CRIME-PREVENTABLE OR INEVITABLE:

THE LIMITS AND LATITUDE OF THE LAW

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In her paper, Dr. Scutt examines the traditional role of the court in the sentencing process, together with some of the more recent sentencing options. She suggests that the courts may have a more positive role to play in the area of crime-prevention than may have been the case in the past.

It has come to be accepted as a truism that sentencing is:

"...the punch-line of the criminal justice system. It is at this point that the law is seen to have its impact. The sentencing stage provides the most tangible, public demonstration that the criminal law is not just a declatory moral code, but is a set of rules which are to be enforced by punishment. The whole apparatus of investigation, prosecution and trial is in many respects simply a prelude to the punishment of the guilty. And similarly, the range of institutions and personnel which makes up the correctional component of the criminal justice system is largely about administering the sentencing decisions of the courts. The importance of the sentencing stage can hardly be overstated." 1

There can be little doubt that sentencing is a vital part of the criminal justice system. But the concentration upon it as the "punch-line" may in fact be misplaced. To fix upon the sentencing-end of the court process as if it gives the major directive to community and accused, and as if it is the central repository of judicial imposition on the system, is to overlook equally (perhaps more) important realities.

To effectively dismiss the "whole apparatus of investigation, prosecution and trial" as "in many respects simply a prelude to the punishment of the guilty" is to ignore the very great power wielded by police and courts in defining and dealing with crime. Individuals may never be sentenced through the formal processes of the courts. They may nevertheless be subjected to criminal investigation. They may even be prosecuted and tried without participating in what is seen as the "final" stage of the trial process, sentencing. Even if they do come through the investigation stage to prosecution, trial and sentence, the first three stages may be even more crucial to questions such as "crime: preventable or inevitable" than is the last stage, sentencing.

It has become fashionable to deplore the sentencing process, to criticise courts and other authorities in relation to it, and to call for its overhaul. The criticisms emanate from both sides of the philosophical fence, from both ends of the political spectrum. All manner of "reforms" are suggested: home detention, decriminalisation of drunkenness, early release schemes, pre-release schemes, re-release schemes, community service, courses of lectures; harsher sentences, abolition of remissions, fixed terms, even the re-introduction of capital punishment vie for attention. But these all see as the sole focus the person being sentenced: the convicted criminal.

There are two problems with this approach. The first is the failure to take into account persons other than the convicted criminal who are intimately involved in the sentencing process and/or its outcome, whether or not they are present in court and whether or not the court even knows of their existence. The second problem is that, in the end, sentencing is a very minor part of the criminal justice process, and it arguably has a relatively minor part to play in that process, and in the overall question confronting this conference: whether crime is "inevitable" or "preventable".

LIMITS OF THE LAW

When hearing of the "limits of the law", listeners no doubt become jaded at reiterations of the difficulties faced by judges in the sentencing process. True it is that the law in sentencing has its limits: the court can simply pronounce upon society's expectations of "good conduct", condemn "bad conduct", and dictate a sentence it deems appropriate (hoping that it might change bad conduct into good). But there is another way to view legal limitations: these are the limitations set upon sentencing by the lack of imagination of those who determine upon sentencing reforms.

In 1988 one of the major political parties published a document which it claimed to be its "blue print" for Australia's future. When speaking of the document, in a widely publicised "flying tour" throughout the country, two issues were continually touched upon by the parliamentary leader. They were, first, the need and determination to "end crime in the streets"; and secondly, the need to maintain and support "the family". In juxtaposition, these two aims are frightening. The implication is that the family must be maintained and supported as a mechanism of social control. Getting crime off the streets seems to depend upon ensuring that the home is available as a repository of anti-social behaviour. For if "law and order" is effected by a clamp down on outdoor criminal activity, we can rest assured that this will not end crime, nor will it cause it to lessen in any appreciable way. Rather, crime will continue, but "safely" behind closed doors.

"Law and order" campaigns tend to be viewed, by political pundits, as campaigns run by conservative elements. "Sentencing reform" tends to be seen as the preserve of the progressives. Yet in essence the outcomes may be very similar, even identical. For it is not only conservative political parties that view the family as a mechanism of social control which should play its part in "cleaning up the streets". One government which would traditionally fall into the category labelled "progressive", has led the way in formalising family containment of crime. Home detention is "set to take off in Australia, with electronic surveillance being introduced in South Australia at the end of October 1989". 2

In "Home Detention: The Privatisation of Corrections", Amanda George of the Heidleberg Community Legal Service describes its operation:

"There are two types of home detention: human, or electronic monitoring. The basic premise of human monitoring is that the offender lives in a home with a phone and a correctional officer monitors his/her whereabouts. Offenders are strictly required to leave home only at certain prearranged times. Otherwise, they must

stay at home, not drink, gamble, act illegally, enter into hire purchase agreements, or drive a car ...

There are two types of electronic monitoring: passive, where your telephone is randomly called by a central computer; and active, where you wear a transmitter which continuously transmits to a receiver in your phone, which in turn informs another central computer. With passive monitoring, you go to your phone and plug an attachment into a device on the phone and this transmits a message to the central computer. With active monitoring, if you go out of range, or tamper with the device, it records a violation at the central computer. Violations are also recorded in a number of other circumstances, for example: the subject may be lying in bed with one leg over the device; large metal beams in a house can cause dead spots, as can walking through an elevator door or past cars." 3

Home detention appears to have been fixed upon as a means of overcoming perceived problems with early release schemes. Hardly an Australian state has, in recent times, escaped criticism amounting to loud public and press outcries, against early release schemes. Criticisms have varied from allegations that prisoners are being "let out" early as a result of nefarious machinations on the part of authorities, to the proposition that prisons are overcrowded and that the authorities are fixing upon early release as a means of alleviating overcrowding, unmindful of any perceived "dangerousness" of offenders so released, or their potential for conforming to society's (lawful) dictates.

If early release schemes are to be allowed to continue, then there must be a mechanism for ensuring, as far as possible, that those released early are under surveillance so that the public's fears can be quietened, the press left without fodder. This, at least, appears to the operative factor. The desire to make early release schemes "work" comes from two directions: those acknowledging the exorbitant monetary cost of imprisonment; and those acknowledging the exorbitant human cost of imprisonment. What mechanism is available, at negligible human and monetary cost, to carry out this surveillance? Both factions (like the conservative "law and order" faction) seem to be satisfied by the idea of using the family as the necessary mechanism of social control. They, like the "law and order" group, fail to see the human cost to families of containment of crime. As Amanda George points out:

"It is, without doubt, better to be out of prison than inside. But what is the psychological effect of having your home as your prison? This is in fact already the reality for a lot of women and it has enormous social costs. In a sense it privatises and hides the psychological costs of imprisonment. Because of the continual surveillance at home it is not only the offender who is in a prison environment; it is also the prisoner's husband/wife/lover/child/housesharers who all come within the control and surveillance of the Department. It is these people who assume the dual role of co-prisoner and warder." 4

Limitations on the imagination mean that prison or sentencing "reformers", and "law and order" advocates, fail to see that such proposed mechanisms fail miserably: locked into the home in a highly artificial atmosphere (hardly what one could truly call "home": "home is where the electronic surveillance is"), rehabilitation must surely be doubtful. The disruption of families by imprisonment is accepted; the disruption of families by imprisonment-at-home is ignored. But more than this. Limits on the imagination mean that prison or sentencing "reformers", and "law and order" advocates, fail to see that their ideas are not even new. They are simply a recycling of worn out modes of dealing with persons convicted and sentenced for crime, modes that have long been recognised as inappropriate. Home detention is not new in its essence. It is a recycling of the old British Fleet, where families lived in prison together with their errant head-of-household. The sole element added in the 1980s is that the family does not go to prison; prison comes to it. The technology of surveillance devices has enabled this to happen, together with the political philosophy of privatisation.

Sentencing reform is bereft of ideas. Efforts in this area: the constant enquiries, reports, pronouncements; the sitting of committees, commissions and other bodies, serve to provide industry and activity for those involved. But whether they effectively improve the lot of those the subject of sentencing, or the lot of those required to do the sentencing, or that of the general public which must live with the results, is more than a moot point.

LATITUDE OF THE LAW

It may be time to forget, at least for a time, the end of the criminal justice process, the sentence, and to direct attention at the substantive part of the system. The public which, after all, is the body that must be appealed to in the context of a theme of crime: inevitable or preventable, is far more able to be engaged in the trial process. The courts are, or can be, a major focus of public attention. It is through the operations of the courts that the public establishes its perception of crime and its treatment through the law. The element of theatre present in every courtroom is not lost on public or media. This is an accepted element in our system: it is a strong tenet of the criminal justice system that it be public, and that it be open to reporting. The educative aspect of the system is clearly recognised by members of the judiciary, and properly so.

Rather than allow the courts to run down through lack of financial and other resources, or to "jam up" because resources are inadequate to deal promptly and efficiently with criminal trials, it is encumbent upon governments to recognise the crucial part played by them in this educative role. The educative role is not confined to the sentencing process, and indeed that may be the least important element.

In every criminal trial in the higher courts, jurors are brought into the system and experience first hand the value or lack of value the community sets on the criminal trial process. In every criminal trial 12 jurors sit through an entire trial, inculcating the views, attitudes and behaviours of those involved in the process: judge, accused, witnesses (including victims), counsel for the defence and the crown, instructing solicitors, judge's clerk or associate, and courtroom attendants. The public, where participating in trials from the gallery, similarly inculcate the views, attitudes and behaviours of judge, accused, witnesses, various counsel, solicitors, attendants. In the Magistrates Courts many more people are involved, in many and varied capacities: the accused; accused persons who are present in court awaiting their trial; police officers; court attendants; magistrate; clerk; witnesses (including victim-witnesses); lawyers; police prosecutors; family of witnesses and accused; the public; frequently groups of school children; other court personnel. What happens in court is observed and noted.

The perception of what occurs in the courtroom is not limited to the sentencing process. Even more important is the way arguments are put by counsel, what latitude judges give to counsel in examination and cross-examination, the response in the courtroom

to various witnesses, the response to the accused. Whether the community takes a particular crime seriously (and therefore all crimes of that type seriously), or whether the community accepts arguments about individual responsibility or absolution from it for social, economic or other factors, is to a very large degree wrapped up in the way crimes are dealt with through the trial process.

It is not difficult to find contrasting approaches to the same types of crime, according to the particular characteristics of those who have committed them. These contrasting approaches do not show themselves only at the sentencing stage of the process, and it is a limited view which considers they do. The law has a deal of latitude in the way it deals through the trial process with crime, and differentiation shows itself clearly. It shows itself in matters that would be considered by some to be relatively minor, or even trivial, but which are fundamental to the way society (and the court system) measures human worth: for example, in a trial involving corporate figures prosecuted for company offences amounting to millions of dollars, the accused will not be referred to as "the accused", nor as "Bloggs" or "Smith"; they will be given an appropriate salutation such as "Mr...", or even "sir".

With economic crime, for example, the differentiation does not lie in the fact that the crime is economic rather than against the person. It lies in who (that is, from what "category" of person) is accused: is the offender a woman or a man; is the offender from a particular economic class; is the crime corporate, amounting to millions; is it tax fraud on a grand scale; or is it social security error? If the courts are of the view that social security fraud, or overpayment, is due for an example, then this can be made clear through the court process, not only through sentencing. If the courts wish to make themselves conscious of all the relevant matters involved in this type of crime, then they can do so.

In the late 1980s, clear evidence is available of the criminal justice system making examples of women found to be in receipt of social security above their entitlements. Custodial sentences are being imposed where the overpayment is less than $7,000. For example in Queensland in a recent case a woman received a term of 12 months' imprisonment for an overpayment of $4,000. In Western Australia, a woman received imprisonment for an overpayment of $3,307.40. In Victoria, a six months' gaol term was set for an overpayment of $6,000. In Western Australian an overpayment of $3,571.80 was met with a term of imprisonment. The annual prosecution rate for all pensioners and beneficiaries has increased tenfold from the 1970s to the 1980s. In 1976, less than 200 people were charged for social security overpayment; in 1983 the number had risen to 1,466. For the twelve month period from July 1987 to June 1988, social security fraud charges were laid against 2,368 persons. The Campaign for Economic Justice reports:

"Sole parents have been increasingly targeted in recent years. In 1986-1987, 14.6 per cent of the people charged were sole parents. In 1987-1988, 20.6 per cent were sole parents. A total of 643 parents were charged in 1987-1988 compared with 429 in 1986-1987." 5

The Campaign reports that trials of sole parents for social security fraud do not in their experience deal with the reality of the financial affairs of the accused. There is little or no acknowledgement that:

"As the situation now stands, a single parent with two children (who engages in paid employment whilst in receipt of sole parent's benefit) loses 50 cents in every dollar earned over the sum of $64.00 per week. This represents an effective marginal tax rate of 50 per cent. If the single parent earns more than the tax threshold the effective marginal tax rate jumps to 62 per cent. This is because the parent is subject to both the 50 per cent withdrawal rate of pension and the 24 per cent official tax rate — the 'double crunch'.

This abnormally high effective marginal tax rate operates on single parents who are already on very low incomes and locks them into a cycle of poverty, unemployment and dependency of social security benefits ... (They live below the poverty line.) For example, in September 1988 the sole parent pension for an adult with two children was only $176.05 per week. Even when the family allowance of $12.75 was included, the total income of $188.80 was $21.00 below the poverty line. This translates into denial of the necessities of life, adequate food, clothing, heating in winter, etc., with consequent increased risk of illness in the family, especially the children. If the sole mother joins the paid labour force, she is caught in the poverty trap." 6

In the context of a continuing debate about tax cuts and increases to executive salaries, that this information is not placed before courts in the context of trials for social security fraud of sole parents, or not properly taken into account, is doubly disturbing.

But it is not only in economic crime that information for courts is lacking which severely hampers the educative role courts should play, and which they often strive to play. The law does not prevent the information being made available. Often the lack lies in the failure of police to ask the "right" questions in their investigations, or their ability to ask the "wrong" questions, and lawyers in failing to follow up issues that are crucial and should be incorporated into cases before they are placed before the courts. In other cases, the opposite problem arises: of information being made available to courts which is erroneously admitted, and which clouds the issues. This equally hampers the educative role of the courts.

In rape trials, although efforts have been made around Australia to ensure that rules of evidence are applied appropriately by the courts, and that lawyers involved in the prosecution of rape trials and defence of accused in these cases, it remains true that sexual history and other irrelevant evidence is placed before juries in rape trials. Research in New South Wales subsequent to changes in the early 1980s affirms this. There is also concurrence in Victoria on this issue. For example, in the Law Reform Commission, Victoria's Report on Unsworn Statements in Criminal Trials it is pointed out that despite changes to evidence laws in Victoria, changes specifically designed to alleviate the problem of irrelevant evidence about the victim being admitted in the course of the trial, discretion is exercised to allow evidence in, against the character of the complainant, and discretion is exercised against the character of the accused thereby being required to be put into evidence by reason of his impugning of her character:

"..it is evident that questions or allegations which do not go to the base of the crime (of rape) but which deny the honesty of the victim witness are allowed to pass in some courts. For example, in a recent pre-trial hearing it was put to the court that the defendant wished to say in his (unsworn) statement that the victim witness had stolen some cigarettes from a discotheque. Would this put the defendant's character in evidence, asked defence counsel? The judge is reported to have stated that in making such an allegation, the defendant was running such a risk, but that discretion would be exercised not to open the defendant's character to view. If correctly reported, this is an astonishing result." 7

In other criminal cases, evidence which is vital to a proper determination by the jury is not admitted, Wendy Bacon and Robyn Lansdowne in a study carried out in New South Wales in the early 1980s, of women imprisoned for unlawful killing showed that because police often assumed the woman was guilty, they failed to carry out investigations which were vital to the woman's defence. 8 This failure meant that evidence of long histories of violence against them by the man killed was not documented, and therefore had no possibility of being taken into account. Even where such evidence is documented, lawyers may not consider it relevant, and therefore decline to put it before the court. Rather than bringing evidence of this sort into the trial arena to lay a defence of provocation or self-defence, lawyers may advise the woman to plead guilty on grounds of diminished responsibility. This means the court never receives the facts. It is limited in the role it can play.

In other cases, where lawyers place evidence of a history of long

endured violence before the court, a determination is made to rule it out as irrelevant, so that the jury (and public) does not deal with the crime in context. Alternatively the jury is told that the evidence cannot be taken into account as founding any proposition that the woman killed whilst under provocation, to mitigate the offence. This occurred in the New South Wales' trial of Georgia Hill, and in the South Australian case R. v R. In the first, Georgia Hill had been subjected to years of abuse by her de facto husband, who left the house saying he was going out to "get drunk", and that when he returned he would shoot her. In fear of her life, Georgia Hill grabbed the gun on his return and shot him. In R v. R. the woman was told by her husband, who had beaten her for years, that through those years he had also been sexually abusing and raping their daughters. In response to this, whilst he lay sleeping and after she had sat distraught for some time, Ms. R. killed her husband with an axe. In both cases, it was only after considerable lobbying and agitation that appeals were lodged and provocation allowed to go to the jury in the one case, and in the other to be taken into account by the Court of Criminal Appeal.9

CONCLUSION

A concentration on the sentencing process, and on "what to do" at the conclusion of the criminal investigation and trial, has limited the possibilities of the criminal justice system and diverted attention from those parts of the process that could have an important effect in grappling with the issue of crime: preventable or inevitable. It may be more constructive, and more possible to achieve a positive end, to look at the whole criminal process and, in the context of the courts, to give proper regard to the latitude which courts have in their educative role.

Ultimately, it is important also to recognise that the community has an educative role to play in the criminal justice process, and that mechanisms should be introduced whereby that role can be made effective. In discussing a recent Victorian report on sentencing, Jude McCulloch of the Victorian Federation of Legal Services has said:

"The report states: 'There can be no doubt that there is a great deal of public concern about the operation of the sentencing system in Victoria. One need only turn on the television or radio or read the newspaper to find statements made about what are perceived to be inappropriate sentences or practices in shortening sentences imposed by the courts. Indeed it was this growing alarm which resulted in the setting up of this committee.

To equate media attention with public concern is a dangerous trap, particularly in these days of increasing concentration of media ownership. Research has shown that some sections of the media's persistent concentration on 'murders' and those convicted of crimes does not reflect the community's perspective. A national survey of the Australian Institute of Criminology demonstrates that the public sees violence and personal crime as encompassing not only murder, armed robbery and heroin trafficking, but also industrial pollution causing death and employer negligence causing injury.

The media has had little to say about the latter types of crime even though more people are killed as a result of inadequate occupational health and safety precautions than are murdered in the streets." 10

Those setting up and sitting on sentencing committees, and those engaged in the criminal investigation process and working in the courts, might listen with some profit to the real concerns of the community.

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NOTES

1. Peter Sallman and John Willis, *Criminal Justice in Australia,* 1983, Oxford University Press, Melbourne, p. 157.
2. Amanda George, "Home Detention: The Privatisation of Corrections" (1988) 13 (No. 5) *Legal Service Bulletin* 211.
3. Ibid, 211.
4. Ibid, 212.
5. Low Income People's Network, *Submission to Federal Government,* 1988.
6. Ibid
7. Law Reform Commission, Victoria, *Report No. 2: Unsworn Statements in Criminal Trials,* September 1982, Government Printer, p. 32, note 49.
8. Wendy Bacon and Robyn Lansdowne, "Women Homicide Offenders and Police Interrogation" in *The Criminal Injustice System,* John Basten, Chris Ronalds, Mark Robinson and George Zdenkowski, editors, 1982, Australian Legal Workers Group/Legal Service Bulletin, 4; Wendy Bacon and Robyn Lansdowne, "Women Who Kill Husbands: The Battered Wife on Trial" in *Family Violence in Australia,* Carol O'Donnell and Jan Craney, editors, 1982, Longman Cheshire, Melbourne, 67.
9. Further on these cases, see Jocelynne A. Scutt, *Even in the Best of Homes: Violence in the Family,* 1983, Pelican Books Australia, Ringwood, Victoria
10. Jude McCulloch, "Victorian Sentencing Report Released: The Starke Reality" (1988) 13 (No. 5) *Legal Service Bulletin* 208, pp. 208-209.