Tasmanian Women Lawyers

Submission to *Justice Legislation Miscellaneous Amendments Bill 2019*

The Tasmanian Women Lawyer Committee thanks the Department of Justice for the opportunity to provide feedback in relation to this bill.

Tasmanian Women Lawyers is an organisation committed to women in all aspects of the legal profession. This includes judicial officers, professionals, academics, graduates and students. Our objectives drive our support of TWL members in that we work to:

- Advance and encourage equality for women in the legal profession.
- Create and enhance awareness of contribution to the practice and development of the law by women.
- Provide support and mentoring opportunities for women in the legal profession.
- Provide a forum for the exchange of information and opinions on aspects of the law relating to women.
- Provide a professional and social network for women lawyers.

Additionally, TWL has a particular interest and focus in how women interact with and are affected by law reform and the justice system.

Justice Legislation Miscellaneous Amendments Bill 2019

There are a number of issues canvassed in this bill:

- Amendments to the arrest provisions in relation to home detention orders;
- Providing a default period of 28 days within which fines and monetary pentalties are to be paid in the absence of a specific order made by a judicial officer;
- Amendments to the *Criminal Law (Detention and Interrogation) Act 1995* in relation to persons arrested pursuant to Supreme Court warrants;

- Amendments to the *Criminal Code Act 1924* to widen the definition of "sentence" to enable a deferred sentence to be appealable.

Right of appeal for deferral of sentence

The TWL Committee understands the background which has prompted these changes,[1] and in principle agrees that lengthy deferral of sentences without a rehabilitative or therapeutic element is inappropriate.

However, the TWL Committee notes concerns with the proposed reform to grant a right of appeal to a decision of a Court to exercise its discretion with respect to deferring sentence. At present, a deferral of sentence means that the matter is not finalised and cannot be appealed. With respect, this is the correct legal approach. The Crown is entitled to make submissions as to the appropriate sentence in the circumstances of each case according to s 80 of the *Sentencing Act* 1997

The Court may only defer sentencing under strict conditions (section 57A(3) *Sentencing Act 1997*) and may only defer sentencing to allow the accused to participate in (or be assessed for participation in) a rehabilitative or pre-sentence program. While section 57A(2)(d) does give the Court some wider discretion to defer "for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the offending" it is submitted that this wider discretion should be read in the context of the whole of that section in Part 8. The deferral of sentencing reforms were enacted when the Government was proposing to abolish suspended sentences, but since the Government has moved back from that position, that should be a clear indication to the Judiciary that deferred sentencing is not a substitute for a suspended sentence, and deferral should only be used for a therapeutic purpose. Arguably, deferral of sentence with no conditions geared towards a rehabilitative or therapeutic purpose is an appealable error of law within the existing appeal processes.

As the proposed amendment currently stands, in order for an appeal of a decision to defer sentence to succeed, the Court of Criminal Appeal would need to:

a) make an assessment as to the defendant's likely rehabilitation trajectory if sentencing was deferred; and

b) having made such an assessment, decide that even if the defendant demonstrated complete rehabilitation, any sentence imposed taking that rehabilitation into account would lead to a manifestly inadequate result.

In effect, the proposed amendment interferes with the sentencing judge's discretion before it has been fully exercised.

---

[1] Premier press release: major sentencing reforms to phase out the use of suspended sentences, 30 March 2016, http://www.premier.tas.gov.au/releases/major_sentencing_reforms_to_phase_out_the_use_of_suspended_sentences_and_introduce_new_sentencing_options; Community Legal Centres Tasmania comment on *Sentencing Amendment Legislation Bill 2016* http://www.clctas.org.au/wp-content/uploads/2013/05/SentencingBill310816.pdf

There is evidence that women offenders are more likely to receive rehabilitative type orders, such as community-based sentencing options, than terms of imprisonment.[2] Women with serious criminal matters or significant criminal history are far more likely to be vulnerable due to victimisation in their personal histories, as victims of childhood abuse, sexual and/or family violence, which has fed into adult psychosocial dysfunction and contributed to their criminal offending.[3]

It is important that this gendered difference to criminal offending pathology and sentencing responses is taken into account in law reform, to avoid unintended consequences for female offenders in the justice system, who may find themselves unable to access deferred sentencing programs if there is a greater reluctance (borne from a fear of being appealed) to use those methods by the Judiciary.

Trauma-informed approaches to the work of sentencing offenders should be used by judicial officers, noting that "women's offending pathways are qualitatively different from men" and consequently rehabilitative programs, including those used in deferrals of sentence, pose a much greater likelihood of success for women offenders and breaking the cycle of recidivism.[4]

Suspended sentences have an important role in providing a sentence of specific deterrence for offenders whose psychosocial dysfunction means that they will struggle to comply with an onerous rehabilitative program (e.g. someone who is homeless and unable to report regularly to a Corrections or other social support program as a condition of a Community Corrections Order or deferred sentencing program), especially for people from already marginalised and over-incarcerated communities such as Aboriginal and Torres Strait Islander Peoples.[5]

While a broader discussion around deferred sentencing and rehabilitative or therapeutic sentencing options is welcomed, introducing a right of appeal to a discretion which does not complete a criminal matter is a blunt tool to address a problem more properly addressed through policy discussions with and education or training for judicial officers, and interlocutory appeals on points of law. If there is not a right of appeal on an interlocutory basis to *generally* appeal in the rare instances when it is appropriate to lodge an appeal prior to the finalisation of matter, then such an *interlocutory* right should be framed more broadly to appropriately capture a range of possible interim decisions that could be appealed, which may be lacking at present.

---

[2] Dr K. Gelb, *Gender Differences in Sentencing Outcomes*, Sentencing Advisory Council of Victoria, July 2010, https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf

[3] M. Stathopoulos, A. Quadara, B. Flleborn and H. Clark, *Addressing Women's Victimisation Histories in Custodial Settings*, Australian Institute of Family Studies, https://aifs.gov.au/publications/addressing-womens-victimisation-histories-custodial-settings/export

[4] AIFS, *ibid*.

[5] Australian Law Reform Commission, Chapter 7: Appropriateness of Alternative Sentencing Options, *ALRC Report 133: Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, 28 March 2018, https://www.alrc.gov.au/publications/appropriateness-alternative-sentencing-options

Other proposed reforms

The TWL Committee takes no issue with the other reforms proposed in this legislation, all of which seem sensible and bring various pieces of legislation into line with expectations of practitioners and courts.

Authored: Sarah Holloway & Jessica Sabapathy, TWL Committee Members.

Endorsed and authorised: Amanda Thompson, TWL President