Women and the Criminal Code Chapter 11

MISCELLANEOUS

In this Chapter we cover four topics that have considerable impact on the experience of women in the criminal justice system. These are:

- Police Powers and Procedures
- Bail
- Majority Jury Verdicts
- Trial by Judge alone

PART 1: POLICE POWERS AND PROCEDURES

Introduction

This Part deals with the following issues:

- strip searches of women by police;
- detention of the accused;
- police investigation of offences involving people with an intellectual disability;
- police questioning of people with an intellectual disability.

Police in Queensland have operated under the Police Powers and Responsibilities Act 1997 ("the Police Powers Act") since April 1998. This Act sets out police powers relating to searches, entry, seizure, arrest and investigations. It also imposes responsibilities on police in relation to the exercise of those powers.

Strip searches of women by police

The Taskforce has been advised that strip searches of people in custody are routinely undertaken:

- to determine whether a suspect has evidence of a crime concealed on his or her person; or
- to ensure that the person has not concealed an article which may endanger the safety of police, the offender or other people in custody.

The Taskforce has been concerned by recent occurrences in Warwick and Ipswich where women were subjected to what appear to be unnecessary, routine and excessive strip searches. Whilst it is not appropriate for the Taskforce to comment on the individual cases, unnecessary strip searching of women is a concern for the Taskforce.

The legislation

Section 26 of the Police Powers Act provides that a person may be searched without a search warrant in certain circumstances, which include reasonable suspicion that the person may have a weapon or knife that the person may not

lawfully possess or stolen property. Section 29 allows strip searches to be conducted where a search warrant has been obtained.

Section 56 applies to search of people in custody. That section provides:

56.(1) This section applies if a person-

(a) is lawfully arrested, refused bail, or is in custody because bail has been revoked; or

(b) is in custody under a sentence of imprisonment or, for a child, a detention order; or

(c) is otherwise lawfully detained under another Act.

(2) A police officer may search and re-search a person to whom this section applies.

(3) A police officer may seize from the person anything found on the search that the police officer reasonably suspects may provide evidence of the commission of an offence.

(4) Also, the police officer may take and retain, while the person is in custody, anything that-
(a) may endanger anyone's safety; or

(b) may be used for an escape; or

(c) the police officer reasonably considers should be kept in safe custody while the person is in custody.

Section 111 states that a police officer may remove items of clothing for a search. The section attempts to provide safeguards to preserve the dignity of individuals being searched by providing that:

- where removal of clothing is required, the search must be conducted in a place which provides reasonable privacy;
- unless an immediate search is necessary, the person conducting the search must be either the same sex as the person to be searched, or if there is no police officer of the same sex, someone else acting at the direction of the police and who is of the same sex, or a doctor acting at the direction of the police officer.

The Police Responsibilities Code, which is at Schedule 2 to the Police Powers and Responsibilities Regulation 1998, contains provisions about searches of persons (section 6) and protecting the dignity of persons during search (section 7).

The key features of section 6 are the police officer searching must:

- ensure, as far as reasonably practicable, the way the person is searched causes minimal embarrassment to the person;
- take reasonable care to protect the dignity of the person; and

- restrict the search of a person in public to the outer clothing and out of public view - unless an immediate and more thorough search of a person is necessary but does not have to be conducted immediately.

Contained within section 6 is operational guideline 2.3 which provides:

2.3 The grounds for a search because of a reasonable suspicion must exist before the search is conducted. Locating the thing sought is not a ground for the search but may confirm the suspicion.

Note that section 2(5) of Schedule 2 to the Police Responsibilities Code provides that:

(5) Under the Act, section 135(4), operational guidelines are not part of the Regulation containing this Code. (Emphasis added)

The key features of section 7 are:

- when conducting a strip search, the person searched must be given the opportunity to remain partly clothed during the search, for example, by allowing the person to dress his or her upper body before being required to remove items of clothing from the lower body;
- the police officer conducting the search must ensure, as far as reasonably practicable, that the person being searched can not be seen by anyone of the opposite sex or by anyone who does not need to be present;
- if a video camera monitors the area where the person is searched, the police officer must make sure, unless the person viewing the monitor is a police officer of the same sex as the person being searched, that the video camera is turned off or conduct the search out of view of the camera; and
- the police officer making the search must not make physical contact with the genital and anal areas of the person searched, but may require the person to hold his or her arms in the air or stand with legs apart and bend forward to enable a visual search to be made.

Issues

1. Is it necessary for strip searches to be undertaken routinely for people in custody and should the legislation be more prescriptive as to the circumstances in which strip searches can occur;

2. Should strip searches be permitted in circumstances where a person is not in police custody.

Searches in custody

A report of the Home Office Research and Statistics Directorate provides some insight into the usefulness of strip searches. The Home Office Report states that strip searches are conducted when officers have reasonable grounds to believe a suspect may be concealing an article while in detention. Three percent of suspects were strip searched in the custody record sample. By far the most common group to undergo such a search were those arrested for drug offences, with just under a quarter of this group being searched. The frequency of strip searches varied between forces with seven percent of suspects strip searched in the Metropolitan Police compared to one percent in the majority of other forces.

The majority of searches were for controlled substances (i.e. drugs), while other searches related to concealed weapons and stolen goods. It is important to note that strip searches resulted in relatively low success rate, with items found in only 12% of cases. Controlled drugs (7%) were the most common items uncovered, with stolen goods (1%) and knives and other weapons (1%) found in a small number of cases. Searches revealed additional items (3%) which were either related to the arrest, such as a crack pipe, or could be used to inflict harm or damage, such as a cigarette lighter.

The results of this study do not appear to support the routine practice of strip searching given the low success rate of the procedure. As strip searching carries with it potential for abuse of process by the police and harm and humiliation on the part of the recipient, the necessity for routine strip searching must be carefully evaluated. It may be that less intrusive search methods such as the use of metal detectors or "pat down" searches would achieve police objectives in the majority of cases.

The CJC intends to undertake a research project on the question of strip searching by the QPS and will provide a report to Parliament. The Taskforce commends this project, however stresses that the research project must address the impact of strip searching on women.

Recommendation 91

The Taskforce notes that the CJC is examining the issue of strip-searching, and stresses that the research project must address the impact of strip-searching on women.

Detention of accused

Offenders with care responsibilities

The Police Powers Act, at section 50, provides the initial period of detention for police investigation or questioning. The person "must not be detained for more than 8 hours, unless the person is charged with an indictable offence or is lawfully held in custody." In those 8 hours, the person may not be questioned for more than four hours and the "time out" period may be more than four hours. "Time out" may be used for the benefit of police (to progress the investigation) or for the benefit of the accused (for example, to receive medical attention).

Although time out is allowed for the accused to contact a "lawyer, friend, relative, parent, guardian, interpreter or other person", there is no specific provision to deal with the issue of "care" arrangements for which the accused, particularly female accused, may generally be responsible. These could relate to children, parents, siblings or people with a disability.

Issues

1. Should the Police Powers Act make specific provision for the "care" arrangements of accused people during police questioning.

2. If so, how far should these extend? (for example, to collect children from school or day care, collect and breast feed a baby).

3. Should the offender be allowed to leave the police station to attend to such matters and, if so, in what circumstances?

Deliberations

Options

The Taskforce released the following options for discussion:

1. Amend the Police Powers Act to make provision for "care" arrangements.

2. Amend the Police Powers Act to make provision for "care" arrangements and provide that the offender may leave the police station for this purpose.

3. Amend the Police Powers Act to provide additional time out provisions for Aboriginal and Torres Strait Islander offenders. This time would be in addition to the present time out periods provided for in the Act.

Results of consultation

Submissions generally favoured allowing time out for care arrangements. A submission from the QPS indicated that the police do consider the offenders "caring" role, which usually extends to arrangements being made for the care of offenders' children. Police divisions have access to baby capsules/car seats to transport children, and breast-feeding may be attended to during police interviews. The offender is not allowed to leave the police station to make arrangements for care of children. Sgt Heit of the Queensland Police Service stated:

It is implied through the duty of care that police would attend to the needs of any children who require supervision/care who would have been under the control of the accused.

A submission from TC Wockner, District Officer of the Warwick Police Service cautioned:

From a police perspective the use of time out to deal with personal responsibilities would be an almost unmanageable burden if imposed on the police. It must be remembered that whilst the PPRA (Police Powers and Responsibilities Act) is designed to protect the suspect's rights, the primary purpose of the Act is to give police powers to effectively investigate crime etc. Whilst most police are sensitive to such (care) needs of female suspects and from experience usually attempt to accommodate such needs, any formal legislation would become an administrative and practical nightmare.

Discussion

The Taskforce believes that the Police Powers and Responsibilities Act 1997 should make provision for care arrangements. An offender should be able to leave the police station for this purpose provided that he or she was appropriately accompanied. Additional time out periods were not considered necessary for Indigenous suspects.

Recommendation 92

That the QPS amend the Police Powers and Responsibilities Act 1997 to provide for care arrangements for suspects.

Police investigation of offences involving women with a disability

A matter of considerable concern to people with a disability who are victims of violence or sexual assault, is that police can be unwilling to pursue such claims where the victim, in the opinion of the officer, will make a "bad witness" whose evidence will not stand up to cross-examination.

At the Taskforce Women with Disabilities Focus Group workers from WWILD-SVP, a specialist support service for women with intellectual disabilities who have experienced sexual violence, pointed out that this was the main problem with the reporting of sexual and other violence to police.

Women with disabilities and those who work with them consider that it is inappropriate for police to make such judgements at such an early stage of the investigation. People with disabilities may need sufficient breaks and appropriate support while giving evidence in court. However this should not prevent them from being heard if there are allegations which would be brought before the court if the victim did not have a disability.

The discretion to arrest and charge rests with the investigating police officer. In New South Wales, the parents of a woman with an intellectual disability who had been sexually assaulted successfully lobbied their local member and the DPP to the point where the DPP made a recommendation to the police that there was sufficient evidence to charge the suspect. An essential element of the successful "appeal" was the obtaining of an expert report on the woman's ability to give evidence.

The Queensland Director of Public Prosecutions has a power under the Director of Public Prosecutions Act 1984 to give directions to the Commissioner of Police with respect to offences that are to be referred to the Director for the institution and conduct of proceedings.

Deliberations

Option

The Taskforce released the following option for discussion:

- That where police decide not to lay charges against a person on the basis of the victim's ability to give evidence, a formal review mechanism be implemented involving officers of the DPP using such expert assistance as is required resulting in a recommendation by the DPP as to whether the prosecution should proceed.

Results of consultation

During the focus group meeting it was stressed that the issue of women with disabilities not having their cases prosecuted because they "drop out" of the system at various stages was a major concern. Either their abuse is not detected, or if it is detected, it is not reported to the police. If it is reported to the police, the police can decline to proceed. If the decision is made to proceed, the court system can deny such women a voice in explaining what happened.

The QPS argued that there are sufficient guidelines and policies in place regarding the discretion to prosecute offenders. Detective Inspector D J Alcorn of the QPS Child & Sexual Assault Investigation Unit was supportive of a formal review mechanism being available.

Discussion

The Taskforce acknowledges that it is currently open to any potential complainant to approach the DPP informally for a review of the decision by police not to proceed with a matter and that one issue may be that victims are not aware of this current avenue of review. The Taskforce also acknowledges that there may have to be a reconsideration of current in-house police processes about how the matter is referred to the DPP upon the request of the victim if a formal review mechanism is to be recommended.

However the Taskforce notes that people with a disability are in a special position. Decisions not to proceed where they are the complainant are usually the result of a decision being made as to their inability to give evidence. Expert advice could in fact demonstrate that the complainant can give evidence if given sufficient support while doing so. A formal mechanism for a review of the decision by the DPP will go some way to reducing the "invisibility" of women with disabilities as victims of crime.

One Taskforce member does not support the recommendation on the grounds that such a formal review mechanism should be available for all complainants.

Recommendation 93

93.1 Where police decide not to lay charges against a person on the basis of the victim's inability to give evidence, a formal review mechanism be implemented involving officers of the DPP using such expert assistance as is required resulting in a recommendation by the DPP as to whether the prosecution should proceed.

93.2 Further, the DPP should ensure that services working with people with disabilities be alerted to such a process.

Women with disabilities who offend

Submissions to and consultations undertaken by the Taskforce suggest that there are serious issues of identification of intellectual disability, learning difficulties and some physical disabilities by police operations which should be addressed by effective training, education and awareness raising within the QPS.

Often hearing impaired people may have good speaking skills but still need an interpreter in order to understand what is being said to them. The law does not currently address this issue.

Section 101 of the Police Powers and Responsibilities Act 1997 gives a person in custody the right to an interpreter "if a police officer reasonably suspects a person in custody is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English". (emphasis added)

Questioning and investigation (including medical and dental examinations) must be delayed until the interpreter is present.

It is proposed that the section be amended to give a person the right to an interpreter where a person being questioned is unable to understand what is being said to them. This will ensure that the accused person understands what is happening.

Deliberations

Option

The Taskforce released the following option for discussion:

- That section 101 of the Police Powers and Responsibilities Act 1997 be amended to give the person in custody a right to an interpreter when the person can either not speak the English language with reasonable fluency, or have a reasonable understanding of the English language.

Results of consultation

This particular topic was not addressed in the issues papers, however at the specific consultation for women with disabilities, the need to ensure that people with disability are able to understand what is happening was stressed.

The QPS argued that there is no need for the provision in the Police Powers and Responsibilities Code to be moved to the Act. A submission from Detective Inspector D J Alcorn was supportive of the option presented in the Discussion Paper that accused people should have interpreters if they do not have a reasonable understanding of the English language.

Discussion

When looking at issues relating to NESB women, the Taskforce considers it more appropriate that a person be entitled to an interpreter as a right upon request. We believe that the same principle should be applied to women with disabilities who require interpreting services. We note that the recommendation may also arise in relation to facilitators of indigenous languages. (See discussion in Chapter 8).

Recommendation 94

That section 101 of the Police Powers and Responsibilities Act 1997 be amended to give the person in custody a right to an interpreter if requested or indicated by that person or if a police officer reasonably suspects a person can not speak the English language with reasonable fluency or does not have a reasonable understanding of the English language, or does not have an ability to understand what is being said to them.

Police questioning

Although there are specific provisions in the Police Powers and Responsibilities Act 1997 to protect the interests of children (section 97) and Aboriginal people and Torres Strait Islanders (section 96) when they are being questioned, there is no provision in relation to the questioning of people with an intellectual disability in the principal legislation. Provision for questioning of people with impaired capacity in custody is made in the Regulation to that Act.

Section 67 of the Police Powers and Responsibilities Regulation 1997 provides:

Questioning persons with impaired capacity
67. (1) This section applies to a person in custody whose capacity to look after or manage his or her own interests is impaired because of either of the following%u2014

(a) an obvious loss or partial loss of the person's mental functions;

(b) an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.

(2) A police officer must not question a person mentioned in subsection (1) unless%u2014

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to a carer in circumstances in which the conversation will not be overheard; and

(b) a carer is present while the person is being questioned.

(3) Also, the police officer must suspend questioning and comply with subsection (2) if, during questioning, it becomes apparent that the person being questioned is a person mentioned in subsection (1).

(4) This section applies as if it were a section to which section 106 of the Act applies.

Section 106 of the Act provides that the requirements in section 67 of the Regulation need not be complied with if the police officer reasonably suspects that compliance with the sections is likely to result in accomplices or accessories avoiding apprehension or being present during questioning, evidence being concealed, fabricated or destroyed or a witness being intimidated. Questioning should not be delayed if it will adversely affect the safety of other people.

Deliberations

Options

The Taskforce released the following options for discussion:

1. That section 67 of the Police Powers and Responsibilities Regulation 1998 be located in the Police Powers and Responsibilities Act 1997.

2. That provision be made for the person's carer or other support person nominated by the person to be present at the questioning to ensure that the support needs of the person with an intellectual disability are met.

Results of consultation

There was no specific consultation on the issue of the placement of the section, however informal discussions with the Queensland Police Service revealed that this anomaly is to be corrected in the next round of amendments to that Act.

Specific consultations with women with disabilities stressed the need for police to understand that a carer is not necessarily a friend, nor an appropriate support person and the person with the intellectual disability should be given an option.

Discussion

There was only limited discussion of the two options as the Taskforce unanimously supports them both.

Recommendation 95

95.1 That section 67 of the Police Powers and Responsibilities Regulation 1998 be located in the Police Powers and Responsibilities Act 1997.

95.2 That provision be made for the person's carer or other support person nominated by the person to be present at the questioning to ensure that the support needs of the person with an intellectual disability are met.

PART 2: BAIL

The Taskforce released an Issues Paper on the subject of bail and its impact on women as both offenders and victims of crime. The issues we consider to be of particular importance to the women of Queensland include:

- considerations to be taken into account when deciding to grant bail;
- whether in certain situations, a right to bail should not be assumed;
- whether the victim should have a role in the decision to grant or refuse bail;
- getting all relevant information before a court in a hearing of an application for bail; and
- granting of bail where the victim is known to the accused and they are likely to come into contact with each other (for example, in rural communities and in Aboriginal and Torres Strait Islander communities).

QLRC Report

The QLRC previously considered the Bail Act 1980 in 1993. The recommendations of that Report have not been fully implemented by successive Queensland governments. There are several recommendations of the QLRC which are of particular concern to women, such as:

Recommendation 7 - Abolition of the reference to "unacceptable risk" as the basic test for determining a bail application and the introduction of the three categories used in New South Wales, the Australian Capital Territory and the Northern Territory. These are 1. The probability of the person appearing in court; 2. The interests of the person charged; and 3. The protection of the community

These factors should also include chances of reoffending, protection of the victim and non-interference with prosecution witnesses.

Recommendation 8 . - The legislation should follow the Northern Territory model and refer specifically to offences involving domestic violence using the definition used in the Domestic Violence (Family Protection) Act 1989. The Commission also recommends the introduction of a notification procedure to the victim of the violence if a person is granted bail after being charged with a domestic violence offence

In the New South Wales Crimes Act certain offences are defined as "domestic violence offences". Where a person is charged with such an offence, the police are required to complete special bail forms which allow data to be collected for research purposes relating to domestic violence prevention services.935

Secondly, the New South Wales Bail Act936 provides that where a domestic violence offence has been committed and the court is satisfied that - the accused has a history of violence, or has been violent to the victim in the past or has failed to comply with the relevant apprehended violence orders - then the presumption in favour of bail may be displaced.

Recommendation 24 - A specific provision should be included to provide that in the determination of the level of security required, the financial means of the defendant be taken into account.

Recommendation 27 - That recommendation 90 of the Royal Commission into Aboriginal Deaths in Custody should be incorporated in the Bail Act 1980. That is, where police bail is denied to an Aboriginal person or granted on terms that cannot be met, the Aboriginal Legal Service should be notified and an officer of the Service be granted access to the person.

Recommendation 33 - The present requirement of providing an address within 25 kilometres of the court should be replaced by a discretion to decide whether the defendant's usual place of residence is sufficient.

Issues for women with disabilities

People with intellectual disabilities can have difficulty understanding and thereby complying with bail conditions. As a result, bail conditions can be breached unwittingly and bail withdrawn.
The NSWLRC recommended in 1996 that the offender's intellectual disability should be taken into account in setting bail conditions. The Taskforce considers that disabilities other than intellectual disability can also affect a person's ability to meet bail conditions and that the Commission's recommendation should therefore be applied to women with disabilities whether physical, sensory, intellectual or mental. The Bail Act 1980 should be amended to reflect this.

Terms of bail

The legal representative of the person granted bail will usually explain the terms of the bail to them. However, if the person is not legally represented when being granted police bail, the police should make every effort to ensure that the person with an intellectual disability understands the terms of the bail. This may include reading the terms of bail to the person, or showing the person the bail terms on the bail sheet.
If it appears that this approach would not be appropriate, a mechanism should be provided in the Act which would allow the police to release the person into the custody of a "responsible person". This could occur if it appears that the person

does not have the capacity to understand the terms of bail therefore making an order for bail inappropriate.

Women in remote and Indigenous communities

It has come to the attention of the Taskforce that women from remote Aboriginal and Torres Strait Islander communities are being disadvantaged in the granting or refusing of bail. More particularly, if they are charged with offences that are to be tried in Cairns, funding will be provided for travel to Cairns only where they either do not obtain bail or do not apply for it. If the offender obtains bail, they will have to fund their own transport to Cairns for the hearing.

The North Queensland Women's Legal Service raised a particular problem in relation to people in remote communities who are charged with offences that have to be heard in Cairns. If they are not released on bail they will be transported to Cairns at the expense of the government. If however they apply for bail and it is granted, it is up to the accused to find their own means of getting to Cairns. This means they may prefer not to apply for bail. The obvious injustice of this current arrangement is of great concern to the Taskforce.

Bail hostels

In a submission to the QLRC discussion paper on Bail, the Combined Community Agencies Group recommended the introduction of bail hostels as an alternative to incarceration. In their submission, the group noted that many women prisoners are responsible for children and will have to place them if bail is denied. They suggested in particular, that prisoners could benefit from being referred to a centre that is also suited to young children.

They argued that a bail hostel for women who are refused bail would minimise the trauma of separation from their children and may allow women to deal with other issues in their life such as domestic violence, need for parenting support and access to community resources.

Deliberations

Options

The Taskforce released the following options for discussion:

1. That the above recommendations (at least) of the QLRC be implemented and that consideration be given to the implementation of provisions similar to those in New South Wales specific to offences involving "domestic violence offences".

2. That a further examination be undertaken by the Government on the provisions of the Bail Act 1980, with regard to legislative provisions in other States.

3. That the Bail Act 1980 be amended to provide that an accused person's disability (physical, sensory, intellectual or mental) should be taken into consideration in setting bail conditions.

4. That the Bail Act 1980 be amended to provide that when police grant bail to an offender with an intellectual disability who does not have a legal representative

present when the bail is granted, the officer granting bail will be required to ensure that, as far as possible, the offender understands the terms of the bail.

5. If it appears that this approach would not be appropriate, a mechanism should be provided in the Act which would allow the police to release the person into the custody of a "responsible person" if it appears that the person does not have the capacity to understand the terms of bail so that an order for bail would not be appropriate.

6. That government funding be provided for the transporting of offenders from remote Aboriginal and Torres Strait Islander communities to regional centres for hearings whether or not bail is granted.

7. That a grant of Legal Aid to such offenders to defend such a charge include the costs of transport to and from the relevant regional centre.

8. That the Government examine the possibility of establishing bail hostels for women who are refused bail.

Results of consultation

Issues of bail were specifically raised in Issues Paper 5. The community considered that factors such as care and family commitments, previous criminal history, and the danger of the individual to the community should all be taken into account at bail hearings. It was noted however, that these factors are already taken into account if relevant and raised at the hearing.

There was however a strong community feeling that bail should not be available in cases involving violence. One submission suggested that "previous serious violent convictions should mean that bail is not available to the accused, particularly when the previous violence was of a domestic nature".

More specifically, ATSIWLAS recommended that a rule of "no presumption of bail" should extend to offences such as stalking, and where there is a peace and good behaviour order relating to the parties. The nature and extent of the relationship between the parties and the existence of any violence and any power imbalance should also be able to displace the presumption of bail. Any legislative provision giving effect to this change should, in the opinion of ATSIWLAS, specifically state that it was introduced to break the cycle of violence perpetrated by men against women.

The majority of submissions consider that the present system does not give a victim the opportunity to give their perspective. They argued that the attitude of the victim to the granting of bail should be a consideration taken into account. Queensland Homicide Victims Support Group said "in our experience, ... seldom is a family's wishes stated before the court...the victim of crime should be heard before the court or at least given the option to have their feelings put before the court regarding the application for bail. Most families are unaware of the process until the bail has been granted."

Submissions were made in relation to the granting of bail in regional and remote communities in Queensland. Victims located in small communities often meet the accused in the community if bail is granted, which is unfortunate but difficult to prevent by way of legislation. Another problem occurs when the family of the accused pressures the victim into dropping charges.

The QDVC supported the implementation of the recommendations of the QLRC. Women's Legal Aid was generally supportive of the options presented in the Discussion Paper.

DFYCC did not support any amendments that removed the presumption of bail for domestic violence offences as they considered that it would be contrary to the fundamental principles on which our criminal justice system is based, that is a person is innocent until proven guilty.
The submission from the QPS suggested that the Bail Act 1980 did not require amendment.
A submission from Detective D J Alcorn of the QPS Child & Sexual Assault Investigation Unit supported all the options put forward by the Taskforce.

Discussion

The Taskforce notes that the concept of "unacceptable risk" that is currently applied is relevant not only to the question of re-offending but also to who would be at risk. Further, in serious offences, even a small risk may be an unacceptable one.

The Taskforce also notes that the evidence that can be admitted on a bail application is far wider than can be admitted at the actual trial. We therefore agree unanimously that the present bail legislation is working quite well and that it is not necessary for the QLRC recommendations to be implemented.

The Taskforce, by majority, does however support further consideration of bail legislation in other jurisdictions including an investigation of the provisions currently in operation in New South Wales relating specifically to domestic violence offences. The Taskforce notes that domestic violence offences are often not viewed as seriously as other offences of violence, when in fact, the risk of re-offending (against the same victim) is often greater. The minority position holds that information relating to domestic violence is already provided to the court at bail hearings and that it is a matter of education and encouragement to ensure this practice continues.

The Taskforce, by majority, supports the view that the Bail Act should be amended to expressly require that a person's disability be taken into consideration when setting bail conditions. The minority holds the view that this is already covered by the provisions of the Act and compliance is the issue.

The Taskforce, by majority, agrees that a police officer should ensure that a person with an intellectual disability who does not have legal representation understands the terms of the bail. While understanding bail terms is essential for all people granted bail, the Taskforce acknowledges that there are particular problems for people with difficulties understanding time, place and other specific requirements. One member of the Taskforce does not support the recommendation on the grounds that such a requirement should be located in the police procedures manual rather than the Bail Act.

The Taskforce unanimously supports allowing police to release a person with an intellectual disability into the custody of a responsible person.

The Taskforce considers that there needs to be further examination of the issue of people in remote and rural communities refusing bail in order to gain transport to attend their trial. This issue is addressed earlier in this Report, in Chapter 3.

A majority of the Taskforce also support an examination of the option of establishing bail hostels for women.

Recommendation 96

96.1 That a further examination be undertaken by the Government on the provisions of the Bail Act 1980 with regard to legislative provisions in other States with specific regard to the New South Wales provisions relating to domestic violence offences.

96.2 That the Bail Act 1980 be amended to provide that an accused person's disability (physical, sensory, intellectual or mental) should be taken into consideration in setting bail conditions

96.3 That the Bail Act 1980 be amended to provide that when police grant bail to an offender with an intellectual disability who does not have a legal representative present when the bail is granted, the officer granting bail will make every attempt to ensure that the offender understands the terms of the bail.

96.4 A mechanism should be provided in the Act which would allow the police to release a person with an intellectual disability into the custody of a "responsible person" if it appears that the person does not have the capacity to understand the terms of bail and the making of such an order would be inappropriate.

96.5 That the Government examine the possibility of establishing bail hostels for women who refused bail.

PART 3: MAJORITY VERDICTS BY JURIES

Introduction

Verdicts in criminal trials in Queensland must be unanimous. When a unanimous verdict cannot be reached, the jury is discharged and the prosecution has the discretion to continue to a new trial. One of the arguments in favour of allowing majority verdicts in criminal trials (11/1 or 10/2) is that it would reduce the trauma to victims of crime (especially victims of sexual offences) by reducing the need for retrials and of them having to give evidence again. It also therefore avoids the extra financial costs of a retrial.

Which jurisdictions allow for majority verdicts in criminal trials?

Majority verdicts in criminal trials are allowed in South Australia, Western Australia and Tasmania. In South Australia and Western Australia, majority verdicts are not allowed for murder or treason trials or trials for an offence "punishable with strict security life imprisonment".

Majority verdicts are allowed where a jury has deliberated for a set time and cannot reach a unanimous verdict.

A majority verdict is one where at least 10 of the 12 are agreed.

If a majority verdict is not obtained, the jury is to be discharged. Tasmania and Western Australia provide judicial discretion to allow the jury to continue deliberating if he or she considers it appropriate.

Why unanimous verdicts?

The requirement of unanimity of jury verdicts in criminal trials is considered "an essential and fundamental part of jury trials". Its history is long but somewhat obscure. It has been traced to the fact that jurors were originally regarded as witnesses in criminal trials and having twelve unanimous witnesses was seen as conclusive of the facts alleged. Jury unanimity has been considered as essential to minimise the risk of innocent people being convicted and ensuring community confidence in the verdicts given.

Arguments against the unanimity rule

Criticisms of the need for unanimity in jury verdicts include:

- jury disagreements are unsatisfactory as they require a retrial, the cost of which is an unnecessary burden on the State and the accused person;
- it forces compromises on the part of jury members;
- it leaves open the possibility of the corruption of a juror through bribery or intimidation. Only one juror need be corrupted or intimidated to result in a hung jury;
- the rule is undemocratic (a small minority can frustrate the decision of the majority); and
- the rate of acquittals is too high and may be caused by the unanimity rule.

Costs

The New South Wales Law Reform Commission noted that where a jury is unable to agree on a verdict, the costs are seen as having been expended without any apparent return. Most of the costs are met by the State. It must also be noted that complainants in sexual assault cases undergo a great deal of stress when giving evidence and the personal, though not financial, costs for the victim in having to give evidence again must also be taken into account.

Statistics

The New South Wales Law Reform Commission has noted that in a survey of court trials from 30 September 1985 to 13 December 1985 (179 trials), retrials on the basis of lack of jury unanimity were less than 4%. On the other hand, mistrials (where the judge discharges the jury without taking its verdict because of a flaw in the trial process), occurred in over 12% of jury trials. In the same survey, over 10% of all accused people were acquitted by direction of the judge.

In Queensland, during the 1998/99 financial year, there were only eight hung jury trials in Brisbane.

Queensland

The option of introducing majority verdicts was considered by the Litigation Reform Commission in its report on juries. The Litigation Reform Commission

noted that the argument that majority verdicts reduce the need for retrials is weakened by the fact that the incidence of hung juries in Queensland is so low. In 1993, only 3.25% of jury trials in the Supreme and District Courts over the previous five years had resulted in jury disagreements. The Commission also noted that majority verdicts do not eliminate disagreements, only possibly reduce them. States that allow for majority verdicts still have trials ending with disagreements in around 3% of cases.

Statistical research in New South Wales suggests that hung juries are no more likely (or are even less likely) in trials for sexual offences as compared to other offences.

Prevention of corruption of jurors

Corruption of jurors through intimidation or bribery is said to be preventable by use of majority verdicts. However there is no evidence, anecdotal or otherwise that bribery or intimidation of jurors is a problem in Queensland. The Queensland Criminal Justice Commission ("CJC"), in an Issues Paper on the Jury System, stated that even if corrupt jurors could be shown to exist, it is not a good enough reason to abolish unanimous verdicts. The CJC noted that a corrupt juror could not secure an acquittal of the accused - at best they could cause a retrial.

Forced compromise

This argument refers to the perception that unanimous verdicts mean that compromise is forced on jurors even if they are uncomfortable with the result. However, compromise is not necessarily a 'bad thing'. It is hard to explain a criminal conviction as being "beyond reasonable doubt" where up to two members of the jury remain unconvinced. New South Wales statistics suggest that a majority of hung juries contain more than two jurors who are unwilling to convict. In such a situation, community expectation would be that a retrial is required, both legally and morally.

Issues

Victims of crime, especially of sexual assault, are concerned that jury disagreements will require them to give evidence again and face cross-examination. However, as noted above, prosecutions for sexual assault do not appear to result in any more jury disagreements than other offences, as demonstrated by the 1997 research in New South Wales. Trials that result in jury disagreements are only a small percentage of total trials in Queensland. Jury unanimity is an ancient requirement for ensuring that justice is not only done but is seen to be done. It may be that there are other ways to protect the complainant from having to face repeated experiences of the criminal justice system in the case of a hung jury and re-trial.

Deliberations

Options

The Taskforce released the following options for discussion:

1. Retain the requirement for unanimous verdicts for juries in criminal trials

2. Amend the Jury Act 1995 to allow for majority verdicts (either 11/1 or 10/2) in criminal trials

- for jury trials other than for murder and treason
- where the jury has deliberated for a set time (for example, five hours) and cannot come to a unanimous verdict; and
- retaining a judicial discretion to allow for further deliberation where considered appropriate.

Results of consultation

While no particular reasoning was given, two submissions to the Taskforce did support the introduction of majority verdicts in accordance with the option presented in the Taskforce Discussion Paper.

Discussion

The Taskforce, by majority, supports the retention of the requirement of unanimity in jury trials. Those who supported majority verdicts supported the concept for trials other than murder trials.

PART 4: TRIAL BY JUDGE ALONE

Which jurisdictions in Australia currently provide for trials by judge alone?

Three Australian States and the Australian Capital Territory provide for trials by judge alone.

In these jurisdictions, an accused facing a criminal trial in the Supreme or District Court is given the option to elect to be tried by judge alone. South Australia does not allow for election in "minor indictable offences" tried in the District Court.

The legislation tries to ensure that the accused makes a free and informed decision in making the election. In Western Australia the election must be made in open court. In South Australia and New South Wales the presiding judge must be satisfied that the accused has had legal advice prior to making the election. The ACT requires the accused to elect in writing and produce a certificate signed by a legal practitioner stating that they have advised the accused in relation to the election and that the accused has made the election freely.

In the case of multiple offenders all co-accused must also make the election and the election must cover all the charges before the court. Western Australia and New South Wales also require that the Crown consent to the election.

The accused can make the election "before the date fixed for the trial"; "before the court first allocates a date for the person's trial", or "before an indictment has been presented to a court or at any stage after an indictment has been presented to a court but before the identity of the trial judge is known to the accused".

While Western Australia provides that once the election is made the accused cannot then elect to be tried by a jury, in other jurisdictions provision is made for the accused to change their mind. New South Wales allows an accused person,

at any time before the date fixed for the trial, to subsequently elect to be tried by jury. The ACT allows the accused to choose to be tried by jury at any time before arraignment. However, if the accused makes, and then withdraws, an election (to be tried by judge alone) they cannot make another election.

The judge's verdict is deemed the same as a jury verdict for all purposes.

New South Wales, the ACT and Western Australia also require that the judge give reasons for the verdict including principles of law applied and findings of fact that he or she relied on. Any warnings usually given to a jury must be taken into account by the judge.

Other jurisdictions

New Zealand

In 1971 New Zealand made trial by judge and jury compulsory in respect of offences carrying the death penalty, life imprisonment or a maximum penalty of 14 years or more. Otherwise in New Zealand there is no absolute right to trial by judge alone, it being a matter for the discretion of the judge in that, on an application for trial without a jury, he shall so order unless in the interests of justice he or she considers the accused should be tried by a judge and jury.

United Kingdom

In 1983 a Frauds Trial Committee chaired by Lord Roskill recommended that complex fraud trials should be heard by a tribunal of a High Court Judge and two lay members so as to secure the just, expeditious and economical disposal of fraud criminal proceedings. The recommendation was not implemented.

Canada

In Canada the Charter of Rights and Freedoms guarantees the right to trial by jury for offences punishable on indictment by a minimum of five years imprisonment. An accused may elect trial by jury for an indictable offence that is not within the absolute jurisdiction of the provincial court (section 536 Canadian Criminal Code). A jury trial is mandatory for offences of treason, mutiny, piracy and murder, except with the consent of the accused and the provincial Attorney-General (section 427 Canadian Criminal Code). For other indictable offences the accused may elect trial by judge alone.

Why have trials by judge alone been introduced?

The New South Wales Law Reform Commission reported in 1986 on the use of trials by judge alone as an option in reducing the incidence of bias and prejudice in criminal trials, especially in cases where there has been extensive pre-trial publicity surrounding the case. As Australian jurisdictions do not use voir dire hearings (a preliminary and separate hearing) to determine the impartiality of potential jurors, the option of trial by judge alone was seen as an alternative means of ensuring a fair trial.

The Commission noted that the criminal justice system does not appear to trust jurors to put inadmissible and prejudicial material aside when considering the case against an accused person. Rules of evidence seek to exclude such material and warnings are regularly used in an attempt to overcome prejudice. Judges on the other hand are seen by their qualifications, training and experience to be able to disregard prejudicial material.

The New South Wales Law Reform Commission also saw trial by judge alone as a way of saving time and money. Juries are expensive for the criminal justice system, the accused and the juror. The Commission's survey of jurors revealed 22% of them had suffered financial loss through jury service. Further, the use of a judge in more complex trials may shorten the length of the trial and thereby save the defendant money. However the Commission stressed that they did not think it legitimate to diminish the effectiveness or the inherent fairness of the jury system for the purpose of saving money or reducing inconvenience to people who serve as jurors.

Fair trial

The right to a fair trial according to law is fundamental to our criminal justice system. However a fair trial is not necessarily assured by a trial by jury.

The New Zealand Law Reform Commission defined the role of a jury as follows: a fact finder, the conscience of the community, a safeguard against arbitrary or oppressive government, an institution which legitimises the criminal justice system and an educative institution. Admittedly, a judge sitting without a jury cannot fulfil all these roles.

The New Zealand Commission also commented on the suggestion that trial by judge alone may reduce the trauma of victims giving evidence in sexual offence cases. The Commission preferred that the victim be given assistance in giving evidence (such as the use of closed circuit television) rather than interfering with the use of a jury in criminal trials.

Criticisms of jury trials

The Law Reform Commission of Western Australia made the following criticisms of jury trials:

- unqualified jurors cannot fully understand scientific and technical evidence in complex trials;
- cost;
- congestion in criminal trials due to the delay inherent in jury trials;
- possibility of prejudiced jurors;
- irrational verdicts (perhaps because they do not question witnesses or counsel and do not have full access to exhibits);
- social and economic disruption of the lives of jurors, especially by lengthy trials.

Arguments in favour of retaining jury trials

Arguments in favour of the retention of jury trials put by the Law Reform Commission of Western Australia were:

- jurors bring a diverse range of perspectives, personal experience and knowledge to individual cases;
- their number enables them to represent the general community in the standards and values they apply;

- group deliberation is an effective way of determining contested facts and issues by reason of group exploration and scrutiny;
- the jury is not bound to apply the law in a strict and technical way but can base its verdict on the broad equities of the case and bring the conscience of the community to bear on its merit. Jurors can make "mercy" verdicts;
- the community participates in the administration of justice therefore legitimises it and maintains public confidence in that system;
- the jury system protects the citizen from judges who might be too responsive to higher authority.

The general thrust of the Consultation paper was however that at all times, the right to a fair trial according to law must be preserved.

Practical issues were also raised. Where an accused is denied bail and has to remain in custody pending the verdict, the extra delay involved in the trial judge providing written reasons for the verdict would be unfair in the case of acquittal. Written reasons could refer to the possible guilt of other people which could affect their reputations. Written reasons could give more grounds for appeal and result in further delays. Anonymous jurors are protected from threats and personal criticism, while a judge is more vulnerable to attack.

Judge only trials and sexual offences

Many workers and legal practitioners dealing with the prosecution of rape and sexual assault cases find that if the victim is not the "stereotypical" rape victim (that is, one that puts up a violent struggle, sustains physical injury and then immediately makes "hue and cry"), prosecutions are less successful. The question then arises as to whether use of trials by judge alone would increase the number of successful prosecutions in this area. There are however problems with such a suggestion.

- there is no guarantee that a judge will be any more open-minded than a jury as to the behaviours of rape and sexual assault victims;
- no jurisdiction currently allows the prosecution or judge to require a judge only trial without the free election of the accused;
- while there may be no jury present when the victim is giving evidence, the accused will still be present;
- there may be a higher acquittal rate in judge only trials.

Judge only trials and diminished responsibility

Another of the Taskforce's concerns arises when the accused elects trial by judge alone in homicide cases where the partial defence of diminished responsibility is argued. These cases often involve the consideration of (often conflicting) medical evidence, and it appears that the election is made in the belief that a judge trying the case alone is better suited to consider and understand all the expert evidence.

This issue was considered by the New South Wales Law Reform Commission in 1997. The Commission considered that the jury should remain central to the process of whether a particular person suffered from diminished responsibility, as this defence requires a value judgment as to whether there was a substantial

impairment of the accused's responsibility. This is a question which must reflect community standards. (For further discussion on the defence of diminished responsibility and the role of the jury see Chapter 6).

Deliberations

Option

The Taskforce released the following option for discussion:

The Queensland Government consider introducing the option for the accused of trials by judge alone for certain offences.

Results of consultation

This issue was raised in the Taskforce Discussion Paper. One submission to the Taskforce noted the complexity of the issue but suggested that trial by judge alone could also be a legislative requirement for some offences rather than just being a matter for the accused to elect.

Detective Inspector D J Alcorn of the Child & Sexual Assault Investigation Unit supported providing the accused with the ability to elect a trial by judge alone for certain offences.

Discussion

The Taskforce is evenly divided on the question of whether to allow for trial by judge alone. However the Taskforce, by majority, recommends further examination of the issue by government.

Recommendation 97

That the issue of trial by judge alone be further examined by the Government