

ANNUAL 2009 SHIRLEY SMITH ADDRESS

The Wellington Branch of the New Zealand Law Society
Women-in-Law Committee

Held at Rutherford House, Victoria University, Wellington
Thursday 9 July 2009 at 6 pm

“BLAMELESS BABES”

Sian Elias*

[1] I am delighted to have the opportunity to speak up for Shirley Smith. I am grateful indeed to Helen Sutch and to the Wellington Women in Law Committee for the invitation to give this lecture in Shirley’s honour. She was someone I admired long before I met her. And after I met her, she was someone I loved. The admiration was for the example she set in refusing to be deterred legal practice in the courts because of her sex. But when I met Shirley, what made me love her was the fact that she lived and breathed for justice. All her life.

[2] I do not need to tell you that Shirley Smith did not have a conventional career in law by the standards of the time. Even for the daughter of a respected High Court judge, doors did not open. No matter. She did what came her way. She was the first woman law lecturer in New Zealand. And, like many other women practitioners to follow, when she entered the profession it was as a sole practitioner. The work that came her way was small beer by the standards of the successful in the profession. Much of it was *pro bono* or poorly paid. She herself however considered that the people who came to her for representation enriched her life. She had no complaints. She was not interested in success according to any standards but her own. She acknowledged that she had always been headstrong, opinionated, and “determined to stick to what I believed was right”.¹ And she rated herself fortunate in having a clear sense of herself and “what it is right for me to do and what would be wrong for me to do”.

[3] Shirley’s work was varied. But she is best known for criminal work. She usually represented those who were at the bottom of the heap. She did so without condescension and conscious always that, as she once put it, “no matter what they look like, there is a human being in there”.² She said that she always hoped for the best in people, and was not often disappointed. She believed passionately that all were entitled to the protection of the law

* The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

¹ “Shirley Smith” in Neville Glasgow, *Directions: New Zealanders Explore the Meaning of Life* (Shoal Press, 1995), p 192 [transcript of an interview with Shirley Smith first broadcast on National Radio on 18 January 1989].

² *Ibid*, p 199.

and to fair treatment. Her sense of social justice led her to champion human rights and civil liberties. And to fire off letters to the editor about the futility of escalating sentences.

[4] In November 1999 Shirley wrote a letter to the editor expressing her opposition to a bill increasing sentences. She said:³

To provide only a prison at the bottom of the cliff is not a solution. Criminals will just go on falling into it, at great cost to the community.

We have to find out why blameless babes become criminals. Writing as a lawyer who has read many probation reports I have no doubt that their life experience has been the cause. Society creates criminals, society must look at the conditions that create them.

[5] Criminal justice was something that Shirley Smith believed in passionately. In this lecture for her, I thought I would take it as my theme. I've also taken "blameless babes" as my working title, although I suppose I will have to alter it because it is bound to be misrepresented along the lines of "Chief Justice says murderers are 'blameless babes'". What Shirley Smith was posing however is the critical question we have to address: What turns "blameless babes" (as all criminals once were) into the stuff of nightmares? I do not mean to suggest that a lot of serious thinking has not been given to this topic. But what is clear is that it isn't enough to leave such thinking to those working in the criminal justice system. We have to get wider social engagement and buy-in if we are to find answers.

Perspective

[6] My views are those of someone who has been involved in criminal justice in one way or another for forty years. During that time there have been considerable shifts in the way in which we tackle crime. Optimism about strategies for reform gave way to professional pessimism and community loss of confidence in those working in the criminal justice sector. We have seen the rise of popular anxiety about crime which has led to calls for increasingly punitive sentences, and which has led to fixation with management of risk and marked intolerance when risks come about, as risk always does from time to time. We live in a climate in which "every mistake becomes a scandal".⁴

[7] Moreover, strategies to channel those who are considered of less risk into community penalties have not delivered the hoped reduction in prison

³ "Kneejerk reaction" *The Dominion* (17 November 1999, ed 2, p 12).

⁴ David Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, (Oxford University Press, 2001), p 13.

population, for reasons I want to discuss later. And the more punitive sanctions for those who commit serious offence have not made our communities safer. Although recorded crime has decreased during the last 10 years, violent offending has risen by 31 per cent.⁵ It is not clear whether this reflects higher reporting of offences. It may be however, as the New Zealand Crime and Safety Survey estimates, that there is serious under-reporting of sexual offending and family violence.⁶ The level of crime, particularly violent crime, is a source of proper public concern. It is estimated that the criminal justice system impacts directly or indirectly on the lives of 250,000 New Zealanders every year.⁷ As importantly, crime and its punishment are pressing social and political concerns to very many more. Criminal justice is rightly the subject of close political attention. It comes to be considered in a climate of anxiety, in which professionals are not trusted to have answers.

[8] How did we come to this pass? From the 1920s research into the causes of crime identified the personal background and social conditions of the offender as key factors bearing on criminal behaviour. That insight led to therapeutic interventions and welfare programmes aimed at rehabilitation. From the 1970s empirical research tended to suggest that these methods of crime prevention had failed. Through the 1980s a view that “nothing works” resulted in retreat from rehabilitative strategies. More punitive responses replaced them. Public scepticism about the effectiveness of rehabilitative strategies led to loss of confidence in professional expertise in the field, including the courts. Crime rates rose dramatically. In New Zealand the prison muster almost doubled between 1985 and 1999.⁸ Law and order became a highly charged political and social issue. And leadership of the debate about penal policy passed from officials and professionals working in the field to advocates for victims and safer communities.⁹

[9] A substantial shift in the focus of criminal justice during my time in law has been the emphasis on the victim of crime. The new emphasis places victims at the centre of the criminal justice process. Professor Stenning, formerly head of the Department of Criminology at Victoria University, has warned that in this repositioning we risk turning the clock back to earlier systems which were overtaken by historical evolution.¹⁰ The detachment and public ownership of the accusatorial system of determining criminal culpability freed victims and their kin from the tyranny of private vengeance. At risk is the retention of the traditional accusatorial system of determining

⁵ Ministry of Justice, *New Zealand Criminal Justice Sector: Outcomes Report* (June 2008), p 13.

⁶ Ministry of Justice, *New Zealand Crime and Safety Survey 2006*, (April 2007).

⁷ Philip Stenning, *The Modern Prosecution Process in New Zealand* (Victoria University Press, 2008), p 16.

⁸ Department of Corrections, *About Time: Turning people away from a life of crime and reducing re-offending* (May 2001), p 1.

⁹ See David Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, (Oxford University Press, 2001).

¹⁰ Philip Stenning, *The Modern Prosecution Process in New Zealand* (Victoria University Press, 2008).

criminal culpability, with its detachment and public ownership. Courtrooms now can be very angry places.

[10] The impact on court processes and Parole Board hearings has been profound. The distinguished British criminologist, David Garland, has written of the significant impact of the introduction of the victim's voice. He says it has led to a "re-personalisation" of criminal justice and "recasts sentencing not as a finding of law, but as an expression of loyalty ... crime victims are led to regard the severity of punishments as a test of this loyalty and a mark of personal respect".¹¹ It is associated with public loss of confidence in criminal justice and lack of trust in criminal justice personnel and officials. Two of the more important legal thinkers of our time have described the procedures of criminal justice as having been designed to "turn hot vengeance into cool, impartial justice".¹² Cool, impartial justice is not getting a very good press these days.

[11] There is no question of going back to the days when victims were largely irrelevant in criminal proceedings. They were not well treated. But we need to consider how much further we can go without undermining basic values and whether indeed we may have gone too far in this respect already. What are we trying to achieve? Perhaps direct assistance to victims may be of more help than a sense of ownership of the criminal justice processes. I do not know whether this is right. But I would like to see some serious assessment of whether the emotional and financial cost of keeping victims in thrall to the criminal justice processes (through trial, sentencing and on to parole hearings) does help their recovery from the damage they have suffered or whether they are re-victimised through these processes. The answer may not be to force further change on our accusatory methods of trial, as is proposed from time to time. It may be to reassess how we respond to victims of crime.

[12] There are signs that the retreat from professionalism and pessimism about the efficacy of rehabilitation and intervention is shifting. Decision-makers have clearly accepted that we cannot afford a strategy that punitive isolation is the principal response. The increasing emphasis on community based sentences for all but the most serious offenders is a measure of the new resolve. While the Sentencing Act requires the most serious crimes of their type to receive sentences approaching the maximum and while the sentences for serious violent crime have risen, the Act also requires the court to keep offenders in the community "as far as that is practicable and consonant with the safety of the community".¹³ The resolve to get down the prison population is seen too in the increased resources for probation officers and mental health assessment. Better communication about why

¹¹ "The Cultural Uses of Capital Punishment" (2002) *Punishment & Society* 4(4) p 464.

¹² Neil MacCormick and David Garland "Sovereign States and Vengeful Victims: The Problem of the Right to Punish" in Andrew Ashworth, Martin Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press, 1998), p 26.

¹³ Section 16 of the Sentencing Act 2002.

alternatives to prison are in the public interest is however clearly necessary to counter community scepticism.

[13] Such research as there is indicates that the effect of incapacitation on general levels of crime is very small.¹⁴ And as Lord Bingham, then Lord Chief Justice of England, once pointed out, the problem with incarceration is that in all but a small number of cases at some point the offender must re-enter society. In the first place, as he says, the personal profile of the typical offender can be drawn with some confidence:¹⁵

He is usually male, and often of low intelligence, and addicted to drugs or alcohol, frequently from an early age. His family history will often include parental conflict and separation; a lack of parental supervision; harsh or erratic discipline; and evidence of emotional, physical or sexual abuse. At school he will have achieved no qualification of any kind, and will probably have been aggressive and troublesome, often leading to his exclusion or to truancy. The background will be one of poverty, poor housing, instability, association with delinquent peers and unemployment.

[14] If prison further damages such an offender, he may well be more dangerous when he comes out than when he went in. In this connection an American writer has recently referred to prisons as “monster factories”.¹⁶ A Canadian study unsurprisingly has found that re-offending is higher for those sentenced to imprisonment than those sentenced to community-based sanctions and that longer prison sentences increase the rate of re-offending. Canadian research demonstrates that those on community sentences have much better prospects for rehabilitation than those sentenced to imprisonment.¹⁷ In New Zealand, studies of 5,000 prisoners released in 2002/3 indicate that the re-imprisonment rate within a 60 month follow-up period was 52 per cent.¹⁸ And those sentenced to lengthy periods of imprisonment have the least prospect of rehabilitation.¹⁹

[15] The profile described by Lord Bingham is echoed in New Zealand. In addition to the background of family disruption and abuse and lack of educational attainment, prisoners in New Zealand have been found to have significantly higher rates of mental disorder than the rate to be found in the community. And more than half of male prison inmates, and a staggering 60

¹⁴ R Tarling, *Analysing offenders: data, models and interpretations* (HMSO, 1993).

¹⁵ Tom Bingham “The Sentence of the Court” in *The Business of Judging* (Oxford University Press, 2000), p 308.

¹⁶ Sunny Schwartz, *Dreams from the Monster Factory*, (Scribner, 2009).

¹⁷ P Gendreau, C Goggin, FT Cullen, *The effects of prison sentences on recidivism: user report* (Officer of the Solicitor General, Canada, 1999).

¹⁸ Department of Corrections, *Reconviction patterns of released prisoners: A 60 month follow-up analysis* (March 2009).

¹⁹ P Gendreau, C Goggin, FT Cullen, *The effects of prison sentences on recidivism: user report* (Officer of the Solicitor General, Canada, 1999).

per cent of female prison inmates are Māori, a calamitous state of affairs for the health of our society.²⁰

[16] There have been huge shifts in criminal justice policy during the 40 years I have been working in the court system. In the past, sentencing was left pretty much to the judges. Parliament prescribed maximum sentences, within which the judges had wide discretion to fit the sentence to the circumstances of the crime and the offender. In the last 10 years especially, there has been a change to greater prescription by Parliament. That is entirely legitimate. Parliament through legislation sets down the framework. So we have had minimum sentences prescribed for some aggravating circumstances and minimum non-parole periods. And we have had increasing prescription of the factors to be weighed in sentencing, including a direction that for the worst offending of its kind judges must look to the maximum penalty provided.

[17] The parole decision is now a significant second stage in determining the sentence to be served. It entails consideration of risk (which usually entails consideration of acknowledgement of wrong-doing) and the attitude of victims. Indeed, the “paramount consideration” for the Parole Board in every case is “the safety of the community”.²¹ Such approach has overtaken the former entitlement to early release. Again, there is nothing illegitimate about this prescription or the substance of the reforms. And they clearly had substantial community support, as demonstrated by the 1999 Referendum. Nor have they been directed simply to higher imprisonment. The reforms were part of a package which greatly improved community-based options to imprisonment.

[18] These reforms have not however brought down the number of prisoners over time, and they are not forecast to reverse the trend of increase in the prison muster. Indeed, there are some suggestions that they may be generating further imprisonment for non-compliance. Of particular concern is a view expressed to me by the Chief Judge of the District Court that community based sentences are generating second-stage imprisonment because so many offenders sentenced to them lack the personal life-skills to fulfil the conditions. We may be dooming to failure the very offenders we have most chance of turning. I am not qualified to comment on this but it needs to be asked whether making community-based sentences work effectively requires more resources and community support than we have provided.

[19] I should make it clear that I do not take the view that there is no place for prison. Nor do I think that the only ethical end of criminal justice is rehabilitation. I accept that retribution is a proper response for serious crime. Nor do I want to suggest that other sentencing reforms and initiatives we

²⁰ Department of Corrections, *Over-representation of Māori in the criminal justice system: An explanatory report* (September 2007).

²¹ Section 7 of the Parole Act 2002.

have tried such as through restorative justice, family group conferences, drug courts and other therapeutic interventions are not worth trying even though a number of commentators are sceptical as to whether they will effect lasting changes.²² I think we need to keep trying to see what works in the criminal justice system.

[20] We are not alone in trying one reform after another in criminal justice. And we are not alone in regarding with dismay at times the costs and results of the outcomes. Our experiences have been mirrored by those in the United Kingdom (or perhaps we have mirrored them). And I certainly don't want to suggest that we should desist from seeking better ways. But all the evidence and all the informed opinions seem to point to the futility of believing that the causes of crime can be addressed by penal policy and criminal justice processes. The fact is that what we can expect from the criminal justice system and such experimentation is very modest indeed in the scheme of things. Penal policy is largely irrelevant to reduction of crime and to making our communities safest. It is, as one commentator put it, "the bluntest of society's instruments of control."²³ Baroness Wootton, a noted British penologist, looking back over the optimism she had expressed 17 years earlier, confessed in 1981 that over the intervening years she had been increasingly haunted by the nagging feeling that the whole penal system was "a gigantic irrelevance – wholly misconceived as a method of controlling [crime]".²⁴ In origins, she had come to accept were "inextricably rooted in the structure of our society". There are no easy or quick fixes.

The prison population

[21] The size of the prison population indicates the scale of the challenge. Shirley Smith's view was that imprisonment is a measure of social failure and that as a strategy it is doomed never to succeed. If she is right in that, we are doing very badly indeed as a society. Today, the New Zealand prison population is about 8,400. That is down from a peak of nearly 8,500 in September 2007.²⁵ But the reduction then obtained when extended provision for community sentences was made in sentencing legislation has now been substantially eroded. That is a very disappointing result, and it suggests that without further support in the community, those serving their sentences there are at high risk of failure, perhaps because they lack the personal skills to organise their lives. The latest indications from the Department of Corrections suggest that the prison numbers are continuing to rise. I want to talk about the drivers of these projections later. But the really bad news is that, if they prove accurate, in eight years time the prison

²² Russell Hogg, "Crime Control In Late Modernity, David Garland's *The Culture of Control*" (2002) *Current Issues in Criminal Justice* 14(2), p 237.

²³ AH Smith "Criminal Law: the Future" [2004] *Crim LR* 971, p 980.

²⁴ Barbara Wootton, *Crime and the Criminal Law: Reflections of a magistrate and social scientist* (2nd ed, Steven & Sons, 1981), pp 117-8.

²⁵ Department of Corrections, *Briefing for the Incoming Minister* (November 2008), p 9.

population will reach 10,795, a 37 per cent increase.²⁶ It means that our population will then be imprisoned at the rate of 200 per 100,000 population.

[22] We have been shocked to be told that we are second only to the United States in the proportion of prisoners to the total population. The comparison is in fact quite misleading because the rate of incarceration in the United States is four times ours. What is troubling however is the comparison of our rate of imprisonment with Australia, the United Kingdom and Canada.²⁷ We have the sad distinction of imprisoning our population at a higher rate than any of them. And in respect of Māori prisoners as a proportion of the Māori population, the rate is very close to that in the United States.

[23] The average cost of keeping an offender in prisoner for a year is nearly \$100,000.²⁸ That may be contrasted with an average cost per day of an offender on a community based sentence of \$10.04.²⁹ There is a looming crisis because we do not have enough prison beds. It is no wonder then that successive governments have been asking officials for creative ways to keep down or to manage the prison population. The Sentencing Council, as originally proposed by the Law Commission, was suggested as a mechanism by which the prison population could be managed by government through directions to the judges. That was constitutionally suspect (because it is for Parliament through legislation to control sentencing).³⁰ But in any event, it came to be frankly acknowledged that promoting consistency in sentencing cannot in itself reduce the prison population. At best, greater consistency may assist officials trying to predict and obtain the resources required. The new government has said that it does not intend to implement the Sentencing Council legislation.

[24] Reducing sentence levels would reduce the prison population, not only by cutting the length of prison terms but also by bringing more sentences within the bounds set for community-based sanctions, including home detention. But a frank policy of reducing sentences has so far been politically difficult. I think it is a nettle the public should want to see grasped. We cannot blame successive governments. They have responded to high public anxiety. And indeed the high level of crime is a source of proper public concern and political attention. Channelling public anxiety into effective strategies is not easy when the first task is to get across the unwelcome message that there are no simple or quick answers. And it is difficult for the public and political debate to be properly informed in an age

²⁶ Ministry of Justice, New Zealand Police, Department of Corrections, *Summary of the 2008-16 Justice Sector Prison Population Forecast* (September 2008), p 2.

²⁷ Department of Corrections, *Briefing for the Incoming Minister* (November 2008), p 11.

²⁸ Ibid, p 9.

²⁹ Department of Corrections, "Community Probation & Psychological Services": <http://www.corrections.govt.nz/about-us/structure/community-probation-and-psychological-services.html>.

³⁰ For reasons explained by Lord Phillips, then Lord Chief Justice of England and Wales, in a speech on "The Relationship between the State, Sentencers and Probation (Judicial and Probation Autonomy)" (Probation Boards' Association Conference, 2 May 2007).

where our news and comment is geared to simple messages and the stories of individual crimes are readily and graphically communicated. But if we are not to lurch from one increasingly punitive and expensive reaction to another, we all need to take responsibility for understanding the options and for buying in to the strategies that work, rather than knee-jerk responses. Those strategies require social change, not demands for easy quick fixes now. We need to get some of the heat out of the discussion. We do not disagree on the goals. We all want to see crime reduced and to increase safety in our communities.

[25] Achieving a reduction in the number of prisoners requires concerted strategy. When Finland attempted such a reduction, it was expert led, supported by a political accord that there would be no use of “fear of crime” as a populist theme, and assisted by media restraint in reporting crime. There was an open agenda of reducing both the length of prison terms and reducing the range of crimes for which imprisonment was imposed. This programme was supported by the public, which understood, after a programme of public education, that imprisonment did not reduce crime. Importantly, they understood too that the core justice sector could not be the sole focus. A range of strategies in education, social welfare, and youth justice was set up to provide support for those at risk.³¹

[26] So, if I am pushed to identify some strategies I think we need to consider, I would opt for effort in five principal ways: community education, intervention strategies for those at risk, better support for probation, increased attention to mental health and substance abuse, and a frank policy of being prepared to reduce the prison population by management.

Community education

[27] The first is community education. Information the community needs to know has to be got across. The message that imprisonment does not reduce crime, that the criminal justice processes are largely irrelevant to crime reduction and that the causes of crime have to be directly addressed must be communicated and understood.

[28] Proper conduct, as Shirley Smith knew, can only be promoted on a consistent basis by what has been described as “the mainstream processes of socialization”.³² Those who don’t belong (often because they are damaged or marginalised) or who don’t care (often because they lack the capacity for insight or feel themselves rejected) have already slipped through the cracks. They may be prevailed upon to modify their attitudes, but often

³¹ See M Lapps-Seppala, *Regulating the Prison Population: Experience from a long term policy in Finland* (National Research Institute of Legal Policy Research Communications, Helsinki, 1998).

³² David Garland, *Punishment & Modern Society: A study in social theory* (University of Chicago Press, 1990), p 288.

they cannot. Far better to develop strategies for keeping those at risk integrated into our communities.

[29] What seems clear from overseas experience is that if we are serious about reducing crime, it is necessary to obtain community buy-in for non-punitive strategies.³³ Without it, politicians come under intense pressure to talk up law and order issues and get pushed into escalating punishment. That is why we need a strategy of public education about the causes of crime and the limits of prison as a solution. We need acceptance that sentences should reduce and that imprisonment should be reserved for cases in respect of which it is the only appropriate response. And we need to be prepared to commit resources to make interventions effective. We need to support politicians and officials undertaking these policies, not to turn on them.

Intervention

[30] Secondly, perhaps we need to reconsider the reluctance shown in recent years to intervene to try to avert risk. Such strategies were discussed in the Department of Corrections 2001 publication *About Time*. It looked to targeted interventions at critical stages in the lives of those at risk. They are, as most of us would I think accept from our own experiences, people who will come from socially and economically disadvantaged families and who will experience what were described in the report as “an unrelenting series of adverse life effects”.³⁴ The unfortunate reality is that the most influential risk factors will have been present at birth. As a result, those at risk can be identified with “increasing certainty from birth to the beginning of their adult offending career”.³⁵ The most effective interventions are the earliest interventions.

[31] This report has languished, partly one suspects because in a punitive climate which stresses individual responsibility and is intolerant of excuses, the idea that many offenders do not have much of a chance is not a welcome thought. But perhaps partly the report makes us squeamish because its strategies of targeted interventions are reminiscent of the intrusiveness we accepted 20 years ago but which has come to seem inconsistent with personal autonomy and dignity. I remember as a young lawyer acting for a woman whose child was removed for neglect on grounds that today we would think were relatively trivial. And I do not suggest we go back to that complacent time. But perhaps we have become too inert and need to get behind strategies for intervention that are more supportive, less punitive, and more community-grounded.

³³ Department of Corrections, *About Time: Turning people away from a life of crime and reducing re-offending* (May 2001).

³⁴ *Ibid*, p 27.

³⁵ *Ibid*, p 4.

[32] The Ministry of Justice has been asked by the present government to present it with options for intervention strategies. This willingness to engage more broadly on the drivers of crime is a move we all need to support.

Probation

[33] The third strategy I think needs to be pushed is probation. When I started practising in the Magistrate's Court in Auckland in the early 1970s, probation officers involved with the management of the offenders appearing in the court were always present. Very often the particular officer assigned to an offender would be asked by the judge to speak about the offender's living or employment circumstances and to comment generally about how he was getting on. At sentencing lawyers would often indicate to the judge that the offender's probation officer was present in court, to show that there was support for and interest in that offender and what happened to him. There was a sense of personal involvement. And the probation officer was someone of considerable stature, a professional known to and respected by judges, lawyers, and usually by the offenders he or she deal with.

[34] I am not well placed to report on the present position. But my impression, reading the evidence in employment cases involving probation officers and in claims involving probation officers that come before the courts, is of a service that is overwhelmed by its case-load, under-resourced to do the job, and insufficiently supported and appreciated in the hard work it does by the public.

[35] Probation was introduced in New Zealand in 1886, long before it was adopted in the United Kingdom. We pioneered the service, initially for first offenders, at a time when no other country in the British Empire had such a system. The Hon Joseph Augustus Tole, who introduced the legislation, said of its purpose: "it is cheaper and safer to reduce crime or to reform criminals than to build gaols".³⁶ By 1906 *The Evening Post* described the Act as "one of the best ever placed on a statute book" and expressed the view that "those who in 1886 had opposed it as dangerous legislation must now admit that such opinions were erroneous".³⁷ Later, when legislation was enacted in England in 1907, one of the functions of the probation officer was "to advise, assist and befriend" the offender.³⁸ And that was an ethic echoed in New Zealand where the 1954 Criminal Justice Act required probation officers to assist the social rehabilitation of offenders.³⁹

[36] Today, responsibility to manage risk, which is imposed by statute, is conducted against public unwillingness to accept that risk cannot be

³⁶ (14 July 1886) 55 NZPD 507.

³⁷ "How Probation Works: A Satisfactory Report" *The Evening Post* (23 August 1906, Vol LXXII, Issue 46, p 5).

³⁸ Section 4 of the Probation of Offenders' Act 1907 (7 Edw 7, Ch 17).

³⁹ Section 4 of the Criminal Justice Act 1954.

eliminated, and a pervasive culture of blame. Meeting these public expectations is not only highly stressful and largely unrewarding, it seems to leave little time for getting alongside offenders. The probation officer has quite enough to do policing the conditions of parole or supervision. And he or she must always be conscious of the public wrath that will follow if the whistle is not blown and a parolee who might have been recalled goes on to commit significant crime. The actions of the probation officer will be judged by the public with the benefit of the full glare of hindsight.

[37] At the beginning of the year the Auditor-General released a critical report on the management of prisoners on parole.⁴⁰ It reported that the increasing numbers of offenders on the community based sentences extended in 2007 had exacerbated an existing staffing crisis. The 2009 budget has addressed this concern, with substantially increased operating funding to enable the increased demand for community based sentences to be supervised and to improve the quality of the management of parole and home detention.

[38] Today, the statutory functions of the probation officer contain no explicit reference to advice or assistance, much less to “befriending”. Have we lost something here that needs to be reconsidered? The probation service as first set up in the United Kingdom, was poorly resourced. To make its resources go further, it relied on part-time workers and volunteers.⁴¹ I wonder whether the time has come to consider greater community involvement in the supervision of offenders in our community. I do not suggest that the policing and risk assessment functions of the service can be properly devolved from professional officials. But perhaps the functions of advising, assisting and befriending ought to be reinstated and could well be a community responsibility. Such greater community responsibility fits within the wider theme that we are all directly implicated in the offending we rightly recoil from.

Mental ill-health

[39] The fourth strategy I would like to see supported more widely is the efforts to address mental ill-health and substance abuse, both within the prison population and within the community. Until 1999 there was no published epidemiological study of the mental health status of prisoners in New Zealand. Since then there has been a study in Christchurch⁴² and a follow-up national study.⁴³ They are disturbing reading. They show that all

⁴⁰ Controller and Auditor-General, *Department of Corrections: Managing Offenders on Parole* (February 2009).

⁴¹ Martin Page, *Crimefighters of London: A history of the origins and development of the London Probation Service 1876-1965* (Inner London Probation Service, 1992).

⁴² P Brinded *et al*, “Canterbury Prison Study” Unpublished Study for the Ministry of Justice (1995).

⁴³ Department of Corrections, *National Study of Psychiatric Morbidity in New Zealand Prisons* (1999).

major psychiatric conditions are represented in prisoners at rates higher than in the population as a whole. Ninety per cent of those with major mental disorders also have a substance abuse disorder. The reports showed that only 50 per cent of those with major mental health disorders had received any form of mental health treatment while in prison. Only 35 per cent of the prisoners with substance abuse or dependency (83 per cent of prisoners) received any treatment for the disorder while in prison. Of those who met the criteria for schizophrenia or a related disorder, only about a quarter were on medication. The results were worse than comparable studies in England.

[40] More recently, in March 2008 the treatment of mental health in prisons has been the subject of report by the Auditor-General.⁴⁴ He reports that there is a lack of clarity about the responsibilities of the Department of Corrections and the Ministry of Health and District Health Boards, especially in respect of the vexed question of responsibility for those with personality disorders. The systems for dealing with mental disorder in prisoners are reported to be under significant pressure from increasing prison musters and the high demand for in-patient beds. I have no doubt that the Ministry of Health and the Department of Corrections are responding to this report. But the scale of the problem in prisons indicates the significance of mental health issues in crime more generally and suggests the need for a comprehensive strategy.

[41] The status of those with personality disorders is a contentious issue in both psychiatry and legal definition. In England, severe personality disorder, called “psychopathic disorder” is recognised in mental health legislation.⁴⁵ We have no such equivalent. Psychiatrists in general remain reluctant to accept responsibility for those who cannot readily be treated and who pose substantial management risks. One method in which we seem to manage such people is through imprisonment. Up to 70 per cent of male prisoners may have anti-social personality disorder.⁴⁶ There is some evidence emerging that anti-social behaviour may be associated with brain disorder. Shirley Smith, in one of her letters to the editor, predicted as much. Advances in our knowledge of the functioning of the brain may have significant implications for our treatment of prisoners. While personality disorder is not invariably associated with criminal behaviour, it is clearly linked with much abnormally aggressive or seriously irresponsible conduct. We need more commitment to addressing this component of criminal offending.

Reduction of prison population

⁴⁴ Controller and Auditor-General, *Mental Health Services for Prisoners* (March 2008).

⁴⁵ Section 1 of the Mental Health Act 1983 (UK).

⁴⁶ P Brinded *et al*, “Canterbury Prison Study” Unpublished Study for the Ministry of Justice (1995).

[42] My last suggestion may be controversial. I do not know whether it is practical or politically acceptable, but I think it needs to be considered. We need to look at direct tools to manage the prison population if overcrowding is not to cause significant safety and human rights issues. Other countries use executive amnesties to send prisoners into the community early to prevent overcrowding. Such solutions will not please many. And I am not well placed to assess whether they are feasible. But the alternatives and the costs of overcrowding need to be weighed.

[43] In addition, we need to look at the drivers of the prison population to see what further adjustments can be made. The 2008 Justice Sector Prison Population Forecast⁴⁷ identifies the most influential factors driving the forecast as being:

- remands in custody;
- the proportion of those given custodial sentences upon conviction; and
- proportion of imposed sentence served in custody.

[44] These are the issues of bail, prison versus community sentences, and parole. In the forecasts, the proportion of those sentenced to imprisonment is not expected to rise over the eight years of the forecast. The length of sentences is expected to remain constant. But the proportion of sentence served will continue to rise, “converging around 66 per cent” of the sentence imposed (against the potential for parole in most cases after a third of the sentence has been served). Those remanded in custody are expected to grow by 3.5 per cent and the average time on remand is expected to grow too (initially by 6.1 per cent over the next year, but diminishing to 4.2 per cent from 2011/12, presumably because it is hoped that cases will be processed faster through the system). Additionally, charges are expected to grow by six per cent. There is little that can be done to fix the growth in charges quickly. It reflects the rate of crime and its detection. But the growth attributable to remands in custody and denial of parole should be looked at closely. To some extent the numbers remanded in custody are affected by delays in the court system. And that is a matter for which the courts need to devise strategies. Any such strategies should not lightly throw over important values in the criminal justice system, and should not impact on fair trial. There are measures that should responsibly be taken to improve performance in the courts. But it seems to me that the real drivers of the increased prison population forecast as a result of denial of bail and parole are our insistence that risk be managed by a policy of containment.

⁴⁷

Ministry of Justice, New Zealand Police, Department of Corrections: *Summary of the 2008-16 Justice Sector Prison Population Forecast* (September 2008).

[45] I question whether that strategy can responsibly be maintained. Changing it will require public acceptance that risk cannot be eliminated and that the costs we are absorbing to try to do so are disproportionately expensive. If we are not prepared to relax the pressures to contain risk in the discretionary decisions as to bail and parole, then the only other immediate options may be to confront the length of sentences directly. That could be achieved by statutory changes to bring down the parole component of the sentence (effecting an overall reduction in sentence), statutory modification of the policy of containment of risk in the current bail legislation, and early release amnesty. Are we ready for solutions such as these? If not, we will have to keep building prisons and diverting resources into incapacitation, a strategy that Shirley Smith had no doubt would not work.

Conclusion

[46] Time and again Shirley Smith made the point that “the threat of imprisonment does not deter, and imprisonment does not reform”.⁴⁸ She points to the causes of crime – lack of love and care, cruelty, bad diet which handicap the child and lead to physical damage of the brain as well as psychological damage. I leave the last words to her. “As a society we create our criminals; we, as a whole, are responsible”, she wrote in one letter to the editor.⁴⁹ And in another, she said this:⁵⁰

As counsel over many years, defending those charged with criminal offences, I read probation reports that would break your heart.

Children brought up in dysfunctional families, without love, abused and beaten, ill-fed and ill-clothed, how were they to turn into model citizens?

An overall cause is the replacement of a sense of community by that “every man for himself, and the devil take the hindmost” culture ...

To reduce crime it is necessary to identify what makes criminals and deal with the causes ...

This is the only long-term, effective way to help victims, to reduce their numbers. Punishment does not work.

⁴⁸ “Only solution” *The Dominion* (26 July 1999, ed 2, p 8).

⁴⁹ “Society creates criminals” *The Evening Post* (12 February 1997, ed 3, p 4).

⁵⁰ “Crime and jail” *The Dominion* (2 February 1999, ed 2, p 10).
