

Victim Support Service Inc.

POSITION PAPER – SENTENCING

Introduction

Victim Support Service is a statewide, non-government community organisation which provides services to crime victims and advocates for victims' rights. It has become recognised as an authoritative body which speaks on behalf of South Australian crime victims, and is invited to be a representative voice about victims' issues at many forums within the Criminal Justice System.

Traditionally it has been the policy of the organisation not to comment upon individual sentences or criminal proceedings, mandatory sentencing or capital punishment. In its 25th year of existence, Victim Support Service seeks to recognise its responsibility to show leadership on the issue of sentencing in the criminal jurisdiction.

Representatives of Victim Support Service have spoken publicly on sentencing issues, contributed to many conferences and prepared written policies on related matters – this Position Statement brings together many of these philosophies in one document which is the endorsed position of Victim Support Service Inc.

Victim Support Service is an active member of Victim Support Australasia, the peak body representing victims' services in Australia and in New Zealand. Victim Support Service recognises the role of Victim Support Australasia in bringing a collaborative environment and leadership to victims' services and acknowledges the work and words of Victim Support Australasia - many of which are adopted in this statement, and can be found in the paper "Crime Victims in Australia: Towards a National Approach – May 2001"

Crime in Australia

Crime is an everyday occurrence for people in Australia. As a community, it costs us dearly.

- One in three assaults takes place in private dwellings. ¹
- There is approximately one property offence for every 13 people in Australia today.
- There has been an increase in assault and robbery during the 1990's.
- Two out of three break and enter offences and attempts occur in residential locations. ²
- Only four out of ten criminal incidents that occur in any community are ever reported to police, and fewer still actually end up in court. ³
- The direct costs of crime to the criminal justice system amounts to over \$4,567 million per annum. ⁴

¹ Mukherjee, S. Caracach, C. and Higgins, K. (1997). *A Statistical Profile of Crime in Australia*. Australian Institute of Criminology, p. 15.

² *Ibid.*, p.1. The above three figures are for offences reported to police.

³ *Ibid.*, p.41.

⁴ *Ibid.*, p.63.

The Fear of Crime report produced in 1998 by the Commonwealth's National Crime Prevention initiative emphasised that people's anxiety about crime focuses mainly on risks to the person. People are especially anxious about personal risks to their children.

The Impact of Crime

The statistical picture of crime provides only a snapshot of the extent of victimisation in Australia. The impact of crime on a victim, on their family and friends, and on the community is as varied as the range and background of victims themselves.

Across both personal and property offence categories criminal victimisation impacts on people in ways that are:

- Physical,
- Emotional and psychological,
- Spiritual,
- Material and financial, and
- Social.

Not only is crime experienced numerically more by people from lower socio-economic groups and by vulnerable groups such as young people and women, but its effects impact disproportionately on those who can least afford it.⁵

Criminal Justice Responses

Victim Support Service acknowledges that the vast majority of incidents in which people are victimised never actually reach the courts. Less than 25% of incidents of sexual or physical violence whether against adult or child, man or woman even get reported to police.⁶

The Criminal Justice System is, however, a deeply symbolic set of institutions. People still attach strong views to the notion of "justice" even as they express disquiet about the criminal justice system. The issue of sentencing in general raises strong emotions in many of the client group we serve and much public comment has been made on it by various victims' groups over the years.

We believe that it cannot be assumed that crime victims as a group in society support mandatory or punitive sentencing. Many individual crime victims express extraordinary compassion and understanding of the offender's behaviour. Indeed, many victim services, including Victim Support Service and crime victims themselves have been strong proponents for restorative justice initiatives. Equally we have heard people, from positions of great pain and distress, express damning and retributive views about offenders.

It should be recognised that neither punishment nor imprisonment actually help victims recover from trauma, threats to life, sleeplessness, nightmares or other psychological or emotional injury. These offender-focused strategies do not directly reduce the effects or impact upon victims.

⁵ *Ibid.*, pp 41-42 and Putt, J. and Higgins, K. (1997). *Violence Against Women in Australia*, Australian Institute of Criminology

⁶ Wundersitz J Sexual Offending in South Australia (1996)

What crime victims in general cry out for are recognition, acknowledgment and meaningful participation within the criminal justice system. What they have experienced is exclusion, alienation and a lack of understanding.

Victims want a system which is respectful to them, facilitates just outcomes, and contributes to stopping crime. Victim Support Service believes individual sentences provide the system with the opportunity to encourage offenders to face up to their own behaviour and the harm they have caused, pay a 'fair price' through an appropriate sanction and learn not to do it again.

Punishment Alone Is Not Enough

Luckily only a small number of people commit the majority of crimes hence we have an opportunity to target these offenders in an effort to reduce their offending. The strategies are as complex as society itself – there is no one solution which fits for all situations or individuals.

Research shows⁷ that aggression, anti-social and criminal behaviour are remarkably stable from early childhood into adulthood and generally caused by:

- biological factors,
- upbringing,
- sex-role socialisation,
- peer relationships,
- cultural influences,
- social factors such as economic inequality, and
- media influence.

As a society we have an enormous challenge to change the predisposition to violence and anti-social behaviour that many children carry forward into adulthood, and to prevent potential adult offenders from developing this way later in life.

Punishment is important to show that the community will not tolerate certain behaviour – but it will not reduce crime⁸. We know that Punishment on its own does not act as a deterrent nor does it change or teach alternative behaviour – especially in traditional criminal justice and correctional settings which cannot apply sanctions with the necessary:

- consistency
- timeliness
- specificity, and
- shaming of the behaviour (rather than the person).

The community needs strategies to address:

- family dynamics;
- parenting;
- school approaches to bullying and childhood violence;
- what the entertainment multimedia inaccurately portrays as a representation of 'normal' society;
- the behaviour of role models in sport, music and community leadership;

⁷ "Punishment and behaviour change: an Australian Psychological Society position paper". Australian Psychologist Vol 31, No. 3, p 160

⁸ ibid

- appropriate health and justice system responses to those who are dependent on alcohol, drugs, or similar, and
- a justice system approach to sanctions for unacceptable behaviour which is serious and consistently applied.

Sentencing Can Be More than Punishment

Sentencing does and should, take account of individual circumstances and be used as an opportunity to change attitude and offending behaviour.

The Sentencing Principles which are used by Judges and Magistrates to arrive at a penalty are specified in the Criminal Law (Sentencing) Act. They are:

- The circumstances of the offence;
- Other offences that are to be taken into account;
- If the offence forms part of a course of conduct consisting of a series of criminal acts of the same or similar character, that course of conduct;
- The personal circumstances of any victim of the offence, for which purpose a victim impact statement may be read to the court;
- Any injury, loss or damage resulting from the offence;
- In the case of an offence committed by an intruder in the home of another, the need to give proper effect to what is described as 'the primary policy of the criminal law' to protect the security of the lawful occupants of the home from intruders;
- The degree to which the defendant has shown contrition for the offence – by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;
- If the defendant has pleaded guilty to the offence - that fact;
- The degree to which the defendant has cooperated in the investigation of the offence;
- The need to protect the community from the defendant's criminal act;
- The deterrent effect any sentence may have on the defendant or other persons;
- The need to ensure that the defendant is adequately punished for the offence;
- The nature and extent of any ordered forfeiture of property (other than that which is a benefit derived from the offence);
- The character, antecedents (prior events), age, means and physical or mental conditions of the defendant;
- The rehabilitation of the defendant;
- The probable effect of the sentence on dependants of the defendant; and
- Any other relevant matter.

Crime victims often have to bear the burden of an offender-oriented Criminal Justice System and feel aggrieved by a final sense of injustice if a sentence seems manifestly inadequate or does not seek to change offending behaviour. They find it particularly difficult to accept suspended sentences or repeat offenders not being punished sufficiently to deter future behaviour.

Sentencing principles are offender-oriented but the nature of the offence, circumstances of victims, harm caused, remorse, reparation offered need to be recognised and given their due in responding to victims' needs and rights.

Victims and the community generally do not have faith that this does occur. Whether it is reality or merely perception, the Courts need to address this issue.

Victim Support Service believes that sentences can be more than punishment, and sentencing remarks are able to give much needed acknowledgement and validation of victims' suffering and harm experienced. The sentencing process is a point from which both victim and offender can begin to restore the balance and move on.

Victim Support Service believes in sentences which:

- are balanced and take into account community protection and victims' circumstances
- incur appropriate punishment or formalised sanction for harm done
- focus on offender rehabilitation and addressing criminogenic needs
- recognise genuine remorse and reparation of harm done.

Victim Support Service believes that it is vital for the correctional system to be able to implement an offender assessment process which can identify those most at risk of re-offending, determine their criminogenic needs and target rehabilitation to address the issues. Incarceration and offender-monitoring in the community provides opportunity for intensive intervention to address offending behaviour.

The assessment should be rigorous and reliable and begin at the pre-sentence stage when reports are prepared for trial. The assessment should be objective and thorough from the outset giving good grounding for the offenders' transition to community or institutional placement.

Mandatory Sentencing

Mandatory minimum sentences have been set in South Australia for murder and driving under the influence of alcohol or drugs. These applications appear to be appropriate.

Mandatory minimum sentences have been tried more generally for other crimes in Australian criminal jurisdictions without success. Proponents of designated sentences for certain serious offences have usually done so in an environment of seeking harsher penalties primarily as a deterrent, or to be seen to be implementing a "tough on crime" policy.

Victim Support Service does not advocate for expansion of mandatory minimum sentencing because:

- the organisation has an inherent belief in the justice system and the role of the judiciary as the independent arbitrator
- standardised sentences do not enable sufficient flexibility in the interpretation of the individual circumstances of either offender or victim
- increase in sentence severity, ie punishment, will not in itself as a single element in the justice process, lead to certain reduction of crime by an individual offender

- maximum sentences as prescribed by law provide adequate sentencing flexibility
- mandatory sentences or heavier penalties do not necessarily reduce crime rates or successfully provide deterrence from future criminal activity in the community.

While Victim Support Service does not support expansion of mandatory sentencing, we do recognise that many victims and the community generally are critical of apparent sentence inconsistency. Victim Support Service is also concerned about this but believe in other strategies to address this issue. We believe in:

- sentencing guidelines for more serious crimes
- greater weight and importance being given to victim impact and circumstances of the victim(s)
- improved consultation with victims before and during charge negotiations

Sentencing Guidelines

Victim Support Service has found that the overwhelming concern expressed by victims of crime is about the process of sentencing rather than concerns with an increase in penalties. Typically, they show no desire to actually make sentencing recommendations or decisions. Their major concern is that they wish to have a process that takes into account the harm, which has occurred to them. Their major issue stems from their feeling of being unrecognized during the sentencing process. This occurs due to the following factors:

- The apparent lack of weight often placed on Victim Impact Statements in the sentencing process. The concern has been that Victim Impact Statements are often only lip service to the harm, pain and grief suffered by victims because of the offence. This is in part expressed in a report compiled by the Justice Strategy Unit in June 1999 "*Victims of Crime Review*".⁹
- As a consequence of not having victims concerns adequately reflected in the sentencing process, victims can become affronted and angry if a sentence appears manifestly inadequate or if, for example, is suspended. They express this as a sense of injustice that they are left with a 'life sentence' whereas the offender suffers a relatively temporary interruption of their life.
- Victims express concern that a court too easily finds an offender is 'remorseful' if, for example, an offender sends a letter to the victim(s) expressing that sentiment. The victims concern is that a letter alone does not necessarily demonstrate genuine remorse and that remorse may be better reflected by actions such as commitment to apologise to the victims on a face to face basis, preparedness to take action to ameliorate behaviour such as willingness to undertake treatment programs and community service, or participate in victim-offender meetings. Victims see the antithesis of remorse as being the continuance of further similar conduct following the offence. Victims believe that too much weight is given to mitigating circumstances of the offender and too little heed is given to the impact on victims.

⁹ *Victims of crime Review, Justice Strategy Unit, June 1999*

- Victims express anger and frustration at what they see as their exclusion from the plea bargaining process. They wish to be consulted about this issue, and the 'need' to downgrade charges.

Victims express a need for there to be better outcomes in the sentencing process. They express a desire for their particular situation to result in a change both in the case of the individual offender and prevent other potential offenders from causing similar harm.

Therefore, victims have expressed the view that there needs to be a broader range of sentencing options which will have a two fold process of allowing them to achieve psychological closure of their trauma to allow them to get on with their lives at the same time recognizing that there may be a similar need for an offender. More creative and relevant sentencing options tailor made for the individual case should be able to be ordered by the courts.

Victim Support Service believes that in these ways greater acknowledgement and involvement of victims will occur, and that sentencing guidelines will help achieve greater consistency in sentencing. This will improve the level of confidence which victims and the community generally have in the criminal justice system.

Capital Punishment

There are many jurisdictions in the world that condone and use capital punishment as the ultimate punishment for the most serious of crimes – the taking of another human life. They “justify” this on several grounds:

- retribution or “payback” for harm done
- protection of the State and its citizens
- deterrence from new victimising behaviour by an existing offender, and
- to deter others from offending in the future

These are legitimate reasons for a society to ensure it has a criminal justice system which takes the protection of its members from violence very seriously, and seeks to develop a comprehensive and successful range of measures to prevent and reduce crime as well as punish and rehabilitate offenders.

The debate is often about how to achieve the best outcomes.

South Australia does not sanction capital punishment and Victim Support Service does not advocate to change the status of this legislation.

Execution disallows any possibility of reform or rehabilitation of the offender, for them eventually to make some reparation to the community, or to offer direct compensation to victims.

The death penalty is more about retribution/vengeance than in encouraging an offender to learn from what they have done and, in some meaningful way, to attempt to repair some of the harm done. Offenders should be punished with all the impact and might of a criminal justice system – but one that is fair, encourages development and restoration, and is humane. The community must be protected from a murderer who has no compassion, remorse or desire to make reparation, or remains a risk to others.

This jurisdiction's governments have believed it is possible to do this through long term incarceration and attempts at rehabilitation. It is also generally recognized that most murders are personally motivated and committed by persons known to the victim. Hence most murderers kill only once and are unlikely to be a risk to the wider community – this is probably the main concern of South Australians.

Restorative Justice

From our 25 years of experience the majority of victims of crime do not seek revenge or clamor for harsher sentences – their overwhelming concern is that the criminal stops the behaviour and no one else gets hurt. Crime victims can be anyone in our community from the most advantaged to those with the least resources to survive. Most want the victimisation against them to stop, for it not to happen to others, to receive acknowledgement (which is often not forthcoming), restoration of their property and sense of safety, and for the system not to make matters worse by its treatment of them – ie one which is more supportive, less adversarial and more user-friendly.

Victims also want an appropriate punishment to be applied, certainly, but they know from personal experience that it will take much more than this to stop crime at both the individual and the societal levels, and for restoration to occur.

Initiatives, which can be implemented and are based on restorative justice principles, can be located at all stages of the criminal justice process: the investigative, judicial and corrective. Whilst many of these are not 'pure' restorative justice because of the dominating responsibility of the formal statutory processes, many of the fundamental principles are evident. Some existing practices include:

- problem-solving with communities to find crime prevention strategies or programs to reduce the impact of crime
- victim-offender meetings
- family conferencing trialed in the youth court and now being piloted for adults in the Adelaide Magistrates Court
- police informal and formal cautioning – which can also include negotiated reparation or penalty.

Victim Support Service believes in the potential benefits for victims of restorative justice approaches in many crimes – although does have concerns and cautions that they should be done effectively and within a victims' rights framework, particularly where there are issues of power and gender imbalance, eg, in sexual offences. In such cases, the thorough assessment of participants becomes even more important. Victims' needs must be maintained at an equal value to those of other parties and not be subsumed by the creation of another offender-orientated system.¹⁰

Conclusion

If we are to get tough on crime and its causes in order to reduce crime, then we must develop a balanced approach to law and order. We need:

- crime prevention through early intervention/social inclusion
- crime prevention through practically addressing environmental design to minimise the opportunity for crime to occur
- rehabilitation for those offenders who are ready and able to be reformed
- appropriate justice sanctions for illegal behaviour
- incarceration and close community monitoring of proven offenders particularly to ensure the physical, emotional and social safety of community members.

We need to make drastic changes to education, health and criminal justice systems in a cross government approach to prevent, treat and reduce crime – there are many exciting possibilities to do so through social inclusion and restorative justice approaches.

Sentencing of convicted offenders must play its part in punishing and deterring offenders, as well as keeping the community safe – but let it be done humanely and with positive outcomes.

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