

Sentencing juveniles - HREOC

In 1997 the report of a joint inquiry into children and the legal process undertaken at the request of the then federal Attorney-General by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) was published. Titled "Seen and heard: priority for children in the legal process", the report considers, among many other topics, how Australian sentencing practice could become more consistent with the requirements of the UN Convention on the Rights of the Child. This article briefly outlines the main findings and conclusions.

Principles of sentencing

The juvenile justice sentencing system is based on the principle that young offenders can and should be rehabilitated. This reflects the requirement in Article 40 of the Convention on the Rights of the Child that treatment of children who come into conflict with the law must take into account "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

The Convention also requires that children be deprived of liberty only as a last resort and for the shortest appropriate period of time. Children must be given a voice in any decisions that affect them. In accordance with these principles most jurisdictions accept that rehabilitation should be a goal of juvenile justice and that detention is not the preferred option for achieving this end.

Compliance with the Convention requires a contextual approach to sentencing in which all relevant factors are taken into account in determining sentences for children. Children's courts in Australia generally take into account the particular circumstances of the offender. The immaturity or inexperience of the child may affect the commission of the offence and courts are generally aware of this. Nevertheless, evidence to the inquiry indicated that courts do not always have sufficient regard to the totality of relevant circumstances when deciding sentences. More attention is needed to social factors such as homelessness, family circumstances, educational needs and so on in determining sentences for children. Sentences should take into account the special health and other requirements of children and young people.

Particular attention needs to be given to the situation of repeat young offenders. These people often have serious family or other problems. Programs that involve continuing support aimed at re-directing the young person's behaviour into more socially accepted forms are more likely to succeed in preventing recidivism.

The report highlights some important principles for sentencing of juvenile

offenders. They include:

- the need for proportionality by reference to the circumstances of both the offence and the offender - thus requiring individualised sentencing
- the importance of rehabilitating juvenile offenders
- the need to maintain and strengthen family relationships wherever possible
- the desirability of imposing the least restriction consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the need to take into account the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially indigenous children.

Sentencing options

The Convention on the Rights of the Child requires a range of options for dealing with young offenders.

A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education, and vocational training, programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.

Magistrates dealing with young offenders should ensure that they are aware of the range of available sentencing options.

Conferencing schemes

Conferencing schemes are increasingly being used as a sentencing option. Typically, they involve contact between the victim and offender for the purpose of reconciliation or compensation. Conferencing has a lot to commend it,

particularly in terms of rehabilitation. Offenders are confronted with the consequences of their actions and given an active role in making amends. On the other hand, some of these schemes have attracted criticism because they lack sufficient procedural safeguards and are not always open to scrutiny, accountability and review. These factors should all be considered carefully before a juvenile offender is committed to a particular conferencing scheme.

Fines

Although provisions dealing with fines generally set monetary limits for juveniles, there remain serious questions as to their appropriateness as a sentencing option for juvenile offenders. Many young offenders come from financially disadvantaged backgrounds and indeed poverty is one of the root causes of their offending behaviour. They may encounter difficulty paying the fine on the terms set by the court. Default may then lead to further involvement in the criminal justice system. In addition, financial penalties have limited rehabilitative value for young offenders.

Parole and probation

Parole and probation are intended to assist the rehabilitation of the child by providing guidance and support. The inquiry found that insufficient supervision is made available to child offenders. Magistrates and judges do not always specify the agency responsible for supervision. Parole and probation orders could be made more effective with quality supervision, proper training and closer monitoring by the courts.

Community Service Orders

Community service orders and other non-custodial sentencing options offer significant benefits for young offenders in terms of rehabilitation and reintegration into society. However, they can also attract quite significant and onerous legal consequences if they are breached. Community service programs should not

be so onerous that young people find it difficult to complete them. Courts must be aware of the problems children in difficult circumstances face in complying with orders. For example, travel for a community service order may be problematic for a young person who is not receiving any assistance or support from parents and other family members and perhaps no income support payments. Community service programs should also be culturally appropriate, taking into account the particular needs and problems of children from different backgrounds and especially indigenous children.

Effective supervision is vital to the effectiveness of community service orders. Magistrates should give clear guidance on the respective roles of police, government agencies and community organisations in the supervision of these orders.

Detention

The laws in some jurisdictions recognise that detention, while appropriate in some circumstances, is not the preferred option for achieving rehabilitation of young offenders.

The relatively high youth detention rates in a number of jurisdictions may be indicative of insufficient regard for the requirement that detention should be the last resort when sentencing.

Available statistics and research suggest that detention and other harsh sentencing options are generally ineffective as deterrents to re-offending. In fact, for young and impressionable people detention is more likely to be the first step in a life-long cycle of involvement in the criminal justice system. In terms of preventing re-offending, the most successful programs are positive and constructive non-custodial programs that seek to address the offending behaviour.

The sentencing process

Background reports

Background reports give vital information to courts to assist in the sentencing decision. The inquiry considered that they should be provided in all cases where a detention order for a child offender is being considered.

Children should have a full and clear understanding of the reporting process. They should be aware that they are not obliged to participate in the preparation of background reports and that their comments to agency staff are not confidential.

Giving children a voice

The Convention on the Rights of the Child requires that the children be allowed appropriate involvement in decisions and actions affecting them. Involving children in sentencing means giving them genuine opportunity to express their views freely. This in turn means ensuring that the individual child is able to be fully engaged in the process with attention to creating an environment which is not intimidating and using language which is readily understood by each particular, individual, child.

Much of the language used by judges and magistrates in relation to sentencing is confusing and alienating for children.

Post-sentence processes

Follow-up support programs for young offenders can play a role in helping to reduce recidivism. Courts and agencies should formally acknowledge completion of orders by young people stating that "you have completed all the requirements of the order". Acknowledgment has a strong rehabilitative influence.

Doubly vulnerable children

Girls

When considering sentencing options for young female offenders, magistrates should seek wherever possible to utilise programs designed specifically for young women and involving supervision by female caseworkers.

Mental illness

Many young people are incarcerated instead of being given appropriate treatment for their mental illness. In sentencing children affected by mental illness the emphasis should be on treatment and rehabilitation rather than punishment and detention. In these cases magistrates and judges should obtain and give appropriate consideration to specialist psychiatric reports prior to making any sentencing decision.

Rural and remote areas

Sentencing may have particularly harsh effects on children from rural areas. Generalist magistrates sometimes impose relatively harsher sentences on juvenile offenders than specialised children's magistrates. One reason for this is the lack of non-custodial programs in rural areas. However, it is also due to insufficient understanding on the part of some generalist magistrates about the appropriateness of different sentencing

options for juvenile offenders and the effect on children of being detained in a centre far from their family and community. Magistrates in rural areas should be aware of the range of available non-custodial programs in the local community and should utilise them to the maximum possible extent.

Substance abuse

Many offences committed by young people are alcohol or drug related. In these cases, sentencing decisions should address the addiction that is the root cause of the offending behaviour rather than punishment for its own sake. This should include the provision of appropriate drug treatment facilities incorporating both detoxification programs and treatment or referral services. It should also include counselling and other practical programs to assist these young people and their families.

Indigenous children

Sentences for young Indigenous people should give recognition to Indigenous culture and kin relationships. This requires appropriate training for both magistrates and practitioners. Defence lawyers should have the knowledge to propose culturally appropriate sentencing arrangements. This might include, for example, involvement of the extended family and maintenance of links between the young offender and his or her local community.

Where there is no alternative but to impose a custodial sentence on a young Indigenous offender, custodial arrangements must be designed as far as possible to maintain the links between the juvenile and his or her culture.

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The report can be obtained by sending \$30 (plus \$5 postage) to the Australian Law Reform Commission at GPO Box 3708, Sydney NSW 1044 (telephone 02-9284 6333).

The report is also available at State libraries, or alternatively can be viewed on the Australian Law Reform Commission homepage

<http://www.alrc.gov.au>.

Some information about the inquiry and the report can also be found on the Human Rights and Equal Opportunity Commission homepage

<http://www.hreoc.gov.au>.