

# **Community, Corrections and Future Challenges for Practitioners**

**Rick Sarre**

**School of International Business**

**Probation and Community Corrections Officers Association**

**(PACCOA) Annual Conference 2001**

**Adelaide**

**19 September 2001**

## **Introduction**

I have been asked to address today a range of issues that may impact upon probationary practice and community corrections. I bring to this paper and this conference a somewhat unique set of qualifications. I am probably the only commercial lawyer in this State if not the country who has a track record in theology and criminology. It means I am perfect when a prison chaplain wants to see me about a theory she has on crime causation when, at the same time she is being sued. I trust that the coalescence of these disciplines can add something to the debates we need to have concerning corrections policy and probationary practice and the attacks on their integrity that occur from time to time.

I want to develop a few ideas concerning some of the risks associated with community corrections, risks that need to be addressed to ensure that the policies of community corrections remain sound and their integrity intact in the face of doomsayers and critics. Risks will always be associated with any public policy that places people who may wish to harm themselves or others (including their probation officers) in the community rather than in secure isolation. Any policies that encourage decarceration can be very challenging to a community that believes fervently that wrong-doers should be out of sight and out of mind for long periods of time. As Braithwaite and Strang noted recently, with a hint of irony;

*For people who are insecure about their jobs and their children's futures, the politics of exclusion is very appealing, especially when the exclusionary impulse averts explicit racism alighting upon the exclusion of criminals (who are only coincidentally black or of minority ethnic background in disproportionate numbers). (2001:3)*

My brief for this paper was to address the following themes that are of current interest or concern to modern probationary practice: the shifting sands of 'rights' talk, the concept of 'justice', the duty of care, the notion of restorative justice, and the politics of law and order (and the manner in which political considerations often thwart proper implementation of policy). In tacking this brief, I felt a little like Mr Squiggle, looking at five issues and wondering where the connections lay in fashioning a useful response. In the end, I recognised that in each of these topics lies a risk to the integrity of the concept of community corrections.

## Risks

These risks are:

1. The risk that community corrections may be seen to compromise the right of citizens to be protected against criminals in the community;
2. The risk that community corrections may be seen to compromise the concept of justice especially if the sentencing process appears to have been usurped;
3. The risk that community corrections may exacerbate the potential for a legal suit alleging breach of a duty of care in cases where offenders harm themselves or others while in community care;
4. The risks to victims, especially in restorative justice settings, and finally
5. The risk that community corrections programs may founder if they are perceived by timorous politicians and their constituents as going 'soft' on crime.

### ***1. The risk that community corrections may be seen to compromise the right of citizens to be protected against criminals in the community***

There is such a right, but this right needs to be balanced with others' rights also. To paraphrase Justice Holmes of the US Supreme Court, 'My right to swing my arm ends at the point at which your nose begins'. In other words, the question of rights is usually one that involves a balancing of competing interests. Where do we start? In an ideal world there might be a written commitment to rights, with constitutional authority, that binds individuals, administrators, governments and courts to apply and enforce fundamental principles. We might, then, be in a better position to understand, interpret and apply the rights of probationers, prisoners, parolees and victims. It is not that easy, however. At the moment, Australian's rights and freedoms are found not in any written commitments dedicated to the task but in piecemeal legislative enactments and in the common law. Some limited rights may also be found in the Australian Constitution (such as the implied right to freedom of political expression as defined in the High Court's decision in *Lange v ABC*<sup>1</sup>) but only if you look very hard and have a sympathetic High Court. Difficulties arise, obviously, in interpreting legislation, creating common law and being able to inveigle certain constitutional implications out of a nineteenth century document.

So we are left with a balancing act. For example, the 'right' of an Indigenous person to be sentenced in accordance with traditional law, by 'pay-back' or spearing with the chance of death resulting, has to be balanced with the rights set out in the international rules forbidding torture or inhuman punishment as found in Articles 21 and 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to which Australia became a signatory on 7 September 1989. The right of the probationer not to be subjected to arbitrary or unlawful interference with his or her privacy, in accordance with the *First Optional Protocol to the International Covenant on Civil and Political Rights* (ICCPR), article 17 which Australia signed in September

---

<sup>1</sup> (1997) 189 CLR 520

1991, must be balanced with the right of the community to know that the sentence of the court is being carried out appropriately. In other words, the rights of offenders to have an opportunity to demonstrate that they can exercise their freedom from incarceration responsibly must be balanced against the right of the community to be protected from them and to have the sentencing laws made by parliaments not held up to ridicule. Rights talk, however, merely extends the debate. It certainly does not finish it.

***2. The risk that community corrections may be seen to compromise the concept of justice especially if the sentencing process appears to have been usurped***

The word 'justice' is just as problematic as the word 'rights'. Although Aristotle and Justinian in ancient Greece and Rome respectively used the formula 'give everyone their due', there is no way of telling what everyone's 'due' is. Simplistic formulae and prescriptive answers help very little. Justice is not some objective reality, but rather a fluid concept better aligned with faith than fact. An offender who receives leniency in sentencing in the name of justice may easily have been given a harsher sentence in the name of justice. A fine which is meted out in identical fashion to like offenders (a just outcome) will affect rich and poor in different ways (an unjust outcome). Take the issue of a judge's task to sentence an Aboriginal defendant who has pleaded guilty to a serious sexual assault on his partner. On the one hand considerations of community safety (and the effect upon the victim) ought to be given paramount importance by the court, and the offender ought to be sentenced to a long period in prison in the name of justice. On the other hand, should not the legal system take into account the profound disadvantage suffered by many Aboriginal defendants as a legacy of two hundred years of colonial domination, and allow the defendant some leniency in the name of justice? Yet again, how can that happen without demeaning the offender, or indeed the Aboriginal clan of which he is a member, by suggesting that his is a 'special' case, which has the notion of moral inferiority attached to it?

In the face of manifest inconsistencies and contradictions, some have suggested that law (which strives to attain consistency and avoid contradictions) should be the ultimate arbiter. I am not sure that that is the path to follow, for I prefer to link justice to a theological quest not a legal one. But that is a debate for another day.

***3. The risk that community corrections may exacerbate the potential for a legal suit alleging breach of a duty of care in cases where offenders harm themselves or others while in community care***

The law of negligence states that if a duty of care is owed (and yes, there is a duty of a care owed by probation officers to persons on probation), and that duty is breached, (for example, by an officer failing to act upon a threat that persons may do harm to themselves), and that breach causes loss (for example, personal harm or property damage), then tortious liability will follow, giving rise to an award of damages (legal compensation). The field of tort in the area of professional negligence is an expanding one. As the lawyers say, the boundaries of negligence are never closed. While the legal principles are straightforward, the application of facts to law is not always easy, especially where third parties are involved, for example, where your client is injured at the hands of another person who could or should have been recognised as posing a danger or a threat. The High Court was called upon to consider issues surrounding third parties in November last year and made a rather controversial decision,

overturning a unanimous SA Full Court verdict. The question was one of liability for negligence in circumstances where the victim of a bashing was seeking compensation from the owners of the shopping centre where his business was located. It is possible to apply the judgment of the court in *Modbury Triangle Shopping Centre v Anzil and Anor*<sup>2</sup> and to find some relevance for officers who are dealing on a day-to-day basis with vulnerable persons. There could be, for example, a legal suit alleging negligence brought against a department for correctional services (vicariously liable) for the actions of a staff member who did not exercise a sufficient standard of care in relation to their work. To give an example, consider an officer failing to make an appointment and, as a result, another person injects drugs into their client, assaults their client, or prevents them from meeting their probationary requirements (for example, they may be drawn back into criminal behaviour) or harms them in some other way. The High Court, however, has made winning such a case against the officer and the department a little more difficult as a result of *Anzil*. This case involved a shop owner being bashed and robbed while leaving his store late at night with his takings. The lights had been turned off in the car park prematurely as the result of cost savings by the shopping centre owner. The victim failed before the High Court. Having drawn attention to the fact that there had been a number of incidents involving illegal behaviour in the area where the assault took place, the Chief Justice said as follows:

*... This [however] does not indicate a high level of recurrent, predictable criminal behaviour. It is unnecessary to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour. It suffices to say two things: first, as a matter of principle, such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another; and secondly, as a matter of fact, the present case is nowhere near the situation postulated*<sup>3</sup>.

In other words, the court was not satisfied that a breach of a duty of care had been made out by the plaintiff. Justice Kirby wrote a strong dissenting judgment. In it he said:

*[My] review of legal authority ... demonstrates that neither in Australia nor in any other common law country examined have claims in negligence for damage consequent upon the criminal acts of a third party been excluded as a universal category or class. Such claims have been evaluated by the application to the facts of each case of the ordinary principles of negligence law. For this Court now to hold that no duty of care of a relevant scope requiring reasonable preventive measures can arise in respect of the criminal acts of a third party would amount to a departure from basic legal doctrine. Moreover, it would isolate the approach of the common law in Australia from that of other like countries.*<sup>4</sup>

I agree with Kirby J but the fact remains that he was alone in his dissent. My caution, nevertheless, is that dissenting judgments often become settled law in due course. One

---

<sup>2</sup> 23 November 2000, A16/2000 as yet unreported.

<sup>3</sup> *Anzil* supra per Gleeson CJ in the electronic judgment that does not carry page numbers.

<sup>4</sup> *Anzil* supra per Kirby J.

should never discount the possibility that an error of judgment in relation to a client that later exposes that client to criminal harm at the hands of a third party may give rise to a successful negligence action by that client.

#### ***4. The risks to victims, especially in restorative justice settings***

I want to examine the notion that probationary practice and community corrections place victims in particular at some risk. Is there a way through this that does not discount the experiences of victims? Leaving to one side the counter argument that imprisoning offenders for long periods of time probably places a greater long-term risk on the community, it is appropriate to address this concern in light of recent developments generally in the field of restorative justice, for it is possible to draw community corrections into the broad ambit of restorative themes.

The arguments against restorative justice emerge both from a 'left' and a 'right' critique. I add, from the outset, that I do not consider either of these critiques entirely accurate. It would be helpful to recite a short history of victim involvement in the justice system to help explain my position (Sarre 1999a, 2000a). Prior to the sixteenth century, in our English tradition at least, victims took the lead in organising the communal reaction to law-breaking, and the desire for compensation was probably at least as common as the urge to retaliate. Victims eventually lost their central role in the justice process when formally organised governments emerged. Crime became a crime against the state, and victims were referred to the civil courts, not the criminal courts, for their grievances to be heard. This occurred despite the persistence of 'restorative' themes in contemporary religious thought and practice. Christian tenets allowed a guilty person to ask for divine pardon, and one's good works often amounted to sufficient reparation without there having to be any form of formal punishment. It was this concept that gave rise to the 'indulgences' system of pardon, a corrupt system ridiculed by Martin Luther in 1517 (Burns 1978:204). While we praise Luther today for his efforts in rooting out some of the more problematic theologies and practices of the Holy Roman Church, the legacy for the criminal law is less commendable, for it shifted role of the criminal law from victims to the state, a shift that has been difficult to replace (Sarre 1999b).

The restorative justice movement endeavours to reinstate something of the pre-sixteenth century view, both in processes and in values. More enduring solutions and satisfactory outcomes are likely to occur, it maintains, in a non-adversarial environment than an adversarial one, in a diversionary framework rather than a legalistic one, in a community-centred framework rather than one that relies upon the state as the controlling force. In other words, restorative justice "taps into late-modern cynicism about the capacity of state institutions to solve problems like crime" (Braithwaite and Strang 2001:3). Not that community corrections is divorced from the state, but it does involve greater interaction with the wider community concerning the future prospects of offenders.

The critique of restorative justice from the right is that it excuses too much behaviour and, as such, does a disservice to victims. Individuals need, rather, to take responsibility for their actions. The critique of the left is that some restorative models co-opt victims into participating in a ritual that leaves them side-lined (Laster and Erez 2000:252; Erez 2000). The former notion is not borne out by the facts, however, given that the restorative justice movement has been one that has allowed victims a

greater say in the justice process than formerly had been the case. The latter critique overstates the supposed mutual exclusivity of victims' and offenders' interests (Sarre 2000c). For example, the restorative justice movement seeks means by which each offender can seek atonement with each victim and each community, "rebuilding human bonds torn asunder by the criminal act of harm" (Sherman 2001:47). Both critiques are useful, however, in so far as they remind us of the value of considering, during policy development, whether community corrections initiatives frustrate or enhance the interests of victims. It is important to remember that is not axiomatic that restorative models should be an affront to victims.

*[B]oth "public safety" and "restorative justice" have merit as ideas around which the future of community corrections might coalesce and that competing ideas do not. (Smith 2001:7)*

There is much room for optimism that restorative justice models can provide a preferred response to victims' needs and desires (Strang 2001:81).

##### ***5. The risk that community corrections programs may founder if they are perceived by timorous politicians and their constituents as going 'soft' on crime***

Following on from the previous discussion, there is an argument that community corrections are always at risk of being abandoned by parliamentarians who fear an electoral back-lash if they move away from pronouncing on 'tough' measures like building new prisons and embrace 'soft' measures like community-based corrections or any restorative-type program or initiative. Ultimately, the task is to find ways to reassure political leaders that they can embrace informed justice policy-making without imperilling their own futures (Sutton 2000:328). Let me make some remarks on how that may be done.

The appearance of the 'law and order' debate in any forthcoming election is inevitable. The first thing we can predict is that various leaders will pronounce that their strategies are preferable to others' strategies in bringing about greater law and order and public safety. This is usually done by announcing policies to do with increasing police numbers and powers and raising penalties and ignoring anything that smacks of 'restoration' (Sarre 2000c). This criticism is rather strange, for two reasons. The first is that voters are less supportive of prison than politicians assume (Doob 2000). And the second is that, as we all know, crime is, for the most part, a phenomenon that exists outside of the control of the police and the corrections systems. Ninety per cent of the variation in crime rates among population aggregations of substantial size can be predicted accurately by factors other than police strength, factors such as population density, ethnic mix, unemployment, income levels, school leaving rates and household structures (Bayley 1993:3). In fact there is a strong argument to say that if we get the community corrections right, not only is it far more cost effective (thus freeing up dollars to aid health, housing, education and welfare budgets) but it has a prophylactic effect on crime given that it occurs in the midst of the community and enhances the services available to the community. To make this point, Chief Justice Bayda of Saskatchewan is reported to have invited an audience recently to imagine that they were alone late at night in the dark streets of their city.

*“There are two routes home. On one street live 1000 criminals who have been through the Canadian prisons system. On the other street are 1000 criminals who have been through a restorative justice process. Which street do you choose?” (cited in Braithwaite and Strang 2001:4)*

Ministers for justice rarely embrace community-based responses, because to move away from the mantra that each of us is responsible for our actions would involve them in difficult policy analysis and commitments to research funding and efforts based upon rehabilitation in contradistinction to retribution and deterrence. It may also locate some of the blame for crime in poor social policy choices. It’s interesting that they often refer to their portfolios as involving ‘hard’ choices. Choices involving standard law and order options are the *easy* responses. They don’t require any thought. Hard choices involve finding the right mix of policy options, including social development options (housing choice, health, welfare, education, employment and so forth), research and evaluation, including exploring encouraging results in the rehabilitation field (eg. Howells and Day 1999) that delivers the outcomes voters require, not the ones that are easily saleable come election time. It should be noted that, at the present time, the British government has launched a comprehensive ‘what works’ style program from the Home Office in the field of probationary practice and psychological services (Home Office 2000).

Sadly, in this country in contrast, political figures frequently chide academics and deride research findings. That may be because some academics challenge existing power structures or received political wisdom about the obligations of government (Beckett 1997). That is, when criminologists say crime control requires concerted action against social inequality, or racism or the oppression of women or the alienation of public space or that it requires increased investment in labour market programs especially regarding young people, they threaten powerful political interests and strongly held political assumptions. The empirical evidence which links disadvantage or gender or youth alienation to crime is hard to refute and grows by the day (eg. Weatherburn and Lind 1998). Faced with the evidence, policy-makers may seek to undermine the case for social and economic reform and to demonise offenders. They scorn academics and ignore their views.

There is an additional view, put persuasively by Don Weatherburn, that criminologists have unwittingly contributed to their lack of influence on policy-making. He maintains that some academics and commentators, in order to avoid a ‘law and order’ auction and to broaden the policy scope, typically are forced to down-play the impact that crime is having on communities.

*When official statistics paint a dismal picture of recent trends in crime across the country we either ignore them, down-play them or preoccupy ourselves with the politics behind public, media or political preoccupation with them. When public concern about crime rises to fever pitch (as it usually does around State election time) and we are forced to talk about crime (as opposed to analysing the motives and agendas of others who talk about crime), we appeal to the stability of our homicide rates or the possibility of increased public intolerance of crime as if this were proof that there is nothing to worry about or, at least that there is much less to worry about than everyone seems to think (Hogg and Brown 1998) ... On any reckoning this sort of approach to public concern about crime is hardly calculated to make us the*

*first port of call in a storm about law and order policy. On the contrary. Failure to come to grips with national trends and regional variations in crime is a certain recipe for continuing irrelevance. (Weatherburn 1999:10-11)*

Weatherburn is concerned that too often academics and commentators turn away from some options too easily, even though they may give demonstrably good evidence of some valid policy outcomes.

*To decline an opportunity to trial a method for reducing crime because it poses some risk to civil liberty is to decline an opportunity to protect the rights of those who fall victim to crime. In some circumstances such a choice might be warranted but it cannot be defended as general policy. (Weatherburn 1999:13)*

The role of the academic, asserts Weatherburn, is to engage the media, even to seek out the media, and to get actively involved in public debate about crime and criminal justice issues, with a view to putting forward credible and practical alternatives to current policy and practice. I agree with this rather provocative view. If we, as researchers, fail to engage those who are looking for more tangible outcomes for policy direction, it will be left to those less concerned about the evidence and more concerned about their own self-interest.

## **Conclusion**

There is little doubt that any model of decarceration, like community corrections or diversionary practice, faces a perennial battle to win hearts and minds in public forums, politicians' manifestos and policy-makers' recommendations (Sarre 1999c). Michael Smith captures the essence of the dilemma when he writes as follows:

*[E]mbracing "public safety" seems smart in these risk-averse times, when the public's experience of less-crime-in-fact seems to leave fear of crime in place. There is no doubt that powerful ideas get a bit tarnished by political exploitation, but their substantive value is not affected. The malaise in parole and probation agencies is real and it is shared by the public. It will not be dissipated by slapping feel-good labels on impoverished correctional practices, but it will motivate a continuing search for something more plausible than probation and parole as we know them. The need will remain for strategic re-direction of community corrections ... Experience suggests that ... the operational capacity for community corrections will continue for some time to fall short of what the ambitious new ideas require, but that efforts to apply them in practice will move the field to another, better, but still transitional performance level. (Smith 2001:7)*

Non-custodial approaches to corrections may attract the doomsayers who will allege that the risks are not worth the effort. I reject that view and agree with Smith who sees this as a period of transition. There are risks, but not only are those risks amenable to appropriate management, but the risks associated with not pursuing the alternatives to imprisonment are indeed greater.

## References

- Bayley, D. 1993. 'Back from Wonderland, or Toward the Rational Use of Police Resources' in A.N. Doob, (ed) *Thinking About Police Resources*, Toronto: Centre of Criminology Research Report No. 26: 1-34.
- Beckett, K. 1997. *Making Crime Pay: Law and Order in Contemporary American Politics*, Oxford University Press, New York.
- Braithwaite, J and Strang, H. 2001. 'Introduction' in J. Braithwaite and H. Strang (eds) *Restorative Justice and Civil Society*, Cambridge: CUP.
- Burns, J.M. 1978. *Leadership*. New York: Harper and Row.
- Doob, A.N. 2000. 'Transforming the Punishment Environment: Understanding public views of what should be accomplished at sentencing', *Canadian Journal of Criminology*, 42(3):323-340.
- Erez, E. 2000. 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements', in A. Crawford and J. Goodey (eds), *Integrating a Victim Perspective through Criminal Justice*, Aldershot: Ashgate.
- Hogg, R. and Brown, D. 1998. *Rethinking Law and Order*, Annandale NSW: Pluto Press.
- Home Office 2000. Website of the Probation Service strategy *National Standards for Supervision of Offenders in the Community*  
<http://www.homeoffice.gov.uk/cpd/probu/natstds.htm>
- Howells, K. and Day, A. 1999. 'The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems', *Trends and Issues in Crime and Criminal Justice*, 112, Australian Institute of Criminology: Canberra.
- Laster, K. and Erez, E. 2000. 'The Oprah Dilemma: The Use and Abuse of Victims' in D. Chappell and P. Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Sydney: Butterworths, 240-258.
- Sarre, R. 1999a. 'Restorative Justice: Translating the Theory into Practice', *University of Notre Dame Australia Law Review*, 1(1):11-25.
- Sarre, R. 1999b. 'Who's on Trial? The slow journey down an important road to victim-centred law reform in sexual assault cases', *Journal of Psychiatry, Psychology and Law*, 6(2):189-196.
- Sarre, R. 1999c. 'Deconstructing and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Waste-paper basket', *Current Issues in Criminal Justice*, 10(3):259-272.
- Sarre, R. 2000a. 'Restorative Justice', In R. Sarre and J. Tomaino (eds) *Considering Crime and Justice: Realities and Responses*, Crawford House Publishing, Adelaide.

- Sarre, R. 2000b. 'Diversionary Programs within the Criminal Justice System and their effects on Victims' in M. J. O'Connell (ed), *Victims of Crime – working together to improve services. Conference Proceedings*. South Australian Institute of Justice Studies, Victim Support Service Inc and the Australasian Society of Victimology, Adelaide, 68-80.
- Sarre, R. 2000c. 'Implementing and Evaluating Criminal Justice Reforms', In R. Sarre and J. Tomaino (eds) *Considering Crime and Justice: Realities and Responses*, Crawford House Publishing, Adelaide.
- Sherman, L. 2001. 'Two Protestant Ethics and the Spirit of Restoration', in J. Braithwaite and H. Strang (eds) *Restorative Justice and Civil Society*, Cambridge: CUP.
- Smith, M. E. 2001. 'What Future for "Public Safety" and "Restorative Justice" in Community Corrections', *Sentencing and Corrections: Issues for the 21<sup>st</sup> Century*, No. 11, June 2001.
- Strang, H. 2001. 'The Crime Victim Movement as a Force in Civil Society', in J. Braithwaite and H. Strang (eds) *Restorative Justice and Civil Society*, Cambridge: CUP.
- Sutton, A. 2000. 'Crime Prevention: A Viable Alternative to the Justice System?' in *Crime and the Criminal Justice System in Australia: 2000 and beyond*, eds D. Chappell and P. Wilson, Butterworths, Sydney.
- Weatherburn, D. 1999. 'Why does criminology exert so little influence on Australian public policy? A view from outside the Academy', unpublished paper presented to the ANZ Society of Criminology Annual Conference, Perth, September 1999.
- Weatherburn, D. and Lind, B. 1998. 'Poverty, Parenting, Peers and Crime-Prone Neighbourhoods', *Trends and Issues in Crime and Criminal Justice*, 85, Australian Institute of Criminology, Canberra.