TERRITORY
CRIMINAL LAWYERS

SUBMISSIONS IN RESPONSE TO THE MANDATORY SENTENCING AND COMMUNITYBASED SENTENCING OPTIONS CONSULTATION PAPER

Introduction

1. Territory Criminal Lawyers welcomes the opportunity to comment on mandatory sentencing laws.

2. It should be noted from the outset that the repeal and abolition of mandatory sentencing laws has already been recommended by countless reviews and inquiries. This inquiry will no doubt produce worthy recommendations of the same flavour as those other inquiries into mandatory sentencing. Within this context we fear that when all is said and done this consultation will still not lead to meaningful change. We hope we are wrong.

3. The Legislative Assembly, and Territory Labor which controls it, both already know the right thing to do. Reform was promised by Territory Labor before it won the 2016 election. A draft bill aimed at repeal and abolition should have been prepared and circulated years ago.

4. The urgency of this reform cannot be understated. While we continue to talk about reform, the Territory continues to incarcerate Aboriginal people at a greater rate than nearly any other population on the planet.[1] We should all be ashamed of this. Those who support laws that perpetuate this appalling statistic, and those with power who do nothing about it, will one day find themselves on the wrong side of history.

A brief history of mandatory sentencing in the Territory

5. The Northern Territory was – and, many say, still is – the site of the last of Australia's colonial frontiers. Within its borders are among those places where British "settlement" happened last, and it remains the jurisdiction with the

[1] As their proportion of the total national population, Indigenous people are the most incarcerated cultural group in the world for whom data exists: Thalia Anthony, "FactCheck Q&A: Are Indigenous Australians the most incarcerated people on Earth?", *The Conversation*, 6 June 2017: https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528. The rate at which Western Australia incarcerates its Aboriginal population is substantially higher than the equivalent rate in the Northern Territory: Corrective Services Australia, "National and state information about adult prisoners and community-based corrections, including legal status, custody type, Indigenous status, sex", Australian Bureau of Statistics, June Quarter 2020 (released 17 September 2020): https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release.

highest proportion of Aboriginal people per capita. Any inquiry into the functions and reform of the Territory's criminal justice system must bear these basic and central facts in mind.

6. When the British "settled" on the Australian continent from January 1788, they brought the law of Britain with them. They failed to recognise the legal systems which had been in place in this land for more than 50,000 years. British law in the eighteenth century was inhumane by today's standards. It imposed a mandatory death penalty for more than 200 different offences, from murder to chopping down trees.[2]

7. When the administration of the Territory passed from South Australia to the Commonwealth in 1911, the *Criminal Law Consolidation Act 1876* (SA) left the Territory with mandatory sentences for a whole range of crimes. A conviction for attempted murder meant a minimum of three years' prison. Rape; four years' prison. Carnal knowledge of a girl under 12; four years. Buggery; ten years. Abortion; three years. Setting fire to a church or dwelling; seven years. Setting fire to crops; three years. Armed robbery; three years. Burglary; three years. And a conviction for murder automatically meant the death penalty, at least until 1934, when the court was given a discretion to impose a sentence other than death where the defendant was Aboriginal.[3]

8. There was an argument in favour of mandatory sentences a century ago that thankfully does not apply now - convenience. Back then, the Territory had very few police officers; its roads were often little more than bush tracks, impassable during the wet season; the Supreme Court was a single judge in Darwin. People who broke the law in a serious way needed to know that if they were caught and convicted, they would face certain punishment. But the fair and just application of these mandatory sentencing laws depended on the fair and just conduct of criminal hearings, and that was not always the case.

9. In 1933 Thomas Wells's was plucked from the junior Bar in Sydney and installed as the Territory Supreme Court's single resident judge. Within his first year on the bench he sentenced ten Aboriginal defendants to death on flimsy evidence. About a year after his appointment Wells presided over the now infamous case of *R v Tuckiar*, in which the Yolngu defendant, Dhakiyarr Wirrpanda, was accused of murdering a (white) police constable. The Crown's evidence was not conclusive, and there were missing witnesses who could have cleared things up. But Wells told the (all-white) jury that it would be "a grave miscarriage of justice" if it acquitted an Aboriginal man who might possibly be guilty, in circumstances in which the moral character of the dead officer had been attacked. The jury convicted and the case ended up in the High Court, which overturned the conviction and ordered Wirrpanda's release. But

[2] See for instance the infamous *Black Act* of 1723.

[3] See: Dean Mildren, *Big Boss Fella All Same Judge: A History of the Supreme Court of the Northern Territory*, Federation Press, 2011, pp 90-91.

Wirrpanda was not released, and instead mysteriously disappeared – presumably, he was murdered by people who believed him to be guilty.[4]

10. The last of the nine (lawful) executions in the Territory took place in 1952, and the death penalty was finally abolished in 1973. Murder has since continued to attract a mandatory sentence of life imprisonment in the Territory.[5] But it is only since February 2004 that murder has attracted a *mandatory non-parole* period of either 20 or 25 years (depending on the level of aggravation) unless "exceptional circumstances" apply.[6]

11. The first of the modern provisions imposing a mandatory prison sentence for particular offences other than murder was the new *Misuse of Drugs Act* which became law in February 1990. Where a court finds an offender guilty of a drug-related offence that carries a maximum penalty of at least seven years' imprisonment, or where there's an aggravating circumstance, the court must impose an "actual" sentence of imprisonment (unless it is "of the opinion that such a penalty should not be imposed"). The practical effect of section 37(2) was to reverse the courts' default position: since then, courts have started with prison and worked backwards. Section 37(2) has remained unchanged ever since.

12. In November 1992, the CLP-controlled Legislative Assembly carved out the restraining order provisions of the existing Part IV Division 8 of the *Justices Act* (where they had been since 1989) and created a new *Domestic Violence Act*. In the process, it introduced the second mandatory sentence for an offence other than murder: anyone found guilty of a third or subsequent breach of a Domestic Violence Order had to serve at least seven days in prison.[7] After Labor took power in 2001 it reviewed this legislation, and came to the conclusion that the mandatory sentencing provision lacked fairness. As attorney-general Syd Stirling explained as he introduced the new *Domestic and Family Violence Bill* in October 2007: "in circumstances where the breach of the order does not in fact result in harm, the court will have discretion not to impose a mandatory sentence if the court is of the opinion that in the circumstances of the offence it is not appropriate to do so."[8]

13. In November 1996, following a political campaign for tougher criminal sentences, the Country Liberal Party (CLP) government pushed through the Legislative Assembly amendments to the *Sentencing Act* that introduced "compulsory imprisonment" for property offences.[9] The amendments were similar to Western Australia's "three-strikes" legislation which had been passed

[4] *Tuckiar v R* [1934] HCA 49; Peter Read, "Murder, revenge and reconciliation on the north eastern frontier" (2007), *History Australia*, vol 4, no 1, pp 9.1-9.15.

[5] *Criminal Code 1983* (NT), s 164.

[6] *Sentencing (Crime of Murder) and Parole Reform Act 2003* (No 3 of 2004) (NT).

[7] *Domestic Violence Act 1992* (No 67 of 1992) (NT), s 10(1).

[8] Legislative Assembly, "*Domestic and Family Violence Bill* (Serial 120)", Second Reading Speech, Debates, 17 October 2007 per Syd Stirling (Minister for Justice and Attorney-General), p 4846 at 4849.

[9] *Sentencing Amendment Act (No 2) 1996* (No 65 of 1996) (NT), s 8.

earlier that year, but were even more oppressive. A first offence carried a minimum term of 14 days' actual imprisonment. A second offence, 90 days. A third or subsequent offence, no matter how minor, no matter what extenuating circumstances, would see an offender imprisoned for at least one year – just like in WA. Quite predictably the amendments struck hardest against young Aboriginal defendants, whose poverty, intergenerational trauma and practical exclusions from work and study meant that they were heavily over-represented among those arrested for property crime. Rather than deal with those criminogenic drivers, the amendments imposed a simplistic and draconian punishment that would inevitably further marginalise and brutalise them.

14. The three-step mandatory sentencing laws for property offences were a disaster. Two 17-year-old girls with no previous convictions were both sentenced to 14 days' mandatory imprisonment for stealing clothes from other girls who were staying in the same room. Another 17-year-old girl, also with no prior convictions, was sentenced to 14 days' mandatory imprisonment after she received jewellery stolen by others. Two young apprentices were both imprisoned for two weeks for first offences after they broke a window a light worth $9.60. A 17-year-old boy from a remote Aboriginal community, who had broken into a property with friends and stolen food, alcohol, cigarettes, soft drink and petrol, was sentenced to 7 months' imprisonment *plus* a mandatory 3 months' mandatory imprisonment. Between June 1994 and June 1997 the number of young Aboriginal and/or Torres Strait Islander people in prison across Australia increased by 20 per cent, with a substantial portion of that figure due to mandatory sentencing laws in the Northern Territory and Western Australia. From Opposition, the Labor Party promised to repeal them. The Human Rights and Equal Opportunity Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner slammed them, and pointed out that they were in fundamental breach of Australia's obligations under the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*.[10]

15. Undeterred, the CLP government rammed through further amendments – in two days in early June 1999 – that required courts to sentence violent repeat offenders to actual imprisonment.[11] It would not matter that a person's previous offence for violence was twenty years earlier. It would not matter even if the two offences might have both caused no harm. A second finding of guilt for *any* violent offence meant imprisonment. The same amendments also required that *any* finding of guilt for a sexual offence required a court to sentence the defendant to imprisonment – whether it was a first offence or not.[12]

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[10] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, HREOC (tabled in the Commonwealth Parliament on 7 April 2000), chapter 5 (also contains the examples and statistics referred to earlier in this paragraph).

[11] *Sentencing Amendment Act (No 2) 1999* (No 33 of 1999) (NT), s 17, introducing s 78BA into the *Sentencing Act 1995* (NT).

[12] *Sentencing Amendment Act (No 2) 1999* (No 33 of 1999) (NT), s 17, introducing s 78BB into the *Sentencing Act 1995* (NT).

16. Labor won the subsequent (2001) election against expectations. And it did make good on its promise to repeal the CLP's three-step mandatory prison amendments. Except it also knew that home- and business owners still wanted tough sentences for property crime committed by Aboriginal kids. So while it repealed the CLP's gratuitous "punitive work orders", Labor simply replaced the CLP's sections 78A and 78B with its own. Property offences would no longer carry such absurd mandatory minimum prison terms as 12 months. But "aggravated property offences" – which includes criminal damage and other common property offences under the *Criminal Code* – would carry mandatory prison terms, or a mandatory community work order, unless exceptional circumstances applied.[13]

17. The new Labor government didn't touch the CLP's mandatory sentencing laws for violence until early into its third term. (Late in its first term, of course, it introduced the mandatory non-parole periods for murder.) From December 2008, anyone found guilty of causing any harm to another person, so as to interfere with the victim's health, had to serve a prison sentence – even if it was for a first offence.[14] The CLP's mandatory sentencing law for sexual offences remained unchanged.

18. These draconian provisions remained until Labor lost office at the 2012 election. Among the first laws introduced by the new attorney-general, former police officer John Elferink, was the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*, which passed the Legislative Assembly in February 2013. It introduced the present Division 6A of Part 3, which contains even tougher mandatory sentences for violent offenders. Division 6A establishes five "levels" of violent offending, and provides for mandatory minimum prison sentences for first and subsequent offenders at each level, with exceptions if offenders could show "exceptional circumstances". Division 6A survived the one-term CLP government, and the entire first term of the re-elected Labor government. The mandatory prison sentence for sexual offences, now in section 78F, also survived.

19. In November 2015, Elferink (in his capacity as Minister for Correctional Services) ordered a "root and branch" review of the Department of Correctional Services following a number of escapes from and incidents in the Don Dale Youth Detention Centre in Darwin. The report of that review, by consulting firms BDO and Knowledge Consulting, was finalised at the end of July 2016 – within a month of the general election the following month – and contained significant criticism of mandatory sentencing as it applied to children.[15]

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[13] *Sentencing Amendment Act (No 3) 2001* (No 55 of 2001) (NT), s 6.

[14] *Sentencing Amendment (Violent Offences) Act 2008* (NT), s 5, repealing and replacing s 78BA of the *Sentencing Act 2005* (NT).

[15] Hamburger et al, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services*, BDO and Knowledge Consulting, 31 July 2016.

20. During the leadup to the August 2016 election, the "Making Justice Work" coalition together with the Northern Territory Law Society generated "Six Asks to Make Justice Work for Territorians." Ask #5 was to "ABOLISH MANDATORY SENTENCING". The coalition argued that mandatory sentencing "does not work to reduce crime or make the community a safer place". From Opposition, Territory Labor signed up to the Six Asks.

21. In December 2017, the Australian Law Reform Commission wrote the latest of many reports that have called for the abandonment of mandatory sentencing in the NT. The report of its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples concluded: "Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent."[16]

22. While other states have recently experimented with various types of mandatory sentencing legislation, with one or two exceptions[17] such sentences have largely been confined to very serious offences where lengthy terms of imprisonment are already normally imposed by courts. Nowhere outside the NT are people subject to provisions such as section 37(2) of the *Misuse of Drugs Act*, section 121 of the *Domestic and Family Violence Act*, or the extraordinary Part 3, Division 6A of the *Sentencing Act*.

23. The uncomfortable question that needs asking is: why are these laws on the books here, in the Territory, and nowhere else?

Common Arguments in Favour of Mandatory Sentencing

24. Territory Criminal Lawyers has encountered two arguments frequently put forward in defence of mandatory sentencing.

25. Firstly, many proponents of mandatory sentencing will make the observation that mandatory sentencing laws apply to everyone equally, and the way to avoid being caught in their net is to avoid committing crime. This is a view that fundamentally misunderstands and misrepresents the decades of research by criminologists,[18] sociologists, behavioural economists,[19] trauma experts,[20] and

[16] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report*, ALRC Report 133, December 2017, chapter 8.

[17] For instance: the mandatory 6-month prison sentence for assaulting police in WA.

[18] For instance: Don Weatherburn, "What causes crime?", *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* no. 54, February 2001, NSW Bureau of Crime Statistics and Research.

[19] For instance: van Winden and Ash, "On the behavioural economics of crime" (2012), *Review of Law and Economics*, vol 8, no 1, pp 181-213.

[20] For instance: Bessel van der Kolk, *The Body Keeps the Score: Mind, Brain and Body in the Transformation of Trauma*, Penguin, 2015 [2014], ch 10: "Developmental trauma: The hidden epidemic".

post-colonial theorists[21] into what drives criminal behaviour. Nowhere in Australia is the Aboriginal population so great a proportion of the total population – both generally, and in prison – as it is in the NT. It is a sad reality that members of dispossessed, traumatised, poverty-stricken and over-policed populations are both more likely to become involved in assaults and property crime, and more likely to be detected and charged for their involvement. When this reality is properly acknowledged it can be predicted that the NT's mandatory sentencing laws will overwhelmingly "catch" Aboriginal people who live there. And they do.

26. Another substantial argument in favour of mandatory prison sentences is that they work to protect the victims of violent and other offending on a "no ifs, no buts" basis. A man who hits his female domestic partner a second time should be going to prison for at least three months, a time that potentially provides much-needed respite for her and deters him from similar offending in the future.

27. Protection of victims is an extremely important objective of our criminal justice system. Territory Criminal Lawyers will not speak on behalf of Aboriginal victims of violence, but we do note that Aboriginal women have been among the strongest critics of the use of prison – mandatory and otherwise – over the years.[22] Imprisonment forces violent men together in an environment governed by force, away from their communities and support structures, and away from the influence of women. It has been observed that prison is implicated in the development of a new "bullshit (male) culture" that justifies violence.[23] In other words, imprisonment in its current form simply kicks the problem 'down the road', and upon the expiration of the sentence society is often faced with a person for whom criminal behaviours have been normalised by their most recent environment.

28. Prison will only ever be an effective tool for preventing future victimisation if a person who is sent there is less likely to offend when they return to the community. The Northern Territory prison system fails miserably in this regard. The concept of imprisonment as a deterrent has demonstrably failed. Incarceration affords no protection for victims and the broader community beyond the offender's time in custody, unless rehabilitation and reintegration back into the community are the primary focus of that time.

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[21] For instance: Thalia Anthony and Harry Blagg, *Decolonising Criminology: Imagining Justice in a Postcolonial World*, Palgrave Macmillan, 2019; Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, Hawkins Press, 2008.

[22] See for example: Dorinda Cox, Mandy Young and Alison Bairnsfather-Scott, "No justice without healing: Australian Aboriginal people and family violence", *Australian Feminist Law Journal*, June 2009, vol 30, p 151-161; Victoria Hovane, "White privilege and the fiction of colour blindness: Implications for best practice standards for Aboriginal victims of family violence", *Australian Domestic and Family Violence Clearinghouse Newsletter*, Summer 2006-07, no 27, pp 8-12.

[23] Conversations with Aboriginal women in Katherine, NT, between 2018 and 2019.

Our Objections

29. Territory Criminal Lawyers object to the Northern Territory's mandatory sentencing laws, and mandatory sentencing laws in general, on the following bases:

    a) Mandatory sentencing laws have their greatest impacts on Aboriginal people, their families and their communities. Indigenous Territorians already experience a degree of inter-generational trauma, poverty and surveillance that is so excessive and extreme as to be qualitatively different to what most other people in Australia experience. There is no mandatory sentencing for "white collar" offences such as fraud. Rather, mandatory sentencing laws have been applied mostly to offences in which Aboriginal people are over-represented due to poverty and disadvantage. Mandatory sentencing laws, therefore, contribute to racial injustice.

    b) Mandatory sentencing laws enhance our focus on punishing the *criminal behaviour* of the offender (by imprisoning them), and detract from efforts to focus on the *underlying causes of a person's offending*, which has better prospects of stopping the offending.

    c) These laws do not work. The Northern Territory has used mandatory sentencing provisions for a long time now. This is not a theoretical argument. We know that they are ineffective in reducing crime. We know that they are ineffective in reducing victimisation. We know that they do not prevent moral outrage from flaring up when partial facts are presented in the media on particular cases.

    d) In some cases, mandatory sentencing laws create a disincentive for victims to report offences, in circumstances where victims want help that does not involve offenders going to prison.[24]

    e) It is erroneous and paternalistic to assume that every victim of a crime wishes the worst possible punishment to be inflicted on their perpetrator. The human experience is more nuanced than this. Often victims would prefer an alternative, such as a form of restorative justice in which they could participate, rather than the mandatory blunt instrument of incarceration.

    f) To the extent that mandatory sentencing laws increase the number of people who spend time in prison, they contribute to all of prison's

[24] Matthew Willis, "Non-disclosure of violence in Australian Indigenous communities" (2011), *Trends and Issues in Crime and Criminal Justice* No. 405, Australian Institute of Criminology: https://www.aic.gov.au/publications/tandi/tandi405

negative consequences for individuals (who experience additional trauma and who become less employable), their families and their communities, and for society at large, which must pay the enormous costs of imprisoning people.

g) To the extent that spending time in prison is a factor that *increases* the chance that an individual will reoffend,[25] mandatory sentencing laws contribute to recidivism and work, in practice, to create a society that's *less safe* for victims and communities.

h) To the extent that prison represents a missed opportunity for effective community based rehabilitation, restoration or healing, mandatory sentencing laws contribute to such missed opportunities.[26]

i) Mandatory sentencing laws assume that imprisonment is always, in all circumstances and for all offences of a particular category, the most appropriate punishment. Where imprisonment in a particular case is a recognisably *inappropriate* punishment, mandatory sentencing laws unjustly require the court to impose a sentence that is inappropriate.

j) Mandatory sentencing laws create incentives for lawyers, police officers, jurors, and members of the public (and potentially judges and magistrates) to mischaracterise evidence in an attempt to ensure that a particular offender is or is not caught by mandatory sentencing provisions.

k) Mandatory sentencing laws often further reduce or eliminate incentives for particular offenders to plead guilty. This results in increased workloads for courts, lawyers, and police, and increases the resources that the community must expend on these institutions.

l) Mandatory sentencing laws further reduce or eliminate incentives for offenders to "own up", apologise and provide restitution or compensation following their involvement in an offence. If the punishment will be the same regardless of whether they compensate the victim for the financial losses associated with a break-in, for instance, then an offender is perversely incentivised to avoid offering compensation. Mandatory sentencing laws, therefore, may work to compound the damage caused to the victim of an offence.

[25] Don Weatherburn, "The effect of prison on adult reoffending", *Crime and Justice Bulletin* No 143, Bureau of Crime Statistics and Research, August 2010.

[26] Dorinda Cox, Mandy Young and Alison Bairnsfather-Scott, "No justice without healing: Australian Aboriginal people and family violence", *Australian Feminist Law Journal*, June 2009, vol 30, p 151-161.

m) Mandatory sentencing laws detract, without good reason, from the principle of *individualised justice*. Parliaments make laws that apply generally; only courts are able to consider the individual circumstances of each offender, in order to determine the appropriate sanction in each case. Individualised justice is a fundamental principle that sets liberal democracies apart from other political systems. When parliaments make laws requiring courts to impose minimum penalties *regardless of the offender's individual circumstances*, parliaments undermine the principle.

n) Mandatory sentencing laws undermine the separation of powers. Parliaments make legislation proscribing certain behaviour and establishing sanctions, including maximum penalties for each offence. Courts determine the guilt of an individual, and impose particular penalties (on the principle of individualised justice). When parliaments make laws requiring courts to impose a sentence they wouldn't otherwise impose, parliaments undermine the separation of powers – another principle which sets liberal democracies apart from other political systems.

o) Mandatory sentencing laws undermine public confidence in the courts. Mandatory sentencing laws are made by politicians claiming to represent the will of a public angry that people aren't being sufficiently punished by courts. Generally, this kind of public anger is expressed as a moral panic following inflammatory media coverage that fails to provide the full facts of a case. When parliaments create mandatory sentencing laws, they are effectively confirming that the public is right to mistrust the courts. However, whenever the question has been researched, sentencing judges and magistrates tend on average to be *harsher* sentencers than members of the public who have access to the same facts about a particular case.[27] Therefore, the act of passing mandatory sentencing laws unnecessarily undermines public confidence in courts.

p) Mandatory sentencing laws undermine the long-established sentencing principle that punishment should be proportionate to the gravity of the offence and the context within which it took place. Mandatory sentencing laws create the very real risk that a particular punishment does not fit the crime.

q) Where mandatory sentencing laws lead to injustices in sentencing outcomes, and where media and public opinion vocalises that injustice, mandatory sentencing laws are unfair to victims and their

[27] See the work of Julian Roberts and Anthony Doob, for instance: "News media influences on public views of sentencing" (Oct 1990), *Law and Human Behaviour*, vol 14, no 5, pp 451-468. See also: Kate Warner and Julia Davis, "Using jurors to explore public attitudes to sentencing" (2012), *British Journal of Criminology*, vol 52, pp 93-112.

family and friends because they shift the focus of public discourse from the heinousness of the offence to the injustice of the punishment.

r) Mandatory sentencing laws detract from the principle of imprisonment as a last resort, and instead often make imprisonment a first resort.

s) Mandatory sentencing laws breach Australia's international obligations under Article 9 of the *International Covenant of Civil and Political Rights*, which requires that detention not be arbitrary.

t) Mandatory sentencing laws unnecessarily harm the Northern Territory's, and Australia's, international reputation among the community of nations.

Consultation Paper Questions

3.1 Do the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* achieve their postulated goals or objectives?

30. No. The stated goal of the mandatory sentencing for "aggravated property offences" under the *Sentencing Act 1995* is to "ensure that community disapproval of persons committing aggravated property offences is *adequately* reflected in the sentences imposed on those persons." However, sections 78A and 78B operate to ensure that community disapproval is often very *inadequately* reflected.

31. While parliament may be sure that the community, on average, generally and mostly disapproves of property offending, parliament cannot be sure that the whole community *always* disapproves of *all* such offending to the extent that it demands that *all* offenders are sentenced to terms of imprisonment. The community may, for instance, be strongly against a sentence of imprisonment for a particular offender once their circumstances are known. But in such a case, sections 78A and 78B would force an outcome that ignores the will of the community. In all cases, the community's disapproval is adequately reflected in the maximum penalties established by parliament in the *Criminal Code* and by the various sentencing options available in the *Sentencing Act*.

32. The mandatory sentencing provisions meet very few of the objectives of punishment. They are not strictly retributive, because retribution requires that offenders suffer the punishment they and their actions "deserve". They are no better than ordinary imprisonment at producing specific and general deterrence (or the Territory would have seen reductions in crime rates). They

are not aimed at rehabilitation: when a court is of the opinion that rehabilitation in a particular case would be better effected by ordering a non-custodial sentence, the effect of a mandatory sentencing law is to deprive the court of that option.

33. It is sometimes argued by proponents that mandatory sentencing laws may meet the "denunciation" objective of punishment, whereby a court makes a public statement that the offender's behaviour is not to be tolerated by society. However, mandatory sentencing laws effectively remove this role from the courts. In some cases, mandatory sentencing laws lead to the courts doing the opposite. "I take no pleasure in this outcome," Mildren J told Zac Grieve as he was sentencing him to life imprisonment for murder with the mandatory minimum non-parole period of 20 years. "It is the fault of mandatory minimum sentencing provisions, which inevitably bring about injustice." Observations of this kind substantially detract from the denunciatory role of punishment and sentencing. Indeed, Grieve's sentence has since achieve infamy for its perceived *injustice*: had the court been able to sentence him unfettered by s 53A of the *Sentencing Act*, it's unlikely this would have occurred.

3.2 Are the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* principled, fair and just?

34. No. The mandatory sentencing provisions clearly accord with none of the ordinary sentencing principles (parsimony, proportionality, parity and totality), which have themselves developed to give effect to the liberal principles which underpin the notion of individualised justice. Mandatory sentencing laws impose a requirement on the sentencing court to sentence on the basis of the offending behaviour alone, insofar as it fits into a general category described by parliament. While the offending behaviour is a very substantial factor that a court takes into account when considering a sentence, it shouldn't be the only factor: to give proper effect to the accepted principles, a sentencing court should also be taking into account the offender's background, the context of the offending and the impact the offending had on the victim(s), if any. In many cases, mandatory sentencing laws obviate the need for courts to properly consider these other factors.

3.3 Should the NT's mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* be maintained or repealed?

35. Yes. In line with the recommendations of practically every independent review of the NT's mandatory sentencing laws, the relevant provisions should be

repealed. Their repeal would leave the maximum penalties established by the Legislative Assembly in place, and would afford the courts maximum discretion to apply the sentencing principles and to deal with offenders according to the individual circumstances of their offending.

3.4 Are there other issues relating to the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* not discussed in this Consultation Paper which the Committee should address in its report?

36. As discussed in the Consultation Paper, the Northern Territory's mandatory sentencing laws apply mostly to offences committed most often by people living in poverty, disadvantage and with trauma, such as offences of violence, property offences and breaches of domestic violence orders. There is no mandatory sentencing for "white collar" offences like fraud, for instance. Because Aboriginal people are over-represented among offences of poverty, disadvantage and trauma, Aboriginal people are, unsurprisingly, "caught" by mandatory sentencing laws. These facts are widely known, including among members of parliaments who enacted the mandatory sentencing laws. Instead of addressing the underlying causes of offending of this nature – poverty, substandard housing, intergenerational trauma, dispossession, lack of autonomy – parliament has been content to make laws aimed at *increasing* the time offenders spend in prison. It is widely known and accepted that time in prison tends to *compound* existing problems of poverty, housing, trauma and lack of autonomy.

37. It is widely recognised that Aboriginal people in the Northern Territory are imprisoned at among the highest rates of any population in the world. At least since the Aboriginal Deaths in Custody Royal Commission reported in 1991, the Northern Territory has been under an obligation to reduce the rate at which Aboriginal people are incarcerated. Instead, its parliament has passed laws which disproportionately *increase* the incarceration rate among Aboriginal people. Parliaments cannot claim that these laws are generalist in nature: they are not, because they apply to particular offences. Parliaments cannot claim that the carceral effects on the Aboriginal population were not foreseeable: these effects were predictable and known. In passing mandatory sentencing laws that are known to target Aboriginal offenders, parliament has opened itself to an accusation of implementing a racist policy. It is a difficult accusation to refute.

4.1 Should the mandatory sentence for murder be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?

38. Yes. The absurdity and the injustice of the mandatory non-parole period is nowhere better illustrated than by the case of Zac Grieve and his conviction and sentencing for murder. Grieve was, properly on the evidence, convicted of the murder of Raffaeli Niceforo, on the basis that he had intended to kill Niceforo while he participated in planning. But the evidence established that he had likely tried to back out of the murder before it took place, and that he probably was not at the scene when Niceforo was killed. Therefore, while the evidence established that Grieve was guilty of murder, his actual conduct meant that he was much less morally culpable than that of the two co-accused who physically carried out the murder. But the operation of section 53A meant that the sentencing court had no option than to impose the minimum non-parole period of 20 years under subsection (1), because Grieve did not meet the artificially narrow definition of "exceptional circumstances" under subsection (7).

39. Instead of a denunciation of Grieve's substantial involvement in a murder, his sentence has become an emblematic example of injustice. This is unfair to the family of the victim, and undermines the work of the courts and the entire justice system in the Northern Territory.

4.2 Should the mandatory sentence for sexual offences be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?[28]

40. Yes. Sexual offending typically has horrible consequences for victims, but it is a great mistake to conclude, without knowing the facts of each particular matter, that imprisonment is the only appropriate sentence that can be imposed in all cases involving sexual offending.

41. Currently, section 78F of the *Sentencing Act 1995* (NT) requires that actual imprisonment be imposed for each of the following offences: the possession of child abuse material (*Criminal Code*, s 125B); publishing an "indecent" article (s 125C, with the term "indecent" defined in s 125A); sexual intercourse or gross indecency involving a child under 16 years (s 127), or over 16 years under special care (s 128); sexual intercourse or gross indecency involving by a provider of services to a mentally ill or "handicapped" person (s 130); attempting to procure a child under 16 to have sexual intercourse or to engage in any act of gross indecency (s 131); as an adult, having a sexual relationship with a child under 16 (s 131A); dealing indecently with a child under 16 (s 132); incest (s 134);

[28] This section (4.2) has been adapted from the following published sources: Russell Marks, *Crime and Punishment: Victims and Offenders in a Broken Justice System* (Black Inc, 2015); Marks, "More than taboo", *Overland* 218, Autumn 2015.

bestiality (s 138); indecent assault (s 188(2)(k)); sexual intercourse or gross indecency without consent (s 192); coerced sexual self-manipulation (s 192B).

42. In many cases a term of imprisonment may be the most appropriate sentence for people found guilty of the above offences. But these offences also cover the following circumstances: an 18-year-old girl and a 17-year-old boy create, by mutual consent, a video of their consensual sexual activity; a 16-year-old girl takes a photo of herself engaging in sexual activity and sends it to her 18-year-old girlfriend; a boy who has just turned 18 has sexual intercourse with his girlfriend who is just about to turn 16. Each of the 18-year-olds in the above examples would be guilty of an offence that requires a court to impose a sentence of actual imprisonment. Community members might be concerned by this behaviour and want it to be appropriately addressed in court. It is, however, unlikely that any rational member of the community would expect that this type of behaviour should be punishable by mandatory imprisonment.

43. Recent research and practice also suggests that imprisonment for sexual offending may not *always* be the most appropriate form of punishment. Success has been found elsewhere in Australia with therapeutic models aimed at healing the victims and rehabilitating offenders.[29] Typically to be accepted into such program an offender would have to admit their guilt.

44. The "imprisonment in all circumstances" approach required by section 78F incentivises offenders to deny wrongdoing. A denial of the conduct sets into motion procedures that require victims to recount the events to a court, often under rigorous cross-examination in which they are accused of being untruthful, a process that can exacerbate existing trauma.

45. In May 2014, RMIT University's new Centre for Innovative Justice reported on its federally commissioned investigation into 'pathways to better outcomes' for sex-crime victims, offenders and the community. The overall impression given by the report is that, in comparison with some other parts of the world, most Australian governments have not thought very deeply about how best to deal with either victims or offenders, instead choosing to hide behind the traditional prosecute-and-punish model – which rarely helps anyone. New Zealand, on the other hand, 'has a sophisticated, embedded and legislatively supported restorative justice conferencing program for both young people and adults, with no sexual offence exclusions', and this appears to achieve desirable outcomes for both victims and offenders. The report also looks at the possibility of specialist 'problem-solving' courts for sexual offending (such as those already established in the United States and South Africa) and 'truth-telling'

[29] Butler, Goodman-Delahunty and Lulham, "Effectiveness of pretrial community-based diversion in reducing reoffending by adult intrafamilial child sex offenders" (2012), *Criminal Justice and Behaviour*, vol 39, no 4, pp 493-513.

mechanisms, and includes a how-to guide for governments serious about implementing a restorative justice approach.[30]

46. The hardships for victims built into the classical justice model – cross-examination, public embarrassment, the possibility of non-conviction – are intensified for victims of sex crimes, especially children. The punishment-at-all-costs approach can deny the possibility of the kind of healing needed for victims who want answers, no matter how imperfect these answers might be.

4.3 Should a judge, in appropriate circumstances, have the power to exempt a person from the requirements of the *Child Protection (Offender Reporting and Registration) Act 2004*?

47. Yes. The 18-year-old girl who makes and retains, by mutual consent, a video of her consensual sexual activity with her 17-year-old boyfriend; the 18-year-old girl who receives a photo of her 16-year-old girlfriend engaging in sexual activity; the boy who has just turned 18 who has sexual intercourse with his girlfriend who is just about to turn 16: each of these 18-year-olds have committed "Class 1" or "Class 2" offences under the *Child Protection (Offender Reporting and Registration) Act 2004* (NT) and is therefore a "reportable offender" who must report to the Commissioner and who is barred from child-related employment. However, it would be surprising if the community would insist that any of the 18-year-olds in the above examples should have reporting and registration requirements, or be banned from working with children, as part of managing and preventing the risk of harm to children. Indeed, the prospect of automatically labelling these 18-year-olds as child sex offenders from whom children must be protected is (probably) grossly unfair, absurd and unjust.

48. Again, parliament can only ever deal with general categories of offence. Courts are able to consider the particular circumstances of each individual offence, the offender who committed it, and the victim(s), if any. Courts are, therefore, best placed to determine whether orders under the *Child Protection (Offender Reporting and Registration) Act* are appropriate and required, to craft such orders where they are appropriate, and to avoid making unnecessary orders.

[30] Centre for Innovative Justice, *Innovative justice responses to sexual offending: Pathways to better outcomes for victims, offenders and the community*, CIJ, May 2014: https://cij.org.au/cms/wp-content/uploads/2018/08/innovative-justice-responses-to-sexual-offending.pdf

4.4 Should the "exceptional circumstances" specified in s.53A(7) of the *Sentencing Act 1995* for murder be less restrictive, for example, to allow the court to fix a non-parole period of less than 20 years for offending in the low range of objective seriousness, or when there are circumstances that would otherwise be taken into account by courts when imposing sentences for any other offences?

49. The problems with section 53A are not limited to subsection (7): as argued above, the entire section is unnecessary and unjust and should be repealed. However, in the event that the Legislative Assembly cannot be persuaded to repeal the entire section, the next best alternative would be to expand the definition of what can be considered by courts as "exceptional circumstances".

50. Where that phrase appears elsewhere in the *Sentencing Act* it is unfettered by any further definition that narrows its meaning (apart from that provided in common law). Where the Commissioner of Corrections is satisfied that "exceptional circumstances" exist, the Commissioner can suspend the operation of a community based order (s 39K) or community custody order (s 48H). Where a court is satisfied that it would be unjust "because of exceptional circumstances that have arisen since the order was made" to send a person in breach of a community custody order to prison for the unexpired term of imprisonment at the breach date, the court doesn't need to do so (s 48L). Where the Supreme Court is satisfied that there are exceptional circumstances that apply, it may grant leave for an offender to apply for a review of an indefinite sentence (s 73). Where a court is satisfied that there are exceptional circumstances, it doesn't need to impose the mandatory sentences for aggravated property offences (s 78B) or the mandatory minimum sentences for violent offences (s 78DI).[31]

51. The effect of the phrase "exceptional circumstances" elsewhere in the *Sentencing Act*, then, is to allow courts to step away from the legislated requirement to impose the mandatory minimum sentences in exceptional cases, and to effectively increase their discretion to impose appropriate sentences in particular cases. But the effect of section 53A(7)'s very narrow definition of what can constitute "exceptional circumstances" where the offence of murder is concerned is to unnecessarily limit the court's discretion.

52. Why should the Supreme Court, for instance, have been barred from considering whether Zac Grieves's case was exceptional for reasons other than that the victim's conduct may have "substantially mitigated" his own conduct? Grieves's case may or may not have been exceptional; the point is that the court was precluded from even considering the question, simply because his case didn't meet the very specific set of circumstances imagined by parliament in 2004.

[31] However, s 78DI(4) does make it clear that certain factors are *not* "exceptional circumstances" for the purposes of that section. Further, subsections (3) and (3A) provide *guides* as to what factors "may" allow the court to conclude that "exceptional circumstances" apply in particular cases.

53. As an aside, the requirement in s 53A(7)(b) – that the victim's conduct must have substantially mitigated the conduct of the offender – seems itself highly problematic, in that it might be said to allow for the partial blaming of the victim for her or his own murder. It is worth asking whether, in 2020, a murderer should be encouraged to blame the victim's conduct in order to avoid a mandatory non-parole period?

5.1 Does the NT sentencing regime currently have the right mix of community-based sentencing options?

54. In practice, no. The NT's current sentencing regime includes unsupervised and supervised bonds, community work orders (CWO), community-based orders (CBO) and three forms of custodial orders that don't necessarily involve actual prison time (home detention (HDO), community custody (CCO) and suspended sentences). In practice, the CBO is used barely at all by courts; and CWOs, HDOs and CCOs are often not available in remote communities due to resourcing problems at the Department of Corrections.

55. The ALRC has pointed to two additional problems of community-based sentencing options in the NT: (1) the fact that Aboriginal offenders are less likely than non-Aboriginal offenders to receive a community-based sentence for similar offending, and are therefore more likely than non-Aboriginal offenders to be imprisoned for similar offending; and (2) even when given a community-based sentence, Aboriginal offenders are more likely to breach its conditions and be imprisoned as a result.[32] Both of these problems are functions of poverty and disadvantage among Aboriginal communities, oversurveillance by police officers, under-resourcing of Aboriginal people's defence in court, and discriminatory attitudes by police officers, lawyers, correctional officers and judicial officers, who are overwhelmingly non-Aboriginal.

56. All community-based sentencing options are supervised by NT Correctional Services, whose task is to enforce the sentences created by courts which in turn give effect to the law created by parliament. These institutions infrequently represent or give expression to Aboriginal communities or Aboriginal law.

57. It is possible – as many inquiries and reports have done – to imagine a very different system: a system which is co-designed, even led, by Aboriginal communities themselves.

58. The Warlpiri Youth Development Aboriginal Corporation's Mt Theo Outstation represents one alternative model. Established in 1993 to address chronic petrol

[32] ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133, December 2017 at 230 [7.4].

sniffing in Yuendumu, Mt Theo has since grown to allow for the supervision of bail and non-custodial sentences. Mt Theo is in part supported by the Warlpiri Education Training Trust which, in turn, is part-funded by royalty payments from the Granites Goldmine. It's possible to imagine similarly community-run programs across the Territory. It's also possible to imagine, as the Territory's belated draft Aboriginal Justice Agreement does,[33] community-run courts or councils which impose sanctions in the interests of communities.

5.2 Are all types of community-based sentencing options being used effectively in the NT?

59. No; see [5.1] above.

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

60. Yes; see [5.1] above.

5.4 Is the current process for assessing and reporting on suitability for and conditions of a community-based sentence working effectively? If not, how might the process be improved?

61. Clearly not. Suitability assessments are often performed by public servants who are rarely Aboriginal and who rarely have much of a connection with offenders' communities (though there are notable exceptions), in accordance with a criteria established and imposed by parliaments and bureaucracies, often with little or no involvement by Aboriginal communities. In accordance with the draft Aboriginal Justice Agreement, the NT government should aim to overhaul the current system of community-based sentencing and to replace it with a system built on the principle of community self-government.

[33] *Northern Territory Aboriginal Justice Agreement 2019-2025: Draft Agreement for Consultation*, The Strategies: Aim One: Reduce reoffending and imprisonment rates of Aboriginal Territorians, no. 6 on p 11: https://justice.nt.gov.au/__data/assets/pdf_file/0005/728186/Draft-northern-territory-aboriginal-justice-agreement.pdf

5.5 Why are community-based orders so infrequently used?

62. Gerry McCarthy (as Minister for Correctional Services) introduced the legislation enabling CBOs in May 2011 with the intention of reducing the NT's soaring incarceration rate.[34] But it was too prescriptive to be of much practical use. CBOs were and remain unavailable for offenders found guilty of sexual or violent offences, or of a non-violent assault if the offender was a man and the victim female, or if the offender was an adult and the victim a child, or if the victim was defenceless, if the victim was a politician, a public servant or a first responder, or if the offender threatened the victim with any kind of weapon.[35] Two years later, of course, the Legislative Assembly would pass new laws mandating that practically all violent and sexual offenders go to prison.[36] Since 1996, legislation has required that practically all property offenders have had to go to prison, or else be sentenced by way of a CWO.[37] And since 1990, all semi-serious drug offences have also carried mandatory prison sentences.[38]

63. CBOs were introduced as a sentencing option for offences of middling seriousness – in other words, offences that were too serious for a bond or a fine, and not serious enough for prison. But CBOs aren't being used for offences of middling seriousness, because other legislation requires that practically all of these offenders go to prison. Practically speaking, the CBO is rarely available when courts would normally wish to use it. Indeed, the non-use of CBOs demonstrates like few other statistics the practical effects of the NT's various mandatory sentencing laws: these laws ensure that a large group of offenders, who would normally have been suitable for a CBO (or another non-custodial penalty), are going to prison.

64. It is deeply ironic that the CBO, a sentencing option introduced for the primary purpose of avoiding the use of prison, cannot practically be used because the offenders it's designed for are all going to prison.

[34] Legislative Assembly, "*Justice (Corrections) and Other Legislation Amendment Bill* (Serial 167)", Second Reading Speech, Debates, 5 May 2011 per Gerry McCarthy (Minister for Correctional Services), pp 7974-7976.

[35] *Sentencing Act 1995* (NT), Part 3, Division 4A.

[36] *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT).

[37] *Sentencing Amendment Act (No 2) 1996* (No 65 of 1996) (NT); superseded by the *Sentencing Amendment Act (No 3) 2001* (No 55 of 2001) (NT).

[38] *Misuse of Drugs Act 1990* (NT), s 37(2).

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

65. Yes. Notwithstanding the conceptual confusion at the heart of the suspended sentence, it should remain an option for sentencing courts, on the principle that it is always better for courts to have more options when sentencing an offender, not fewer.

5.7 Does the current regime of non-custodial and custodial sentencing options available in the NT 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?

66. No. See above at [5.1].

5.8 Is a different approach to community-based sentencing, such as that in place in NSW or Victoria, preferable to the regime currently in place in the NT? (If either the NSW or Victorian approach to community-based sentencing is recommended, what changes, if any, should be made to the recommended regime?)

67. It would be difficult to simply adopt the NSW or Victorian regime in the Northern Territory, if only because the Territory's demographics and distances are so different. Rather, the Territory should pursue its own reforms, in consultation with – or even led by – Aboriginal communities under the (draft) AJA.

Respectfully submitted,

TERRITORY
CRIMINAL LAWYERS

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