LAW REFORM

The sentencing phenomenon

The once common notion that law reform represented changes in the law to advance human rights and enhance accessibility to justice seems now to be a quaint, outdated concept that passed out of fashion along with flared jeans, tie-dyed caftans, and the Sunbury Rock Festival. Now the term is commonly used by governments and legislators to describe their increasing initiatives in law and order, usually prompted by the impending onset of an election campaign. Law and order law reform initiatives, as we all know, are perceived by governments and oppositions, whether Labor or Liberal/National to be easy vote winners. Their carefully timed announcements either just before or during election campaigns are quite predictable.

In particular, the area of sentencing is a favourite subject of proposed 'law reform' for the law and order junkies. As Australia is increasingly coming under the scrutiny of international human rights organisations for potential breaches of international covenants and conventions, it is useful to review some of the proposed sentencing initiatives around the country.

Northern Territory

It seems appropriate first to look at the Northern Territory, the jurisdiction with the highest rate of imprisonment in Australia — some three times higher than the State with the next highest, Western Australia. The NT set the unfortunate sentencing 'reform' benchmark in 1997, when it introduced its mandatory sentencing legislation. Under that legislation, first time convicted adult property offenders are sentenced to a mandatory minimum term of imprisonment of 14 days. Second time juvenile property offenders are sentenced to a mandatory minimum term of detention of 28 days. In early 1998, the legislation was amended to widen the class of offences to which mandatory sentencing applies, and to reduce the number of exceptions to mandatory sentencing. In addition, amendments also provided for cumulative sentences, where there was more than one offence coming before the court.

Of course, the NT government is not content to rest on its record, and seems determined to maintain the Territory's

lead in national imprisonment rates. In early 1999, it is expected the NT Parliament will pass amendments to the *Sentencing Act,* the *Juvenile Justice Act* and the *Criminal Code,* which will result in increases in the terms of imprisonment or detention for those who commit offences against vulnerable victims. Courts will be required to consider the vulnerability of the victim in the sentencing process. Where a court makes a finding that a victim was vulnerable, it must increase the term of imprisonment or detention it would have given, but for the determination, by 25%. Mandatory periods of imprisonment or detention will also be increased by 25% if a determination of vulnerability is made. The effect of the amendments will allow courts to impose sentences that exceed the current maximum term of imprisonment for offences by up to 25%.

The proposed legislation specifies the factors a court is to consider in order to ascertain whether a victim was vulnerable. These include the relative age, size, strength or physical or mental capabilities of the victim and the offender, the personal circumstances of the victim and any relevant relationships that may exist (for example, student/teacher or patient/doctor).[1]

The amendments will exacerbate the NT's excessive rate of imprisonment, particularly amongst Aboriginal people, who make up two-thirds of the adult prison population and 90% of under 17-year-olds in detention, but only 25% of the overall population in the NT.

Western Australia

For the past 20 years, Western Australia has had the highest rate of adult imprisonment of any State in Australia, and as stated above, is only exceeded by the Northern Territory. In 1996, WA pioneered the notion of mandatory imprisonment for property offences in Australia, when it introduced the 'three strikes legislation'. This legislation made it compulsory for a court to sentence a repeat offender convicted of a home burglary to a minimum term of 12 months imprisonment.

Continuing in this vein, in October 1998 the WA government introduced the *Sentencing Legislation Amendment and Repeal Bill 1998* which establishes a 'Sentencing Matrix'. The purported object of the legislation is 'to make the sentencing provisions more open, public and accountable, and will position the government to be able to publish statistics showing not only the sentences imposed, but all the factors taken into account and the weight given to them.'[2] Underlying this is the public perception that the sentencing of offenders by WA Courts is inconsistent and unduly lenient — a perception which is not borne out by statistical analysis of the sentences handed down by the courts, but one on which the Court government is all too ready to capitalise.

The legislation sets out a process where regulations will prescribe certain offences to be 'reporting offences', and for courts to prepare a sentencing report for a 'reporting offence'. The sentencing report must set out each mitigating, aggravating or other factor that was taken into account in arriving at the sentence, and the degree to which each of those factors, and the maximum penalty for the offence, affected the sentence.

The legislation allows for regulations to 'prescribe a method' to be followed by the courts to arrive at an 'indicative sentence' for a prescribed offence (also to be determined by regulations). It states that in prescribing a sentencing method, the regulations may provide a prescribed formula to determine the indicative sentence. The court may only impose another sentence if the 'relevant sentence' would be so unreasonable that it would be unjust to impose it. A relevant sentence cannot be considered unreasonable to the extent to which it was arrived at by taking into account or ignoring, or giving undue emphasis to one of the factors to be considered by the prescribed sentencing method or formula.[3] This, in effect, provides the basis on which appeals against sentence will need to be undertaken.

The legislation effectively reduces the sentencing process to a mere mathematical exercise, where each relevant mitigating or aggravating factor to be considered is assigned, with mathematical precision, the effect it will have on the ultimate sentence. The Chief Justice of the WA Supreme Court has expressed particular concern that the prescription of factors and sentencing ranges is to be undertaken by means of regulation. This effectively allows the detailed regulation of sentencing by the executive arm of government. Accordingly, it is not open to public debate or scrutiny, unlike legislation debated in parliament or court decisions made in open court. He quite rightly makes the point that what is being proposed is a significant interference with the exercise of judicial discretion in sentencing by parliament and the executive. The process of sentencing, as it currently stands, is already open given that the sentencing process is currently wholly conducted in open court. The issue of sentencing statistics could be satisfied without such an obvious attack on the independence of the judiciary.

New South Wales

New South Wales has seen a radical increase in the rate at which convicted defendants are sent to prison, since the start of the 1990s. A State election at the end of March is seeing both major parties compete for the law and order vote.

Last year the opposition coalition promised to introduce a grid-sentencing system, similar to those being used in 15 American States. Again, the stated motivation for this initiative is a perceived concern by the community that sentences are both inconsistent and too lenient. Under the system, the government would provide judges with guidelines to use in imposing penalties. The system grades the seriousness of an offence against an offender's criminal record, producing a table of 'appropriate' penalties for an offence. Judges may only deviate from the suggested penalty if they provide detailed written justifications for the deviation in their judgments, which can then serve as the basis of an appeal.

The Coalition indicated that, as part of the grid-sentencing system it plans to introduce, property crime will be punished by at least one day's gaol for each $100 stolen or damaged. For example, the theft of a $40,000 car, which is not subsequently recovered, would result in a first time offender being imprisoned for 400 days. The Coalition has indicated penalties will be doubled for repeat offenders.

Both the Australian Law Reform Commission and the Victorian Sentencing Committee rejected the introduction of sentencing grid systems. Their common concerns were that removal of judicial discretion in sentencing to such an extent would result in an unacceptable level of rigidity.[4]

The Carr government has criticised the proposed system as being an attack on the independence of the judiciary, and their ability to exercise appropriate discretion in sentencing offenders. Fully aware that law and order issues will dominate much of the election campaign, Carr has responded with proposed amendments to the *Criminal Procedure Act 1986,* which will enable the Attorney-General to apply to the court at any time to ask it to exercise its power and jurisdiction to give a guideline judgement in respect of a specified offence or category of offences. Under the *Criminal Procedure Amendment (Sentencing Guidelines) Bill 1998,* the Attorney-General may make such an application even if there are no pending proceedings before the court with respect to the offence, or category of offences, specified in the application.

The Bill was introduced into Parliament in October, following the decision from the NSW Court of Criminal Appeal in *R v Jurisic* (unreported, NSW CCA 60131/98), where the Court decided to issue sentencing guidelines in cases involving dangerous driving occasioning death or grievous bodily harm. The Court indicated 'guideline judgments' had a useful role to play in obtaining consistency in sentencing and maintaining public confidence in sentences imposed, and also maintaining appropriate judicial discretion in sentencing. The government has claimed the Bill provides greater flexibility in the establishment of such judicial guidelines, as the Attorney-General can apply to the Court of Criminal Appeal to consider formulating a sentencing guideline for a particular offence or class of offences, without there needing to be a particular case before the court.

The government proposal has also been criticised as granting the courts a legislative role. There has also been concern expressed about the practice of a court establishing sentencing guidelines in a contextual vacuum, in a hypothetical situation. Further, the designated role of the Senior Public Defender under the legislation, who will be able to appear in the proceedings and make submissions in relation to the proposed sentencing guidelines, including submissions opposing the application, has been criticised as being not within the functions of that position.

Victoria

In Victoria, where private companies operate 45% of the total prison beds, prisons and corrections are big business. And with an 11% increase in Victoria's gaol population in the past financial year, yet only a 1% increase in the crime level, business is definitely booming. With the likelihood of a State election in 1999, the Kennett government is keen to ensure the boom continues.

In October 1998, the Attorney-General introduced the *Magistrates' Court (Amendment) Bill* into Parliament. According to the Attorney-General, the objectives of the amendments are to bring about a fairer and more efficient appeals system in which the appellant will be genuinely 'at risk' when they lodge an appeal. The legislation establishes a series of disincentives for convicted defendants to lodge appeals against conviction and sentence. The most serious proposal is to allow the Court of Appeal, on dismissing an appeal, to direct that the whole or any part of the period of time which the appellant was held in custody awaiting their appeal (up to three months), is not to be considered as a period of imprisonment already served under the sentence.[5] Effectively, prisoners risk up to three months extra gaol time if they appeal to the Court of Appeal unsuccessfully.

The amendments appear to be in clear breach of the International Covenant on Civil and Political Rights in that they discriminate against prisoners lodging appeals to the Court of Appeal. Non-prisoners who appeal to the Court of Appeal are not faced with the risk of extra imprisonment or imprisonment if they unsuccessfully appeal to the Court.

The amendments also propose to limit the opportunity to abandon an appeal once it has been lodged, to within 30 days from the date of lodging.[6] The Federation of Community Legal Centres (Vic.) has expressed concern that this will see increased numbers of appellants unrepresented at their appeal hearings because they have not been eligible for legal aid, have not been able to access legal advice before the expiry

of 30 days, and have been prevented from abandoning their appeals. Such people face the risk of having their sentences increased on appeal.

Other developments in Victoria include:

- an announcement in December that inquiries were being undertaken to establish the first private youth detention facility in Australia;
- an announcement in October that the operation of the Melbourne Custody Centre would be put out for private tender — believed to be the first example world wide of a police holding facility being privatised; and
- an announcement in January of a new privately built and operated adult prison to help deal with increased incarceration rates in Victoria.

This is at a time when existing private prison facilities are increasingly under scrutiny for lack of accountability and inadequate procedures for preventing deaths in custody. In addition, resources for community-based corrections programs have been savagely cut in the last three years.

Conclusion

The example set by the Northern Territory two years ago when it introduced its mandatory sentencing regime has set the agenda for other State governments to emulate. While not going to the extremes adopted in the NT, which has seen people imprisoned for small thefts, such as a can of soft drink, the perception that tougher sentencing and corrections regimes is good politics (and in Victoria, good business!) has taken strong hold in State political agendas.

Louis Schetzer

Louis Schetzer is Project/Policy Worker, Federation of Community Legal Centres (Vic.)

References

1. *Sentencing Amendment Bill (No.3) 1998* (NT), *Juvenile Justice Amendment Bill (No.3) 1998 (Serial 134)* (NT), *Criminal Code Amendment Bill (No.5) 1998 (Serial 133)* (NT).
2. Part 3, *Sentencing Legislation Amendment and Repeal Bill 1998* (WA).
3. Clause 101B to Clause 101N, *Sentencing Legislation Amendment and Repeal Bill 1998* (WA).
4. *Sentencing*, Australian Law Reform Commission, Report No. 44, 1988, para. 183; *Sentencing: Report of the Victorian Sentencing Committee*, Volume 2, p.573.
5. Section 18, *Magistrates' Court (Amendment) Bill 1998* (Vic.).
6. Section 14, *Magistrates' Court (Amendment) Bill 1998* (Vic.).

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

Retreating forces

One of *Girlie's* favourites, Newt Gingrich, once helpfully explained why women should not be in the armed forces. 'They would have biological problems' he mused, 'being in a ditch for 30 days [in combat, one can only assume] because they would get nasty infections.' With this in mind, it is perhaps a blessing in disguise that the Federal Government's Defence Reform Program is failing so spectacularly to keep women in the armed forces.

Despite denials from the government, women have been leaving the armed forces at twice the rate of men's departures since the implementation of the Reform Program. Particularly alarming is the number of women in senior positions resigning in frustration at their lack of opportunity to progress. The government insists that the program is designed not only to keep women in the forces, but to encourage more to enter. However, the Program aims to cut the numbers of staff by approximately 7000, reducing the proportion of support and other non-active service staff, concentrating on staffing the active fighting units, or the 'tail to teeth' units, as they are known.

This policy appears to *Girlie* to be a delicious example of indirect gender discrimination. Senior women are faced with the proverbial double glazed glass ceiling, unable to advance beyond their position because they do not have the requisite 'active service' experience; denied the opportunity to obtain this experience because it was not available to women when they entered the service. This experience is available to an extent to women currently entering the service, but the powers that be are refusing to adopt a more flexible approach, the Minister responsible for Defence Personnel insisting that both the numbers and status of women in the military is improving, and emphasising that there will be no changes to the Program midstream. Coupled with the lack of flexible work practices and very serious and repeated allegations about sexual harassment, *Girlie* thinks the military has its own nasty infections to worry about.

Close, but no cigar

Both Elizabeth Dole and Hillary Clinton are being courted as future Senate and possible presidential candidates in the US. As well as listing their innumerable credits and qualifications, supporters have further endorsed them by reminding a jaded America that at least these contenders can be trusted to keep their hands to themselves. Journalists in the US have argued that Washington has been 'contaminated with testosterone' not only by a President who can't keep his pants on, but by hypocritical Senators, outraged simply because he was stupid enough to get caught.

Misogyny and the male fear of being cuckolded has long insisted that women are less interested in sex and are certainly more faithful. Curiously, though, the bastions of purity being put forward to replace the failed boy scouts are not completely independent. They are chaste, shiny, new and improved versions of their husbands and, not surprisingly, recognised as far more capable. They have been commended for having stood firmly by their respective spouses while these men embarrassed themselves: one man electorally and personally flaccid; the other with so little blood left in his brain he forgot to tell the truth.

The possibility of a woman as conservative as Elizabeth Dole being the first female President of the US is strangely disconcerting. Similarly, while the prospect of a self-professed feminist Senator Clinton is exciting, *Girlie* can't help wondering why this thinking man's Tammy Wynette didn't take a leaf out of Lorena Bobbitt's book a long time ago, or at least flick through Virginia Woolf occasionally. She was comforted, though, by a peculiar article in the *Age* recently which asked the reader to 'Pick the Better Feminist: Diana or Hillary'. After musing for a while on the 'freewhirling', impulsive Diana, who refused to accept her husband's infidelity, starved herself and kept the British Fashion industry alive singlehandedly, the author finally voted in favour of Clinton. Hillary, despite enduring her humiliation in silence, had made a choice, and was

Continued on p.53