



ALS

Aboriginal Legal Service (NSW/ACT) Limited

16 October 2020

The Hon Peter McClellan AM
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney, NSW 2001

via email: sentencingcouncil@justice.nsw.gov.au

Dear Chairperson,

Review of sentencing for assaults on emergency service workers

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') welcomes the opportunity to make a brief submission to the NSW Sentencing Council's review into sentencing for assaults against emergency service workers – including police officers, correctional staff, youth justice officers, emergency services workers and health workers.

Everybody deserves to have a safe working environment and to be able to move around the community without fear of harm. Due to the nature of work, some workplaces present more risks than others and hence the respect for emergency service workers on the frontline helping those in need. However, in our view, harsher penalties and more punitive sentencing approaches will fail to address underlying issues that lead to incidents of violence. Instead, increased emphasis must be placed on developing de-escalation and risk mitigation strategies, as well as therapeutic responses which are aimed at improving community relations and reducing incidents of harm against all members of the community, including our frontline emergency service workers.

We note that many of the issues being considered by this Review were previously considered in a recent Inquiry undertaken by the NSW Legislative Assembly's Committee on Law and Safety.¹ The 2017 Inquiry did not recommend the creation of any new offence types or penalties, nor did it support the creation of any further mandatory minimum sentences.²

¹ Legislative Assembly, Committee on Law and Safety, *Violence against emergency services personnel*, 2017.

² *Ibid.* Finding 12, xvi. P.12

Reducing harmful interactions through a holistic response

It is important to note that the history of our nation and the ongoing impacts of colonisation and dispossession have led to an understandable distrust and fear of many government institutions, particularly police and law enforcement services, by Aboriginal and Torres Strait Islander people. In our experience many ‘police-assault’ offences occur in the process of a person being arrested or restrained, often in situations where the interaction could have been avoided. For instance, research studies have highlighted that the over-policing of Aboriginal communities leads to net-widening, with low-level offending being disproportionately policed and often leading to situations escalating and leading to additional altercations and further charges.³ And in our experience assaults against police are more likely to attract sentences of imprisonment compared with general assault provisions. As a result, we suggest an increased focus on strategies which ensure that arrest is a principle of last resort and are aimed at reducing unnecessary negative interactions between police, law enforcement and Aboriginal and Torres Strait Islander communities.

The ALS strongly urges the NSW Sentencing Council to look beyond a narrow criminal justice response to these issues. Increased emphasis must be placed on improving police and community relations, addressing systemic racism, ending the targeted policing of Aboriginal communities and people of colour and developing therapeutic responses which more appropriately respond to, and address, individual needs and community wellbeing. In addition, what is needed is a broader holistic and public-health based response – which ensures people experiencing mental ill-health or cognitive impairment have access to appropriate treatment and support and provides effective support for carers and support workers.

The existing sentencing regime is sufficient

The ALS is of the view that existing sentencing options available in NSW are adequate and should not be increased. Under the *Crime Act 1900 (NSW)* there are over 25 assault (and related) offences which capture the varied nature of violence towards emergency services workers and provide sufficient scope for the Court to exercise discretion in determining an appropriate sentence. In addition, s21A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* provides for aggravating factors to be taken into account by the Court in the process of determining a sentence, including providing that offences against emergency services personnel will be treated more seriously by a sentencing court.

Mandatory minimums are ineffective

The ALS is strongly opposed to the development of any mandatory sentencing regime that requires that judicial officers deliver a minimum or fixed penalty. Mandatory sentencing laws prevent the court from

³ Schwartz, M. (2013). “Redressing Indigenous over-representation in the criminal justice system with justice reinvestment” in *Precedent*, Issue 118 (September/October 2013). Accessed via: <http://www5.austlii.edu.au/au/journals/PrecedentAULA/2013/69.pdf>

exercising proper discretion in passing sentence on the accused and have been found to have a disproportionate impact on vulnerable groups, including Aboriginal and Torres Strait Islander people.

In addition, we note that the creation of a mandatory sentencing regime for assaults against emergency workers would be ineffective as a deterrence mechanism. As the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) has previously stated:

*Mandatory sentencing regimes are not effective as a deterrent and instead contribute to higher rates of reoffending. In particular, [they] fail to deter persons with mental impairment, alcohol or drug dependency or persons who are economically or socially disadvantaged. They also have no rehabilitative value, disrupt employment and family connections ... and diminish the prospects of people re-establishing social and employment links post release. Significantly, mandatory sentencing prevents the court from taking into account the individual circumstance of the person, leading to unjust outcomes. This is an arbitrary contravention of the principles of proportionality and necessity, and mandatory detention of this kind violate a number of provisions of the International Convention on Civil and Political Rights.*⁴

In our experience, incidents which relate to a charge of assault against emergency services workers often arise in an unplanned way where individuals are compromised in their consequential thinking because of the stress of the situation, involve individuals who may have an intellectual disability or are experiencing ill mental health, or arise in direct response to the over-policing of Aboriginal and Torres Strait Islander communities.

We would welcome the opportunity to discuss these matters in more detail with the NSW Sentencing Council throughout the review consultation period and if you have any questions regarding this submission, please contact Shannon Longhurst (Policy and Communications Manager) shannon.longhurst@alsnswact.org.au.

Yours Faithfully,



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⁴ National Aboriginal and Torres Strait Islander Legal Services (2017), *Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples*. Accessed via: https://www.alrc.gov.au/wp-content/uploads/2019/08/109._natsils.pdf

Case Studies

** Note: Names changes for privacy*

Case Study – David*

David was homeless, in a public park and suffering from mental health issues.

Members of the public in the park were concerned about him and called police to check on him. He was distressed and resisted being taken to the hospital. He was then arrested, and whilst being arrested spat on police. On the way to hospital he spat on a police officer and was subsequently charged with 'assault police'.

David received a 7-month prison sentence.

David instructed the ALS to withdraw the appeal for his sentence, because he had a bed and food in custody so wanted to stay.

Adam*

Police were called because Adam was threatening to commit suicide.

Adam's brother had recently attempted suicide and his dad was in hospital in the intensive care unit. When being pulled off the ledge, Adam bit the Police Officer on their gloved hand.

Adam was distressed and taken to hospital. Adam was later arrested for "assault police officer." Police refused bail, and bail was also later refused in the Local Court.

Adam's record is limited. He is a father of three, and a full-time painter who works 6 days per week.

Now he is in prison on remand with no mental health support.

Dion*

Dion is 14 years old and likes talking to his lawyer about the nature documentaries he watches. He seems to know everything about the weather.

Dion also has a diagnosis of Autism Spectrum Disorder with intellectual impairment. He has a history of trauma and of being sexually exploited.

Dion was charged with damaging property. When he didn't attend court because he thought it was on a later date a warrant was issued for his arrest. Police arrested Dion on the warrant and put him in a police cell.

Dion also told police he had some coins in his undies and that he wouldn't give them to police because he wanted to buy something when he went into juvenile detention. Police told him they were going to strip search him. A support person was called who Dion had never met. Dion became very distressed. He lay down on the floor. Police tried to remove him from the cell and held his arms while pulling down his pants. Dion bit the arm of one of the police officers holding him.

Dion's pants were pulled down and a single coin removed from his underwear. Dion was subsequently charged with assaulting police. Within days Dion had a psychotic breakdown and remains in hospital.

Jacob*

Jacob is a 13-year-old boy who has been assessed as having a global cognitive deficit and moderate intellectual delay at a level lower than 99.9% of his age peers.

His receptive communication skills are at a functional age equivalent to less than 3 years old and his interpersonal relationship skills at less than 4 years old. Jacob also has Tourette's syndrome and a rare kidney disease. He was removed by FACS from the care of his family at 3 ½ months. Jacob has a strict behaviour management plan for his carers to help manage his behaviour.

One day, Jacob calls police and tells them he has a knife. Police arrive and see that Jacob doesn't have a knife; he has a stick.

Jacob's carers tell police they do not need police assistance. At this point, Jacob who is behind a fence spits at an officer.

Jacob is then arrested for "assault police" and taken into police custody. In custody Jacob becomes very distressed and refuses to take his medications. Jacob then spat again at police.

He is charged with two counts of assault police. Jacob cannot state what his charges were or what the word 'guilty' means. He says, "my heart is constantly sad and sore".

Jacob's lawyer subsequently successfully advocates with police for the charges against Jacob to be withdrawn.

Luke*

Luke is a 19-year-old Aboriginal man with no prior record.

Police attend his house to do a bail check on his younger brother. He and his mum say that he's not here and would not let them in.

The police hang around for 15-30 minutes continuing to question and ask to come in. Luke says that police are intimidating his mother and being aggressive.

Luke asks police to leave multiple times, but they do not. He then says to police, "you wouldn't be so tough without your badge on."

Police instantly grab him and arrest him for intimidation.

An allegation of 'assault police' occurs as he is being pulled from the house.

He is then charged with offensive language as he is getting put in the paddy wagon.

Douglas Shillingsworth

Douglas Shillingsworth was seen on the street to be acting erratically and was seen to be involved in an affray with a member of the public. Another member of the public told a police officer. The police officer came over to speak to Douglas. He told him to "f*** off c***". The officer attempted to arrest Mr Shillingsworth. Mr Shillingsworth threw a punch and a can of food at the officer but missed. Mr Shillingsworth continued to assault the officer.

He was eventually arrested and pleaded guilty to affray, assault police and resist arrest. Due to his record the Office of the Director of Public Prosecutions refused to finalise the matter in the summary jurisdiction and elected to have the matter dealt with in the District Court.

Mr Shillingsworth remained on remand for almost 11 months awaiting sentence. He was held in the psychiatric unit for the first few months of custody due to his mental illness. Tragically, Mr Shillingsworth developed an ear infection that led to an abscess on his brain and he passed away in custody.

Mr Shillingsworth was a 44 year-old Aboriginal man who had a history of chronic ear infections and mental illness.