AUSTRALIAN CRIME PREVENTION COUNCIL

FORUM

SPECIAL EDITION : THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA

# DE-INSTITUTIONALISATION

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

November 1981

AUSTRALIAN CRIME PREVENTION COUNCIL

FORUM

SPECIAL EDITION : THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA

# DE-INSTITUTIONALISATION

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

## THE BLIGHT OF IMPRISONMENT

'De-institutionalisation' is an ugly word. But we all know what it means and it provides a useful motto for the future direction of punishment in the criminal justice system in Australia. I want to advance the proposition that we should be doing more to keep as many people as we can out of the corrosive environment of prison. This is not to look forward to the early dissolution of prisons. Marx wrote that with the advent of perfect communism, there would be no need for the oppressive paraphernalia of the State : it would simply 'wither away'. I am afraid realism requires us to recognise that prisons will not 'wither away'. No reader of this piece will live to see a society completely free from imprisonment.

Nonetheless, I believe we have just begun to turn the corner and to recognise the imperative need to keep as many people as we can out of gaol. This realisation has come about, not because the Australian community is feeling particularly generous to those who offend against society and its laws. There is very little of the 'bleeding heart' syndrome in the Australian reaction to crime and antisocial behaviour. Our country's history began as a penal colony and we have always been fairly tough-minded about those who make a nuisance of themselves or who are cruel and violent to fellow citizens or indifferent to property rights. The change of attitude in the Australian community, and in its laws, towards imprisonment as a reaction to antisocial conduct, has come about for different reasons. Many could be mentioned. But amongst them I would single out three considerations:

. Prisons brutalize and instil criminality. First there is a growing knowledge of the tendency which prisons have to brutalise those committed to them and, sometimes even, of those placed in charge of them. The report of Mr. Justice Nagle's Royal Commission on New South Wales Prisons came as a shock to many decent citizens. The vivid language in which Mr. Justice Nagle, as Royal Commissioner, described the state of many of the prisons gave an insight into the generally secret world over the prison wall, unknown to most people. He found that there were 'degrading, pointless and cruel' practices in the prisons.[1] Essentially he brought home the message : if you degrade a human being, you must accept part of the blame if, on his release from the cage, he acts in a non-human fashion. Part of the problem highlighted by Mr. Justice Nagle (and by other reports) is the inheritance by modern custodial authorities of gaols built in an earlier century. These grim relics of earlier penological theories are difficult and expensive to convert to reflect the social values of modern Australia. Governments, hard-pressed with budget cuts and razorly restraints, find it difficult to afford the funds to prisons when there are so many needs of law-abiding citizens that cannot be met. Yet prisoners are a special responsibility of society and a specially vulnerable group. We must constantly repeat Winston Churchill's aphorism that the civilisation of a nation can be assessed by the way in which it treats its prisoners. The first reason, then, for changing attitudes, is a growing appreciation of the unsatisfactory features of some of our old prisons, the repeated tales of brutality and rape within the prison walls and the realisation that as a society we may need sometimes to deprive people of their liberty; but we ought not to tolerate the destruction or undue diminution of their humanity in our name.

. Our prison rates are high by world standards. The second reason for changing attitudes is a growing realisation that in Australia we are amongst the 'big league' of imprisoning countries. In fact figures in some of the jurisdictions of Australia are amongst the highest in the Western world. Not only is there considerable disparity from one jurisdiction to another in the use of imprisonment (without any noticeable increase in crime reduction as a result). But in the Northern Territory and Western Australia the figures are well above those of any country of Western Europe. According to the figures of Australian prison trends issued by the Australian Institute of Criminology in late October 1981, the rate of imprisonment per 100,000 of the population in Western Australia is 104.1. In the Northern Territory of Australia it is 202.3.[2] The rate in the Northern Territory is amongst

the highest recorded figures in the world. The figures in Western Australia were so high that they caused the government there to initiate a committee of inquiry which has just reported on why those figures are so significantly higher than in other parts of Australia. The very high proportion of Aborigines in our prisons in Australia is part only of the explanation.[3]

If we look at the penal population of a number of countries and examine the number of people per 100,000 of the general population presently behind bars, the figures are instructive[4]:

| Country | Prisoners Per 100,000 of the General Population |
|---|---|
| USA | 211 |
| Western Samoa | 122 |
| England and Wales | 86 |
| Malaysia | 78 |
| Australia | 66 |
| Denmark | 54 |
| Japan | 43 |
| The Netherlands | 22 |

The figures vary greatly from State to State in Australia. Some of the figures are in the West European league, with comparatively low rates of imprisonment. Others are extremely high[5]:

| | |
|---|---|
| NSW | 66 |
| Vic | 44 |
| Qld | 73 |
| SA | 62 |
| WA | 104 |
| Tas | 61 |
| NT | 202 |
| ACT | 19 |

The comparative ineffectiveness of imprisonment as a means of protecting society against antisocial conduct tends to emerge from a little reflection upon these figures. Factors other than the effectiveness of prisons in stamping out or discouraging crime seem to influence rates of imprisonment. Legislative policy and judicial attitudes to the utility of imprisonment seem to be more significant than scientific assessment of the net gains for the peacefulness of society derived from putting people behind bars.

. Prisons are extremely expensive. The third, and increasingly potent consideration in a reasoned withdrawal from imprisonment, wherever possible, is the relatively recent realisation of how terribly costly it is to keep people in prison. The figures vary from place to place and estimates are widely different. One Queensland Minister, adding the capital costs, salaries of custodial officers, social security to the family and loss of economic production, has suggested that the annual cost of keeping a prisoner exceeds $23,000. Others put the figure at $10,000. I have not heard a lower figure than this seriously contended for. If one begins to add to the nett costs to the State, the considerations of indirect costs involved in all the ancillary services to the prisoner and his family (to say nothing of the long-term costs of the impact of imprisonment of the breadwinner upon other members of the family and their social obedience) we must realise that imprisonment is a very expensive way of marking society's condemnation of crime. This is not a matter of the community paying for colour television and blankets on the beds in prisons. It is not a matter of paying for luxuries for prisoners. It is the simple economics of the community's paying for an extremely manpower-intensive operation, with plenty of shift work operating in frequently antiquated capital establishments which are sometimes inefficient and therefore extremely costly, to run.

WHAT CAN WE DO ABOUT THIS?

All of these points about imprisonment were brought out in the Australian Law Reform Commission's report, Sentencing of Federal Offenders.[6] The report was commissioned by the Federal Attorney-General, Senator P.D. Durack QC. It was specifically addressed to the issue of Federal crime. A principal focus of its concern was the disparity in the punishment of persons convicted of like Federal offences in different parts of Australia. I refer, for example, to the greater risk that a doctor convicted of a Medibank fraud or a passenger bringing into Australia the same quantity of drugs, will go to gaol in Western Australian than might be the case in like circumstances in the ACT, Victoria or New South Wales.

Last year, in response to the Attorney-General's reference, the Law Reform Commission delivered its report. It is a major document. Strange to say, it was the first national review of crime and punishment in the history of our country. Although crime statistics in Australia are notoriously poor, the Law Reform Commission based its recommendations upon detailed empirical studies including a comprehensive survey of judges and magistrates in all parts of the country, a survey of prosecutors, public opinion polls and a comprehensive survey of prisoners in gaol in all parts of Australia. No relevant stream of opinion was left out.

The Commission made many proposals and one important theme was the need for society to do more for the victims of Federal crimes. But to address the imperative to reduce, comparatively, the use of imprisonment as a punishment, the Commission proposed many recommendations. Central to these were four:

- The adoption by Federal Parliament of a clear statement of policy, addressed to the judiciary, to the effect that imprisonment is to be used only as a last resort, when all other forms of punishment have been exhausted in the case of a convicted Federal offender.
- The provision for judges and magistrates sentencing Federal offenders of a much wider range of punishments than is presently available to them. At present they generally have little choice beyond imprisonment, a fine or probation. The Law Reform Commission recommended adding to the list the increasing range of State alternatives to imprisonment now available in respect of State offences but not yet available for Federal offenders.
- The provision of means to ensure that fewer people, especially in times of unemployment, are imprisoned automatically because they cannot pay a fine imposed on them. Quite a high proportion of prisoners fall into this category in Australia.
- To provide a long-term solution for the need for greater consistency and a more principled approach to sentencing, it was proposed that a national Sentencing Council should be established to provide sentencing guidelines (not formally binding upon the judiciary but to be varied only for reasons stated). These guidelines, it was hoped, would not only reduce the idiosyncratic conviction of some judicial officers in the utility of imprisonment but generally promote greater consistency in the punishment of Federal offenders, wherever they happened to come up for trial in any part of this large country.

## WHAT HAS BEEN DONE?

In the business of sentencing law reform, we all know things tend to move slowly. There has been a long record of proposals for sentencing reform in Australia and overseas and all too frequently nothing has come of them.[7] In respect of the Australian Law Reform Commission's proposals, they were put forward in an interim report and the final report has yet to be delivered. I hope that work on the final report can commence in 1982. There will be a full opportunity for the judiciary, lawyers, citizens, prisoners, police

and community bodies to have their say. But even in advance of the final report, the Federal Government in October 1981 took an initiative, little noticed in the popular press, but one which deserves the attention of all who are interested in orderly reform of the law in controversial matters. Senator Durack has introduced into the Federal Parliament a Bill for amendments of the Commonwealth Crimes Act.[8] The Bill adopts, with variations, the recommendations of the Law Reform Commission on the four matters I have mentioned:

First, it adopts a new s.17A in respect of all Federal prisoners, wherever convicted in Australia:

> 17A(1) A court shall not pass a sentence of imprisonment on any person for an offence against the law of the Commonwealth, or of the Australian Capital Territory or an external Territory ... unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.
>
> (2) Where a court passes a sentence of imprisonment on a person ... the court —
>
> (a) shall state the reasons for its decision that no other sentence is appropriate; and
> (b) shall cause those reasons to be entered in the records of the court.[9]

Secondly, the Bill proposes the adoption of a new section 20AB of the Crimes Act so that where, in a like State case, a sentence of alternatives to imprisonment could be imposed, if enacted, in the future, such a sentence would be available for Federal offenders. The list of alternatives is set out in the new proposed provision. It includes an order known as

- community service order;
- work order;
- a sentence of periodic detention;
- an attendance centre order;
- a sentence of weekend detention.

and other similar orders.[10] This much can be said for the expanding list of alternatives to imprisonment : they are proving themselves sometimes more effective, almost always no less ineffective and in every case much less expensive than orders of imprisonment. They are not available to or suitable for every case of a convicted criminal. Imprisonment

must be retained for some offenders. But reducing our prison populations in Australia to figures closer to those of the countries of Western Europe rather than emulating the prison rates of the United States, the Soviet Union and South Africa is a legitimate goal of the Australian criminal justice system. It is one that was strongly advocated by the Law Reform Commission. It has now found reflection in the Bill introduced by Senator Durack.

Thirdly, the Bill proposes new machinery to deal with people who must go to prison for default in payment of a fine. The new provisions are designed to facilitate review and reduction of repayments of fines. The aim is to make sure we avoid imprisoning people because they are poor.

Fourthly, in introducing his Bill, Senator Durack announced that he has written to the State and Northern Territory Attorneys-General proposing that a Sentencing Council should be established administratively with functions to provide guidelines for judicial officers engaged in sentencing. This was the key and most important suggestion of the Law Reform Commission's interim report.[12] Senator Durack's announcement envisages a Council comprised somewhat differently to that suggested by the Commission. He proposes a Council comprising only judges. The Commission, whilst contemplating a majority of judicial officers, envisaged the inclusion of a wider range of disciplines : magistrates, correctional authorities, criminal justice administrators, legal practitioners and academics.[13] The step towards the provision of a Sentencing Council and the establishment of a permanent institution that could help promote greater consistency and uniformity in punishment, is something which every thoughtful member of the community, and certainly every prisoner and those who help prisoners and their families, should welcome. One of the recurring sources of complaint in Australia about our criminal justice system is the apparent disparity in punishments, including of imprisonment, which cannot always be corrected by courts of criminal appeal, within the scope they afford to individual judicial officers exercising their sentencing discretion. The need to bring a little more science into the business of sentencing and to help judges in the painful and unrewarding task of sentencing, is the chief theme of the Law Reform Commission's report.

## TURNING THE CORNER

Articles about sentencing reform are generally depressing efforts that end with a solemn identification of problems and a despairing cri de coeur that nothing ever seems to be done. I hope that I have written enough to indicate that, in the Federal area, the problems are being identified and tackled by the Law Reform Commission and legislative initiatives are being taken which reflect a determination to bring about important measures of reform. To do so is worthy of a community that is not foolishly soft-hearted but is better informed about the realities of criminal punishment and determined to pass Winston Churchill's test of civilisation.

## FOOTNOTES

1. Report of the Royal Commission into New South Wales Prisons (Mr. Justice J.F. Nagle, Royal Commissioner), Government Printer, Sydney, 1978, cited in M. Everett, 'The Prison System — Should it Continue?' (1981) 55 Australian Law Journal 619, 625.

2. Australian Institute of Criminology, Australian Prison Trends, No. 64, 26 October 1981, mimeo.

3. Western Australia, Committee of Inquiry into the Rate of Imprisonment (Mr. O. Dixon, Chairman), 1981. See also W. Clifford, J.V. Barry Memorial Lecture 1981, Melbourne University, 30 September 1981.

4. This table appears in New Zealand Law Society, LawTalk, 137, 16 October 1981, 9. The years of the figures vary between 1978 and 1981 but the general comparison is believed to be accurate and representative. The figures were taken out for use in a Committee of Inquiry in New Zealand on Sentencing.

5. Australian Prison Trends, n.2 above. The figures have been rounded to the lower digit.

6. The Law Reform Commission, Sentencing of Federal Offenders (ALRC 15), Interim Report, 1980.