to modify them meets the shocked resistance with which the very religious would meet a proposal to depart from several of the Ten Commandments on grounds of expediency."

Procedures adopted in earlier centuries were those found by experience to be most appropriate for those times. Unfortunately, having become articles of faith, any attempts to replace them with practices that would better serve the interests of justice today are regarded as heresy. Resistance to change of practice is regarded as a heroic attempt to maintain traditional standards. It produces the courage of the Captain Brown Syndrome. We all know that,

“The bravest man was Captain Brown. For he played his ukulele as the ship went down.”

Heroic inertia is a dangerous syndrome when the ship of law needs urgent refitting. Those who recommend procedural change to preserve the traditional values of the common law criminal trial must face the fact that there will be those amongst their colleagues in the judiciary, legal profession and law schools who will regard them as disloyal to those values. They must resist the temptations of heroism by inertia. (3)

On the other hand, if those who together operate the judicial system desire to implement a change there is a great deal that can be done without amendment of Acts of Parliament. Judges may alter rules of court. Judges, legal practitioners and court administrators may alter administrative organisations and administrative or court practices and procedures.

Elton Mayo regarded formal and informal groups as having a great influence on the operation of an industrial enterprise and upon the attitudes and conduct of those involved (see for example, Trahair 1984). Research, which he initiated, showed the vital importance to production of the attitudes to work of those engaged in it (Trahair 1984, pp226, 238, 246). Research established that "morale - a mental attitude that is the source of human effort - is more important for success at work than are machines and office systems" (Trahair 1984, p134). Industry should aim at achieving effective collaboration between people and groups of people (Trahair 1984, pp 255 & 289).

Recent research has shown that the effective improvement of a court system depends on the "local legal culture", the attitudes of the groups involved in the system.(4)

I will mention the input of the four main groups, which is necessary to make effective improvements in judicial administration.

Judiciary

The judiciary must give active leadership in improving the quality of judicial administration in its courts and its judicial system. The judges are naturally regarded as the leaders within a judicial system. To a very substantial extent the values of the legal system are within their keeping. The judiciary is the only group in a position to give effective leadership in this area. Mayo stressed the importance of good leadership in administration (Trahair 1984). As partners with the executive in the administration of the court system, the judges must be active and at least equal partners. I do not discuss the respective roles of judiciary and executive. That will be considered in a paper to be presented tomorrow at the AIJA Annual Seminar by the Hon. Sir John Young, Chief Justice of Victoria. It was also considered at an AIJA weekend seminar attended by Chief Justices, Judges, Attorneys-General and Departmental Officers three weeks ago. A record of the proceedings will be published later this year.

Government

The Government, the Attorney-General or Minister for Justice, the Law, Attorney-General or Courts Department, and Court Administrators have an obvious responsibility to the community to work towards an efficient and economical system of judicial administration.

Profession

The legal profession has such an extensive part in an adversary system of justice that its support and involvement is essential to effective improvement of judicial administration. The responsibilities of the profession were discussed in a paper presented by the Hon. Mr Justice Mahoney, Deputy Chairman of the AIJA, at the recent 23rd Legal Convention.(5)

Academic Lawyers

In the long term the responsibility of academic lawyers for the development of judicial administration in desirable directions is a vital one.

Law schools are not value neutral. Any well-functioning law school inculcates in its students the belief that the attainment of applied justice is a desirable end. I consider that the basic attitudes towards the judicial system of most of those who will be influential in the judicial and professional groups and many of those in the government group, are influenced more by their law school experience than by anything else. Students tend to regard as important, principles their law teachers regard as important.

The law schools have a commitment to the attainment of applied justice. Justice systems that fail to provide a satisfactory standard of applied justice, typically do so through a failure of judicial administration. A law school's commitment to applied justice necessarily carries with it a commitment to satisfactory standards of judicial administration.

Most students leave law school convinced that judicial independence is an important requirement of a judicial system. I wonder how important they consider it is. I wonder how much knowledge they have of the various social mechanisms which can operate to safeguard or to corrode that independence? (See for example, ALJ 1977) For example, I would view with alarm any proposal to introduce into Australia the "Beeching" concept of courts administered by the executive, however well that may be working in the different traditions and conditions of England and Wales. In this country I would regard it as an insidious, long-term threat to judicial independence. I wonder how many graduates of our law schools have a view on that.

While law schools would not be expected to teach in undergraduate courses the details of methods of attaining efficiency and economy in court operation, students should obtain a general notion of the importance of this to satisfactory standards of applied justice. The detailed learning should be available in postgraduate courses.

There should be options that would enable some students to graduate with skills of value in research into judicial administration. These would generally come from disciplines other than law. Skills in statistical method and other methods of empirical research in the social sciences would be of importance.

There have been recent developments. Last year the AIJA wrote to all Australian Law Schools suggesting that consideration might be given to teaching the principles of judicial administration. The response was uniformly positive. The Law Schools of Melbourne and Monash Universities are together planning a unit in judicial administration as a course available for LL.M. by coursework. The Law Schools of the Queensland Institute of Technology, the New South Wales Institute of Technology and other Law Schools are giving active consideration to teaching the subject.

Judicial administration and its various aspects are taught as part of academic disciplines in a number of overseas universities.

Systematic research into the way that a system of justice is operating and changes that would improve its operation are necessary pre-conditions to effective improvement. In practice those able to do that research are mainly academic lawyers. The recent major research projects into areas of judicial administration have relied heavily on academic lawyers. Dr Ross Cranston of the Law School of the Australian National University was Director of Research in the AIJA project, *Delays and Efficiency in Civil Litigation*. Professor Ian Scott of the Law School of the University of Birmingham and Professor Peter Haynes, Professor of Justice Studies, Arizona, were involved in that project and in the project of the Civil Justice Committee in

Victoria. Mr Peter Sallmann of the Department of Legal Studies, La Trobe University, was the Researcher/Consultant and wrote the Report on Criminal Trials for the Shorter Trials Committee.

Those in law schools are well placed to collaborate with other schools to do the interdisciplinary research, which is often important in the area of judicial administration .

Other Influential Groups

In discussing the groups with the main existing or potential influence on the operation of the judicial system, I do not imply a lack of influence by other groups. The influence of those regularly involved in litigation is significant. This includes the Police, insurers and trade unions.

SIGNIFICANT EVENTS

The habit of critical examination of the efficiency of Australian judicial systems was given impetus when the Rt. Hon. Sir Garfield Barwick, as Chief Justice of Australia, in 1977 initiated addresses to Australian Legal Conventions on *The State of the Australian Judicature*.⁽⁶⁾ His successor, the Rt. Hon. Sir Harry Gibbs, has continued these.

In the Boyer Lectures 1983, the Hon. Mr Justice Kirby discussed a number of problems facing Australian judges and proposed some remedies ('The Judges', ABC 1983).

The Australian Institute of Judicial Administration Incorporated, grew from the Conferences of Supreme Court Judges, also attended by judges of the High Court and Federal Court. It is an association incorporated in the Australian Capital Territory in 1976. It has been in active operation since 1982.

In 1982, by agreement between the then Attorney-General for Victoria and the Victorian Law Foundation, a joint project was commenced to investigate and make recommendations as to the organisation and operation of the Victorian civil justice system. The Civil Justice Committee which undertook the investigation was chaired by the Chief Justice of Victoria, Sir John Young, and included the Chief Judge of the County Court, His Honour Judge Waldron, three appointees of the Attorney-General and two practising lawyers. The project cost about \$500,000 and its Report was published in September 1984.

ORGANISATION AND TECHNIQUES

The effective improvement of judicial administration requires that there be an organisational and administrative capacity to enable the groups that operate the judicial system to collaborate in initiating research, deciding upon change and promoting and implementing change in the system. It is necessary that this capacity should exist at an Australia-wide level, on a system-wide level and at the level of individual courts.

THE AUSTRALIAN LEVEL

The AIJA

The Australian Institute of Judicial Administration is a pan-Australian organisation dedicated to bringing modern management techniques and research to judicial administration. It has evolved and developed so as to have a unique suitability for Australian conditions.

Although I was a member of the initial Council of the Institute, I had no part in deciding the organisational form that the Institute would take. Its form mainly reflected the ideas of the Hon. Mr Justice Fox. I may say without embarrassment, that I regard the organisational concepts on which the AIJA is based, as outstanding.

The Institute has a membership of some 750. The composition of the Council of the Institute reflects the main groups represented in the membership. The Council consists of six judges or magistrates, six legal practitioners, three government lawyers, three academic lawyers and six distinguished persons who need not be qualified within the earlier categories. Court administrators are amongst those eligible in the latter category.

In 1982 the AIJA adopted conventions aimed at ensuring that it would retain the confidence of the judiciary, the legal profession in its practising, governmental and academic components, those concerned in judicial administration and the community (AIJA 1985). Its policy is that membership of the Council, which manages the affairs of the Institute, should always be representative of and responsive to the views of the various courts and other organisations and groups concerned with judicial administration. Over time, a member of each court, organisation and group within Australia should have a turn in serving on the Council. The AIJA is, in terms often used in Malaysia, a "bottom-up" rather than "top-down" organisation.

Mayo regarded authority within a democratic community as originating and properly residing, except in times of crisis, in the organisations and informal groupings of the community. In normal times orderly change comes from below (Trahair 1984, p287-290). This approach is particularly suitable for a body that aims to bring about orderly change in the judicial systems of Australia.

The public function of the AIJA has been recognised under the Income Tax Assessment Act. As a scientific and public education institution its income is exempt. As an approved research institute, donations to its research fund for research projects are allowable deductions.

Since commencing active operation in 1982, the Institute has operated with great effectiveness and achieved a high standard in the Australian community. The community looks to the AIJA for research, recommendations and the promotion of improvements in all areas of judicial administration. When added to the work that it is already doing, the new work in judicial administration, which is now offering to the AIJA, would be beyond the capacity of its honorary administration. From the outset it had been intended that the Institute would eventually have a full-time secretariat with an Executive Director to lead and organise research.

In a detailed submission to all Attorneys-General the Institute in November 1984 applied through the Standing Committee of Attorneys-General for composite government funding to enable it to establish a full time secretariat in Melbourne. It considered it crucial that it should not be, or appear to be, in a position to be influenced by any particular government or governments. Composite government funding by all governments was the only feasible way of obtaining permanent funding and retaining full autonomy.

For the cost of researchers other than the staff of the Institute and for the expenses of particular research projects, the Institute will continue to rely on specific grants and donations from public and private foundations and grants schemes. Composite government funding was sought for the shortfall between the income of the Institute and the cost of its staff, its promotions work and its administration.

In May 1985, the Standing Committee decided:

1. To support in principle and seek the relevant budgetary approvals for the following commitments: Commonwealth, \$100,000; NSW, \$36,000; Victoria, \$28,000; Queensland, \$15,000; SA, \$9,000; WA, \$7,000; Tasmania, \$3,000 and Northern Territory, no contribution.

2. To request the AIJA to permit the Standing Committee to make references to the AIJA.
3. To request regular reports from the AIJA as to work being undertaken.

The AIJA wrote expressing its appreciation to the Ministers and their governments for their historic decision; that while retaining discretion as to the priority of its projects it would be glad to receive references from the Standing Committee and that it would make regular reports as to work being undertaken.

I am confident that with research led and organised by an Executive Director with an orientation towards research and supported by a small but adequate staff, research into, and promotion of, improvements in judicial administration will increase many fold.

Consistently with the important role for academic lawyers in the improvement of judicial administration, the possibility of having the Executive Director associated with a Law School and the secretariat located on or near a university campus is being investigated.

Research

It is an objective of the AIJA "to organise and conduct scientific research designed to improve the administration of justice in Australia" (see Rule B(iv)).

Commencing in 1982, the AIJA conducted the first systematic research into the causes of delay and inefficiency in civil litigation in the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory. Headed by Dr Ross Cranston of the ANU and supported by research funds of \$93,500, the research team examined nearly 3,000 court files and took selective samples. Seminars were held in the three jurisdictions and selected practitioners commented on early results. Over 80 judges and practitioners were interviewed. Nearly 200 solicitors provided statistical information in response to written inquiries.

The Report in unrevised form was released last year and welcomed as the first 'in-depth' account of what actually happens in Australian courts. The revised printed Report was published within recent weeks.

Based on the findings of the Report the AIJA has initiated a project to develop with the assistance of the Australian Bureau of Statistics, a system of uniform and compatible civil statistics for all Australian courts. Another project to reduce a cause of delay identified by the Cranston Report is to be headed by Mr Bernard Cairns of the Law School of the Queensland Institute of Technology, working in conjunction with a committee of judges and practitioners. By reference to courts in Sydney and Brisbane it will recommend ways of reducing delay caused by discovery and interrogation.

The Institute intends to carry out a number of other projects based on the findings of the Cranston Report.

The Shorter Trials Committee, whose Report on Criminal Trials was released yesterday, was constituted by the Victorian Bar Council in 1982. To have the advantage of the organisation and research techniques of the Institute it became a joint committee of the Bar and the AIJA. It is significant that the Committee owed its origin, not to any official action, but to an initiative of the legal profession. The Bar Council invited the Attorney-General, then, the Hon. John Cain, to nominate a member and he nominated the Crown Counsel.

The Committee's task has been to recommend ways of shortening the time taken by criminal trials and lessening their expense.

The Victoria Law Foundation provided \$37,000 towards the project and the Commonwealth Attorney-General's Department \$5,000. La Trobe University agreed to Mr Peter Sallmann of its Department of Legal Studies acting as Researcher/Consultant to the Committee and writing the Report.

The work of the Committee exemplified the most effective way of investigating, recommending and implementing practical improvements in the area of judicial administration. Its membership represented those primarily involved with the criminal justice process. They were two Supreme Court Judges, two County Court Judges, the Director of Public Prosecutions, the Crown Counsel, a Deputy Commissioner of Police, the Director of the Legal Aid Commission, the Dean of Faculty of Law, a Queen's Counsel and three barristers in private practice, a solicitor in private practice and a legal aid solicitor. I was its Chairman. The Report is a product of the fusion of the great variety of members' experience of criminal trials with Mr Sallmann's wide knowledge of many criminal justice systems and proposals for improvement.

The Committee in its 55 working sessions "... looked at the process from offence to verdict; identified existing ways of carrying out parts of the process which could be altered to save time without reducing the quality of justice; collected proposals for change; critically tested the proposals in the light of existing data, experience elsewhere, expert opinion and the experience of Committee members; developed and adopted those the Committee assessed most viable; and prepared a Report to persuade those who operate the system that change is needed and that the recommended changes and means of implementation will save time and are feasible of achievement" (Shorter Trials Committee 1985, p.iv).

It recommended the setting up of a standing Criminal Justice Committee responsible for regularly scrutinising the overall operation of the criminal justice system of Victoria; considering and recommending ways of improvement; and monitoring changes which are made, with a view to suggesting their modification or cancellation if they do not operate to save time without producing undesirable consequences. The Criminal Justice Committee would be an advisory body whose reports would be widely distributed but it would have no administrative authority. Its membership would include judges and magistrates, court administrators, practitioners with prosecution and defence experience, the Director of Public Prosecutions and the Director of the Legal Aid Commission or their nominees, a Police officer and others.

The Shorter Trials Committee recommended specific changes to reduce time. These included that the law be amended so that in three years time, subject to a discretion in exceptional cases, confessions by accused persons be inadmissible unless recorded or confirmed on tape; that no person be charged at trial with conspiracy without the express consent of the Director of Public Prosecutions or his nominee; that a plea of guilty should of itself justify a discount in the amount of sentence; that the issues in actual contest be ascertained before the trial and stated to the jury before the commencement of evidence; that a judge have authority to order by consent that evidence which is not contested be admitted to evidence in the shortest and cheapest practicable way; and that pilot schemes be initiated under which counsel briefed for the prosecution or by the Legal Aid Commission would be remunerated by a lump sum fee for the trial.

While made on the background of the Victorian criminal justice system the recommendations of the Shorter Trials Committee are designed to be useful for adaptation in other Australian systems

In its first three years of active operation the AIJA has completed projects (one in association with the Victorian Bar) directed to the reduction of time, delay and cost in civil and criminal cases. They were far more thorough and extensive than anything previously done in those areas in this country.

The most extensive and far-reaching research project and recommendations were those of the Civil Justice Committee. It recommended an integrated organisation and management approaches for the whole civil justice system in Victoria. I have concentrated on the AIJA projects *Delay and Efficiency in Civil Litigation* and the Shorter Trials Committee's *Report on Criminal Trials* because I was indirectly involved in the former and directly involved in the latter.

Elton Mayo's contributions to organisational change were based on scientific studies of human relations in industry (Trahair 1984, p213). To social science he applied the methodology of the medical sciences "i.e., close continuous observation and experiment to refine, clarify and extend firsthand knowledge" (Trahair 1984, p202). He was critical of an approach to improvement that "treated the symptoms without diagnosing the illness" (Trahair 1984, p290). The first step is to study the problems (Trahair 1984, p309). Mayo recognised the importance of a scientific base to reliable knowledge and the value of applied knowledge (Trahair 1984, p151). He became aware of the difficulty of justifying the cost of detailed investigation and the resistance it encountered (Trahair 1984, p204). Scientific research in the social sciences must take a different form from that of the physical sciences. It is often impracticable to conduct controlled experiments. Mayo's view was that "in human experimentation researchers must go on a voyage of discovery for new concepts and techniques of control" (Trahair 1984, p248). The researcher must make use of the best data and expert evidence that can be procured. In this area scientific inquiry follows a question and as it does so the question changes (Trahair 1984, p231). The reliability of the results of research is always in doubt (Trahair 1984, p351). The making of decisions for improvements does not follow automatically from research. Mature judgement based on human experience is necessary if the best decisions are to be made (Trahair 1984, p219). Because of the uncertain base on which decisions for change are made it is essential to monitor the changes to see whether they have had the expected effect. (8)

Promotion

The objects of the AIJA include "to promote improvement in the administration of justice throughout Australia" and "to promote foster development and assist the acquisition, dissemination and application of knowledge and information concerning the administration of justice in all its aspects" (see Rules B(I) & (iii)).

In 1982 the AIJA held a Court Administration Workshop in Melbourne led by ten acknowledged experts in the area from England and the United States. In 1984 there was a Seminar in Sydney on the Use of Computers in Court Management. Participants saw a working system in operation and were addressed by experienced speakers from the United States and United Kingdom on the experience in those countries. Court administrators, judges and lawyers throughout Australia and Papua New Guinea attended the Workshop and Seminar. Reports of the proceedings of the Workshop and Seminar have been published.

Membership

The AIJA has received the strongest support and encouragement from judiciary, government, court officials and users, and members of the various components of the legal profession throughout the country. Its application for composite government funding was supported by all Chief Justices. It has in a short time gained a high reputation.

In my view, three of the strongest influences to improve judicial administration in Australia are the reputation, methods and membership of the AIJA.

There is no personal advantage in membership of the AIJA apart from being informed of, and involved in, the improvement of the judicial system. There is great advantage to the community in having as members of the AIJA large numbers of people who are involved in, and concerned to improve, that system. It means that there is a ready supply of informed experienced people able to contribute their ideas and their good judgement to proposals for improvement. The recommendations of AIJA projects have "grown" from those involved in judicial administration. They are not regarded by the groups that operate the system as the strictures of outsiders but as the practical proposals of respected members of those very groups.

After nine years of existence and three years of intensive work, I suggest that the AIJA has provided the organisations and techniques needed for the improvement of judicial administration on an Australia-wide basis.

THE LEVEL OF THE INDIVIDUAL COURT

In considering the capacity for the improvement of judicial administration by an individual court or a separate system of justice, I will concentrate on those to which I belong and with which I am familiar.

It is necessary for the groups involved in the operation of the courts to collaborate in making and effectively implementing decisions for the improvement of the system. This is necessary at both the court and system level. A consultative management system is necessary because no one is in ultimate control.⁽⁹⁾ While the departments and the organisations of the legal profession have had the organisational machinery to make and implement administrative decisions, the courts have not always been in a position to do so.

COUNCIL OF JUDGES

The Supreme Court of Victoria is now following the recommendations of the Civil Justice Committee in making changes to improve its making of administrative decisions and its management of administrative affairs. The *Supreme Court Act* has long provided for a Council of the Judges of the Court, which includes all the Judges (*Supreme Court Act* 1958). The Council now meets for half a day each month and makes decisions on behalf of the Court in respect of the management of the Court.

EXECUTIVE COMMITTEE

This year the Council of Judges set up an Executive Committee consisting of the Chief Justice and six other judges. The six judges were elected in a secret ballot in which each puisne judge of the Court was treated as having nominated and the six with the most votes who were prepared to serve were elected.

The Executive Committee is authorised to act on behalf of the Council in the day to day management of the Court and in matters the Council delegates to it. It meets for an hour before court once a week.

The six elected judges have been allocated the following portfolios of responsibilities:

1. Judicial administration (including case flow management, the performance of the Court and relations between the Court and legal profession).
2. Staff (other than the secretarial staff of the judges).

3. Buildings and facilities.
4. Legislation and rules (this involves perusing all proposed legislation to see whether comments should be made).
5. Planning and development (this includes responsibility for the secretarial staff of the judges and for the word processing equipment they use).
6. Court records (including computers, retrieval of information and methods of recording information).

The portfolios do not carry with them executive or administrative responsibilities. On day to day affairs Officers of the Courts Administration Division consult with the responsible judge on matters within his area of responsibility. If an issue of particular importance arises, the Chief Justice is consulted.

Chief Executive Officer

Discussions are proceeding between the Executive Committee and the Attorney-General and Deputy Secretary for Courts upon the appointment of a Chief Executive Officer of the Court responsible to the Council of Judges acting through the Chief Justice.

Annual Reports

In the annual report, which it is obliged to make to the Governor, which is in due course tabled in Parliament, the Council of Judges now draws attention to the needs of the Court.

The Attorney-General for Victoria, the Hon J.H. Kennan (1985), has stated that legislation will be introduced to establish a Council of Judges in the County Court and a Council of Magistrates.³⁹ He has also stated support for a system of annual reports from the County Court and the Magistrates which would be tabled in Parliament and contain information about the workload, staffing and administration of the Courts. (Kennan 1984, p5)

THE SYSTEM WIDE LEVEL

Courts Advisory Council

The Civil Justice Committee recommended a Courts Advisory Council and one has been constituted by the Attorney-General. It consists of the Chief Justice (Chairman) and two other judges of the Supreme Court, the Chief Judge and another judge of the County Court, the Chief and Deputy Chief Stipendiary Magistrates, two legal practitioners, the Secretary of the Law Departments the Deputy Secretary for Courts, an Academic Lawyer and two other persons.

Its terms of reference are to monitor and report upon the implementation of the recommendations of the Civil Justice Committee and to suggest any necessary modifications to a recommendation. It may also report upon any matter that the Attorney-General may refer to it with the agreement of the Chief Justice.

This is another instance of a Committee with advisory powers but no executive powers, which has members from various groups involved in the operation of the court system. It is to have its first meeting in about three weeks.

It clearly has the potential to develop into an advisory body that considers and makes recommendations upon the needs and operation of the Victorian system of justice as a whole. There is at present no established machinery in which the various groups can participate in making recommendations as to the priorities to be given in satisfying the competing needs of the various parts of the Victorian court system. The way in which it may develop cannot yet

be predicted. One can echo the response of Michael Faraday, a pioneer in the knowledge of electricity, when a lady asked what was its use: "Madam, what is the use of a new born babe?"

CONCLUSION

I have not sought to propose specific measures that the judicial system should take to improve its performance. I have considered whether the system is adopting the organisational and managerial approaches that will enable suitable measures to be sought, identified and implemented. The general principles of organisation and management, which Elton Mayo pioneered, have shown a great capacity for development and evolution. Other schools of thought have grown and had their influence. Judicial administration, and court administration have a long way to go in both theory and practice. The events of the last few years have shown that the judicial system has been equipping itself to find and adopt the ways that will improve its performance in terms of efficient, effective and economical operation. It is setting itself in the directions that will enable it to cope with its challenges.

End Notes

- (1) While the opinions expressed are entirely my own, I have had the advantage of discussing with Mr Dan Hourigan, B.Com., M.B.A., A.A.S.A., Director of Court Operations, Victoria, the applicability of Mayo's principles to court administration.
- (2) Compare: Nelson, *Judicial Administration and the Administration of Justice: Cases and Materials* (1974) p xxv, quoting Professor Delmar Karlen.
- (3) The Shorter Criminal Trial: Paper delivered to Supreme Court Judges' Conference, January 1985.
- (4) AIJA Workshop on Court Administration, Session IX, Implementing Change, pp 28-36, especially Professor Friesen, pp 29-30.
- (5) Delay in the Courts: The Responsibility of the Lawyers, Papers of the 23rd Australian Legal Convention, 1985, p 154.
- (6) Published in (1977) 51 *Australian Law Journal*, 480.
- (7) These questions are discussed by The Honourable Mr Justice King, Chief Justice of South Australia, in *Minimum Standards of Judicial Independence* (1984) 58 *Australian Law Journal* 340 and by The Honourable Sir Guy Green, Chief Justice of Tasmania in *The Rationale and Some Aspects of Judicial Independence* (1985) 59 *Australian Law Journal* 135.
- (8) The importance of monitoring changes made in the area of judicial administration was stressed by Mr Philip Murray at the AIJA Workshop on Court Administration, p 35.
- (9) This is stressed by Professor Friesen, AIJA Workshop on Court Administration, p 35.

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IMPRISONMENT PAROLE - THE JUDGE'S FUNCTION & PRISONER'S RIGHTS

Ian D. Temby

I start by putting forward two series of propositions, each of which can hardly be denied. The first is that the role of judges is to adjudicate: they decide cases before them by choosing between the competing contentions of the parties on each critical issue. In a criminal case the parties are on the one hand the person laying the charge, who is or represents the Crown, which in turn represents the community generally, and on the other hand the accused. One of the critical issues, assuming a finding of guilt, is just what sentence should be imposed. Finally, that which is decided by a judge - or indeed a magistrate: any judicial figure acting within power - should happen. otherwise society ceases to be governed by the rule of law.

Secondly, criminals have rights. They are human beings, and all of us have rights. Their rights might be less than those enjoyed by others: obviously while serving sentence a prisoner is not free to roam at will. However, in the absence of legal circumscription prisoners, like other criminals and all the rest of us, should enjoy their rights unimpaired. And like all of us they should not be disappointed because their reasonable expectations are not met. Among those expectations are that the law will operate in a fair, reasonable, consistent and predictable way.

I propose to examine an aspect of punishment, namely the system for the imprisonment and parole of convicted persons, against the background of those propositions. In doing so, reference will be made to three States: New South Wales, Western Australia and South Australia. What is said concerning them generally reflects the situation throughout Australia. It is, however, fair to acknowledge - not just because I am addressing an audience in Adelaide - which the position here is somewhat more satisfactory than in most other places. That is not surprising given the record of South Australia in legal and social reforms. This State was a leader in world terms -

- In conferring the right to vote without property qualifications
- In granting women the right to vote
- As to land registration and simplified conveyancing - I refer of course to the Torrens System
- In establishing a legal aid scheme.

Reference also should be made to statutory initiatives relative to Aboriginal land rights, racial and sexual discrimination, homosexuality, and consumer protection.

While the case is not proven, the reason for an obvious primacy in enlightened reform may be that only South Australia did not suffer from the blight of transportation and the suppression of individual rights that inevitably flowed from it. (1)

To date I have made brief mention of the role of judges and the rights of prisoners. That is not to say that theirs are the only points of view that matter in relation to imprisonment and parole. There are others. Acting on behalf of the community, prosecutors have a responsibility

to ensure as best they can that only the guilty are convicted and that punishment is condign - neither more nor less than is appropriate for the case. Governments also have a role and responsibility in this area. Prisons are expensive, imprisonment rates in most parts of Australia are too high, and in all parts of the country the Executive has from time to time taken steps to reduce the prison populations. It is my contention that various of the steps taken have been inappropriate. Finally, and most importantly, the public generally has an interest in this area. It is one that has been aroused of recent times. There is grave public disquiet as to the way in which the imprisonment and parole system works. My belief is that, for reasons that will be developed, such disquiet is amply justified.

Let us take a notional case, Robert W. who normally works as a plumber goes to Penang with a view to purchasing heroin for the purpose of importation into Australia. He is an occasional drug user and has the necessary contacts to arrange distribution in Sydney. That is not to say that he is a major crime figure. As is nearly always the case in real life, what develops can be categorised as disorganised crime. He has raised \$20,000 by saving and borrowing and hopes to make enough money to set up his own business. Because he is better at plumbing than drug running, the enterprise goes wrong. He is caught at Kingsford Smith Airport with over a kilogram of heroin of relatively high purity secreted in the lining of his suitcase. It is worth about a million dollars assuming a successful importation. In that event, the heroin would have flowed down a distribution chain, being at least diluted and perhaps adulterated at most steps along the way. A deal of it would have finished up in the hands and veins of narcotic addicts, many of whom would thus be hastened to their early deaths. Many of them would have been young people having no employment, low self esteem and an anti-social attitude dictated by their need to raise money to buy heroin.

Robert W. has committed a serious offence, which contributes to a grave social problem, although it is too readily assumed that law enforcement alone can provide the solution. Clearly, such a case calls for heavy punishment. The *Customs Act* provides that Robert W. can be sent to prison for life. The particular individual has no prior criminal record. A judge decides, following conviction, that he should go to prison for at least 9 years, and not more than 15 years.

So far so good. The police have done their work, as have the prosecutors and as has the Judge. Now kindly observe how the law operates to render the disposition of the case illusory to the great detriment of the public, and even perhaps of the prisoner.

Under the *Probation and Parole Act* 1983 prisoners are entitled to what is effectively an automatic remission of one third off both the head sentence and the non-parole period. It was decided in *O'Brien's case* ((1984) 2 NSW LR 449) by the Court of Criminal Appeal in New South Wales that a sentencing judge cannot have regard to the remission system and its effect when determining a head sentence and a non-parole period.⁽²⁾ Accordingly, although the Judge imposing sentence well knew that Robert W. would be paroled after 6 years at the most, and applying the relevant criteria reached the conclusion that he should spend at least 9 years in jail, he could do nothing about it. The Judge was required by law to involve himself in an illusory exercise - if you like a sham and a farce. The legislative changes, which came into force in May of this year, were piecemeal in nature, and their practical effect remains to be seen. The Judge can now order that there be no entitlement to remissions, but there is no middle course which can be followed, and it is not easy to see how the statutory criteria relate to the question of remission entitlement.

In the event the prisoner is fortunate because during his time in custody there is a withdrawal of ordinary labour by prison officers. In addition, he participates in study and training programmes. By reason of these two factors he is entitled to, and in fact receives, release after having spent a little less than 5 years in prison.

I am not to be taken as advocating the viewpoint that long sentences of imprisonment are ordinarily desirable or that prisoners should not receive some small allowance for good conduct, participation in training and study programs, or even strikes by warders. Indeed, modest remissions of 10%, which were commonplace in this country up until a decade ago, served a very useful purpose. What is contended is that in the situation just outlined the role of Judges has been hugely subverted. They may well pronounce a minimum term of which only about half is served. It is hardly surprising that members of the public should feel that the system has gone ludicrously awry when made aware of this huge gap between appearances and reality.

That is not the only matter of concern. It will be appreciated that not everybody in a prison environment provides company that is gracious, enlightened and civilised. While penologists have not abandoned rehabilitation as a desirable and possible consequence of imprisonment, most knowledgeable observers now recognise that imprisonment has more to do with punishment, even revenge, and the keeping of offenders in a place where they cannot further prey upon the public. There are few who would deny that time spent in prison is a brutalising experience. For a significant number of prisoners it serves to teach them bad ways, and criminal skills.

If during the period of the parole order the released prisoner breaks the law, or breaches a condition upon which parole was granted, then the result can be the revocation of parole and return to prison, or alternatively the laying of a charge for having breached parole. In either event, a parolee is worse off than an ordinary member of the public: at risk of further or additional punishment by reason of his status. Most would reckon that to be reasonable, but for how long?

The rules differ from place to place and are complex to an extent which is almost hideous, but in the notional example we are working from Robert W. must keep his nose clean for a period of 10 years. If he does not he can be punished, not just for future infractions of the law, but also by reason of his status as a person serving parole, which can be looked upon as a sentence which is being served in the community. Whatever the period might be, the constraints are powerful. No person who is undergoing parole can be seen as free.

What now fails to be considered are the purposes of parole. They include a desire not to keep people in prison for longer than it is necessary, because to do so is expensive to the community and probably harmful to the individual. But the prime purpose is surely to benefit the prisoner, to enable him to adjust to life in the community, and with the benefit of enlightened supervision to turn him away from anti-social conduct. (3)

It is, I think, universally accepted that the purpose just stated cannot be furthered beyond a period of about 2 years after release. Circumstances alter cases, very often the benefits of parole supervision will have been fully realised within a year or so, and there may be very occasional cases in which a longer period is called for. But as a general proposition two years is the maximum useful period for parole supervision. There are many thousands of people in this country who are serving far longer periods of parole, which can do them no good, but may cause them to be doubly punished if they lapse from the path of relative righteousness. While some criminals are to be feared and loathed, many are deserting of understanding and some of pity. Perhaps the majority of them cannot readily help themselves when it comes to committing offences. How can it be in the community interest to have such people on parole for periods of 5 years or more, which simply increases the likelihood that they will return to the treadmill of offence, imprisonment, brief release, further offence and imprisonment, and so on (see for example, Law Society of Western Australia 1980).

I propose now to develop the topic in rather greater detail, particularly from the historical viewpoint. In case it is thought that all of this address is a way of carping criticism, let me

assure you that positive suggestions will follow. It is not pretended that they represent a final answer, or indeed that they are original. However, the time has come to get back to first principals and devise a system which does not require judges to do one thing while pretending to do another, or alternatively to cheat by defying the will of the Parliament, a system which does not represent a fraud upon the public, and one which is not potentially unfair to prisoners. Whether that can be done without it being necessary to build more in some places I do not know. It is clearly a matter of concern that the difference between imprisonment rates should vary so widely as between the various States and Territories. Nobody likes to contemplate imprisonment, but it is a harsh necessity' in many cases, and It must be logically fallacious to assume that present rates are desirable maxima or alternatively about right (Chan & Zelenkowski 1986).

In the brief historical survey that follows I propose to concentrate upon New South Wales. Those who know the literature will be well aware of the debt of gratitude owed to Dr. Weatherburn of the NSW Bureau of Crime Statistics and Research.(4)

If one goes back to the first half or the last century release on licence with or without conditions, was an expedient frequently resorted to, much of early Australian history is dominated by the struggle of ticket-of-leave men (and women), and other former convicts, to obtain some say in the running of society. Release was almost invariable subject to at least one condition, namely, to stay in the colony. There could be other conditions imposed, which could lead to supervision, as for example by the master of a convict-servant. For reasons that will be obvious the motivation and standard of such lay supervision was hugely variable. As a general proposition it came to be the case that prisoners served sentences imposed upon them, subject to relatively small remissions for good conduct. There appears to have been little reluctance to build and staff prisons, which was after all, the chief purpose of establishment of most of the settlements on the Australian mainland, Van Dikeman's land and Lord Howe Island. Prisons during the last century were degrading places, and convicted persons were sent to prison for punishment in addition to being sent there as punishment.(5)

About the middle of this century one first saw parole, in the sense that prisoners were released into the community on conditions, which included supervision by State functionaries having training and still for the purpose. This system met with general approbation from public and prisoners alike.

I come now to the past few years, which have been periods of rapid change. The spur has been that of perceived economic necessity as the cost of keeping prisoners in jail has increased markedly in real terms. (Weatherburn 1986, p123)

The *Probation and Parole Act* 1983 represented a determined effort to reduce the prison population. It abolished parole for aggregate sentences of three years or less and replaced it with automatic release. Remissions were applied to minimum terms in the same proportion as they had previously been applied to the head sentence. Finally, there were set up legislative impediments in the way of parole refusal, such that a prisoner could have a far higher degree of confidence than previously that release on parole would occur within a very short period after the date of eligibility was reached. During the first 6 months of 1984 the prison population in New South Wales reduced by 205 to about 3,000.

Then over the next 12 months it increased by nearly a third to almost 4,000. Dr. Weatherburn attributes this to a tendency on the part of Judges to increase minimum terms to offset remission entitlements, and a corresponding lack of willingness on the part of the Parole Board to grant prisoners parole where eligibility was due to accrual of large amounts of remission. Each of these factors may have been wrong, in the sense of being opposed to the sovereign will of the Parliament. But surely each was utterly predictable. It is well known

how difficult it is to change the spots on the leopard, and Judges are larger felines with markings most clear and deep. Apparently Parole Board members are not dissimilar.

Various further methods were adopted to try and reduce the prison population as for example diversionary schemes Such as periodic detention. These front-end solutions are laudable, but they tend not to change the prison population greatly because they impact on persons who would otherwise have been imprisoned for a short period only. Reverting to rear-end solutions that which was most successful was the so-called Release on Licence Scheme under section 463 of the *Crimes Act* 1900 of New South Wales. The scheme was subjected to judicial criticism but according to Dr. Weatherburn the Corrective Services Department was no less competent than the Parole Board in screening prisoners for release: the then Minister for Prisons claimed a 95% success rate. It was only allegations of corruption of the administration of the scheme that brought it to a sudden end. Over a thousand prisoners were released during a 15-month period. The public controversy, which ensued from the way in which the release on licence Scheme came to an end, swung the pendulum back towards lesser discretions. Under recent NSW legislation judges are empowered to specify that a person sentenced will enjoy no remissions or remissions only in circumstances that are specified. This is calculated to allay judicial criticism. It may work to an extent. Judges cannot be heard to say that their will has been subverted in circumstances where they are enabled by statute to make an order which avoids a consequence they may see as being unhappy. (6)

The position in Western Australia is generally similar to that which prevails in New South Wales. In particular parole is a privilege and not a right. However recent figures show that 90% of persons eligible for parole are released on or within a week of their eligibility date so that in practice release on parole is automatic. The Chairman of the Parole Board in that State takes the view that It should retain its discretionary function as to release on parole and stresses that the paramount consideration is the protection of the community that responsibility being shared between sentencing judges and the Parole Board.(7)

In South Australia since 1983 a distinctly different regime has prevailed. The functions of the Parole Board are now markedly changed. It has no discretionary power as to release save in the fixing of conditions. In *R v. Tio and Lee* ((1984) 35 SASR 146) the Court of Criminal Appeal in that State said it would be expected that in general non-parole periods would be longer than previously because the new legislation brings about automatic release on expiration of the minimum term less remissions and the sentencing judge knows and can take into account that the remissions will operate. In this State it is therefore the case that two objectionable features, which generally operate elsewhere, are not present. Contrast what was said by the Department of Correctional Services in South Australia in its 1983-84 report:

“The aim of all these changes is to achieve some form of predictability in the sentencing system. Prisoners now have some certainty about the period they will spend in prison. It has helped reduce tension and resentment in prisons.”(p2)

with what was said by the Parole Board of New South Wale in its 1985 report:

“It is unfortunate that there has been so much misinformation, rumour and wishful thinking spreading through the prison system, which misled prisoners, their relatives and even victims to expect that an eligibility date adjusted by remission guaranteed release.” (p5)

These statements graphically illustrate a significant objection to the parole system in its operation in most parts of Australia. Prisoners should know, as a matter of right, when they are to be released.

The other major objection, in both principle and practice to the present system in most places - excluding South Australia - was pointed out by Chief Justice Young of Victoria when he said:

"An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the court had no authority because little notice was taken {by the Executive) of the sentence passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted upon an offender."(*R v Yates* (1985) VR 41)

Mention was made earlier of the varying and legitimate viewpoints which arise concerning the topic under consideration. It may be hard to reconcile them, but it is urged that there are three minimum requirements. The first is an aspect of the rule of law, namely that a judge's considered disposition of a sentencing matter should not be lightly set aside, or at least if that happens it should be on the basis of known criteria which the responsible authority can be called upon to justify. Secondly, prisoners deserve to know where they stand, and not be at the mercy of prison officers or Parole Boards as to when they will in fact be released from prison, particularly as their right to be heard on the issue is doubtful at best.⁽⁸⁾ Most importantly, the public demands and deserves a system of imprisonment, remissions and parole in which they have justified faith.

Two points should be made before I proffer certain suggestions that may contribute to a solution, bearing in mind the minimum requirements just stated. The first is that the special considerations, which apply to Commonwealth prisoners, have not been dealt with. The position concerning them is even more muddled and unsatisfactory than is the case with respect to State prisoners. In particular, given that all prisoners serve their time in State prisons, and that the system differs somewhat as between the various jurisdictions, an exquisite dilemma arises. The law must see all treated equally, but should the equality be as between a Commonwealth prisoner and those other prison inmates with whom he or she snares accommodation? Alternatively, should all Commonwealth prisoners be treated alike? That question is left for resolution by others on another occasion (see for example, Kelleher 1986).

Secondly, while front-end solutions to reduce the prison population have been mentioned, time does not permit exploration of that aspect in any degree of detail. It is gratifying that the Commonwealth has at long last passed legislation which enables convicted persons to be dealt with in most places on the basis of the relatively wide range of sentencing options which exist. More use should be made of community service orders and periodic detention, first because imprisonment should really operate as the sanction of last resort, and secondly, because they are so very much cheaper. It is surely a matter of grave concern that a lot of the persons imprisoned at any time are there by reason of default in the payment of fines. So long as somebody in receipt of a high income, having an undoubted capacity to pay, receives about the same fine for like conduct as another person who is unemployed, the law can be seen to operate in a discriminatory way, so that people go to prison for the basic reason that they are poor, rather than because of their breach of the law. This should not be tolerated in a society that lays claim to be civilised.

Much the same can be said with respect to mandatory prison sentences, example, on those who drive a car without a licence after a couple of prior convictions for so doing. All mandatory sentences are objectionable in principle. Surely the responsible authority could and should chase up young people convicted of such offences on a first occasion, teach them to drive and see they are issued with a licence. A combination of these two small reforms, one statutory and one administrative, would significantly reduce the number of people who go through the prison system, although admittedly the impact upon the prison population would

not be great. In particular, those steps would markedly reduce the shocking statistics relative to imprisonment of Aboriginal offenders. There are many others that could be suggested. (9)

I revert now to the main theme, what follows is largely drawn from a report prepared by the Law Society in Western Australia (Inc.) in 1980. It is a matter of regret that the recommendations then made, or similar basic changes which pay due regard to the minimum requirements already stated, or if you like first principles of Just imprisonment, have not been introduced and spread throughout Australia.

Parole is properly to be regarded as part and parcel of the sentence; that portion which is spent outside of the prison walls. It is generally recognised as serving two purposes, the first being to rehabilitate an offender, and the second as an extension of the punitive measures associated with imprisonment. The former provides guidance and adjustment, and the latter object is achieved by the sanctions attaching to a breach of parole: this, if you like, provides a deterrent against re-offending, and consequently some protection of the community,

As most systems in Australia presently operate the Parole Boards have discretion as to whether a particular offender will be released at the time of the expiry of his minimum term of imprisonment. As already stated, it would be rare for the actual period served to coincide with the minimum period initially set by the sentencing Judge because of the operation of remissions. There is no reason to think that the objects of parole could not be achieved by shifting the discretion of the Parole Board, and the Executive in general, to the sentencing Judge.

In brief outline, the changes I advocate are these—

- parole operate for a maximum period of 2 years;
- prisoners be released on parole automatically;
- the Parole Board have no discretion as to release, and its function be reduced to that of making the supervisory system work, and deciding what conditions should be imposed upon parolees;
- breach of parole be an offence that should be charged as appropriate, with only a Court being empowered to order revocation of parole, which could only be for a period of up to two years.

These suggestions will be expanded shortly. For the moment, consider briefly the virtue such a scheme would have. It is simple to operate. The courts would know that sentences they impose will take effect. Prisoners would know exactly where they stand, and the iniquitous dangers of long parole periods would be avoided. Surely this is a system in which the public could and would have complete confidence.

A finite sentence pronounced by a Court, at the expiration of which the offender will be released, promotes certainty: the offender knows that date upon which he is entitled to release, and the community is satisfied that the sentence will be observed and not fiddled with, This is not to say that it is inappropriate to have a system of remissions as a reward for good behaviour, but this should be a privilege and not a right. It should also not be so large as to render the determinate sentence ineffective, which is what occurs at the present time. A system of specified small remissions, which are not automatic, is far preferable.

Short prison sentences can be useful. In relation to determinate sentences of less than one year in duration, release should be automatic upon its completion, without any facility for parole

supervision equal in duration to the sentence served. For terms of greater than two years there should be two years parole supervision regardless of the length of the sentence. This is not to say that the Parole Board would be divested of all function: some of them would simply be moved elsewhere. The Board would still retain discretion as to what conditions ought to attach to a particular parole period. There could be statutory guidelines in respect of standard conditions, leaving enough discretion for individual cases.

The courts should have the general power to direct that an offender not be subject to parole upon release. This would cover two distinct classes of cases, that is where the court is of the opinion that an offender will not require parole supervision to aid his rehabilitation, or where the court feels that the offender is such a hopeless case that he would have no chance of completing the parole period without breach.

Under the present system where there is a breach of parole, whether by re-offending or by non-compliance with a condition of the parole, there is discharge of the order, on either an automatic or a discretionary basis. The offender is then returned to prison, perhaps for a long time. This approach lacks flexibility. There is no reason why a breach of parole cannot be treated as an ordinary criminal offence, which may be dealt with by a court of summary jurisdiction. If a person were convicted for breaching parole, then a number of sentencing options would be available. An offender could be sentenced to a term of imprisonment, say not exceeding six months, or fined, or the parole order could be discharged, or the conditions of the existing order could simply be amended. If the breach is occasioned by the commission of a serious offence, then it should be dealt with in the ordinary way.

The benefits of such a system are quite evident. In the first place the sentence imposed by the court would be the one served; administrative interference would be kept to a minimum and a fraud would not be perpetrated upon the public. The sentence would be certain both to the offender and the community. The period of parole supervision would be far more effective: periods will neither be too short nor too long, both of which are counterproductive. The Parole Board would not be expected to make decisions sometimes without proper guidance, as to whether or not to release an offender upon parole. The sanctions for a breach of parole would be far more flexible and, where there was a breach, at least credit would be given for the parole period served prior to that time.

At this juncture something needs to be said of indeterminate and so-called life sentences. Neither sit comfortably within a system of automatic release. Such sentences are objectionable as they completely lack certainty. Some members of the community may be forgiven for thinking a life sentence means that an offender is kept incarcerated until death. This, of course, is not the case. In most cases, nor should it be. There are provisions allowing the release of life sentence offenders at the discretion of Parole Boards. Life sentences should be replaced by appropriately long finite sentences. The so-called life sentence is another fraud on the public that should be done away with. For those offenders who are found to be criminally insane there is some justification for indeterminate sentences but again, the rights of those persons cannot be ignored. I recall a few years ago the case of two persons in New South Wales who were discovered to have been incarcerated at the Governor's pleasure since the 1930s. Few records were available; the reasons for their imprisonment had become long lost and of course they had not been the subject of any review. This must be one of the worst examples of the defects of indeterminate sentences. If they must be retained for use in very special and rare cases, there must be a system of mandatory periodic review, say every five years, preferably with judicial input.

None of these proposals should be seen as likely to greatly increase the prison population. Indeed the authors of the report upon which they are based reckoned that, because a large number of prisoners who are currently in prison for breaching parole would not otherwise be there, prison populations would decrease, which must be a desirable goal. There are large

differences between the States and Territories of Australia as to the number of prisoners per head of population (Australian Institute of Criminology 1986). In some cases, Governments may expressly or effectively determine that the maximum number of prisoners is to be a specified amount. Most usually this can be attributed to limitations in the number of prisoners who can be held at any one time. Of course, this is completely illogical. As the population expands then it necessarily follows that the number of prisons must increase about proportionately.

It is appreciated that Governments cannot create prisons overnight and at the drop of the proverbial hat. Furthermore prison overcrowding is a serious problem conducive to unhappiness at least and mayhem at worst. If there is a discrepancy between the number of persons sent to prison by the courts and the capacity of the goals to contain them then something must be done. In my submission that which is necessary should be done by the Executive by exercise of the prerogative of mercy or by release on licence in the manner previously outlined which operated for a period of NSW. The Executive would then be required to answer in the political arena for its failure to provide enough facilities or for mistakes made in selecting those to be released early or both of those things. It would of course be infinitely preferable that this necessity not arise but if it does the Government in question should be precluded from hiding behind the collective skirt of its Parole Board as presently happens all too often.

It would be necessary for Judges to adjust themselves to a radical departure from the present regime having as its components head sentence and minimum terms. Under the proposals outlined they would impose a single sentence: that which was in fact to be served less small remissions for good conduct. To achieve the adjustment it might be necessary to embark upon a judicial training programme the various courts of criminal appeal would have important roles to play and there might be utility in a Sentencing Council (Australian Law Reform Commission 1980) such as has been proposed in a rather different context. The message to get across as simple enough: the single sentence imposed should be about equivalent to the non-parole periods that are now fixed. It surely cannot be beyond the human capacity to make this critical adjustment. Lawyers who get to be judges are mostly intelligent and compassionate people and almost any sentencing Judge will tell one what an anguish it is to impose a severe prison sentence. In summary sentences will be shorter but the Court will mean what it says and will be seen to do so.

In conclusion let me remind you of what was said by Sir Winston Churchill speaking as Home Secretary in 1910:

“We must not forget that when every material improvement has been effected in prisons when the temperature has been rightly adjusted when the proper food to maintain health and strength has been given when the doctors, chaplains and prison visitors have come and gone the convict stands deprived of everything that a free man calls life.

We must not forget that all these improvements, which are sometimes salves to our consciences, do not change that position. 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.”

Most uninformed members of the public think that prisons are more pleasant places than they should be, and that sentences imposed for serious offences are generally too short. In my belief they are profoundly wrong in both respects. The criticisms that have been levelled, and the suggestions which have been made, are aimed at achieving a situation that is both just and humane. A more compassionate attitude on the part of the public cannot be expected until cause for justified cynicism is reduced to naught. If that is to be done, then radical change is necessary. Surely every effort should be made to strive for an enlightened solution.

End Notes

(*) The research upon which this paper is based was undertaken by Lucy Anderson-Morshead, an undergraduate of Cambridge University.

- (1) See generally Manning Clarke, *A History of Australia*, particularly the first two volumes; for South Australian legislation see eg. *Aboriginal Lands Trust Act 1966*, *Prohibition of Discrimination Act 1966*, *Criminal law (Sexual Offences) Amendment Act 1975*, *Consumer Transactions Act 1972*.
- (2) *R v O'Brien* (1984) 2 NSW LR 449, for effect of automatic remissions in NSW see reg 110 *Prison Regulations 1968*. and *Probation and Parole Act 1983*.
- (3) For effect of 'earned' remissions in NSW see reg 111 *Prison Regulations 1968* and *Probation and Parole Act 1983*; for effect of 'strike' remissions NSW see *Probation and Parole Regulations 1984*, reg 18.
- (4) Dr. Don Weatherburn, Acting Deputy Director, N.S.W, Bureau of Crime Statistics and Research, author of many articles and papers on parole in NSW and related topics. See recently 'Reducing the N.S.W, Prison Population: Sentencing Reform and Early Release' (1986) 10 CLJ 121.
- (5) Compare recommendation 2 of the *Report of the Royal Commission into NSW Prisons* (March 1978).
- (6) Recent NSW legislation - see *Crimes (Remissions) Amendment Act 1986*, *Prisons (Remissions) Amendment Act 1986*, *Probation and Parole (Remissions) Amendment Act 1986*.
- (7) Statistics from Jacqueline Musk, 'Parole' in *Brief* (W.A.) December 1985; see also Statement of Chairman in Report of the Parole Board for WA, year ending 30th June 1985.
- (8) Especially in relation to federal offenders, see *Steiner v. A-G* (1983) 52 ALR 148 and the decision of the Full Federal Court in *re Thong Chau*, May 1986 (unreported). for other jurisdictions see relevant legislation eg., *Probation and Parole Act 1983* (NSW), s.28(2), s.30.
- (9) For Commonwealth legislation on sentencing options see *Crimes Amendment Act 1982*; see Wallwork QC, in *Brief* (WA) July 1986 for details of imprisonment of Aboriginal offenders.

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THE DECLINE OF THE VACCINATION MODEL: Criminal Justice Education for a Changing World

Dorothy H. Bracey

A vaccination is a mildly irritating event that, once endured, changes its recipient permanently for the better. Ideally, the process is undergone early in life, when the patient is too young to argue about it. And once it has been successfully completed, the sufferer need never undergo it again.

The similarities of attitude towards vaccination and education are too obvious - and for a professional educator, too painful - to pursue. Fortunately, it is not necessary to pursue them too far, for the vaccination model of criminal justice education and training is definitely on the wane. The days in which it was assumed that a few weeks of recruit training provided sufficient preparation for a career whose primary learning would consist of on-the-job training and the fatherly advice of veterans are long behind us.

The vaccination model has in many ways been replaced by the inoculation model. A major change in career or position calls for a fresh dose of new training. Thus, just as the cautious first-time visitor to an Asian country avails himself of a cholera shot, the police or corrections officer recently promoted to management level avails himself of a course in management and policy studies. Indeed, just as the immigration officers of some nations may not admit persons who have not had the requisite inoculations, the requisite courses may be mandatory before the recently elevated criminal justice officer is permitted to take up his position. But just as the traveller who puts away his suitcase and settles down to a lifetime of tending his garden no longer visits his doctor for further inoculation, the criminal justice professional who is no longer getting promotions and special assignments no longer receives additional training or education.

There are exceptions. It is not always necessary to travel to encounter a new strain of infectious disease; new varieties of flu or other microbes can dictate inoculations even for stay-at-homes. Similarly, new types of crimes, new insights into personnel problems, or new threats to well-being may produce seminars and short courses in terrorism, stress management, or how to handle clients with AIDS.

Vaccination and inoculation have both served their purpose in justice administration; they have provided a foundation for further initiatives in education and training, initiatives that will retain their advantages but will improve upon them. What is the model that will provide education and training that will enable the justice system to meet the demands of a world that is changing at a dizzying pace? It appears to me that for our careers as for our bodies we must fashion a constant state of fitness and flexibility, one that will allow us to meet whatever challenges come our way.

You will probably be relieved to hear that I am about to abandon this rather analgesic analogy.

What are these demands and challenges and how may education help us to deal with them? Part of the problem, of course, is that so many of them are unpredictable. But it is possible to make a few rather general statements about what the future holds for justice administration.

First, I feel fairly secure in suggesting that in the foreseeable future a substantial portion of the clientele of the criminal justice system will be better educated and more sophisticated than it has been in the past. Greater public understanding of and concern about fraud, corruption, industrial espionage, price fixing, and environmental crimes mean that the law, police, courts and correctional services will all be faced with offenders possessing a high level of understanding, technical knowledge and professional expertise as well as - in many cases - the resources to hire the best legal talent available.

The international aspects of crime will continue to increase. The scope of the international drug trade means that even a simple burglary committed in order to buy narcotics has international implications. Holding up a bank and jumping on a jet is old hat by now; modern communications make it possible to carry out a crime without ever going near the country in which the crime is committed. Money may pass through several national borders in the process of being laundered. A conspiracy may involve as many continents as there are conspirators.

Weberian bureaucracy is dying. It removes too many people from line jobs, distorts too much information both on the way up and the way down, and places too many buffers between those who make decisions and those whose lives are affected by them. The increasing use of technology means that real power is often in the hands of those who have the necessary knowledge, not those who have the administrative title. Increasingly, there is recognition and support of the idea that the most important decisions in any organisation can and must be made by those actually on the coal face.

Science will play an increasing role in the administration of justice, in detection, in adjudication, and in corrections. Far more than in the past, lawyers, judges, juries and administrators will be asked to assess the validity of scientific reasoning and the results of the scientific method.

Questions of professional ethics will become more complex. Undercover work, sting operations, infiltration, relations with informants, and a host of proactive and often highly imaginative law enforcement activities verging on entrapment raise questions of law and morality far more complicated than those addressed to the free cup of coffee or the criminal payoff to the police officer, prosecutor, judge, juror, or corrections officer. These traditional forms of abuse of power will not disappear, however; instead, increasingly lucrative forms of criminality will produce increasingly tempting bribes. Finding effective yet ethical ways of helping their people deal with that temptation will pose ever more vexing problems for administrators in all areas of the justice system. In addition, the demands of articulate and politically aware interest groups will force us to confront questions about the exact nature of this thing called justice that we are supposed to be administering. "I don't make the law, I just carry it out," hasn't really been a valid comment since Nuremberg. And challenges concerning the definition of justice will not only come from those outside of the system; educated and thoughtful young people joining the system will also demand that its actions be justified in moral terms.

The line between criminal and civil law will continue to blur. For example, some victimless crimes and public order offences will be decriminalised, while some conduct affecting the environment and actions involving employers and employees will be criminalized. Other deeds will demand definition - if a person, contrary to his promise, gives a new employer information about his old employer, has he stolen property, breached a contract, or committed no illegal act at all? If a person improperly asks a company executive for information and the executive gives it, the person doing the asking has not broken the law is the situation different when he uses the telephone to request the same information from a computer?

Increasingly expensive technology will invite increasingly ingenious rip-offs. Such crimes will demand increasingly adroit methods of detection, but they will also require increasingly sophisticated laws. The current laws of theft, patent, and copyright are simply not up to the task of providing protection for inventors and developers in these areas while also encouraging improvement and dissemination.

International migration will continue on an unprecedented scale. The international community as well as domestic unrest will bring pressure to bear on those lands that have hitherto denied their citizens the right to travel and immigrate. The increasing economic interdependence of nations means that people will find it natural to move from countries with a labour surplus - and this includes white collar, technical, and professional labour - to those with a labour deficit. International economic instability means that such moves may take place more than once in a person's life.

THE ROLE OF EDUCATION

Simply listing these challenges of the foreseeable future should bring home sharply the fact that it will take educated people to deal with them. To work successfully in an environment in constant flux calls for the command of a large body of information; the learning skills that make it possible to add to that body consciously and relevantly; the ability to analyse and synthesise, induce and deduce; a copious amount of self-knowledge; and the self-confidence that permits a novel situation to be faced with determination and zest, rather than with the hope that if it is ignored, it will simply go away. What role can education play in preparing the criminal justice system for these changes? Let's look at a few obvious things.

Each segment of the criminal justice system will have to have a respectable proportion of members who are acquainted with the languages and cultures of other countries. Those of us who have English as our native tongue seem at times to have a constitutional inability to learn languages; if we are to deal with international crimes and criminals, as well as with the increasing ethnic heterogeneity of our own populations, it is an inability we will have to overcome. But if we are to deal with the problems of migrants, frustrate the plans of international criminals, and cooperate effectively with our criminal justice counterparts overseas, we must understand more than their words; we must also understand their history, their habits, and their values. Better understanding of the criminal justice systems of other countries will be imperative if we are to join with them in countering international criminality. And our lawyers and judges must feel at home with international law as well as with the laws of other nations.

The best scholarship of the eastern and western worlds has been addressed to questions of ethics, morality, and justice. Much of traditional and modern thinking in these areas has been applied or is easily applicable to the problems of justice administration. Such scholarship can be dismissed as out-of-date or unrealistic - but only by those who are unfamiliar with it. In doing justice to others or in deriving ethical standards of conduct for themselves, members of the justice system deserve the guidance that the systematic and sustained study of philosophy can give them.

Traditional bureaucracy, with its hierarchical pyramid, assumed that information flowed from the bottom of the pyramid to the top, that policy was made at the top, that policy was applied to information at the top, and that the orders, which followed from this process, then flowed from the top to the bottom. If carried to its logical extreme, this process could operate with automatons at the bottom. In many organisations this model has been adhered to, not because it was considered the best, but because it was considered inevitable. The study of management can introduce criminal justice administrators to alternative models of organisation and problem solving. But alternative models often involve decentralisation and the devolution of decision making, calling for teams and task forces that identify problems, decide how to

tackle them, muster resources, and are as responsible to their clientele and to the public as they are to the agency head. Such team and task force members cannot possibly be automatons; they must be knowledgeable, flexible, articulate, and masters of a large repertory of skills.

Detection, adjudication, and administration will make increasing use of the social and physical sciences. Scientific research itself will probably be the domain of specialists, at least some of whom will be criminal justice personnel. But the evaluation of that research and its application in particular instances must remain the responsibility of the non-scientists in the criminal justice system. As social scientists produce one study after another about the operation of that system, decision makers at all levels must be able to decide upon their applicability to particular situations. This calls for an acquaintance with the existing body of knowledge, the will and the ability to keep up with the relevant additions to it, and enough knowledge of the scientific method to read it critically. Not all investigators need to be forensic scientists, but all investigators need to know what forensic science can and can't do. Similarly, juries will not be made up of scientists, but they will be asked to evaluate the evidence that scientists will present to them. In doing so, they must rely upon lawyers who understand the implications of scientific procedures and the valid methods of attacking and defending them; they must rely upon scientist-witnesses who understand legal standards of proof and the demands of the adversary system.

Finally, they must rely on the guidance of judges who can understand and explain scientific methods of explanation and who can guide them through the differences between logical argument and empirical evidence.

Keeping up with technological changes is probably the most exhausting enterprise of the late 20th century; there is no reason to think that things will go more slowly in the 21st. But there is no escaping it. Lawyers and judges must be abreast of technological developments if they are to deal in a just and consistent manner with the host of legal questions that they raise. Investigators must be at least as technologically sophisticated as the criminals they pursue - and that means very sophisticated indeed. And administrators will be able to handle the ever-more-complex demands made on their organisations only if they can make effective use of the help that technology can provide. But seeing that a portable computer in a police car can save time and paperwork, understanding the usefulness of a robot in a bomb unit, or appreciating the ways in which lasers can defeat security systems is only a small part of the task. Without understanding the implications of various forms of technology for decentralisation and autonomy as well as for control, without understanding their effects on human behaviour, physical health, and morale, knowledge of technology itself may be worse than useless. Although engineering, medicine and the social sciences have much to contribute to these understandings, they are not alone; much can also be learned from Mary Shelley and Charlie Chaplin.

Clearly, to do justice in today's world - let alone tomorrow's - calls for a staggering supply of knowledge. It is a supply that is constantly being added to. But in a way, it is also being subtracted from. Scholarship and research are able to demonstrate that the knowledge that we thought we had was false. And if ignorance can be dangerous, misinformation can be positively disastrous. Let me remind you of the three things that we used to think we knew.

1. A woman who is a genuine victim of rape will be bruised, battered and hysterical.
2. The elderly are more likely to be victims of crime - personal and property - than any other age group. If they are not victimised, it is because they have so restricted their activities that they are almost prisoners in their own homes.

3. A domestic argument is the most dangerous situation to which a police officer can be called and more police are injured in trying to deal with domestic situations than with any other type.

Criminal justice decision makers in the past have acted on the basis of all three of these beliefs. They cannot be blamed for this; there was no reason to doubt the conventional wisdom. But today there is data that causes us to question each one of them very seriously: to make a judgement or formulate a policy based on any of them may lead to failure, danger, or injustice and it may open the doors to questions of professional competence.

And - if we need one - here is the bottom-line reason for a new model of professional education in criminal justice. The system is more than ever before being held accountable. It is not only in litigious America that civil liability suits against police, courts, and correctional personnel are being matched proportionately by malpractice suits against members of the legal profession. Processes of accreditation and certification as well as committees on legal and judicial conduct, are all calling for further and better education to protect against charges that decisions were made out of an ignorance that the decision maker had a professional responsibility to remedy.

A MODEL FOR LIFELONG LEARNING

What is the appropriate educational model that will help members of the criminal justice system meet that responsibility in a constantly changing world? First of all, it calls for a solid base on which future learning can be built. It also calls for a frequent and regular return to the classroom for additional learning and preparation for new assignments. Here I realise that I am in some sense preaching to the converted; reading your annual reports and other publications reveals that recruit training in your organisations has frequently been lengthened in past years and that an impressive array of refresher and short courses is available. What remains to be done? Let us consider both content and format, for in many ways the two are closely intertwined.

Certainly the highly desirable emphasis on improving training should not obscure the importance of education; the two should progress side by side and in complement to each other. Training supplies professional knowledge and skills; education explains underlying assumptions; helps the student to understand the relationships among individual, society, and nature; provides the historical and cultural context for action; and supplies the tools for lifelong learning. Training alone may have been sufficient for the past; it is not sufficient for the future. But an appreciation of what education can provide should not obscure the need for high quality and on-going training. Both are necessary.

The appropriate model must include early-on a training program that supplies recruits with the information, policies, law, and skills necessary to carry out the duties of the entry level position. But recruits preparing for a career in an unpredictable world need more than that; they need a solid base from which they can adapt to changing conditions, so that their responses will be neither rigid and unbending, or prey to every change in the wind. For this they need to know about the history and development of their occupation and of the particular organisation they have joined; the part the organisation plays in the entire justice system; the place that the justice system does and should occupy in a democratic society and the philosophy that guides their own organisation. They should have some understanding of the ethical principles underlying their rules of professional conduct, so that they can apply those principles to situations not covered by the rules.

Later - but not too much later - they must come to know about the resources of the community, so that they can effectively refer clients to sources of help. They need to know what various types of specialists can and cannot do for them. Although they should know how

the social and behavioural sciences have been applied to their own occupations, they should also be familiar with the principles and methods of those disciplines as well as the scientific mode of discourse, so that they can appraise future suggestions and applications intelligently and critically. Lawyers and others trained in deductive reasoning must be able to comprehend scientific modes of explanation, hypothesis testing, and the systematic search for rival explanations. Non-lawyers should know how the law is made in a common law jurisdiction and they should have an understanding of the principles and procedures of the adversary system. They must be familiar with the type of technology being used in their organisation, what is being used in similar organisations, and what is being used in very different organisations but might be adaptable.

And they should be learning about the languages, cultures, and criminal justice systems of other countries, as well as developing personal contacts in them. They should be helped to understand the customs and beliefs of minorities in their own country. They should be keeping up with local, national and international political and economic developments, aware of the impact that such developments may have in even the smallest towns. And they must keep abreast of trends in particular crimes or public order incidents and current methods of dealing with them.

Naturally, people attaining specialist, supervisory, managerial or policy making positions must be acquainted with current thinking in these areas, aware that techniques developed in other areas of the public sector or in the private sector may be adapted to the justice system, but also aware that the private sector is not immune to fad and error.

However, most people in any job or occupation will not rise above the bottom ranks. Their responsibilities toward the end of their careers will be similar to those at the beginning. Education can help to provide defence against burn-out, stress, boredom, wastage, and a tendency to retire while still collecting a pay-cheque. Regular opportunities for education and training should be available and mandatory for everyone, not just for those destined for the heights. New forms of organisation dictate that - more than ever - it is those on the bottom rungs who have the most contact with offenders and with the public, who make the important decisions with little administrative support, and who have the greatest needs for professional skills and broad knowledge. The team and task force approach will demand additional specialists even as it disbands specialist units. But the content of their continuing education must be appropriate and useful; it makes no sense to teach modern management techniques to people who aren't going to manage - and who may continue to be managed by people who have never heard of modern techniques.

But most important, all members of the system must be constantly reminded that none of these subjects, once learned, stays learned forever. Each one is constantly changing, and yesterday's knowledge is tomorrow's myth. People administering justice cannot allow themselves to become depressed, cynical, or Philistine; this situation must be accepted as being as inevitable as death and taxes.

What does accepting it mean in practice? First, it means assuming that education and training will be a process that goes on throughout the career, regardless of rank or position. Many armed forces assume that 20 percent of the career will be spent in further education and training; surely something of the kind can be estimated for justice administration. Modern techniques of communication mean that not all the time must be spent in classroom or seminar; closed circuit television, computers with modems and LANS, video and audio tapes, conference calls, satellite, and the Sony Walkman - not to mention the first means of modern communication, the book - all make it possible to carry on education at times and places that are convenient for the student and even to make use of time that might otherwise be wasted.

The process can be helped by making use of as many resources as possible. Certainly institutions of tertiary education must be heavily involved, in providing lecturers and researchers for in-house training, for the development of diploma and degree programs, and for admitting members of the justice system into lectures, programs, and events that would be valuable even if not obviously related to justice administration. But other areas of government as well as the private sector have expertise and information that can and should be tapped by the justice system.

Formal credentials are important but are not an end in themselves. They provide recognition for those who have demonstrated their mastery of often demanding courses of study and - justifiably or not - often increase the status of the individuals and occupations that possess them. But not all education must lead to a degree, diploma or certificate and it is not necessary for all members of the justice system to subject themselves to the lengthy process of *classes*, tutorials and exams that lead to them. Private study, informal seminars, relevant lectures and workshops are suitable vehicles for career- long education and training, both for those who do not wish to attain degrees and for those who already have them.

The increasing rationalisation and professionalisation in all areas of the criminal justice system have spawned a specialisation that cuts each segment off from the others and from the public that it serves and to which it is accountable. In many areas of training, it may be necessary or desirable to separate members of different organisations; in others, and in education generally, it is neither necessary nor desirable to separate them from each other or from lay people. Personal contacts and common experiences across the criminal justice system can only help it to function more smoothly; an education which is to some extent focused on helping members of the system to understand the history, functions, and problems of all of its parts may help to increase its efficiency. This is also an opportunity to examine the interfaces of the system, to demonstrate how changes in police policy, the closing of courthouses for budgetary reasons, or the overcrowding of prisons affect other parts of the system.

Nor should it be assumed that lay people cannot play a creative role in education and training at all levels. Examining the criminal justice system together with intelligent articulate citizens can give members of the system new insights into how and why the public perceives the system as it does and this may help to change their own perceptions; more pragmatically hearing challenges in the classroom situation will help to prepare them for hearing similar challenges in the press, in public meetings, and political gatherings. At other levels, members of the justice system can only benefit from hearing of the experiences other organisations have had with various modes of organisation, management techniques, computer applications, or dealing with the media. Indeed, one of the principles aims of contemporary education in criminal justice must be to enable members of the system to search out and evaluate the innovations of others and to modify those innovations for use in their own organisations.

Educational calendars can be designed for the student rather than for the teacher. Class times can be tailored to the student's work schedule, even if that means that the class meets a different time or day each week. Classes can be held in police station houses, prisons and gaols, court houses, or any other place convenient to the students. Intensive weekends and classes during the summer or holiday recesses make education more accessible to the working member of the justice system.

Newly acquired information, skills, or ideas must be treated as an asset to the entire occupation or organisation. There must be institutionalised methods of debriefing someone who has returned from a workshop, educational program or training course and the debriefing must proceed on the assumption that the person has learned something that can be used. Too often people returning from educational or training experiences are greeted with remarks such as "Welcome back from the ivory tower", "The first thing to do is forget everything you

learned at the Academy", or "You've been assigned to a difficult district; that will help you remove the pink cloud from your feet". Perhaps more often than they are not greeted at all, on the assumption that the time spent at the course was simply a little unofficial R&R. Of course, if the organisation treats training as nothing more than R&R, it gets what it deserves. I remember talking to attendees at a course for newly promoted detectives in New York State; one of the members of the audience had been a detective for 20 years. I asked what he was doing at the course and he explained that it was his turn to go to a course in New York City and this was the only one being given. That was not only a waste of money, but also a clear signal to every member of the force about the esteem in which training was held.

If education is an asset to the system, it must be treated as one. It is common to pay lip service to the importance of education and training, but when the training budget is the first one to be cut, when training endeavours are cancelled whenever extra manpower is needed, when the training academy is considered a soft berth for those on light duty or looking for a retreat from other activities, the message is clear. A slightly different message is equally clear when advancement and reward are given for simply attending a course, rather than for how much was learned or the benefit gained by the organisation.

A final way of judging how much value those at the top of the system place on continuing education is to see how consistently they subject themselves to it. It is difficult for commissioners, directors, and senior judges to sound sincere about life-long learning when they themselves avoid it like the plague.

Why do senior officers, directors, and other department heads so rarely appear in classrooms? The press of time is an obvious reason. With demands made on them from all directions, carving out the time for an occasional workshop or residential short course, let alone accommodating to the rigidities of the usual college or university calendar, may seem impossible.

Another reason has to do with the absence of carrots and sticks. Much as we professors like to think that the shining faces before us are glowing with the desire for knowledge, in rare moments of stark honesty we must admit that the vast majority of them have either been directed to attend our courses or are doing so in the hope of having done so will give them an advantage when it comes to assignment or promotion. The person who has reached the top has no one to give him orders nor does he have a promotion to work toward. Even the example of peers, which is often a factor in bringing lower and middle ranking people to further education, is non-existent for those who experience the loneliness of the top. Besides, the few people the director recognises as his peers aren't going to school either.

But agency heads may have other reasons for not undertaking further training or education. As the person who shoulders the final responsibility for the agency's performance, who must answer for its reputation and at times defend its very existence, the director or commissioner - like the barrister, solicitor, and judge - makes decisions on which the future well-being of others depend. All who must make such judgements may feel that they perform better - that they are more apt to inspire the confidence of others - if they operate in an aura of omniscience and self confidence. From such a viewpoint, volunteering for further education may be seen as a confession of inadequacy, doubt, worry, or fear; obviously, the omniscient person has no need for additional information. Related to this may be doubts about how well he or she will perform in the now foreign environment of the classroom. What if he appears slow or ill informed before fellow classmates possibly including - heaven forbid - subordinates? What if - due to the obtuseness and lack of perception of the instructor, of course - his contributions to the course are not accorded proper appreciation? Why endanger both ego and image in an endeavour that has little to commend itself to begin with?

Why indeed? Why should people who are close to or at the top of the professional tree sacrifice their time, energy and comfort to undertake additional education and training? Why can such endeavours not be left to those who are still striving, those whose professional activities will clearly benefit from acquaintance with the latest in technology and technique? I would like to suggest several reasons.

First of all, it is not healthy for the functioning or the morale of the organisation if the people at the top cannot respond in an informed and sophisticated manner to the concepts and ideas that lower and middle ranking people produce as a result of their education and training. There is nothing more frustrating than to return from a period of training and education with an idea that seems absolutely appropriate for implementation in one's own organisation, only to be treated with indifference and lack of comprehension by one's supervisor. It is an experience that leads to apathetic performance and contempt for the organisation's leadership. It is also an experience that may become more common as recruiting standards rise and a growing number of people in the criminal justice professions have tertiary qualifications and up-to-date information in the areas of law, technology, and current events; the people at the top will have to scramble if they are to continue to understand what is happening to their organisations, let alone continue to supply vision and leadership.

Secondly, there is a growing need for those in justice administration leadership positions to communicate effectively with their opposite numbers in government, business, and the media; they will not only have to satisfy the demands for accountability, but also have to earn support for activities, innovations, and decisions. Neither venerable wig nor insignia of rank will substitute for a thorough understanding of the subject; its social, political, and economic context; and the ability to articulate a position in a clear and convincing manner. Both the knowledge and the skills to do this are fit subjects for continuing education.

Finally, learning comes from reflection as well as from study. The experiences of those who have reached leadership positions will be of greater value to themselves, to their organisations, and to the future of justice administration if there is time and opportunity for those experiences to be analysed and assimilated; the exchange and comparison of insights with peers in other occupations and professions can be a valuable contribution to such learning.

If career long education and training are to contribute all that they can to the process of doing justice, they cannot be treated as a frill or as a symbol to demonstrate the enlightened and progressive nature of the organisation. They must be systematically planned by the best minds that the justice system can recruit to its service, they must have the proper financial support, effective participation must be a pre-requisite to recognition and advancement, they must meet the needs of both the individual and the system, and they must be treated as a long term investment as well as a means to short term goals.

Let me finish by returning to the medicinal comparisons with which I started.

A recent study found that, due largely to poor diet and lack of exercise, a significant sample of American police officers possessed a body composition, blood chemistry, and general level of physical fitness greatly inferior to that of a similar sized sample of convicts. This is bad enough - it would be worse if the same could be said of our intellectual and technical ability. Fitness in both areas can be achieved and maintained only with adequate motivation and - yes - with a great deal of hard work.

VIOLENCE, CRIME & AUSTRALIAN SOCIETY

Duncan Chappell

FEAR, VIOLENCE AND 'LAW AND ORDER'

'Beware of Dangerous Australia, Japanese Tourists Warned' (*Sydney Morning Herald* 1988)

'The Violent Society, Fears Deepen as the Law Seems to Lose Its Grip' (*The Bulletin* 1987)

'Nooses Sent to Police Stations' (*The West Australian* 1988)

'Rape and Drugs - Madness Stalks the Manicured Streets of the Capital' (*The Sun Herald* 1988)

These are just a few of the media headlines Australians have been reading in recent months, which make mention of the state of violence in our society. They are headlines that suggest that our nation is succumbing to a torrent of violent crime beyond the control of our traditional system of law enforcement. The impact of this type of publicity upon public fear about crime has yet to be fully measured. But if the recent election results in New South Wales are any guide, there seems little doubt that it is publicity that has helped to push law and order issues to the top of the list of contemporary community and political concern (see, for example, Murdoch 1988).

Further evidence of the high levels of public anxiety about crime, and especially violent crime, can be found in the ubiquitous opinion polls which influence so much of the decision-making in the political area. More than two years ago the Gallop Poll found that violent crime was the 'number one issue of concern for Australians' (Australian Public Opinion Polls 1986). This Gallop finding reported in April 1986, was the first occasion since 1977 that unemployment had not been the principal concern of those polled. Gallop also reported that men and women were equally worried about violent crimes. Residents of Tasmania were found to be the most concerned about violent crime, and those of the Australian Capital Territory least concerned (Australian Public Opinion Polls 1986).

The views of the community about the state of violent crime are almost certainly influenced to a substantial degree by the attention given in the media to particular criminal events. Thus in reporting its 1986 poll results Gallop noted that they were based on interviews conducted after the publicity associated with the murder of Anita Cobby in New South Wales (see, for example, *Sydney Morning Herald* 11 June, 1987), but before the equally publicised bombing of the Victoria Police Headquarters in Russell Street, Melbourne.

Since these two events there have been further well publicised acts of criminal violence in Australia to fuel public alarm. Of these acts probably none have been more traumatic and troubling than the two mass shootings that occurred in Melbourne in 1987. In the first of these shootings in Hoddle Street, Clifton Hill in August, seven people were killed and nineteen injured (see, for example, *The Australian* 11 August 1987). Just four months later a second incident of this type occurred in Queen Street in the heart of the City of Melbourne, resulting in eight deaths and injuries to five people. The gunman responsible for this violence subsequently leapt to his own death from the tenth floor of an office building where the shootings took place (see, for example, *The Bulletin* 22-29 December 1987).

Few of us will probably forget the sense of personal shock and horror that these mass shootings provoked. Perhaps more than any other notorious crimes or violence in recent history these two events made us aware as Australians that the forms of random and senseless carnage we have tended to associate with television pictures beamed from abroad could occur in the midst of one of our own supposedly tranquil cities. With this awareness has also come a growing realisation that remedial measures are required as a matter of urgency to deal with a range of violent behaviours in our society.

Much controversy currently surrounds the question of the form these measures should take. For governments whose political survival may well rest on the manner in which they respond to violence and associated crime the options may seem few. Persistent community demands for tougher penalties for offenders, coupled with increased resources and powers for law enforcement agencies, have proven difficult policies for most to resist even past criminological experience suggests that these are at best short term and costly palliatives for complex problems (see, for example, Morison 1987). Attempts by certain governments to deal with these problems in a more effective manner, as in the case of gun control, have tended to spark strong and successful opposition from powerful lobby groups whose influence can sway election results (see, for example, *Sydney Morning Herald* 4 April 1988; *The Age* 14 April, 1988).

Despite these somewhat gloomy developments there are a number of measures that have been suggested, and in some cases implemented, to alleviate the problems of violence that offer promise for governments, and society at large. It is intended to review a number of these measures in this paper. This review is preceded by a background analysis of the nature and scope of the violent behaviours against which these measures are directed. Such an analysis, which time and space requires to be brief, is needed to place in some perspective the trends in violence currently being experienced by Australians.

A LEGACY OF VIOLENCE

Our Bicentennial celebrations have been the cause for much reflection about the origins of our nation. These origins involve a deep legacy of violence both among those transported here as a punishment for crimes committed on another continent and those who joined them in the settlement of this country.

This is not the place to document the brutalities inflicted in the name of British justice upon convicts at locations like Port Arthur, Norfolk Island and Macquarie Harbour (Hughes 1987; Shaw 1966). These brutalities were only exceeded by the violence directed against the Aboriginal population scattered across the continent. But it is important to recall that scarcely a century ago Australia was a much more violent and dangerous society than it is today. Rates of homicide for example were as much as ten times higher than those experienced in contemporary society while rural living in the nineteenth century was made somewhat hazardous by the prevalence of bush ranging (Grabosky 1977).

Even during the first few decades of the present century violence appears to have been a much more commonplace aspect of life in Australia. In 1916 for instance drunken soldiers caused havoc in Sydney akin to that reported recently to have been committed by soccer hooligans in certain European cities (*Financial Review* 1988).

“Noisy drunken soldiers arrived at Central Railway Station in train after train and marched through the city overturning fruit carts and smashing windows. Meanwhile a group of about 500 soldiers was confronted by an armed military picket at the station: several shots were fired killing one rioter and wounding six. Activity on the streets of the city was disorganised and consisted primarily of small groups of soldiers wandering around the city well into the night. Those participants with interests in

addition to that of staying drunk directed their energies against property rather than persons. In addition to the aforementioned casualties at Central Station, four policemen were injured, and sixty rioters were arrested. The Commonwealth Government responded to the disturbance by ordering the six o'clock closing of hotels under the War Precautions Act and no further incidents of this kind occurred.” (Grabosky 1977 p. 108)

The Depression years also witnessed substantial violence associated with labour unrest and protest. In New South Wales late in 1929, police opened fire on a group of striking miners at Rothbury wounding seven and killing one. This particular event was one of historical significance representing the most severe repression of labour protest in twentieth century New South Wales (Grabosky 1977 p.121).

CONTEMPORARY TRENDS IN VIOLENT CRIME

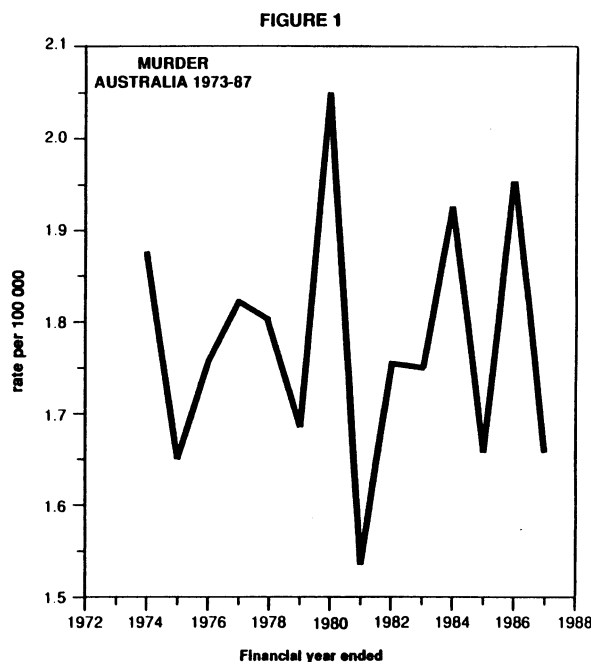
To recite facts like these is probably to give greater comfort to students of history than contemporary observers of the state of violent crime. For while the rates of all forms of violent crime have fallen significantly during the past one hundred years the shorter term trends, in general, have been less encouraging (Grabosky 1977).

It is to these trends that this paper now turns.

Homicide

There is no doubt that in the public mind the most serious form of crime is homicide. The term homicide in fact incorporates a number of legal categories of offence including murder, infanticide, and manslaughter (Mukherjee 1986). Homicide may also in some cases be justifiable, as in the situation in which a person acts in self defence, or in the course of their duties as a law enforcement officer (Wallace 1986).

Because by definition homicide also involves the death of a human being we tend to have much better data about its incidence than other forms of violence. There are well established procedures for investigating deaths occurring in the community as well as stringent obligations to report their occurrence. It is therefore assumed that almost all homicides, whether justified or not, are in fact brought to the attention of the authorities.



When Australian trends in homicide are examined, it is found that their incidence has been remarkably stable over the past two decades. National rates for the crime of murder, the gravest of all forms of homicides, are shown in Figure 1 for the period 1973-1987 (Hogan 1988). The number of murders reported to the police in the most recent year for which data are available (1986-87) in each Australian jurisdiction, as well as the rate per 100,000 population, are shown in Table 1. It will be seen from Table 1 that there are quite substantial variations in the murder rate around the country. The Northern Territory, in particular, in 1986-87 had a murder rate that was five times greater than that of any other jurisdiction.

TABLE 1
Violent Crimes Reported to Police and Rate per 100000 population
Australia 1986-87

Region	Murder		Robbery		Other Violent Crime	
	Number	Rate	Number	Rate	Number	Rate
New South Wales	98	1.77	3897	70.45	20971	379.11
Victoria	68	1.63	2090	50.23	16386	393.81
Queensland	53	2.02	649	24.73	9656	367.90
Western Australia	24	0.91	459	31.46	7530	516.10
South Australia	13	0.94	725	52.44	10159	734.80
Tasmania	5	1.12	39	8.74	N/A	
Northern Territory	18	11.66	58	37.56	1566	1014.11
Australian Capital Territory	3	1.16	52	20.08	837	323.28
Australia	282	1.76	7969	49.75	67105*	418.93

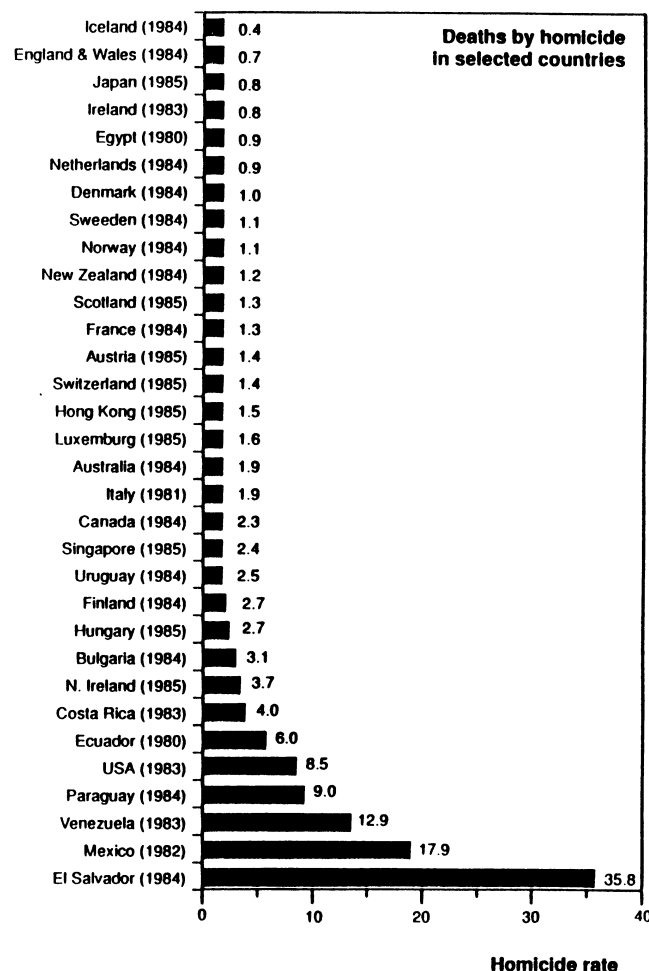
*Excludes Tasmania

No national study has as yet been made of homicide but the New South Wales Bureau of Crime Statistics and Research has made a detailed examination of homicide offences occurring in that State (see, however, Mukherjee et al 1987). Since approximately 40 per cent

of all Australian homicides are committed in New South Wales there is some justification for making some cautious generalisations, based on this study's findings, about homicide across the nation. Some of the more important findings to emerge from this New South Wales study include (Wallace 1986; see also Grabosky 1981):

- Homicide was overwhelmingly a crime committed by and against people who knew one another. Most victims (more than 40%) were killed by members of their families or by friends or acquaintances (20%). Less than one-fifth of the victims were killed by complete strangers.
- Almost one-third of homicides were related to some form of marital conflict.
- The most frequently used weapon was a gun (about 35%). the rate of gun homicides was 60 per cent higher in rural areas than in urban areas.

FIGURE 2

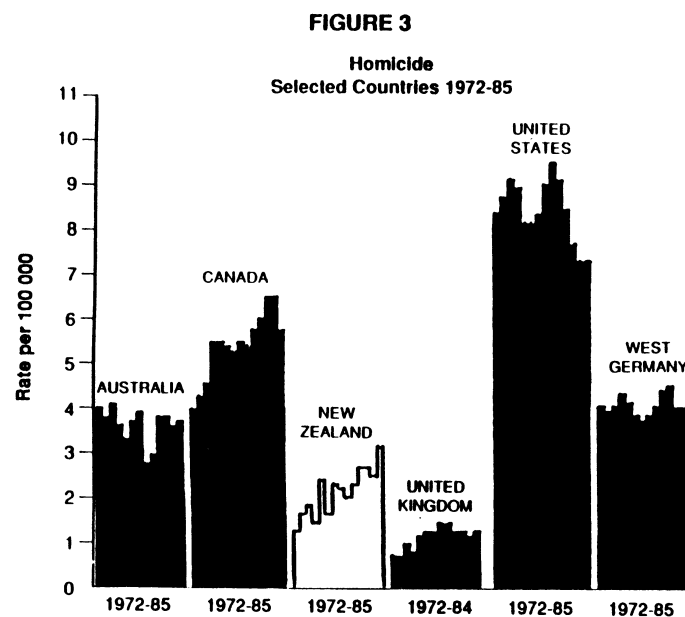


- The rate of family killings was significantly higher in rural areas and guns were much more likely to be used in these killings. Suspects and victim in homicides were in the majority of cases males. In the case of suspects this male predominance was overwhelming (approximately 85% } while in the case of victims slightly less than two-thirds were male. Putting it another way, women were approximately twice as likely to be the victim of homicide as they were to be suspects.

- Mental illness among homicide offenders was found to be no higher than in the population in general. Few offenders had any prior criminal record involving any form of serious violent offence.

This New South Wales study also examined the rates of homicide in the State over the last sixty years and found there had been no dramatic increase. It was noted, in contrast, that in the period between 1960 and 1980 the homicide rate in the United States almost doubled (Wallace 1986, p. 15-21).

Figures 2 and 3 contain some more detailed international comparative data in regard to homicide that indicate that Australia at large has a homicide rate well below that of many other nations including Canada, the United States and West Germany. However, Australia's rate is higher than that of New Zealand and the United Kingdom. The rate of homicide in the Northern Territory, on the other hand, places it among the highest in the western world.



Given the significant level of public concern about homicide, the data presented thus far may in one sense be viewed as encouraging. Offences of homicide do not seem to be increasing in Australia and while our homicide rate is still higher than that of a number of western democracies with whom we normally wish to associate ourselves it is significantly lower than the rates found in North America. Homicide in Australia is also a crime that does not seem to be closely related to acts of random terror committed by strangers, nor to violence in the streets of our cities. The most dangerous situations, and greatest risks, associated with homicide arise from people who are known to one another and, in many cases, from people who are living together in the same home.

What is both surprising and rather disturbing is that these facts are almost certainly neither widely known nor understood within Australian society. Although specific research is lacking to substantiate this assertion, attention should be drawn to some comparative findings from Canada about the state of public knowledge regarding trends in homicide and allied crimes of violence. In a survey in the early 1980s of Canadians' views about violent crime made by University of Toronto researchers it was found that most believed that the incidence of violent crime was as high as or above, that of the United States (Doob & Roberts 1982). In reality

rates of violent crime in Canada are approximately one-fifth those experienced by its neighbour to the south of the forty-ninth parallel.

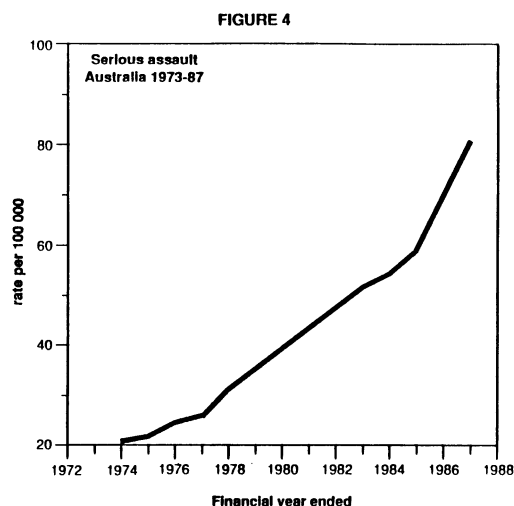
How could Canadians be so wrong about such an important issue? The researchers suggested that much of the public's misconception about the Canadian rate of violent crime could be attributed to the massive flow of information into Canada about violence that occurred in the United States. Sharing a virtually open border with the United States, across which flowed print and electronic media reports of crime, Canadians tended to make their assessment about violence in their own society based on information which was really inapplicable to the situation prevailing in their own country (Canadian Sentencing Commission 1987).

It may be speculated that a similar situation, lessened to a degree by distance and the lower availability of such media reports, influences public beliefs about the state of violent crime in Australia. So much of the news we consume on a daily basis about crime originates from and relates to events in the United States. Thus the concerns felt by many Australians about the incidence of homicide and other violent crime in our society may be mistakenly based on 'foreign data'. More research is clearly required before this hypothesis can be substantiated, or, possibly, rejected. Meanwhile it is worthy of note that the Gallop Poll results in 1986 referred to earlier showed that Tasmanians expressed the highest levels of concern about violent crime in the nation. Yet the available data suggests that this Island State enjoys the lowest levels of recorded violence in Australia. Perhaps we are witnessing here a situation similar to that occurring on a much larger scale in Canada, namely, Tasmanians are mistakenly judging the state of violence in their own community based upon a flow of information across Bass Strait about crimes of violence being committed in mainland Australia.

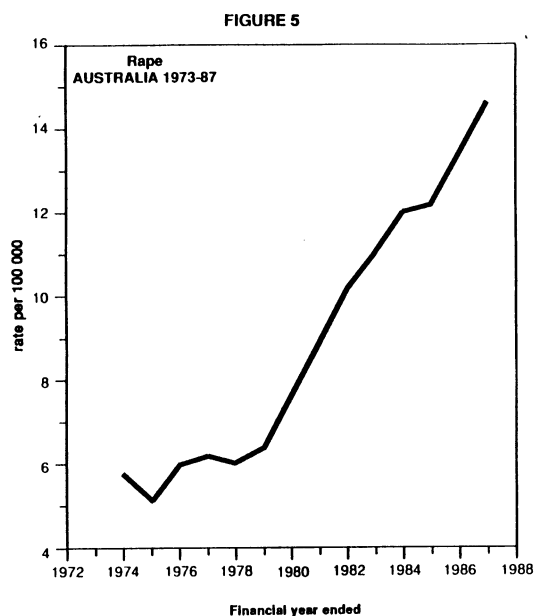
Other Forms of Violent Crime: Serious Assault, Sexual Assault and Robbery

While the situation may not be as serious as many members of the public seem to believe in regard to rates of homicide in Australia the trends in other forms of violent crime display less reassuring developments.

Because of well documented dilemmas associated with the official reporting, definition and recording of violent crimes like serious assault and sexual assault both national and inter-jurisdictional reviews of trends in such offences must be made with extreme caution (Department of Justice 1988). Subject to this caveat national trends within the categories of violent offences included in the uniform crime reporting program under the heading of Serious Assault, Rape and Robbery are shown in Figures 4, 5 and 6. It will be seen that in each offence category there has been a significant upward trend during the period under review.



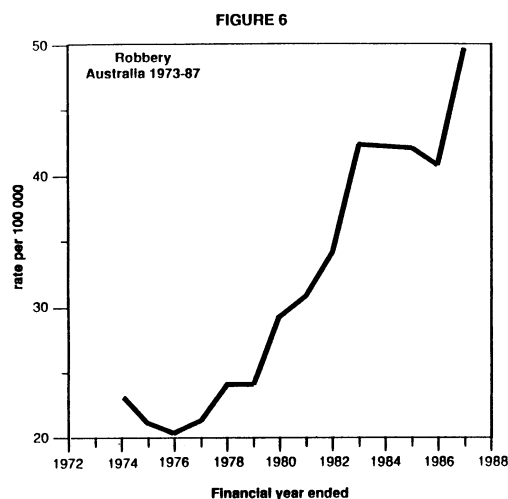
Some inter-jurisdictional comparisons of violent crimes are made in Table 1 (1986-87) and in Figures 7 and 8. It will be seen that the Northern Territory has rates of serious assault That are much higher than those prevailing in other parts of Australia. However, in regard to robbery New South Wales had the highest rate in the most recent year for which figures are available (Mukherjee 1981, p. 15). Although international data are not included in these figures or table, Australian rates of non-fatal violent crime tend to display similar characteristics to those of homicide ((Mukherjee 1981, p.20-24). Thus our rates of robbery remain significantly lower than those of the United States and Canada, as do our rates of serious assault. On the other hand countries like New Zealand and the United Kingdom have a lower incidence of these crimes than we do in Australia.



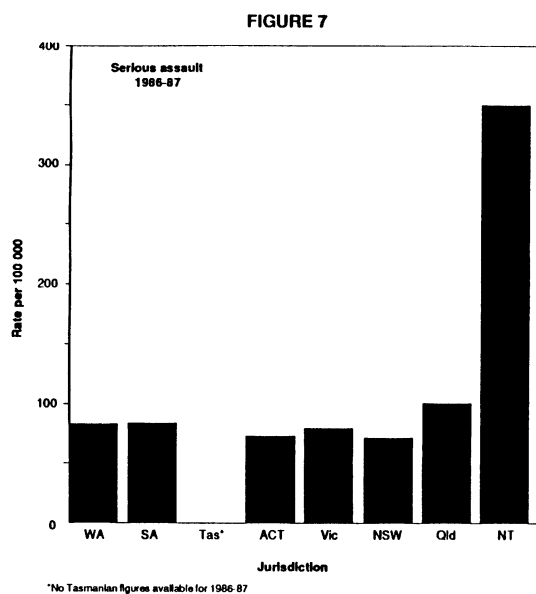
The largely unresolved question in this area of violent crime concerns the impact that changes in victim reporting behaviour and allied factors may have had upon the official statistics. Since the early 1970s for example substantial attention has been devoted by the women's movement to sexual assault (see, for example, Scutt 1980). Each Australian jurisdiction has

now effected some form of reform in both the legal definition of such assaults and the way in which victim are dealt with by the criminal justice system (Scutt 1986). One outcome of these reforms may well have been an increasing willingness on the part of sexual assault victim to report their victimisation experience to law enforcement authorities. There may also have been an increased willingness on the part of these authorities to accept such reports as "founded offences" rather than dismissing them as was on occasions the past practice, as unwarranted fabrications (Chappell 1977).

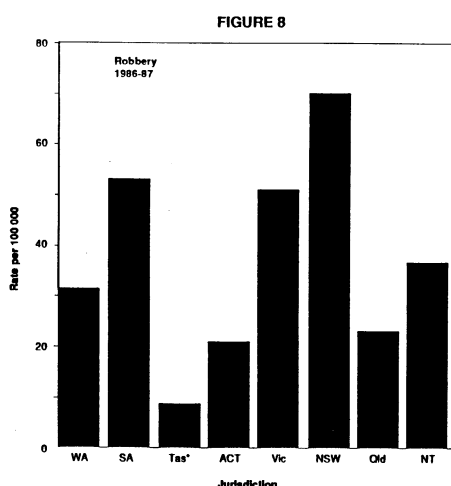
Both of these developments, if they have occurred, may well account for much of the rise in the reported incidence of sexual assault in the community without necessarily reflecting any real increase in the overall incidence of this form of crime.



A similar situation may possibly have occurred in the area of violence within the context of the family. As will be seen in more detail below much of the attention originally focused on sexual assault by the women's movement has subsequently been transferred to violence occurring in the home (Hatty 1985). In the main this violence has been perpetrated by men upon women, or upon children (Snashall 1987).³⁵ As part of an extensive program to make members of the community more aware of this most pervasive and troubling form of violence much has been done in the 1980s to mandate reporting of child abuse, and to persuade health professionals and law enforcement officials to deal with family violence as a criminal rather than a largely private matter (Hatty 1985; Snashall 1987).



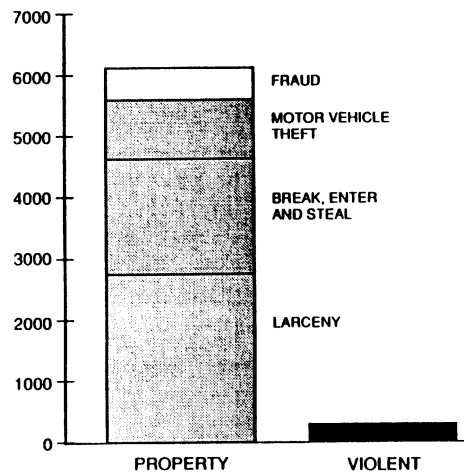
It still remains an open question in Australia whether or not these developments can in large part explain the increase that has been experienced in recent years in the reported numbers of serious assaults. With one important exception no substantial research has been conducted to date on this topic within the country. The exception is a recently released report of the New South Wales Bureau of Crime Statistics and Research on Police Reports of Serious Assault in *New South Wales* (Robb 1988). Based on an examination of police incident reports relating to this category of offence researchers found, among other things, that these assaults had increased by more than 20 per cent per annum on average since the early 1980s (Robb 1988, p. 2-3). Almost two-thirds of all attacks did not involve weapons and there was a decline in the use of weapons from 1982 onwards (Robb 1988, p. 11-12). More than two-thirds of all the incidents occurred between males and the most common age group of both victims and suspects was 20-29 years (Robb 1988, p. 13-15).



This New South Wales research tends to nullify the hypothesis that the increase in serious assault can be explained by changes in reporting by certain categories of assault victim. In particular the proportion of reported domestic assault incidents in New South Wales among all serious assaults did not alter over the period under review in the study (Robb 1988, p. 27-28). The increases in serious assault could also not be explained according to the researchers by factors like a rise in gang disputes or in street muggings. Such offences accounted for very

few of the serious assault reports (8% and less than 4% respectively). The researchers concluded that so far as New South Wales was concerned the increases in reported incidents of serious assault “do not appear to be due simply to increased reporting to police but imply (at least in part) an actual increase in alleged offending. This point requires research, however, in order to be conclusively established” (Robb 1988, p. 36).

FIGURE 9
PROPERTY CRIMES OUTNUMBER
VIOLENT CRIMES 40 TO 1



Nationwide research is obviously needed in this area to establish whether or not the findings from New South Wales are merely applicable to that jurisdiction or have a wider relevance to the country at large. Regardless of such research it is apparent from the available information that serious assault presents a major social problem in Australia. This problem is one that presents major consequences for the health care system alone that must cope with the physical and emotional trauma resulting from violent crimes. But in order to assess just how serious this problem is we also require the conduct of regular crime victimisation surveys in Australia. Such surveys now form an accepted and much valued data source about crime in most developed nations including the United States, United Kingdom and many European countries. These surveys allow an informed assessment to be made of the impact of changes in victim reporting behaviour upon official crime statistics, and of the nature and extent of the so called 'dark figure' of crime - the crime which is committed in the community but not reported to the authorities (Gottfredson 1986). They also allow policy makers to assess the effectiveness of different types of criminal justice programs, including those designed to assist crime victims. Australian policy makers at present lack access to any systematic or comprehensive crime victimisation data - a fact which makes them almost completely dependent upon frequently questionable official crime statistics as a basis for decision-making (see, for example, Mukherjee 1986).

THE COSTS OF VIOLENCE

Overall, this analysis of official sources of information concerning the nature and incidence of violence in contemporary Australian society does not portray as dark a picture as the media headlines would have us believe. In comparative terms Australia remains a relatively safe country and certainly one that does not deserve the type of international reputation for violence implied in the warning given to Japanese tourists by the headline cited at the beginning of this paper. Clearly tourist authorities will have to devise measures to dispel such impressionistic and misleading publicity, which has obvious and immediate negative consequences for an industry whose overall good health is vital to the Australian economy.

It is not only tourists but local residents as well who are affected by this form of misleading information about the state of violence in our society. Based on inaccurate assumptions about the risks of becoming victims of a violent crime many citizens undoubtedly modify their normal patterns of behaviour, including being much less willing to venture forth into various parts of the nation's cities, particularly during the hours of darkness, and also restricting their use of facilities like public transport because of the fear of being attacked (Braithwaite, et al 1982).

The fear of becoming a victim of violent crime is quite widespread among the general population. For instance, an opinion poll conducted nationally in July 1987 found that as many as one-third of the respondents thought it was somewhat likely that they might become a victim of violent crime, while about 10 per cent thought it was very likely (Australian Public Opinion Polls 1987). These risk assessments are vastly out of accord with the actual risks involved of becoming the victim of a violent crime that remain very low. Crimes of violence are not only still relatively rare events but they also represent a very small proportion of the total of all serious offences committed within the community. Overwhelmingly, as Figure 9 shows the majority of crime committed in the community is directed against property rather than against the person. Violent crime in Australia over recent years has remained quite stable at about 5 per cent of the total of all offences.

Although these statements are intended to reassure a frightened public about the actual incidence of violent crime it should not be thought that it is in any way intended to denigrate or diminish the gravity of the problem presented by violence. The death and injury that results from violence in Australian society cause immeasurable suffering and loss to thousands of citizens. Some measure of the dimension of these losses can be obtained from recent research in the United States, which shows that:

“Because the lives lost to violence are so often those of young people homicide and suicide rank fourth and fifth respectively among all health problems for years of potential life lost. The abuse of women may be the most frequent cause of physical injury for which women seek medical attention - more common than automobile injuries, rape, and mugging combined. In 1980 alone, suicide, homicide, and aggravated assault taken together accounted for more Than 50,000 deaths 1.3 million years of potential life lost, 1.8 million hospital days and \$754 million in health care.” (Roesenberg et al, no date)

Equivalent figures are not available for Australia but even with our acknowledged lower levels of violence the social and health costs to our community produced by this behaviour are both high and completely unacceptable.

RESPONDING TO A COMPLEX PROBLEM

How then should we respond to this situation that is of such concern to the average Australian citizen? It has already been suggested that there is a temptation for governments to seek relatively simple and immediate solutions - most commonly in the form of a criminal justice oriented response. It has also been suggested that such a response is most unlikely to have any long-term impacts and may well run the risk of exacerbating the situation.

For example, contemporary proposals to increase the level of penalties provided for various categories of violent crime, coupled with a tightening of paroles and remission provisions. If fully implemented, will almost certainly result with great rapidity in more serious overcrowding in already over stretched correctional facilities (see, for example, *Reporter* 1987, p. 3-4). We know that such overcrowding is one of the principal factors precipitating violence within prisons - violence which has already been evident in a number of Australian

jurisdictions and which promises to become a much more severe problem in the future as new law and order policies begin to bite. In this regard it is significant to note that the United States, which has led the western world in its move towards using capital punishment and long prison sentences as a primary weapon against violent crime, continues to experience extremely high levels of violence within its society.

There is now a very substantial body of multi-disciplinary research examining the causes of violence. While much disagreement continues in this area among researchers about issues of causation, and prevention, there is virtually no disagreement about the complexity of the situation. Most researchers would offer no quick solutions to dealing with violence and most would also suggest that successful solutions will require sustained interventions of a quite widely varying type (Rosenberg et al, no date).

Current discussing about the causes of violence amongst researchers tends to be arranged into three broad categories - biological, psychological, and sociological. In regard to the biological category it is known that violence is more frequently associated with males and with those in younger age categories (Mednick et al 1982, p.21-80). It is also suggested that some forms of violence may be a product of certain brain defects, as in the case of temporal lobe epilepsy (Mednick et al 1982, p. 21-80). However, factors like these do not seem in themselves to account for an explanation of more than a very small component of the total violence committed in the community

Psychological explanations of the causes of violence are largely associated with learning and developmental theories (Meargee, no date, p. 81-170). Learning theory suggests that violence is acquired from role models like parents or peers, and is reinforced by a punishment and reward system provided by others.

The greatest range of causation theories about violence is to be found in the sociological literature that tends to offer three main explanations of such behaviour - cultural, structural and inter-actionist. Probably dominant among these is the cultural explanation, which suggests that certain sub-groups within a society have far higher rates of assault and homicide because they accept violence as a cultural norm (Wolfgang & Ferracute 1967). Examples of such sub-groups may be found in certain youth gangs as well as among organised criminal fraternities (Rutter & Giller 1984; Ianni 1972).

Structural theory tends to view violence as a response to larger social forces which produce lack of equal opportunity, racism and wide-scale disparities in wealth (see, for example, Curtis 1975). Inter-actionist theory, on the other hand, tends to concentrate on the events which occur between perpetrators and victims of violence and how those inter-actions may escalate into a serious assault or even homicide (Straus et al 1980).

It should be apparent, even from this extremely limited description of the possible explanations of violence advanced by researchers, that the identification and implementation of appropriate prevention strategies represents a formidable task. It is a task that cannot be performed in an atmosphere of crisis, and with an expectation of immediate results. Rather, it is a task which requires an opportunity for widespread consultation and dialogue with the members of the many disciplinary groups who have an expertise and interest in violence related issues.

There is some encouraging evidence that governments in Australia are beginning to recognise these facts. Following the Queen Street tragedy in Melbourne, the all party Social Development Committee of the Victorian Parliament receive a broad reference to inquire into strategies for dealing with the issue of community violence. The Committee has recently tabled its initial report, which contains a recommendation to establish a Community Council Against Violence (Social Development Committee 1988). This proposed Council, backed by

a research staff, would have as its broad long-term objectives the prevention and reduction of violence. The shorter term specific goals recommended for the Council include reducing the extent of inappropriate portrayals of actual or fictionalised violence; (changing) community attitudes and values; and (improving) the control of offensive weapons (Social Development Committee 1988, p. 4).

At the national level the Prime Minister announced In December 1987 that it was proposed to establish a National Committee on Violence to assist in the understanding and combating of violence in Australian society. The announcement followed a special meeting of heads of government convened by the Prime Minister to discuss gun control and related matters. It is anticipated that the National Committee on Violence will begin its work shortly under far reaching terms of reference. The Australian Institute of Criminology also expects to be involved to a significant degree in the work of the Committee. The Institute is already conducting an active research and related program in the field of violence and has published a range of materials on the topic.

While neither the proposed Victorian Council Against Violence, or National Committee on Violence, can be expected to offer a series of magic potions which will give instant cures for the problems of violence in our society, they promise to provide a much more balanced and realistic set of action proposals than those which have emerged in this area so far. Much of the advice, which is likely to flow from these bodies, will relate to the need to change deep seated attitudes and values in our society, which tolerate the use of violence in so many aspects of our daily lives. It is change that will take a long time to achieve.

VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM

Does this all mean that the criminal justice system has no role to play in dealing with the problem of violence in our society? The answer to this question is certainly no, but it is suggested that this role should be rather different from that proposed by most of those involved in the contemporary debate about law and order. The most promising long-term solutions to reducing violence in our society lie well beyond the responsibilities of this system. They are solutions that, as suggested above, almost certainly demand a massive program of re-education of the public about attitudes and values associated with the use of violence.

We are already beginning to witness attempts to effect such change in regard to the use of violence in the context of the family. Recent survey research has shown that as many as one-third of Australian males believe that the use of violence towards a spouse or child may be justified in certain circumstances (Office of Status of Women 1988). Such attitudes undoubtedly help to explain the high levels of violence that occur in Australian homes, most of which goes unreported or unnoticed. Changing this situation requires a concerted, sustained and imaginative education program (see, for example, the work of the Commonwealth / State Coordinating Task Force on Domestic Violence which was established in 1987).

Much attention is also being given to the impact of the media, and in particular television, upon the formation of attitudes and values that tend to justify the use of violence in the resolution of problems. While the causative relationship between exposure to different types of media portrayed violence and actual violent behaviour remains elusive to scientific proof, many informed observers believe that there is sufficient peripheral evidence of such a relationship to justify certain preventive interventions (*Report of the Joint Select Committee on Video Material* 1988). These interventions have included, in the case of television, the formulation of guidelines designed to prevent the screening of certain violent scenes and programs during times when children are most likely to be watching (Federation of Australian Commercial Television Stations 1988). There have also been very recent proposals advanced

by the nation's Attorney-General to re-classify videos and films in ways which would exclude from public or private screening any productions displaying excessive violence. However, these proposals have also extended to the banning of pornographic materials that contain no violence. To civil libertarians such proposals raise the danger of censorship again becoming a commonplace practice in Australia with consequent infringements on freedom of speech and expression (*Report of the Joint Select Committee on Video Material* 1988).

With certain caveats, like the one just mentioned, the developments which have been referred to offer the possibility of future reductions in the levels of violence committed in Australia. But they are developments that will still need the support and assistance of the criminal justice system if they are to succeed. To conclude this discussion, it is therefore proposed to examine what form this assistance and support might take within each of the major agencies involved.

Policing

Apart from the exercise of their traditional law enforcement responsibilities of apprehending and gathering evidence for the prosecution of those involved in acts of criminal violence, Australian police forces are giving increasing recognition to their role of preventing violence within the community. Under the guise of descriptive labels like 'community-based policing' or, more appropriately, 'problem orientated policing' many police are now engaged in joint work with the community to identify their principal concerns about crime, and to devise methods of addressing these concerns in ways which prevent or lower the risks of criminal victimisation (Eck & Spelman 1987). The impact of this new approach can be seen in a number of areas including the response made to domestic violence, youth crime and in ways of ensuring the well being of those held in police custody (Grabosky et al 1988).

In regard to domestic violence police are now being encouraged to deal with it as a 'real crime' rather than as simply a matter to be resolved between the parties involved. Research evidence suggests that arresting the perpetrator of such violence diminishes the risk of a repeat of the behaviour (Sherman et al, no date, p. 145-174). This evidence also shows that a failure to intervene at an early stage in a violent situation in a family may result in subsequent escalation of the violence into a potentially fatal assault (Sherman et al, no date, p.145-174).

When dealing with youth crime new preventive strategies adopted by police stress the need for much greater use of cautioning powers, and for the development of a better understanding of the rights, responsibilities and needs of young people. School-based policing programs, like that now widely implemented in the Northern Territory, appear to be one useful and promising example of the use of such strategies (Harvey 1987). So too do certain approaches adopted by police in suburban areas of Sydney designed to defuse violence which has occurred as a matter of tradition at New Year celebrations. In past years police utilised their tactical units to break up riotous situations with substantial force, and with injuries often being caused to the rioters as well as those seeking to control the riot. Confronted by this situation it was decided that rather than relying upon a very visible presence of police there would instead be a use of street theatre to defuse the tensions involved, and to produce a peaceful rather than violent New Year celebration. This street theatre involved the symbolic burning of scrap motor vehicles - a device which seems to have had the desired effect of preventing the recurrences of rioting (Chappell 1984).

The Adjudication Process

For those involved in the process of adjudicating the guilt or innocence of persons charged with offences of violence the principal objective remains that of ensuring that accused persons are dealt with in a just and fair manner. Part of this process may well involve determining whether or not that person is suffering from some mental disability which may preclude them being fit to stand trial or may lead to their acquittal on the ground of insanity. There are ways in which the screening mechanisms required to make decisions of this type might be handled

in a more effective manner (Roesch & Golding 1980; Roesch, Webster & Eaves 1984). The quality of the information made available by both defence and prosecution to the judicial officer responsible for sentencing a convicted offender responsible for a violent offence is also a matter of importance and concern. One of the more contentious questions that needs to be resolved is the extent to which information should be made available about the impact of the violent crime upon the victim as part of the sentencing decision (Victorian Sentencing Committee 1988, vol.2, p. 540-546). The view expressed on this subject in the recent report of the Victorian Sentencing Committee was that victim impact statements, as they are termed, should not be part of the sentencing data considered by a judicial officer (Victorian Sentencing Committee 1988, vol.2, p. 540-546). Other commentators have suggested that without such a statement judicial officers may on occasions neglect or misconstrue the effects of a serious crime upon a victim and, as a result, not adequately sentence an offender for that offence. Part of that sentencing process must, of course, also involve a consideration of the types of facility that may be available to provide treatment for any convicted violent offender. This issue leads to a consideration of the correctional aspects of the criminal justice system response to violence.

Corrections

There seems to be a substantial deficiency in the current range of treatment programs - and information about such programs - which are available to those convicted of violent offences within Australia. It would appear that in most cases once a person has been convicted of a violent crime and sentenced to imprisonment the likelihood of them receiving any form of treatment is quite slim. The correctional services around the nation simply lack the resources to provide such programs, or they are not minded to develop them because of other competing priorities. This is an area where research is required. There is also a need for the further development of community-based correctional programs to deal with those offenders convicted of violent offences who may still be kept safely outside prison walls, either with the assistance of drug therapy or through the application of probation and parole supervision.

CONCLUSION

This paper began with an acknowledgment of the very high level of public concern being expressed in Australia about the state of violent crime. While acknowledging that much of this concern is justified, and that we are confronted by a troubling and deep-seated problem of violence within our society, this paper has also sought to provide a more balanced appraisal of the nature and scope of the problem as well as pointing to some of the more promising strategies which might be applied to deal with it.

It has been suggested that certain strategies, and particularly those associated with contemporary law and order political platforms, have little to offer in the way of long-term solutions to the problem of violence. Rather, a number of much more difficult, time consuming and often costly interventions will be needed to begin to make a major impact on the levels of violence being experienced by Australians. There does seem to be substantial evidence that much of the violence that surrounds us is behaviour that is learned from a variety of sources including our parents, our peers and the media. Changing these learning experiences is a formidable task but not one that is beyond us. The task is obviously not one that is for the criminal justice system alone. It is a task to which all members of society must make contributions if we are to have a safer and more peaceful environment in which to live.

End Notes

- (1) More recent polls confirm these general trends found in 1986 although the level of fear expressed in different parts of the country are likely to have been influenced by local crime events. Persons, in Canberra as the headline cited above suggests there has been very extensive publicity associated with the commission of several

particularly brutal crimes which has almost certainly had an impact upon public perceptions about the state of violence at large in the Nation's Capital.

- (2) Anita Cobby was murdered in New South Wales on 3 February 1986. Five men were charged with her abduction, robbery, sexual assault and murder. They were found guilty on all counts In June 1987 (*Sydney Morning Herald*, 11 June 1987).
- (3) A bomb attack, which resulted in the death of a policewoman and injures to a number of other persons, was made on the Victoria Police Headquarters in Melbourne on 27 March 1986.
- (4) The shooting occurred on 9 August 1987. Julian Knight, a 20 year-old former officer trainee at the Royal Military College Duntroon was arrested at the scene of the shootings and is currently awaiting trial on charges relating to the incident (*The Australian*, 11 August 1987).
- (5) The shootings took place on Tuesday 8 December 1987.
- (6) The gunman was Frank Vitkovlc, a 22 year-old former law student (*The Bulletin*, 22-29 Dec. 1987).
- (7) The impact of the gun lobby seems to have been felt in the New South Wales State Election on 19 March 1988, especially in rural seats (*Sydney Morning Herald*, 4 April 1988). More recently, the Victorian Government which is also facing an election shortly appears to have stepped back from its very tough stance on gun control which followed immediately after the two mass shootings in Melbourne in 1987 (*The Age*, 14 April 1988).
- (8) The story contained in the Sydney Morning Herald regarding the potential danger to Japanese tourists visiting Australia resulting from the state of crime was based upon a story which had originated in Japan's biggest selling newspaper with a daily circulation of nine million readers. The story suggested that one of the most important rationales for the booming \$400 million a year trade in Japanese tourists in Australia - its reputation for safety - was 'a myth'.
- (9) For a general comment on some of the pressures being felt by overcrowding in Australian prisons, see 'More Prisons?', a summary of a seminar held at the Australian Institute of Criminology, 29-30 September 1987 in *Reporter*, vol. 8, no. 4, Dec. 1987, pp. 3-4.
- (10) An excellent reference source to violence literature up until the early 1980's is the set of five topical bibliographies produced by M.E. Wolfgang, Neil Allan Weiner and W. Donald Pointer for the US Department of Justice's National Institute of Justice. These bibliographies cover the areas of domestic violence: biological correlates and determinants of criminal violence; and criminal violence and race.
- (11) These terms of reference required the Committee to examine:
...Strategies which can be employed by the community to reduce the level of violent behaviour.
...The portrayal of violent behaviour in the mass media and entertainment industries.
...(and) The composition, function and objectives for the proposed community council against violence (Terms of Reference, 11 January 1988, Governor in Council, Victoria).

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HORROR REVISITED - Towards effective victim assistance by police in major crime - a case study

Gerry M. McGrath

INTRODUCTION

A couple of weeks ago I was speaking with the mother of one of the boys abducted and murdered by a group or groups of Adelaide homosexual assailants who terrorised this city over the years 1979-1983. In referring to a sergeant in the South Australia Police's Major Crime Squad, who are primarily responsible for the investigation she said:

"I cannot begin to imagine what life would have been like without this sergeant. The man is a saint, a compassionate man. We could not have survived; we couldn't go on without his help."

This very intelligent, very sensitive and affectionate mother had lost her son to a predatorial criminal, Bevan Spencer von Einem. Such are quintessential criminal predators. They, or people of similar bent, would cruise the streets of our city looking for youngsters wandering alone, or in shopping centres - they'd feign a car breakdown, request assistance or some such and physically or otherwise, overpower their victim, transporting them to a secure house(s) for a protracted ritual of horror which defies description. Just as they plunged their victims into this situation so also did they plunge the families of the victims.

Mothers, fathers, sisters, brothers, waiting for their children to come from the bus, home from a party or a walk along the street, were suddenly wrenched from their normal predictable existence into a world as foreign as it is macabre.

My address tonight is about that world, about its immediate and enduring impact and about the present and potential role of police as guides in a terrain which none of these victims had imagined, let alone experienced. (Some details of the cases are changed to protect the privacy of respondents.)

That police should be in the business of assisting victims of crime is perhaps a self-evident truth. Traditionally, policing has held and been seen to hold the view that the best way for police to assist victims of crime is by preventing crime itself and locking up those who would commit crime. Of course, there's a lot of merit in this argument.

Locking up criminals and otherwise preventing their criminal activities will remain a primary task of policing. In the sort of serial murders I'll be discussing initiatives like Criminal Profiling, D.N.A. and the Violent Criminal Apprehension Programme or VICAP, which are initiatives designed to do exactly this.

It is timely in this age of Fitzgerald to remind ourselves that the role of police in protecting the community from violent criminals must not be devalued. The fact that such activity does not constitute in any way a statistically major part of police work does not lessen its fundamental importance. It would be a mistake, indeed a serious mistake, if in our legitimate enthusiasm for economic rationalism or for enhanced police accountability we in any way lessened the capacity of police in this regard.

The ability of police to deter, to detect and to incapacitate violent criminals will remain a primary indicator of police effectiveness. It is the first and most important way police can assist victims of crime.

My address tonight however is not about this traditional aspect of policing. My address is mainly about a second and less well recognised police responsibility to provide support to victims of crime.

I will allude in closing to a third, but the bulk of my address will be devoted to the role of police as guides to victims in that inhospitable and foreign terrain we call the criminal justice process.

If the notion of police service has any legitimacy over the police as force mentality all police officers have a responsibility to assist victims of crime. It is important that the assistance be based on as firm a foundation of knowledge as is possible.

A METHODOLOGICAL NOTE

That knowledge must entail as a first necessary step, a systematic understanding of the particulars of the impact of crime on victims. The data I present tonight arises from ten hours of semi-structured conversation with seven close relatives of what are thought to be serial homicide victims. I was particularly interested in the details of their interactions with police from the moment of disappearance of their children to the present. To a large extent it is their story, in their words - that's exactly how it should be.

THE IMMEDIATE IMPACT

When their children failed to appear home at the expected time the realisation that something dreadful was happening came in different ways. The most clearly frustrating fact was the difficulty in getting the message across to the police of first response that something was wrong:

"It was late afternoon about 5 or 6 on the Sunday. When Adrian didn't come home, I rang his mate and said, 'Where is he?' He said, 'Well he's on his way home' (he was hitch-hiking). It was four hours after he should've been home. I reported him missing about 10 that Sunday night. My kids have plenty of freedom but I always know where they are and when they were coming in. I mean he didn't break the rules. I rang the police three times. I felt I was being ignored. 'He was off with his mates', they'd say.

We didn't think the police were doing anything- they wouldn't come out for a report. Thursday was his birthday - I kept getting up to check his room. On Friday the police came around to get a report. At 9 o'clock the Sunday evening, a week after he disappeared the Major Crime Squad came knocking at the door, I said 'It's Adrian isn't it' they said 'I'm afraid it is.' They took my husband into ID the body - they were very good, they tried to be very good."

Bearing in mind this was ten years ago and the lad involved was a strapping 17-year-old, it is perhaps easy to understand the lack of immediate police attention. No one has yet come up with a foolproof method of discriminating between the genuine abduction/foul play cases and the simple 'runaway'.

The classic police-as-force mentality would defend such initial inactivity in terms something like this - 'it's not yet a crime - it's not yet police business'.

Yet a more police-as-service orientated mentality might go something like this - 'It's not yet a crime and probably won't become one but this mother, father, sister etc are beside themselves - it's up to us to do something and be seen to be doing something!' In early case discussion the parents were adamant that the behaviour was so out of character as to be disturbing. It's not just a question of operationalising a mother or father's intuition but one of more systematically assessing each case in line, with clearly identifiable criteria which gives credence to subjective assessment including that of parents and of experienced police. Some three years after the first incident the parents of the second victim an outward going 18 year old who jumped out of his mate's car in downtown Adelaide, got more sympathetic attention.

"It was two days after he'd gone that my husband went to headquarters. We'd reported him at 4 o'clock the day before. At headquarter an older detective heard my husband telling the story - he said, 'Hang on a minute there's something wrong with this one.' Straightaway he could tell there was something that wasn't right ... They were very good at Major Crime. Fantastic couldn't speak better of them. Any of them. You really need them because when you get right down to it, they are the ones, the only ones, that really can understand. You know people say, 'we understand how you feel' -that used to get my hair standing on end - I thought 'No you damn well don't know how I feel.' The Major Crime people are the only ones who are anywhere near understanding - they were very nice people."

The immediate impact is one of exponentially progressing fear - from concern through panic to horror at the wanton and premature death. But it's no ordinary journey of sudden bereavement (if there is such a thing). The journey these people begin is, above all else, a public journey.

THEY BECOME PUBLIC PROPERTY

As the realisation dawned on the families and on the media that the missing youths were potential victims of serial killers, the relatives were plucked from the peaceful security of their private lives and thrown into a limelight that was both bewildering and macabre. In addition to the terrible burden of inexplicable and unexpected bereavement they suddenly discover they become public property:

As one mother phrased it:

"The camera crews kept coming in and out. The newspaper people were around the front door. We really didn't know what to do. They asked for photographs of our son. We gave them the photo - it's still appearing almost weekly. They took my photo - I was distressed. I still see it cropping up in obscure magazines - me in my home. I became public property.

"People just must know what their rights are with the media. We didn't know. We weren't thinking clearly. We just wanted our boy home."

In the six-month period January to June 89 some eleven articles were published in Adelaide on the killings known or proffered as the 'Family Killings'. Since June as you well know the reporting of the case has increased dramatically. Many of the articles are accompanied by photographs of the victims and occasionally the dreadful details of their demise. I am not sure what motivates the reporters and the editors of the newspapers concerned - perhaps it is the genuine concern to bring all the perpetrators to justice, perhaps it is an honest commitment to the ethics of the journalistic profession's obligation to public interest or perhaps it is in the words of Keith Conlon in the *Sunday Mail* of August 27:

"Three journalists who have spent a long time looking at the issues, talking to the police and others, join us to tackle the story that certainly sells." (Sunday Mail, August 27, 1989).

The story, which certainly sells, has a wide effect. A sister of one of the victims said

"I went to a new school - as soon as they heard my name, they'd ask are you his sister?"

A mother said,

"Going to the supermarket was an ordeal. People would know you."

Another example,

"I used to go to work and see the papers open on the desk - see the photograph of my son. - Still happens, even today."

But of course, it's not just any publicity.

STIGMATIZED

One mother, who in responding to a question about her son's lifestyle admitted he'd once smoked a joint told me:

"We were babes in the woods. I was very honest with the media. I was asked if my son was involved with drugs. The police had already told them no, but I told them he once told me he'd smoked a Marijuana cigarette at a party. After the news one night they did this thing on the murders and they put up my son's photo and said, 'Known Drug User'."

The relentless publicity led directly to a phenomenon that can only be described as bizarre. All of the victims whose relatives I interviewed were totally innocent murder victims, taken off the streets as they went about their perfectly lawful and normal business - one hitchhiking home after a party, another walking along a city street after a minor disagreement with his mate and a third, a schoolboy, seeing a friend off on the bus in the late afternoon, some two blocks from his home. Their families are perfectly normal law abiding people, though from different backgrounds united by their parental commitment to their children. They became however, to use the words of one, 'naive innocents cast all of a sudden into a maelstrom'.

The media is a direct contributor to this further unkindest cut of all - that of stigmatisation.

Int: What was the reaction of your friends? [at the publicity of the inquest].

R1: They used to cross to the other side of the street - some of them didn't know what to say to me - there was a lot of publicity. I think they thought [the tragedy] was catching.

One youngster said:

"I felt so alienated, it was like there was a wall between them and me - I was no longer part of the group. I was different."

The motivation for the media exposure is probably a mixture of all the ingredients I've mentioned - I'm not sure. What I am sure of however is that it just tears the families of the

victims to pieces. Consider *The Advertiser's* lead article of Monday 28th in which the protestations of innocence by the convicted murderer Bevan Spencer von Einem are spelt out. The court has found that this young lad was taken off the street and murdered. On a monthly basis the grieving parents of this youngster and the grieving parents and relatives of the other victims are assaulted with lurid questions about their lads. What possible right can a convicted murderer like Bevan Spencer von Einem have to a public platform to slander the character of the child he so callously killed? The harm to victims' relatives is manifest. Bevan Spencer von Einem, Lawrence, Miller, Murphy, Travers, Birnie are individuals quite beyond the pale. Their life sentences should entail their social isolation - they should be denied a public forum, for their access to same exacerbates and perpetuates the dreadful wrongs they have perpetrated. Their presence on the media reinforces the mark of Cain, which they've imposed upon these families.

If the media is the principal catalyst to their stigmatisation the quest for criminal injuries compensation, at least in its old form, legitimised it, with innocent people forced to publicly prostrate themselves in an adversarial setting to demonstrate what must be patently self evident harm.

R3: It's a very touchy thing this compensation thing. You feel as if you're making money out of your own son's death. We backed off; we didn't want it. The Sergeant in the Major Crime Squad said, 'go for it'. I suppose if it was somebody else's son I'd understand.

One close-knit family was awarded in total some \$11,000 for compensation for eight persons. Notwithstanding the Crown's concession the lad had been murdered, his background was summarised and reported thus by the presiding judicial officer:

"It is possible that death was an accident during the course of conduct, to which the deceased was a consenting party."

Included in the \$11,000 was \$500 for the lad's stepfather in recognition of the trauma occasioned at the identification of the body. The court had previously been told that the body had been attacked by rodents.

It must be clearly pointed out that I'm speaking of an event that took place some seven years ago. The process and the understanding of Criminal Injuries Compensation has undergone a fundamental change. A principal catalyst to this change is the S A Attorney-General, Chris Sumner. Sumner and Ray Whitrod of Victims of Crime Service are forces of great moment in this recognition of victims' rights. Nonetheless, the memory of a harrowing public humiliation of a situation almost of blaming the victim has lived a long life.

The dynamics of this process of stigmatisation are a complex social psychological mystery but the reality is that the tragedy each of these families experienced has put them apart. Perhaps the clue to this is in one mother's adjudication:

"People seem to think his murder must have been his fault. He must have done something to bring it on. It's their protection. It's their talisman. They're saying, 'It won't happen to us because we're not doing anything wrong.'"

THE ANNIVERSARY SYNDROME

Whether the stigma wanes over time remains to be seen. Respondents, years after the event, speak today of their 'black weeks' and 'days' - of birthdays, Christmas and other family celebrations. One mother phrased it poignantly:

R: It's when the leaves start to fall. The night he went out it was just beginning winter. He had a bit of a cold - I was worried when he didn't come straight back - he didn't have his jacket. I think of him out there in the cold. When the leaves fall that's when it's worst. People say you're coping well -they don't see me in private anguishing for my lost boy. You know I'm just filling in time now. Just waiting...

INT It is just like a nightmare?

R: No, his death is not a nightmare, not a dream. His death is the reality. My life is the dream. My husband and I are just putting in time.

Once again, I remind you that we're talking about events that began not months but years and in one case a decade ago. Anniversaries of death, Christmas, birthdays are all principal life events distorted by the thought of what might and what should have been.

THE ROLE OF THE POLICE

The question I kept asking myself as these generous and so grievously wronged people took me through their personal hell was how do they endure? The anchor point each of the respondents alluded to was the S.A. Police Major Crime Squad.

This senior detective in charge of the case assumed the status of guide and confidant.

"When they found his body, I thought about going to the ID - just to see him, to touch him, just to touch his hand. The night he went out we didn't say goodbye or anything like that. He was only going out for a little while. His tea, I think his tea was ready. I said, 'Don't be late your tea will get cold'. Anyway, when he was found up in the hills I wanted to go. The sergeant said there's no need - the body's deteriorated a bit. He wouldn't advise it."

Another incident was recalled,

"They wanted the autopsy. We didn't know whether we should cooperate, but the sergeant said we need these tests to find out what happened to your boy."

Another said

"The best police I came across was this sergeant ... I mean he could have washed his hands of the whole thing [a debate about exhumation] and said can't do anything but he seems to feel for the victims, he feels for the families."

Another said

"I won't talk to the papers at all now, unless I talk to the sergeant first."

Another pointed to the need for continuity of support:

"He was very good to me. They were very gentle. The only thing I found hard with the police force is that you're lost; you're in a lost world, all of a sudden [from] a normal family you're turned upside down. There is no sense of reality anymore. You tend to link with these people and rely on them and talk to them and they'll say I'm no longer on your case. You get somebody new-you don't know this person. You got nobody to talk with and you feel as though you're drowning again. The fear and terror of that is dreadful. It's a dreadful feeling of terror because you're alone again. You've

started to rely on these people; you've started to link with them. Theirs is the face of reality...

"We've got someone now we can link with and -that's the Sergeant, since he took over, we've formed a base. I've got a lot of faith in that man. When the Sunday Mail published all that rubbish on Mother's Day, insinuating my son was a homosexual he said 'I've investigated your son for the last ten years. There's not one word of truth in that article.'"

The respondents were unanimous in the view that they didn't want 'do gooders' around them recommending 'relaxation tapes' and the like. What they wanted was someone close to the central activity of the pursuit and prosecution of their sons' murderers - people who've been there before.

The importance of the front-line officer cannot be stressed enough. What these people need and will continue to need is not as one eloquent respondent put it 'people who got it all out of a text book' or people with the wrong motivation 'trying voyeuristically to get off on our lives' but people or a person who is in the position and has the commitment to actually do something.

One respondent summed it:

"They are a very important part [of my life]. Contact with them is the most, well to me anyway, the most important thing because they're right in the middle of it and they and understand."

CONCLUSION

The world of the victim that I've tried to give you a glimpse of tonight is above all else two things - it is unwelcome, and it is mysterious. As these people embark on their journey through it, they need guides who live in that world. They need guides who are committed, who are compassionate. Above all else, they need people who are involved in what is and remains their most principal life event. They want people with a stake in the enterprise. Investigators are just such people. The people I spoke to needed this involved assistance at many stages. It is sorely needed to prepare people for the rigours of the investigative process, including ID, autopsy, for the distorted reaction of friends, for the complexities of criminal justice compensation, for the techniques of defence counsel in ritualistically blaming the victim and particularly for the excesses of the media. The required commitment, assistance and compassion must come in substantial part from training arenas which give to police an understanding of what it is to be a victim and techniques for assisting those thrown into their charge.

Crime investigation entails involvement with victims. If we accept this premise and if we accept the service interpretation of modern policing, it follows that police should be systematically prepared for this involvement. It follows that training for victim assistance must be included as a routine part of all investigative courses whether generalist or specialist so that investigators can assist victims and themselves.

That training does not entail formal courses in the psychology of trauma or bereavement - certainly the curriculum should be informed by those inquiries. What it does entail is a systematic capitalising on the wealth of tangible benefit already evident as in the case I've outlined tonight. In the case of homicide investigators each state has its Kipling, its Kennedy, its Ryan, its Cole. The challenge is to mobilise the experience of these exemplary officers.

The police occupation enjoys or perhaps more accurately endures, a distinctive perspective on the tragic plight of the victims of the sort of crimes I've addressed tonight. These are high profile crimes with their own distinctive dynamics but they represent the dynamics of all victims of violent crime - the consequences to the victims may be less, the publicity may be more fleeting, the stigmatisation less acute, the blaming the victim more measured, and the recurring anniversary recall perhaps less hurtful - none the less there is a singular lesson from these accounts of people so sorely wronged and to whose plight police have the sort of distinctive access I've illustrated tonight. That distinctive access entails an obligation on the part of the police occupation to assist victims.

This then is the second traditional role of policing - it remains to scientifically harness training resources to further this police service function. It ranks as nearly as important as the force role of police in deterring and incapacitating violent criminals.

There is emerging a third course of action, which I've not illustrated directly tonight. It is premised, however, on the sort of considerations I've already addressed. What is difficult for the laity to understand is the deep frustration which investigators feel when their investigations are voided by the exploitation of technicalities in the criminal justice system. Most police officers would agree with Tony Fitzgerald (p.200) that police are entered as 'combatants in unequal adversarial proceedings', 'good points of law' often make 'compelling bad points of justice'. The Australian Commissioners of Police are mounting an offensive to redress this inequality. That offensive under the rubric of reality vs. legality is founded in a frustration at a system that does not seem to understand the impact of violence on individuals and their families. The strategy we're adopting is to combine the perspective of the experienced investigator with the scholarly input of lawyers, jurists and researchers, to ensure that police commentary and contribution to criminal law reform cannot be dismissed as sheer self-interest. The commitment has always been there - it has been there since the first constable came across the violated person of the first victim. What remains is to channel that commitment, to mould it into a voice that will be heeded. If this emergent voice seems to impact on such treasured notions as the separation of powers then so be it but it is an action that flows from the routine access of investigating police to the world of the victim.

As one final example of the world that is open to police on this matter could I read a school essay from the sister of one of the victims. It's the sort of essay grade nine teachers the world over give to their classes and normally attracts accounts of family holidays, a surprise gift, a family windfall or such - this young lady when asked to 'In two pages tell us about your most memorable experience' wrote:

"The most memorable experience was a sad experience, that I'll never forget. It happened in 1981 and one night when we were all going to my cousin's 21st party. Everything was going fine; my sister was helping with making the punch, getting a bit under the weather as well as helping. My brother David was going around making sure everyone was happy and paying his respects and I was talking to friends I had made. Margaret my sister went outside, feeling sick; Mum and Dad decided it was time to go home. I went inside to say bye, I turned to David and walked out, after saying goodbye.

The next morning came, then lunch and afternoon and still no David. There was a knock at our front door, Dad rushed at it hoping to see his dark-haired angel but no, his best friend and others were there instead. David, after having an argument with one of his friends, stormed out of the car, nobody knew why, and nobody will.

I remember myself that Sunday thinking where he might have gone and always coming up blank. Tuesday the chaos began, press reporters front page 'David O'Malley, 17 missing'. All that time I was thinking, 'where is he', 'Is he all right?' and

all along he was killed the 23rd of January, the night of the party. Although he's gone, I still remember, our golden-haired boy is gone, he hurts no more. The ones left behind like me are hurting, wishing he will walk through the door and pick me up and hug me. The friendship we had, the love we shared that a brother and sister has, ours was special because David was special, gone because of some thoughtless people. Why did he go, why? I sit here alone still thinking of good times we all shared, I only know how I felt about him, I idolised him. I miss my brother."

"You know I got an A for that essay, it was my first A. He would've been so proud."

The mother of the girl said to me - "You know until she wrote that essay, she couldn't, wouldn't accept that he'd died."

A FINAL WORD

This then is the world of the victim for they are surely victims. Their journey is a long journey and it is a terrible journey and it is a public journey in terrain that is foreign and is menacing.

Police, as inhabitants of the terrain, are cast into the role of guide and confidant. My message tonight is the acceptance of that role, not as an afterthought but as an essential feature of police service - service to the people so grievously wronged and, through them, to the community at large.

Lurking in the caves of even the most progressive forces are some rabid spear carrying troglodytes who might say 'he wants us all to become social workers'. My response to such critics is brief.

Police, well at least good police, have always been social workers - it comes with the territory.

AIDS STRATEGIES & AUSTRALIAN PRISONS

Michael Kirby

RETURN FROM KOREA

A little more than a week ago I was in Seoul in the Republic of Korea. There is little evidence to be seen there of the ancient civilisation of that peninsula. Devastated by war and successively overrun by advancing and retreating troops, the city bears all the hallmarks of modernity. It is a place of crowded populations, super highways - a desert of concrete. Now it is concerned about a new enemy.

The purpose of my visit was to attend a meeting called by the World Health Organisation (WHO). The regional office for Asia and the Western Pacific had summoned the meeting on the legal and ethical issues of AIDS. I am a member of the WHO Global Commission on AIDS. That is a body of twenty-five Commissioners, appointed from the four corners of the world, and with different expertise, to advise the Director General of WHO (Dr H Nakajima) on worldwide strategies to combat the spread of the AIDS epidemic. Among the Commissioners are the two scientists credited with the isolation of the human immuno-deficiency virus (HIV), which is the cause of AIDS: Dr Luc Montagnier of France and Dr Robert Gallo of the United States. Membership of this body has given me a rare and privileged insight into the battle against a global epidemic of frightening potential.

Epidemics are not new. Any visitor to a garrison church or graveyard in the outposts of empire will see reminders of earlier epidemics. The history is chartered from the very earliest days of the Australian colonies. Smallpox, the plague, cholera - the epidemics of the past - have regularly carried off millions throughout the world. Traditionally, they were seen as God's work. Economically, they were described as a natural check on over-population. The history of humanity has been a history of epidemics. It is only in our century that we came to the dazzling belief that we could conquer such challenges to public and individual health. The advent of HIV, and the toll of AIDS throughout the world, have served as reminders of our humanity and the persisting limitations of our scientific skills.

To this time, AIDS has been a relatively small problem in our region. In terms of numbers, Australia and New Zealand show the greatest penetration of the epidemic. To the 30th June 1990, Australia had notified 1861 cases of AIDS to the WHO. New Zealand had notified 160. Japan with 189 cases is second highest in total notifications. However, proportionate to its population, the epidemic is still at an early stage in that country. In Asia the most pressing concern is the rapid rise in reports of sero conversions amongst intravenous drug users in Thailand. Whereas two years ago only 3% of a sample of these persons was found to be HIV positive, a similar test this year revealed more than 40% presenting with evidence of exposure to the virus. Obviously, with huge populations, comparative poverty in many countries, multiple health problems and scarce resources, the concern about the potential of AIDS to wreak devastation in the region is acute.

The participants in the Seoul conference agreed upon a checklist of measures, which should be adopted in considering the introduction of laws to deal with HIV and AIDS. (1) One of the most interesting sessions concerned the subject of AIDS in prisons. It was interesting because of the perspectives of scientists and lawyers from such diverse cultures, tackling a problem common for humanity. They came to the problem from different backgrounds. Yet the need for common strategies was recognised. So was the need for global cooperation.

It is easy, in our busy lives, to be preoccupied with the problems of the moment. For prison administrators, correctional policies in hard economic times present special challenges. The needs for reform of the law, of practices and of the resources devoted to institutional facilities press hard upon those who have the responsibility for Australia's prisons. Among the many issues that confront such officials, HIV and AIDS must presently seem low in the order of priorities. Yet, as I shall seek to show, the potential significance of HIV/AIDS in prisons in Australia is such that our community should be looking most closely at the policies that must be put in place at this time for the protection of the prison population and of the community to which that population eventually returns. So much was recognised by the experts in Seoul. So much should be recognised by people of responsibility in Australia.

THE VIRUS AND MODES OF TRANSMISSION

A useful rule for the development of any law or policy - but imperative in the control of an epidemic such as AIDS - is the necessity to have a clear understanding of the features of the target. Good ethics, effective policies and just laws are more likely to emerge from a clear understanding of the features of the epidemic, its modes of transmission and its characteristics in the community than from preconceptions based upon fear, hysteria, religious conviction or other grounds. If we are truly serious about mobilising whatever fragile and imperfect assistance we can give to impede the spread of HIV and AIDS, it is self-evident that people with relevant responsibilities should be aware - at least in general terms - of the nature of the epidemic and of the virus which causes its spread. To ensure that we keep our sense of proportion, it is also useful to know something about the present size and projected enlargement of the problem. We should be aware of the available therapies and the prospects for a vaccine and cure. Knowledge of the latter reinforces a proper sense of urgency about developing effective policies and laws that protect society, and the individuals who make it up, from the spread of this life-threatening virus.

AIDS is a viral infection that suppresses the body's immune system (Mutton & Gusi 1983). In the worst cases it goes on to destroy that system, leaving the patient vulnerable to opportunistic infections which would otherwise be resisted. The HIV virus invades and kills the body's white blood cells (called T lymphocytes or T-cells). As this occurs, diseases that rarely affect a person with an immune system, which is intact, can prove seriously debilitating (and later fatal) to those infected with HIV. AIDS, caused by HIV, is thus the precondition of a serious and usually, eventually, fatal illness. The end stage illness will typically involve one of a number of infections or malignancies, many of them otherwise quite rare.

The HIV virus has been isolated in most body fluids, including saliva, tears and urine. However, only blood and semen have, so far, been implicated by epidemiological evidence in the transmission of the virus from one human to another. Mosquito bites, sneezing, casual contact, social interaction and shared toilet seats can be ruled out as modes of transmission. Fortunately for humanity, the HIV virus is not easily acquired. It is important to make this point to repel the worst fears, sometimes held by people who should know better. Irrational fears about earlier epidemics have taken their toll in the past. At the turn of the 20th century, it was seriously thought in public health circles that syphilis (a condition then bearing many parallels to contemporary AIDS) was transmitted by the shared use of pencils, pens, towels and bedding. Naval regulations were promulgated during the First World War requiring the removal of doorknobs from United States battleships because of the belief that they caused the spread of syphilis amongst the sailors (Brandt 1988). We now know that the causes were something rather less impersonal than a doorknob.

AIDS represents the third, or end, stage of the progress of infection with HIV. Like syphilis, AIDS has a typically long period of latency, although this varies according to the subject's age, environmental factors, etc. The long first period of HIV infection may last indefinitely. However, typically, in the adult it lasts about 8 years. The second stage (ARC) sees the

development of "AIDS related complex" - with the onset of certain physical signs and symptoms. These usually accompany a significant drop in the T-cell count. It is the third stage that is AIDS - a condition diagnosed by reference to a number of now internationally accepted criteria.

Although progress from one stage to the next, and from AIDS to death, can be interrupted or slowed in some cases by therapeutic drugs, the available therapies are imperfect. They are also expensive. The most effective of them (AZT) costs (depending on dosage) about \$4,000 per person per year. Obviously in poorer countries - such as some of those represented in the meeting in Seoul - drugs such as AZT are simply not available, whether to prisoners or to other citizens. But even in comparatively wealthy countries, such as the United States and Australia, controversies have also arisen concerning the availability of AZT therapy. Some views have been expressed that even people in the first stage of symptom-free HIV infection would benefit from AZT therapy. The cost of providing such therapy would be enormous, particularly in the United States where it is estimated that more than a million persons are infected with the virus. Three thousand new cases are reported each month in that country. In Australia, complaints have also been made about the availability of AZT. However, at least we have a national health system and standard criteria by which therapeutic decisions on this and other drugs can be made with a measure of equity.

The dimension of the problem we are facing with AIDS is clearly presented by the fact that the number of reported cases of AIDS represents only a portion of those persons with the condition. There are still various pressures to ascribe illness and eventual death to the opportunistic infection rather than to AIDS. In this way the dimension of the problem continues to be under-estimated. And cases of AIDS represent only the tip of the iceberg of persons infected with the HIV virus. Various estimates have been given for the numbers in Australia. Those estimates have recently been revised downwards. But it seems likely that at least 30,000 Australians have been infected. Most of them are young, symptom-free, and apparently healthy, at the peak of their economic and social utility. As such, these people provide no risk to other citizens with whom they come in contact. It is not people or groups who present a problem for the spread of HIV. It is particular behaviour.

At first, a significant mode of transmission of HIV in Australia was through contaminated blood products (especially blood transfusions). This source of the epidemic has been stemmed in Australia but not, appallingly enough, in many developing countries of Africa and Latin America. The remaining modes of transmission are well known. They are sexual intercourse, sharing of contaminated intravenous drug equipment and perinatal transmission. The last is now a major source of transmission of the virus in the United States and in parts of Africa. The first two represent the source of the challenge of AIDS in the context of prisons.

PRISONS: AN INCUBATOR?

There are no reliable figures for the prevalence or incidence of HIV infection in Australian prisons (Strang 1990). However, a recent article on the subject has suggested that the prison environment, at least in Australia, is, by its very nature, a potential reservoir for the spread of HIV/AIDS because of the established incidence in prisons of high risk activities which cannot, responsibly, be ignored (Strang 1990).

The position in prisons overseas is better documented or estimated. In a recent paper published in the *Medical Journal of Australia*,² Dr Jael Wolk and others (1990, p453) referred to the spread of AIDS to the community by reason of infection acquired in prison:

"Needle sharing and unsafe sexual practices are both generally considered to be prevalent within prisons, although the extent to which they occur is unknown. In the United States the number of AIDS cases in prisons increased by 157% between

January 1986 (766 cases) and October 1987 (1964 cases) and the majority of cases were [intravenous drug users]. Studies of HIV sero prevalence in Argentine and Brazilian prisons in 1988 showed that 17% and 18.3% respectively of inmates were infected and the majority of the infected prisoners [are intravenous drug users]. HIV sero prevalence ranged from 11 % to 48% in European prisons in 1987/88. There is also evidence that HIV infection is occurring in prisons: 2 of 137 inmates incarcerated for 9 years in Maryland, USA, tested HIV positive as did 6 inmates incarcerated for between 4.6 and 7 years in New York."

Further statistical data on the presentation of HIV in prisons is collected in a paper on the topic of Hans Heilpern and Sandra Egger (1989). Most of the data collected by them refers to Europe and North America.

So far as Europe was concerned, the highest figure reported was from Spain where screening among high-risk prisoners revealed that 25.7% were sero positive. Other high figures were reported from France: 13% (testing of 500 consecutive entries); Italy 16.8% (screening of 30,392 prisoners in 1986); Switzerland 11%; and the Netherlands 11% (screening of a sample of prisoners in Amsterdam}. The low figure returned by the United Kingdom (0.1 %) was regarded as reflecting a low level of screening rather than a genuine low level of prevalence in that country.

On the basis of these to other studies, an estimate was put forward that the overall prevalence of sero positivity in European prisons was in excess of 10% (Heilpern & Egger 1989, p23). Amongst IV drug users in prisons the level of sero positivity was much higher. In one study of IV drug user prisoners in Fresnes in France, it was found that 61 % were sero positive. More recent research in France paints a still grimmer picture of the French prisons surveyed. Twelve percent of prisoners admitted in 1987 admitted to drug dependence; an estimated 50% of IV drug user prisoners were deemed HIV positive. The overall HIV sero positive rate in French prisons was estimated to be 6% - a rate 20 to 30 times higher than in the general population. Overcrowding was such as to exacerbate these difficulties. And perhaps the most telling statistic was the rapid increase in the rate of HIV sero prevalence. In one Spanish prison, for example, it almost doubled in one year from 24% in 1986 to 46% in 1987.

Similar patterns emerge from studies in the United States. Two national prison project surveys in 1985 and 1987 showed a 293% increase in the number of cases of inmates with AIDS (420 to 1650). In both cases the death rate within a year was approximately 50%. At October 1987, there had been a cumulative total of 1964 AIDS cases amongst prison inmates in the United States. Five percent of the inmates with AIDS were women. The correctional administrators attributed approximately 66% of the male cases to pre-prison homosexual activity. However, other opinions expressed the view that IV drug use is a much more important transmission category in correctional AIDS cases than in the population at large.

W.H.O. PRINCIPLES

Against the background of accumulating data on the incidence of HIV in prisoners in many countries - and the perceived importance of the issue to the future course of the AIDS pandemic - the World Health Organisation convened a meeting on the subject in November 1987 in Geneva. Thirty-seven specialists from twenty-six countries participated. They included experts in public health, prison and medical administration, prisoner care, occupational health and safety, epidemiology and health policy. At the end of the consultation a statement, reached by consensus, was approved (World Health Organisation 1987). This is a common procedure adopted by WHO to provide guidance to member countries from the international pool of talent and expertise available in dealing with major world health problems, including AIDS.

The WHO experts stressed the need to perceive control and prevention of HIV infection in the context of the larger obligation significantly to improve overall hygiene and health facilities in prisons. They recognised that in many countries there "may be substantial numbers of prison inmates who have a history of high-risk behaviours such as intravenous drug use, prostitution and "situational homosexual behaviour" in the prison environment. These considerations imposed upon prison authorities a "special responsibility" to inform prisoners of the risk of HIV infection. Many of the persons making up the prison population were thought to be "unlikely to have received such education in the general community". If there is ignorance about AIDS and its transmission in the general community, it may fairly be assumed to be a still larger problem in prisons. There, socially deprived persons with lower than average education tend to predominate. The experts urged that policies of prison administrations to deal with HIV/AIDS should be developed "in close cooperation with health authorities". They stressed the need for independent advice in the interests of prisoners by prison medical services. They urged the adoption of prison policies along the lines of guidelines, which took into account a number of considerations. These included:

1. The responsibility of prison administrations to minimise HIV transmission in prisons; and
2. Prisoners' rights of access to educational programmes, voluntary testing, confidentiality of results, availability of counselling, medical services equivalent to those available to AIDS patients in the community at large and information on treatment programmes.

The WHO report suggested that prisoners with AIDS should be considered for compassionate early release "to die in dignity and freedom". The need to prevent discriminatory practices relating to HIV infection or AIDS "such as involuntary testing, segregation or isolation, except when required for the prisoner's own well-being" was clearly stated. The necessity to provide prison staff with up to date information and education was also stressed. The experts went on:

"Homosexual acts, intravenous drug abuse and violence may exist in prisons in some countries to varying degrees. Prison authorities have the responsibility to ensure the safety of prisoners and staff and to ensure that the risk of HIV spread within prison is minimised. In this regard prison authorities are urged to implement appropriate staff and inmate education and drug user rehabilitation programmes. Careful consideration should be given to making condoms available in the interest of disease prevention. It should also be recognised that within some lower-security correctional facilities, the practicability of making sterile needles available is worthy of further study."

Perhaps most boldly the experts urged that governments:

"May also wish to review their penal admission policies particularly where drug abusers are concerned in the light of the AIDS epidemic and its impact on prisons."

AUSTRALIA'S REACTION

Against the background of these internationally stated guidelines, it is relevant to examine the response by governments and prison administrators in Australia where prisons are generally a State responsibility. Recent developments in New South Wales illustrate the fact that it is difficult to be sure of the most up to date information on this score. Certainly, compulsory testing of all prisoners, including unsentenced prisoners, entering the correctional system is undertaken in Queensland, South Australia, Tasmania and the Northern Territory (Heilpern & Egger 1989, p29). Compliance with the obligation is obtained through the use of what are described as "correctional sanctions". In South Australia and Tasmania, a repeat test is undertaken after three months of imprisonment. The purpose of this test is to overcome the possible inaccuracy of the initial test based upon the established numbers of false positives

and false negatives (due to imperfections of the test) or the possibility that the prisoner was in the "window period" at admission, when first tested. As is now widely known, the test commonly in use to establish the presence or absence of HIV infection responds to the antibodies produced following exposure to the HIV virus. These antibodies take a time to present in sufficient degree to produce a positive test result. Estimates of the "window period" vary. However, three months would appear to be safe for the purpose of catching cases missed in this way. In Queensland, retesting is conducted at twelve monthly intervals. It may also be repeated on prisoners assessed as possibly engaging in "high risk behaviour" (Heilpern & Egger 1989, p30).

In the other States, at least until recently, voluntary testing programmes were offered and indeed encouraged. In Victoria, all prisoners are offered the opportunity to be tested upon admission. Reluctant prisoners are counselled and encouraged to volunteer. A very high compliance rate (98%) is reported (Heilpern & Egger 1989). In Western Australia, a voluntary testing programme was offered; but few prisoners were reported as seeking to be tested.

Until mid-1990, the policy of New South Wales prisons was to provide for voluntary tests only. At least until 1989 the number of prisoners volunteering for the test was quite low (estimated at 5%). This was because of the consequences of a seropositive result. Prisoners found to be HIV positive were segregated. They lost the opportunity to participate in many prison activities, e.g. industry, education, work release. In these circumstances it was little wonder that the volunteers were few. Their number reportedly increased upon the abandonment of segregation. As well, prison authorities provided much information to prisoners about HIV/AIDS. In-house prisoner newsletters also contained much beneficial discussion of the subject and of the special risks presented by prison life.

The results of the testing systems outlined above are not (as has been said) entirely satisfactory. By the beginning of 1989, the cumulative number of HIV positive prisoners in Australia revealed by such testing procedures was 99. As the total Australian prison population at any given time is of the order of 11,000 and as total annual admissions amount to about 33,000 prisoners, it can be seen that the present testing procedures reveal quite a low incidence of HIV in Australia's prisons. But these figures obviously mask a larger problem. Sources of the problem, and of the unreliability of the available statistics are:

1. The numbers of false negatives/positives in jurisdictions where tests are not repeated;
2. Prisoners in the-"window period" where tests are not repeated;
3. Self-selection and exclusion in jurisdictions where tests are voluntary; and
4. Exclusion of long-term prisoners in systems reliant upon more recently introduced testing on admission.

There seems little objective reason why Australia's prisons should be immune, at least in the long run, from the kinds and levels of infections revealed in Western Europe and North America. The same phenomena exist to give rise to the same problems, namely:

- (a) High levels of drug using persons who -
 - (i) are imprisoned for drug related offences, or
 - (ii) gain access to injected drugs in prisons; and

- (b) High levels of young male prisoners, deprived of heterosexual outlet, thrown together often in crowded conditions which may give rise to "situational homosexual conduct" at levels significantly higher than would exist in civilian life.

It is in these circumstances that HIV is specially relevant to prisons. For these features of prison life mirror, unfortunately, the major known modes of transmission of the HIV virus.

The precise levels of access to injected drugs in prisons in Australia is unknown. Professor John Dwyer estimated in 1988 that in Long Bay prison in Sydney, about 60% of inmates used intravenous drugs once or twice a week (Norberry & Chappell 1989; see also Strang 1990). If this is even partly right, it represents a very high exposure rate to the risk of infection from unsterile injecting equipment. The figure may seem very high to a casual observer of the problem. In any case, figures in Sydney, the major port of entry into Australia of illegal injected drugs, may make figures in New South Wales prisons unrepresentative of prisons in Australia generally. But that drugs do enter the prison system is indisputable. It is proved by the occasional cases of criminal charges brought against prison officers and prisoners. It is established by reliable anecdotal evidence. It reflects, in part, the fact that a very high proportion (said to be more than 70%) of all persons sent to prison in Australia have some civilian contact with illegal drugs. Because of mandatory or otherwise high prison sentences for drug related offences, it is inevitable that, at any time, many prisoners, in Australian prisons, will have had exposure to illegal injected drugs before admission. It is also true that many non-drug offences, particularly of larceny and robbery, can be traced to crimes committed, allegedly, to provide funds to feed an illegal drug habit. Likewise, male and female prostitution are in some cases associated with that need. It is enough to say that the preconditions for the high increase in HIV through drug injection exist in the very nature of the client population of Australian prisons. Lack of effective alternative programmes, lack of motivation to escape drug use, lack of resources to ensure adequate surveillance, the limits, in any case on complete surveillance and the advantages which can sometimes result from addicted prisoners who have access to their drugs all conspire to provide the environment in which even honest prison officers may fail to eradicate drug use in prisons.

The level of homosexual activity between prisoners is likewise difficult to estimate. At the meeting in Seoul, Korea, the representative of Vietnam, an epidemiologist, reported that there were no such cases in Vietnamese prisons because homosexuality was completely unknown in Vietnamese society. This information was received with a degree of scepticism. The Chinese medical participants reported that homosexual activity in Chinese prisons was at a very low level of incidence, but doubtless did occur. Crowding together of young male prisoners was recognised as a circumstance that could give rise to sexual conduct. Overseas studies report that 20 to 30% of prisoners engaged in sexual activity at least one time whilst in prison (Nakki & Kane 1984; see also Strang 1990). A 1989 study of a sample of prisoners in the South Australian prison system reported that about 42% of prisoners engaged in risk behaviour at least once whilst incarcerated. Thirty-seven percent were estimated to use drugs intravenously. Twelve percent were reported as having engaged in unprotected anal intercourse (Douglas, Gaughwin, Davies & others 1989). There are numerous constraints upon accurate investigation of this phenomenon, including the cultural norms typically prevailing in men's prisons. Some cases of non-consensual sexual intercourse come to notice when charges are laid. It is reasonable to infer that these represent but the tip of the iceberg. Quite apart from violent activity of this kind, consensual homosexual acts undoubtedly do exist. The debate is thus about the level of prevalence.

WHAT CAN BE DONE?

What then can be done to protect prisoners from infection with HIV whilst in prison? About some matters there need be little debate. Few observers would dispute the need to:

1. Provide information, education and training to prisoners and to prison officers, administrators and all those responsible for prisons about the special risks of HIV/AIDS in the prison context;
2. To provide facilities for antibody testing on a voluntary basis whenever a prisoner reasonably wishes to undergo the test;
3. To provide for strict confidentiality in the results of the test and for counselling both before and after testing is conducted. Discovery of seropositivity, particularly in a prison environment with a lack of support that may be available outside, add to the need for understanding and assistance to prisoners found to be HIV positive. Prolonged periods of idleness, and the absence of the distractions available to a person pursuing an ordinary life in the community, mean that the impact of knowledge of seropositivity will be even greater in the case of a prisoner than otherwise;
4. Attention to tattooing by unsterile tattooing equipment is another special concern in the Australian prison culture. It provides a reason for the provision of bleach or other cleaning materials so long as in-house tattooing occurs;
5. Facilities for treatment, as with AZT, therapy and therapeutic counselling should be available from prison medical staff to seropositive prisoners. Such staff should be provided with information about HIV/AIDS with the latest medical and non-medical supports available to persons infected; and
6. For the purpose of tracing the problem and constantly reviewing policies in relation to it epidemiological data on the incidence of HIV among prisoners, provided on a purely statistical footing, should be pooled and distributed to correctional authorities throughout the country. Personal identifies should be removed from such data.

Fortunately, certain studies including the one on South Australian prisons, reveal relatively high levels of accurate knowledge about HIV and its modes of transmission within prisons (Gaughwin et al 1990). The bad news, however, is that, despite this information, prisoners and prison offices believe that there has not been a resultant substantial reduction in risk behaviour, particularly in respect of intravenous drug use (Gaughwin et al 1990). Clearly prison journals should be used and prisoners themselves consulted on ways in which information can be effectively disseminated in the prison environment to ensure necessary behaviour modification.

TESTING, CONDOMS AND BLEACH

Mandatory screening

This leaves three issues of controversy upon which there is no unanimity. The first is whether compulsory testing of prisoners should be supported. Its introduction in New South Wales was accompanied by considerable debate including, apparently, within the Government. There is a tendency with AIDS to resort to mandatory screening. The Government is then seen to be acting. It is usually directed at powerless, voiceless groups (such as prisoners, overseas migrant applicants and members of disciplined services). It has the colour of a medical response to a medical problem. We remember the widespread useful testing for tuberculosis. It is relatively cheap. It has some epidemiological utility. It may also provide prisoners with some proof in the event that they later wish to bring an action for negligent care against the government or prison authorities.

The arguments in favour of mandatory testing of all prisoners for purely statistical data are strong. But, as introduced in Australia, identifiers have not been removed. Confidentiality has not been observed. In some prisons, the prisoners are segregated and lose valuable rights. In

others, their confidences have been betrayed, as when one prison officer told a family member that his father would take a time to get to the interview room because he was 'on the AIDS wing'. Testing leads to no cure. Unless accompanied by strict confidentiality (which it is difficult anyway to maintain in a prison environment) it leads to discrimination, hatred and even retaliation out of fear. Unless a strict policy of separate prisons and segregation is adopted the testing leads, effectively, nowhere. As well, it is subject, unless constantly repeated, to the defects of false positives and negatives and to the window period. It may lead to false confidence about HIV status. It does not have the advantage that "encouraged" voluntary testing presents as a first step in personal responsibility and behaviour modification that are essential for the containment of the HIV epidemic - especially in the artificial environment of prisons.

Whilst, therefore, I understand the political forces that lie behind compulsory testing of prisoners, I do not believe that it can be justified as an effective strategy against the spread of HIV in prisons, at least as presently undertaken. It is, I regret to say, politically attractive in part because it is cheap and has little consequence but involves doing something. I consider that the WHO guidelines that exclude such involuntary screening show greater wisdom.

Condoms

The provision of condoms in prisons has been opposed by prison officers' associations. In New South Wales, they even threatened to go on strike if any condoms were distributed in prisons (Sydney Morning Herald 1990). As a result of this threat it was agreed that the proposal would be "kept on ice" for the time being. The *Sydney Morning Herald* reported that it was understood that "Ministers feared that any unexpected confrontation with prison officers would seriously jeopardise legislation aimed at introducing compulsory AIDS testing for all New South Wales prisoners".

A number of arguments are raised against the provision of condoms in prisons. Some of them are based upon the assertion, as in Vietnam, that homosexual activity does not exist. This is a factual issue. It appears to defy such anecdotal and research information as is available. In some cases, it is opposed on the basis that the provision of condoms would condone sexual activity, to the decline of prison discipline. However, in many of the responses to the AIDS epidemic, authorities have had to face cold reality. In the name of the higher good of preventing the spread of a deadly condition, which should certainly not be acquired whilst a person is the responsibility of a State in a prison, steps have been taken which, even recently, would have been considered unthinkable. The most obvious of these involves the needle exchange scheme.

It is said that prison officers should not be demeaned by handing out condoms. I entirely agree. Such a procedure would, in any case, greatly discourage their use. Condoms should be readily available from medical services. At the least they should be available from vending machines or prison stores. Prisoners cannot walk into a pharmacy and purchase them, as ordinary citizens may. They should not, by reason of their imprisonment, be exposed to the risk of a deadly condition, which can be avoided (or the risk greatly reduced) by the use of condoms.

Then it is said that condoms will break and are not suitable to anal intercourse. New and safer condoms have been developed. Furthermore, it is not only for anal intercourse that condoms should be used. Condoms reduce the risk of sexually transmitted diseases spreading by other means of sexual intercourse. No one suggests that condoms are a complete answer to sexual transmission of HIV/AIDS. But they clearly reduce the risk very substantially. They would not be likely to be used in violent sexual acts, e.g. rape in prison. But for reducing the transmission of HIV in prisons at least by consensual sexual activity, condoms should in my opinion be made available free of charge. Whilst it is true that there is some risk that they may be used for secreting drugs or other objects, it is necessary in HIV prevention to balance risks.

One thing is sure about HIV: once acquired there is no cure. In most, if not all, cases, it leads to death. I therefore find myself in agreement with the leader of the *Sydney Morning Herald* (1990, p30):

"[T]here are more private ways of distributing condoms. In other countries condoms are simply sold across the counter in prison canteens or from vending machines. For six years, NSW Prison Officers have maintained that they will not accept the State-sanctioned introduction of condoms. This obstruction is a major political problem ... there is ... a fear that condoms would be used to conceal contraband in body cavities. This is indeed a risk. But it is less serious than the dangers of the spread of AIDS in NSW prisons and its implications for society outside the prisons."

IV DRUG USE

The most controversial issue is whether sterile syringes should be made available to prisoners or, at the least, bleach and other cleaning material to reduce the risk of spreading HIV through unsterile needles infected with contaminated blood. That risk is greater in the prison context because of the likelihood that, if illicit drugs are available, they will be administered with equipment that must be repeatedly used and shared amongst many users. To the sub-cultural forces that promote sharing of unsterile needles in civilian society, is typically added the imperative of unavailable alternatives in the prison context. It is not as if the prisoner can participate in the needle exchange scheme that has been introduced. He or she, if addicted, will usually have access only to imperfect equipment: just the kind likely to provide the perfect vehicle for the spread of contaminated blood.

I can understand the attitude of politicians and prison officers who resist the notion of providing sterile needles or even cleaning materials in a prison context. To many this would seem the final abandonment of the "war against drugs" and in a disciplined context. It would appear, in an environment designed to uphold the law, to condone illegal drug use: a contradiction in terms. Many of these arguments were presented by analogy, when the proposal for needle exchange was made. In a rare and bold move with bipartisan support, governments in Australia, New Zealand and elsewhere have concluded that the risks of HIV/AIDS, and the usually fatal result of the infection, require radical and even unpalatable steps to be taken.

It is my belief that in due course even more radical steps will be needed as the AIDS epidemic penetrates western societies by the vectors of drug infected heterosexual males and females. Already we are beginning to see serious calls to address the problems of drug addiction by the techniques of public health rather than the imperfect mechanisms of law and order (see for example, Australian Parliament, Parliamentary Joint Committee on the National Crime Authority 1989; Wodak 1990; Kaplan 1988). But this will remain a long-term strategy - one of great significance for the prison system. It would be a suitable topic for a future oration in this series. In the short term, in prisons, as in society, contradictions must be tolerated precisely because HIV once acquired has such devastating, horrible consequences. Offenders are imprisoned as punishment and not for punishment. They certainly do not go to prison to be exposed to the risk of acquiring a fatal condition there. Unless governments and prison administrators can absolutely guarantee a totally drug-free environment, it is their plain duty to face up to the risks of the spread of HIV infection by the use of unsterile injecting equipment in prisons. If it is too much to adopt a similar exchange system (unused for used needles) at the very least cleaning bleach should be provided in discrete ways for use by prisoners. Such provision must be backed up by education about the great dangers of IV drug use today. It must be supported by the expansion of methadone and drug rehabilitation programmes both within prison and afterwards (Strang 1990; see also *The Age* 20 July 1990). Again, I agree with the *Sydney Morning Herald* leader (14 June 1990):

"Dr Alex Wodak, Director of the St Vincent's Hospital Drug & Alcohol Service said this week [that] prisoners [should be supplied with] condoms and provided with bleach for cleaning needles. It is advice to which [the Minister] should listen."

The subject of this oration has illustrated the challenge to our correctional policies and institutions posed by an epidemic, which was completely unknown and unexpected fifteen years ago. However, it is now upon us. As overseas experience shows it has special significance for the Australian prison system. We must ready ourselves, as a civilised community, to ensure that prisoners are not unnecessarily exposed to acquiring a fatal condition whilst in prison. If we do not take proper steps, we will stand condemned as irresponsible and morally negligent in the safekeeping of prisoners. Winston Churchill's adage remains true. The civilisation of a country can still be tested by the way in which it treats its prisoners.

The World Health Organisation has provided sensible guidelines. Sadly, Australian politicians and prison administrators have not adhered to them. Not enough has been done to spread and repeat the educational messages to the constantly changing prison population. Political gestures, such as mandatory testing, have been taken with little practical utility in addressing the real problems of HIV infection in prison. Prisoners found to be infected are not isolated. The only advantage of this testing is that it will provide evidence upon which prisoners will be able to rely in actions against governments in negligence in other respects to HIV acquired in prison. I rather doubt that this was the policy that lay behind the strategies of mandatory testing of prisoners. As is usually the case, those strategies are based either on ignorance of prejudice or real indifference to the true problems of containing the AIDS epidemic.

In the potential incubator of prisons those true problems derive from the established modes of transmission of the HIV virus. These are by IV drug use and unprotected sexual intercourse. Advice, education and counselling (including to the point that the highest protection exists in avoiding entirely risky activities) must be given. But for those who cannot, or will not, take such advice, practical steps must also be taken. These include the availability of condoms and of cleaning bleach to prisoners.

Death, as they used to say in the old road safety advertisements, is "so permanent". If overseas experience is any guide, many prisoners will become infected with AIDS in prison. They will mirror the sexual orientation of the general population. They could then become vectors for spreading a deadly virus through our population. We owe it to the prisoners - but if this is unconvincing, we owe it to our community - to protect prisoners from infection whilst in prison. This requires radical steps before it is too late. Just as we have taken them with the needle exchange scheme in civilian society. Such steps may seem unpalatable. But the death of a person who is in the custody of society, because society has preferred to turn the other way, is even more unpalatable. Most unpalatable of all is the failure of elected governments to act because of industrial threats by Crown offices of a disciplined service whose duty it is to comply with the law made by the elected representatives of the people.

I therefore hope that we will go back to the WHO guidelines on prisons. And, that we will see less show-biz politics and fewer empty gestures - and more real concern to protect prisoners, and ourselves. Only in that way will we halt the needless spread of this most terrible virus which imposes a great economic burden on society, strikes down the young, uses pleasure as its agent of spread and inflicts a long, cruel one-way journey to death which causes great suffering to those infected and to those who, helplessly, see them die.

End Notes

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WHITE COLLAR CRIME: Reflections on the 80's & lessons to be learned for the 90's

Frank Costigan

When I was approached last year to perform this task, it was suggested that I might care to speak in the area of White Collar crime, with particular reference to the 1980s. I acceded to this suggestion, though somewhat uneasily. The unease arose from the impossibility of dealing with such a complicated and, in many ways, technical subject within the confines of a reasonably timed speech.

I came upon White Collar crime somewhat late in life, and certainly to my surprise. In October 1980, which is at the beginning of the decade, I commenced some investigations into an interesting area of so-called traditional street crime on the waterfront in Melbourne. Within twelve months I was looking at a quite different kind of crime, but a kind that was almost certainly more destructive of the body politic and the social fabric of the country than the initial area that I had been asked to consider. This was, in the first instance, tax fraud, though the tentacles spread much wider than that into general corporate and White-Collar fraud.

It was October 1984 when I returned my Letters Patent. For the last seven years I have been able, as an outsider, to contemplate the ravages inflicted on our community in this area.

A significant and growing number of responsible business and political leaders have, in recent months, bemoaned the excesses of the 80s and been highly critical of the conditions, which brought them about. I am very glad to see this development, which is undoubtedly improving the quality of the debate.

In this Oration, I do not intend to mention names of individuals or of companies. This makes my task more difficult, but I am afraid I am required to follow that course in view of the immense number of investigations and charges and trials that are occurring around the country. May I, however, caution the listener and the reader not to draw any inferences from what I might say in respect of any particular individual. That could be seriously unfair.

Let me set out the outline of this Oration. I propose to discuss what happened during the 80s and, in the course of that discussion, limited though it must be, I will indicate some of the causes of the problems. When I have completed that task, I would like to reflect on the lessons that can be learned for the future and to discuss briefly what changes, if any, are needed to make less likely a repetition of this period.

It is difficult to look back on the 80s without a feeling of despair and anger. In Australia there must also be a sense of enormous regret at the opportunities that were lost during this decade when vast amounts of money were brought into this country, not for sensible investment purposes, but to gratify the egos and greed of non-productive scoundrels. The events I refer to were not, of course, limited to Australia as I will demonstrate shortly. But at the end, my emphasis will be on Australia for it is the affairs of this country that we can, perhaps, influence.

One significant characteristic of the 80s was the concept of the illusion: the idea that if you dressed something up sufficiently so that it looked like reality, then in fact it became reality. This illusion, of course, was considerably assisted by the widespread use of the lie. Use of the lie was justified by reference to "situational ethics". Many groups in the community joined, if not conspired, together to produce this illusion and to defend it. They each must accept a share of the blame. Let me discuss some of those groups, but in no particular order.

One outstanding feature of the 80s, the effects of which will be felt for a long time, was the widespread use of "creative accounting". One might sensibly regard such a description as a contradiction in terms. The accounts of companies were not meant to be the subject of creative thinking, but were supposed to be an accurate reflection of the true financial situation of an enterprise so that those who were disposed to invest in it or lend money to it could do so in some confidence that the accounts were a valuable guide. One was bemused to read that the new business giants were shown in the accounts of their companies to possess assets worth hundreds of millions of dollars. Subsequent investigation has shown that those assets were often not worth the paper on which they were so described. Nonetheless, false valuations, false descriptions of profits, and manipulation of inter-company loans and transactions were all held out to be serious descriptions of the worth of the company. Such descriptions were often the product of the grossest misrepresentation of a civil and criminal kind. The failure of the accounting profession, and in particular that of auditors, to disown such procedures meant that the investing public were deceived as to the true worth of enterprises.

My own profession, the law, must share some responsibility. As might be expected, the great bulk of lawyers behaved in accordance with the high standards of their profession during this time. However, only a few were needed to provide their skills for very large fees to those who wished to rape the system. I saw a number of examples of this during my Commission. This was a particularly pernicious activity as the anonymity of trust accounts and the assumed protection of legal professional privilege was of great value in protecting the activities of clients. Moreover, there was a failure or refusal to understand the concept of "conflict of interest", an attempt often being made to rationalise it behind so-called Chinese Walls. I should say immediately that this latter problem was by no means restricted to the law and became, and still is, a problem with many consultants and merchant banks. I should also say that the idea of a Chinese Wall is part of "the illusion". There is no such thing as a Chinese Wall. It is a figment of the imagination designed to hide a conflict of interest.

At the end of the day, many of the problems we are now seeing in the corporate area, and in the serious area of foreign exchange borrowings, spring from the fact that the banks were prepared to lend money without proper analysis of their chances of getting it back one day: in former days this used to be called "checking the security". By adopting the device of charging very high up-front fees, the profits of the banks themselves were distorted and supported the illusion. One cannot overlook the role of other financial institutions, including merchant banks. The names of Rothwells and Tricontinental spring readily to mind. Without the availability of loan funds, almost without limit, a different scenario would certainly have occurred.

Finally, we have our political leaders. It is necessary that I be critical of some of the actions of our political leaders. In doing so, I would not wish for a moment to suggest that we do not have within Government men and women of great integrity and probity. I need only mention, by way of example, in the Federal sphere, John Button and John Kerin. The fact that I have mentioned only people in Government does not, of course, mean that there are not such people in the Opposition. It goes without saying that there are.

There are two areas in which our leaders have failed us.

The first lies in the area of regulation and oversight. Ultimately Governments have the power to take action, to regulate and monitor. They have an obligation to do so when serious assaults on the social and financial fabric are occurring. That these assaults were occurring was beyond debate. Indeed, a National Crime Summit was held in Canberra and a National Crime Authority was set up in 1984 to deal with those concerns.

What is ironic and unacceptable is that at the very time when the public had become aware, with considerable anger, of the existence of tax rorts, the Government opened the doors to commercial larceny on a far greater scale.

I discussed this matter at some length in a speech, which I gave in Brisbane last year. I discussed the fact that problems associated with false financial manipulations and money laundering had failed to be dealt with properly by existing law enforcement agencies, and I gave examples. I then turned to the effect on such investigations of the removal of exchange controls. I wonder might I quote myself briefly.

"The first significant matter that occurred was that in December 1983 the Australian dollar was floated and most of the exchange controls were abolished. In June 1984 the Treasurer, Paul Keating, announced that 40 non-bank financial institutions were to be granted authority to trade in foreign exchange. These measures formed part of a historic deregulation of the financial markets, both national and international. There is no doubt that these measures were widely welcomed at the time and I do not have the economic expertise to criticise them. What I do find unacceptable is that the baby was thrown out with the bath water and all the quite intricate monitoring mechanisms that were in existence prior to deregulation ceased to operate. The Increase in turnover on the foreign exchange market was enormous and the way was open for those who were more Interested In their own pockets than in any sense of the national Interest to plunder this country; and the mechanism for monitoring what they were doing was no longer available."

It was the absence of proper regulation and monitoring which most concerned me.

I referred to an address that I had made to the Australian Institute of Bankers in 1986 where I said:

"Accordingly I have the strongest suspicion that a proper analysis of foreign exchange dealings in 1984 in particular and in subsequent years would disclose a significant amount of money running into hundreds of millions of dollars which could probably be categorised as money laundering in the sense in which I have used it. I use the word suspicion not because I have any doubt as to my broad conclusion but because I no longer have access to the hard documentary material which would enable such suspicion to be converted into a firm finding of fact. But that material is available to be put together and analysed.

Unless some steps are taken to correlate the information held by banks and other financial institutions and the Taxation Office in relation to the movements of money in and out of this country there will be no accurate overall understanding of the extent of the problem other than by legitimate generalisations drawn from experience both in this country and overseas. Discovery of illegality will be on a case-by-case basis."

No effective steps were taken. My conclusion last year was:

"That decision not to monitor and at the same time to open the doors for monies to go out and come in provided the basis upon which some of our heroes were able arrogantly to parade both in the country and on the world stage.

In many ways there has been a great deal of useful activity in recent years. Lionel Bowen deserves great credit for his *Proceeds of Crime Act 1987*, *Mutual Assistance in Criminal Matters Act 1988*, and *Cash Transactions Report Act 1988*. But there has also been a failure to recognise and acknowledge that when Paul Keating opened the financial deregulation doors and failed to keep in place proper monitoring mechanisms, he prepared the ground for the financial vandalism that we have seen in recent years. And when the National Crime Authority walked away from the job it was set up to do, and the National Companies and Securities Commission was without proper resources in its area, we were left without the protection we were entitled to expect.

It is a sad story. I do not think history will look kindly on these years."

I have stressed this question of failure properly to regulate and to monitor because it is a problem that is not unique to Australia, and because it is absolutely central to a proper understanding of this period. One need look no further than the United Kingdom and the United States of America. Bear in mind that in both those countries during the 80s, the political philosophies of their leaders positively encouraged deregulation and marketplace concepts. Strongly allied to this concept of deregulation were the closest links between business and government. The encouragement and approval of the "mates" was as significant in those countries as it has been in Australia. In America we saw the proliferation of junk bonds, the abuses of insider trading, and the collapse of the Savings and Loan institutions. In the United Kingdom, we have seen the Guinness problems and the internal problems of Lloyds. These are only examples. Now we have the Bank of Credit and Commerce International. As a person who had some knowledge of the workings of Nugan Hand at the beginning of the decade, I felt a sense of nostalgia when the BCCI scandal finally broke in the last month.

The BCCI debacle is particularly illuminating in the context of the need for regulation and monitoring. Although it was at the beginning of July 1991 that the Bank of England finally took action against BCCI, there had been public knowledge of the problems with the Bank for some years prior to that date. Bear in mind that in 1988 ten BCCI executives in America were charged with money laundering \$US35m of drug money and that those executives pleaded guilty to the charges in 1990. Moreover, in 1990, the Bank revealed a loss of \$US498m for the 1989 financial year. Information is now being revealed on a daily basis in the press as to the knowledge of many institutions of State of the presence of fraud, and also the use of the Bank by some of these very institutions. Moreover, disquiet about the affairs of the Bank had been commented to the Treasury in London in 1990. The question must be asked: why is that the regulatory agencies have, time after time, failed to stop practices of this kind until the full disaster is unleashed upon the community?

The BCCI affair attracted the attention of *The Economist* of 13-7-91 in an editorial on page 14.

"The first lesson of BCCI is that regulators should intervene early in the affairs of a mismanaged bank. For years BCCI had operated as a virtual outcast in top financial centres. One part of the bank pleaded to money-laundering last year, another is under investigation in America for hiding its ownership of a Washington bank; rumours of fraud have buzzed around its intentional operations for years. BCCI's clearing agents - National Westminster in Britain and Security Pacific in America - had so little confidence in the bank that they had almost no exposure to it when it folded. None of this can have been a mystery to banking authorities, whether in America, Britain or elsewhere. Yet the bank stayed open. Why? The answer given by the Bank of England is that they had no proof of mismanagement until June 27th when BCCI's auditor Price Waterhouse delivered evidence of widespread fraud at BCCI.

The second main lesson of BCCI concerns international, especially European, regulation. Every bank needs a strong lead regulator capable of following its worldwide operations even into the secret-banking havens exploited by BCCI. Many regulators are not yet up to the job. Although that is a worldwide failing, correcting it is especially urgent in Europe. In less than 18 months' time, banks authorised in any member country of the European Community will be able to set up business in any other without a local licence."

The BCCI scandal is a very good example of the way in which a failure of regulation and proper monitoring can allow cross-border manipulation of monies. Although it used London as its world headquarters BCCI's home base was Luxembourg whose regulatory systems were incapable of dealing with a bank that operated in seventy countries and widely used the facilities of the Cayman Islands to keep secret its activities.

There is another area in which our political leaders have a high moral responsibility. One of the great problems of the 80s rested in the climate of approval that was bestowed upon the activities of those whose actions in fact deserved disapproval. There is no doubt that over a time the community's views of certain types of activity can be changed by education and Information. Examples can be found in the changed community attitudes to drink driving and smoking. Closer to home is an area that I was Involved in during my Commission that of tax rorts. It came as a great shock that a large section of the community was indulging in larceny of the public purse. There is no doubt that the public aversion to this kind of activity has strengthened.

There is an immense obligation on those whom we elect to high office to show leadership in areas that involve questions of integrity, honesty, truth and codes of ethical behaviour. Not only do they have an opportunity to establish decent standards, they have the responsibility to do so. We have seen in Australia over the last twenty years a series of examples where Governments have failed to meet those standards. When I was doing my Royal Commission, it became clear to me that the troublesome links in Australia were between Sydney, Brisbane and Perth. In each of those cities there was an entrenched association between Government and its friends based on the principle that "you can do a deal on anything". Some of those relationships were positively corrupt. The prime example is Queensland. Whatever the final conclusions of the Royal Commission in Western may be, and I would not presume to anticipate them, there can be no doubt that the evidence reveals a complete lack of understanding on the part of those in high places of any decent standards of public life. Far from maintaining any standards, the tactic was to launch an attack on anyone who suggested that matters of corruption should be investigated; whereas the correct step to take would have been to investigate the matters raised.

The end result was that the unacceptable standards that I have referred to were seen to be the norm and to have the approval of those in power. In an era of deregulation, the so-called entrepreneurs were held out as heroes and provided a most disturbing model for the community.

What are we to learn from all this? There are a number of lessons to be learnt. I put them into two categories. One is general, and the other is particular.

GENERAL MATTERS

The first and most important lesson to learn is the need for continuing vigilance. The money to be made from this area of crime is so great that it has always attracted, and will continue to attract, many people, some of whom are of high intelligence and possess great skills. They have access to a great deal of money, even if it is not always their own. We must be alert to

identify new trends and new activities before they have become an epidemic. We must then act on that information. I should note that we are getting a good deal better at it. Some agencies, like the Taxation Department, have made enormous strides in the last decade. But we must not be complacent.

I do not think we need any more agencies. Indeed, I sometimes wonder whether we do not have too many already. Nor do I think they need any more power. They have more than enough power, if used properly and intelligently. With encouragement and support from Government, they can do the job of monitoring and regulating.

But it is important to recognise that we cannot just leave it to the agencies. There is an inbuilt tendency in agencies over a period to become hidebound and secretive. They can, even in the absence of malice and corruption, be protective and can rationalise inactivity in a particular area. I saw many examples of this during my Commission. They cannot be satisfactorily monitored internally; they need outside observation.

Apart from the agencies, there are two other sources of monitoring assistance. The first is our politicians and the second is the media.

Serious and concerned politicians have an immensely important role in the monitoring of activity in the community. They have great power and they have privileged forums. Both, of course, can be abused but such abuse normally brings its own punishment in due course. When democracy works properly, it works to protect itself.

The other source of outside expertise is the media. I cannot stress too highly the importance of the role of the media in this area. The setting-up of the Fitzgerald Royal Commission in Queensland would not have happened were it not for the courageous performance of a number of distinguished media commentators. Likewise, the present Royal Commission in Western Australia may not have been established were it not for the continuous discussions in the national media. My own Royal Commission flowed, to a large extent, from a series of articles in *The Bulletin*. In this context the current concern about the media and the control of it assumes great significance. The fact that control of the media in this country is being concentrated in fewer and fewer hands is a matter of great concern. It is not only a question of the concentration of ownership, but also the question of ownership by businessmen with possible conflicting commercial and political interests that needs serious discussion.

One of the tragedies associated with the changes in the Fairfax Group is that that group was previously under the ownership of a family which basically had all its major investments in the media and, with a tradition of editorial independence, had no difficulty in discussing wide ranging commercial, political and international matters without the need for any so-called Chinese Wall or conflict of interest. The absence of an independent and diverse media would, in my view, seriously limit the proper discussion and investigation of the matters I am discussing.

The other major lesson that needs to be learnt from the past decade is the necessity for Government leadership at a high ethical standard. The community is entitled to expect that Governments make decisions in the public interest. No appearance of favouring particular persons or groups should be tolerated; a fortiori the actual favouring. Governments should be courteous but distant in their relations with those who are seeking or likely to seek advantage from such relationship. The events in Queensland and Western Australia should not be forgotten quickly. The reports of the ICAC in New South Wales show how dangerous can be the approval by Government of a climate of activity, even when there is no direct corruption. The question of private donations to political parties is a matter of concern. In my view, they should not be allowed except in the presence of full and frank disclosure; other mechanisms for funding political parties, including Government funding, must be explored. To suggest

that there is no harm in receiving such donations because they do no more than provide access to a Government ear is both fatuous and dangerous. To buy access is to purchase a greater opportunity for obtaining preference, and that is akin to offering a bribe.

PARTICULAR MATTERS

Let me now deal with a number of separate matters.

Trials of Offenders

A critical comparison is often made between the speed with which offenders are prosecuted in the United States of America and here in Australia. Not all this criticism is well founded, but the comparison does throw up some very disturbing features in Australia.

Bear in mind that there are various interests involved in the pursuit of White-Collar criminals.

- (a) The first is that no person should be convicted of an offence except after a fair trial based on appropriate evidence - this is a paramount consideration.
- (b) There is a community interest in seeing that guilty men are brought to justice.
- (c) There is a community interest in seeing that the financial resources of the State are properly husbanded.

What has happened in many large White-Collar cases is that the defendant uses every technical ploy to delay and lengthen and wear out the prosecution.

Let me outline a theoretical case:

A serious White-Collar fraud is committed. Investigation commences and massive documentation is collected. Massive may well mean a small roomful of documents. The analysing and assembling of these documents can take months. The defendant is then charged. The committal proceedings may take weeks. The defendant is committed for trial. He then challenges the Magistrate's decision to commit him by taking judicial review proceedings. This can take months before it is even heard. If the defendant loses his application, he may appeal. If, at the end of the appeal process, he loses, the trial is fixed for hearing many months hence. By now it is a long time since the events occurred which form the basis for the offence; he might choose to take out a summons to stop the proceedings, alleging that it is an abuse of process. This hearing can take weeks. I know of one instance, not in this State, which took twelve weeks if unsuccessful, the appeal process can start again. If all this fails, the trial will come on years after the original charge. It is then necessary for the Crown to prove every element in the offence. In a large documentary trial, this can involve thousands, if not tens of thousands, of documents. Very few of these documents are in dispute, but the Defence can require strict proof of each of them in the hope that some small link can be shown to be missing. It commonly happens that after months of such evidence the accused goes into the witness box, or makes an unsworn statement, which establishes that ninety-nine percent of the evidence called in the preceding months was not in dispute. This situation is intolerable.

This community cannot afford these delays. The price is too high; both in financial terms and in the proper administration of justice. Steps must be taken to alleviate the problem. Let me suggest some of those steps:

- (I) Appropriate major White-Collar trials should be heard and determined in the senior trial court of the State, namely the Supreme Court

(ii) Greater control of the proceedings should be given to the trial Judge who could, with benefit, emulate some of the disciplines which are now commonly accepted in the Commercial List. This would include a number of Directions hearings where many preliminary matters could be determined. The Court should be empowered by legislation to require the defendant to define the issues. He should not be allowed to waste the time of the Court by requiring technical proof of every document when, in reality, there is no dispute on that question. Perhaps this could be achieved by alterations to the Evidence Act which in effect reverse the onus of proof in relation to disproof of documents. Care should be taken in the drafting of such legislation to ensure that no legitimate civil liberty Interests were offended.

(iii) Even the most apparently complicated cases can normally be identified as having only a limited number of issues to be contested. The thrust of any change should be to simplify procedures at trial so that only those issues were before the jury. In this way trials which currently last up to six months could be disposed of in two to three weeks.

(iv) Do not take away the jury from these trials. I have the highest admiration for the ability of Juries to hear and understand these cases.

Accounts

In almost every case of White Collar crime, an investigation of the accounts of a company reveals a manipulation of figures and valuations to increase the apparent worth of the company and a hiding of expenditure that was personal to the directors or some of them and of dubious value to the shareholders. Dare one mention yachts in this context; or planes? These facts of course, emerge years after the event. In these circumstances it is of high importance that auditors feel under no constraint in their work. There are clear difficulties in maintaining this position when the audit report which is normally a report to the Board, is reflecting adversely on the Board. Section 332 of the Corporations Act 1989 imposes a responsibility on the auditor to report to the Australian Securities Commission in certain circumstances. This is an excellent section. It is essential, however, that the ASC maintain a close watch on the financial accounts of companies and give to auditors the comfort of its support and encouragement. It has the expertise and, unlike the NCSC, the funds to do this. It should identify and chase lies with all its vigour.

Tax Havens

The use of tax havens such as the Cayman Island and the Netherlands Antilles by Australian companies and persons should be absolutely forbidden. There is no legitimate reason for their use. Let me put it another way: any use of these havens is against the interests of this country.

CONCLUSION

Let me conclude with an attempt to summarise this rather discursive endeavour. I suspect that what was quite unusual at the end of the 80s was the realisation of the public at large of a number of facts as follows:

- The extraordinary extent of White-Collar crime in the community
- The very large amounts of money involved in this activity
- The arrogance and greed of those involved
- The immense damage caused to the community by such activity.

In one sense that awareness is one of the few benefits. The fact is that great damage has been done, for which we will pay for many years. We have also lost a great opportunity to channel investment funds that were available into valuable areas.

If we do not take heed of the lessons of the last decade, we are doomed to repeat them. And that we will do unless we are prepared to acknowledge the various factors which contributed to these events, and to resolve they will not be allowed to continue, and to support those bodies, such as the ASC, who are endeavouring to ensure that result. of equal importance is to ensure that those who breach the law in these areas will come to justice speedily.

I am nevertheless troubled. When I was conducting my Royal Commission, I observed the reactions of those who had been involved in financial misbehaviour. Almost without exception there was no indication given to me of remorse or, and this is far worse, any understanding that what they had been doing was offensive to decent behaviour. They, on occasions, displayed anger, but the anger was because they had been discovered, not because they felt their lies and thefts were worthy of censure.

Likewise, I have seen no sense of understanding by those who were involved in the 80s of what they did. There has been a great deal of wringing of hands and self-satisfied analysis. There has also been a feeling that "the 80s are now behind us; we all know it was a bad time

and we won't let it happen again." But it will happen again unless there is a real acceptance and understanding of the true elements of the problem. We need to understand that lies are not acceptable in a civilised community, that conflicts of interest are the product of greed, that shareholders' funds belong to shareholders and not directors, and that Governments should be astute to maintain proper relationships with business.

The day that our business, financial and professional leaders acknowledge these truths, and in particular our political leaders acknowledge their responsibility in setting, maintaining, and following proper ethical standards, will be the day one can put the 80s behind us and look with some optimism to the future. I wonder when that day will come.

THE VICTIM, THE TRAUMA & JUSTICE

Beverley Raphael

INTRODUCTION

The extent and nature of violence in Australia has been well documented in the Report of the National committee in *Violence: Violence Directions for Australia*. Not only is the extent of violence of concern however, but also attitudes of acceptance for some forms of violence - for instance domestic violence, and cultural perceptions supporting violent solutions, are of even greater concern.

It is increasingly recognised that the violence in society has profound effects on those who suffer it and those more indirectly involved. There are also the problems of the perpetrator, who in some instances may be closely attached to the victim, as in family violence, or indeed driven by powerful psychological forces deriving from his own inner world or even his own experience of victimisation. While violence is acutely distressing to those who are its victims, their psychological needs have been poorly acknowledged until relatively recently. Indeed in most instances services to deal with either acute distress or long-term psychological sequelae have developed in response to the demands of those affected - voiced and channelled through a range of consumer and self-help organisations or community based social movements. Systems of care such as health and welfare, and systems of law did not initially at least, wish to know of these needs and consequences.

THE VICTIMS

There are many sources of violence and they may entail varying levels of horror and trauma. It is appropriate to establish - who are the victims? O'Connell (1992) describes the multiple definitions and meanings that have been used, ranging from sacrifice to weakling, individual to organisation. The United Nations definition is perhaps that most aptly applied. "Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws". The law may not be known, nor the perpetrator apprehended, but the person is still a victim. And his family and loved ones and others who have suffered in their efforts to help rescue or assist him, may also acquire victim status.

Murder and attempted murder are no more frequent in Australia than in many other Western Societies, except the USA. A rate of 2.4 per 100,00 is quoted by the National Committee on Violence, but rates for Aboriginal Australians range from 11.9 - 40.00 per 100,00. For the most part the perpetrators are males aged 18 - 30, of low socio-economic status, and mostly the people they kill are known to them - males of the same age with whom they fight or women with whom they live. The majority are "intimate" homicides (Polk & Ransom, 1991) in that men kill their sexual partners, often as part of ongoing domestic violence, which may have extended over many years. The man may kill his partner in response to her intentions to leave him, through jealous sexual possessiveness, or he may kill the "other man". Not infrequently these are violent "lust" killings with multiple stabbings. US data (there is little available on this point in Australia) suggests that up to 20% of these homicides may be witnessed by one or more children (Pynoos & Eth, 1985), or sometimes other family members, and these people may have had their own lives threatened. The perpetrator may be so disturbed as to kill wife and children and go on to kill himself. This typed of violence

represents the extreme end of the spectrum of domestic violence, which is of course far more frequent.

The “*victims*” of such violence are not just those who die, but also those who “witness” both directly, and indirectly. Children who witness family violence of this kind will have the trauma of the terror and violence of the episode, the double grief of losing both parents, the fear of the violent parent and possible retribution if he is released, or if they give testimony, and the ongoing losses of family life and stability during the years of their development. Bereavement is inevitably complex with such losses, both for the child, the parents and siblings of the victim, and for all those closely attached to the family unit, who are usually shocked by the savagery, of and unexpectedness of what has happened, despite even long term knowledge that all was not well. In the circles of those affected there are welfare, health and other workers involved in the emergency, or longer term care with these families; there are the emergency service providers such as police and ambulance, called on to deal with the consequences which often reinforce feelings of frustration, anger, helplessness and futility about human nature and its destructiveness. Where children are caught in such a maelstrom this is especially distressing for workers who may be traumatised by the gruesome and horrific deaths that occur.

Other types of murder such as those with sexual violence in cases of rape/murder, sexual mutilation, or crimes where young people, children and adolescents vanish, often in repetitive patterns bring a different type of horror, and are also highly traumatic to the families of the victims. There are particular connotations of suffering in these circumstances as well as prolonged periods of uncertainty and dread. The cycles of trauma extend to wider circle beyond the family in these instances too. The mutilated state of bodies or body parts; the premeditated and sexual nature of the crimes, the decomposition that may have occurred; being confrontation with the most inexplicable and savage of human behaviour; all constitutes additional components of trauma. Public awareness through the media may affect even those who see or read of those events.

Mass shooting, such as have occurred in random violence of Hoddle Street and Australia Post in Melbourne, or Strathfield in Sydney, will affect the victims who are injured or killed, those threatened or witnessing, and the families and communities of these victims. Again emergency, police, ambulance, health and other services are all likely to suffer traumatic effects.

Violence in armed robbery and other crime may lead to another group of victims. Bank personnel, people in money handling industries, security guards and members of the public are all vulnerable to threat, assault, injury and even death, in such circumstances. Serious assault is said to occur at rates of 81 per 100,000 (Weatherburn & Devery, 1991), which may or may not be associated with robbery, fighting between young men, or other causes. The degree of trauma is likely to relate to the severity of the violence and crime, the threat, to life, issues of injury and helplessness. Other less obviously violent crimes such as domestic robbery, breaking and entering are distressing to a degree, but the elements of violence, life threat and shock are the most potentially traumatic components of such criminal activities.

Women as victims of violence suffer in many ways.

Rape is seen as one of the most dreaded and frightening forms of assault, often with life threat, prolonged terror and injury. Reported rates of 15.2 per 100,000 in Australia (Weatherburn & Devery, 1991) are probably far below actual rates as estimates suggest that only one in three are reported to the police. US data suggest that 25% of women experience rate at least once in a lifetime. Rape within marriage must contribute to such figures, and is likely to have very limited reporting - often occurring as part of the spectrum of domestic violence.

Not only are the women subjected to rape severely traumatised (the majority developing post-traumatic symptoms and many prolonged disorder), but there may be witnessing children in settings. There is clear evidence (Pynoos & Eth, 1985) of the traumatic effects of such an experience on these children. Families, friends and support and health workers may be secondarily affected in both the recognition of the victim's traumatising and through empathic involvement themselves.

Domestic violence affects more than one in ten women in Australia and perhaps up to one in three or four. There are no epidemiological data community studies, but phone-ins and other sources identify this as a major problem. The crime of domestic violence has only been acknowledged in relatively recent times and it represents an enormous area of victimisation affecting women chiefly, although in some instances men. Such violence often goes unattended because of community attitudes that it is a "private" or "family matter" (one in three Australians believe this) and that the use of force by a man against his wife is acceptable (one in five are said to believe this). A large group of women in the community are affected by it. These women may ultimately seek community support through refuges, welfare systems or not infrequently present with somatic complaints to health care systems. A study in Queensland (Robert et al, 1991) has shown that 14% of presenters to accident and emergency services are likely to have a history of having been "battered", often recently, and that this rarely detected and treated.

Witnessing children are frequent in circumstances of domestic violence. It is reported that 88% of instances are observed by children and 68% of children are themselves also abused (Queensland Domestic Violence Task Force, 1988). Consequences of traumatising are probable for these children too.

Domestic violence may involve marital rape, marital murder, and chronic traumatising over years and have profound effects on the victim's mental and physical health and well-being. Sadly there is a dearth of epidemiological data on violence of this type and of its acute and longer-term outcomes, but depression, passivity, self-directed aggression, poor self-image, somatic complaints are frequent (Rosenberg & Gross, 1987).

Children as victims of violence suffer at many different levels. They suffer directly or indirectly in the circumstances outlined above. They may reverberate with their parents' trauma and its psychological consequences, as is evidenced by studies of disaster, the Holocaust and family situations. But children are also especially vulnerable to the violence of abuse, be it overt or covert, sexual or physical. This too is a "hidden crime" as is domestic violence, for it is very clear that it may be difficult for the child to tell, and there is a great deal of denial of the reality of the child's experience, both by parental figures and childcare workers.

Child abuse generally is estimated to occur in one in ten to one in 15 children. The trauma is generally repetitive and chronic, identified by Terr (1991) as Type II trauma in contrast to a single, one-off traumatic occurrence. The child is highly likely to be traumatised psychologically by such experience, both in childhood and adult life, when the vulnerabilities that result may enhance the risk of developing psychiatric disorder, or they may create a context in which the person may perpetrate abuse and violence on others, in up to one in three to one in five cases. The pattern and degree of psychiatric sequelae is uncertain although post-traumatic stress disorder has been described (Green, 1983; Terr, 1991) with marked phenomena of numbing, depression, sadness, rage and somatic complaints. Children may of course suffer substantial physical injury, which has further very adverse effects on their health and well-being.

Childhood sexual abuse - there is here, too - a lack of adequate data, but a fair degree of concurrence on data that exists which support rates of 10-12% of girls and 5% of boys by age 14-16 years. Males in the home or known to the child are the chief perpetrators in most instances. The immediate consequences for the child are likely to be profound, but are, to date, poorly researched in terms of prospective studies with systematic frameworks. The long-term sequelae of becoming an "incest survivor" are increasingly documented ranging from ongoing post-traumatic stress effects to borderline and multiple personality disorder, and other conditions such as depression and dissociative disorders. This is damaging to the child both in the short and long term and likely to have major effects on development, functioning, interpersonal relationships and subsequent adult sexual adjustment.

There is evidence that the extent of abuse - suffering both physical and sexual abuse, repetitively and with multiply abusers - is likely to increase the child's risk of developing post-traumatic morbidity. This is hardly surprising in view of the powerlessness, humiliation, and lack of appreciation of and concern for the child's needs that this entails. Further the elements of betrayal, fear of loss, self-blame, and accusation by family members that the child in some way "caused" these are likely to constitute further sources trauma.

LEGACY OF PAST VIOLENCE

Violence may have been experienced from many other sources, and may lay down wounds and legacies of vulnerability that people take with them to future traumatogenic situations, or which show forth in response to the challenges and stresses of development.

Many Australians have experienced violence in war and bear scars on the mind from this victimisation. This especially applies to people such as Vietnam Combat Veterans, survivors of POW camps and so forth. More recently refugees from South East Asia may suffer traumatisation from experiences in their countries of origin such as Cambodia, and in their escape and even in their re-establishment, which require understanding and support. Similarly, people from Central and South America may have experienced torture and persecution, and resettlement in alien environs. The scars of such violence are difficult to erase. Special treatment and support programs are usually required.

Victims of the Holocaust, and other circumstances of genocide and mass destruction may carry the vulnerabilities of such experience with them, to be opened as wounds by later trauma, or the gentler pressures of aging.

Community violence may occur with riots, protests, disasters: to name a few. Where forces of violence are man-made, perpetrated deliberately with malice aforethought or random violence, then the direct and indirect victims caught in the circles of effect over space and time, are likely to be more severely affected.

Racial violence deserves special mention because of its destructive effects on those who experience it, others belonging to the same group and the society as a whole. Related to this is the occurrence of multiple or serial episodes related to violence, such as the Aboriginal Deaths in Custody which represent not only a tragedy for the families and society experiencing them, but also intense traumatisation for families and other direct and indirect victims.

The perpetrators of violence have increasingly been of interest and no single label or personality profile fits them. The questions of mad or bad, the incomprehensibility of some violent actions, the dark side of human nature so revealed are all distressing. It is of interest however that a significant proportion of perpetrators have themselves been abused or subjected to violence in their childhoods. As noted above the cycles of violence may propagate the epidemic of morbidity that is a consequence (Gunn, 1992).

The consequences of violence, and the victims affected, might be seen as unending. Indeed, this in is not the case, even though the listing above is not all-inclusive. The concept of victim must be taken into account in considering effects, or who will be affected? Who will be traumatised? As was pointed out by Short (1979) the concept of victim has stereotypes of helplessness, passivity, weakness, damage.

In reality victims, or trauma affected persons, represent the spectrum of the human condition and inherently they bring strengths and weaknesses to the experience and respond with both vulnerability and mastery. The psychological nature of the trauma, the processes of reacting to it, the influencing parameters and the process and outcomes over time will now be considered.

THE TRAUMA

The incidents of violent and other crime outlined above, by their total numbers constitute a significant problem for Australian society. There are clearly substantial economic costs, both in damage, injury, loss and in the consequences of human suffering. It is the purpose of this paper to examine this latter variable: the nature of human suffering for those traumatised.

The Traumatic Elements

A number of components exist in the situation described above (to varying degrees), which have the potential to affect psychologically the persons who have been exposed.

- **Traumatic encounter with death.** Many situations of violence and crime bring threat to the individual in terms of his or her own life being threatened, or threat to the lives of loved ones or others. Sometimes death occurs and it may be in horrific circumstances or leave gruesome and mutilated remains or injuries. Studies have clearly demonstrated the pathological effect these two elements, i.e. personal life threat, and experience of the deaths of others especially if these are the deaths of children, or occur in violent, shocking and unexpected circumstances, or entail human action, or involve mutilation decapitation etc. This traumatic element leads to shock and arousal during the experience and as well fear, helplessness, terror and often anger, although this latter emotion may not appear until later. This trauma must be subsequently processed cognitively and emotionally by those who experience it and this leads to reactions and in some instances, pathology- such as post-traumatic stress disorder - which will be described below.
- **Loss.** Many crimes and similar events lead not only to the shock and threat outlined above, but to substantial losses. These may be the personal loss of treasured personal items, property, valuables and so forth, but also symbolic losses, such as the loss of the sense of a safe a secure world, and the sense of personal invulnerability. Loss may be obvious and reacted to immediately, but often there is initial shock and numbness before the reality and finality “sink in”. The more unexpected and untimely the loss, the more attached the individual to what has been lost - the greater the impact of this traumatic element. Reactive processes that follow include normal grief or at times pathology - such as chronic grief, depression and so forth.
- **Helplessness** is inherent in most traumatic experiences, especially in situations of threat and loss. This helplessness in itself may be most traumatic and shocking to those who dread loss of control, but is threatening in that it reminds the affected person of all the powerlessness of infancy and childhood. This powerlessness and helplessness, even if only temporary, help to reinforce terror and fear when there is life threat, the powerlessness to protect against of loss and the reality of human mortality and

vulnerability. It helps to imprint the trauma. What is meant and what it was associated with must later be integrated into the individual's experience of the trauma. Regaining some sense of control over the world and life is a critical part of the recovery process. This is one of the reasons why recognising and supporting the victims' strengths and empowering them to recover while at the same time providing necessary support is so essential.

- **Separation** from loved ones, the familiar world, dislocation from home, neighbourhood, familiar environment may be additional stressors and this is particularly important in children, where vulnerability to traumatic effects may be heightened because the child has been separated from the security and support of parents.

Many other elements may contribute to the impact of a crime - both past and current. A sense of personal responsibility and related feelings of guilt is not uncommon, when the person feels that they should have or could have done more. Such feelings may be realistic, but often they are distortions related to personal perceptions of the need to be in control, social attitudes, or distorted views of what happened. For instance it may be easier for people to feel they are "*blame*" in some way than to accept their inability to predict, control or prevent, such trauma from occurring, or occurring again. Social attitudes or particular social contexts may reinforce these views - for instance many women feel and social attitudes often reflect this, that if they are raped they somehow provoked it, or were not careful enough, and they are really to blame in some way for what has happened to them.

- **Secondary traumatisation** is trauma which arises subsequently, in relation, to traumatic experience, and which adds further damaging traumatic elements. It will be described below.

The listing of traumatic elements is not all-inclusive, but the key elements are threat, and encompassed in this some degree of life threat or death encounter, and loss. These elements, in terms of severity, degree of exposure and levels of helplessness and range of modulating variables, will determine outcomes.

Processing the Traumatic Experience

Key theoretical developments such as those of Horowitz (1976, 1986) provided a framework for understanding how traumatic experiences are processed and integrated psychologically, how individuals cope and adapt, and what determines outcome. Work with victims of disaster such as the Ash Wednesday Bushfires (McFarlane 1991) has provided more in depth understanding of the relative contributions of personal and other variables to this process. It was initially thought that the processing of the traumatic encounter with death and loss were identical, but recent conceptualisations highlight the differences, although both involve a confrontation with and acceptance of the realities of what has happened, progressive and gradual emotional release and readapting to an altered world. A general model of the variables encompassed has been identified by Green et al (1985) and is usefully adapted to a range of circumstances of trauma.

Reaction to and Processing of Threat and Death Encounter - For most people who have experienced such an event, there is a continuance or return of the anxiety or fear that was felt at the time. There is *heightened arousal*. It is as though the person stays prepared, or prepares again, psychologically, to protect themselves and others against the threat or its recurrence. It is common for people to feel as though they are vulnerable, that it will happen again. Heightened arousal manifests itself in difficulty in sleeping, alertness, startled reactions and other exaggerated responses to stimuli, heightened vigilance and scanning of the environment

to seek out any other potential threat, and irritability. Concentration is disrupted and work and personal functioning may be impaired, at least temporarily. Extreme protective behaviour may come with fears, e.g. an unwillingness to leave the house, to be alone, “fortress” type security systems for the home and so forth.

Re-experiencing of what occurred is also part of the process. It is as though the mind needs to go over and over the experience, in attempts to master it, in retrospect. Re-experiencing may be in the form of nightmares, where the person is aroused from sleep, ‘in a cold sweat’, reliving some part of what occurred, usually that which was most shocking and frightening. Re-experiencing may also occur in the form of flashbacks in the daytime, intrusive memories of scenes of the event with all the related emotion, *reliving* as though they were there again in the experience, and re-evoking of the experience by triggers or reminders.

It should be noted that people may re-experience events even if they have not actually been there. For instance, Rynearson has shown how people may have nightmares and intrusive distressing images of the death of a loved one who was murdered (Rynearson 1984) even though they did not witness it.

Numbing, avoidant, reactions are also common and often alternate with re-experiencing, or may predominate. People may wish to put what has happened out of their minds, to avoid talking and thinking about it, or any reminders. This is difficult to do, because it is usually centrally preoccupying, at least initially. People may try to numb themselves with alcohol or medication or distract themselves with activity. This numbing of feeling may extend to other areas of life - impacting on personal and intimate relationships.

For the most part, these reactive processes start to settle in the first few weeks and lessen in intensity. The event becomes less distressing to remember and some sense of mastery of the world returns. This is not likely to be the case where the trauma has been very substantial however, where its effects may persist, for weeks, months and years, disrupting functioning and producing ongoing distress and disorder. Follow up studies of rape victims have shown that post-traumatic stress symptoms as above, to the levels of disorder, occur in 94% of women shortly after, 47% of at three months and even 17 years later in 16.5% of cases.

Dissociation - At times a traumatic experience, particularly where it involves continuing life threat or severe threat and violence, as in a prolonged and brutal rape, is so overwhelming that the individual attempts to deal with it by a psychological and emotional distancing. This may happen consciously or unconsciously during the event, or afterwards. It may be described in terms such as, “it was as though I wasn’t there - it was happening to someone else”, or “it was as though I were watching it”. Sometimes there is recognition of this shutting off of the self from the experience, the person knows it happened and describes it, for instance, as above. Sometimes it results in a ‘forgetting’ of aspects of the experience so that terrifying parts of it may seem to be repressed, or forgotten, subsequently. The whole experience may be forgotten, shut off, or repressed in this way, creating inner psychological problems, or perhaps coming to the surface subsequently, when some other trauma or similar circumstance occurs, or when counselling and support help the person to deal with it at a later time. This type of reaction may occur with childhood trauma and is sometimes discovered later when the person feels as though he or she is back in the time of the trauma again, reliving it. It should be noted however, that it may be, especially at the time of the trauma, the only way in which the person can deal with it and survive psychologically.

Survival Mechanisms - Different coping measures help the individual to survive the acute psychological experience, for instance, dissociation as indicated above. Valent (1991 personal communication) has described these survival strategies in times of disaster and trauma.

Coping mechanisms to survive in extreme life-threatening situations are very important and may include intense attachment ideation, i.e. intense focussing on survival for close attachment figures, hope, support of leadership if there are several involved, or even rage at the perpetrator. Some behaviours may follow which are difficult for the person to reconcile with views of the self subsequently e.g. violence/timidity. It is usually most important to understand those experiences for they may be issues the person has to deal with afterwards.

Unspeakable Horror - Juda (1987) has highlighted the fact that some violent crimes are so horrific that words are inadequate to describe them. They may involve intense aggression, 'evil', dehumanising, repulsive and monstrous experiences, he suggests. There is a need to recognise and not avoid such traumatising situations and ensure that the full depth of empathy and support is available to deal with them. They may be so horrific as to be stigmatising for the victim in that none can bear to hear or be "contaminated" by his experience. Families and those who do support and hear, may suffer, their own traumatising in the process and need support to integrate and work it through. This type of experience, even more than others, permanently damages the capacity for innocence and the belief in the goodness of man. Yet, as survivors of the Holocaust have indicated, it is possible to survive, to make meaning and to retain a belief in humanity and the human spirit (Frankel 1963).

Personal strengths, vulnerabilities and experience may affect the degree and nature of such processing. For instance, hardiness and resilience, as personality traits, coping styles of active problem-solving and mastery, maturity, past training or mastered experience may mitigate effects, especially if the individual appraises the event as one he can deal with. Higher personality trait levels of neuroticism, arousability, personal developmental immaturity, lack of understanding, of experience in dealing with stressful events may increase vulnerability to the traumatic experience, as may the reawakening of unresolved trauma from the past. Previous vulnerabilities in health, physical or psychiatric, may add to the difficulties of the victim. Education, socio-economic status and other variables of advantage also contribute, positively.

The **social environment** of the victim is also important. Social support can mitigate distress and facilitate recovery, by providing opportunities for sharing the experience, catharsis of feeling, helping with the struggle to make meaning of what has happened. Perceptions that support is lacking may increase the pathogenic potential. Support from others who have shared the experience, and opportunities to talk through what has happened with them, are likely to assist recovery.

Recovery environments which acknowledge the victim's experience and suffering, which allow and encourage the telling of their trauma story, and which attempt to comfort are more likely to help recovery, than those which do not.

While aid and practical resources may be needed, the way in which the social environment views and acknowledges the victim's experience, the trauma he has suffered, his needs for support and his strengths to master it are critical. Negating of the victim's experience by his/her family, friends, workplace and so forth may impair recovery, increase feelings of injustice and contribute secondary traumatising. Nor does the victim need to be seen in a stereotype that would define him as helpless, weak, inadequate, or unable to recover, without strength. This too is damaging, or it may reinforce passive acceptance and leave the person locked into the trauma experience. Timelines of recovery will vary with individuals and trauma, and social environments of family and support systems may be "out of kilter" with this.

For most people, the internal and interactive processes of re-experiencing and shutting out and arousal will lessen, and the experience will be progressively integrated. It becomes a

distressing, traumatic and painful “fact of life” but does not preoccupy or dominate, is not “alive” as a focus of pathology and the victim has survived it.

REACTION TO AND PROCESSING OF LOSS

Grief, like the traumatic stress reaction is to threat, is the normal response to the stressful element of loss. While there may be initial numbness and shock for the person who has suffered a loss, there may also be traumatic elements if the situation has been one of violence or threat. However, the grieving response, which represents the psychological mechanism for adaptation to loss, is necessary. It encompasses a number of elements.

Preoccupation with the lost person, or what has been lost is central and is associated with intense *yearning and longing* for the person’s return, or for things to be as they were. As sense of *angry protest* is also common with questions of “why” and often a sense of unfairness about what has happened. These feelings and preoccupation are intermingled with attempts to mitigate the inner emotional pain. Gradually, as reality and finality of the loss are accepted, feelings of sadness supervene and there is an active process of *remembering* and *reviewing* the lost person, or memories of what has now gone. This may bring a range of feelings; anger at what can no longer be, sadness, despair, guilt and so forth, relevant to who or what has been lost and how it happened.

Over weeks and months, or longer, if the loss has been of a loved person, these feelings of grief and distress gradually lessen. Nostalgic memories continue, and grief for those who are intimates, family and close friends, may continue for many years in attenuated form, or may be intense, chronic and prolonged if mourning has not progressed and pathological outcomes supervene. The intensity of the attachment will influence the depth of grief. There is data on different bereavement situations, which suggest that the loss of a spouse may be followed by problems such as depression in 20-30% of people. The death of a child is likely to be associated with higher risk of problems and sudden, unexpected or violent deaths, a much greater risk of pathology still - perhaps nearer 80-100% when violent crime is involved.

Personal vulnerabilities, strengths and previous experience may increase or lessen the difficulties of adapting to and mitigating loss. Resilience, coping styles facilitating expression of feelings and problem solving, capacity for meaningful interpersonal relationships, lack of excess ambivalence and dependence in relationships, especially that with the deceased, will all help. On the other hand, previous unresolved loss, particularly for instance, of a parent in childhood, may create difficulties. Maturity, both emotional and developmental is likely to be helpful and immaturity likely to create vulnerability. There is little evidence about pre-existing psychological vulnerabilities in terms of traits such as neuroticism, and their impact on outcome.

The social environment is important here too. There is evidence from several studies that perceptions that the social network is supportive will facilitate recovery and non-supportive or inadequate will create greater risk of pathological outcome. There are even more specific findings; that social interactions perceived as helping the bereaved to share the complex feelings of grief and review the lost relationship are most helpful in terms of perceptions and outcome. Acknowledgment, recognition of the bereaved’s distress and opportunities to talk of the lost person, or tell their story of loss, and offers of comforting, are seen as important and helpful components of the social environment. *Social rituals* of grief and mourning symbolise and facilitate the interactive component that allows integration of the experience. Where these are lacking, or do not meet natural needs to deal with the reality of death and the need for farewells, problems are also likely. Being able to see the person after death, touch and hold if need be and say goodbyes, is important personally and if not available, may complicate recovery. Culturally appropriate religious practices about the death, funeral and subsequent ceremonies may make a critical difference for bereaved people.

Coronial requirements may interfere with many of these aspects and thus complicate recovery, or indeed constitute secondary traumatisation, as may *investigatory* processes.

Helplessness may be one of the difficulties faced during the days and weeks after a traumatic experience. It may return or continue as this person attempts to come to terms with the fact that such things can happen to people, and to him. The difficulties of coming to terms with the experience of fear, being unable to act, or the actions one wished to do but could not, the inability to protect oneself or others against threat and loss, are all significant. Making meaning of the experience is likely to encompass the need to understand and incorporate into one's view of the world, this element. Talking through what has happen, actions to recover, interactions with others seeking reinforcement of strength take place as the individual attempts to process this experience. Sometimes there is exaggerated controlling behaviour, or shame and denial of helplessness. The more that personal strengths and resilience are recognised and given place, the more the *social environment* empowers and encourages mastery while still providing support as needed, the less likely this helplessness will become a fixed and entrenched pattern in the victims life.

Separation and other traumatic elements are resolved in less specific ways, the former however, may reflect some of the yearning and longing and protest of bereavement, as well as searching behaviour seeking reunion. Responsibility trauma is likely to be associated with shame, guilt and blame. This may be especially difficult for the obsessional and controlling person, just as separation may be for the dependent and anxiously or insecurely attached individual. There is in both these too, however, the need to understand and support personal aspects of vulnerability and to enhance resilience, a need for sharing in interactions with supportive and acknowledging social networks and environments.

INDIRECT VICTIMS

While it is relatively easy to understand the traumata experienced by those who have been the primary targets of violence, violent crime, or their loved one, it is often not recognised that those who assist, investigate or are in other ways involved may be also adversely affected. Most emergency services have identified stress or situations such as the deaths or sever abuse of children, mutilated, decomposed or decapitated bodies, violent sexual crimes, severe gunshot effects such as in some suicides, or assaults, as being “too much” and likely to lead to trauma effects. *Extent of exposure*, perceived intensity, numbers of stressors may here to interact with *personal factors*: strength, and resilience; vulnerabilities, such as coping styles involving denying feelings, immaturity, to influence outcomes. Past training experience and pre-trauma preparation and briefing may mitigate traumata effects. Concurrent stressors in home and work environments and additional life events will add to vulnerability. The *social environment* is also critical for those who may be indirect victims. This is especially so when an occupational environment may dominate with work related stressful experiences. The social system of work may not acknowledge the nature of the stressful experience or may denigrate its effects or see those who suffer as weak or inadequate. It may fail to encourage the telling of the trauma, deny its existence and may offer little comfort to its members. This may be reflected in the subculture of the organisation and unwritten rules, particularly for “macho” or hierarchical and military style systems or it may be reflected in formal administration, management and policy.

Some organisations or workers are seen as invulnerable, as stress related experience is the “nature of their work”, e.g. medical, forensic, police, but this is not so. Others are seen as too distant, e.g. welfare and counselling; yet they may carry stresses of uncertain roles and empathic identification.

Fortunately, as with direct victims, social movements have evolved to acknowledge, allow testimony and provide comforting or care to those affected. Stress debriefing, counselling, education and training, and employee assistance programs may all operate in this way.

TRAUMA OUTCOMES

In all these instances, it might be said that the greater the severity of the trauma elements, as perceived and experienced; the greater the numbers of stressors experienced; the interaction of these with personal vulnerabilities and strengths as well as the imprint of past experience; and the acknowledgment and support of social environments; will interact to determine outcomes.

Fortunately, in many instances there is short-term distress, and with support and working through, trauma and loss are integrated. But the elements of violence, human malevolence and lack of empathic concern for the victims by the perpetrators makes pathology a high risk. Additional social factors that fail to acknowledge, fail to allow testimony or telling of the trauma story and fail to comfort, make the risk of psychological morbidity high.

Post-Traumatic Stress Disorder may result with criteria of re-experiencing, avoidance and arousal, disrupting personal and social functioning, as indicated by diagnostic criteria such as those of DSM III-R (Diagnostic and Statistical Manual of the American Psychiatric Associations). This is frequent in traumatised children and adults, for instance after rape, assault, community or personal violence and especially where there has been threat, life threat and encounter with death. Nightmares of fear, the perpetrator, the terror, the “inescapable horror” as Burgess-Watson (1987) have labelled it, disrupt sleep. Flashbacks may occur during the day, reflecting experience. Sights sounds and smells may trigger re-experiencing and the person may be “as if” back in the traumatic experience.

Avoidant phenomena and numbing may mean shutting out, false forgetting, shutting off of emotion. Arousal may reflect an ongoing dread of danger and harm. This disorder’s phenomena reflect the causative elements. The symptoms are often disabling and chronic.

Depression may co-exist as co-morbidity with PTSD or occur in its own right. The victim loses hope, sees the world as bleak, has pervasive negative moods and cognition and may even contemplate or attempt suicide. Somatic complaints are also frequent and may hide the true nature of the problem. All interest in life and recovery is lost. Depression may also complicate grief or appear alongside chronic grief.

Substance Abuse - Many traumatised persons, especially men, drink heavily or use drugs to deaden feeling and shut out distress which they find overwhelming, or to shut out memories and reminders. Emergency Service workers, including Police, are vulnerable in this way, because of the “macho” ethos of drinking.

Anxiety Disorders are not infrequent with phobic reactions to situations such as those where the traumatising occurred, generalised anxiety disorders, with ongoing arousal and dread, Agoraphobia (social phobias) and panic disorder, have also been described and may be linked to traumatic elements, severity of experience, pre-existing vulnerability and failures of the social environment.

Somatization Disorders may occur but are not frequent. Somatic complaints are not uncommon, however.

Dissociative Disorders may arise as an extension of the dissociation noted above. The shutting off of the experience, or behaviours as though the person were re-enacting it in some

way, is fortunately not frequent, but at times explains bizarre, repetitive or self-destructive behaviours, or occasionally, rage reactions and behaviour destructive or others.

Adjustment Disorders are often diagnosed and may reflect depressed mood occurring after loss or other traumata.

Personality problems have been described in chronically or overwhelmingly stressful experiences, with avoidant, impulsive, antisocial traits in some groups. Borderline and multiple personality disorders often correlate with histories of childhood abuse.

Identity - Severe traumatic experiences may impact on the sense of self as impaired, or damaged or interfere with the development of identity, especially if the person is young when traumatised. Laufer (1985) and Lifton (1992) have discussed this with respect to traumata such as Vietnam or the Holocaust, but it may at times follow other severely traumatic situations, especially those where repeated traumatising occurs.

Interpersonal Relationships are often impacted upon by stress or experiences. An inability to talk of what has happened, irritability, numbing and avoidance, anxiety and depression and other post-traumatic phenomena, preoccupation with the event or the lost person or loss, may all create difficulties with family relationships, intimate relationships, parent/child relationships, and as well, social and work relationships.

Impaired work functioning is not infrequent with severe posttraumatic morbidity, be it PTSD, depression, anxiety or other disorders.

None of these impairments are in themselves disorders but are some of the complaints or presentations that may occur for the traumatised persons.

THE TRAUMATISED CHILD

Children's reactions to threat and loss are at times different from adults, perhaps less obvious, although reflecting similar phenomena and themes: the child's perception and experience of threat, death, loss, his or her developmental level and developmental stresses.

The recognition and acknowledgment of the reality of the traumatic experience by his social environment, especially parents and family, the support and secure environment available to allow the telling or playing out of the experience, the comforting and care provided to help healing, will all contribute to short and longer term outcomes.

With *child abuse, physical or sexual*, the stressors are often multiple and ongoing, creating chronic pathology in the form of post-traumatic stress disorder, or damaging personality development so as to lead to vulnerability in adolescence or adult life. There is no accurate data on psychological outcomes for abused children and the levels of pathology but abuse itself is very common and must contribute significantly to the emotional problems of children. Terr (1991) suggests that the patterns of symptoms with the Type II (multiple or longstanding experiences) are often one of denial or psychic numbing, rage and unremitting sadness, which may be incorporated into the personality. Other symptoms are common, and include substance abuse, suicide attempts, self-destructiveness, chronic anger, unstable relationships, dissociation, mistrust and fear of abandonment. Kiser et al (1991) found that PTSD is common, in abused children and adolescents, whereas those who don't develop PTSD are more likely to show depression and externalising behaviour such as delinquency and aggression.

Witnessing children may also be subjected to violence and have been clearly demonstrated to have posttraumatic stress disorder as a consequence and also if they are threatened. They

can also be shown to suffer grief reactions when they experience loss and as with adults, both reactions may occur concurrently.

Children who *suffer* loss of a significant figure, e.g. a parent, show grieving reactions and acute distress, as well as potentially longer-term vulnerability to depression or other problems. Children's reactive processes may appear in withdrawal, "good" behaviour, regression, clinging and separation anxiety, aggressive and impulsive activities. Impact on development, school performance and social achievements is possible and may disguise the reality of the degree to which the child is a direct victim. The child may also be indirectly the secondary effects of this, for instance, parent's posttraumatic stress disorder effects on the child.

Terr (1991) and Pynoos & Nader (1989) have contributed most to the understanding of traumatic or violent circumstances. Terr has identified the Type II trauma (e.g. child abuse) and the specific pattern of symptoms that are likely to occur in such frequent and damaging situations, as well as studies of acute trauma with a kidnapping of school children. Pynoos, with studies of children who have witnessed violent assaults, rape and murder of parents, or been exposed to life threat or death encounter with a playground sniper attack, as well as the loss of friends who were killed, has provided extensive evidence of the damaging effects of such experiences and the differential effects of threat and encounter with death, and loss.

Play, talking through, drawing and counselling/therapy may all help the child to master the experience. When families or schools deny the reality of the child's trauma however, and fail to provide supportive care, it is likely that adverse consequences will occur in both the short term and with vulnerability to disorder later.

SECONDARY TRAUMATISATION

The concept of traumata of encounter with death and loss and their consequences is now well established. But there is less recognition of secondary traumatisation, how it occurs and how it can impede recovery, or indeed produce additional morbidity.

The "secondary injury" has been talked about in the trauma field when health workers or others failed to take seriously, or recognise the impact of the traumatic experience suffered by the victim.

Symonds (1980) was the first to analyse the nature of this "second injury" to victims. From extensive work with the victims of violent crime, he described four phases of response. The first two phases represent the acute response to sudden, unexpected violence; namely: shock and disbelief; and secondly "frozen fright" which he describes as terror induced, pseudo-calm, detached behaviour. The third stage is "traumatic depression" but represents much of what is now subsumed in PTSD, with bouts of apathy, anger, resignation, rage, startle reactions, reliving and nightmares. The fourth phase is resolution and integration of the experience into lifestyle and behaviour.

He sees the *second injury* as the victim's perceived rejection by or lack of anticipated support from family, agencies, community or others, leading the victim to feel *helpless*. It is also related sudden and unexpected helplessness. This is likely to reawaken the feelings of helplessness and powerlessness brought on by the criminal during the trauma. Indeed, these feelings may be "replayed" by the victim unconsciously. The restoration of power, the mastery of helplessness is critical to prevention or to lessening the impact of both primary and secondary traumatisation.

Inherent in secondary traumatisation is the *failure of acknowledgment of the experience* (and the suffering/stress it entailed). People will express this in terms such as "he didn't seem to realise what I'd been through".

Another component of secondary traumatising is the *failure to allow the telling of the story, the giving of testimony* of what has been experienced or lost - “Nobody wanted to hear about it”, “stop talking about it”... and so forth. This may be a failure to allow for the details, especially the traumatic details to appear.

There are also often elements of failure to offer care, comforting for what has been experienced. “It didn’t matter to them”, “They didn’t seem to care” ...and so forth.

Failure to recognise strengths, to restore a sense of control or, to allow mastery, may reinforce the trauma of helplessness and as noted above, make the individual further vulnerable. For instance, hiding facts about what has happened because the victim “couldn’t take it”.

Secondary traumatising may also occur with actively negative responses to the victim, e.g. suggestions that “he’s making a fuss over nothing”, is not “wanting to work”, “hasn’t tried”, “wouldn’t be having these problems if he weren’t a weakling,” and so forth.

Common sources of secondary traumatising include:

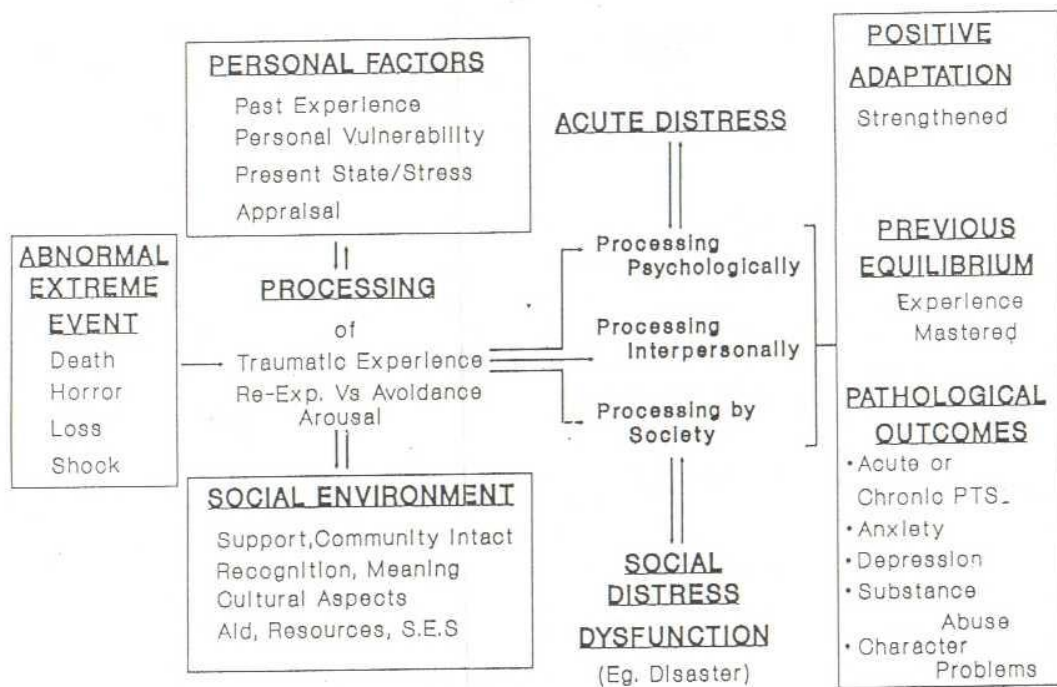
- Health care systems that respond only to physical complaints or the request for sedation.
- Blaming the victim for his or her experience or status. This is also not uncommon and very traumatic.
- Compensation Boards where junior staff who are inexperienced with trauma can fail to care, negate the experience or react in rejecting or hostile ways, inferring the person is trying to “do the system in”.

Secondary traumatising is frequent and powerful and may contribute as much if not more to the final morbid outcomes of traumatic experience, as the original event.

- Workplace and organisations who are ignorant of stress reactions or fail to recognise them in the specific instance and denigrate or disallow the workers reaction.
- Legal systems. The prolonged processes of litigation, the adversarial approach to acknowledging the reality of the person’s trauma, and its effects, the reviewing and reawakening of the traumatic experience to develop a base for evidence, but without the necessary emotional support and care, may all contribute. The judgement which may weigh the suffering lightly or heavily, provide reparation or retribution accordingly, but in ways that may not align with the victims perception or needs, is another element contributing to traumatic effects. Finally, the need to keep the trauma alive to extract legal acknowledgment of its reality and the victims suffering may significantly impair recovery.
- Media. The reports and interpretations of the trauma within the media - the level of its acknowledgment; how it is portrayed; the reality or unreality; positive and negative of the story told; the supportive care/comforting or otherwise of the presentation - may all contribute. A feeding frenzy of destructive commentary may lead to even greater damage.

Betrayal by those from whom understanding, care and support was expected, or who owed this to the victim, (as he or she perceives it) on the credit points of social exchange, may further traumatise the vulnerable.

Social stigma of victimisation, or some victim groups, blaming the victim, and rejection from the system are further similar stressors, even if of non-malevolent nature. Rape is one such instance, but there are many more similar stigmatisations of victims as well (Williams 1984).



JUSTICE

In a recent review of concepts of justice, Master (1991) suggests that in Western tradition, the sense of justice has been viewed in a multitude of ways, for instance, when religious doctrine or philosophy theory teaches that it is “an absolutely binding or historically determined standard” (pg. 299) or it may be viewed as a convention or custom “based entirely on the way a human community ‘names’ some things as just, or others ‘unjust’” (p299). He concludes however, that a naturalistic approach to conceptualising justice is appropriate as it incorporates emotions and feeling, as well as rational judgement and calculation.

The Oxford English Dictionary defines “just” in terms of “equitable”, “fair”, “deserved”, “right”. All these concepts plus issues of emotion, rational judgement and calculation as well as culturally, legally or religiously defined concepts (e.g. Talion principle) come into play for the individual’s view of what is just and unjust in his own situation.

Sumner (1991) has provided an overview of some of the key issues for victims of violence and the criminal justice system. He sees that victims needs have in the past often not been recognised or met, despite the fact many participate in the criminal justice system. He goes on to state that in a democratic society, the criminal justice system needs to be in tune with the feelings and needs of the community and meet its demands for justice for victims of crime. He also believes that there is a real obligation for all in the community “to ensure that in the interests of justice, victims are treated with compassion and understudying (p221).

In circumstances of violent crimes what is just may be seen in two frameworks: what the individual perceives as just and what they experience as just in services provided for them: and what is determined as just by courts, the law, charters of victims’ rights and so forth.

Justice in the Mind of the Victim

The individual's perceptions of justice are enormously variable and determined not only by the realities of his particular experience, but how this relates to other aspects of his life. For instance, the person with a profound sense of entitlement may feel he should have greater reparation for his losses, or the person with earlier deprivations may, apparently unreasonably, believe he should have more, because of all the other "damage" he has suffered. Social inequity may leave anger and a wish to seek restitution from others. The victim may expect justice to match his suffering and loss as he or she perceives it and it may not do so, either in compensation for losses, or punishment of those who threatened or harmed him.

The victim may unconsciously and to some degree consciously seek a number of things in terms of justice.

1. The **return of the sense of personal in vulnerability**. This may be symbolically attained in his or her mind when a safe world is again assured. This may result from the working through of the trauma, intra-psychically, or actions to ensure a safe world, or the redevelopment of trust in the world and people again.
2. The **undoing or "making right" the life threat/death encounter** trauma that was suffered. The degree to which the victims suffering is acknowledged, his story told, his pain comforted, his helplessness empowered may influence the degree to which he feels justice has been done for him.
3. **The reparation of loss**. Reparation can only be made of impersonal material items, and no reparation can replace a loved one, a treasured home, or personally meaningful possessions. The degree to which the victim's loss is acknowledged, his story of his beloved told, his grief expressed and comforted, his strengths and capacity to recover and to live without the loved one supported, are likely to influence the need for reparation. The resolution of the loss and his or her acceptance of the altered world, be it unjust or just is the endpoint. When a loss also symbolises losses of the past, unless these too can be grieved, then there may be greater difficulty in acceptance.
4. **The return of feeling of power** and often power over those who rendered him powerless or helpless. The capture of the perpetrator may be perceived as rendering him powerless, the trial and punishment as reinforcing this, redressing the balance. Needless to say, when this does not occur, the feelings of powerlessness may continue or be reinforced. It should be noted too that there might be a wish to gain power over those who secondarily rendered the victim helpless, and traumatised him further. Steinmetz (1984) emphasises the view that outside help is only effective if it stimulates self-help. This ultimately empowers the victim. A sense of power gained through recovery, mastering what has happened, overcoming what has been done to him or her may also to some degree help the victim to feel empowered, and sufficiently so to be reasonably all right, even if there is not "justice" in legal terms, and some residual resentments remain.

Many of the above factors may help the victim to deal with the emotional demands for justice. But if they are not met they may lead to rage and resentment, desire for retribution and revenge, and the sense of *unfairness* and *injustice* is likely to prevail, as things have not been made "right". Factors that contribute to the sense of injustice include the following:

1. **Failure of psychological resolution**, especially if complicated by secondary or further traumatisation. As noted above, this is likely if there has been failure to acknowledge adequately what has happened and what the victim has suffered, failure to allow the telling of the story and giving testimony, failure of empathic care, failure of re-empowerment.

2. **Calculation of the degree of restitution**, reparation, punishment, to make good, or make right, differ substantially between the justice system and the victim. As the victim's calculations may be determined by powerful psychological needs, with past suffering and secondary traumatisations added to the total, and then it is very likely that he will perceive the balance as inadequate and indeed in rational terms, because justice even in law, may be illusory, the balance often may not be "enough".
3. **Anger.** One of the driving emotions through all the themes of trauma and loss is anger at what has happened. This is the most difficult to resolve and the most tied to what is perceived as just or unjust. Understanding, allowing expression of this anger, linking it to its various origins in terror and loss, to the unfairness of a world in which "bad things can happen to good people", may assist in dealing with this anger. It may otherwise constitute an unremitting force, dominating the victim's life, binding him forever to the relates to guilt, anger is directed at the self or projected onto others to avoid recognition of the sense of personal mind. Anger may not only drive the need for restitution but also the seeking of *revenge*, the wish to make the perpetrator suffer as much or more than the victim, to make things just and right, to equal the balance.

As Symonds (1980) has pointed out it may be helpful for victims to see that surviving, getting better and recovery is really the ultimate revenge, negating the perpetrator and what he has done.

4. **Culturally determined norms of justice** and injustice. In a multicultural society it is critical to take into account the demands of culture as to what is perceived as just or unjust, what is retribution, punishment to fit the crime and so forth. It may not be possible or appropriate for these to be fulfilled, but they must be taken into account in the psychological response of the victims. This is especially relevant for instance in terms of Aboriginal people's views and laws, their traditions of justice and how these can be met in Western society.

These psychological processes and forces, their interaction with the experience of the victim, his social group, and his attempts to integrate and master the experience. Such factors are relevant to the way in which justice is dispensed and need to be understood.

The *search for justice* that the victim undertakes may be both rational or irrational, and driven by both the suffering and the loss, and his need to make things "right". As things can never be exactly as they were before, it is critical that all those interacting with him understand this and help him towards the *optimal* integration of what has happened in the way that is possible for him. If this does not happen, the search for justice may *dominate* preventing his resolution of and recovery from the experience. It may become the victim's principle *raison d'être* and further irrational expectations build upon it. These are in all probability doomed with further cycles of rage and injustice to follow.

JUSTICE AND RESOLUTION

The services for justice need close links with other services for victims so that they will, as far as possible, work together to help the victim resolve and integrate his experiences and will not add secondary traumatisations. Several psychological issues are then important.

- a) **An acknowledgment** of the traumatic experience and what the victim has suffered. At times investigations and justice systems fail singularly in this regard. This is highlighted in failures surrounding crimes of abuse, particularly those which affect women and children, Scutt (1990) in an excellent chapter on women and crime shows how with failure of acknowledgment in terms of prosecution, or delineating as criminal, domestic violence, which often seen as a private or family matter, this crime and the

woman's need for justice are often ignored. A similar picture had occurred with child abuse, until recently.

- b) **Telling the trauma story and giving testimony** is an important part of the investigatory and justice process. The full psychological value of this needs further recognition, including the value of writing it out, and having it heard (as *testimony* in court or by those who will acknowledge its significance). Both court testimony and *victim impact statements*, the latter allowing the victim to state their suffering more specifically, are likely to be helpful in this regard. Importantly, however, the fact that a woman's word may be less credible and not to be "testimony" for instance, in rape or domestic violence. As Scutt (1990) suggests this may mean that the woman is unable to gain the psychological value of testimony, of telling her story. This applies also and particularly to *children*, where there is much concern about their capacity to tell the truth and to give testimony. Thus they run even greater risk that their psychological needs may not be met. Furthermore, because of their relatively powerless position, they may be helpless and frightened fearing further threat and loss if they do tell their story of testimony against parent/s.

As Scutt states in both these instances, the central problem is power, "the power of men to control women, and the power of adults to control children" (pg. 484). The child can be helped, empowered for effective participation (and thus the psychological benefits that might accrue) through mechanisms such as televised testimony, preparation and support for the child's court appearance, linking the child's testimony with supportive evidence (Berliner and Barbieri, 1984). Pynoos and his colleagues have developed a semi-therapeutic "witness to violence" interview that can also assist children with this process (Pynoos and Eth 1986).

- c) **Care for the Victim.** While it is not the role of the justice system to provide counselling or love, it is clear that many victims perceive it as cold and uncaring, or even overtly rejecting. This is well exemplified by the prolonged periods of waiting, the peremptory way in which victims are treated and the lack of information they may have about their case, what to do, outcomes and so forth.

The role of victim's organisations in preparation and support for court cases is helpful in this regard. Many aspects of the detail of court procedures appear uncaring and even traumatising for victims. Linking to other support services and indicating even some empathy concern for victims would be helpful. Of particular importance is the prolonged delay of years for many cases. This makes it very difficult for the victim to resolve the experience and recover, as it must be "kept alive" for all this time and cycles of secondary traumatisation are likely to build, especially with repeated delays. The victim frequently feels that there is greater concern for the alleged perpetrator than for himself or herself.

- d) The justice system may further **disempower** victims. This can occur because of lack of knowledge of the system, the lowly status of the victim within it and the ritual practices of hierarchy and power that exist. These issues may be handled in ways which do not increase helplessness, and which indicate a respect for the rights human worth and dignity of the victim.
- e) The significance of the **adversarial system** may have several roles psychologically. It may disempower the victim and place him in a position where he has to "prove" his experience and his suffering. It does not provide a framework for resolution but rather reparation, retribution and punishment. Some innovations can facilitate resolution in some but not all circumstances of trauma and may have the danger for other victims of re-traumatisation if the healing is not yet secure. There is a key problem in that

resolution is the central need of the victim, and systems of justice may not recognise this. They may help or at times hinder this process.

THE JUSTICE OF SERVICES FOR VICTIMS

As noted above, services for victims have been quite inadequate until social movements and support groups, driven by consumers, demanded a more just and equitable provision. Crime victims movements as exemplified in NOVA, have been established for some time and encompass principles such as those outlined above, i.e. acknowledgment, testimony, care and support and empowerment.

They have been powerful lobbying channels and greatly enhanced awareness of the needs of victims. Young (1988) has delineated these frameworks and needs very well in terms of emergency response, victim stabilisation, resource mobilisation, court appearance related needs, and needs in relation to sentencing, and the relation of these to victim rights. Australian victim organisations have now developed in most States and have similar frameworks and goals. They too provide acknowledgment, opportunities for testimony, care and support and empowerment. They are variously supported and resourced, but have achieved significant national impetus with development of the Australasian Victims of Crime Association (AVOCA) in 1991. This group is committed "to the task of setting Australasian standards for victims services, promoting the recognition of the needs of victims services, promoting the recognition of the needs of victims of crime and their families throughout Australasia and representing the rights of such victims at Federal Government level for the first time" (Paterson 1992, pg. 26). The development of the Australian Society of Victimology and the production of a journal, *Australian Victimology*, will contribute substantially to this field.

However, services are far from adequate as a survey and report from David et al (1991) indicates. Although this survey was carried out in 1988 and improvements have occurred as above, many services are still inadequately resourced, not systematically backed in policy and program and with variable government commitment. Specialised services such as those for women (e.g. refugees, rape crisis centres) and children (sexual abuse services) are very helpful but often not backed by adequate specialised mental health services. These latter are few and need much further development to provide consultation/liaison to victims groups and high quality intensive services oriented to prevention and care for those who have been severely traumatised (Raphael 1991). The mental health consequence of trauma resulting from violence are severe and prolonged and it is critical that services are further developed to provide needed backup to front line groups and specialised care for those in need.

JUSTICE RIGHTS

In International community, through the United Nations Declaration of the Rights of Victims of Violence, approved in 1985, has provided a framework for defining the rights of victims, be they of crime or abuse of power.

It states, as reported by Sumner (1991) "Access to justice and fair treatment: this including being treated with compassion and respect for their dignity; having prompt redress for harm suffered...having information about their cases; ... allowing for concerns of the victim to be presented and considered at appropriate stages of proceedings; having proper assistance throughout the legal process; minimisation of inconvenience and protection of their privacy and safety; avoiding unnecessary delay" (pg. 224). It is also concerned that "medical, psychological and social assistance should be available and policy, justice, health, social service and other personnel concerned should receive training on the needs of victims" (pg225).

Australia is co-signatory to this declaration and it thus applies and should influence policy and practice in this country. Many States have developed policies, charters and so forth (e.g. South Australia, New South Wales) but much further progress is clearly needed to achieve these basic rights for those who have suffered violence.

CONCLUSIONS

There is much to be learned and much to be done for those who have been the victims of violence. Prevention of violence must be the ultimate goal. But until that can be achieved, it is vital that there is a compassionate approach to those affected. Their experience and their suffering must be acknowledged; their story told and heard with concern; care, empathy and support are needed to comfort them for their suffering; but they need also support for a recognition of their strengths, empowerment to undo their helplessness. They seek and deserve justice, but if such justice is *prima non nocue* first not to harm, it must understand and respond to their psychological needs and incorporate these understandings into just practice and just outcomes.

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ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY: An opportunity for reconciliation

Michael O'Connell

INTRODUCTION

Patrick Dodson is a Yawuru man from the Kimberley region of Western Australia. He spent his early years in Katherine in the Northern Territory, before attending the Monivae College in Victoria.

As a Catholic priest he worked for several years with the church in the Northern Territory. He left the priesthood to assume a position with the Land Council in Alice Springs.

In 1989 he was appointed a Royal Commissioner with the Royal Commission into Aboriginal Deaths in Custody. He was tasked to investigate the underlying causes relating to the number of Aboriginal people dying in custody.

In 1993 Patrick Dodson fronted some 400 plus people at the Adelaide Convention Centre to deliver a passionate oration on the plight of Australia's Indigenous people. He implored the audience to confront the effects of dispossession and disruption of Aboriginal society; to look for solutions, rather than blame.

Since he spoke, Patrick Dodson returned to the Kimberley region as the Director of the Land Council. In 1997 he was appointed the Chairperson of the Council for Aboriginal Reconciliation.

The following paper is not Patrick Dodson's oration. Instead, it is an overview of some of the central themes that he broached. Patrick Dodson has not endorsed it.

AN OPPORTUNITY FOR RECONCILIATION

The Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody began in 1987 to investigate the deaths in custody that had occurred during the 1980s. The Commission reported that the number of Aboriginal deaths in custody could be related to the over-representation of Aboriginal people in custody. Over-representation, suggested Patrick Dodson, resulted from social and economic disadvantage experienced by Indigenous Australians. Moreover, the exercise of power by the dominant white population for 200 years - not just in the criminal justice system - had led to a "Neanderthal approach" (Dodson 1993) that lacked respect for the dignity of Aboriginal people as "citizens in their own country" (Australian Reconciliation Convention 1997, p7).

As the Hon. Clyde Holding, Minister for Aboriginal Affairs aptly stated in 1984 (p3),

" The origins of Australia, as the Western nation we know today, are seen by Indigenous people here as the end of the Dreaming, not the birth of the nation."

Dodson argued that Indigenous people were often looked upon as a 'policing imperative' - that is, Aboriginal people are people needing to be policed. This was reflected in policies and practices employed for years by white Australians. This approach - manifest, for instance, in the dispossession of the Aboriginal custodians of the land - has been instrumental in the destruction of Aboriginal society. Dodson asserted that the plight of indigenous people in Australia today was not just a police problem, nor was it solely an Aboriginal problem. The social, economic and political structures that fostered Australia's past need to be torn away - not to erase the legacy of the past but to forge a new partnership ground in inclusion and incorporation, and self-determination.

The Royal Commission's report is an indictment of the treatment of Indigenous people. Its 339 recommendations plot a course to liberate indigenous people.

The Commission found that,

"... Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody."

"... what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community."

"Too many Aboriginal people are in custody too often." (Report (vol 1), p6)

Behind the report and its recommendations, however, are the life experiences of many Aborigines. It is their lives that hold the true message. It is the realities of their lives - John Pat, Eddie Murphy, Charles Michael, Dixon Green, Robert Walker, Mark Quayle, Kingsley Dixon and Alistair Riversleigh, and others - that illustrate the last 200 years might be construed as a holocaust rather than a 'civilising mission'.

Almost half of the Aboriginal people who died in custody had been removed from their real families as children. Almost half of the Aboriginal people who died in custody had been charged with at least one offence before aged 15. Many had repeated contact with the criminal justice system prior to their death. The life experience of many of these Aborigines was compounded characteristics common to Indigenous lifestyle such as unemployment, under-education, poor health, inappropriate housing and cultural deprivation.

Their stories represent a chilling history, which features (among other things) the confinement of Indigenous people to reserves, their dispersal to other than their native lands and the removal of their children. A series of admissions have been countered by denials. There has been a concerted effort to ensure that Australia's modern history is dominated by an orthodox white history. That history has not, for example, recognised the death of more than 20,000 Aborigines defending their land and culture (Reynolds 1997); nor the "... great contribution made by Indigenous Australians to European exploration and settlement of the country" (Clark and others 1994, p23).

The media rarely plays a helpful role. The media often compounds the worst aspects of relations between black and white Australians. The media plays a fundamental role in influencing populous ideas about race and community relations (Dodson encouraged his audience to read, in addition to the report of the Royal Commission's report, the report on the

National Inquiry into Racist Violence 1990). According to Bourke, Hollinsworth, Holt, Jull and Sutherland (1994, p20),

"The [National Inquiry into Racist Violence] was told that journalists did not consistently apply principles of fairness and accuracy when reporting on 'race-related issues, and tended to focus on conflict and extreme views often ignoring the indigenous communities' perspectives, and positive developments within minority racial and ethnic groups, particularly Indigenous communities."

The Royal Commission's recommendations give all of us an opportunity to alleviate, not eradicate some of the horrors of the past. To tackle the disproportionate number of Indigenous people in custody the Royal Commission recommended —

- ★ Reforming aspects of the criminal justice system, including repealing public drunkenness law, changing police arrest and bail procedures and practices, and devising alternatives to police custody (recommendations 87, 60 & 61) as well as legislating to make imprisonment a 'punishment' of last resort (recommendation 92).
- ★ Addressing the underlying issues (see recommendations 63 - 71, 246-288), which require strategies to alleviate the shackles of colonisation inherent in 200 years of domination by white Australians. Fundamental to achieving this is the elimination of inequality and disadvantage that continues to plague Indigenous people.
- ★ Ensuring Indigenous self-determination by the "empowerment of Aboriginal society on the basis of their deeply held desire, their demonstrated capacity, their democratic right to exercise, according to circumstances, maximum control over their own lives and that of their communities" (Report, vol 1, pp22-23; see also recommendations 77, 78, 199 - 204)).

The Mabo decision

White Australians have been comforted by the notion that Australia was 'terra nullus', that Indigenous people simply accepted the intrusion of white colonists. The Mabo decision, like the Royal Commission, provided an opportunity for Indigenous people to be freed from the past, not to forget their past. Other peoples are not asked to forget their past; indeed, the tragic events in history often serve as the basis for those people to seek a better future.

Mabo was a narrow yet courageous decision said Dodson. Although restrictive, it decided that antecedent rights and interests in land possessed by Indigenous 'custodians' of Australia survived change in sovereignty. Mabo shows that successive governments had appropriated land without a 'clear and plain intention' to extinguish native title, which is recognised in common law. Furthermore, the 'Crown' might have acquired political power over land, but not absolute ownership.

Mabo marks a great moment in Australia's modern history. The court held that native title does exist, and there need not be formal recognition by the Crown before such title exists. The rights and interests of Indigenous people should be protected should by the Australian courts. If, however, the Crown extinguishes title then there must be procedural fairness and reasonable compensation.

CONCLUSION

All Australians should learn about the past that, no longer hidden, cannot be changed. It holds lessons for our future. Just as Australians share their past, they will share the future.

The Royal Commission into Aboriginal Deaths in Custody and the Mabo decision provided an opportunity for us to embark on a reparative course, during which Australians might reconcile their differences and learn to appreciate the wealth of their diversity.

It seems to this author that, since Patrick Dodson spoke, Governments across Australia have undertaken a considerable number of initiatives. There has been a substantial move towards reconciliation, despite moves to purge the significance of Mabo and the subsequent Wik case. Far more needs to be done.

Patrick Dodson left his own legacy that night. He challenged South Australians to carry over the Aussie 'fair go' ethic to all people. He strongly encouraged those present to think about the quality of society that could be attained through honest dialogue; through open consultation; through the collective action of Aboriginal and non-Aboriginal people working together for a future our children might cherish.

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THE GROWTH OF POLICIES & SERVICES FOR VICTIMS OF CRIME IN THE UK, 1974 - 1994

Helen Reeves

No-one studying the Criminal Justice System in the United Kingdom today could fail to notice that victims of crime are firmly on the political agenda. Victims feature dramatically in the conferences of the governing Conservative Party, and both the Prime Minister and the Home Secretary have asserted that victims are "*central to our considerations*". The new Leader of the Opposition is also an enthusiastic advocate of victims' rights. Committees drafting new policies on issues as diverse as the cautioning or prosecution of offenders, the administration of the courts, and the release of offenders from imprisonment have all taken care to include amongst their recommendations measures aimed at protecting the interests of victims. A Victims Charter of Rights (Home Office 1990), first published in 1990, is now being monitored and upgraded, and a new Charter is due before the end of this year.

All this is a far cry from the position in 1984, graphically described by Paul Rock (1990) in his scholarly work *"Helping Victims of Crime, the Home Office and the rise of Victim Support in England and Wales"*. Rock describes the institutional apathy that existed towards victims and the obstacles that had to be overcome before their interests could be taken seriously:

"For reasons quite opaque to their members, organisations for victims seemed unable to attract major financial and political support. It was as if victims were unclean, a cross between pariahs and saints. Worse, they were uninteresting unless linked to a more florid politics. "

The '*florid politics*' referred to by Rock (1990) related to the traditional established purposes of criminal justice and tended to consist either of evoking victims in the cause of harsher penalties for offenders or promoting victims as a new party who could mediate with offenders and thus divert them from the legal process and traditional punishment. Each of these attitudes to victims were common in the early 1980s and neither had much foundation in the interests of victims in their own right.

This paper will outline some of the major reasons why victims were eventually accorded their own more prominent position on the criminal justice map. It will describe the policies and practices that have evolved so far and highlight some of the major issues which remain to be addressed. To set the scene, it is necessary to provide a brief historical perspective.

THE VICTIM'S EXCLUSION FROM THE PROCESS OF JUSTICE

Up to the early part of the 19th century, the responsibility for prosecuting offenders in the United Kingdom lay with the individual who had been harmed by the offence. It was the victim who had to assemble the evidence, or to pay a lawyer or other official to do it for him. He was responsible for the way in which the case was presented to the court, and for the costs if the case failed to be proved. For the inexperienced citizen, with no legal education, and for those with few financial resources, the burden of responsibility must have weighed very heavily indeed, and it is probable that many cases which should have been prosecuted in the public interest would not have found their way to a court of law. Had we been considering victims' rights at that stage in our history, we would no doubt have asserted that the duties

forced upon the ordinary citizen were unjust and that more of the burden should be shouldered by the State.

The problems inherent in a system of justice exercised between private individuals lay in the imbalance of power that was likely to exist. A rich, powerful victim could exact disproportionate revenge from a weak or impecunious offender, and a powerful offender could intimidate a vulnerable victim, thus avoiding any sanction.

The gradual introduction of local police services during the 19th century provided an opportunity to redress the balance. The new police constables assumed the responsibility of gathering evidence and presenting prosecutions to the court on behalf of the communities that they were employed to serve. This situation continued until the recent introduction of an independent Crown Prosecution Service in England and Wales, which has taken over that responsibility on behalf of the State. The victim has thus been relieved of the onerous duty of prosecuting his own offender, although victims do retain the right to prosecute when the public authorities fail to do so. The law also makes provision for offenders to be ordered to pay compensation to their victims as a part or as the whole of the sentence of the criminal court.

By intervening between the victim and the offender, the State set out to restore the balance of power between the parties concerned. An elaborate system of justice has evolved, aimed at establishing equity in the way in which various crimes and misdemeanours are dealt with. But by taking over the responsibility for prosecuting and sentencing the offender, the State has introduced a new imbalance of power. The accused is now the weaker and more vulnerable party and is faced with defending himself against the power and authority of the State.

In order to restore the balance and to offer some protection to the alleged offender, a package of rights has been developed to enable defendants to put their case clearly and to protect them from unfair prosecution and punishment. Legal advice and representation are available and strict rules are applied to the way in which evidence can be brought. A new dictum was established that it is better to acquit ninety-nine guilty men than to convict one who is innocent. The fact that both types of miscarriage of justice leave the victim unprotected was ignored.

The victim of crime became regarded as an ordinary citizen with a responsibility to assist the police with the provision of evidence, and when that evidence is needed as part of the prosecution case in court - usually only when the offender is pleading his innocence - the victim will be required to act as a witness. No special status is granted to the victim in respect of the special interest s/he has in the case, and where evidence is not required it has not been considered necessary even to provide information to the victim about the arrest of an offender or about the intention to prosecute. In the course of historical development, therefore, the victim, in being protected from unwanted responsibility, has now been pushed to the sidelines and become irrelevant to the procedures in the eyes of the professionals who operate the system.

VICTIM DISSATISFACTION

Evidence that the pendulum had swung too far began to emerge from research studies early in the 1980s. A survey of burglary victims, carried out by Mike Maguire (1982) at the Oxford Centre for Criminological Research, showed for the first time that some 25% of victims were dissatisfied with the response they received from the police after reporting a crime. The main problems cited by victims included lack of contact with the police; lack of information; and a general feeling that they were regarded as unimportant. Maguire's work was followed up by his colleague at Oxford, Joanna Shapland and others (1985), who studied victims of violent crime as they passed through the criminal justice process. By the time the cases in the sample had passed through the courts, no less than 38% of victims were dissatisfied, and some of

these said that they would not report a crime in the future. Once again, it was lack of information and a general feeling of being attributed low status by the authorities that caused the major problems. There was no evidence in either study that victims wished to resume a responsibility for decision making in the process of criminal justice.

There was considerable concern about the research in police circles and, not unnaturally, some doubt about the validity of the findings. The police in the United Kingdom had for some time enjoyed high status in the community and were generally considered to be well thought of by the public. They saw themselves as the main protectors of victims' interests and were surprised by the research results. A number of comparative studies were carried out by police officers, including one by a group of senior officers on a Command Course at the Police College in Bramshill (Burns-Howell 1982). The proportion of victims expressing dissatisfaction was similar to that in the Maguire study, the main complaints being that the Police did not appear to be concerned about the effects of the crime; did not spend enough time with victims; and did not return for follow-up visits, except for administrative reasons such as checking a statement. Victims were less concerned about recovering property or about identifying the offender than might have been expected, and even when the police had been successful in achieving these results, it did not affect the level of satisfaction. In addition, a large majority of victims wanted more contact with the police and expected to receive follow-up visits, but hardly any wished to trouble the police by asking for this. Lack of recognition and feelings of neglect were a major cause of dissatisfaction.

One interesting aspect of the police study is that police officers were also interviewed. Officers were reasonably accurate in assessing victims' priorities, although they slightly over-estimated the desire for arrest and return of property. In listing their own priorities, the provision of reassurance and support to victims came very low on the list: well behind the organisational requirements of recording details of the crime and taking statements. The officers involved in the study concluded that the pressure of organisational priorities which require police officers to concentrate on the crime and the evidence, in practice prevent the police from providing an effective service to victims. Put another way, by emphasising the relationship between the State and the offender, the relationship between the State and the victim had been completely neglected. This newly identified problem was to become the focus of much policy development during the rest of the 1980s.

A simple diagram of the process described is provided on the adjoining page.

THE DEVELOPMENT OF VICTIM SUPPORT

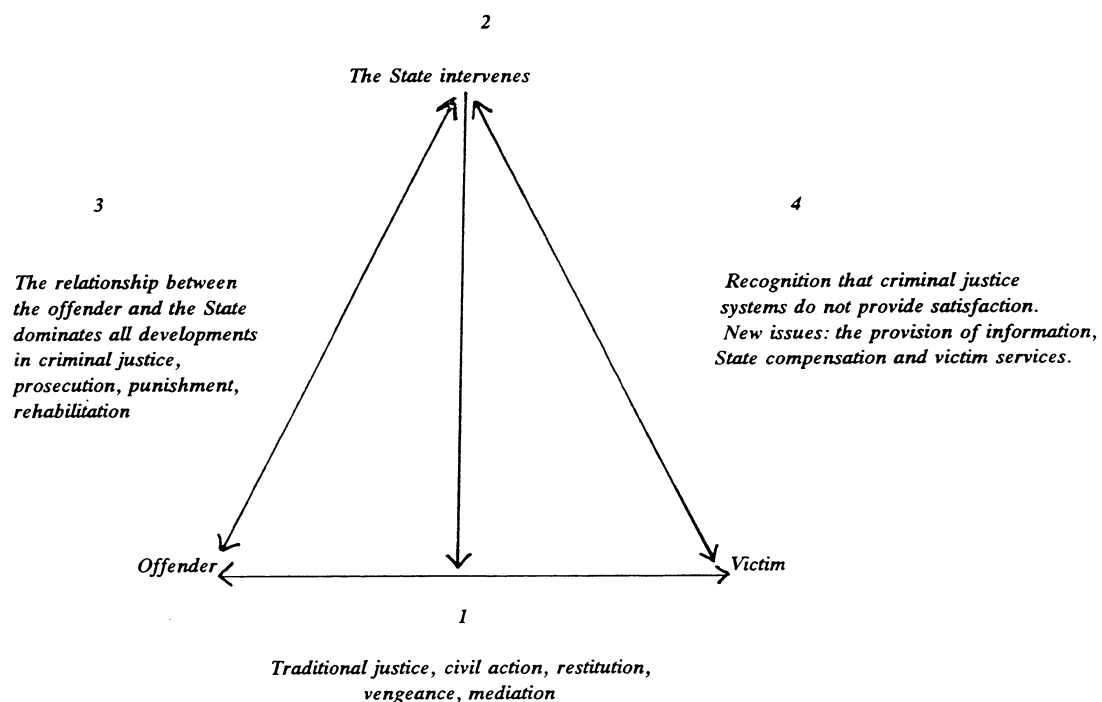
Long before the research, which has been referred to, a new phenomenon was developing in the United Kingdom, in the form of the Victim Support organisation. Victim Support is an independent voluntary organisation, first set up in 1974 to provide direct services to victims of crime from the point at which the crime first comes to notice, extending right through the various processes of criminal justice and for as long as is necessary to deal with the various problems which victims encounter.

The main service is provided by volunteers, trained to national standards, who contact victims and their families, usually in their own homes. Volunteers help victims to talk about their experiences and offer understanding and reassurance about the anger, fear and loss of trust that are the natural consequences of crime. Volunteers also give practical help with repairs, crime prevention and claims for compensation and insurance. Where necessary, referrals are made for professional or specialist help - for example, for legal or medical services or of a transfer to new accommodation.

In order to use the name 'Victim Support', local groups have to conform to a nationally agreed *Code of Practice* that, amongst other standards, regulates the membership of the local

committee. The core membership of the committee must include official representatives of the police, the professional social work agencies, such as Probation and Social Services, and key voluntary organisations that already provide a service to the local community. This representative membership is designed to ensure credibility and high standards of work, as well as to confirm the model of inter-agency work that is an essential feature of Victim Support. The range of representation ensures that the best resources of the local community are brought together and made available to victims of crime. It also ensures that no one agency can dominate the policies or practices of the new victim services that must retain the essential ingredients of independence and confidentiality.

RELATIONSHIPS IN CRIMINAL JUSTICE



Victim Support's relationship with the police is extremely important. Over the years, a high level of trust and credibility has been built up, and this is the key to the current referral system. In the British system, locally based police forces enjoy a great deal of autonomy, and therefore each Chief Constable is responsible for determining the Force policy which will operate towards Victim Support in the local area, although these policies are based on guidance issued by the Home Secretary. In an area where there is a fully developed Victim Support service, the basic referral policy will include burglary, theft, assault and criminal damage. Names and addresses of victims are passed to the local Victim Support co-ordinator, who allocates work to volunteers. This process is known as "automatic referral". It is designed to ensure that all victims of such crimes receive a direct offer of help from Victim Support, which of course they may accept or refuse. In the most sensitive situations, involving sexual assault, homicide or domestic violence, police officers will obtain the consent of the victim before referral, and only volunteers who have received specialist training will be allocated these referrals.

The problem of achieving both funding and recognition from the government has already been referred to. Money is needed to pay the salaries of professional local co-ordinators to

manage the service and to train and supervise the volunteers. Up to the mid-1980s, an increasing number of local government departments had provided limited salaries to local groups. Victim Support was not, however, a statutory responsibility of local government and the salaries were vulnerable to cuts when spending in other departments increased. By 1986, Victim Support had established its credibility amongst other practitioners and had won for itself powerful friends amongst the Police, the Probation Service and the magistrates. After repeated representations, the government finally conceded the importance of the new work and funds were made available to Victim Support to pay the salaries of local co-ordinators.

Today, Victim Support is active in every part of England and Wales. 10,000 trained volunteers are providing direct services, and more than 1,000,000 crimes are referred each year (Victim Support 1993). Everyone is provided with information and an offer of personal service, and 300,000 victims and their families are provided with direct personal support, often over a long period. The government provides a grant of £10,000,000 per annum, which pays for the equivalent of approximately 550 full-time staff (in practice, 750 staff, many of whom work part-time).

THE IMPORTANCE OF VICTIM SUPPORT

Through their contact with victims of crime, particularly those who had experienced serious violence, volunteers gather considerable information on cases where victims feel neglected or even abused by the system of justice. Volunteers who attend court with victims of crime have experienced for themselves abortive visits to court when cases are not even heard, long periods spent in the waiting room alongside the offender and his friends and family, and the serious lack of information, advice and explanation of what is taking place.

In 1989, Victim Support commissioned independent research into the treatment of victims and witnesses in the Crown Courts (Raine & Smith 1991). The results were to cause a ripple of alarm throughout the court system. One in three witnesses would have liked more information on court procedures; 58% felt there had been insufficient consultation over the date of the hearing; in 37% of cases the hearing did not take place on the scheduled day (of whom seven out of ten were unaware of the change until they arrived at court). Most were given too little information; nearly half were kept waiting more than four hours. Victims complained that the cases they heard in court took little account of their own experiences, and they objected to procedural devices such as a plea of guilty to a lesser charge, which fails to recognise the extent of the harm suffered by the victim.

Awareness of the victim's perspective began to spread through the criminal justice agencies as a result of their own involvement with Victim Support, particularly on management committees. The police saw a broader range of needs than those apparent when they interview victims in the immediate aftermath of a crime. Probation officers learnt about the effects of crime on victims, and some of them resolved to make offenders aware of it. Initially, the Magistrates' Association would not allow magistrates to participate, for fear of an appearance of conflict of interest, but Victim Support argued successfully that there is no conflict involved in an expression of concern for victims, and the Lord Chancellor agreed that they could, without impropriety, serve on management committees or, outside their own court areas, as volunteers.

A number of proposals for reform have been put forward by Victim Support in evidence to government committees, in working party reports, and through the twice-yearly Victims Steering Group, which brings together senior representatives of the relevant agencies and government departments. An extensive package of new measures to protect the rights of victims has now been negotiated and agreed. Systems are being introduced to ensure that victims are kept informed at every stage of the criminal justice process, the arrest of an alleged offender, the decision to prosecute, bail, sentence and appeal. Victims are to be

consulted about diversion for prosecution, they now have the right to enter their own compensation claim through the prosecution service, and they are increasingly informed and consulted about the release of offenders from imprisonment. The interpretation of the word 'consultation' has caused considerable problems in practice, and I shall return to this later.

The Crown Prosecution Service has published a detailed statement on its own policies towards victims and witnesses, confirming that reasons will be provided when a prosecution is discontinued, or a charge reduced. This information will usually be conveyed by the police, but in sensitive cases, particularly where there has been a bereavement, relatives will have the right to request an interview with a senior Crown Prosecutor. Additional steps will be taken to reduce the problems of attending court. Victims' interests will be considered when cases are listed, waiting time will be reduced, prosecutors will introduce themselves to witnesses on arrival, and special seating is to be provided for families attending hearings for murder or manslaughter. Seating will also be provided for a supporter who may accompany a witness into the courtroom.

As in most other Western countries, there are additional measures to protect the interests of children who are called to give evidence, including pre-recorded evidence, video links with the courtroom, or screens around the witness box. It would be wrong to claim that all of these improvements have been fully implemented, or that they are working as well as they should. The traditional attitudes and training of the professionals who have to operate the system will take longer to change, but at least the direction of policy is clear.

One of the most important and far-reaching developments has been the introduction of a full Witness Service in the Crown Courts. The service was developed by Victim Support as part of the research programme previously referred to. A professional co-ordinator is appointed to each Crown Court, and volunteers are recruited and trained to provide support to witnesses, victims and their families attending court. The service operates according to a *Code of Practice* that has been negotiated with the Lord Chancellor's Department, which is responsible for the administration of the courts. Early suspicions of the initiative had to be overcome (Rock 1993), but the new service has now been warmly welcomed by judges, prosecutors and court officials. Where possible, witnesses, other victims who wish to attend or bereaved families are contacted in advance of the trial and offered a familiarisation visit to the court. On the day of the trial, separate waiting rooms are provided with refreshments, magazines and toys for the children.

Witnesses needing support are allocated to a volunteer who will offer reassurance and information about the process, accompany them into court and help with de-briefing after the trial. If witnesses wish to leave court, the Witness Service will inform them of the outcome and refer them back to their local Victim Support group if more support is required. The programme has been so successful that Victim Support has now been given sufficient funding to provide a Witness Service in every Crown Court in England and Wales by the end of 1995.

THE EMERGENCE OF REPEAT VICTIMISATION

In December 1993, interest in victims received a sudden and unexpected boost with the publication of a report by the Home Office (Pease et al 1993) describing a series of studies of repeat victimisation and multiple victimisation. To summarise, the British Crime Survey had found that a small number of people are victimised time and again, and account for an inordinate amount of the total crime recorded. 81% of all crime was found to be suffered by only 50% of victims, and still worse 44% of all crimes were suffered by only 4% of victims. To some extent, the phenomenon of multiple victimisation is already well known to the police and social work practitioners. Incidents of racial violence are frequently only the tip of an iceberg of severe racial harassment repeatedly blighting the lives of whole families. Domestic violence is similarly well known to occur again and again with escalating severity. Of all the

women who are murdered in the UK each year, 40% are murdered by their husbands or partners, most of whom have committed other violence against the same woman on earlier occasions.

The new findings went much further, however, and demonstrated that a wider range of crimes was likely to be repeated against the same victims. I can do no better than to reproduce the summary of findings published in a report by the National Board for Crime Prevention (1994), of which I am a member:

The extent of repeat victimisation:

- **Racial attacks** - 67% of the families were multi-victims (Sampson & Phillips, 1992)
- **Domestic violence** - estimates that only 10% involves an isolated event and that the other 90% involves systematic beatings, often with escalating violence (Hanmer & Stanko, 1985).
- **Domestic burglary** - once a house has been burgled, its chance of repeat victimisation was four times the rate of houses that had not been burgled before (Forrester et al, 1988)
- **Motor vehicle theft** - A quarter of respondents experienced more than one incident. 8% of victims accounted for 22% of the incidents measured in the three surveys (Mayhew et al, 1993)
- **Crime against small businesses** - 39% of businesses were found to have been burgled at least once in a year (Tilley, 1993)
- **Crime on industrial estates** - on the worst estates, businesses could expect to be victimised five times per year (Johnston et al, 1991)
- **School burglary and property crime** - 98% of the total crimes recorded by thirty-three schools in Merseyside were repeat crimes (Burquest et al, 1992)
- **Bullying** - a study of comprehensive schools in Sussex showed that 9-10% of pupils had been bullied weekly or more (Yilmaz, cited in Whitney and Smith, 1991).

The importance of the findings for crime prevention has been quickly recognised. By focusing more resources, including support, advice and crime prevention hardware, onto known victims, a very high proportion of crime could potentially be prevented. The new findings have moved Michael Howard, the Home Secretary, to comment that: "More support to victims could prove to be the best form of crime prevention."

Ken Pease, the eminent criminologist, who is primarily responsible for developing the work on repeat victimisation, now claims that Victim Support and Crime Prevention have become indistinguishable, as you cannot prevent crime without supporting victims and there is no point in supporting victims without helping them to prevent the next crime.

This sudden boost of interest is not without its problems. It is important that victims should continue to receive support in order to reduce the effects of crime, and this is a vital end in its own right. To provide support merely as the latest fashion in crime prevention - a fashion that may eventually fail to reduce crime - would be a serious backward step. Even more serious is the obvious danger that, by focusing crime prevention onto victims, those victims will soon be

considered responsible for preventing crime and they are more likely to be blamed when further crime does occur.

A third problem was immediately evident to workers in Victim Support: should we now advise all the people we see that they are likely to be targeted again and again, or is it unacceptable to raise fear, which in some cases (the 50% of victims who are not re-victimised) will be groundless?

There is still a great deal to be done in the field of repeat victimisation before we can know with any certainty which characteristics will identify individual incidents as those which are likely to be repeated. We also need more clarity about which crime prevention measures are more likely to work, and therefore what action should be taken. In the meantime, we must attempt to make best use of the new and extensive interest, which is being focused on victims of crime, while avoiding some of the more obvious pitfalls.

DETERMINING THE VICTIM'S FUTURE ROLE

Great advances have been made during the past decade to improve direct services to victims of crime and to protect victims' interests during the process of criminal justice. In addition, compensation has been paid by the State since 1964 for serious injuries inflicted in the course of violent crime. All of these measures are designed specifically to improve the position of the victim and to promote the previously neglected relationship between the victim and the State, or in the case of Victim Support, the victim and the local community. While there may be a potential bonus in improving individual and public confidence in the process of criminal justice, the offender is not directly affected by these measures (see area 3 on the diagram). Although it has been difficult to achieve recognition and finance for the various developments, they are now widely accepted, uncontentious and extremely popular with everyone concerned.

Far more difficulty is encountered with all developments and proposals that return victims to a direct relationship with the offender (area 1 on the diagram). Even the payment of financial compensation by the offender is not without its problems. Criminal courts in England and Wales have, since 1990, been required to consider compensation orders in all cases, but they must also take the means of the offender into account. Awards can be, and often are, reduced and offenders are given time to pay in accordance with their means. This can result in long delays, during which the victim can neither replace the stolen or damaged property nor put the crime behind them. Home Office (Newburn 1988) research has shown that "while most victims consider compensation orders to be a good idea in theory, they, are less than satisfactory, in practice." It should be noted that there is no requirement for the victim's means to be taken into account. As many people find it impossible to afford the insurance premiums in high crime areas, this can mean that offenders end up in a much better financial position than that of their victims: a clear conflict of rights which has still to be resolved.

The development of mediation programmes between victims and offenders has also been fraught with difficulties. If suitable cases for mediation are identified only when the offender, or more probably the court, has expressed an interest, the victim could feel under pressure to co-operate with the process, particularly if the alternative is that the offender will be prosecuted or imprisoned. On the other hand, one programme in England which set out to ask all victims if they wished to be considered for mediation eventually failed because the relevant offenders were never arrested! If cases can only be identified through the offender, considerable time must be given to prepare and support the victim and to ensure that their consent is freely given. In practice, although mediation became very popular in the UK during the 1980s, the projects had to be revised considerably to take more account of victims' interests. Even so, research demonstrates that, although 81% of victims who actually took part in the projects studied found the process helpful, neither victims nor offenders thought they should take the place of the formal process of cautioning or prosecution, which should

continue to be the responsibility of the State. No further government funding has been provided for mediation programmes since the initial research, although some local authorities, probation services and voluntary organisations continue to operate local programmes.

CONSULTATION WITH VICTIMS

I mentioned earlier that there is new provision for victims to be consulted at various stages of the criminal justice process. Difficulties have arisen as to what 'consultation' should mean in practice. Is the victim to be told passively about the progress of the case, hopefully with some explanation of the reasons for decisions? Does the victim have an opportunity to provide what might be valuable information to the decision makers, anxiety about future safety, or the need for compensation, for example? In theory, there is no difficulty about either of these aspects of consultation, although the mechanisms are still lacking whereby victims can input information into the system after the first police enquiries have been completed.

Much more problematic is the issue of whether or not the victim's opinions should be taken into account in decisions on prosecution, sentencing or release from prison, thus once again restoring the direct relationship between victim and offender and resurrecting some of the old problems which the criminal justice process set out to address.

To illustrate the confusion that has developed in my own country, I would like to take as an example a circular issued to the Police by the Home Office in 1990 on the cautioning of offenders. The police are asked to take into account the victim's "view about the offence", while also being reminded that "the general public interest, rather than the view of individual victims, must continue to prevail in the decision whether or not to caution or to institute criminal proceedings. " The circular also states that, although the consent of the victim to a caution is desirable, it is not essential. The term "view" is ambiguous and implies some element of opinion. This is particularly so as the factual information required from the victim about the extent of any damage or loss, or the nature of any continuing threat from the offender, are listed as separate items about which the victim is also to be consulted. This lack of clarity is sure to lead to a wide range of interpretations in practice and there does appear to be confusion about what is intended.

Similarly, probation officers are charged under the Victims Charter with the duty of consulting victims or bereaved families prior to the decision to release prisoners serving sentences for serious violence. The relevant circular makes it clear that victims and their families' views will not influence the decision of whether or not to release the prisoner, but they may affect the conditions of the release - for example, where an offender is allowed to live. From the correspondence I have received from probation officers all over the country, I am aware that many are finding it extremely difficult to conduct these interviews, fearing that they are likely to stir up strong passions of anger or revenge, which will go unrequited. In practice, this has not so far happened. Families have been pleased to have the information rather than having to worry about a chance meeting; they have valued the opportunity to obtain an assurance that the offender will stay away from their home; and if they would prefer him not to be released at all, this can be acknowledged as a reasonable desire from their perspective and can be discussed openly.

My own view on these related issues is that it is important that victims should be given a full opportunity to say whatever they wish about a crime and to be heard by the decision makers, but it is equally important that, if their opinion will not influence the decision, this should be made clear at the outset. To consult the aggrieved party and then to ignore the views expressed, may create more frustration and dissatisfaction than is necessary by having raised expectations that the victim's opinion would count. There is, in any case, no evidence from existing research in the UK that victims would either wish or expect to be consulted about their opinions regarding the formal management of the case.

VICTIM IMPACT STATEMENTS

This brings me to the complicated issue of victim impact statements. Although there have been suggestions from time to time that these should be introduced in the UK, and the present Conservative government is thought to be interested in the idea, Victim Support has not supported the introduction of victim statements if they are intended as a sentencing tool. The reasons for this have been largely stated above. Victims could have their expectations raised that they can influence the outcome of the case. If the resulting sentence seems surprisingly light, they may feel more aggrieved and insulted than at present. If, on the other hand, the sentence is severe, they may be left feeling guilty and more afraid of the offender's eventual release.

Perhaps some of our fears are based on a distrust of the excessively adversarial nature of our current court system. Information in the victim statement could undoubtedly be challenged, independent evidence sought and appeals lodged if there was seen to be the slightest chance of a sentence being reduced. It has already been suggested that defence lawyers may attempt to delay the case so that a more 'recovered' victim could be presented to the court. Alternatively, the prosecution might oppose the victim receiving counselling or support in case they are too recovered by the time of the trial. Regrettably, counselling is already opposed for children who have to give evidence of abuse as talking about the offence to a third party might contaminate their evidence.

All these dangers arise only if the victim statement is regarded as part of the sentencing process and serving no other purpose. Victim Support has proposed an alternative strategy that is currently being negotiated with the Crown Prosecution Service. We propose that victims should be offered an opportunity to prepare a statement for the Crown Prosecution Service, describing the crime and the circumstances surrounding it in their own words. This might include whether or not they had any previous knowledge or contact with the offender, any continuing threats or fears, and any other aspect of the crime that they would like the prosecutor to know. The suggestion is not that this statement should be presented to the court, but that it should inform the prosecution service in the general management of the case. It would assist in determining whether or not a prosecution was in the public interest; whether bail should be objected to; and whether the validity of certain lines of defence or mitigation might be questioned. The question of whether or not to refer specifically to the victim's statement in open court would be a matter for the professional judgement of the prosecutor. It is recognised that the rules of disclosure would require such a statement to be given to the defence. Victims would need to be fully aware of this before preparing their statement so that they could take this into account in deciding what information to include.

CONCLUSION

The position of victims in the United Kingdom has improved dramatically during the past twenty years with the introduction of Victim Support in 1974, and more recently by improved recognition in the process of criminal justice. Far more support is now available from their local communities and recognition has been given by the various agencies of the government. There remain questions to be resolved, however, regarding the formal relationship between the victim and those aspects of the criminal justice process that have a direct bearing upon the offender. Victims should be given as much information as possible about the progress of their case and explanation of any decisions which have to be made. They should also have opportunities to communicate any information they have about the crime to the people who are responsible for making the decisions and to seek clarification of any matter that concerns them. Caution should, however, be exercised about any suggestion that victims might resume a position of responsibility by being involved in formal decisions concerning the prosecution or treatment of the offender.

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CUSTODY, CRIME & THE COMMUNITY

David Biles

INTRODUCTION

I would like this oration to be seen as something of a report card on the use of custody in Australia in the mid-1990s. Without wishing in anyway to be alarmist, I want to suggest that our custodial regimes are in a state of ferment with pressures for change coming from many directions, while at the same time the number of people in custody are increasing and budgets for administering the custodial services are shirking. The public mood across the whole of Australia in recent years has clearly been in favour of 'getting tough' with law breakers and this has resulted in legislation in some jurisdictions abolishing remissions and increasing sentences, as illustrated by the so-called 'truth-in-sentencing' and 'three strikes and you're in' slogans. This has led to acute prison overcrowding in all mainland states, and it has also led to calls for the privatisation of prisons on the grounds that they will be less expensive. Then there is the question of how best to manage AIDS infected prisoners; this is one of the many issues that provoke major differences of opinion. There is also continuing concern about the unacceptably high numbers of deaths in custody and the inadequate implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody. There is further anxiety about whether or not the custody we apply illegal immigrants is humane and in accordance with United Nations protocols, and there is also pressure for all governments (Commonwealth, State and Territory) to enact legislation that will authorise the international transfer, both in and out of Australia, of convicted foreign offenders serving substantial prison sentences.

All of this, and much more, is happening at a time when we are less well informed about the use of custody in Australia than at any time in the past 20 years. That unfortunate information gap has been created by a decision of the Commonwealth Minister for Justice in October 1993 to establish priorities for the Australian Institute of Criminology which excluded reference to the collection, analysis and publication of the wide range of correctional statistics and other correctional data that the Institute had developed over many years. The Minister's decision was subsequently endorsed by the *Report of the Review of Commonwealth Law Enforcement Arrangements* in February 1994, on the grounds that corrections was a matter of low priority as far as the Commonwealth is concerned. In my opinion, that decision was ill conceived and contrary to the national interest. To date, no other agency has taken over the work that the Institute was ordered to terminate and, I believe, it is already too late for the data collections to be reactivated without a substantial loss of continuity. One direct consequence of this information gap is that this oration will not be as liberally sprinkled with statistics and graphs as is usually the case with my work.

I will have more to say about the role of the Commonwealth Government later, but I would like in these introductory remarks to explain why I have chosen the word 'custody' rather than 'prison' or 'incarceration' in the title of this oration. At this point in our history it is safe to say that all Australian jurisdictions have irrevocably resolved that neither capital punishment are acceptable in a society which likes to see itself as humane and civilised. Therefore, the most severe penalty that may be imposed on persons who commit even the most serious or heinous crimes is the loss of liberty. In these days we do not kill or maim offenders, but we may restrict their freedom of movement. We also do that with other categories of people, some of whom are only suspected or accused of being offenders, and all of these categories are potentially controversial. As free and responsible citizens I believe that we all have a duty to at least know, or try to know, who it is that our representatives, our

judges, police and other officials, place in custody. We also should know why they are in custody, for how long, and under what conditions? To start moving in that direction it may be useful to try to unravel the many face of custody that are to be found in this nation.

THE MANY FACES OF CUSTODY

There are at least six different types of legal custody in Australia, the most important of which is represented by the prison systems of the six states and the Northern Territory. In the days when we used to count these things, there were just over 15,000 people in prison in approximately 80 separate institutions. About 2000, or 13 per cent, of the total were unconvicted remandees, so we should probably think in terms of two sub-systems: one for convicted prisoners serving sentences and the other for persons remanded in custody are not sentenced to prison, but are either acquitted or sentenced to non-custodial penalties, if not released on bail before coming to trial.)

Probably the second most important type of custody in terms of numbers is that administered by our eight police forces. In this custodial system the numbers passing through are extremely high (much higher than through our prisons) but the numbers inside at any point in time are relatively small. Our best estimate is that between 300,000 and 350,000 incidents occur each year in which people are taken into police custody, but only between 500 and 1000 people are being held in police cells or watch houses at any one time. (McDonald 1993) Until the Royal Commission into Aboriginal Deaths in Custody there was very little hard evidence or understanding about how Australia's police custody is by no means absolute as many remandees are held in police watch houses, especially if prisons are crowded, and in remote areas convicted offenders may serve sentences of up to three months in police custody without being transferred to a prison.

Similarly with the third category of custody, that of juvenile detention, there is not an absolutely fixed line between institutions for juvenile offenders and prisons for adult offenders as the age cut-off point, either 17 or 18 years, varies between jurisdictions, and for the most serious offenders juveniles may be sentenced or transferred to prison even though younger than the cut-off age. To complicate matters further, in Victoria there are Youth Training Centres which take offenders between the ages of 17 and 21 years, and in all jurisdictions young people in juvenile institutions are not transferred to prison when they reach the cut-off age and so there are always people in juvenile institutions who are older than the relevant cut-off age and it is also likely that at any time there will be some younger people in prison.

The other three categories of custody that are used in Australia today are represented by immigration detention centres, military prisons or guard houses, and secure facilities in psychiatric hospitals for persons suffering from serious mental illnesses who may or may not have been accused of committing criminal offences. Without labouring the point, I want to suggest that, as with prisons, police watch houses and juvenile detentions centres, the distinction between these other categories is also not as clear as might be imagined. Illegal immigrants may be held in prison if other, more appropriate, facilities are not available; offenders in the defence forces may also be found in police or prison custody; and mentally ill offenders are not infrequently transferred between prisons and psychiatric hospitals according to their state of health and their manageability. In short, it can be seen that in a number of different ways our separate custodial systems are inter-connected and to some extent overlapping. There may be some value therefore in thinking in terms of one overarching custodial system that is comprised of a number of different parts. If we did that, even though we do not have accurate figures for any one of the six components, my best guess would be that the national total would be between 17,500 and 18,500 people in custody at any one

time.ⁱ That is about one person in every 1000 in the community, or 0.1 per cent of the total population. The national total is certainly not overwhelmingly large, compared with many other nations in which proportionately four or five times as many people would be in some form of custody, but we know from studies of the relative use of imprisonment in different jurisdictions that there are remarkable variations and that these are very persistent over time.

IMPRISONMENT AND CRIME - THE LASTING PARADOX

These studies have repeatedly shown that there are very significant differences in the imprisonment rates (prisoners per 100,000 of the population) of the six Australian states and the two mainland territories. The Northern Territory rate is nearly always nine or ten times higher than the rate for the Australian Capital Territory, and, among the states, the Western Australian rate, which is the highest, is generally between two and three times higher than the Tasmanian rate, which is the lowest. For the past two or three years the New South Wales rate has been just over twice the Victorian rate, while the rate for South Australia has remained almost exactly at the national average of 86 per 100,000 of the total population or 114 per 100,000 of the adult population. (For the sake of completeness, it should be mentioned that the Queensland rate is generally below the national average, about half way between New South Wales and Victoria, but there are some doubt about the accuracy of the Queensland figures.).

It is sometimes suggested that these remarkable and persistent differences may be explained by reference to the numbers of Aboriginal and Torres Strait Islander people in the general populations and in the prison figures for each jurisdiction, but this is by no means a total explanation. The suggestion can easily be tested by calculating the non-Aboriginal imprisonment rates (that is without counting Aboriginal people in the community or in prison). When this is done the differences are considerably reduced, but the Northern Territory rate is still three times higher than the rate for the Australian Capital Territory, and the New South Wales rate is still twice as high as that of Victoria. The South Australian rate remains firmly fixed at the national average, but the Western Australian rate drops markedly below that of New South Wales and even slightly below that of the Northern Territory. This exercise identifies New South Wales as by far the most imprisoning jurisdiction in Australia with an adult non-Aboriginal imprisonment rate of 122 compared with a national average of around 94. The difference in the overall pattern can be seen in the next graph.

While the search for a convincing explanation, or explanations, for the differences in the Australian rates remains largely unsuccessful, the one thing that can be said on this topic with some degree of confidence is that the wider use of imprisonment cannot be shown to have an positive impact on the level of reported crime. The citizens of the New South Wales are certainly not twice as safe as their neighbours in Victoria, not is the Northern Territory the safest part of Australia as far as crime is concerned. Contrary to the belief of many members of the public, and nearly all politicians, within the limits that are acceptable in our type of society, we cannot buy our way to public safety by putting more and more offenders behind bars. It might perhaps be different in a totalitarian society that was prepared to meet the enormous costs involved, but within the limits available in Australia increasing the number of prisoners two or three times would not make any demonstrable difference to crime, even though it certainly would to the budget.

It should not be surprising that this is the case. We have known for many years from the results of crime victim surveys that a very high proportion of serious offences (offences that would almost certainly result in imprisonment if they were detected and convictions were

ⁱ In addition to the prison and police figures given earlier, informal inquiries suggest that there are about 1000 people in immigration and detention, 700 in juvenile detention, from 200 to 300 in secure psychiatric hospitals, and 50 in various forms of military detention at any time.

recorded) are not even reported to the police. For sexual and non-sexual assault it seems that only between 10 and 20 per cent of the offences are reported, and for nearly all categories of crime the police only 'clear', or solve, a very small proportion. And of those cases that are 'cleared', by no means all proceed to a court hearing, and of those that do, some result in acquittals and only a small proportion of the cases which result in convictions lead to imprisonment. The majority of convictions lead to the imposition of fines or other non-custodial penalties. My conservative conclusion on this point is that not more than one in one hundred imprisonable offences actually result in prison sentences being imposed. Other criminologists have suggested that the correct relationship is lower to one in one thousand. Whatever the real figure, it cannot realistically be expected that slightly shortening the odds against the offender, by for example spending millions of dollars to double the imprisonment rate, would make any real difference to the probability that a particular individual would or would not commit an offence. It must be seen as quite naive to assume that it would.

Before leaving the subject of the relationship, if any, between the use of prisons and the incidence of crime, a few more words must be said about the current state of crime in Australia. There is insufficient time available for a thorough review of the subject, but we are at a fascinating period of our history as there is an array of evidence from scattered sources that tends to show that, for the first time in decades, the rates for many offences, if not all, are actually declining in many parts of the country. The total picture is not at all, are actually declining in many parts of the country. The total picture is not at all clear at this time as well as from crime victim surveys, thus increasing one's confidence in the validity of the trend. At the same time as this evidence was emerging from agencies in different states, the first report of the National Crime Statistics Unit of the Australian Bureau of statistics was published (Castles 1993) that was in May 1994. This report does not show trends over time, but it does, for the time, allow reasonably valid comparisons to be made between Australian jurisdictions on the levels of reported crime in the calendar year 1993. It shows that, in general terms, disregarding minor variations, the reported rates for violent offences in the Northern Territory are many times higher than the national average, and the rates for most offences for Tasmania and the Australian Capital Territory are noticeably, but necessarily dramatically, lower than the national average. All of the other differences between jurisdictions seem to be less significant, but it must be said that the South Australian rates tend to be on the high side of the average.

If one compares this national picture of crime in Australia in 1993 with the data on the comparative use of imprisonment that I presented earlier, it seems reasonable to conclude the imprisonment rates are driven by crime rates, rather than the opposite. In other words, where crime rates are high there will also be a high use of prison, and where crime rates are low the prison figures will be correspondingly low. I believe that this is quite a useful observation as far as the extremes of crime rates and imprisonment rates are concerned, but it does not help us to understand the other large differences in the use of custody that we have seen between those extremes, for example between New South Wales and Victoria.

Nevertheless, from this brief and sketchy review of the information that I have presented so far, I would like to suggest it is reasonable to conclude that a democratic and compassionate society is one which would keep the use of custody to the lowest possible level that is consistent with public safety and tolerance. As was stated most powerfully by the Royal Commission into Aboriginal Deaths in Custody, both in prisons and in police cells, custody must only be used as a 'last resort'. It is a matter of considerable regret, almost to the point of despair, that since the release of the final report of the Royal Commission in May 1991 the number of people in prison has increased dramatically, even though the number in police custody seem to have come down. The increase in prison numbers may well be due to the hardening of public attitudes that I referred to earlier. Even if there were total agreement with the proposition that custodial numbers should come down, I think that there may well be some disagreement about how that is to be achieved. For example, there is widespread support for

the idea that making a range of alternatives to imprisonment available to the courts would reduce the number of convicted offenders sentenced to prison. This is an attractive idea that obviously has some validity, but as a solution to the problem of high prison numbers the evidence is not encouraging. In fact, the notion of alternatives to imprisonment may be a myth.

THE MYTH OF ALTERNATIVES

It seems as if it is contrary to common sense, but the non-custodial measures that are usually referred to as 'alternatives to imprisonment', such as fines, probation and parole orders, community service orders, home detention and suspended sentences, seem to be often used as alternatives to each other, rather than as measures that genuinely reduce the flow of offenders into our prisons or reduce the time that they spend inside. Before proceeding, I would like to make it quite clear that I am fully supportive of the wide use of all these measures, especially if they incorporate programs, such as anger management or drug treatment, that aim to correct the underlying cause of the unacceptable behaviour. I must also say that I greatly admire and respect the dedicated work of community corrections officers who supervise and administer these schemes, but I seriously doubt whether the availability of these options has had much impact on the actual cause of custody. If that were the case one would expect that those jurisdictions which recorded higher-than-average relative use of non-custodial penalties would have lower-than-average use of imprisonment, and vice-versa, but quite the opposite is revealed by an examination of the facts.

Even though the facts are not as readily available now as they were a few years ago, every time in the past that my colleagues and I studied the full range of correctional statistics that were previously published by the Australian Institute of Criminology it was strikingly clear that the high imprisoning jurisdictions, the Northern Territory, Western Australia and New South Wales, also had the highest rates for the use of probation and community service orders. Conversely, the low imprisoning jurisdictions, the Australian Capital Territory, Tasmania and Victoria, were shown to have the lowest rates for the use of non-custodial or community-based penalties. This unexpected finding creates the impression that perhaps the Australian jurisdictions are more or less *generally* punitive, to a large extent irrespective of the level of crime. Certainly, the greater use of the so-called 'alternatives' does not seem to have fulfilled its promise.

Furthermore, there is a real danger with some of the non-custodial measures towards the upper end of the hierarchy of penalties, that the inevitable proportion of failures will actually boost prison numbers. This could happen because a breach of the conditions of a very strict order will almost certainly result in a period of imprisonment, whereas the breach of a less strict order may well result in the offender being given a second or even third chance in the community. I do not propose that we should use non-custodial penalties less frequently, but I would seriously suggest that we should cease referring to them as 'alternatives to imprisonment'. They should be seen as penalties in their own right, and the principle of the lowest level of intervention that is compatible with the public interest should always guide their application.

Before leaving the subject of non-custodial penalties, I feel compelled to raise the question of why the services that administer them have not yet to my knowledge been embroiled in the privatisation debate. If there is merit in privatising the operation of prisons and court escort services, one would have thought that probation and parole officers and community service order supervisors might be considered for the same fate. Perhaps the answer is that community corrections offer meagre pickings compared with the high costs involved in full-time custody.

PRIVATE PRISONS - COMING READY OR NOT

Whether we like it or not, there seems to be no doubt that private prisons have found a place in Australia and that place seems destined to increase greatly over the next few years. At the present time there are three private prisons in Australia, two in Queensland and one in New South Wales. (The latter at June, with accommodation for 600 male prisoners is the largest prison in Australia.) These three prisons hold approximately seven per cent of all of the prisoners in Australia. This is a much higher proportion than any other country in the world, and, in my judgment, it is likely to reach between 25 and 30 per cent by the end of this century. By that time, Victoria will be the most privatised jurisdiction in Australia with at least half of its total prison population in three private institutions, and some of the other States will each have one or more private prison.

It would be fairly easy, I believe, to develop an argument against this trend on the grounds that the punishment of offenders is a matter of such grave significance that it must only be undertaken by the State itself. Furthermore, for private companies to profit from the suffering of others is seen by many people to be unseemly if not immoral. This can be a powerful argument, but I do not believe that it is totally convincing in a society which allows, and in fact encourages, private schools and private hospitals and has also for many years accepted privately-run juvenile detention centres, especially by the Catholic Church and Salvation Army. Also, the opponents of prison privatisation constantly run the risk of being interpreted as ineffective and as uneconomical as they could possibly be. That is not a conclusion that I would happily accept. I therefore welcome some level of prison privatisation on the grounds that it may improve the total system by the injection of new ideas and new methodologies, but I give my support with two major qualifications.

In the first place I believe that it is absolutely vital that all private prisons are continuously and rigorously monitored to ensure that the human rights of the prisoners are being respected and that adequate provision is made for security, safety, health care, nutrition, work, recreation, education and training. Who should be responsible for the monitoring is a question that I will explore later. My second qualification is that private prisons must be independently evaluated to assess their relative effectiveness in terms of outcomes or recidivism. Monitoring and evaluation are not the same. Monitoring examines the day-to-day operations of the institution, and is primarily concerned with standards, whereas evaluation examines the long-term impact of the institution in terms of post release behaviour, but both will be conscious of the relative costs of private and government-run prisons (see, for example, the *Melbourne Age*, 10 February 1995).

One aspect of prison privatisation that I believe has considerable potential is the provision of services, or even complete institutions or parts of institutions, for Aboriginal and Torres Strait Islanders prisoners. The fact of Aboriginal over-representation in prisons, in non-custodial corrections, and was highlighted by the Royal Commission into Aboriginal Deaths in Custody. This issue deserves close scrutiny, as does the challenge of responding to the special needs of these people.

ABORIGINAL OVER-REPRESENTATION

Possibly one of the most unexpected findings of the Royal Commission into Aboriginal Deaths in Custody was the fact that Aboriginal and Torres Strait Islander people who were in either prison or police custody, once they were there, were no more likely to die than were non-Aboriginal people in custody. There are many other relevant factors, such as poor state of Aboriginal health, but the overwhelming reason why an unacceptably high number of Aboriginal men and women died in prison and in police cells was the extraordinary high levels of Aboriginal over-representation in both forms of custody. Throughout the period covered by the inquiries of the Royal Commission, January 1980 to May 1989, the proportion

of all prisoners who were identified as Aboriginal increased from just over 10 per cent to around 14.5 per cent. Since then, that trend has continued with Aboriginal prisoners comprising 17.8 per cent of the national total in April 1994. These percentages are to be seen against the background figure of approximately 1.1 per cent of the adult Australian population who are Aboriginal or Torres Strait Islander. The actual level of over-representation, calculated as the ratio of the adult Aboriginal imprisonment rate to equivalent non-Aboriginal rate, for each Australian jurisdiction in April 1994 is shown in the next graph.

It can be seen from this illustration that, for Australian as a whole, an adult Aboriginal person was at that time nearly 20 times more likely to be in prison than was an adult non Aboriginal person, but for three jurisdictions, South Australia, Western Australia and Victoria, that ratio was well over 20. There is nothing in these ratios that can cause any of us to take any pride. A more appropriate reaction would be one of shame.

In the light of these figures it is probably not surprising to find that Aboriginal people are also significantly over-represented in non-custodial corrections, but what is perhaps unexpected is the fact that in this field the level of over-representation is considerably lower than it is in prisons. One study that I undertook for the Royal Commission using 1987 data found that 'for Australia as a whole, adult Aboriginal people [were at that time] 15.1 times more likely than non-Aboriginal people to be in prison, but they [were] only 8.3 times more likely to be serving non-custodial correctional orders' (Biles & McDonald 1990). This finding prompted the speculation that perhaps the difference was due to the possibility that some magistrates and judges, as well as parole authorities, held the view that Aboriginal offenders were either less able or less willing to comply with the requirements of non-custodial orders than were non Aboriginal offenders. That speculation receives some support from the fact that Aboriginal prisoners generally serve shorter prison terms than non-Aboriginal prisoners.

The data from the two arms of corrections are bad enough, but the data from police custody create an even worse picture. The second national police custody survey was conducted during the month of August 1992 and it found that of the 25,654 people placed in custody (not just arrested) during that month 28.8 per cent were identified as Aboriginal or Torres Strait Islander. That percentage is almost exactly the same as found in the first survey in 1988. The actual levels of over-representation are shown in this graph. From this it can be seen that the national

level of over-representation is much higher than it is for prisons (the actual ratio is 26.2) but the level for Western Australia is a remarkable 51.9. (It is easy to become insensitive to figures like this, so it may be wise to remind ourselves that this survey told us that in Western Australia at that time an Aboriginal adult was very nearly 52 times, or 5,190 per cent, more likely to be subjected to custody in police cells than was a non-Aboriginal adult.) (McDonald 1993) This survey also showed that there was an overall reduction in the use of police custody between 1988 and 1992, but that the proportion who were Aboriginal remained virtually unchanged. It is relevant to note at this point that since the tabling of the report of the Royal Commission report on 9 May 1991 there has been a significant decrease in the numbers of Aboriginal deaths in police cells, but the number of death sin prisons, of both Aboriginal and non-Aboriginal prisoners, have reached higher levels than at any time since these data have been collected (Halstead, McDonald & Dalton 1995). Clearly, much more needs to be done and, in my view, most of the changes that are needed lie outside the operation of the criminal justice system, and also lie outside the scope of this address.

Before leaving the subject of Aboriginal custody, I would like to refer briefly to a specific case. It is the case of James Savage, a young Aboriginal man who was convicted a few years ago for a very serious crime in Florida in the United States. He was initially sentenced to death, but that sentence was changed on appeal to one of life imprisonment. Several Aboriginal organisations then proposed that he be transferred back to Australia, but that

proposal foundered because there was no lawful basis for it to be done. Australia did not then, nor does it yet, have any bilateral treaties that would allow for the transfer of foreign prisoners between nations.

THE INTERNATIONAL TRANSFER OF PRISONERS

The international transfer of prisoners is an initiative that is strongly supported by the United Nations, the Council of Europe, the Commonwealth of Nations, Amnesty International and the International Committee of the Red Cross. Within Australia, it also now has the support of the Standing Committee of Attorneys-General and legislation at the Commonwealth, State and Territory level is expected on this subject later this year. The central idea is that convicted offenders serving substantial prison terms in foreign countries may be permitted (if they apply and if the authorities in both nations agree) to serve a part of their sentences in prison in their home nations. The motivation for this initiative is essentially humanitarian, as the transferred prisoners will be spared the additional stress caused by a foreign language, and culturally different food and living conditions, and they will also be closer to their families. From Australia's point of view it will also save money as all of the estimates suggest that slightly more foreign prisoners will leave than Australian prisoners overseas will come home. Even though the proposal seems sensible and straight-forward, in practice it will require considerable diplomatic effort as, especially in the beginning, each case will need to be negotiated separately. A high level of cooperation between the Commonwealth and the States will also be required as it will be the Commonwealth that does the negotiating but it will be the States and Territories who will be receiving or sending the prisoners. It will in fact be necessary for the relevant authorities at the Commonwealth and State level to agree, as well as the overseas nation and the prisoner himself or herself, before any transfer could take place.

I suspect that some people will suggest that the effort involved in arranging the international transfer of foreign prisoners will not be justified, especially as the number of cases, both in and out, will not be more than a few dozen each year. In response to this it must be said that most nations in the Western world, and many developing nations as well, have had transfer treaties operating for many years. It is surely time that we showed the rest of the world that Australia is also willing to participate in this type of international cooperation (Biles 1994).

THE UNITED NATIONAL PROTOCOLS ON THE TREATMENT OF OFFENDERS

There is no obligation on Australia at this time to pursue the matter of the international transfer of prisoners as there is as yet no treaty on the subject. There is, however, a model agreement on the transfer of foreign prisoners, which was accepted by a United Nations congress in 1985. This has considerable influence, if not authority. There is also a *Council of Europe on the Transfer of Sentenced Persons*, which Australia may choose to join.

Other United Nations instruments or protocols do impose obligations, and probably the most relevant of these is *the International Covenant of Civil and Political Rights* which was ratified by Australia in 1981 and also incorporated into Australian law (*Human Rights & Equal Opportunity Act 1986* (Commonwealth)). Article 10 of the Covenant requires that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Such a requirement must surely be beyond argument, but there may be difficulty in ensuring the extent to which it is met. Certainly, the Royal Commission into Aboriginal Deaths in Custody found numerous examples that could not by any standard be described as exemplifying humanity and respect for the human dignity of people in custody.

Compliance with the International Convention and similar protocols is the subject of quinquennial implementation reports prepared by the Commonwealth Attorney-General's Department and considered by the Standing Committee of Attorneys-General. Thus, the

States and Territories, who are responsible for the administration of nearly 95 per cent of all custody in Australia, have an opportunity to express their view on the matter of compliance with this and other international obligations. But the question must be raised: how could an Attorney-General possibly know whether or not all person deprived of their liberty in his or her jurisdiction were always being treated with humanity and respect? Short of having a continuous Royal Commission, or a very thorough independent inspection procedure, I would think that the question is unanswerable.

There are other international protocols that potentially raise similar problems as far as the reporting requirements are concerned. In particular, compliance with the *Standard Minimum Rules for the Treatment of Prisoners*, which is also the subject of a report every five years, has always in Australia been based on the views of the correctional administrators themselves. In my experience, no attempt has ever been made to obtain an independent view on how closely we do in fact comply with the specifications set out in the rules. (There is now an Australian version of the rules, known as the *Standard Guidelines for Corrections in Australia*, which was published in 1989, after more than a decade of debate and discussion, but those guidelines make no provision for the reporting of compliance or independent assessment. It must therefore be doubtful if they have any impact on Australian correctional policy or practice.)

Before leaving the subject of international protocols and treaties I want to say that I am aware of increasing criticism by the States and Territories to the effect that the Commonwealth has too readily, and without adequate consultation, entered into treaties which cover areas of government which are clearly the responsibility of the States and Territories. That may well have been a valid criticism in the past, but I believe that since 1991, when the Special Premiers' Conference established a Standing Committee on Treaties, there has been a much more open and cooperative approach. It is probably still the case, however, that there is room for closer collaboration and mutual respect between all tiers of government.

That observation leads me to raise the question of what is the proper role of the Commonwealth Government in relation to the use of custody?

THE ROLE OF THE COMMONWEALTH GOVERNMENT

We have already seen that the Commonwealth is directly responsible for two of the six forms of custody, immigration detention centres and military prisons and guard houses, and there must also be a small number of cases where the Australian Federal Police hold suspects in custody (apart from the cases in the Australian Capital Territory where the AFP operate under contract to the ACT Government). My best guess is that all of these categories would comprise only from five to six per cent of the national total. Then there are Federal prisoners who are held in State prisons as required by s.120 of the constitution. At the last count there were just over 550 Federal prisoners, almost exactly half of whom were in New South Wales prisons.

It would seem highly unlikely in the present economic climate, but it might just be possible in different circumstances, for the Commonwealth Government to establish its own prison system, as the Americans did mainly in the 1920's and 1930's, in order to express dissatisfaction with the State prison systems. The main reason why this is highly improbable is that, unlike the United States before the Federal Bureau of Prisons was established, the States in Australia are not paid for housing Federal prisoners. It has been suggested, however, that this matter is taken into account in the general distributions of the Commonwealth Grants Commission. the reality is that there is no economic incentive for the Commonwealth to become more actively involved.

In my view, the principal roles for the Commonwealth Government in relation to custody should lie in information gathering and dissemination, the coordination and facilitation of relevant international activities, and perhaps some assistance with the monitoring of custodial standards. As far as information gathering is concerned, you will not be surprised if I suggest that the Commonwealth should act quickly to re-establish the collections of national correctional statistics that were terminated just over a year ago. Apart from many other considerations, it surely makes a mockery of our commitment to human rights if we claim that all persons who are deprived of their liberty in Australia are treated with respect and dignity when we cannot with any confidence state how many people we are talking about. Currently, we don't know who they are, where they are, or why they are in custody, but we are quite sure they are treated humanely! It is relatively unimportant whether this work is done by the Australian Institute of Criminology, the Australian Bureau of Statistics, or by some other body. It is much more important that the actual work is done, and the results are widely disseminated.

As far as relevant international activities are concerned, the Commonwealth must clearly continue to play a central role, and hopefully a more collaborative and cooperative role, in the negotiation of treaties and the reporting on their implementation. The imminent start to the program of transfer of foreign prisoners will bring a sharpened focus to the need for international treaties. It will also greatly increase the workload of our diplomats, as well as increasing public understanding of the need for international activity in relation to custody.

At a rather more radical level I would like to suggest that the Commonwealth should offer to assist the States and Territories with the monitoring of custodial standards. What I have in mind is the creation of a new body that might be called a National Custodial Standards Agency or Council.

A NATIONAL CUSTODIAL STANDARDS AGENCY

If such a body were to be created, it could only be on the basis of the full cooperation and support of the State and Territories. As the States and Territories have the major responsibility for custody, I believe that they should have a dominant role in making appointments to the agency. They would then have some sense of ownership or control, but I would suggest that the Commonwealth should provide the necessary funds, or a major part of them, because it is the Commonwealth that signs the United Nations protocols and reports on their implementation on behalf of the whole nation. Also, as I have indicated earlier, the Commonwealth does have some direct responsibility in this area.

As I see it, the major aim of such an agency would be to ensure the compliance with the *Standard Minimum Rules for the Treatment of Prisoners*, the *International Covenant on Civil and Political Rights*, and other relevant international protocols, possibly including the *Council of Europe Convention on the Transfer of Sentenced Persons*. The agency would conduct regular inspections of all custodial facilities, including private and public prisons, police watch houses, immigration detention centres, juvenile detention centres, etc. and would prepare detailed reports on its findings. (I would suggest that drafts of the reports should, as a matter of courtesy, always go to the relevant custodial agency for comment before release.) The reports would consider matters such as: security, safety (of staff as well as inmates), classification procedures, health services, nutrition, hygiene, the provision of appropriate work, education, recreation, training and treatment programs, freedom of religious observance, and the adequacy of grievance and discipline procedures. It would not be part of the agency's role to try to settle individual grievances, but to ensure that appropriate grievance resolution mechanisms are in place.

I do not think that it would be possible for any single agency to inspect every custodial facility in each country every year, especially police facilities, of which there are over five

hundred ⁱⁱ across Australia, but for all larger facilities annual inspection would seem appropriate. Priority for inspection would clearly be given to facilities of greatest potential for public concern such as private prisons and immigration detention centres, but priorities would obviously change from time to time. In addition to physical inspections, the work of the agency might well include the regular collection of other information, such as the national statistical collections that I mentioned earlier.

For a custodial standards agency to be effective it must be seen to be both independent and authoritative. I must also be practical and realistic. Custodial authorities will be understandably cautious about giving their support to the creation of an agency that in the future may criticise them, especially if the agency is seen as too ideological and setting standards that are not realistically achievable. However, such agency should not be a threat to operational managers and, in time, could be seen as of considerable value in that it will identify what is being done well and where improvements are needed. The reports of the agency may therefore avert future political crises in relation to custody and may even eliminate the need for future Royal Commissions in this area. If it did only that, a National Custodial Standards Agency would times over save the costs that it would itself incur. (The Royal Commission into Aboriginal Deaths in Custody, which ran from October 1987 to May 1991, cost approximately \$40m, largely paid for by the Commonwealth. Most of the States and Territories have also conducted Commissions or other inquiries into their correctional systems in recent years.)

CONCLUSIONS

In conclusion, I would like to reiterate my view that we all have a public duty to ensure that custody, the most severe penalty or form of control that may be imposed in this country, is always used wisely and humanely. I do not advocate the abolition of any of the forms of custody that I have mentioned, but I am quite confident that we would not place the community at risk, for most of them, they were used less often and for shorter periods of time.

The management of people in custody is never easy, and if their numbers decrease, as I think they should, their management will be even more difficult and challenging as only the most dangerous and most intractable will be behind bars. We must therefore spare a thought for the custodians, the staffs of the custodial institutions, who are one of the most underappreciated and under recognised occupational groups in our society. I am aware of the fact that some very worthwhile work is done in nearly all of our institutions, especially in education, training and treatment programs. This work is important as, I believe, if custody is unavoidable, we must do all that we can to make it a positive and constructive experience.

Finally, I would like to leave you with the thought that the way we as a society deal with our failures is the ultimate test of our humanity. how we respond to and treat those who are accused or convicted of committing crimes, those who arrive unlawfully on our shores from overseas, and those suffering from serious mental illnesses, reveals the extent of our compassion as well as the limits of our professionalism. When we look into the recesses and corridors of our custodial institutions ... we are looking at a mirror of ourselves.

ⁱⁱ The National Police Custody Survey of August 1992 identified 506 locations at which people were in the custody of police. It is likely that there were a small number of other police facilities that had no persons in custody during that month.

PUBLIC OPINION & THE JUDICIAL SYSTEM: How does public opinion legitimately influence the course of justice?

INTRODUCTION

There is a paradox at the core of the relationship between public opinion and the judicial system in a society founded on democratic principles. It is of the essence of democracy that the people govern themselves through institutions that they establish for that purpose. All public institutions in a democracy must be answerable ultimately to the people. Yet one of the three arms of government in a democratic system is a judiciary that must operate in a detached impartial and independent manner and free of external influence on the decisions that its members make. In the course of this address I propose to examine some of the issues that arise out of the paradox.

First, however, it is necessary to say something about the nature and implications of the concept of judicial independence which gives rise to the paradox.

It is a trite but profound truth that the foundation of the democratic state is the rule of law. The rule of law means that the citizens are governed not by the arbitrary will of persons in authority but by laws enacted in accordance with the relevant constitutional processes, publicly promulgated and applied fairly and impartially by a judiciary which is independent of external pressure of influence. The law confers rights and imposes liabilities on the citizens and prescribes rules to govern their conduct.

Their ability to enforce those rights and their protection against unjust exposure to liabilities or penalties for infringement of the prescribed rules of conduct, depends upon access to courts, which adjudicate in accordance with the norms of legal justice.

Legal justice requires that the citizens' rights and liabilities be determined in accordance with the law, that is to say by the application of the relevant legal rules properly interpreted by an independent court to facts ascertained fairly and impartially in accordance with the evidence present to the court.

The security and welfare of each of us depend upon respect for our legal rights and upon immunity from exposure to unjust liabilities and penalties. These rights and immunities may require protection from powerful and influential individuals and corporations and indeed from the state itself. This protection can be available only if we can assert our rights or defend ourselves from injustice in courts presided over by judges who are totally free from the possibility of extraneous influences and who will determine each case according to its merits as disclosed by the evidence and argument in court.

A necessary corollary of the principle of the independence of the judiciary is the further principle of the separation of powers. Sound constitutional arrangements require the separation of the judicial power from, and its independence of, the executive and legislative powers. The legislative arm of the state consists of the parliament that makes the laws. The

executive arm consists of the government, both in its political and official aspects, which implements or executes those laws and carries on the government of the state. The judicial arm of the state consists of the judiciary and the court system which judges the validity of those laws and interprets them, and adjudicates upon the dispute brought before the courts in accordance with the law. The reasons why sound constitutional arrangements require the independence of the judicial arm, of the other two arms of the state are well understood and can be shortly stated.

The protection of the citizens from arbitrary and unlawful actions by the government, or even the parliament, is of the essence of the role of the judiciary in the society. Citizens frequently have occasion to seek redress from the courts with respect to arbitrary or illegal behaviour by governments or officials of government. In the criminal jurisdiction the courts are required to adjudicate upon allegations of criminal conduct made against individual citizens by officials acting in the name of the state. Justice would not be done, nor would it seem to be done, if the judiciary were subject to any form of direction or influence by the government or the parliament. Judges are required to be fair to all parties and to bring a dispassionate and impartial mind to bear upon the issues brought before them. Any interference or influence, direct or indirect, by executive government on the judicial process is incompatible with that requirement. Parliament enacts laws and the laws so enacted are binding upon the courts that must apply them. That, however, is the limit of the legislature's proper role in relation to the courts. The judiciary is in no sense accountable to parliament for the way in which it exercises its constitutional role.

The principle of judicial independence involves not only the independence of individual judges in their decision making but also the independence of the judiciary as an institution. In one sense the essence of judicial independence is the freedom of the judge from pressure or influence in the making of his decisions in his courtroom. In the exercise of the judicial function a judge must be subject to nothing but the law and the dictates of his conscience.

That independence of the judge in his courtroom, however, is dependant ultimately upon the collective independence of the judiciary as a whole.

The preservation of the independence of the judge in his courtroom requires that the judiciary as a whole should enjoy autonomy and collective independence of the other two arms of the state. It is therefore of the utmost importance that there be emphasis upon the protection of and buttressing of the freedom from interference of the judge in his individual decision making, by means of the strengthening of the collective independence of the judiciary as a whole. That implies emphasis upon the conditions which are essential to the existence of the internal management of the judiciary, the provision of the necessary material and financial resources to enable the judiciary to perform its function and the protection of judges from intimidation, whether physical or non-physical and from any form of undue pressure.

Public opinion has a crucial role in the maintenance and defence of the independent judicial system as the cornerstone of our free and democratic society and it is important that that should be generally understood.

Judicial independence exists not for the benefit of judges but for the benefit of the people. It is an integral component of the rule of law on which the security and liberty of the people depend. I think that it must be acknowledged that there is an innate tension between the principle of judicial independence and the power of the political arms of the state. For that reason, there is no need for constant vigilance to detect and repel any moves having an effect of undermining judicial independence. It is at that point that public opinion is of decisive importance. The judicial arm of the state has no source of power at its disposal to repel attacks upon its integrity and independence. It depends ultimately upon the power of public opinion. Judicial independence is safe only if the state of public opinion is such that any

erosion of that independence however, subtle, will attract such a degree of indignation of the public as will deter those responsible. Public opinion is the ultimate rock upon which an independent judicial system is supported.

It is therefore of crucial importance to all of us that the public should be aware of the importance to the well-being of society of an independent and impartial judiciary and should have confidence in the judicial system. Australia has the good fortune to have what is lacking in so many countries of the world, namely an independent highly professional and incorrupt judiciary. It has a judicial system that, for all its faults, provides a high quality of justice in the community. The loss or serious impairment of such a system would be a catastrophe for our society.

There is, I fear, a lack of awareness in the public generally of the value of the judicial system that we possess, and that lack of awareness tends to undermine the strength of public support for the system. There are a number of reasons for that. One reason is the existence of serious defects in the system of which the public is well and properly aware and which give rise to the feeling that the system does not meet the needs of the ordinary citizen. Another is the erroneous impression of the work of the court conveyed by inadequate and often misleading media reporting and populist comments by some politicians. I do not think that there is any deliberate purpose on the part of politicians or journalists or commentators in the news media to undermine the system of justice. Nevertheless, the constant barrage of misinformation and ill-informed criticisms and the manner in which news stories are consistently presented in the media, must in the long run have the effect of undermining public confidence in the judicial system. It is vital to the health of our society that public confidence in the courts be restored and that there exist a public opinion capable of being mobilised if necessary in defence of their independence.

This restoration of public confidence in the judicial system requires both a concerted attack by government, the judiciary and the legal profession on the faults and defects which undermine public confidence, and also a radical change in the understanding and the treatment of the system by the media and other forces which influence public opinion.

Once the tenet is grasped that the integrity and independence of the judicial system is indispensable to the existence of a free democratic society, the vital role of public opinion is readily seen. The judicial system exists not for judges, lawyers or officials but for the general community. Without it our liberties and security could not survive. The lesson of history is that the dangers to the independence of the judicial system invariably come from powerful elements in the society whose influence and interest are threatened by the impartial administration of justice. Governments may resent the constraints upon their ability to do what they wish, which result from the public's right of access to the independent courts. Other powerful influences may seek to use political influence or other strategies to undermine the independence of judicial decision-making. It is, of course, the responsibility of executive government to protect the integrity and independence of the courts. Generally speaking, in the country they have done so. There have, however in recent years, been disturbing departures by governments from the principles that underpin judicial independence. The most blatant was in Victoria where the appointments of the judges of a court that did not find favour with the government, the Accident Appeals Tribunal, were revoked by legislation in 1994 and the Court abolished. There have been other, although less blatant departures. A troubling aspect of these affairs has been the lack of effective response from the public. There has been some controversy in the media but no sustained public indignation of the kind that compels the attention of offending governments. It says that that is troubling because in the end the preservation of the integrity and independence of the judicial system against political interference depend upon public opinion. The Courts have no means of defence against an aggressive government, especially if it has control of the legislature. Attacks upon

judicial independence can only be repelled by the force of public opinion. The independent judicial system exists for the public and its preservation ultimately depends upon the public.

Judges lawyers and court officials may do what they can to defend the system and to inspire public confidence in it, but in the end its survival as a bastion of civil rights and liberties depends upon the will and determination of the public to defend it, a will and determination expressed with such strength when necessary as to deter any power driven politician who may seek to weaken it.

A public opinion of that kind can only be mobilised in a crisis if there is an underlying public understanding of the importance of independent courts and an underlying respect for the administration of justice. Much more needs to be done, in my view, to foster and sustain such a public opinion. I have already spoken of the importance of remedying defects in the system that undermine public respect for it. The performance of judges not only in delivering fair and impartial justice but also in explaining their reasons clearly and understandably can always be improved. More, however is needed. There is need of widespread and thorough education of the public in the relevance and importance of the judicial system.

Education of the public should begin in the schools. Civic studies in the schools could do much by placing emphasis upon the indispensable role of the judiciary.

The importance of the media cannot be overemphasised. Unfortunately for the most part media personnel are unsympathetic to the judiciary and the judicial system. In part that is because they are called to account from time to time for contempt of court or in defamation suits and that gives rise to resentment. However, I think, that there is a more fundamental reason. The media has become accustomed to exercising by means of its impact on public opinion, an inordinate influence on the action of the political arms of the state. The one arm of the state, which remains immune from that influence, by reason of its independent character, is the judiciary. It is difficult for many people in the media to reconcile themselves to the concept of the immunity of an important element in the society from media influence. It is important to the formation of a strong public sentiment in support of the judicial system, that this media attitude be modified.

The cynicism, which infects much media reporting of the work of the courts, is a relatively recent phenomenon. Perhaps it is just one manifestation of the modern suspicion of and disrespect for authority. In previous generations the media, like all other influential elements of the society, understood the importance of maintaining respect for the role of law and the institutions through which it operated. Criticism of the judiciary was rare and was not lightly embarked upon. Court news was reported in a way that encouraged respect for an acceptance of the decisions of the courts. It was recognised that criticism or disparagement of the judiciary might diminish that respect and thereby damage the rule of law. Such criticism was a course to be undertaken only after full consideration and for grave reasons. A return to this type of treatment of reporting and comment on the work of the courts would involve no impairment of the role of the media to report accurately the proceeding in the courts and to comment fearlessly on perceived imperfection in the courts and the judiciary; it would simply require that the role be performed in a manner which manifests respect for the role of the judiciary and thereby encourages similar respect in the public.

An attempt should be made to secure the restoration of former standards of behaviour in relation to the judicial system on the part of politicians. In former times it was an acknowledged convention that those in public life were under an obligation to respect and safeguard the rule of law by supporting the work of the judiciary. Any criticism of the courts or their decisions would be made in a restrained and responsible manner that did not disparage the judicial institution. That convention is the foundation of the standing order in all parliaments that reflection on the judiciary is out of order unless made in relation to a

substantive motion regarding the judiciary. It was the responsibility of Ministers, particularly law ministers, to explain and defend the actions of the judiciary and the work of the courts. Unfortunately, that wise convention appears to have lost its hold on some politicians. Ill-informed and sometimes quite unbridled criticism of the courts even at times by Attorneys general, is all too common. Politicians could do much to foster public support for the work of the administration of justice, if they themselves demonstrated that support and resisted the temptation to seek political advantage by engaging in irresponsible disparagement of the work of the courts.

I do not wish to be misunderstood. It is entirely proper and very necessary that the work of the courts should be subject to public scrutiny and, where appropriate, criticism. A Lord Chancellor of England, Viscount Kilmuir said "Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men." The same must be said of the comments of politicians and media commentators. There is, however, a world of difference between scrutiny and respectful, albeit outspoken criticism, and vituperative and repeated disparagement of a kind which is likely to bring the judicial system itself into disrepute.

The judiciary itself, in my view, has a special responsibility to participate in public education concerning the judicial system. All too often in the past, judges have taken the view that they should confine themselves to the performance of their judicial task and that they have no role beyond that. Judicial institutions, so they felt, exist for the benefit of the public and it is for the public and their political representatives to defend and preserve those institutions. I think that that is too narrow a view of the judicial vocation in contemporary society. Judges, by reason of their calling, have a special understanding of the vital role in the society of an independent judicial system. That I believe, imposes on them, as a matter of civic duty, an obligation to share that understanding with their fellow citizens and to assist in the education of the public. We are witnessing the growth of awareness among judges of that obligation. Judges, of course, can never properly engage in public discussion of their decisions. They are now far more disposed, however, than formerly to be involved in public seminars, talks and other appropriate means of communicating to the public the values and principles upon which the judges act and explaining the social role of the judiciary. The present Chief Justice of South Australia has been active in this process of communication with the public and I am confident of the benefits that will flow from his activities. The judges by such activities can contribute greatly to the formation of an enlightened public opinion.

The role of the South Australian Justice Foundation, under whose auspices we meet tonight, is of great importance, both actually and potentially. It has already done much to promote better understanding of the judicial system. It has the potential to play a major role in the creation of public opinion capable of supporting and defending the independent judicial system.

Thus far I have been discussing public opinion in its necessary role of supporting and defending the independent judicial institutions. I now turn a consideration of its role in relation to the functioning of the system.

The ideal of impartial justice implies that the judge's decisions will not be influenced by extraneous factors, such as public opinion, as to the merits of the case.

There is nonetheless a legitimate role for public opinion in the administration of justice. Before discussing that role, however, it is necessary to acknowledge and consider the real dangers to impartial justice, which may result from public opinion.

The impact of public opinion upon the independence of judicial decision-making is not necessarily and, in all cases, beneficial. Judges live in the community and are part of it. They cannot be and out not be, insulated from the currents of opinion and sentiment which exist in

the community which they serve. Nevertheless, they are required to do fair and impartial justice uninfluenced by the opinion about a case that may be held by their fellow citizens, including their friends and relations. Judges are called upon to adjudicate in cases of persons who have attracted the loathing of the public. They are called upon to adjudicate in cases involving unpopular minority groups and individuals. Frequently the public has prejudged those cases and public feeling and indignation are high. The dangers to justice arising from public opinion in such cases cannot be ignored.

The danger, I think is increasing, particularly in the area of criminal justice. I suppose that there has always been a good deal of public interest in criminal justice. But I believe it to be undeniable that current public interest is unprecedented. A number of factors have contributed to the growth of public interest in the criminal justice system. The fascination that many have felt with criminal activity, those who engage in it and the process by which they are brought to justice, has been nourished in our time by the pervasive influence of the mass media. Crime and the processes of criminal justice are brought daily into the nation's lounge rooms by the electronic media. The airwaves are thick with radio reporting of such matters. A good deal of print media space is similarly occupied.

The fascination, nourished by the influence of the media, has now merged with a much deeper and more serious factor. Crime has grown to the extent that it casts a shadow over the lives of most people in the community, the degree varying from person to person according to their individual circumstances and temperaments. It is rightly perceived as a threat to the ability of people to go about their affairs and to conduct their lives free from threat of violation of their persons or property. Crime, and the fear of it, is a genuine blight on the peace of mind and happiness of a great many people. This state of things naturally produces great indignation at those who are responsible for so blighting the lives of people and restricting their freedom of movement and capacity to enjoy their lives. It produces moreover serious and widespread concern about whether the justice system is making the maximum contribution of which it is capable to the safety of the citizens.

There is a further factor. There is increasing concern about crime as a threat, not only to individual members of the community, but also to society at large. The business and financial excesses of the nineteen eighties have left a deep impression on the public mind. Those excesses were often accompanied by criminal activity on a grand scale. Criminal excesses on so grand a scale are widely understood as having contributed to the recession and the economic and social malaise that followed. Organised crime and its offshoot, corruption, even institutionalised corruption in public life and certain areas of law enforcement, strike at the foundation of organised society.

It should come as no surprise that those factors have produced an intense public interest in the way in which criminal justice is administered. It manifests itself in a healthy public debate about the effectiveness and adequacy of police powers and the nature and efficiency of our judicial procedures, levels of sentencing, the prison system and the treatment of young offenders. Its manifestations, however, are not always healthy. Our television screens portray increasingly occurring ugly images of mass demonstrations of hate and unreason, threatening violence to person who have been merely arrested and charged with some hateful crime but have not yet been tried, still less convicted. Many people, without knowledge of the circumstances or any reflection on the principles involved, are loud and aggressive in their criticisms of sentences imposed in the criminal courts and of the judges who have imposed them. Sometimes these blind and prejudiced reactions even extend to acquittals. People who have not heard of a world of evidence know better than the judge or jury who have heard all the evidence and have given it much anxious consideration.

It is easy to confuse real public opinion with the strident voices of the ill-informed and self-opinionated and of those affected by partisanship or personal involvement.

A major problem confronting the courts in the decades ahead will be the maintenance of dispassionate and rational attitude to the punishment of crime in the face of prejudice and pressure from sections of the public, stimulated by inflammatory treatment of the subject in the media. It is almost standard practice on the part of the media, when there is a sentence that is, on the fact of it, lenient, to feature angry comments by the victim or members of the victims family. In that way public feeling is inflamed against the courts and the judges. The victim of a crime is however usually the worst possible judge of what is fair and just treatment of the offender. A person can rarely be a just judge in his own case. A judge in passing sentence, must take all factors into account, not merely the need for punishment and deterrence, but also the need for rehabilitation and for a fair and if appropriate merciful treatment of those who have transgressed.

In passing sentence judges have regard to the impact of the crime on the victims. Information is placed before the sentencing judge by means of a written impact statement. The victim has no opportunity to explain to the judge orally the effect of the crime on the victim. I think that this is a defect in our system. Many victims would be assisted in coming to terms with the wrong which they have suffered in they were given the opportunity of telling the sentencing judge, in the presence of the offender, about their sufferings and the impact on their lives. I appreciate the problems not least of which are that such victims would have to be prepared to face cross examination and also the additional burden, and associated cost, upon the court system. I have reached the view, however, perhaps somewhat belatedly, that the system, and the public's opportunity to those victims who wish to take advantage of it, to supplement the written impact statement by oral evidence. Nevertheless, the feelings of the victims can never be the dominant factor. The fate of an offender cannot be allowed to depend upon the degree of resentment or forgiveness, as the case may be, expressed by the victim. The criminal law, is and ought to be, concerned not with private vengeance but with public justice.

The danger from the pressures of judges created by inflammatory public criticisms and media treatment of them, is that it may as the years pass have the effect of eroding perhaps by imperceptible degrees, the judiciary's detachment and impartiality. Judges are human. They have to mix socially and in the course of their personal relationships with people who are influenced by unfair and inflammatory criticisms published in the media.

There is a great need of more balanced reporting of court decisions and of subsequent discussion of them. Judges give careful reasons for their decisions arrived at the light of all the evidence and argument addressed to them and after much deliberation. Those reasons are rarely reported or, if reported at all reported briefly and without prominence. Unless holders or high public office, the media and the public are prepared to defend the integrity impartially and detachment of the judicial process, there is a real danger that judges and magistrates will, by degrees be deflected by personal pressures and public feeling from dispassionate discharge of their judicial duties.

How then does public opinion legitimately influence the course of justice? One of the most important ways in which this occurs, is the influence of public opinion upon the values that judges apply in arriving at their decisions. There are many circumstances in which a decision cannot be made by means of a rigid process of applying known law to the facts. The judge must resort to values that are not to be found in the written law.

The law confers choices on the judges. The modern law confers on judges wide discretions for example as to what sentence to impose within the permitted range, whether to exclude from a trial evidence illegally obtained, who is to have custody of a child, whether certain conduct is to be excused, and so on. Moreover, there are many situations in which the judge has a choice as to which of competing rules of law are to be applied to the facts of the case. In the higher courts especially there is a choice as to which of two possible interpretations is

to be placed upon a statute or as to how the common law is to be developed to meet new or altered social circumstances.

The values, which a judge is expected to apply when making choices in the exercise of his or her office, are not his or her personal values but those of the society as a whole. "My duty as a judge" wrote the great American jurist and legal scholar Benjamin Cardozo, "may be to objectify in the law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time." Nevertheless, the judge's personal values will always be factor. Cardozo continues: "We shall never be able to flatter ourselves, in any system of judicial interpretation, that we have eliminated altogether the personal measure of the interpreter. In the moral sciences, there is no method or procedure which entirely supplants subjective reason".

It is important then to notice the influence of public opinion in a community on the attitudes and values of the judges drawn from that community.

When we are told that judges are remote from the community which they serve and that their attitudes not reflect those of the community we need to remember that judges are part of the community and are necessarily influenced by the thinking of the community at large. So far as their personal beliefs and values influence their decision making, they will be beliefs and values derived at least in part from the benefits and values currently prevailing in the general society.

Nevertheless it is vital to the detachment and impartiality of the administration of justice, that the influence of judge's personal beliefs and values on the exercise of the office should be minimised. The authority conferred on a judge is not conferred on him to give effect to personal convictions but to apply the law impartially as the representative of the community. A judge commands respect by his disinterested application of the law. The judicial philosophy has never been stated more powerfully than by the late Justice Felix Frankfurter, a great American jurist, in a dissenting judgement in a case in the Supreme Court of the United States in 1943 when the majority held that a law of the state of Virginia compelling school children to salute the flag was invalid. Frankfurter, who was a Jew said: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant, I should associate myself with the general libertarian views of the majority opinion, representing as they do the thought and action of a lifetime. But as judges are neither Jew nor gentile, Catholic nor agnostic. As a member of the Court, I am not justified in writing my private notions of policy into the Constitution no matter how deeply I may cherish them or how mischievous I may deem their disregard."

The attitude beliefs and values according to which judges exercise the choices and discretions which the law requires them to exercise, must in some sense, be those of the community and not necessarily those of the individual judges. That proposition raises difficult questions as to the sense in which a pluralist society such as ours can be said to have community attitudes and beliefs and values and the method by which they are to be ascertained. Those questions are beyond the purview of this address. What is relevant for present purposes is the role of public opinion in informing the judges about community attitudes, beliefs and values.

There can be no question but that, if the law is to be applied and justice is to be administered in accordance with the ethos of the community, judges must be familiar with their community and the deepest aspirations of its members. There is no place in our type of society for judicial remoteness and lack of sensitivity to the community's aspirations. Although judges must take care never to be swayed from the path of truth and justice, by current public clamour, they must be in close touch with the deeper currents of public opinion that reflect the abiding ethos of the society. Public opinion must not be confused with the noise made by

vociferous minorities or special interest groups, or even by the public at large when inflamed by some current case of passing incident. The relevant public opinion is the abiding sentiment which in general and persistent currency in the community and which reflects the people's abiding attitudes beliefs and aspirations.

Changes in public sentiment over time are reflected in the way in which justice is administered in many areas of the law. The area in which public opinion has the most noticeable influence is the punishment of crime because that is the area in which the general public is most interested. A few examples may illustrate the point. When I began legal practice, child sexual abuse, and it is now called, was viewed by the Courts with horror. Sexual intercourse with a child under 12 years of age attracted a mandatory whipping of at least 10 strokes with the cat o nine tails. Often more strokes and more than one whipping were ordered. Long sentences were imposed for sexual intercourse with older children and particularly for Incest. This was a reflection of public condemnation of sexual misconduct with children. By degrees public condemnation of sexual delinquency generally softened. This was in time reflected in sentences for this type of offence. Whippings disappeared. Prison came to be seen as a less and less appropriate response to consensual sex at least where the young person was over the age of puberty. Bonds and suspended sentences became common. A welfare model - designed to re-establish the family became the norm in incest cases. There has been of course a marked public hardening of attitudes in recent times towards child sexual abuse. The maintenance or re-establishment of the family is now generally regarded as less important than punishment. Rather curiously in an age of sexual licence and in an age in which young people often become sexually active at an early stage, public sentiment has hardened in favour of punishment of sexual misconduct with persons under the age of consent. Once again one sees the influence of this state of public feeling on the level of sentences. Long sentences for sexual abuse of young children, including offences within the family, have returned and consensual sexual acts with adolescents under the age of consent are viewed with much less tolerance in the sentencing process.

Prior to the 1939-45 war, rape was looked upon as a crime next only to murder in gravity. It was a capital crime in some states and attracted long terms of imprisonment and whippings in others. The softening of public condemnation of sexual delinquency that followed produced a more lenient approach to sentencing for the crime. Sentences, although remaining severe became much shorter. The rise of feminist thinking has produced a public opinion on which the protection of women is thorough to demand severer punishment for rape. The Courts have responded with markedly increased sentences in the last few years.

Another example may be taken, this time from the non-sexual area of the criminal law. In the early days of the motor car public feeling about the danger to pedestrians was high. Motorists who caused death by dangerous driving were charged with manslaughter and if convicted given less severe prison sentences. With the passage of time, as more people became drivers, public opinion moderated. Juries identified with the accused in the dock and were disinclined to convict of manslaughter. A lesser crime, causing death by dangerous driving, had to be created by statute with lesser penalties. In this altered climate of opinion, fines, bonds and suspended sentences for convicted persons became common. In latter times, public opinion has swung again. Resentment at the danger to other road users caused by dangerous drivers has altered the climate of opinion. Drivers are now readily convicted by juries. This confronts judges with the enormous problem of having to sentence 18 or 19 year old first offenders with good personal and employment records in a way satisfies public anger at what is called the "carnage on the roads". In general, the courts have responded to public feeling by imposing substantial prison sentences.

This responsiveness to long-term shifts in public sentiment is by no means confined to the criminal area of justice. Similar examples are to be found in the application of family law and many areas of civil law.

So, the courts respond to changing public attitudes. There is, and always ought to be, a time lag between change in the public mood and modification of judicial policy. This may create a perception at times that the judiciary is out of touch, but it is necessary corrective to the volatility of public opinion. Too hasty a response by the courts to changes in the public mood, would produce an unjust instability and inconsistency in judicial policy. Time is necessary to distinguish between transient aberrations in public sentiment and the more enduring shifts that must be reflected in the policy of the courts.

Public opinion of course is mainly concerned with criminal justice. The public is naturally concerned to be protected by the law from the harm inflicted by criminal actions. There is also a sense of justice in the community which requires that evil doing be appropriately punished.

The criminal justice system exists primarily for the protection of society and the members of the society, from criminal activity. The public has a legitimate interest in the system's effectiveness for that purpose. The way in which criminal justice is administered must therefore be influenced to some degree by the state of public opinion as to whether the community is receiving the protection to which it is entitled. I do not of course mean that the decision or sentence in any particular case is to be determined by public opinion. What I mean is that the sentences imposed for any particular type of crime must be such as will in the long run satisfy the public that the level of punishment is proportionate to the crime and that the courts are doing what they can to protect the public.

One of the important purposes of the criminal law and its administration by the courts is to satisfy the public's sense of justice. It is a fundamental principle that punishment must fit the crime and criminal. The public conscience will be repelled alike by undue harshness and undue leniency. The problem about satisfying public opinion with respect to crime and punishment, however, is that it is frequently ill informed. The public, as surveys show, often has a totally incorrect understanding of the levels of punishment prevailing in the courts and the factors that have to be taken into account to achieve justice. Although it is important that public opinion should be satisfied, it cannot be satisfied at the price of passing unjust sentences or abandoning the well-established principles of just sentencing. The judiciary must hold fast to these principles and rely upon better communication with the public as the means of building public confidence that justice is being done.

Allowing for the necessary time lag referred to earlier, I think that the courts are as responsive to public sentiment as is consistent with faithful adherence to the principles of justice. Prior to World War II, the criminal justice system had features of harshness, even brutality. Capital and corporal punishment and heavy sentences in harsh penal institutions were features of the system. With the development of a more enlightened public opinion, the courts were able to humanise the delivery of criminal justice with less emphasis on punishment and more on reform. Contemporary community pre-occupation with the increased incidence of crime and the hardening of public opinion towards offenders, have now produced a response in the courts in the form of a severer sentences, something of a reversion to earlier attitudes.

No doubt the response of the courts to public concern about crime and levels of punishment is not as marked as some would desire. But it is a function of the judiciary to act as a moderating influence on the impact of public opinion upon the administration of Justice. Justice must be based on secure and stable foundations. It must not be shown of course by even temporary gust of wind that blows. The public should feel safer and more secure precisely because the judiciary responds only with caution and delay to the waves of public opinion.

There could be no better indication of the need for caution in allowing public opinion to be reflected in the manner in which justice is administered, than the present state of public opinion regarding levels of punishment. There can be no doubt that there is general, albeit generally vague, public sentiment in favour of higher levels of punishment. Courts are held to be responsible for what is perceived to be inadequate punishment of offenders. Yet there are many indicators that most member of the public are quite ignorant of the true level of penalties imposed by the courts. They tend to be influenced by media headlines about cases in which apparent leniency has been extended. The general level of penalties is simply not understood. Moreover, public opinion is confused by the intervention of executive government in the sentencing process. The sentences imposed by the courts are not carried out. Prisoners are released during the term of their sentences to home detention, by administrative act. The public sees a person who has committed a serious crime enjoying the comforts of home after what seems to be an unreasonably short period. The courts are blamed. What is not understood is that the sentence imposed by the court has been greatly mitigated by administrative act. The public, quite rightly, feels that time spend enjoying the comforts of home is by no means the equivalent punishment of time in prison, but does not appreciate that the Court is not responsible. I do not wish to be understood as being opposed to home detention as an element in the treatment of offenders. Home detention has its place in a sound regime of criminal sentencing. It should however, form part of a package designed by the sentencing judge so that the punishment is properly proportionate to the crime, and should be a device available to administrators to reduce the numbers in the prisons and to relieve the pressure on government to provide adequate prison accommodation. The punishment inflicted for crime should, under the rule of law, always be a matter for the independent judiciary and not for officials of executive government. Furthermore the public sees offenders who have been sentenced to short terms of imprisonment back on the streets having served only a small proportion of the sentence imposed. They do not realise that this too is the result of administrative action and tend to blame the judicial system.

There is then widespread confusion in the public mind as to the level of punishment imposed by the courts. If the principles of justice are to prevail, the judiciary must continue to exercise caution in the extent to which it allows sentencing practices to be influenced by a public opinion, which does not have a sound basis of knowledge of the facts surrounding existing practices.

I have used the example of public opinion in relation to the criminal sentencing process to illustrate the general point that the judicial system, if it is to discharge its true role in the society, must reflect the spirit, values and attitudes of that society, but must also act as a moderating influence to ensure that the true principles of justice are not contaminated in their application by an over-responsiveness to the transient waves of public opinion.

CONCLUSION

I have, in this address, attempted to make two principal points. The first is that the survival of the rule of law in the sense of the administration of impartial and detached justice according to law by a judiciary which is independent of executive government and the possibility of influence by executive government or other extraneous forces in the society, depends ultimately upon the existence of a public opinion which is prepared to protect it against erosion or attack.

The second point is that the judicial system must be sensitive and responsive to public opinion but that ill-informed opinion must not be allowed to compromise the fundamental principles of justice.

Both those points indicate the importance of a well-informed public opinion. The public needs to be aware of the importance of the rule of law and the independence of the judicial

system and of the conditions necessary to maintain that independence. It needs to be aware of the true facts regarding the operation of the system so that public scrutiny will be wise and public pressure will not compromise the fairness and impracticality of the administration of justice. This presents a challenge to those who by reason of the offices that they hold, have a responsibility of leadership, judges, politicians, police, justice officials and media leaders. Communication with the public and the provision of sound information are critical.

This is not the occasion for a detailed consideration of the means that might be adopted to assist in the formation of a sound public opinion. I take the opportunity, however, of paying tribute to the concept and work of the South Australian Justice Administration Foundation. It has a valuable role in establishing and maintaining lines of communication between the judicial system and the public and is filling a long felt need.

I am honoured to have been given the opportunity of assisting in the work of the Foundation by delivering this address.

AFTER WORD

Michael O'Connell

Every orator was inspirational and, at times, controversial. They shared their wisdom and their understanding. Many heard them but how many listened? The orators - all of whom are leading thinkers on justice and its administration - broached several matters that continue to confront policymakers and justice practitioners.

Social and political changes, advanced technology and the expansion of international business operations have impacted in Australia. Australia has been exposed to the global economy, and free market trade ideology prevails. Once sacred public enterprises have been privatised.

The rapidity of change has given rise to social, economic and political upheaval previously unknown (Jones, 1982; Dunphy & Stace, 1990). Many of the resultant changes are irreversible. The so-called "third wave" (Toffler, 1984) or era of "discontinuity" (Jones, 1982; Drucker, 1985) require a preparedness to "thrive on chaos" (Peters, 1987). Reactionary, ad hoc planning modes, for example, have proven deficient (Ansoff, 1987).

Contrary to the gains enjoyed by some people, social, economic and political problems manifest among the homeless, under-educated, unemployed and poor have remained (Wilson, 1989). Resultant feelings of powerlessness and frustration have culminated in a more aggressive society.

It is unlikely, therefore, that criminal deviance will abate. Instead, positive indicators such as the steady decline in house breaking offences and robberies in, for instance, South Australia during the 1990s (Office of Crime Statistics 2001) have been overshadowed by atrocious acts of violence and increased death by drug over-dose.

Resource constraints have ensured that 'value for money' concerns remain paramount. Justice agencies have not been immune from purges on their resources to meet 'bottom-line' demands of governments pre-occupied with 'pulling in' deficits and producing budgets in surplus despite the social costs. Although a sense that we are losing control on our streets and along our borders fuels promises of expenditure on more robust law enforcement agencies.

Additionally, governments (no matter their ideological persuasion) have been, and will continue to be, confronted by public demand, in part fuelled by the media, for more punitive and authoritarian criminal justice policies (Wells & Blau, 1994). However, concomitant demands for human rights and civil liberties have impacted on those institutions charged with the responsibility of maintaining law and order.

Alternative ways of dealing with offenders such as family conferencing for young offenders and their victims and victim-offender mediation in adult corrections have begun to make positive in-roads in the administration of justice. Likewise, the concept of 'problem solving' courts has emerged. These courts use their authority "to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities" (Berman & Feinblatt 2001). The mental impairment court, the domestic violence court and the Nunga court in South Australia (Moss 2000) and the drug court in South Australia, New South Wales and Victoria are prime examples.

Aboriginal and Torres Strait Islander people, who attained citizenship rights in the late 1960's, achieved formal recognition of their native title rights through the prominent decisions of the High Court in the Mabo case then the Wik case in the 1990's. Paralleling these gains has been the community shift towards reconciliation, which is a stark contrast to the concept of segregation that dominated discourse as recent as the 1960's.

In addition to the 'journey of healing' commenced between black and white people in Australia, Australians have also faced the prospect of becoming a nation republic. In spite of the referendum result, the 'process of adjustment' has begun for many in Australia.

Some pro-republicans advanced the diversity of Australia's population as justification for their stance, and indicative of a maturing nation no longer bound by colonial ties to an imperialist motherland. It is somewhat of an irony then that fear that 'foreigners' (no matter how deserved) are 'jumping queues' to gain entry into Australia played such a significant part in recent political debate.

Australia's population is culturally diverse; it is also aging. Furthermore, as life expectancy increases, the size of families declines. More women have entered the workforce and two income families are more prevalent. Women are increasingly represented in offender statistics as well, which might be manifest of the dysfunctional influence of social cues and environmental cues on women - once sheltered in the home. In familial settings, however, women continue to be prone to victimisation by men known to them. This violence frequently has adverse effects on the children who witness 'domestic violence'.

Initial concern for the victims of domestic violence and child abuse that grew out of the 1960's and 1970's civil rights movements has grown to encompass all victims. In all Australian jurisdictions victims now have rights. These rights, often stated as guiding principles in charters or declarations, influence the making and administration of law. These rights are fundamental to the treatment of victims in criminal justice systems.

Each of the aforementioned factors has, and will continue to have, ramifications for the administration of justice. In fact, the future of the agencies charged with administering justice in Australia is inextricably linked to the changing environment. Unless the police, prosecutors, defence counsel, magistracy, judiciary and corrections (to name but a few) are prepared to embrace the significance of change and devise innovative and creative responses they are unlikely to cope with our future.

"Look after the world and all be friends, with peace in our hearts the dream never ends!"

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