

## BETTER CRIMINAL JUSTICE

**Hon Justice Stephen Kós**  
President of the Court of Appeal

*An address to Victim Support Manaaki Tāngata*  
Wellington  
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*E nga mana, e nga reo.*

*Tena kotou, tena kotou, tena kotou katoa.*

Thank you for joining me today to talk about *Better Criminal Justice*: to talk about our justice system, what is wrong with some parts of it, and some things we might undertake to improve it.

It is a pleasure to do this in conjunction with Victim Support *Manaaki Tāngata* — who do so much excellent work, most of it on a volunteer basis, in the criminal justice sector.

After a career in commercial litigation, the last four as a QC, I became a High Court Judge in 2011. For four years I undertook a number of criminal trials ranging from fraud to sexual violence to murder. In 2015 I went to the Court of Appeal. Sixty per cent of its work is crime — much higher than in the High Court. Subsequently I became President of the Court. Collectively, we write about 450 criminal appeal judgments each year

These experiences have made me think carefully about our criminal justice system, society, and the responsibilities of judge, counsel, offender, victim, witnesses, jurors and the corrections system.

There is much that is good about our criminal justice system. Some of it is very good. But there are parts that just don't work as they should.

No judge enjoys sentencing, especially where a prison sentence involved. The Chief Justice is wont to call judging “exacting work”, and she is right.

Nothing is more exacting than sentencing a man or woman to prison, knowing that the consequence is to put a fellow human being behind bars. And to put his or her family often at even greater peril without their daily support.

Some cases stick in a Judge’s mind. This is one that has stuck in mine.

Levi Keil was 26 years of age. He lived at Nūhaka, east of Wairoa. This is what we said about him in our judgment:

His family [is] well known in the community. He worked with his father on the family farm. His father had been chairperson of the local marae for over 36 years. Mr Keil is fluent in te reo Maori and was himself a leader in the community. He had no previous convictions.

One night there was a family birthday party. A disaffected group of his whanau, who had not been invited, turned up. They assaulted Mr Keil’s father and left.

The host whanau were very upset about this. The next morning Mr Keil and five others drove over to the aggressors’ house. They took with them some baseball bats, a wheel brace and a “tree branch”. They went to sort things out. But one of the people they’d come to sort out, a Mr Haronga, unexpectedly produced a gun. Mr Keil grabbed a baseball bat and hit the arm holding the gun with it. There was a melee and Mr Haronga, the man with the gun, ended up being seriously injured about the head. Though not so injured that he could not pursue Mr Keil by car and try to ram him off the road.

Mr Keil and his party were charged with wounding with intent to cause grievous bodily harm. Several were acquitted. But Mr Keil was convicted on the basis that, although no one had seen him beat Mr Haronga about the head, he was party to a common purpose to cause wounding. Because he was the leader, Mr Keil was given a term of five years’ imprisonment.

There was no sentence appeal in that case, and so there was nothing we could do about the sentence.

But it has continued to trouble me that the official response to a stupid piece of impetuous retributive intra-family violence, was to put a young man of talent and ability, with no prior convictions, in prison for five years.

It makes you think, and ultimately in that case I do not think justice was done

I am going, then, to talk to you about crime and punishment. There is more I could talk about than that, but this is a breakfast meeting, and it cannot run on to lunch.

## **Crime**

Before talking about punishment you have to look at the criminal landscape. And that landscape is changing.

### *Crime is changing*

Crime in New Zealand is changing.

Three facts. First, total offending recorded in New Zealand has fallen fairly steadily across the last two decades. It has fallen 13 per cent since 2011. Secondly, and contrary to some popular opinion, the most serious violent crime has also been falling. Thirdly, violent crime in public places has fallen also.

But violent crime in general has *risen* by three per cent overall in the same period. And, what that means therefore is that violent crime has risen within private dwellings.

That is a reflection of a troubling increase in family violence, steadily increasing over the last five years: 41 per cent of police callouts concern family violence. There is no reason necessarily to assume that reporting has increased — believed to be about 20 per cent of total incidents. So most family violence is being swept under the rug.

Yet, as Principal Youth Court Judge John Walker has noted, the effect on impressionable children of witnessing family violence is profound. It normalises

violence as a means to obtain power and encourages disrespectful and dangerous intergender behaviours.

And, perhaps worst of all, as a 2011 study of young women in the Tasman region found, teenage girls exposed to family violence are more apt to form relationships with violent partners and to be more accepting of their conduct.

### *Legislative change to criminal law*

Legislative change is in the air more generally, and it too will change the criminal landscape.

One of the marks of a civilised, socially progressive society that it is able to have an adult and not-overwrought discussion about just what behaviour is, and is not, to be criminalised. And it is mark of New Zealanders that they have that debate, accept the outcome and move on.

So it was, then, in 1986 when New Zealand decriminalised homosexuality. And in 2003, prostitution.

But we have some big debates ahead of us on the shape of our criminal law, some just around the corner.

ACT MP David Seymour's End of Life Choice Bill was drawn from the ballot last year. It is a legislative response to the High Court case brought by Lecretia Seales, in which she sought declarations that suicide assisted by her doctor would not engage criminal consequences for the doctor. The High Court declined those declarations. Ms Seales died three days later.

Mr Seymour's Bill is now before the Justice select committee. If enacted it would give persons with a terminal or grievous and irremediable medical condition the ability to seek suicide assisted by a doctor — and would relieve that doctor of the risk of criminal liability for doing so.

Another debate ahead of us concerns the current state of *abortion laws* in New Zealand. The Government referred the issue to the Law Commission last month for a briefing on whether the current state of the law was consistent with treating abortion as a health issue. The briefing is sought by the end of October 2018.

And a third subject for future debate is going to have to be the extent to which this country continues to criminalise *cannabis and other class C controlled drugs*. The legislation governing this was enacted in 1975. The Law Commission reported on this in 2011. It said the Misuse of Drugs Act 1975 failed to respond appropriately to the health and addiction issues that often underpin drug use.

The Government recently introduced an amendment bill to deal with medicinal cannabis use, and that is currently before the Health select committee. And the confidence and supply agreement between the Labour Party and the Green Party provides for a referendum on the wider issue of cannabis law reform, probably in 2020.

These are big issues, and they deserve a thorough, and decent, airing.

## **Punishment**

I turn now to *punishment* of crime.

And here I venture to suggest that something has gone badly wrong in New Zealand. The short point is that we have far too many people in prisons.

I make four points.

### *Increased prison population*

First, we are sending more and more people to prison. In 2015 the Ministry of Justice estimated a prison population of 10,000 in 10 years' time. That increase took just two years. Last week the prison population was 10,700.

Fifteen years ago it was less than 6,000.

And all this at a time when crime rates generally are declining.

What is especially worrying is the increase in *remand* prisoners. That is, for the most part, those who are awaiting trial, and are supposed therefore to enjoy the presumption of innocence.

In New Zealand, 28.5 per cent of our prison population is on remand. In England and Wales it is 11.4 per cent. The number now — almost 3,000 remand prisoners in New Zealand — compares to less than 750 in 2000.

The reasons for the increase are three. First, bail law amendments in 2013 placed a heavier onus on bail applicants. Secondly, after some highly publicised slayings by persons on bail, the police and the judiciary became considerably more bail-averse. A spike in remand prisoner numbers followed these two events.

And thirdly, of course, we lack adequate facilities apart from prisons to remand defendants to. So even if we don't want to send them to a prison, there isn't much option if they need to be remanded in some form of custody.

#### *Increased sentence lengths*

The second reason the prison population is growing is because of increased sentence lengths. Some of this is legislative increases, and some of it is a change in judicial attitude to sentences.

A decade ago the average New Zealand prison sentence length was 15 months. Today it is 18 months. The increase has been steady across the decade.

In the 1980s the effective length of a life sentence for murder was about nine years. By 2013 it was 16.5 years.

But the question you have to ask yourself, however, is whether increased sentence lengths do any good. Because it is costing taxpayers \$100,000 per year per prisoner to keep them there. So you'd want to be sure that it was worth that wouldn't you?

But I am yet to see any convincing evidence that sentence length deters either the specific offender or the criminal (or potentially criminal) population generally.

To the contrary, the evidence is that incarceration increases recidivism. In part because prisons associate inmates with criminals, and in part because it disables them from going straight, the longer they spend inside. Extra sentence years keep prisoners off the street, but they increase the level of recidivism on release.

Catherine the Great recognised this 250 years ago. In her Letter to the Legislative Commission of 1767 she said that “experience shows that the frequent use of severe punishment has never rendered a people better”.

An English case from 1973 illustrates the point well: *R v Storey*. In that case a young man was sentenced to 20 years’ imprisonment for his role in the violent robbery of a drunken man in Birmingham. The trial was well-publicised and the sentence was called an “exemplary” one.

But researchers plotting the rate of reported robberies in Birmingham and two other locations in the months before and after that “exemplary” sentence was passed noted the robbery rate was unaffected by it. Indeed, in Birmingham the robbery rate began *increasing* before trial — and continued to do so for some weeks, before eventually peaking.

It is not prison sentences that deter. It is detection and capture.

Catherine the Great got that right too in 1767 when she said, “[t]he most certain curb upon crimes is not the severity of the punishment but the absolute conviction in the people that the delinquents inevitably will be punished.”

So DNA sampling and improved policing techniques are far more effective deterrence than long sentences, as the Scandinavian experience demonstrates.

*New Zealand is out of step*

Thirdly, both prison population and increased sentence lengths put us seriously out of steps with like-minded nations whose value systems we broadly share.

We currently imprison 217 people per 100,000 members of the population. The OECD average is 127.

Here are some other countries that we share common values with: Australia, imprisons 167 people per 100,000. England and Wales, 143. Canada, 114. Norway, 74. Denmark, 59. Sweden, 57. Finland, 55.

New Zealand hasn't seen numbers like the Scandinavian countries since 1965.

I mentioned that our average prison sentence length is now 18 months. In Norway, it is eight months.

We really have to ask ourselves how it is our numbers are so badly out of step with like-minded nations. How are we so different from them?

How have we changed since 1965 — when we were in step with the Scandinavian states?

And are we better for going down a different path?

At the same time, we might note, New Zealand is rated as the second safest place on Earth according to the Global Peace Index.

You might say, perhaps, that that is because we have locked up our criminals.

Well, the safest nation turns out to be Iceland. And it locks up just 45 in 100,000 — a fifth New Zealand's incarceration rate.

### *Whom we send to prison*

Fourthly, many of the people we are sending to prison arguably have no place being there. Or should be somewhere else.

I have already talked about *remand prisoners*. Those awaiting trial are presumed innocent, but the allowance made for that is simply that they are segregated from other

prisoners in a general prison. It states the obvious to say that being in jail is not the best place to prepare your trial defence. The courts often receive serious complaints from defence counsel about access and trial preparation problems with clients remanded in custody.

Then there are those with *mental health issues or substance addictions*. Roughly 60 per cent of sentenced prisoners have mental health issues, and almost 70 per cent have mental health or addiction issues.

This should hardly be a surprise. As we deinstitutionalised mental health treatment, we seem to have reinstitutionalised those who need it in prisons instead. Are prisons a good place for mental health treatment? You know the answer to that question.

And then there is the *ethnicity* breakdown of prisoners. Māori are 15 per cent of the population, but make up 57 per cent of the male prison population and an extraordinary 64 per cent of the female prison population.

In another startling statistic I heard last week, based on the Otago long-run study, of babies born in 1978, one quarter will now have a criminal conviction. But if we just look at the Māori and Pasifika study subjects, it is double that: one half have a criminal conviction.

These statistics, which reflect the misdistribution of economic and educational poverty in this country, are a sorry stain upon our national character.

### **What we can do about it**

It is time for a reassessment of the extent to which we imprison our people. In particular, Māori. There are things we can do.

And it has been done before, in another country. Although a more homogeneous country than ours, it is one with which we share significant values.

That country is Finland.

In the 1950s Finland had incarceration rates similar to ours today. In fact, immediately post-war, they exceeded an incarceration rate of 250 per 100,000 citizens.

Finland appreciated it was out of step with its Nordic neighbours, and that that state of affairs could not continue. It reconsidered the aims of its criminal justice policies. It looked at the issue, with pure Nordic logic, in terms of cost benefit analyses.

Finland looks at its criminal justice policy through a dual formula: minimisation (of both cost and the harmful effects of crime and crime control) and fair distribution (of those costs among the offender, society and victim).

Apart from Iceland, it now has the lowest incarceration rate amongst Nordic states: 55 per 100,000 population, a quarter of New Zealand's incarceration rate.

How has it done this? Some of the things it has done are included in the four suggestions I make to you today to reduce New Zealand's excessive incarceration rate.

#### *Shorter sentence lengths*

First, a significant aspect of the Finnish reform starting in the mid-1960s was the reduction of sentence lengths.

For instance, in 1950 the average length of sentences of imprisonment for theft was 12 months. By 1971 it was seven months, and by 1991 three months. Evidence also suggests that shorter sentence lengths tend to reduce recidivism — a point I have made earlier.

In Norway the average prison sentence is eight months. In New Zealand it is 18 months, and climbing (up from 15 months 10 years ago).

We need to ask ourselves a hard question here: what has changed about New Zealand, or criminal offending in New Zealand, that justifies this increase?

And, most importantly, what good is it doing? As I said before, the empirical evidence suggests the contrary is the case.

Long sentences do not specifically or generally deter, they postpone effective therapeutic interventions that might correct antisocial behaviour (until they are too late), they stifle realistic prospects of effective rehabilitation into society and (as a result) they increase recidivism.

### *Alternative sentences*

Secondly, we need to look at alternative sentences and interventions.

Scandinavian penal systems also favour early therapeutic interventions — sometimes as an alternative to a custodial sentence. For instance, drink driving, which is also an issue in that part of the world, can be dealt with either penally or (if the offender wishes and agrees) by treatment. Denmark introduced that policy in 1990, extended it to drug offenders in 1995 and to non-violent sex offenders in 1997. In 2000, it introduced the option of a conditional (that is, suspended) sentence combined with community service or alcohol treatment for drunk drivers.

Community service is the cornerstone of Scandinavian penal policy. It is beneficial for the community, and is beneficial to offenders.

Assistance with and completion of *education* is also fundamental. Education is empirically demonstrated to meaningfully reduce recidivism. But research suggests it is best focused on completion of general educational programmes (that is, school and university) as opposed to offence or offender-specific courses. Persuasive evidence exists that offenders who complete post-secondary education programmes are considerably less prone to recidivism than those who do not.

It is notable that one of the reasons that Sir David Carruthers, former Head of the Independent Police Conduct Authority and Parole Board, identified for the fall in crime rate was the reduced degree of suspension or exclusion of secondary school students from schooling.

Another point. In New Zealand, where an offender is not dangerous, and a suitable address is available, he or she will be eligible for *home detention* if their sentence is two years or less. Two things have always troubled me about that.

First, there is the arbitrary barrier of the two-year sentence. Recognising the therapeutic and fiscal advantages of home detention, judges sometimes feel compelled to engage in distortive mathematics to bring a sentence down to two years.

In the United Kingdom, home detention is available for a sentence of up to four years. In Norway, there is no relevant limit.

We should think about increasing the limit — or having none at all for home detention. But there is another thing. We should also provide that, with good behaviour and community service, the length of sentence may be rebated, and reduced retrospectively. What might provisionally be a four-year sentence, could, then, ultimately become only say 18 months.

Secondly, what often stands in the way of a home detention sentence is the absence of a suitable address. The offender has no home, or the victim lives in it, or no one suitable will take him in.

So here we have someone who is not dangerous, who is otherwise eligible for home detention — and simply because we haven't thought up any alternatives to prisons, he or she has to go and spend time in one.

That really is reprehensible discrimination against the disadvantaged, as well as being a serious failure of imagination on society's part.

#### *Alternative institutions to prisons*

So that leads me to my third point. New Zealand has, basically, a binary corrections system: prisons and community (that is, home) detention. There are other and better alternatives. Bearing in mind a prisoner costs us \$100,000 a year to keep, there have to be better alternatives.

The first thing to ask ourselves is what a prison should be. In Scandinavia many prisons are open institutions.

That is, they fill an important gap between home detention and prisons. They are places which prisoners (the ones who are not dangerous) must attend. But they are relatively humane institutions. No walls, watch towers or barbed wire. In some, no guards. Liberty is significantly restrained, but there is some semblance of normality. Interaction with the community remains possible; some measure of employment remains possible. It is a prison, but not as we know it.

These are the places we need for home detention-eligible offenders who have no suitable address. Where they can stay — at considerably less cost than a prison — be supervised (and electronically monitored if necessary) and remain connected to the community they eventually will return to.

### *Judging in the community*

Fourthly and finally, we need to think about how we go about judging: who does it, in what context and with what level of community engagement.

There are two models.

There is the traditional city District Court, with large lists and judges who are often remote from that community. Indeed some of them don't even live there, but have been rostered in temporarily from other centres.

In ordinary city list courts, a judge may sentence up to 15 prisoners daily in police sentencing lists (and sometimes more). The Judge will receive the file, ahead of time, but in some instances only on the morning of sentencing. Sentencing does not start until 11.45 — giving some preparation time. There are no written submissions typically, so the judge simply has the court file, summary of facts, probation report (a document which is frequently formulaic and rushed), victim impact statements and the like.

There is little opportunity for community engagement. Some people call this a “sausage factory” and the analogy is not inapt. Rushed, remote justice can contribute to undue incarceration rates.

I am firmly of the view that justice is best served, and the best sentencing takes place, with locally-based judges and with strong community involvement.

I live in the City of Porirua. In Porirua Judges Walker and Kelly (and more recently Judge Johnson) have engaged community organisations in the sentencing process — so the District Court there sits as a court of its community. Senior iwi and Pasifika community members attend court and are engaged in the process. It has been on any view a significant success, because the Judges get to know the people they are sentencing and what community-based alternatives exist to imprisonment.

And the defendants know and respect the Judges. Judge Jan Kelly was walking through the North City Plaza when a young man she had sentenced came over, quite respectfully, and said, “G’day Miss. I see you’ve got your reds on”.

In the Youth Court there are more specialised engagements such as the Rangataahi Courts, where youth offenders are sentenced on the marae, and there is strong whanau, iwi and community engagement in their sentencing.

That is a great start but it is a shame that these more community focused engagements are limited to youth offenders (recognising that 17 year olds will be included as from 2019). But, again, that is an arbitrary age. Experience tells us that the mental immaturity and educational disadvantage affects young people well into their early 20s. So why stop at 17?

The Porirua District Court is not limited in that way. Another community-focused Court is the Matariki Court, a District Court that strongly engages iwi in relation to Māori offenders. But it sits only in Kaikohe, in Northland.

These community-focused courts along with new court initiatives that address the underlying causes of offending — the Alcohol and Drug Treatment Court (in Auckland) and the Court of New Beginnings (also in Auckland) which deal with homeless people — are the start of a better way of judging offenders. Used properly, they will reduce the number of offenders the courts have to deal with.

Is it really too much to hope for to think that before any person is sentenced to prison there will be a separate-solutions hearing to consider underlying offending causes, therapeutic needs, and alternatives to imprisonment?

### **Conclusion**

Make no mistake. Prisons are good places for bad people. But they are not good places for people who might yet be good. Those people who have a chance of returning to the community as decent citizens.

Prisons should be places for violent people who are at risk of reoffending violently. It is doubtful that anyone else has any business being behind prison walls.

Where crimes are economic or property-based, we need a different sort of custodial response including the use of open prison institutions, community and home detention, combined with the undertaking of community service that benefits the community (including victims) and ultimately the offender him or herself.

And where the underlying causes of crime are mental health or substance-abuse based, we are fooling ourselves if we think prisons are the best place to resolve those issues.

I look forward to discussing these challenges with you. Thank you very much indeed for listening to me speak this morning, and for continued support for Victim Support, *Manaaki Tāngata*.

*No reira tena koutou, tena koutou, kiora tatou katoa.*