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The Criminal Justice System: The good, the bad and the ugly

Presenter

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CRIMINAL JUSTICE IN NSW – THE GOOD, THE BAD AND THE UGLY

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The title of this paper really has nothing to do with the 50 year old spaghetti western film of similar name. At a stretch, it might be possible to draw comparisons between the operation of criminal justice in NSW and the scheming, backstabbing, lawless, unprincipled and venal activities in the film – but it would be a stretch. I just think the title allows me to focus on aspects of criminal justice in NSW now that could be described in those three categories, drawing attention to what can be done better (and, to be fair, drawing attention to what has indeed been improved).

I acknowledge that individual perceptions of what is good, what is bad and what is ugly will vary significantly. I am giving my point of view as a more or less retired barrister, retired prosecutor, legal academic of sorts and consultant in various criminal justice projects. It is my partial snapshot of the present scene (taken with a Box Brownie only) and you are free to differ and to express those differences, of course – and to raise other matters. It is not to be regarded as any kind of a scoresheet. I have been at this game for over 45 years and I have seen a lot of changes in that time, sometimes being part of them, and the process is ongoing.

There are two considerations I would like to examine before we get into the criminal justice process itself.

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FOOTNOTE 1: I am privileged to be a Life Member of the Legal Studies Association, so I suppose that while I live and breathe – and maybe continue to make sense – I may be invited back to your conferences. I hope so. This is the 13th conference I have addressed in 14 years. I do enjoy this audience and I am heartened by the dedication you show to the education of our students in matters that will help them to understand and work to support the institutions, principles and processes that make ours a good community.

FOOTNOTE 2: This paper is substantially similar to the one I road tested for the Toongabbie Legal Centre two weeks ago.

The first is the purpose of crime. Why do politicians create criminal offences and prescribe penalties for their commission? Putting it shortly, the received wisdom is that we need to identify as crimes conduct that is so seriously undesirable in our society that it should be punished by the society that prohibits it. We create crimes so as to identify areas of conduct that are harmful to society as a whole and that will not be tolerated. Anyone convicted of a crime after due process may then be punished and we say that will show our collective disapproval of what has been done, deter the offender and others from doing it, protect the community from some offenders and incidentally allow some reform through control of the offender's life. So we say.

The creation and punishment of crimes is done in an attempt to protect the community from such offending. But one bad aspect of punishment is our blind adherence to its value as a deterrent, either individually or generally. There is much academic research and discussion on deterrence and I must say that my strong impression is that any deterrent effect that punishment might have is marginal and slight and operates mostly on the individual without much general effect. Nevertheless, it is enshrined in law and courts must take it into account and give weight to it (or at least pay lip service to it).

Far better, I think, to acknowledge that we should punish for three main reasons (and not the seven in section 3A of the **Crimes (Sentencing Procedure) Act** 1999): to denounce the conduct, to protect the community where necessary and to rehabilitate the offender. It seems unnecessary to go further.

Wouldn't it be efficient if we had some way of instantly and accurately identifying crimes and offenders and imposing appropriate and effective punishments? I suspect that a drive for such efficiency is at the heart of moves by politicians from time to time to describe criminal liability in absolute terms and to prescribe mandatory punishments. We know, of course, that both exercises are undesirable for any serious offences that require justice to be done. Politicians often think they have the answers, but they are usually asking the wrong questions – and the wrong people.

The second preliminary consideration is the purpose of the criminal justice process that we apply when a crime is said to have been committed. All sorts of players spring into action. Various procedures are followed and forms of conduct adhered to. What is it intended to achieve?

The usual community perception of all this (and often the political perception) is that we are trying to lay blame by discovering the truth about what happened. But that is not the case. While blame may enter into the picture and while the truth may emerge, our adversarial criminal justice process is not designed to find the truth. If that does happen, it is a welcome but incidental outcome. Other systems, including the European inquisitorial system, are much better designed for it and more effective in finding the truth of events.

I am old enough to have been practising when Evan Whitton was more actively writing (he still writes for Justinian – I believe – and gets the odd letter into the Sydney Morning Herald). He has written books such as "The Cartel: Lawyers and their Nine Magic Tricks" (1998) and "Our Corrupt Legal System" (2010). He wrote a column in The Australian on 2 March 2000 quoting me (among others) when I said *"The adversarial system...is not directed to the ascertainment of truth, despite our pretences to the contrary..."*. At the beginning of the column he had made a very good point: *"Law and order politicians...invariably grab the wrong end of the truncheon: in seeking to protect the*

community from criminals, they focus on the sentence rather than on the chances of arrest and conviction". He then went on to criticise the process generally – claiming that its form of corruption is diversion (by lawyers, of course) from *"its proper course of truth, justice and protecting the community"*. He claimed that a search for truth is fundamental to justice and, basically, lawyers obstructed it.

Well, that is just not what we do in our criminal justice system. In our criminal trial scenario the prosecution makes an allegation and mounts a case supported by admissible evidence. The defendant may do nothing, may attack the prosecution case, may mount a positive defence case. In the end, the question for the jury is not: "What happened – what is the truth?" It is: "Has the prosecution proved its allegation beyond reasonable doubt?" If it has and it is the truth (in the sense of objectively factual) that is a happy coincidence – but truth is not the primary goal. Is that justice? Well, that depends. The potential for injustice is always there and participants in the process must do their best to ensure that it does not occur, subject to the duties they must bear. I think that it is worth pondering whether, if practitioners did focus more on seeking the truth, justice would stand a better chance.

Legal practitioners do have obligations to the doing of justice. We are legal technicians and professionals in the way we practise our techniques. Lawyers are expected to be honest, diligent and dispassionate in the advice they give and in advocacy. Ethically they must do their best for their clients, not for themselves.

Chief Justice Bathurst explored this area and the state of three fundamental rights in the law of NSW in his Opening of Law Term Address on 4 February 2016. (I strongly commend the speech to you, available on the Supreme Court website – with its Appendix.) The rights he discussed are fundamental to legal practice and his findings give me a good introduction into some of the "bad" in criminal justice in NSW.

The Chief Justice surveyed NSW Acts and Regulations to discover the extent to which infringements had been made on legal professional privilege, the presumption of innocence and the privilege against self-incrimination. His paper explains his methodology and some of the limitations and qualifications that should be taken into account; nevertheless, his findings are salutary. There are also some interesting reflections on the history of these rights (not nearly as ancient as many suppose, but nonetheless vital) and formal state "scrutiny mechanisms" and informal mechanisms in place supposedly for our protection.

The Chief Justice reports that there are 162 provisions that arguably abrogate the right to legal professional privilege. Some seem to assume unethical conduct by some lawyers.

There are 183 provisions that arguably encroach the privilege against self-incrimination. Some are actually headed "protection against self-incrimination" and the like. Only six of the 183 had headings truly describing their effect.

There are 52 provisions encroaching on the presumption of innocence, by reversing the onus of proof or even, in a few cases, making a bare allegation proof of offending and subject to proof to the contrary by the defendant. One example is section 128 of the **Liquor Act** 2007 that requires a person reasonably suspected of being a minor and, if a minor, of offending against the Act (by drinking, etc

alcohol) to give their date of birth (thereby incriminating themselves) and it is an offence to fail to do so.

Some of these encroachments on fundamental principles might be said to occur in uncommon circumstances or situations without serious consequences; but the Chief Justice said this: *"Let us assume Parliament were to pass legislation generally abrogating, in all cases, the rights to legal professional privilege and against self-incrimination. There would be an absolute outcry, I venture to say, not only from lawyers. That is because these rights are fundamental to the rule of law as we understand it and... partly inform our identity as legal professionals. It is important, therefore, that we, as lawyers, appreciate the extent of any encroachment on these rights. It is equally important to form a view, on which minds might differ, as to whether encroachments are both individually and cumulatively justified. If we don't do that, we may end up in a position where, without protest, those rights are so substantially diminished that the underpinning of the basis on which we conduct our profession is itself substantially impaired."*

So let us look at some of the other good, bad and ugly features of the system we all know and love. I think the most convenient way of doing that is to look at some stages in the criminal justice process as it unfolds and identify the features worthy of comment in a paper like this. As I run through the process the commentary will get shorter and shorter – there is a lot to cover.

INVESTIGATION

In general terms, we have a very professional and highly competent police crime investigation service working for us and it is constantly improving. That is good.

What is not so good is that police drives towards ever more vigorous and sometimes ill-considered enforcement of the letter of the criminal law are avidly supported by the law and order political and media classes. We need to be on the alert. Police set the agenda for criminal law reform and they do not do it in a finely balanced way.

Police work with the tools they are given – they are well resourced (better than some other agencies in criminal justice) and they apply the law (and should not be criticised for doing so – most criticism may properly lie elsewhere).

One of the laws they apply (ie one of the tools they have been given) is section 99 of the **Law Enforcement (Powers and Responsibilities) Act** 2002 as amended on 16 December 2013, which relates to arrest without warrant.

Arresting a person is a very serious event. In Donaldson v Broomby (1982) 5 A Crim R 160 @ [1] Deane J [then of the Federal Court of Australia, later of the High Court and later Governor General] highlighted the nature of arrest and the significance of its infringement upon rights when he said:

> *"Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of*

personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable. [Emphasis added] *Where the Parliament has legislated so as to define those circumstances, neither legal principle nor considerations of public interest commend or support a search among the shadows of earlier subordinate legislation for the means of evading the constraints upon the interference with the liberty of the subject which the Parliament has imposed."*

(In that case an attempt had been made to qualify the legislation in favour of the power of arrest by reference to earlier regulations.)

These are not empty words, for in some countries arrest powers are routinely abused and the temptation is always present even in our own jurisdiction, beset as it is by political penal populism, to bend the rules and tip the balance inappropriately in favour of law enforcement.

Nevertheless, Parliament slipped into section 99(1)(b)(ix) a new provision effectively giving *carte blanche* for arrest without warrant. That provision enables a police officer, quite lawfully, to arrest a person without warrant if he or she is satisfied that the arrest is reasonably necessary *"because of the nature and seriousness of the offence"*. Said quickly, it might seem reasonable – but a court analysing police conduct under this provision would need only to consider the officer's personal and subjective satisfaction of the objective test of reasonable necessity, based only upon the officer's assessment of the *"nature and seriousness of the offence"*. Nothing is required in that justification of the long accepted principal rationales for arrest (all disjunctively listed elsewhere in section 99(1)(b)) of: ensuring appearance in court; preventing continuation, repetition or commission of another offence; preventing flight; preventing the concealment, loss or destruction of evidence; preventing interference with a witness; preventing the fabrication of evidence; or preserving the safety or welfare of the suspect.

That is bad.

Another law police are required to consider – ie another tool in their box – is section 89A of the **Evidence Act** 1995, inserted in 2014. That is a serious infringement of the right to silence as we have had it in our justice system for centuries.

The so-called "right to silence" is a right only to the extent provided by Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) which provides a right to an accused:

"(g) Not to be compelled to testify against himself or to confess guilt."

Otherwise, the expression really refers to a collection of immunities that suspects and accused persons enjoy in the course of the criminal justice process: immunity from adverse cooperation in the investigation, from self-incrimination, from torture and mistreatment directed to obtaining confessions and from being required to testify in proceedings against them.

The enactment of section 89A was said to have been modelled on the **Criminal Justice and Public Order Act** 1994 (UK). Section 34 of that Act permits an adverse inference to be drawn where a defendant fails to mention, when questioned under caution or charged, facts later relied upon by him or her in court.

However, the practices of England and Wales are not replicated in NSW and, in any event, the English legislation is viewed by many as unsuccessful and problematic even in the English context. The Court of Appeal in a joint judgment in R v Beckles[2] said that s. 34 had been justifiably described as "a notorious minefield".

Section 89A makes it a precondition of drawing an inference against the defendant at trial that at the time of questioning he or she was allowed the opportunity to consult a lawyer – in person, face to face – and take advice about the effect of failing or refusing to mention a fact later relied upon by the defendant (clause 89A (2) (b)). The proposal puts the defendant's lawyer (usually at this stage a solicitor) in a dilemma. If the lawyer tells the defendant that he or she runs the risk of an adverse inference being drawn from the fact that he or she has exercised his or her right to silence, that provides justification for such a direction being given. However, if the lawyer simply tells the defendant to exercise his or her common law right to silence, a statutory pre-condition for the adverse inference is withdrawn and it cannot be invited.

An important problem with the curtailment of the defendant's right to silence is that there is no requirement in NSW for the police to inform the defendant of the evidence available against him or her at the interview stage of an investigation. For example, it is standard practice in cases where the police know that the defendant's fingerprints have been found at a particular location (for example in a house-breaking) for a police officer to ask the defendant if he or she has ever been in the street or the suburb where the fingerprint was located. The defendant might well deny being in the street or suburb, having no idea of the significance the prosecution might later attach to the answer and a lie (if it be such) may work against the defendant. The fact that a defendant has had access to legal advice does not really assist the defendant. The defence lawyer, at the time when the defendant is interviewed by the police, will normally have no more information about the evidence the police have against the defendant than the defendant does. This will be so particularly when the only contact the lawyer has with the defendant is by telephone. In remote areas of New South Wales, where legal resources are scarce and where the need for professional advice is often high, access to lawyers by way of telephone will frequently be the only access to legal advice available and this may disadvantage defendants in remote areas (although it will mean that section 89A will not operate).

This may be contrasted with the English scheme where government funded duty solicitors were established long ago – serving in police stations, principally. It is also the practice there that the suspect is given access to the material obtained by police before there is any requirement for interview.

Section 89A does not apply to defendants who, at the time of questioning, are under 18 years old or who have a cognitive impairment. This provision is both welcome and necessary; but there are other vulnerable groups in the community who are not protected, such as people with a limited understanding of English, people of very poor education or people who may be conditioned to act subserviently to authority.

This represents a significant deviation from the gold standard of criminal justice that we should all enjoy. Section 89A was enacted contrary to views expressed in the past by the NSW Law Reform Commission and many other reputable bodies. It was strongly opposed by the professional associations. There was no demonstrated need for the curtailment of the right to silence. There is no evidence that section 89A will affect the rate at which accused persons plead guilty or are convicted. The experience of the English legal system is that this proposal may lead to "a notorious minefield".

[2] [2005] 1WLR 2829

That is bad. It would be ugly, but for the fact that lawyers avoid its operation routinely, simply by refusing to turn up to give advice to their clients and by advising them, by telephone, to exercise their right to silence. It is also kept from being completely ugly (in my own view) by the fact that some moderate and reasonable compulsion should be put on the defence to make pre-trial disclosure of just what is to be in issue – but this is not the way to do it.

The investigation of crime is also influenced by the participation of defence representatives. Last year there was much concern that the funding of the Aboriginal Legal Service (NSW/ACT) Custody Notification Service [CNS] would be removed. The CNS is a 24/7 legal advice and RU OK phone line for Aboriginal men, women and children which has prevented deaths in police cell custody in NSW and the ACT since it began in 2008. It ensures access to fundamental legal rights, no matter if a person is in an urban, rural or remote location. The health and welfare check by a trained solicitor means that Aboriginal detainees can feel safer in custody. The CNS also inherently demands a good working relationship with NSW and ACT police.

The Australian government has funded the CNS through one-off annual grants since 2008. It costs $526,000 per year to operate, employing six solicitors working around the clock without penalty rates and with an administrative officer. The grant was to finish on 31 December 2015 but it has been continued after a strong public and political campaign for its retention. The CNS was nominated for an Australian Human Rights Award in 2015. It is planned to see the model rolled out to every State and Territory.

That is a decidedly good thing.

Especially is it good, given the continuing escalation in the numbers of indigenous men, women and children, being incarcerated across the country every year – a problem for which we do not yet have the solution, but about which a great deal has been said and written. Indigenous people make up no more than 3% of the population of Australia, but 27% of its prison population. Their numbers are rising, especially among indigenous women.

That is an ugly thing. We must try harder – and many people and organisations are doing just that. I say more about this later.

ERISPs

The introduction of the ERISP (Electronic Recording of Interview with Suspected Person) was undoubtedly a good thing. I well remember in my early years of practice when the bulk of the time of a trial was taken up with contesting the admissibility of a confession and otherwise no doubt reputable police officers told serial lies on oath about what had happened during interrogation. Now it is surprising to many to find just how many suspects make full confessions in the face of a TV camera.

Police have now embraced this very effective tool that brings true confessions (after initially opposing it). They have also come to understand that they cannot rely on false confessions any more – they must investigate allegations – do detective work. But that has created another problem – over-investigation. Courts must now deal with vast volumes of electronically recorded evidence of

surveillance, telephone intercepts, listening devices, CCTV recordings and so on and only slow progress is being made towards dealing with this material in a user-friendly fashion. That is not so good. But case management regimes that continue to be introduced are going some way to make the process more efficient (even if at a cost).

PROSECUTION

By some miracle the NSW Government decided this year to increase the funding to the Office of the Director of Public Prosecutions. That is good. But the increase is not nearly enough, so that is bad. The battle continues and occasionally it has become ugly. It is always curious to see more resources tipped into police and prisons without complementary increases being given to the processes between them: prosecution, defence (legal aid) and courts.

In the meantime, there is no sign of the Government making the principled decision that is required to transfer all prosecution functions from Prosecution Operations of the Police Prosecutions Command to the DPP. That is bad and is becoming ugly as time moves on.

There is a very long line of recommendations and findings by entirely reputable public bodies supporting such a change (Royal Commissions, commissions of inquiry, review bodies and so on). The lessons of the pilot transfer conducted at Campbelltown and Dubbo Local Courts in 1998, assessed by an independent panel as a success on all fronts, have not been acted upon and such a trial has not been repeated. While moves in that direction have been made in other States (notably Western Australia and Queensland) and in the Northern Territory (the ACT having made the change in the 1970s and England and Wales in the 1980s), NSW prefers to lumber on with a system that produces inefficiencies and low morale and violates principle and public expectations. That is not "gold standard" justice.

It should also be the case that in serious matters, charges should not be laid until advice has been given by the ODPP. Such processes are followed in other jurisdictions and it would save a great deal of angst in NSW if it were done here.

One of the holy grails sought by governments and prosecutors in the conduct chiefly of serious criminal prosecutions (indictable offences, triable in the District and Supreme Courts) – although it applies also to summary offences – is the early identification of issues in dispute, early entry of guilty pleas and early indication of cooperation and remorse in such cases. The latest NSW Law Reform Commission [LRC] report on the subject is Report 141 Encouraging Appropriate Early Guilty Pleas and it seems it is yet to receive Government attention (behind a backlog of really useful reports from really sound bodies including the LRC).

The latest Government intervention in the issue was the expansion of Division 3 of Part 3 of Chapter 3 of the **Criminal Procedure Act** 1986 which seems to have had the effect of requiring the prosecution to do even more work with little contribution or benefit flowing from the defence. That is bad.

The Government has also reinstated the formerly abandoned (despite good results) Criminal Case Conferencing scheme in the Local Court. That is good. But it is bad that it has had to go through an "on again, off again" process.

The root causes of the problem are (it seems to me) twofold: the reluctance and/or inability of the defence to make commitments to the process too far ahead of time; and the shortage of resources to enable the prosecution to prepare and engage very far ahead of time. These are linked. If proper resources were provided to the prosecution (and cooperation by investigators improved), the prosecution would be in a position to engage with the defence and explore those matters that would benefit the defence (by way of mitigation of penalty on a plea) and those that would benefit a defended trial process (by way of agreed matters and the identification of disputed issues that would shorten trials). The incentive for the defence to delay cooperation – being the hope that something helpful might happen to the case if it is delayed sufficiently – would be removed. There would still be a need to get responsible defence representation in place in a timely manner. Somebody should read the LRC Report 141.

What is good about the prosecution? The independence, professional competence and application of the DPP and his staff. And the results they achieve.

DEFENCE

The vast majority of serious defended cases have legally aided representation, through the excellent Public Defenders we have or through the Legal Aid Commission or Aboriginal Legal Service. The Legal Aid Commission has had to deal with constantly diminishing funds for criminal defence work. This is false economy, largely by the Federal Government. This is bad.

Recently the President of the NSW Bar Association called, again, for the Federal Government to increase its contribution to the NSW Legal Aid Commission. It had kept it to about 55% of the Commission's budget, sharing with the State Government. That has now fallen to 25% and places a huge strain on the Commission that the State Government says it cannot alleviate. Cases are not proceeding because they involve serious offences and the accused are unrepresented. That contributes to court backlogs, problems for victims and, ultimately, problems for trials that do get on including missing or forgetful witnesses.

When the defence does appear in a trial, however, it may open its case to a jury following the Crown opening. This is intended to identify the matters the jury (or judge) should concentrate on and that will be in issue throughout the trial. I take part of the credit for this initiative, way back when. That is a good thing.

BAIL

At a time when the left hand of Government appears to be seeking ways of controlling and, hopefully, reducing, the prison population, the right hand seems to be adopting ever more punitive

approaches in pursuit of what it erroneously expects will make it popular. This affects police procedures, sentencing and bail.

In its December 2015 Quarterly Update on NSW Custody Statistics the NSW Bureau of Crime Statistics and Research (BOCSAR) reported that NSW prisons reached their highest occupation ever in December at 12,121 (an increase of 12% in 2015 and 17% over 2014 and 2015). The remand component of that total increased 9% to about one third of the number of prisoners.

A contributor to this situation must be the bail laws that were altered in 2014 after the LRC recommendations were (sort of) put into effect and the treatment of persons in breach of bail conditions. Another contributor must be the increasing backlog in the criminal courts, especially the District Court, caused by a lack of resources.

BOCSAR reported further at the end of February on the apparent reasons for the increase in the prison population generally and the remand component specifically. It reported: *"The growth in the number of persons entering remand is due to four factors: (a) more people being proceeded against by police for offences where bail refusal is likely (b) more people being proceeded against for breach of bail (c) longer periods on remand and (d) (possibly) an increase in the likelihood of bail refusal."*

Many of those held on remand will not be convicted of an offence. Many will receive penalties less than the time they will have spent on remand. Lives will have been disrupted in families, social connections, employment and education.

That is very bad.

COURTS

It must be emphasised that in Australia generally we have a strong, well-qualified, professional and independent judiciary that serves us well, in accordance with the highest international standards. Not every country can say that. Our judiciary interprets and applies the law in an appropriately beneficial fashion. We have appropriate and effective trial and appeal processes. That is good.

In NSW our trial process itself is generally efficient. From time to time backlogs do build up, but they are usually resolved after a time by the Government coming to its senses and providing appropriate resources to enable the courts and the agencies serving them to keep on top of demand. Case management by the courts (eg using Chapter 3, Part 3, Division 3 of the **Criminal Procedure Act** 1986 for proceedings on indictment) has become much more common in recent years and that has been a good thing (although it can cause unnecessary work for the parties appearing). Criminal Case Conferencing in the Local Court contributes to greater efficiency. The District Court Rolling List arrangements in Sydney also contribute.

It is possible in the District Court and Supreme Court for a trial to be heard by judge alone, without a jury. It occurs quite frequently, although the vast majority of trials are before juries (despite attacks on the institution by some who should really know better). Directions to juries are under investigation and in March 2013 the LRC reported on them (Report 136). We are yet to see any kind of meaningful response to the very competent work represented in that report.

Section 132 of the **Criminal Procedure Act** 1986 applies – if all parties apply for trial by judge alone it must be granted; it cannot be granted without the agreement of the accused; if the Crown does not agree, it may still be ordered if the judge considers it is in the interests of justice to do so; the judge may order it anyway, if there is a substantial risk of jury interference that cannot reasonably be mitigated otherwise.

The reasons for trial by judge alone vary and anecdotally it is said that the number has increased in recent times. The facility to hear matters in this way is good – just as majority jury verdicts (11:1) are also good (and I also take some credit for those).

With the enactment of the **Evidence Act** 1995 the evidence laws were substantially improved. As a former prosecutor I can say that the situation was greatly improved for the prosecution – but only in ways that really accord more closely with commonsense. The Act has been amended and no doubt there will continue to be a need to amend from time to time to take account of changes in society and to draw from the experience of the application of the law.

In the last decade or more we have significantly improved the way in which sexual assault cases, against children and adults, are conducted. The experience of the victim has been greatly improved (although there will always be some cases where things could have been done better). Legislative responses have included Chapter 6, Part 5 of the **Criminal Procedure Act** 1986 with provisions for hearings *in camera* with media control, restrictions on evidence of a complainant's sexual history, judicial warnings on considering lack of complaint and other warnings, arrangements for a complainant witness where the accused is unrepresented, giving of evidence from a remote place or with screens or other protection, support persons attending, a regime for dealing with sexual assault communications privilege and subpoenas – with contributions from prosecutors and private solicitors acting *pro bono* - and the facilitation of the presentation of evidence in retrials.

The Local Court has responded with the Child Sexual Offence Evidence Pilot.

Practical responses have included the establishment of the Witness Assistance Service in the Office of the DPP many years ago and greater sensitivity to the issues by police and the courts. That is all good.

We know that domestic violence continues to be a major problem in Australia. At the DPP level a special Prosecution Guideline has been created to assist prosecutors in making decisions about such cases – the protocol included in Appendix E. Provisions have also been made to allow videorecordings by first responders to be admitted in evidence. Further work to address this scourge requires commitment well beyond the criminal justice system, which can only perform the "undertaker" role of cleaning up after the event.

CROWN APPEALS

The Crown may now appeal in certain circumstances and on certain grounds from directed verdicts of acquittal and acquittals by Judge alone (on a question of law alone – section 107 of the **Crimes (Appeal and Review) Act** 2001) and from tainted acquittals and in cases where fresh and compelling

evidence becomes available (sections 99 to 106). I believe these remedies to be good – and they have not been abused; indeed, the responsible authorities have been very reluctant to invoke them.

These measures have to an extent encroached upon the firmly established prevention of double jeopardy, but they should be regarded as useful safety valves available in extreme cases where not to challenge an acquittal could be regarded as an affront to justice.

DIVERSIONARY PROGRAMS

We have made some good progress in the operation of diversionary programs – means of dealing with criminal matters outside of the usual court and corrections processes. That is good. But the resources available for them are limited and especially in regional areas many of the programs are simply not available. Diversions are sometimes called therapeutic jurisprudence and essentially they involve non-custodial dispositions in ways that will (hopefully) improve rehabilitation and satisfy the interests of victims and the community at large.

The programs available in the Local Court include:

- MERIT (Magistrates Early Referral into Treatment): drug-affected and in 7 courts also alcohol-affected defendants; operates pre-plea; available in 65/150 Local Courts.

- CREDIT (Court Referral of Eligible Defendants into Treatment): for persons with a range of issues where assistance would be helpful to avoid offending; operates pre-plea; educational, training, treatment and social welfare programs; available at Burwood and Tamworth Local Courts.

- Domestic Violence Court Intervention Model (DVCIM): provides witness preparation and victim safety and support; available at Campbelltown and Wagga Wagga Local Courts. (Really a service for others than defendants.)

- Forum Sentencing: brings together the adult offender, victim and others (community) affected by the offence to discuss the impact and work to a resolution; available at 50 Local Courts in Sydney, the Hunter and northern NSW. (Youth Justice Conferences are also available via the Children's Court.)

- Circle Sentencing: for adult Indigenous defendants; involves the local Aboriginal community in the sentencing process; applies post-conviction; available at 9 Local Courts.

- Traffic Offender Intervention Program: for traffic offenders, a road safety education program; operates post-conviction; available in any court; the program is under review until at least March 2016.

- Drug Court: a mixed Local/District Court for drug-dependant adults with a limited range of offences; at Parramatta, Toronto and Sydney. (A Juvenile Drug Court program at Parramatta was discontinued, despite very positive results.)

PUNISHMENT - SENTENCING

There are seven purposes of sentencing set out in section 3A of the **Crimes (Sentencing Procedure) Act** 1999 and I have said something about this already. Unless and until the Government acts on the LRC Reports 139 and 139A of 2013, the task of sentencing will continue to remain more complicated and difficult than it needs to be and the outcomes will continue to be largely unsatisfactory. Some aspects of sentencing that are worth commenting on here now follow.

The NSW Sentencing Council published (long ago) two reports that are linked: Abolition of Short Prison Sentences (August 2004) and Effectiveness of Fines as a Sentencing Option (October 2006). They are linked because non-payment of fines can often result, in due course, in short prison sentences and other sanctions. A common course is for a fine to be imposed, non-payment resulting in driving licence suspension/disqualification, driving while suspended/disqualified leading to imprisonment. These sanctions disproportionately affect juveniles, Indigenous persons and persons in rural areas. Despite constant challenges to this cycle by lawyers and legal bodies, change is not occurring. That is bad.

While there is some focus on rehabilitation inside prisons and post-release, a lack of resources inhibits the extent to which it can be effective. The preponderance of short prison sentences also does not assist, because with any sentence of six months or less it is impossible to get a prisoner onto a useful program. The Productivity Commission has published its 21st annual Report on Government Services 2016. It reports that nationally 44.3% of released prisoners had returned to prison within two years (48.1% in NSW), while 51.1% had returned to corrective services (52.9% in NSW). That is an unacceptably high rate of recidivism – bad.

This is in the context that in NSW imprisonment is at its highest ever. The Bureau of Crime Statistics and Research (BOCSAR) in its December 2015 quarterly report on NSW Custody Statistics reported:

- 12,121 persons in custody, up 12% in 2015 and up 17% over 2014 and 2015;

- the non-Indigenous component was up 12% and 18% respectively;

- the Indigenous component was up 8% and 11% respectively;

- in 2015 sentenced prisoners increased 17% and remand prisoners 9% (to the point where they constitute 1/3 of the total);

- steady increases are measurable from November 2014;

- juvenile prisoners, however, declined 6% over 2015 (although the proportion of remandees increased).

That is all very bad and getting ugly. BOCSAR reported at the end of February: *"The increase in the sentenced prisoner population is partly due to an increase in the percentage of convicted offenders given a prison sentence and partly due to the fact that police are more often initiating criminal proceedings against offenders who, if convicted, are likely to be imprisoned."*

Although it is not very public yet, it is known that the Government is considering measures, drawing upon the LRC Sentencing Report (with some adjustments), to expand community based sentencing

options (especially Intensive Correction Orders and Community Correction Orders) to focus more on supervision, intervention and rehabilitation. There is no time to be lost to make this good.

VICTIM IMPACT STATEMENTS

Overall, I think the introduction of VIS has been good. But the courts are still in a quandary about just how to deal with them and the Government still seems to be confused about their proper status.

As a means of enabling victims and family victims to be heard, to express the hurt they have suffered and to know that the court and the community are aware, I think they are a very good thing. But they do put judges and magistrates in a bind. Division 2 of Part 3 of the **Crimes (Sentencing Procedure) Act** 1999 enables a court to "receive and consider" a VIS. Section 28(4) provides:

> *(4) A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.*

I think this is a most problematic provision that creates more issues than it resolves – and that is bad. Its enactment was probably a compromise, but it will satisfy no-one. The prosecutor must apply; the court must consider it appropriate; the final justification is specious.

MANDATORY MINIMUM SENTENCES

They are back! There is not time here to explain why mandatory sentences (minima or otherwise) for serious crimes are plain ugly. Even the Attorney General recognised that to some extent, when she said in an interview reported in the Bar News, Summer 2015 edition:

> *"...mandatory sentencing is something used in very rare circumstances. My personal view is that mandatory minimum sentences should be rare, and that's the view of the government. There has to be a good public policy reason to be served by mandatory sentencing."*

Section 25B of the **Crimes Act** 1900 (the killing by intoxicated hitting offence) is the latest manifestation. While NSW may be faring slightly better than some other jurisdictions in this regard, we cannot let down our guard and allow any more of these legislated injustices to occur.

Increasing political penal populism does not serve us well and it is interesting to note that even in Victoria the Sentencing Advisory Council has received a reference to report on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:

- promotes consistency of approach in sentencing offenders; and
- promotes public confidence in the criminal justice system.

In addition to providing advice on the type of guidance that should feature in a new sentencing scheme, the terms of reference seek the Council's advice on which offences should be subject to such a scheme and the appropriate levels for those offences.

The Council will be looking at sentencing guidelines, standard non-parole periods and mandatory sentencing in its review and submissions are now open.

LIFE SENTENCES

The most severe penalty that our courts can impose is imprisonment for life, with no release and no parole. The good thing about that is that we do not have the death penalty. The bad thing is that life sentences are themselves hugely problematic. I can summarise the heads of objection to locking up someone until they die[3]:

- People can and do change. At the young end of life, the brains of adolescents are still developing and they are more likely to act on impulse, engage is dangerous or risky behaviour and misread social cues and emotions. They might change. But if they are sentenced to life they are treated as adults are and as if they will not change. At the other end of life, people are less inclined to commit crime (sometimes referred to as the "criminal menopause"). They have changed.

- Economically it is an expensive option. High incarceration of ageing people requiring care and medical attention is costly to the community.

- Legally it may be argued that life imprisonment is a cruel and inhumane punishment, negating reform (which is supposed to be one of the purposes of sentencing) and offering no prospect of release and rehabilitation in the community.

- Socially life sentences offer no incentive for reform.

- Morally they offend the dignity and rights of the prisoners.

- Psychologically they take no account of the myriad reasons for offending and their responsiveness to appropriate treatment.

- Epistemologically life sentences say to all that there is no piece of information that could be learned between sentencing and death that could bear in any way on the punishment the prisoner is said to deserve. Any transformation during the sentence is irrelevant. And this is accepted at the time of sentencing. How is it rational to say at the time of sentence that there can be no possible evidence in the future (which we are not to know, of course) that could bear on the punishment that, decades on, the prisoner deserves?

That means that it is irrational to remove the possibility for parole for life prisoners (as we have in NSW, but is not done in some other jurisdictions).

[3] With acknowledgement to Jennifer Lackey, The New York Times, 1 February 2016

SERIOUS SEX AND VIOLENCE OFFENDERS

We have regimes in place to enable, pursuant to a judicial process admittedly with procedural fairness built in, orders to be made detaining serious sex or violence offenders beyond their sentences or having them subject to extended supervision in the community. The **Crimes (High Risk Offenders) Act** 2006 sets out the regime to be followed. The legislation is presently under review.

The fact that further orders of detention or supervision can be made to take effect after a sentence imposed has been served is, on its face, bad. The UN Human Rights Committee has had things to say about it. But the facts that most orders made are for supervision in the community and that, by and large, they are unproblematic, makes the idea a little less bad – but not really good, as a matter of principle.

GENERAL

I conclude with a few brief general observations about some more of the good, bad and ugly in the criminal justice system and processes that occur in NSW.

- Government invests resources into the operations of bodies like the Law Reform Commission and the Sentencing Council and they perform their tasks to an exceptionally high standard, investing much time and expertise in the reports and recommendations they produce. But Government is inordinately slow to respond to them. In the meantime, genuine wrongs continue to be done to people that could be avoided by constructive change.

- There seems to be a great lack of resources for crime prevention programs. Prevention is certainly better than cure, but Government puts very little into it, concentrating instead on trying to clear up the damage after the event.

- At the Federal level, but mirrored in NSW, there has been significant overreach in our legislative responses to the threat of terrorism. Balance is required, or we risk being given a cure that is worse than the disease. We do not protect our freedoms by throwing them away [to quote Julian Burnside AO QC].

- The criminal organisations legislation (so-called "bikies" legislation) is another example of overreach at the State and Territory level.

- The over-representation of Indigenous offenders in prisons is a national disgrace and just as much so in NSW. ATSI people nationally represent up to 3% of our population, but 27% of our prisoners (and I have given the latest figures already). In the Second Frank Walker Memorial Lecture delivered on 16 February 2016 the Hon Bob Debus gave earlier figures from the Australian Bureau of Statistics:

> *"In June last year there were* [in NSW] *nearly 12,000 inmates and more than 2,800 or 24 per cent of them were Aboriginal. Nationally, there were nearly 34,000 inmates, 27 per cent of them Aboriginal. This is an age-standardised imprisonment rate 13 times higher than the non-indigenous population. For every 100,000 non-Indigenous Australians there were 146 in prison last year. For every 100,000 Indigenous Australians 2,253 were in prison."*

He also noted:

> *"There is some encouragement in the news that there has been a decline in the rate of imprisonment for younger males over the last ten years, but here's the rub. In the last decade or so overall rates of Aboriginal incarceration have increased by more than fifty per cent In New South Wales. Alcohol-induced death for Indigenous people occurs at six times the rate for non-Indigenous people. In 2009 a careful study reported that one in four indigenous women living with dependent children younger than 15 years had been victims of violence in the previous year. It seems that still there are somewhat more young Indigenous men in prison than there are at university."*

- We are still grappling with those with mental disorders who are caught up in the criminal justice system. Many bodies, such as the Mental Health Review Tribunal, do excellent work in the area, but the police at the frontline and the prisons need to have more assistance and resources.

- Charge negotiation and the agreement of facts to form the basis of sentencing, with procedures built in to acknowledge the rights of victims of crime, have become better organised since the Samuels report of 2002.

- The giving of immunities (indemnities and undertakings) should not be restricted to an elected politician, the Attorney General. They are not in some other Australian jurisdictions and they should not be in NSW.

- Drug laws continue their absurd existence. I have said on too many occasions that the criminal law is singularly ill-equipped to deal with drug use and matters closely connected with that. Yes, it should have a role in dealing with people who operate commercially and for profit outside legal regimes, but for all presently illicit drugs those regimes must change. Drugs of all kinds (including alcohol, nicotine, caffeine and those presently banned) should be legislated, regulated, controlled and taxed and the sooner that is done, the sooner the avoidable harms being done by the present regime can be reduced. They should be addressed in a social and health context, not by the criminal law (although it would still have a role against those operating outside the regulated system) .

> - The Medically Supervised Injecting Centre in Kings Cross is superbly valuable – but "bring your own"? And only one in Australia? There are 81 in 60 cities in 9 countries and more are in contemplation in at least 6 more countries. The benefits are unarguable.
> - Drug detecting dogs do more harm than good (but they are an easy option for police).
> - There should be drug checking facilities available at mass events.
> - Drug testing of drivers is cynically dishonest and ineffective in its expressed purpose. It is carried on the back of random breath testing for alcohol, a completely separate proposition. Drug testing is not random. It has nothing to do with driver impairment. It is not scientifically rigorous. It is a measure employed to detect and penalise drug users, regardless of driving. It is more closely analogous to stopping pedestrians in the street to test them for drugs. That would be socially unacceptable – and if more people understood driver testing for drugs, it would not be accepted either (unlike RBT).

- How do we make just one bold step to bring general improvement to the protection of rights in NSW? By a bill of rights, of course. With Queensland starting off a process, it is time to crank it up for NSW and I am pleased that the Council for Civil Liberties will be doing just that.