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Dear Mr Goldflam

Mandatory Sentencing and Community Based Sentencing Options – Consultation Paper

Law Society Northern Territory (Society) welcomes the opportunity to comment on the *Mandatory Sentencing and Community-Based Sentencing Options* Consultation Paper (Consultation Paper).

In accordance with its previous advocacy on this issue, the Society calls for the immediate repeal of all of the Northern Territory's mandatory sentencing laws with the arguments supporting the repealing of these laws being well vented over many years by many organisations. Many of the arguments supporting this position are outlined in the Consultation Paper.

The Society is opposed to mandatory sentencing laws because such laws:

- exclude judicial discretion;
- offend the rule of law;
- lack any evidentiary basis;
- impact on the overrepresentation Aboriginal and Torres Strait Islander People in our prisons;
- breach basic human rights obligations; and
- impact the entire justice system.

In addition, the Society is mindful that in 2016, the repeal of mandatory sentencing laws was an election commitment of the Labor government, which it should uphold.

In general terms, the Society acknowledges and defers to organisations such as the Northern Territory Legal Aid Commission and the National Australian Aboriginal Justice Agency who are at the coal face of the criminal justice system and have the specialist expertise to provide the statistical data, empirical and anecdotal evidence, and case studies called for in the Consultation Paper. The Society's submission will summarise previously stated positions.

Exclusion of judicial discretion/offending the rule of law

It is a fundamental principle that the sentencing of offenders should take place on an individual basis. Mandatory sentencing distorts the sentencing process and results in unfair sentences - this undermines the justice system. Judges must have the power to ensure the punishment fits the crime. The Law Council of Australia's Mandatory Sentencing Policy Position[1] explains its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the system of justice. The Law Council of Australia's Policy Paper on its Rule of Law Principles[2] provides in criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime and as such, offends against the principle of proportionality.[3] The inability of the judiciary to exercise discretion in sentencing leads to injustice.

The case of Zak Grieve is an example of the injustice caused from mandatory sentencing laws.

> "It has long been acknowledged that mandatory sentencing laws produce instances of grave injustice. The sentence of Zak Grieve to life imprisonment with a minimum non-parole period of 20 years for a crime he did not physically commit is a paradigm example of how mandatory sentencing can go wrong. Whether it is described as unique or, in the Chief Minister's words, "an anomaly", Zak's case is characterised by a confluence of factors – a perfect storm – that meant that it was incapable of being justly resolved by mandatory sentencing. It was for this reason that the judge sentencing Zak called the laws "unprincipled and morally insensible" and recommended that the Administrator exercise the prerogative"[4].

Evidence based

There is no evidence that mandatory sentencing works to deter criminals or keep communities safer.

The Northern Territory's mandatory sentencing laws for violence offences were reviewed in 2015[5] and although the report did not make any recommendations, it did note that the decrease in violent offences shown in the report was the result of other initiatives and that there was limited impact on deterrence.

A 2011 review by the Victorian Sentencing Advisory Council found that increasing the length of imprisonment resulted in no corresponding increase in a deterrent effect. In fact, the Victorian Sentencing Advisory Council found that mandatory sentencing increased the likelihood of recidivism because it placed prisoners in a learning environment for crime, reinforced criminal identity and failed to address the underlying causes of crime[6].

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[1] https://www.lawcouncil.asn.au/publicassets/2c6c7bd7-e1d6-e611-80d2-005056be66b1/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf
[2] https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf
[3] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process Report 84/19 Sentencing*, 1997, paragraph 19.55, at http://www.alrc.gov.au/publications/19-sentencing/sentencing-options#_ftn113.
[4] The Petition for Mercy in the Matter of Zac Grieve presented to the Administrator of the Northern Territory
[5] https://justice.nt.gov.au/__data/assets/pdf_file/0006/269736/Review-of-the-Northern-Territory-Sentencing-Amendment-Mandatory-Minimum-Sentences-Act-2013.pdf
[6] Sentencing Advisory Council, Does Imprisonment Deter? A review of the Evidence, April 2011

The Department of Attorney-General and Justice in its 2019/20 Annual Report (Report) stated[7]:

> "The Territory has alarmingly high rates of violent crimes, and one of the highest rates of domestic violence in Australia. The human cost is enormous and impacts everyone from families to whole communities. The vast majority of prisoners in NT correctional facilities are there for crimes of violence against another person.
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> To illustrate this, on 30 June 2020:
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> - there were 1215 NT prisoners whose most serious offence or charge was a violent offence. This represented 74 per cent of the total NT prison population (1 634) on that date;
> - 1369 (84 per cent) of the total NT prisoners were Aboriginal and 1074 (78 per cent) of the Aboriginal prisoners had a violent offence as their most serious offence or charge".

The Report also showed the lowest percentage of community work orders completed since 2016.

At a cost of $321.59 per day to incarcerate a person and with a recidivism rate of 59.4 per cent, it is clear the current approaches are not working. This money could be invested in strategies that prevent crime. Sentencing laws require a modern, evidence-based approach.

The Hamburger Report[8] explained the need for a holistic government and community approach that empowers Indigenous People to be part of the solution to their gross over-representation within the criminal justice system.

The Society notes there are many alternatives to sentencing that can prevent crime and deliver outcomes to communities like justice re-investment. Justice re-investment is an innovative approach that reallocates money and resources that would otherwise be spent on prisons and reinvests them in the community. It is one way to address underlying social problems associated with offending, in order to prevent future incarceration.

Another is the use of properly designed and resourced community based sentencing options. The Australian Law Reform Commission (ALRC) in its review in to the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples reported:[9]

> "Community-based sentences are important in reducing the over-representation of Aboriginal and Torres Strait Islander peoples in prison because they enable an offender to serve their sentence in the community. They are designed to be punitive while fulfilling other sentencing purposes, such as rehabilitation and deterrence."

Further the ALRC noted that community-based sentences are more effective in reducing reoffending than a short term period of imprisonment. Community based sentencing should be culturally appropriate, accessible and flexible, particularly in relation to offenders with complex needs. In the Society's view, community based sentencing should be more readily

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[7] https://justice.nt.gov.au/__data/assets/pdf_file/0009/943902/agd-annual-report-2019-2020.pdf

[8] Report of the Review of the Northern Territory Department of Correctional Services, July 2016 (The "Hamburger Report").

[9] https://www.alrc.gov.au/wp-content/uploads/2019/08/fr133_07._community_based_sentences.pdf

available to people in remote areas. Programs should be well funded, designed and controlled by Aboriginal people.

Overrepresentation and increase in the number of people imprisoned

Mandatory sentencing laws can and do have an unacceptable impact on Aboriginal people. The 2017 Law Council of Australia Justice Project[10] showed that imprisonment of Aboriginal people had increased by 88% in the last decade. This was viewed as an issue which was exacerbated and created by laws and policies that have a disproportionate effect and compound existing disadvantage.

The Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody in 1991 ('RCIADIC') reported on the overrepresentation of Aboriginal and Torres Strait Islander peoples imprisoned in Australia and made a number of recommendations, including imprisonment as a last resort. Since RCIADIC, the rate of Aboriginal and Torres Strait Islander imprisonment has continued to increase.

Law reform is an important part of that solution. Reduced incarceration, and greater support for Aboriginal and Torres Strait Islander people in contact with the criminal justice system, will improve health, social and economic outcomes for Aboriginal and Torres Strait Islander peoples, and lead to a safer society for all[11].

The introduction of mandatory sentencing laws are a political 'criminal law and order' response to the concerns that courts are too lenient on offenders[12]. These laws drive up the rates of Aboriginal and Torres Strait Islander imprisonment. The Northern Territory government introduced mandatory sentencing laws knowing it would create unacceptable injustice acknowledging this during the debate on the introduction of the 'Three Strikes' mandatory sentencing laws for property offences.[13]

It is also arguable that mandatory sentencing laws may have a detrimental effect on reconciliation[14] as the laws may operate to widen the gap between Indigenous and non-Indigenous Australians and to further marginalise Indigenous offenders which may in turn contribute to the risk of further deaths in custody. Retaining mandatory sentencing is clearly inconsistent with the intent of the Aboriginal Justice Agreement and the *Pathways to the Northern Territory Aboriginal Justice Agreement*[15] outlines the issues with over incarceration of Aboriginal People and highlights the issues with the lack of sentencing options, including the lack of community-based sentencing available to the courts.

Human Rights

Mandatory sentencing is a breach of Australia's international human rights obligations under the International Convention on Civil and Political Rights – Article 9(1) which precludes arbitrary imprisonment like removing the ability of judges to take into account individual

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[10] https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Toolkit/Aboriginal%20Infographic.pdf

[11] Australian Law Reform Commission, 'Report: Pathways to Justice – Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

[12] Law Council of Australia 2014 Discussion Paper on Mandatory Sentencing

[13] Northern Territory, *Parliamentary Debates,* Assembly, 19 November 1996 (Mr Reed).

[14] Law Society of South Australia's Aboriginal Issues Committee, quoted in the Law Council of Australia's Policy Discussion Paper on Mandatory Sentencing

[15] https://justice.nt.gov.au/__data/assets/pdf_file/0009/728163/Pathways-to-the-northern-territory-aboriginal-justice-agreement.pdf

circumstances. Article 14(5) – the right to have one's sentence reviewed by a higher tribunal which is denied once an accused receives a mandatory minimum sentence.

Detention must not only be lawful, but reasonable and necessary in all the circumstances.[16] It may amount to arbitrary detention because the sentence imposed can be disproportionate as judges are inhibited from handing down punishments that fit the particular circumstances of the case. Mandatory sentencing can reduce the independence of the judiciary. Mandatory sentencing disproportionately affects indigenous Australians and contributes to their higher imprisonment rates.[17]

Impact on justice system and guilty pleas

It is well known and accepted that a consequence of mandatory sentencing is that an accused is less likely to plead guilty, which places additional burden and strain on an already under resourced criminal justice system.

Conclusion

The Society encourages the Committee to recommend the immediate withdrawal of all mandatory sentencing laws. Restoring judicial discretion will in itself reduce the unjust incarceration of offenders in the Northern Territory. The repeal of these laws need not impact on the development of other areas of sentencing reforms other than to prioritise the latter.

The Northern Territory should implement an independent justice reinvestment body as recommended in the Pathways to Justice Report[18] and consider implementing many of the other measures in that Report without further delay. The Committee should also consider the need for the Northern Territory to introduce a Sentencing Advisory Council which will provide transparent sentencing guidance in line with those operating in other jurisdictions.

If you would like to discuss this matter further, please do not hesitate to contact me.

Yours faithfully

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[16] See: Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014), 48-55
[17] See: Law Council of Australia, *Mandatory Sentencing Fact Sheet* (2014)
[18] Pathways To Justice–Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples (ALRC 133)