Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Penalties for assaults on public officers

Submission to the Queensland Sentencing Advisory Council

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Protecting and promoting justice, freedom and the rights of the individual

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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 Queensland Sentencing Advisory Council ('QSAC') regarding penalties for assaults on public officers. This submission will focus on the following questions in the Issues Paper:

   Question 15

   If the Government was to introduce sentencing reforms targeting assaults on public officers in general, or specific categories of public officers, on the basis that current sentencing practices are not considered adequate or appropriate, what changes would you support or not support?

   Question 16

   What issues contribute to, or detract from, the community's understanding of penalties and sentencing for assaults on public officers?

   Question 17

   How can community knowledge and understanding about penalties and sentencing for assaults on public officers be enhanced?

2. The ALA notes that reviews into the penalties and sentences for offences involving assaults on public officers often involve consideration of whether mandatory minimum sentences are appropriate, 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 by detracting 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. The ALA strongly submits that the QSAC 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 whether there are 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 Parliament to prescribe mandatory minimum sentences for particular offences as it does not enable consideration of individual circumstances or nuances for particular factual scenarios. Ultimately, only the courts have access to the facts, circumstances and contexts in which a particular offence is committed. It is often the case that offenders who have found themselves committing these offences are facing situational crises, which is why they are dealing with a public officer in the first place. Those circumstances are very important for the court to hear and submissions to be made in line with other s9 considerations so that the judge can sentence the offender accordingly. It 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 increasingly resort to accepted mechanisms such as plea bargaining to circumvent the harsh and unjust effects of mandatory minimum sentences.[3] This was a growing practice by judges when faced with the mandatory minimum non-parole period of 80% for an offender convicted of drug trafficking under s5 of the *Drugs Misuse Act 1886*. That section has now been removed from the Act. 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

[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>.

[3] Ibid, 18.

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 serves to undermine 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). These obligations include:

    - the right to be free from arbitrary detention (Article 9(1));
    - the right to a fair trial (Article 14(1)); and
    - 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 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, these sentences also breach Article 14(5) of the ICCPR.

The financial costs of mandatory sentencing

10. The ALA submits that mandatory minimum sentencing regimes increase the costs of the administration of justice. The effect of such a sentencing regime is to remove the incentives for offenders to assist authorities with investigations (in the expectation that such assistance will be taken into account in sentencing). They will also remove an incentive for defendants to plead guilty, thereby earning the right to a sentencing discount. Accordingly,

[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.

mandatory minimum sentences result in more 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 costs to the state for incarceration of convicted offenders.[5] The ALA also notes that mandatory sentencing has been associated with offenders finding it more difficult to obtain bail, thereby increasing the number of offenders held in custody.[6]

The community's understanding of penalties and sentencing for assaults on public officers – mandatory sentencing does not achieve its purported 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 provide more effective deterrence and that imprisoning offenders will necessarily lead to a lower crime rate. This assumption is based on the notion of 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 deterred, 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

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

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

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

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, there is often no opportunity to consider the costs and benefits of a particular course of conduct. 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 mistaken.

15. In part, the failure of mandatory sentencing to secure its aims is also because the public's perceptions of crime and sentencing are not always accurate or informed, and it relies significantly on information derived from reports published in mass media. According to Gelb, the mass media have 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 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 to fashion appropriate sentencing responses to particular offenders and offending situations.

Conclusion

16. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry being undertaken by the QSAC regarding penalties for assaults on public officers. The ALA

[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.

strongly submits that the QSAC should rule out any proposal that involves introducing a scheme for mandatory minimum sentences for the stated offences.

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