President's Column

SENTENCING AMENDMENT BILL (NO 3)
The Government of the Northern Territory is in the process of passing the Sentencing Amendment Bill (No 3) 1998.

The purpose of sections 4 to 9 inclusive of the Bill is to make it mandatory

- that the Courts in the Northern Territory consider whether a victim of a crime is a "vulnerable victim"
- where the victim of the crime is a vulnerable victim, that the sentence to be imposed on an offender by the Court be increased by 25% of the sentence the Court would otherwise have imposed having taken into account all relevant factors including the vulnerability of the victim.

The relevant committee of the Law Society has considered the Bill and is of the view that the Bill should be amended prior to being assented to by the Administrator. Accordingly, submissions to this effect have been made to the Attorney General's Department.

The substance of the Law Society's recommendations are set out below.

People who commit crimes against the aged, the young or involving a breach of trust should be properly punished.

However, the proposed Bill will not be good legislation. It fails to achieve the aim of properly protecting the particular members of the community concerned. This is so for the following reasons:

1. The manner in which the Bill is structured and in particular the manner in which s 49A(3) requires a Court to arrive at the ultimate sentence to be imposed on an offender is embarrassing. This is so as:

   1.1 The Court is required to arrive at what it believes is the appropriate penalty. In so doing it is required to take into account the vulnerability of the victim (see proposed s 5(2)(ba)) and disregard the fact that the sentence may be increased by 25%. Having done so and having arrived at what the Court believes is a proper penalty in all the circumstances, the Court is then required (if the victim is vulnerable) to increase its sentence by 25%. Logically the ultimate sentence to be imposed must be a sentence which the Court believes is inappropriate. Further, it must be a sentence which the offender and ultimately the community will see as unjust, thereby bringing the Courts into disrepute.

   1.2 It assumes wrongly that the Courts never take into account the age, infirmity, etc of the victim as an aggravating factor when considering what sentence should be imposed.

2. The sole purpose of the proposed s 49A(3) appears to be retribution or the denunciation of crimes involving:

   2.1 the young;

   2.2 the elderly;

   2.3 a breach of trust.

3 Retribution or denunciation alone is never a good reason for determining the extent of a criminal sentence in a mature and civilised society.

4. The Law Society is not aware of any real evidence which suggests that sentences involving crimes against the young or the elderly or a breach of trust have been inadequate or do not adequately reflect what the community believes to be the appropriate denunciation of such crimes. Courts do take such factors into account and if found, such factors do frequently result in a higher sentence being imposed.

5. The Law Society is not aware of any evidence which suggests:

   5.1 there has been a sustained increased of the prevalence of such crimes;

   5.2 a causal factor of such crimes is the inadequacy of the sentences which are imposed.

6. The proposed amendments are unlikely to have a deterrent effect as:

   6.1 it is unclear what is the meaning of "vulnerable victim";

   6.2 not every conviction for a crime against a vulnerable victim will result in an increased penalty.
   S 49A(2) is not expressed in mandatory terms. Whether a 25% increase is to be imposed depends upon a Court (either of its own motion or upon an application by the DPP) making a determination that the victim is a vulnerable victim. The Court is not bound to make such a motion nor is the DPP bound to make such an application;

   6.3 the exact extent of a 25% increase in sentence is unclear as it is determined by the term of imprisonment that but for the relevant determination the Court would have imposed on the offender;

   6.4 the exact extent of the 25% increase will vary from case to case.

7. The proposed 25% increase is totally arbitrary -

   7.1 why 25%?

   7.2 the exact extent of the 25% increase will vary from case to case and such variation will not be as a result of the victim's level of vulnerability;

   7.3 offenders who have committed crimes involving the same degree of vulnerability of the victim may have their sentences increased by different amounts. For example, assume two offenders break into the same house which is occupied by the same vulnerable person and that for one offender it is his 10th break and entry but his first involving a vulnerable person and that for the other offender it is his first offence. The first offender is bound to get a significantly larger sentence than the other. Consequently the extent of the 25% increase will vary considerably for each offender. There cannot be any justification for this. It is against the principles of parity in sentencing.

Steve Southwood, President

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8. The meaning of "vulnerable victim" is unclear and the matters listed in the proposed s 49A(4) are of no real assistance in making such determination.

9. The proposed amendments overlook that for some crimes the Criminal Code already imposes increased penalties when the victim is female or is under the age of 16 years or is unable to defend himself because of age, infirmity, etc. For example, see s 188(2) of the Criminal Code. The effect of the proposed s 49A(3) is that such offenders will be doubly punished.

10. The proposed subsection 49A(5) will result in unjustifiable anomalies. For example:

    10.1 why should a burglar of a normal household get less than a burglar of a household occupied by a twenty stone man who is suffering from post traumatic stress disorder and receiving full payments of workers compensation?

    10.2 surely a person who knows of the vulnerability of the victim and who commits an offence for that reason has been more contumelious and is deserving of a greater punishment, than a person who does not know the victim is vulnerable.

11. The provisions contained in the Bill may be unconstitutional. They are provisions of a different kind to s 78A of the Sentencing Act (NT) and of those contemplated by the High Court in cases such as **Palling v Corfield** (1970) 123 CLR 5.2. It is arguable that:

    11.1 the penalty is not a fixed penalty;

    11.2 the penalty does not apply equally to all adults;

    11.3 there is an inference with the Courts functioning in imposing sentence;

    11.4 such provisions are inconsistent with the separation of powers.

12. The amendments if enacted will result in a plethora of appeals. The Bill will be a lawyer's picnic.

13. It is extremely undesirable that Courts should not have a full discretion in the imposition of sentences for criminal offences. Circumstances alter cases and it is a traditional and proper function of Courts of justice to make the punishment appropriate to the circumstances as well as to the nature of the crime.

In the circumstances the Law Society recommended that:

1. Only sections 1, 2, 3, 5 and 6 of the Bill should be enacted;
2. "vulnerability" be defined more precisely;
3. substantive amendments equivalent to s 188(2) of the Criminal Code be made if necessary. Provisions such as s 188(2) provide for both adequate retribution and proper exercise of judicial discretion;
4. sections 7, 8 and 9 of the Bill should **not** be enacted.

STRATEGIC PLANNING

On 23 January 1999 the Council of the Law Society is holding a Strategic Planning Meeting for 1999. I believe this is the first time that such a meeting has been held. The purpose of the meeting is to give consideration to matters such as:

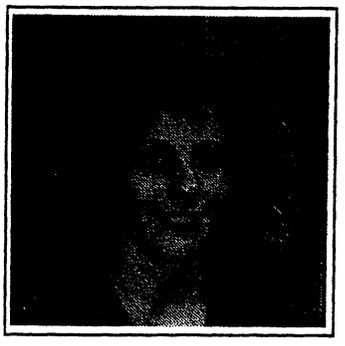
- member services
- the structure of the secretariat
- law reform
- functioning of the Courts
- professional standards and performance of the profession
- efficiency of the delivery of legal services

and to formulate specific targets which, hopefully, can be achieved in 1999

NEW EXECUTIVE OFFICER

Maria Ceresa has been offered and has accepted the position of Executive Officer of the Law Society of the Northern Territory. Maria is currently Bureau Chief of The Australian newspaper's NT office. The Council of the Law Society is looking forward to Maria commencing her employment. It is hoped she will start work as EO on 1 March 1999.

Maria is a highly respected and experienced journalist and it is believed her expertise will greatly assist in promoting the legal profession of the NT and expanding the services which the Law Society offers its members.



Maria Ceresa, Executive Officer

Maria's appointment follows an extensive selection and interviewing process which was undertaken by members of the Council of the Law Society and its Consultants.

Letter to President COURT ATTIRE

Dear President,

As you know, the judges of the Federal Court have, for some time now, been considering whether there should be a change in the attire expected of counsel appearing before the Court in matters in which robes are worn.

Having now, through the Chief Justice, consulted with the Bars and law societies, the judges have decided that, as from the commencement of the Law Term in 1999, the attire of practitioners appearing before the Court as counsel in matters in which robes are to be worn will be the attire now customarily worn, but without a wig.

The essentially civil nature of the Federal Court's jurisdiction means that our decision should not of course be seen as involving any expression of view about the wearing of wigs in criminal trials. I mention this because I know that it is an issue about which there have been strong expressions of opinion.

Yours sincerely,

MEJBLACK
Chief Justice
Federal Court of Australia