

PRE-SENTENCE REPORTS

An unpublished report of the Justice Department, "Recommending Sentence — A Study of Probation Officers' Pre-Sentence Reports in New Zealand", reveals a factor which is often overlooked by critics of the role played by the judiciary in sentencing convicted persons. This factor is the use of the probation report by a judge or magistrate when considering the possible sentence to be imposed on a convicted person. It has often been argued that such judicial officers with their purely legal background are unsuited to making sentencing decisions unaided by more expert sociological and psychological opinion. (See Nigel Walker, "*Sentencing in a Rational Society*", London, 1970.)

However can it be said that the courts often come to a decision on sentencing with no outside influence or assistance? The Justice Department Report seems to indicate that this is not always the case. When considering a sentence which could involve imprisonment the court will usually call for the report of a probation officer which will contain details about the offender's background and circumstances and in most cases a recommendation as to possible sentences which it would be desirable to impose. The material contained in the body of the report will vary according to the officer who prepares it. Some appear to be little more than a summary of details which could be better supplied by defence or prosecution counsel whereas others (the majority) are carefully prepared and exhaustively detailed psychological and sociological scrutinies of the offender.

The Justice Department Report shows that out of 3,157 probation reports studied only 371 contained no recommendation as to sentence and it is of considerable interest to note that in the remaining 2,786 cases the recommendations were followed in 86% of the cases where they were made.

This would seem to indicate that in practice the courts do have some outside expert assistance in reaching a sentencing decision. It could be argued, of course, that in most of these cases the courts might have reached a similar conclusion as to sentence unaided by any recommendation. This however overlooks the value the court will place on the remainder of the report apart from the sentence recommendation. Most magistrates who have been interviewed on their attitudes to probation reports agree that whilst a recommendation as to sentence *per se* does not influence their final decision greatly, the material which the report contains about the offender generally, leads to an inference as to the correct sentence. Indeed the complaint has been heard that probation officers "force" magistrates to accept their recommendation by phrasing their report in such a way as to make the sentence recommended the only logical solution. However, few magistrates could claim that they were totally uninfluenced by probation reports.

Therefore if judicial opinion and the Justice Department Report

indicate that probation reports do have a useful influence in helping the courts to determine a sentence, why should there be a discretion vested in the courts to dispense with probation reports completely?

Section 4(1) of the Criminal Justice Act 1954 provides that:

“A probation officer may, and shall when so required by any Court, report to the Court on the character and personal history of any person convicted of any offence punishable by imprisonment, with a view to assisting the Court in determining the most suitable method of dealing with his case; and may in any such report advise the Court whether the offender would be likely to respond satisfactorily to probation and whether any condition of probation should be imposed.”

Thus in some cases where possible imprisonment is considered the courts will not have to (and in a small number of cases do not) call for a probation report, leaving themselves open to the critics' cries of “arbitrary justice!” In view of the undeniable value of probation reports it is difficult to see why there should be no requirement that a report be made available in every case where possible imprisonment is involved. Such a procedure is a matter of practice in the Supreme Court although there is no statutory requirement. Furthermore in all cases in the Children's Court the magistrate must have the report of a child welfare officer available.¹ Also there must be a probation officer's report available before a sentence of borstal training,² periodic detention³ or detention in a detention centre⁴ is passed. If in the above cases a report is not called for the sentence is not invalid but may at any time be liable to review. Finally, before passing a sentence of preventive detention⁵ the court must consider any report which may be presented by a probation officer or other person specified in the Criminal Justice Act. Therefore it seems anomalous that a magistrate should have the power to impose a sentence of imprisonment (maximum term, three years) without having to consult a probation report whereas when he imposes a term in a detention centre (maximum term, three months) there is a statutory requirement that a report be available. It should be stated at this point that most magistrates would invariably require a report if a prison sentence was contemplated but others have on occasion imposed a three year sentence without the aid of a probation report despite Supreme Court disapproval of this practice. One magistrate interviewed claimed that he had imposed a three year sentence without a probation report so that a “sharp and immediate shock” could be administered to the offender who had been arrested a short time before.

There are many arguments in a similar vein which magistrates

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1. Child Welfare Amendment Act 1927, s. 31(1).
 2. Criminal Justice Act 1954, s. 19.
 3. Criminal Justice Amendment Act 1962, s. 15.
 4. Criminal Justice Act 1954, s. 16A.
 5. *Ibid.*, s. 25.

put forward to justify proceeding to a prison sentence without a report. For example, where there is a persistent offender who has been fined, then put on probation several times and finally imprisoned, would a probation report serve any useful purpose? This argument overlooks the factors that a probation report may reveal existing as a cause of the offending. No matter how persistent or serious the offender or the offence may be the courts should always seek a better understanding of the individual offender. The best method of achieving this understanding is through the use of a probation report. Even in cases where a magistrate is in doubt whether imprisonment should be imposed at all, for example where the offence is trivial, the use of a probation report is still important as it will give a guide to the appropriate penalty (e.g. fine or probation).

Apart from the situations quoted above, it has been argued that the judiciary should not have to call for a probation report in every case involving possible imprisonment because the added burden that would be imposed on the already overworked probation service in preparation and the lack of time available to a busy magistrate for reading such reports would be enough to cause the judicial system to break down. However since the practice of calling for a probation report is already widespread, as I have shown above, there should be no marked increase in workload if a report were called for in every case involving imprisonment as a possible penalty. Moreover arguments against such a requirement on the grounds of expense, delay or increased workload, overlook the gravity of the decision being made. Imprisonment is the gravest sanction our society can level at one of its members. The consequences of even a short term of imprisonment can be socially disastrous. Therefore a decision to deprive an individual of his liberty should not be made lightly and should be based on the widest possible knowledge of the case in question. In England the Streatfield Report⁶ laid down as a primary rule that:

“A sentence should be based on comprehensive and reliable information which is relevant to the objectives in the court’s mind.”

How can any magistrate acquainted only with the facts brought before him in the normal course of court proceedings claim that he has “comprehensive and reliable information” before him when he imposes sentence?

Apart from statistics revealing the frequency with which the courts will follow sentence recommendations made by probation officers the Justice Department Report gives some measure of the flexibility that can remain in the hands of the court even when a recommendation as to sentence has been made. For example in Magistrates Court Centre A (a North Island town) 22.7% of recommendations made by pro-

6. *Report of the Inter-Departmental Committee on the Business of the Criminal Courts* (1961; Cmnd. 1289, London H.M.S.O.).

bation officers were not followed whereas in Magistrates Court Centre B (a South Island town) only 4.5% were not followed. Even more interesting is the way the courts deal with cases where the recommendations were not followed. In Court Centre C (North Island) where 21% of all recommendations were not followed, the Justice Department Report shows that 18 out of 29 cases were dealt with more severely than recommended. In Court Centre A (*supra*) however only 2 out of 20 cases were dealt with more severely. It is apparent therefore that even if probation reports and a recommendation as to sentence were to be made mandatory, a considerable amount of latitude would still remain with the judiciary who, of course, would not be bound to follow any recommendation.

To conclude therefore it can be seen that the Justice Department Report reinforces the suggestion made here that probation reports be made available and compulsory in every case involving imprisonment. Too few judges or magistrates can admit to any qualifications apart from legal and judicial experience (and some claim this is sufficient) that would enable them to sentence individuals unaided by more expert opinion.

If critics of our present sentencing process are to be denied proposals that call for, to name only one, the setting up of separate sentencing tribunals that would take the sentencing function from the courts and place it in the hands of those better qualified in psychology and sociology etc., then all judges and magistrates must be prepared to widen their approach to sentencing and admit outside opinion. The Justice Department Report shows that in many cases this is being done through the use of probation reports. If these reports were mandatory in all cases involving possible imprisonment then, in the words of the Streatfield report, all offenders would receive a sentence based on "comprehensive and reliable information."

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