

A populism that courts injustice

Stephen Keim

AUSTRALIA'S liberal-conservative parties once were followers of English statesman of Irish origin Edmund Burke who, famously, on his election for the seat of Bristol in the House of Commons in 1765, said of himself: "Your Representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

Equally, the Australian Labor Party comes from a tradition where, as agents of the working man and woman, its representatives fought issues on the basis of what was right, not whether it was popular.

Labor parties, in their early days, had to persuade by the rightness of their cause, since the restrictive franchise deprived many of their natural constituency of the right even to vote.

But more and more the platforms and programs of political parties are formed from the results of focus groups.

Nowhere is this more evident than in the policy area of crime and punishment or, as it is marketed, law and order so that, for example, dangerous prisoner legislation (originally touted as applying to less than a dozen individuals) now clogs the Supreme Court with hundreds of applications to keep people inside long after their sentences have expired.

Law and order populism has reached a nadir in the recently announced proposals of Victorian Attorney-General Robert Clark to use the results of an online survey to help set minimum sentences.

Clark's abandonment of "Burkean" teaching is wrong on at least three counts. First, a move to increased use of minimum sentences prevents courts from crafting sentences to the circumstances of the individual case. Even the most serious form of offence including homicide involves great variation in culpability and blameworthiness on the part of the offender.

Second, public perception of the performance of courts in sentencing is severely hampered by the selective and incomplete reporting by many media outlets of sentencing hearings. Often, individuals who were outraged after reading reports of cases take a very different and more benign view when the full facts are explained to them.

As an elected representative and an adviser to the Crown on the subject, Clark would be better advised informing himself as to the true situation and making the judgments for which he has been appointed rather than delegating that judgment to opinion poll results.

Third, online voluntary polling is well known to be the least reliable indicator of public opinion among all forms of opinion polling.

The Queensland Government recently shepherded through Parliament legislation to amend certain defences to the crime of murder. The Government was acting on a report from the Queensland Law Reform Commission. The commission's report was restricted, however, because it was instructed not to consider the option of an alternative to the current mandatory life sentence for murder. The Government was terrified of uninformed public opinion on the issue.

Clark in Victoria is courting the same uninformed opinion to impose a new set of mandatory minimum sentences.

Not only will the rightful place of the courts in applying laws be impinged upon, but injustice will result.

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