GWD;dgr

12 October 2015

The Hon Alan Wilson S.C.
Chairperson
Taskforce on Organised Crime Legislation
Department of Justice and Attorney-General
GPO Box 149
Brisbane Qld 4001

Dear Mr Wilson

Re: Inquiry Area 9 – The proposal for a new 'serious organised crime offence'

Introduction

This proposal refers to paragraph 7 of the Terms of Reference, which states:

Note the Queensland Government's intention that the new 'serious organised crime' offence will carry a maximum penalty of life imprisonment and any person convicted of this offence would serve a mandatory minimum non-parole period of 80% of their 'term of imprisonment' or 15 years imprisonment, whichever is the greater.

For the purpose of response to this area, it has been taken that the comment sought is with respect to the intended penalty. The Bar Association of Queensland ("the Association") is awaiting some confirmation as to whether the offence itself has been drafted.

In previous submissions the Association has identified its opposition to mandatory sentencing. Those submissions remain relevant for consideration pursuant to this area of inquiry.

The Law Council of Australia has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles[1]. The maintenance of discretion to

[1] See the Policy Discussion Paper on Mandatory Sentencing, May 2014 for a comprehensive review of the issues arising in mandatory sentencing – link: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf.

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properly tailor sentences to the circumstances of the commission of the particular crime is critical to a system of justice.

Further comment

There are two reasons usually cited for seeking to impose harsh minimum sentences for specific categories of offending: deterrence and incapacitation. There have been numerous studies on the aspect of deterrence through harsh minimum sentences. The general findings may be summarised by reference to the following passage:

... we know of no reputable criminologist who has looked carefully at the overall body of research literature on "deterrence through sentencing" who believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts.[2]

In Australia, a comprehensive article examining mandatory sentencing in people smuggling cases noted that there was little evidence supporting the sentencing regime as having a deterrent effect[3], as distinct from deterrence achieved by the political position that those smuggled on these boats would not be resettled in Australia. The observations made in that article on the impact of a mandatory sentencing regime are, in the view of the Association, relevant across all types of criminal offending. The article reinforces the general concerns that have been expressed regarding mandatory minimum sentencing regimes with practical demonstrations.

Most of the research on mandatory sentencing also confirms the significant costs involved, in that they increase periods of incarceration and are more likely to result in matters proceeding to trial (increasing cost through the Court system) as there is no power in the Court to mitigate sentences.

The latter point was of significant relevance in demonstrating the effect on the Court system of mandatory sentencing in people smuggling prosecutions. Depending on the charge that was preferred, circumstances of aggravation increased the mandatory minimum sentence that had to be imposed. One consequence was that many of those matters proceeded to trial notwithstanding the strength of the evidence, at greater cost to the State.

In order to circumvent that cost, the Commonwealth Director of Public Prosecutions determined not to charge the more serious circumstance of aggravation even where the factual circumstances of the offending arguably supported charging in that manner, for those offenders who were clearly subordinate in the offending and where the charging of a more serious offence requiring a higher mandatory sentence

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[2] Centre for Criminology & Sociolegal Studies, University of Toronto "Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation", 14 February 2014.

[3] "Mandatory Sentencing for People Smuggling" Melbourne University Law Review Vol 36:553 2012.

would have been iniquitous. One consequence was to significantly reduce the number of matters that proceeded to trial.

In its paper, the Victorian Sentencing Advisory Council predicted that such outcomes were likely. It further noted that then current research indicated mandatory sentencing was unlikely to achieve the generally stated aims (regarding deterrence and consistency in sentencing) and considered that the costs of such a regime weighed strongly against it even were it to achieve some of its central aims[4].

Another matter of significance is that such a regime reduces the likelihood of offenders being willing to provide direct and real cooperation to law enforcement agencies as recognised by ss.13A and 13B of the *Penalties and Sentences Act*. Since the enactment of those sections, offenders have provided assistance to law enforcement agencies allowing for the successful prosecution of other serious offenders. In addition, information provided, on occasion, has allowed identification of offenders that were unlikely to have been identified through normal law enforcement investigations.

Excluding these provisions from operation for offenders charged with a 'serious organised crime' offence renders cooperation from such offenders unlikely. That in itself is self-defeating, if the object is to disrupt or restrict organised crime.

Briefly turning to the concept of the proposed offence, the Association remains puzzled as to what, if any, benefit might be sought to be obtained from creation of the suggested offence. The problem with organised crime is that it frequently involves the commission of serious crimes such as murder, abduction, torture and drug production and trafficking. Serious offences of that kind carry onerous penalties. That the offence was carried out as part of an organisation is a matter of aggravation that the courts can take into account in the sentencing process. For example, drug trafficking will frequently carry, on a plea of guilty, a sentence of 12 years imprisonment or above of which 80% must be served in prison. If such a penalty fails to deter many would be drug traffickers, it is unlikely that the new offence, even with its mandatory punishment, would achieve a different effect.

(Certainly, as suggested above, such an offence would achieve many more very long trials in the superior courts of Queensland eating up resources that could be used in crime prevention and specialised sentencing courts like those dealing with Indigenous, intellectually disadvantaged and mentally ill offenders.)

A person at a high level in a criminal organisation may be properly charged, under the parties provisions of the *Criminal Code*, with offences committed by her minions.

It is difficult to avoid the conclusion, in the Association's opinion, that suggestions of a new crime, or of more severe and mandatory penalties, are made as simplistic

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[4] See "Mandatory Sentencing" 2008 – link https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Mandatory%20Sentencing%20Sentencing%20Matters%20Research%20Paper.pdf

solutions to the complicated problems of investigating crime and obtaining evidence that can convince juries that particular individuals have committed the plethora of crimes for which provision is made in our criminal statutes.

If, in fact, there is evidence available that the involvement of some criminal actors in anti-social activity is not properly reflected in the existing provisions of the criminal law, that evidence should be collected, and published in a way that policy makers can use and understand, by independent research. Again, the Association urges the creation of an independent research body that would allow and assist evidence based law making. The Association repeats the suggestion of a BOCSAR type body for Queensland.[5]

Conclusion

In 1999, an Australian Institute of Criminology paper summarised research on mandatory sentencing as follows[6]:

Mandatory sentencing is claimed to prevent crime, introduce certainty and consistency into a criminal justice system lacking in those qualities, and reflect community condemnation of crime. Available evidence suggests that mandatory sentencing can deliver modest, but expensive crime prevention ... The deterrence-based assumptions of mandatory sentencing are also questionable. Mandatory sentencing does not deliver the consistency it promises. In short, critics of mandatory sentencing argue that it is a crude policy resting on crude assumptions about how crime is prevented, what the public want, and what legislation can deliver.

The imposition of such a minimum mandatory sentence regime that excludes judicial discretion is strongly opposed.

Thank you for your consideration of this submission.

Yours faithfully

Geoffrey Diehm QC
Vice President

[5] http://www.bocsar.nsw.gov.au/

[6] No 138 Mandatory Sentencing by Declan Roche – link http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi138.pdf