

**Understanding prisons: key issues on policy and practice
12 May 2008**

**Auckland University of Technology
Institute of Public Policy
Restorative Justice Centre**

I am delighted to be in Auckland again after ten years. The last time I was here was in 1998 to deliver Allan Nixon Memorial lecture. That was at the invitation of Jean Stewart and I am honoured to see her in the audience this evening.

It is significant that this event is taking place in the Institute of Public Policy in the Auckland University of Technology. The use and management of prisons is a key feature of public policy in all democratic states. The Institute's website notes that it has an established track record in public policy and public administration and in economic and social development. All of these are relevant to the subjects which we will discuss this evening.

It is also significant that this event is being sponsored by the Restorative Justice Centre, which was set up in the university so recently. Over the last few centuries CJ, particularly in the Western world, has been based on the principles of punitive justice. Injustice is done when the scales of justice are imbalanced and the task of the justice system is to rebalance these scales. Usually this is done in an adversarial environment. There is a triangular relationship between the state (represented by the different elements of the criminal justice system), the victim and the offender. The offender damages the victim, so the state punishes the offender. The problem is that this frequently does not give satisfaction to the victim. RJ principles are based on the principle of an attempt at restoration between the victim and the offender. NZ has a well deserved international reputation for the work it has done in the RJ field, particularly in the field of youth justice.

I note that last September Professor Howard Zehr, one of the world's leading academics in this area of research, lectured in the Centre. As one would expect, he spoke highly of this country's the application of RJ in the youth justice system but he went to express bafflement at the unwillingness to apply the philosophy to the adult system. "There is a strange anomaly in New Zealand," he said, "You have the highest incarceration for adults but the best practice youth justice system," And that is the discussion which I would like us to have today. When I was last here ten years ago you had a prison population of 5,500. I remember concern was being voiced because it has risen by 900 over the previous three years. Little did you then know what lay ahead of you. By the year 2004 it had risen to 6,800 and at the end of 2007 it stood at over 8,300. Apparently you intend to continue in this vein and the Ministry of Justice forecasts that there will be a further increase of 15.6% over the next seven years, with an estimated prison population of over 9,000. This would put you on a par with Libya, Azerbaijan and Brazil. I noticed that in August 2006 the Prime Minister commented that "Numbers at this level are neither financially nor socially sustainable in New Zealand". I would be interested to hear further discussion about these issues.

Before we move on to this, let me say a few words about the use of imprisonment around the world.

The use of prison as a direct punishment of the court is a relatively modern phenomenon. It began to expand in the 17th and 18th century, principally in Western Europe and North America. We do not have time now for an extended treatise on imprisonment and its purposes but it is relevant to note that its expansion was the result of a number of social developments. The first was linked to the expansion of industrial society in what we might call the Western world and the need to have a compliant workforce. Students of Émile Durkheim and more recently Michel Foucault will be well acquainted with this set of arguments. Another important factor, particularly in England, was the need to find a way of dealing with those offenders who prior to the middle of the 19th century were transported to work in the colonies, first in North America and then in Australia. The great convict prisons which were built to hold them, some of which are still with us today, were testament to the fact that hard labour for the public good remained the principle on which they operated.

In other parts of the world the use of imprisonment developed for different reasons. In the 19th century in far flung parts of different colonial empires, where there was no indigenous concept of imprisonment, prisons were built as a method for the colonial powers to subdue the local populace. That is why today one can visit prisons in part of South East Asia and see prisons which reflect their French past. I well remember doing some work in a prison in a region which had formerly been part of the British Empire. I asked whether the authorities could provide a layout plan of the prison. The Commissioner smiled at me and said, "No, we don't have one but I am sure that if you go to the Public Records Office in Kew you will find one."

In Tsarist Russia prisons were built to hold political and other dissidents until such time as they could be exiled to far flung parts of the empire to work as slave labour in the forests and mines of areas such as Siberia which were resource rich but had very severe weather and living conditions. This arrangement was continued and massively expanded in Soviet times.

I do not make these points merely as interesting historical irrelevancies but rather as considerations which we would do well to keep in mind as we have our discussions. The more that I visit prison systems around the world, the more I understand how much they are shaped by their history and how differences in practice can be traced to the genesis of the systems. We can discuss shortly to what extent this is true in New Zealand.

The use of imprisonment

Most of this audience will be well acquainted with comparative rates of imprisonment around the world. Well over nine million men, women and children in prison – the equivalent of a medium sized country. Half of the total is in only three countries - the United States, China and Russia. The so-called penal exceptionalism of the United States means that more than one in 100 American adults are now behind bars.

There are wide variations in rates of imprisonment between neighbouring countries and between some which would otherwise regard themselves as broadly comparable. In Europe we find a rate of 140 per 100,000 in Spain, while its neighbour France has 91; Slovenia has a rate of 66, while neighbouring Hungary has a rate of 147. In 1995 both the Netherlands and neighbouring Denmark had rates of 66. Today this is still the rate in Denmark, while that in The Netherlands has jumped to 117 per 100,000. In this region we contrast the rate of 197 in this country with that of 130 in Australia. Within Australia itself, how are we to explain a rate of 528 in Tasmania, compared to 112 in South Australia, or indeed a rate of 80 in Victoria with one of 906 in the Northern Territory (that is, almost one in every hundred people)?

The first thing to say is that there is no evidence that differing rates of imprisonment can be explained by differing crime rates. It is notoriously difficult to compare crime rates across different countries because of a wide variety of variables. Tapio Lappi-Seppala, Director of the National

Legal Policy Research Institute in Finland, has written a persuasive set of explanations for differing rates between European countries. He has examined the influence of increased punitiveness in some countries, measuring not only the rate of imprisonment but also the number of people entering prison, the average length of prison sentences and the probability of imprisonment compared to other available sanctions. He has gone on to examine the link between punitiveness and fear of crime (as distinct from crime itself). He has also demonstrated the existence of a strong positive correlation between income inequality and prisoner rates among the Western European countries. Looking at Western Europe he has contrasted Sweden and Denmark, which spend a high proportion of GDP on welfare and have relatively low imprisonment rates, with the obverse figures in Eastern European countries together with Western European countries such as the United Kingdom, Portugal and Spain.

Expressing this in another way, the reality in almost all countries is that those who commit serious offences, such as murder, serious assault or rape go to prison. Although there may be differences in the length of sentences, there is little argument about the need for prison sentences in these cases. The significant differences in levels of imprisonment, often between otherwise broadly comparable countries, reflect different attitudes to the treatment of people who are at the margins of society: those who are mentally ill, who are addicted to drugs including alcohol, who are homeless, who come from minority ethnic or other groups, who are foreign nationals. What we have been seeing in a number of jurisdictions in recent years has been an expansion of the criminal justice system into areas where it has not traditionally operated.

Take as an example, the proportion of people who are in prison with identifiable mental illnesses. In many jurisdictions the lack of appropriate health and social support for many of these people means that these people only come to the attention of the authorities once they are accused of committing an offence and at that point the relevant authority is within the criminal justice system so the person goes not to the health system but to court. Given that a crime may have been committed, one can understand the commentators who assert that justice must have its day but they ignore two facts. The first is that prior intervention by a non-criminal justice agency may well have prevented the crime and saved its victims. The second is that the criminal justice system, acting through its agencies in the prison and probation services, is not well equipped to deal with the individual's underlying mental health problems, with the consequence that he or she is likely to go on to commit future offences and to harm more victims.

European Prison Rules

Let me now turn briefly to what happens inside our prisons. I would like to place this within the context of the European Prison Rules, which were approved by the Committee of Ministers of the Council of Europe in 2006 and have been recommended by them to all member states of the Council. The first set of European Prison Rules were approved in 1973, when the Council of Europe consisted of about 15 member states, all in western Europe. By the beginning of 1987 the Council had expanded to 21 states and the Council adopted a revised set of European Prison Rules. By the beginning of the 21st century there were 46 member states, stretching from the Atlantic to the Pacific Ocean and from the Arctic to the Caucasus.

Since 1990 the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the CPT, has visited every member state several times and has published detailed reports on prison conditions in individual states, as well as making recommendations on a series of broader issues in its general reports. The European Court of Human Rights has admitted an increasing number of applications by or on behalf of individuals in a wide range of member states concerning breaches of the Convention on Human Rights in respect of their treatment in prison.

For all of these reasons the Committee of Ministers decided that the time had come for a further revision of the Rules and I had the privilege of being one of the three experts invited by the Council to help with drafting the revision. From the outset we were aware that in addition to the technical

issues which needed to be dealt with we also faced with a sensitive diplomatic task. The challenge which faced us in revising the European Prison Rules was to take account of the different traditions in the new accession states and also to be aware of a new political attitude within a number of the original member states which might be much less sympathetic to rules based on human rights standards. It seemed to us that one way of dealing with that problem would be to place at the beginning of the Rules a set of Basic Principles on which everyone could agree.

In the EPRs of 2006 the first nine rules set out the basic principles on which a decent and humane prison system should be founded. This achievement should not be underestimated. From now on, all persons involved in prisons in whatever capacity in any of the 47 member states of the Council of Europe should be aware that their government has signed up to these principles. If you will forgive me, I would like to list these for you now.

1. All persons deprived of their liberty shall be treated with respect for their human rights.
2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.
4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
5. Life in prison shall approximate as closely as possible the positive aspects of life in the community.
6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
7. Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged.
8. Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.
9. All prisons shall be subject to regular government inspection and independent monitoring.

So, in each of the 47 member states of the Council of Europe any discussion about prison overcrowding, conditions of detention, health care, activities, education and work, links with families and the outside world, discipline, complaints or management must now be carried out within the context of these nine basic principles.

The principles, of course, have wider application and should inform the prison debate in countries such as New Zealand. I look forward to learning whether this is in fact the case.

Professor Andrew Coyle