

Governing Crime at a Distance: Spatiality, Law and Justice

Russell Hogg*

Abstract

Legal ideology depicts law as a spatially invariant practice. There is mounting evidence, however, of gross geographical disparities in the administration of justice in Australia. This article reviews this evidence as it relates to one body of law and practice in one Australian jurisdiction—namely, sentencing and punishment in New South Wales. It considers some of the possible implications of the failure to provide effective justice and governance infrastructures in some rural and remote areas. The purpose is not so much to indict the justice system for failing to live up to its promise of equal treatment, as to stress the need both to take spatiality seriously in relation to law, justice and governance and to consider the practical challenges it poses under present conditions in Australia.

Introduction

A cardinal (mostly taken for granted) feature of the modern state system, which developed in western Europe and has been emulated or imposed globally, is the claim made by states to sovereign (or exclusive) rule over a contiguous national territory. Foremost amongst the incidents of sovereignty is the assertion by the State of a monopoly over the means of legitimate violence within its borders (the recourse to armed force and the lesser uses of force entailed in law enforcement and punishment), thus enabling states to repel foreign invaders, control entry and exit at the border, and deliver justice and security to their populations. Justice and governance are territorially organised.

Much contemporary debate in politics, law and the social sciences is taken up with questions of how to provide legal security and deliver justice in the face of a variety of novel, non-territorial threats associated with new communications, transport and weapons technologies that apparently transcend the geographical boundaries and national scales within which the means of justice and control have conventionally been organised in the modern world. However, in an important sense, these problems are not new. Communities of any but the smallest size have always had to wrestle with questions of how to control violence, provide security and deliver some legitimate form of justice, or at least sustainable rule, with respect to populations dispersed in space. The modern state system—with its various organs, divisions and modalities for ruling over and defending a territory—is not the

* School of Law, University of New England. This article stems from research undertaken under an Australian Research Council (ARC) Discovery Grant (project number DP0878476). I take the opportunity of acknowledging the ARC for its support and thanking my colleagues on this project: Kerry Carrington, John Scott and Alison McIntosh. I would also like to thank two anonymous reviewers for their helpful comments and suggestions on an earlier draft of the article.

natural, immutable, timeless answer to the problem, but only one historically contingent, if undoubtedly durable, form of political organisation and rule.¹ The issues of rule at a distance and the manifold dimensions of delivering 'remote justice' (Kirby 2007) have a long history and continue to be raised at the sub-state as well as the supra-state level. It is only particular, related forms of national history and legal ideology in which space is ignored or treated as a neutral 'backdrop' or 'stage' that obscure these issues (Carter 1988:xvi).

This article considers these issues and illustrates concretely the problems that attend them in the Australian context. The image of placelessness that the law promotes for itself is juxtaposed with an examination of some practical realities attending the actual administration of justice under the determinate socio-spatial conditions applying in Australia, or more precisely one geographical slice of Australia, the State of New South Wales (NSW). This article takes one limited aspect of the administration of justice—that of the law and practice relating to sentencing and punishment—to make the argument. The article begins by briefly considering the image of 'placeless principle' (Geertz 1983) presented by the law specifically in respect of the administration of criminal justice. It then juxtaposes to this a brief, mundanely empirical summary of the social geography of the Australian continent and its ramifications for the administration of justice with particular reference to NSW. The following section considers the law of sentencing and punishment in NSW and the evidence of geographical disparities in its administration. It will also be apparent from this that it is impossible to detach a consideration of legal or criminal justice from other dimensions of governance. The penultimate section considers some of the possible deleterious effects—higher rates of violence and general mortality and morbidity—that may be linked (if not wholly, then in part) to compromised forms of governance and justice applying in parts of regional and remote Australia. The concluding section briefly recapitulates the argument and considers some of its implications for practical and institutional reform.

The Promise of Equal Justice in Neutral Space

In *Walker v New South Wales*, the Australian High Court rejected the legal claim by an Indigenous defendant that the criminal laws of NSW did not apply to people of Aboriginal descent in the following terms:

It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle. The general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not any other persons and matters...And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose. The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated. (Mason CJ at 323)

¹ Nor should it be forgotten that, for many in the modern world and earlier eras, states and rulers were the principal source of their insecurity. The most consequential forms of violence and threat were state-sponsored. This is less of a problem in democratic polities where the State and state action depend on the legitimacy that derives ultimately from the support of the people, although this simple formula can be confounded by conflicts over who constitutes 'the people' and by the capacity of majorities to systematically oppress minorities.

This affirmation of the principles of sovereignty, universality and equality in the administration of the criminal law is unexceptional as a statement of legal ideology and commands wide adherence, both from those formalists who would invoke it only to deny any form of legal pluralism (and especially recognition of Indigenous customary law) and those seeking its practical realisation as a vital component of social justice. Of course, discretion exists at every phase of the criminal process and as well as being a vehicle for discrimination, it can mitigate harsh and unjust outcomes that might flow from the strict application of the law. Yet there are areas, particularly of judicial decision-making, where most would accept that justice demands discretion be closely circumscribed by principle.

In the domain of sentencing and punishment the promise of equal justice finds expression in the core principle of consistency:

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration and to the community. (*Lowe v The Queen*, Mason J at 610–1)

Consistency in sentencing allows for account to be taken of the individual circumstances of each case; also, being more art than science, there can be no expectation of mathematical exactitude in the sentencing process. However, it might reasonably be expected that if ‘basic principle’ requires courts to treat like cases alike then at the very least the sentencing courts of a jurisdiction would have available to them a uniform range of penal sanctions; otherwise instances of different sanctions being imposed for like offences would be unavoidable. Criminal punishments on occasions will depend not on the conduct of the offender, but on accidents of geography. Moreover, if the sentencing options provided under law are so designed to allow the courts to achieve the legal purposes of sentencing, the practical unavailability of some of those options for arbitrary geographical reasons compromises the capacity of the courts to meet their legal and constitutional obligations.

As we will see later, notwithstanding the rhetoric of equality and consistency and the image of a sort of placeless system of justice it projects, geography is a significant, if submerged, determinant of the practice of NSW criminal courts. Given certain spatial realities, this is hardly surprising. What is problematic is not so much that space makes a difference to governance and the administration of justice, but the way in which the practical issues of rule at a distance and territorial justice are obscured by legal ideology that assumes law is without geography, that it functions in neutral space (Blomley 1994).

Justice and Rule at a Distance on the Australian Continent

The issues of rule at a distance were, and remain, a pronounced factor in the pattern of settler governance established on the Australian continent (Powell 1991). Today, a nation of just over 20 million people occupies a continent whose land area exceeds that of Western and Eastern Europe combined (minus Russia). That occupation is profoundly uneven, due to environmental, historical and political factors. A substantial part of the interior is desert or semi-arid. The British colonisation of Australia also bequeathed a highly centralised system of local colonial rule, which later passed through the phase of self-government to become

the systems of state and territory government within the Australian federation we know today. This was further entrenched by the familiar pattern of immigrant settlement in existing major population centres. Currently, almost two-thirds of the Australian population live in the state and territory capital cities where political power, administration, and economic activity are also concentrated and radiate outward to touch, highly unevenly, the rest of each state or territory. Only 2.3% of the population live in remote and very remote Australia (ABS 2009). Almost 9 in 10 Australians live within 50 kilometres of the coastline and the numbers are growing. Eighty four per cent of the population live in 1% of the continent's land mass, whilst 0.3% of the population is dispersed over half its total area. The maldistribution of population has increased over time. In 1900, over 60% of the population lived in inland rural Australia. A hundred years later it had dropped to below 15%. In a century in which the Australian population increased by more than 16 million, the population of inland Australia increased by one million. The national pattern is reproduced, albeit with significant local variations, in each of the mainland states and territories (with the exception of the Australian Capital Territory (ACT)).

How are justice, equity and an inclusive economy and polity to be attained in the face of such spatial disparities? There are many considerations involved in providing a satisfactory answer to this question and the focus of this article is restricted to one set of institutions concerned with governance, namely criminal justice institutions, and to one state only, that of NSW. However, the issues are doubtless more pronounced in the larger jurisdictions with smaller populations, like Western Australia and the Northern Territory.² Yet, in the face of the vast distances and small dispersed populations of these jurisdictions, it is easily forgotten that NSW—even with the largest state population—has its own massive spatial disparities. The 'Western Division', as it is known, constitutes over 40% of the land area of the State and has a population of little more than 50,000 people. A large portion of it has no local government, whilst the local government areas composing its eastern side are all the size of small countries, but with populations numbering no more than the low thousands (NSW Department of Natural Resources 2006).

Sparse population makes for 'low demand for local infrastructure, creating difficulties in the provision of services needed to sustain a dispersed rural population' (Holmes 1981:80). The difficulties of low demand affect both market provision and state provision, with areas like health care and social services, banking and financial services, communications and transport being a perennial focus of the complaint that regional communities are not effectively and equitably serviced. This also feeds into concerns about effective representation and political legitimacy. Sparse population and the tradition of highly centralised government are mutually reinforcing. One consequence is that police and the courts, as the most decentralised elements in this otherwise centripetal pattern, have

² There are quite dramatic disparities in justice expenditures and imprisonment rates amongst the different Australian jurisdictions (Steering Committee for the Review of Government Service Provision (SCRGSP) 2009:C13, 8.6). The Northern Territory and Western Australia spend significantly more and imprison more per capita than any of the southern and eastern states. It is likely that spatial factors are a significant influence on these differences. Of course, the disparities can be explained away on the basis that the administration of criminal justice is essentially a state and territory responsibility in Australia and each jurisdiction has its own autonomous body of criminal law and systems of police, courts and corrections.

assumed a more significant role in governance at the local level compared with most countries.³

For a time, ending in the second half of the 19th century, police in NSW were organised and supervised at a local level by magistrates, many of whom were unpaid justices of the peace drawn from the local landowning classes.⁴ This followed the English traditions of local government and local justice structures, wherein executive power was dispersed throughout society and the administration of justice (as well as other aspects of government) was, in key aspects, vested in local officials and ordinary citizens, including juries, lay justices and local constabularies and watch and ward systems. In England, this was seen as a bulwark against despotic central government on the continental model. There also existed in England an extensive system of penal and quasi-penal institutions— gaols, houses of corrections, workhouses—that were under local administration and control (McConville 1998). In England, the deeply rooted traditions and institutions of localism had to be defeated, incorporated or accommodated in order to build a modern central state. The English prison system was only finally unified and centralised in 1878. Its other local justice structures—local police forces, unpaid justices—survive to this day, albeit with substantial modifications and under massively increased direction by central government.

By contrast, in colonial Australia the centre was all powerful and the localities weak. In NSW, the police were formally separated from the supervision of the local justices and brought under a centrally directed and unified bureaucratic structure in 1862 (Hirst 1988:218–41), but with stations and officers dispersed throughout the State they remain the most decentralised and locally accessible agency of State Government. The local justices survived, with important though diminishing judicial responsibilities, for more than another century. However, the ranks of the justices officiating in courts at the local level⁵ were progressively filled by stipendiary magistrates, paid public servants, until the public service structure was abolished and magistrates became fully independent judicial officers under the *Local Courts Act 1982* (NSW) (see generally, Golder 1991).

Local Courts (more than 140 of them) are located throughout the State, with many of the non-metropolitan magistrates operating on circuits to deliver justice to smaller local communities. In contrast to police and the courts, the prison system is one of the most highly centralised state bureaucracies (although prisons themselves are located throughout the state). Centralisation of penal administration was the order of the day from the foundation of the British colony, because of the convict system, which was also one driver of the centralisation of the English penal system in the 19th century. In Australia, the most distinctive surviving remnant of the English tradition of decentralised, lay participation in the exercise of legal authority is, of course, the jury system, although its iconic status in the common law legal tradition is belied by the relatively infrequent and shrinking number of cases actually decided by jury trial.

³ This may also help to explain the higher criminal justice expenditures and imprisonment rates in the Northern Territory and Western Australia noted in footnote 3. It appears that the greater the reliance on governing through criminal justice, the bigger the area and the smaller and more dispersed the population.

⁴ There were also a number of centralised paramilitary police units, notably the mounted police.

⁵ Various known over the years as Courts of Petty Sessions, Police Courts, Magistrates' Courts and now designated as Local Courts in NSW.

The Geography of Sentencing and Punishment in NSW

Geographical disparities in the NSW justice system, particularly those affecting the courts, have recently been the subject of concerted inquiry and expressions of concern from a range of official quarters (NSW Legislative Council Standing Committee on Law and Justice 2006; NSW Sentencing Council 2004:59–65, 2007; NSW Auditor-General 2009). These reports document various systemic dimensions of geographical inequity in the administration of criminal justice in NSW, in particular relating to the uneven availability of the sanctions provided under state sentencing legislation and of a variety of alternative, diversionary measures. The NSW Sentencing Council (2004:59) put it plainly in a report in 2004: ‘In NSW, magistrates in a number of courts are prevented from using particular sentencing options due to geographic limitations on the availability of some of the options and insufficient funding of the Probation and Parole Service, which limit the availability of viable programs and necessary supervision’.

The criminal court hierarchy in NSW is composed of the Supreme Court, the District Court and the Local Courts. The Supreme and District Courts together try a small minority of serious cases and predictably sentence a majority of convicted offenders to full-time prison custody. However, in excess of 95% of cases prosecuted before the courts are heard and determined in the Local Courts and it is the work of these courts that will be the focus here. Courts in NSW have, in principle, a number of formal sentencing options available to them: imprisonment to full-time custody, periodic detention,⁶ home detention, a suspended prison sentence, community service order, bonds and fines. Imprisonment is the penalty of last resort (*Crimes (Sentencing Procedure) Act 1999* s 5). Full-time imprisonment, periodic detention, home detention and suspended prison sentences are all classified as forms of imprisonment.

The law requires a court contemplating sentencing an offender to prison to follow a three step process (*R v Foster*). It must first be persuaded that no penalty other than imprisonment is appropriate in the particular case. Second, it must determine the term of the prison sentence before proceeding to the third step of deciding the form in which the prison sentence is to be served: that is, whether it is to be suspended or served by way of home detention, periodic detention or full-time custody. The term of the prison sentence affects the availability of the alternatives to full-time custody. All sentences over three years must be served in full-time custody.

Imprisonment being the penalty of last resort, the vast majority of convicted offenders in local courts is sentenced to a non-custodial penalty and many of those given a prison sentence are ordered to serve it by way of one of the alternatives to full-time prison custody. Full-time imprisonment is available to all courts throughout the State. The NSW Department of Corrective Services unsurprisingly, has a duty to find a place for any offender sentenced to prison custody, however congested the prisons and however remote the prison might be from the offender’s usual place of residence or otherwise inappropriate to his or her particular circumstances. Whilst it is current policy to consider such factors in placing a prisoner in a particular institution, there is nothing to compel this. Central administrative

⁶ Periodic detention is being phased out in favour of a new penalty, known as an intensive correction order. At the time of writing these provisions are yet to commence, but the changes are discussed in the postscript to this article.

power over such matters as classification and transfer between prisons is substantially legally unreviewable and open to no form of accountability to the local court or any other external local body.

Prisons, as Erving Goffman famously described them, are ‘total institutions’ (Goffman 1987). They institute a thorough-going discontinuity between life on the ‘inside’ and life on the ‘outside’, confining the prisoner in a complete and closed living space where all basic material needs (food, shelter, clothing and so on) are to be met and where the prisoner is subject to an exhaustive supervisory control (Foucault 1979). Prisoners retain no rights of ‘residual liberty’ (*Hague v Deputy Commissioner of Parkhurst Prison and Others; Prisoners AA to XX Inclusive v State of New South Wales*). Consequently, a prison may, in principle, be located anywhere in space. It is an instance of what Foucault called a ‘heterotopia’. He described heterotopias as:

‘real places – places that do exist and that are formed in the very founding of society – which are something like counter-sites, a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted. Places of this kind are outside of all places, even though it may be possible to indicate their location in reality’ (Foucault 1986:24).

If we are to talk of remote justice, therefore, we should not confine attention to the work of criminal justice agencies in geographically remote or dispersed local settings. Prisons administer a form of remote justice: remote from the personal circumstances of offenders, from the conditions affecting offending in the communities from which prisoners are drawn, from the courts that sentence them, and from the variety of local factors that influence these sentencing decisions. The costs of incarceration being what they are, a large portion of the justice budget is also devoured in their administration.

Unlike prisons, non-custodial and semi-custodial measures must reconcile the ‘normal’ living circumstances of the offender with available correctional resources and forms of provision. Imposing home detention on the homeless would make little penal or other sense unless the State assumed responsibility for housing needy offenders, but it is central to the rationale of measures like home detention that the State is able to avail itself of private resources to support the otherwise costly enterprise of punishment. Offenders on periodic detention have been required to support themselves through paid employment or some other means during the working week and to present themselves to their nearest periodic detention centre to meet the custodial requirements of the sentence at weekends. Thus, before imposing these and other non-custodial penalties, courts must be satisfied that the necessary amenity is available in the relevant area, be it correctional accommodation in a periodic detention centre, private residential accommodation, transport, supervised community work or relevant intervention programmes. Provision is made for such matters (and others) to be assessed prior to sentence.⁷

Thus, behind the ideological veil of principles like equality and consistency legislation makes express reference to geographical considerations. This prompts the question of whether, and if so how, locational factors may affect the availability of *alternatives* to full-time imprisonment. The only penalties with state-wide coverage in NSW besides full-time

⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 66(1)(d)–(e) and 68 relating to periodic detention, ss 78, 80 and 81(2)(iv) relating to home detention, ss 86(1)(c) and 88 relating to community service orders, and ss 95A(2)(c) and 95B for good behaviour bonds involving intervention programmes.

imprisonment at the top of the sentencing hierarchy are bonds without supervision and fines, both of which generally lie at the bottom of the hierarchy. Courts in rural and regional NSW do not have the full range of intermediate penalties at their disposal when sentencing offenders. Many appear to have few of them and some have no supervisory penalties at their disposal other than full-time imprisonment (NSW Sentencing Council 2004:61; NSW Legislative Council Standing Committee on Law and Justice 2006).

Home detention is currently only available in Sydney and the coastal regions to the immediate north and south. It is unlikely to be extended to localities in the interior of the State due to problems with reliable telecommunications services, issues of scale affecting provision of monitoring personnel and technical infrastructure (like drug testing equipment) and problems of inadequate housing provision (NSW Legislative Council Standing Committee on Law and Justice and NSW Department of Corrective Services 2005:5, 25–6). Periodic detention has been more widely available than home detention, but there are still only seven periodic detention centres in the State, leaving many areas effectively uncovered. Offenders in regional areas have generally been required to travel to regionally located periodic detention centres (all of which are attached to correctional centres ie prisons) to perform weekend detention and complete required community work. However, many offenders lack access to reliable private transport and public transport is often unavailable or unaffordable (NSW Legislative Council Standing Committee on Law and Justice and NSW Department of Corrective Services 2005:7). Factors outside the control of periodic detainees can put them at risk of default and, thus, full-time imprisonment. Similar problems arise with suspended sentences where supervision, support or treatment services are not locally available, as is more likely in localities outside major population centres.

Other community-based penalties, like community service orders and good behaviour bonds with supervision, are also more restricted in their availability to courts in regional and remote locations due to the relative lack of specialist treatment services (psychiatric, drug and alcohol, disability support and so on) and inadequate transport and communications technology. Probation supervision is not available in every locality. This also means that pre-sentence reports and psychiatric assessments are often not available to courts. Community organisations in some areas are also reluctant to be involved in the provision of community service work (NSW Legislative Council Standing Committee on Law and Justice and NSW Department of Corrective Services 2005:21; NSW Legislative Council Standing Committee on Law and Justice 2006:71–2).

Court-based diversionary measures, notably drug courts and magistrates' early referral into treatment (or MERIT), are also restricted in their availability. The NSW Drug Court is an important and effective alternative to imprisonment for drug-dependent offenders. Drug court orders involve diverting offenders who would otherwise be sent to prison into an intensive programme of treatment and rehabilitation in the community. The specialist resources needed to support such programmes are less accessible in most rural settings and completely absent from many. As a consequence, the geographical catchment for the Drug Court is limited to parts of Sydney only. MERIT is administered in the local courts and is also aimed at diverting offenders with drug problems into treatment. It is currently only available in 61 of 144 local courts across NSW, although these courts deal with about 80% of all offenders appearing before local courts. The courts excluded from the programme are located in the more remote parts of the State. The effectiveness of such diversion is dependent on access to rehabilitation services that are also geographically concentrated in high population areas (NSW Auditor-General 2009:51–2). The same issues arise with

respect to court-based diversion of mentally disordered offenders into treatment⁸ (Gotsis and Donnelly 2008).

There are some diversionary measures that have a specific rural focus, or more accurately, an Indigenous focus. Circle sentencing, an alternative sentencing process for adult Aboriginal offenders, is available in several rural localities. The intensive court supervision programme, an alternative for children facing likely detention, is also focused on Aboriginal offenders and is available in the north-west of the State. Both programmes seek to involve the offender's community in the sentencing process and the administration of the penalty, particularly through local Aboriginal Community Justice Groups. However, these programmes are likely to be limited in their effectiveness if they are not also able to call on specialist professional services.

The fact of geographical disparity in sentencing and punishment, of unequal justice, is plain. Similar issues arise in relation to policing, the use of police custody and bail decisions by both police and the courts. In the absence of appropriate health and welfare services in many communities, problems are more likely to be shunted into the hands of the police as the major and often the only locally accessible public agency in many localities (NSW Ombudsman 1994; Cunneen 2001:86–91). In every national police custody survey conducted since the Royal Commission into Aboriginal Deaths in Custody initiated them, drunkenness has been one of the three most common grounds for police detention. Although showing a drop in the most recent survey, it still accounted for 12 per cent of police custody incidents across the country (Australian Institute of Criminology 2005:40). The impact is disproportionately felt in rural communities and by Indigenous Australians in those communities, simply because no alternative to detention in police cells is usually available locally.

There is an understandable concern, expressed by some of the inquiries discussed above, that the restricted sentencing options available to regional courts place offenders in these courts at increased risk of being imprisoned. A study by the NSW Bureau of Crime Statistics and Research (Snowball 2008), however, found to the contrary that when relevant sentencing factors were taken into account offenders in rural and regional areas of NSW were *less likely* to be imprisoned compared with offenders in metropolitan areas. The most likely explanation, it was suggested, is that courts in regional areas respond to the lack of non-custodial and semi-custodial sanctions by sentencing 'down', rather than 'up'. The aggregate picture, of course, may conceal myriad local variations in judicial practice, pointing to further issues requiring research. Even if the Bureau study provides some reassurance that offenders before regional courts are not generally treated more harshly than their counterparts in urban courts, this does not alter the basic fact of sentencing inequity nor its possibly unfair, unjust and deleterious impact for offenders in both settings. Courts faced with the dilemma could hardly be blamed for opting for the lesser evil, although adopting this course puts them in violation of the strict letter of NSW sentencing law, which requires a court to first decide whether imprisonment is the only appropriate penalty and then to set the term of imprisonment *before* deciding whether it will be suspended or be served by periodic detention, home detention or full-time custody. Having taken the first step, a court cannot resile from it in favour of a non-custodial penalty if and when it is discovered that the only custodial penalty available to the court is full-time imprisonment (*R v Atkins*). The

⁸ *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32.

findings of the Bureau study would appear to suggest that many rural courts simply circumvent the mandated reasoning process in order to avoid this harsh and unjust outcome.

It may be the lesser of two evils, but if offenders are released who are in need of the stricter supervision and/or the programmes, treatment and resources that are unavailable to the court and the community, this may often simply ensure the individual's speedier return to crime, to the courts and, ultimately, to prison. The purposes of sentencing will have been frustrated, raising major questions as to the quality and effectiveness of justice delivered by courts in regional and remote locations, for those accused or convicted of crimes and for the local communities affected by crime.

This article has focused on the situation in NSW, but it is likely that the issues arise to the same or a greater extent in other Australian jurisdictions.⁹

Governance, Law, Justice and Violence

The various official reports and inquiries raise obvious questions of unequal treatment before the courts. However, taken together, and along with other evidence of deficient services in rural and remote Australia,¹⁰ they may point to more profound issues: Are basic justice and governance needs of many remote communities being met at all? What are the implications for the human well-being (including security) of those living in these communities?

It is significant that levels of violence and some other forms of crime, as well as mortality and morbidity rates stemming from non-natural causes (suicide, road accidents and so on), are also significantly higher in regional and remote localities than in Australian cities (Hogg and Carrington 2006; Carrington 2007a, 2007b; Carrington, McIntosh and Scott 2010). As a general rule in NSW, the smaller and more remote the locality the higher the official rates of violence (Hogg and Carrington 2006:64–71). Most of the recent media and political attention has focused on the incidence and patterns of violence in Indigenous communities—particularly in remote central and northern Australia—conditions prompting the ‘National Emergency’ intervention initiated by the Howard Government in 2007 and continued under the Rudd Government.

Marcia Langton uses the term ‘lateral violence’ to describe the patterns of normalised victimisation, abuse, humiliation, bullying and control (much of it fuelled by severe alcohol and other substance abuse) to be found in some Indigenous communities cut off from economic opportunities and public services and deficient in functioning local institutions

⁹ See, for example: Guest (2009), reporting withering criticism by the Western Australian Chief Justice, Wayne Martin, of the lack of sentencing alternatives in many regional localities in that State; Robinson (2009) reporting criticism by the Northern Territory Chief Justice, Brian Martin, of the shortage of services to support mentally ill petty offenders who are consequently imprisoned. See also Robinson (2010) reporting findings from an unreleased 2007 report in the Northern Territory exposing how the virtual absence of mental health and disability support programs in remote areas leads to the incarceration of the mentally ill (particularly Indigenous people) in prison.

¹⁰ See, for example Moran (2009:29) reporting the findings of a survey of country lawyers; Australian Government Department of Health and Ageing (2008a) indicating a significant shortfall in the provision of rural mental health services; and Australian Government Department of Health and Ageing (2008b) showing the poor servicing of many regional areas by health professionals.

(Langton 2007–08). Lateral violence involves victims of injustice, inequality, exclusion and other forms of ‘vertical violence’ turning in on themselves and it is typically the most vulnerable—in particular children and women—who suffer the most in such circumstances. Lateral violence also stems from a breakdown in and perversion of traditional authority structures, cultural norms and customary law, a condition that is exacerbated by geographical and social isolation and severe cultural dislocation.

The peculiar gravity of the problems in some Indigenous communities and their particular roots in past and present policy failures specific to the Indigenous sector should not be downplayed. By the same token, nor should recognition of the scale of the problems confronting these communities be allowed to obscure the evidence that rates of alcohol-fuelled violence, accidental death and injury and self-inflicted harm are also much higher for non-Indigenous Australians living in regional and remote localities (Carrington, McIntosh and Scott 2010). Lateral violence, social stress and breakdown may not be as severe or prominent in non-Indigenous and mixed Indigenous/white rural communities, but they are present at worrying levels in many.

The absence or relative absence of effective law, governance and justice can serve as a spur to crime, not merely in the sense that criminals exploit the vacuum in control, but in the more profound and worrying sense that ordinary citizens may resort to violence and crime as a form of control. Violent self help is a time-honoured form of social control, which can become normalised (and even normatively prescribed) under certain conditions (Black 1983). Australia is no stranger to traditions and practices of violent self help. They are more likely to take root in spaces that are relatively inaccessible to the formal legal order: in family, group, cultural, organisational or socio-spatial settings that are relatively closed to or remote from the law. Criminologists have recognised that much conventional criminal violence is also moralistic and self-righteous. It is, from the standpoint of the perpetrators, inflicted as ‘punishment’ for perceived or actual slights to honour or transgressions against unwritten social codes (Polk 1994; Katz 1988). This does not mean that self help and the absence of state law always or necessarily signal an absence or breakdown of order; nor that its presence is a guarantee of order, let alone of justice. There is a growing body of academic and expert opinion arguing that formal state justice mechanisms need to be rolled back in favour of a greater reliance on informal, decentralised, community-based justice structures (Braithwaite 1989; Black 1989; Johnston and Shearing 2003). Few, however, argue that it is the presence of the State and formal legal institutions as such that are problematic, as distinct from the form that presence takes and its interaction with other aspects of governance.

Be that as it may, the evidence of high levels of violence and other preventable morbidity and mortality, as well as manifold related forms of disadvantage, highlight the urgent need for issues of effective local governance, justice and service delivery to be addressed, perhaps in some cases if communities are to have a sustainable future. It is not a question of choosing between state and non-state measures, but of achieving a healthy mix between the two, the precise nature of which will vary according to context, including socio-spatial setting. It is possible to reject the unified, panoramic viewpoint of State and Law implied by principles of sovereignty, universality and equality without in any sense rejecting the importance of law or the role of the State and its criminal justice institutions in the governance of social life. As against invocations of abstract legal principle, it is important to stress concrete structures and practices of governance, and the many and varied ways in

which law and state may be incorporated into them without, at the same time, exhausting them.

Concluding Comments

With their small and shrinking local populations, thin and decaying physical, social and economic infrastructure, declining farm communities, and the growing reliance on a 'fly in, fly out', expeditionary strategy for resource extraction, it has been suggested that large parts of regional and remote Australia meet the criteria of a 'failed state', including on measures of poverty, violence/security, and government capacity to meet human development needs (Dillon and Westbury 2007: ch 2; Sanderson 2008). Since the 1970s, and more particularly with the rise of neo-liberal policies in the 1980s and 1990s, governments in Australia have substantially abandoned the old nation-building attitude that treated populating the interior as a national priority.

They are now faced with the question of how to deliver viable governance to communities under increasing stress. The task often falls too heavily on criminal justice agencies that lack adequate resources and support services. Police and courts standing alone are limited in what they can do to rectify or mitigate local problems. Whilst they are a crucial part of any response, they do not operate in a social and governmental vacuum. Even in an ostensibly discrete area of legal administration like sentencing, functioning and effective courts depend on the role of other government agencies and professional services (mental health, drug and alcohol, and so on) and on the existence of viable local institutions. Otherwise courts are confronted with a choice only of doing too little or (in a sense) too much, of putting offenders back in the community with little in the way of supervision and support addressed to the causes of their offending, or of temporarily removing them from the community by sending them away to prison. The latter is a short-term solution that generally carries substantial long-term costs. Aside from the exorbitant financial cost of incarceration, there are also the collateral social costs of churning offenders through prisons and back into society (Hagan and Dinovitzer 1999). Usually this does little to improve the offender and it does nothing to strengthen social capital in the marginal communities from which they come and to which they invariably return (Vinson 2007a, 2007b; Vinson 2008). More often, it contributes to the further deterioration of both.

It may be time to consider more consciously crafted models of decentralised justice, where justice resources, and particularly the penal system, is made more responsive to local conditions and needs (cf Allen and Stern 2007). Some of the resources that are currently consumed by highly centralised, bureaucratic prison systems—90 per cent of the correctional budget across Australia devoted to less than a third of the offenders who are under correctional supervision: Steering Committee for the Review of Government Service Provision (SCRGSP) (2009):8.3, Tables 8A.1 and 8A.3—could be redirected to locally based programmes and professional services (probation and parole, drug and alcohol programmes, psychological and psychiatric staff, and so on), which would allow courts to make greater use of non-custodial penalties that are both less costly and more effective for both offenders and communities.

Courts and police in Australia and elsewhere have been slowly moving in the direction of problem-oriented approaches to justice where the idea is to address in concrete ways some of the factors that lie behind offending behaviour (Freiberg 2001). The approach appears

particularly apposite in regional and remote settings where the resources of governance are limited by small and dispersed populations, and where courts and police are the government institutions most likely to have a local presence. Such a move will only yield benefits if key resources, programmes, agencies and staff needed to support it are also localised to a greater degree. There are two dimensions to remoteness: the physical distance of communities from the services and resources they need, but also the distance (cultural, social, political as well as physical) of services from the local needs of communities. Shifting resources from the costly, centralised prison sector to the provision of justice and social infrastructure in needy local communities might be one strategy for addressing both dimensions at the same time.

Postscript

In mid-2010, the NSW Parliament enacted the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) which has the effect of removing periodic detention as a sentencing option and introducing a new sentencing option known as an intensive correction order (ICO). At the time of writing these provisions had not commenced.

An ICO will involve intensive supervision and rehabilitation in the community, including electronic monitoring, curfews, and the like. An ICO will operate in a similar fashion to a periodic detention order, in that a court will first have to sentence an offender to a term of imprisonment before the option of an ICO becomes available. Once a court has determined that no sentence other than prison is appropriate and set the term of the sentence, it is required to choose how the prison sentence is to be served: whether suspended, by way of home detention or by way of an ICO. An ICO will only be available if the term of imprisonment is not more than two years.

The legislation was enacted in response to a report and recommendations of the NSW Sentencing Council (2007). One of the Council's principal criticisms of periodic detention was that it was not uniformly available throughout the State. A central purpose of its recommendations was to rectify this with the introduction of an option (the ICO) that would not entail the same capital costs as would any attempt to expand periodic detention to cover the state. The Council stipulated that arrangements for the supervision and monitoring of offenders, for rehabilitation programmes and for specialist staff (psychiatrists and psychologists) to support the measure must be guaranteed state-wide. The Government enacted the legislation with this as one of its stated aims. In his second reading speech, the Attorney-General, John Hatzistergos, indicated that the provisions would be progressively rolled out to regional centres so that approximately 12 months from commencement it will be available within a 200-kilometre radius of each of several nominated regional centres, 'effectively covering the state' as he put it (Hatzistergos 2010). This geographical coverage would be a significant achievement, but it would still not cover the State as the Attorney-General claimed. Indeed, it would exclude some major regions and localities with among the highest crime rates in the state (such as large parts of the north-west and south-west). Moreover, it must be open to doubt that it can be effectively achieved given the existing restrictions on access to infrastructure and services to support current community-based sanctions in many (non-remote) regional areas of the State.

References

- Allen R and Stern V (eds) (2007) *Justice Reinvestment – A New Approach to Crime and Justice*, International Centre for Prison Studies, London
- Australian Bureau of Statistics (ABS) (2009) *Regional Population Growth, Australia, 2007-08*, ABS, Canberra, <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/3218.0~2007-08~Main+Features~Main+Features?OpenDocument>>
- Australian Government Department of Health and Ageing (2008a) 'Utilisation of Mental Health Medicare Items', accessed online at <[http://www.health.gov.au/internet/main/publishing.nsf/content/92C4BC433ED5C171CA25742C00837BBB/\\$File/utitab.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/92C4BC433ED5C171CA25742C00837BBB/$File/utitab.pdf)>
- Australian Government Department of Health and Ageing (2008b) *Report on the Audit of Health Workforce in Rural and Regional Australia*, Commonwealth of Australia Canberra
- Steering Committee for the Review of Government Service Provision (SCRGSP) (2009) *Report on Government Services 2009*, Productivity Commission, Canberra
- Australian Institute of Criminology (2005) *2002 National Police Custody Survey*, Technical and Background Paper no 13
- Black D (1983) 'Crime as Social Control' *American Sociological Review*, vol 48 no 1, 34–45
- Black D (1989) *Sociological Justice*, Oxford University Press, Oxford
- Blomley N (1994) *Law, Space and the Geographies of Power*, Guildford Press, London
- Braithwaite J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge
- Carrington K (2007a) 'Crime in Rural and Regional Areas', in Barclay E, Donnemeyer J, Scott J and Hogg R (eds) *Crime in Rural Australia*, Federation Press, Annandale
- Carrington K (2007b) 'Violence and the Architecture of Rural Life', in Barclay E, Donnemeyer J, Scott J and Hogg R (eds) *Crime in Rural Australia*, Federation Press, Annandale
- Carrington K, McIntosh A and Scott J (2010) 'Globalization, Frontier Masculinities and Violence—Booze, Blokes and Brawls' *British Journal of Criminology*, vol 50 no 3, 393–413
- Carter P (1988) *The Road to Botany Bay*, Faber and Faber, London
- Cunneen C (2001) *Conflict, Politics and Crime: Aboriginal Communities and Police*, Allen and Unwin
- Dillon M and Westbury N (2007) *Beyond Humbug* Seaview, Press West Lakes, SA
- Foucault M (1979) *Discipline and Punish – the Birth of the Prison*, Peregrine, Harmondsworth
- Foucault M (1986) 'Of Other Spaces', *Diacritics*, vol 16, 22–7

Freiberg A (2001) 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?', Paper presented at the Australian Institute of Judicial Administration Magistrates' Conference, Melbourne, 20–21 July 2001

Geertz C (1983) *Local Knowledge*, Basic Books, New York

Goffman E (1987) *Asylums – Essays on the Social Situation of Mental Patients and Other Inmates*, Peregrine, London

Golder H (1991) *High and Responsible Office – A History of the NSW Magistracy*, Sydney University Press, Sydney

Gotsis T and Donnelly H (2008) *Diverting Mentally Disordered Offenders in the NSW Local Court*, Monograph 31, Judicial Commission of NSW

Guest D (2009) 'Justice System Fails in the Bush', *The Weekend Australian* (Sydney), Editorial, 19 September 2009, 6

Hagan J and Dinovitzer R (1999) 'Collateral Consequences of Imprisonment for Children, Communities and Prisoners' in Tonry M and Petersilia J (eds) *Prisons*, University of Chicago Press, Chicago

Hatzistergos J (2010) *NSW Parliamentary Debates*, Legislative Council, 22 June 2010, 24426

Hirst J (1988) *The Strange Birth of Colonial Democracy*, Allen and Unwin, Sydney

Hogg R and Carrington K (2006) *Policing the Rural Crisis*, Federation Press, Sydney

Holmes J (1981) 'Sparsely Populated Regions of Australia', in Lonsdale R and Holmes J (eds) *Settlement Systems in Sparsely Populated Regions – the United States and Australia*, Pergamon Press, New York

Johnston L and Shearing C (2003) *Governing Security – Explorations in Policing and Justice*, Routledge, London

Katz J (1988) *The Seductions of Crime: the Moral and Sensual Attractions of Doing Evil*, Basic Books, New York

Kirby M (2007) 'Remote Justice', Keynote Address presented at the Criminal Lawyers' Association of the Northern Territory Conference, Bali, 2 July 2007

Langton M (2007–08) 'The End of "Big Men" Politics', *Griffith Review*, edition 22

McConville S (1998) 'Local Justice: the Jail' in Morris N and Rothman D (eds) *The Oxford History of the Prison – The Practice of Punishment in Western Society*, Oxford University Press, Oxford

Moran S (2009) 'Bush Reality: Shortage of Lawyers Looms', *The Australian*, 10 July 2009, 29

NSW Auditor-General (2009) *Helping Aboriginal Defendants through MERIT*, Performance Audit, Audit Office of NSW

NSW Department of Natural Resources (2006) *The Western Division of New South Wales Fact Sheet*, accessed online at <http://www.dnr.nsw.gov.au/western/pdf/western_division.pdf>

NSW Legislative Council Standing Committee on Law and Justice (2006) *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*

NSW Legislative Council Standing Committee on Law and Justice and NSW Department of Corrective Services (2005) *Submission to Inquiry into Community Based Sentencing Options for Rural and Remote Areas and for Disadvantaged Populations*

NSW Ombudsman (1994) *Race Relations and Our Police: A Discussion Paper*

NSW Sentencing Council (2004) *How Best to Promote Consistency in Sentencing in the Local Court*

NSW Sentencing Council (2007) *Review of Periodic Detention*

Polk K (1994) *When Men Kill*, Cambridge University Press, Melbourne

Powell J (1991) *An Historical Geography of Modern Australia – The Restive Fringe*, Cambridge University Press, Cambridge

Robinson N (2009) ‘Jailing of Mentally Ill “Appalling”’, *The Australian* (Sydney), Editorial, 21 September 2009, 6

Robinson N, (2010) ‘Disabled in Remote Areas Abandoned’, *The Australian* (Sydney), Editorial, 10 February 2010, 5

Sanderson J (2008) ‘National Security and Climate Change: Is Remote Australia to become a Contested *Terra Nullius* in a New World Order?’, Lecture Presented at Murdoch University, Murdoch University, WA

Snowball L (2008) ‘Does a lack of alternatives to custody increase the risk of a prison sentence?’ *Crime and Justice Bulletin*, No 111, NSW Bureau of Crime Statistics and Research, Sydney

Vinson T (2007a) *Dropping off the Edge: Mapping the Distribution of Disadvantage in Australia*, Report Commissioned by Jesuit Social Services and Catholic Social Services Australia

Vinson T (2007b) ‘Dropping off the Edge: the Distribution of Disadvantage in Australia’, Speech delivered at Parliament House, Canberra, 28 February 2007

Vinson T (2008) ‘Lost in our own Bermuda Triangle’, *The Sydney Morning Herald* Weekend Edition (Sydney), 26 January 2008, 31

Legislation

Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Local Courts Act 1982 (NSW)

Mental Health (Criminal Procedure) Act 1990 (NSW)

Cases

Hague v Deputy Commissioner of Parkhurst Prison and Others [1991] 3 All ER 733

Lowe v The Queen (1994) 154 CLR 606

Prisoners AA to XX Inclusive v State of New South Wales (1994) 75 A Crim R 205

R v Atkins [1998] NSWCCA, Unreported, 3 November 1998

R v Foster [2001] NSWCCA 215, Unreported, 15 February 2002

Walker v New South Wales (1994) 182 CLR 45