

**TOUGHER PENALTIES – DO THEY REALLY WORK?  
OR IS IT TIME FOR A NEW APPROACH?**

**28 JUNE 2011**

**BALI**

**THE CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN  
TERRITORY, CONFERENCE**

**T F PERCY QC**

Albert Wolff Chambers

7<sup>th</sup> Floor

33 Barrack Street

PERTH WA 6000

***TOUGHER PENALTIES - DO THEY REALLY WORK?  
OR IS IT TIME FOR A NEW APPROACH?***

**T F Percy QC\***

*A paper presented to the Bali Conference of the Criminal Lawyers Association of the Northern Territory held, 28 June 2011.*

**1. Introduction**

One would think that as a matter of logic, imposing harsher penalties for an offence would tend to inhibit the commission of any given an offence.

However if one examines this concept and delves into the statistics and the data available, it seems that there is some considerable doubt as to whether this might actually be true.

It has been said by a leading Australian sentencing academic, Professor Mirko Bagaric that

*“sentencing should be developed on the basis of research findings regarding what can actually be achieved through a state run system of punishment, as opposed to continuing with the slavish reliance on the hunches of judges and politicians.”<sup>1</sup>*

Much can be said about this proposition and researching the matter further it is obvious that current sentencing principles are becoming less relevant to attacking the actual causes of crime and effectively deterring offenders, and are submerged in providing harsh sentences as a means of deterrence.

This paper analyses deterrent penalties generally, and the effect of government initiatives in decreasing crime rates. Suggestions are also made regarding some initiatives that could be adopted to effectively decrease crime, as well as looking at the root causes of crime itself.

---

\* Barrister, Albert Wolff Chambers, Perth Western Australia. The author wishes to thank his research assistant Elaine Arcaro BA, LL.B for her considerable assistance in the preparation of this paper.

<sup>1</sup>Mirko Bagaric, ‘Suspending Belief’, *Courier Mail*, 24 May 2006, pg 27.

## 2. The Theory of Deterrent Penalties

The theory of deterrence works on the premise that a person will avoid committing an offence as a result of the fear of being caught or identified. Deterrence itself is designed to reduce the frequency of prohibited behaviour.<sup>2</sup> There are two types of deterrence; general and specific deterrence, they are both subjective concepts that rely on the knowledge and understanding of the individual.

### General Deterrence

General deterrence is when the punishment imposed on an offender is used to make an example of the offender and in turn deter the public at large from committing criminal acts. That is, an individual will choose to avoid committing a crime through the fear of punishment. General deterrence is based upon the 'classical economic theory of rational choice, which assumes that people weigh up the costs and benefits of a particular course of action whenever they make a decision.'<sup>3</sup>

There are in turn, two types of general deterrence, marginal and absolute. Marginal deterrence concerns whether there is a direct correlation between incremental (marginal) increases in punishment and decreases in crime.<sup>4</sup> Absolute deterrence 'is the notion that having a formal system of punishments deters criminal behaviour.'<sup>5</sup>

The evidence concerning absolute general deterrence suggests a much more positive reaction. In consideration of the cost/benefit analysis whereby people when making decisions about committing a crime, are said to generally weigh up the risk of being caught, not what will happen when they are apprehended. It could be said that the best way to reduce crime is to increase the perception in people's minds that they will get caught.

The Melbourne Police Strike of 1923 demonstrates this point, where there was a reduction in the perceived and or real likelihood that people would be punished for

---

<sup>2</sup> Hennessey Hayes & Tim Prenzler, 'An introduction to Crime and Criminology' (2009, 2<sup>nd</sup>ed) Pearson Education Australia, pg 299.

<sup>3</sup> Donald Ritchie, 'Sentencing Matters. Does Imprisonment deter? A review of the evidence' (April 2011) *Sentencing Advisory Council*, pg 7.

<sup>4</sup> Gennaro F.Vito, Jeffrey R. Maahs, Ronald M.Holmes, *Criminology: Theory, Research and Policy* (2006) 57.

<sup>5</sup>Vito (*supra*).

criminal behaviour. During this police strike over one third of the entire Victorian police force was sacked. Once news of the strike spread thousands of people poured into the city centre and engaged in widespread property damage, looting of shops, and other acts of civil disobedience including assaulting government officials and torching a tram.

The offending behaviour lasted for two days and only stopped when the government enlisted thousands of ex-servicemen to act as 'special' law enforcement officers. This behaviour was in complete contrast to the normally law-abiding citizens of Melbourne.

According to Donald Ritchie, for any law enforcement by the criminal justice system to act as a deterrent a potential offender must;

1. Realise that there is a criminal sanction for the act being contemplated;
2. Take the risk of incurring that sanction into account when deciding to offend;
3. Believe that there is a likelihood of being caught;
4. Believe that the sanction will be applied to him or her is her or she is caught; and
5. Be willing (and able) to alter his or her choice to offend in light of the criminal sanction.<sup>6</sup>

For deterrence to work in any matter, these conditions must be satisfied as 'knowledge of penalties logically precede perceptions of the certainty and severity of penalties.'<sup>7</sup>

It appears that people are not totally irrational when they contemplate committing a crime. The evidence shows that to the extent that people make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended.<sup>8</sup> Thus, the best way to reduce crime is to increase the perception in people's minds that they will get caught if they break the law; the size of the penalty does not seem to impact on this decision.

The Australian Law Reform Commission rejected general deterrence as an appropriate rationale for sentencing:

---

<sup>6</sup> Donald Ritchie, 'Sentencing Matters. Does Imprisonment deter? A review of the evidence' (April 2011) *Sentencing Advisory Council* pg 7.

<sup>7</sup> Donald Ritchie (*supra*), citing Williams, K.R. and J.P. Gibbs, Deterrence and Knowledge of Statutory Penalties (1981) *Sociological Quarterly*, 22: 591 – 606, p 591.

<sup>8</sup>Parliament of New South Wales; Talina Drabsch, '*Reducing the Risk of Recidivism*' (2006) Briefing Paper No. 15/2006, 28.

*To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she committed.*<sup>9</sup>

It is impossible to measure accurately the effect of deterrence as a decrease in offending can be attributed to the incapacitation of offenders, who due to their imprisonment are physically unable to re-offend.<sup>10</sup>

### **Specific Deterrence**

Specific or special deterrence is a subjective theory, it works by having an impact upon a specific individual offender, to deter them from coming further criminal acts. Research into specific deterrence shows

*‘that imprisonment has, at best, no effect on the rate of re-offending and often results in a greater rate of recidivism.’*<sup>11</sup>

There are explanations that may explain this, such as ‘prison being a learning environment for crime.’<sup>12</sup> Prison also reinforces ‘criminal identity and may diminish or sever social ties that encourage lawful behaviour.’<sup>13</sup>

Many people who are imprisoned are dealt with, as a result of their drug, alcohol or mental health issues causing them to commit criminal acts. Such issues are not effectively addressed by imprisonment. Also harsh conditions often experienced by people imprisoned ‘do not generate a deterrent effect, the evidence shows that such conditions may lead to more violent re-offending.’<sup>14</sup>

It has been established by the Australian Institute of Criminology that as at 30 June 2005, about 60 per cent of those in custody in Australia had been imprisoned before.<sup>15</sup> Re-offending behaviour or recidivism can be influenced by many factors including poor

---

<sup>9</sup> Australian Law Reform Commission, *Sentencing*, Report Number 44 (1998), 18.

<sup>10</sup> Donald Ritchie, ‘Sentencing Matters. Does Imprisonment deter? A review of the evidence’ (April 2011) *Sentencing Advisory Council* 1, pg 13.

<sup>11</sup> Donald Ritchie, (*supra*)

<sup>12</sup> Donald Ritchie, (*supra*)

<sup>13</sup> Donald Ritchie, (*supra*)

<sup>14</sup> Donald Ritchie, (*supra*)

<sup>15</sup> Parliament of New South Wales; Talina Drabsch, ‘*Reducing the Risk of Recidivism*’ (2006) Briefing Paper No. 15/2006, 1.

education and employment histories, mental illness and bad physical health, as well as drug and alcohol misuse.<sup>16</sup>

### **Likelihood of Apprehension**

Research has indicated that the certainty of punishment has much more deterrent impact than the severity.<sup>17</sup>

It has been suggested that an increase in police numbers or intensification of traditional police activities, above what is necessary to maintain order, may have a 'limited additional, marginal, general deterrent or crime reduction effect.'<sup>18</sup> The Canadian Sentencing Commission in 1987 also accepted the validity of this proposition,<sup>19</sup> and it has also been confirmed in a number of other significant studies.<sup>20</sup>

In *R v Griffith*<sup>21</sup> the High Court observed:

*The deterrent to an increased volume of serious crimes is not so much heavier sentenced as much as the impression on the minds of those who are persisting in a court of crime that detection is likely and punishment is certain. The first of these factors is not within the control of the courts, the second is. Consistency and certainty of sentence must be the aim... Certainty of punishment is more important than increasingly heavy punishment (emphasis added).*<sup>22</sup>

In some parts of the United States in the 1990's crime markedly fell and it appears that this was as a result of a marked increase in police numbers.<sup>23</sup> It is accepted however that other changes may have included other things, such as better policing methods and a

---

<sup>16</sup> Australian Government, *Recidivism* (2011) Australian Government; Australian Institute of Criminology <[http://www.aic.gov.au/crime\\_community/communitycrime/recidivism.aspx](http://www.aic.gov.au/crime_community/communitycrime/recidivism.aspx)> accessed at 20 June 2011.

<sup>17</sup> Hennessey Hayes & Tim Prenzler, 'An introduction to Crime and Criminology' (2009, 2<sup>nd</sup>ed) Pearson Education Australia, pg 271.

<sup>18</sup> Hennessey Hayes & Prenzler, (*supra*) p358.

<sup>19</sup> Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987).

<sup>20</sup> For example, see H. Laurence Ross, 'Law, Science and Accidents: The British Road Safety Act of 1967' (1973) 2 *The Journal of Legal Studies* 1, 26 where road accident casualty rates were compared from 1961 to 1970 in order to determine the impact of the breathalyser in 1967. A significant drop in the casualty rate was noted after the introduction, thereby leading to the conclusion that this was due to an increased subjective probability of detection and punishment.

<sup>21</sup> (1977) 137 CLR 293.

<sup>22</sup> (1977) 137 CLR 293 at 327.

<sup>23</sup> Steven D. Levitt, 'Understanding Why Crime Fell in the 1990's; Four Factors That Explain the Decline and Six that Do Not' (2004) 18 *J. Econ.Persps.* 163, 177.

generally improving the economy. The greatest decline in crime during this period was in New York City which enjoyed the greatest number of extra police employed.<sup>24</sup>

Raymond Paternoster in 2010 observed that:

*What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt's estimates as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.<sup>25</sup>*

### **Normative Issues**

It has also been noted that normative issues are closely linked with compliance with the law.<sup>26</sup> People do not merely obey the law because it's in their self-interest to do so, but also because they believe it's proper to do so.

The judgement that it is appropriate to obey the law is not only affected by the content of the law but by the attitude of the community towards those who enforce the law. The perception of a legitimate police force makes it more likely that law will be observed and the most effective laws are those that have wide spread effectiveness.

### **Deterrence and increasing the severity of punishment**

It is a common proposition, often embraced by politicians that the commission of criminal offences will decrease if the severity of punishment is increased, that is, there is a 'greater potential 'cost' to be weighed up by the offender when contemplating the commission of the crime.'<sup>27</sup>

For the purposes of increased deterrence however the offender must have knowledge of the increased punishment.<sup>28</sup> Comprehensive studies have been undertaken which did not

---

<sup>24</sup> Franklin E. Zimring, *The Great American Decline* (2007).

<sup>25</sup> Raymond Paternoster, 'A century of criminal justice: crimes and punishment: So, how much do we really know about criminal deterrence?' (2010) *J. Crim. L. & Criminology* 765, 799. See also, above n 17.

<sup>26</sup> Tom Tyler, *Why People Obey the Law* (1990) 107, 175 – 6.

<sup>27</sup> Donald Ritchie, (*supra*).

<sup>28</sup> Donald Ritchie, (*supra*).

sustain the hypothesis that an increase in the severity of penalties generated a marginal increase in deterrence (and therefore a reduction in crime).<sup>29</sup>

### **Theoretical criticisms of Deterrence**

Deterrence opens the way for the imposition of harsher, exemplary, sentences in order to deter others from committing similar offences. According to the High Court, proportionality should be the primary aim of sentencing law.<sup>30</sup> If general deterrence were to take precedence over proportionality, then the convicted offenders punishment is being determined entirely by the expected future behaviour of other persons, not by his own past behaviour.<sup>31</sup> The principle of proportionality is found in the High Court judgment of *Hoare v The Queen*;<sup>32</sup>

*A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of it's objective circumstance.*<sup>33</sup>

In the light of this observation, there is no merit in simply increasing penalties with a view to decreasing time, at least from a strict jurisprudential point of view.

### **3. The ratio between increasing penalties and rate of crime**

Professor Mirko Bagaric casts some doubt on whether increased penalties work at all. In a recent article he expresses the following opinion:

*The data suggests that offenders cannot be rehabilitated or discouraged from re-offending by punishing them. It is also wrong to assume that harsher penalties deter potential offenders. The only thing that deters would-be criminals is a perception that if they offend they will get caught – the magnitude of the penalty is irrelevant.*

---

<sup>29</sup> Donald Ritchie, 'Sentencing Matters. Does Imprisonment deter? A review of the evidence' (April 2011) *Sentencing Advisory Council* pg 14; citing Doob and Webster (2003) comprehensively reviewed major studies of the deterrent effect of changes to penalty severity from a period of 10 years and concluded that they could find no conclusive evidence that supports the hypotheses that harsher sentences reduce the crime through the mechanism of general deterrence (Doob, A.N. and C.M Webster (2003). 'Sentence Severity and Crime: Accepting the Null Hypothesis.' *Crime and Justice*, 30: 143 – 195, pg 187).

<sup>30</sup> *Veen (No 1) v R* (1979) 143 CLR 458 and *Veen (No 2) v R* (1988) 164 CLR 465

<sup>31</sup> Donald Ritchie, (*supra*) pg 6

<sup>32</sup> *Hoare v The Queen* (1989) 167 CLR 348; (1989) 86 ALR 361; 63 ALJR 505.

<sup>33</sup> *Hoare v The Queen* (1989) 86 ALR 361 at 365



*The main rationales underlying the move towards harsh penalties are community protection and the view that higher penalties reduce crime. Given that these objectives are in most cases flawed, we should be watering down the severity of most sentences, except for offenders who have high rates of recidivism, such as sexual offenders. At the same time, we should be striving for a lower crime rate.*<sup>34</sup>

Unfortunately the view of the legislators has for many years, and continues to be that increased penalties axiomatically tend to reduce crime. It seems that few if any of them have turned their mind to the sort of data that Professor Bagaric refers to or the experience with the death penalty as a deterrent in the United States.

### **The Death Penalty as a Deterrent**

The ultimate in deterrent penalties is obviously the death penalty in those nations where it still exists.

According to Amnesty International in 2010, 23 countries were known to have carried out executions.<sup>35</sup> This has decreased however from the 40 countries in the mid 1990's who were known to have carried out executions.<sup>36</sup>

There would however seem to be some doubt as to whether there is any correlation between the States with the highest crime rate and those that implement capital punishment.

Recent data indicates that of the 10 American States with the highest murder rate per 100,000 of population, 8 of them retain the deathpenalty, conversely of the 10 States with the lowest murder rate, 4 of them had the death penalty.<sup>37</sup>

Like much of crime generally, capital offences are committed in moments of extreme passion and emotion such as jealousy, hatred, revenge or greed and without any real

---

<sup>34</sup>Mirko Bagaric, 'Bringing Sentencing out of the Intellectual Wasteland – Ignoring Community Opinion' (2010) 34 *Criminal Law Journal* 281, at 281 – 282.

<sup>35</sup> Amnesty International, *Death Penalty Statistics 2010* (2010) Amnesty International USA <<http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-statistics-2010>> accessed at 21 June 2011.

<sup>36</sup>Amnesty International, (supra).

<sup>37</sup> Death Penalty Information Center, *Deterrence: States Without The Death Penalty Have Had Consistently Lower Murder Rates* (2009) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>> accessed at 21 June 2011.

consideration of the consequences. The idea that most perpetrators of this type of crime might pause to consider the consequences, it is almost fanciful.

Similarly many capital offences are committed under the influence of alcohol and or drugs; and by persons of diminished mental capacity. The notion of any of these sorts of offenders might be deterred from their crime by the imposition of a tougher penalty, is dubious in the extreme.

According to Amnesty International almost all death row inmates could not afford their own attorney at trial.<sup>38</sup> Often the attorney appointed to them is overworked and often lack the experience necessary for capital trials.<sup>39</sup>

Indeed the failure of the death penalty to serve as an effective deterrence to homicide casts significant doubt on deterrent penalties generally. According to a survey of America's top academic criminological societies, 88% of these experts rejected the notion that the death penalty acts as a deterrent to murder.<sup>40</sup>

One might ask rhetorically whether, given that the ultimate deterrent penalty doesn't work, then what is the likelihood of any increasing penalties for say drugs, or serious assaults on police officers?

There have been strong levels of support for the death penalty but these have since moderated as knowledge grows about flaws in the judicial process leading up to the sentence of death.<sup>41</sup> Also awareness of death row prisoners who since been exonerated (there has been 138 people exonerated since 1973 in America alone)<sup>42</sup> has also resulted in the decrease of support by legislators and the public, for the death penalty.

---

<sup>38</sup> Amnesty International, *Death Penalty and Arbitrariness* (2009) Amnesty International USA <<http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-arbitrariness>> accessed at 21 June 2011.

<sup>39</sup> Amnesty International, (*supra*).

<sup>40</sup> Death Penalty Information Center, *Facts about the Death Penalty* (updated June 17, 2011) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/home>> accessed at 21 June 2011, citing *Radelet & Lacock* 2009.

<sup>41</sup> David Indermaur, 'Contemporary Comments, Changing Attitudes to the Death Penalty: An Australian Perspective' (March 2006) 17(3) *Current Issues in Criminal Justice* 443, 448.

<sup>42</sup> Death Penalty Information Center, *Innocence: List of Those Freed From Death Row* (October 28, 2010) <<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>> accessed at 21 June 2011.

There is however no data which has been put forward to suggest that since the death penalty was abolished in Australia in the mid 60's that the rate of homicide per head of population has markedly increased.

It is always difficult to make any real evaluation in this regard, as policing per head of population is probably less now that it was at that time, and the incidence of drug use and addictions has probably become a far more relevant factor in the rate of homicide than it was when the death penalty was implemented.

### **Mandatory sentencing as a deterrent**

Recently the New South Wales Government introduced a bill into Parliament that would make life sentences mandatory for anyone convicted of murdering a police officer.<sup>43</sup> The President of Law Society of NSW, Stuart Westgarth, criticised the new proposed law, "the legislation is unnecessary, it undermines the proper role of the judiciary, it will not deter offenders and may have serious consequences from a law enforcement and prosecution perspective."<sup>44</sup> Further Mr Westgarth said;

*Unintended consequences of the Bill would be providing no incentives for an accused person to co-operate with authorities, to make it more difficult to apprehend suspects due to the prospect of those people facing life in prison if caught, and that mandatory life sentences would remove any incentive for an offender to be of good behavior during the sentence or to rehabilitate or educate themselves... Mandatory sentences have been considered and rejected by sentencing law reviews conducted by the Australian LawReform Commission and the NSW Law Reform Commission... It is widely recognised that mandatory sentences do not deter offenders. The government has provided no objective research or other evidence in support of its proposal.<sup>45</sup> (Emphasis added)*

In Victoria the Government plans to introduce mandatory sentences, for offences of intentionally causing serious injury and recklessly causing serious injury when either offence is committed with gross violence, the statutory minimum penalty would apply to

---

<sup>43</sup>Lawyers Weekly, *Mandatory life sentences undermines judiciary* (June, 2011) Lawyers Weekly [http://www.lawyersweekly.com.au/blogs/top\\_stories/archive/2011/06/01/mandatory-life-sentences-undermines-judiciary.aspx](http://www.lawyersweekly.com.au/blogs/top_stories/archive/2011/06/01/mandatory-life-sentences-undermines-judiciary.aspx) at 2 June 2011

<sup>44</sup> Lawyers Weekly, (*supra*)

<sup>45</sup>Lawyers Weekly, (*supra*)

juvenile offenders aged 16 or 17, as well as adult offenders.<sup>46</sup> Acting Law Institute of Victoria President, Michael Holcroft has voiced his concern over the proposed laws,

*Mandatory penalties for youth flies in the face of the whole youth justice system which, quite rightly, focuses on rehabilitation...we are not doing the community any favours if we lock young people up for two years and then expect them to be rehabilitated...mandatory sentencing would also lead to increased court delays and additional pressure on victims as it would discourage offenders to plead guilty to any offence... each case must be determined on its individual merits. Judges and magistrates, not the court of public opinion, are best placed to do this.*<sup>47</sup>

Mandatory sentencing laws adversely affect minority groups such as Aboriginals. In Western Australia, there are mandatory sentencing laws, which are ostensibly neutral but are discriminatory in their effect. For example the mandatory sentencing regime for home burglary achieved by s 401 of the Criminal Code, known popularly as the “three strikes law.”<sup>48</sup>

Between ‘2000 and 2005, about 87% of children sentenced under the mandatory detention provisions of the home burglary laws were Aboriginal.<sup>49</sup> Fewer aboriginal children are able to access diversionary schemes, such as cautions or juvenile justice teams.<sup>50</sup> These latter options do not count as a conviction and are not therefore regarded as “strikes” in terms of the three strikes law.<sup>51</sup> Consequently, Aboriginal children more readily accumulate the two prior convictions, which then engage the mandatory sentencing regime.<sup>52</sup> Incarceration and its consequences are rarely beneficial and are often the start of an increasing familiarity with the criminal justice system.

---

<sup>46</sup> Lawyers Weekly, (*supra*)

<sup>47</sup> Lawyers Weekly, (*supra*).

<sup>48</sup> LexisNexis, *Criminal Law WA* (as at 3 June 2011) Sentencing Legislation, at SA 8.45.

<sup>49</sup> LexisNexis, *Criminal Law WA* (as at 3 June 2011) Sentencing Legislation, at SA 8.45 citing; Law Reform Commission of Western Australia; Project 94 (September 2006) Final Report at pp 86–7.

<sup>50</sup> Law Reform Commission Western Australia, *Aboriginal Customary Law: Discussion Paper, Project 94* (December 2005) 101.

<sup>51</sup> *Western Australia Criminal Code Act Compilation 1913* s 401(4) if a person convicted of an offence against subsection (1) or (2) committed in respect of a place ordinarily used for human habitation was a repeat offender at the time of committing that offence, the court sentencing the person shall sentence the offender to (a) at least 12 months imprisonment notwithstanding any other written law; or if the offender is a young person (as defined in the *Young Offenders Act 1994*) either to at least 12 months imprisonment or to a term of at least 12 months detention, as the court thinks fit, notwithstanding section 46(5a) of that Act.

<sup>52</sup> LexisNexis, *Criminal Law WA* (as at 3 June 2011) Sentencing Legislation, at SA 8.45.

The concept of mandatory sentencing in relation to aboriginal offenders prevents a court from taking into consideration any relevant aspects of customary law that the offender may have faced into mitigation. It also prohibits a court from utilising appropriate diversionary options,<sup>53</sup> which in the circumstances may be of more rehabilitative assistance.

The Law Reform Commission of Western Australia remains convinced that:"

*The mandatory sentencing laws should be repealed because the laws are unjust and unprincipled; there is no evidence to suggest that they are effective in reducing crime; and they continue to impact disproportionately on Aboriginal children.*<sup>54</sup>

Despite an increasing tendency towards implementing mandatory sentencing in Australia, there is no reliable evidence that it has at any level had any effect on decreasing crime or that it is likely to do so in the foreseeable future.

#### **4. If tougher penalties don't work, what does?**

Professor Bagaric<sup>55</sup> has suggested that a principle of proportionality should be the main framework used when determining sentence. That is, to match the seriousness of the crime with the harshness of the penalty. Such a concept would bear its roots in the principle that the pain inflicted by the punishment should be commensurate with the harm caused by the offender.

The principle of proportionality however;

*Is presently distorted by the pursuit of sentencing objectives. The main one are rehabilitation, community protections, specific deterrence (that is, deterring the particular offenders) and general deterrence (that is, deterring the potential offenders).*<sup>56</sup>

---

<sup>53</sup>Law Reform Commission of Western Australia, *The interaction of WA Law with Aboriginal law and culture*, Project Number 94 (September 2006) at p 87.

<sup>54</sup>Law Reform Commission of Western Australia, *The interaction of WA Law with Aboriginal law and culture*, Project Number 94 (September 2006) at p 87.

<sup>55</sup>Mirko Bagaric, 'Bringing Sentencing out of the Intellectual Wasteland – Ignoring Community Opinion' (2010) 34 *Criminal Law Journal* 281, at 281.

<sup>56</sup> Mirko Bagaric, (*supra*)

If a balance can be struck between sentencing objectives and the principle of proportionality a more effective system of sentencing may evolve.

A major consideration in the implementation of such a system would be the victim.

It is well established that a victim, (for example) of a sexual assault will experience long lasting effects as opposed to a victim of a property or theft offence.<sup>57</sup> In applying a proportionality system 'jail terms for serious sex and violent offenders would be maintained, whereas lower penalties would be imposed in relation to property, driving and drug offences.'<sup>58</sup>

Police strategies such as police crackdown and rotating blitzes that generalise the deterrent effect, increase the certainty or increased likelihood of apprehension. The key object of manipulating the perceived uncertainty about actual risks of apprehension can be exploited in other ways (although with some threats to civil liberties), 'notably through the use of highly publicised and visible random checking procedures applied indiscriminately to the whole population of potential offenders.'<sup>59</sup>

*A good example of the success of this approach is the deterrence impact of random breath testing on potential drink drivers in Australia, also police door-to-door visits to households, ostensibly to advertise the use of property-making devices to prevent burglary but actually having the effect of alerting potential burglars to the likelihood of detection by police. Deterrence strategies can also be mixed with non-punitive measures by non-police agencies to create systems of third party policing based on both punishment and persuasion. The key idea is that police enlist the assistance of 'third parties' such as businesses, government officials or community groups to target 'criminogenic' conditions using civil law or regulatory systems rather than criminal law.<sup>60</sup>*

When new innovations are proven successful it is often hard to institutionalise them into our criminal justice system. They are often impeded by:

*Structural factors such as fragmentation across state and federal levels; frequent changes in direction; a lack of coordination between agencies (especially police);*

---

<sup>57</sup> Mirko Bagaric, (*supra*)

<sup>58</sup> Mirko Bagaric, (*supra*)

<sup>59</sup> Hennessey Hayes & Tim Prenzler, 'An introduction to Crime and Criminology' (2009, 2<sup>nd</sup>ed) Pearson Education Australia, pg 295.

<sup>60</sup> Hennessey Hayes & Prenzler, (*supra*)

*and the uncritical acceptance by the bureaucracy that the community-based crime prevention model is best.*<sup>61</sup>

## **5. The root causes of crime**

There are a number of causes of crime that transcend penalties.

A monocular approach to reducing crime by increasing penalties ignores that there are a number of root factors that are inextricably related to the rate of offending in any given community.

Poverty and lack of education (both usually go hand in hand) are hallmarks of a majority of people in custody. It's no accident that the more well off members of the community tend to be significantly under represented in prisons.

Drug and alcohol abuse is well documented in so far as its effect on offending is concerned. It also ties in closely with poverty and lack of education to produce an over representative presence in the rate of offending.

Ineffectual parenting is also well established as a cause in itself. The former Chief Justice of Western Australia David Malcolm, in providing an analysis of the increase of juvenile crime as a result of dysfunctional families, quotes an old African proverb, that is 'it takes a village to raise a child'<sup>62</sup>. In applying this we are reminded that crime and the prevention of crime are community problems.

The criminal justice system is relied on too readily to 'fix' problems surrounding juvenile offending. Calls for 'retribution and deterrence go beyond that which can be reasonably achieved by the criminal justice system.'<sup>63</sup> The root causes of crime need to be addressed to prevent individuals 'pursuing a criminal career.'<sup>64</sup>

The nature of relationships within an offender's family, the structure of the family and the behavior of an offender's parents have a significant effect on the offender's personal development and is one of the primary reasons of motivating the child to offend. Any

---

<sup>61</sup> Hennessey Hayes & Prenzler, (*supra*)

<sup>62</sup>The Hon. Malcolm, David K. 'Addressing Juvenile Crime by Fixing the Dysfunctional Family' (2007) (9) December *University of Notre Dame Australia Law Review* 19, 20.

<sup>63</sup> The Hon. Malcolm, David K. (*supra*)

<sup>64</sup> The Hon. Malcolm, David K. (*supra*)

exposure to violence, drugs, alcohol and abuse both emotionally and physically are also factors that can be determinative in this regard.

The introduction of early intervention programs into dysfunctional families has proven to be of great benefit. America for example adopted the *Elmira Study*, which was centered on a home visit program. The study visited 400 clients, 85% of whom were women that were unmarried, adolescent, or from low-socio economic conditions.<sup>65</sup> Nurses conducted home visits every two weeks from when the child was 6 months prenatal through to two years of age.<sup>66</sup> The nurses provided the parents with educational and social support. They study followed the children until turned 15. Evaluations of the study found that the study;

*Reduced child abuse substantially during the first two years of life, then later reduced arrests, not only of the infants who were being treated by the program but also of the mothers, who were less likely to get involved in crime, more likely to become employed, more likely to get off welfare, and less likely to have as many children as quickly as the control group, the comparison group, not given the program.*<sup>67</sup>

It may be an expensive approach but the cost to the community far outweighs the cost of potential solutions.<sup>68</sup>

The Juvenile Justice System has achieved some success in lowering the crime rate but it however cannot, by its nature address juvenile crime.<sup>69</sup> It is restricted to dealing with those offenders who have already offended. To obtain long term success in reducing rates of juvenile crime,

*We need to expand our focus to provide support and services to families and children as a method of crime prevention by focusing our attention on the identifications of children at risk and the adoption of targeted means of crime prevention. This involves an adoption of an approach based on a welfare model rather than a justice model.*<sup>70</sup>

## **6. Conclusion**

---

<sup>65</sup> The Hon. Malcolm, David K. (*supra*)

<sup>66</sup> The Hon. Malcolm, David K. (*supra*)

<sup>67</sup> The Hon. Malcolm, David K. (*supra*)

<sup>68</sup> The Hon. Malcolm, David K. (*supra*)

<sup>69</sup> The Hon. Malcolm, David K. (*supra*)

<sup>70</sup> The Hon. Malcolm, David K. (*supra*)



Any serious analysis of the relationship between increased penalties and the rate of crime will demonstrate that the existence of a linear relationship between harsher penalties and a corresponding decrease in the rate of crime is a fallacy.

It is however a view that continues to be embraced by politicians of all colours throughout the Commonwealth. It is, sadly, a fallacy that exists in the broader community and its popularity ensures that, despite deterrent penalties having been generally discredited for the best part of 50 years (as acknowledged by the High Court in *Griffith* in 1977) it is alive and well in 2011.

Rather than getting tough on crime it may be time for politicians to get tough on issues such as poverty, illiteracy and poor parenting.

It may also be time to:

- Radically review the utility of imprisoning people for low-level non-violent and drug offences.
- To acknowledge that by fettering judicial discretion in the imposition of penalties no benefit to the community is achieved, and
- Review and exponentially increase the level of policing in the community.

Put bluntly, it's probably time for a wholesale change of attitude on the part of the legislators as to the fundamental relationship between crime and punishment.

T F Percy QC  
June 2011

## ACKNOWLEDGEMENTS

---

The author wishes to acknowledge the assistance of Professor Mirko Bagaric BA, LLB (Hon), LLM, Ph.D (Mon) of Deakin University in the preparation of this paper in allowing me access to his forthcoming paper in relation to Penalties in Taxation Cases, which is scheduled for publication later this year.

I would also like to acknowledge the considerable assistance of my research assistant, Elaine Arcaro, BA, LLB in the preparation of this paper. I would also express my gratitude to my colleagues David Grace QC and Jon Davies for their input.

**TFP**

## REFERENCES

---

### Journal Articles

- Bagaric, Mirko, 'Bringing Sentencing out of the Intellectual Wasteland – Ignoring Community Opinion' (2010) 34 *Criminal Law Journal* 281.
- Indermaur, D, 'Contemporary Comments, Changing Attitudes to the Death Penalty: An Australian Perspective' (March 2006) 17(3) *Current Issues in Criminal Justice* 443.
- Levitt, Steven D, 'Understanding Why Crime Fell in the 1990's; Four Factors That Explain the Decline and Six that Do Not' (2004) 18 *J. Econ.Persps* 163.
- Malcom, The Hon. David K, 'Addressing Juvenile Crime by Fixing the Dysfunctional Family' (2007) (9) December *University of Notre Dame Australia Law Review*; 19 – 45.
- Paternoster, Raymond, 'A century of criminal justice: crimes and punishment: So, how much do we really know about criminal deterrence?' (2010) *J. Crim. L. & Criminology* 765.
- Ross, H. Laurence, 'Law, Science and Accidents: The British Road Safety Act of 1967' (1973) 2 *The Journal of Legal Studies* 1.
- Williams, K.R. and J.P. Gibbs, 'Deterrence and Knowledge of Statutory Penalties' (1981) *Sociological Quarterly*, 22, 591 – 606.

### Texts

- Gennaro F.Vito, Jeffrey R. Maahs, Ronald M.Holmes, *Crimonlogy: Theory, Research and Policy* (2006)
- Hennessey Hayes & Tim Prenzler, '*An introduction to Crime and Criminology*' (2009, 2<sup>nd</sup>ed) Pearson Education Australia.
- Franklin E. Zimring, '*The Great American Decline*' (2007).

### Law Reform Commission Reports

- Australian Law Reform Commission, *Sentencing*, Report Number 44 (1998).
- Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987).
- Law Reform Commission Western Australia, *Aboriginal Customary Law*: Discussion Paper, Project Number 94 (December 2005).

Law Reform Commission of Western Australia, *The interaction of WA Law with Aboriginal law and culture*, Project Number 94 (September 2006).

Legislation

*Western Australia Criminal Code Act Compilation* 1913.

Cases

*Hoare v The Queen* (1989) 86 ALR 361

*R v Griffith* (1977) 137 CLR 293

*Veen (No 1) v R* (1979) 143 CLR 458

*Veen (No 2) v R* (1988) 164 CLR 465

Internet Resources

Amnesty International, *Death Penalty and Arbitrariness* (2009) Amnesty International USA <<http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-arbitrariness>> accessed at 21 June 2011.

Amnesty International, *Death Penalty Statistics 2010* (2010) Amnesty International USA <<http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-statistics-2010>> at 21 June 2011.

Australian Government, *Recidivism* (2011) Australian Government; Australian Institute of Criminology <[http://www.aic.gov.au/crime\\_community/communitycrime/recidivism.aspx](http://www.aic.gov.au/crime_community/communitycrime/recidivism.aspx)> accessed at 20 June 2011.

Death Penalty Information Center, *Facts about the Death Penalty* (updated June 17, 2011) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/home>> accessed at 21 June 2011.

Death Penalty Information Center, *Deterrence: States Without The Death Penalty Have Had Consistently Lower Murder Rates* (2009) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>> accessed at 21 June 2011.

Death Penalty Information Center, *Innocence: List of Those Freed From Death Row* (October 28, 2010) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>> accessed at 21 June 2011.

Lawyers Weekly, *Mandatory Youth Sentencing will drive crime* (June, 2011) Lawyers Weekly <[http://www.lawyersweekly.com.au/blogs/top\\_stories/archive/2011/06/05/mandatory-youth-sentencing-will-drive-crime.aspx](http://www.lawyersweekly.com.au/blogs/top_stories/archive/2011/06/05/mandatory-youth-sentencing-will-drive-crime.aspx)> at 13 June 2011.

Lawyers Weekly, *Mandatory life sentences undermines judiciary* (June, 2011) Lawyers Weekly

<[http://www.lawyersweekly.com.au/blogs/top\\_stories/archive/2011/06/01/mandatory-life-sentences-undermines-judiciary.aspx](http://www.lawyersweekly.com.au/blogs/top_stories/archive/2011/06/01/mandatory-life-sentences-undermines-judiciary.aspx)> at 2 June 2011.

Commentary

LexisNexis, *Criminal Law WA* (as at 3 June 2011) Sentencing Legislation

Publications

Donald Ritchie, 'Sentencing Matters. Does Imprisonment deter? A review of the evidence' (April 2011) *Sentencing Advisory Council*.

Newspaper Articles

Mirko Bagaric, 'Suspending Belief', *Courier Mail*, 24 May 2006, pg 27

Parliamentary Briefing Paper

Parliament of New South Wales; Talina Drabsch, '*Reducing the Risk of Recidivism*' (2006) Briefing Paper No. 15/2006.