

# JUDGE NOT — LEST YE BE JUDGED

VICKIE ROACH

When I was asked to write this, I was led to wonder what on earth I could possibly say that would be of any interest to the law practitioners, judges and policy-makers who make up this journal's readership. I made several false starts and scrapped heaven knows how many drafts before I realised that, for somebody in my position, I had been given a rare opportunity to speak directly to the very people in whose hands lie the future of Victorian prisoners. That I had been afforded this opportunity because of the Tim McCoy Award was a fact also not lost upon me.

Crime and punishment are always difficult issues. Prisoners in particular are an unpopular cause and it is only for the advocacy of people like the late Tim McCoy and the CLC movement he founded, that we have any voice at all.

I had never heard of Tim McCoy — at least not until I was nominated for an award in his honour and had occasion to do a little research. In itself, that is not without its difficulties from a prison cell with no internet connection, but I did learn Tim was a tireless and dedicated advocate for prisoners' rights — founding member of the Community Legal Centres movement in Australia and a 'legal aid warrior', to quote Simon Smith from the September issue of these pages.

I think I would have liked Tim immediately. As I read about his lonely struggle to get the CLC movement off the ground, I was reminded of the fledgling Aboriginal Legal Service in Redfern back in the 70s and the similar vision, passion and ideals held by that organisation. People like me are lucky people like Tim McCoy ever existed. He was a true champion of the disadvantaged, marginalised and oppressed — and I'm sorry I will never have the opportunity to meet him.

His legacy however, in the form of the award given in his honour by the Tim McCoy Trust, is something that will stay with me forever. I couldn't quite believe it when I learned that Charandev Singh (another advocate for whom I have the utmost admiration), and I had jointly won the Award and the moment was at once very humbling but at the same time, strangely exalting.

Here I was, a prisoner, a common criminal looked upon with fear and distaste by the general public, being honoured with an award usually given to someone with a far more acceptable pedigree. I wondered how this could have happened. It wasn't me personally who'd argued the case for prisoners' voting rights before the High Court — Ron Merkel had that unenviable task,

and it was Phil Lynch along with the team from the Human Rights Law Resource Centre and Allens Arthur Robinson who did all the heavy lifting. It didn't seem right I should be so honoured for the hard work of others — but then I had a shining moment of clarity, you could even say an epiphany during which I realised my entire life experience had led quite bizarrely to this moment. It occurred to me that, had I not had the misfortune to be in prison when John Howard amended legislation to disenfranchise prisoners, I would never have become so politically motivated or inspired to take up the struggle for the rights of prisoners. Talk about seeing the silver lining in a very dark cloud!

Statistically, I *am* a very dark cloud. I tick all the boxes for criminogenic risk predictors including:

- 1) I'm an Aboriginal — *tick*;
- 2) I'm a woman — *tick*;
- 3) I had little formal education — *tick*;
- 4) I was raised in foster care and children's homes — *tick, tick*;

I've also suffered sexual abuse, domestic violence, drug and alcohol abuse, homelessness and previous prison sentences ✓✓✓✓✓.

All of these things have led me through the revolving doors of various prisons, time and time again and it could be reasonably expected they would continue to do so; in fact my Tier One Risk Assessment records me as being at 'high risk of re-offending'.

Despite this, I began to see a glimmer of the aforementioned silver lining when I began studying for my Masters Degree in Writing with Swinburne University. Suddenly my background, which had been such a gross disadvantage in my life thus far, became a rich source of material for my passion for writing. When I graduated in a full academic ceremony here at the prison in 2006, it suddenly occurred to me that anything was possible.

Then in early 2007 I learned John Howard considered me an 'undesirable element of society' who would inevitably corrupt the integrity of the electoral system if allowed to vote. Our illustrious former PM's justification for the amendment he made to existing legislation, named somewhat ironically the *Electoral and Referendum (Electoral Integrity and other Measures) Act 2006*, relied in part on arguments that disenfranchisement of prisoners:

would act as a deterrent to crime and support civic responsibility — support respect for, and obedience to

the law and encourage recognition that the rights and obligations of community participation are correlative.

He had to be kidding! Here I was, just beginning to recover from a life of marginalisation and exclusion — just starting to believe I could find a place in 'normal' society — and along comes 'little Johnny' telling me I will never belong, that I am now excluded from the most basic of civic duties and denied the most fundamental of human rights with the spurious claim that disenfranchising prisoners would somehow promote respect for the social contract and the rule of law. I was outraged. Fortunately, so were a good many other people.

And here's where the dark pathways of my life thus far began to converge in a blaze of illumination. I already knew Amanda George from my participation in a submission to the EOC during a previous prison sentence and she now introduced me to Phil Lynch from the HRLRC. Phil and his team, together with Allens Arthur Robinson and Ron Merkel, began to formulate a challenge to the constitutional validity of John Howard's retrogressive 2006 legislative amendment.

The case was heard in the High Court in June 2007 with the Court's decision handed down on August 30th. The rest, as they say, is history. In a majority 4–2 decision, the High Court overturned Howard's blanket ban on prisoner voting and reversed his Electoral Act amendment so that only those serving sentences of 3 years or more would be disenfranchised. Not a total victory by any means, but a victory nonetheless.

My dark cloud began to shrink even more and further reveal the silver lining surrounding it. Even though we had not won back the right to vote for myself or anyone else serving over 3 years, I had discovered the advantages of political awareness and participation, and as the imprisoned face of the struggle I noticed people were suddenly taking an interest in what I had to say. My 'dark past' seemed no longer a disadvantage or an impediment to success — it had become instead, somewhat incongruously, the means by which I am now able to realise my potential and take my place in society rather than continue to exist painfully on its margins.

From my own experience, and contrary to our former PM's beliefs, I am of the firm opinion that inclusion rather than exclusion is the key to promoting 'respect for the social contract and the rule of law'. Senator Bartlett of the Democrats agrees. He said,

but how can we rehabilitate and actively re-integrate them into society if we exclude their democratic rights and remove any incentive they may have to take an interest in the outside world? Such policies will only promote resentment and may lead to an unrepresentative government.

The *Constitution* says a representative government must be 'directly chosen by the people of the Commonwealth'. The 'people of the Commonwealth' are in this instance defined as being anybody over the age of 18 who is an Australian citizen, of sound mind, and one who has never been convicted of treason or treachery. It doesn't say anywhere that only those

people the government deems 'desirable' should be considered the people of the Commonwealth.

Statistically, prisoners come from some of the most undesirable groups in society. We are the products of social policies that fail to address chronic shortages in the availability of affordable housing, that ignore the ongoing crises in public schools, hospitals and the mental health system, and which introduce welfare and workplace reforms that artificially reduce unemployment figures yet fail to produce greater employment or generate an income above subsistence level. These policies marginalise huge numbers of people and make it increasingly hard for them to participate in any meaningful way in the wider community.

We are the ones clinging to the fringes of Australia's 'robust economy' and who are excluded from any economic prosperity the rest of the country might be enjoying. We are the 'poor relations' that nobody invites to the feast. Is it any wonder that a black economy in drugs and crime flourishes in this bleak environment? Is it any wonder that jails are full to bursting with the fallout from that economy?

So, what's the answer? Dostoevsky once famously wrote that '*a society should be judged not by how it treats its outstanding citizens but by how it treats its criminals*'. I think if we were to be judged under this maxim today, we would be found badly wanting.

For as long as I can remember, from Glebe Shelter to Mulawa women's prison in the 70s, to Cessnock, Bathurst and now DPFC prison, there has been a phrase inscribed on cell walls and written in prison poetry that goes, 'there is no justice — *Just Us*'. I've always thought it was cute and a bit clever but now I wonder if the first person to carve those words into the brick or stone wall of a prison cell ever considered the veracity of the sentiment as deeply as I have. Like 'anon' (whoever he or she was), I too believe there is no justice in a system that metes out vengeance in the place of fairness, and delivers even that only to those who haven't the means or the wiles to escape it. There is, in the final analysis, '*just us*'.

Real justice would recognise the failure of society to properly include *all* of its members in the universal pursuit of a common morality. Atkinson (1969)<sup>1</sup> makes the claim that to be moral necessitates an understanding of moral standards as being universal. He writes, '*moral standards must be in some way strictly universal, not subject to arbitrary exceptions or limitations of scope*,' and perhaps this is why I have such difficulty with morality versus justice. I think justice (or fairness) is moral and therefore 'good' but we live in a world where justice is equated with retribution, and that is neither good nor 'moral'.

Real justice would restore a sense of community instead of the further exclusion from it by imprisonment. Real justice would recognise the human frailties leading to behaviour that goes against the accepted norms, and seek to redress the inequalities in a system that favours the few and marginalises the many, in the relentless pursuit by the few of wealth and

#### REFERENCES

1. Ronald F Atkinson, *Conduct: An introduction to moral philosophy* (1969), in Tricia Fox, 'The Necessity of Moral Education in Prisons' (1989) 40(1) *Journal of Correctional Education*, 20–25.

## OPINION

power. Real justice would be fair and ultimately seek to heal rather than punish those transgressors against the society it purports to represent. The fact that our justice system is built on the basest of human desires for retribution and punishment renders it intrinsically immoral in the 'limitations of its scope'.

And no, I'm not suggesting we just open the gates and let everybody out. That would be counter-productive and possibly quite dangerous in some circumstances. What I am suggesting is an approach to justice that fulfils its definition of 'fairness' and that focuses on healing rather than 'punishment'.

To imprison someone under the current system is to merely punish them as though simple punishment is enough to rehabilitate or 'correct' their behaviour. Quite clearly this approach is not working. Recidivism rates remain high and 'corrective' services facilities remain full to capacity. Some attempt has been made to introduce programs that may be of benefit to some prisoners but these provide little in the way of tangible benefits for prisoners' rehabilitation and can often seem little more than box ticking on somebody's performance indicator spreadsheet.

This 'box-ticking, performance indicating' mentality renders many programs ineffective in terms of the rehabilitative benefits they offer 'clients'. The quality of delivery is often compromised by lack of funding, inexperienced facilitators and the compulsory nature of prisoners' attendance. Technically the programs are not compulsory, but failure to complete them more often than not results in the denial of parole.

I'm reminded of the old joke, 'how many psychologists does it take to change a light bulb?' The answer is 'only one, but the light bulb has to really *want* to change.' Drug and alcohol counsellors have understood the principle of this for decades in relation to the treatment of substance abuse. Policy-makers in the business of corrective services would do well to recognise it too.

A possible solution would be self-determined and self-referred educational programs in prisons, not informed solely by their potential employment outcomes but geared instead toward the personal development of the individual. Programs that develop self-esteem and build confidence are the first steps towards a holistic approach to rehabilitation that seeks to 'make whole' rather than simply punish. I have seen more success stories made possible due to the prisoner's participation in education or creative arts programs than I have through compulsory cog skills or D&A counselling (read, 'none' for the latter). Many such creative arts or personal development programs are offered by community groups and NGOs whose participation in prisoner rehabilitation also offers a sense of community inclusion to prisoners.

For women in particular, personal development programs are essential for the rebuilding of lives shattered by sexual abuse and domestic violence (87 per cent of women in prison have been victims of sexual, physical or emotional abuse, the majority by a combination<sup>2</sup>). These statistics are more than alarming,

they are shameful to society as a whole, yet there are still no programs offered by Corrections that make any attempt to address these issues despite several NGOs offering their services. There also needs to be greater emphasis on, and access to, pre-release reintegration programs that include but are not limited to:

- family ties leaves;
- education leaves; and
- leaves for the purpose of engaging in community work.

According to Department of Justice statistics, only 15 per cent of women are classified as maximum security prisoners yet 80 per cent of us are housed in maximum security facilities<sup>3</sup> that make the approval of such leave applications a rarity. In these facilities we are also subject to greater restriction, heightened surveillance in the form of strip-searches with 12 000 performed each year (down from 18 900 in 2002) on a static population of around 200 women,<sup>4</sup> and a higher incidence of disciplinary action for minor offences than men. That women are in the minority of Victoria's prison population is no excuse for our continued discriminatory treatment in relation to security classification and accommodation in maximum security facilities, and the heightened security measures we are subject to as a result.

Things are changing, slowly. Corrections authorities are beginning to recognise that women's needs in a corrections environment are different to men, but it is an uphill battle and often a case of two steps forward, one step back — what a progressive prison administrator giveth, the Minister for Corrective Services quite often taketh away in response to yet another critical media report — which brings me to my conclusion ...

Why can't the media be utilised to create a climate of support for the rehabilitation of offenders rather than the current one of 'getting tough on crime' and the strident call for harsher penalties? We already know harsher penalties don't work and that prison is no deterrent to crime, so why do we persist with a system that clearly doesn't achieve its goals? Why can't we mount a campaign to educate the public on the benefits of truly rehabilitative programs in prisons — programs that will return people to their communities healed and whole instead of demoralised, devalued and deskilled?

The truth is that 99 per cent of prisoners *will* return to the community at some point in time. Would it not be better for society as a whole if those ex-prisoners had been improved and empowered by their prison stay rather than the opposite? It seems so simple — and so obvious.

Dostoevsky was right on the money — perhaps it is society who should be judged.

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2. Holly Johnson, *Drugs and Crime: a study of incarcerated female offenders*, Australian Institute of Criminology (2004) in Amanda George, 'Discipline and Discrimination: Women prisoners and human rights' (2007) 81 *Precedent*.

3. Department of Justice, 'Statistical Profile of the Victorian Prison System 2001–2 to 2005–6' in George, above n 2.

4. Information released under FOI to Brimbank Community Legal Centre in George, above n 2.