SUBMISSION TO THE NORTHERN TERRITORY LAW REFORM COMMITTEE CONSULTATION PAPER

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INTRODUCTION

Mandatory minimum sentencing in the Northern Territory is not new. Prior to 1939, there were a large number of offences which carried a mandatory minimum sentence including murder (death), attempted murder (3 years); wounding or causing grievous harm with intent (3 years); rape (4 years); carnal knowledge of a female under the age of 12 (4 years); buggery (10 years); abortion (3 years); setting fire to a church or dwelling (7 years); setting fire to crops (3 years); armed robbery (3 years); burglary (3 years).[1] All except the mandatory penalty for murder were abolished by the *Criminal Law Amendment Ordinance 1939.*

In the case of murder, there has always been a mandatory minimum sentence which cannot be reduced. Prior to the abolition of the death penalty, the mandatory minimum was death except for a short period when the courts had the power to sentence an aboriginal to a sentence of imprisonment.[2] But otherwise, the only sentence which could be passed was the death penalty. In nearly all cases, the penalty was avoided by the exercise of the prerogative of mercy by the Governor-General. Eventually the death penalty was abolished in 1973 and replaced with imprisonment for life with hard labour (without the possibility of parole).[3] It was not until 2004 when the *Sentencing (Crime of Murder) and Parole Reform Act 2003* came into force that the Court had the power to impose a non-parole period. The head sentence remained as imprisonment for life as the only sentence available, but for the first time, the Court was able to impose a non-parole period. The provisions which enacted these reforms imposed mandatory minimum non-parole periods which were generally difficult to avoid.

Mandatory minimum sentencing is one form of control which limits the judicial discretion of the sentencer. Another form is what is called grid sentencing. Grid sentencing may take a number of different forms. In its simplest form, it provides for a different maximum and/or minimum sentence if certain factors are present. To take a simple example, s.213 of the *Criminal Code* (NT) provides for a range of maximum penalties ranging from 2 years to life imprisonment for unlawful entry into a building depending upon various factors such as whether the intent was to commit a simple offence, or an indictable offence, or whether the

[1] *Criminal Law Consolidation Act 1876-1902* (SA) ss. 5, 6, 7, 21-15, 27, 28, 60, 71, 78, 80, 81, 96, 163 and 172.

[2] *Crimes Ordinance 1934*

[3] *Criminal Law Consolidation Ordinance 1973* (NT)

property was a home, or whether it occurred at night and if so whether it was occupied. Sometimes these permeations can bring about bizarre results. But we are not concerned with this type. Of more importance is the grid system which applies in relation to mandatory minimum sentences.

The *Sentencing Act 1995 (NT)* in its current form is replete with grid sentencing provisions which result in mandatory minimum sentences. They are contained mainly in Division 6 (aggravated property offences) and Division 7 (violent offences). A common feature of these provisions is that the mandatory minimum is increased if the person has been convicted of a previous offence of the same character: see for example s. 78D and s. 78DA. This is so no matter what period of time has lapsed between the two convictions.

It is not always easy to tell from the Information for Courts which is handed up at the sentencing hearing whether there was a conviction imposed in the distant past. Usually if there was a conviction, that has been recorded, but in my experience, not always.

The biggest problem with grid sentencing of this kind is that in some cases, the offence for which the court is dealing is relatively minor, as was the previous offence which may be 10 or 20 years old. The sentencer is faced with the prospect of having to impose a sentence of at least 12 months actual imprisonment if s. 78DA applies, as well as having to impose a conviction because of s. 78DG(a). The only escape is if the court is able to find exceptional circumstances under s78DI. Is the fact that the previous conviction was 20 years ago for a minor aggravated assault which resulted in a good behaviour bond an exceptional circumstance? Does it matter that the previous conviction was committed when the offender was a youth?

MANDATORY MINIMUM SENTENCES GENERALLY

1. The first question to be answered is whether mandatory minimum sentencing achieves its stated objectives. There are a number of reasons why this must be answered no.

1.1 The premise of those who argue in favour of mandatory sentencing is that it acts as a deterrent.[4] There is no evidence whatsoever to support this premise. Although there is evidence that the rates for homicide in the Northern Territory have fallen gradually over the last 20 years[5], there is no empirical evidence that the rate has fallen because of the introduction of mandatory minimum sentencing. During the period from 1998 -1999 to 2019-2020 the numbers of prisoners in the Northern Territory have increased steadily each year from 623 in 1998-1999 to 1,370 in 2019-2020.[6] Aboriginal prisoners have always, as far as I can remember, represented over 80% or more of the total prisoner population. My experience over fifty years as a legal practitioner and judge is that crime rates are determined by such factors as poverty, poor housing, lack of jobs, boredom, alcoholism, drug taking and social issues (such as the view of some men that it is their right to impose their will upon the female members of their household regardless of the rights of others). What acts as a deterrent is not the length of the possible sentence, but whether the person who contemplates committing a crime is prepared to take the risk of being caught by the police, charged with the relevant offence and possibly going to prison. Very few, if any, members of the public are aware of what sort of sentence a court is likely to impose if they offend. I would strongly doubt that members of the public generally have any idea of what mandatory minimum sentences are available for various offences. To take an extreme example, there is no evidence that the crime of murder increased when the death penalty was removed either here or overseas. On the other hand, the homicide rate for the Northern Territory has remained relatively stable since 1999.[7] In other words, it is the perceived quality of policing, the chance of getting charged, the likelihood of having to go to gaol and face a gaol sentence of indeterminate length rather than the length of a possible sentence that may act as a general deterrent. There is a stronger case for those who have been previously dealt with by the courts, but even in those cases I strongly doubt that mandatory minimum sentencing acts as a specific deterrence in the majority of cases and indeed may have the opposite effect. If the prisoner is

[4] Consultation paper para 3.2.1
[5] See ABS stats (Recorded Crime- Victims Australia 2018 and 2009)
[6] NT Corrections Services Daily Average Dataset.
[7] See footnote 4.

told or made aware that there is a mandatory minimum sentence of 3 months if he or she were to re-offend, to the extent that the prisoner may think about it at all, the prisoner may think that a sentence of 3 months is all that he is likely to get and decide to take the risk.

1.2 A mandatory minimum sentence can only act as a deterrent, either generally or specifically, if the person concerned is aware of the mandatory minimum penalty, and has considered planning the offence, and has weighed that up with his chances of getting caught and decided that it is worth taking the risk. There are some types of cases where planning of some nature is not uncommon, particularly stealing, dishonesty offences generally, robberies and property offences. However, in many cases, persons who commit crimes do so impulsively, and give no thought to the consequences. The motives for crimes of violence, for example, are often connected with jealousy issues, often when the perpetrator is intoxicated, especially amongst indigenous offenders. It is conceded that some crimes of violence are planned, for example, in circumstances where the perpetrator is seeking revenge, or seeking to exercise dominion over the victim. There are also cases where the crime is committed because of the thrill involved in causing harm to the victim. It is not conceded that the mandatory minimum penalty has come into the equation as a factor.

1.3 Whether the crime is a spontaneous reaction to some provocation (perceived or real), whether it is impulsive, whether it is planned out of revenge, greed, or in order to dominate, are all relevant factors in determining the level of moral culpability of the offender. If the moral culpability of the offender is high, it is unlikely that the mandatory minimum sentence will be relevant (except in cases of murder). If the moral culpability is low, or very low, the mandatory minimum may be out of all proportion to the offending. For example, in the case of a second or subsequent offence against a level 5 offence, the circumstances of the previous offence may be that it occurred 30 years ago, involved an assault by slapping the victim with minimal force to the face whilst intoxicated, where the defendant threatened the victim with a stick and caused harm in the sense that the victim reasonably objected to it in the circumstances. The second offence may be of a similar character and yet result in a mandatory minimum sentence of imprisonment for 12 months if the offender was intoxicated at the

time. What is meant by "intoxicated" in s. 78DC(4)(a) of the *Sentencing Act*, is very vague and in fact the level of intoxication may have been so mild as to be largely irrelevant to the offending.

1.4 A second premise is that mandatory sentencing enhances parity (or consistency) in the sentencing of offenders for similar offending.[8] There is no empirical evidence for this either. On the contrary, the problem is that parity in sentencing assumes that the crime, the victims and the perpetrators are sufficiently similar to warrant similar sentences. This is hardly ever the case in practice. Even the most cursory study of sentencing remarks by judges shows that these factors are infinitely variable warranting different outcomes in most cases. Parity as a sentencing consideration most often comes into play where there are joint co-offenders. In any event, parity in sentencing is not the issue. The issue is *disparity*, so that a sentence should not bear an inappropriate disparity with other sentences taking into account the differences in the circumstances of the offenders and of the offences. Of course Judges do try to ensure that sentences imposed are within the broad range of sentences for similar offences and offenders and have always done so. In the Supreme Court, this is achieved by reference to previous sentencing remarks, or by tables setting out the substance of the sentences imposed in similar cases. Sometimes the Court of Criminal Appeal suggests a sentencing range for particular offending, as in the case of *The Queen v Roe*.[9] However, the Court provides the range not as a fetter on sentencing discretion but as a guide only. I would argue that mandatory minimum sentences do nothing to create parity and in fact, because it is a one size fits all solution to sentencing, it has the potential to create disparity.

1.5 A third premise is that judges are soft on crime, (referred to as "ensuring appropriate punishment for the offender") and that harsher sentences are needed for the purposes of denunciation, just punishment and retribution.[10] This was the result of the truth in sentencing campaign led in part by American academics and picked up by the media. Part of the impetus for the campaign was to get rid of the remissions system, but it took on a much wider

[8] Consultation paper, para 3.2.1

[9] [2017] NTCCA 07 (supply class 1 drugs: methamphetamine); see also *Hancock v The Queen* [2011] NTCCA 14 (Child abuse material). There are other similar decisions.

[10] Consultation paper para 3.2.1

momentum especially in the USA[11] which ultimately took root in Australia. The system in America was that there was no system. Individual judges were free to impose whatever sentence they thought fit, subject only to the maximum penalty provided. They were not required to provide reasons and sentencing appeals were very hard to win. There was evidence that individual judges sitting in the same court would impose vastly different sentences for the same crime. There was no principled system for the imposition of sentences. The position in Australia was very different. Australian courts kept sentencing records which enabled judges to keep track of sentences imposed by other judges for the same offence. Courts were required to give reasons. There was an effective system of sentencing appeals, including the right of the Crown to appeal against a sentence. The introduction of mandatory minimum sentences in Australia was not only unnecessary but, in effect, a rejection of the basic methodology of sentencing, which must take into account not only retribution and punishment, but the possibility of reform, and in some cases, considerations of mercy. Moreover, depending upon the circumstances, the mandatory minimum sentence may be much greater than either the circumstances of the offence or the offender warrant, leading to injustice. As a matter of logic, this must inevitably be the case because the mandatory minimum only comes into play if the judge considers that a sentence less than the mandatory minimum is all that is required (unless the court has the power to avoid the mandatory minimum in the circumstances).

1.6 I support the arguments against mandatory sentencing which are set out in paragraph 3.2.2 of the Consultation Paper. The present system, leaving aside mandatory sentencing and grid sentencing, despite its faults, works very well. The sentence is decided by the Judge based on the facts presented to him or her at the plea or at the trial followed by a plea hearing. The judge is required to consider the sentencing guidelines set out in Part 2 of the *Sentencing Act.* The judge may also consider other similar sentences or guideline judgments. The judge is required to give reasons for his or her sentence. Appeals lie by the prosecution or the defendant if the sentence is considered to be unsatisfactory.

[11] See for example, Norval Morris *Towards Principled Sentencing* 37 Md. L. Rev. 267 (1977).

1.7 It is true that in many cases to which the mandatory minimum provisions apply, because the mandatory minimum is set very low, these provisions have little practical effect in most cases. There are also in some hard cases provisions which can ameliorate the outcome: see especially s. 78DI of the *Sentencing Act 1995*, 37(2) of the *Misuse of Drugs Act 1990* and s. 121(3) of the *Domestic and Family Violence Act 2007*. The problem with s.121(3) is that it requires proof that the offence did not result in harm to the victim. "Harm" is so broadly defined that any touching of the victim is likely to be considered "harm". Effectively a common assault is limited to those assaults where there was no touching at all. My own view is that the definition of "harm" is too broad. At the very least there should be pain or psychological harm before there could be said to be "harm". The result is that in cases of breaches of DVOs, breaches which fall within the exception are limited to conditional breaches which did not result in harm to the victim. There should, at the very least, be a time limit on how far back the previous conviction can be called into account, either under this provision, or under the various *Sentencing Act* provisions. It is ridiculous that a previous conviction going back 10 or 20 years or more can be taken into account in determining whether or not a mandatory sentence must be imposed.

1.8 The problem with s.78DI is that even where it applies, the court must impose a conviction and impose a sentence of imprisonment: see s.78DI (2) and s.78DG, and may not wholly suspend the order, even if it imposes a home detention order: s.78DG (3). There is no room for an order under s.10, 11or 13 of the *Sentencing Act*, even if the offence was trivial, technical or of a minor nature. This, and the requirement under the various sections that there must be a conviction recorded, sets up the possibility of a longer mandatory minimum perhaps many years in the future. Also community based orders under s. 34 or 39B are not available. Even the recording of a conviction may not be appropriate.

2. There are other problems which the Consultation Paper does not mention:

2.1 When a person is charged with a series of offences arising out of the same episode, it is not unusual for each of the offences to carry a different mandatory minimum sentence provision. In these circumstances arriving at the correct result can be extraordinarily

difficult and very time consuming. In *Court v Armstrong*[12] the Local Court was dealing with a series of offences of this kind and overlooked that some of the mandatory minimum sentences which were imposed could not be suspended. On appeal by the complainant, the Supreme Court allowed the appeal and re-sentenced the respondent, observing that the Local Court judge had not received any proper assistance from the parties' legal representatives in relation to the mandatory minimum sentencing requirements and that the re-sentencing exercise was excessively complicated and time-consuming.[13] Cases like this are difficult enough for Supreme Court judges who have the time to ponder over the provisions and see that all the horses have been caught and locked away in their respective paddocks. For a busy Local Court Judge, having to deal with dozens of cases every day, the task is virtually impossible.

2.2 In cases brought before the Local Court, especially the "bush courts", the lawyer appearing as counsel for the offender may be inexperienced, or not have sufficient time to delve fully into the circumstances, and may overlook the possibility of making a submission, or a forceful submission, that the offending occurred in exceptional circumstances under s.78DI of the *Sentencing Act*. Sometimes, even if a reasonable submission is made, the Local Court, having to deal with many cases in a very short period of time, may not give the submission the attention it deserves.

2.3 My own observations are that where there is a mandatory minimum term, there is a tendency, particularly in the Local Court, to impose the mandatory minimum even if the case, properly considered, deserved a longer term. I suspect that this is brought about by busy Judges recalling similar cases where the mandatory minimum was imposed and thinking that the case before them warrants a similar sentencing disposition.

2.4 The Consultation Paper does not mention the requirement to impose a mandatory minimum licence disqualification of between 3 months and 5 years as required by various provisions of the *Traffic Act 1987*. See for example ss. 21(3), (4), and (5); 22(3); 24(4) and (5); 25(6) and (6A); 26(4); 28(4); 29AAA(3) and (3A); 29AAB(4) (5) and (6), 29AAE (3) (4) and (5); 29AAFA (4); 29

[12] [2019] NTSC 38

[13] See especially paragraphs [45]-[48]

AH (3) (4) and (5); 29AAR (2); 30(3); 30A (2). There are also minimum penalties for some offences eg s.34(2). Whilst in many cases the mandatory minimum penalty is probably well-deserved, the problem is that the consequences of licence disqualifications and minimum monetary penalties do not affect individuals equally. People who live in towns and cities can access public transport or take taxis to go about their business which may not be available, or reliably available in remote communities. It is not uncommon for a person who has lost his licence and decided to remain sober or at least not as intoxicated as his friends, to have pressure put upon that person by his friends to drive them all home, often to a remote community, with disastrous results. The driver gets all the blame and the friends who coerced the driver into this walk away. People who rely on a driver's licence to earn an income are likely to be punished more severely than those who can do without it. It may result in loss of a job and may mean that another job is hard to find. There is also the problem of obtaining a licence after the period of disqualification has elapsed. Those in rural communities are likely to find it harder to obtain a new licence than those living in cities or large town. Loss of a driver's licence can make it harder to prove one's identity when it is necessary to do so. This may not affect affluent people who have some other form of identification such as an Australian passport; but this is not likely to be the same with people who live in rural areas. The purpose of mandatory licence disqualifications is presumably to protect the public and other road users from bad drivers, and I think it also acts as a real deterrent for many people to behave responsibly when going out at night to a nightclub, hotel or restaurant, or to what might loosely be called a drinking session. Nevertheless there is much to be said for giving the courts more flexibility in dealing with individual cases. The fact is that these provisions operate more harshly on people who live in remote communities or on people who need a licence to earn an income, or on those who are poor. Finally, we should consider the position of women with young children. The mother might have difficulty in taking or collecting the children from school or from a child minding centre. It may mean that she has to give up her job or obtain night work which will affect her ability to give her children the attention that they need.

3. It follows from the above that I do not consider that the mandatory sentencing provisions are principled, fair and just, and that they should be repealed.

MANDATORY SENTENCES FOR MURDER

4. The case of *Grieve v The Queen* [14] and the sentences imposed in relation to Grieve, Buttery, Malyschko and Halfpenny speak for themselves. As the trial Judge I could not impose appropriate sentences in each and every case and accordingly made recommendations to the executive to consider exercising the prerogative of mercy under s. 432 of the *Criminal Code*. In the case of Halfpenny, who had pleaded guilty and given evidence on behalf of the Crown, that course was taken at the request of the prosecution. Clearly the power to impose a minimum sentence of less than 20 years was so limited as to be of little use in nearly every case. In particular, no discount was available for pleading guilty or giving evidence for the Crown, as happened in the case of Halfpenny. This was plainly unjust. The result in *Grieve's* case was to create significant disparity between the sentences which could not be avoided.
5. The mandatory minimum sentence for murder of life imprisonment is out of step with the maximum penalties for murder in all other jurisdictions in Australia. The Northern Territory is the only jurisdiction where there is a mandatory sentence of imprisonment for life which cannot be reduced or departed from. In all other jurisdictions the maximum penalty is life, but the court retains a power to impose a lesser sentence if it is warranted by the circumstances of the offence or the offender[15] or in the case of Western Australia, if the sentence of life would be unjust having regard to the circumstances of the offence or the offender and the defendant would not be a threat when released, in which case, the offender is liable to imprisonment for 20 years. As is pointed out in the Consultation Paper at para [4.2] not every murder carries the same degree of moral responsibility. It is submitted that the sentence for murder should carry a maximum penalty of imprisonment for life with a power in the court to impose a lesser sentence if the circumstances of the offence or the offender warrant that course.

[14] [2014] NTCCA 2

[15] *Criminal Code* (Cth) : see for example ss 71.2 (murder of UN personnel); 80.1(a) (treason, which includes causing the death of the Sovereign, the Crown Prince, the Governor-General or the Prime Minister; s.268.3 (genocide by killing); s.268.8 (crimes against humanity by murder); 268.24 (war crimes unlawful killing); 268.70 (war crime-murder); *Crimes Act 1900* (ACT) s.12; *Crimes Act 1900* (NSW) s. 19A; *Criminal Code* (Qld) s.305(1) read with *Penalties and Sentences Act 1992* (Qld) s153; *Criminal Law Consolidation Act 1935* (SA) s.11; *Criminal Code* (Tas) s. 158; *Crimes Act 1958* (Vic) s.3; *Criminal Code Compilation Act 1913* (WA) s.279 (4) (a) and (b).

6. In some jurisdictions, the power to impose a lesser sentence than life is restricted by a mandatory minimum head sentence: see the Western Australian provision referred to above; the *Criminal Law Consolidation Act 1935* (SA) s, 11; and the "standard sentence" provisions of the *Sentencing Act 1991* (Vic) ss. 5A and 5B which although they do not impose a mandatory minimum as such, impose guidelines.
7. The majority of other Australian jurisdictions do not impose any mandatory minimum non-parole periods (NPPs). Section 19AB(1) of the *Crimes Act* (Cth) requires the sentencer to fix a NPP unless the court is satisfied that it is not appropriate because of the nature and circumstances of the offence and the antecedents of the offender. There are no minimum requirements. The *Crimes (Sentencing) Act 2005* (ACT) s.65(5) provides that a NPP is not available if the person is imprisoned for life, but it is otherwise open under s.65(2). The *Crimes (Sentencing Procedure) Act 1999* (NSW), s44 and 45 permit the fixing of a NPP provided that the balance of the term must not exceed one third of the sentence. The *Penalties and Sentences Act 1992* (Qld) ss305(2) and (4) do impose mandatory minimum NPPs if the person causes the death of more than one person or has a prior conviction for murder (30 years); or if the victim was a police officer (25 years). The *Sentencing Act 2017* (SA), s 47(1) (a) provides that the court must fix a NPP unless s.47(5)(b) applies (life sentence as the head sentence) in which case the mandatory minimum NPP is 20 years. S.18 of the *Sentencing Act 1997* (Tas) has no mandatory minimum restrictions. In Victoria, s.11A of the *Sentencing Act 1991* (Vic) requires the court to fix the NPP according to s11A(4) which provides for minimum terms ranging from 30 years for a life sentence, to a percentage of the head sentence: 70% if the head sentence was more than 20 years but otherwise 60%. The *Sentencing Act 1955* (WA) s.90 (1) provides for a mandatory minimum NPP of 10 years for murder, with a power to order that the prisoner never be released. It is difficult to see what is to be gained by imposing restrictions on the fixing of NPPs. If a NPP is inadequate it can be corrected on appeal by the Crown or by the prisoner to the Court of Criminal Appeal. The same factors are considered with the fixing of NPPs as in fixing head sentences. The circumstances of each case are inherently different. In fixing a NPP the court is required to take into account the same factors as it took into account when fixing the head sentence and decide what is the least period of time that the prisoner must serve before being eligible to be released into the community. It is important to remember that the minimum term is not just an act of clemency on the part of the court but must be

balanced with the interests of the community to ensure that the offender is justly punished whilst at the same time given an opportunity to reform if the prisoner can be conditionally released without undue risk to the community, subject of course, to the decision of the Parole Board that the prisoner should be released.[16] I agree with the matters put in the Consultation Paper at para [4.3].

MANDATORY SENTENCES FOR SEXUAL OFFENCES

8. With respect to others who might think otherwise, I do not think that s.78F (1) (a) achieves anything much except nuisance value. In the case of serious offending, the courts have always taken the view that a considerable sentence is usually justified. As far as I know, there has only been one occasion when the court has imposed a wholly suspended sentence for sexual intercourse without consent. That was the case of *Love*[17] decided by Asche J in 1986. I doubt if the same result would occur again, but it might in a very rare case.
9. I agree with the observation at para [4.4] page 28 of the Consultation Paper that in very minor cases the imposition of a mandatory term could result in the offender being placed on the Child Protection Offender Register. I think that there may be rare circumstances where it would be appropriate for a Judge to have the power to exempt a person from those requirements, for example, where the court has not recorded a conviction nor imposed a sentence of actual imprisonment.

COMMUNITY BASED SENTENCING OPTIONS

10. In my experience, the main problem with the *Sentencing Act* is that the various sentencing options are drafted in such a way as to make many of them exclusive of one another. For example, a home detention order is not possible if the sentencer also imposes a suspended sentence.[18] Similarly, community work orders and community-based orders cannot be imposed if a sentence of imprisonment is also imposed.[19] A

[16] *The Queen v Shrestha* (1991) HCA 26; (1991) 173 CLR 48, at [20].

[17] (1986) 24 A Crim R 449

[18] *O'Brien v Quin* [2003] NTSC 99; 13 NTLR 122. In *The Queen v Bennett* [2020] NTSC 49 Hiley J imposed a HDO in circumstances where the offender had been in remand, backdating the sentence, and then ordering a HDO effective from the date of sentence. This has been done on numerous other occasions. I understand that this is subject to appeal by the DPP to the NTCCA as it will be argued that it is contrary t the reasoning in *O'Brien v Quin*. If this appeal succeeds, it will place a further limit on the power of a court to order a HDO, albeit one which could be avoided by not backdating the sentence.

[19] *Sentencing Act 1995*, s. 39B(2)

community custody order is not available for sexual offences, violent offences or aggravated assault.[20]

11. Although s.7 envisages that the court could make "one or more of the following orders", which appears to guarantee maximum flexibility, it is subject to a contrary intention appearing which strips the section of its real use.
12. It is not difficult to envisage circumstances, for example, where a court might want to impose a head sentence of 3 or 4 years imprisonment, suspended after 6 months, thereafter subject to a home detention order for 6 months and thereafter suspended on conditions.[21] Alternatively, the court might want to combine a partly suspended sentence with a community work order or a community based order. This might be very useful in encouraging an offender's rehabilitation after release from imprisonment by a graduated return to normalcy.
13. Part of the difficulty with the NSW and Victorian models is that they both lack flexibility, although the basic idea is possibly some improvement on what we currently have at least in relation to minor offending.
14. My submission is that the courts should have maximum flexibility to impose whatever combination of sentencing options most logically fit the circumstances of the case and of the offender.
15. A further difficulty is the time taken to obtain reports as to suitability for home detention orders and, for that matter, pre-sentence reports, which typically take 6 weeks. In many cases, these reports are not sought because of the time taken to obtain them, which may mean that the accused is remanded in custody in the meantime, when, if the report could be obtained more promptly, the prisoner might not have to have spent as much time in custody. Consequently these options may not be sought by counsel for the accused. I would also recommend that s.48 (6) be repealed as it is unduly harsh.
16. So far as aboriginal people are concerned, (and for that matter non-aboriginal people as well) in many cases, home detention is not an option in any event because of the fact that they may not have a suitable home, or because they might not be able to be supervised due to remoteness, or because they are not in employment and therefore not regarded as being suitable for supervision.

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[20] *Sentencing Act 1995*, s.48A (1)

[21] I am aware that there is power for the Commissioner to release prisoners on home detention even if that has not been ordered by the Court: *Correctional Services Act 2014*, s.109(1)(d). It seems odd that this can be done administratively but not by a court.

17. To some extent, these problems can be overcome by crafting conditions onto a suspended sentence. Take for example, an aboriginal person who normally lives in an out-station. He may not have a regular job and it may be that supervision is limited to telephone contact. It may be that the offender lives a traditional lifestyle, hunting and fishing. It is not unusual for courts to impose as a condition of a suspended sentence that the person is not to leave an area within, say, 50 kilometres of the out-station without approval. A similar type of order might be made even if the person does live in a community such as Wadeye or Maningrida where electronic monitoring is possible, but it would not be realistic to require the person to be confined to his home, if the home is not suitable (perhaps because there are a lot of other people living in the home). However, this does not address the possibility of including as a condition that he perform community work. As to the latter, if a community based order could be tacked onto a partly suspended sentence, it could mean that the offender is able to perform community work. This might be a solution towards encouraging the offender to obtain employment.
18. Another example is someone living in a town or city in a small flat, or living with parents or others. The housing arrangements may not be suitable, particularly if the person is unemployed. It is possible to get around this to some extent by placing curfews on the individual, but would it not be better to include as a condition something akin to a community work order?
19. One possible solution to the delay problem (in getting suitability reports) is that the conditions could provide that the offender be released on home detention after serving part of the sentence, subject to the obtaining of a report as to suitability, with a power to come back to the court to alter the conditions if that report is unfavourable. This would give corrections the opportunity to consider the matter before the offender is released, and if unsuitable, give the court the opportunity to reconsider the matter and deal with it in some other way. This might help overcome the type of situation which arose in a recent case I had where a single mother of 3 young children who could not even be considered for home detention as she was about to lose her accommodation due to the fact that her rental agreement was due to expire. As she was still in custody and I did not think it appropriate to release her, she had no opportunity to obtain other accommodation.
20. I think that legislation which tries to micro-manage the circumstances under which these sort of orders can come into play inevitably miss the boat. Take community custody orders for example. I have never ever

imposed a community custody order and I doubt if anyone else in the Supreme Court has either. That type of order is probably directed at very low level offending which is usually dealt with in the Local Court. Part of the reason for that is the delay in obtaining a pre-sentence report, which is very often not necessary.[22] In the case of bush courts, the judge hearing the matter might not be rostered to the same bush court in 6 weeks' time. Delay in imposing sentences is often not in the interests of justice (not to mention the inconvenience of having to remind oneself of what the case was all about some 6 weeks earlier, assuming that the judge is going to be available in 6 weeks' time, which is another matter). Other reasons include the limitation on the types of offences for which that type of sentence is available and the fact that the head sentence cannot be longer than one year.[23] It is not possible to combine that order with a suspended sentence or as a condition of a suspended sentence.

21. Currently, a suspended sentence or partly suspended sentence is not an option if the head sentence is longer than 5 years.[24] Suspended sentences have a long legislative history which I will not go into in detail. Suffice it to say, originally, they were available only in very limited circumstances.[25] In 1971, the power to impose a wholly or partly suspended sentence was enacted by s. 5(1)(b) of the *Criminal Law (Conditional Release of Offenders) Ordinance 1971*. There were no mandatory restrictions on the court's power to suspend a sentence. In the same year, the *Parole of Prisoners Ordinance 1971* introduced a parole system into the Northern Territory for the first time. There were no mandatory minimum provisions relating to parole by reference to the length of the head sentence, save that the head sentence had to be longer than one year. Prior to then, and after then, prisoners who were sentenced to a term of imprisonment were entitled to one third remissions on their sentence. The system was that the remissions were credited to the prisoner upon entry into the prison, but could be lost or diminished for bad behaviour in prison. When fixing the non-parole period, the Court of Criminal Appeal decided that a court should not fix a non-parole period which was too close in time to the remission date.[26] This effectively put a limit on the maximum period that a non-parole period could be fixed, which was in the order of 50% of the head sentence. Subsequently in

[22] Sentencing Act, s.48B(1)
[23] *Sentencing Act 1995*, s. 48A(1)(b)
[24] *Sentencing Act 1995*, s.40(1)
[25] See the *Offenders Probation Act 1887* (SA) which applied only if the maximum penalty was less than 2 years. A suspended sentence was only available to a first offender: s.3. See *Good v Benyon* (1951) NTJ 6.
[26] *Mulholland v The Queen* (1991) 1 NTLR 1

1995[27], the *Sentencing Act 1995*, s40(1) limited the power of the court to suspend a sentence of imprisonment only where the head sentence was 5 years or less, and imposed a limited on the power to fix a non-parole period to not less than 50% of the head sentence. Remissions were abolished a few years later. Subsequent amendments to the *Sentencing Act 1995* have provided that there must be a non-parole period of at least 70% of the head sentence in cases of offences against certain provisions of the *Misuse of Drugs Ac*t 1990 and in cases of sexual intercourse without consent[28]. The 50% limit is not necessarily unreasonable and I have no particular problem with it in most cases. However, there are still hard cases where a court must impose a head sentence greater than 5 years in circumstances where the court would probably have suspended part of the sentence rather than fixed a NPP. Examples of such cases arise most commonly with dangerous driving causing the death of more than one victim, in circumstances where the offender is a first offender and may even be a youthful offender. The circumstances might include high speed, intoxication and driving through a red light. Again it would be more just for there to be flexibility. In some cases, there is perhaps a temptation to impose a 5 year sentence to avoid this consequence. This is not necessarily justice either. The 70% rule is not necessarily unreasonable either in many cases, but it is not hard to envisage circumstances where it might result in injustice. One of the problems of this type of mandatory minimum sentencing is that in most cases the courts have tended to fix the mandatory minimum of either 50% or 70% as the case may be; there is often no submission by the Crown that this would be inadequate, and not a great deal of thought is given to the real question which should be asked: what is the minimum term that the prisoner should serve before being eligible for release on parole? In my view, these limitations are unnecessary, deflect from sentencing principle, and should be repealed.

22. I think also that the courts should have more flexibility when dealing with breaches of court orders, especially suspended sentences. S.43 (5) requires the court to order that the whole of the balance of the sentence be restored unless the court is of the opinion that it would be unjust to do so. This does not create a problem, but the options for breaches are limited: restore the whole or a part of the suspended sentence, extend the operational period or do nothing. We are regularly invited to change the

[27] Prior to the introduction of the Sentencing Act 1995, there were very few restrictions on a court's sentencing powers but the options available were very limited: see the *Criminal Code 1983* ss390 - 405.
[28] See s. 55.

conditions (the power to do so is under s.42) but it is commonly overlooked that this is a separate application. It would be better if the court's powers were more flexible so that if a change to the conditions was appropriate, it could be dealt with without having to go through the hoops imposed by s.42. This was the subject of a submission by the Judges of the Supreme Court, supported by the Judges of the Local Court in May 2020. I have attached copies of the correspondence.

23. I am not at all in favour of doing away with suspended sentences. Currently, this is the only mechanism available to the court to craft a sentence with appropriate conditions designed to meet most, if not all, of the relevant sentencing considerations. It would be a disaster if this were to be removed as a sentencing option.
24. So, to answer the questions set out at the end of the discussion paper I would submit:
    1. We do not have the right mix of community based sentencing options principally because they are not available in many cases because the legislation does not permit them to be employed.
    2. The community-based sentencing options are not effectively used because they are too limited for the same reasons.
    3. I consider that greater use should be made of them. This could be achieved by making the provisions more flexible.
    4. The current need for a pre-sentence report prevents community-custody orders from being considered. Likewise, a community service order should be able to be made as a condition of a suspended sentence. Currently it is available only if there is no sentence of imprisonment.
    5. The reasons why they are so infrequently used is because of their limited availability for the reason previously discussed.
    6. Fully and partially suspended sentences are the most important sentencing tools presently available to the courts and must be retained.
    7. Non-custodial and custodial sentencing options could be used more often to meet the needs of indigenous Territorians if the restrictions on their use were eliminated.
    8. I do not recommend either the NSW or Victorian systems of community based sentencing because they too are subject to too many restrictions.
    9. I understand that if a non-custodial community based order is made, there is still a victim impact levy payable under s.61 of the *Victims of Crime Assistance Act 2006*. Currently this is $200 for offences charged on indictment upon a finding of guilt or $150 for matters dealt

with on complaint. This is imposed regardless of the means of the individual to pay and cannot be waived or modified. If that is correct, it should be removed, or at least modified to a reasonably low level. It operates as a disincentive, particularly with indigenous offenders. Also, it seems to me to be objectionable that the levy is payable even if the court dismisses the charge under s.10 of the *Sentencing Act 1995* because the offence was trivial or for any of the other reasons set out in s.9.

THE NORTHERN TERRITORY OF AUSTRALIA

CHAMBERS OF JUSTICE HILEY
SUPREME COURT, DARWIN

25 May 2020

Ms Jenni Daniel-Yee
Director of Legal Policy
Department of Attorney-General and Justice
GPO Box 1722
DARWIN NT 0801

By Email: Policy.AGD@nt.gov.au

Dear Ms Daniel-Yee,

Re: Amendments to s 42 & s 43 *Sentencing Act*

I am writing on behalf of the judges of this Court to suggest amendments to s 42 and s 43 of the *Sentencing Act* to clarify and expand the powers of a court in relation to suspended sentences imposed under s 40.

Where there has been a breach of an order suspending a sentence, unless the court proposes to restore part or all of the sentence held in suspense (s 43(5)(c) & (d)) or make no order (s 43(5)(f)), the only thing that the court can do under s 43 is to extend the operational period.

There are a number of other things that the court should be able to do. These include the ability to:

(a) add, remove or vary a particular condition;

(b) extend or vary the period of supervision fixed under the order (for example so that it corresponds with an extended operational period).

Commonly these things are achieved through a two-step process:

(a) taking one of the actions presently permitted under s 43(5); then

(b) proceeding under s 42(1) to vary the order.

However this approach, and indeed the interaction between those two provisions, seems cumbersome and or unsatisfactory. There are several reasons for that observation:

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(a) Unlike s 43(5), s 42 does not seem to give the court any power to act unless an application is made by the offender, a prescribed person, or the prosecutor (cf s 42(3));

(b) Section 42 only seems to operate in relation to "conditional breaches", not where the offender has breached the order by committing another offence punishable by imprisonment;

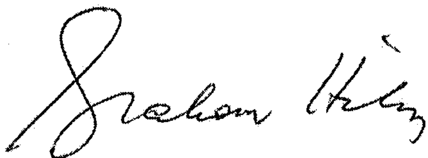
(c) Where the offender has failed to comply with a condition of the order (s 42(1)(b)) the court seems to have the additional power of sentencing the offender afresh under s 42(1) – a power additional and quite different to those set out in s 43(5)(c) – (f).

(d) There may be circumstances where the order should be varied, but neither of the preconditions in s 42(1) apply. For example it might be thought appropriate to add, remove or vary a particular condition where the circumstances of the offender have altered since the order was made, but the second requirement of s 42(1)(a) does not apply. Examples of such changes could be the extention of the period of supervision, the removal or extension of an alcohol condition, or the variation or addition of a condition relating to residential rehabilitation.

It may be that the powers to vary or cancel an order under s 42 should be expanded by giving the court the power to so act "in the interests of justice", "where the interests of justice require", "where the court thinks it appropriate / just / convenient" or something like that.

I am happy to discuss these matters with you or someone else at any time.

Yours Sincerely



The Hon. Justice Graham Hiley
Supreme Court of the Northern Territory

cc. Chief Judge Morris, Local Court

Dean Mildren

From: Elizabeth MORRIS
Sent: Wednesday, 27 May 2020 3:54 PM
To: Jenni Daniel-Yee
Cc: Graham Hiley
Subject: Breach of suspended sentences

This message has been archived. Please double click the message to retrieve from the Vault.

Dear Ms Daniel-Yee

His Honour Justice Hiley recently provided me with a copy of his letter to you relating to the provisions in the Sentencing Act for dealing with breaches of suspended sentences.
The Judges of the Local Court and myself support the suggestions made and have had similar difficulties with the operation of the section.

I would be happy to provide further information if needed.

regards

Elizabeth Morris
Chief Judge

Northern Territory Local Court

Nichols P