The Quiet Revolution: Reconciling the Purposes and Principles of Criminal Punishment in NSW

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Introduction

Sentencing is a notoriously difficult and complex area of law. It is therefore unfortunate that media commentary and the ensuing public debate around issues of criminal punishment are usually overwhelmingly simplistic.

There is also a gaping disparity in the nature of criticism levelled at both the Government and the courts in relation to sentencing policy and practice. While one section of the media frequently chastises us for being 'too soft', another is critical of what's characterised as a 'tough' approach to law and order.

For example, the *Daily Telegraph* recently ran a front page article which claimed to provide 'proof that the state's courts are soft on criminals.'[1] But then a mere two weeks later, the *Sydney Morning Herald* ran a story with claims that 'New South Wales can no longer afford the economic costs of jailing so many people.'[2]

While being on the receiving end of such wildly divergent criticism can be frustrating, it is important to remember that these disparate critiques actually reveal fundamental and longstanding differences in ways of thinking about criminal justice.

The New South Wales Government believes that these seemingly irreconcilable conceptions need not be mutually exclusive.

Indeed, as part of our State Plan goal to reduce rates of re-offending, we are bringing forward a range of innovative new criminal court programs that seek to simultaneously punish and rehabilitate, thereby reconciling longstanding and often disparate principles behind sentencing law and practice.

In taking this approach, which has largely escaped media and therefore broader public attention, we are experiencing something of a quiet revolution in the New South Wales criminal justice system.

Tensions in criminal justice in New South Wales: Macquarie's legacy

2010 marks the 200th anniversary of Lachlan Macquarie's appointment as Governor of New South Wales.

[1] 'Court Being Too Soft', *Daily Telegraph* (1 February 2010).
[2] 'Jail Crisis: Locking Up So Many a Crime', *Sydney Morning Herald* (14 February 2010).

While there is a lot of focus on Macquarie's legacy as a builder and explorer, he should also be commended for being one of the first to recognise that criminals could and should be rehabilitated to become fully accepted and productive members of society.

As he wrote to the Duke of York in 1817:

> *It has been a uniform measure of my government … to rule and manage these children of misfortune so as at once to make them feel sensibly the weight of their crimes … and to hold out to them the distant prospect of relaxation from their chains and even of eventual restoration to their original rank in society.*[3]

In line with this approach, Macquarie oversaw the so-called assignment system at its height, which involved convicts being engaged in meaningful employment such as working for free settlers as shepherds or farm workers. Others were employed in government service, usually due to their special skills. Some even held significant positions of trust, such as constables. After a maximum of eight years, many convicts sentenced to transportation for life who had good records were granted 'tickets of leave', which enabled them to work on their own account. Many were also granted conditional or absolute pardons.

While we cannot ignore the fact that brutal and inhumane punishments like the lash were frequently inflicted on convicts who breached discipline, the assignment system allowed many to lead rich and successful lives in the new colony after they had served their time. Indeed, Macquarie actively encouraged this – controversially, he appointed former convicts to exalted positions like the magistracy.

However, Macquarie's approach incurred the ire of many free settlers, who were opposed to his conciliatory and reformatory techniques, and complained accordingly. Coupled with other complaints surrounding Macquarie's alleged autocratic style, this led the British Government to appoint Commissioner Bigge to inquire into the affairs of the new colony.

Contained within Bigge's instructions was the following direction:

> *You will in the whole course of your inquiries constantly bear in mind that transportation to New South Wales is intended as a severe punishment … and as such must be rendered an object of real terror to all classes of the community.*[4]

Bigge's inquiry and final report ultimately led to Macquarie's resignation as Governor in 1821.

Reconciling principles of sentencing law

The tension between the desire to strongly punish criminal offenders and the need to rehabilitate them is therefore not new to New South Wales.

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[3] Lachlan Macquarie, *Letter to the Duke of York,* 25 July 1817, quoted in J.M. Bennett & Alex C. Castles (eds) *A Source Book of Australian Legal History* (1979) at 6.

[4] Earl Bathurst, *Letter to Commissioner Bigge*, 6 January 1819, quoted in J.M. Bennett & Alex C. Castles (eds) *A Source Book of Australian Legal History* (1979) at 7.

It is, in fact, an inherent feature of our justice system, which actually seeks to service different and sometimes incongruent moral and social purposes.

There are, firstly, the goals of retribution and denunciation.

We expect criminal sentences to correct past wrongs, and for offenders to be penalised with sanctions which are equal to the crime. This not only provides justice to victims of crime, but ensures that the community maintains its confidence in the system as a whole. In a similar vein, it is also important that punishment expresses society's relative moral condemnation of different kinds of criminal behaviour.

But we also expect sentences to prevent the commission of future wrongs.

Sentencing law and practice incorporates several different approaches to achieving this end, including:

- Specific deterrence, which uses the experience of punishment to dissuade the individual offender from committing further offences;
- General deterrence, which uses the example of punishment to dissuade others;
- Incapacitation, which uses imprisonment or intensive supervision to physically prevent an offender from committing further offences; and
- Rehabilitation, which seeks to address the causes of an offenders' behaviour so they aren't influenced to keep committing crime.

These different purposes of criminal punishment are all given expression in state sentencing legislation.[5] With the exception of rehabilitation, all lend themselves towards the imposition of strong punishments.

Rehabilitation is predicated on the idea that there are factors outside of an individual's control - addiction, mental illness, or destitution – which ultimately cause criminal behaviour. It also asserts that these causative factors can be corrected, and that criminals can be reformed and go on to lead lawful and productive lives.

In the seventies and eighties, studies by prominent sociologists like Robert Martinson had caste doubt on this assertion.[6] But today increasing amounts of research from bodies like the New South Wales Bureau of Crime Statistics and Research is showing that well designed rehabilitative programs can yield significant results. A number of these successful programs have been developed and maintained right here in New South Wales.

We have travelled a long way on the road to rehabilitation since Macquarie's time.

At the most basic level, following recommendations made by the Nagle Royal Commission in 1978, the principle that prison should only be used as a punishment of last resort has been enshrined in legislation.[7] We have also seen real progress in transforming our prisons to humane institutions that provide inmates with the means to address the causes of their offending behaviour.

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[5] *Crimes (Sentencing Procedure) Act 1999* (NSW), s3A

[6] Robert Martinson, 'What works? Questions and answers about prison reform', (1974) 10 *The Public Interest* 22

[7] *Crimes (Sentencing Procedure) Act 1999* (NSW), s5.

In 1997, the Government introduced the *Young Offenders Act* which, by providing police and courts with a range of diversionary options including warnings, cautions and youth justice conferences, sees tens of thousands of juveniles kept out of the criminal justice system every year.

However, there can be no doubt that in recent years our justice system, driven largely by legislative change, has become much tougher. Indeed, over the last fifteen years, the proportion of offenders sentenced to imprisonment has increased significantly, as has the average length of prison terms.[8]

As outlined above, a tough approach to sentencing is necessary in serving many of the purposes for which criminal punishment is designed, including deterrence, incapacitation, denunciation and, most notably, retribution as a means of providing justice to victims and the community.

The Government recognises the value of these different goals, and we will continue to authorise our courts to impose tough punishments as a means of furthering them.

But this is not to say that we don't support rehabilitation. In fact, the Government has actually set itself the very ambitious goal of reducing rates of re-offending by 10% by 2016.

But we reject the suggestion that rehabilitation is somehow incompatible with other sentencing purposes.

Recent reforms to the NSW criminal justice system

With this philosophy mind, the New South Wales Government is taking revolutionary steps in providing courts with innovative sentencing alternatives which are punitive as well as a therapeutic in nature.

In doing so, we are demonstrating that punishment and rehabilitation are not mutually exclusive, and that if done properly, rehabilitation can and does work.

The New South Wales Drug Court is a great example. The program, which operates as an alternative to imprisonment, offers non-violent drug dependent adult offenders the opportunity to participate in an intensive, supervised program of treatment and rehabilitation. Those who fail to comply with their program face the risk of being sent to prison. Since its inception in 1999, we've spent around $4 million per year on the Drug Court, and had close to 2000 offenders successfully complete the program.

A recent evaluation from the Bureau of Crime Statistics and Research has shown that Drug Court participants are:

- 17 per cent less likely to be reconvicted for any offence;
- 30 per cent less likely to be reconvicted for a violent offence; and
- 38 per cent less likely to be reconvicted for a drug offence.[9]

[8] Rohan Lulham & Jacqueline Fitzgerald, 'Trends in bail and sentencing outcomes in New South Wales criminal courts: 1993-2007', *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice; no. 124* (Sydney: NSW Bureau of Crime Statistics and Research, 2009).

We are now looking to take this approach to a much broader group of offenders.

Having recently gone through a public consultation process, the New South Wales Government will soon be introducing a new style of community-based sentence as an alternative to imprisonment, called an Intensive Corrections Order. Offenders will be subject to strict monitoring and be forced to comply with a range of conditions and obligations, including requirements to participate in therapeutic treatment programs.

The Government is also giving courts wider rehabilitative options for dealing with lower level offenders.

Since 2000, around 8000 offenders have completed the Magistrates Early Referral Into Treatment, or MERIT program, a joint State and Commonwealth initiative that engages defendants with drug treatment as part of their bail conditions. With an annual budget of $13 million, MERIT is now available in 63 local courts across the state. Research by the NSW Bureau of Crime Statistics and Research has shown that the program reduces the proportion of offenders reconvicted for any offence by 12%.[10]

We have recently commenced trialling the application of MERIT to offenders with alcohol dependency issues at seven local courts. Pending discussions with the Commonwealth, we hope to introduce Alcohol MERIT into more courts across the state.

We are also giving courts new options for dealing with those who have other problems that we know contribute to recidivist behaviour.

The Court Referral of Eligible Defendents Into Treatment, or CREDIT program, is currently being trialled at two local courts. Modelled on New York's 'Community Court', CREDIT refers defendants to treatment and support services to address issues such as homelessness, financial management, gambling addiction and mental health problems. Since the program's commencement in August last year, we've had 75 defendants enter the program, with 17 having successfully completed their Intervention Plan. We will fully evaluate the program in two years time, and then consider whether or not it should be expanded throughout the state.

The Government is also reforming the fines system so that it has a greater focus on rehabilitation. While fines and penalty notices can be a useful and non-custodial means for courts and enforcement officers to punish lower level offenders, they can result in vulnerable people being further drawn into the criminal justice system if they are unable to pay.

To address these problems, the Government has introduced the option of a Work and Development Order for fine debtors who are destitute, mentally ill, intellectually disabled or homeless. A Work and Development Order allows eligible people to apply to satisfy their fine debt by doing unpaid work for charitable and other organisations, or by participating in courses or treatment to address issues like mental health problems. The Work and Development

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[9] Don Weatherburn, Craig Jones, Lucy Snowball & Jiuzhao Hua, 'The NSW Drug Court: A re-evaluation of its effectiveness', *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice; no. 121* (Sydney: NSW Bureau of Crime Statistics and Research, 2008).

[10] Rohan Lulham, 'The Magistrates Early Referral Into Treatment Program: Impact of program participation on re-offending by defendants with a drug use problem', *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice; no. 131* (Sydney: NSW Bureau of Crime Statistics and Research, 2009).

Order Scheme is a two year trial, which formally commenced on 10 July 2009. Since its inception, we've had 53 community organisations and 42 approved health practitioners sign up, servicing more than 100 locations across the state, and 66 fine defaulters placed on Orders.

The Government is also looking to better adapt a number of existing justice programs towards rehabilitative ends.

For example, the Forum Sentencing program currently services thirteen courts across the state. It operates as a pre-sentence program, and brings together the offender and the victim with a facilitator, support people, the police officer and other relevant people to discuss the harm caused by the offence and prepare an 'intervention plan' for the offender. While earlier analysis from the Bureau of Crime Statistics and Research had suggested that the program works very well in terms of increasing victim satisfaction with the justice process,[11] a further study released last year indicated the program is not achieving results in terms of reducing rates of re-offending.[12]

Similarly, Circle Sentencing, which is an indigenous offender program which operating at ten court locations, has recently been assessed by BOCSAR and shown not to be achieving results in terms of reducing re-offending. Similarly to Forum Sentencing, Circle Sentencing involves Aboriginal elders, the magistrate, prosecutor, defendant, and victims sitting down together to discuss the harm caused by the offence and develop an appropriate sentence. We are therefore currently assessing both programs, and investigating a number of ways that we can ensure that outcomes are better focused on linking offenders with treatment and support to address those factors which might be contributing to their offending behaviour.

The Government has also taken a number of steps to improve the manner in which our justice system manages offenders with mental health problems.

We have, first and foremost, introduced significant reforms to the *Mental Health (Forensic Provisions) Act 1990*. This has included replacing the previous system of executive decision making in relation to forensic and correctional patients, with the Mental Health Review Tribunal as the authority in relation to the detention, care, and treatment of forensic and correctional patients.[13]

We have also asked the Law Reform Commission to examine the law and practice regulating what happens to people with a mental illness or a cognitive impairment who commit crime. This review will assess the effectiveness of the current operation of the criminal justice system in its dealings with offenders who have cognitive or mental health impairments against the background of the current legislative and administrative regime.

The Government has also introduced a scheme in a number of Local and Children's Court locations to assist the courts in managing people with mental illnesses. Under the scheme, mental health nurses attend court to enable early diagnosis of a defendant's mental health problems, thereby stopping people with a mental illness from becoming entrenched in the criminal justice system.

Conclusions: The quiet revolution in NSW criminal justice policy

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[11] Julie People and Lily Trimboli, *An evaluation of the NSW community conferencing for young adults pilot program* (Sydney: Bureau of Crime Statistics and Research, 2007).

[12] Craig Jones, 'Does Forum Sentencing reduce re-offending?', *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice; no. 129* (Sydney: NSW Bureau of Crime Statistics and Research, 2009).

[13] Mental Health Legislation Amendment (Forensic Provisions) Bill 2008 (NSW).

With these innovative and so far successful new programs, the New South Wales Government is enabling courts to impose sanctions that maintain a punitive element, while providing offenders with serious rehabilitative support.

The Government recognises that rehabilitation is as important as retribution, denunciation, deterrence and incapacitation, and that both approaches to criminal punishment have valid and important roles to play. Innovative programs like the Drug Court, and new sentencing options coming on line such as Intensive Corrections Orders, give courts the flexibility to impose sanctions which rehabilitate while they provide retribution, denounce, deter, and incapacitate.

While it is perhaps inevitable that media organisations will be attracted to simpler aspects of sentencing policy, and focus on unsophisticated criticisms that the system is either too soft or too hard, in reality the New South Wales Government is showing that you can chew gum and walk at the same time. With millions being spent on new programs and thousands of offenders serving intensive rehabilitative punishments, this new approach is well and truly in full swing.

With a relative lack of media interest in such dramatic changes, I think that we are experiencing something of a quiet revolution in New South Wales criminal justice policy.

Let’s just hope we fare better than poor old Lachlan Macquarie.