# The Australian Capital Territory Bar Association

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Standing Committee on Justice and Community Safety
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The Bar Association welcomes the opportunity to make submissions to the Standing Committee on Justice and Community Safety in its inquiry into sentencing in the Australian Capital Territory.

The Bar Association notes that the inquiry is wide ranging in its terms and the Association is enthusiastic about the opportunity to provide input into the Inquiry on an ongoing basis.

In respect of the terms of reference the following matters are raised as preliminary observations.

**Sentencing Practice in the ACT**

The Bar Association is generally supportive of an approach to sentencing that ensures that sentencing Courts have a wide range of sentencing options available so that the requirement under section 10 of the *Crimes (Sentencing) Act 2005* that imprisonment be used as sentence of last resort is given full effect.

The Bar is also conscious of the need for arrangements to be put in place to ensure that Judges and Magistrates are given a greater range of options other than remand in custody in respect of bail issues.

The Bar is also in favour of a form of sentence administration that ensures that rates of recidivism are reduced from their present high levels.

(a) Rates of Imprisonment and Recidivism

Like other stakeholders the Bar notes with concern the increasing rates of imprisonment in the ACT. The ACT Justice and Community Safety Directorate (JACS) Annual Report for 2012 and 2013 notes that more people are being imprisoned. The reasons for this need investigation given that overall crime statistics do not reflect a significant increase in crime levels. Concerning is the number of people being sentenced to longer terms of imprisonment. There is little evidence of more serious crimes becoming more prevalent and probably (if the ACT is the same as other jurisdictions) it does not accord with general community attitudes in relation to the increased use of imprisonment as a sentencing outcome. Therefore, this increase seems to reflect a change in sentencing practice. It is unclear why this has occurred given there has been no change to legislation that would warrant such an increase in the number and length of terms imposed.

Equally problematic is the number (again increasing) of prisoners serving terms of two years or less. In this context it is noted that the Average Daily Number of Periodic Detention Orders (Warrants) have actually decreased in the same period. Again this speaks of a shift in sentencing practice where "short sharp" sentences may be becoming more prevalent. There is little evidence that imprisonment acts as an effective deterrent to future criminal behavior. The increasing resort to short sentences is likely to have the effect of exposing a greater number of people to the prison environment who might otherwise be punished in other ways.

In respect of bail outcomes it is noted that the remand population at the AMC remains quite high and aboriginal accused (even more than the general prison population) are over-represented. This, in the view of the Bar, may reflect the lack of non-custodial options (which may still involve a degree of supervision) that are available in the context of bail determinations.

Recidivism rates remain high. In 2010 to 2011 some 46.64% of those in prison had returned with a new correctional sanction within 2 years. The rates were even higher for those subject to a non-custodial sanction. The Bar is aware that investigation has been undertaken in respect of the high rates of recidivism. The explanation given by JACS that the increase is due to a greater proportion of the released prisoners being subject to supervision orders is not a compelling one. Nor does it explain why it is that such a high proportion of offenders are re-offending. It is the view of the Bar that the Committee might more fully investigate whether post release programs (particularly but not limited to post release programs addressing drug and alcohol programs) are working effectively and are adequately funded.

Anecdotally, the suggestion is that the Courts have relied on the promise offered by the new initiatives for treating offenders with drug and alcohol problems in a custodial environment and that this may have (inadvertently perhaps) led to more accused people with drug and alcohol problems being sentenced to gaol or sentenced for longer periods. In particular the SOLARIS program has been held up as an effective means of treating those problems in a custodial setting. It is understood that the effectiveness of that program has been recently assessed and the outcomes of the SOLARIS program have been found to be quiet poor so far as they relate to issues of post release recidivism. The Bar invites the Committee to access data from that review with a view to determining whether the resources devoted to the SOLARIS program are best spent in the community. This should not be interpreted as a call for drug and alcohol services at the AMC to be cut back. Rather resources should be effectively targeted.

The Bar encourages the Committee to examine how the Transitional Release Centre at the AMC can be further utilized to facilitate the transition of prisoners to the community. The paid work release scheme is an important initiative. The Committee is encouraged to examine how the TRC and the paid release scheme might fit within a form of sentencing disposition referred to below.

A more systematic integration of privately funded rehabilitative facilities particularly in the drug and alcohol area needs to be undertaken. At the very least participation in these programs (particularly when they are residential programs) should be formally recognized in the *Crimes (Sentencing) Act 2005* as a matter relevant to sentence.

(b) Comparison with Other Jurisdictions

The Committee is urged to consider non-custodial sentencing options that are employed in other jurisdictions that might be used to cut back on the number of shorter sentences that are being imposed and/or to reduce the time actually spent in custody. For example, Intensive Corrections Orders of the type identified in section 7 of the *NSW Crimes (Sentencing Procedure) Act 1999*. That section applies to persons who have been sentenced to a term of imprisonment for 2 years or less. Whilst some elements of the intensive correction order regime are already present in the ACT, there are elements of that scheme that may provide the Courts here with greater sentencing options in respect of offenders liable to serve shorter periods of custody. This legislative initiative would tie in neatly with the comprehensive review of the case management framework for Community Corrections in the ACT that was undertaken in 2012. As noted in the JACS last Annual Report the review "recommends the development of an integrated and dynamic case management model incorporating *Throughcare* principles and proactive supervision." [1] The pilot *Throughcare Initiative* (which the Bar certainly supports) would also fit comfortably within this legislative model.

Certainly the Bar supports the position taken by the Attorney General to resist the steps taken in other jurisdictions to abolish or limit the use of suspended sentences. The

[1] JACS Annual Report 2013 pg 111

statistical evidence that is available suggests clearly, in the view of the Bar, that these sentences are effective in limiting the rate of recidivism.[2] The Bar would not support any recommendation or submission that would see this issue re-visited.

(c) Sentencing Council for the ACT

It would, in the submission of the Bar, be useful for an advisory body to be established in the ACT to provide ongoing and independent advice to the Government and the Assembly about sentencing matters. The establishment of a sentencing database has provided a means of providing meaningful statistical data about sentencing trends in the ACT. A sentencing council could provide the Assembly with commentary that amongst other things would provide that statistical material meaningful context and provide comparisons with sentencing practices and outcomes in other jurisdictions. Apart from secretariat support, such a body would not require the allocation of significant financial resources. The Bar would be willing to provide members to such a body on a voluntary basis.

(d) Sentence Appeals

There are aspects of the appeal process in the ACT that the Bar suggests invite attention. Sentence appeals from the Magistrates Court are too technical in their nature and are expensive and time consuming to prepare. At the moment, and at the risk of over-simplifying the matter somewhat, legal error must be shown for an appeal to succeed. This results in a process that is highly technical requiring the preparation of appeal books and the production of often lengthy submissions. Given their technical nature decisions are often reserved meaning that the resolution of appeals is delayed.

The Bar supports a shift to a process of Magistrates Court appeals more in keeping with the model adopted in NSW under the *Crimes (Appeal and Review) Act 2001*. In NSW sentence appeals are instituted by the filing of a notice of Appeal that defendants often

[2] For example Lorana Bartles: "The use of suspended sentences in Australia: Unsheathing the Sword of Damocles" (2007) 31 Crim LJ 113 at 113

file themselves. On appeal judges place themselves in the shoes of the original Magistrate. Although the opinion of the Magistrate is taken into account the justification for a different approach (whether to increase or decrease the sentence) is not predicated on there being a finding of error. The system is more conducive to ex-tempore decisions. Justice is delivered more quickly and in a much more cost effective manner. This system could apply to both defence and prosecution appeals. Whilst this reform may simplify the appeal process and make the avenue of appeal more accessible to the convicted, there is no indication that it would result in a net increase in the workload of the Supreme Court. The reform would improve accessibility to justice and improve judicial accountability.

(e) Timeliness Issues

The Bar in recent times has raised concerns about the delay in the delivery of judgments in the Supreme Court. An unusually high proportion of sentences in the Supreme Court are the subject of reserved decisions. The time taken to deliver those reserved decisions is also in some instances unusually long. Whether this is a matter that can be resolved by a recommendation of the Committee is unclear.

Consistent with the move toward more punitive outcomes being imposed in the Magistrates Court there is a tendency to obtain more and more pre-sentence reports (PSRs). Although difficult to quantify the anecdotal evidence is that this process of obtaining a PSR is delaying proceedings in the Magistrates Court and placing unreasonable burdens on ACT Corrective Services. Legislative amendment to section 41 of the *Crimes (Sentencing) Act 2005* to guide the exercise of the Court's discretion as to the ordering of a pre-sentence report may be necessary. This would require the Court to consider in a timely and more systematic way whether a full time custodial sentence is prima facie indicated on the material before it.

**The Practice and Effectiveness of Current Arrangements for Restorative Justice and Circle Sentencing**

(a) Circle Sentencing and Other Diversionary programs for Indigenous Offenders

The Galambany Circle Sentencing Court has been in operation since 2004 in the ACT Magistrates Court and since 2009 in the Childrens Court. The aim of the court is to "provide a culturally sensitive framework that gives recognition of the ongoing disadvantage experienced by many Aboriginal and Torres Strait Islander people in the criminal justice system."[3]
The number of referrals has increased (at least amongst adults). The process of referral provides a very important sentencing option for Magistrates who are dealing with indigenous offenders. The Bar supports the extension of the scheme to the Supreme Court.

The sentencing review is a timely opportunity for a review of the sentencing options available in respect of indigenous offenders. Mr. Anthony Hopkins of Counsel has made a detailed submission to the Committee in respect of the sentencing of indigenous offenders. The Bar commends that submission to the Committee.

(b) Restorative Justice

The ACT restorative justice scheme is governed by the *Crimes (Restorative Justice) Act 2004*. Phase one of the scheme , involves the referral of young offenders aged between10 and 17 years in relation to less serious offences. The scheme again is regarded as a very useful and important adjunct to the sentencing process. Certainly the number of referrals has increased. The Bar sees no reason for the scheme not to be extended in its operation beyond its present field of operation. In particular the Bar would support the program being applicable to domestic violence offences particularly when young offenders are involved. The declaration of the Phase 2 Application date should be notified as soon as practicable. See section 15 and 16 of that Act.

**Mental Health and the Criminal Law**

[3] JACS Annual Report 2013 pg 22

The role of mental illness in the commission of criminal offences is well established. The funding of a forensic mental health unit is an important initiative although the number of beds in that unit is unlikely to be adequate to meet demand.

A practical issue that causes great concern within the legal community is the process by which proceedings involving mentally ill offenders can be discontinued. At the moment the terms of section 334 of the *Crimes Act 1900* allows the Magistrates Court when hearing proceedings including indictable proceedings that are heard summarily involving someone who is mentally impaired to dismiss the charge and refer that person to ACAT for the making of a mental health order. At the moment in indictable proceedings that are being heard summarily the DPP is given the right of veto over such a dismissal. Its discretion to do so is not fettered by any stated consideration nor is it required to give reasons. This veto is not reflected in the comparable legislative schemes of other jurisdictions. Its existence owes more to personality considerations, that were present at the time of the enactment of this veto, than to sound policy. In fact the veto has no good policy justification.

The Bar would urge its removal. The Court is in the best place to give effect to the policy considerations of the mental health provisions that apply in criminal proceedings. The Court rather than a prosecuting agency best exercises the balancing of public interest considerations that is required. The DPP would retain the ability to put relevant evidence and submissions to the Court in relation to the exercise of the discretion.

**Other Relevant Matters**

The Bar would urge the Committee to consider a number of other Matters in its sentencing review.

(i)Time Frame for the Institution of Appeals

Following the decision of His Honour Justice Refshauge in *R v Meyboom [2012] ACTCA 2* the 28 day time frame for the instituting of appeals against conviction runs from the finding of guilt by a judge in a trial by judge alone (and by implication a jury in a jury trial). The implication for accused persons is that appeals must be lodged (with all the expense for litigants and the Courts that is involved) when the ultimate result normally would be only a sentence appeal. It had hitherto been assumed that the time frame for both sentence and conviction appeals ran from the date of sentence.

The practical consequences of the pre *Meyboom* position is that accused persons could take into account the sentence outcome in their case before deciding whether it was worth while trying to overturn a finding of guilt. As a result of His Honour's ruling a conviction appeal must be instituted usually even before the sentence has taken place. Not only is this position wasteful of resources it may involve an accused impugning the judge's conduct of a trial before the sentence takes place. That is a difficult proposition for accused persons who may by their appeal feel they may invoke the ire of the presiding judge.

(i) Taking into Account Matters on Sentence

(a) The Significance of Aboriginality

It is established law that an Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence: *Fernando.*

In *Bugmy v R [2013] HCA 37 (2 October 2013)* the High Court has recently affirmed that the deprived background of an aboriginal offender remains relevant to sentence even with the passage of time. As the Court found:

> It will be recalled that in the Court of Criminal Appeal the prosecution submitted that the evidence of the appellant's deprived background lost

> much of its force when viewed against the background of his previous offences. On the hearing of the appeal in this Court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.

The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

It is the Bar's view that the significance of Aboriginality to the process of sentencing should be made the subject of explicit legislative provision. Such an approach ensures that the *Bugmy* and *Fernando* principles are not the subject of derogation over time. It would also send a powerful message to the community at large and to the indigenous community in particular of the Assembly's mindfulness of the extent to which indigenous people are over represented in the ACT's prison population.

(b) Relevance of forfeiture of lawfully-acquired property.

The Bar notes that, currently, section 34(2) of the *Crimes (Sentencing) Act 2005* (ACT) places what is apparently an absolute prohibition on a sentencing court from having regard to the forfeiture of any property under the *Confiscation of Criminal Assets Act 2003* (ACT) or the making of a penalty order under that Act. The prohibition applies regardless of whether the property in question has been identified as "proceeds" of the relevant offence (i.e. derived from the offence), or alternatively merely as an "instrument" of the offence (i.e. used in or in connection with the commission of an offence but otherwise lawfully acquired).

This position is in contrast to the position at common law, where forfeiture of lawfully-acquired property generally has been regarded as a mitigating factor in sentencing.[4] The ACT position also contrasts with the legislative positions at federal level and in Victoria. For example, subsection 5(2A) of the *Sentencing Act 1991* (Vic) provides in effect that a sentencing court:

- Must not have regard to the forfeiture of the proceeds of an offence; but
- May have regard to the forfeiture of an instrument of an offence; and
- May have regard to pecuniary penalty order to the extent to which it relates to benefits in excess of profits derived from the commission of the offence.

See also section 320 of the *Proceeds of Crime Act 2002* (Cth), which also allows a sentencing court to have regard to cooperation of an offender in resolving forfeiture proceedings.

The Bar is of the view that the legislatures in Victoria and at federal level have adopted a considered and fair approach to sentencing in this context, and urges the ACT

[4] See the Victorian Court of Appeal in *R v McLeod* (2007) 16 VR 682 at [17] and cases there cited.

government, as a matter of fairness, to replace the current "blunt instrument" approach reflected by section 24(2) of the *Sentencing Act* with a similar legislative scheme.

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Dated this day of October 2013