



Hard line fine for dangerous criminals, but what about the rest?

By Greg Smith SC MLA, Shadow Attorney General and Minister for Justice

Introduction

I have worked as a lawyer in prosecution and criminal justice agencies for most of my career, since the mid 1970s. This included working in Commonwealth Government agencies in Sydney from 1975 to 1987 and New South Wales Government agencies from 1987 to February 2007, as a crown prosecutor; a secondment to the Independent Commission Against Corruption as general counsel assisting in the Milloo inquiry into police corruption; deputy senior crown prosecutor; and finally, as deputy director of public prosecutions for almost five years before resigning to run for election as the member for Epping in the New South Wales Parliament.

During that period, I witnessed many changes to the criminal justice system by the enactment of legislation and changes to practice and procedure dealing with such things as: the establishment of Offices of Director of Public Prosecutions in each jurisdiction; the Uniform Evidence Act; sentencing laws; guideline judgments; and standard non-parole periods. In that period I appeared for the Crown in hundreds of criminal trials and many appeals in the Court of Criminal Appeal, and full court appeals in the High Court of Australia. I became very uneasy with the law and order auctions, as they tended to make the law – particularly the sentencing laws – more complex and more susceptible to error.

Law and order auctions

Remarkably, law and order did not feature as a major issue in the 2007 NSW state elections. This totally contrasted with the previous five elections held between 1988 and 2003. The lemma government and Coalition nevertheless continued policies with a 'tougher approach' to crime and criminals.

In January 2003, journalist Paola Totaro predicted that 'Bob Carr and John Brogden share an unstated hope – that crime does pay. In the March 22 election, they



expect a dividend of votes from their efforts to exploit community anxiety about criminals.¹

She opined 'law and order' auctions in New South Wales probably had their genesis in the lead-up to the 1988 state election, in the wake of disastrous revelations about Labor's corrupted early-release prison scheme.

She said Liberal Opposition leader, Nick Greiner, built a powerful election policy platform on significant anti-corruption and criminal justice reforms. The early-release scheme, which allowed prisoners to earn time off for good behaviour, spawned what Greiner called 'truth in sentencing' legislation.

Law and order issues featured prominently in the March 1995 election campaign, prompting 'widespread criticism of both sides of politics for conducting a law-and-order 'auction' in a bid to win votes on the crime issue'.²

The Fahey government proposed life imprisonment for serious offenders, such as murderers, rapists, drug traffickers and robbers who repeatedly broke the law. John Fahey stated in his campaign launch, 'It is three strikes and you are in. In gaol. And in gaol to stay.'

Labor's policy in 1995 included mandatory life sentences following conviction for

dealing in large commercial quantities of hard drugs and for a new offence of 'horrific crime' (multiple murder, contract killing and murder or attempted murder in conjunction with violent sexual assault).

Both sides promised greater victims' rights.

The ALP won that election and the following three elections. Many policies were not honoured or watered down. Gratefully, no mandatory sentences have ever been enacted.

In the 1999 election campaign, the Opposition's policy included reforming the justice system with a new set of sentencing guidelines, described as 'grid sentencing', which would set a mandatory minimum sentence, with rare exceptions. Judges could depart from the guidelines in particular circumstances.³

The Carr government labelled the plan a 'disaster', claiming the proposal mirrored grid sentencing, which they claimed had failed spectacularly in the United States. Attorney General Shaw said it would take away judges' powers to sentence and hand them over to politicians and in practice, would not lead to tougher sentences.⁴

In the 2003 election both sides proposed to abolish double jeopardy laws, to allow re-trials for homicide and other serious offences. A restricted law was enacted

in late 2006. A further amendment has recently been enacted.⁵

In 2007 the Opposition promised a parliamentary committee to monitor the DPP; increasing frontline police numbers; increasing police powers; mandatory life sentences for those who murder police; tougher bail laws and tougher laws against young offenders; and giving juries a say in sentencing. The lemma government promised to build more gaols; to increase penalties and to introduce new offences. Both sides also promised to modify the right to silence.

Building more prisons to house the growing number of prisoners, many of whom are recidivists who have had little genuine rehabilitation, is expensive and does little to make a better society. Harsher sentencing is leading to more, not less, recidivism.

Changes to the laws of sentencing

In addition to the many changes to the NSW criminal law in the last 20 years, particularly in the creation of aggravated offences, the following changes have prompted tougher sentences, with much confusion: s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) has been criticised by judges, prosecutors and defence counsel alike. Aggravating factors spelt out include: offences involving police, health workers and judicial officers; the use of violence or weapons; and where the victim is very young or old and frail. Many of the categories are based on the common law in sentencing. Section 21A warns courts not to use an aggravating factor in sentencing if it is an element of the offence. When the warning is overlooked, error in sentencing is found by appeal courts.

Section 54 of the *Crimes (Sentencing Procedure) Act* enacts a table of standard non-parole periods for common serious offences. The Carr government introduced these amendments with great fanfare and after a slow start and a number of

successful Crown appeals, more tough sentences are being imposed.

UK has changed tack on tough sentencing

The law and order auction was replicated in the UK. In 1997, Tony Blair's election manifesto stated: 'We propose a new approach to law and order: tough on crime and tough on the causes of crime.'

As in New South Wales, for some years the British Government pushed the first part, tough on crime, but neglected the

second, tough on the causes of crime. But as gaols filled and sentences increased, the Blair Labour government was seen to have failed on the second. By 2007, the Brown Labour government was changing its position, with the Commission on English Prisons Today being established. In the final report, released in July 2009, Commissioner Cherie Booth QC said that a significant cut is needed in the 84,000 prison population, with community based punishments replacing short-term prison sentences. Effectively criticising the policies of her husband's government, she said that the 'unrestrained and irresponsible penal excess' over the past 15 years, during which prison numbers had nearly doubled from 45,000 was no longer sustainable in the face of the public spending squeeze.⁶

Tougher sentences, greater costs, don't deter recidivism

In New South Wales, total government expenditure on the justice system has grown at an average annual rate of 3.4 per cent since 2003, but Corrective Services'

annual spending has increased by an average of 5.1 per cent in that period.⁷

The Corrective Services' budget allocation has increased from 21.2 per cent of justice budgets in 2003–2004 to 22.7 per cent in 2007–2008. Governments across Australia in 2007–2008 spent \$2.435 billion on corrective services (NSW alone spent over \$1 billion on prisons alone). In 1997–1998 only \$1.141 billion was spent on corrective services, so there has been more than a doubling of government spending in ten years. Corrective services funding across Australia occupied 19.6 per cent of governments' justice budget in 1997–1998.⁸

NSW has traditionally had a higher rate of recidivism (that is, released prisoners returning to prison within two years) than the national average. Over the last ten years the state's recidivism rate has increased as well as the national average. It has been at about 43 per cent for the last three years with our prison population now over 10,000 and steadily rising. Victoria has only about 4,400 prisoners and a recidivism rate of about 36 per cent and falling.⁹ Their sentences are lower and rehabilitation more effective. Be assured that I strenuously support protecting the community from dangerous offenders, but most of those imprisoned could not be so described. They are sentenced to less than 12 months imprisonment and there is a strong case for non-custodial punishment.

In my view the same realisation reached by Cherie Booth should be reached in Australia, especially in NSW. Building more prisons to house the growing number of prisoners, many of whom are recidivists who have had little genuine rehabilitation, is expensive and does little to make a better society. Harsher sentencing is leading to more, not less, recidivism.

We have come to a point in time when the theory of 'lock them up and throw away the key' just doesn't work. Governments all over the world have to contend with more pressures on limited resources. Greater funding of health, education and

public transport infrastructure is sorely needed and has significantly more public support than prison funding.

In looking for better value propositions in corrective services, government will be looking not just at short-term cost-savings (i.e., outsourcing new or existing prisons), but long-term savings. If the NSW prison population continued to increase at the same rate it has over the last 10 years we would need to build a new 500 bed prison every two years. Based on the cost of 500-bed Wellington Correctional Centre the cost would be \$125.5 million every two years.

This state cannot afford to keep incarcerating more people, and spending will have to shift to reducing incarceration rates. Non-custodial punishments will inevitably become more prevalent and far more work must be done on rehabilitation

before, during and after incarceration.

I invite suggestions as to how we may best achieve improvements. I may be contacted at epping@parliament.nsw.gov.au or ph: (02) 9877 0266.

Endnotes

1. The *Sydney Morning Herald*, 'Scaring up the votes', 27 January 2003.
2. 'Crime Debate in NSW Out of Order' *Weekend Australian*, 11-12 March 1995, at 22, referred to in Law Reform Commission Discussion Paper 33 (1996) *Sentencing*, Chapter 2, fn 55.
3. Parliamentary Library Briefing Paper 18/98
4. <http://www.abc.net.au/news/nsw99/diary/990318diary.htm>
5. *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009* (NSW), which also removes double jeopardy in sentencing after a successful Crown Appeal
6. <http://www.guardian.co.uk/society/2009/jul/02/cherie-booth-prison-reform>
7. Productivity Commission, *Reports on*

Government Services 2009 and 2002

8. Productivity Commission, *Reports on Government Services 2009 and 2002*
9. NSW Auditor General's Report 2003, Vol. 6 and Productivity Commission, *Reports on Government Services 2009 and 2002*

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