



Queensland University of Technology

School of Justice Breakfast

Address by

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Vice Chancellor, Dean Lavarch, judicial colleagues, other distinguished guests far too numerous to mention, it has been a great pleasure and an honour to have been invited to give this address to the annual breakfast of the QUT School of Justice. I would like to commence by acknowledging the traditional owners of the lands upon which we meet, the Turrubal, Jagera and Yuggera peoples, and pay my respects to their Elders past and present.

The burden of my address this morning is perhaps the unsurprising proposition that the development of criminal justice policy and sentencing practices appears to be influenced more by the perception of populist views, and less by the scientific evaluation of empirical data, and rational evaluation of the consequences of penal policy. I use the expression 'popular punitivism' to describe this phenomenon because that is an expression that has been used by criminologists for some decades now. Obviously enough it reflects the (perceived) support of the populous for increasingly punitive responses to criminal conduct.

One of the interesting aspects of democracy as a means of government is that it provides a ready mechanism for the translation of popular views into government policy. 'Democracy' is of course derived from the Greeks who claim to have invented democracy, with some justification. The word itself comes from a combination of the Greek word 'demos' which refers to the population of an ancient Greek State, or the people, and the Greek word 'kratos' which is Greek for power. So, in contemporary terms democracy means 'power to the people', which is fine if the people are informed and their perceptions are accurate, but it is not so good if the people's perceptions are not accurate.

Staying with the Greek theme, I think Socrates was an early example of a victim of popular punitivism, and his case shows in a graphic way the way in which empowering the people can have significant influences upon penal responses. His eloquent and stinging criticisms of the majority which ruled ancient Athens resulted in him being charged with the crime of 'corrupting the minds of the youth of Athens'. Following his conviction by a jury, he was asked to suggest his own punishment, and perhaps facetiously he suggested that he should be given free dinners for life and a wage from the government. Ironically, of course, that is precisely what life prisoners get in Australia today. But the jury rejected that proposition and required him to commit suicide by drinking Hemlock.

Democracy has had other detractors, Dr Mahathir Mohamad, the Prime Minister of Malaysia for 22 years once observed:

Too much democracy leads to homosexuality, moral decay, racial intolerance, economic decline, single parent families, and a lax work ethic.

In other parts of the world, to use the words of Rampaging Roy Slavin and HG Nelson, 'too much democracy is never enough'. One example is the United States where they elect everybody from dogcatchers, to sheriffs to judges. The practice of electing the judiciary in the United States provides another ready mechanism for the translation of populist perceptions and views about penal policy into sentencing policy. Those of you who have looked at the website of the many judges who maintain websites in the United States will see that they proudly boast about their harsh sentencing records as a means of securing re-election. But on balance I am inclined to the view expressed by Winston Churchill:

It has been said that democracy is the worst form of government except all those other forms that have been tried.

There is another expression about democracy that I will share with you which is commonly attributed to Otto von Bismarck. He said:

If you like laws and sausages, you should never watch either one being made.

But if there is a gap between popular perception and reality then it poses an issue for democratically elected leaders, because their duty is to respond to reality not to popular perception. I think the challenge has been neatly put by Richard Milhouse Nixon, who is an unlikely source of authority on leadership. Nixon once wrote:

Taking uninformed voters where they want to go is easy. Taking them where they should go is the role of the leader. To make what is unpopular popular is the supreme test of leadership. (*In the Arena 1990*)

It seems to me that because of the gap between perception and reality in penal policy, this is the challenge that confronts many of our elected leaders today.

Public interest in punishment and penal policy has been very significant over many years. In Australia, our country owes its contemporary existence to punishment practices, and colonisation would not have occurred but for penal policy. Transportation was seen as a cheap means of effecting punishment as early as the time of Queen Elizabeth I. One of the recurrent themes that emerge from any historical analysis of penal policy is government trying to find ways of cheaply dealing with the problem of crime and punishment.

After transportation was introduced, it was seen to have potential economic benefit and so the prisoners were transported to America, sold by the private prison owners into indentured labour in America. Interestingly around that time, in the 17th and 18th centuries, about half of the prisons in the United Kingdom were privately run, which provides some sense of déjà vu. Those of you who watched the Little Dorrit television series recently would have seen depicted Marshalsea Prison ("The Marshalsea"), an example of the privately-run prisons that were common in England. Transportation worked very well until the American colonists rebelled and said that they did not want to be governed by the mother country anymore and nor did they want its prisoners. They were able to take this stance without economic disadvantage because by then America was importing African slaves at a much greater rate than they were receiving United Kingdom prisoners.

That left the United Kingdom with the problem of where to put its prisoners. It was thought that the American rebels would be put down quickly so prisoners were kept in hulks on the Thames waiting for the American colonists to see sense and return to the fold. Of course, that did not happen and somewhere else had to be found to put the prisoners - hence Australia. The first fleet came out and 70% of the occupants of the first fleet were convicts. We like to think, romantically, that they were political rebels and starving waifs who were forced to steal in order to get food, but in fact the vast majority were petty thieves. Some 160,000 convicts were sent to Australia in the first 80 years or so of the life of this country which resulted in Australia being known, as Robert Hughes has pointed out, as the 'Thief Colony' for a number of years. So, penal policy and punishment practices have been a very important part of our history.

It is interesting to revert to those times, as Robert Hughes did in his work *The Fatal Shore*. He referred to an observation by Dr Johnson made in 1759 about imprisonment, Dr Johnson wrote:

The misery of gaols is not half their evil ... In a prison the awe of publick eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious. Everyone fortifies himself as he can against their own sensibility, endeavours to practice on others the arts which are practised on himself, and gains the kindness of his associates by similitude of manners. Thus some sink amidst their misery, and others survive only to propagate villainy.

As early as 1759, the Georgians were under no illusion about the effect of imprisonment. They did not believe that imprisonment rehabilitated or was likely to discourage reoffending. Back in the same period, we see also the same theme that we often hear about on talkback radio and that is concern about the so-called 'scourge of crime'. Another passage cited by Robert Hughes from the 1770s came from an author who wrote:

I sup with my friend; I cannot return to my home, not even in my chariot, without danger of a pistol being clapped to my breast. I build an elegant villa, ten or twenty miles distant from the capital: I am obliged to provide an armed force to convey me thither, lest I should be attacked on the road with fire and ball.

So public concern about the increasing prevalence of crime has been with us for centuries.

If one listens to talkback radio and reads letters to the paper or addresses public gatherings as I do regularly, I do not think one can escape the impression in Australia that the perception of the public is that our community is drowning under a tidal wave of almost tsunami-like

proportions of increasing crime; crime that is increasing both in rate and severity, and that the judiciary are responding to that tidal wave of increasing crime with increasingly pathetic and inadequate sentences. Neither of those things is true; in fact, they are both far from the truth.

If we look back over the last, say, 50 or 70 years, public enthusiasm for a punitive response seems to be traced from about the 1970s. Following World War II, an increasing focus on new disciplines like sociology and psychology led to a focus upon a rehabilitative penal model for a time. But from about the 1970s that focus seems to have waned and increasingly punitive responses have become more and more popular, matched by significantly increasing imprisonment rates.

In Western Australia, the imprisonment rate is now about two and a half times what it was 25 years ago. If one goes around Australia looking at the imprisonment figures as at March of this year, in Western Australia there were about 4,800 people in prison; in Queensland 5,600; in New South Wales 10,300; in Victoria 4,500; and around Australia about 29,000 people in prison.

So there are more people in prison in Western Australia than there are in Victoria, even though Victoria has a population two and a half times the size of Western Australia, and there are only 800 more people in prison in Queensland than there are in Western Australia even though your population is about double that of our State.

Let's go back and look at the increases in prison numbers over the last 10 years in each of those jurisdictions. In Western Australia, the number of prisoners increased by 54% between 2001 and 2010; in Queensland by

25%; in New South Wales by 17%; in Victoria by 33%; and across Australia by 29%. These rates are counting prisoner numbers in absolute terms, but as everybody here would realise, the population of our two States, Western Australia and Queensland, has grown much faster than the other jurisdictions in Australia over the last 10 years or so. So for a meaningful comparison one needs to go to imprisonment rates per head of population. For those of you who know imprisonment figures, we talk in terms of prisoners per 100,000 of population. In Western Australia in 2010, our rate was 281 per 100,000; in Queensland 164; in New South Wales 186; in Victoria 106; and across Australia 170. So our rate of imprisonment in Western Australia is almost three times that of Victoria; the New South Wales rate is almost double that of Victoria; and the Queensland rate is in between - at 164 per 100,000. In terms of increases over the preceding nine years, in Western Australia the rate increased by 27%. In Queensland, your rate reduced by 3%, it went from 169 back to 164, and as best as I can see, Queensland is the only Australian State in which there has been a decrease in the rate of imprisonment over that period. In New South Wales, the rate went up 21%; in Victoria by 18%; and across Australia the rate rose by 18% over the last nine years.

One cannot overlook the Indigenous contribution to imprisonment when one is making regional comparisons around Australia, because it is profound. The Northern Territory has by far the highest rate of imprisonment per head of population because it has by far the highest proportion of Indigenous population. But if we go to rates of imprisonment per Indigenous person, one gets a slightly different picture, although still not dissimilar to the overall picture. In 2010, the rate of Indigenous incarceration in my State of Western Australia was 4,300 per 100,000. As I said, the overall rate for WA was 280, but for Aboriginal

people it is 4,300 — a rate of about more than twenty-five times the non-Aboriginal rate, which is about 170 per 100,000. If you break that rate down into gender, the male rate of incarceration for adult Aboriginal people in Western Australia is 8,000 per 100,000, and for those of you who are good at maths that means that about one in every 12 1/2 adult Aboriginal men will spend tonight in prison in Western Australia, which is a fairly scary thought. International figures are hard to find, but as best as I can see that suggests that Western Australian Aboriginal men are probably one of the most incarcerated ethnic group in the world. That rate of 8,000 per 100,000 matches almost exactly the rate of incarceration of adult African American men in the United States. The United States has by far the highest imprisonment rate of any country in the world. Their overall rate is 1,000 per 100,000. So, by comparison, the disproportion between Aboriginal and non-Aboriginal people in prison in Western Australia is significantly higher than the disproportion between the imprisonment of African Americans and non-African Americans in the United States.

As I mentioned, in Western Australia, tragically, the Aboriginal imprisonment rate is 4,300 per 100,000. In Queensland, the rate is 1,750, so our rate is over double the Queensland rate of incarceration. In Victoria, the rate is 1,300 per 100,000. Interestingly, the rate in Victoria, 1,300 per 100,000, is about what the Western Australian rate was about 25 years ago, so our rate of incarceration of Aboriginal people has more than trebled over the last 25 years. That was over a time in which government policies had been specifically directed at reducing rates of Aboriginal incarceration.

In absolute numbers, over the last 10 years or so, the number of Indigenous people in prison in Australia has gone from about 4,500 to a over 7,000, so the total number of Indigenous people incarcerated increased by about 50% over the last nine or 10 years. That is at a time after the Royal Commission into Aboriginal Deaths in Custody had reported a period in which pretty much all Australian governments have quite expressly embraced policies aimed at reducing Indigenous incarceration. These have all failed because the number of Indigenous people incarcerated and the rate continues to increase. In New South Wales, there is an interesting study conducted which shows, I think quite convincingly, that the number of Indigenous people in prison has increased even though the number of Indigenous people presented to court and convicted of offences has reduced, so that Indigenous imprisonment increased while offending and conviction has reduced. What that suggests is that Indigenous people are being sentenced more often to prison and for longer terms. If that is why the Indigenous imprisonment rate is going up, it suggests that the judiciary are not uninvolved in these increases in Indigenous imprisonment.

Turning now to juveniles, again the rates from Western Australia are depressing. In the last year for which figures are available, the average daily number in juvenile detention in Western Australia was 164, whereas in Queensland it was 155. So the Queensland population is about double Western Australia, but we are locking up more young people than you are. Our rate of detention of Aboriginal young people is the highest in the country. In Western Australia, an Aboriginal juvenile has about 45 times the chance of being in custody as a non-Aboriginal juvenile. The Queensland rate of detention for young Indigenous people is less than one-third of the Western Australian rate and your detention rate for

non-Indigenous young people is about half the Western Australian rate. So I have to say that on a comparison between Western Australia and Queensland, you seem to be doing much better at addressing these issues than we are in Western Australia.

Imprisonment is horrendously expensive. I do not know what the Queensland figures are but in Western Australia the capital cost of providing a prison bed for a prisoner is about \$1 million, so a 150-bed prison will cost \$150 million, and a further \$100,000 per year per prisoner in recurrent expenditure. For juveniles, the cost is higher at \$610 per day; so to incarcerate a juvenile in Western Australia costs about \$220,000 a year. The Auditor General in Western Australia did a report on juvenile justice and he concluded that the 250 children who had the most intersections with the criminal justice system in Western Australia would cost the State of Western Australia about \$100 million while they pass between the ages of 10 and 17. Those of you who are quick at maths will realise that is \$400,000 per juvenile, and 75% of those kids will be Aboriginal kids. Now for \$400,000 we could send them to Geelong Grammar, we could put them up at five-star hotel during the summer and send them to a Swiss finishing school. The only thing we can confidently say of the consequence of our expenditure of \$400,000 is that the most likely outcome for those kids is that they will graduate into the adult criminal justice system, so we are spending an awful lot of money to limited effect.

In Western Australia, the budget of the Department of Corrective Services increased by 60% over the last three years and it is one of the fastest growing areas of government expenditure. This is money that could otherwise be spent on schools and hospitals and roads and

universities. Is it effective in reducing crime? The answer is it is not particularly effective. If you look at rates of recidivism, about 40% of male adult non-Aboriginal prisoners leaving prison in Western Australia return to prison within the next eight years. For Aboriginal prisoners the equivalent figure is just under 70%. In the case of female prisoners, the rate of return to prison for non-Aboriginal prisoners is about 30% compared to about 55% for Aboriginal prisoners. So prison does not seem to be particularly successful in discouraging people from re-offending and it is particularly unsuccessful in discouraging Aboriginal people from re-offending.

If you look at other alternatives to imprisonment, there have been analyses of what are commonly called 'problem-solving courts' of which the Drug Court is perhaps the most obvious example. A study of the Western Australian Drug Court showed that a cohort of offenders who went through Drug Court had one-third less chance of re-offending than a comparable cohort who went to prison. The relative costs were \$16,000 to put somebody through Drug Court and \$100,000 to put them into prison for a year. In public policy terms, it is a no-brainer; it is more effective to address the causes of offending than it is to punish the consequences of offending.

I do not mean to suggest that imprisonment should be abolished. Punishment is an important part of the sentencing process. Society must denunciate those who commit crime; there is the aspect of retribution; there is the aspect of assuaging the outrage of the victim, all of which is properly reflected in the court's approach to criminal offending and requires the imposition of punishment. But we should not delude ourselves that by punishing people we are by that means alone protecting

the community, because punishment as a means of crime reduction is significantly overrated. There is an element of what is called incapacitation – that is, while people are in prison, the only people against whom they can offend are other prisoners but that is a very expensive way of reducing the level of crime within our community, and can only have a marginal effect unless prison numbers increase exponentially.

As I have already mentioned, people who go to prison tend to go back again so it does not seem to be terribly effective in discouraging people from re-offending. In terms of general deterrence - that is, discouraging people from offending in the first place - again I think the benefits of imprisonment are significantly overrated. A moment's thought will reveal why that is so. Most criminal offending is committed by people who are stupefied or intoxicated or behaving irrationally. Very little of it is rational and planned or premeditated. If somebody was rationally planning the commission of a crime, if they think they are not going to be caught then the level of punishment is not going to make much difference. If they think they are going to be caught, they are not going to commit the offence provided the punishment has some level of significance. So increasing the level of punishment will not have a great effect on a rational premeditated offender and no effect upon the irrational or intoxicated. What is more significant in discouraging crime is the perceived risk of detection. If you are interested in protecting the community, money spent on improving levels of detection and clear up rates for reported crime is better spent than on building more prisons and locking people up for longer, because it has a greater effect in discouraging offending.

We have seen how much the prison population has grown and how much we are spending on it, so let us now look at levels of reported crime. Western Australia is fairly typical of most Australian jurisdictions and over the last 10 years, levels of recorded crime have reduced significantly in all Australian jurisdictions in most areas. Taking my own State of Western Australia, over the last 10 years ending in 2008, indexed rates of reported homicides declined by about 40%; armed robbery by 45%; burglary by 45%; motor vehicle theft by 50%; and other thefts by 12%. So in a lot of areas of crime which significantly impact upon householders, levels of crime have reduced significantly. Those reductions are a little higher than in other jurisdictions because we started a bit higher but in all Australian jurisdictions the same picture has been seen - those types of crime have generally reduced. The one area of crime in Western Australia that has not reduced, and I think this is true of other jurisdictions as well, is the area of assault, personal assault, and sexual assault. In the area of assault you have got to be very careful in looking at the figures because report rates, that is, the percentage of crimes which are reported, can have a big impact on the number of crimes reported.

So, crime rates have generally gone down and imprisonment rates have generally gone up. It's hard to believe that there is a causal connection between the two. To suggest that there is a causal connection between the two is a bit difficult when you look at the imprisonment rates to which I referred earlier. As I mentioned, the imprisonment rate in New South Wales is almost double that of Victoria and Western Australia is almost treble that of Victoria, yet the crime rate in all of these States are roughly the same. There are some regional differences but more or less the crime rates in each of those jurisdictions are the same — but the imprisonment

rates are dramatically different. The difference seems to me to reflect the approach that is taken to criminality in each jurisdiction. If there was a causal connection, then America, which has by far the highest incarceration in the world, should be a much safer place to live than in fact it is. In the USA, the imprisonment rate is 1,000 per 100,000; that is 10 times the rate of imprisonment in Victoria. Those of you who have visited America would not notice that it is significantly safer than Victoria as a consequence of that rate.

If there is this gap between popular perception and reality, why is it so? I think the answer lies in the nature of news. The nature of news is such that our media do not report things that are good; people are more interested in reading bad news. Sensational crime, particularly where there is pictorial images, are much likely to be reported. These days everybody carries around in their pocket a video-camera in the form of their phone, so increasingly we are finding that assaults are being recorded and are available to the media to report. So the media publish the images and people see many more images of criminal behaviour than they used to and they may feel therefore that many more crimes are being committed. But all it is reflecting is the fact that there are many more images available. And, of course, cases in which a victim of crime or the family of a deceased victim of crime complain bitterly about the sentence provide a focus for the media upon which to base a report. Quite irrespective of the adequacy or otherwise of a sentence, you are much more likely to see an interview with an outraged victim or an outraged family member on the steps of a court complaining about the inadequacy of the sentence imposed than you are to see somebody wisely gazing into the camera saying they thought the judge took account of all relevant

circumstances and handed down a sentence which is entirely fair and reasonable.

So the cases that get reported in the media are self-selected as being cases about which there is controversy. The most avid viewer and reader and consumer of news will see only those cases in which there is an element of controversy and will know nothing of the overwhelming majority, the 99.9% of cases, in which there is no controversy and in which a reasonable sentence was handed down. Unfortunately, the viewer will often gain their perception of an entire system from the cases about which they read. I do not blame the media for that. It is inherent, I think, in the nature of news.

The mechanisms which today exist for the expression of public opinion are such things as talkback radio, letters to the newspapers, and telephone and internet polls. Now anybody who thinks people who call talkback radio or write to newspapers, or respond to internet polls are generally representative of the public is deluding themselves. The people who take the time and trouble to answer those sorts of requests for a response are not representative of the general population, but those with a particularly strong view on the subject. Unfortunately, both politicians and also judges gain a perception of public opinion that does not match actual public opinion because that version of "public opinion" may be based on less than accurate information about what is actually happening in the criminal justice system. So our politicians and the judges are responding to a cascading series of inaccurate perceptions. I think this is what has led to increasing legislative responses to perceived increases in crime and also to significantly increased sentences, particularly in Western Australia

and New South Wales where imprisonment rates have increased significantly.

At the legislative level there have been a number of legislative responses of a significant nature in such areas as dangerous sexual offender legislation whereby, in my State and other jurisdictions around Australia, people who commit sexual offences are now being incarcerated not as punishment for past offences but because of their perceived propensity to re-offend. People are being indefinitely detained because of that perceived propensity. That is a significant change in our approach to crime and punishment. Most jurisdictions also have sexual offender reporting legislation so that people who commit sexual offences are put on a register and are required to report to police on a regular basis. The legislation is usually cast in such wide terms that it catches a raft of offenders including in my own State, a number of young Aboriginal men who have had consensual sexual relationships with younger Aboriginal girls. It is not at all uncommon in Aboriginal communities, or indeed I suggest in suburban communities, for consensual sex to take place with teenagers who are under age. But that meets the definition of a child sex offence and so you get a 17-year-old Aboriginal boy who has had consensual sex with a 14-year-old Aboriginal girl and is then required to be on the sex offender registry - to report to police, advise of change of address, change of employment and so on. Very often they get in more trouble for failing to report to police than they ever got into for the offence that put them under the yoke of the reporting requirement.

In the context of the appalling rates of Aboriginal incarceration to which I have already referred, we ought to be avoiding requirements for young Aboriginal men to come into regular contact with police. I have even

heard of a case in which a 14-year-old boy sent an image to his 12-year-old girlfriend's mobile phone. He was branded as a sexual offender and required to report under the legislation. Some of the legislative responses to the perceived wave of crime can be draconian and can have unintended consequences.

The state of Texas is an unlikely source of inspiration for enlightened penal policy, but it, and a number of other American states have produced policies that are generally tagged under the heading 'Justice Reinvestment'. This policy has been actively promoted in Australia by Tom Calma, the recently retired Aboriginal and Torres Strait Islander Social Justice Commissioner among others. Basically, the policy recognises that imprisonment is extremely expensive. Interestingly, in America the call for penal reform has not come from those who are outraged at the injustice of incarcerating so many citizens, but rather from State Treasuries which have been outraged at the expense of incarcerating so many of their population. What some State Treasuries and legislators have realised in America is that the proactive expenditure on the causes of crime is more effective than spending a lot of money incarcerating people. Justice reinvestment works by identifying the geographic sources of the prison population, identifying communities that are over-represented in the prison population and then investing money in social infrastructure in those communities - improving living conditions, reducing levels of social disadvantage, providing support to families, providing programmatic intervention and non-custodial solutions in those communities instead of spending money in prisons. Studies show that it works and it has saved those states a lot of money and reduced levels of crime. Texas and a number of other states have led the field in this area.

It seems to me that there is a lot to be said for the implementation of this policy in Australia. In Australia, because of the pattern of Indigenous incarceration to which I have referred, the policy would focus largely on the Indigenous communities from which so many of our prisoners are drawn. Tom Calma estimated that in Australia we spend collectively about \$2.6 billion each year incarcerating our 29,000 prisoners, and about \$650 million of that is spent on incarcerating Indigenous people. If some portion of that \$650 million were directed towards reducing the social disadvantage which is causing the high rates of Indigenous offending then we might see a little more benefit than by spending money on imprisonment. In Western Australia, although figures are very hard to get, it is estimated about half of the total amount of money spent by the state on Aboriginal people is spent in the criminal justice system. Arguably, that is shutting the stable door after the horse has bolted. If that investment were proactively spent on causes of crime rather than the consequences of crime we might be better off. I think these figures also suggest that the judiciary, like politicians, have been responding to public perception. There is nothing intrinsically wrong with that. Indeed, there is authority at the highest level to support the proposition that judges should reflect community standards and expectations. But judges have a role, just as I think politicians have a role, in responding to the actual rather than to the perceived. I think politicians like judges should adopt evidence-based policies and should not respond to perceived public opinion which may not in fact be based in reality.

The judiciary are promoting problem solving courts like the Drug Court, like the Murri Court in Queensland, all of which seem to me to be very valuable initiatives. They focus on the notion that we should be treating the causes of crime rather than the symptoms of crime – using a medical

analogy, in these problem-solving courts we are treating the disease rather than the symptom. I think there is as much to be said for expanding that approach beyond the areas in which it is currently applied, like in the Murri Court, the Drug Court and so forth. In my view, we should be seeing a person's intersection with the criminal justice system as an opportunity for a beneficial intervention rather than a merely punitive response. Now I do not suggest that punishment is not appropriate - of course the community will require courts to punish offenders and that is entirely appropriate, but we should not stop only at punishment. We should not delude ourselves into thinking that punishment of itself will protect the community. In my view, we must look at other things as well as punishment and through that means I think we will bring reality closer to perception.