Review of the sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency services workers and health workers

Submission to the NSW Sentencing Council

14 September 2020

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry being undertaken by the NSW Sentencing Council ('the Council') regarding sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency service workers and health workers ('the specified offences').

2. The ALA notes that reviews into the penalties and sentences for offences involving assaults on police officers, correctional staff, youth justice officers, emergency service workers and health workers often involve consideration of whether mandatory minimum sentences are appropriate, driven by an aim to send the desired message to the community regarding the seriousness of these offences and provide an appropriate deterrence. The ALA is strongly opposed to mandatory minimum sentences as it considers that they are inconsistent with the rule of law, breach international human rights standards and undermine the separation of powers as they detract from the independence of the judiciary.

3. This submission will focus on the failure of mandatory sentencing to achieve its aims in providing a deterrence and sending a strong message to the community, and strongly submits that the Council should not recommend mandatory minimum sentences as appropriate penalties for the stated offences.

Mandatory sentences – removing judicial discretion

4. The ALA agrees with the Law Council of Australia that prescribing mandatory minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or any mitigating factors such as mental illness or other forms of hardship or duress. This can result in sentencing outcomes that are disproportionately harsh, unjust and anomalous.[2]

5. The ALA submits that it is not appropriate for the Parliament to prescribe mandatory minimum sentences for particular offences as it does not enable consideration of individual circumstances or the nuances of particular factual scenarios. Ultimately, only the courts have access to the facts, circumstances and contexts in which a particular offence is committed. It

[2] Law Council of Australia, 'Mandatory Sentencing' (Policy Discussion Paper) May 2014, 20–21, <https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

is therefore appropriate that the courts have the ultimate discretion in determining the appropriate sentence for a particular offence that has been proved, subject to the principles and maximum sentence that has been determined by the legislature.

6. The Law Council of Australia noted that in jurisdictions where mandatory sentencing has been introduced, lawyers, judges and juries will increasingly resort to accepted mechanisms such as plea bargaining to circumvent the harsh and unjust effects of mandatory minimum sentences.[3] While proponents of mandatory minimum sentencing state that such sentences are transparent, mandatory sentences tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution and the police, given that the choice of the charge will determine the sentencing outcome. If prosecution agencies wish to avoid the imposition of mandatory penalties, they will charge an offender with offences that do not carry mandatory sentences.[4]

7. Accordingly, the ALA submits that mandatory minimum sentences undermine the role of the courts in determining sentencing outcomes. Ultimately this undermines community confidence in the criminal justice system.

Mandatory sentencing and Australia's international human rights obligations

8. The ALA submits that mandatory minimum sentencing is also contrary to Australia's international human rights obligations, as set out in the International Covenant on Civil and Political Rights (ICCPR). The relevant obligations include:

    a. the right to be free from arbitrary detention (Article 9(1));

    b. the right to a fair trial (Article 14(1)); and

    c. the right to have one's sentence reviewed by a higher court (Article 14(5)).

9. The ALA submits that mandatory minimum sentences that prohibit the court from attributing the weight it deems appropriate to the seriousness of the offending and the circumstances of

[3] Ibid, 18.

[4] Andrew Ashworth, *Sentencing and Criminal Justice,* Cambridge University Press, 6th ed, 2015, 107; Nicholas Cowdery, *Mandatory Sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, 13.

the offender is bound to result in terms of imprisonment that are arbitrary, thereby breaching Articles 9(1) and 14(1) of the ICCPR. As an appellate court cannot, on review, reduce a mandatory minimum sentence that is imposed, there is also a breach of Article 14(5) of the ICCPR.

The financial cost of mandatory sentencing

10. The ALA submits that mandatory minimum sentencing regimes increase the cost of the administration of justice. Such sentencing regimes remove the incentives for offenders to assist authorities with investigations (with the expectation that such assistance will be taken into account in sentencing). They also remove an incentive for defendants to plead guilty, thereby earning the right to a sentencing discount. Accordingly, mandatory minimum sentences result in a greater number of contested hearings requiring the use of extra resources.

11. The ALA also notes that mandatory sentencing increases both the use of imprisonment as a sentencing option and the length of sentences served by offenders, thus increasing the cost to the state.[5] The ALA also notes that mandatory sentencing has been associated with a lower likelihood of offenders being granted bail, thereby increasing the number of offenders held in custody.[6]

Mandatory sentencing does not achieve its aims

12. The ALA submits that mandatory sentencing fails to achieve its aims of providing a general deterrence for the applicable offences and sending a strong message to the community. The ALA submits that mandatory sentencing is based on flawed assumptions about the nature of human decision-making: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate. This assumption is based on deterrence theory, which suggests that one will avoid committing criminal acts through fear of punishment. According to Ritchie, implicit in this definition is the assumption that individuals have a choice whether or not to commit criminal acts and, when successfully

[5] Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Victoria, 2008) 15.

[6] Law Council of Australia, n 2, 28.

deterred, they deliberately choose to avoid that commission through fear of punishment. The critical focus of deterrence is on the individual's knowledge and choice and the way in which the criminal justice system – through the threat and imposition of punishment – informs, and influences, that choice.[7]

13. Hoel and Gelb state that the notion of deterrence assumes a rational link between human behaviour and punishment. It presupposes that an individual can rationally weigh up the advantages and disadvantages of a given behaviour and choose a course of action based on this deliberation. Deterrence assumes that rational individuals, in seeking to advance their own self-interest, will only engage in illegal conduct where the expected benefits outweigh the expected costs after allowing for the risks of detection and the costs of prosecution.[8]

14. Accordingly, the notion of deterrence presupposes that would-be offenders are rational actors who are capable of weighing up the costs and benefits of a particular course of conduct. However, given that criminal offending is often impulsive in nature, such a capacity to consider the costs and benefits of a particular course of conduct is often not present. Also, given the high incidence of behaviour affected by mental illness or substance abuse in criminal offending, the assumption that would-be criminal offenders are rational actors is often incorrect.

15. In part, the failure of mandatory sentencing to secure its aims is also because public perceptions of crime and sentencing are not always accurate or informed, and they rely significantly on information derived from reports published in mass media. According to Gelb, the mass media has a vested interest in sensationalising news reports so as to attract a larger audience, while at the same time conveying very limited factual information due to time and space constraints. This tends to result in a significant expression of public opinion about crime that reflects the impression of crime that has been presented in the media, overestimating rates of offending and underestimating the nature and severity of the sanctions imposed by the courts.[9] However, where members of the public are provided with more detailed information regarding the background of an offender, the context in which offending

[7] Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Victorian Sentencing Advisory Council, April 2011, 11.

[8] Hoel and Gelb, n 5, 13.

[9] Karen Gelb, *Myths and misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, Melbourne, July 2006, 14.

occurred, and the availability of other sentencing options to address particular characteristics of disadvantage or illness, then the tendency to support severe mandatory sentences diminishes, with a greater preparedness to accept the important role of courts in fashioning appropriate sentencing responses to particular offenders and offending situations.

The high numbers of First Nations people in custody in NSW

16. The ALA is concerned that establishing a more severe sentencing regime for offences involving assaults on police officers, correctional staff, youth justice officers, emergency service workers and health workers could have a disproportionate effect on Aboriginal and Torres Strait Islander people, resulting in a further increase in the already unacceptable levels of imprisonment of Aboriginal or Torres Strait Islander people.

17. In NSW, the number of people in custody as at 31 March 2020 was 13,991. Of these, 3,683 were Aboriginal or Torres Strait Islander people. Aboriginal or Torres Strait Islander people made up 26.3% of the total people in custody or prison in NSW, despite only being 3.4% of the NSW population.[10] The total number of Aboriginal or Torres Strait Islander people in custody or prison in NSW was 28.5% of the total number of Aboriginal or Torres Strait Islander people in custody or prison nationwide.[11]

18. In 2018–2019, the average daily number of young people in custody in NSW was 265. Of these, the average daily number of Aboriginal and Torres Strait Islander young people in custody was 127 (48%).[12] In NSW, the rate of imprisonment for Aboriginal and Torres Strait Islander young people is approximately 12 times the rate for non-Aboriginal and Torres Strait Islander young people.[13]

19. The ALA agrees with the ALRC that poor policing practices with respect to First Nations people often results in disproportionate arrests, detention in police custody and higher incarceration rates among Aboriginal and Torres Strait Islander people. In its inquiry *Pathways to Justice* –

[10] Australian Bureau of Statistics (ABS) 2020, *4512.0 Corrective Services Australia*, March quarter 2020.

[11] Ibid.

[12] Australian Institute of Health and Welfare (AIHW) (2020), *Youth detention population in Australia 2019*, Bulletin 148, February 2020.

[13] AIHW, Youth Justice in Australia as quoted in *The Guardian*, 16 July 2020, 'Indigenous children 17 times more likely to go to jail than non-Indigenous youth.'

Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, the ALRC received reports of inappropriate policing practices in relation to the exercise of police discretion, policing of bail conditions and charging practices. The ALA is concerned about the practice of over-charging which can be particularly disadvantageous for an Aboriginal and Torres Strait Islander accused.[14] Establishing a more severe sentencing regime for the specified offences will further exacerbate this issue, and undermine any efforts to reduce the unacceptable level of incarceration of Aboriginal and Torres Strait Islander people in NSW.

Conclusion

20. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry being undertaken by the NSW Sentencing Council regarding sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency service workers and health workers. The ALA strongly submits that the Council should rule out any proposal that involves introducing a scheme for mandatory minimum sentences for the stated offences.

Joshua Dale
NSW President
Australian Lawyers Alliance

[14] Ibid, paras 14.39, 14.42 and 14.46.