

Draft Submission on Sentencing Bill from a Restorative Justice perspective.

1. The Bill as drafted had several good restorative justice features and some further worthwhile changes were made after the meeting I attended in Wellington and before the Bill was introduced into the House. It is important that these are retained and not watered down as a result of further submissions. In particular I refer to clauses 7 regarding the purposes of sentencing. However, I would have preferred to see the sort of over-arching provision that the Chief District Court Judge proposed, and which I advocated in Wellington but found it was too late for such major surgery, namely :

“The general objects of sentencing are to promote the safety of the community, to hold offenders accountable for the harm done to victims and to the community, and to ensure that victims’ interests are given primacy.”

It may well be worth promoting that change through the Select Committee; even if it is not successful it will help ensure that this focus is kept in the finer detail of the Bill.

2. Also, instead of “reintegration” in cl 7(h) [an advance on the earlier version which just referred to rehabilitation] I would have preferred the fuller version proposed –

“To give the offender the opportunity to develop as a respected and contributing member of the community”

3. It is important to retain the new wording of cl 8(e) – “take into account the general desirability of consistency ...” as the earlier wording was likely to tie sentences to tariffs in a way that would prevent imaginative outcomes from being implemented.

4. The terms of cl 8(d) have not been changed - imposing sentences near the top of the range for cases near to the most serious. This will ratchet up sentences right across the board and should be restricted to cases of serious violence, which is what the Norm Withers referendum was referring to.

5. Cl 8(i) is good – taking into account restorative justice outcomes – and must be retained.

6. Cl 10 – the offer of amends – is excellent and will be seen all round the world as a precedent.

7. In cl 16 the age limit should be 18, not 17, to comply with our obligations under the UN Convention on the Rights of the Child. This need not wait for general revision of the law on age limits for children and would help ensure that young people aged 17 are not imprisoned except for serious offences.

8. The removal of the suspended sentence is a backward step in at least two areas – for young offenders (those under 20), and as part of a restorative justice sentence. It should be retained even if limited to those two types cases, where it has most promise. Overseas research shows that the threat of imprisonment is more valuable than its first imposition, so that the later the actual sentence is imposed the better. In the case of young people who have not yet served a term of imprisonment, or people who have expressed the desire to make a new start and need to be held to their word, the “sword of Damocles” has most value. Perhaps it could be retained for say five years so that results could be compared against the previous general and often poorly focussed use of suspended sentences.

9. I do not accept that a deferral of sentence - the old “come up for sentence if called upon” – is of much use, and it has not been much used by the courts. It seems to lack teeth. Few judges are likely to use it in the sorts of cases that would have attracted a suspended sentence so it cannot be seen as a substitute. While I would like to share Judge Johnson’s view that the reference to cl 10 agreements in cl 100(1)(c) suggest it is intended for serious cases because the pilot generally applies to serious cases, the problem is that the pilot is not part of the Bill and some Judges may consider that it is simply confirming what they always thought, namely that restorative justice is not for serious cases.

10. Reparation – cl 29 the term “emotional or physical harm’ may be thought to cover the whole range but I do not think it does. A victim may feel violated, affronted etc without suffering any harm at all, in the sense of damage. It is a throw back to the terminology of decades ago when progressive societies were allowing for new kinds of damages, eg emotional shock. There is no need now to divide the human person into compartments so that some types of harm can give rise to reparation and others cannot. The better wording would therefore simply be “caused harm to any other person”. Consequential amendment would be needed to cl 30(1) so that (a) and (b) are replaced with

“the nature of the harm, the value of any pecuniary loss or damage caused, and any consequential loss or damage”

11. Cl 46 should have a further provision to the effect

“In deciding what if any programme will be a special condition of supervision, the court may take into account any agreement reached at a restorative justice conference.”

This would have benefit generally for restorative justice and not just in the context of the present pilot.

12. As to Margaret Thompson’s concerns about supervision, I agree that the terms of s46 [the court’s power to impose special conditions] are all related to preventing reoffending and are too narrow for restorative justice purposes. It should be made express that a Judge may impose a special condition of supervision if that is in accordance with an agreement reached under cl 10. This should not be defeated because Corrections have not budgeted for it – that is letting the tail wag the dog.

13. Community work. It is unfortunate that it is seen only in terms of compensation – see cl 52. CW has value also as punishment, as work experience, as a reintegrating experience, and as community building. Cl 52 should be amended to delete this narrow interpretation. Further, work for the victim with the consent of the victim should be expressly recognised as either or both community work or as reparation.

14. As for other outcomes of agreements – ie those not able to be covered by supervision or community work – I would like to see a power to defer sentencing for up to one year for the terms of any cl 10 agreement to be carried out, with the court recording the sentence that would be imposed if the agreement is kept to, and that being binding on the court except where there are changed circumstances. This gives the sentencing a contractual nature. Where practicable such cases should go back before the original judge.

Judge FWM McElrea

28 Sept 2001