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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
BRISBANE QLD 4000

Email: lacsc@parliament.qld.gov.au

Dear Sir/Madam

Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015(the Bill)

This submission is made on behalf of the Commonwealth Director of Public Prosecutions (CDPP).

The CDPP

The CDPP conducts prosecutions for offences against the laws of the Commonwealth. It operates across Australia. It conducts prosecutions in State and Territory courts exercising federal criminal jurisdiction. Federal criminal jurisdiction is conferred on State and Territory courts by the Judiciary Act 1903 (C'th).

Scope of submission

This submission relates to the proposal in the Bill to abrogate the effect of the High Court decision in Barbaro and Zirilli v The Queen [2014] HCA 2 (Barbaro).

Proposed amendments to Penalties and Sentences Act 1992 (Qld) (PSA)

It is doubtful that the proposed amendments to s 15 of the PSA would apply to sentences for Commonwealth offences. Section 15 currently sets out some of the information a Court may receive in imposing a sentence. The effect of the proposed amendment to s 15 of the PSA would be to allow a sentencing submission to be made by a party to proceedings. 'Sentencing submission' is defined as a submission 'stating the sentence, or range of sentences, the party considers appropriate for the Court to impose'. The matters a Court may have regard to in sentencing a State offender are set out in detail in ss 9(2) and 15 of the PSA.

By contrast, the sentencing process for a Court sentencing a Commonwealth offender is set out in Part 1B of the Crimes Act 1914 (C'th). The matters a Court may take into account when it is sentencing a Commonwealth offender are set out in detail in s 16A(2) of the Crimes Act. The list does not include a sentencing submission made by a party. In Barbaro, the High Court rejected the practice of a party making a submission on sentence as 'wrong in principle' (para 23). In doing so the Court decided that such a practice was inapplicable in all criminal matters, including Commonwealth criminal proceedings.

The primacy of Part 1B as the repository of Commonwealth sentencing law is stated by the High Court majority in Barbaro (at para 25):

> In particular, when sentencing offenders for offences against the laws of the Commonwealth, a sentencing judge is bound to apply those provisions of Pt IB of the Crimes Act 1914 which govern the sentencing of federal offenders. That Part provides the fundamental starting point for the sentencing of offenders for federal offences.

Further, State sentencing law does not ordinarily apply in sentencing of Commonwealth offenders. In the High Court case of Hili and Jones v The Queen [2010] HCA 45 (at para 21), the majority noted:

> Of their own force the laws of the States with respect to the sentencing of offenders could have no operation with respect to the sentencing of offenders against laws of the Commonwealth. Any relevant operation is by reason of a federal law which 'picks up' State law. By operation of s 68 of the Judiciary Act 1903 (Cth), some State and Territory laws in relation to the sentencing of offenders are picked up and applied when a court, exercising federal jurisdiction conferred by s 68, sentences a federal offender. But, to the extent to which Pt IB of the Crimes Act otherwise provides, State and Territory laws in relation to the sentencing of offenders are not picked up.

Given the rejection of the practice of parties making submissions as to the available range of sentences by the High Court in Barbaro, it is clear that the proposed amendment to the PSA would not be a State law 'picked up' by the Judiciary Act. It would not be inapplicable to Commonwealth sentencing in Queensland courts.

Given the inapplicability of the proposed amendment to proceedings for sentencing Commonwealth offenders, it would be preferable to make this clear in the legislation itself. There is a precedent for such a reference. In the Criminal Code (Qld) there is explicit reference to the inapplicability of the procedure for judge only trials to Commonwealth criminal prosecutions. Section 615D of the Code provides as follows:

> This chapter division [i.e. chapter 62 division 9A of the Code] does not apply to –
>
> (a)…
> (b) a trial on indictment of any offence against a law of the Commonwealth.

A similar provision could be inserted in the PSA to ensure that the inapplicability of the law to Commonwealth sentencing proceedings was explicitly stated.

Proposed amendments to the Youth Justices Act 1992 (Qld) (YJA)

The Bill proposes amendments to the YJA sentencing provisions. These are similar to the proposed amendments to the PSA.

On relatively rare occasions the CDPP conducts Commonwealth prosecutions in the Queensland Children's Court. Commonwealth law provides that, subject to inconsistency with federal law, the sentencing procedure that is applicable in the prosecutions of young people who are charged with a federal offence is the State sentencing procedure. This occurs because of the operation of s 20C of the Crimes Act which provides:

> A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

The application of State law by this mechanism is subject to inconsistency with federal law. The amendment would not apply to federal offenders as it would be inconsistent with federal law as set out in Barbaro.

Again, as the amendment to the YJA proposed in clause 9 of the Bill would not apply to the Children's Court sentencing a Commonwealth offender, a provision should be included in the YJA ensuring this is made clear.

Yours sincerely

David Adsett
Deputy Director