

# SENTENCING AND OTHER CONTROVERSIAL ISSUES: WHY WE NEED RATIONAL DEBATE MORE THAN EVER

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*The article seeks to demonstrate the importance of rational debate in the community on controversial issues. It focuses on the need for rationalism to prevail in community debates on controversial issues. Issues inclusive of sentencing, climate change, mental health and its prevalence in the prison system and 'whether courts are out of touch' with the community. The article recognises the difficulties faced by those engaged in community issues and concludes by promoting the need to maintain a tolerant and harmonious society by engaging in well informed rational debate.*

## WITH THANKS AND PRAISE

Thank you to Frank Vincent. I also wish to acknowledge the Chancellor of Victoria University, Mr George Pappas; the Vice Chancellor, Professor Peter Dawkins; and the Executive Dean, Professor David Lamond. Distinguished guests, judges, magistrates, students, ladies and gentlemen. It is a privilege to be invited to give this year's Annual Michael Kirby Justice Oration for Victoria University Law School. My thanks to Professor Andrew Clarke, Head of the Law School, for inviting me to deliver this oration. At the outset, I wish to acknowledge the traditional owners and custodians of this land on which we meet today.

## I INTRODUCTION

The theme of this oration is the need for rational debate in the community on controversial issues and I begin with two quotes from 18<sup>th</sup> century philosopher Immanuel Kant: 'All our knowledge begins with the senses, proceeds then to the understanding and ends with reason.'<sup>1</sup> 'There is nothing higher than reason. Seek not the favour of the multitude; it is seldom got by honest and lawful means. But seek the testimony of few; and number not the voices, but weigh them.'<sup>2</sup>

Michael Kirby has been, on the national stage, one of the great Australian champions of rational public discourse. The life and work of the Honourable Michael Kirby AC CMG, to use his formal title, has provided inspiration to countless judicial officers (including me), academics, lawyers, law students and others. His tremendous work ethic is legendary. A borderline obsession with work is, wholeheartedly, acknowledged by the man himself. Committing to six to seven day weeks in the early stages of his career, his tenacity and intellectual power have produced a truly impressive body of work.<sup>3</sup> Post-retirement from the High Court, Michael Kirby shows no visible signs of slowing down.

Michael Kirby is remarkable for his ability to write prolifically on a myriad of topics. He writes and speaks about issues spanning the law, sciences and the humanities: issues ranging from the human genome and scientific method, HIV and AIDS awareness, international law and its normative value in Australia, equality in the law, the Constitution, secularism, public education, and so on.

Notwithstanding Michael Kirby's status as one of Australia's great legal minds; during his time on the bench, he strove to write judgments that were as 'clear, interesting and simple' as possible.<sup>4</sup> Kirby's is an organic

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\*Chief Magistrate of Victoria. This article has been adapted from the Annual Kirby Justice Oration presented by the author to Victoria University Law School, Melbourne, Victoria, on 24 November 2011.

<sup>1</sup> Immanuel Kant, *Critique of Pure Reasoning* (Cambridge University Press, 1999).

<sup>2</sup> Ibid.

<sup>3</sup> Michael Kirby, 'The Seven Ages of a Lawyer' (2000) 26(1) *Monash University Law Review* 1, 6.

<sup>4</sup> Michael Kirby, '50 Years in the Law: A Critical Self-Assessment' (Address given to the State Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2006) 22.

intellectualism, where rationality is combined with 'love and empathy for others'.<sup>5</sup> Michael Kirby's scholarship is infused with a deep humanism.

Michael Kirby has often commented publicly on his belief in 'rational dialogue'.<sup>6</sup> Tonight I focus on this key theme of Michael Kirby, a defining trait of his judicial and life's work. Let me quote from a paper he wrote entitled *This I Believe 2*: 'I believe in rationality. I believe that it is the supreme and unique characteristic of our species. Together with love and empathy for others, that grow out of rationality, this quality leads us on — pulling us away from our prejudices and irrational fears.'<sup>7</sup>

This succinct statement highlights Michael Kirby's belief in rational thought and methodology. I agree with him. Ours is a society where science and rationalism should prevail. When it comes to sentencing we need a well informed, balanced, and most importantly, a rational debate. When it comes to such topics as climate change and asylum seeker policy we need both a rational debate, and a respect for science. Tonight, I will cover a number of topics beginning with public perceptions of sentencing in the courts and I will attempt to further debunk the myth that 'courts are out of touch'.

## II SENTENCING

In the 1990s (for five years), I served as Chief Magistrate of the Northern Territory and I have been Chief Magistrate here for 10 years. Then in the Northern Territory, now in Victoria and indeed throughout the country, sentencing issues dominate public perceptions of courts. As one journalist recently put it, 'there are few more important areas of debate than sentencing and no subject generates more letters to the editor'.<sup>8</sup>

Sentencing is the most difficult job undertaken by a magistrate or judge.<sup>9</sup> Each case is unique and has its own set of facts and circumstances; there are no 'one-size-fits-all' sentencing solutions.

Not surprisingly there is a relationship between political 'law and order' rhetoric and public attitudes to sentencing. 'Penal populism' and misperceptions of judicial leniency in sentencing tend to correspond with the introduction of mandatory sentencing regimes. To quote Dr Karen Gelb of the Sentencing Advisory Council, '[l]aws that restrict what courts can do when they decide on a sentence can seem an attractive way... for politicians to address community concerns'.<sup>10</sup>

In the Northern Territory, I had firsthand experience of the impact of a mandatory sentencing regime. In 1997, the Northern Territory Government legislated for mandatory prison terms for a broad range of property offences.<sup>11</sup> If an offender was found guilty of a first offence, 14 days imprisonment was the minimum sentence. A second offence would result in 90 days imprisonment. A third offence would mean a 12 month term of imprisonment.<sup>12</sup> This sliding scale of imprisonment did not allow for the exercise of judicial discretion, in contrast with otherwise established common law and statutory sentencing principles, no mitigating, special or exceptional circumstances could be considered. Magistrates were, 'strait-jacketed' by the legislation. The regime of mandatory sentencing was repealed in 2001. Data now shows that approximately 70% of offenders caught by these mandatory sentencing laws were Indigenous males, who are already over-represented in the sentencing statistics.<sup>13</sup>

Most (but not all) magistrates felt subjectively that this system eroded their independent decision making role and, in an objective sense, it drastically eroded their sentencing discretion.

I remember the first case I heard under the new regime in the Northern Territory. The defendant was a young non-Indigenous seventeen year old student (an adult for the purposes of the Northern Territory Criminal

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<sup>5</sup> Michael Kirby, 'This I Believe Too' (Speech, 2003)

<[http://www.michaelkirby.com.au/index.php?option=com\\_content&view=article&id=49&Itemid=77](http://www.michaelkirby.com.au/index.php?option=com_content&view=article&id=49&Itemid=77)>.

<sup>6</sup> ABC, 'Bold Enough: Michael Kirby', *Sunday Profile*, 2 December 2007, 3.

<sup>7</sup> Michael Kirby, above n 3.

<sup>8</sup> Alan Howe, 'West Australia's Top Cop Talks Tough', *Herald Sun* (Melbourne), 17 October 2011.

<sup>9</sup> Ian Gray, 'Sentencing in Magistrates' and Local Courts in Australia' (Speech delivered at the Sentencing Conference, Canberra, 8-10 February 2008) 4.

<sup>10</sup> Karen Gelb, *Mandatory Sentencing* (Sentencing Advisory Council, 2008) 1.

<sup>11</sup> Northern Territory Office of Crime Prevention, 'Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience' (Paper presented at the Australian and New Zealand Society of Criminology Conference, Darwin, 1 December 2003) 1, 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 3.

Code). He had committed the offence of criminal damage by breaking the mirror of a motor vehicle parked in the street when he was upset and somewhat intoxicated. He came from a supportive family, was going well at school and had no criminal history. He was pleading guilty. In his case, the mandatory minimum sentence of actual imprisonment was 14 days with no power to suspend. I stated a case to the Supreme Court which re-affirmed the statutory minimum period and I imposed that sentence. As I did I made remarks about what sentence would have been applied but for the application of the new sentencing regime. Remarks of this type were made recently by Justice Judith Kelly in the Supreme Court (NT) case of *The Queen v Nafi*, when she was imprisoning a young Indonesian crewman charged with people smuggling for a mandatory minimum period (eight years, with five years non-parole).<sup>14</sup> No doubt many other judges and magistrates have said something similar.

Judges and magistrates should never be in a position where they feel duty-bound, or conscience-bound, to say that they believe they are handing down an unjust sentence.

I was quoted this year in *The Age*, commenting on the proposed introduction of mandatory and baseline sentences in Victoria.<sup>15</sup> I stand by my statement about the media survey commissioned by the Government that 'when only very limited information about a particular case is given, you are more likely to get a superficial, under-informed response.'<sup>16</sup> Similar views have been expressed by Justice David Harper (of the Victorian Court of Appeal) and former Victorian Supreme Court Justice, Frank Vincent, in their articles published in *The Age*.<sup>17</sup> These views are indicative of universal (or close to) judicial consensus on such issues — a consensus borne of knowledge and experience. It does have to be said that the offender and the offence targets of the proposed Victorian laws (gross and extreme violence) are more credible than the Northern Territory system. But the same flaw exists: namely the restriction of the sentencing discretion.

Sentencing in the courts is too often reduced to attention-grabbing headlines, and accompanied with coverage that pays no regard to the inherent complexity of sentencing. Michael Kirby once described the 'many screaming headlines' on sentencing in the courts as part of the 'fear discourse' run by media commentators.<sup>18</sup> He acknowledged, as we all do, the role that the courts and media have to play in improving the overall quality of public debate. Despite their very different functions, both the courts and the media have vital roles to play in the public debate about sentencing. They share an obligation to inform the public accurately.

I acknowledge the fundamental and important role of the media in our society, and we in the courts have to be robust and not over sensitive about how we are reported on. But we have a problem when the media over simplifies or sensationalises reporting of sentencing, and in some sections of the media, it happens far too often. As Professor A.C. Grayling put it: 'The media no longer hesitate to whip up lurid anxieties in order to increase sales, in the process undermining social confidence and multiplying fears.'<sup>19</sup> The clear duty is to be accurate and balanced and today I call again for an informed debate about sentencing, one based on facts, information and objective analysis. In doing so, I join with countless judges and other commentators. Philosopher Bertrand Russell made a telling observation: 'The degree of one's emotion varies inversely with one's knowledge of the facts — the less you know the hotter you get.'<sup>20</sup> Plato probably put it best when he said: 'Ignorance, the root and stem of every evil.'

It certainly cannot be argued that there is a lack of available information to guide informed debate. There is a plethora of it, including a substantial body of research and study findings on the issue of public opinion on sentencing. University of Tasmania Professor of Law, Kate Warner, led a team of academics and researchers in the Tasmanian Jury Sentencing Study. Findings from the study were published by the Australian Institute of

<sup>14</sup> *The Queen v Nafi* (Unreported, Supreme court of the Northern Territory, 19 May 2011); See also L Wilson, 'Judge Pleads for Smuggler Mercy', *The Australian* (Sydney), 20 May 2011; ABC Radio Australia, 'Australian Judge Recommends Mercy for People Smuggler', 20 May 2011, 1.

<sup>15</sup> Peter Munro, 'Chief Magistrate Hits Tough on Crime Plan', *The Age* (Melbourne), 7 August 2011, 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> David Harper, 'Don't Rush to Judge on Sentencing', *The Age* (Melbourne), 18 May 2011, 1; Frank Vincent, 'Maximum Justice Needed', *The Age* (Melbourne), 13 September 2011, 1.

<sup>18</sup> Michael Kirby, 'Improving the Discourse Between Courts and the Media' (Speech delivered for the Victorian Law Reporting Awards, Melbourne, 8 May 2008) 4.

<sup>19</sup> A.C. Grayling, *Life, Sex and Ideas: The Good Life Without God* (University Press, 2005).

<sup>20</sup> Bertrand Russel, *The Conquest of Happiness* (Routledge, 2006).

Criminology in February 2011.<sup>21</sup> The Tasmanian Jury Sentencing Study gauged the opinions of jurors, members of the community who had experienced the court and criminal justice system firsthand. Participants in the study were supplied with relevant information about the sentencing process. 52% of jurors imposed a more lenient sentence than judges.<sup>22</sup> 90% of respondents believed that judges' sentences were appropriate, and 83% viewed judges as being in touch with public opinion.<sup>23</sup>

The results of the Tasmanian Jury Sentencing Study correlate with similar studies conducted in Australia and overseas. The results of the study demonstrated that informed members of the community are not as punitive as the media suggests people are.

Dr Karen Gelb, Senior Criminologist with the Sentencing Advisory Council (SAC), has also undertaken comprehensive studies on public perceptions of sentencing. Karen Gelb authored two pivotal reports in 2006 and 2008 on myths and misconceptions about sentencing.<sup>24</sup> These reports examined levels of public knowledge on sentencing issues, and the various survey and study methodologies used in attempts to gauge public opinion.<sup>25</sup> One of Karen Gelb's key findings was that 'when people are given more information, their levels of punitiveness drop dramatically.'<sup>26</sup>

In March 2011, the SAC published a report on community views about alternatives to imprisonment in Victoria.<sup>27</sup> In this report, Karen Gelb undertook detailed and qualitative research into public perceptions of sentencing options and imprisonment. The methodologies used in the study are outlined, and the survey's sample range, size and demographic clearly enunciated. Various measures were utilised in efforts to minimise the presentation of overly abstract ideas to participants.

The key finding was that the vast majority of respondents preferred the option of investing in alternatives to imprisonment, as opposed to building more prisons.<sup>28</sup> The majority consensus was amplified when participants considered vulnerable groups of offenders. A resounding 91.7% believed that mentally ill offenders should receive appropriate treatment at specialised facilities as an alternative to imprisonment.<sup>29</sup> 87.9% approved of appropriate alternatives to imprisonment of young offenders, and 83.5% favoured rehabilitation and counselling for drug-addicted offenders.<sup>30</sup>

These studies add to an expanding body of qualitative research, involving well informed participants, and rigorous methodologies. The consistently uniform findings from these studies refute myths and misconceptions about public opinion on sentencing. They are a compelling answer to what is often called 'penal populism'.

A note of caution: having said all this, we should not forget the legitimate expectation in the community that stern but proportionate punishment will be applied to the worst offenders including of course the most violent offenders. Judges and magistrates routinely denounce crimes and punish offenders by sending them to prison. Many cases do not make the news and not all sentencing remarks are accurately reported, but there can be little doubt that when reasonable, informed and objective members of the community believe that a particular sentence is so lenient that it offends their sense of justice, then we have a problem.

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<sup>21</sup> Kate Warner et al 'Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (2011) 407 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>22</sup> *Ibid* 5.

<sup>23</sup> *Ibid*.

<sup>24</sup> Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing* (Sentencing Advisory Council, 2006). See also Karen Gelb, *More Myths and Misconception* (Sentencing Advisory Council, 2008).

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* 17.

<sup>27</sup> Karen Gelb, *Alternatives to Imprisonment: Community Views in Victoria* (Sentencing Advisory Council, 2011).

<sup>28</sup> *Ibid* 17.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*.

### III MENTAL HEALTH

Professor Patrick McGorry has described mental health as 'the lens through which we experience our lives [and] the means by which we shape our lives.'<sup>31</sup> This quote highlights the importance of mental health, and the impact of mental illness on the lives of individuals in the community.

In an address to Victorian magistrates in July this year, Patrick McGorry asked us to consider two questions: firstly, with all the evidence on the level of mental illness in Australian society, is it rational and reasonable not to implement national preventative measures alongside remedial responses? Secondly, is it moral to leave an issue that affects such large proportions of the Australian community unrectified?

Patrick McGorry's work emphasises early intervention and community education. During his presentation, he told us that filling the Melbourne Cricket Ground (MCG) up 40 times over is indicative of how many people suffer from mental illness every year.<sup>32</sup> He also highlighted the relationship between mental illness and offending, particularly for young people. He has previously stated that 75% of mental illnesses occur before a person reaches 25 years of age, and '750,000 young people in Australia have a mental health problem but no access to treatment.'<sup>33</sup> It is common sense to consider prevention and early intervention during susceptible periods. He went on to say:

Every day, we miss opportunities to prevent future mental ill-health by not adequately or appropriately responding to the needs of Australian children at risk. Every day, young Australians are let down by a health and social system that is weakest where it needs to be strongest. Between the ages of 12 to 25, Australians have the highest need for and worst access to mental health care.<sup>34</sup>

He advocates for a '21<sup>st</sup> century' approach to youth mental health, and the establishment of 'more specialised forensic mental health services' for adolescents and young adults.<sup>35</sup> Although his opinions are contested by some in his field, given the number of people appearing in court with mental health and/or psychological problems, these reform proposals struck a very responsive chord with Victorian magistrates.

### IV MENTAL ILLNESS IN THE PRISON SYSTEM

Debates on sentencing often translate into calls for more offenders to be imprisoned. Is this a rational response? Corrections Victoria statistics indicate that since 30 June 2000, there has been a 43.9% increase in prisoner numbers.<sup>36</sup> As at 30 June 2010, there were 4,537 offenders in Victorian prisons.<sup>37</sup> Karen Gelb's study on alternatives to imprisonment highlighted the financial and social costs of imprisonment, and made the well-known point that such 'a large proportion of ... prisoners do not change their criminal behaviour' after release.<sup>38</sup> She cited statistics showing that almost 50% of Victorian prisoners as at 30 June 2010 had previously been imprisoned.<sup>39</sup>

Statistics also provide evidence for the proposition that 'the prisoner population is far less mentally healthy than the wider Victorian population.'<sup>40</sup> A 2003 study by Deloitte Consulting, commissioned by the Department of Justice, concluded that 'more than one-quarter of all prisoners were told by a doctor in the past that they have a mental illness.'<sup>41</sup> Depression was the most common mental illness, with approximately 20% of offenders

<sup>31</sup> Patrick McGorry, 'A 21<sup>st</sup> Century Approach to Mental Health Care for Australia' (Speech delivered at the Maurice Blackburn Lecture 2010, Brunswick, 15 November 2010) 9.

<sup>32</sup> Patrick McGorry, untitled (Speech delivered at Magistrates' Conference, Melbourne, 29 July 2011) 3.

<sup>33</sup> McGorry, above n 31, 11; See also Peter Munro, 'Making Waves', *The Age* (Melbourne), 28 March 2010, 2.

<sup>34</sup> McGorry, above n 31, 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Department of Justice (Vic), *Corrections Statistics FAQ's* (2011), available at <<http://www.justice.vic.gov.au/wps/wcm/connect/D0J+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Corrections+Statistics+-+FAQs>>.

<sup>38</sup> Karen Gelb, *Alternatives to Imprisonment: Community Views in Victoria* (Sentencing Advisory Council, 2011) 2.

<sup>39</sup> *Ibid.*

<sup>40</sup> Deloitte Consulting, *Victorian Prisoner Health Study* (Corrections Victoria, 2003) 25.

<sup>41</sup> *Ibid.* 48.

previously diagnosed with this condition.<sup>42</sup> The report also noted '[m]ore than half of the prisoners reported that they had been assessed or received treatment by a psychiatrist or doctor for an emotional or mental health problem.'<sup>43</sup> The report concluded that mental illness was prevalent amongst prisoners and that 'a comprehensive mental health service is required for Victorian prisons.'<sup>44</sup> That was in 2003. The recommendation could be as validly made again today.

Writing on this subject, former Supreme Court Justice, Murray Kellam, raised some practical and ethical considerations:

Almost every day one can see calls in the popular press for the expansion of prisons and longer prison terms. However, this will not provide safety for the community without additional resources being provided. There is simply no safety for the community nor is there any moral principle in warehousing people who require mental health services to be provided rather than being incarcerated for longer and longer terms.<sup>45</sup>

I agree. Imprisonment is not the only way to combat crime. If it was, how does one explain the successes of the Magistrates' Court's specialist Court Integrated Services Program (CISP) and Neighbourhood Justice Centre (NJC), to take just two programs in reducing rates of relapses into crime?

CISP is a multi-disciplinary program established to 'help ensure that (participants) get support and services to reduce re-offending and make communities safer.'<sup>46</sup> It is essentially a sophisticated bail support program.<sup>47</sup> The program applies to individuals with multiple and complex needs; such as intellectual or physical disabilities, drug and alcohol dependency, inadequate socio-economic support, and other issues that contribute to the 'frequency or severity of their offending.'<sup>48</sup> The CISP referral process involves preliminary screening of applicants to ascertain their particular needs, and ultimately results in the provision of appropriately individualised support (ranging from 'drug and alcohol treatment, crisis accommodation, disability services, mental health and acquired brain injury services').<sup>49</sup> On average, it takes a CISP participant approximately 110 days to complete the program.<sup>50</sup>

Independent reports verify the benefits of dealing with the underlying causes of crime. The University of Melbourne's Dr Stuart Ross evaluated CISP and concluded that the program had demonstrably contributed to an improvement in offenders' mental health, and reduced recidivism rates for participants.<sup>51</sup> The Victorian Auditor-General reviewed CISP and NJC and concluded that both 'showed indications of having contributed to a reduction in re-offending,' with CISP having a 'significant' effect.<sup>52</sup>

These findings are not surprising: it will always be a rational response to crime to tackle its underlying causes; including lack of education, poverty, drug and alcohol dependency, social isolation, parental neglect, and so on.

Cost benefit analyses are always a factor in this discussion. The Council of Australian Government statistics show that during 2009/10, it cost \$240.66 per day to keep a prisoner in custody.<sup>53</sup> Comparatively, an offender in Community Corrections cost \$18.50 per day over the same period.<sup>54</sup> An evaluation of the cost-effectiveness of CISP estimated that for every \$1 spent on the program, \$5.90 worth of savings would be delivered back to the community.<sup>55</sup>

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 49.

<sup>44</sup> Ibid 50.

<sup>45</sup> Murray Kellam, 'Mental Health Issues in Parole' (Speech delivered at the AIJA Annual Conference, Auckland, 18-20 February 2010) 9.

<sup>46</sup> Magistrates' Court of Victoria, *Guide to Court Support and Diversion Services* (2011)

<<https://www.magistratescourt.vic.gov.au/publication/guide-court-support-and-diversion-services>>.

<sup>47</sup> Magistrates' Court of Victoria, *Court Integrated Services Program* (2011)

<<http://www.magistratescourt.vic.gov.au/home/court+support+services/magistrates+-+court+integrated+services+program>>.

<sup>48</sup> Magistrates' Court of Victoria, *Court Integrated Services Program* (2011)

<<http://www.magistratescourt.vic.gov.au/home/court+support+services/magistrates+-+court+integrated+services+program>>.

<sup>49</sup> Magistrates' Court of Victoria, *Guide to Court Support and Diversion Service* (2011)

<<https://www.magistratescourt.vic.gov.au/publication/guide-court-support-and-diversion-services>>.

<sup>50</sup> Department of Justice (Vic), *Court Integrated Services Program: Tackling the Causes of Crime* (2010) 5.

<sup>51</sup> Stuart Ross, *Evaluation of the Court Integrated Services Program* (University of Melbourne, 2009) 5.

<sup>52</sup> Victorian Auditor-General, *Problem-Solving Approaches to Justice* (2011) 29.

<sup>53</sup> Department of Justice (Vic), above n 37, 1.

<sup>54</sup> Ibid.

<sup>55</sup> Department of Justice (Vic), above n 49, 10.

There is a clear need for the correctional and prison system to provide for both secure and therapeutic custody of mentally ill offenders. Whilst existing prisons provide some programs, traditional prisons are not designed to facilitate or assist mentally ill prisoners. Murray Kellam and Frank Vincent have expressed similar views. I agree with Murray Kellam's statement that 'it is inarguable that there remains an urgent need for additional investment in mental health services to be provided to those in the prison system,' and that: '[I]n the long run there can be no doubt that when prisoners are convicted the interests and safety of the community demand the provision of appropriate mental health services to those who suffer from mental illness or impairment.'<sup>56</sup>

In a recent speech titled 'What does a Humane and Effective Justice System Look Like?' Frank Vincent had this to say:

Acknowledging the high incidence of mental disorders and drug addiction in our prison populations, a sensible society would ensure that there were adequate resources available to prisoners whilst in custody and on release. We have never ever remotely approached providing such support.<sup>57</sup>

I agree. One can substitute the words 'rational society' for the word 'sensible society'.

## V DEBUNKING THE MYTH THAT 'COURTS ARE OUT OF TOUCH'

Courts and judicial officers routinely face criticisms that they are 'out of touch with the community.'<sup>58</sup> It is a myth. Apart from mischievous and gratuitous attacks on judges, the bases for such critiques are founded in misconceptions and stereotypes as to the nature and scope of the judges and magistrates. We in the Magistrates' Court witness daily the 'parade of humanity' passing through the 'People's Court.'<sup>59</sup> Last year, more than a quarter of a million cases were initiated in the Magistrates' Court. Magistrates have a daily exposure to the real world on an extensive scale, across a range of jurisdictions and cases and extra-curricular activities. Few people in the community would have wider exposure, in fact anywhere near the exposure, to the variables of human behaviour, the infinite facets of the human condition, as do judges and magistrates.

The Victorian courts have a long and proud history of engagement with, and education of, the community. I will say a little bit more about this later, but I note the importance of this engagement and the vital obligations of courts to educate. Our educational duty is ongoing and the task is a big one. Success in this area builds community confidence in the courts and the legal system.

In my court, magistrates and registrars are in touch with, or connected to, the community through a myriad of programs, outreaches, information sessions, court user forums, open days, mock court sittings, court tours and school presentations.<sup>60</sup> In the year 2009/10, at the Melbourne Magistrates' Court alone, over 6,000 students from more than 100 schools participated in the court's school program. The numbers grow every year. Let there be no doubt and no confusion; magistrates are in, and of the community, and although we all mix in different social circles, magistrates make it their business to try to understand and reflect what is happening around them.

The Magistrates' Court regularly participates in the Victoria Law Foundation's Law Week 'Courts Open Day'. The Melbourne Magistrates' Court opens its doors to the public during this Open Day, and co-ordinates court registry tours, mock hearings, educational presentations, and stakeholder stalls. Last year, over 400 visitors attended the court's Saturday Open Day. Court venues around Victoria also regularly host Law Week events, and organise Open Days for their local communities, and there are a multiplicity of engagements with court users and agencies throughout the state on a regular basis.

<sup>56</sup> Murray Kellam, above n 45, 8.

<sup>57</sup> Frank Vincent, 'What Does a Humane and Effective Justice System Look Like?' (Speech delivered at the Jesuit Social Services and Public Policy Institute National Justice Symposium, Melbourne, 21 October 2011).

<sup>58</sup> Steve Butcher, 'Out of Touch with the Community? Who's to Judge?' *The Age* (Melbourne), 28 August 2004, 1.

<sup>59</sup> Ian Gray, 'The People's Court — Into the Future' (Speech delivered at the Twelfth Australian Institute of Judicial Administration Orator in Judicial Administration, Brisbane, 22 June 2002) 1.

<sup>60</sup> Magistrates' Court of Victoria, *2010-11 Annual Report* (2011) 9-10.

I give a few further examples: in 2010, Sunshine Magistrates' Court invited members of the African community to attend an Open Day that involved court tours, meetings with court staff, and participants learning more about the justice system. In October 2011, the 'Enhancing Justice Through Understanding' forum took place in Footscray with the aim of increasing mutual understanding, and developing closer ties, between members of the courts and justice system and local African communities. Dandenong Magistrates' Court has implemented programs reaching into local African communities, such as the Sudanese Family Mediation Program, and has recently appointed a Community Engagement Worker with strong ties to the African community, and collaborates with the Migrant Resource Centre to enhance the court's accessibility.

Activities of this nature are routine, not exceptional. They are products of an ethos of community engagement, shared and supported by magistrates and court administrators. This is as it should be, because whilst the community rightly values independence as a fundamental quality of courts, it also expects a commitment to engagement with the community and to the playing of an educational role. Such things promote confidence in the system.

In November 2010, Latrobe Valley Magistrates' Court piloted the 'U-Turn' Program in Morwell. 'U-Turn' is a diversionary program aimed at young drivers, where offenders attend sessions (often with their parents) and learn about road trauma from Victoria Police Traffic Management Unit and Coroners Court officers, and Regional Co-ordinating Magistrate for Gippsland, Clive Alsop.<sup>61</sup> The 'Prevent Alcohol and Risk Related Trauma in Youth' (P.A.R.T.Y.) program has a specific pilot program for young traffic offenders that is facilitated by the Sunshine Magistrates' Court in conjunction with the Alfred Hospital, Royal Melbourne Hospital, Visy Cares Centre and Victoria Police. Shepparton and Wangaratta courts have run the 'Cool Heads' program over years, providing targeted driver education to youth participants.<sup>62</sup> These programs have been strongly supported and successful in their local communities.

## VI TOLERANCE AND A HARMONIOUS SOCIETY

We live in a richly diverse multicultural society, but it has its challenges for courts, not least to provide adequate interpreter services. Courts have a responsibility to meet the legitimate access to justice expectations of the diverse communities within our society, and we have a duty to educate ourselves about these communities.

In August 2011, the Melbourne Magistrates' Court hosted on behalf of the Judicial College of Victoria (JCV), an Iftar dinner marking the Islamic month of Ramadan. I was proud to co-host the event with the Australian Intercultural Society. It was another opportunity for the court to demonstrate its commitment to understanding the cultural diversity of our society and to learn from each other.

At the Iftar dinner, Tasneem Chopra (Chairperson of the Australian Muslim Women's Centre for Human Rights) told us of her experiences as a Muslim woman.<sup>63</sup> She noted the 'relentless' nature of 'Islamophobic hype', and that Muslims were 'tired of being located, placated and dissected.'<sup>64</sup> I note that Muslim communities in Australia are comprised of more than 70 different nationalities, and comprise roughly 1.7% of the nation's population.<sup>65</sup> Recently, the Regional Co-ordinating Magistrate for Sunshine, Noreen Toohey, met with local leaders from the Islamic community who asked to spend time in the court learning about family violence law and practice. A dinner will be held shortly involving Imams from six mosques, six magistrates, a court registrar and representatives of Victoria Police.

I expect these relationships to grow in the interests of mutual understanding, and in fulfillment of the courts' obligation to reach out and educate the community about its work, and to ensure that we in the courts work assiduously on expanding our knowledge and understanding of an evermore pluralistic and complex society.

<sup>61</sup> Ibid106.

<sup>62</sup> Ibid 10.

<sup>63</sup> Tasneem Chopra (Chairperson), 'Australian Muslim Women's Centre for Human Rights' (2011), available at <<http://www.islamicwomenswelfare.org.au/node/15>>. See also Fatima Dennaoui, *Tasneem Chopra* (2010) Institute for Cultural Diversity, available at <[http://www.culturaldiversity.net.au/index.php?option=com\\_content&view=article&id=401](http://www.culturaldiversity.net.au/index.php?option=com_content&view=article&id=401)>.

<sup>64</sup> Tasneem Chopra, untitled (Speech delivered at the Judicial College of Victoria Iftar Dinner, Melbourne, 10 August 2011).

<sup>65</sup> Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 2011) 239.



I mention in passing the contentious issue of refugees and asylum seeker policy only for the purpose of emphasising the need for rational debate. As complex as this issue may be, a rational and informed debate in the community will take into account that between 96 to 99% of asylum seekers arrive in Australia by plane.<sup>66</sup> Suffice to say, disproportionate attention is paid to the comparatively small numbers of asylum seekers arriving by boat. Michael Kirby wrote of the 'high emotions' stirred by this debate in Australia, and the 'repeated imagery of boat people on the high seas approaching the continental land mass of the nation.'<sup>67</sup> He also reminded us that most Australians 'were also "boat people" of some kind' in earlier generations.<sup>68</sup> It's a good point.

## VII THE CLIMATE CHANGE DEBATE

A recently published newspaper article contained the following:

[J]ust '42 per cent of people [in Australia] believe in a wholly scientific explanation for the origins of life', something that has been proven by science. By contrast, 34 per cent believe in UFOs and 22 per cent think witches exist, something which has never been proven by science. Given this track record of acceptance of science, is it realistic to have a fruitful public debate on the science of climate change?<sup>69</sup>

The climate change debate is a good example of how evidence and facts too often become lost in polarising argument. In a recent essay, Robert Manne comprehensively analysed the portrayal of the climate change debate in *The Australian* newspaper.<sup>70</sup>

Given that climate science is an extremely complex and difficult field of study, Robert Manne emphasises the need for society to turn to experts, and '[a]ccordingly, no rational layperson has any alternative but to accept the view that is consensual among them.'<sup>71</sup> He queries whether laypersons should tackle the scientific nuances of climate change themselves, or seek advice from academically and professionally qualified experts.

He said this:

Democracy relies on an understanding of the difference between those questions that involve the judgment of citizens and those where citizens have no alternative but to place their trust in those with expertise. By refusing to acknowledge this distinction, in its coverage of climate change *The Australian* not only waged 'war on science' ... but also threatened the always vulnerable place of reason in public life.<sup>72</sup>

His view accords with that of Professor Philip Kitcher. Philip Kitcher has warned of the dangers of 'massive ignorance and massive media distortion of the truth on all sorts of grounds' equating to the failure of 'free discussion.'<sup>73</sup> Both write that in order to achieve 'genuine democratic participation' in open societies, citizens need more balanced coverage and information.<sup>74</sup>

As lawyers, we are accustomed to giving experts a certain status in our system. Other professions do the same and most ordinary people would subscribe to the idea that you should give special weight to expert opinion.

Robert Manne is of the view that the 'most important fact is that there is consensus view among qualified scientists about the cause of climate change.'<sup>75</sup> This is the nub of the issue. Ideological and subjective opinions in the climate change debate, often based on dubious, minimal or distorted evidence, do not reflect majority views held by climate scientists. During his visit to Australia earlier this year, Nobel laureate Professor Harold Kroto encouraged discussions about science and emphasised why it is important not to let it 'drift into the zone

<sup>66</sup> Janet Phillips, 'Asylum Seekers and Refugees: What are the Facts?' (Department of Parliamentary Services, 2011) 6.

<sup>67</sup> Michael Kirby (foreword) in Roz Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, 2003).

<sup>68</sup> *Ibid.*

<sup>69</sup> Michael Bachelard, 'Witches, God, Climate Change ... it's a Matter of Belief', *The Age* (Melbourne), 23 October 2011, 1.

<sup>70</sup> Robert Manne, 'Bad News: Murdoch's Australian and the Shaping of the Nation' (2011) 43 *Quarterly Essay* 1.

<sup>71</sup> *Ibid* 39.

<sup>72</sup> *Ibid* 35.

<sup>73</sup> Bachelard, above n 69, 2.

<sup>74</sup> Philip Kitcher, 'The Climate Change Debates' (2010) 328 *Science* 1230, 1231.

<sup>75</sup> Manne, above n 70, 37.

of ideology and belief, rather than reason and evidence.<sup>76</sup> He also noted 'science was at risk of being devalued through contemporary scientific debates' that had 'descended into rhetoric, not reason.'<sup>77</sup>

I make these points, not to engage in the climate change debate, and I am not qualified to do so, but to reflect back on the sentencing debate. Both topics demand rational and informed discussion. I make one final point: while sentencing is a matter of constant community debate in which the media has a vital role to play, magistrates and judges are in fact a little like the scientists in the climate change debate: they are trained, experienced, practiced experts in their field who know the law and the methodology required to arrive at balanced just decisions in the cases they hear. They should be respected for their expertise, and dare I say it, they should be respected for their wisdom.

## VIII THE FUTURE OF THE MAGISTRATES' COURT

In conclusion, I want to speak a little about the future of the Magistrates' Court. In 2002, I gave an oration for the Australian Institute of Judicial Administration (AIJA) and spoke about the 'People's Court' and the way I saw the future.<sup>78</sup> I touched on the use of court support programs and specialist courts and I am proud to say that in the last decade we have made great strides in this area.

The Magistrates' Court continues to work on projects that seek to unify specialist courts into a comprehensive model, and increasingly integrate problem-solving methodology into the court system across Victoria.<sup>79</sup> Building on a project titled 'Next Generation Courts'; there has been significant work undertaken on the expansion and streamlining of the court's problem-solving sentencing focus, especially through the 'Integrating Court Programs' project (ICP).<sup>80</sup>

The project 'aims to make problem-orientated justice part of the day-to-day functions of courts.'<sup>81</sup> The principles, as applied in the court's specialist and problem-solving jurisdictions, are proving to be highly effective in practice. The project proposes an overarching framework to assist in the daily implementation of therapeutic jurisprudence across Victoria. It outlines a roadmap, a blueprint for the future.

One of the main benefits of the proposed ICP Framework is its potential application of the lessons learned from presently existing problem-solving courts and programs, and financial and social benefits from such programs, to courts located around the state. In this sense, the broad and structured ambit of the project may address the marginalisation of regional and rural communities ('postcode justice').<sup>82</sup> The resource limitations and ad hoc 'patchwork' implementation of problem-solving initiatives across Victoria means that rural and regional communities face barriers to accessing such services.<sup>83</sup> Tackling 'postcode justice' will be one of the court's biggest challenges in the next decade.

The Magistrates' Court has been a strong innovator in this area, with more than 20 specialist courts and initiatives including CISP, NJC, Koori Courts, Drug Courts, Assessment and Referral Court, Mental Health Court Liaison Service, Criminal Justice Diversion Program, Enforcement Review Program, Sexual Offences List and Family Violence Court Services and so on. The Magistrates' Court has been the home of the majority of such problem-solving initiatives in this state.

Problem-solving courts and specialist responses have been implemented around the world in places such as the United States, New Zealand and Canada.<sup>84</sup> The combination of the court's authority, and offenders' participation in treatment and support programs, gives offenders the chance to take responsibility for their behaviour, and the opportunity to address the fundamental reasons and causes for their offending.

<sup>76</sup> Sarah-Jane Collins, 'Teaching Children the Real Truth about Science', *The Age* (Melbourne), 28 September 2011.

<sup>77</sup> Ibid.

<sup>78</sup> Gray, above n 59.

<sup>79</sup> Magistrates' Court of Victoria, above n 60, 9.

<sup>80</sup> Department of Justice, Courts and Tribunals Unit, *Integrating Court Programs Project* (2011), available at <<http://www.courts.vic.gov.au/courts-tribunals/courts-portfolio/key-projects-and-initiatives/Integrating-Court-Programs>>.

<sup>81</sup> Ibid.

<sup>82</sup> Richard Coverdale, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (Deakin University, 2011) 9.

<sup>83</sup> Ibid.

<sup>84</sup> Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 3.

I acknowledge and welcome the Attorney-General's strong support for this approach expressed in May this year, by way of media release, in the following terms:

Many offenders who end up in court have serious problems such as drug and alcohol abuse, mental disorder or disability. If those problems go unrecognised or ignored, offenders can often end up quickly re-offending again. However, if the problems can be addressed, it can mean the cycle of criminal behaviour can be halted, offenders can be rehabilitated and crime rates reduced.<sup>85</sup>

As I noted earlier, independent evaluations of CISP and NJC have shown that these initiatives are very effective, and provide benefits to the community as a whole. CISP achieved a '20% reduction in re-offending rates' for program participants, and a '30.4% drop in re-offending frequency for CISP participants post program involvement'. 50.5% of participants incurred no further charges. These results indicate a 'demonstrable decrease in the seriousness of offending' after offenders participated in CISP.<sup>86</sup>

The ICP Framework seeks to expand and embed problem-solving initiatives and approaches in day-to-day practice, around the state. The Magistrates' Court welcomes any proposal that will enhance the court's ability to provide a higher quality of justice: reducing recidivism rates and contributing to public safety, enabling better responses for victims, engaging communities across the state, and strengthening confidence in the courts and legal system.

## IX IN CONCLUSION

We can, as a society choose to lock more and more people up, or we can choose to approach crime prevention and community protection in a more sophisticated, more effective and more humane way. There are thousands of offences, and offenders, dealt with by magistrates each year where the sentencing approach outlined above is, I would suggest, the only rational way to meet what the community really does expect from the courts. To return to the man in whose honour this oration is given, I end with a quote from a speech of Michael Kirby's in which he used the description of Satan's home in Milton's epic poem *Paradise Lost* as a metaphor for a world without rationality:

So there was the very definition of Hell as seen by earthlings. Darkness and Night. Tumult and Confusion. Discord and Chance. Rumour and Chaos. A nethermost abyss. The very antithesis of what we, as human beings, thirst for and seek: an explanation. A rational cause. An ordered pattern. An understandable reason for this existence.<sup>87</sup>

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<sup>85</sup> Robert Clark, '\$22 Million to Help Courts get Offenders Back on Track' (Press Release, 3 May 2011) 1.

<sup>86</sup> Department of Justice (Vic), *Court Integrated Services Program: Tackling the Causes of Crime, Executive Summary Evaluation Report* (2010) 10.

<sup>87</sup> Michael Kirby, 'Chaos and the Rational Mind' (Speech delivered at the Australian Academy of Forensic Sciences, Plenary Scientific Session Dinner, 14 February 1990) 4.

