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THE COMMUNITY RESTORATIVE CENTRE

ANNUAL REPORT 2021

PATRON'S FOREWORD

The Hon. Michael Kirby AC CMG

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CRC - 70 YEARS ON

The year 2021 marks the 70th anniversary of the Community Restorative Centre (CRC). Events to mark this anniversary will hopefully take place in 2022, now that the COVID-19 pandemic has begun to recede.

The small minority of Australians who were living 70 years ago will remember events of that time which stand out for recollection. They include celebration of the 50th anniversary of Federation in 1951, marked by the book *Prosper the Commonwealth*, written by Sir Robert Garran, first Secretary to the Attorney-General's Department. He had seen, and sometimes drafted, many of the changes to law and policy that accompanied the emergence of Australia as a new federal nation.[1]

Unlike Canada, the Australian Commonwealth did not assign a general power to make laws with respect to crime and punishment to the Federal Parliament. Overwhelmingly, such laws were regarded as the business of

[*] Former Justice of the High Court of Australia (1996-2009); former President of the Court of Appeal of New South Wales (1984-96); inaugural Chairman of the Australian Law Reform Commission (1975-84). The writer acknowledges assistance from conversations with Professor Mirko Bagaric, Dean of Law at Swinburne University, Melbourne

[1] Robert Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958.

State parliaments. The federal role was only possible where some special head of legislative power or the incidental power sustained provisions for federal laws.

Another event, 70 years in the past, was the death of the wartime monarch, George VI and the proclamation of his young daughter as Queen Elizabeth II. Her Majesty will shortly celebrate her Platinum (70th) year as monarch. Most criminal prosecutions in the Commonwealth are still made in her name, although some States have changed this practice and some have abolished the office of Queen's Counsel.

A curious disparity in custodial sentencing of prisoners in Australia was connected with the visits of the monarch. In some jurisdictions of Australia, State governments provided for State prisoners to enjoy remission in their sentences to mark a royal arrival. But this was not always done in all States; nor was it always provided for federal prisoners.[2] This was only one of the very many disparities in sentencing of federal prisoners that came under the scrutiny of the Australian Law Reform Commission in 1980. The Commission's report showed many differences in sentencing practices in the several jurisdictions of Australia. Some States recorded significantly more and higher custodial sentences. Others significantly lower. But the highest of all per capita incarcerations were found amongst First Nations People in Australia.

[2] Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC, 15) 1980, 189 [302].

INDIGENOUS PRISONERS & DISPROPORTION

Shocking levels of custodial sentences (including among the young) and deaths in custody of Indigenous prisoners led to a Royal Commission on Aboriginal Deaths in Custody in 1991. It found that the Aboriginal population was the mostly over-represented, disproportionately punished in this way and that the figures were "disturbing and not improving".[3]

Although First Nations' People made up only about 2% of the national population, they constituted 27% of the national prison population. Eventually this unmoving statistic caught the eye of the United Nations Human Rights Council in Geneva and its experts holding mandates to investigate human rights abuses. A new investigation by the ALRC in 2017 resulted in its report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.[4] Although many suggestions have been made for improvement in the path to reform it remains very slow indeed. Throughout the 70 years of the work of the CRC, the disproportionate levels of imprisonment and their sequelae have been amongst the most serious of the deleterious consequences of the interface of Australia's settler society and Indigenous Peoples.

Many political leaders, judges and public officials recognise these challenges. They regularly commit themselves to addressing and repairing them. Even before the ALRC investigated the disparities of the sentencing of federal offenders, including by the imposition of custodial sentences (the

[3] Australia, *Royal Commission into Aboriginal Deaths in Custody*(1991), Canberra, Vol. I [9.4.1].
[4] ALRC 133 (20217).

special concern of the CRC) the ALRC, had in its first project investigated, and made many proposals for, reform in 1975, of the procedures that should be followed in conduct of *Criminal Investigation*,[5] including in respect of Indigenous accused and others apprehended in remote, regional and rural areas of Australia's continental territory. Unfortunately, whilst improvements to the civil law of the Commonwealth recommended by the ALRC were commonly implemented, those concerned with criminal investigation; sentencing of federal offenders; and the recognition of *Aboriginal Customary Laws*[6] tended to be placed in the "too hard basket". If the Australian Commonwealth were a public, or even a private, corporation, auditors would be seriously questioning those responsible for its governance and administration, for the failure to address, and systematically improve, the areas of public law repeatedly called to notice.[7]

RUN AWAY PRISON NUMBERS

An editorial in the *Criminal Law Journal* contained a description of the client base of the CRC, and other bodies, prisoners, in terms far from flattering:[8]

> "Until recently incarceration numbers and rates in Australia were at record levels – considerably above the historic norms. At the turn of the 20th century, the imprisonment rate per 100,000 of the (ad hoc) population was 126 persons. During the next quarter century there was a significant reduction in prison

[5] ALRC, *Criminal Investigation – Interim* (ALRC 2) 1975.
[6] *The Recognition of Aboriginal Customary Laws* (ALRC 31) 1986.
[7] R Sarre, "Australia's Prison Rates are Up but Crime is Down: What's going on?
[8] Mirko Bagaric, "Incarceration Trends Over the Past Decade: The Need for More Effective Risk and Needs Assessments and Rehabilitative Measures" (2020) 44 *Criminal Law Journal* 3.

> numbers. In 1925 the rate was 52 per 100,000 population and remained relatively steady for over 80 years apart from a spike in the mid-1930s and early 1970s. The rate rose to 80 in 1970 and dropped to 66 per 100,000 by 1985. Since that time there has been a steady increase in the incarceration rate. Prison numbers broke through the 30,000 mark for the first time on 30 June 2013, at which point the rate of imprisonment was 170 prisoners per 100,000 adults. Prison numbers continued to grow for the next 5 years growing to 44,159 in the March quarter 2020. The increase in prison numbers shows no sign of abating. … There are far too many non-violent and non-sexual offenders in Australian prisons, thereby violating the principle of proportionality."

Notwithstanding this worrying trend, that has increased the pressure and demands placed upon the CRC in last decade, many surveys of community and even expert opinion showed steady persistence in Australia of a highly punitive culture that can possibly be traced to our origins as convict settlements. Usually the largest cohort of opinion about the perceived severity of judicial sentences in Australia is that they are "too lenient" (38%). Empathy for legal, philosophical and even economic arguments to the contrary were dismissed as "misty eyed dreaming". With relatively few exceptions, responsible ministers who appeared as beautiful butterflies of enlightenment at legal and criminology conferences, turned into caterpillars of 'law and order' when targeted under the pressure of 'shock-jocks' at election time. Somehow, there is a need for informed analysis and realistic acquaintance with overseas models and local practices, in order to improve the actual achievement of reform agenda and turn it around from its current trajectory.

CHANGE & NO CHANGE IN 70 YEARS

The main changes that I would list in the past 70 years of the CRC would include the following:

1. The move to a harsher sentencing regime – evidenced by an approximate tripling of the incarceration rate over the past 3 decades in Australia;

2. The increase in sentencing tariffs that have been especially stark in relation to drug offenders (notably following the declaration of President Nixon of the "war on drugs" in the 1970s). Many drug offenders in Australia as in the United States now receive higher custodial penalties than convicted murderers;

3. An increased move towards standard (but not fixed) penalties in some jurisdictions, notably in New South Wales. This has occurred in a bid to curtail inconsistencies stemming from the so-called "instinctive synthesis" favoured by the majority in the High Court of Australia and therefore applied by judges throughout the nation;[9] and

4. An ever-increasing number and proportion in the incarceration rate of Indigenous imprisonment, now 13 times that of the rest of the

[9] *Makarian v The Queen* (2007) 228 CLR 357 at 370 [24] ff; Cf at 397 [110]. See also HD Bennett and GA Broe, "Judicial Neurobiology, *Makarian* Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?" (2007) 31 *Criminal Law Journal*, 75.

community. The rate has actually grown since the Royal Commission report of 30 years ago.

Just as important as the changes that have occurred in custodial sentencing in Australia over the past 70 years are the changes that have *not* occurred despite the Royal Commission, law reform, academic and other suggestions for reform:

1. Imprisonment remains basically the only sanction available to judges for dealing with serious offenders. The development of more alternatives has sadly eluded our lawmakers;

2. No rehabilitative techniques have been developed that enjoyed notable success. The recidivism rate of offenders has not significantly declined;

3. There has been a nearly total disconnect between sentencing in practice and the dynamic of modern technology. The only small exception has been the use of electronic monitoring as a sanction in a small number of cases admitted to bail. Whilst the world rushes to embrace technology, custodial sentencing has generally resisted it;

4. Despite the law reform reports, advocacy of civil society and ceaseless academic argument, there remains a continued lack of momentum towards uniform Australian sentencing objectives and practices. A roadmap was provided by Professor Duncan Chappell and the ALRC

back in 1980.[10] It is time to retrieve that report from the government warehouse, blow away the dust and enact many or most of the recommended proposals.

5. Most recently, in relation to serious complaints against miscarriages of justice in criminal appeals, some Australian jurisdictions, but only some, (South Australia, Tasmania, Victoria and hopefully soon Western Australia) have enacted a right, by leave, to enjoy second entitlement to appeal against conviction and sentence in cases of new and compelling evidence. Yet, although it has been adopted in England, Scotland, New Zealand and promised in Canada, no Australian jurisdiction has established a professional and efficient Criminal Cases Review Commission to supplement the imperfect 1907 statutory procedures of courts of criminal appeal.[11] Are we in New South Wales, Australia, so much better than in other jurisdictions that we are not in need of improving our post-trial scrutiny of suspect convictions and sentences? I think not.

THE UNEXPECTED COVID DIVIDEND?

Many of the problems we have faced in excessive incarceration of convicted prisoners in Australia (including of Indigenous accused) are repeated in the United States and elsewhere. There, a recent realisation of the counterproductive and discriminatory features of imprisonment, as a primary

[10] ALRC 15 (1980).
[11] M.D. Kirby, "A New Right of Appeal as a Response to Wrongful Convictions: Is it Enough?" (2019) 43 *Criminal Law Journal* 299.

punishment have led to bipartisan moves to urgently reduce the numbers of the prison population, especially amongst racial minorities. However, as in the United States, the major factor that arose in 2020 and 2021, to have an effect on prison numbers, was not a development of human intelligence yearning for greater justice. It was, instead, an unintended consequence of the COVID-19 pandemic that struck the world after December 2019. In consequence, in the June quarter 2020, the number of prisoners in Australia suddenly decreased by 5%. The largest decreases were in New South Wales (8%) and the Northern Territory of Australia (6%). This represented an unexpected and substantial reversal of all the recent trends. Total prisoner numbers dropped to 41,784 in the June quarter 2020. All of the reasons behind this decrease in prisoner numbers are as yet unclear. However, it does seem the decrease may have been a consequence of government restrictions implemented to reduce the risks of the impact of the COVID virus (and its Delta variant) on criminal activity and on the willingness of judges to impose custodial sentences to be served in already overcrowded prisons.[12]

A challenge for the CRC is to turn this unexpected, but beneficial, development in custodial punishment into a genuine case study to measure the repeated policy of statutes and judicial opinions. Custodial punishment should indeed be a "last resort". Its imposition should be confined to identified instances of violent and other crimes where no other punishment is suitable to the facts proved at trial. The opportunity for advocacy based on a "COVID bonus", in favour of non-custodial sentencing options, should

[12] M Bagaric, above n7. See Also M Bagaric, Gabrielle Woolf and D McCord, "United States Sentencing Developments: The World's Largest Mass Incarcerator Goes into Decarceration Mode" (2019) 43 *Criminal Law Journal* 130.

not slip through our fingers. Experienced judges in New South Wales have become very sensitive to the developments of arguments for non-custodial sentences that derive from the crowded and unsuitable conditions of many prisons and the special additional burden of prisoners being housed in close proximity to distressed prisoners who are COVID-19 positive, who are coughing loudly, calling out in pain and demanding pain relief, further isolation and fearful for themselves and their families.[13]

When in due course the great losses and burdens of COVID-19 are ultimately assigned to a footnote to human history, it may be hoped that one ray of light that emerges from the pandemic will be seen as the need for reduction of the previously growing rates of incarceration in Australia. And the fact (if, as expected, it can be proved) that this happened without any measurable increase in crime or serious anti-social behaviour.[14] Reform should remain the target of CRC. It affects individuals; but also the institutions, its employees; and its inmates. We need to revive the spirit of reform of custodial punishment. Addressing individual grievances and needs is good and just. But addressing institutions and the "system" who work for greater rationality, proportionality and justice in our crime justice system.

The Hon. Michael Kirby AC CMG
Patron, Community Restorative Centre

[13] *R v Michael Brown* SCNSW – Ierace J, 10 October 2020, unreported; Cf *R v Zerafa* [2021] NSWDC 547.
[14] The Australian Productivity Commission is stepping into the unattended reform proposals.