

PRELIMINARY SUBMISSION

NSW Law Reform Commission Review Crimes (Sentencing Procedure) Act 1999

About the CSNSW Women's Advisory Council

The CSNSW Women's Advisory Council (the Council) provides an opportunity for sharing of information among government agencies and community organisations which have interests in the well-being of women who are serving a custodial sentence or are under community supervision. The Council is a link between Corrective Services NSW and other government and non-government agencies with a mandate to develop and administer policies and services to women in general and women with specific needs. The Council is a mechanism for drawing attention to significant issues that relate to women in the criminal justice system. Membership is invited from representatives of key areas of relevance to women in custody and under Corrective Services NSW supervision in the community. A list of members is appended to this submission. The Council has a Consultants group of practitioners and others representative of key areas related to women offenders who contribute to Council projects.

The Council welcomes the opportunity to contribute to the Law Reform Commission's preliminary review of the Crimes (Sentencing Procedure) Act 1999.

The Council urges that the LRC acknowledge women as a distinct population in the criminal justice system and to consider women's distinct experiences and pathways into custody, characterised by high levels of trauma.

Outline of the Council's submission

The submission focuses on sentencing options and alternatives to imprisonment for female offenders. It emphasises options and access to these for Aboriginal women in recognition of their long-term and persistent over-representation among the female population in custody in NSW. The Council feels strongly that children's needs are a major factor when a determination of a woman's sentence is being made.

Further, the Council urges the LCR to recognise that women's offending pathways are different from male offenders' and are characterised by high levels of dependency - on relationships that are frequently destructive, on alcohol and other drugs and on income support. Long-term unemployment, self-medication through legal and illegal drug use and experience of violent relationships and domestic violence are acknowledged contributing factors to women's offending.

Background

The NSW inmate population has fallen from 10,293 to 9,945 over the past 12 months and the ratio of female to male offenders has decreased from 7.4% to 7.0%. According to the 2011 CSNSW Inmate Census¹ among the female population the over-representation of Aboriginal women has increased to 30.2% compared to 22.5% among the male

¹ CSNSW Corporate Research Evaluation and Statistics Inmate Census 2011

population. Increasingly, women are going to gaol for longer periods, generally for minor crimes most frequently related to drug and alcohol offences or theft.

The 2009 NSW Inmate Health Survey of women in prison² found that:

- 45% experienced domestic violence or abuse as an adult
- 80% are current smokers
- 38% consumed alcohol in a hazardous or harmful way in the year prior to incarceration, with 16% showing signs of dependent drinking
- 78% had used an illicit drug and 52% had injected drugs
- 20% have been admitted to a psychiatric unit or hospital
- 27% have attempted suicide
- 45% left school prior to completing year 10 at an average age of 14 years
- 32% were placed in care as children
- 67% were unemployed in the six months prior to incarceration; of these 25% had been unemployed for 10 or more years
- 62% of non-Aboriginal women and 80% of Aboriginal women had been in a violent relationship
- 59% of women had experienced sexual coercion.

Diversion requires the provision of a wide-range of viable community-based alternatives to detention. Diversion programs should be adequately resourced to ensure they are capable of implementation, particularly in rural and remote areas. Diversion should be adapted to meet local needs and public participation in the development of all options should be encouraged. There should be adequate consultation with Aboriginal communities and organisations in the planning and implementation stages. Diversionary options should be available at all stages of the criminal justice process including the point of decision-making by the police, the prosecution or other agencies and tribunals. Diversion should not be restricted to minor offences but rather should always be an option. The decision-maker should be able to take into account the circumstances of the offence. The fact that a woman has previously participated in a pre-court diversionary program should not preclude future diversion. A breach of conditions should not automatically lead to a custodial measure.

Agencies with the discretionary power to divert women from the criminal justice system must exercise that power on the basis of established criteria. The introduction, definition and application of non-custodial measures should be prescribed by law.

All law enforcement officials involved in the administration of diversion should be specifically instructed and trained to meet the needs of women. Justice personnel should reflect the diversity of women who come into contact with the system.

On 6 October 2011 the number of women on community orders was 2465. This is 15% of all offenders supervised in the community by NSW DCS. This figure has remained fairly steady over the past five years.³ The NSW Sentencing Council has found that geographic limitations exist despite all forms of community based sentencing options

² Justice Health Inmate Health Survey 2009

³ Evidence presented to the Standing Committee into Aboriginal and Torres Strait Islander Affairs, Inquiry into the over-representation of Indigenous juveniles in the criminal justice system 2010

being legislatively available across the State.⁴ The NSW Parliamentary Inquiry into community-based sentences⁵ confirmed this finding, noting that unsupervised bonds were the only community-based sentence available throughout NSW. This has particular implications for offenders whose offending may result from the lack of services in the community, for young offenders and people serving relatively short sentences of imprisonment which in part may be the result of the lack of available alternatives.

Despite the Judicial Commission's⁶ suggestion of the suitability of periodic detention as a sentencing option for women with child care responsibilities, both the NSW Legislative Council Standing Committee on Law and Justice report on community-based options⁷ and the NSW Sentencing Council report on Periodic Detention⁸ found that there was limited availability of periodic detention, particularly in regional areas, for female offenders. For example, of the 724 people on periodic detention orders at 30 June 2006, only 60 (8.3%) were female. The lack of utilisation of the scheme for female offenders was one reason the Council recommended its abandonment.

Home detention

On 6 November 2011 approximately 17% of Home Detainees were women; according to Corrective Services NSW this equates roughly with their level of representation among CSNSW clients in the community. Of the total of 2465 women under CSNSW supervision in the community, 15 were on Home Detention. Home Detention is currently available only in the Sydney metropolitan area.

The Women's Advisory Council understands that the CSNSW is considering a proposal to extend Work Release to a third stage that would include Home Detention. The WAC is concerned to ensure that sentenced women are adequately represented in the proposed Work Release 3 model that includes Home Detention at the end of a sentence, and has asked that CSNSW set targets for women to be included in this program (seeking in fact that in the initial phase of this new model for Work Release 3 that more women than men be offered places). As approximately 59% of women in custody have children participation in the program would greatly assist the reintegration of families and reduce the trauma of separation.

The WAC refers the Committee to the NSW Sentencing Council's reports, *How Best to Promote Consistency in the Local Court 2004* and *The Effectiveness of Fines as A Sentencing Option*, for further consideration of this issue.

Remand

Of the total number of women in full-time custody in NSW, over 30% of women are on remand at any one time. There is evidence that high numbers of women who are remanded in custody are released at sentencing because of back-dated sentences. The WAC understands that CSNSW is considering a trial of electronic bracelets for bail refused persons, and has urged that preference be given to women, especially Aboriginal

4 NSW Sentencing Council, *How Best to Promote Consistency in the Local Court 2004*

5 NSW Legislative Council, Standing Committee on Law and Justice Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations Final Report March 2006

6 Judicial Commission of New South Wales Bench Book

7 NSW Legislative Council, Standing Committee on Law and Justice Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations Final Report March 2006

8 NSW Sentencing Council, *Review of Periodic Detention 2007*

women who are the sole carers of dependent children. Targeting women for this initiative would recognise the exceptional circumstances of women and would ensure the least disruption to children and families, who often suffer extensive disruption when an accused is incarcerated. This would contribute to the avoidance of intergenerational offending. Care needs to be taken however that the trial does not lead to net-widening. The WAC urges therefore that electronic bracelets *not* be considered as a first resort or automatic response to women applying for bail who would not otherwise be considered a risk of flight or non-attendance at court. The trial should be used only as a means of ensuring that women who would otherwise spend time in custody on remand can be diverted from the custodial system.

Lack of adequate programs in custody

Delivery of programs in custody is problematic for a client group representing small numbers with complex needs, serving short periods. This difficulty is exacerbated by the overwhelming needs of male prisoners. Programs need to be delivered across a wide geographical area, from the Sydney metropolitan region to Kempsey, Wellington and Broken Hill. Delivery of evidence-based treatment programs may not be viable, given the low numbers of women in the non-metro gaols and that participation in treatment programs is not effective for those assessed as low risk of reoffending. Alternatives to custody are the obvious option for this group, (i.e. low risk), particularly those who may have histories of minor offences whose antisocial behaviour can only be addressed through assistance/guidance in pro-social activities in the community. Mentoring support is increasingly available and can work alongside community-based support services and monitoring agencies.

Approximately a third of women in custody are Aboriginal, a higher over-representation than their male counterparts. They also have the highest recidivism rate, higher than non-Aboriginal women, Aboriginal and non-Aboriginal men. The WAC recently supported Link-Up to obtain funding for a female case worker so that the much needed and important work of reconciling Aboriginal women with their families can commence.

Impact of experience of childhood and adulthood sexual assault is not understood

The WAC is concerned that the impact of sexual trauma on women's life courses and links with offending have not been adequately explored or provided for in terms of program delivery in custody. At the WAC's request, the CSNSW has commissioned The Australian Centre for the Study of Sexual Assault (ACSSA) to undertake further examination of this issue – including what treatment/support is efficacious in addressing this trauma in the general community and for women offenders in custody and under supervision in the community; the study is examining the appropriate context for treatment/support and the impacts of sexual trauma histories on women's capacity to participate and benefit from offence-related programs.

Information gaps at court and prison reception

After court, many women, particularly Aboriginal women, do not comprehend the sentences they have been given. For example, the Legal Education Assistance Program (LEAP) offered by Wirringa Baiya, Women's Legal Service and Hawkesbury-Nepean Women's Legal Service in Silverwater Women's Correctional Centre, Emu Plains Correctional Centre and Dillwynia, report that 1 in 4 women don't know what their sentence is or who represented them.

A need for explanation of individuals' sentences has been identified – specifically, when & who should provide legal advice, mode/s of communication; court proformas, information from and details of lawyers who represented women. AVL/Video Court Link is a major issue as offenders frequently do not understand what the judge has said and have no assistance. They are confused about what is happening and the outcome.

Proposed diversionary programs

Concerning Question 3 of the LRC preliminary outline, (3) *any sentencing options in addition to those that currently exist that could be provided as an alternative to imprisonment, either generally, or in relation to particular categories of offenders*, the Council proposes the following:

1. Gender analysis of women's access and participation in community-based sentencing options
2. Criteria to be considered in bail applications
3. Increased access to CREDIT and other diversionary options
4. Piloting abolition of short sentences
5. Use of 'Exceptional circumstances' during sentencing
6. A Compulsory Drug Treatment Program for women
7. Establishment of a Complex Needs Panel or equivalent.

1. Gender analysis of access and participation in community-based sentencing options

Each existing sentencing option must undergo gender analysis to determine levels of access, participation and completion by women including Aboriginal, non-Aboriginal and women from culturally and linguistically diverse backgrounds as well as those with mental health and other cognitive disabilities. This analysis would provide a picture of successful programs that could be expanded or, where deficits exist, indicate that action is needed to ensure equity of access.

For example, in relation to fines, women offenders have poor employment histories: 67% of women were unemployed in six months prior to incarceration, compared with 50% male offenders (IHS 2009). This indicates a level of hardship that would impact on capacity for repayments. Duration of unemployment is longer for women than men; women are substantially more likely than men to have been unemployed for five years, 44% to 30% respectively, prior to incarceration (IHS 2009).

The WAC refers the Committee to the NSW Sentencing Council's recommendations and findings regarding prisoners and debt, and the intersection of licence suspension and custody.⁹

The Fines Amendment (Work and Development Orders) Bill 2011 establishing Work Development Orders has been shown to be successful in assisting people in hardship who are unable to pay fines. Answers to the following questions would assist in determining if or where the program could be expanded:

⁹ NSW Sentencing Council, (2008) Effectiveness of Fines as a sentencing option.

- Are women in regional and remote areas able to participate?
- Are women with mental health issues and disabilities able to participate?
- Are the orders structured to enable women with dependents to participate?

If gender analysis identifies barriers to equitable access and successful completion by women, the program needs to be adjusted or links made to support services for participants e.g. for women with dependents.

Recommendation:

That the Judicial Commission be required to undertake a gender analysis of community-based sentencing options be undertaken to determine:

- *current access and participation by eligible women, particularly Aboriginal women*
- *identification of areas where lack of availability may be resulting in use of custody*
- *action to be taken to address barriers to access.*

2. Criteria to be considered in bail applications

Subsection 32(1) of the Bail Act outlines the criteria to be considered in determining bail applications. Paragraph 32(1)(b) sets out an exhaustive list of factors that should be taken into account in considering the interests of an accused person. These factors include the needs of a person to be free for any lawful purpose. The term ‘lawful purpose’ is not defined or limited in any way in the provision, except to say that ‘lawful purpose’ includes the needs of a person to be free to prepare for an appearance in court or to obtain legal advice.

Without aiming to provide an exhaustive list or limit in any way the range of lawful purposes that a court could take into account under s 32(1)(b)(ii)-(iii), the WAC submits that this provision should prescribe certain international human rights principles that the court should consider as ‘lawful purpose[s]’ for the purpose of s 32(1)(b). These include, but are not limited to, a person’s right to work¹⁰, obtain an education¹¹, participate in family life¹², access health services¹³ and maintain housing¹⁴.

Allowing a person to remain in the community pending the resolution of their criminal case promotes and enables effective participation in society and fulfils some fundamental objectives of the justice system. A person remanded in custody on the other hand, is effectively prevented from participating in society in a meaningful way, which can have detrimental effects. For example, the impact of being refused bail can lead to a person losing the care of their children and losing their housing which can in turn have devastating consequences when the person is released from custody into homelessness. Such situations hinder successful re-integration into the community and increase the risk of offending. The Council is aware anecdotally, that in practice criminal defence lawyers make submissions addressing the needs of a person to obtain or continue employment, education, participate in family life, access adequate health care or maintain housing as

10 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, (16 December 1966), United Nations, Treaty Series, Article 6, viewed July 2011 <<http://www.unhcr.org/refworld/docid/3ae6b36c0.html>>

11 Ibid, Article 13

12 Ibid, Article, 10

13 Ibid, Article, 12

14 Ibid, Article, 11

the case may be, in support of a bail application. There will indeed be other relevant factors which impact on the rights of an accused person and should be considered in a bail determination. The WAC submits that a non-exhaustive list should be developed in consultation with legal practitioners and the community more broadly.

Recommendation

For the purpose of expanding the list of 'lawful purposes' that can be taken into account under section 32(1(b)(iii) of the Bail Act, a non-exhaustive list of criteria should be developed in consultation with legal practitioners and the community more broadly, which includes a person's right to work, obtain an education, participate in family life, continue the care of children, access health services and maintain housing.

3. Increased access to Court Referral of Eligible Defendants Into Treatment (CREDIT) and other diversionary options

With the aim of reducing the over-representation of Aboriginal women in custody the Council proposes the extension of CREDIT. At the 2011 Inmate Census, 30.2% of the female population were Aboriginal.

The program is currently operational in two locations, Tamworth and Burwood, and aims to give Local Court defendants the support they need to access a wide range of treatment, programs and services to assist them and reduce their chance of reoffending.

The Council proposes that CREDIT programs be established at Dubbo and Outer Western Sydney where there are high populations of Aboriginal offenders. These are locations are well served by Aboriginal and mainstream services.

An *Evaluation of the NSW Court Liaison Services* by BOCSAR in 2009 states that drug use, histories of abuse and psychiatric disorders are characteristic of women offenders (74% had had psychotic episodes in the year prior to their court appearance). The 2009 Inmate Health Survey showed the higher representation of women among inmates who, prior to their incarceration, had had mental health treatment, been admitted to a psychiatric unit and attempted suicide or self-harmed.

Assisting the courts to recognise mental illness and organise court-ordered treatment in a community setting is now recognised as a valuable alternative to incarceration. The Mental Health Court Liaison Officer model of support for offenders with histories of drug misuse could benefit from expansion. The WAC has supported NSW Justice Health's bid to increase numbers of Mental Health Court Liaison Officers and would urge this to be adopted as a recommendation of the LRC.

Recommendation

That CREDIT and other diversionary options be established at locations where high numbers of offenders are located such as in outer western Sydney and in areas where such options would enable magistrates to divert offenders who, in the past, would have served time for minor offences.

The Council also recommends that the LRC supports the increase in numbers of Mental Health Court Liaison Officers.

4. Piloting abolition of short prison sentences

Women typically spend less than 12 months in custody. From July 2010 to June 2011 of the sentenced women released 51% of Aboriginal women and 44% of non-Aboriginal women served 4 months or less; the majority of women serving five months or less, 64% and 56% respectively.

The WAC argues that it is a fundamental waste of money to incarcerate women for these short sentences and is an ineffectual process. CSNSW has argued that most educational or rehabilitative programs cannot be successfully carried out with people who are in custody for such short periods of time.

The NSW Sentencing Council has recommended that abolition of short prison sentences should be piloted for Aboriginal female offenders throughout NSW, and that such a pilot should be carefully monitored and evaluated.¹⁵

The Council noted that data provided by CSNSW on the characteristics and size of the population serving prison sentences of 6 months or less indicated that almost a quarter are Aboriginal. It found that women are serving short sentences primarily for public order offences and fine default, and noted concerns that many of these women serving short prison sentences are unable to access counselling or courses, and that community based sentencing options, in place of short prison sentences, would allow for flexibility in service provision and links to ongoing treatment in order to address underlying issues related to offending behaviour.

The Council acknowledged that the same sentencing *principles* should be applied to Aboriginal offenders, but that the Aboriginality of an offender *is nevertheless relevant* to explain or throw light on the particular offence and the circumstances of the offender. Judicial education and cultural awareness programs therefore have an important role to play. It noted that there was evidence to show that alternatives to prison specifically targeted to Aboriginal offenders have a positive effect on reducing re-offending, and that any general reform to prison sentences of 6 months or less should be clearly articulated with current policies specifically developed for Aboriginal people. The development of alternative sentencing options to short prison sentences clearly involves criminal justice intervention programs.

The over-representation of Aboriginal women in correctional facilities, in particular, and the shorter sentences that they serve indicates that non-custodial sentencing alternatives are not being utilised for them.

The WAC notes that Aboriginal women are more likely to be serving their current prison sentence for a violent offence (57 per cent compared to 21 per cent of non-Aboriginal women) and less likely to be serving a sentence for property (21 per cent compared to 35 per cent) or drug offences (two per cent compared to 18 per cent).¹⁶ This has obvious implications for any attempts to reduce the impact of short custodial sentences for Aboriginal women. On past practice, governments are unlikely to permit violent offences to be included in any sentence reduction or abolition scheme. To overcome this barrier,

15 NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less: Final Report*, 2004

16 Johnson, H. (2004). *Drugs and Crime: A Study of Incarcerated Female Offenders*. Research and Public Policy Series No. 63
Australian Institute of Criminology

the WAC recommends that eligibility criteria for the trial prevent exclusion on the basis of seriousness of offence if an offender has been sentenced to less than 6 months.

Precedent for this idea lies in the NSW Sentencing Council's recommendation in its report on sexual offences:

3.35 [The Council] is ... of the view that consideration should be given to relaxing the bar on entry to diversionary/restorative justice programs for first offenders facing potential charges for less serious sexual offences, with each case being considered on its own merits by reference to the subjective circumstances of the offender, his or her acceptance of guilt, and prospects of rehabilitation.¹⁷

The WAC also notes that the Sentencing Council's recommended trial was dependent on consideration of the success of the Western Australian abolition of short sentences project – which was deemed not to have been successful. However, it is noted further that discussion of sentencing practices and prison numbers in the UK had led to a recent consideration of the abolition of short custodial sentences.

The impact of short sentences endures beyond the term of the sentence, with the loss of housing, disruption to care arrangements for dependents, loss of employment and other community connections. The ongoing burden of a criminal record is another significant factor.

For those serving short sentences there is insufficient time for program participation to address causes of offending; staff are occupied with disconnecting inmates from support e.g. Centrelink, housing and other services as well as addressing family issues, then after a few weeks, need to reverse the process to re-establish connections. This is a particular challenge in relation to housing and children's needs.

As the majority of women are serving short sentences for non-violent offences, alternative community-based options would not result in increased threat to the community. It may be that women are sentenced to custody for non-violent crimes because they are unable to access other options due to location or other factors such as responsibility for dependents. Community-based sanctions are known to be more effective than custody-based and allow care of children to be maintained. This has a net effect of reducing future crime. Linking assistance to at-risk families needs to be an integral component of community-based programs such as CREDIT.

The Council urges the LRC to recommend the increase of community sentencing options to replace sentences of less than six months. The Council acknowledges the necessity to prevent 'bracket creep' (also termed 'sentence creep') which is the tendency for magistrates to give longer custodial sentences when previously a sentence of less than six months would have been an option.

5. Use of 'Exceptional circumstances' during sentencing

The Council urges the LRC to promote the use of 'exceptional circumstances' when sentencing is being considered for women with dependent children.

17 NSW Sentencing Council (2008) Sexual offences - penalties for

In current sentencing legislation an offender's family circumstances are considered as a relevant factor only if recognised as 'exceptional circumstances'. That is, the offender's situation and caring obligations must substantially exceed the 'normal' experience of other offenders before the court. Family breakdown and the loss of a child to the out of home care system of itself does not constitute exceptional circumstances.

The WAC understands that the judiciary (particularly in the Local Courts where the majority of women appear) seldom exercises 'exceptional circumstances' legislation during sentencing, notwithstanding that the circumstances of children and other dependants will undergo major trauma upon the parent's incarceration. Whether this is due to inadequate legal representation where such arguments are not raised, a view that a relatively short sentence of six months could not constitute hardship on either the offender or her children, or a view that it is an irrelevant consideration or one that would unfairly advantage a female offender, is not known, but it is an issue in need of further examination.

The WAC argues that this sentencing approach is fundamentally flawed and requires reform. Women are the primary carers of children and, increasingly, of other family members. Approximately 59% of women in prisons are parents, with many the sole carers of young children before their incarceration. Data are now being collated by CSNSW on parental status, living arrangements prior to custody, relationship of the incarcerated parent with the child/children's carer in the community as well as the number of children visiting offenders. In the six months between 1 September 2010 and 28 February 2011 **86,300** visits were made by children to inmates.

Given the negative impact of parental incarceration particularly for children whose mothers are in custody, there is a major need to prevent separation of mothers from newborns, children and young people. The impact of imprisonment of a primary caregiver can be severe, resulting in disruption in family living arrangements, multiple and changing caregivers, and unstable school placements. For those babies born in custody who are unable to remain with their mothers, a situation results in disrupted attachment that may lead to long-term behavioural, emotional, relational and educational problems. Among the most significant long term impacts on children is the child's increased probability of criminal justice involvement as an adolescent and imprisonment as an adult.

Although it is not unusual or exceptional for women to have children it is exceptional to have the state causing separation of mother and child where this is against the best interests of the child. A stark difference between incarcerated mothers and fathers is the care arrangements that are made when parents enter custody. 84% of the children of inmate fathers are cared for in the community by their mothers. Children of incarcerated mothers, however, are cared for by a mere 28% of fathers. The majority are in the care of grandparents (34%), siblings and other relatives (15%). 6% of children of fathers are in the care of Community Services and other care in contrast to 18% of children of mothers. (CRES unpublished data 2011).

Fifty-nine per cent of women in custody are mothers. Of these 47% were carers of their children prior to custody. Based on female inmate population of 624 as of 23 October 2011 this equates to 150 - 180 women.

CSNSW runs a Mothers and Children program in NSW prisons which enables women to their children reside with them in custody. Notwithstanding the limited placements, it is the

WAC's experience that judicial officers have pointed to the existence of the program as justification for a woman's incarceration, arguing that she will not be separated from her child while in custody. However, the program is for sentenced, minimum security women only and excludes those with serious AOD and mental health issues.

The 'exceptional circumstances' requirement disadvantages women in the sentencing process by discounting the common everyday experience of the majority of female offenders. The criminal justice system thereby tacitly accepts that female offenders will lose their children – it is not an unusual enough outcome to warrant leniency in sentencing. Women are thus disadvantaged by a supposedly impartial sentencing system because their common female experience departs from the common male experience.

The WAC argues that the internationally recognised principle of the best interests of the child demands that family break-up and institutionalisation of the child in out of home care be an elevated consideration in sentencing such as to constitute 'exceptional circumstances' in its own right. Judicial education and information about women's caring obligations must be provided – particularly to the lower courts - and the legal profession educated so that exceptional circumstances arguments can be considered as a matter of course when women with dependants are sentenced.

Support for the view that a special approach can be taken with respect to a particular class of offenders is found in the 2010 report on the Fernando Principles on Sentencing Aboriginal offenders (commissioned by the NSW Sentencing Council)¹⁸. The report provides a comprehensive review of the development of the current common law principles in relation to sentencing Aboriginal offenders against a backdrop of increasing rates of imprisonment of Aboriginal offenders in NSW. It identifies various reasons for the overrepresentation of Aboriginal offenders in NSW prisons and examines alternative sentencing models and criminal justice strategies from this and other jurisdictions. The report indicates how judicial practices have attempted to adjust for the needs of Aboriginal people – through development of Circle Sentencing, Koori Court and other initiatives in Canada. An evaluation has shown that Koori sentencing models have not reduced recidivism but are valued for the positive, although slow, process of increasing the engagement of Aboriginal communities in criminal justice. In Victoria there have been successes because programs have been integral to the options. The Council encourages the LRC to examine the Victorian programs with a view to incorporate features that would enhance Circle Sentencing functioning in NSW.

Offending is a male-dominated social phenomenon, evidenced by the ratio of males to females in prisons around the globe. Although rates of incarceration of women have increased over the past 10- 15 years there is still a major difference between male and female prisoner numbers. It is less common for women to offend and to be sentenced to a community or custody based sentence.

The Council's proposal is supported by the increasing evidence of the major negative impact of separation on the child's emotional and cognitive development and the known intergenerational risk of offending.

18 Manuell, J (2010) The Fernando Principles: Sentencing Aboriginal Offenders, NSW Sentencing Council.

Recommendation

The Council recommends that the use of 'exceptional circumstances' when women with dependents are being sentenced be expanded. Family histories and current circumstances to be requested in Pre Sentence Reports for mothers with dependent children.

The Council also recommends that education and information on women's caring obligations be provided to the judiciary, particularly in the lower courts.

6. Compulsory Drug Treatment Program for women

Given the success of the Compulsory Drug Treatment Program for male inmates and the high numbers of women in custody for drug-related offences there is a need for a similar legislated treatment and supported transition program for women. 65% of women compared with 52% of men believe that their current sentence is somehow linked to drugs (IHS 2009). Women were more likely to have overdosed in the community compared with men (30% and 20% respectively).

For the high numbers of women with complex needs such as histories of complex trauma a program would need to be structured to address these needs in a supported, staged return to the community. Forthcoming research by The Australian Centre for the Study of Sexual Assault, commissioned by CSNSW, on *Women as offenders, women as victims: the role of corrections in supporting women with histories of sexual abuse* will assist in informing the development of a more effective drug treatment program. The consequences of chronic trauma are central to women's pathways into offending and drug use. A Compulsory Drug Treatment Program would need to be informed by these histories and responsive to the offence pathways of women that are different from those of men. The program would be developed from a set of principles reflective of the knowledge of women's offending.

Recommendation

That a Compulsory Drug Treatment Program be legislated for women, to be structured to address their specific needs through a supported, staged return to the community that adjusts for those who lack family support.

7. Problem Solving Court

The Council urges the LRC to consider the establishment of a Problem Solving Court and Lists based on therapeutic jurisprudence principles. Problem Solving lists serve the same function as problem solving courts, operating on particular days in a 'regular' court. Use of Lists would greatly expand the geographic availability of this diversionary option. The longer term aim is to mainstream a problem solving approach as a function at regular courts.

A model for consideration is the Special Circumstances Court Diversion Program at Brisbane Court that focused initially on homeless people and expanded to include others considered in hardship. It is one of a suite of Brisbane Magistrate's Courts Innovations Programs, developed in recognition of the wider causal factors (special circumstances) behind many minor offences and the need for support beyond sentencing. The Special Circumstances Court aims to work with people in the early stages of criminal justice processes to minimise their risk of becoming entrenched in the system and to address

underlying causes of their offending. The Court uses bail and sentencing options to place people with support services to help them deal with issues that are contributing to their offending e.g. unmet housing and health needs, and to enable them to make life changes.

The types of offences over which a Problem Solving Court would have jurisdiction could include some drug-related offences, theft/stealing, some property offences, public order and procedural offences such as breaching bail for public order offences.

Problem Solving Courts and/or Lists would reduce the number of Indigenous people appearing in the criminal justice system by taking into account cultural issues in bail and sentencing hearings and providing culturally appropriate treatment programs as part of the conditions. Rather than serving successive short sentences, women could be assisted to resolve issues e.g. debts, access AOD services and other counselling to address underlying causes of their offending.

The development of Lists would allow special hearings in all courts to process the offenders most in need of remedies to address their offending behaviour.

Recommendation

That a Problem Solving Court and/or Lists be developed and implemented in locations that will assist in diverting Aboriginal women from custody particularly those who have histories of repeated short sentences.

8. Complex Needs Panel or equivalent

The Council urges the LRC to consider the development of an over-sighting service (under legislation) to offenders with multiple and complex needs. Women, particularly Aboriginal women, experience difficulties in gaining access to essential services. People with multiple and complex needs usually include those who experience various combinations of mental health issues, cognitive and other disabilities, acquired brain injury, behavioural problems, homelessness, social isolation, family dysfunction and drug/alcohol misuse. They have usually been involved with many services, including child protection and juvenile justice.

Disruptive or aggressive behaviour shown by some of these people contribute to the difficulties services face in maintaining involvement. Backgrounds of chaotic lifestyles plus levels of need contribute to pathways into custody, their situations reducing likelihood of diversion or community-based sentencing options. An increasing number of people with complex needs are unnecessarily entering the criminal justice system having been effectively excluded from the broader service system.

A legislated Multiple and Complex Needs Initiative, similar to the Multiple and Complex Needs Initiative (MACNI) implemented in Victoria, aims to overcome the resistance and barriers that are frequently experienced by people with issues described above. The strength of this approach is the perceived authority of a statutory body, a Complex Needs Panel, to ensure service access for people who have frequently been denied service. The role of legislation is particularly useful in bringing services together “to the care plan table; rather than dealing with reluctant clients [who in this case are voluntary], it allow[s] for dealing with reluctant services... legislation can be used to urge services to respond and

support people's rights to service and that this could occur in supportive rather than coercive relationships."¹⁹

This initiative differs from the existing NSW ADHC-led Integrated Services Project for Clients with Challenging Behaviour that is exclusively for clients with a mix of disabilities and diagnoses most commonly mental illness, intellectual disability and AOD disorders. As an ADHC program participants must meet target group criteria. In contrast the Complex Needs Panel model has a broader participant base, concentrates on compelling service responses and strengthening systems to enable ongoing and appropriate provision.

The Council urges the LRC to consider legislating for a Complex Needs Panel or equivalent that would aim in its pilot to meet the needs of women offenders, with a focus on Aboriginal women and women from culturally and linguistically diverse backgrounds, who in contrast to their male equivalents, have minimal family and community support.

Recommendation

That a statutory body, a Complex Needs Panel or equivalent, be established and piloted for women offenders, focusing on Aboriginal women and women from culturally and linguistically diverse backgrounds to resolve issues that contribute to their offending and to ensure that services provide support that is needed.

In conclusion

The failure to recognise that women offenders often have different motivations or drivers for their participation in crime than their male counterparts, and the refusal to recognise that gender-specific responses to offending are required at every stage in the process, from diversion, sentencing itself and post-custody options, means that the criminal justice system continues to fail the majority of female offenders and perpetuates the continuing invisibility of women within the system.

The Council asks that the LRC give consideration to the development of general sentencing principles in State law to reflect the circumstances of the offender, the victim and the community, reflecting a commitment of human dignity and equality in our society.

We draw your attention to the 1997 Standing Committee on Social Issues statement: A sentence of imprisonment on a primary carer of children should only be imposed when all possible alternatives have been exhausted. The courts should always seek community-based alternatives, particularly in the case of offenders who have committed non-violent offences.

In our society, the role of the court and the presiding judicial officer is surely not to simply apply the law but to seek to serve the human rights of offenders and victims, and protect the community while upholding the rule of law. Questions of application of 'Fernando Principles' or 'Exceptional circumstances' when determining a sentence could best be interpreted in terms of proportionality: balancing the respect for human dignity, acknowledging the law (defined by parliament) allowing 'unelected judges' to consider

19 Hamilton, Margaret 'People with Complex Needs and the Criminal Justice System', Current Issues in Criminal Justice Vol. 22 No 2(Nov 2010) 307-324

remedies that admit that in our diverse society some citizens have suffered extreme poverty, neglect, racism and violence.

The task of providing alternatives, on a state wide basis is now before the LRC and its opportunity to advise the government to proceed with reform which recognises human dignity and equality.

CSNSW Women's Advisory Council
Chair: Ann Symonds

18 November 2011

See Attachment A for a membership list of the Council

ATTACHMENT A

Corrective Services NSW Women's Advisory Council Members November 2011	
Jenna Bateman	Chief Executive Officer Mental Health Coordinating Council
Monique Hitter	Director Civil Law Legal Aid Commission
Helen L'Orange	Past Child Advocate Mothers & Children's Program
Katherine McFarlane	Chief of Staff Minister for Infrastructure and Planning Past Lecturer, Justice Studies / Criminology School of Humanities Faculty of Arts & Social Sciences Charles Sturt University Past Official Visitor Past Registrar Children's Court
Nicole Lawless	Manager Violence Prevention Coordination Unit Office for Women's Policy Department of Family and Community Services
Carmen Parter	Director Aboriginal Health NSW Health
Christine Robinson	Co-ordinator Aboriginal Women's Legal Service Wurringa Baiya
Ann Symonds	Chair Patron Mothers and Children's Program Patron SHINE For Kids Past patron Guthrie House
Sally Trevena	Assistant Manager Housing and Homelessness Section NSW/ACT Office Department of Families, Housing, Community Services and Indigenous Affairs
Mandy Young	Manager Domestic and Family Violence Unit Department of Attorney General and Justice

Corrective Services NSW

Luke Grant	Assistant Commissioner Offender Services and Programs
Rosemary Caruana	Assistant Commissioner Community Offender Management
Marilyn Wright	General Manager John Morony & Oberon Cluster
Deirdre Hyslop	Executive Officer Principal Advisor Women Offenders Offender Services and Programs