A Magistrate’s view of the Law and Social Change

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1. The reform of the NSW Magistracy as a mirror of social change

Nicholas Hasluck tells the story of an English law lord who, having just heard that the Parliament had passed a series of new statutes, expostulated, “Reform! Reform! Aren’t things bad enough!” What follows is, I hope, an answer to the question as applied to the NSW Local Court.

In my first year out of law school in 1981 I worked as a Judge’s Associate in the District Court. On a circuit somewhere in western NSW, I recall attending a morning tea given by the local profession for the judge at which a solicitor remarked to him, “Who would want to be a magistrate?” It was said with such contempt that it made a lasting impression on me. That kind of scorn for magistrates was commonplace in the legal profession when I first entered it. They were regarded not only as quasi-policemen (and they were almost all men) but as straighteners and punishers first and foremost. This was unfair to many magistrates but certainly numbered amongst that group of elite public servants were a number of who made a poor impression on most of the older lawyers I knew. It was reputed that there was even a notoriously erratic beak who carried around in his pocket a medical report certifying him to be sane.

Times have changed – the last time the Chief Magistrate advertised for expressions of interest in appointment to the Local Court, 500 lawyers applied. Presumably none of them were afraid of being regarded contumeliously by other practitioners.

In his recent autobiography, Chester Porter QC wrote:

The improvement of the magisterial bench is one of the great success stories of Australian law today. In recent years as a QC I have felt humble in the presence of experienced magistrates, well versed in the law, and shrewd judges of fact...

The jurisdiction of magistrates in criminal cases has been substantially enlarged in recent years, but there has been little to protest about this. By and large magisterial justice these days is on a high plane. There are many magistrates who would be capable judges, and at least two have been promoted to the District Court. There are numerous magistrates today, and of course the quality of justice varies with the individuals. However, it is fair to say that the greatest and least appreciated reform of the law since the war has been the standard of justice in the Local Courts. They are not called Police Courts so often now. They are independent of the police and on the whole the citizen can count on receiving a fair go.

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3 In fact three in NSW, Judges Karpin, Williams and Price. Judge Price is also the current Chief Magistrate. The Chief Justice of Tasmania is an ex-Magistrate.
The NSW magistracy is itself a mirror of legal and social change. It always has been to a greater or lesser degree but the transformation of the magistracy from a public service organisation perceived by the legal profession and defendants as having an almost papal confidence in the truth of police evidence, and a belief in severity as the best guardian of its own reputation for integrity, into a modern independent judiciary has enhanced the quality of the judiciary as a whole. I do not pretend that I have a great depth of scholarship in this field but in this section of the paper I want to explore, in an impressionistic fashion, the history of the reform of the magistracy and some of the factors that may have led to the reform Porter so perceptively detected.

It is worth reciting a little of the early history of the magistracy to gain an understanding of how it became a public service institution. Like most institutional histories, that of the magistracy is neither well-known, even within the legal profession, nor glamorous or exciting. Its importance lies in its essential ordinariness. When considering issues of law reform and social change there is an almost irresistible tendency in most commentators to identify the failings and shortcomings of a current state of affairs combined with a tendency barely to interrogate the historical record, or to do so only superficially. This can result in unfortunate consequences, the least damaging of which is that reformers merely invent solutions to already solved problems.

Mistakes of the past may, if we do not consult history, be repeated. For example, Truth in Sentencing, the big reform of 1988, merely reinvented a very old system. It resulted, as predicted by most informed commentators but denied by the so-called reformers, in an immediate and irreversible jump in the prison population of NSW, but it also had the unforeseen consequence of putting law-and-order politics in NSW thereafter on steroids. It is virtually impossible, no matter what happens to crime rates in real terms, to dissuade tabloid reporters, talk-back radio commentators and the general public that there is no direct relationship between increasing the prison population and reduction of crime or the fear of crime.

Secondly, reformers who undertake their campaigns in historical ignorance may suffer from the hubris of enthusiasts and unfairly diminish the stature of previous reformers. To adapt the cliché, the truth is that virtually all legal and social reform is built on the shoulders of previous giants in the field. Their experiences have much to tell us because most of the problems and issues faced by moderns have in fact been faced by, and dealt with by previous generations. An obvious example of such an issue is the use of narcotic drugs, a problem which arose well-before the first baby-boomer smoked his or her first joint or took a trip listening to Sgt Pepper’s Lonely Hearts Club Band. In some senses it is always true that plus ça change, plus ça meme chose. At the very least – but I suggest it is more than that – we can learn from the past what did not work.

The magistracy in NSW started off from a low base. Judge Greg Woods, in his fine history of the criminal law in NSW, described one of the early magistrates (later Judge Advocate), Richard Atkins, as “one of the most interesting judicial appointments in Australian history. A man who has both a serious drinking problem and power over life and death over his fellows is almost bound to be a problem…” That the most famous

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4 “Those who cannot remember the past are condemned to repeat it”. George Santayana, The Life of Reason.
6 Woods, ibid p28.
magistrate (an possibly judicial officer of any court) in NSW history is Samuel Marsden, a.k.a “the Flogging Parson” probably says all that needs to be said about the harshness of the administration of justice by magistrates in those days. It is interesting to reflect on the fact that many of the naval and army governors of the colony before self-government were, despite having been brought up in a culture of flogging, often fairer, more humane and just than their civilian legal administrators, and sometimes by a considerable margin.

In her estimable history of the NSW magistracy, Hilary Golder demonstrates that the magistracy has, until recent times, been in a state of virtually permanent tension with the executive over questions of judicial independence and accountability. One of the most dogged issues plaguing the NSW magistracy from its very beginnings until recent times has been the question of recruitment. Atkins and Marsden are perfect illustrations of the difficulties early colonial administrators had in attracting suitable persons to the magistracy. Marsden and others were virtually a law unto themselves and governors struggled constantly to rein in their power and mitigate their abuses of power – usually by appointing men to congenial to Government House. The upshot was often that men such as John MacArthur and the “uniformed hucksters” of the NSW Corps would then, with breathtaking hypocrisy, accuse the unfortunate governor of “cronyism” and corrupt conduct.

As part of the gestation process, a dual system of magistracy developed in the colony. It was a system with some similarities to English cricket of a bygone era. On the one hand were the Gentlemen, the amateur magistrates who presided over courts in a lordly fashion. Golder comments acidly of these men, “the English system of honorary justices had not been healthily transplanted to NSW. Indeed, the colonial magistrates scarcely deserved the title ‘honorary’…”

On the other hand were the professionals: a stipendiary magistracy. In 1810, for example, the first Police Magistrate was appointed. The appointee was D’Arcy Wentworth. There may never, at least in one respect, have been a more uniquely qualified appointment to a magistrate's court in this country’s history. Wentworth had been tried four times at the Old Bailey for highway robbery before being finally acquitted and being sent by his poor but aristocratic family to NSW to practise (and I use the word loosely) medicine in the colony as the Assistant Surgeon. The real significance of Wentworth’s appointment, however, was that he was not only a judicial officer but simultaneously Superintendent of Police. Conveniently, he conducted court and had his police headquarters in his own house. In 1862, the control of police by magistrates was eliminated but the title Police Magistrate appears to have remain in formal use until 1947 and informally, among criminal law practitioners for a long time after that.

The demise of the Gentlemen came in the second half of the 19th century when they were effectively displaced not only by professional magistrates but by a growing army of other public servants. It was under Henry Parkes that the magistracy became the closed shop it remained until the last quarter of the 20th century. Although it had from time to time been suggested by Attorneys-General in the late 19th century, formal legal qualifications were not prescribed for magistrates until 1955.

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8 Ibid, p38.
9 In the early colony, there seems to have been a strong medico-legal connection well before the development of an insurance industry of any note. Other doctors who performed magisterial duties were William Redfern and army surgeon Donald McLeod, the first Stipendiary Magistrate in Parramatta.
From the vantage point of the early 21st century, the incorporation of an important branch of the judiciary into the public service seems offensive to any concept of judicial independence and impartiality, but the course chosen by Parkes enabled the creation of a court which, at least superficially, rose above hot political fields of conflict generated by sectarianism, the temperance movement, the rise of the Labor Party and the union movement. “Governments throughout this period chose to rely on their own magistrates, who were represented as efficient and accountable”10 rather on the more erratic and predictably biased ministrations of the honorary justices.

It was in this climate that the magistracy as it was known throughout most of the 20th century was built. Golder noted that “efficiency was equated with speed and predictability [of decision-making], but some critics questioned the rapid dispatch of cases and argued that a dangerous congruence between police and magistrates was turning the lower courts into mere ‘manufactories of criminals.’”11 It seems to have been this culture of “efficiency” at the expense of traditional ideas of justice that gave lawyers as various as Chester Porter and Murray Gleeson a rather jaundiced view of the old-style “police courts”. It was easy to gain the impression that for many magistrates trained in that system the emphasis in the phrase the administration of justice lay squarely on the word administration.

The keys to the reforms in the late 20th century were, first, the removal of magistrates from the public service and, second, the breaking down of the doors of the closed shop. Although the first was a necessity if the magistracy was to be regarded with appropriate respect as a judicial body, the second was just as important. Although a real advance had been made in 1955, when the Public Service Board required that all candidates for appointment to the magistracy have legal qualifications, this only tightened the grip of the Petty Sessions Branch elite on the magistracy. With the introduction of public service reform in NSW in 1979, a wedge was jammed fractionally into the previously impenetrable façade. In 1980, while offering an olive branch to the Petty Sessions Officers’ Association by assuring them that the majority of new magistrates would be appointed from the branch, Attorney-General Frank Walker nevertheless reserved the right to make outside appointments.12

The unsung hero of the modern magistracy is Clarrie Briese. He had become the Chairman of the Magistrates Bench in 1979 and was already of the view that it needed to attain full judicial independence. His fellow magistrates were not entirely convinced. In 1980, stipendiary magistrates supported a motion for a break from public service control only by a majority of two votes. (Briese presumably worked the numbers during following 12 months because, at the next year’s meeting, the argument was supported 78 to 1!) The principal argument against the devolution of the magistrates from the Petty Sessions Branch was that the magistracy would, in gaining judicial independence, paradoxically, become subject to the old evil of political patronage and manipulation as governments sought to select and appoint “suitable” candidates. The reformers, such as Briese, hoped that they would build into a new type of magistracy “an independent selection process which would balance the need for outside appointments with the claims of public service candidates.”13

10 Golder, op cit, p110.
11 Ibid, p110 citing Magistrate 6,7 (April 1911) at p219.
12 Ibid, p190.
It is no news to anyone that the question of “political appointments” to all courts, from the High Court down, remains thorny but unresolved. Although all courts from time to time receive unfortunate appointments due to political favouritism and patronage, when one considers the overall current quality of the NSW Local Court, most magistrates having been appointed from outside the court’s administration, the pessimism of the Petty Sessions Cassandras does not seem justified.

The Local Courts Act 1982 was Clarrie Briese’s triumph. To attain and savour it he first had to endure the blowtorch of Premier Neville Wran’s displeasure. It was unfortunate for him that, as the reform movement gained momentum, Briese became the pivotal figure in two of the great scandals or cause célèbres of Australian legal history – the disgracing of ex-Chairman of Magistrates, Murray Farquahar, following a Royal Commission, and the trials of Justice Lionel Murphy and Judge John Foord. This is not the place to explore those particular events. After Murphy’s ultimate acquittal, Wran bitterly attacked Briese with his characteristic forcefulness. Briese, supported by the Council for Civil Liberties, some branches of the fourth estate and various judges, refused to buckle under his pressure, thus demonstrating in a concrete fashion that the Local Court was truly an independent judicial body at last.

(The consequences of the Farquahar-Murphy scandals, with all their suggestions of corruption and back-door deals, were not without the occasional punctuations of absurdity. Many magistrates learnt the unwisdom of even being thought to have contact behind closed doors with police prosecutors (many of whom were also investigated and suspected of corruption at this time) and lawyers, shady or otherwise. On one occasion the prosecutor got up in court at the beginning of a day’s proceedings and asked a magistrate whether they could speak in chambers. The magistrate sternly refused to entertain the suggestion. The prosecutor insisted that it was important and that he had confidential information only for the magistrate. Again the magistrate refused to go off the bench for a private meeting. “If it’s important, you should tell me in open court, Sergeant,” he demanded. “All right, Your Worship,” replied the police officer, “your Mum rang to say you’ve left your lunch behind.”)

The opening up of the closed shop has had the important consequence that experienced advocates now make up the majority of NSW magistrates. A majority of them are, appropriately, from a criminal law background. The bulk of work done in Local Courts is, of course, criminal (and quasi-criminal if that is a proper description of apprehended violence cases). Significantly, a large proportion of magistrates come from a Legal Aid background or worked as private solicitors or as barristers representing defendants. The perceived nexus between police and the magistracy has been broken for good. It used to be argued that the police prosecuting service ought be replaced by the DPP. Ideally, this is so, but the reality is that with the magistracy cut from its Petty Sessions past in a decisive way, the lack of independent prosecutors is far less hazardous to the practice of justice administration than in the times when the police and the magistrates made common cause in the name of efficiency of administration.

The appointment of practising lawyers, with experience in dealing with briefs of evidence and the rules of evidence, many of whom have had experience instructing counsel or acting as counsel in District Court and Supreme Court matters, has wrought, over years, an immeasurable but significant cultural change in the Local Courts. It is merely impressionistic, of course, but many lawyers used to say of some magistrates from a Petty
Sessions background that they “never had a doubt”, that is, they always accepted prosecution evidence. It is my impression that the magistrates of NSW, including those with a background in courts administration, are now regarded by most practitioners as fair and competent. Of course, some will always be more competent than others but the overall standard is regarded as being as high, or higher, than it has ever been.

(Lest I give the false impression that I regard magistrates from a courts administration background as having lower standing in the magistracy than ex-litigators, I want to pick up the question of administration of justice. Until I was appointed it was not clear to me how highly skilled magistrates from courts administration backgrounds actually were. To conduct a list appeared, from the bar table, to be a relatively easy and, indeed, rather mindless process. Experience has taught me otherwise. To move large numbers of people and paper and offer a human face to each party is a highly under-rated skill. It is about as easy as riding a monocycle while juggling several different-sized and shaped flaming objects. To do so and to concentrate for a full day on each party’s case is an exhausting process. If I can now perform this kind of wizardry myself, it is only because I have been taught by some very able people who learnt their skills in the Petty Sessions Branch.)

Since Briese’s time, successive Chief Magistrates have built on the reforms he initiated. When the Local Court was instituted all but four of the serving magistrates were reappointed. Thus it took some time for the doors of the closed shop to open fully. Nevertheless, they are now.

The contrast is obvious when one compares the backgrounds of acting magistrates with the backgrounds of current tenured magistrates. Acting magistrates are almost entirely drawn from the ranks of retired magistrates. There are at any given time about tenured 135 magistrates serving in NSW. Of the approximately 24 acting magistrates, about 18 whom had courts administration backgrounds.

On my count about 40 current magistrates were appointed from courts administration or the NSW Attorney-General’s Department. Significantly, however, the last appointment of a Clerk of the Court to the magistracy was in 1998. Annual turnover is relatively high. Since late 1995, about 75 magistrates have been appointed. About six retirements are due or expected in the next 12 months, mostly of ex-courts administration magistrates. The next biggest cohort of magistrates consists of ex-Legal Aid Commission lawyers, of whom there are about 22. A majority of these have been appointed since 1995. About 8 came from other NSW Government departments including Aboriginal Affairs, Fair Trading, Industrial Relations, the Environmental Protection Agency and the Crown Solicitor’s Office. There are about 15 ex-barristers on the Local Court and about 20 magistrates who practised privately as solicitors. About seven came from the State DPP and four from the Commonwealth DPP. A small number of ex-police prosecutors have been appointed as magistrates.

A number of magistrates have come from other courts and tribunals – one magistrate from the WA Family Court; one Judicial Registrar from the Federal Court; one Judicial

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14 In particular I would like to mention ex-Deputy Chief Magistrate Charles Gilmore and ex-Magistrate Neil Milson.
15 Magistrate Brian Wilson, then Clerk of Gosford Local Court.
16 One resigned in the course of a Judicial Commission inquiry into his alleged misconduct. No further police prosecutors have been appointed since that time.
Registrar from the NSW Supreme Court; one Commissioner from the Workers Compensation Court; one from the Refugee Review Tribunal and one is currently Deputy President of the NSW Administrative Decisions Tribunal. One magistrate was a senior Army legal officer (he remains a member of the Army Reserve) and three were academics. One acting magistrate is also an ex-academic.\(^\text{17}\)

Since the beginning of 1996, a gender imbalance in the magistracy has largely been rectified. When I conducted my little survey, I found that among the top 78 magistrates in order of seniority (which, except for the Chief Magistrate, Deputy Chief Magistrates, Senior Children’s Magistrate, Chairman of the Licensing Court, State Coroner and Chief Industrial Magistrate dates from the date of appointment), only eight were women. These figures are even more dramatic when it is realised that one of these was Deputy Chief Magistrate Syme who was appointed in March 1996 and promoted over the heads of many magistrates senior to herself.\(^\text{18}\) The bottom half of the seniority list, however, looks very different. Of 66 names listed in the directory of magistrates, 34 are those of women. Again, a stark contrast is to be drawn with the list of acting magistrates: of the 24 only three are women.

While one form of imbalance has been addressed, there remains a question of ethnicity. Patricia O’Shane is the only Aboriginal magistrate to have served on the court. As far as I am aware there are only four Jewish magistrates currently on the Local Court, although ex-Chief Magistrate David Landa is Jewish. Of the 130-odd names in the list, only 11 seem to suggest their owners come (however far back) from non-Anglo-Celtic backgrounds. Perhaps as the legal profession and, in particular the government legal services, absorbs more lawyers from a wide variety of backgrounds we shall start to see a more interesting ethnic mix on the Local Court than the rather homogeneous group now presiding.

Lest I be misrepresented as some sort of trendy, politically-correct, inner-city type, I do not suggest that anything but competence (in all its aspects) for the job should be given priority in selection for the magistracy. Nothing would be more likely to reduce the standing of the court and the magistracy, in my opinion, than the appointment of token representatives of minority groups. It is now a demonstrated fact that there are significant numbers of high-quality lawyers of various ethnic backgrounds practising in Sydney. In my view, most of the women appointed since 1996 have proven themselves to be excellent appointments and, without being too chivalrous about this, my own impression is that, as a group, they outshine the male appointments made in the same time. If this impression is correct, it is no doubt a demonstration of the claim often made by women that they have to be better than men to gain equal success. I do not doubt that as the young lawyers of Asian, Middle Eastern, southern and eastern European backgrounds start to ease into middle-age some of them will consider the contributions they can make as magistrates and will do so as excellently as women have done in recent years.

\(^\text{17}\) My informal survey is slightly out of date as it is based on a list which is now about six months old but it will serve to illustrate the point that the magistracy is no longer dominated by ex-courts administration members.

\(^\text{18}\) The penultimate Chief Magistrate was Patricia Staunton, another rapid riser. She was also appointed in 1996. She is now Deputy President of the NSW Industrial Commission.
2. Problem-oriented courts

The work of courts in relation to social change and social policy is distinctly unglamorous. Magistrates’ courts are not referred to as the “coal-face of the legal system” for nothing. By and large, we are constrained by the separation of powers from saying what we really think about most of the laws and policies we are required to apply and administer. Nevertheless, the courts get on with their jobs of trying to preserve and protect a civilisation based on the rule of law. Part of that responsibility is not to make things up as we go, not to act according to whim or fancy but, even if it sometimes hurts, to apply the laws democratically-elected Parliament gives us to administer “without fear or favour, affection or ill-will”.

Although the phrase is not common parlance in Australia, magistrates’ courts are, in a real sense, “problem-oriented courts”. On any given day, a magistrate may deal with issues of domestic violence, environmental damage, alcoholism, misuse of drugs, mental illness, reckless driving, access to children, protection of children, workplace accidents and so on. In courts of first instance, no others come close to the dealing with the variety of matters and problems which may confront a magistrate. Magistrates are not only required to be jacks of all trades, they are expected to be masters of them all too.

Problem-oriented courts, however, are courts with a more specific brief than this. One definition is that they are courts “which attempt to use judicial authority to deal with the offender’s underlying problems in conjunction with governmental, social and community agencies.” The distinguishing marks of a problem-oriented court are that it is interested primarily in problem-solving as opposed to dispute adjudication; in therapeutic outcomes as opposed to a legal outcome; the process is collaborative as opposed to adversarial; the processes emphasise needs and interests as opposed to rights; the judge is more of a coach than an arbitrator; the process is forward-looking rather than backward-looking, and there emphasises, for example, rehabilitation rather than retribution; the process is concerned therefore with planning rather than precedent; and there is a wider than usual range of participants in the process. Commonsense rather than legalism prevails in a process which is informal rather than formal.

The development of problem-oriented approaches has not been formally articulated in any forum of magistrates I have ever attended yet the concepts are immediately familiar. According to Freiberg, they emerge from “therapeutic jurisprudence”, the study of the law’s potential for healing. Therapeutic jurisprudence has been described as seeking...

... to assess the therapeutic and counter-therapeutic consequences of law and how it is applied and to effect legal change designed to increase the former and decrease the latter. It is a mental health approach to law that uses the tools of the behavioural sciences to assess the law’s therapeutic impact, and when consistent with other important values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected.

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It will be immediately obvious that most of the time most magistrates are not formally operating according to such principles because it would be inappropriate to do so. The reality is that, except for certain specific types of cases, magistrates tend to slide in and out of such roles, depending on the cases before them. Sentencing is frequently an exercise that involves therapeutic or problem-oriented approaches but the bulk of magisterial work is the management of an adversarial process designed to adjudicate disputes of one sort or another rather than to solve problems per se.

Nevertheless, I suggest that policy-makers have come increasingly to perceive the potential for channelling various client groups into therapeutic or problem-solving processes via magistrate’s courts. It is no secret that a large number of persons coming before courts charged with relatively minor offences are mentally ill or suffering from psychiatric or psychological conditions which can and probably ought be treated. A court, of itself, is unable to do much but if it becomes a portal to other services it can play a critical role in addressing various problems suffered by individuals.

Individual casework in courts is essentially unspectacular and, sadly, in many cases, not highly productive except in terms of harm-minimisation. Nevertheless, when it realised that literally thousands of people move through magistrate’s courts in Australia per annum, it is reasonable to infer that the lives of many are improved as a result of their being referred to services to which they may not previously have had access. Utopia cannot be delivered in this fashion but the harshness of the lives of many can be ameliorated.

The types of people who, it seems to me, are likely to benefit most from problem-oriented courts are those who, for one reason or another, both suffer significant social disadvantages and who are amenable to appropriate treatment or rehabilitation programs. (I use the term “treatment or rehabilitation programs” in the broad sense to include educative programs and counselling, especially those directed to cognitive therapies.)

The potential clients for such programs are readily discernible on any list day in a magistrate’s court. People with mental illnesses or mental health issues; people with drug-addiction issues; people with alcohol issues; people with anger-management issues; people suffering from conditions such as ADHD and ADD; and people living in poverty (often because they suffer from one or more of the above types of problems) make up the large bulk of any recidivist populations seen by magistrates. While it will sometimes be useful to refer a first offender to some sort of therapeutic program, commonsense dictates that the scarce resources be allocated in a more focussed fashion, and that is generally how magistrates approach such questions.

Freiberg has identified a number of issues concerning the operations of problem-oriented courts. The first is that such courts must identify the relevant problem(s)\(^\text{22}\). In fact most “problems” are clusters of problems that manifest themselves in certain types of behaviours. The successful treatment of, for example, drug addiction will almost invariably require, not only detoxification and drug treatment, but a range of social issues, such as housing, employment, family relationships, physical and mental health, as well as legal issues, such as arrest, bail and sentence to be addressed. One of the most critical is the motivation (on a supported basis) of the client.

\(^{22}\) Freiberg, ibid p21.
Any considered attempt to deal therapeutically with, for example, domestic violence will also, for self-evident reasons, require the “problem” to be attacked on a number of fronts.

The second major issue Freiberg raises is that:

...the problem-oriented paradigm raises some profound questions about the nature and operation of the court process itself. Proactive judging, which requires the presiding officer to act as judge, mentor, supervisor and service broker threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive...

Problem-oriented courts also pose significant challenges for prosecution and defence counsel. The 'team' approach, which requires co-operation and collaboration, sits uneasily with the traditional notions of the adversary system... Should defence counsel seek the least restrictive alternative open to the court in the light of the gravity of the offence and the background of the offender, or should they seek a disposition, or process, which is in their client’s 'best interests’, a phrase which conjures issues of paternalism, coercion and role conflict.

In practice, however, such concerns seem to me to be misplaced. While we have developed specialist problem-oriented courts, such as the Drug Court and Youth Drug Court (part of the NSW Children’s Court), and processes such as Youth Conferencing for restorative justice, magistrates’ courts will, in conjunction with other services, use different techniques to deal with problems. In my experience, magistrates and practitioners, as well as defendants, are easily able to distinguish between the formal, legal processes of adjudication of cases and the consequences which flow from such cases.

What we are observing is not a holus-bolus rejection of traditional notions of procedural justice and separation of powers but the application of different techniques, in a pragmatic fashion, to ameliorate the consequences of crime and other social dysfunctional. It is without question that deterrence alone, sought to be achieved by severity of sentence, is an inadequate solution to most forms of crime, let alone any other social problems. Recidivists, by definition, are not deterred merely by the fear of sentence, especially if their repeat offences flow from drug addiction, mental illness, alcohol abuse and other such factors. The bad old days of parades of prostitutes marching through Central Court of Petty Sessions on Monday mornings paying their 10/- fines brought the law into disrepute as even the crusty old beaks of the Fifties and Sixties well understood. Such rituals did nothing to reduce prostitution, raise community standards, eradicate sexually transmitted disease or achieve any other worthy Victorian goals of the Vagrancy Act.

Without giving such philosophical questions any conscious thought, most modern magistrates are capable of applying relatively sophisticated problem-solving techniques to the complex social problems confronting them daily. This is, perhaps, another measure of the advancement of the magistracy to which Chester Porter was referring. Of course, it should go without saying that they can do so only because policy-makers have themselves become more sophisticated in the identification of problems, their possible solutions and the insertion of resources into the court system.

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23 Freiberg, ibid, p23.
24 See Golder, op cit, p195.
3. Two examples

The Circle Sentencing project in Nowra and the MERIT\textsuperscript{25} programme which is operating in a small number of courts across the State are two particular examples of the problem-oriented approach. A more detailed treatment of the Nowra Circle Sentencing pilot project will be given at the Conference by Ms Gail Wallace so I will confine my remarks on it to a short number of points.

\textit{Circle Sentencing}

Circle sentencing is an approach to problems which have combined to frustrate most attempts by the criminal justice to deal with Aboriginal repeat offenders in a productive way. Engaging Aboriginal people in dealing with members of their own communities who offend repeatedly is part of the attempt to build a bridge between the justice system and Aboriginal people. Circle sentencing is a sophisticated combination of restorative justice, retribution (there are no soft options being exercised here!) and rehabilitation. The key to it is the creation of a mutually respectful partnership between the magistrate and the Aboriginal leaders who manage the process.

Of course, it is not magical but the project appears so far to have been remarkably successful. To what extent Nowra’s experience can and will translate to other communities is a matter of speculation but, if the appropriate lessons are learned and applied elsewhere in indigenous communities, the signs are good. I do not wish to overstate the case but the Nowra project appears to be one of the most hopeful developments we have yet seen in the NSW criminal justice system for many years.

\textit{MERIT}

The MERIT scheme, which was first piloted in Lismore in 2000 and then rolled out to a number of courts, is a joint project of the Local Court, the NSW Health Dept, the NSW Probation & Parole Service and some non-government agencies. It is designed to divert alleged offenders into a short but intensive drug-treatment program at the earliest opportunity once they enter the criminal justice system after arrest. It is not part of a sentencing exercise: the referral may be made by the arresting police or lawyer representing the accused person even before his or her first appearance in court. Usually, however, the referral is made as a condition of bail by the court, either on the magistrate’s own motion or at the suggestion of a legal aid lawyer or sometimes a police prosecutor.

The program is voluntary and entry into it is not dependent (unlike the NSW Drug Court program) dependent on a plea of guilty being entered. Once an accused person has volunteered to be assessed, the MERIT team seeks to identify the needs and goals of the participant and any risk factors to be considered in relation to that person. The program is generally an intensive 12-week programme, although it may be extended in certain circumstances. In the course of the programme, the MERIT team deals with issues of detoxification, pharmacotherapies (such as methadone, naltrexone and buprenorphine), residential rehabilitation and individual or group-based psychological and psychiatric therapies.

\textsuperscript{25} The acronym stands for Magistrate Early Referral Into Treatment.
In practice, if a person completes the MERIT programme successfully and is ultimately convicted of the offence alleged, there is a significant discount on sentence. On the other hand, since the programme is voluntary, unsuccessful completion does not (or ought not) result in any stiffening of the sentence that might otherwise have been imposed if the person had never started the programme. If a person breaches a bail condition requiring attendance at the programme by dropping out and does not approach the court promptly to deal with that issue, magistrates will often issue an arrest warrant and will reconsider the question of bail once the accused is brought before the court. On occasions, after consultation with MERIT, a person may be given a second chance if the magistrate is persuaded of the accused’s bona fide intention to seek treatment.

The MERIT programme has been enthusiastically endorsed by the NSW magistracy. In a survey carried out by the Judicial Commission, there was virtually unanimous support for the programme and the concept of therapeutic justice in relation to drug crime. The wave of support for the programme undoubtedly reflects the frustration magistrates feel in dealing with the large volumes of non-violent drug-related crime with inadequate tools and a sense of relief on the part of magistrates that suitable treatment programmes for drug-dependant accused persons are finally becoming available.

4. Final words

In this paper I have, I hope, identified some reasons why Australian lawyers yearning for reform of, and improvement in, the criminal justice in this country should be heartened. Overall, however, it has to be admitted that only the most complacent could be entirely happy with the system’s capacity to meet the challenges it faces.

It is a commonplace that, since 1988, when the Liberal Party won office largely on the basis of a forceful Law-and-Order election campaign, what has been called “penal populism” has been a constant theme in NSW politics. The theme is, however, not unique to our State – it is a phenomenon which has swept the Anglophone world. Sadly, no matter how rational governments may at times be in practice, such as when they establish programmes like MERIT, there are few if any votes in such approaches.

Notwithstanding the virtually unanimous endorsement of the judiciary for therapeutic justice in relation to some problems, such policies seem rarely to be publicised to the mass media (or if they are the media take little or no interest) but are mainly confined to the delectation of connoisseurs. The dilemma for the honest politician is, no doubt, how to do the rational thing and to escape misrepresentation by the mass media. Sadly, the conclusion most honest politicians seem to have reached is that there is no such thing as a debate on this topic – only the risk of a loud-volume denunciation by ill-informed critics who reserve not only the last word to the themselves but also the volume controls.

To my unscholarly observation there has been virtually no publicity given to the fact that approximately one-third of persons remanded in custody suffer mental illness. People in the criminal justice system know this but it is not a matter of common knowledge that gaols are, to a significant degree, required to serve as psychiatric wards and drug-detoxification centres. With the best will in the world, it is difficult to see how the most enlightened correctional regime could be adequate to meet such a test.

In some major NSW Local Courts, psychiatric nurses assess all persons brought to the court in custody and provide reports to magistrates. The reports not only provide a preliminary diagnosis or assessment of the accused person’s mental illness or health but also advice as to suitable treatments or other interventions which may be indicated. By means of this relatively inexpensive expert service, significant numbers of people who might otherwise be refused bail can be granted bail and diverted to mental health services for assistance and treatment. For all that, the problems of identifying mentally-ill people when they are brought to court, and of finding treatment for them outside the prison system once they are identified remains an acute one for the justice system and individual magistrates. It is a sad but common experience that magistrates will identify someone as probably mentally ill, have them taken by police to a psychiatric hospital for assessment only to have them bounced back to the court by a psychiatric registrar who cannot diagnose a mental illness in the accused. All too often, of course, these unfortunate people are properly diagnosed only when they get to prison having had bail refused. I have no doubt that a cost-benefit analysis would be very sobering.

Imprisonment rates also make for sobering reading but it is difficult for an individual member of the judiciary to tell precisely what they mean. Apart from the mentally ill, whether we are locking up too many people is a tricky problem to analyse from the coalface of the justice system. I can say that there is very little enthusiasm, as far as I can tell, among magistrates for imprisoning people. It is a dispiriting and, often, saddening experience when one finds oneself left with no alternative but to gaol someone. If, for example, the argument is made that the courts are still imprisoning Aboriginal people at much the same rates as they were before the Deaths in Custody Royal Commission, it seems to me that the real questions are not why are the courts behaving this way but why do crime rates among the people being locked up remain where they are and what are we going to do about them.

Similarly, one cannot help reflecting, almost on a daily basis, that one of the reasons that we now have more people going through the criminal justice system, and therefore being exposed to the risk of going to gaol, is that our society is now fiercely denunciatory of crimes which a generation or two ago were rarely prosecuted. One does not need to be a professional criminologist to observe that domestic violence and sexual abuse of children are two of the most prominent categories of offences dealt with in NSW courts these days. Communities and individuals are less ashamed of bringing these kinds of crimes into the open than they once were. No doubt the number of examples can be multiplied. What all this means in terms of crime statistics and imprisonments rates bears careful analysis but there do not appear to be simple answers.

The greater concern to me, as an individual member of the judiciary, is not so much the raw number of people being imprisoned but the length of the sentences being imposed. The judiciary as a whole is, it seems to me, lives under two constant but countervailing

28 See, for example, Russell Hogg and David Brown on the question of the dimensions of the crime problem: Rethinking Law & Order p18-44.
pressures -- to be tough on crime, because of community expectations, (insofar as one can discern them from the public statements of politicians, police and journalists and such things as letters to editors and talk-back radio) and to be staunch in defying irrational expectations or demands for excessively punitive approaches to individual crimes and offenders, because that is what your judicial oath requires. There has probably never been an easy time to be a judicial officer but this seems a fairly trying one because the debate (such as it is) about crime and punishment in Australia is frequently conducted in an irrational and, indeed, puerile way.

While I think that there are some signs of hope in the criminal justice system – circle sentencing, youth conferencing, therapeutic approaches to drug crime, etc -- the tendency towards a more punitive approach in terms of imprisonment (and the statistics appear to demonstrate this) is one in urgent need of rational analysis and debate. Don Weatherburn, in his paper “Law and Order Blues”, argues “the principal defect of Australian law and order policy is not that it is punitive but that it is so rarely evidence-driven or evaluated.” I would respectfully adopt those remarks in respect of sentencing policy too.

Sentencing policy of the courts is a subtle work, always in progress, constantly being crafted and revised by the senior judiciary (especially the NSW Court of Criminal Appeal and its interstate counterparts) but also by the minor players in the hierarchy. It is not usually driven directly by government policy but is fashioned intuitively by the judiciary in response to its interpretations of law and community sentiment. It is not, however, a creation in a vacuum. Judges and magistrates read, and listen, and think on these issues. All of them are open to be influenced by rational and appropriately expressed arguments and all of them are interested in results.

My appeal, therefore, to academic lawyers and practitioners who find the justice system disappointing or unjust is that they develop arguments that will persuade governments that there are better ways to achieve the results the community desires than the alternatives currently available by implementing new policies giving courts new tools crafted to meet the problems which are funnelled into them.

I should not be understood to be impliedly denigrating academics and scholars when I suggest that a MERIT program and a circle sentencing project is infinitely more useful to the people at the coalface than an article in abstruse language in an obscure journal decrying, for example, the rising rate of imprisonment. Pure research has its place. I am, however, asserting that reform is not achieved merely by critique but the proposal of superior practical alternatives to current practice. That is, of course, an enormously tall order because, to be effective, it requires an understanding not only of the problems themselves but of the resource implications for policy-makers. It may also require some political sophistication on the part of advocates because reformist changes in direction in the criminal justice system always present political issues for governments. One thing that may give reformers some confidence is that bulk of the magistracy in NSW is supportive of the development of sophisticated problem-oriented approaches to criminal justice issues as they confront practising judicial officers on a daily basis. I hope that is some encouragement.

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