

actlaw society



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Standing Committee on Justice and Community Safety Inquiry into Sentencing in the ACT

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1. Introduction

1. The Society appreciates the opportunity to provide this submission to the Standing Committee on Justice and Community Safety's Inquiry into sentencing in the ACT.
2. The Society has set out specific comments below in response to the Inquiry's terms of reference. The Society would like to make further comments in relation to other issues set out in the terms of reference if invited to do so at a public hearing.

2. Appeals

3. The Society considers that the appeals procedure in the ACT should be a primary focus of this Inquiry.

(i) The nature of the appeal process as it relates to superior court consideration of sentencing within the Magistrates Court

4. At present the ACT approach to such appeals is a highly technical one, in sharp contrast to the mechanism utilised in the NSW District Court. This has the potential to not only divert concentration from the substantive merits of a case, but to cause the court to engage in a resource intensive and time consuming analysis of the lower court decision on the basis of its technical merits.
5. The sentence appeal process in relation to appeals from the NSW Local Court to the NSW District Court, in accordance with Part 3 of the *Crimes (Appeal and Review) Act 2001 (NSW)*, tends to function far more efficiently than the current process in the Territory.
6. Appeals are initiated in NSW by completing a very simple Notice of Appeal. Self-represented parties would have little difficulty in completing and lodging a Notice of Appeal themselves. The Territory equivalent requires the appellant to enunciate the grounds of the appeal in far more detail. Sentence appeals in the Territory usually require the appellant to establish an error in the sentence imposed in the Court below.
7. Unlike the Territory, sentence appeals in NSW are conducted on a *de novo* basis. That is the appeal judge is placed in the position of the sentencing Magistrate and determines the appropriate sentence based on the same evidence. There is no requirement for the appellant to show an error in the original sentence, thus removing the requirement for the appellant judge to dissect the original proceedings. This puts in place a complex and resource intensive process, in contrast to the relatively simple *de novo* sentencing process.
8. While it could be argued that a change in the Territory approach would lead to more sentence appeals being lodged, the time required to consider an appeal on a *de novo* basis should be substantially less. The NSW District Court, particularly on regional circuits, sets

an impressive example for efficiently determining a relatively large number of appeals in a short time frame.

9. The Territory procedure has recently been improved with the abolition of the need for the appellant to prepare the Appeal Book in sentence appeals. As in NSW, the lower Court provides the appellant Court with the relevant documents considered by the sentencing Magistrate. Appellants in the Territory are, however, still required to obtain and file a transcript of the proceedings from the Court below. It would be preferable if these were provided by the Court.
10. Also, the current docket system does not encompass efficient case management principles in relation to sentence appeals, with multiple court appearances before the appeal is considered. This usually results in increased costs to the appellant. In NSW, sentence appeals are often determined on the first or second date the matter is before the Court.
11. The Territory should give due consideration to adopting the NSW approach to sentence appeals in their entirety.

(ii) Timing of Appeals

12. The Society wishes to address the potential problem in relation to timing of appeals as a result of the following paragraph in *The Queen v Craig Paul Meyboom* [2012] ACTCA 2:

“It seems to me that the finding of guilt by a judge in a trial by judge alone must entail not only the verdict but also the acceptance of the verdict by the Court and thus the conviction. This is reinforced by the fact that on 4 February 2011, the Court adjourned the proceedings for the purpose of hearing submissions on sentence.” Refshauge J at [30]

13. The result of this finding by Refshauge J is that many defendants are forced to lodge conviction appeals before their sentence. It is a significant problem related to sentencing as contrition is a matter to be taken into account (appealing shows very little). However, if they do not appeal before sentence the opportunity will be lost in circumstances when the appeal window is 28 days (time to lodge appeal) but most sentences involving pre-sentence reports do not occur for 6-8 weeks to allow those reports to be completed. This also means that appeals are lodged for conviction when, if the matter had finalised to sentence before the appeal period expired, there may have been no appeal lodged at all.
14. This is compounded as the increased result on sentence that becomes likely may in fact solidify an appeal, while if a lesser penalty had been imposed (without reference to lack of contrition) an appeal may have been avoided.
15. The Society suggests that legislation be enacted specifying that appeals are to be lodged within 28 days of the date of sentence.

3. Circle Sentencing

16. Circle sentencing is a "diversionary" initiative focused on reducing rates of incarceration of Australian and Torres Strait Islander (ATSI) people by involving respected members of the ATSI community in the sentencing process.
17. A typical sentencing outcome is that the ATSI community members involved in the sentencing process recommend that a defendant/participant enter into some form of conditional liberty in the form of a bond. Rehabilitation of a participant is considered of high importance.
18. There is a need for the supervision under these bonds to be administered or supervised by ATSI people, as there is for input into the formal sentencing process. The established structure of the corrective services program does not allow for the flexibility of approach that is a fundamental characteristic of the circle sentencing program.
19. Another recurring theme in circle sentencing reviews that have been completed is the role that victims should play within the process. At this stage there has been nothing formalised on this question. There is a need for further thought as to how to quantify the weight that should be given to the therapeutic or restorative nature of the circle process where the perpetrator is required to "face" his/her victim or community and account for themselves.
20. It is suggested that the application of existing legislation and sentencing law in reviewing outcomes is inadequate when applied to a court based diversionary program administered in part by community members with no legal training. Consideration could be given to legislative acknowledgement of the unique nature of circle sentencing, if only to protect the flexibility of approach that distinguishes the circle court from traditional sentencing courts.

4. Restorative Justice

21. Restorative Justice appears to work well in the Territory, especially for those young people who are unlikely to be before the Court on more than one occasion.
22. It is disappointing (and surprising) that restorative justice remains unavailable for domestic violence offences (see section 15 and 16 of the *Crimes (Restorative Justice) Act 2004 (ACT)*). It is unclear why the Phase 2 Application date has not yet been declared by the Minister.
23. Most domestic violence offences in which a young person is the defendant involve an offence of violence towards a parent or sibling or damaging property belonging to a family member. While it may make sense that restorative justice is not appropriate in domestic violence matters involving serious assaults on a domestic partner, that issue should be left for the determination of the Magistrate and the Director-General in accordance with the act.

5. Inadequacies in the post sentencing rehabilitation facilities

24. The Territory has the highest rate of re-imprisoned offenders within Australia. Anecdotal reports have indicated a dearth of facilities made available to prisoners, in particular directed to education and qualification which may bear upon this rate of recidivism.
25. In considering the proper functioning of sentencing within the Territory, it is necessary to consider the practical effects of imprisonment (and extended periods of remand in cases of the delayed hearing of cases). The Society is concerned that a lack of implementation of rehabilitative strategies in the prison context undermines effective sentencing within the Territory.

6. Changing sentencing patterns

26. The Society is concerned with the recent upward trajectory in the rate of imprisonment. Imprisonment is the sentence of last resort and significant changes to the rate of imprisonment are properly a matter for the consideration of the Standing Committee.
27. The question to be answered is whether the rate reflects an underlying shift in the sentencing jurisprudence of the Territory, or whether it is fuelled by other factors. Connected to this question are issues relating to the efficacy of imprisonment in protecting the community. The Territory should review the conventional wisdom that imprisonment is the sentence of last resort, only to be imposed where there is no other option.

7. The place of mental health considerations in sentencing

28. Mental factors in the commission of criminal offences are prevalent. Such a pattern is deeply entrenched in the sentencing history of the Territory. For the Standing Committee's consideration the Society raises the related questions of whether, as a matter of principle, mentally ill offenders are being dealt with appropriately and whether proper facilities are available to allow this to occur.
29. The Committee is invited to examine, longitudinally, the effect of the criminal justice system in dealing with mentally ill offenders. To what extent do the current facilities, mechanisms and legislation produce improved humane outcomes in comparison with previous approaches?
30. Further, the Society raises for consideration the question of whether it is appropriate that the Director of Public Prosecutions holds a power of veto in respect of certain court referrals for treatment in lieu of criminal proceedings continuing.