CRIMINAL SENTENCING IN THE ACT – THE NEED FOR EVIDENCE

SHANE RATTENBURY*

Sentencing in the ACT has recently been the focus of attention for the three political parties in the ACT Legislative Assembly. A number of bills have been prepared by the Government and the Canberra Liberals to increase maximum sentences for certain crimes. As the ACT Greens Attorney Generals spokesperson, I have advocated for a different approach which involves gathering evidence on the effectiveness of current sentences before considering raising penalties.

As a practical suggestion of how to implement such an approach, I drafted the Greens own bill on sentencing. It proposed to create a review of sentencing in the ACT to gauge how well current sentences are meeting the purposes of the *Crimes (Sentencing) Act 2005.* ("the Act"). I recently brought my bill on for debate in the Assembly but was unable to secure the support of either the Government or the Canberra Liberals. Nevertheless, I continue to advocate that a review of sentencing would be beneficial to the ACT and that this needs to occur before any further amendments are made to sentencing law. Before turning to the need for a review of the Act, it is of course important to understand the history of the Act itself.

I THE CREATION OF THE *CRIMES (SENTENCING) ACT 2005* (ACT) ('THE ACT)

Prior to 2002 there were twelve or more separate pieces of legislation in operation that governed sentencing law and procedures in the ACT. To improve this situation, the ACT Government established a Sentencing Review in 2002 which reported in 2004.

The Government determined that the 2002 Sentencing Review would:

(a) consider extending the use of diversionary/restorative justice programs and other non–custodial sentencing options in the ACT;

(b) assess the sentencing options/programs available for offenders who are chronically sick or elderly, have a disability, personality disorder or substance

* MLA, ACT Greens Attorney General spokesperson

abuse problem, are indigenous Australians, young persons, women, mentally ill and/or persons whose first language is not English; and

(c) in light of the results of (a) and (b) above, make recommendations about the consolidation of the legislation governing sentencing in the ACT, including legislative amendments to rectify identified difficulties and defects in ACT sentencing legislation.[1]

The Sentencing Review ran for two years and the result was the enactment of the Act and the *Crimes (Sentence Administration) Act 2005*.

When tabling the bill to create the Act the then Attorney General, Jon Stanhope, identified the key aspects of the proposed Act to be: consolidating the diverse range of ACT sentencing law into the one Act; harmonising language, concepts and procedures; the introduction of the concept of combination sentences and removal of old restrictions on combining penalties for individual convictions; the clarification of the ability for periodic detention to be available as part-time imprisonment; the creation of good behaviour orders; the creation of two new preventive tools for the courts in non-association orders and place restriction orders; increased scope of presentence reports to enable the court to select the topics of assessment, as needed; and, an expanded availability of victim impact statements.[2]

Seen in this context, the 2002 Sentencing Review was a valuable exercise in consolidating existing law and establishing new tools for sentencing judges to utilise.

However, the 2002 review was not asked to look closely at how well the sentences that were being imposed were meeting the purposes of sentencing. While part of the review included a survey of Magistrates to determine the key factors that were used to determine whether a custodial or non custodial sentence was most appropriate, the review did not measure or analyse the *effect* of those sentences being imposed.[3]

II PURPOSES OF SENTENCING

One aspect of ACT sentencing law that was not amended significantly during the review was the stated purposes for which a judicial officer could impose a sentence. The new section 7 of the Act essentially replicated the pre-existing purposes that were outlined in Part 12 of the *Crimes Act 1900* (ACT).

[1] ACT Government Issues Paper, *Sentencing Review*, September 2002, 1.
[2] ACT Legislative Assembly Hansard 7th April 2005 <http://www.hansard.act.gov.au/hansard/2005/pdfs/20050407.pdf>
[3] Sentencing Review Issues Paper tabling statement to ACT Legislative Assembly, September 2002

Section 7 of the Act states that:

(1) A court may impose a sentence on an offender for 1 or more of the following purposes:

(a) to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
(b) to prevent crime by deterring the offender and other people from committing the same or similar offences;
(c) to protect the community from the offender;
(d) to promote the rehabilitation of the offender;
(e) to make the offender accountable for his or her actions;
(f) to denounce the conduct of the offender;
(g) to recognise the harm done to the victim of the crime and the community.[4]

Importantly, a single primary or overriding purpose is not listed in section 7. This reflects a long running debate surrounding the true purposes of sentencing.[5] Whereas the predominant theory in the 19th century was one of punishment to achieve retribution and deterrence, this was challenged in the 20th century by the aim of rehabilitating the offender. This was again challenged in the late 20th century by a return of retribution under the phrase 'just deserts'. In more recent decades this has again been challenged by newer theories that focus on achieving restoration for the victim and ensuring offenders understand the consequences of their actions.

This long running discussion has left courts around Australia with a plethora of stated purposes for which they may impose a sentence. This was acknowledged in the High Court by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen*:[6]

> Sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from the unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution, and reform. The purposes overlap and none can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to appropriate sentence but sometimes they point in different directions.

Regardless of the historical context to section 7 or at times, the difficult task it sets for sentencing judges, it does form the cornerstone for the entire Act and the way in which sentences are determined. Using the language of the High Court, section 7 provides the "guideposts" to finding an appropriate sentence.

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[4] *Crimes Act 1900* (ACT).
[5] For a discussion of the historical context surrounding purposes of sentencing see Warner, *Sentencing in Tasmania* (2002) The Federation Press, 63-74.
[6] (1988) 164 CLR 465, 476.

III THE ARGUMENT FOR A REVIEW OF SENTENCING IN THE ACT

A Important pieces of new legislation that should be reviewed

Many new important pieces of legislation include a section requiring the Government of the day to review the Act after it has operated for a certain period of time. This is important as it provides a mechanism by which the impact of the legislation, both positive and negative, can be measured. Statutory reviews often result in further amendments being made to the legislation to fine tune particular provisions and to make them work more effectively.

Review clauses typically state the time after which the review must be commenced by the relevant Minister, the matters the review must inquire into and the date the review must be tabled in the Assembly.

Over the last 15 years there were over twenty new Acts passed by the Legislative Assembly that included statutory review clauses.[7] This is a relatively recent trend which improves accountability and the increases opportunities for improving legislation over time. This improvement is achieved by measuring the impact of a new legislative initiative and further improving the Act to get a better result, if the review shows this to be possible.

Given the Act was a significant new piece of legislation which was central to the operation and deliberations of our courts and ultimately used to determine sentences, it is curious a review clause was not inserted into the Act when it passed in 2005. Nevertheless, this can be rectified easily via legislative amendment.

The review clause I proposed in the Greens Sentencing Bill[8] read as follows:

> (1) The Minister must review the operation of this Act.

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[7] See, *Workplace Privacy Act 2011* (ACT)s 48; *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) s 26; *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT) s 11; *Plastic Shopping Bags Ban Act 2010* (ACT) s 9; *Building and Construction Industry (Security of Payment) Act 2009* (ACT) s 45; *Road Transport (Third-Party Insurance) Act 2008* (ACT); *Protection of Public Participation Act 2008* (ACT) s 11; *Terrorism (Extraordinary Temporary Powers) Act 2006*, *Radiation Protection Act 2006* (ACT) s 125; *Pest Plants and Animals Act 2005* (ACT) s 54; *Construction Occupations (Licensing) Act 2004* (ACT) s 131; *Emergencies Act 2004* (ACT) s 203); *Environment Protection Act 1997* (section has expired now that review has taken place), *Government Procurement Act* (section has expired now that review has taken place), *Territory Records Act* (section has expired now that review has taken place), *Dangerous Substances Act 2004, Legal Profession Act 2006, Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011*, *Working with Vulnerable People (Background Checking) Bill 2010*

[8] Available at the ACT Legislation Register: http://www.legislation.act.gov.au/b/db_43118/default.asp

(2) The review must begin before the end of this Act's 6th year of operation.

Note The Act commenced on 2 June 2006. The review must begin not later than 1 June 2012.

(3) The Minister must present a report of the review to the Legislative Assembly within 12 months after the day the review is started.

(4) In reviewing this Act, the Minister must have regard to—

(a) how effective sentences imposed in the ACT are in meeting the purposes mentioned in section 7; and

(b) a comparison of custodial and non-custodial sentencing options available in the ACT with options in other jurisdictions, with an evaluation of the effectiveness of sentencing options that are not available in the ACT; and

(c) community attitudes to current sentencing outcomes; and

(d) options to improve the level of understanding within the community of sentencing purposes, processes and outcomes.

(5) In conducting the review, the Minister must consult with the following:

(a) the director of public prosecutions;

(b) civil liberties groups;

(c) entities that represent—

(i) police officers; and

(ii) victims of crime; and

(iii) the legal profession; and

(iv) offenders;

(d) any other entity that, in the Minister's opinion, has an interest in sentencing.

(6) In conducting the review, the Minister may have regard to anything else that the Minister considers relevant.

(7) The report must include recommendations about ways to improve the effectiveness of sentences imposed in the ACT in meeting the purposes of sentencing mentioned in section 7.

(8) This section expires 2 years after the day it commences.

B Sentencing reviews provide evidence

Sentencing is an issue that is highly emotive. For victims the sentence imposed will be closely felt. The same will be felt by close family and close friends. However, because of the media interest in crime generally and sentencing specifically, emotions are not restricted to those directly involved. Public outrage can erupt at times through the media about perceived leniency of a particular sentence or a certain type of crime over time.

Governments in Australian have, at times, responded to this type of public outcry by increasing maximum sentences and promising to 'get tough on crime'. While Governments are responsible to the people, there are two dangers in responding to public outcry in this way.

Firstly, increased sentences may not better achieve any of the stated purposes of sentencing. For example, while Government may promise to cut crime through tougher penalties, the evidence is well settled that increasing the severity of punishment does little extra to deter or prevent crime.[9]

Secondly, where Governments do react to public outcry by increasing sentences, they risk creating the precedent for legislative action to follow any public outcry. This is a dangerous precedent to set or to reinforce because there will be times when it is appropriate for Government to be able to ride out a particular public or moral outrage in the long term best interests of the particular issue.

Because of these twin dangers, Governments should ensure that any sentencing reforms are firmly based on evidence. A sentencing review in the ACT is the ideal way to update existing sentencing evidence and gather new emerging thinking and strategies.

The idea of sentencing review is not new to the ACT. In 2009 the idea received tri-partisan support in the Standing Committee on Justice and Community Safety. When inquiring into a proposal to amend the definition of murder in the ACT, the committee made the unanimous recommendation that the ACT Government consider the need to undertake a general review of sentencing in the Territory.[10] Each of the three political parties in the ACT was represented on the committee.

C A case study of a missed opportunity to implement an evidence based approach

To illustrate this point about the opportunity for an evidence based approach, I'd like to provide a case study from the ACT. Recently, the ACT Legislative Assembly passed a Government bill to double the maximum sentence for culpable from seven to fourteen years. This was in response to the *Creighton* case[11]. The Government and the Canberra Liberals came to the view that previous maximum penalty of seven years was out of step with community views about the severity of crime. In part this was based on other Australian jurisdictions who have a penalty higher than seven years.

The purpose of sentencing that the Government's bill sought to better achieve was *"to ensure that the offender is adequately punished for the offence in a way that is just and appropriate"*. The bill was passed on the basis that it was not "just and appropriate" for sentencing judges to be limited to imposing a seven year sentence for the crime of culpable driving and that community expectations demanded a harsher punishment.

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[9] For example, Weatherburn *Law and Order in Australia, Rhetoric and Reality* (2004) The Federation Press

[10] ACT Legislative Assembly Standing Committee on Justice and Community Safety, *Inquiry into Crimes (Murder) Amendment Bill 2008*, Final Committee Report,

[11] *R v Creighton* SCC 88 of 2010

There was no information or evidence provided by Government to support their rationale that the ACT community thought sentencing laws were deficient in this area. The argument at its highest pointed to laws interstate which imposed harsher punishments for similar crimes. But an evidence based approach to this issue could have been adopted. Recent research in Tasmania has looked explicitly at this question of community views about sentencing. The results from the Jury Sentencing Survey[12] are revealing and the approach could have been adopted in the ACT.

The Jury Sentencing Survey developed a reliable statistical method for assessing whether sentences being handed down do reflect community standards. The rationale behind the survey was that jurors will provide a better source of informed community standards than the rest of the community which have to rely on media reports which can only ever cover the most newsworthy aspects of a case.

The survey asked jurors involved in criminal cases what they thought about sentencing generally and what they thought about the sentence imposed in the case they served on. When talking about sentencing in general, the jurors felt that sentences imposed were too lenient. That is, for those cases where they relied on the media, they held the view that harsher penalties were warranted.

However, the results changed dramatically when the jurors were asked about the particular case that they served in the jury for. In these cases around fifty percent of jurors thought the sentence imposed was too harsh and the other half thought the sentence imposed was too lenient. These findings suggest that judges were striking an appropriate balance in their sentencing decisions.

This is a telling finding that shows how important it is to measure *informed* community standards of people who are likely to know all the facts of a case, not just those reported on in the media.

Research of this type in the ACT would have provided the Government with an evidence base to assess the claim that sentencing in the ACT is out of step with community expectations. If the results of the Tasmanian research were repeated in the ACT, this would have shed significant doubt on the need for doubling the maximum sentence.

D Current bills before the Assembly cover only a fraction of sentences being imposed

During 2011, there were three bills tabled by the ACT Government and the Canberra Liberals proposing to increase sentences across four offence categories. The bills covered manslaughter, grievous bodily harm offences, culpable driving offences and

[12] Warner, Davis, Walter , Bradfield, Vermey *Jury Sentencing Survey* (2011) Criminology Research Council

crimes involving physical violence against police. At the time of writing the Canberra Liberals have also indicated they are contemplating tabling one further bill to increase penalties in additional categories.

However, the three bills cover only a fraction of all the crimes that occur in the ACT and receive convictions. A broad review of all crimes and sentences would be better approach because it would provide a comprehensive overview of how sentences are working across all crime types and would show where the greatest priority for attention and possible reform is.

For example, recent media reports cite court data that shows thirty percent of ACT drink drivers are repeat offenders. If the review confirmed this statistic it would show that the current sentencing approach is failing to deter or rehabilitate repeat drink drivers. A sentencing review would look at the new sentencing options that exist, how effective they have been in other jurisdictions, and whether the ACT could consider implementing them here.

Only once a comprehensive review of all crimes and sentences has been conducted will the Government have a sense of where the priority areas exist for sentencing reform.

IV Conclusion

A review of the Act represents the best opportunity to gather evidence about the effectiveness of current sentences. By mid 2012 the Act will have been operating for six years and this represents a good time to commence the review. Only once we have conducted the review and gathered the data can we have a grasp of which areas we need to prioritise for attention and potential reform.

The ACT Greens are not against sentencing reform. The drink driving statistics discussed in this article are certainly one area the needs attention. However, the approach we advocate for is one where any changes are based on evidence that one or more of the stated purposes of sentencing will be better achieved.

Ultimately, the review will facilitate a 'smart on crime' approach where we look address the root causes of crime and prevent it before it occurs. This is contrasted to a 'tough on crime' approach where the promise is made to reduce crime by locking offenders up for longer and longer. This promise rings hollow when the evidence is taken into account. Our community deserves better, and we should be looking to take a smarter approach that delivers real results and less rhetoric.