Contemporary Comments

Launch Speech of Beyond Bars Alliance

It gives me great pleasure to be asked to launch the Beyond Bars Alliance at the NSW Parliament House today.

For the occasion I searched my wardrobe for a tweed jacket so I could fit the stereotype ascribed in an article by David Penberthy (who I must say looks quite resplendent in a suit and tie in the by-line photo) in the *Daily Telegraph* last Friday 20 September, headed: 'Us and Them, and They Haven't Got a Clue'. In the article Penberthy argued that:

> Sydney is divided into two types of society — lower case "s" society, a vast and disorganised mass of humanity which judges issues on their merits, and the many smaller capital "S" Societies which operate on the basis of occupational self interest, political ideology, or some other set of common beliefs and experiences. ...
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> It is no overstatement to suggest that on sentencing, it has been The People versus The Law Society, the Council for Civil Liberties, a handful of eminent jurists and a few chin-scratchers in tweed jackets from the University of NSW.

I am a bit bemused by the chin scratching as it has never been a particular habit of mine. I guess it is suggestive of thoughtfulness (a terrible thing) or lack of resolve; as for the tweed jacket, this has caused great amusement among colleagues for few if any in the faculty would be less likely to be described as 'tweedie' over a 30 year academic career than me. 'Scruffy' would be the word more likely to spring to colleagues' minds.

Still, it is probably naive to expect sartorial insults to be any more accurate than anything else in the text, for such texts operate not at the descriptive or realist level, but at the ideological level. And that ideology is perhaps best described as a variation on the post-Hansonite politics of division and exclusion that we have seen more generally in mainstream politics in recent years around issues like land rights, an apology, asylum seekers, and so-called ethnic crime

It is an ideology encapsulated in the pithy headline 'Us and Them — and They Haven't Got a Clue'. Here is a perfect example of what Russell Hogg and I have called the 'uncivil politics of law and order' (Hogg & Brown 1998:ch1) — short-term, abusive, narrow, fomenting division — of the sort that the Beyond Bars Alliance is seeking to confront, and hopefully to change.

The members of the Alliance run the risk of similarly being discounted by the David Penberthy's of the world as being part of the Big S Society — and therefore motivated by occupational self interest or political ideology. In fact, most of the constituents of the Alliance are individuals and organisations from the non-government and government sector, front-line street level organisations surviving on minimal resources and voluntary work, dealing on a day to day basis with the social and economic conditions which generate crime and victimisation; but this won't stop them being labelled, in the extraordinary perversion that passes for political debate, part of the 'elite', however risible and fantastical that may be to them.

Community attitudes

Despite the silliness of this name-calling, the issue of community attitudes needs to be taken very seriously. Community attitudes in relation to sentencing seem to have become more punitive in recent years. This is in line with less sympathetic attitudes towards minorities, asylum seekers and others, at a time of rapid social economic and technological change and high social anxiety. Demands for heavier sentences and attacks on 'judicial leniency' are part of a more general climate of fear and a distrust of authority and expertise that are particularly evident after shocking crimes of personal violence and cruelty. Revulsion, outrage and the desire for revenge are very deep-rooted, understandable and in many senses healthy, reactions to such crimes.

However there are a number of important qualifications to bear in mind before responding to increasingly punitive community attitudes by way of more punitive sentencing and dramatic changes in legal processes. These are well put in a *Sydney Morning Herald* editorial on 6 September.

> The community is entitled to be heard, but that is not to say popular sentiment should dictate outcomes requiring dispassionate, expert assessment. Judges sit through entire trials; public outrage is too often inflamed by scant knowledge. The public campaign against judges implies sentencing is getting softer when the reverse is the case. It assumes harsh punishments deter serious crime when there is much evidence to the contrary. The most grievous concern from a political auction, however, is its inability to forsee an end bid. If it is appropriate to double sentences now because the dogs are barking, what is to stop them being doubled again, and again?
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> Leadership demands courage of convictions, not acquiescence to every ill-considered public bellowing. Both Mr Carr and Mr Brogden are failing this test.

However justifiable and understandable community outrage against violent and brutal crimes, the criminal justice system cannot be turned into simply a vehicle for private or community revenge. The criminal justice system has to respond to and balance a complex and contradictory range of interests, values and objectives. While community attitudes are clearly important as a measure of the community respect in which the criminal justice system is (or is not) held, it can never be the role of judges and magistrates simply to reflect community opinion. Their role is to do justice according to law in the particular case, taking account of all the relevant circumstances.

Two approaches to law and order

I would now like to contrast two approaches to law and order debate. The first is what we might call an irresponsible approach and the second an open-minded approach. I want to use the recent NSW Opposition campaign on sentencing as an example of the first[1] and the work of the NSW Legislative Council Select Committee on The Increase in the NSW Prison Population[2] as an example of the second.

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1 For a more detailed account of the sentencing policies of the major parties in the lead up the 2003 NSW state election see Brown (2002b).

2 For a review of the Reports of this Committee see Brown (2002a).

Irresponsible: the '13 excuses'

A leading example of an irresponsible approach to law and order can be found in the NSW Opposition campaign 'Here are 13 excuses for judges to avoid handing down standard minimum sentences'. This refers to the proposed NSW government legislation setting out standard minimum Non-Parole periods which can be departed from upwards and downwards according to the existence of aggravating or mitigating factors spelt out in the legislation (the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002 proposed new s21A(3)). These factors have not been dreamed up overnight but are the distillation of the common law over centuries. They are not only part of the legal framework of any civilised society; they are also part and parcel of our daily lives — part of the way we make moral judgments.

Let me give a mundane example. Suppose a child pokes a sibling or a neighbour or another child at school in the eye. Do we as parents, observers or teachers pull a grid or calculator out of our pockets or handbags and say — 'that behaviour is worth 3 weeks without TV, 4 weeks without *The Simpsons*, 2 weeks washing up, 5 smacks, 1000 lines, bin duty ...' or whatever the local currency of punishment is? Hardly. What we do is look to and investigate the surrounding circumstances.

Suppose for example we find that the other child did the same thing first, wouldn't we want to take the provocation into account in our assessment of the act? Or if we found that it was an accident, that for example the child was trying to knock something down from a tree and accidentally poked the other child in the eye, isn't this relevant? Similarly wouldn't we want to take into account the age of the child involved, whether they had apologised and shown contrition, or offered some form of reparation, or were generally of good character, or were ill, or suffering from a disability? Or alternatively, if the child says, 'I did it because I don't like girls', or 'I don't like kids who don't speak English', wouldn't we want to treat the wrongdoing more seriously?

In short, this is the process of moral judgment what we all engage in every day. It is what judgment is, the bringing into consideration and evaluation of a range of factors. To suggest as the NSW Opposition does, that such an approach is illegitimate, mere 'excuses', constitutes a trashing of the traditions of moral and legal judgment, and as such is the height of irresponsibility.

An open-minded approach — the NSW Legislative Council Select Committee on the Increase in the Prisoner Population

The second and contrasting approach is open-minded, is based on research, on facts, is interested in 'what works'. It is an approach illustrated by this NSW Upper House Committee, which was composed of ALP, Liberal Party, National Party, Democrat and Green members, with John Ryan (Lib) as chair. They started by looking at some of the facts (a revolutionary approach) in the form of a profile of the NSW prison population. They found for example that:

- 60% of inmates were not functionally literate;
- 60% did not complete year 10;
- 64% have no stable family life;
- 20% have attempted suicide; and
- 60% of males and 70% of females had a history of illicit drug use (*Final Report* 2001:xiv–xv).

The Committee found that of the 8135 receptions in NSW prisons in 2000, 41% are for sentences of less than three months and 65% are for sentences of less than 6 months (at 29). As well as short-term offenders the proportion of remandees has increased from 18.7% of the total NSW prison population in 1995 to 28.6% in 2000. These facts led the Committee to conclude that the keys to stemming the increase in and reducing the current imprisonment rate lie in stemming the flow of unsentenced prisoners and of short-term prisoners. Indeed the Committee recommended following the recent initiative of the WA ALP government in prohibiting prison sentences of less than 6 months.

The Committee noted that the cost per inmate per day is $181.14 for maximum security ($64,485.84 per annum); $163.19 for medium security ($58,095 per annum); and $138.93 per day for minimum security ($49,459 per annum). By comparison 'the average cost per day when completing a community based program delivered by the Probation and Parole Services is $8.63 ($3,150 per annum). In terms of the expenditure of the NSW Department of Corrective Services of $549.6 million in 1999/2000, 10% was spent on "community supervision", 73% on the "containment and care of inmates" and 17% on "assessment, classification and development of inmates"' (*Final Report* 2001:71–72).

The general drift of the Reports is that existing sentencing options such as probation, home detention, community service orders, and drug court programs should be expanded to divert offenders from full time imprisonment; bail hostels could take some of the expanding remand population out of prison; rehabilitative programs in the prison could be improved and targeted to vulnerable groups and post release services increased in ways which may reduce levels of re-offending.

Here then in the work of this Committee we see that members of the NSW Legislative Council from nearly all major political constituencies could engage in an open-minded process of inquiry over two years and agree on a method of approach to the issues which included:

- calling for more research where evidence was lacking;
- seeking to stimulate a more informed and evaluative approach around 'what works' rather than an acceptance of established views based largely on retributivism;
- focusing on the differentiated nature of the prison population and the differential experiences of particular disadvantaged groups;
- a preparedness to envisage a more plural, experimental, diverse approach to corrections, what might be called a 'mixed penal economy', rather than accept the inevitability of the traditional centralised state command model;
- taking up the argument that Tony Vinson and Eileen Baldry have been putting for some time, that NSW seriously look at the suspension of short term prison sentences;
- a commitment to public consultation and a recognition of the need to build up constituencies of support;
- a recognition that the issues are those for a 'whole of government' approach.

The approach of the Committee was democratic, open, largely non, or at least significantly less, factional, based on issues, pragmatic in the best sense, far less ideological, and based on the evidence. It is the type of politics we could do with much more of, as against the 'button-pushing', 'poll driven', 'message sending', 'wedge', 'dog whistling' and factional politics of posture, name calling and appeals to sentiments of anxiety, fear and exclusion, which we have seen so much of lately. Particular praise should go to the Chair of the Committee, Liberal MLC John Ryan.

It is the sort of approach we desperately need in the current law and order debate — an approach that hopefully the Beyond Bars Alliance can help to foster.

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REFERENCES

Brown, D (2002a) 'Legislative Council Select Committee on the Increase in Prisoner Population, *Interim Report*, July 2000; *Final Report*, November 2001: A Review' *Current Issues in Criminal Justice*, vol 14, no 1, pp 111–118.

Brown, D (2002b) 'The Politics of Law and Order', *Law Society Journal* vol 40, no 9, pp 64–72.

Hogg, R & Brown, D (1998) *Rethinking Law and Order*, Pluto Press, Sydney.

NSW Legislative Council Select Committee on the Increase in Prisoner Population (November 2001) *Final Report*, NSW Parliamentary Papers, Sydney.