Australian Human Rights Commission

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth)

AUSTRALIAN HUMAN RIGHTS COMMISSION SUPPLEMENTARY SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

1 June 2015

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Table of Contents

1 Introduction

1. This supplementary submission of the Australian Human Rights Commission responds to issues raised during the public hearing of the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth) introduced by the Australian Government.

2. The submission provides answers to two questions taken on notice and provides further material in relation to a third question asked during the course of the hearing. The issues dealt with in this supplementary submission are:

    a. The proposal to expand the forms of secondary criminal liability to include 'knowingly concerned'.

    b. Research dealing with whether there is a deterrent effect from mandatory minimum sentences.

    c. Research dealing with whether juries have a tendency not to convict an accused in circumstances were a mandatory minimum sentence would be imposed.

2 Knowingly concerned

3. Senator Collins asked the Commission to reflect on the amendments proposed in Schedule 5 of the Bill to insert 'knowingly concerned' into section 11.2 of the Commonwealth Criminal Code as a form of secondary criminal liability.[1]

4. A seminal case dealing with the meaning of 'knowingly concerned' is the High Court's decision in *Yorke v Lucas* (1985) 158 CLR 661. There the court was considering the meaning of the phrase in the context of s 75B of the then *Trade Practices Act 1974* (Cth) (now called the *Competition and Consumer Act 2010* (Cth)). Section 75B(c) extends civil liability to a person who 'has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention'. Although the court was dealing with civil provisions, these provisions were based on the then s 5 of the *Crimes Act 1914* (Cth) which relevantly provided:

> Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth ... shall be deemed to have committed that offence and shall be punishable accordingly.

5. The court held that 'knowingly concerned' in s 75B should have the same meaning that it has in criminal law. In order to establish that someone is 'knowingly concerned' in a contravention, it is necessary to show that:[2]

    a. the person had knowledge of the essential facts constituting the contravention; and

b. the person was an intentional participant in the contravention, based upon that knowledge.

6. As described by the Commonwealth Director of Public Prosecutions in evidence given to the Committee, the concept of being 'knowingly concerned' is currently part of a number of Commonwealth Acts dealing with both civil contraventions and criminal offences (one example of a current criminal provision at the Commonwealth level is s 79 of the *Competition and Consumer Act 2010* (Cth) which deals with criminal liability for cartel conduct, although the Commission understands that there have not been any prosecutions under this section to date).

7. However, it is difficult to anticipate the impact of extending this form of liability to all offences. For example, as submitted by Liberty Victoria, it would be necessary to carefully consider the impact of the change on the prosecution of inchoate offences.

8. For this reason, the Commission supports the view expressed by the Law Council of Australia that proposals for change to Chapter 2 of the Criminal Code, dealing with general principles of criminal responsibility, should follow wide public consultation and be based on work of relevant experts such as the Model Criminal Code Committee.

3 Mandatory sentencing and deterrence

9. Senator Wright asked the Commission if there was research that considered whether mandatory sentencing had a deterrent effect on crime and particularly asked about the Canadian experience.[3]

10. This issue was considered by the Supreme Court of Canada in its recent judgment in *R v Nur* 2015 SCC 15, handed down on 15 April 2015. In the majority judgment, Chief Justice McLachlin said:

> Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crime … . The empirical evidence 'is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences'.[4]

11. In reaching these conclusions, the Chief Justice referred to the following three articles:

    a. AN Doob and C Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39 *Osgood Hall Law Journal* 291;

    b. AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143;

    c. M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65.

12. The last two of these are the most significant in terms of analysing empirical evidence across a range of previous published studies.

13. As the President of the Commission noted in her evidence before the Committee, there can be difficulties in social science in 'proving a negative' or establishing a null-hypothesis.[5] That is, it can be difficult to show that there is no significant relationship between two variables such as the level of penalties and crime rates.

14. Doob and Webster (2003) considered a body of literature over a period of 30 years, but particularly through the 1990s, on the deterrent effect of sentences. They concluded as follows:

> We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence. Particularly given the significant body of literature from which this conclusion is based, the consistency of the findings over time and space, and the multiple measures and methods employed in the research conducted, we would suggest that a stronger conclusion is warranted. More specifically, the null-hypothesis that variation in sentence severity does not cause variation in crime rates should be conditionally accepted.[6]

15. Some of the most significant results that Doob and Webster refer to related to the well-publicised introduction of 'three strikes' laws in a number of states in the United States in the early 1990s. The combination of a sudden change to significantly higher mandatory minimum penalties in a number of jurisdictions along with a high level of publicity provided the ideal conditions to test whether harsher penalties deter crime. This is what is sometimes referred to in economics literature as a 'natural experiment'. The result was that there was no decrease in felony rates attributable to the change in policy, and that violent crime in states that did not adopt three strikes laws fell nearly three times as fast as violent crime in states that did adopt such laws.[7]

16. Accepting that higher sentences do not reduce crime may seem counter-intuitive if people are acting rationally. However, the authors provide some explanation for this effect by describing the preconditions for higher sentences to have an impact on a person's decision to commit a crime:

    a. the person must believe that there is a reasonable likelihood that they will be caught, convicted and sentenced;

    b. the person must know that there has been a change in the level of the penalty;

    c. the person must be someone who will consider the penal consequences in deciding whether to commit an offence;

    d. the person must calculate that it is 'worth' committing the offence for a lower level of punishment but not for the increased level of punishment.

    The authors note that: 'viewed from this perspective, the lack of evidence in favour of a deterrent effect for variation in sentence severity may gain its own intuitive appeal'.[8]

17. These conclusions do not mean that the criminal justice system in general does not have a deterrent effect. Rather, as Tonry (2009) concludes:

> The critical question is whether marginal changes in sanctions have measurable deterrent effects. The heavy majority of broad-based reviews reach similar conclusions that no credible evidence demonstrates that increasing penalties reliably achieves marginal deterrent effects.[9]

18. In considering the impact of mandatory minimum sentences in particular, Tonry also examined 15 empirical studies of California's 'three strikes' laws and concluded:

> No matter which body of evidence is consulted – the general literature on the deterrent effects of criminal sanctions, work more narrowly focussed on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties – the conclusion is the same. There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime.[10]

4 Mandatory sentencing and juries

19. Senator Macdonald asked the Commission whether it was aware of instances that reliably indicate that some juries are inclined not to convict a person because a mandatory minimum sentence would be imposed.[11]

20. The phenomenon of juries returning a verdict to acquit contrary to law is known as jury nullification. In these circumstances, the verdict is returned because the jury disagrees with the application of the law. It is more likely to occur in cases where a verdict of guilty will inevitably lead to a penalty that the jury considers to be unjust.

21. There is a long history of jury nullification, particularly in cases where conviction would lead to the application of the death penalty. A 1930 report of the British Select Committee on Capital Punishment, described the way in which this occurred in eighteenth-century cases:

> In vast numbers of cases, the sentence of death was not passed, or if passed was not carried into effect. For one thing, juries in increasing numbers refused to convict. A jury would assess the amount taken from a shop at 4s 10d so as to avoid the capital penalty which fell on a theft of 5s. In the case of a dwelling, where a theft of 40s was a capital offense, even when a woman confessed that she had stolen £5, the jury notwithstanding found that the amount was only 39s. And when later, in 1827, the legislature raised the capital indictment to £5, the juries at the same time raised their verdicts to £4 19s.[12]

22. Without interviewing jury members, it is not possible to reliably ascertain their motives for returning a verdict of not guilty. However, there is both anecdotal and statistical evidence which supports the view that some juries in Australia have been deterred from finding a defendant charged with an aggravated people smuggling offence guilty because the defendant would then receive a mandatory minimum sentence.

23. The transcript in one people smuggling case in 2012, *R v Auli*, reveals that the jury passed a note to the judge to ask about the penalty to which a guilty verdict would expose the defendants. The judge informed the jury of the

mandatory minimum that would apply, and the jury proceeded to acquit the defendants.[13]

24. Evidence given to this Committee in 2012 by the Commonwealth Director of Public Prosecutions showed that there was a rising rate of acquittals for people smuggling offences attracting a mandatory minimum penalty, as public awareness about the impact of mandatory minimum penalties increased.[14]

25. From mid-2008 to mid-2010, there were 59 people charged with people smuggling offences and none were acquitted (3 cases were discontinued and two were listed as 'other outcome'). In 2010-11 there were 140 cases and 8 acquittals (14 cases were discontinued and 9 were listed as 'other outcome'). In 2011-12 there were 151 cases and 25 acquittals (49 cases were discontinued and 8 were listed as 'other outcome').

26. That is, over the four year period, the rate of acquittals by the jury as a proportion of all cases brought rose from zero in the first two years, to 6% in year 3, to 17% in year 4.

27. When cases that were discontinued by the prosecution are removed from this analysis, the results are even more stark. The rate of acquittals by the jury in finally determined cases rises from zero in the first two years, to 6% in year 3, to 25% in year 4.

28. In September 2012, the then Attorney-General, the Hon Nicola Roxon MP, gave a direction to the Commonwealth Director of Public Prosecutions under s 8(1) of the *Director of Public Prosecutions Act 1983* (Cth) that the Director must not institute, carry on or continue a prosecution for an offence under s 233C of the *Migration Act 1958* (Cth) against a person who was a member of the crew on a vessel involved in bringing unlawful non-citizens to Australia unless the director was satisfied that:

    a. the person had committed a repeat offence;

    b. the person's role in the venture extended beyond that of a crew member; or

    c. a death occurred in relation to the venture.[15]

29. Instead, the Director was required to consider instituting a prosecution under s 233A of the *Migration Act 1958* (Cth), which did not attract a mandatory minimum penalty.

30. This direction was revoked by the current Attorney-General, Senator the Hon George Brandis QC, on 4 March 2014.[16]

[1] Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, *Proof Committee Hansard*, 20 May 2015, p 22 (Senator Collins).
[2] *Yorke v Lucas* (1985) 158 CLR 661 at 670.
[3] Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, *Proof Committee Hansard*, 20 May 2015, p 20 (Senator Wright).
[4] *R v Nur* 2015 SCC 15 at [114] (McLachlin CJ, with whom LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ concurred).
[5] Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, *Proof Committee Hansard*, 20 May 2015, p 23 (President Triggs).
[6] AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 187.
[7] AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 173-177.
[8] AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 190.
[9] M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65 at 93.
[10] M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65 at 100.
[11] Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, *Proof Committee Hansard*, 20 May 2015, p 25 (Senator Macdonald).
[12] British Select Committee on Capital Punishment, *Report* (1930) para 17, referred to in M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65 at 73.
[13] Transcript of Proceedings, *R v Auli* (District Court of Queensland, 1973/2011, Shanahan DCJ, 17 May 2012) 4–9, referred to in A Trotter and M Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy', (2012) 36 *Melbourne University Law Review* 553 at 613.
[14] Commonwealth DPP submission to the Senate Standing Committee on Legal and Constitutional Affairs - *Inquiry Into The Migration Amendment (Removal Of Mandatory Minimum Penalties) Bill 2012* at 3. At http://www.aph.gov.au/DocumentStore.ashx?id=8429b616-4759-4929-a7d8-814f64381ed6 (viewed 29 May 2015).
[15] Commonwealth, *Gazette: Government Notices*, No GN 35, 5 September 2012 at 2318 'Director of Public Prosecutions – Attorney-General's Direction 2012'. At http://www.comlaw.gov.au/file/2012GN35 (viewed 29 May 2015).
[16] Commonwealth, *Gazette: Government Notices*, 4 March 2014 'Director of Public Prosecutions – Attorney-General's Instrument of Revocation 2014'. At http://www.comlaw.gov.au/Details/C2014G00412 (viewed 29 May 2015).