

THE WEEKEND AUSTRALIAN

CRIME AND PUNISHMENT, 1980

by

Mr. Justice M.D. Kirby

Chairman of the Australian Law Reform Commission

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Sentencing of Federal Offenders, A.G.P.S., \$21.00.

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Punishment is a subject which has long fascinated mankind. Man's mind has devised retribution of the most exquisite, and seemingly limitless, variety. Tacitus, writing of the German tribes at the beginning of our era, described their code. Shirkers of military service and those who 'polluted their bodies by vice' were 'plunged into a foul swamp with a hurdle put over them'. King Canute's laws provided that for adultery, a woman was to forfeit both nose and ears. William the Conqueror's desire to protect his newly acquired forest rights led to a law requiring that infractions should result in death: but not quickly administered. The body of the culprit was to be hacked about for a time, as a preliminary. By European standards, the English, until quite recently, were specially ingenious in devising cruel punishments. It was only last century that disembowelling and burning were abolished. Women, who were spared this punishment, were, until 1814 liable to be burned instead. Chaining and abandonment of pirates, drawing on a hurdle, transportation to unexplored, distant lands, public hanging and whipping were all available, some of them late into the last century.

The abolition of these forms of punishment by the end of the last century was celebrated at its close. It was declared 'a century of reform'.

What will we be able to boast at the end of this century? True it is that capital punishment is in retreat. But our time has seen the perfection of new forms of brutality: the concentration camp, abuse of State power, psycho-surgery, extermination. We in Australia have a special reason to be interested in reform of punishment. The modern history of our country began in a penal colony. Some of the prisons in which convicted criminals are housed today are remnants of those colonial times: cold edifices enshrining past attitudes to punishment and forgotten penological theories.

FEDERAL ABDICATION

It took eight decades of Australian federation before a national inquiry was ordered into criminal punishment. Unlike its Canadian counterpart, the Australian Constitution did not specifically confer on our Federal Parliament power to enact a comprehensive national law of crime and punishment. Basically, it remains a State concern. One might say that of all the subjects suitable for national treatment in the new federal polity, crime and punishment should have been single and uniform across the continent. The Founding Fathers thought otherwise.

But as Federal responsibilities grew, the provision in its laws of criminal offences grew also. Separate criminal justice machinery did not develop. State police were involved. Offences were tried in State courts. The Constitution required the States to accept prisoners into State gaols. The result of this delegation has been a significant federal abdication of responsibility for its offenders. The report of the Law Reform Commission suggests that the tide should at last be turned. Federal Parliament should take a hand to ensure that its punishment procedures:

- . are more uniform throughout the country;
- . are more consistent between different courts;
- . provide punishment which are more varied and modern and less costly;
- . provide fair compensation to fellow citizens who are the victims of federal crime.

NOVEL INQUIRY

Everyone in society has views about the punishment of criminals. Another heavy tome stating dogmatic opinions was not needed. Opinions and recommendations worked out in a back room have been the plague of 20th century criminology. Informed opinion, based upon a thorough understanding of how the law works and how its operators and consumers perceive it, is the only sound basis for effective law reform. As in other cases, so in this. The Law Reform Commission's inquiry started with a great advantage. Two of Australia's leading criminologists, with international reputations, were members of the Commission. Professor Duncan Chappell led the project. Professor Gordon Hawkins took an active part. A team of consultants was appointed from interest groups ranging from the judiciary, through prison authorities, to statisticians and a Prisoners' Action Group. We started from an almost total lack of statistics and information on federal crime. It was not even possible to ascertain the exact total number of federal prisoners held

in Australia. It seems there are fewer than 500 in a total prison population of 10,000. Data from courts, federal police and federal departments was supplemented by four novel national opinion surveys:

- . 500 judges and magistrates were asked their views;
- . federal prosecutors were questioned;
- . federal and state prisoners were surveyed;
- . public opinion polls were conducted.

The survey of judges and magistrates was the most novel of these inquiries. Conducted with the Law Foundation of N.S.W., the results provide a fascinating insight into judicial opinion. These results are attached in a 100-page section of the report. Amongst interesting features:

- . 74% of judges and magistrates answered the questionnaire: a remarkably high response for a voluntary survey of busy people. Only from the Victorian judges were the returns low.
- . Less than 3% of those who replied were of the view that no aspect of criminal punishment required reform.
- . Highest on the priority list was the need for uniformity and consistency to reduce disparity in punishment.
- . Almost half were of the view that there was a need for greater uniformity in sentencing throughout Australia. Only 14% felt no such need exists.
- . 70% favoured or strongly favoured provision of improved statistics to help get better uniformity.
- . 50% either approved or strongly approved of 'plea bargaining' negotiations between the defence and prosecution.
- . 71% strongly disapproved of judicial involvement in such negotiations.
- . 35% stated that their knowledge of prison conditions sometimes or frequently dissuaded them from sentencing defendants to prison.
- . 52% were against the death penalty in any circumstances.

The opinions and comments of prisoners and prosecutors are equally interesting. Neither these, nor public opinion polls, can determine the direction of criminal punishment reform. Public opinion, in particular, would quite possibly support certain of the cruel punishments of earlier times. Canute's mutilation for adultery might be an exception. But a law commission, recommending changes which must ultimately be approved by Parliament, must do so against the backdrop of information and views of this kind. So it was here.

AN AWFUL WORD

'De-institutionalisation' is an awful word. But it represents a good idea. Research and common experience make it plain that prisons, far from being reformatory, all too often brutalise inmates and set them upon a path which repeatedly brings them back to prison until they become unable to escape the cycle of crime and punishment. What is more, it is now increasingly realised that keeping people in prison is a very expensive business indeed. Estimates which include capital and recurrent costs and social security payments range from \$20,000 per prisoner each year to \$40,000, which one State Minister told me was the cost of keeping a prisoner in maximum security. Somebody pays. The community foots this bill. Little is returned for it.

Of course prisons must be used in some cases to protect society, where other lesser punishments have been tried and failed or where something less would not reflect society's repugnance and censure. But in some parts of Australia prison rates are up with the highest in the world. They far exceed European rates. The provision and use of alternatives varies throughout Australia. Few of the alternatives are available for federal offenders. A major thrust of the report is the encouragement to the development of effective alternatives to imprisonment. Whilst these must have a punitive component, recent research suggests that, in the long run, they may be more useful, have fewer unsavoury side effects. Certainly they will be infinitely cheaper. Amongst the alternatives discussed are:

- . community work orders
- . weekend detention
- . work release during working hours
- . restitution payments to victims
- . forfeiture of property used in crime
- . hospital orders and treatment for alcohol and drug-related offences
- . youth training facilities

There is no doubt that the future of criminal punishment in Australia will involve close examination of these. Hopeful statistics suggest that people sentenced to community service frequently continue their association after the compulsory period has expired.

CONSISTENCY

The case for consistency is based not only on judicial perceptions and afternoon headlines. Statistics show enormous variation in rates of imprisonment in different parts of Australia. Whereas in the A.C.T. 21 in 100,000 were in gaol, in Victoria the figure is 44, in N.S.W. 73, in W.A. 119 and in the Northern Territory 218! Because these differentials affect the punishment of federal offenders reform measures are proposed:

- . The establishment of a national Sentencing Council. This would comprise judges and others. It would be serviced by the Australian Institute of Criminology. It would lay down guidelines for punishment in federal cases. Judges could disagree with the guideline result but would then be obliged to state their reasons for doing so. Similar systems have been operating for many years in parts of the United States.
- . Instead of appeals being taken to State Supreme Courts, an appeal in federal cases would lie to the new Federal Court of Australia. This would introduce consistency across the nation for the equal punishment of like federal crimes.
- . To promote more evenness in the actual length of punishment, parole, which introduces large administrative discretions, would either be abolished or significantly reformed. Judges would return to imposing the penalty actually meant to be served.
- . Because prison conditions affect the punishment suffered, and vary greatly in different parts of Australia, new, fair prison grievance machinery is proposed and a time set to stop the talking about bringing Australian prisons up to United Nations minimum standards. The Commonwealth has a legitimate interest in this because its prisoners are kept in State prisons. In a relatively prosperous and civilised country, successive reports have condemned many gaols as below world standards. Winston Churchill declared that the way we treat prisoners is a mark of our civilisation. In this league, Australia does not do well. It is not a matter of making prisons luxurious. It is a matter of reaching world minimum standards for those inside and finding effective alternatives to keep many out.

THE VICTIMS

Finally, the report turns to victims of crime. Only in the federal area is there now no crime victim scheme. Handouts and ad hoc decisions mark the Commonwealth's response to this problem. Newspaper headlines and passing public interest are frequently all the victim secures. Yet there, but by chance, may go any member of society. Crime is an offence against the whole of society. Short of a national compensation scheme, the whole of society should provide fair compensation for innocent victims of crime. Most federal crime is white collar crime. The report postpones compensation for theft, fraud and like crime victims. But for those who suffer bodily injury (or death) it suggest an independent tribunal with full power to assess compensation. If a maximum has to be set, it should not be the \$10,000 fixed by most State laws. It should be no less than the \$60,000 fixed for sporting injuries by N.S.W. legislation. Why is a sporting injury more socially compensable than an injury to an innocent victim of physical attack? The forgotten participants in the criminal justice drama deserve more than words and ephemeral regret.

THE FUTURE

Sentencing of Federal Offenders is an interim report. Many tasks remain. Matters still to be considered include:

- . deportation of aliens as a punishment;
- . criminal bankruptcy;
- . special problems of migrants, women and drug offenders;
- . fair court procedures on sentencing;
- . use of publicity as a punishment.

The report will now be subjected to public hearings and other consultations. The road to criminal justice reform involves a long haul. But when we read Tacitus and reflect on cruel punishments so recently abolished (usually against community and 'expert' opposition), reformers can take heart. Because it concerns individual liberty, there are few subjects in the law more important than criminal punishment. Yet there are few matters upon which the law gives its officers less detailed guidance. The age of cruel and barbarous punishments has been followed by the age of excessive discretions in punishment. That age must now give way to one which puts more store on consistency and economy in punishment and pays attention to the needs of victims.