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Are We Tough Enough to be Smart on Crime?

I INTRODUCTION AND ACKNOWLEDGEMENTS

Before I begin, I want to acknowledge the traditional owners of the land on which we meet, and to pay my respects to their Elders, past and present. I also want to acknowledge the organisers of this fantastic event for inviting me to contribute today.

It's certainly wonderful to be here in Cairns. It's a privilege to be part of such an illustrious gathering, and a joy to be back in North Queensland where I spent my formative years in the law – arriving from the breezy climes of coastal Victoria to work in Aboriginal Legal Aid.

Though I thought I was fairly worldly at the time, my middle-class existence had not prepared me for what I discovered. Fresh-faced and perpetually perspiring, I travelled between my base in Mt Isa and the far reaches of the state. In fact, my ambivalent relationship with light planes was forged as I flew to represent my clients, while the Magistrate and Prosecutor, my travelling companions, often conferred along the way and, I suspect, made decisions about my clients on that plane.

The setting was therefore a far cry from the bluestone surrounds of the old Melbourne Magistrates' Court. On Mornington Island there was no place to interview my clients other than under the only tree that gave any shade in the forecourt of the police station. The police called it the "guilty tree" as anyone who sat under it, in their eyes, was indeed guilty! I had a short time to take instructions before a hearing in a makeshift courtroom at the police station – often the same building in which my client had been remanded in custody. On one occasion, an old Aboriginal fella, who had been called to give evidence as a witness – just a witness, mind you – climbed into the stand, raised his hand and said 'I plead guilty, eh?'

It was here, then, that I learned what members of this profession all around the world come to understand – that the law and genuine justice are not always natural companions. It was here that I made the decision to commit my professional life to bringing them closer together, to protecting those fundamental principles that evolved to protect us from the excesses of the state, while also striving for measures which make justice a reality for all.

II TWO STEPS FORWARD, ONE STEP BACK

This ambition, however, is not always a straightforward one to realise. Change often takes two steps forward before taking another step back, with the small achievements that accompany this peculiar waltz not always engendering popularity.

Certainly, I experienced this frustration as a politician, having left practice to effect change at a more systemic level. First as the Federal Member for Kennedy in the brief interlude between Katter successions; and then later on a more widespread basis as Victoria's Attorney-General. During eleven years as Victoria's First Law Officer, I was labelled all manner of things as I slugged it out to bring the operation of the law and its capacity to deliver real justice closer together.

Building on my experiences here in North Queensland I set about forging stronger and more constructive relationships between Government and Victoria's Koori communities – entering into a partnership called the Aboriginal Justice Agreement to attempt to stem the disproportionate rates of Indigenous incarceration. The network of Koori Courts were part of this plan.

More broadly, I pushed for a greater use of therapeutic court initiatives – establishing Australia's first Neighbourhood Justice Centre, which uses the strength of support services and local community to disrupt the cycle of crime. Despite strenuous objections from the opposition at the time, the current Premier of Victoria having labelled the initiative 'apartheid justice', the results now speak for themselves, with recidivism rates in the relevant local area significantly down, as are the rates of offenders who pass through other therapeutic court programs introduced around the same time.

Though I'm proud to be associated with these and other reforms, self-congratulation is not the purpose of my remarks today. Rather, my purpose is to highlight that progress does not come easily – that sometimes initiatives which may have obvious merit cannot get over the line and, when they do, have rightly been subjected to rigorous analysis.

Others, like reforms to sexual assault proceedings that increased specialisation and improved the court experience for victims, heralded significant promise. Though they have achieved an increase in reporting, they have not, however, achieved the increase in successful prosecutions that we had hoped for, while feedback from those working in the field suggest that tougher penalties and restrictive release conditions are in fact increasing the number of allegations being contested.

Meanwhile, big ticket items like Victoria's Charter of Rights and Responsibilities can take years to achieve – even partially – and are not always set in stone.

In fact, four years on from the departure of our government from office, some of these reforms are being wound back. For a time the Charter looked like being abolished, while

recent sentencing reforms are undermining the gains made under the Aboriginal Justice Agreement. An emphasis on rehabilitation which saw a significant drop in reoffending has also been reversed, with instead a 17% rise in post- release recidivism since 2009-10.

III REVOLVING DOORS

In other words, legal policy, just like case law, often goes in cycles. Some of the most senior representatives of the judiciary are here this evening, as are representatives from academia, from private practice and public law. You will therefore appreciate that some of the most valued developments in our criminal justice system have not always followed a linear trajectory towards enlightenment.

My first point today, therefore, is that we have to expect a certain amount of ebb and flow in the evolution of the law. In my home state of Victoria we are very firmly in an ebb, prison numbers having increased dramatically and expected to increase further.

That said, we are certainly not alone. Progressive reforms are being wound back all over Australia, while I don't need to explain to this audience that Queensland is experiencing a 'tough on crime' revolution, with reforms coming at such a relentless pace as to leave the profession spinning.

Retrospective changes to double jeopardy laws; the expansion of the Attorney-General's appeal powers; legislation to bypass the courts and detain certain sexual offenders on a 'public interest ruling'; laws to publicly identify repeat young offenders and have their criminal history made available to adult courts; unexplained wealth laws that reverse the presumption of innocence; and a raft of mandatory sentences – the list is long and undoubtedly familiar to a great many here.

I won't bother mincing words when I say that, in my view, these reforms are draconian in the extreme. My objections, however, are not about partisan politics, even if my new status as an impartial academic so allowed. Certainly, conservative governments do not have a mortgage on severe justice policies, with many administrations on the other side of the fence having succumbed over the years to similar urges, while some officially conservative Attorneys-General have taken a very liberal approach to reform.

Rather, my objections are based on what we know about the fundamental value of legal principles, as well as the increasing evidence at our disposal about how such policies actually work.

IV SHOWING OUR SMARTS

The second – and more important - point that I wish to make this afternoon, then, is that although criminal justice reform goes in cycles, we don't have to just sit back and watch it spin. Though we might understand that the ebb and flow I spoke of earlier is inevitable, we also have a responsibility to try and hold back the tide.

In other words, we need to remember that every time we step through that revolving door of political or policy reform, we are armed with more information, more knowledge. Even in the decade since first commissioning the sexual assault reforms I mentioned earlier, for example, we have learned that improving existing processes is not sufficient, that we need to take a different approach to hold more perpetrators to account.

We may not always get it right the first time, but we have a better evidence base on which to draw every time we make each attempt. This means that we have a better chance of hitting the mark, and is also why I was drawn to my new role as Director of the Centre for Innovative Justice – a body which sees its mission not only as researching and understanding problems, but developing solutions.

I believe, then, that there is no excuse to go backwards, the only real barrier being that the decision to take a different path – one that is innovative and gets results – is invariably less popular in the wider community. Certainly, most reformers fear being labelled 'soft on crime', the resulting default – and, frankly, the lazy - option being to ride the wave of outrage that understandably accompanies serious transgressions. For my own part, I have experienced the pressure – from the media, from the community, and even from within my own political circles - to 'lock 'em up and throw away the key'.

What I believe, however, is that choosing what seems like the most hard-nosed bid in the law and order debate simply limits our options, as well as – and this is a reality often missed – the options available for victims. In fact, entrenching criminality can often perpetuate victims' anger and distress instead of addressing their needs in meaningful and restorative ways.

As hardened as it may seem, then, to 'crack down on criminals', in truth there is no softer option that a politician can take. Trampling the separation of powers to allow the Executive to decide which violent sexual offender stays in prison? Easy, when compared with tackling the sexual violence epidemic being played out in ordinary homes and communities across the nation. Building more prisons to house increasing numbers of prisoners? Piece of cake, compared to the complexity of addressing the factors that contribute to the disproportionate number of people in the prison system with mental illness; of preventing crime before it is committed and institutionalisation has set in.

In Victoria, a cushy response such as this means that we are not only failing to address mental illness, but are contributing to it – incarceration increasing its effects on those in custody, and leaving them ill-equipped once released. This kind of soft thinking drives a wedge between the law and real justice. Instead, we need to recognise the law's responsibility to *prevent*, as well as to punish, crime – acknowledging that sometimes the toughest approach is to be *smart* – shaping constructive, compassionate and, ultimately, safer communities by acting as a positive intervention in people's lives.

V MAKING A DIFFERENCE

As many in this audience may know, leaders in the US are coming to this realisation. Having spent years trying to outdo each other with harsher penalties and rhetoric, conservative governments have changed direction. In 2007, the Republican government of Texas decided not to build any more prisons, but to focus instead on justice reinvestment – directing funds into encouraging young people to stay in school; into tackling generational disadvantage; into emphasising rehabilitation.

In just a few years, the Texans witnessed a significant drop in crime and around $2 billion saved. In fact, for the first time in Texan history, a prison was closed. In other words, the approach worked and, with evidence like this, politicians from across the spectrum are making the case for more change.

Well, if the Yanks can do it, we can do it. We need to harden up and get smart about crime – about preventing it before it occurs, about redirecting lives, about repairing the damage caused, about restoring relationships. We need the guts to weather the storm of condemnation that will invariably come our way when we make the case for change.

Next week, for example, the Centre for Innovative Justice will release a report that recommends an additional and quite different option to the conventional prosecution process for victims of sexual offences.

While I cannot go into detail, our recommendations will no doubt be interpreted by some as soft on offenders. Yet the evidence shows that we *must* find smarter options than those which are currently on the table. Estimates suggest, in fact, that as few as one in a hundred sexual assaults result in a conviction, such are the barriers that stand in victims' way. It is therefore my hope that governments will engage genuinely with the reforms that we recommend.

For this to occur effectively, of course, the reforms will need champions. The legal community can contribute to this and, though often quite vocal about its own interests (the debate about QCs versus SCs being a rather comical case in point), more crucially, the profession needs to speak out about taking a smarter approach to justice.

Certainly, I know that Queensland's legal community has voiced repeated concerns about the raft of criminal justice reforms I referred to earlier. The harsh reality, however, is that this is not going to mean much to a politician who has decided that 'uncompromising' is the adjective that looks best next to his name.

Well, the title of this conference is 'Making a Difference'. That is why lawyers not only need to get out there, but to give the public reason to listen – providing the evidence; making the case; promoting the programs which are already out there and working; and explaining why protection of the rights of even the most repugnant to the community is, ultimately, protection for us all.

VI CONCLUSION

From what I have read about Marylyn Mayo, she was a thoughtful and determined advocate for justice – formative in ensuring that the study of law had a formal presence here in north Queensland, that the value of its principles be recognised. She pushed for the law's rightful place in the life of this academic community and I am honoured to have had the opportunity to deliver an address in her name.

It is now *our* turn to push for the law's rightful place, this time in the life of our wider community. We also have to push, however, for recognition of the law as an evolving concept – one that moves in cycles, yes, but one that takes with it improved understanding as it goes.

We *must* get better at explaining that there is no room for knee jerk policy making – that we know more about what is just theatre and what has real value; about what gets results; about what really works to make our communities fair and safe.

In other words, though it doesn't always feel like it, we *are* getting smarter. We just have to be tough enough to let it show.