

Women and the Criminal Code Chapter 10

SENTENCING

PART 1: INTRODUCTION

The Taskforce is concerned with the following issues surrounding sentencing and its impact on women:

1. The impact of the sentencing regime on women and sentencing options.
2. How victim-impact statements should be used in the sentencing process.

In Queensland provision for sentencing of offenders is made in the Penalties and Sentences Act 1992 (the PSA).

Section 9 of the PSA provides sentencing guidelines for offenders. The only purposes for which sentences may be imposed on an offender are -

- (a) to punish an offender in a way that is just in all the circumstances, or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or similar offence; or
- (d) to make it clear that the community acting through the court, denounces the sort of conduct in which the offender was involved; or
- (e) to protect the Queensland community from the offender; or
- (f) a combination of two or more of the purposes outlined in (a) to (e).

Section 9(2) provides for the matters to which the court must have regard on sentence.

Important features of section 9(2) are:

- a sentence of imprisonment should only be imposed as a last resort;
- a sentence that allows the offender to stay in the community is preferable;
- the court must take into consideration the maximum and any minimum penalty prescribed for the offence; and
- the court must also consider
 - the nature of the offence and how serious it was, including any physical or emotional harm done to the victim;
 - the offender's character, age and intellectual capacity;
 - the presence of any aggravating or mitigating factor concerning the offenders;
 - any other relevant circumstances

The matters to be considered in determining the person's character are provided at section 11. These include the number, seriousness, date, relevance and nature of any previous convictions. The PSA provides that the court may take a guilty plea into consideration when imposing sentence.

A range of sentencing options is available under the PSA. These include:

- release absolutely;
- release on entering a recognisance;
- orders for restitution and compensation;
- fines;
- fine option orders;
- unpaid community service;
- probation;
- intensive correction orders;
- order of suspended imprisonment;
- imprisonment.

PART 2: IMPACT OF SENTENCING ON WOMEN

Is gender a relevant consideration in sentencing?

A number of studies have looked at whether there is a "gender bias" in sentencing and the related question of whether women are treated more leniently by the courts. Unfortunately, due to resource constraints, the Taskforce has not had the opportunity to conduct independent research into these issues. However, "while the gender of an offender should not, in itself, be a matter relevant to sentencing, the problems associated with and of particular relevance to female offenders should not be ignored." It is this latter aspect which will be considered in this Report.

Meredith Wilkie in her study "Sentencing Women: Pre-sentence Reports and Construction of Female Offenders" writes:

Sentencing which takes sex into account may be condemned as biased or praised as enlightened and fair. Judges are faced at the one moment with criticism for their paternalistic attitude to women and at the next with demands that women and children should not be gaoled. What is needed is a clear analysis of the proper relevance of sex to sentencing.

She further states:

Sex per se, should be an irrelevant ground on which to distinguish between people. This principle is now entrenched in all other areas of public life. In the course of a candid and open examination of sentencing principles and objectives, however, it might appear that some characteristics still more likely to appertain to women than to men should be taken into account in sentencing. If it were generally agreed, for example, that primary carers of dependent children should not be imprisoned, that principle would then be applied to all, irrespective of sex (although mothers would likely be the bulk of the beneficiaries). Likewise, if

being distressed at the time of committing the offence is to be regarded as mitigatory, it should mitigate equally for females and males.

In the course of a public review of sentencing, moreover, it may become apparent that the realities of women's lives are still so very different from those of men in contemporary society, in ways that ought to be taken into account in sentencing, that to adopt a gender-neutral (or gender-blind) stance would reinforce existing gender biases. Treating all people as if they are men can operate to the profound disadvantage of those who are not. This principle is expressed in the maxim 'treat equals equally and unequals unequally'. The aim should be one of equality of outcome rather than equality of treatment (except where that would achieve the ultimate aim).

The sentencing of female offenders raises the following concerns:

- the consequences of incarceration for female offenders and society as a whole;
- the difficulties faced by women in meeting financial obligations;
- the inequalities in availability and types of community service orders; and
- the difficulties faced by women with disabilities.

Female incarceration

Anne Edwards, in her essay "Women in Prison" writes that, "despite constituting approximately half of the general population, women are a very small proportion of the prison population in Western countries. This fact has sometimes obscured public recognition of their needs and problems".

"Research has shown that the needs of women prisoners contrast markedly with their male counterparts". These needs have arisen from:

- the difference in characteristics between the populations of male and female prisoners;
- the difference between lifestyles and responsibilities of men and women (family, etc).
- the impact on institutionalisation would seem to differ greatly between men and women.

A comparative study entitled "Incarcerated Mothers and Children: Impact of Prison Environments" (IMCIPE) in Australia and England, examined the impact of imprisonment on mothers and their children up to eight years old.

The study found that the inmate mother is not only seen to abrogate the socially constructed female ideal of a compliant law abiding woman, but she is also seen to contravene her primary maternal role as a nurturing responsible parent. The perceived denial of her feminine and maternal identity is further galvanised in the male constructed prison environment with its pervasive philosophy of incarceration, its rigid rules and regulation and its male oriented mode of containment which may run directly counter to the needs of mothers and young children.

The relevant findings of the IMCIPE Report are:

(1) maintenance of family ties is seen by inmates and their families as important for the rehabilitation of the inmate mother and for the welfare of her children.

(2) inmate mothers maintain that they need support from "significant others" (within and/or outside the prison) to cope with the roles of parent and mother.

Quoting Butler's (1994) study of the post-release experiences of inmate mothers in New South Wales, Anne Farrell states that:

From arrest through sentencing, imprisonment and post-release, there is almost no recognition or consideration given to the fact that these inmate women are mothers.

Studies indicate that imprisonment of women can have a serious impact on their children. A study by the Home Office Research and Statistics Directorate indicates that of the children in the study:

Almost three-quarters were living with their mothers before imprisonment, some with their mothers only. So, most of the children lost their principal carer when their mother was imprisoned. This is very different from the situation experienced by fathers in prison. Whereas the children of male prisoners are generally looked after by their partner, women prisoners relied heavily on temporary carers to look after their children ... The children were reported to be experiencing a variety of problems as a result of the separation from their mother. This confirms other research (Richards et al 1996) which found that the children of women prisoners tended to have quite serious emotional and behavioural problems whereas the children of male prisoners tended to have relatively minor problems.

The fundamental difference in the experience of men and women in prison needs greater recognition by sentencers and the Prison Service.

Should the needs of female offenders be taken into account on sentence?

Carol Quadrelli in her article "Women in Prison" correctly points out, "harsher law enforcement and penal policies reflects the prevailing mood at the general community towards offenders".

She says that government must, at the same time, contend with the problems of prison overcrowding and the costs of keeping people in prison. She says "the political imperative of governments in fashioning penal policy is to some extent in conflict with their economic imperative. To introduce any scheme as an alternative to imprisonment invites the response of 'going soft on criminals' both in the political and media arenas".

Brand asks, however, "why are these women in prison? Women's crimes are overwhelmingly economic in nature and few female offenders pose a risk to society or public safety, imprisonment is therefore inappropriate, costly and inefficient". This statement is confirmed by recent statistics which show that :

- less than half (38%) of sentenced female prisoners were convicted of violent offences, the figure for males being 57%;
- drug offences accounted for a larger proportion of female prisoners (17% compared to 7% of male prisoners);
- fraud and misappropriation accounted for 15% of females compared to 8% of males.

In addition, female prisoners were serving shorter sentences than males (median expected time to serve of 1.9 years compared to 4.0 for males).

Brand puts forward a number of sentencing options, which include periodic detention:

Periodic detention does not need to be weekend detention, particularly in the case of female offenders who are very often mothers and single mothers of young children. A system of periodic detention that requires female offenders to report to a college, training centre, drug rehabilitation centre or a community corrections centre during school hours would serve as a true alternative to imprisonment. It would keep the family unit together and provide a means by which the offender could address offending behaviour.

Intensive correction orders could also be used to address the problems of female incarceration.

A further sentencing option which was recommended in the "Corrections in the Balance" Report on corrective services in Queensland, was the extension of sentencing options to include home detention as a direct sentencing option. Although this was recommended with particular reference to Aboriginal and Torres Strait Islander offenders, it would also be of benefit to female offenders generally.

Deliberations

Options

The Taskforce released the following options for discussion:

1. That the PSA be amended to provide that where a court wishes to impose a custodial sentence in relation to persons with dependants, it be required to examine non-custodial options such as periodic detention orders and increase the use of intensive correction orders.
2. That the use of home detention as a direct sentencing option be examined.

Results of consultation

The Taskforce consultation at Brisbane Women's Prison revealed that contact hours with children was one of the major issues for prisoners. There was concern that contact hours were limited (at the time of the consultation - one to three hours per week) and that appropriate facilities were not available at that centre for contact visits with children. There was also concern that following relocation to the new Women's Prison, contact hours would be reduced to two one-hour visits per week. Prisoners believed that this would have an adverse effect on prisoners and their children.

Recent advice from DCS indicates that prisoners at the Women's Prison are allowed to have their one hour visits separately or in a continuous block. DFYCC may also arrange special visits in addition to these allocated times. It also advised that the centre contains two purpose built accommodation units for children and that more equipment has been provided for a playgroup. Attempts are currently being made to obtain more play equipment for visiting areas.

The prisoners at the consultation felt that the fact that they had children was looked on adversely by the sentencing judge. There was also a concern that the recommendations made by judges for early parole were not necessarily taken into consideration by the Parole Board.

The majority of submissions made to the Taskforce supported the notion that the court and the corrective services system should take into consideration whether the offender is a caregiver of children.

Only one submission did not support this view:

Depending on the seriousness and the reasoning behind the offender's actions, I believe that sentencing should not be made with dependents in mind. The offender is the one that should have been concerned with this aspect initially.

More typical submissions were:

Gaol should only be used as a last resort. Men and women suffer the same alienation, and community support should be more readily available. However consideration of problems peculiar to women should be given, especially to those mothers who have offended. Regardless of the offence, unless against their children, women should receive the comfort that their children are well cared for if incarceration is the result of their actions. Fear of losing children must interfere with attempts to rehabilitate. (Mavis Cooper, Deputy Mayor Warwick Shire Council)

Wherever possible, options other than prison should be sought in cases where women and children will be separated by a prison sentence. (Noosa District Family and Youth Support Centre.)

A submission from the Women's Policy Unit of the DCS agreed that within the criminal justice system there is little consideration given to the fact that women are mothers and that imprisonment of a mother may impact seriously on the child.

The submission also pointed out that according to anecdotal evidence, a high percentage of the women who are received into prison in Queensland have had interaction with DFYCC regarding the welfare of their children. This is for a range of reasons but often is in conjunction with some mothers' drug-taking behaviour and consequent neglect of a child or children. The submission cautions that non-custodial options to imprisonment for women should exhaustively consider the welfare of the child and the need for appropriate support mechanisms for mothers with children.

The submission of the Unit also indicated that it will explore the differences in offending patterns for men and women as part of research looking at the acceleration of the female prison population in recent years. It states that this will give a clearer picture of the differences in offending patterns between males and females, causal factors and provide some analysis of trends and issues.

The submission also states that any consideration of non-custodial options such as periodic detention and intensive correction orders should take account of the present initiative to divert drug offenders from the criminal justice system. It argues that direct sentencing to rehabilitation units for women offenders could be argued as a strong recommendation on the basis of their high rates of drug

offending in comparison to their male counterparts and their specific gender requirements for treatment.

Discussion

The Taskforce generally supports the notion that the sentencing court should take into consideration the fact that the female offender is a mother, subject to certain qualifications.

As is noted above, less than half of female prisoners are serving time for violent offences. Drug offences and fraud offences account for a larger proportion of female offenders. Further, female prisoners are serving shorter sentences than males. Given this, the Taskforce considers that it is appropriate to examine non-custodial options for certain classes of female offenders.

The Taskforce considers however, that any attempt to provide in legislation that care responsibilities of the offender should be taken into account, should be done with caution. This concern is also reflected in the submission of the Women's Policy Unit of the DCS. For example, evidence would need to be placed before the sentencing court as to the offender's family dynamics. It would not be appropriate to sentence to home detention an offender who was abusing her children. Further, should a man with dependent children who has killed the children's mother be entitled to a sentence which would take account of his responsibilities as a father? The Taskforce also considers that other relationships might need to be taken into consideration, such as care for elderly parents.

The Taskforce is of the view that the question of whether alternative sentencing options should be provided for in legislation is an issue that should be the subject of further consultation and investigation.

However an issue of equal importance is how the correctional system presently deals with prisoners who are mothers. As indicated in the discussion above, the issues surrounding imprisonment of mothers will also impact on society generally. Some of these issues could be addressed by changes to prison regulations, processes and procedures.

The Taskforce notes and commends the Department of Corrective Services for the establishment of the Women's Policy Unit within that department. The Unit will provide integrated and strategic policy development and implementation support to assist the department to address issues relevant to the management and rehabilitation of women offenders. The functions of the unit include:

- development of policy advice in relation to women in custody and under community supervision;
- contribution to the development of correctional practices and procedures affecting women and issues associated with the placement and management of children who are accommodated in correctional centres;
- provision of advice with respect to the program and rehabilitation needs of women; and
- contribution to the development of staff training in relation to women's issues.

In addition to the work being undertaken by the Unit, the Taskforce has been informed of other proposals under consideration by that department which will

address the particular needs of prisoners who are caregivers for children.

Recommendation 84

84.1 That the DCS examine the particular needs of inmates who are sole caregivers for their children.

84.2 That the DCS establish policies, procedures and guidelines which will facilitate appropriate contact and support between sole caregivers and their children.

84.3 That the DFYCC examine the issue of communication between prisoners and children in the care of the department and if necessary implement changes to facilitate improved communication.

84.4 That JAG consider amending the PSA to make available non-custodial sentencing options for persons who are sole care givers for their children. Such options may include periodic detention orders, increased use of intensive correction orders and the use of home detention as a direct sentencing option. This is to be done in consultation with appropriate stakeholders, including the DCS and the DFYCC.

84.5 That JAG consider amending the PSA to make available non-custodial sentencing options for persons who are sole care givers for others, such as elderly parents.

To what extent should the court take into consideration cultural background when imposing sentence?

The ALRC has recommended that the offender's cultural background should be specified as a factor to be taken into account on sentencing. The Taskforce takes a cautious approach to this recommendation.

On one view, this is entirely appropriate. For example, for NESB women charged with drug importation offences, where their involvement in the commission of the offence was brought about by cultural pressures, the Taskforce has noted the relevance of culture to the defence of duress. However, if the defence was unsuccessful, and the women were convicted of the offence, they should, at the very least, be entitled to place evidence of cultural imperatives before the court in mitigation of their sentences.

In contrast, examples were evident in both the literature and at our community consultations where culture has been used by men to argue for a reduction in sentence for crimes involving violence against women:

Another common scenario is where the woman's culture is used to justify the violence perpetrated against her through stereotyped assumptions that a level of violence is tolerated in certain cultures. In this way the focus is inappropriately shifted from the perpetrator's violent and unacceptable behaviour to the woman's culture.

Gonzalez, Gilmore and Orlando argue that accepting that another culture "allows" force to be used as a means of disciplining women has the following consequences:

- the violence is justified;

- the woman's behaviour is seen as the cause of the violence;
- it does not question whether women have a say in this version of culture;
- it does not acknowledge that this cultural value reinforces the power disparity between men and women.

Indeed, the very notion that violence against women is "allowed" or "tolerated" by some cultures begs the question: tolerated by whom? By the women? If violence is forced upon, but not tolerated by, women, does it form part of their culture?

Deliberations

Discussion

The Taskforce discussed the difficulty of assessing whether a culture does permit certain behaviours or not. Who is to be the judge of what is a cultural "norm", a person from that country or the community? As indicated above, the Taskforce also recognises that it is difficult to decide when it is appropriate to take cultural factors into consideration on sentence. The Taskforce notes there is an international move by women that culture should not be used to justify violence against women.

As stated above, the Taskforce recognises that in some circumstances it is entirely appropriate for culture to be taken into account on sentence. The Taskforce is mindful of the possibility that cultural considerations could be used in mitigation of sentence where violence had been perpetrated against a woman. Given the complexity of the issue however, the Taskforce is not prepared to make a general recommendation to this effect, without the matter receiving further consideration. The Taskforce is united in its view that any future amendment in accordance with the recommendation of the Taskforce (below) should ensure that cultural considerations should not be taken into consideration in relation to crimes of violence. For this reason the Taskforce recommends that culture should not be taken into account when sentencing for the crimes included in section 9(3) of the PSA.

Recommendation 85

85.1 That JAG give consideration to amending section 9(2) of the PSA to take account of the issue of culture on sentence.

85.2 That any amendment to section 9 of that Act ensure that cultural considerations are not taken into account for the crimes included in section 9(3) of that Act.

Fines

Another way in which some women, and men, can be disadvantaged by the sentencing process is when imprisonment occurs for non-payment of fines. This is a particular concern for Indigenous offenders. A recent study conducted by Judith Andrews in Far North Queensland discovered that there are many problems associated with enforcement of fines. One of the difficulties explored in the paper was that:

In addition to government policy enshrined in the 'black letter law' the cumulative effect of discretionary decisions has an impact on determining who defaults on payment of fines and who is ultimately imprisoned for this default. Such

discretion is exercised by the police and the judiciary as well as court and corrections staff.

Magistrates exercise quite wide judicial discretion in relation to fines, within the limits of the Penalties and Sentences Act in matters such as orders for restitution, compensation and penalty for non-compliance, payment by instalments, time to pay and Fine Option Orders ... and in ordering default imprisonment ... They also exercise discretion in the weight they give to relevant factors to be taken into account when deciding the amount of the fine.

Andrews argues that the present sentencing regime operates to the detriment of the poor particularly where "the severity of the penalty is directly related to the financial circumstances of the offender" and "that the interaction of the influences of race, gender and poverty result in very high levels of fine default in Far North Queensland, with the impact falling disproportionately on Indigenous people and most disproportionately on Indigenous women".

The cases that she observed demonstrated that "little attention was given to offenders' financial circumstances in setting the amount of the fine or the time to pay".

A common problem identified in the study was that duty lawyers did not have sufficient time to obtain financial information from clients, consequently sufficient details of the client's financial means was not put before the courts.

It is ironic that despite the fact that fines can be imposed in order to avoid sending the offender to prison, circumstances can work against the offender so that a prison term may ultimately be served for non-payment of a fine. This is particularly the case for Aboriginal women. A review of imprisonment rates for women revealed that "the Aboriginal women's imprisonment rate was and still is significantly higher than non-Aboriginal women's. The most frequently committed offences by Aboriginal women are non-payment of fines, drunkenness and social security fraud - crimes of extreme poverty".

Ways to address the issue of imprisonment for fine default.

Brand observes that "despite efforts to eliminate the prison sentence in fine default, it is still being used ... Consideration should be given to greater reliance on civil enforcement measures to collect outstanding payments in appropriate cases". The State Penalties Enforcement Act 1999, seeks to achieve this aim. The Explanatory Notes to the Act state that the establishment of the State Penalties Enforcement Registry (to be known by the acronym SPER), is designed to increase the rate of payment prior to enforcement action and minimise the number of fine defaulters being imprisoned.

Both Brand and Andrews favour the use of unit fines as a sentencing option. The concept originated in the UK Home Office in 1988 and after a trial period was adopted on a permanent basis. Brand notes that the system was modelled on day fines which were introduced into Finland in 1921 and Sweden in 1931, and is in use in a number of European countries, Latin America and some states of the United States of America. "The system requires detailed calculation of each fine imposed. Factored into the calculation is a scale for severity and a weighting for ability to pay. This means that offenders of substantial means pay more than those of lesser means but suggests that the ability to pay and the effect of the penalty upon the offender is equal."

In the English trial, sentencing guidelines were expressed in units of weekly

income rather than cash figures. The gravity of the offence was reflected by magistrates increasing or decreasing the number of units, the idea being to deprive an offender of "spare income" for the number of weeks chosen. The system provided that all offenders on whom a fine is imposed would have the ability to pay.

Although the trial of the unit fine system was a success, the attempt to establish the system on a permanent basis foundered seven months after its commencement. The originator of the unit fine system in Britain, David Moxon, pointed to a number of factors which contributed to its demise. These included the fact that the unit values spanned too wide a range, that all offences were included in the scheme, and that it appeared that there was a lack of understanding of the principles and practical applications of the scheme. He stated that during the operation of the scheme, there were signs of a consensus developing in some quarters as to how to resolve the problems. Despite the system being abandoned, he said that:

What has replaced it does not take England and Wales back to the pre-existing situation; courts are now able to increase fines for the better off and to reduce them for the poor. The legislation also makes it clear that means are still relevant when setting fines, and courts can evolve whatever measures they think most appropriate for taking means into account. It will be interesting to see whether the experience of relating fines to means in a systematic way will have a lasting impact on the way fines are set.

Deliberations

Option

The Taskforce released the following option for discussion:

That consideration be given to the introduction of a "unit fine" system so that fines will be expressed as units of weekly income rather than in cash figures.

Results of consultation

Submissions did not specifically address this issue. However the Women's Policy Unit of the DCS indicated that it will be monitoring the impact of the SPER project with regard to its impact and appropriateness for women fine defaulters as part of its wider research brief to analyse the growth in the female incarceration rate.

Discussion

The Taskforce notes that the implementation of the unit fine scheme in Britain had a number of difficulties, which may have been resolved if the system had been given more time to operate. While noting the difficulties, the Taskforce is of the view that the concept of a unit fine system is worthwhile and that JAG should investigate the introduction of a similar system to Queensland.

Recommendation 86

That JAG investigate whether a unit fine system would be appropriate for Queensland courts.

Automatic deductions

Andrews also favours an approach of automatic deductions from the weekly income of an offender so that people who are unable to manage their funds are not disadvantaged.

This could create problems where the offender is a social security recipient, as "garnishee" of social security income is prohibited by Commonwealth legislation. The arrangement would therefore need to be voluntary.

Deliberations

Option

The Taskforce released the following option for discussion:

That consideration be given to allowing offenders to agree to automatic deductions from their weekly income as a means of meeting their fine obligations.

Results of consultation

No submissions specifically addressed this issue.

Discussion

The Taskforce does not consider it necessary to recommend any legislative change in relation to this matter. There should be some kind of encouragement by the courts for offenders to agree to "garnishee" of their social security benefits to assist in meeting fine obligations.

Recommendation 87

That JAG examine ways in which offenders can be encouraged to agree to automatic deductions from their social security payments as a way of meeting their fine obligations.

Community service orders

A study undertaken in Tasmania investigated concerns expressed by Tasmanian Corrective Services Department personnel about inequities that they perceived to be inherent in the operation of the community service scheme. "In particular, there was anecdotal evidence of regional variations in the operation of the scheme and of constraints imposed upon the selection of offenders by organisational pressures that ran counter to the stated aims for the administration of the scheme".

The report of the study noted that:

Assessments of the type undertaken here are important in the interests of fair and equal application of the law. If constraints within the scheme operate to limit the applicability of this sentence for particular categories of offender in ways not related to general sentencing principles or to established policies of those administering the scheme, this may result in injustice for offenders within those categories should they receive a harsher penalty than a community service order.

Relevant findings of the study were:

- offenders with dependants may be anticipated to pose logistical problems for community service organisers because of potential difficulties they may experience in accommodating those dependants at times when community service is required to be done;
- offenders with dependants are perceived to be at a greater risk of breaking community service orders because of possible conflicts which may arise between their personal responsibilities and their community service obligations;
- the fact that community service work is less likely to be available for women offenders is partly attributed to the fact that comparatively few overall offenders are women - the majority of approved projects are therefore oriented to male offenders;
- when the last point is coupled with the fact that community corrections officers are generally reluctant to place women on an predominantly male work groups, women are likely to be excluded from participation;
- these problems are compounded by assumptions about gender by some officers as to the type of work which is appropriate for women.

The study found the fact that an offender who has responsibility for dependants affects the availability of community service order work irrespective of the person's gender. It was also clear that there was no deliberate discrimination against women offenders in the assessment process.

Accordingly, the impact of the offender's gender on work availability appears to arise principally from systemic factors and also from prevailing, orthodox, views about the type of work suitable for women.

A submission to the Taskforce revealed that Corrective Services officers in some parts of Queensland have similar problems with finding appropriate and available community service work. Other impediments to successful completion of community service orders are the lack of availability of childcare for offenders.

While Community Corrections does make allowance for this issue, in the end, if the issue of childcare cannot be addressed so that the prescribed Community Service can be performed, the woman will end up back in Court for an alternative sentence - or in the case of fines, the reinstating of the original fine with, perhaps, time to pay. There might be no penalty in this in that this is not a breach of the woman's order - but, in the end, she has not had the opportunity to perform community service, despite her best intentions.

The Tasmanian Report concluded that:

1. Specifically, the variables of gender, dependants and health status influence the assessment outcome because of the negative impact upon work availability. The result is that because community service work is less likely to be available to women offenders, offenders with health problems and offenders with dependants, the community service order itself is likely to have limited availability for these groups of offenders;
2. Where community service work is not available, there is an increased chance that the offender will receive a custodial sanction.

It would be appropriate if resources were made available to ensure that women do not face default imprisonment due to circumstances which are beyond their control, for example, being unable to attend to community service obligations because of lack of child care. If necessary, legislative provisions to ensure that this occurs, may need to be considered.

Deliberations

Option

The Taskforce released the following option for discussion:

That resources be made available to ensure that women and offenders with dependants are not disadvantaged in the performance of community service orders. Is legislative prescription necessary to ensure this?

Results of consultation

Submissions received generally supported the notion that community service orders should be accessible to both men and women and make provision for offenders who are parents.

The submission from the Women's Policy Unit of the DCS stated that there may be a need for a working party to be developed to look at the issue of community service for women. The Women's Policy Unit of that department may take this initiative in consultation with the Director of Community Corrections. There would be extensive consultation with a range of stakeholders. The submission also stated that a legislation review taskforce within the DCS is currently examining the 'special needs' status of women as part of an overall review of legislation.

Discussion

The Taskforce supports the concept that women should have equal access to community service orders. Although we acknowledge that this issue is of concern in the Logan area in particular, it is difficult for the Taskforce to assess how widespread the problem is. As stated above, this issue is under consideration by the DCS. The Taskforce supports this work and considers that any consultation undertaken by that department would need to include community service providers.

Recommendation 88

That the DCS, in consultation with stakeholder groups, ensure that women and offenders with dependants have equal access to community service orders.

Women with disabilities

Should the PSA be amended to provide for expert assistance in the preparation of pre-sentence reports for persons with an intellectual disability?

Section 9 of the PSA provides that a court, in sentencing an offender, must have regard to their character, age and intellectual capacity. Section 15 of that Act also provides that in imposing a sentence on an offender, a court may receive any

information, including a pre-sentence report, that the court considers appropriate to enable it to impose the proper sentence.

The NSWLRC noted that case law was increasingly recognising the relevance of intellectual disability in sentencing decisions and that it is inappropriate to make blanket rules for sentencing. However, that Law Reform Commission was prepared to recommend that where such pre-sentence reports are ordered by the court, that expert assistance should be given to the judge or magistrate in deciding the most appropriate placements for offenders with intellectual disabilities.

Section 15 of the PSA provides that a court may receive a report under section 201 of the Corrective Services Act 1988. Community correctional officers prepare such reports and section 201 does not provide for expert assistance.

Deliberations

Options

The Taskforce released the following options for discussion:

1. That section 15 of the PSA be amended to allow the court to specifically require that a pre-sentence report concerning an offender who is a person with a disability include expert advice on suitable penalty options for the offender.
2. That section 201 of the Corrective Services Act 1988 be amended to allow for the inclusion of such expert advice in the pre-sentence report.

Results of consultation

Those submissions on the Taskforce Discussion Paper that discussed this issue were supportive of the options.

Discussion

The Taskforce believes that insufficient consideration has been given to the issue of delays in sentencing caused by time taken to obtain necessary expert assistance. This may result in longer detention prior to release on a community-based order.

The Taskforce unanimously supports the two options, subject to further consideration by the Government.

Recommendation 89

89.1 That Government give consideration to the following reforms:

89.2 That section 15 of the PSA be amended to allow the court to specifically require that a pre-sentence report concerning an offender who is a person with a disability include expert advice on suitable penalty options for the offender.

89.3 That section 201 of the Corrective Services Act be amended to allow for the inclusion of such expert advice in the pre-sentence report

PART 3: VICTIM IMPACT STATEMENTS

What is the purpose of victim impact statements?

Section 14 of the Criminal Offence Victims Act 1995 provides-

14. Information during sentencing of impact of crime on victim

(1) At the sentencing of an offender for a crime, the prosecutor should inform the sentencing court of appropriate details of the harm caused to a victim by the crime .

(2) In deciding what details are not appropriate, the prosecutor may have regard to the victim's wishes.

(3) A prosecutor should ensure the sentencing court has regard to the following provisions, if it would help the victim to have the benefit of the principle mentioned in subsection (1) -

(a) Penalties and Sentences Act 1992, section 9(2)(c);

(b) Juvenile Justice Act 1992, section 109(1)(g).

Both the PSA and the Juvenile Justice Act 1992 (JJA) require the sentencing judge to take into account the effect of the crime on the victim (see section 9(2)(c) of the PSA and section 109(1)(g) of the JJA. Often a Court is informed of the effect by way of a victim impact statement, which might be tendered or read to the Court. In other cases, the prosecutor might inform the Court by way of submissions from the bar table.

The Victim Support Service of the DPP has prepared a brochure for victims, called "Making a Victim Impact Statement" which expressly recognises that a victim who prepares a victim impact statement may be required to go to court and be cross-examined about the statement, if it is challenged by the defence.

Why have victim impact statements?

Zoe Rathus, in a speech presented to a "Women, Rape and the Law" Conference stated that "proponents of victim impact statements put forward a number of compelling arguments for their use. These include:

- that they will provide the court with detailed information about the physical, financial, psychological and emotional effects of the crime on the victim and their family;
- they will reduce the victim's sense of alienation from the system by providing them with the opportunity for direct input into the sentencing process;
- they may increase the willingness of victims to co-operate with the criminal justice system;
- they may increase the victim's satisfaction with the system.

Rathus points to some of the arguments against the use of victim impact statements:

- that they undermine the fundamental principles of the criminal justice system which is dependent on two participants - the State and the offender;
- they may encourage victim vengeance. However a Canadian study which looked at eighteen months operation of the use of victim impact statements indicated that an insignificant number contain information which could be considered vengeful.

It is important to note that the victim has the choice of whether information should be given to the court. Some victims of crime choose not to prepare a victim impact statement. This should not lead to the assumption that no harm has been suffered. A victim may be inarticulate or too traumatised to express his or her feelings. A homicide victim who was friendless should not be assumed to be less of a loss to humanity just because there is no one to speak to the Court on his or her behalf.

In Queensland the purpose of victim impact statements has been unclear. Are they intended to have an influence on the sentence imposed on the offender? Or are they part of the "healing" process for the victim by giving them a voice in the criminal justice system? A consideration of the sentencing principles already referred to would suggest that the impact of the crime on the victim is relevant to sentence.

Other jurisdictions

New South Wales

In New South Wales, the new Part 6A of the Criminal Procedure Act 1986 provides for victim impact statements at sentencing. Section 23C says that a court may receive and consider a victim impact statement, if the court considers it appropriate to do so, after conviction and before determining punishment (section 23C(1)). The court must accept a victim impact statement if a family member of a deceased victim wishes to provide one. However in this case, although the court must acknowledge receipt of the statement and may make any comment it considers appropriate, the statement cannot be considered in determining punishment "unless the court considers it appropriate to do so" (section 23C(3)). Under section 23D, it is made clear that a victim impact statement is not mandatory, and that the absence of a victim impact statement is not to give rise to an inference that an offence had little or no effect on a victim.

Victoria

In Victoria, section 95A to 95E of the Sentencing Act 1991 (introduced in 1994) make clear that a victim who has made a victim impact statement may be required to give evidence and be cross-examined.

Issues

1. Is the sole purpose of victim impact statements to give the victim a voice in the criminal justice system?
2. Should victim impact statements impact on sentence?

3. If they should impact on sentence and the facts contained in the statement are in dispute:

(a) should the victim be subject to cross-examination?

(b) should the standard of proof applied be 'beyond reasonable doubt' or 'on the balance of probabilities'?

Deliberations

Options

The Taskforce released the following options for discussion:

1. To include in legislation the purpose of or use to which a victim impact statement can be put.

2. To provide that the maker of a victim impact statement cannot be cross-examined on it.

Results of consultation

In submissions on the purpose of victim impact statements (VIS) the following views were expressed:

- The purpose of the VIS is to allow the victim to participate in the system.
- The purpose of the VIS is to affect the sentence that will be given.
- The purpose of the VIS is to make the offender aware of the victim's suffering.
- The court should be obliged to take the VIS into account, and where there is no statement it should assess the impact on the victim through questioning appropriate witnesses.
- Without a VIS or other kinds of information, the court should use its own judgment to quantify the impact on the victim.

The views of Sherrie Meyer of the Queensland Homicide Victims Support Group were representative of many submissions:

The primary purpose of a VIS is the chance for a victim to explain to the court the effects the crime has had on their lives. The ability to put forth a VIS provides the victim with an opportunity to participate in the justice system and to be recognised as a relevant part of the process. Certainly as much as pre-sentence reports on behalf of the offender are recognised and included prior to sentencing, so the VIS should be included and regarded by the presiding judge prior to sentencing. In the case of homicide, VIS are vital to surviving family members as many times this is the only opportunity for the victim's story to be 'heard' before the court. Most families surviving homicide strongly indicated that they feel their loved one has been entirely forgotten in the court process because they are dead and so incapable of speaking for themselves. The VIS is their only chance to speak about their feelings and on behalf of their loved one.

Discussion

The Taskforce considers that determining the purpose of the VIS is an extremely difficult and sensitive task. Members caution that the VIS can contain inflammatory material, which is peripheral to the issue at hand. Also, it can be problematic to prescribe that the VIS can impact on sentence when much will depend on the victim's ability to present his or her case to the court. Whilst members concede that the VIS is a valuable tool in giving the victim a voice in the system, in some cases the victim will not want the offender to know what damage has been caused, particularly in the sexual assault cases.

The Taskforce is of the view that the purpose of the VIS should be clarified. However, if the victim chooses not to put a VIS before the court, the court should not draw an adverse inference from this.

Recommendations 90

That JAG clarify the purpose of the Victim Impact Statement.

That if a Victim Impact Statement is not tendered to the court, the court should not draw an adverse inference from that failure.