

19 August 2013

Mr Steve Doszpot MLA
Chair, Standing Committee on Justice and Community Safety
ACT Parliament
GPO Box 1020
Canberra ACT 2601

 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
SUBMISSION NUMBER	1
DATE AUTH'D FOR PUBLICATION	11.09.13

Dear Mr Doszpot,

Re: Inquiry into sentencing in the Australian Capital Territory (ACT)

Thank you for the opportunity to provide this submission to the Standing Committee on Justice and Community Safety inquiry into sentencing in the ACT. I am an Assistant Professor in the School of Law and Justice at the University of Canberra, where I teach about the ACT criminal justice system. I am also a member of the ACT Law Reform Advisory Council (LRAC) and the ACT Law Society Criminal Law Committee. I have published extensively on Australian criminal justice issues and have written about sentencing in the ACT in the following publications (copies available on request):

- Christina Lewis, Anthony Hopkins and Lorana Bartels, 'Aboriginality in Sentencing: ACT Interview Findings', in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 37.
- Lorana Bartels, 'Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory', in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.
- Lorana Bartels, *Submission to the ACT Justice and Community Safety Directorate Review of Criminal Justice Statistics* (2013).

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- Lorana Bartels, 'Comment: New Criminal Laws for the ACT' (2013) 38 *Alternative Law Journal* 129.
- Lorana Bartels, 'Comment: A Sentencing Council for the ACT?' (2013) 38 *Alternative Law Journal* 55.
- Lorana Bartels and Simon Rice, 'Reviewing Reforms to the Law of Suspended Sentences in the Australian Capital Territory' (2012) 14 *Flinders Law Journal* 253.
- Lorana Bartels and Simon Rice, *A Report on Suspended Sentences in the ACT*, prepared for the ACT Law Reform Advisory Council (2010).
- Lorana Bartels and Simon Rice, *Discussion Paper: The Rate of Imposition of Suspended Sentences in the ACT*, Confidential report prepared for the ACT Law Reform Advisory Council (2010).
- Lorana Bartels and Simon Rice, *Evaluation of the Current ACT Regime for Suspended Sentences*, Confidential report prepared for the ACT Law Reform Advisory Council (2010).

Please find below my comments on the Inquiry's terms of reference.

1. Sentencing practice in the ACT, its effects and implications, including:

a) the law, legal doctrine and rationale of contemporary sentencing practice;

My key observation, first identified when I conducted a review of suspended sentences in the ACT on behalf of the LRAC, is that there is a dearth of jurisprudence on sentencing by ACT judicial officers. The Chair of the LRAC, Professor Simon Rice OAM and I noted:

Compared with the practice in some other jurisdictions (for example, NSW and Victoria), ACT judges seem more likely in their sentencing remarks to confine themselves to the facts of the case before them. A consequence of this is that only a limited body of jurisprudence on the imposition of suspended sentences under the 2005 reforms has developed, which has the potential to reduce sentencing consistency over time.¹

¹ Lorana Bartels and Simon Rice, 'Reviewing Reforms to the Law of Suspended sentences in the Australian Capital Territory' (2012) 14 *Flinders Law Journal* 253, 284.

I am currently conducting research on ACT sentencing practices for armed robbery cases and have again identified a paucity of analysis of legal doctrine and the rationale underpinning sentencing practices. This is unfortunate, as it prevents the development of a robust and comprehensive body of judicial analysis of sentencing principles and practice in the ACT. As noted above, it may also contribute to inconsistency in sentencing. Although judicial discretion and independence is very much to be valued – and I am mindful of the delays in delivering judgments and the negative implications this can have on the administration of justice – it may be time for the ACT judiciary to develop a culture which more extensively explores matters of doctrine in its judgments.

b) comparisons with other jurisdictions;

Statistics from the Australian Bureau of Statistics indicate not only that the ACT has the smallest number of prisoners of any jurisdiction (only 313 out of 29, 381 at 30 June 2012)², but also the lowest rate of imprisonment in Australia, at 107 per 100,000 population. The next closest is Victoria (at 112) and the national average is 168. This picture of apparent leniency, however, masks the reality that the ACT's only adult prison is already at capacity.³ In addition, the ACT's imprisonment rate has risen very sharply in recent years, increasing by 43 per cent between 2009 and 2012. By way of comparison, over the same period, the imprisonment rate declined nationally (by 4%), in NSW (by 16%), Queensland (by 5%) and Tasmania (by 11%)⁴. The ACT therefore appears to be part of an unfortunate, and somewhat atypical, upward trajectory. This is of particular significance, given that it is costlier to house a prisoner in the ACT than in any other jurisdiction (\$313 per day, against a national average of \$226).⁵ It should be noted, however, that the real net operating cost per prisoner has been declining since 2008-09 (when it was \$507 per day). It remains to be seen whether operating costs will continue to decline, and whether this can be managed without a decrease in appropriate programming or treatment for inmates.

It should also be noted that the ACT is the only jurisdiction in Australia that offers periodic detention as a sentencing option (after NSW abolished it in 2010 in favour of intensive

² Australian Bureau of Statistics (ABS), 'Prisoners in Australia' (Cat 4517.0, 2013).

³ Peter Jean, Larissa Nicholson and Michael Inman, 'Sentencing Inquiry as Jail Hits Capacity', *Canberra Times*, 8 May 2013 <http://www.canberratimes.com.au/act-news/sentencing-inquiry-as-jail-hits-capacity-20130507-2j67g.html>

⁴ Calculated from ABS, n 2.

⁵ Review of Government Service Provision, 'Report on Government Services 2013' (Productivity Commission) Table 8A.9.

correction orders). Although I am not in a position to comment on the effectiveness of the Symonston facility and the program it offers, it may be timely to consider whether periodic detention remains an appropriate sentencing option.

d) timeliness in handing-down decisions and sentences.

It has been well publicised that there have been lengthy delays within the ACT court system.⁶ Although much of the focus appears to have been on civil matters, the Victims of Crime Commissioner 'has spoken of the "serious adverse effects" [the delays] are having on victims', although it is not clear whether this pertains more to the trial stage than at sentencing. Obviously, it is in the interests of victims, defendants and the broader community for justice to be dispensed swiftly. One way of easing workload pressures on the court would be to review the decision to provide an additional judge. Other measures, such as the docketing system recently introduced in the Supreme Court, may assist in reducing delays; the experiences of other jurisdictions may also be instructive in this context. To the extent possible, any measures should take into account the desirability of judges providing comprehensive reasons for their sentencing outcomes, including statements of policy and principle, as appropriate (see 1(a) above).

2. Ways in which contemporary sentencing practice in the ACT affects other parts of the justice system, including:

a) the Courts;

The issue about workload and delays in delivering judgments has been noted above. Another point is that there has been little clear knowledge to date about what constitutes 'contemporary sentencing practice', given the paucity of available sentencing data. I have previously provided input to the JACS review of criminal justice data and have participated in an information session on the new ACT sentencing database. I welcome these developments and would strongly support these data (or some form thereof) being made available to the general public, as occurs with the Commonwealth Sentencing Database.⁷

⁶ Christopher Knaus, 'Call for Action on Legal Case Backlog', *Canberra Times*, 29 July 2013 <http://www.canberratimes.com.au/act-news/call-for-action-on-legal-case-backlog-20130728-2qt4m.html>

⁷ For discussion, see Lorana Bartels, 'Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory', in Patricia Eastaugh (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.

b) Corrective Services and the Alexander Maconochie Centre;

There have been repeated reports that services provided at the AMC are inadequate, especially for special groups, such as offenders with a mental illness⁸ and female offenders, with criticisms that women are being denied the opportunities male prisoners receive.⁹ There has also been concern expressed about the use of lockdowns at the AMC and the extent to which this is a breach of prisoners' human rights.¹⁰ There is also anecdotal evidence of violence and intimidation between inmates. Although these issues pertain more to correctional management than sentencing *per se*, they are clearly of relevance to the circumstances in which offenders serve their sentences.

In addition, offenders in the ACT who are sentenced to imprisonment are more likely than in any other jurisdiction to have previously been imprisoned (71%, against a national average of 55%¹¹). Although this may be linked with the ACT's comparatively lower rate of imprisonment (ie, more minor offenders are diverted to other sentencing options, leaving only the more serious offenders in the prison setting), this has clear implications in terms of corrections management. With almost three-quarters of prisoners having previously served time, there is an urgent need for effective prison programs that deal effectively with offenders' criminogenic factors. The need is particularly high for ACT women, 79 per cent of whom have previously been imprisoned, compared with a national average of 44 per cent.¹² This obviously compounds the issues outlined above and in submissions to the current inquiry by the ACT Human Rights Commissioner on the treatment of women prisoners.¹³

⁸ Christopher Knaus, 'Court Clash as Bid for Bail Fails', *Canberra Times*, 12 July 2013 <http://www.canberratimes.com.au/act-news/court-clash-as-bid-for-bail-fails-20130711-2ptge.html>. See also Louis Andrews, 'Mental Health Unit "Too Small, Too Late"', *Canberra Times*, 14 January 2013 <http://www.canberratimes.com.au/act-news/mental-health-unit-too-small-too-late-20130113-2cnuy.html#ixzz2bjZPnqlc>

⁹ Rachel Stokker, 'Women in Jail 'Denied Opportunities'', *Canberra Times*, 24 June 2013 <http://www.canberratimes.com.au/act-news/women-in-jail-denied-opportunities-20130623-2oqvg.html>

¹⁰ Christopher Knaus, 'Concern Inmates' Rights Breached', *Canberra Times*, 27 May 2013 <http://www.canberratimes.com.au/act-news/concern-inmates-rights-breached-20130526-2n5mh.html>

¹¹ ABS, n 2.

¹² Ibid.

¹³ For further information on the human rights audit and review of the treatment of women at the AMC and the submissions to the review, see http://www.hrc.act.gov.au/news.php/article/art_id/55

e) victims of crime; and

As discussed above, the ACT Victims of Crime Commissioner, John Hinchey, has criticised delays in the court process for their impacts on victims of crime. John Hinchey and I will be working together in the coming three years on research about the opinions of jurors in sexual assault cases on sentencing.¹⁴ Part of this research will focus on victims' views and will provide important insight into ACT sentencing issues.

3. The practice and effectiveness of current arrangements in the ACT for:

a) parole;

The issue of parole and the role of parole authorities such as the Sentence Administration Board (SAB) has recently been the subject of controversy, following the revelation that Adrian Bayley, who killed Jill Meagher, was on parole at the time of that offence. The Victorian Government appointed former High Court judge Ian Callinan to conduct a review of Victoria's parole processes. NSW is also currently reviewing its parole processes, with two separate reviews by the NSW Law Reform Commission and Justice James Wood.¹⁵

In my view, the following are the key issues of significance in relation to parole in the ACT:

- Unlike some other jurisdictions (NSW, Victoria, South Australia, Western Australia and the Northern Territory), the SAB is not required to consider the nature or circumstances of the offence(s) committed by the offender seeking parole;
- The parole conditions that can be set are more prescriptive than most jurisdictions, which may set offenders up to fail. There also appears to be some duplication, with the option of separate conditions that the offender not 'leave the ACT for longer than 1 day without the prior written permission of the director-general [of the Justice and Community Safety Directorate]'¹⁶ or 'leave Australia without the [Sentence Administration] Board's prior written permission'.¹⁷ It is arguably redundant to have a separate rule for international travel and two separate levels of authority, and would be simpler to merge these rules to require the approval of either authority for all interjurisdictional travel exceeding one day.

¹⁴ This project has received funding from the Australian Research Council and has the support of the ACT Attorney-General and outgoing Chief Justice Terrence Higgins.

¹⁵ For discussion, see Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis?', *Criminal Law Journal* (forthcoming).

¹⁶ Crimes (Sentence Administration) Regulation 2006 (ACT) r 4(e).

¹⁷ Crimes (Sentence Administration) Regulation 2006 (ACT) r 4(g).

- There is no publicly available guidance as to how the SAB decides parole revocations, as it the Board may cancel a parole order simply if it decides that parole 'is, or would be, no longer suitable for the offender'.¹⁸ By contrast, some other jurisdictions set out the circumstances in which parole can be revoked. For example, in NSW, the State Parole Authority may revoke a parole order:
 - if it is satisfied that the offender has failed to comply with his/her obligations under the order;
 - for an offender granted parole on the grounds that s/he is in imminent danger of dying or is incapacitated to the extent that s/he no longer has the physical ability to do harm to any person, if it is satisfied that those grounds no longer exist;
 - if the offender fails to appear before the SPA when called on to do so; or
 - if the offender has applied to have the order revoked.¹⁹

It may promote confidence in the administration of justice for the SAB to make the factors it takes into account in determining parole revocations.

- In addition, the data published in the JACS annual report do not provide any indication of the proportion of parole orders that are completed successfully, or the bases for cancellation (ie, by commission of a new offence or due to breach of conditions). By contrast, the annual report of the Victorian Adult Parole Board includes information on:
 - The numbers of parole orders cancelled due to reoffending and breach of conditions;
 - The time when orders were breached (ie, within three months of release, after 3-6 months, etc);
 - How breaches which did not result in revocation were resolved (eg, by way of warning); and
 - The number of prisoners in custody and eligible for parole.

It may therefore be timely to consider improving the amount of information reported by the SAB.

- A separate, but linked, issue is whether the SAB's reasons for their decisions should be made public. This is currently the subject of inquiry in NSW and Victoria. A 2005 review of the Western Australian management of offenders by retired judge Dennis Mahoney²⁰ recommended improving '[c]ommunication with the public to improve understanding of its

¹⁸ *Crimes (Sentence Administration) Act 2005* (ACT) ss 156(1)(e), (3).

¹⁹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 170.

²⁰ The Hon Dennis Mahoney, *Inquiry into the Management of Offenders in Custody and in the Community* (2005).

functions'. As a consequence, the Prisoners Review Board of Western Australia publishes its decisions where the Chair considers it in the public interest to do so.²¹ The Parole Board of Tasmania also publishes its decisions on its website. In the interests of promoting better understanding of parole and the processes whereby it is granted (or refused), it may be beneficial to expand the sort of information the SAB makes available to the public, and ensure it is appropriately resourced to provide it. Doing so may promote a greater public understanding of what parole authorities do – and the reasons why they do so, which may also increase confidence in this aspect of the administration of justice.

c) bail;

As at March 2013, 33 per cent of ACT offenders in full-time custody were on remand.²² By way of comparison, the national rate was 24 per cent. A particular issue noted by highly regarded criminologist David Biles is that female remandees and sentenced prisoners are housed together at the AMC. Biles suggests that this is in breach of international human rights conventions requiring untried prisoners to be kept separate from convicted prisoners and that '[t]he ACT must be unique in Australia in its disregard for this rule'.²³

e) Circle Sentencing.

According to the March 2013 criminal justice statistics published by JACS, there were 28 adults and seven young people referred to the circle sentencing court in the 2012-13 financial year to March 2013.²⁴ There were 22 and five people respectively assessed and 18 and two people sentenced. Unfortunately, there is no further information available about the operation of the Court, for example, the types of offences committed, the gender of participants, and their reoffending patterns. I note the Galambany Court Practice Directions implemented in August 2012 which include a presumption that all Indigenous offenders be assessed for the program if they so choose and are not otherwise excluded.²⁵ This is a welcome development, with previous

²¹ Prisoners Review Board of Western Australia, *Annual Report 2011-12* (2012) 3.

²² ABS, 'Corrective Services, Australia' (Cat 4512.0, March Quarter, 2013).

²³ David Biles, 'No Escaping Problems at Jail', *Canberra Times*, 8 February 2013

<http://www.canberratimes.com.au/federal-politics/no-escaping-problems-at-jail-20130207-2e1bo.html>

²⁴ ACT Government Justice and Community Safety, *ACT Criminal Justice Statistical Profile* (March 2013).

²⁵ Magistrates Court of the Australian Capital Territory, *Galambany Court*, Practice Direction No 1 2012 http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice_Direction_1_of_2012_Galambany_Court.pdf

research with Aboriginal Legal Service lawyers indicating support for increased access to and use of circle sentencing for Indigenous offenders.²⁶

There remains a need, however, for appropriate programs for participants in the circle sentencing process and the Indigenous offender population more generally. Earlier this year, the Chief Justice described the Indigenous imprisonment rate in the ACT as 'appalling', and called for 'more service[s] for young people particularly at the point before they get into trouble with the criminal law. Having more young people who can relate to Aboriginal people and engage them is really necessary'.²⁷ In an attempt to remedy this, earlier this year, I was part of a team at the University of Canberra, together with the Deputy Vice-Chancellor (Education) and two Elders on the Galambany Circle Court, Wayne Applebee and Paul Collis, who sought funding from the Commonwealth Attorney-General's Department Indigenous Justice Program to develop Circuit Breaker, a mentoring program for young offenders referred to Galambany. The program was designed to divert and then to change offending behaviours by investing in Indigenous cultural laws and traditional cultural ways of behaviour. Due to the large number of applications, our funding application was ultimately unsuccessful, but the project has the support of Justice Refshauge; Peter Dingwall, who presided over Galambany at the time; the Victims of Crime Commissioner; the Director of Public Prosecutions; Relationships Australia; and the NSW/ACT Aboriginal Legal Service. We are currently seeking alternative sources of funding and would be happy to work with the ACT Government on developing and evaluating a program of this nature.

4. Alternative approaches to sentencing practice in the ACT.

There has been significant support for justice reinvestment in the ACT.²⁸ As part of its 2012 election policies, the ACT Government committed \$660,000 over four years towards research

²⁶ Christina Lewis, Anthony Hopkins and Lorana Bartels, 'Aboriginality in Sentencing: ACT Interview Findings', in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013).

²⁷ Ewa Kretowicz, 'Indigenous Jail Rate "Appalling"', *Canberra Times*, 13 January 2013 <http://www.canberratimes.com.au/act-news/indigenous-jail-rate-appalling-20130112-2cmzf.html>

²⁸ See eg Jill Guthrie, Fleur Adcock and Phyll Dance, 'Exploring the Feasibility of Justice Reinvestment in the Australian Capital Territory' (AIATSIS Workshop Report, November 2010) <http://www.aiatsis.gov.au/research/people/documents/FinalJRWorkshopReport.pdf>; Alcohol Tobacco and Other Drug Association (ATODA), the ACT Council of Social Service (ACTCOSS) and the Mental Health Community Coalition ACT (MHCC ACT), 'Joint Submission on the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia' (March 2013).

on justice reinvestment.²⁹ This is to be applauded. In its submission to the Senate inquiry on justice reinvestment, the Alcohol Tobacco and Other Drug Association (ATODA), the ACT Council of Social Service (ACTCOSS) and the Mental Health Community Coalition ACT (MHCC ACT) noted that the AMC being at capacity means

decisions need to be made to either reduce the prison population or to invest in the building of new facilities to cater for an increase in the prison population.

Consequently, the ACT is in a prime position to benefit from initiatives that help to reduce prison populations. Justice reinvestment may provide an opportunity to reduce future growth in prison expenditure by removing the need to build new facilities.³⁰

However, it was also noted that challenges exist for a small jurisdiction like the ACT to employ justice reinvestment strategies. In spite of this, ATODA, ACTCOSS and MHCC ACT recommended that the ACT be included in any justice reinvestment preparatory research and scoping exercises and any subsequent pilot programs. It was recommended that a justice reinvestment design build on the following measures:

- Analysis of the strengths and weaknesses of current criminal justice systems (though noting full reviews are not required prior to beginning a justice reinvestment initiative);
- Police, Court and Corrections training and support;
- Comprehensive community and work order programs;
- Effective and comprehensive diversion programs;
- Targeted courts (eg. Aboriginal and Torres Strait Islander, mental health and drug and alcohol; families);
- Effective community based and short (e.g weekend) detention;
- Diversion of first time offenders from the criminal justice system;
- Strengthened parole systems;
- Comprehensive infringement scheme reforms;
- Effective and accessible treatment systems;
- Comprehensive and ongoing throughcare systems and programs;
- Access to targeted legal services (e.g. alcohol and other drug, prison); and

²⁹ Katy Gallagher MLA, 'ACT Labor's Plan for a Fair, Just and Equitable Society', 8 October 2012 http://www.actlabor.org.au/images/stories/03_Justice_and_law_reform.pdf

³⁰ ATODA, ACTCOSS and MHCC ACT, n 28, 5.

- Appropriate screening and assessment for cognitive and other disabilities that cause offending behaviour.³¹

In June 2013, the Senate Legal and Constitutional Affairs Committee delivered its report on justice reinvestment in which it made a number of recommendations in support of justice reinvestment. The Committee noted that the ACT had the highest national rate of return to corrective services (56%) and '72 per cent of inmates in the ACT [compared with 61% in NSW] stated that their current imprisonment was due to being intoxicated while offending, showing the direct link between alcohol and drug use and involvement in the justice system'.³² In my view, it is vital that the ACT take an active role in promoting justice reinvestment approaches as a means of reducing offending and reoffending and ensuring effective use of public resources.

I also note the Government's commitment to the Ngunnawal Bush Healing Farm, which will reportedly 'offer holistic care for ACT Aboriginal and Torres Strait Islander peoples requiring alcohol and other drug rehabilitation and will focus on "cultural healing" – reconnecting Aboriginal and Torres Strait Islander people to land and culture'.³³ This initiative is to be welcomed, although there have been criticisms of the lack of progress on the project³⁴ and there is limited information about it on the ACT Government's websites.

5. Any other relevant matter.

I have written previously about the need for a dedicated sentencing council in the ACT.³⁵ Such councils are in place in the majority of Australian jurisdictions and have a critical role to play as a bridge between the criminal justice system and the community. In the lead-up to the 2008 ACT election, the then Stanhope Government committed to spending \$633,000 to create a sentencing council to gather evidence on sentencing and make recommendations to the government, but has failed to deliver on this. The ACT public not only deserves accessible sentencing data, but also a council which can disseminate and contextualise this information.

³¹ Ibid 9.

³² Senate Legal and Constitutional Affairs Committee, 'Value of a Justice Reinvestment Approach to Criminal Justice in Australia' (June 2013) [4.37].

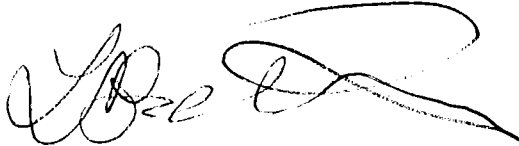
³³ Katy Gallagher MLA, cited in 'Bush Healing Farm Plans to be Made Public', *City News*, 25 May 2012 <http://citynews.com.au/2012/bush-healing-farm-plans-to-be-made-public/>

³⁴ Scott Bridges, 'Aboriginal Health a "Political Football"', *Crikey News*, 10 October 2012 <http://blogs.crikey.com.au/next-act/2012/10/10/aboriginal-health-a-political-football/>

³⁵ Bartels, n 7; Lorana Bartels, 'Comment: A Sentencing Council for the ACT?' (2013) 38 *Alternative Law Journal* 55.

I hope these comments are of assistance. I am happy to expand on anything in this submission as required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'L Bartels', with a large, sweeping flourish extending to the right.

Dr Lorana Bartels