

# LEGAL BRIEFS

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The Conference Edition



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of NSW Inc

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*The information contained in Legal Briefs is not legal advice and is written for teachers of Legal Studies and the students who study this course in NSW. Opinions expressed in the articles within this journal are not necessarily those of the LSA Committee as a whole or individually.*

**We welcome contributions!**

All contributions will be acknowledged and are treated as the intellectual property of the author(s).

Please send your contributions as Word documents to [office@lsa.net.au](mailto:office@lsa.net.au)

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## From the Editor's Desk

*Keith Thomas – Editor of Legal Briefs*

Dear Members!

The Legal Studies Association of NSW presented our annual State Conference to a small audience in March 2021. Members were able to attend in person or watch the professionally filmed presentations during Term 2.

Some of the presenters have made a paper and/or their slides available to LSA Members. These papers and slides make up this edition of *Legal Briefs*. Some lesson materials and / or notes on how to use each presentation have been provided by LSA Committee Members.

## Basic Legal Concepts by Emmanuel Kerkyasharian

*Activities developed by the LSA Committee*



This presentation would be particularly useful for teachers new to Legal Studies or Commerce. Task 4 pertains to the Crime topic Sentencing and Punishment – Post Sentencing Considerations.

Click on the picture of Emmanuel to the left to access the video of his presentation.

Clicking on the image to the right will take you to Emmanuel's podcast, *The Wigs*.



### Activities

The video could be played, in sections, to a Commerce class or a Year 11 Legal Studies class at the start of the first law unit / the Year 11 course. Key concepts that could be elaborated upon include:

- Hammurabi's code
- Ecclesiastic law
- Common Law
- Parliament
- Characteristics of just laws
- Rule of law

1. Emmanuel didn't mention the Court of Chancery. Discuss how and why this court arose.
2. What does Emmanuel think are the problems with laws being determined by only one, or a small group, of law-makers?
3. Should the Queen / Governor General be at the end of our law-making process in Australia?
4. How much does power influence the law? In your answer, consider many factors, including:
  - "Brutal power dynamics"
  - Discussion in parliament to decide what needs to be changed
  - Checks on power – "there is no doubt the people who administer the law have power"
5. How is the law working positively?
  - "Conflict creates drama".
  - It can be hard to generate interest in long-serving laws.
  - Compare current or historical examples.
6. Class discussion: There is parliamentary supremacy at state level but not at Commonwealth level.
  - The Commonwealth Constitution does not state that the Commonwealth Parliament is to have primacy
  - The High Court (judiciary) is separate to the legislature (state parliament)
  - For example in the *Kable v DPP* case (High Court)

In the High Court's judgment in the landmark case of *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24. The case marked an important extension of a particularly Australian concept of the independence of the judiciary from the federal level to the state level.

The case concerned Gregory Kable, a New South Wales man who plead guilty to manslaughter in August 1990, following the death of his wife. He was imprisoned for five years. During that time, he wrote a number of threatening letters to members of his wife's family, who were in custody of their two young children. He was charged with various relevant offences, but at the date of his release from jail, those charges had not yet been heard. The NSW Parliament took the not-very-extraordinary step of passing a law – the *Community Protection Act 1994 (NSW)* – that set up a system of preventative detention. However, the law was, extraordinarily, framed in a peculiar way. Section 3(3) of the Act read:

(3) This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.

The NSW Parliament had limited the extent of the system of preventative detention to just one person. On 30 December 1994, just before Kable's imprisonment was about to end, Justice Hunter of the NSW Supreme Court made an interim detention order against Kable, for a period of three months. Just as that order was about to lapse, Justice Levine made a preventative detention order against Kable for 6 months. Kable appealed to the NSW Court of Appeal and lost. He subsequently was granted leave to appeal to the High Court. In the interim, the NSW DPP made a second application for a 6-month preventative detention order against Kable, and lost in August 1995. Kable was freed from custody, but remained liable to be re-imprisoned should a future application by the NSW DPP be successful.

Source: <https://www.ruleoflaw.org.au/kable-and-the-rule-of-law/>

Further resources can be found at:

- <https://www.ruleoflaw.org.au/kables-case-and-the-rule-of-law/>
- <http://www5.austlii.edu.au/au/journals/UQLawJI/2015/12.pdf>
- [http://www.unistudyguides.com/wiki/Kable\\_v\\_Director\\_of\\_Public\\_Prosecutions\\_\(NSW\)](http://www.unistudyguides.com/wiki/Kable_v_Director_of_Public_Prosecutions_(NSW))

7. Class discussion: The Black Lives Matters protests in 2020

- The state/the police were trying to stop the protest. Emmanuel represented the movement in the Supreme Court. Emmanuel said he lost. But the issue was taken to the Court of Appeal, and based on a technicality, Emmanuel's team won and the protests went ahead.
- Emmanuel said we all should be cognisant of the breaches of rule of law during the Covid-19 era. Give that this was such a controversial yet essential protest issue, should it have been permitted to go ahead during the lockdown? Provide reasons for and against.

Further resources can be found at:

- Enormous crowds march in Sydney Black Lives Matter protest after last-ditch win in Court of Appeal – <https://www.abc.net.au/news/2020-06-06/arrests-at-sydney-black-lives-matter-protests/12329066>
- Black Lives Matter protests: Sydney rally given green light as court ruling overturned – <https://www.theguardian.com/australia-news/2020/jun/06/black-lives-matter-protests-nsw-police-minister-says-officers-prepared-for-anyone-who-flouts-the-law>

# **Sentencing and Criminal Law Reform – The Justice Reform Initiative**

*Nicholas Cowdery AO QC*

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## INTRODUCTION

This year the conference is being held in a COVID-safe fashion – a term I understand is uniquely Australian (noting that few other places are able to be COVID-safe). So I have a small audience with the potential for expanded reach by videorecording. However you hear me, I hope I have something useful to contribute to the great work you all do in teaching Legal Studies.

## ISSUES AND STATISTICS

In the last couple of years there have been a few procedural improvements made to the operation of the criminal justice process in NSW. Since 2018 at the punishment end there has been a greater emphasis on community-based corrections; but so far it has not had much impact on prisoner numbers which are at record levels and continue to grow. Over-reliance upon imprisonment is of great concern, especially of First Nations offenders and vulnerable groups in society.

The Bureau of Crime Statistics and Research (BOCSAR) publishes quarterly NSW Custody Statistics and reports on many other matters that are an excellent resource. The Australian Bureau of Statistics also publishes annual reports on imprisonment (see endnotes).

The latest BOCSAR figures for the quarter to December 2020<sup>i</sup> show that in NSW: there were 12,766 adult prisoners, 33% (4,205) being on remand; 862 were female and 11,904 male; 282 of the females were Aboriginal and 2,971 of the males. Given that First Nations people constitute less than 3% of the NSW population, having representation of 33% female and 23% male prisoners and a total of 25% of all adult prisoners is a strong indication of failure of many policies and practices. About one in 20 Aboriginal adult males are in prison. Another sign of failure is the high proportion of prisoners on remand, yet to be tried, many of whom serve no sentence time. It should also be noted that around 40% of prisoners are serving sentences of 6 months or less, which are useless from many points of view; not the least being that most courses (therapeutic, educational, industrial) require at least 6 months attendance after prisoners have been classified and sent to their selected institutions (a process that can take up to two months).

## SENTENCING

We know that the criminal justice process is an indispensable part of our system of governance. Parliament makes the laws – creates the crimes and prescribes how they are to be dealt with – and public functionaries apply the laws with appropriate discretion in each case. Collective responsibility is taken for dealing with lawbreakers and vigilantism discouraged.

There will always be crime. We should work harder at preventing it and we should deal with it in ways that do not increase the harm already done (to the victim, the community and the offender) – we should not waste criminal justice resources and public funds on matters that are social and health issues (such as drug use and offending behaviour by the mentally-impaired).

If we are confronted with a serious offence that has caused harm, how should the offender be punished in a way that implements the purposes of criminal punishment as laid out in section 3A of the *Crimes (Sentencing Procedure) Act 1999*? Those are:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

In our present system (in NSW, but also nationally and internationally in many comparable countries) we rely far too much on imprisonment as a means of dealing with offenders. While imprisonment may satisfy the aims (a), (c), (e) and (f) above, those may be regarded (in my view) as the least important of the aims prescribed. Paragraph (b), deterrence, is not assisted by imprisonment – the strongest deterrence is the fear of being caught. Paragraph (d), rehabilitation, is ineffective. And paragraph (g) is essentially meaningless.

In the last two decades we have seen offending in most categories of serious crime decline<sup>ii</sup>, but imprisonment has substantially increased. The possible reasons for that decline are examined in detail in the Weatherburn and Rahman book. There seems to be a disconnect and it increases the harms done by abruptly separating offenders from family, employment, education, social connections, healthcare and so on – often for no good purpose and without creating better citizens. Inquiry after inquiry produce reports and recommendations that are ignored officially, so we are not short of ideas<sup>iii</sup>.

Resources for prisons are available unevenly and at disproportionate cost to the community. The Australian imprisonment rate (per 100,000 of the adult population) more than tripled between 1985 and 2019, from 66 to 223; among comparable OECD countries it is now third behind the USA and New Zealand. (The England and Wales number was 173 in 2019.) The overall Australian prison population has increased by 50 per cent since 2000, way beyond the increase in population (35%).

Prison has not been able to reform offenders mainly because the necessary resources have not been applied to relevant programs and post-release support is inadequate. It does not deter offenders: the recidivism rate (offenders returning to corrections within two years) is 55 per cent – so it is not improving community safety. Seventy-three per cent of prison entrants have been in prison before, 32 per cent of them at least five times. Only one quarter of prisoners are entering for the first time. The largest cohort of prisoners is from disadvantaged and marginalised groups in society, including those without access to adequate education, those abusing alcohol and other drugs, individuals with a mental or cognitive disability (for whom therapeutic options are sparse before, in and after imprisonment), and First Nations people suffering social disadvantage. Women are the fastest-growing cohort – most have committed non-violent offences and many are themselves victims of persistent domestic abuse. While they are incarcerated, their children often become the next generation of offenders. Victims of crime are frequently (perhaps surprisingly) dissatisfied with custodial outcomes for offenders. Prisons cost Australian taxpayers \$3.6 billion per annum (\$110,000 per annum per prisoner on average)<sup>iv</sup>.

There is a range of available programs of community-based correction. Despite the efforts of the NSW Government in 2018 to move more offenders from prison to community corrections, jailing is still failing all of the groups mentioned above.



## JUSTICE REFORM INITIATIVE

That is the catchcry of the Justice Reform Initiative (JRI), launched in September 2020<sup>v</sup>: ‘Jailing is Failing’. The truth of this statement is clear.

The JRI is supported by more than 100 patrons across the country, including eminent Australians such as two former governors-general, former members of Parliament, academics, respected Aboriginal and Torres Strait Islander leaders, and former senior judges, along with many other individuals and organisations. A summary of its arguments is to be found in the document here, sent to all Australian members of parliament:

[https://d3n8a8pro7vhmx.cloudfront.net/justicereforminitiative/pages/145/attachments/original/1599456518/JRI\\_The\\_State\\_of\\_the\\_Incarceration\\_Nation\\_Paper\\_V5\\_APPROVAL.pdf?1599456518](https://d3n8a8pro7vhmx.cloudfront.net/justicereforminitiative/pages/145/attachments/original/1599456518/JRI_The_State_of_the_Incarceration_Nation_Paper_V5_APPROVAL.pdf?1599456518)

That briefing document refers to ongoing levels of imprisonment – jailing – failing: as a deterrent; victims of crime, the most disadvantaged in the community; Indigenous Australians; people with mental illness or cognitive disability; women; young Australians; as rehabilitation; and Australian taxpayers. It notes that “Successful bipartisan reform initiatives internationally show us there is another way. It’s time for governments to listen and accept the evidence for reform.”

The JRI reveals how high prison numbers undermine community safety, contrary to assertions made by some politicians. It shows that governments can improve public safety and community strength not by being ‘tough on crime’, but by being ‘smart on crime’ – by introducing more effective alternatives to incarceration, based upon real evidence (of which there is much available from other jurisdictions). Some of those measures will be directed towards crime prevention (such as justice reinvestment and drug law reform) and some towards non-custodial outcomes for offenders (with community supervision and real reform programs). Bail law reform will be part of it.

This is not a prison abolitionist movement. It is recognised that there is a role for prisons but not for the numbers and types of prisoners presently incarcerated.

The JRI is leading a national conversation to reduce our over-reliance on prisons in Australia and to save taxpayers money and improve community safety.

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i [www.bocsar.nsw.gov.au](http://www.bocsar.nsw.gov.au)

ii *The Vanishing Criminal: Causes of Decline in Australia’s Crime Rate* by Don Weatherburn and Sara Rahman (Melbourne University Press, 2021) ISBN: 9780522877342

iii See, for example: Australian Law Reform Commission’s 2018 Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

iv Productivity Commission (2020) – *Report on Government Services 2020*; Chapter 8: Justice; Table 8A.17. See also generally Australian Bureau of Statistics (2019).4517.0: *Prisoners in Australia 2019*.

v [www.justicereforminitiative.org.au](http://www.justicereforminitiative.org.au)