Australian Government

Australian Law Reform Commission

Eilish Copelin
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Northern Territory Law Reform Committee
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By Email: lawreformcommittee.doj@nt.gov.au

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Dear Ms Copelin,

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to the Northern Territory Law Reform Committee inquiry into the mandatory sentencing and community-based sentencing options.

In December 2017, the ALRC completed an inquiry to examine the laws, frameworks and institutions and broader contextual factors that lead to the disturbing over-representation of Aboriginal and Torres Strait Islander peoples in our prison system: *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2017).

In this Inquiry, the ALRC observed that achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.

The following submission to the Northern Territory Law Reform Committee inquiry is a summary of key points from the *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Report (Report 133, 2017), which we feel maybe most useful to your inquiry.

The full text of the Final Report may be accessed at: https://www.alrc.gov.au/

Sincerely,

Matt Corrigan
General Counsel

ALRC Submission to the Northern Territory Law Reform Committee Inquiry

Mandatory Sentencing

The ALRC discussed mandatory sentencing in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2017). Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples—especially those found guilty of property crime (see [8.1]).

In the Northern Territory, stakeholders identified a number of mandatory sentencing provisions to be particularly problematic in terms of their application to Aboriginal and Torres Strait Islander offenders. NAAJA submitted (quoted at [8.30]):

> The following provisions should be prioritised for immediate repeal, as they disproportionately affect Aboriginal people:
>
> - Part 3 Division 6 of the Sentencing Act – Aggravated property offences;
> - Part 3 Division 6A of the Sentencing Act – Mandatory Imprisonment for violent offences;
> - Sections 120 & 121 of the Domestic and Family Violence Act;
> - Part 3 Division 6B of the Sentencing Act – Imprisonment for sexual offences;
> - Section 53A of the Sentencing Act – Mandatory non parole periods for offences of murder;
> - Section 37(3) of the Misuse of Drugs Act.
>
> The Northern Territory governments should also abolish:
>
> - Provisions which remove the availability of suspended sentences (or other sentencing alternatives) for certain classes of offences or at all.
> - Provisions which remove the availability of home detention orders for offences that are not suspended wholly.
> - Mandatory minimum fines for traffic offences such as drive unregistered section 33 and drive uninsured section 34 of the Traffic Act.

CLANT provided a similar list of offences for repeal at [8.31].

The ALRC recommended against the imposition of mandatory sentences in relation to federal offenders in *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006). Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice. In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases (see [21.63]).

In addition, as the NTLRC noted, the ALRC expressed concern regarding mandatory sentencing especially in relation to provisions affecting youth observers in *Seen and Heard: Priority for Children in the Legal Process* (No 84, 1997).

Community-Based Sentencing Options

As the ALRC observed in *Pathways to Justice*, community-based sentences have some significant advantages over full-time imprisonment where the offender does not pose a demonstrated risk to the community.[1] A community-based sentence offers a sentencing court 'the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender' (see [7.3]).[2]

Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and, as a result, may be more likely to end up in prison for the same offence.[3] In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result (see [7.4]).

5.3 Should greater use be made of community-based sentencing options and, if so, how might this be facilitated?

The ALRC recognises that there are a number of practical matters that need to be overcome to effectively implement community-based sentences across the country including (see [7.36]):

- occupational health and safety (OH&S) and public liability concerns;
- reluctance in some communities to participate in community-based sentencing schemes;[4]
- the difficulty of attracting qualified staff in some regional and remote communities,[5] particularly in relation to support services;
- supporting greater integration and information sharing between Aboriginal and Torres Strait Islander communities and community corrections staff;[6] and
- provision of accessible, available and legal transport in regional and remote areas. [7]

Electronic supervision may assist in the practical implementation of community-based sentences.[8] In particular, it may aid offenders to meet reporting obligations, particularly in rural and remote communities where distance and lack of transport makes in-person reporting impossible or overly arduous. One example of electronic supervision is 'supervision kiosks', which are 'automated machines ... to which supervisees can report in lieu of in-person reporting to a probation, parole or pretrial supervision officer' (see 7.37).[9]

5.6 Should fully or partially suspended sentences be retained as a sentencing option? If not, are there any pre-requisites to their abolition?

> **Recommendation 7–4** In the absence of the availability of appropriate community-based sentencing options, suspended sentences should not be abolished.

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1 Community-based sentences are also much less costly than full-time custody. Other benefits of community-based sentences include the avoidance of contaminating effects arising from imprisonment with other offenders, see NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.16]–[9.17].

2 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [114]–[115].

3 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017, Cat No 4512.0* (2017) table 19. See also ch 3.

4 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xiv.

5 Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

6 Dr T Anthony, *Submission 115*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

7 Driver licence issues are discussed in ch 12.

8 Electronic supervision includes use of the following technologies: automated reporting; remote alcohol detection devices; programmed contact systems; and continuous signalling devices.

9 Jesse Jannett and Robin Halberstadt, 'Kiosk Supervision for the District of Columbia' (Urban Institute Justice Policy Center, January 2011) 2.

Suspended sentences are problematic. In particular, research has demonstrated that they have resulted in net widening while being perceived as too lenient by the public. While offering some offenders a last chance, suspended sentences can and do 'set people up to fail', particularly people with complex needs (see [7.149]).[10]

The ALRC notes that Aboriginal and Torres Strait Islander offenders may be disproportionately represented as recipients of suspended sentences compared to non-Indigenous offenders (see [7.136]).[11] The removal of suspended sentences without improving access to community-based sentences is likely to lead to even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait Islander offenders. Once this is addressed, consideration could safely be given to abolishing suspended sentences (see [7.150]).

5.7 Does the current regime of non-custodial and custodial sentencing options available in the Northern Territory adequately meet the needs of Indigenous Territorians, and in particular, Indigenous Territorians living in rural and remote communities? If not, what more can be done to ensure that Indigenous Territorians are able to take advantage of community-based sentencing options?

Recommendation 7-1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islander offenders, by:

- expanding the geographic reach of community-based sentencing options, particularly in regional and remote areas;
- providing community-based sentencing options that are culturally appropriate; and
- making community-based sentencing options accessible to offenders with complex needs, to reduce reoffending.

Recommendation 7–3 State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders.

Regional and Remote Areas

One of the reasons that Aboriginal and Torres Strait Islander offenders are less likely to receive a community-based sentence is that those sentences are often not available in many locations and, in particular, in areas outside of metropolitan and inner regional areas (see [7.17]).[12]

Remoteness has been tied to higher rates of imprisonment and disadvantage for Aboriginal and Torres Strait Islander people. Up to 80% of the Aboriginal and Torres Strait Islander prisoner population in the NT originate from regional or remote communities.[13]

Even in areas where community-based sentences are technically available, significant barriers have been experienced due to limited local opportunities for community service work and appropriate rehabilitation programs (see [7.23]). Where issues related to remoteness limit the usage of

10 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.26]–[10.30].

11 In NSW in 2015–16, 8.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a suspended sentence compared with 6.3% of their non-Indigenous counterparts; in Queensland 5.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a fully suspended sentence compared with 4.5% of their non-Indigenous counterparts. See Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2017) table 12; Australian Bureau of Statistics, above n 6, tables 1, 19; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [7.25].

12 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [12.66]; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.79]; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.

13 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006, Cat No 4705.0* (2007).

community-based sentences, the consequences can be severe, and may result in net widening and penalty escalation (see [7.25]).[14]

In order to expand the availability of community-based sentencing options in rural and remote areas additional resources will be required. When considering the principle of equality before the law—a founding principle of the rule of law—those funds should be provided expeditiously.[15] The type of sentence a person receives should not be determined by where they live (see [7.28]).

Offenders with Complex Needs

Aboriginal and Torres Strait Islander offenders are more likely than their non-Indigenous counterparts to have complex needs and experience multiple forms of disadvantage such as childhood and ongoing trauma, homelessness or unstable housing, marginal histories of employment, illiteracy, innumeracy, mental health issues, alcohol or drug dependency and cognitive impairment.[16]

However, such individuals are often found ineligible for a community-based sentence. As a result they are likely to be given a sentence of imprisonment or a sentence that increases the risk of imprisonment in the longer term (see [7.39]).[17]

The ALRC identified a number of approaches to addressing the issue of suitability assessments excluding access to community-based sentencing options:

- The imposition of unpaid community work in combination with rehabilitation and treatment services, as demonstrated in the Victorian Community Correction Order regime (see [7.48]-[7.49]);
- Pre-work programs to address an offender's drug or alcohol dependency, illiteracy, lack of work training, or other issues which currently prevent access to community service (see [7.50]-[7.56]);
- Fulfilment of community-based sentence requirements through participation in community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities; adopting some aspects of the NSW Work and Development Order scheme (see [7.57]-[7.58]).

Improving Compliance

Reductions in breach may be accomplished through engagement and collaboration with relevant Aboriginal and Torres Strait Islander organisations to provide sentencing options and assistance in meeting conditions, partnering with agencies and service providers to provide co-location of services.[18] Breach rates may also be reduced by the use of graduated sanctions in order to provide an alternative to imprisonment for breach (see [7.106]).

In addition, there some culturally appropriate community-based sentencing options that have been developed with or by Aboriginal and Torres Strait Islander organisations (see [7.128]). These include:

- A sustainable work program based in the grounds of Weeroona Cemetery under the Victorian Aboriginal Justice Agreement (see [7.129]);
- The Wulgunggo Ngalu Learning Place in Victoria (see [7.130]);

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14 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [5.78–5.85]. See section titled 'Suspended Sentences' for more on net widening and penalty escalation.

15 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble.

16 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45, 117–8; Victorian Alcohol and Drug Association, Submission No 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4.

17 See, eg, Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.1]–[5.38]; Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.34]–[2.39], [2.47]–[2.52]; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) [1.4]–[1.16], [1.26]–[1.47], [1.67]–[1.86], [1.97–1.111]; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [4.24]–[4.26]. See also chs 4 and 11.

18 Also known as a 'wrap around' model.

- The Balunda-a (Tabulam)—'be good now you have a second chance down by the river'—program in NSW (see [7.131]).

The ALRC notes that the NT has numerous remote communities, and implementing community-based sentencing options in some areas would be challenging. To overcome this, a 2016 independent review of NT Corrective Services recommended the appointment of probation and parole officers to remote communities who are from that community to provide local supervision and support to offenders.[19] The recommendation makes clear that this should only be implemented with community agreement (see [7.132]).

5.8 Is a different approach to community-based sentencing, such as that in place in New South Wales or Victoria, preferable to the regime currently in place in the Northern Territory?

5.8.1 If either the New South Wales or Victorian approach to community-based sentencing is recommended, what changes, if any, should be made to the recommended regime?

> **Recommendation 7-2** Using the Victorian Community Correction Order regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.

Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender.[20] To achieve this, the sentencing regime for sentences served in the community needs to be as flexible as possible so that an individual sentence can be tailored by the judicial officer (see [7.59]).[21]

In *Pathways to Justice*, the ALRC suggested the community correction orders regime in Victoria as an approach to community-based sentencing that allows for flexibility in both the sentencing structure and the imposition of conditions (see [7.72]-[7.86]):

- As part of a CCO, the court must impose at least one additional condition of either unpaid work, treatment, supervision, non-association, residence restriction, place exclusion, curfew, alcohol abstinence, a bond condition, or a judicial monitoring condition (see [7.75]).[22]
- It is not a substitution for imprisonment. If it is treated as such, this can limit the flexibility that a court may have in setting the scope and conditions of the order—reflecting that the two orders are designed to serve different purposes (see [7.82]).
- The Victorian model enables a community-based sentence to be applied over a longer period compared to other jurisdictions (see [7.83]).
- The Victorian CCO regime allows for judicial officers to 'mix-and-match' an initial short term of imprisonment with the imposition of a lengthier CCO (see [7.84]).

However, as the NTLRC noted in the Consultation Paper, the ALRC observed that there are no remote communities in Victoria,[23] and consequently other states and territories that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness (see [7.91]).

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19 Northern Territory Government, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services, 31 July 2016—Statement of Response* (2016) rec 133.

20 See, eg, Wai-Yin Wan et al, 'Parole Supervision and Reoffending' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, September 2014); Elizabeth Drake, Steve Aos and Marna Miller, above n 21; Don Andrews, James Bonta and Stephen Wormith, 'The Recent Past and Near Future of Risk and/or Need Assessment' (2006) 52(1) *Crime & Delinquency* 7.

21 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [56].

22 *Sentencing Act 1991* (Vic) ss 48C–48K.

23 Council of Australian Governments, above n 30, 74.