

Baseline Sentencing Inquiry

We are grateful for the opportunity respond to matters raised in the Baseline Sentences Issues Paper September 2011 and apologise for the late notice of this correspondence.

Fitzroy Legal Service (FLS) is only responding to the following Baseline Sentencing Inquiry term of reference:

The likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences.

Summary

The SARC discussion paper on baseline sentencing reveals the complexity and number of issues around how such a system might be structured and organised. FLS believes the adoption of this scheme is a further threat to better public understanding about sentencing.

FLS believes the likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences will be to increase the length of custodial sentences and reduce the flexibility of Judges and Magistrate's decisions.

Submission

Fitzroy Legal Service (FLS) provides legal support through its volunteer and paid solicitors at 124 Johnston Street and the Neighbourhood Justice Centre, in areas of law including crime, family law, family violence, victims of crime and infringement offences. In addition FLS has an outreach position funded by the Department of Human Services that provides assistance exclusively to clients presenting with alcohol and other drug related legal problems. FLS work closely with health service providers in providing legal support to our client base.

We seek to make short submissions only, and in doing so, share our experience as a legal service providing services to community members experiencing socio-economic disadvantage and circumstances of frequently compounded vulnerability. Our client base includes clients who have been charged with serious and significant offences.

We acknowledge that the Sentencing Advisory Council is able to consider submissions only within the terms of reference put forward in the Issues Paper.

FLS believes the likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences will be to increase the length of custodial sentences and reduce the flexibility of Judges and Magistrate's decisions.

There are a number of negative consequences attached to this outcome some of which are mentioned below.

The (2010)FLS summary of research in relation to the lack of effectiveness of more punitive sentencing (copy attached) drew attention to some of the consequences associated with more punitive sentencing. The Federation of Community Legal Centres 'Smart Justice' website also summarises much of the relevant research –some of it from the Sentencing Advisory Council itself.

Public attitudes to sentencing and public confidence

In particular FLS draws attention to the contradiction between research which suggests the public support 'tougher sentencing' and research which demonstrates the public supports current practice by magistrate's and judges. The difference between these two types of research, which the Sentencing Advisory Council (Gelb, 2008) and Lovegrove's (2007) research has highlighted, is that when people are given the same details as judges hear at a court, they adopt similar sentences to judges. The more abstract questions such as simple opinion polls about punishment, tap a more punitive sentiment in the public.

We suggest that if there is this level of confusion exists around sentencing in the public's thinking then a 'baseline system' will not only result in longer sentences but the complexity of the system will do nothing to allay the concerns of the community. It may contribute to them.

Expertise and Discretion of Judges and Magistrate's

We nevertheless take this opportunity to express our formal opposition to the proposed measures as significantly impeding the exercise of judicial discretion.

The arguments for retention of judicial discretion have been raised on many occasions by a range of voices. We reiterate the following matters as central from our perspective.

Judges and Magistrates clearly have more experience than any other body in applying and balancing those considerations Parliament has defined as in the public interest in applying sentences.

Staff at our service participated in the sentencing surveys circulated through the Herald Sun and found the case studies did not reflect the complexity of decision making that occurs in our Courts.

Judicial discretion is a corner stone of the separation of powers doctrine and a substantial body of precedent in relation to sentencing matters has been developed in Victoria. We are also concerned that the proposed approaches will affect the common law sentencing principles currently applied by the judiciary.

We are aware that a strong consideration for the Attorney has been the efficacy with which the courts run the introduction of sentencing baselines would likely lead to an increased number of matters where charges are contested thereby increasing court delay.

Conclusion

We reiterate our support for judicial discretion and autonomy and decision making as a key characteristic of progressive judicial systems. We note that the public support for increased sentences would appear to be based on a significant level of misinformation we note also that incarceration for any significant length of time does not necessarily serve the community interest in enhancing safety. We note in this regard the significant recidivism rates for community members exiting the prison system.

These concerns are not just concerns for criminal defence lawyers they are rightly considered to be concerns of the public and the public interest in this regard must continue to be a key consideration for decision makers in our courts.

We restate our concern that the scheme will increase the length of custodial sentences without contributing to public understanding or public safety.

The evidence about harsher sentencing

“It’s also costing taxpayers a fortune and has reached a point where increased spending isn’t doing any more good”

The Age Senior columnist, Ross Gittins, on the limitations of harsher sentencing policies.
(June 10th 2009)

Punitive sentencing is ineffective on two levels. Punitive sentencing has no or little impact on offending, and is unlikely to make the public more confident in the courts and sentencing.

A considerable body of literature has shown that harsher sentencing only results in modest reductions in crime rates¹. In his sentencing review in 2002 Professor Arie Freiberg of the Victorian Sentencing Advisory Council states that in Australia “there is little evidence that increasing imprisonment rates have significantly affected crime rates”². Furthermore, although Victoria’s crime rate over the last decade has shown small annual increases for the most part, the crime rate appears to be unrelated to the numbers in prisons³. The heavy use of imprisonment is ineffective as a crime control strategy⁴. An emphasis on imprisonment diverts resources from other crime control policies, such as early intervention and other preventive measures, that may more effectively promote community safety⁵.

Wilkinson and Pickett in their 2009 book *Spirit Level: Why Equality is Better for Everyone* have used international comparisons to highlight the strong link between inequality within a country and a range of social ‘ills’ including high levels of imprisonment. A web site based on their book highlights strong links between imprisonment and income inequality - both internationally and among the 50 US states.⁶

Making sentences harsher will not change public opinion on sentencing. The public needs better information about sentencing and criminal justice policies. Research into public opinion and sentencing consistently finds that when more information is provided to respondents their levels of punitiveness drop dramatically⁷. Extensive research performed by the Sentencing Advisory Council found that “despite apparent punitiveness, the public believes that the most effective way to control crime is via programs such as education and parental support, rather than via criminal justice interventions”⁸.

The evidence about public opinion and sentencing

¹ Roberts et al (2003) *Penal Populism and Public Opinion: Lessons from Five Countries*; Freiberg (2002) *Pathways to Justice: Sentencing Review 2002*.

² Freiberg 2002, p.41.

³ Ibid, p.41.

⁴ Roberts et al. p.6.

⁵ Ibid, p.6.

⁶ www.equalitytrust.org.uk

⁷ Gelb, K. (2008), *More Myths and Misconception*, p.6.

⁸ Gelb, K. (2006), *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, p.vi

Decades of basic opinion polls show that the public believes the criminal justice system, and courts in particular, to be overly lenient⁹. However, research by the Australian Institute of Criminology concludes that the vast majority of the Australian public have distorted views about the distribution of crime and the severity of sentencing - they hold incorrect perceptions of crime trends, the proportion of violent crimes, and the number of offenders brought to trial who are convicted and imprisoned¹⁰. The Sentencing Advisory Council found that “in the abstract, the public thinks that sentences are too lenient” however when people are given more information (about the crime, sentencing procedures and criminal justice policies) “their levels of punitiveness drop dramatically”¹¹.

When public opinion is examined in deliberative settings, where attitudes are formed on the basis of information and debate, the views of the public emerge as far more complex and discriminating, and not at all straightforwardly punitive¹². Academic researchers have repeatedly shown that public opinion on crime and justice issues, and on sentencing in particular, is far more nuanced and complex than basic media opinion surveys show¹³.

A study conducted by Professor Austin Lovegrove at the University of Melbourne demonstrated that where the public is given the same information as judges, they tend to give similar or lower sentences than judges¹⁴. The study comprised of 471 adults (sampled from a wide range of demographics) who were given information on the aims of sentencing, and the considerations judges would make when imposing sentences. They were then given information (the same information a judge would be given) about four actual cases. In half the cases, the average sentence given by the respondents was lower than that given by judges. In the other cases, the sentences were much the same. Importantly, in no case was the actual sentence given by the judge lenient compared with the average sentence of the public¹⁵.

The results of Lovegrove’s study cast doubt on the populist view of judicial sentencing as too lenient and, therefore, the intelligence of increasing the punitiveness of sentences to satisfy what was believed to be a harsh and punitive public. The solution is to deliver more and better information and to facilitate more rational public debate and policy-making.

Research report produced by Jessica Crofts for Fitzroy Legal Service 2010

⁹ Gelb (2008), *More Myths and Misconceptions*

¹⁰ AIC 2007 Survey of social attitudes

¹¹ Gelb (2006), *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, p.v

¹² Roberts et al.

¹³ Gelb (2006), *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, p.1.

¹⁴ Lovegrove (2007), ‘Public opinion, sentencing and lenience: an empirical study involving judges consulting the community’

¹⁵ Ibid.

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