Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Dean Mildren • GPO Box 1064 DARWIN NT 0801 • ABN: 64 391 168 310•

SUBMISSION ON MANDATORY SENTENCING AND COMMUNITY BASED SENTENCING OPTIONS

We refer to the Northern Territory Law Reform Committee Consultation Paper dated October 2020 and welcome the opportunity to make a submission.

'Territorians have had a gutful, and the Gunner government has to find a solution' [1]

That solution is abolishing mandatory sentencing and increasing the availability and resourcing of community based sentencing options aimed at individual offenders' underlying criminogenic risk factors. A targeted and balanced approach to punishment and therapeutic/rehabilitative sentencing options is the only meaningful way to counter recidivism and improve justice outcomes.

The Northern Territory has the highest incarceration rate in Australia.[2] With seven in ten prisoners re-offending[3] it is clear that sentences of mandatory imprisonment are doing nothing to curb crime levels in the Territory.

Mandatory sentencing was introduced to quell public concern about offending. Mandatory sentencing has done nothing to reduce crime and nothing to allay public concern of crime in the community.

Mandatory sentencing ought to be abolished as it is incapable of achieving principled, fair and just outcomes. It is the *'very antithesis of just sentences'*[4] and does not meet the objectives it sets out to address.

The principles of sentencing that have been developed by Courts for centuries are set out at section 5 of the *Sentencing Act*. Mandatory sentencing results in Courts being unable to properly apply those principles. Courts have been warning for years of the dangerous of mandatory sentencing:

> *".....The other dangers of mandatory minimum sentencing, apart from the fact that the Court is required to impose a sentence which is greater than the justice of the case would otherwise require include the fact that principles of parity between offenders has little or no role to play. All offenders that fall*

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[1] Sunday Territorian 22.11.2020.
[2] Australian Sentencing Council< https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/australia-imprisonment-rates>
[3] Australian Bureau of Statistics <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Northern%20Territory~27>
[4] Mildren J *Trenerry v Bradley* (1997) 6 NTLR 175 at 187.

within the class will be treated equally no matter what their level of criminality may be....."[5]

We have had the benefit of reading the submission filed on behalf of the North Australian Aboriginal Justice Agency and endorse that submission. We also raise the following issues for your consideration.

A. Impacts of mandatory sentencing

There are innumerable impacts of mandatory sentencing that will undoubtedly be canvassed by other submissions. However, some examples are:

Increase in number of contested matters and costs to the community

One impact of mandatory sentencing is that matters that may otherwise resolve early are instead contested. Mandatory sentencing takes away any incentive for an accused person to plead guilty early. A 'discount for pleading guilty early' becomes meaningless. Putting the prosecution to proof is a more attractive option than automatically going to prison for a set period of time which is not reflective of the severity of the offence and surrounding circumstances.

We live in a society where we all enjoy the presumption of innocence. The task of proving a case at a hearing or trial is a task made more difficult in the Northern Territory because of our transient population and language and cultural barriers that make access to the Justice system more difficult. There are reasonable chances of being acquitted simply by putting the prosecution to proof. That approach does not encourage taking responsibility for one's actions, rehabilitation or appropriate punishment.

Disregard of victim's views

Mandatory sentencing does not enable the Court to take into account a victim's wishes in relation to sentence. In 1997, his Honour Justice Angel, observed:

> *'What ever [sic] else may be said about these provisions, Parliament, it appears, intended that courts impose the blunt instrument of imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence and of the offender, in the hope or expectation of lessening property offences, and, perhaps, of making victims feel better - about something'.*[6]

In the twenty-three years that have passed since his Honour's observations, very little has changed for victims. On Saturday 21 November 2020 over 200 residents of Darwin's rural area gathered asking police questions about whether they are entitled

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[5] Mildren J Sentence of Mohamed Tahir and Beny 28.10.2009.
[6] *Trenerry v Bradley* 6 NTLR 175 at 185.

to use firearms to defend their properties.[7] Victims of Crime have no role to play in mandatory sentencing.

Example – mandatory sentence for violent offending:

Fred lives at the remote community of Wadeye. Fred went to Court when he was 18. There was some trouble in Wadeye about where a young man should be buried. Fred got into a fight with his cousin. It went a bit too far and his cousin had to go and get a couple of stitches at the clinic. He was charged with assault and plead guilty.

Fred has been married to his wife Mary for 15 years. They have one daughter who is 10 and suffers a disability. Fred is the town's only qualified road maintenance worker. He doesn't get paid very much for doing that work but he doesn't mind because he enjoys helping his community. Fred and his wife care for their disabled daughter. Fred plays guitar in the community band. One evening Fred attends the Peppimentarti club to play in the band. The band have some drinks afterwards. When he got back to home to Wadeye Fred was drunk. His wife scolded him and they had an argument out the front of their house. Fred slapped Mary once to the face just as the local police officers happened to drive past. Mary didn't want Fred charged. He had never done anything like that before but police said it is domestic violence and they didn't have any choice.

Fred goes to Court next time the Judge flies to Wadeye. He speaks to legal aid and they tell him that because of the old trouble with his cousin if he is found guilty he will go to prison for 3 months unless they can convince the judge it is exceptional and that will be hard because it is a domestic violence offence. Fred knows it will be very hard for Mary to look after their daughter by herself so Fred decides to say 'not guilty'.

The Judge sets a hearing date and Mary will be given a summons to come to Court to tell a story she does not want to tell.

Two Court dates, the services of a legal aid lawyer on at least two occasions, a legally qualified prosecutor and a witness assistance officer will all now be required at tax payer expense.

If mandatory sentencing did not apply Fred would likely have plead guilty on the first day in Court and the Judge could have given him some rules to stay away from drinking around Mary. Following sentencing principles, unimpaired by mandatory sentencing, the offence did not require Fred to go to prison. Instead as a result of mandatory sentencing the cost to the government increased.

[7] Gary Shipway, Sunday Territorian 22.11.2020, pages 4 & 5.

Inability to meet objective of 'General Deterrence'

Deterrence is an aspect of sentencing that can be overstated. That was recognised as long ago as 1975 when Dame Roma Mitchell noted *"whatever the judge may say, his remarks may or may not reach that section of the community to which they are directed, depending upon whether those who publish reports of court proceedings regard the remarks as being worthy of reporting, and whether the criminally minded persons for whom they are intended read or listen to any report which may be made. It is useless to suggest that one of the purposes of a sentence is to deter others from committing a similar crime, if the knowledge of such sentence does not come to those who are likely to commit the crime"*[8]

It is the all too common experience of our members that accused persons approach us seeking legal advice expecting, that as someone who has never been to Court before, the Judge will have some discretion to sentence them in a just manner. Equally common, the mature age person facing a criminal charge who has a prior conviction from 30 years ago when they were young and drank too much will be startled to hear that their very old conviction will now see them, if they plead or are found guilty of the new charge, running the gauntlet of having their lawyer run an argument that there is something exceptional about the case, and that if that argument fails they will go to prison.

It is the frequent experience of our members that defendants rarely recount tales of thinking about mandatory sentencing in the heat of the moment when an offence occurs. Whilst deterrence will always play a role in sentencing, mandatory sentencing is incapable of meeting that objective.[9]

B. Further mandatory provisions for consideration

There is an additional form of mandatory sentencing that was not mentioned in the consultation paper, that is the requirement that where a Court is sentencing for drug or sexual offending a person to a sentence of 12 months or longer that is not suspended in whole or in part, the Court is required to impose a non-parole period of not less than 70% of the total sentence.[10]

If a Court sentences to a period of greater than 5 years there is no power in the Sentencing Act to partially suspend the sentence. The result is that Courts are unable to impose a sentence that accurately reflects the seriousness of the offending but also protects the community by encouraging rehabilitation at an appropriate stage of the sentence.

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[8] Mitchell J, The Web of Criminal Law 1975 Boyer Lectures, ABC Sydney, p 49 as quoted in Ross on Crime, 7th edition

[9] [9] See for example Michael Tonry 'The Mostly Unintended Effects of Mandatory Penalties; Two Centuries of Consistent Findings', 2009 University of Minnesota Law School.

[10] *Sentencing Act* (NT) s. 55.

The mandatory imposition of financial penalties for regulatory and traffic offences, such as for failing to have a current compensation certificate, which in itself is a charge that is encompassed by driving unregistered, sees a minimum of 5 penalty units for a first offence and 10 for a second or subsequent offence.[11]

Examples of injustices in the application of the current sentencing regime

Misuse of Drugs Act

The most commonly encountered 'circumstance of aggravation' is a previous finding of guilt under the *Misuse of Drugs Act* or an equivalent provision interstate. Even if no conviction has been recorded, if the person is subsequently found guilty of a second drug charge they are liable to 28 days in prison unless particular circumstances are found.

Example – mandatory sentencing for aggravated drug offence:

In 2010, an 18 year old is found in a house with his father where the pair jointly possessed some cannabis. He was not convicted. In 2016 the man has a break down in his relationship, loses his job and becomes addicted to methamphetamine - a highly addictive drug. He is found by police with enough methamphetamine for his own use, and not more, in his pocket. He would be liable to 28 days imprisonment.

Drug addiction is a health problem. CLANT would like to see a therapeutic model for minor drug possession charges similar to that available in some interstate jurisdictions where a Court is able to divert a matter for drug counselling to occur and upon successful completion of the counselling the charge is dismissed.

Domestic and Family Violence Act

CLANT further submits repeal of the mandatory sentencing provisions of the *Domestic and Family Violence Act* must be considered as a matter of urgency, particularly s121(5) of the Act. As recently observed by Justice Kelly in the matter of *Arnott v Blitner*,[12] s121(5) prevents the suspension of *any part* of a term of imprisonment imposed for a subsequent DVO contravention offence. This interpretation, which appears correct on the face of the statute, flies in the face of the common practice of Judges of the Local Court who regularly impose sentences of imprisonment in such circumstances which are partially suspended after the 7 days' imprisonment mandated under s121(2) of the Act.

The fact that a practice has developed whereby the requirement for a repeat offender to be sentenced to "at least 7 days imprisonment" has been interpreted as allowing for partial suspension after the service of that "minimum period" reflects the desirability that an offender be afforded an opportunity to demonstrate commitment to change, either through a general commitment to abstain from offending behavior, or conditions

[11] With the exception of if the registration expired within a month of the offence.

[12] [2020] NTSC 63 at [55].

imposed as part of a suspended sentence of imprisonment to specifically address the underlying criminogenic risk factors contributing to recidivist offending behavior.

Say for example a recidivist offender commits a subsequent contravention offence deemed worthy of 2 months imprisonment.[13] A Judge who has discretion to suspend part of that sentence may impose conditions designed to meet the risk of reoffending and minimize the risk of further harm to the community or to an individual. Such conditions are tailored to each offender's individual needs and could include supervision by a probation and parole officer, mandated participation in a family violence program, abstinence from alcohol for a short, defined period and so forth. These conditions provide an incentive for an offender to take steps to change their behavior which, if successful, ultimately benefit the community generally and, perhaps more importantly, minimize the risk of harm to the very persons these orders are designed to protect.

The alternative is to send that same person off to prison for 2 months – a period unlikely to provide any real benefit to the offender insofar as their ability to participate in programs and access services is concerned. That person is released back into the community with the underlying causes of their offending behavior having been addressed in no way whatsoever. The cycle of offending and incarceration continues at exorbitant cost to the community in both monetary and human terms.

The injustices of mandatory sentencing for subsequent domestic violence offenders is more generally illustrated through the following scenario:

Example – mandatory sentencing for second/subsequent breach of DVO:

Mary and George have been married for several years. Neither has been convicted of violent offending against the other. Mary and George ordinarily live in a remote community however travel to Darwin for shopping, medical appointments and to visit family. During one trip to Darwin Mary and George find themselves at a relative's house drinking and become intoxicated. An argument develops over funeral arrangements for a deceased family member and a neighbour, concerned about the noise, calls Police. Police attend and find Mary and George highly intoxicated, threatening and swearing at each other while pushing each other in the chest.

Police place both in protective custody and make application for a section 41 Police Domestic Violence Order, prohibiting Mary and George from being in each other's company while intoxicated. Mary and George are given a copy of the s41 order which contains a summons to attend the Darwin Local Court to show cause as to why the order should not be confirmed. Neither can read English well and the conditions of the DVO are explained to them without the use of an interpreter. Mary and George return to their community and the order is confirmed in their absence in Darwin for a period of 12 months. A local Police officer attends Mary and George's house in community and hands them a copy of the order.

A month later Mary and George return to Darwin for a shopping trip. On their last night of their trip they attend a local sports club where they have a meal and a few drinks.

[13] The maximum penalty for contravening a Domestic Violence Order is imprisonment for 2 years.

While leaving the club and walking to a taxi rank Police parked nearby notice George is unsteady on his feet. Police speak to Mary and George and when taking their names conduct a check on their Police iPads. Police see the Domestic Violence Order has been confirmed and arrests both Mary and George for contravening the conditions of their Domestic Violence Order. Police deem them both too intoxicated to bail, so they are held in the Watch house and taken to court in the morning where they plead guilty to the offence and are fined.

They have now missed their bus home and the next bus does not leave for another three days. They don't have enough money for a hotel so they go to a family member's house to stay. People are drinking at the house and Mary and George join in. During the night a fight breaks out involving Mary and George's family members. They are not involved. Someone calls Police who attend and start taking the names of persons present who may have been witnesses to the fight. They speak to Mary and George and discover the DVO. They are arrested and refused Police bail on the basis that the presumption in the Bail Act is against the grant of bail. They attend court the next morning and plead guilty. The Judge remarks that Mary and George are "obviously showing a contumelious disregard for the conditions of the DVO" on the basis that the breaches have occurred in successive nights. The Judge rejects the contention advanced by Mary and George's lawyers that it is not appropriate to sentence them under the mandatory sentencing provisions on the basis that "a clear message needs to be sent". They are sent to prison for 7 days each at the taxpayer's expense.

C. Community based sentencing options

The *Sentencing Act* should be amended to allow Community Custody Orders, Community Based Orders and Home Detention Orders to be at the Judge's discretion rather than only for certain prescribed offences. Such reform would broaden the availability of suitable sentencing options for the Courts, particular in the case of youthful offenders (18 to 25 years of age) and those from remote communities.

The Act could also be amended to allow Judges to combine sentencing options in a manner which is appropriate for the offender before the Court. In a recent sentence of Quinton Jessell, his Honour Acting Justice Mildren queried whether he could make a community work order in addition to a suspended sentence in order to ensure the young adult gave back to the community and got the work he hoped for in the future. his Honour ultimately decided that Community work was not appropriate and commented that a Community Based order was not an option available to him.

Rather than implement further sentencing regimes borrowed from other jurisdictions, CLANT's position is that the legislature should focus on:

1. Removing the provisions that limit the availability of the community based orders currently in our *Sentencing Act;*

2. Investment in resources and infrastructure to work with communities to establish culturally appropriate and meaningful sentencing options in community;

3. Funding and incorporating initiatives under the Aboriginal Justice Agreement including community courts;

4. Decriminalization of drug possession offences;

5. Maintaining suspended sentences as an option to sentencing judges; and

6. The implementation of specialist drug and alcohol courts with therapeutic alternatives to imprisonment.

D. Answer to questions posed

3.1 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?

No.

3.2 *Should the Northern Territory'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?*

Repealed.

3.3 *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?*

Yes. We refer to our comments in relation to non-parole periods at B above.

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?

Yes.

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?

Yes.

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?

Yes. Particularly for offences contrary to section 188(2)(k) of the Criminal Code –indecent assault.

4.4 Should the 'exceptional circumstances' specified in 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 in the circumstances referred to at [4.3] above?

Yes. The Consultation paper refers to the case of Zak Grieve, that young man's case could not be a starker example of the injustice of the current provisions.

4.5 Are there other issues relating to the mandatory sentencing regime for murder of sexual offences not discussed in this Consultation Paper which the Committee should address in its report?

No.

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

Yes but there are unnecessary restrictions on when they are applicable.

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

No

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

Yes

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?

Often community based orders are not capable of being imposed or are unsuitable due to geographical impediments such as no community work programs, no electronic monitoring capabilities or no permanently placed community corrections officers.

5.5 Why are community-based orders so infrequently used?

Mandatory sentencing provisions largely prohibit the use of community based orders, however there are two further primary reasons:

a) **Because of provisions restricting their availability to only a small number of offences (particularly they are not available for violent offence –get stat on number of those).**

b) **Because of a lack of resources in remote communities to ensure their successful implementation.**

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

Yes, it is imperative that suspended sentences be retained as sentencing options.

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?

Funding currently invested in imprisoning people in accordance with mandatory sentencing legislation could instead be reinvested in drug and alcohol rehabilitation services in remote communities.[14]

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?

Not at present. The abolition of mandatory sentencing can exist comfortably under our current *Sentencing Act* which enables suspended sentences with supervised conditions.

We look forward to discussing our submission further.

Marty Aust
CLANT President
15 December 2020

[14] Australian Institute of Criminology 'Justice reinvestment in Australia: A review of the literature' 2018 in relation to what 'justice reinvestment' is. See also Hansard 11.11.2020 Member Guyula: *'I want to see movement towards alcohol rehab on homelands and services for people, which do not bring them to Darwin but keep them strong on country, with language, law and discipline'.*