Contemporary Comments

Criminal Justice in New South Wales under the new State Government

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Introduction

There was a state election in New South Wales (NSW) on 26 March 2011. It was widely predicted that there would be a change of government. It was widely hoped in criminal legal circles that this would not be another 'law and order auction'[1] election in the mode of the previous four elections, so when the Coalition's then shadow Attorney General (and now Attorney General), Greg Smith SC MP, publicly announced in November 2010 that he would not take part in such a campaign, there was widespread relief. That effectively prevented such an electoral contest, with one side refusing to engage; but change was in the air in any event, particularly in light of the increasing general punitiveness of the Labor Government's policies during the previous decade or so.

The then Opposition, however, did make some election promises in the area of criminal law. It promised that there would be reviews of bail law and of sentencing law, and that a mandatory penalty of life imprisonment would be legislated for the murder of a police officer in certain circumstances. It has kept those promises in government (see below).

It is also notable that nine months after his public declaration, on 31 August 2011 the Attorney General resisted calls by the Opposition for an increase in sentences for firearms offences in response to an outbreak of a 'shooting war' in Sydney's southwest. On ABC Radio news he said that better law enforcement was required and that '[t]hese fellows don't think they will even be caught', much less pay heed to any increased sentences to which they may become liable if captured, prosecuted and convicted. But the matter returned for consideration in January 2012 (see below).

This Comment reviews actions taken by the new NSW Government in the development of criminal justice policy during its first ten months in office. It may be of interest now and in the longer term to record the significant criminal justice policy shifts made by the Government, particularly following a change of government from one that had become increasingly punitive, and to note the extent to which (if at all) those previous policies are modified over time.

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[1] 'Law and order auction' describes a political campaign in which the opposing parties attempt to outbid each other in extending the range of conduct to be made criminal and increasing the penalties to be available for offenders. The modern version of such campaigns was begun by Bob Carr in the run-up to the State Election in March 1995 and the model has been followed in many Australian jurisdictions at various times.

Bail

The *Bail Act 1978* (NSW) was groundbreaking legislation in its day. Until its enactment NSW had relied on common law principles and procedures for the regulation of bail by the courts. By 1978, however, the prison remand population had grown to such proportions that a different approach was required and the Act introduced a scheme of offences for which there would be presumptions against bail, those for which there would be presumptions in favour of bail and those for which there were no presumptions. It worked well and the remand population fell without any corresponding crime wave from suspects at large on bail, awaiting trial.

However, a crime wave was not needed for government to intervene — all that was required was further offending by someone on bail who, or whose further offence, would attract the attention of the Police Association and/or the tabloid media. So it was that, progressively over many years, by ad hoc legislative amendment in response to unrepresentative cases, the offences with presumptions against bail were increased and those with presumptions in favour of bail decreased. For good measure, procedural restrictions on the granting of bail were also increased. Not surprisingly, the remand population again rose over time until in 2010 it was more than 25 per cent of the NSW prison population (then well over 10,000 in total) (NSW Corrective Services 2010:123) and far more than in comparable jurisdictions such as Victoria. It must also be remembered that in the course of proceedings up to 30 per cent of those persons will not be convicted and more will receive non-custodial penalties — and none has a right to compensation for the deprivation of their liberty.

On 9 June 2011 (O'Farrell 2011), the Government announced a review of bail law by the NSW Law Reform Commission (NSWLRC).[2] It was originally due to report by the end of November 2011, but, following further specific requests by the Attorney General for additional inquiry, that date has now been extended to 30 March 2012. It remains to be seen how and to what extent the NSWLRC will recommend the bail laws be reformed.

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[2] 'Terms of reference: Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review bail law in NSW. In undertaking this inquiry the Commission should develop a legislative framework that provides access to bail in appropriate cases having regard to:

1. whether the Bail Act should include a statement of its objects and if so, what those objects should be;
2. whether the Bail Act should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be;
3. what presumptions should apply to bail determinations and how they should apply;
4. the available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach;
5. the desirability of maintaining s22A;
6. whether the Bail Act should make a distinction between young offenders and adults and if so, what special provision should apply to young offenders;
7. whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness. In considering this question particular attention should be given to how the latter two categories of people should be defined;
8. the terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes; and,
9. any other related matter.'

Sentencing

A number of legal developments in the area of sentencing had become problematic over the decade leading up to the 2011 State Election, including the interpretation and effect of section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the application of the standard non-parole period regime introduced in 2002.[3] A great deal of work had been and continued to be generated for the NSW Court of Criminal Appeal, as questions of interpretation and application continued to arise and a plethora of (sometimes conflicting) decisions was created. In the meantime, the number of sentences of imprisonment and their lengths continued to increase as the courts sought to apply the ever-changing and increasingly punitive laws — but not in response to any increase in serious crime or the severity of its circumstances.[4] The situation appeared to be one of mounting legal confusion and probably injustice, with an increased workload for all agencies concerned. Something needed to be done about it.

On 20 September 2011, the NSWLRC received Terms of Reference to review the *Crimes (Sentencing Procedure) Act 1999* (NSW).[5] It is required to report by the end of October 2012 and is working closely with the NSW Sentencing Council (to which the issue was also referred on 20 September 2011) and other bodies on a wide-ranging review of sentencing law and practice in NSW. Again, it is too early to tell what the thrust of the recommendations will be.

Mandatory life imprisonment

The third election promise (in the area of criminal justice) was to introduce mandatory life imprisonment for the murder of a police officer in certain circumstances. This was reaffirmation of a Coalition (then Opposition) undertaking given to the Police Association many years before and was carried not by the Attorney General, but by the Police Minister, the Hon Michael Gallacher MLC.

As a matter of principle, mandatory or mandatory minimum sentences are widely considered to be undesirable and should not be provided for serious offences (see, for example, Crispin (2010:125–8); Brennan CJ in *Nicholas v The Queen* at 188; Spigelman CJ in *R v Jurisic* at 221C; Spigelman (2008:454); Gleeson CJ, McHugh, Gummow and Hayne JJ in *Weininger v The Queen*). The *Crimes Amendment (Murder of Police Officers)*

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3 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.

4 Regular statistical reports from the NSW Bureau of Crime Statistics and Research (BOCSAR) showed that throughout this period the incidence of most serious crime remained steady or declined slightly: <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_pub_statistical>.

5 'Terms of reference: Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review the Crimes (Sentencing Procedure) Act 1999. In undertaking this inquiry, the Commission should have regard to:

1. current sentencing principles including those contained in the common law
2. the need to ensure that sentencing courts are provided with adequate options and discretions
3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
4. the operation of the standard minimum non-parole scheme; and
5. any other related matter.'

Act 2011 (NSW) was passed on 9 May 2011.[6] It attracted comment in the Winter 2011 issue of the NSW Bar Association's *Bar News* and on the ABC's *The Law Report* (ABC Radio National 2011)), among other places. It is difficult to envision a case that would satisfy the conditions for the application of the amendment; and absent such a case, the existing law will continue to apply. While, on its face, the legislation appeared to follow the punitive path of the previous Government, in practice it may not make any real difference.

Graffiti

Graffiti is widely considered to be a blight on our environment; but on 15 May 2011 the Attorney General took it a step further and declared that graffitists were 'at war' with the community and they deserved to be imprisoned. To date, there has not been legislation mandating that course, but the argument may not be over yet and graffiti vandalism remains a problem. This is an area in which past policies of increasing penalties for persistent criminal offending might yet continue to be applied.

Drivers with children

On 20 October 2011, while the NSWLRC was beginning its review of sentencing law, the Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Bill 2011 (NSW) was read a second time by the Minister for Roads and Ports, the Hon Duncan Gay MP. It became section 21A(2)(p) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[7] In his second reading speech, the Minister (Gay 2011:6836) explained that the provision was to apply to serious offences involving drink and drug driving, engaging in police pursuits and failing or refusing to undergo breath analysis or provide a sample for drug or alcohol testing:

> Committing a serious traffic offence with a child passenger presents a significant danger to the child. Road safety is a priority of the Government and it is necessary to ensure that children are protected from inherently dangerous driver behaviour.

Despite the obvious value in deterring bad driver behaviour, one wonders what this provision adds to the aggravating factor in section 21A(2)(ea): that the offence was committed in the presence of a child under 18 years of age. Indeed, despite the Minister's

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6 The Act inserts into the *Crimes Act 1900* (NSW) a new section 19B, subsection (1) of which provides:

> 19B Mandatory life sentences for murder of police officers
> (1) A court is to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed:
> (a) while the police officer was executing his or her duty, or
> (b) as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty,
> and if the person convicted of the murder:
> (c) knew or ought reasonably to have known that the person killed was a police officer, and
> (d) intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.

Other subsections provide that this does not apply to anyone under the age of 18 years at the time of the murder or to anyone suffering from 'a significant cognitive impairment', not being a temporary self-induced impairment.

7 Section 21A(2)(p): 'without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.'

assertion that paragraph (p) does not limit paragraph (ea), that is precisely what it does by reducing the relevant age in some applicable cases from 18 to 16 years. No doubt the NSW Court of Criminal Appeal will be asked to resolve that issue of statutory interpretation.

In his second reading speech, the Minister (Gay 2011:6836) also said in relation to the NSWLRC review:

> The Commission may consider how aggravating circumstances are dealt with in the sentencing process. As such, the proposed amendment may need to be reviewed in the process of responding to the report. However, this is no reason to delay the bill, which provides for the increased safety of children on our roads.

It might be said that this is also an area in which an overtly political response with apparently increased punitive consequences was considered preferable to rededication to the effective application of existing provisions.

Other children

On 20 October 2011, the NSW Government also invited public comment on whether changes are needed to the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW), and released a Consultation Paper (NSW Department of Attorney General and Justice 2011). The aims were stated to be: reducing recidivism among young offenders and ensuring that the laws were in line with community standards.[8] The review is being conducted by the Department of Attorney General and Justice.[9]

On 6 July 2010, the NSW Legislative Council Standing Committee on Law and Justice released its final report entitled *Spent convictions for juvenile offenders* (NSW Standing Committee on Law and Justice 2010). The inquiry had been set up to inform the Government's approach to the Model Spent Convictions Bill developed by the (then) Standing Committee of Attorneys General,[10] which requires that each jurisdiction make a decision on whether convictions for sexual offences should be capable of becoming spent. On 14 December 2011, the NSW Government (2011a) responded to the report, stating that further consideration would be given to it, but that

> The NSW Government in principle supports the Committee's recommendation that sexual offences committed by juveniles should be able to become spent in certain circumstances, however has not yet determined its preferred mechanism by which those offences should become spent.

This will be a matter for further consideration.

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8 The issues raised include whether:
- any changes are needed to the laws governing the issuing of warnings and cautions and the directing of young offenders into youth conferencing;
- the Children's Court should be responsible for hearing all traffic matters involving juvenile defendants (currently young people must face the Local Court if they were old enough to legally drive at the time of the incident);
- the *Young Offenders Act* and the *Children (Criminal Proceedings) Act* should be amalgamated.

9 The new Attorney General wasted no time in changing the name of the Department from the Department of Justice and Attorney General (DJAG) to the Department of Attorney General and Justice (DAGJ).

10 Renamed the 'Standing Council on Law and Justice' from 18 November 2011.

Drug courts and other diversions

On 6 September 2011, the NSW Government (2011b) announced that it would build new courts and improve existing facilities, including a new Drug Court in the city centre of Sydney (to complement those at Parramatta and Toronto), specialist drug rehabilitation correctional facilities and education and training programs for inmates. On 9 November 2011, it announced that a second Drug Court would be established in Sydney and 300 beds would be provided for the treatment of drug-addicted prisoners (Smith 2011). The Court will sit at the Downing Centre in the city one day per week, initially, commencing in May 2012 and will involve 40 participants per year. The John Morony Correctional Centre at Berkshire Park will run the 'Intensive Drug and Alcohol Treatment Program' for men and women in the Metropolitan Drug Treatment Facility. The first phase will be a 62-bed unit for male inmates that opened in February 2012. Eventually, there will be 250 beds there for males and 50 for females at Dillwynia Correctional Centre.

The longstanding Parramatta Drug Court has proven its effectiveness and efficiency. The NSW Bureau of Crime Statistics and Research (BOCSAR) has conducted assessments of its operations and found it to be more cost-effective and otherwise more effective than prison in reducing the rate of reoffending in drug-related crime. Expansion of the program is to be welcomed — but it still does not ensure that offenders across the state who may benefit from its programs may access a Drug Court, which has consequences for the notion of equal access to justice across the State (see the comments of Dr Weatherburn below).

The Government (2011b) also announced on 6 September 2011 that:

- Juvenile Justice will increase the number of Court Intake and Bail Support staff statewide;
- the Remote Remand Model housing at Broken Hill will be increased;
- the Forum Sentencing program will expand from its present 33 locations to Cessnock, Lismore, Penrith, Port Macquarie, Tamworth, Wagga Wagga and Albury;[11] and
- the prisons at Berrima, Parramatta and Kirkconnell would close and that it was 'examining the potential for greater contestability in the provision of corrective services' (ie the privatisation of more prisons).

The Attorney General (who also has responsibility for Corrective Services) has publicly stated that he wishes to reduce reliance upon imprisonment as a punishment for juveniles, Aborigines and members of disadvantaged groups such as the mentally ill. This is a significant departure from the trend of the previous Government and, as individual initiatives are implemented, it will be of interest to note the extent to which this can be done.

Establishment

The NSW Government has also looked at the structure and procedures of some criminal justice agencies, and functions and processes in the criminal justice system.

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[11] See also, in this connection, Dr Weatherburn's remarks about evidence-based policy (Weatherburn 2012).

On 11 August 2011, amendments to the *Director of Public Prosecutions Act 1986* (NSW) and the *Crown Prosecutors Act 1986* (NSW) provided that retirement ages for Crown Prosecutors and senior officers are increased to 72 years. The Executive Director of the Office of the Director of Public Prosecutions (ODPP)[12] no longer reports to the Attorney General (but only to the Director of Public Prosecutions (DPP)).

Following the decision of the Court of Criminal Appeal in *R v Lipton*, the *Director of Public Prosecutions Act* was amended to ensure that police officers investigating alleged indictable offences are not required to disclose to the DPP information, documents or other things obtained during the investigation that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. The amendment restored the position that applied prior to the decision in *Lipton*. Procedures had been well established to implement section 15A of the *Director of Public Prosecutions Act* and Prosecution Guideline 18 (NSW ODPP 2007). While the temporary amendment is in place (it has a sunset date of 1 January 2013), a review will be conducted of the proper scope of the duty of disclosure.

On 19 October 2011, it was announced that work health and safety prosecutions would be transitioned from the Industrial Court to the District Court and Local Court from 1 January 2012.

The Legislative Council Standing Committee on Law and Justice is presently inquiring into 'Opportunities to consolidate tribunals in NSW', with a reporting date of 22 March 2012.

Continuing concerns

While it might be said that ten months is too a short time within which to effect significant improvement and that the NSW Government remains concerned to listen to voices advocating change and improvement, criticism continues.

In *The Sydney Morning Herald* on 10 January 2012, Dr Don Weatherburn, Director of BOCSAR, published an opinion piece critical of the Government's failure to adopt evidence-based policies and continuing ineffective programs simply because they are popular. He said: 'Why do governments trumpet the virtues of evidence-based policy, while often ignoring it in practice? One reason is that law and order policy is as much, if not more, influenced by what's popular than by what's effective' (Weatherburn 2012).

Dr Weatherburn listed ten questions[13] that require affirmative answers if a government is to be able to demonstrate commitment to evidence-based policy and identified five

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[12] On 8 February 2012 the Executive Director resigned.

[13] 'Here are 10 questions one should ask of any government that declares its commitment to evidence-based policy:

1. Does the government state the objectives of its law and order policies and programs in terms that can be measured? If not, there is no way they can be properly evaluated.
2. Does the government base its policies and programs on the results of systematic reviews, such as those published on the website of The Campbell Collaboration, an international research network? These reviews objectively summarise the results of all past rigorous research into the effectiveness of various interventions in preventing crime and reducing re-offending.
3. Are the government's law and order policy advisers trained in both research methods along with statistical analysis?

programs in criminal justice that BOCSAR had determined had failed the relevant tests. Those programs are:

- high fines for drink drivers;
- supervision of offenders on good behaviour bonds;
- detention for juvenile offenders;
- the forum sentencing program (see above); and
- the circle sentencing program.

In each case, Dr Weatherburn asserted, the program is ineffective in reducing crime and preventing reoffending; while programs that do work, such as the Drug Court (see above), wait years for acceptance and expansion. A spokesman for the Attorney General was quoted as having said that the criticism did not apply to the current Government, which had proved itself willing to gather evidence and consult the public before passing policy (Jacobsen 2012). However, blaming the past administration cannot continue forever. There is always much still to be done and the real interest now will be on the direction that is set in government policy-making.

In the meantime, the matter of drive-by shootings raised its head again during December 2011 and January 2012. By the end of 2011 there had been, according to *The Sydney Morning Herald* (Gardiner 2012), over 30 drive-by shootings in southwest Sydney since the election without a response having been made by the Government. By mid-January 2012, in the face of at least a dozen more incidents, that had changed and the Government was reported as saying that it 'will consider tougher laws to compel witnesses and victims of drive-by shootings to co-operate with police' (Patty 2012). Investigating police had reported difficulties in overcoming the refusal of victims and witnesses to allow investigations on their premises and generally to provide relevant information that it was suspected they may have. But as Clive Small, retired Police Assistant Commissioner, said on television news: how do you legislate to compel people to provide information that they may or may not have?

The Premier was quoted as saying: 'What resources they need, whether manpower or legislative powers, they will have from this government. But the solution here is to have

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4. Does the government provide researchers with comprehensive access to information on the rate at which convicted offenders are reconvicted?
5. Does the government provide to researchers comprehensive access to all information on reported crime?
6. Are all major new programs subjected to rigorous cost-benefit or cost-effectiveness evaluation by an independent agency?
7. Are all evaluations subjected to independent peer review by appropriate experts in the field to detect flaws?
8. Does the government abandon or substantially modify programs that have been shown to be ineffective in achieving their stated goals?
9. If the government substantially amends a policy or program, is the revised policy/program evaluated?
10. Does the government ever delay or withhold the results of evaluations it commissions? If so, then the government is clearly keen to persist with policies that are not supported by evidence.

Without this planning, training, transparency and responsiveness, policies may amount to a complete waste of public money.

Where governments are truly committed to evidence-based policy, it should be possible to answer all these questions with a "yes".'

national laws because whether it is guns coming into the state, whether it is outlawed motorcycles [sic] people coming into the state, they cross borders' (Patty 2012). He was also reported as having said that there was scope to toughen laws in relation to gang-related crimes and offenders with a criminal history (Patty 2012).

The Police Association of NSW (2012) suggested that the best way to deter criminal organisations is to take away their ill-gotten gains and that police (as well as the NSW Crime Commission) should be able to move against unexplained wealth, not just property proven to have been the proceeds of crime.

That all raises some intriguing possibilities, including (as soon became apparent) additional laws against criminal consorting and a return of the *Crimes (Criminal Organisations Control) Act*[14] in some form. We await developments.

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Cases

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R v Lipton [2011] NSWCCA 247 (17 November 2011)

Wainohu v New South Wales [2011] HCA 24 (23 June 2011)

Weininger v The Queen (2003) 212 CLR 629

Legislation

Bail Act 1978 (NSW)

Children (Criminal Proceedings) Act 1987 (NSW)

Crimes Act 1900 (NSW)

Crimes Amendment (Murder of Police Officers) Act 2011 (NSW)

Crimes (Criminal Organisations Control) Bill 2012 (NSW)

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[14] On 23 June 2011, the High Court of Australia in *Wainohu v New South Wales* stated in response to the question in the special case that: 'The *Crimes (Criminal Organisations Control) Act 2009* (NSW) is invalid'. On 15 February 2012 the Crimes (Criminal Organisations Control) Bill 2012 (NSW) was passed by the NSW Legislative Assembly.

Crimes (Sentencing Procedure) Act 1999 (NSW)

Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Bill 2011

Crown Prosecutors Act 1986 (NSW)

Director of Public Prosecutions Act 1986 (NSW)

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