

NORTHERN TERRITORY LAW REFORM COMMITTEE

MANDATORY SENTENCING AND COMMUNITY- BASED SENTENCING OPTIONS CONSULTATION PAPER

Consultation Paper

October 2020

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CHAPTER 1 – INTRODUCTION TO THE INQUIRY

[1.1] Introduction

On 21 March 2019, the Honourable Natasha Fyles, Attorney-General and Minister for Justice, asked the Northern Territory Law Reform Committee (the ‘Committee’) to investigate, examine and report on possible law reform in relation to mandatory sentencing and community-based sentencing options. The Terms of Reference request the Committee to consider the following matters:

1. Whether mandatory sentencing for murder, sexual offences, violent offences, aggravated robbery offences, drug offences within the ambit of section 37(2)(b) of the *Misuse of Drugs Act 1990* and breach of domestic violence order should be repealed.
2. The operation and use of community-based sentencing options that provide for supervision under the *Sentencing Act 1995* and whether amendments are recommended to streamline and increase the flexibility of such orders, including the removal of statutory barriers for violent offenders. In particular, consideration should be given to:
 - a. adopting a single community-based sentencing option with flexible conditions (such as the community correction order in the *Sentencing Act 1991* (Vic)); or
 - b. adopting a streamlined tiered model (such as enacted by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW)); and
 - c. whether, and if so with what scope, suspended sentences should be retained; and
 - d. reform of the process for assessing and reporting on suitability for and conditions of a community-based sentence.

The Committee has been asked to provide its report to the Attorney-General and Minister for Justice by 30 March 2021.

[1.2] Background to the inquiry

The *Report of the Review of the Northern Territory Department of Correctional Services: Summary, Findings and Recommendations* notes:

The Northern Territory imprisonment rate is by far the worst in Australia and ranks with the world’s worst, with the Territory accounting for about 1% of the Australian population but about 5% of all prisoners. Even worse, in our view, is

that fact that 85% of the adult prisoner population and 95% of youth detainees are Indigenous people with a very high recidivism rate.¹

The Northern Territory's mandatory sentencing laws contribute to the imprisonment rate. The Australian Law Reform Commission ('ALRC') in its report, *Pathways to Justice – an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, observed:

Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples – especially those found guilty of property crime.²

There is little question that mandatory sentencing laws have a disproportionate impact on the Northern Territory's Indigenous population. During 2017-2018, 11,070 defendants' matters were finalised in the Northern Territory criminal courts. Of the matters finalised, 9,835 defendants had their matter(s) adjudicated and almost all (9,531) were proven guilty or entered a plea of guilty. Seventy-eight per cent of the defendants finalised in the Northern Territory identified as Aboriginal and Torres Strait Islander.³ While not all of the defendants' matters finalised related to crimes which attracted a mandatory sentence, '48% (4,620) received a custodial sentence, which was the highest proportion of custodial sentences nationally.'⁴ The statistics indicate that '[a]round one in three (62%, 2,922) Aboriginal and Torres Strait Islander defendants who were proven guilty were sentenced to a correctional institution.'⁵ Finally, rates of incarceration among Aboriginal and Torres Strait Islander defendants has a disproportionate impact on those living in regional or remote communities.⁶

While the statistics tell a discouraging tale, the Committee is cognisant of the fact that there is legitimate concern in the community over incidents of crime, and particularly property crime. Rarely a week passes where headlines such as 'Northern Territory

¹ Hamburger, K et al, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services: Summary, Finding and Recommendations* (31 July 2016) 4.

² Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 273 [8.1].

³ Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-18* (Catalogue No 4513.0, 28 February 2019).

⁴ Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-18* (Catalogue No 4513.0, 28 February 2019). 'The most common principle offence for both Aboriginal and Torres Strait Islander and non-Indigenous defendants [in the Northern Territory] was [a]cts intended to cause injury (42% or 2,405 and 27% or 390, respectively).' Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-18* (Catalogue No 4513.0, 28 February 2019).

⁵ Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-18* (Catalogue No 4513.0, 28 February 2019).

⁶ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 235 [7.19].

Break-ins at highest level in more than a decade, with Alice Springs leading the pack',⁷ or, 'Out of Control: Shocking CCTV vision sparks warning that frustrated residents will take matters into their own hands',⁸ grace the front page of Northern Territory newspapers or feature on television news. Behind the headlines are stories of individuals whose home life or business have been severely disrupted by criminal offending.

The question arises, therefore, whether mandatory sentencing is the best way to deal with such offending, and other serious offending such as domestic violence, sexual offences, drug offences or murder. Alternatively, are there community-based sentencing options that can address more effectively some or all such offending?

[1.3] Purpose of this Consultation Paper

Through this Consultation Paper, the Committee is seeking the views of professionals, agencies and individuals in the Northern Territory and other jurisdictions on the issues of mandatory sentencing in the Northern Territory and community-based sentencing options. To assist stakeholders, this Consultation Paper provides some background information relevant to the inquiry and poses questions which will assist the Committee in forming its recommendations for reform.

The Consultation Paper is divided into five chapters. Chapter 1 provides some background to the inquiry and provides information about how to make a submission. The Committee is made up of volunteers and therefore has limited capacity to meet with individual stakeholders. The submissions received will assist the Committee to determine what face-to-face consultations should be held.

Chapter 2 provides an overview of sentencing in the Northern Territory. Chapter 3 focuses specifically on those crimes which attract a mandatory minimum sentence. Included in the discussion in Chapter 3 are mandatory sentences for aggravated property offences, violent offences, drug offences and breach of domestic violence orders. In Chapter 4, mandatory sentences relating to murder and sexual offences are discussed. Chapter 5 discusses possible alternatives to mandatory sentencing, with a focus on community-based sentencing options.

[1.4] How to make a written submission

Anyone can make a written submission. The Committee will accept all forms of submission, be they short and informal such as a letter or email, or a more substantial document. Submissions in electronic form are preferred. While we encourage those making a submission to address the questions set out in this Consultation Paper, there

⁷ Jano Gibson, 'Northern Territory break-ins at highest level in more than a decade, with Alice Springs leading the pack' *ABC News* (online, 2 September 2019) <<https://www.abc.net.au/news/2019-09-03/northern-territory-break-in-levels-highest-in-decade/11457442>>.

⁸ Judith Aisthorpe, Will Zwar,, 'Out of Control: Shocking CCTV vision sparks warning that frustrated residents will take matters into their own hands', *NT News* (Darwin, 28 August 2019).

is no need address all the questions posed. Further, the submission need not be confined to the issues addressed in this Consultation Paper. Finally, for ease of reference, all of the questions for stakeholder comment set out in this Consultation Paper have been set out in Appendix 1.

Submissions should be sent to:

Executive Officer

Northern Territory Law Reform Committee

E: Lawreformcommittee.DOJ@nt.gov.au

Alternatively, a hardcopy of the submission can be mailed to:

GPO Box 1535

DARWIN NT 0801

The closing date for submissions is **Wednesday 25 November 2020**.

In the absence of a clear intention that a submission should be treated as confidential, the Committee will treat all submissions received as non-confidential.

The purpose of a submission is to assist the Committee in its formulation of recommendations, and the contents of a submission may be quoted or referred to in the Committee's final report. Submissions also may be made publicly available.

CHAPTER 2 – OVERVIEW OF SENTENCING LAWS IN THE NORTHERN TERRITORY

[2.1] Introduction

When discussing sentencing laws, it is important to distinguish between the sentence, which 'is the penalty or punishment for an offence',⁹ and sentencing law, which is 'the body of statute and common law which governs the sentencing process.'¹⁰ With respect to the former, it is generally accepted that the rationales for punishment of offenders are as follows:¹¹

- **Retribution** – which is the notion that the guilty ought to be accountable for their actions and suffer the punishment which they deserve.
- **Deterrence** –
 - **specific deterrence** which aims to dissuade the offender from committing further crime; and
 - **general deterrence** which aims to dissuade others from committing the crime in question by making them aware of the punishment inflicted on the offender.
- **Denunciation** – which involves the court making a public statement that behaviour constituting the offence is not to be tolerated by society either in general, or in the specific instance.
- **Rehabilitation** – which relies on the philosophy that the offender's behaviour can be changed by using the opportunity of punishment to address the particular social, psychological, psychiatric or other factors which have influenced the offender to commit the crime.
- **Incapacitation** – which involves preventing a person from committing further offences during the period of incarceration, with community protection as the justification.

All of the above rationales for punishment are embodied in s 5(1) of the *Sentencing Act 1995*. As that section stipulates, such rationales are the 'only purposes for which sentences may be imposed on an offender'. Further factors to which the court must have regard are set out in s 5(2) and include 'the maximum and any minimum penalty prescribed for the offence',¹² the aggravating factors that make the offending more serious, and the mitigating factors that may lessen the seriousness of the offending.

⁹ Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2nd ed, 2012) 283.

¹⁰ *Ibid.*

¹¹ New South Wales Law Reform Commission, *Sentencing* (Report No 79, December 1996) [14.12].

See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.1]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006) [4.1]-[4.22].

¹² *Sentencing Act 1995* s 5(2)(a).

It has been noted that, while the predominant rationale for sentencing can change over time, in the Northern Territory the prevailing rationale has been retribution.¹³ As Gray and Blokland noted in 2012:

In the Northern Territory [an emphasis on retribution] has resulted in the introduction of ‘truth in sentencing’ schemes, for a time, mandatory minimum terms, and a trend towards longer sentences and increasing use of imprisonment rather than other sentencing options.¹⁴

This is not to suggest that alternatives to imprisonment are absent from the Northern Territory’s sentencing regime,¹⁵ however, as the imprisonment rates referred to in Chapter 1 indicate, the emphasis on retribution remains. How such an emphasis accords with the well-recognised principle of criminal law that a sentence of imprisonment should be used by the court only as a last resort¹⁶ is explored in Chapters 3 and 4.

[2.2] Sentencing principles

In addition to the rationales for punishment, sentencing principles have developed over time, through legislation and common law, and form the basis of sentencing decisions. As the Victorian Sentencing Advisory Council notes, these principles include:¹⁷

- parsimony – the sentence must be no more severe than is necessary to meet the purposes of sentencing
- proportionality – the overall punishment must be proportionate to the gravity of the offending behaviour
- parity – similar sentences should be imposed for similar offences committed by offenders in similar circumstances
- totality – where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour.

[2.3] Conclusion

Given the competing purposes of sentencing, the imposition by the sentencing judge of a fair sentence on an offender is a difficult task. This has been recognised by the majority of the High Court of Australia in *Veen v The Queen [No 2]* (1988) 164 CLR 465 (*‘Veen (No 2)’*) at 476:

¹³ Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2nd ed, 2012) 284.

¹⁴ *Ibid.*

¹⁵ See Chapter 5.

¹⁶ *Dinsdale v The Queen* (2000) 202 CLR 321, [14] (*‘Dinsdale’*). While the High Court in *Dinsdale* was applying the *Sentencing Act 1995* (WA), it has been held that the same principle applies in the Northern Territory. See *Mamarika v Ganley* [2013] NTSC 6, [22].

¹⁷ Sentencing Advisory Council, *Sentencing Principles, Purposes, Factors* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors>>.

[S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.

Veen (No 2) and the discretionary nature of sentencing was discussed in *R v Engert* (1995) 84 A Crim R 67 by Gleeson CJ at 68:

A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate... It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

Since *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*'), the accepted method for determining the correct sentence is by the 'instinctive synthesis' of all relevant considerations. In *Markarian* at [51] McHugh J described 'instinctive synthesis' as follows:

By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

As noted above there are many different and often conflicting considerations or factors to be taken into account in arriving at an appropriate sentence. This is recognised by the 'instinctive synthesis' approach:

...where a variety of considerations, often tending in opposing directions, operate in the context of a statutory maximum, there must finally be a quantification of the sentence to be imposed. There must be a synthesising of the relevant factors. In that process, greater and lesser weight will be allocated to some factors depending on their relevance to the person convicted and his or her crime. Ultimately, community and legal values are translated into a number of years, months and days. That process must involve an instinctive judgment.¹⁸

¹⁸ *Markarian v The Queen* (2005) 228 CLR 357, [73].

In undertaking that ultimate synthesis the judge must, in accordance with *Veen (No 2)*, recognise that the purposes of sentencing overlap. No purpose can be considered in isolation when determining what weight should be given to each of those purposes and what is the appropriate sentence in a particular case.

Whether mandatory sentences achieve the purposes of sentencing is a central issue in this inquiry. This is addressed in greater detail in Chapters 3 and 4.

Another central issue in this inquiry is whether the sentencing methodology implicit in mandatory sentencing regimes such as those that operate in the Northern Territory are consistent with the common law 'instinctive synthesis' method of sentencing. This is also dealt with in greater detail in Chapters 3 and 4.

Finally, whether the competing purposes of sentencing are being achieved through existing community-based sentencing options or might be achieved better through amendment to the existing regime, is discussed in Chapter 5.

CHAPTER 3 – MANDATORY SENTENCES OTHER THAN MURDER OR SEXUAL OFFENCES

This chapter provides an overview of current mandatory sentencing provisions in relation to aggravated property offences, violent offences, offences against the *Misuse of Drugs Act 1990* and breaches of domestic violence orders.

[3.1] Overview of Mandatory Sentencing Provisions

[3.1.1] *Aggravated Property Offences*

Part 3, Division 6 of the *Sentencing Act 1995* ('the Act') prescribes mandatory sentencing for 'aggravated property offences'.¹⁹ Section 78A of the Act states that the purpose of Part 3, Division 6 is to ensure that community disapproval of persons committing aggravated property offences is adequately reflected in the sentences imposed on those persons. Section 78B creates the mandatory sentencing regime in relation to aggravated property offences. That section provides:

- (1) A court that finds a person guilty of an aggravated property offence must take into account the purpose of this Division before sentencing the person in relation to the offence.
- (2) A court that records a conviction against an offender found guilty of an aggravated property offence must:
 - (a) order the offender to serve a term of imprisonment; or
 - (b) order the offender to participate in an approved project under a community work order;

unless there are exceptional circumstances in relation to the offence or the offender.

- (3) A court that orders an offender to serve a term of imprisonment in accordance with subsection (2)(a) may only wholly suspend the sentence on the offender entering into a home detention order.
- (4) Nothing in subsection (2) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order made in accordance with the subsection.

¹⁹ 'Aggravated property offence' is defined in the *Sentencing Act 1995*, s 3 to mean any of the following:

- (a) an offence against section 211, 212, 213 or 215 of the Criminal Code;
- (b) an offence against section 218 of the Criminal Code if subsection (2) of the section applies to the offence;
- (c) an offence against section 226B of the Criminal Code if subsection (3) of the section applies to the offence;
- (d) an offence against section 241 of the Criminal Code;
- (e) an attempt to commit an offence against section 213 of the Criminal Code.

Although s 78B creates a mandatory sentencing regime, it gives the court some discretion as to the type of disposition to be imposed, namely a community work order, a home detention order or an actual term of imprisonment. However, the section gives no guidance as to how that discretion is to be exercised.

The three mandatory sentencing options in s 78B are presumptive in the sense that they may be displaced if 'exceptional circumstances' in relation to the offence or the offender arise. If exceptional circumstances are found to exist, the court has discretion to impose whatever sentencing option under the Act it considers appropriate in the circumstances of the case.

'Exceptional circumstances' as provided for in s 78B(2) is not defined and does not appear to have been judicially considered. However one would presume the expression would be attributed a similar meaning to that accorded by the courts to 'exceptional circumstances' in the context of the mandatory sentencing for violent offences (discussed in the next part of this Chapter).

If the court imposes a term of imprisonment that is not wholly suspended on the offender entering into a home detention order, the offender must serve an actual term of imprisonment. The length of that term of imprisonment is within the discretion of the court and may be in terms of hours, days, weeks or months, or expressed to be until the 'rising of the court'.

It would appear from the terms of s 78B(2) that the mandatory sentencing provisions only apply if the court records a conviction following a finding of guilt. Accordingly, if the court declines to record a conviction it may impose a good behavior bond, a fine or a community work order, which are further discussed in Chapter 5.

[3.1.2] Violent Offences

Part 3, Division 6A of the Act prescribes mandatory sentencing for violent offences. Section 78C of the Act provides that a 'violent offence' means:²⁰

- (a) an offence against a provision of the Criminal Code listed in Schedule 2 (of the Act²¹); or
- (b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:
 - (i) a law that has been repealed; or
 - (ii) a law of another jurisdiction (including a jurisdiction outside Australia).

²⁰ *Sentencing Act 1995* s 78C.

²¹ Provisions of the Criminal Code listed in sch 2 include, among others: s 54 (Terrorism); s 55 (Contribution towards acts of terrorism); s 155A (Assault, obstruction etc of persons providing rescue, medical treatment or other aid); s 156 (Murder); s 160 (Manslaughter); s 161A (Violent act causing death); s 165 (Attempt to murder); s 166 (threats to kill); s 175 (Disabling in order to commit indictable offence); s 176 (Stupefying in order to commit indictable offence); s 177 (Acts intended to cause serious harm or prevent apprehension); s 181 (Serious harm); s 182 (Attempting to injure by explosive substances); s 185 (Setting man-traps); s 186 (Harm).

Section 78CA of the Act creates five violent offence levels in descending order.

A 'level 5 offence' is:

- (a) an offence against s 181 of the Criminal Code;²²
- (b) an offence against s 155A (if the offender assaulted the other person), 186, 188 (if the offence is committed in circumstances mentioned in section 188(2), other than paragraph (k)), 188A, 189A, 190, 191, 193 or 212 of the Criminal Code if:
 - (i) commission of the offence involves the actual or threatened use of an offensive weapon (as defined in section 1 of the Criminal Code);²³ and
 - (ii) the victim suffers physical harm²⁴ as a result of the offence.

A 'level 4 offence' is an offence against s 188A or s 189A of the Criminal Code provided the victim suffers physical harm²⁵ as a result of the offence. A 'level 3 offence' is an offence against s 188 of the Criminal Code provided it is committed in circumstances mentioned in s 188(2) (other than paragraph (k)). A 'level 2 offence' is an offence against s 186 of the Criminal Code provided the victim suffers physical harm²⁶ as a result of the offence. A 'level 1 offence' is any other violent offence.

Part 3, Division 6A, Subdivision 2 of the Act prescribes mandatory terms of imprisonment in respect of all levels of violent offences. If an offender is found guilty of a level 5 offence, but has not been previously convicted of a violent offence, the court must impose a minimum sentence of three months actual imprisonment.²⁷ The minimum sentence of actual imprisonment is increased to 12 months if an offender is found guilty of level 5 offence and has previously been convicted of a violent offence (whenever committed).²⁸

In the case of an offender who is found guilty of a level 4 offence (whether or not the offender has been previously convicted of a violent offence), the court must impose a minimum sentence of three months actual imprisonment.²⁹

If an offender is found guilty of a level 3 offence, the victim having suffered physical harm,³⁰ and the offender has not previously been convicted of a violent offence, the

²² Unlawfully causing serious harm to another.

²³ An 'offensive weapon' means 'any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person.'

²⁴ Section 1A(2) of the Criminal Code provides that 'physical harm' includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.

²⁵ Criminal Code s 1A(2).

²⁶ Ibid.

²⁷ *Sentencing Act 1995*, s 78D.

²⁸ Ibid s 78DA.

²⁹ Ibid s 78DB.

³⁰ Criminal Code s 1A(2).

court must impose a term of actual imprisonment.³¹ In such cases, the term of imprisonment is not specified in the section. However, where an offender is found guilty of a level 3 offence and has previously been convicted of a violent offence (whenever committed) the court must impose a minimum sentence of three months actual imprisonment.³²

In the case of an offender who is found guilty of a level 2 offence, the court must impose a term of actual imprisonment.³³

If an offender is found guilty of a level one offence and has previously been convicted of a violent offence, the court must impose a term of actual imprisonment.³⁴

Section 78DG of the Act provides that where the court is required to impose a term of actual imprisonment, the court:

- (a) must record a conviction; and
- (b) must sentence the offender to a term of imprisonment; and
- (c) may make an order under section 40 [suspended sentence] or 44 [home detention order] in relation to part, but not the whole of, the term of imprisonment.

Where the court is required to impose a minimum sentence of a specified period of actual imprisonment, the court:³⁵

- (a) must record a conviction; and
- (b) must sentence the offender to a term of imprisonment of not less than the specified period; and
- (c) cannot make an order under section 40 or 44 in relation to the imprisonment for the specified period.

However, if the offender is a youth (as defined in s 6 of the *Youth Justice Act 2005*), the minimum terms of actual imprisonment prescribed by Part 3, Division 6A, Subdivision 2 of the Act do not apply.³⁶ The court must instead impose a term of actual imprisonment in accordance with s 78DG of the Act.

[3.1.3] Exceptional circumstances

The minimum sentence provisions in Part 3, Division 6A, Subdivision 2 of the Act are subject to an 'exceptional circumstances' exemption.³⁷ The effect of the exemption is that the prescribed minimum sentences are presumptive and can be displaced by the demonstration of 'exceptional circumstances'. In other words, if the court is satisfied the circumstances of the case are exceptional, the court is not required to impose the

³¹ *Sentencing Act 1995* s 78DC.

³² *Ibid* s 78DD.

³³ *Ibid* s 78DE.

³⁴ *Ibid* s 78DF.

³⁵ *Ibid* s 78DH.

³⁶ *Ibid* s 78DH(2)(a).

³⁷ *Ibid* s 78DI.

prescribed minimum term of actual imprisonment. In those circumstances, the court is instead mandated to impose an actual term of imprisonment.³⁸

In deciding whether the circumstances of the case are exceptional, the court may have regard to:

- (a) any victim impact statement or victim report presented to the court under s 106B of the Act; and
- (b) any other matter the court considers relevant.³⁹

Although the Act is silent as to what amounts to 'exceptional circumstances', s 78DI(4) provides that the following do not constitute exceptional circumstances:

- (a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time he or she committed the offence;
- (b) that another person:
 - (i) was involved in the commission of the offence; or
 - (ii) coerced the person to commit the offence.

In *R v Duncan* (2015) 34 NTLR 201 ('*Duncan*'), the Court of Criminal Appeal considered the 'exceptional circumstances' exemption at length. The Court reviewed a number of authorities that have attributed meaning to the expression 'exceptional circumstances', and noted the following:⁴⁰

- (a) the word 'exceptional' must be construed as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely or normally encountered: *R v Kelly* [2000] 1 QB 198 at 208; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];
- (b) exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2001] 1 WLR 1262; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];
- (c) exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [26]; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];
- (d) beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *AWA v*

³⁸ *Ibid* s 78DI(2)(b).

³⁹ *Ibid* s 78DI(3).

⁴⁰ *R v Duncan* (2015) NTLR 201, [25]-[26] ('*Duncan*').

Independent News Auckland [1996] NZLR 184 at 186; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66].

In *Duncan*, the Court of Criminal Appeal went on to observe that when considering whether exceptional circumstances arise

...the whole of the circumstances of the particular case must be considered. The 'mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances'⁴¹ for the purpose of the legislation. Although individual factors may not be exceptional, the relevant factors, considered in combination, may amount to exceptional circumstances.⁴² Whilst reasons should be given for the exercise of the discretion, the exercise remains part of the overall instinctual synthesis that is undertaken by the sentencing judge.

The content of the expression 'exceptional circumstances' in the mandatory minimum sentencing provisions of the *Sentencing Act* should not be filled by the ad hoc examination of individual cases.⁴³ In *Baker v The Queen*, Gleeson CJ observed:⁴⁴

There is nothing unusual about legislation that requires courts to find 'special reasons' or 'special circumstances' as a condition of the exercise of the power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or whether circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

These observations apply to the exceptional circumstances provided for in the *Sentencing Act*.⁴⁵

It should be noted that the Court of Criminal Appeal in *Duncan* also said:

It is important to appreciate that the [mandatory minimum sentencing] regime has application only where the sentence which would otherwise have been imposed is less than the legislatively prescribed mandatory minimum. If, having regard to all the surrounding circumstances, including: the circumstances of the offending; the circumstances of the offender; the maximum penalty and the

⁴¹ *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273 at [25].

⁴² *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *Baker v The Queen* (2004) 223 CLR 513 at 574.

⁴³ *Owens v Stevens* (unreported, Supreme Court, Vic, Hedigan J, No 6834 of 1991, 3 May 1991) at 16-17 per Hedigan J.

⁴⁴ *Baker v The Queen* (2004) 223 CLR 513 at 523.

⁴⁵ *Duncan* (n 40), [27] – [29].

terms of any other statutory requirement, the appropriate sentence exceeds the mandatory minimum sentence, then the need to consider exceptional circumstances does not arise.⁴⁶

In *Orsto v Grotherr* (2015) 249 A Crim R 518, Blokland J, in hearing an appeal against a sentence imposed by the Local Court, had to consider whether the learned magistrate had erred in finding that the circumstances of the case were exceptional for the purposes of s 78DI of the Act. Her Honour opined, at [22]:

the meaning attributed to the term “exceptional circumstances” within the context of the *Sentencing Act* is a question of mixed fact and law, dependent on the factors relied on, said to constitute “exceptional circumstances” that are consistent with the meaning attributed to that term discussed recently in *R v Duncan*.⁴⁷

Blokland J observed that in *Duncan*, the Court of Criminal Appeal emphasised that the question of satisfaction of ‘exceptional circumstances’ in the sentencing context involves the intuitive synthesis process.⁴⁸

In dealing with the relationship between general principles of sentencing and the ‘exceptional circumstances’ exemption, Her Honour was not convinced that proportionality (an important sentencing principle) had no role to play in the assessment of whether the circumstances of the case were exceptional, commenting:

I see no reason why an exceptional disparity between the impugned conduct and the minimum penalty provided would necessarily be excluded from consideration.⁴⁹

Her Honour noted that the principle of proportionality was broadly understood to be embodied in s 5(1)(a) of the *Sentencing Act*, which provides that a purpose of sentencing is “to punish the offender to an extent or in a way that is just in all the circumstances”.⁵⁰

Her Honour at [40] concluded:

The instinctual synthesis approach does not exclude general principles of sentencing. It does not in my view exclude consideration of the purposes of sentencing enumerated in s 5 of the *Sentencing Act* when the question of the exemption falls for consideration.

⁴⁶ *Ibid* [22].

⁴⁷ *R v Duncan* (2015) 34 NTLR 201.

⁴⁸ *Orsto v Grotherr* (2015) 249 A Crim R 518, [23].

⁴⁹ *Ibid* [34].

⁵⁰ *Ibid* [20]

The exceptional circumstances exemption was considered by Southwood J in *Douglas v Dole & Ors* [2019] NTSC 80. His Honour noted at [32] that

General sentencing principles, including proportionality can be relevant when assessing whether or not exceptional circumstances apply.⁵¹ However, a mere disparity between the mandatory minimum term and the sentence the Court would impose in the absence of such a regime is alone not sufficient to amount to exceptional circumstances.

His Honour went on to quote from Blokland J's judgment in *Dhamarrandji v Curtis* [2014] NTSC 39 where it was noted the mandatory minimum terms 'must be given their full effect, however, this includes giving full effect to the broadly based "exceptional circumstances" provision.'⁵²

[3.1.4] Drug Offences

Section 37(2) of the *Misuse of Drugs Act 1990* establishes a mandatory sentencing regime for drug offences. The subsection provides:

(2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without fine) is:

- (a) 7 years imprisonment or more; or
- (b) less than 7 years imprisonment but the offence is accompanied by aggravating circumstance,

impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed.

In *Maynard v O'Brien* (1991) 78 NTR 16, Angel J held, at 22, that 'particular circumstances' as used in s 37(2) means, 'circumstances sufficiently noteworthy or out of the ordinary, relative to the prescribed conduct constituting the offence, or of the offender, to warrant a non-custodial sentence.' However, Angel J adopted the remarks of Asche CJ in *Fejo Ilett; Wilton v Ilett*⁵³ that 'such particular circumstances will be the exception rather than the rule.'⁵⁴

In *Duthie v Smith* (1992) 83 NTR 21, Mildren J identified what he called the narrow view as to the meaning of 'particular circumstances' which required the circumstances to be in the nature of exceptional circumstances. His Honour contrasted this view with the broader view that s 37(2) intended no more restriction upon the sentencing discretion than to reverse the normal sentencing discretion that non-custodial

⁵¹ *Dhamarrandji v Curtis* [2014] NTSC 39; *Orsto v Grotherr* [2015] NTSC 18.

⁵² *Douglas v Dole & Ors* [2019] NTSC 80, [32], quoting *Dhamarrandji v Curtis* [2014] NTSC 39, [26].

⁵³ *Fejo v Ilett; Wilton v Ilett* (1991) 1 NTLR 27.

⁵⁴ *Maynard v O'Brien* (1991) 78 NTR 16, 22.

dispositions must first be considered and rejected before a sentence of imprisonment is imposed.

In agreeing with the view that s 37(2) is designed to reverse the normal approach to sentencing of first deciding non-custodial dispositions, Mildren J said:

It seems to me that the approach called for by the legislature is to look at a sentence of actual imprisonment unless the circumstances of the offence or of the offender warrant otherwise. This places an onus on the accused to establish that either of those circumstances exist, and if that onus is not discharged, a 28 day minimum sentence of actual imprisonment must follow.⁵⁵

Mildren J rejected the view that ‘particular’ is to be equated to ‘exceptional’ and concluded as follows:

In the end I consider that the preferable interpretation to be given to s 37(2) is, as Angel J concluded in *Maynard v O’Brien*, that the circumstances must be ‘sufficiently noteworthy or out of the ordinary, relative to the proscribed conduct constituting the offence, or of the offender, to warrant a non-custodial sentence’, but, like Kearney J, I do not consider that the circumstances need to be so noteworthy or out of the ordinary as to convey the meaning that only in rare cases will there be found circumstances that fall within that class. Indeed, it is apparent that Angel J himself could not have intended that consequence given that he found that the fact that the appellant in that case was of exemplary character, a first offender, and intended to use cannabis for his own use, amounted to ‘particular circumstances’ warranting the imposition of a non-custodial sentence.⁵⁶

Mildren J’s analysis of ‘particular circumstances’ has been consistently followed by single judges of the Supreme Court and was approved by the Court of Criminal Appeal in *R v Day* (2004) NTLR 218 (*‘Day’*). It is clear from the decision in *Day* that circumstances relating to the offence or those personal to the offender, either considered in isolation or in their cumulative effect, may be capable of qualifying as ‘particular circumstances’ for the purposes of leading to an opinion that the minimum 28 days imprisonment need not be imposed.

[3.1.5] Breaches of Domestic Violence Orders

Section 121(1) of the *Domestic and Family Violence Act 2007* provides that if an adult is found guilty of an offence against section 120(1)⁵⁷ the offender is liable to a penalty of 400 penalty units or imprisonment for 2 years. Section 121(2) requires the court to record a conviction and to sentence the offender to imprisonment for at least 7 days if

⁵⁵ *Duthie v Smith* (1992) 83 NTR 21, 28.

⁵⁶ *Ibid* 30.

⁵⁷ Section 120 of the *Domestic and Family Violence Act 2007* creates the offence of contravening a domestic violence order.

the offender has previously been found guilty of the offence of contravening a domestic violence order.⁵⁸ However, the section is subject to subsection (3) which provides:

(3) Subsection (2) does not apply if:

- (a) the offence does not result in harm⁵⁹ being caused to a protected person; and
- (b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

Section 121(5) prevents the court from making an order for a person found guilty of a second or subsequent offence if the order would result in the release of the person from the requirement to actually serve the term of imprisonment imposed. Sections 121(6) and 121(7) require that if the offender is sentenced to serve a term of imprisonment for the offence while serving a term of imprisonment for another offence, the court must direct the term of imprisonment to commence at the expiration of the other term of imprisonment.

Section 122 of the *Domestic and Family Violence Act 2007* creates a similar mandatory sentencing regime for offences committed by young persons. However, the provisions of ss 121(5) and 121(6) are not replicated.

The effect of the mandatory sentencing provisions of ss 121(2) and 121(3) of the *Domestic and Family Violence Act 2007*, especially the 'particular circumstances' test, was comprehensively discussed by Riley J in *Midjumbani v Moore* (2009) 229 FLR 452. Riley J observed that s 121(3) of the *Domestic and Family Violence Act 2007* enables a court to avoid the imposition of the minimum 7 days imprisonment prescribed by s 121(2) if the circumstances specified in s 121(3) are satisfied.⁶⁰ The requirements of subsection (3) are 'cumulative and it is for an offender seeking to rely upon the provision to raise matters which may bring him or her within the ambit of the subsection.'⁶¹

In relation to the 'particular circumstances' test, His Honour said at [15]–[17]:

In applying the section the court must consider whether it is 'not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence'. The first thing to notice is that the reference is to the 'circumstances of the offence' rather than of the offender. The respondent submitted that the provision is to be distinguished from similar

⁵⁸ Section 121(4) provides that this mandatory sentencing provision does not apply to a police DVO that has not been confirmed by the Court under Part 2.10 of the *Domestic and Family Violence Act 2007*.

⁵⁹ Criminal Code s 1A.

⁶⁰ *Midjumbani v Moore* (2009) 229 FLR 452, [12]. See also *The Queen v Anzac* [2020] NTSC 58.

⁶¹ *Ibid.*

directions provided for in the *Misuse of Drugs Act 1990* (NT) where, in s 37(2), there is reference to ‘the particular circumstances of the offence or the offender’.

Notwithstanding the different wording, in my opinion the reference to ‘the particular circumstances of the offence’ should be given a wide interpretation to achieve the purpose of the legislation. Where appropriate such circumstance will include relevant circumstances of the offender. Such factors as immediate remorse, immediate cooperation with the authorities and an early plea of guilty may be so closely connected to the offender’s culpability as to affect the seriousness of the offence.⁶² ...

There would appear to be no reason why all the circumstances of the offence including those directly related to the offender should not be included.

His Honour held, consistent with the similar ‘particular circumstances’ test under s 37(2) of the *Misuse of Drugs Act 1990*, that ‘particular circumstances’ as used in s 121(3) of the *Domestic and Family Violence Act 2007* meant circumstances ‘sufficiently noteworthy or out of the ordinary to warrant a non-custodial sentence.’⁶³

[3.2] Issues Concerning Mandatory Sentencing

As stated in Chapter 1, a primary issue to be addressed by this inquiry is whether the Northern Territory’s mandatory sentencing provisions should be repealed. This requires a careful analysis of the arguments in favour of mandatory sentencing and an assessment of the efficacy as well as the appropriateness of the Territory’s various mandatory provisions. Do the mandatory sentencing provisions achieve their postulated goals or objectives? Are the provisions principled, fair and just?

[3.2.1] *The arguments in favour of mandatory sentencing*

Proponents of mandatory sentencing provisions argue that mandatory sentencing laws:⁶⁴

- deter individuals from offending;⁶⁵
- denounce the proscribed conduct;
- ensure appropriate punishment of the offender;⁶⁶

⁶² *R v Crabbe* (2004) 150 A Crim R 523 at 543.

⁶³ *Midjumbani v Moore* (2009) 229 FLR 452, [24].

⁶⁴ See generally Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014).

⁶⁵ For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that these provisions were intended to ‘send a clear message to serious and repeat violent offenders that if they commit a violent offence they will serve genuine gaol time.’ Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

⁶⁶ For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that the ‘mandatory minimum sentences are also intended to demonstrate

- protect the community through incapacitation of the offender; and
- promote consistency in sentencing.⁶⁷

In addition, it is argued that mandatory sentencing provisions have community support and a popular mandate.⁶⁸ Mandatory sentencing provisions are also seen as a means of addressing community concerns that sentences handed down by courts are too lenient when sentencing offenders.⁶⁹

The question for this inquiry is whether any of these arguments can be maintained in relation to the mandatory sentencing provisions under consideration. In particular, do any of these provisions:

- act as an effective deterrent;
- serve the denunciatory purpose of the sentencing;
- ensure appropriate punishment of offenders;
- protect the Territory;
- promote consistency in sentencing outcomes; and
- have community support due to a public perception that the sentences imposed by the courts are too lenient?

[3.2.2] *The arguments against mandatory sentencing*

Opponents of mandatory sentencing argue that mandatory sentencing provisions:

- 'impose unacceptable restrictions on judicial discretion'⁷⁰ and 'interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime';⁷¹

to victims of serious violent offenders that perpetrator will suffer the consequence of prison for their violent offence.'

Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

⁶⁷ For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that the 'purpose of setting the mandatory minimum sentences in this Bill is to maintain a consistent standard for sentencing for violent offences.'

Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

⁶⁸ Law Council of Australia, *The Mandatory Sentencing Debate* (Report, September 2001) 10; Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) *Alternative Law Journal* 211.

⁶⁹ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 9.

⁷⁰ *Ibid* 5.

⁷¹ *Ibid* 21.

- 'displace discretion to other parts of the criminal justice system, most notably to police and prosecutors.'⁷² 'In addition, it places an unfair onus on law enforcement officers and serves to distort the role of law enforcement officers';⁷³
- 'are inconsistent with the rule of law and the separation of powers, by directing the manner in which the judicial power should be exercised';⁷⁴
- 'violate well-established sentencing principles that a sentence and retribution should be proportionate to the gravity of the offence. Unjust cases demonstrate how there is a real risk that mandatory sentencing goes against the principle of retribution because the punishment does not fit the crime.'⁷⁵
- 'contradict the principle of imprisonment as a last resort';⁷⁶
- 'offend against the principle of proportionality';⁷⁷
- 'do not operate to deter offenders, and may in fact increase the likelihood of reoffending, as periods of incarceration diminish employment prospects, positive social links and other protective factors that prevent recidivism';⁷⁸ and
- 'reduce the incentive to plead guilty, resulting in increased workloads for the courts.'⁷⁹

Mandatory sentencing provisions also fly in the face of the following observations made by the High Court in *Wong v The Queen* (2001) 207 CLR 584 at [75]:

[T]here are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all.⁸⁰

⁷² Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) 78.

⁷³ Law Council of Australia, *The Mandatory Sentencing Debate* (Report, September 2001) 13.

⁷⁴ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) 78.

⁷⁵ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 11.

⁷⁶ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) 78. This Discussion Paper also notes, at 78, that all Australian jurisdictions (except Tasmania and the Northern Territory) have legislated to enforce the principle: *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) ss 4S, 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 991* (Vic) ss 4B, 5(4); *Sentencing Act 1995* (WA) ss 6(4), 86.

⁷⁷Ibid 79. This Discussion Paper also notes, at 79, the following observations made by the High Court in *Chester v The Queen* (1988) 165 CLR 611, [20]: 'It is now firmly established that our common law does not sanction preventative detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.'

⁷⁸ Ibid 78.

⁷⁹ Ibid.

⁸⁰ See also *Markarian v The Queen* (2005) 228 CLR 357, [37].

It is also argued that mandatory sentencing provisions such as those that prevail in Western Australia and in the Northern Territory target disadvantaged and vulnerable members of the community and disproportionately affect Aboriginal and Torres Strait Islander offenders because:⁸¹

- they attach to some offences where Aboriginal and Torres Strait Islander people find themselves disproportionately charged;
- this group is highly visible and easily identifiable, particularly in smaller communities; and
- the impact of the provisions tends to exacerbate a range of problems already faced by this cohort that tend to lead to recidivism.

Although the Northern Territory mandatory sentencing provisions are subject to statutory exceptions allowing courts to depart from the mandatory sentencing regime, these exceptions make judicial officers answerable to the legislature in the event they are satisfied that there are either 'exceptional circumstances' or 'particular circumstances' warranting a non-custodial sentence.⁸²

Mandatory sentencing has also been criticised for violating a number of provisions in the International Covenant on Civil and Political Rights ('ICCPR') including the prohibition on arbitrary detention in Article 9.⁸³ The ALRC expressed particular concern in relation to Northern Territory and Western Australian provisions affecting youth offenders. It considered these provisions to be serious violations of international and common law norms, recommending federal legislation to override these laws unless the parliaments of the Northern Territory and Western Australia repealed them.⁸⁴

The ALRC considered that, in contravention of the ICCPR and the Convention on the Rights of the Child ('CROC'), mandatory sentencing violates the principle of proportionality in sentencing, fails to represent a sentence of 'last resort', and breaches the requirement that sentences be reviewable by a higher court.⁸⁵

The Law Council of Australia is similarly of the view that mandatory sentencing provisions are inconsistent with Australia's international obligations, including:⁸⁶

⁸¹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) 79.

⁸² Law Council of Australia, *The Mandatory Sentencing Debate* (Report, September 2001) 19.

⁸³ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) [19.63]. Mandatory sentences may also be discriminatory and breach Article 2 of the ICCPR by reason of their disproportionate impact on Aboriginal and Torres Strait Islander peoples.

⁸⁴ *Ibid* [19.63] - [19.64] and Recommendation 242.

⁸⁵ *Ibid* [19.63]. See also Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (17th Report, August 1998) [8.26]-[8.34].

⁸⁶ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 21.

- the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
- the obligations under Articles 3, 37 and 40 of the CROC to ensure that decisions regarding children have their best interest as a primary consideration and children are only detained as a last resort and for the shortest possible appropriate period.

Mandatory sentencing has also attracted criticism due to its unjust impact on offenders with a mental illness or cognitive impairment.⁸⁷ As the Law Council of Australia has observed:

The idea of mandatory sentencing is in part based on the principle of deterrence. However, a deterrent sentence is not usually appropriate in dealing with a person with mental illness or intellectual disability because the punishment can be meaningless to the offender.⁸⁸

Mandatory sentencing has also been objected to because it sometimes results in anomalous and disproportionately harsh and unjust sentences.⁸⁹ Indeed, mandatory sentencing provisions over the last two decades have been the subject of judicial criticism.

[3.3] Invitation to Stakeholders to Make Submissions

In light of the arguments for and against mandatory sentencing outlined in this chapter, stakeholders are invited to make submissions as to whether the Northern Territory's mandatory sentencing provisions under the Act, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* should be maintained or repealed. Submissions to the effect that only some of the provisions should be repealed while other provisions should be maintained are welcome.

It is important for submissions to take into account not only the substantive/presumptive mandatory provisions, but also the statutory exceptions permitting a departure from the mandatory sentencing regime as those exceptions purport to ameliorate the perceived harsh effects of the substantive provisions by allowing courts to undertake an instinctive synthesis approach and to pay some regard to the principle of proportionality.

Where possible, submissions should be supported by statistical data, empirical or anecdotal evidence as well case studies demonstrating the application of the mandatory sentencing provisions.

⁸⁷ Ibid 32.

⁸⁸ Ibid 32. See also Disability Discrimination Legal Service, Submission No 67 to Senate Legal and Constitutional References Committee, *Inquiry into the Provisions of the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (undated).

⁸⁹ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 5.

It is also important that submissions recommending the repeal of a particular mandatory sentencing provision also recommend what custodial sentencing or community-based sentencing options should be available to the courts in sentencing offenders in lieu of that provision.

Questions for stakeholder comment

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?

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?

3.3 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?

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?

CHAPTER 4 – MANDATORY SENTENCING FOR MURDER AND SEXUAL OFFENCES

[4.1] Mandatory sentencing for murder

For adult offenders, the crime of murder carries a mandatory sentence of imprisonment for life.⁹⁰ When the Supreme Court sentences an offender to imprisonment for life for the offence of murder, the court must fix a non-parole period of 20 years (referred to as the 'standard non-parole period'). If any one of a number of specified circumstances applies, the court must fix a non-parole period of 25 years.⁹¹ In either case, the court may fix a longer non-parole period if satisfied that a longer non-parole period is warranted 'because of any objective or subjective factors affecting the relative seriousness of the offence'.⁹² The court may also fix a shorter non-parole period, but its discretion to do so is limited by the requirement for 'exceptional circumstances', which are restricted by the legislation.⁹³

A person commits the crime of murder when he or she engages in unlawful conduct which causes the death of another person ('the deceased'), and the person intends by that conduct to cause the death of, or serious harm to, the deceased or any other person.⁹⁴

Under the Criminal Code, 'harm' is 'physical harm, or harm to a person's mental health, whether temporary or permanent'.⁹⁵ The definition of 'serious harm' is 'any harm (including the cumulative effect of more than one harm) that endangers or is likely to endanger a person's life' or 'that is likely to be significant and long-standing'.⁹⁶ As a result, the requisite intent for the crime of murder may be an intent to cause a relatively low level of harm, which nonetheless qualifies as 'serious harm' under the Criminal Code definition because it is likely to be significant and long-standing. This may be contrasted with the intent to kill or the intent to cause harm that is likely to endanger a person's life.

[4.2] Varying degrees of moral culpability

Because the crime of murder can be committed in many different circumstances, not every murder carries the same degree of moral culpability. Murders in the more or most serious category would include murders involving multiple victims as a result of

⁹⁰ Criminal Code ss 157(1)-(2). In the case of a youth found guilty of murder, the Supreme Court is not bound to sentence the offender to imprisonment for life and may sentence the youth to a shorter period of detention or imprisonment as it considers appropriate. See *Youth Justice Act 2005* s 82(3). Reference to the 'Criminal Code' is to the code of criminal law contained in Schedule 1 to the *Criminal Code Act 1983*, s 4(2) of which provides that, for the purposes of the *Interpretation Act 1978*, 'the Code' is to be construed as if it were a separate Act.

⁹¹ *Sentencing Act 1995* s 53(1) and s 53A(1).

⁹² *Ibid* s 53A(4).

⁹³ *Ibid* s 53A(6) and s 53A(7).

⁹⁴ Criminal Code s 156.

⁹⁵ *Ibid* s 1A.

⁹⁶ *Ibid* s 1, definition of 'serious harm'.

a terrorist act such as a gun massacre or causing a passenger plane to crash; murders involving several victims as a result of hatred or revenge, such as a father murdering his wife and children; murders involving torture and planned murders, where there may be only one victim. Some murders are objectively less serious, for example, where a person kills another, albeit with the requisite intent, but in the course of an argument which has got out of hand.

A person may be convicted of murder solely as the result of accessorial liability. In the case of *R v Zak Grieve*,⁹⁷ the offender was convicted on the basis that he had aided the principal offenders in the planning of the deceased's murder, although he did not participate in the actual killing. As an aider and abettor, he was liable because he had not taken all reasonable steps to prevent the commission of the offence.⁹⁸ Although the sentencing judge found that Grieve was 'troubled in his conscience' and had withdrawn at the last minute,⁹⁹ the offender's circumstances did not come within the 'exceptional circumstances' provisions of the *Sentencing Act 1995* which would have enabled the judge to fix a non-parole period of less than 20 years.¹⁰⁰ At the same time, one of the actual participants in the killing was given a non-parole period of 18 years because the sentencing judge considered that the victim's conduct had amounted to an extreme level of provocation to that offender.

[4.3] Statutory injustice

There is an inherent injustice in the statutory requirement for the Supreme Court to fix 20 years as the 'standard non-parole period'. This is apparent from the explanation contained in the legislation:¹⁰¹

The standard non-parole period of 20 years ... represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

If a non-parole period of 20 years is appropriate for offences in the mid-range, then logically the minimum non-parole period for offences in the low range of objective seriousness should be less than 20 years. However, the court does not have a discretion to go below the standard non-parole period of 20 years, except in the restricted circumstances set out in s 53A(6) and s 53A(7) *Sentencing Act 1995*, which do not include the circumstance that the offence is in the low range of objective

⁹⁷ *R v Buttery & Ors* [2012] NTSC 103.

⁹⁸ On Grieve's appeal against conviction, it was held that, for proof of intention to aid murder, it was not necessary for the Crown to prove intention at each point through to the moment of death. It was sufficient if the intent exists at some time prior to the death or (if relevant) prior to withdrawing from involvement. See *Grieve v The Queen* [2014] NTCCA 2, [9].

⁹⁹ *R v Bronwyn Buttery, Christopher Malyschko and Zac Grieve*, SCC 21140102, 21136198 and 21136195, Sentencing Remarks, Mildren J., 9 January 2013.

¹⁰⁰ *Sentencing Act 1995* s 53A(6) and s 53(7)(b) which refers to where the victim's conduct substantially mitigates the conduct of the offender.

¹⁰¹ *Ibid* s 53A(2).

seriousness. In *R v Deacon*, the Court of Criminal Appeal referred to this anomaly in the context of the principle of equal justice, observing as follows:¹⁰²

So far as the second matter is concerned, there is no doubt the statutory scheme may result in the imposition of the standard non-parole period to offending of markedly different levels of seriousness. For example, the standard non-parole period may have application to both an offence in the middle range of objective seriousness, after account has been taken of all the personal circumstances of the offender, and one falling within the least serious category of murder which does not meet the criteria in s 53A(6) of the *Sentencing Act 1995*.

The fact that there is a statutory standard non-parole period of 20 years also means that the sentence cannot be moderated for the following matters or circumstances in the same way as sentences may be reduced for all other offending, including manslaughter:

- the offender has committed the murder in circumstances where the deceased provoked the offender, but falling short of ‘legal provocation’ which, if established, leads to a conviction for the lesser offence of manslaughter (carrying a maximum penalty of imprisonment for life but for which there is no mandatory minimum sentence or non-parole period);¹⁰³
- the so called ‘excessive self-defence’, where an offender engages in defensive conduct but where his/her conduct is not a reasonable response to the perceived circumstances;
- the offender co-operates with the authorities, for example, surrenders to police, possibly even before the police are aware that there has been a homicide;
- the offender is genuinely remorseful and pleads guilty at an early opportunity;¹⁰⁴ or
- the offender pleads guilty and gives evidence against co-offenders.

Not only does the fixed standard non-parole period of 20 years result in an injustice to the offender, but it very often results in the requirement for a jury trial because there is no incentive for an accused to plead guilty to murder.

[4.4] Mandatory sentencing for sexual offences

Mandatory sentencing for sexual offences is governed by Part 3, Division 6B of the *Sentencing Act* (NT). Section 78F of the Act provides:

¹⁰² *R v Deacon* [2019] NTCCA 22, [39]. See also [32] and [38], pars (a) and (g).

¹⁰³ Criminal Code s 158 requires that a person be convicted of manslaughter and not murder if the elements of the partial defence of provocation apply, in brief, loss of control induced by conduct of the deceased; the deceased’s conduct being such that it could have induced an ordinary person to have lost self-control to such an extent as to have formed an intent to kill or cause serious harm.

¹⁰⁴ This would ordinarily justify a discount of about 25%. See *R v Wilson* (2011) 30 NTLR 51, [39].

(1) Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve:

(a) a term of actual imprisonment; or

(b) a term of imprisonment that is suspended by it partly but not wholly.

(2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order under subsection (1).

The term 'sexual offence' is defined in s 3 of the *Sentencing Act* to mean "an offence specified in Schedule 3 [of the *Sentencing Act*]". Included in Schedule 3 are 13 *Criminal Code Act 1983* (NT) offences found in Schedule 1 of the latter Act.¹⁰⁵

While the imposition of a mandatory term of imprisonment for sexual offences may be seen by some as an effective crime control strategy, it is questionable whether the imposition of a short term of imprisonment for relatively minor offending achieves sentencing objectives other than short term incapacitation.¹⁰⁶ Further, "Indigenous people are more likely to be sentenced to short term imprisonment".¹⁰⁷ As Cunneen, Collins and Ralph note:

Some of the key arguments behind the abolition of short sentences of imprisonment are that they

- Do not provide rehabilitation
- Introduce minor offenders to more hardened serious offenders
- Have negative effects on family, employment, income and housing
- Increase stigmatisation.¹⁰⁸

Finally, the requirement in s 78F(1)(a) that an actual term of imprisonment must be imposed for a sexual offence limits the ability of the court, in appropriate circumstances, to impose a community-based sentencing option. For example, for less serious forms of sexual offending such as publishing indecent articles,¹⁰⁹ which carries a maximum sentence of two years imprisonment, a community-based sentencing option may be more appropriate. It is acknowledged, however, that it is not uncommon for 'rising of the court' sentences to be imposed to avoid any injustice the requirement in s 78F(1)(a) may cause. The imposition of a mandatory term of imprisonment for sexual offences also can result in the offender being placed on the Child Protection Offender Register. Pursuant to the *Child Protection (Offender Reporting and*

¹⁰⁵ Sections 125B, 125C, 127, 128, 130, 131, 131A, 132, 134, 138, 188, 192 and 192B.

¹⁰⁶ Chris Cunneen, Neva Collings, Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement*, (Institute of Criminology, 2005) at [9.2].

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Sentencing Act 1995*, s 125C.

Registration) Act 2004, a person found guilty of a sexual offence stipulated in Schedule 1¹¹⁰ or 2¹¹¹ of the Act is a person deemed to be a reportable offender. The offender is required to register and report to the police for a prescribed period. That period can range from 7 years to life, depending on the circumstances and the nature of the offending. The reporting conditions can be onerous, and a breach of the conditions often will attract a term of imprisonment.

[4.5] Questions for stakeholder comment

The problem with mandatory minimum sentencing is that it is not possible for the legislature to envisage all of the circumstances which would justify a reduction below the mandatory minimum.

One possible solution is to abolish the mandatory sentence for murder altogether, leaving it to the court to impose an appropriate sentence and non-parole period, which would always be subject to correction on appeal.

An alternative solution would be to make the 'exceptional circumstances' specified in s 53A(7) of the *Sentencing Act 1995* 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 above at [4.3].

Questions

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?

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?

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*?

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 in the circumstances referred to at [4.3] above?

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

¹¹⁰ Schedule 1 offences to which a mandatory sentence applies are ss 127, 130, 131A, 134(2) or (3), 192 and 192B.

¹¹¹ Schedule 2 offences to which a mandatory sentence applies are ss 125B, 125C, 128, 131, 132 and 188(1).

CHAPTER 5 – COMMUNITY-BASED SENTENCING OPTIONS

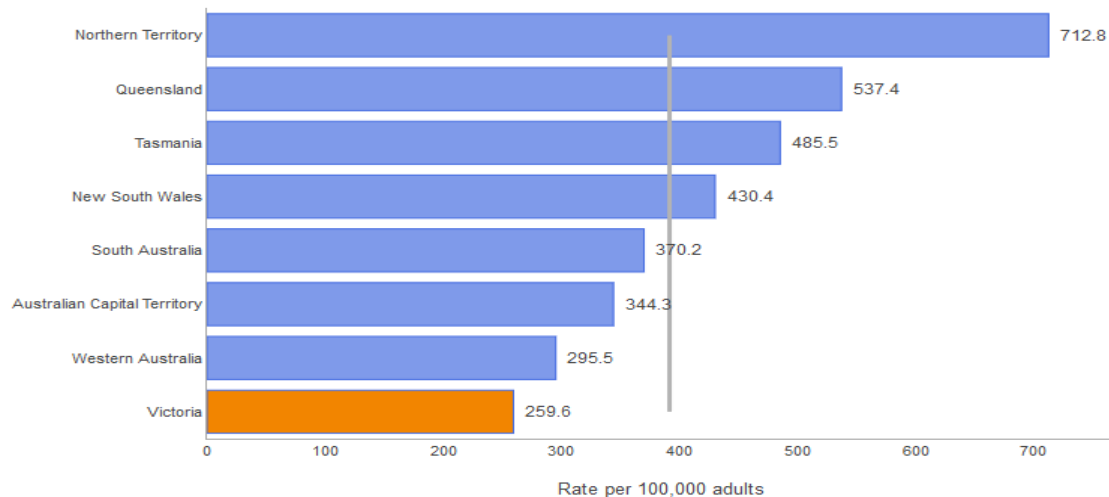
[5.1] Introduction

Community-based sentences can be defined as ‘sentences that are not primarily based in a prison setting but rather are carried out wholly, or to a large extent, in the community.’¹¹² While retaining a punitive effect, the objectives of such sentencing options ‘recognise more clearly and explicitly the community’s interest in the rehabilitation of the offender.’¹¹³

Australian Bureau of Statistics data collated by the Victorian Sentencing Advisory Council indicate that, as at March 2019, the Northern Territory had the highest rate of offenders serving community-based sentences; 712.8 people per 100,000 adults as evidenced in the following table.¹¹⁴

Table 1

Rate of people serving community-based sentences in each Australian state and territory, March 2019



¹¹² Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.13].

¹¹³ *R v Morris* (unreported, 14 July 1995, NSWCCA) 4. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.16].

¹¹⁴ Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2019*, (Catalogue No 4512.0, 2019) quoted by Sentencing Advisory Council, *Community-Based Sentences* (Web Page, 8 August 2019) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/community-based-sentences>>. Note that the vertical line on the graph indicates the national rate.

In the Northern Territory, community-based sentencing orders are divided into non-custodial orders and custodial orders. The former is not an alternative to custody. Rather, such orders are made when the court concludes that the offending is not serious enough to warrant the offender's imprisonment. When the court makes a custodial order, a determination has been made that the conduct does warrant the imprisonment of the offender but suspends incarceration of the offender on the condition that the offender comply with the terms of the custodial order. It has been suggested that the

process of deciding whether or not offending is such that it would normally require a sentence of imprisonment, can limit the flexibility that a court may have in setting the scope and conditions of the order – reflecting that the two orders are designed to serve different purposes.¹¹⁵

[5.2] Non-custodial orders

The non-custodial orders that may be made by courts in the Northern Territory are:

- supervised bonds;¹¹⁶
- community work orders;¹¹⁷ and
- community-based orders.¹¹⁸

[5.2.1] Supervised bonds

A supervised bond is 'an order of the court requiring that the offender not commit any further offences for a specified period.'¹¹⁹ In the Northern Territory, the period of such a bond cannot exceed 5 years.¹²⁰ Those subject to a supervised bond must appear before the court if called on to do so, be of good behaviour for the period of the order and observe any conditions imposed by the court.¹²¹ Supervised bonds are imposed for low level offending, and generally are not available if a mandatory minimum sentence applies. It is open to a court to impose a supervised bond if particular circumstances are demonstrated in accordance with s 37(2) of the *Misuse of Drugs Act 1990* or s 121(3)(b) of the *Domestic and Family Violence Act 2007*. A supervised bond is not available, however, as an option in relation to violent offences even if

¹¹⁵ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 250 [7.82].

¹¹⁶ *Sentencing Act 1995* ss 11 and 13.

¹¹⁷ *Ibid* pt 3 div 4.

¹¹⁸ *Ibid* pt 3 div 4A.

¹¹⁹ Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.20].

¹²⁰ *Sentencing Act 1995* s 11(1)(a) (release on bond without conviction) and s 13(1)(a) (release on bond following conviction).

¹²¹ *Sentencing Act 1995* ss 11(1) and 13(1).

exceptional circumstances are demonstrated because an actual term of imprisonment must be imposed.

Finally, s 78B(4) of the *Sentencing Act 1995* allows a court to impose a supervised bond in addition to one of the prescribed mandatory sentencing dispositions in s 78B(2). However, a supervised bond would have to be compatible with the chosen mandatory disposition. A bond would not be compatible with an actual term of imprisonment or a home detention order.

[5.2.2] Community work orders

Community work orders require an offender to participate in an approved project¹²² for a period not exceeding 480 hours.¹²³ The purpose of such an order is expressly stated 'to reflect the public interest in ensuring that a person who commits an offence makes amends to the community for the offence by performing work that is of benefit to the community'.¹²⁴ While no exclusions to eligibility are expressed in the *Sentencing Act 1995*, as with supervised bonds a community work order is not available if a mandatory minimum sentence applies. The options available to the court in the event an offender breaches a community work order are articulated in the *Sentencing Act 1995*, s 39.

[5.2.3] Community-based orders

Community-based orders are similar to community work orders but differ in a number of respects. First, those convicted of a sexual offence, a violent offence, a common assault offence which falls within s 188(2) of the Criminal Code or another offence prescribed by regulation, are not eligible for such an order.¹²⁵ Secondly, a prerequisite to the court making such an order is the receipt of a pre-sentence report.¹²⁶ Thirdly, the maximum period a community-based order can be in force is two years.¹²⁷ Finally, there are a number of conditions that apply to community-based orders that do not apply to community work orders.¹²⁸ As was noted in the Second Reading Speech to the Justice (Corrections) and Other Legislation Amendment Bill 2011, the introduction of community-based orders aimed 'to provide supervision in the community and mandate programs, treatment or training with the option for a court to order electronic monitoring and community work.'¹²⁹

¹²² An 'approved project' is defined in the *Sentencing Act 1995* s 3, to mean 'a rehabilitation program or work, or both, approved by the Commissioner under the *Correctional Services Act 2014*.'

¹²³ *Sentencing Act 1995* s 34(1).

¹²⁴ *Ibid* s 33A.

¹²⁵ *Ibid* s 39A.

¹²⁶ *Ibid* s 39B.

¹²⁷ *Ibid* s 39D.

¹²⁸ *Ibid* ss 39E-39G.

¹²⁹ Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 5 May 2011, 7974, Mr McCarthy (Correctional Services).

[5.3] Custodial orders

The custodial orders that may be made by courts in the Northern Territory are:

- home detention orders;¹³⁰
- community custody orders;¹³¹ and
- suspended sentences.¹³²

[5.3.1] *Home detention orders*

Home detention orders can be made where the court 'is satisfied that it is desirable to do so in the circumstances.'¹³³ Such an order cannot remain in force for a period longer than 12 months,¹³⁴ and may be made subject to such terms and conditions as the court thinks fit.¹³⁵ Three conditions which are not mandatory, but which are commonly included in a home detention order are set out in s 44(3)(a)-(c) of the *Sentencing Act 1995*. The order can stipulate that the offender:

- (a) not leave the premises or place specified in the order except at the times and for the periods as prescribed or as otherwise permitted by the Commissioner [of Correctional Services] or a probation and parole officer; and
- (b) wear or have attached an approved monitoring device in accordance with the directions of the Commissioner, and allow the placing, or installation in, and retrieval from, the premises or place specified in the order such machine, equipment or device necessary for the efficient operation of the monitoring device; and
- (c) obey the reasonable directions of the Commissioner.

While a home detention order can be imposed in relation to aggravated property offences and for drug offences and breaches of domestic violence orders upon demonstration of 'particular circumstances', a home detention is not an option in relation to violent offences even where 'exceptional circumstances' are demonstrated.

Before any home detention order can be made, the court must receive a report from the Commissioner of Correctional Services stating that:

- suitable arrangements have been made for the offender to live at the premises or place specified in the report;¹³⁶
- the premises or place specified in the report is suitable;¹³⁷ and

¹³⁰ *Sentencing Act 1995* pt 3 div 5 sub-div 2.

¹³¹ *Ibid* pt 3 div 5 sub-div 2A.

¹³² *Ibid* pt 3 div 5 sub-div 1.

¹³³ *Ibid* s 44(1).

¹³⁴ *Ibid* s 44(2).

¹³⁵ *Ibid* s 44(3).

¹³⁶ *Ibid* s 45(1)(a)(i).

¹³⁷ *Ibid* s 45(1)(a)(ii).

- the making of the home detention order is not likely to inconvenience or put at risk other persons living in those premises or at that place or the community generally.¹³⁸

Finally, in preparing the report for the court, the Commissioner of Correctional Services may, but is not required by statute to, 'take into account the views of those members of the community who, in the opinion of the Commissioner, may be affected by the making of the home detention order.'¹³⁹

The circumstances in which an offender will breach a home detention order are set out in s 48(1) of the *Sentencing Act 1995*. If the breach does not result from conduct punishable by imprisonment, the court may allow the order to continue on the same or varied terms and conditions.¹⁴⁰ If the offender's conduct resulting in the breach does constitute an offence punishable by imprisonment, or even if it is not such an offence but the court considers that it is not appropriate to continue or vary the order, the order must be revoked.¹⁴¹ Should the order be revoked, 'the offender must be imprisoned for the term suspended by the court on the making of the order as if the order had never been made and despite any period that the offender has served under the order.'¹⁴² For example, if an 11 month home detention order is revoked in the 10th month, the offender must serve the full 11 months of imprisonment. No credit is given for the 10 months the offender has completed without breaching the terms and conditions of the order.

[5.3.2] Community custody orders

A community custody order is a sentence of imprisonment in which the offender serves their sentence in the community.¹⁴³ Those convicted of a sexual offence, a violent offence or a common assault with aggravating circumstances as specified in a 188(2) of the Criminal Code, are not eligible to be sentenced to a community custody order.¹⁴⁴ A community custody order cannot be made in conjunction with a suspended sentence,¹⁴⁵ or where the offender is convicted of more than one offence and the total period of imprisonment exceeds 12 months (which is the maximum duration of a community custody order).¹⁴⁶ Before the court can make a community custody order it must receive a pre-sentence report,¹⁴⁷ which is prepared by the Commissioner of Correctional Services.¹⁴⁸

¹³⁸ Ibid s 45(1)(a)(iii).

¹³⁹ Ibid s 45(2).

¹⁴⁰ Ibid s 48(9) and (10).

¹⁴¹ Ibid s 48(6)(a).

¹⁴² Ibid s 48(6)(b).

¹⁴³ Northern Territory Government, *Community Custody Order*, (Web Page, 6 February 2019) <<https://nt.gov.au/law/prisons/community-custody-order>>.

¹⁴⁴ *Sentencing Act 1995* s 48A(1)(a).

¹⁴⁵ Ibid s 48B(2).

¹⁴⁶ Ibid s 48B(3).

¹⁴⁷ Ibid s 48B(1).

¹⁴⁸ Note the definition of 'pre-sentence report' in the *Sentencing Act 1995* s 3.

A community custody order is subject to the statutory conditions set out in s 48E of the *Sentencing Act 1995*. These include being supervised by a probation and parole officer;¹⁴⁹ not committing another offence punishable by imprisonment; and performing 12-20 hours per week of community work, undertaking a prescribed program,¹⁵⁰ or undergoing counselling or treatment as directed by the Commissioner of Correctional Services. The court may also impose other conditions stipulated in s 48F, including that the offender must undertake one or more prescribed programs;¹⁵¹ not consume or purchase alcohol or illicit drugs;¹⁵² live at a specified place;¹⁵³ wear an approved monitoring device;¹⁵⁴ and allow for the installation of monitoring equipment.¹⁵⁵ As was noted by Barr J in *Mamarika v Ganley* [2013] NTSC 6 at [23], while a community custody order is a sentence of imprisonment served in the community, the order ‘establishes a very intensive regime.’

If the offender breaches the conditions of a community custody order, the court must revoke the order unless the ‘court is satisfied it would be unjust to do so because of exceptional circumstances that have arisen since the order was made’.¹⁵⁶ If such exceptional circumstances do not exist and the order is revoked, the court must sentence the offender ‘to imprisonment for the unexpired term of imprisonment under the order at the date of the breach of the condition.’¹⁵⁷ In this regard, a community custody order differs markedly from a home detention order.

[5.3.3] Suspended sentences

A suspended sentence, as the name suggests, is a custodial prison sentence that is not put into immediate effect. In the Northern Territory, the option of a suspended sentence is available provided the term of imprisonment does not exceed five years¹⁵⁸ and a sentence of imprisonment would be appropriate in the circumstances having regard to the *Sentencing Act 1995*.¹⁵⁹ The court has the option to suspend the sentence fully, in which case the offender will spend no time in custody if the conditions of the sentence are not breached, or partially, in which case the offender will spend a portion of the sentence in custody. The court may attach such conditions to the order suspending the sentence ‘as the court thinks fit’,¹⁶⁰ although such conditions ‘should

¹⁴⁹ In *Mamarika v Ganley* [2013] NTSC 6, Barr J noted at [28] that the reporting requirement in s 48E(1)(d) meant the offender must have four contacts per week with his or her probation officer; ‘two reports by the offender and two visits by the probation officer.’

¹⁵⁰ A ‘prescribed program’ is defined in the *Sentencing Act 1995* s 3 as ‘a course, training, education or similar activity prescribed by regulation for the order.’

¹⁵¹ *Sentencing Act 1995* s 48F(1)(a).

¹⁵² *Ibid* s 48F(1)(b).

¹⁵³ *Ibid* s 48F(2)(a).

¹⁵⁴ *Ibid* s 48F(2)(b).

¹⁵⁵ *Ibid* s 48F(2)(c).

¹⁵⁶ *Ibid* s 48L(2).

¹⁵⁷ *Ibid* s 48L(2)(b).

¹⁵⁸ *Ibid* s 40(1).

¹⁵⁹ *Ibid* s 40(3).

¹⁶⁰ *Ibid* s 40(2).

not be unduly harsh or unreasonable or needlessly onerous.¹⁶¹ Common conditions include supervision by a probation and parole officer, non-association conditions, refraining from consuming alcohol or taking drugs and participation in rehabilitation programs.

A unique aspect of the suspended sentence is the 'operational period'. This is a condition which must be attached by the court to the order suspending the sentence during which the offender is not to commit another offence punishable by imprisonment.¹⁶² If the offender commits such an offence within two years of the 'operational period' of the suspended sentence, the statutory provisions relating to a breach of a suspended sentence apply.¹⁶³

If the offender commits another offence punishable by imprisonment during the term of the suspended sentence the court may restore all or part of the sentence suspended and order the offender to serve all or part of such sentence. The same applies if the offender breaches a condition of the order suspending a sentence during the term of the suspended sentence.¹⁶⁴ In the event of a breach, there is a presumption in the *Sentencing Act 1995* that the sentence held in suspense will be restored.¹⁶⁵ The rationale for such a presumption was articulated by Riley J in *Bukulaptji v The Queen* (2009) 24 NTLR 210 (*'Bukulaptji'*) at [33]:

The fact that the sentence is suspended and hangs over the head of the offender provides an inducement to the offender to comply with the terms of the order and maintain a law-abiding life. The sanction for failure is the restoration of the obligation to serve the suspended sentence of imprisonment.

Such a presumption can be rebutted if in the opinion of the court 'it would be unjust to do so in view of all the circumstances that have arisen since the suspended sentence was imposed.'¹⁶⁶ In *Bukulaptji*, Riley J (with whom Thomas J agreed) set out the factors that may be relevant in determining whether it would be unjust to restore the sentence:¹⁶⁷

- (a) the nature and terms of the order suspending the sentence;
- (b) the nature and gravity of the breach and, particularly, whether the breach may be regarded as trivial;
- (c) whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any intention to be of good behaviour;

¹⁶¹ *Mamarika v Ganley* [2013] NTSC 6, [29], citing *R v S W Bugmy* [2004] NSWCCA 258, [61] and *Dunn v Woodcock* [2003] NTSC 24, [7].

¹⁶² *Sentencing Act 1995* s 40(6).

¹⁶³ *Ibid* s 43.

¹⁶⁴ *Ibid* s 43(5).

¹⁶⁵ *Ibid* s 43(7).

¹⁶⁶ *Ibid* s 43(7).

¹⁶⁷ *Bukulaptji v The Queen* (2009) 24 NTLR 210, [35].

- (d) whether the breach demonstrates a continuing attitude of disobedience of the law;
- (e) whether the breach amounted to the commission of another offence of the same nature as that which gave rise to the suspended sentence;
- (f) the length of time during which the offender observed the conditions;
- (g) the circumstances surrounding or leading to the breach;
- (h) whether there is a gross disparity between the conduct constituting the breach and the sentence to be restored;
- (i) whether the offender had been warned of the consequences of a breach; and
- (j) the level of understanding of the offender of his obligations under the terms of the order suspending the sentence and the consequences of a breach.

[5.4] The use of non-custodial and custodial sentencing options

The number of non-custodial and custodial sentencing orders commenced and completed in the period from 1 July 2018 to 30 June 2019 are noted in Table 2 below.

Table 2 – Commencement and completion rates of community-based options¹⁶⁸

2018-2019	Supervised bond	Community-based order	Community custody order	Community work order	Home detention order
Commenced	85	3	87	342	31
Completed¹⁶⁹	71	2	75	363	31
Successfully completed¹⁷⁰	62	0	55	287	30
Success rate (%)	87%	0%	73%	79%	97%

In addition, in the same period the various levels of court made the following use of either fully or partially suspended sentences:

Table 3 – Imposition of and order for partially or fully suspended sentence (1/7/18-30/6/19)

¹⁶⁸ Source: Integrated Offender Management System ('IOMS') 271 – Order commencements, IOMS 272 – Order completions. Notes: Completed orders may include orders that commenced before 1 July 2018. With the exception of Community Work Orders, if an offender had multiple case numbers with orders of the same type ordered on the same day, only one order was counted.

¹⁶⁹ 'Completed' includes all orders that ended in the period 1 July 2018 to 30 June 2019, regardless of whether the offenders have fulfilled all the requirements of the orders.

¹⁷⁰ 'Successfully completed' refers to orders which ended in the period 1 July 2018 to 30 June 2019 in which offenders have fulfilled all the requirements of the orders.

NT court	Partially suspended sentence	Fully suspended sentence
Court of Criminal Appeal	5	0
Supreme Court	163	58
Local Court	1118	855

Finally, the use of imprisonment during the same period is noted in Table 4:

Table 4 – Imposition of an order for imprisonment (1/7/18-30/6/19)

NT court	Imprisonment
Court of Criminal Appeal	4
Supreme Court	182
Local Court	2222

A few observations based on the above-noted statistics can be made. First, of the non-custodial orders made, community work orders were the most common. Community-based orders were rarely used. Secondly, while the most common custodial order made was imprisonment, significant use also was made of either partially or fully suspended sentences.

[5.5] Legislative change in New South Wales and Victoria

In Victoria and New South Wales, suspended sentences have been abolished. In New South Wales, the abolition of suspended sentences was recommended by the New South Wales Law Reform Commission ('NSWLRC') in its *Sentencing* report published in 2013.¹⁷¹ In coming to this conclusion, the NSWLRC noted at [10.26]:

The key problem with suspended sentences is that they are conceptually flawed. They require a court to decide that no sentence other than imprisonment is appropriate, yet no imprisonment in fact takes place unless the s 12 bond is breached and revoked.

In recommending the abolition of suspended sentences, however, the NSWLRC stipulated that abolition should take place only if a community detention order is made available as a sentencing option. It was the view of the NSWLRC that sentencing legislation should not provide for both suspended sentences and community detention orders.¹⁷² The community detention order recommended was designed to be 'a flexible

¹⁷¹ New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) 230.

¹⁷² *Ibid* 230 [10.38].

community-based custodial order to replace home detention, intensive correction orders and suspended sentences.¹⁷³

[5.5.1] *New South Wales*

In September 2018, the community-based sentences available in New South Wales were overhauled. Home detention orders and suspended sentences were replaced with a revised form of intensive correction order. Community service orders and good behaviour bonds were replaced with a community correction order. Finally, non-conviction bonds were replaced with a conditional release order.

The intensive correction order is a custodial sentence of up to two years that can be served in the community. Supervision of the offender pursuant to such an order is mandatory. Conditions can be added to an intensive correction order such as

home detention, electronic monitoring, curfews, community service work (up to 750 hours), alcohol/drug bans, place restrictions, or non-association requirements. Offenders may also be required to participate in programs that target the causes of their behaviour.¹⁷⁴

If the offender has been convicted of the following offences, an intensive correction order cannot be made: 'murder, manslaughter, sexual assault, any sexual offence against a child, offences involving discharge of a firearm, terrorism offences, breaches of serious crime prevention orders, or breaches of public safety orders.'¹⁷⁵ While those convicted of a domestic violence offence are eligible for an intensive correction order, before granting such an order the court must be satisfied that the victim, or co-residents of the victim, can be protected adequately.¹⁷⁶

Community correction orders are intended to be used 'to punish offenders for crimes that do not warrant imprisonment or an [intensive correction order] but are too serious to be dealt with by a fine or lower level penalty.'¹⁷⁷ Such orders can be imposed for a period not exceeding three years,¹⁷⁸ and a range of conditions can be attached to such orders.¹⁷⁹

¹⁷³ Ibid 243.

¹⁷⁴ New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019) <<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2).

¹⁷⁵ New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019) <<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1).

¹⁷⁶ New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019) <<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>.

¹⁷⁷ Ibid.

¹⁷⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 85(2).

¹⁷⁹ Ibid pt 7 div 3.

A conditional release order is intended to be used for first time and less serious offending 'where the offender is unlikely to present a risk to the community.'¹⁸⁰ A range of conditions can be attached to such orders, for example that the offender abstain from using drugs or alcohol,¹⁸¹ participate in a rehabilitation or treatment program,¹⁸² or refrain from associating with particular persons.¹⁸³ A supervision condition also can be attached to the order.¹⁸⁴ The maximum term of a conditional release order is two years.¹⁸⁵ According to information published by the New South Wales Department of Communities & Justice,

[t]he [community release order] acts as a warning and provides the option to divert less serious offenders out of the criminal justice system, freeing up resources to deal with the offenders who cause the greatest concern to the community. If an offender commits any further offences while on a [community release order], subsequent penalties may be more severe.¹⁸⁶

[5.5.2] *Victoria*

In Victoria, suspended sentences, along with community-based orders, intensive correction orders and combined custody and treatment orders were abolished in 2012. They were replaced with a community corrections order,¹⁸⁷ which is intended to be a more flexible order.¹⁸⁸

The maximum length of a community corrections order is five years,¹⁸⁹ although restrictions on the length apply if the order is made by the Magistrates' Court.¹⁹⁰ A broad range of conditions can be attached to a community corrections order.¹⁹¹

There are a number of offences for which a court cannot impose a community correction order. These are described as Category 1 and Category 2 offences¹⁹² for

¹⁸⁰ New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019)

<<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>.

¹⁸¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2)(b).

¹⁸² *Ibid* s 99(2)(a).

¹⁸³ *Ibid* s 99(2)(c).

¹⁸⁴ *Ibid* s 99(2)(e).

¹⁸⁵ *Ibid* s 95(2).

¹⁸⁶ New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019)

<<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>.

¹⁸⁷ Sentencing Advisory Council, *Abolished Sentencing Orders* (Web Page, 1 October 2019)

<<https://www.sentencingcouncil.vic.gov.au/about-sentencing/abolished-sentencing-orders>>.

¹⁸⁸ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 251 [7.84]. See also Sentencing Advisory Council, *Community Correction Order* (Web Page, 1 October 2019)

<<https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order>>.

¹⁸⁹ *Sentencing Act 1991* (Vic) s 38.

¹⁹⁰ *Ibid* s 38(1)(a).

¹⁹¹ *Ibid* pt 3A div 4.

¹⁹² *Ibid* s 3.

which a mandatory sentence of imprisonment must be imposed. A broad range of serious offending is included in these categories.¹⁹³

[5.6] Community-based sentencing and Indigenous Territorians

The ALRC highlighted an issue pertaining to community-based sentencing options which is of particular interest to policy makers given the high rate of Indigenous incarceration in the Northern Territory:

Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and, as a result, may be more likely to end up in prison for the same offence. In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result.¹⁹⁴

The ALRC also identified an issue with the Victorian approach. It observed that

[t]here are no remote communities in Victoria, and consequently other states and territories that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness.¹⁹⁵

While there has been an improvement in the number of Aboriginal and Torres Strait Islander offenders in community-based corrections since the publication of the ALRC report,¹⁹⁶ whether Indigenous Territorians are able to take full advantage of such orders remains a concern. In particular, in regional and remote areas of the Northern Territory, access to supervision, work, counselling and treatment programs is limited.

In the Northern Territory during 2018-19, the proportion of offenders commencing community-based sentencing options who identified as Aboriginal or Torres Strait Islander was 81% for supervised bonds; 89% for commenced community custody orders; 88% for community work orders; and 19% for home detention orders.¹⁹⁷

¹⁹³ For a list of such offences, see Sentencing Advisory Council, *Community Correction Order* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order>>.

¹⁹⁴ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 230 [7.4] (citations omitted).

¹⁹⁵ *Ibid* 252 [7.91] (citations omitted).

¹⁹⁶ Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019). According to this source, '[t]he average number of Aboriginal and Torres Strait Islander persons in [community-based corrections] for the June quarter 2019, was 16,680. This represents an increase of 15% (2,168 persons) over the year.'

¹⁹⁷ Source: Integrated Offender Management System ('IOMS') 271 – Order commencements. With the exception of Community Work Orders, if an offender had multiple case numbers with orders of the same type ordered on the same day, only one order was counted.

[5.7] Questions for stakeholder comment

Based on the brief overview of community-based sentencing options set out above, a number of questions arise. The Committee would welcome stakeholders' views on the issues raised.

- 5.1 Does the Northern Territory sentencing regime currently have the right mix of community-based sentencing options?
- 5.2 Are all types of community-based sentencing options being used effectively in the Northern Territory?
- 5.3 Should greater use be made of community-based sentencing options and, if so, how might this be facilitated?
- 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?
- 5.5 Why are community-based orders so infrequently used?
- 5.6 Should fully or partially suspended sentences be retained as a sentencing option? If not, are there any pre-requisites to their abolition?
- 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?
- 5.8 Is a different approach to community-based sentencing, such as that in place in New South Wales or Victoria, preferable to the regime currently in place in the Northern Territory?
 - 5.8.1 If either the New South Wales or Victorian approach to community-based sentencing is recommended, what changes, if any, should be made to the recommended regime?
- 5.9 Are there other issues relating to the community-based sentencing options not discussed in this Consultation Paper which the Committee should address in its report?

APPENDIX 1 – QUESTIONS FOR STAKEHOLDER COMMENT

Mandatory sentences other than murder or sexual offences

- 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?
- 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?
- 3.3 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* should be maintained or repealed?
- 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?

Mandatory sentencing for murder and sexual offences

- 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?
- 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?
- 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*?
- 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 in the circumstances referred to at [4.3] above?
- 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?

Community-based sentencing options

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

- 5.2 Are all types of community-based sentencing options being used effectively in the Northern Territory?
- 5.3 Should greater use be made of community-based sentencing options and, if so, how might this be facilitated?
- 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?
- 5.5 Why are community-based orders so infrequently used?
- 5.6 Should fully or partially suspended sentences be retained as a sentencing option? If not, are there any pre-requisites to their abolition?
- 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?
- 5.8 Is a different approach to community-based sentencing, such as that in place in New South Wales or Victoria, preferable to the regime currently in place in the Northern Territory?
 - 5.8.1 If either the New South Wales or Victorian approach to community-based sentencing is recommended, what changes, if any, should be made to the recommended regime?
- 5.9 Are there other issues relating to the community-based sentencing options not discussed in this Consultation Paper which the Committee should address in its report?