*Prison Policy: Where To Now?**

Introduction

This commentary will start with two general points concerning the political and financial context of penal reform in New South Wales. The bulk of the commentary will then address the Australian Labor Party's Corrections Policy for the 1995 New South Wales state election.

I appreciate what the Attorney-General John Hannaford[1] said about keeping the penal debate separate from the more general law and order debate and there are clear advantages in doing so. However, it is not possible to keep them entirely separate, for the general law and order climate affects policing and sentencing practices which in turn affect imprisonment rates.

I think one thing we can agree on is that there is clearly no mandate for the more extreme punitive sentencing policies of either party as promoted during the election campaign. The relatively sober and constructive tenor of the debate tonight is a welcome contrast to the unseemly "bidding war" we saw during the campaign.

The political context of penal reform in New South Wales

> Clearly with the expansion of all forms of punishment in NSW, what we are seeing is not a crime wave but a punishment wave.[2]

The 1994 Report of the Inter Church Steering Committee from which this quotation is drawn was a follow-up to the Christian Churches major social justice statement on the nation's prison system, *Prison: The Last Resort,* published in 1988. The update chronicles the dramatic changes in New South Wales since 1988, the massive increase in prison numbers from 4000 to 6500, the increase in Aboriginal people in prison of 100 per cent since 1987, the lack of action on the specific problems surrounding women in prison, the poor support services for families and friends visiting prisons, the "regressive" philosophy of the *Sentencing Act* 1989 and the use of community sentencing options not as alternatives to prison but as alternatives to fines or probation.

The view that New South Wales is in the grip of a punishment wave rather than a crime wave is held not only by the Churches. Mainstream economist Ross Gittins in *The Sydney Morning Herald* penned a piece entitled "The Shocking Truth of Falling Crime" based on the latest Bureau of Statistics Crime Victim Survey results. As he points out, "the media and Opposition politicians (which is all of them at one time or another) have worked tirelessly over many years to convey the impression that Australia is experiencing a rising tide of crime."[3]

Despite this dismal picture it is important to note that there have been improvements in the New South Wales prison system since the disastrous Yabsley years and his attempt "to put the value back into punishment".[4] It is a matter of opinion whether what the Attorney-

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* Paper delivered at a seminar organised by the Institute of Criminology held on 29 March 1995 at New South Wales Parliament House, Macquarie Street, Sydney.

1 At the time of the seminar, the New South Wales election results had not been determined.

2 Report of the Inter Church Steering Committee on Prison Reform, *Prison — Not Yet the Last Resort: A Review of the NSW System,* March (1994) at 2.

3 Gittens, R, "The Shocking Truth of Falling Crime" *The Sydney Morning Herald* (*SMH*) 4 May 1994.

4 Yabsley, M, in O'Neill, J, "The Punishment Salesman", *The Independent Monthly* October 1990. For a

General called "the quiet revolution" has mainly been about remedying the damage done under Yabsley or has moved beyond that into novel improvements as the Attorney-General suggests. Whichever it is, the government and the Corrective Services Department deserve some credit for the move away from the Yabsley legacy. It is to be hoped that if the ALP win government in their own right, John Hannaford does not then lead the Liberal Opposition back into Yabsleyism, a temptation not altogether avoided by the ALP in opposition, it is sad to say.

It is true that governments can be embarrassed over issues such as horrendous crimes, prison escapes, apparently lenient sentences and so on. There are always going to be people who have committed heinous offences after being released from prison. Short term publicity can be achieved by opposition politicians prepared to kick the law and order can in an opportunist way, pandering to media requirements for expressions of extreme opinion and instant outrage. But an opposition that holds itself out as a serious alternative government must be able to think itself into the position of responsibility in relation to criminal justice issues, beyond point scoring and posturing. There is little point in simply condemning Yabsley-speak in government and then mouthing it in opposition, hoping to simply reverse the pattern after an election victory. The point of government is more than simply being there, it is to change things for the better In the criminal justice and penal areas in particular, the ability to achieve reforms is closely linked to prevailing attitudes and sensibilities in the community at large.

It is in the interests of a genuine future government to prepare the most favourable climate of public opinion for a reduction in the use of imprisonment in New South Wales. The level of imprisonment is double that of Victoria's, at huge extra financial cost and without any definable benefit in the way of extra community safety. Aboriginal imprisonment has doubled over the life of the Coalition government. These are important political issues that can not be dodged or postponed. The ground for a future ALP government reduction in the New South Wales imprisonment rate, the Aboriginal imprisonment rate, a rethink of the *Sentencing Act* 1989 and an improvement in prison conditions should have been clearly laid in opposition. This is not achieved by attacking work release programs or the reintroduction of cautioning for juvenile car thieves, or stereotyping young people with "baseball caps on backwards" as identikit juvenile delinquents, or coming up with a "one strike and you're in" policy in relation to the category "horrific crime", 10 days before the election in order to trump the government's only slightly less ludicrous "three strikes and you're out" policy.[5]

But because the task is difficult does not mean it is impossible. Even such a mildly reformist government as the Goss ALP government in Queensland has delivered significant

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review of the Yabsley period in NSW corrections see Brown, D, "The State of the Prisons in NSW under the Greiner Government: Definitions of Value" *Journal for Social Justice Studies, Vol 4 Politics, Prisons and Punishment* (1991) at 27–60.

5 For a range of critical media commentary concerning the bidding war in the lead-up to the NSW election see Totaro, P, "ALP Drug Sentence Plan Under Attack", *SMH* 22 February 1995; Dusevic, T, "Statistics Debunk Crime Wave Claims" *The Australian* 4–5 March 1995; Moore, M, "Blood On the Tracks: Low Life Shows Up Both Sides of Politics" *SMH* 3 March 1995; Zdenkowski, G, "Due Process Pushed Aside in the Rush to Be Seen as Tough on Law and Order" *SMH* 2 March 1995; Coultan, M, "How Politicians Make Crime Pay" *SMH* 10 March 1995; McCarthy, P, "US Counts Cost of 'Three-Strikes' Jail Terms" *SMH* 10 March 1995; Moore, M, "The Much Lauded Policy No One Understands" *SMH* 11 March 1995; Editorial, "Sentencing Is No Game" *SMH* 11 March 1995, Editorial, "Crime Debate in NSW Out of Order" *Aust* 11–12 March 1995; Smark, P, "Whoever Wins, the Judges Are in for a Punishing Time" *SMH* 15 March 1995; Nicholson, J and Anderson, T, "Beware the Lynch Mobs" *SMH* 16 March 1995.

reforms in the penal system through a move to community corrections and has reduced the imprisonment rate at a time when New South Wales' is soaring. The Victorian Labor government introduced significant reforms to the sentencing system with a major rationalisation of all penalties and sentencing provisions into one Act,[6] even if it has since been amended by the Kennett government which seems intent on pursuing the costly and disastrous New South Wales path.[7]

Nor is this novel. Recent research by John Walker shows that

> if we plot rates of imprisonment in Australia over the past fifty years, we find that coalition governments in the major states (NSW, VIC, Qld) and in federal power in Canberra ... are strongly associated with high prison populations while Labor governments are associated with lower rates.[8]

Financial context

There is a tendency in both popular and specialist discussion of sentencing and penality to assume that the financial and administrative infrastructure through which specific forms of punishment are actually delivered will be provided as a matter of course, by some iron law of necessity. Certainly it is generally desirable that this is the case, although there are certain attractions to the Scandinavian notion of "Sorry — we are full just now — we will let you know when we can fit you in". My point here is not that forms of punishment should not be properly resourced but that it should be recognised that such resourcing is an act of allocation of public resources, similar to the resourcing of schools and hospitals and roads and railways. Public coffers are not a bottomless pit. Government has other functions and responsibilities. It is not necessarily the case that public resources should be poured into the law and order sector and prisons just because certain politicians think political capital can be made out of appearing to be tough on crime. There comes a point when we have to ask, as we do of other public resources, just how much punishment we can afford. These questions are even more important to ask when it is difficult to demonstrate any connection between imprisonment and crime rates.

The point which follows from this is that criminal justice agencies should be subjected to some of the criteria of effectiveness and efficiency so popular in evaluating the performance of other forms of social provision. The tendency is for this principle to be accepted in relation to the so-called "soft" end of the criminal justice system, such as legal aid, and various welfare and social programs in prisons. But when it comes to the provision of more prisons, the imprisonment rate is treated as if it were like the barometer, beyond human agency, the prognosis Michael Yabsley's "record highs". This was the approach adopted in the Greiner government's blueprint, the Curran Report.[9]

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6 *Sentencing Act* 1991 (Vic).

7 *Sentencing (Amendment) Act* 1993 (Vic).

8 Walker, J, "User-friendly Prisoner Forecasting" (Jan/Feb 1994) *Criminology Australia* at 21.

9 *Report on the State's Finances (Commission of Audit) 1988* (generally known as the Curran Report) at 58. For a brief discussion of the Curran Report and a lengthier one of New Right law and order policies, see: Hogg, R and Brown, D, "Violence, Public Policy and Politics in Australia", in Taylor, I (ed), *The Social Effects of Free Market Policies* (1990).

What is to be done? Comments on the ALP corrections policy

Sentencing

The policy of referring the sentencing laws to the NSW Law Reform Commission with a view to rationalising the sentencing legislation into a single Act, is a sensible one. The current *Sentencing Act* 1989, despite its title, covers only sentences of imprisonment and in a derivative way parole. As well as being highly misleading for a piece of legislation promoted and often referred to as the "truth in sentencing Act", this focus on imprisonment feeds into the perception that any form of sentencing other than imprisonment is somehow a soft option and does not really count as a sanction.[10] This is exactly the wrong message to give to sentencers and the public at large. One of the main challenges facing sentencing reform is the revalorisation of non-custodial penalties as significant forms of imposition in their own right and not "let-offs" or ways of avoiding imprisonment.

As well as gathering all sentencing provisions in one Act, thereby promoting accessibility, giving a true representation of the range of sentencing options and decentring imprisonment from its "only real penalty" status, there are other potential benefits of a sentencing rationalisation.[11] One is the opportunity provided for a reconsideration of current maximum penalties across the wide range of criminal offences. Maximum penalties have been set over the last two centuries in an ad hoc way with little overall sense of comparative relativities, for example between offences of violence against the person as compared to property offences. Consider, for example, the differences between the maximums available for simple assault (two years imprisonment) compared to larceny (five years imprisonment). The Victorian *Sentencing Act* 1991, partly based on the comprehensive review carried out by the Sentencing Committee, provides a good model for a gradation of penalty structures into sentencing bands. Other benefits are the switch to sentences in months and the standardisation of penalty correlations between imprisonment, hours of community service, fines and so on.

The following table and paragraph from Arie Freiberg's informative paper, "Sentencing Reform in Victoria: A Case Study", provides a useful summary of the Victorian changes.

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10 On the "truth" claims that accompanied the *Sentencing Act* 1989 see Brown, D, "Battles Around Truth: A Commentary on the *Sentencing Act* 1989" (1992) 3 *Curr Iss Crim Just* 329; Chan, J, "The New South Wales Sentencing Act 1989: Where Does Truth Lie?" (1990) *Crim LJ* 249.

11 See Sentencing Reform Coalition, NSW, "Balance in Sentencing: Towards a Comprehensive Sentencing Act in NSW" (1993); Griffith, G, "Sentencing Guidelines and Judicial Discretion: A Review of the Current Debate", Briefing Note (August 1994), NSW Parliamentary Library, Attorney-General's Department NSW, Sentencing Review (June 1994).

Table 1: Victorian Penalty Scale, *Sentencing Act* 1991, section 109[12]

Level	Max. prison term	Max. fine Penalty Units	Community based order Max. hrs unpaid community work
1	Life	—	—
2	240 months	2400	500 over 24 months
3	180 months	1800	500 over 24 months
4	150 months	1500	500 over 24 months
5	120 months	1200	500 over 24 months
6	90 months	900	500 over 24 months
7	60 months	600	500 over 24 months
8	36 months	360	
9	24 months	240	375 over 18 months
10	12 months	120	250 over 12 months
11	6 months	60	125 over 6 months
12	—	10	50 over 3 months
13	—	5	—
14	—	1	—

There are a number of notable features of the scale. First, the penalty scale is expressed in terms of levels rather than the traditional prescription of a specific maximum penalty for each individual offence. Second, the scale is used to distinguish indictable from summary offences. Offences punishable by levels 1 to 8 inclusive are indictable offences; offences from levels 5 to 8 inclusive are indictable offences triable summarily while those at levels 9 to 14 are summary offences. Third, the sanction unit for imprisonment is expressed in terms of months rather than years. This is intended to smooth out the range of maxima and it made use of psychological evidence on the effect of "least noticeable differences" produced by Fitzmaurice and Pease which suggested that sentencers might be more discriminating in the use of imprisonment when the sanction unit was smaller. It also set up a connection between imprisonment and fine scales. The fine scale in Victoria is expressed in terms of "penalty units" each of $100. The *Sentencing Act* 1991 (Vic) equates one month of imprisonment with 10 penalty units ($1000) and has standardised the fine/imprisonment, imprisonment/fine correlations, which had previously showed no consistency at all. Fourth, the general level of fines has been increased considerably as a consequence of the policy both to enhance the credibility of the fine as an alternative sanction and to reinforce the policy explicit in the Act that imprisonment is a sanction of last resort. Finally, the application of the scale to the offences in the *Crimes Act* 1958 (Vic) attempted to rationalise the offence/penalty relationship. Unlike the Victorian Sentencing Committee's massive reductions, the re-allocations showed a wide range of changes. Thirty-one offences had their maxima increased, 59 were decreased, and for the majority of offences, there was no change at all. Overall, the general level of maxima has been reduced, but this is accounted for by the reduction in the large number of maxima which were never actually used. Many of the changes in fact reflected the current judicial sentencing practices and brought the statutory maxima more in line with the prevailing "tariffs". In particular,

12 Freiberg, A, "Sentencing Reform in Victoria: A Case Study" in Clarkson, C and Morgan, R (eds), *The Politics of Sentencing Reform* (1995).

there were major reductions in offences against property and some increases in respect of offences against the person.[13]

Two other sentencing aspects of the ALP policy should also be included in this reference to the Law Reform Commission. The first, the proposal for a mandatory life penalty for "horrific crimes", the second the proposal to give five judicial officers responsibility for reviewing the manner in which a sentence has been served. Despite shadow Attorney-General Jeff Shaw QC's best efforts to explain the category of "horrific crime" at the ALP law and order policy release, it was apparent that such a populist term does not translate with any degree of rationality into current legal categories, quite apart from its desirability as a policy. This proposal had all the hallmarks of policy drafted on the back of an envelope in order to trump the government's "three strikes and you're out" proposal for a resurrection of the Habitual Offenders legislation. It was an ill-considered and irrational proposal which should be carefully considered by the NSW Law Reform Commission.

There is more merit to the second proposal for judicial scrutiny of the way sentences are served, but this too requires careful consideration. There are potential benefits, such as drawing the judiciary into closer scrutiny of, and thus some responsibility for, the conditions under which sentences are served. On the other hand there are problems inherent in holding prisoners responsible for the failure of prison authorities to provide appropriate conditions, and of prosecution authorities to manipulate prisoners' desires for better conditions or privileged treatment. So this proposal needs to be thought through much more carefully.

Home detention

In my view this is largely a gimmick. If we are to have it, as a "front end" rather than a "back-end" measure, then it should be evaluated on its own terms rather than as a mechanism for reducing the prison population, that is as an alternative to imprisonment. If there are arguments as to its suitability for certain categories of offender, such as, in the ALP policy, "mentally disabled, parents with dependent children or the aged", then it should be considered on its own terms, not because it might reduce the prison population, for the evidence is that it won't.

Post-release services

The ALP policy promises a 50 per cent increase in post-release services from $500 000 to $750 000. This is the right direction, but still a minute proportion of the total corrective services budget for such an important area. A much bigger proportion of funds should be provided. In addition, much more recognition and material support is required for families and friends of prisoners. This is a group we might call forgotten political subjects in that they receive very little attention or support, especially in comparison with the generic

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13 See also Report of the Victorian Sentencing Committee, *Sentencing* Vol 1 (1988) Australian Law Reform Commission, Report No 44 *Sentencing* (1988); Fox, R G, "Order out of Chaos: Victoria's New Maximum Penalty Structure" (1991) 17 *Monash ULR* 106; Sentencing C Task Force, *Review of Statutory Maximum Penalties: Report to the Attorney-General,* 1989; Sallmann, P, "In Search of the Holy Grail of Sentencing: An Overview of Some Recent Trends and Developments", 1 *J Judical Administration* 125; Douglas, R, "Rationalising Sentencing: The Victorian Sentencing Committee's Report" (1988) 12 *Crim LJ* 327; Fox, R and Freiberg, A, "Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties" (1990) 23 *ANZJ Crim* 165; Fox, R G, "Legislation Comment: Victoria Turns to the Right in Sentencing Reform: *The Sentencing (Amendment) Act* 1993 (Vic)" (1993) 17 *Crim LJ* 394.

category of victims, of which we heard much in the election campaign, most of it in order to justify an increased punitiveness in sentencing. Families of prisoners experience many of the same problems and needs as victims of crime. Two positive signs here have been the publication by the Sydney Institute of Criminology in its excellent monograph series of Ann Aungles' *The Prison and the Home* (1994), and the collaboration between the Department of Corrective Services and the group Justice Action over a visitor survey. The survey is significant not only for its results and the extent to which they might be used to promote a new deal for visitors, but also for the example of how groups traditionally seen as totally opposed might usefully combine on specific projects. Both the Department and Justice Action deserve congratulations on this development.

Staffing levels

The ALP policy promises a review of staffing levels and provides figures which show that New South Wales staffing levels have fallen from 2.03 inmates per prison officer in 1988 when the Coalition took office to 2.62 in 1994, the lowest in Australia. There are others much better qualified than me to comment on the appropriateness of different staffing ratios and I do not claim to be particularly knowledgable here. I would, however, like to express a little scepticism about staffing ratios on the basis that traditionally such formulas have been strongly tied to a security mentality. This is probably naive in the extreme, but for anyone who has been a school teacher or an academic 2.62 prisoners per staff member doesn't sound too bad. Admittedly we do not detain students 24 hours a day and they are not (mostly) spending their time trying to escape.

But if we are to have an increase in staff, let's have it in the education and programs area. As the Corrective Services Teachers Association has pointed out, there is not one full-time teacher in the prison system (as against education officers and part-time teachers on short term contracts). Under Yabsley industry was promoted over education, one suspects for its disciplinary qualities and effects. While that has changed somewhat one still senses a suspicion of education and a preference for industry, on a "keeping idle hands occupied" basis. This mentality needs to be changed and the prisons turned into places where a range of different occupational groupings, teachers, nurses, health workers, program officers, vocational training officers, industry trainers, as well as the more traditional security officers, are coming and going at all times, prisons as a hive of activity with a range of organisations, unions, other government departments, non-government agencies, various professional bodies, all having an interest in penal practice.

Mulawa

It was heartening to hear from Bernadette O'Connor from the NSW Women's Unit about some of the promising developments in women's imprisonment. There are clearly a range of very specific issues here. Still the mail one generally gets paints a pretty dismal picture of Mulawa and it is worth recalling the analysis of the problems and the prescriptions for reform that were spelt out in the *Women in Prison Task Force Report* in 1985, many of which it seems were not implemented or if they were, were later whittled back under Yabsley. Surely it is now time to really try to confront the specific problems at Mulawa.

Transfers

Under the heading "Deaths in Prison" there is a one-line reference to the need to "reduce the number of transfers between prisons". I would like to draw attention to this issue as I think it is a very important one. The Attorney-General talked of culture change, well here is an area crying out for a culture change. The tradition of disciplinary transfers or "shanghais" goes back to colonisation, indeed transportation itself can be seen as a form of

shanghai. The practice is pervasive with scores of thousands of transfers in New South Wales prisons every year. These can not possibly all be justified on genuine security or protection grounds. The disciplinary transfer is mainly being used as a management tool, and what it reveals about management techniques is the reign of arbitrariness, the lack of accountability and the mentality of dealing with problems by sending prisoners elsewhere. This has serious effects in terms of the proper provision of services such as education and health, as well as in some instances, actually putting prisoners' lives at risk when medical files and information are not conveyed along with prisoners. It also operates to create an atmosphere of impermanence and has a profound effect on prisoners' motivation to take part in programs. A very significant reduction in the number of transfers should be a major aim under a new government.

Privatisation

The ALP policy states that a Carr Labor government "will take a much more critical view of private prisons". This is entirely appropriate. I have to say that I was less critical of privatisation than many in the penal reform lobby, for reasons set out elsewhere.[14] While it is possible to argue cogently against privatisation as a matter of foundational principle, for example that private corporations should not make a profit from punishment, that penality is inherently a state function, I tended to prefer more pragmatic arguments which evaluated the outcome of penal practice not by its ownership but by the openness, accountability, and form of its actual operations and delivery of services. There are clearly a number of dangers in privatisation: powerful corporations developing an economic and political interest in maintaining high imprisonment rates, potential conflicts of interest, attacks on union's wages and conditions, accountability problems, and the development of a two-tier system, with private prisons taking predominantly fraud and white collar offenders. However, it seemed to me after two decades arguing against the way New South Wales prisons had been run by the state that it was at least possible for a privately run institution to provide better conditions and programs which could in turn be used to put pressure on the public system to lift its game. The evidence which has emerged thus far from Junee[15] is that this has not happened. Any further experiments with penal privatisation should be suspended pending a much more rigorous assessment of the Junee experience.

Institutional separation

This is not a matter mentioned in the ALP policy but one I want to add which I think is important. That is that there should be clear lines of separation and demarcation between correctional institutions and policing and prosecutorial organisations. For a range of reasons — the rise of the Internal Intelligence Unit in the 1980s, the appointment of retired police officers to senior corrections positions under Minister Yabsley, the emergence of new prosecutorial agencies and commissions with pro-active and targeting policies such as the NCA, the State Drug Crimes Commission et cetera — there has been a serious lack of institutional separation.[16] It is not appropriate for detectives from policing and prosecutorial agencies to have the run of the prisons. Prisons are not or should not be evidence re-

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14 Brown, D, "The Prison Sell" July *1992 Aust Left R* 32. See also "Special Edition, Privatising Prisons" (Autumn 1994) *Socio-Legal Bull* 12.

15 New South Wales' first privately operated prison.

16 Brown, D and Duffy, B, "Privatising Police Verbals: The Growth Industry in Prison Informants" in Carrington et al (eds), *Travesty: Miscarriages of Justice* (1991) at 181–231.

cruitment and assembly areas. The movement of police in the prisons should be meticulously monitored and recorded. Prisoners should be protected by the Corrective Services Department from manipulation by law enforcement authorities.

An Inspector-General of Prisons

The ALP policy includes a commitment to establishing an Inspector-General of Prisons to "fight corruption, inefficiency and violence in the prisons" and generally increase forms of scrutiny and accountability. This has much merit. Michael Yabsley started his assault on New South Wales prisons with a systematic attack on various accountability mechanisms. He abolished the Corrective Services Commission and the Corrective Services Advisory Council, purged welfare and community representatives from key boards, attempted to remove the right of appeal from the Visting Justice Courts to the NSW District Court, sacked certain conscientious prison visitors, banned certain internal magazines, sacked critics in the department and so on.[17] Since this time the door has been propped open again, but not nearly far enough. Prisons and corrections more generally need to be opened up to the flow of information and personnel. The proposal for an Inspector-General seems like a useful way to reinvigorate the range of accountability mechanisms and practices.

Conclusion

Finally, to return to my starting point, I would argue that the closeness of the election result indicates that neither major party can claim a mandate for some of the more extreme law and order policies which were floated in the last few weeks of the election campaign with little warning, little detail and little opportunity for discussion. If law and order is as serious an issue as both sides argued then policies must also be approached seriously, with properly formulated proposals, thought through in full detail and subjected to an adequate period of public debate and consideration. Impractical and counter-productive policy gimmicks floated for rhetorical purposes diminish the seriousness of issues. People become more cynical and less well informed about the actual operation of the existing system, all manner of unreasonable and in some cases dangerous expectations are unleased. This is particularly the case with the so called "three strikes and you're out" proposal and the ALP "horrific crimes" response for mandatory life sentences for a range of offences.

By way of contrast most of the corrections policies of both parties, the government's move away from the Yabsley era in what the Attorney-General called the "quiet revolution" and the ALP's generally constructive Corrections Policy, some aspects of which I have commented on here, are responsible contributions. Let us hope that this more sensible and serious approach to corrections policy, on both sides, can be maintained and extended.

David Brown
Associate Professor, Faculty of Law, University of New South Wales

17 See Brown, D, above n14 at 32–8.