

Speech by Greg Smith SC MP, Attorney General and Minister for Justice to open the Public Defender's Conference, Saturday 24 March 2012 at Taronga Park Zoo Conference Centre.

This Monday marks the first anniversary of the election of the O'Farrell Government. For the past week we have had the pleasure of getting up at 5.30 and going out to railway stations handing out little cards telling people what good things we've done and they are saying: what's up?, Is there an election on? But we have had a very good reception.

I am pleased to say the firm agenda I set in opposition – with the backing of the Coalition –which was that there would be no law and order auction at the last election, has been honoured by us. And I think Labor was becoming weary of it. They didn't try to counter with a one sided auction – no grid sentencing, or more maximum life sentences, no extra aggravated offences, no standard non parole periods – which had coloured the previous 20 years of elections.

Unlike previous governments, our State plan does not demand a certain number of arrests or prisoners. Take section 22A of the Bail Act; it allowed only one application for bail and had a particular impact on young people - especially for those who breached curfews. There are now are 150 people a week in juvenile detention centres who will never receive a custodial sentence.

I promised we would open a second metropolitan drug court – I expect that will up and running in May – and the first intensive drug treatment facility in a NSW jail. We have done that at the John Morony complex at Windsor. In late February the first 62 prisoners started and within two years I hope we have 300 prisoners – 250 men, 50 women - undergoing treatment that will last for about six months. They will be linking up with the non-government organisations after their release so they can continue their treatment.

Drug addiction can be a lifelong struggle and my hope is that this program will help a lot of people to turn their lives around and make a positive contribution to the community. If they can get off the drugs, get a job, get somewhere to live and help –

rather than just being thrown into jail and let out with the same problems – it will be better for the community. We will have more citizens who might have been permanent criminals going straight and the community will be safer. And hopefully the perceptions of safety will increase because that is one of our big problems. Fanned by publicity and sensation, there is a perception out in the suburbs of Sydney that it's dangerous out there, in the night, even in the day.

The old people feel that. And if you have a teenager who is going out on Saturday night say in George St in the city, you might feel scared. There are crazy drunks and drug-affected people out there, fighting and arguing. If you even look at one you can be clobbered by half a dozen.

That's one of the problems, but generally crime rates for serious offences have dropped over the past five years- and continue to drop. There are sometimes spikes in crime rates for particular offences in particular areas but on average its dropping and we have to get that message across. We have to increase public confidence that it is safe on our streets.

We also promised to demystify sentencing laws and we have a reference to the Law reform Commission on that.

We also want to focus on NSW reoffending rates, by focussing on rehabilitation.

I have already visited 10- 12 prisons this year and the thing that sticks out is that they are quite well run but that the exposure and close proximity of criminals charged with reasonably minor offences to hardened criminals must corrupt. And the longer you stay in there with these people the harder it is to go straight when you get out.

I think that's pragmatic. I don't think its being soft; it's trying to tackle crime and the underlying causes of crime and strengthen our community.

As public defenders, you play a very valuable role in the criminal justice system. I remember having stoushes with Virginia Bell and Cathy Lyons out at the old Liverpool district court. I thought these people fight hard, that's good. The

Honourable Justice Michael Kirby, who is here today, told me I used to be a fighter in the High Court. Well, I grew up on that – and it was thanks to people like Virginia. She was obviously going places – and has.

I learned valuable lessons as a prosecutor. I used to be a hardliner, but the message was getting through. The exposure of the Wood Royal Commission was instrumental. You couldn't believe that everything in the Crown case was pristine and pure. Sometimes the court of criminal appeal intervened and acquitted people who had been earlier convicted on the evidence of police.

I also changed my thinking about the people who were coming before the courts. I should have seen this earlier, but I eventually realised that your upbringing and your parents affect your chances in life and where you are going in life.

If someone comes from an area or background in which families are in a downward spiral – several generations may never had a job, several generations have been criminals and they are living near people with similar backgrounds - then it shouldn't surprise when they turn to crime. They often have not had much education, they might have learning problems; others just have no interest shown in them, no-one to encourage them. The greatest thing you can have is good parents, but you don't get that choice. You come along and they raise you. So I have looked away from the prosecution side of the law to the defence side and the community generally and started asking myself; well why isn't this working, this law and order push?

A lot of things have changed in the criminal law. In my earlier years as a prosecutor, we didn't produce our briefs to the other side till the committal. The Crown and the police hung on to the brief – and there were a number of court cases which exposed that. At the time we thought it was outrageous that anyone would want to see our brief, but I think that the change in practice is a great development, even if I used to fight as hard as anybody else to hang on to the brief.

And when I became a Crown it wasn't our practice to give our conference notes to the defence. That would be outrageous because the witness wouldn't trust you again. But if the witness tells you a different story to what is in his statement, the

defence is entitled to know that. It's hard to do that. It's hard to crucify your own case, but you have to do the right thing.

The point I am making is that change can take time.

Today I would like to focus on three things;

- Reform of our bail laws;
- The complexity of current sentencing laws and challenges posed by the decision of the High Court in Muldrock; and
- The challenges for our justice system posed by mental health and substance abuse problems.

Reform of Bail laws.

The Bail Act review was very long overdue. There had been quite a debate over section 22A and the changes which stopped second applications in the higher courts had a disproportionate effect on young people.

The juvenile detention centres became overcrowded with people who had been refused bail. Even now more than 50 per cent of youths in detention are on remand. It happened in prisons too – about 26 per cent of people in adult prisons are on remand, some of them for years.

When you consider 82 per cent of those on remand in juvenile detention centres don't receive a custodial sentence – and that 11 per cent on remand are acquitted altogether – it would seem the bail laws were being used as a form of imprisonment. And there were many who were refused bail because of a breach of conditions, but were facing a charge which did not carry a jail sentence. Now that is an incredible anomaly.

More lawyers should have spoken out. They may not have realised it at the time but to use bail as a form of imprisonment – when you are not going to get a prison

sentence – is absolutely scandalous. It breaches all the traditions of the law that we respect.

I expected there would be opposition to my Bail reference, which was mainly aimed at clarifying things and restoring the law on bail to reflect the position that the presumption of innocence should permeate that legislation.

A lot of people will argue about this issue, but people should not be locked away simply because they are facing an offence – especially one that does not carry a jail sentence.

One of things I asked the law reform Commission to look at was people who were “vulnerable”. I instanced Aboriginal people and Torres Strait Islanders and people with a mental or physical disability.

A certain publication suggested it was there for gays and transsexuals; that they were the ones I was trying to release. Well I hadn’t asked for that, but if they are disadvantaged and in a vulnerable position in prison, then fair enough – give them protection. I don’t believe intimidation or assault should be part of going to jail.

There was a draft document given to some of the stakeholders and there was something in there about people in “other categories”. But the relevant part of that draft report referred to people with disabilities and mental issues. It said we should push towards diverting them out of the justice system, but that got no emphasis whatsoever. They were obviously trying to fan opposition to my views on the Bail Act to make me look “soft on crime”.

I hope we get delivery of the final Bail report in the next couple of weeks. We will then have to table it in parliament within 14 sitting days.

Obviously the government will look carefully at this piece of legislation. There were things in the draft report with which I didn’t necessarily agree, but many things I want to achieve.

Take Section 22A; one thing I wanted the Law Reform Commission to do was look into whether there should be distinction between adults and juveniles when it comes to bail.

In the criminal law generally, we have the Young Offenders' Act, the Children's Criminal Proceedings Act, the children's court legislation, the juvenile detention legislation; all those laws have a far greater emphasis on education and rehabilitation and getting young people away from crime. And there is not so much emphasis on punishment and deterrence in our sentencing rules for children. Why shouldn't bail take some of those things into account?

There are some dreadful young criminals, who do dreadful things – and the community has to be protected from them, sometimes for a very long time. But, by and large, a lot of these young people have not had much support or have rebelled against their parents.

Their problems are usually something that's part of the growing process. Some of them grow out of it by the time they are 15 or 16; others take till they are 30. They mature, they realise what they were doing was stupid and that it's time to leave that behind and get on with a normal life.

Sentencing and Muldrock

I referred earlier to the inquiry which is addressing the ridiculous complexity of our sentencing laws. There is a solid argument in favour of a consistent and transparent framework for sentencing decisions – and more sentencing options.

When I first started doing prosecutions with the Commonwealth in the 1970s, remarks on sentences would go for 2-4 pages. And on a sentencing day on Friday in the District Court a judge might do 10 or 12 matters. Very rarely did they reserve judgment. Times have changed. Judges often reserve on sentence and it is not uncommon for the remarks on sentence to go for 20 pages.

The problem with standard non parole periods is that some carry an extended non parole period of 40 per cent of the maximum sentence, for other offences it is 80 per cent. Some quite serious offences don't have a standard non-parole period.

One thing I am determined to do is get the probation and parole service more involved in the monitoring of those on Intensive Corrections Orders. Monitoring is currently not done by Probation and Parole, it's done by the group who catch parolees out for breaching. I don't know that wanting to breach people helps rehabilitation because those officers are seen as the enemy.

I think longer sentences are one of the reasons why the reoffending rate has stayed around 43 per cent, which is a disgrace. Queensland's rate is about 35 per cent; Victoria's is 37 per cent but that is rising because the law and order auction has been more active there in recent years.

Judges have a much harder role now, as do you - the defenders - and the crowns. Sentencing has become the most complex area of criminal law. I hope there is will from both sides – the bench and the profession- to clear this up. I'd like to see sentences given on the day of conviction; I'd like the Probation and Parole and other reports to be done ahead of conviction at least ensuring that there is some sort of preliminary information collected.

But when it comes to sentencing the elephant in the room is Muldrock.

A background paper delivered by the Sentencing Council in November of last year makes for interesting reading.

It points out that “until the decision of the High Court in *Muldock v The Queen*, sentencing courts in NSW, including the NSWCCA, applied the principles declared in *Way* when sentencing offenders for Standard non parole period table offences....

“In *Way* the NSWCCA commented that, while the introduction of the scheme did not necessarily indicate any dissatisfaction with the general level of sentencing for SNPP Table offences, or convey a legislative intention to increase sentences for the Table

offences, the scheme could result in upward changes in sentencing patterns for some offences.”

Simpson J in *R v AJP* noted - in relation to offences under s 66A of the *Crimes Act*- that it was “inevitable that sentences for these offences will increase”.

“Since the statutory maximum has always been acknowledged to be reserved for the worst offences of their kind, she said “and since non-parole periods have been benchmarked at three quarters of the total term, a worst category s66A offence could ordinarily be expected to carry a non-parole period of eighteen and three quarter years. And yet, under the new provision, and absent reasons for departure, a mid range offence carries a standard non-parole period of 15 years, that is 80% of what the non-parole period that might previously have been expected to be imposed in relation to a worst case: that represents a remarkable increase. However, that is what the legislature has decreed, and it is for this Court to implement the dictates of the legislature.”

The council found that after the scheme’s introduction there was no obvious change in the percentage of offenders sentenced to fulltime imprisonment, with the exception of Items 9A and 9B on the SNPP table, which respectively had a 15 and 20% increase in the percentage of offenders sentenced to prison.

They also reported that of the 62 matters appealed to the NSWCCA between 1 September 2006 and 31 August 2007 on the basis of error in the application of the SNPP scheme, 41 were defence appeals, of which 44% were successful; and 21 were brought by the Crown, of which 81% were successful.

This represented an increase from the 73% success rate of relevant Crown appeals for the preceding year.

In May 2010, the Judicial Commission of NSW released a further report on the impact of the SNPP scheme which confirmed the scheme had led to an increase in severity of sentence for some Table offences.

It also found that where the SNPP scheme did not result in a significant change in sentence lengths, consistency in sentencing had generally increased. And that when the SNPP and the maximum penalty was relatively high, there was more scope for variation in sentence lengths and therefore potentially less uniformity in sentencing.

Interestingly it also found the guilty plea rate for what are now SNPP offences increased from 78% to 86% after the commencement of the scheme, while the guilty plea rate for non-SNPP offences remained relatively stable.

While most SNPP offences already had a high rate of imprisonment before the introduction of the scheme, there was a substantial increase in the use of fulltime imprisonment for Items 9A and 9B in the SNPP Table, increasing from 37% to 59% for aggravated indecent assault, and from 57% to 81% for aggravated indecent assault (of a child under 10).

Even before Muldrock judges were noting that that the application of the SNPP scheme has been causing problems; And those who represent defendants noticed that very often a client would elect to plead guilty to an SNPP Table offence, rather than defend the charge - in order to provide a reason for the imposition of a NPP less than the SNPP.

To Muldrock itself.

As most of you would be aware, in October of last year the High Court found *Way's* case had been wrongly decided.

The Court rejected the argument that the SNPP had no role in sentencing for an offence in the low (or high) range of objective seriousness and said Section 54B applied whenever a court imposed a sentence of imprisonment for a Division 1A offence.

They went back to the judgment of McHugh J in *Markarian v The Queen*, in which I was junior counsel for the Crown:

"[T]he judge identifies *all* the factors that are relevant to the sentence, *discusses* their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case."

The court stressed that "*objective seriousness of an offence is to be determined ... wholly by reference to the nature of the offending*".

The Sentencing Council paper summarised the issues at stake:

"On one view," it said, "the decision could have the effect of simplifying the application of the SNPP scheme, by requiring judges, when sentencing for a Table offence:

- to acknowledge the existence of two guideposts: the maximum sentence and the SNPP for a mid-range offence;
- to form a conclusion as to the appropriate sentence in accordance with the approach approved in *Markarian v The Queen*; and
- to give reasons why the NPP that was fixed differed from the SNPP."

There will be practical problems in following this approach. For example, the bare elements of an offence of armed robbery convey little in relation to its objective seriousness. The nature of the weapon used and of the threat presented, the amount of property or cash stolen, the place at which the offence occurred and the identity or position occupied by the victim, are all relevant to an assessment of the objective seriousness of the offence. A bare reference to its elements discloses very little as to its objective seriousness, unless their presence, without more, is now to be taken as giving rise to a mid-range offence."

So the consequences of Muldrock are potentially enormous.

Legal Aid has had to review hundreds of cases, simply because of the volume of cases which applied the decision in *Way's* case. Then there are the cases where the NSWCCA has allowed Crown appeals against leniency on the basis of an assumed incorrect application of *Way's* case at first instance.

Should the Standard non parole scheme be maintained as presently enacted?; or amended so as to adjust the relative proportions that have currently been set between the SNPP and the maximum available sentence for each offence?; or repealed and replaced by a different scheme?

I am looking forward to getting the Law Reform Commission's thoughts in October. And I will be consulting widely - with all sectors of the profession before acting.

I am aware that Public Defenders and private counsel who act for the defence - fear that standard non parole periods will come back in their Pre-Muldrock form.

Others suggest that we should do nothing and let the courts work it out because standard-non parole periods should have a place in sentencing regimes. However, the do nothing option has one enemy: time.

I am also aware of the importance of ensuring the preservation of judicial discretion. Kirby may have remarked that Kable was "a constitutional guard-dog that would bark but once" but we know that the dog is proving that its bite is just as menacing as its bark.

Mental Health

Before I conclude I would like to speak briefly about the challenges posed by the mentally ill for our justice system.

It's a sad fact that since the Richmond report, the corrections system has become the biggest mental health institution in the state.

I was at the Metropolitan remand Centre at Silverwater during the week. One of the functions carried out there is the assessment of remanded defendants who may be suitable for diversion into the mental health system. They have 37 patients and 24 staff in that unit. Every arrival is assessed to see if they should be diverted out of the justice system. The resources required are enormous. There are mental health

nurses and specially trained police in 21 courts across NSW and they are sometimes send people to the MRRC.

The problem is that resources are inadequate in the mental health system. We will hopefully be getting more money from the Commonwealth so that we can have more courts with mental health nurses and specially trained police – and the resources needed, because mental health patients do not do well in prison and prisons should not be used as another type of asylum.

Conclusion

I thought it was disgrace when the former premier, Nathan Rees, was celebrating in question time as the States' prison population approached 10,500.

How is it a good sign for a society when you have more people in prison?

We will always have prisons and we will always spend money on prisons. But there is no point in building prisons just to house the people who keep reoffending.

In NSW, 43 per cent of all inmates returning to prison under sentence within two years of their release. In Victoria the figure for 2010-2011 was 37 per cent. If we had the same reoffending rate, it would mean almost 600 less people committing crime in NSW every year.

If we can turn them away from crime – by tackling the underlying causes of crime and providing meaningful rehabilitation and education instead of endless prescriptions of methadone - the average citizen is likely to be safer in their home, safer in their car and generally safer from crime.

It would mean fewer assaults, less burglaries and less car thefts. It would mean people would feel safer in their homes and when they are out and about.

It would also mean means less spending on our jails – its costs about \$70,000 a year to keep a prisoner and \$250,000 for a juvenile offender – and more on schools, hospitals, roads and transport.

We believe that is not being “soft” on crime; it’s being smart on crime.

Thank you