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Submission to NSW Law Reform Commission: Semi-Indeterminate Sentencing

Introduction

I am a psychologist who has worked in correctional systems for 12 years, including 10 years in ACT Corrective Services, where I worked as a Probation and Parole Officer, Sex Offender Program Psychologist, and finally Principal Psychologist, Offender Intervention Programs. I have designed and implemented a range of programs for a variety of adult and juvenile offenders in both community and custodial settings. Currently I am working with NSW Juvenile Justice as Program Manager (Sex Offender/Violent Offender/Offending Behaviour). Throughout this experience, I have witnessed a disconnect between the evidence into *What Works* in reducing offending and what correctional agencies are willing/able to implement.

My passion is addressing reoffending, and the views in this submission are my own and should not be interpreted as the views of any organisation. The point of this submission is that reoffending rates can be reduced, but it requires systematic changes in the way we (the entire criminal justice system) go about our business. My key underlying philosophy is that empirical evidence should underpin our endeavours from their very foundation (rather than being an afterthought).

This submission addresses how sentencing could be changed to positively impact upon the reoffending of sentenced individuals.

How the status quo fails to rehabilitate offenders

The current system is based upon an uncomfortable mix of sentencing purposes: retribution, deterrence (both general and specific), denunciation, rehabilitation, incapacitation and Restorative Justice(NSW Law Reform Commission, 1996). I propose that these principles be replaced with one over-arching principle: *Protection of the community*. Before I describe a mechanism to achieve that, it is necessary to briefly examine these purposes.

Retribution

As the Law Reform Commission(1996) noted, retribution is reflected in current sentencing policy through the "just deserts" principle. There appears to be a lack of empirical evidence to support the usefulness of this principle, i.e., it is a philosophy, but not an effective method of protecting the community. While some victims' groups might support this as a way of gaining "justice" and helping them to heal, it is better called by it's real name – revenge. My experience counselling victims, and the literature into trauma, tells me that reliance on the outcomes of any external proceedings (court or otherwise) is an extremely poor strategy for healing. While some victims may look to the court for healing, it is a false hope, one that the court can never provide. Also, there is a body of evidence that victims are not as retributive as they are portrayed, so courts run the danger of delivering unwanted retribution.

Restorative Justice

A recent addition to sentencing, Restorative Justice (RJ) aims to avoid the pitfalls of retributive justice and deliver a sentencing procedure which aims to foster restitution between victims and offenders. However, despite the claims of numerous advocates, the conferencing procedures at the heart of RJ have failed to deliver on the promise of reduced offending – the claimed results were actually the result of self-selection bias (Latimer, Dowden, & Muise, 2001), a process where high risk offenders are less likely to participate, biasing the results in favour of the treatment group. Experiments utilising random assignment to remove this bias have failed to find a treatment effect for RJ (Tyler, Sherman, Strang, Barnes, & Woods, 2007; McCold & Wachtel, 1998). Consequently, while RJ procedures may provide a better result for the current victim, they do not provide a solution for the problem of continued offending.

Deterrence

There are numerous studies showing the failure of deterrence, both general and specific, and I presume the Commission is well aware of these[1]. From a psychological perspective this finding is expected –punishment can modify behaviour, but it is most effective when all the following conditions are met:

(1) It is immediate (ideally 0.5 seconds after the behaviour);

(2) It is inevitable;

(3) It is severe;

(4) It is understood, by the recipient, to be a consequence of his or her behaviour; and

(5) Alternative behaviours are perceived to be available, by the recipient (McGuire & Priestly, 1995, p. 13).

It is clear that these conditions cannot be met in the criminal justice system, particularly for the class of people most likely to offend, unless one abandons all attempts at fairness. Consequently, deterrence can never be an effective crime control method for serious offenders – although there is some evidence that it can work well for common offences committed by people who are not committed offenders (e.g., RBTs for reducing drink driving and non-fixed speed cameras).

Rehabilitation

Offender rehabilitation can be achieved and there is an extensive literature into how this can be done. A good summary of this literature is Andrews and Bonta (2010). The core of this research is that treatment should be directed at higher risk individuals, the treatment should target the factors (criminogenic needs) which underpin their offending, and the style of the treatment should be suited to the targeted population. This is often referred to as Risk-Need-Responsivity (RNR). While most jurisdictions (NSW included) outwardly subscribe to RNR, in practice RNR is usually subverted by other demands upon the system. Consequently,

[1] I am happy to supply evidence of this if required, but I wish to keep this submission brief.

treatment is often delivered to lower risk offenders, or the treatment delivered is of insufficient dosage, or otherwise not properly matched to the particular individual.

A related point, is that the desistance literature shows that "… sooner or later, almost everyone participating in serious criminal activity gives it up and quits" (Laws & Ward, 2011). Consequently, rehabilitation is better thought of as an endeavour to encourage the inevitable to occur earlier, rather than a battle to 'change' someone.

Incapacitation

The criminal justice system has the ability to incapacitate offenders to restrict their offending opportunities. While this is traditionally seen as a dichotemous option (custody/community) it is actually a continuum of restriction, with increasing ability to suppress crime paralleling increased restrictions – crimes are still committed within custody, even within high security, albeit at a greatly reduced rate than would be committed by those individuals if they were unrestrained. However, the current system – and this is its most inherent flaw – requires the courts to guess, often many years in advance, how long an individual should be restrained for. This has lead to post-hoc schemes where some categories of offender can be detained after the expiry of their sentence. The other alternative, as employed in the USA, consists of imposing very long sentences, to minimise the risk of high-risk offenders being released while there is still a substantial risk. However, this results in extremely high incarcation rates for little observable benefit, as many offenders are imprisoned way past the point when they would have normally stopped offending.

A number of jurisdictions in Australia and overseas have adopted various forms of detention after the expiry of a head sentence, with varying definitions of who should be detained. Common criteria in these definitions include treatability, psychopathy and dangerousness. All schemes, which focus on adding further detention to a previously determinate sentence, suffer from a number of common problems:

- Defining who the scheme does and does not apply to;
- Deciding when/if to release an offender once he[2] has been defined as a dangerous, intractable offender;
- A permanent increase in the size of the prison population;
- What method to use to measure the various factors relating to detention and release decisions;
- Potential human rights issues, particularly as designated offenders under these schemes often find out they are to be designated for indefinite detention a few weeks before their head sentence expires.

A related problem is the difficulty in getting most offenders to participate in treatment programs. Programs that address criminogenic needs[3], with sufficient dosage, have

[2] For simplicity'~~ie~~s sake I will use masculine gender when referring to an offender throughout this paper.

[3] Criminogenic needs are those changeable aspects of an offender that, if addressed, result in a lower risk of recidivism. The most powerful criminogenic needs are antisocial attitudes, antisocial associates, lack of prosocial associates, and substance

been demonstrated to reduce the risk of reoffending with a wide range of offenders(Andrews & Bonta, 2010). However, the offenders who most need such programs will actively strive to avoid participating in the program – the very factors that lead them to offend drive them to resist our rehabilitation efforts. Achieving high rates of program completion requires a system-wide effort where participation is rewarded and non-participation results in unavoidable, negative consequences for the offender. This is where sentencing authorities are required as part of the rehabilitation process.

Consequently, I propose a new form of sentencing, to be applied to serious offenders, where custody is currently an option. Without getting into legal technicalities, the group of offenders to whom this scheme should apply are those who would currently have a Pre-Sentence Report[4] (PSR) prepared before sentence.

Semi-Indeterminate Sentencing – An alternative sentencing regime

Criminal law has traditionally oscillated between determinate and indeterminate sentences. The former offers transparency and a fixed tariff which both offenders and victims can understand, whereas the latter empowers parole boards to make release decisions based on the offender's progress through the system. Currently, most offenders in NSW are subject to determinate sentencing and know the date their sentence (whether community based or custodial) will expire, although they may be subject to early release upon parole.

From a community safety viewpoint, the current system requires the judiciary to make an educated guess about when, if ever, the offender will be safe to release into the community. The judge/magistrate is required to do this for quite long periods of time.

An alternative model, *semi-indeterminate sentencing*, is proposed whereby offenders are sentenced to a set period[5] and then re-sentenced at the end of that period. Conceptually, this system has similarities to the use of Griffith remands and the workings of drug courts. It is based in the philosophy of therapeutic jurisprudence. Under this system there is no limit to the number of court reappearances an offender could make.

An offender who participates in treatment and actively addresses their criminogenic needs would progress through increasingly lower levels of restriction, before beingunconditionally discharged at their last appearance. An offender whose behaviour does not justify their current level of liberty could find his next period of sentence at a higher level of security. In essence, this approach is taking much of the guesswork out of sentencing – a magistrate or judge does not need to wonder how the offender will behave in several years time, only the next period of time.

By way of example, let us consider an offender who would currently receive a head sentence of eight years with a five year non parole period. Typically, such an

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abuse. Personal distress factors such as anxiety, depression and low self esteem have not proven to be criminogenic.

[4] Or Background report for juvenile offenders

[5] While the period mentioned could be any amount of time, it is suggested that the maximum such period would be one year.

offender will feel no motivation to undertake treatment until his non-parole period is due to expire, as he cannot earn any freedoms[6] prior to the end of his non-parole period. Additionally, should he refuse to undertake programs, the Parole Boardmay release him prior to the expiry of his head sentence, to at least provide some period of parole supervision, or alternatively, he will be released into the community without any supervision. In the worst cases, a high-risk offender is released at head sentence, despite a stated intention to continue offending.

Under a semi-indeterminate sentencing scheme such an offender would have no specified head sentence or non parole period. The offender would initially be sentence to prison for one year (if deemed an unacceptable risk to the community), with a review in a years time. If, at the end of that year, he has failed to participate in any recommended programs, it would be highly likely he would receive another year of prison. Once offenders realise that their liberty depends upon satisfactory performance in programs with no alternative, the participation rates in programs would increase. Once an offender realises this and starts participating in programs he would be released when the Court judges it prudent, and enter a period of community supervision where he may be required to undertake further programs or activities to further reduce his risk. Once he has satisfied the Court of his rehabilitation, his final appearance before court would be a pleasant one, where he is congratulated on his rehabilitation. This is similar to the process which occurs in a Restorative Justice Conference but, unlike the conference, this process is based on the actual, observable behaviour of the offender, over an extended period of time, not just his assurances.

The core of this system is community protection – can this person be managed in the community without an unacceptable risk to the community (i.e., further victims)? Under this system, the court would have a wide range of dispositions which it could impose, ranging from full custody (of varying security levels), through weekend release, work release, periodic detention, home detention, and a range of community-based restrictions. The offender's risk to the community will be the prime determinate of the level of restriction. This raises the issue as to how the court will make this determination, which is addressed in the next section.

Determining risk and incapacitation level

In determining the risk to the community, the Court will ask Corrective Services/Juvenile Justice to prepare a risk assessment. This risk assessment should be based on the best available research into risk prediction and incorporate actuarial risk assessment instruments already used by these agencies. Having determined the level of risk, and the types of threat the offender poses to the public, the assessment would then address the various levels of incapacitation which could contain that risk. For example, some offenders who are employed but engage in risky binge-drinking on weekends may be restrained by periodic detention, random breathalyser tests, and/or curfews, so custody may not be needed to provide reasonable protection to the community. For other offenders, standard probation-type supervision may be sufficient to protect the community. For others still, nothing less than secure custody will be sufficient to protect the community.

[6] I acknowledge that he could receive privileges within the prison system, but am proposing a much more radical alternative.

Having assessed the level of risk and the types of incapacitation which could contain that risk, the final task of the assessment is to determine the types of intervention which could result in a lower level of risk.

Interventions

Corrective Services/Juvenile Justice would recommend a treatment/intervention strategy to the Court. It is open to the offender to present an alternative formulation to the Court, but the Court will make a determination about what it would require to reduce the level of incapacitation.

Once the Court has made this determination, it will be a condition of continued liberty (if in the community) and successful completion will pave the way for a reduction in incapacitation. Each offender's rehabilitation efforts will be monitored by the Court, which can respond accordingly – an offender who responds poorly to supervision may be judged to be too risky for such supervision in the following year, even without a breach or fresh offence. The Court would have community protection as its core guiding principle.

Uses of Semi-Indeterminate Sentencing

The semi-indeterminate model is applicable to a wide range of serious and high-risk offenders – the types of people who are considered for custodial sentences. Its use with less serious/low-risk offenders would be an inappropriate use of Court resources.

Advantages of Semi-Indeterminate Sentencing

Offenders would be more likely to complete rehabilitation programs earlier in their sentence and would be more likely to do so on their first attempt, rather than dropping out several times. Under this scheme, many offenders will earn a shorter sentence, than currently, through conscientiously rehabilitating themselves. Offenders who refuse to cooperate with rehabilitative efforts, will serve longer sentences. While it is hard to estimate the overall impact on prison population, this system will not automatically result in higher incarceration rates. It should, however, result in a higher correlation between risk and incarceration, as lower risk offenders should be released more quickly than currently. Offenders who receive community sentences and do not abide by their conditions, will have an easier route to prison than currently, which should lead to higher compliance rates with community based orders under this scheme.

Ultimately, such a scheme should deliver enhance community safety.

Disadvantages

Some victims may feel that they have not received justice as the offender does not automatically receive a long sentence – or necessarily any custodial sentence. Some victims will re-traumatise themselves by attending the re-sentencing each year. There will be some extra costs involved in hearings by the sentencing authority, but these should be offset by reductions in recidivism and breach hearings.

However, it should be noted that there are two classes of victims, and it is not wise to privilege one class over the other. The two classes are the current victim and the next victim. The latter is generally forgotten in discussions over victims' rights. If a particular policy, enacted to appease past victims, results in higher rates of

reoffending (or fails to reduce reoffending) then new victims have been created. It is important to consider their perspective – if they knew that they would not have been victimised if their offender had been treated differently beforehand, surely they would have supported a different approach?

Ethical issues

Some people will object to this system on the basis that it could lead to indefinite detention of some offenders who would currently be released. This is a possibility, but not necessarily a bad one. There exist a small minority of offenders who are prolifically recidivistic and resistant to interventions – should they have the right to terrorise the community, simply by the passing of time?

However, the proposed system maintains judicial oversight (including appeal mechanisms) at all parts of the process. An offender who is not progressing through the system (and this will be an unusual offender, as I noted earlier, most offenders cease offending eventually) obtains a yearly judicial review. This serves several purposes: the offender gets to make their case, in competition with Corrective Services/Juvenile Justice, and the Court gets the opportunity to deliver their message ("You need to do … before I will consider relaxing restrictions") on multiple occasions. If the Court is convinced that a particular rehabilitation program is required, then it can state that clearly and repeatedly to the offender – his decision to refuse that treatment is his decision to remain restricted.

The Court may form an opinion that the programs/interventions offered by Corrective Services/Juvenile Justice are not appropriate or of sufficient calliber – this is appropriate, if a person's liberty depends upon the quality of a particular program, then it is important that that program be of a sufficient standard. Correctional agencies are currently held accountable for the quality of their Pre-Sentence Reports, this process would extend that accountability to the quality of their rehabilitation efforts. Obviously, the correctional agencies would be well served by using quality programs and evaluating their use of these interventions. Evidence of program effectiveness can, and should, be presented to the Court.

Changes in Thinking Required

The current sentencing principles include retribution and deterrence, both specific and general. The logic behind these is that punishment will deter the offender from committing further offences (specific deterrence) and will deter others from committing those or similar offences (general deterrence). However, neither specific nor general deterrence have been demonstrated to exist for serious offences[7]. If we accept that deterrence does not exist for serious offenders, the only remaining purpose for punishment is revenge.

[7] I can supply a range of references to outline this point. Suffice to say, offenders generally perceive punishment by the courts as an injustice to them, which then operates as justification for further offending. Pro-social people can be deterred from types of offences they would contemplate, such as traffic offences, but such people are, by definition, unlikely to seriously contemplate committing serious offences for internal reasons unrelated to external punishment.

Consequently, semi-indeterminate sentencing requires a change in sentencing principles away from deterrence and punishment, in favour of safety and rehabilitation. If a high-risk offender refuses to address the factors that make him dangerous, then we as a society can fairly choose to limit his liberty, in order to protect society. This is presented to the offender purely in terms of safety and choice – he is not being punished, we are being protected. If he chooses to address those factors, he will be welcomed back into society in a graduated and appropriate manner.

Has Semi-Indeterminate Sentencing been used elsewhere?

In a strict sense, the answer is "No", but in a general sense, these principles have been used frequently in NSW. The practice of Griffith remands – where an offender is given an extended period of bail for the purposes of engaging in rehabilitation – have been used for numerous years in NSW and in other jurisdictions. Magistrates/judges who have used this option like the ability to "keep their powder dry" by seeing how the offender progresses before sentencing. Probation and Parole officers find that offenders under such orders are more compliant with treatment and, when they are not, breaches are dealt with more easily and treated more seriously.

Drug courts operate under similar processes – the offender is not dealt with at the initial hearing rather, the Court overseas the rehabilitation process before finally sentencing the offender. However, drug courts are only available for a limited class of offender and tend to operate over a relatively short period of time. Semi-indeterminate sentencing would operate over the entire sentence of a serious offender.

Concluding Comments

This submission has outlined a radical restructuring of sentencing for serious offenders in NSW. The current system has evolved over hundreds of years, but has never paid more than lip service to the scientific evidence about offender rehabilitation. This proposal outlines an evidence-based approach to offender rehabilitation that places community protection at the heart of the process.

I would welcome any opportunity to address the enquiry in person.

Yours faithfully

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