North Australian Aboriginal Justice Agency

Submission on the 'Mandatory Sentencing and Community – Based Sentencing Options'

Northern Territory Law Reform Committee

November 2020

About NAAJA

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services for Aboriginal people in the northern and central region of the Northern Territory in the areas of criminal, civil and family law, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal advice and advocacy.

Acknowledgements

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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?

Mandatory sentencing has for more than two decades, played a substantial part in increasing the Northern Territory's incarceration rates. During this time, none of the goals or objectives of the *Sentencing Act 1995* (NT), the *Domestic and Family Violence Act 2007* (NT) and the *Misuse of Drugs Act 1990* (NT) have been achieved by the mandatory sentencing provisions.

In arriving at this conclusion, we have considered objectives of sentencing generally and the myriad goals and objectives of the mandatory sentencing provisions.

NAAJA has opposed mandatory sentencing since the commencement of the first such law on 8 March 1997, when mandatory sentencing was introduced for property offences for adults and youths.[1] For 20 years Aboriginal voices such as NAAJA have decried mandatory sentencing laws and their disproportionate impact on Aboriginal people.[2] In June 2000 NAAJA lodged a communication with the United Nations High Commissioner for Human Rights on behalf of an Aboriginal client, that the mandatory sentencing legislation of the Northern Territory contravened the International Covenant on Civil and Political Rights.[3] Peak bodies such as the Law Council of Australia and NATSILS[4] hold that mandatory sentencing regimes are not effective and contribute to high rates of incarceration of Aboriginal and Torres Strait Islander people.

Sentencing principles in relation to criminal offending in all Australian jurisdictions are clearly articulated[5] and include specific and general deterrence, rehabilitation of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community. These sentencing principles are founded upon the common law and jurisprudential reasoning. Their application permits Courts, in considering an appropriate sentence, to consider proportionality, mitigating and aggravating factors, and allows for judicial discretion in weighing competing purposes and considerations.[6]

Fundamentally, mandatory sentencing law contradicts these principles in focusing on punitive and retributive aspects of sentencing and the fallacy of crime prevention through deterrence. The efficacy of deterrence assumes the validity of rational choice theory – that potential offenders will assess the risks of crime and weigh them against the consequences. This fails to account for the social determinants of crime. If members of your community are being incarcerated at a steady rate, prison is normalised and individuals are socialised to experience prison as a normalised life experience. This is a significant problem.

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[1] *Sentencing Act 1995* (NT) s 78A (Now repealed).
[2] John Sheldon and Kirsty Gowans, '*Dollars without sense: a review of NT's mandatory sentencing laws',* North Australian Aboriginal Legal Aid Service (1998).
[3] That mandatory sentencing laws infringed Articles 2(1) prohibition on racial discrimination; Article 7 cruel, inhuman or degrading treatment or punishment; Article 9(1) arbitrary detention; Article 14(1) right to a fair hearing; Article 26 non-discrimination and equality before the law.
[4] NATSILS comprises Aboriginal Legal Services in all States and Territories.
[5] *Crimes Act 1914* (Cth), *Crimes (Sentencing) Act 2005* (ACT), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1992* (QLD), *Criminal Law (Sentencing Act) 1988* (SA), *Sentencing Act 1997* (TAS), *Sentencing Act 1991* (VIC), *Sentencing Act 1994* (WA).
[6] Elena Marchetti and Thalia Anthony, '*Sentencing Indigenous Offenders in Canada, Australia, and New Zealand'* (2016) 27 University of Technology Sydney Law Research Series 27.

Mandatory sentencing does not pay due regard to factors that may compel someone to commit crime such as socio-economic status, unemployment, and substance abuse. Further to this, mandatory sentencing fails to take into account the systemic oppression particular to Aboriginal people, such as the intergenerational trauma resulting from colonisation, dispossession and the Stolen Generations. Crime cannot be viewed in isolation from acknowledging these deeper social and economic issues. There is no single cause and no single solution. Therefore, one-dimensional approaches to crime such as mandatory sentencing are unlikely to succeed in reducing crime.

Mandatory sentencing fails to take into consideration the individual circumstances of the offender. Whether the aim of punishment and sentencing is from the retributive, rehabilitative or restorative perspective, proportionality is a principle of punishment and sentencing which cannot be ignored.

Addressing arguments for mandatory sentencing

The goals and objectives of mandatory sentencing have been well summarised by the Law Council of Australia. The Law Council sets out and addresses the arguments for mandatory sentencing as follows:[7]

- **Mandatory sentencing ensures adequate retribution:**[8] arguments here include that that "judges are greatly removed from the norm of society, often live and work in affluent areas where there are low crime rates and rarely experience physical assault first hand. As a result, it is argued, judges are often too lenient on offenders". Alternatively, **"**the criminal justice system places too much emphasis on the offender's mitigating circumstances and not enough on the impact of the crime on the victim and the victim's family". "Under this view, a democratically elected Parliament represents public opinion about crime and appropriate sentencing. It holds that mandatory sentencing schemes developed by Parliament reassure victims of crime that the offender will suffer just desserts and appropriate retribution". The Law Council opposed this approach because such retribution:

- is too harsh;
- violates well-established sentencing principles that a sentence and retribution should be proportionate to the gravity of the offence;
- can offend against the principle of proportionality;
- ignores the importance of judicial discretion to just retribution; and
- are pre-emptive, that is imposed by the legislature before particular offences have been committed and all the facts and circumstances are known.

- **Mandatory sentencing provides effective deterrence:**[9] the argument proposed here is that "it deters offenders from engaging in criminal conduct, and as a consequence, reduces crime and promotes social stability". The Law Council opposed this approach because:

- there is inconclusive evidence as to whether mandatory sentencing schemes achieve deterrent effects in Australia and other jurisdictions;

[7] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) ("Law Council Report").
[8] Law Council Report [16]-[27].
[9] Law Council Report [28]-[41].

- evidence suggests that the certainty of apprehension and punishment for an act provides some deterrent effect, but there is little evidence to suggest that a more severe penalty as a legal consequence is a better deterrent;
- it assumes that offenders have knowledge of specific penalties for offences prior to committing the act; and
- the deterrence argument assumes the rationality of the offender and does not take into account the large number of offenders who suffer from mental impairment, behavioural problems, drug or alcohol intoxication, or poor anger management.
- **Incapacitation of offenders prevents further harm to the community**:[10] "The logic is that while in prison, an offender cannot continue to cause harm in the community … Mandatory sentencing provisions act as a form of general incapacitation for first time offenders, and as selective incapacitation, targeting repeat offenders, who by their prior offending, demonstrate a risk to the community". The Law Council rejects this argument for similar reasons to the above, namely that "there is insufficient evidence to suggest that incapacitation of itself will reduce recidivism".
- **Mandatory sentencing denunciates the criminal conduct:**[11] "Mandatory sentencing for certain crimes reflects that such conduct is sufficiently serious to be a complete violation of society's values. That is, a mandatory sentencing regime is about defining the moral code to which society expects people to adhere … the Law Council is of the view that mandatory sentencing has no regard for the individual for whom the minimum sentence might not be appropriate….That is, mandatory sentencing forgets the appropriateness of a punishment in particular circumstances in favour of making a 'tough on crime' statement to society. This statement becomes hollow in light of the injustice it can produce. Further, mandatory sentences operate to undermine the community's confidence in the judiciary's ability to impose punishments, and consequently the criminal justice system as a whole".
- **Mandatory sentencing provides consistency**:[12] **"**Supporters of mandatory sentencing claim that it eliminates inconsistency in sentencing and ensures fairness by treating like offenders alike". The Law Council rejects this argument because "criminal culpability in the criminal justice system does not simply depend on the physical element of committing the offence. Culpability also depends on the degree of an offender's blameworthiness in the commission of a crime … Mandatory sentencing ignores the range of factors that impinge on criminal culpability, resulting in potentially inappropriate, harsh and unjust sentences". The Law Council also notes that "mandatory sentencing does not eliminate inconsistency in sentencing; it simply displaces discretion to other parts of the criminal justice system, most notably prosecutors".

[10] Law Council Report [42]-[46].
[11] Law Council Report [47]-[49].
[12] Law Council Report [50]-[60].

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?

Shortly after NAAJA's submission[13] to the *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* in 2017, the Australian Law Reform Commission (ALRC) released its report.[14] The NAAJA 2017 Submission and Chapter 8 of the ALRC Report make it clear that mandatory sentencing provisions under the above-named Acts are not principled, fair or just. Rather, the reports outline the key reasons why mandatory sentencing provisions are abhorrent and immoral. Since the NAAJA 2017 Submission and the ALRC Report, mandatory sentencing provisions have continued to disproportionally affect Aboriginal and Torres Strait Islander peoples; resulting in unfair outcomes.

Mandatory sentencing has been described as a 'cancer'[15] by an eminent Judge of the Supreme Court of the Northern Territory. The laws are unjust and have resulted in a pernicious effect in fettering the hands of the judiciary, debasing the role of advocacy on behalf of clients and disproportionately increasing the power of police and prosecutors. A fundamental fault of mandatory sentencing is that it generates an acceptance and tolerance in the wider community for the continued gross rates of imprisonment of Aboriginal people.

Mandatory sentencing contravenes of the principles of proportionality and necessity

Mandatory sentencing restricts a court's capacity to ensure that punishment is proportionate to the offence, and can result in arbitrariness.[16] Mandatory sentencing is arbitrary insofar as it requires the imposition of a mandatory policy regardless of whether that policy is reasonable, necessary or proportionate in the individual case.[17] This undermines the principle of the rule of law, which underpins Australia's legal system, and ensures that everyone, including the government, are subject to the law and that citizens are protected from arbitrary abuses of power.[18]

A number of prominent judges, writing extra-judicially, have expressed condemnation of mandatory sentencing regimes which produce disproportionate and unjust sentencing outcomes.[19] For example, on 17 February 2000, former High Court Chief Justice, Sir Gerard Brennan, stated:

> *A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral… Sentencing is the most exacting of judicial*

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[13] NAAJA, *Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples, North Australian Aboriginal Justice Agency Submission,* October 2017, ("**NAAJA 2017 Submission**") <https://www.alrc.gov.au/wp-content/uploads/2019/08/113._north_australian_aboriginal_justice_agency_naaja_.pdf>.
[14] ALRC, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133),* 28 March 2018 ("**ALRC Report**").
[15] Andrew Thompson, 'Mandatory sentencing regime draws more flak', ABC News (online), 15 February 2013 <http://www.abc.net.au/news/2013-02-15/mandatory-sentencing-law-reaction/4521380>.
[16] Law Council Report [73].
[17] Law Council Report [75]
[18] Law Council Report, 5.
[19] Law Council Report [147].

duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty.[20]

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) has previously stated that such regimes can result in 'serious miscarriages of justice' because they are not effective as a deterrent and instead contribute to increased offending.[21] The principles of proportionality and necessity are contravened because relevant factors such as mental illness, alcohol or drug dependency, economic and social disadvantage, rehabilitation prospects, employment and family connections cannot be judicially considered. Fundamentally, mandatory sentencing law contradicts these principles in focusing on punitive and retributive aspects of sentencing and the fallacy of crime prevention through deterrence.[22]

Ineffectiveness of mandatory sentencing

When mandatory sentencing laws are introduced, MLAs of governing political parties either advocate strongly in favour of these laws, or are sensitive to, the notion that they must be seen to be 'tough on crime' and 'in line with community expectations'. The reality is whilst this relates to a cohort of the community, in NAAJAs experience which is informed by our extensive community engagement work, it is not the views of a broad cross-section of Aboriginal communities.

Mandatory sentencing introduces people to prison for minor offences which in other jurisdictions would have simply resulted in a fine. The most notorious example of the unjust sentencing occurred with the imprisonment of a 19-year-old Aboriginal male for 12 months for stealing a packet of biscuits and cordial under the then (and now replaced) third strike mandatory sentencing property offence in 2000.[23]

Two decades of mandatory sentencing has seen intergenerational impacts on Aboriginal people and primarily young Aboriginal men. As identified by the Norther Territory Law Reform Commission Discussion Paper on mandatory sentencing, periods of incarceration diminish employment prospects and positive social links. It is no coincidence that we see corresponding issues for young Aboriginal men of high unemployment, low educational outcomes, high rates of suicide and substance abuse. The state of hopelessness and return to the same environmental factors will often see the perpetuation of further offending. For too many groups in the Territory, returning to prison means reconnecting with extended family members and common language groups. This in turn also contributes to the high rates of recidivism recorded in the Territory, and in turn inflates the rate of incarceration here. Aboriginal recidivism rates in the Northern Territory in 2015 – 2016 were at 60.4%.[24]

High rates of recidivism signals the shortcomings of a punitive approach to sentencing which in turn contributes to the cycle of high incarceration rates. Moreover, there is no rehabilitative value associated with mandatory sentencing, which ultimately renders it ineffective as it fails to break the cycle of imprisonment, release and imprisonment.

Mandatory sentencing does not prevent crime

There is no evidence that mandatory sentencing works to reduce crime or make the community a safer place. Mandatory sentencing has not worked in the past. If we

[20] Law Council Report [147].
[21] ALRC Report [8.14].
[22] NAAJA 2017 Submission, 26.
[23] 7.30 Report ABC, '*Mandatory sentencing controversy continues'* 17 February 2000.
[24] Northern Territory Department of Correctional Services, *2015-16 Annual Report* (30 September 2016), 41.

consider government figures of crime rates, when the Northern Territory introduced mandatory sentencing for property crime in 1997, property crime rates in the NT increased and then decreased after mandatory sentencing was repealed.[25] There has been little or no support for the proposition that harsher sentences reduce crime.[26]

Mandatory sentencing costs the community

The community pays for mandatory sentencing – and the system is very expensive. According to NT Correctional Services, it costs $321.59 per day to imprison a person in the NT.[27] The Productivity Commission calculated this cost at $211.32 per day.[28] That means that a mandatory sentence of three months imposed on an adult offender will cost the community between $19,000 – $29,000 (when the figure is multiplied on an individual basis using these figures).[29] A mandatory sentence of 12 months imprisonment imposed on an adult offender will cost the community between $77,000 – $118,000.

Further, it is likely the costs are significantly higher when the transport and Police escort costs for people charged with offences outside of Darwin and Alice Springs where there are no prisons is taken into account.

During periods where there is pressure on the Department of Correctional Services to reduce costs, the work of imprisoning people focuses on substantial periods of lock-downs for prisoners and reduced access to services (and added layers of supports) that may otherwise put downward pressure on high recidivism rates.

The financial resources would be better spent on crime prevention strategies and resourcing cultural authorities and services that build a better community with the aim of breaking the cycle and reducing recidivism rates.

Our Prisons are full

When the new Darwin Correctional Precinct was opened in 2016 with a much greater capacity to imprison people and to deal with the overcrowding issues of the previous Berrimah Correctional Centre, it was already overcrowded.[30]

The continued overcrowding of Northern Territory prisons has been a major issue despite the opening in 2014 of the $500m Darwin Correctional Precinct. The increasing rate of Aboriginal prisoners who are sentenced or on remand, particularly

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[25] Office of Crime Prevention, Northern Territory Government, '*Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience'* (August 2003) 10.
[26] 1 Anthony N. Doob, Cheryl Marie Webster, Rosemary Gartner, *Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation Research Summaries Compiled from Criminological Highlights* (14 February 2014), A-2.
[27] Department of the Attorney-General and Justice, *Annual Report 2019-20*, <https://justice.nt.gov.au/__data/assets/pdf_file/0009/943902/agd-annual-report-2019-2020.pdf>.
[28] Productivity Commission, *Report on Government Services 2020*, Chapter 8.
[29] Note in relation to figures – although the cost scale of a prison means there is little difference between managing plus 1 offender in prison due to the structure of resources, mandatory sentencing leads to groups in prisons and therefore requires multiple costs across the system. Furthermore, whilst the operational costs of managing a cohort of prisoners can be provided, these costs often don't factor other costs such as programs and rehabilitation initiatives.
[30] Georgia Hitch, *'Extraordinary overcrowding' at Alice Springs women's jail, investigation finds'* ABC News Online, 24 August 2017, accessible at: http://www.abc.net.au/news/2017-08-24/extraordinary-overcrowding-atalice-springs-womens-jail-report/8836916.

Aboriginal women, has already put increasing pressures on a modernised and improved prison infrastructure.[31]

A major concern that follows with such an increased Aboriginal prison population is the limited opportunities to access prison based programs and therapeutic services. Increased waiting times to access programs or inability of access due to lack of Aboriginal language interpreters or disability experienced with hearing loss or mental illness means that there are limited opportunities for rehabilitative support.

The effect of the commencement of mandatory sentencing in 1997 provisions is clear. Rates of imprisonment increased by 72% in 10 years from 2002 – 2012. The Productivity Commission has shown that the adult prisoner population in the NT has continued to increase since 2012, with the population in 2018-19 being 1,708 people.

The role of the judiciary in sentencing is to make the punishment commensurate with the offence and arriving at a just sentence after taking into account all submissions and evidence. Mandatory sentencing means that courts must impose a 'one size fits all' sentence. Most of the time magistrates and judges get sentences right. When they get it wrong, the prosecutor or the defence can appeal the sentence and have it corrected. Stories in the media and the concerns of the public as a result of these stories often report on the original sentence and not the result of an appeal.

Mandatory sentencing results in unfair sentences

As stated, the role of the judiciary in sentencing is to make the punishment commensurate with the offence and arriving at a just sentence after taking into account all of submissions and evidence. As His Honour Justice Mildren said, 'prescribed minimum mandatory sentences are the very antithesis of just sentences'.[32]

Mandatory sentencing means that the Court must as a starting point impose the mandated term of imprisonment before taking into account all other relevant considerations.

Our prison populations are already overpopulated with people struggling with systemic socio-economic disadvantage such as mental health issues, intellectual disability, homelessness, and sexual and domestic abuse. Mandatory sentencing restricts the ability to consider a broad range of factors and pathways that may be required for a more rehabilitative, effective and fair outcome.

Mandatory sentencing in relation to violent offences provides a level of offences resulting in different and harsher sentences for a 'first or subsequent offence'. After amendment[33] of section 78DA(1)(b) of the Sentencing Act a second or subsequent offence would occur where 'the offender has previously been convicted of a violent offence (whenever committed).'

This amendment has resulted in adverse circumstances where an offender who has a prior conviction for a violent offence of some considerable period, in one instance in excess of 20 years, is subject to a more draconian consequence.

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[31] Georgia Hitch, *'Extraordinary overcrowding' at Alice Springs women's jail, investigation finds'* ABC News Online, 24 August 2017, accessible at: http://www.abc.net.au/news/2017-08-24/extraordinary-overcrowding-atalice-springs-womens-jail-report/8836916.
[32] *Trenerry v Bradley* (1997) 6 NTLR 175.
[33] Act 21 of 2013 commencing 12 July 2013.

Exceptional circumstances

NAAJA opposed in the initial draft legislation the inclusion of the test of 'exceptional circumstances' for mandatory sentencing of serious violent offences given the high threshold to meet in seeking exclusion from the mandatory sentence. It was NAAJA's view that a more appropriate test should have been one of 'particular circumstances' of the offender or offence akin to section 37(2) of the Misuse of Drugs Act.

It is clear that the interpretation of section 78DI(1)(b) of the Sentencing Act places an onerous evidential burden on the offender[34] 'as the word 'exceptional' describes a circumstance "which is such as to form an exception, which is out of ordinary course or unusual or special, or uncommon". To qualify as 'exceptional' a circumstance "need not be unique or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally exceptional".

Given the extreme disadvantages of Aboriginal persons and limited access to therapeutic programs and services in remote communities it is very difficult to meet this threshold.

Particular circumstances

Mandatory Sentencing inhibits the instinctive synthesis of judicial discretion. With the overrepresentation of Aboriginal people in the Northern Territory that come from significantly disadvantaged backgrounds there is frequently and regularly offences being considered with particular circumstances that would be categorised as significantly noteworthy or out of the ordinary. The recent decision of *Arnott v Blitner* (2020) NTSC 63 confirmed that 'particular circumstances of the offence' does include 'relevant circumstances of the offender'[35]

The decision of *Blitner* further held that s121(5) applies when the court is sentencing "a person who has previously been found guilty of a DVO contravention offence". Subsection 121(5) prevents the court from suspending any part of the sentence imposed on such a person for breach of a domestic violence order. That means that any sentence imposed under s 121(2) cannot be suspended or partly suspended – it must be served in full. In other words, any sentence imposed under s 121(2) must be a term of actual imprisonment. [36] .

NAAJA submits that this is an unnecessary fettering of judicial discretion removing one option of discretion from the range of sentencing options. This demonstrates how arbitrary the operation of the legislative regimes such as mandatory sentencing can be and denies judicial discretion to impose a just sentence across a number of charges including a sentence that would otherwise include less than 7 days imprisonment

Shifting the role of justice away from courts and to Police/Prosecution

With mandatory sentencing judicial officers are prevented from imposing a sentence that properly reflects the seriousness of the offences and is appropriate, having regard to all of the circumstances of the case. The appeal mechanisms provide a level of

[34] *Heath v Armstrong* (2017) NTSC 35 at [14].

[35] Arnott v Blitner (2020)NTSC 63 at par 59

[36] Ibid at par 55

accountability in this system. This means that with mandatory sentencing the sentences may be inconsistent and therefore unjust and arbitrary.

Mandatory sentencing regimes not only take power from the courts, but give significant power to Police and Prosecutions.[37] It delivers judicial discretion further down the structure of the Administration of Justice and essentially places greater power in the hands of the Police.[38]

An example of a shifting power to Police is in relation to their discretion to charge and the determination of what charge is prosecuted. As the offence with which an accused is charged becomes a substantial determining factor as to the final sentencing outcome, the prosecutorial discretion to opt for an alternative offence carries greater weight.

Further, with a starting point of imprisonment for offences including Breach DVO, Police frequently opt to arrest rather than summons defendants and refuse rather than grant Police Bail. This means that the starting point for Police is to arrest an offender and refuse bail, meaning offenders often appear in court at first instance on their second day in custody rather than in the community on bail or summons.

This has the impact of increasing the rate of incarceration of un-sentenced Aboriginal people across the Northern Territory and regularly forces Judges to take into account time spent in custody when in circumstances where they otherwise may have imposed a different sentence. It also disadvantages defendants who may be precluded by virtue of being in custody from obtain supporting documentation or attend rehabilitation or counselling in the community effectively reducing their chance of meeting any "exceptional circumstances" consideration.

Mandatory sentencing laws raise serious concern as to compliance with the separation of powers and international human rights law obligations such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), particularly due to their disproportionate impact on Aboriginal people and particularly on Aboriginal young people.[39]

Perceptions of discrimination

On the face of it, mandatory sentencing laws are not overtly discriminatory, however in practice it is clear that mandatory sentencing has a discriminatory effect on Aboriginal people. This is an important point in the context of moving towards a culturally appropriate justice system, as Aboriginal peoples' views are valid. The Australian Government's 'Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report' explores the significant research and the link between racism and mental health, including the adverse health consequences on Aboriginal people directly affected by racism. Perceptions of discrimination in the context of the

[37] Jonathon Hunyor, '*Imprison Me Nt: Paperless Arrests and the Rise of Executive Power in the Northern Territory'* (2015) 8(21) Indigenous Law Bulletin 3, 8.
[38] Megan Davis, '*Mandatory sentencing and the myth of the fair-go.*' Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra 21-22 June 2001,4.
[39] See, generally: Sarah Pritchard, "*International Perspectives on Mandatory Sentencing*" (2001) 7(2) Australian Journal of Human Rights 51; Diana Henriss-Anderssen, "*Mandatory Sentencing: The Failure of the Australian Legal System to Protect the Human Rights of Australians*" (2000) 7 James Cook University Law Review 23; Tammy Solonec, '"Tough On Crime": Discrimination By Another Name The Legacy Of Mandatory Sentencing In Western Australia.' (2015) Indigenous Law Bulletin 24.

imprisonment rates of Aboriginal people as a group and how the justice system adds to this result, feeds into these experiences of racism.

According to the Australian Bureau of Statistics, Aboriginal people accounted for 83% of the adult prison population in the Northern Territory in 2019.[40]

Under the initial mandatory sentencing scheme, Aboriginal people were 8.6 times more likely to be imprisoned under mandatory sentencing than non-Aboriginal people.[41] Aboriginal people are already vastly overrepresented in our prisons: they are about 30% of the general population but 84% of the prison population and make up over 90% of young people in detention.

The Northern Territory government should abolish all mandatory sentencing provisions as it unreasonably and disproportionately criminalises Aboriginal people. NAAJA strongly recommends that the abolition of mandatory sentencing provisions in the Northern Territory is a priority due to the extremely high rates of Aboriginal and Torres Strait Islander people being sent to prison.

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?

It is overwhelmingly clear from our responses to Q3.1 and Q3.2 above, the NAAJA 2017 Submission and Chapter 8 of the ALRC Report that all of the mandatory sentencing provisions should be repealed in full.

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?

Alternatives to incarceration in other jurisdictions

There are a number of alternative approaches to mandatory sentencing utilised in other jurisdictions, including Canada, New Zealand and America.

Other issues relating to mandatory sentencing provisions not discussed in the Consultation Paper and in which the Committee should address in its report

Systemic and institutionalised discrimination

As set out in this submission, mandatory sentencing provisions and a tough on crime approach to law and order issues within the political arena, have been long-standing in the Northern Territory and when compared to other jurisdictions across Australia and internationally, are broad in scope, impact and reach. These provisions and this approach have long been criticised by legal bodies, Aboriginal leaders and community controlled organisations – experts who work closely within this system and who observe first hand its impact on Aboriginal peoples and communities.

[40] Australian Bureau of Statistics, '*Northern Territory snapshot at 30 June 2019'*. Prisoners in Australia, 2019, <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#key-statistics>.
[41] Office of Crime Prevention, Northern Territory Government, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (August 2003), 3.

Mandatory sentencing and a tough on crime approach has led to the entrenchment of systemic and institutionalised discrimination in the criminal justice system, characterised by Aboriginal people as a group, being amongst the most incarcerated in the world. Aboriginal people are represented in very high rates as both offenders and victims, and they also lack agency, power and authority in formal roles across this same system.

Suggestions for investment and reform in Aboriginal-led solutions as set out in multiple reports, Royal Commissions and inquiries, including specifically the Australian Law Reform Commission's Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, have mostly gone unheeded.

More recently, the work of the draft Aboriginal Justice Agreement and the significant consultations right across the Northern Territory revealed the low levels of trust of Aboriginal Territorians in the criminal justice system, and the widespread concerns of systemic and institutionalised discrimination. The lack of action and follow-up to the Pathways to Justice Inquiry and related reports, and the lack of investment and reform in Aboriginal-led solutions, coupled with the entrenchment of mandatory sentencing, demonstrates the disconnect between formal government responses and Aboriginal Territorians' views as recorded in these consultations.

The role of the State and prosecutions

Whilst the hope for reform is present, and as demonstrated by the release of the Consultation paper regarding Mandatory Sentencing and Community-Based Sentencing Options, substantive reform in this area can also take place by more immediate steps concerning the role of the Northern Territory within the criminal justice system, and particularly the Office of Director of Public Prosecutions.

Given the pervasiveness of systemic and institutionalised discrimination within the criminal justice system, and the general lack of agency, power and authority of Aboriginal people across this same system, it is vital that Aboriginal-led perspectives inform the role of the Northern Territory in a meaningful way.

The experience in some parts of the United States of America is that meaningful reform can be achieved to address systemic and institutionalised discrimination within the criminal justice system by the direction of prosecutorial offices.

Progressive prosecutor roles have been visible in this context, seeking to reform the culture within their sections, instructing prosecutors to increase the use of diversion programs instead of prison and to ask for more lenient sentences, actively addressing the factors that lead to mass incarceration. The nature of parole supervision has been reformed.

Sentencing Costs and Court Proceedings

In Philadelphia and Missouri, prosecutors are instructed to inform a judge when requesting a prison sentence to outline the anticipated costs to the State.

In the Northern Territory the costs of incarceration are significant. The Productivity Commission, Report on Government Services 2017 – 2018[42] showed that the cost per day to imprison a person in the Northern Territory is $317.73. This equates to $115,971 per year. As this relates to correctional services, the costs can be much higher for areas where Police take a person into custody and transport that person to a correctional centre.

Further, the Northern Territory Aboriginal Justice Agreement draft paper notes[43]:

> The NTAJA consultations highlighted that alongside the cost of incarceration to taxpayers, government, and the wider community, there are significant financial, social, health and wellbeing costs for the family of the imprisoned person and their community. Intergenerational experiences of incarceration were a common theme arising from consultations, with many participants reporting that time in prison had become normalised and was seen as an inevitable part of life, particularly for men in some communities. The social cost to communities in which there is a high concentration of incarcerated people cannot be ignored or dismissed.

In Philadelphia and in response to questions relating to prosecutors informing he judge the anticipated cost of a sentence, Larry Krasner said[44]:

> "Fiscal responsibility is a justice issue, and it is an urgent justice issue. A dollar spent on incarceration should be worth it. Otherwise, that dollar may be better spent on addiction treatment, on public education, on policing and on other types of activity that make us all safer."

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

4.4 Should '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?

We have addressed both questions 4.1 and 4.4 in our answer below.

The mandatory minimum sentence regime for murder results in disproportionate sentences and does not facilitate the administration of justice. As a result, NAAJA supports the abolishment of mandatory sentencing for the offence of murder and, in the alternative, submits that the definition of 'exceptional circumstances' should be expanded. There needs to be scope for courts to account for different individual circumstances to ensure that the sentence is proportional to the seriousness of the crime and the moral culpability of the offender, different factual circumstances and to address the disadvantage that can lead to offending.

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[42] Productivity Commission, Report on Government Services 2017-2018 (2019) Volume C: Justice, Correctional Services, Chapter 8, Table 8A.17. Note: this includes total net operating expenditure and capital costs.
[43] Page 34
[44] https://whyy.org/segments/philly-da-wants-prison-costs-included-as-judge-calculates-offenders-debt-to-society/

The offence of murder in the Northern Territory is subject to a mandatory sentence of imprisonment for life,[45] with a mandatory non-parole period of 20 years.[46] There is no discretion for the Court to grant a head sentence of less than life imprisonment for murder. A non-parole period shorter than 20 years can only be applied in 'exceptional circumstances'.[47] In considering whether there are 'exceptional circumstances', the court may only consider (a) whether the offender is 'otherwise a person of good character' and 'unlikely to re-offend' or (b) whether 'the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender'.[48] Further, the minimum non-parole period is 25 years where certain aggravating circumstances apply.[49]

The mandatory minimum life sentence and non-parole period for the crime of murder leads to unjust outcomes and does not improve the administration of justice in the Northern Territory. The key reasons for this are:

- The removal of judicial discretion means that in many cases the sentences imposed are disproportionate to the circumstances of the offending.
- The provisions lead to especially unjust outcomes in cases of extended criminal liability.
- Mandatory minimum sentences have a discriminatory effect on Aboriginal populations.
- Mandatory minimum sentences discourage guilty pleas, encourage appeals and reduce the incentives for rehabilitation, increasing the cost to the community.
- The provisions are inconsistent with the principles on the basis of which they were enacted.

Disproportionate Sentences

The mandatory sentencing regime for murder leads to sentences that are disproportionately severe in relation to the circumstances of the offending. In general, mandatory life sentence for murder has been described as a 'disproportionate and blunt instrument'.[50] In the Northern Territory, it has been argued that this blanket life sentence has contributed to the lower conviction rate for murder, with juries instead finding offenders guilty of lesser offences like manslaughter.[51]

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[45] *Criminal Code Act 1983* (NT) s 157.

[46] *Sentencing Act 1995* (NT) ss 53, 53A.

[47] *Sentencing Act 1995* (NT) s 53A(6).

[48] *Sentencing Act 1995* (NT) s 53A(7).

[49] *Sentencing Act 1995* (NT) s 53A(1), (3).

[50] See Lawson, Megan, *The Provoking Operation of Provocation: Stage 2 (Homicide Sentencing Background Research Paper)* (South Australian Law Reform Institute, Adelaide, 2018) 8, quoting Law Commission (UK), *Partial Defences to Murder* (Final Report, 6 August 2004) 9.

[51] See David Gibson, 'Mandatory Madness: The True Story of the Northern Territory's Mandatory Sentencing Laws' (2000) 25(3) *Alternative Law Journal* 103; Michael O'Donnell, 'Mandatory Life Sentences for Murder in the

However, the Northern Territory mandatory non-parole minimums by definition lead to disproportionate sentences. The minimum non-parole period of 20 years is defined to represent 'the middle of the range of objective seriousness'.[52] As a result, the Supreme Court of the NT has commented that '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' and '[t]o the extent that gives rise to unequal justice, and so injustice, that is a consequence of the scheme enacted by the legislature'.[53]

Part of the reason for this is that courts can only consider a limited range of factors in determining whether 'exceptional circumstances' apply that would allow a shorter non-parole period to be imposed. In the case of mandatory non-parole periods for violent offences, courts have a 'very wide scope' to take into account 'any matter it considers relevant' in determining whether exceptional circumstances exist.[54] However, regarding the mandatory non-parole period for murder, the exception was designed to be 'an extremely limited one which contains a number of constraints on the exercise of the discretion by the sentencing court'.[55]

Mandatory minimum sentences by their very nature constrain the ability of judges to ensure sentences are proportional to the crime. However, for the reasons outlined above, this is exacerbated in the case of the mandatory sentence regime for murder.

Extended Criminal Liability

One particular way in which the application of mandatory minimum sentences for murder results in unjust outcomes is in cases of extended criminal liability. While persons found guilty of murder by reason of 'common intention to prosecute an unlawful purpose'[56] or aiding or abetting the commission of an offence, actively or by omission,[57] are generally accepted as having a lesser degree of culpability than those who perpetrate core elements of the offence.[58] Regarding common purpose, Professor Dennis Baker argues: 'It would be grossly unfair to use a mandatory life sentence and the crime label of murder to punish a person who has not perpetrated a murder, but has merely foreseen that her associate might kill.'[59]

Northern Territory, the New Reform Legislation and the Possibility of Parole' (Paper prepared for The Bali Conference, Criminal Lawyers Association of the Northern Territory, 2007).

[52] *Sentencing Act 1995* (NT) s 53A(2).

[53] *The Queen v Deacon* [2019] NTCCA 22 (11 October 2019) [39] (The Court).

[54] *R v Duncan* [2015] NTCCA 2 (9 February 2015) [24] (The Court).

[55] Minister for Justice and Attorney-General, 'Second Reading Speech to the Sentencing (Crime of Murder) and Parole Reform Bill 2003' (2003); see also *The Queen v Grieve* [2014] NTCCA 2 (15 January 2014) [58] (The Court).

[56] *Criminal Code Act 1983* (NT) s 8.

[57] *Criminal Code Act 1983* (NT) ss 12, 43BG.

[58] Sentencing Advisory Council (Vic), 'Statutory Minimum Sentences for Gross Violence Offences' (Report, October 2011) 31–39.

[59] Dennis J Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Routledge 2016) 135–6.

This disproportionate outcome was evident in the case of Zak Grieve. The sentencing judge found that Grieve had been involved in a plot to kill the abusive partner of his friend's mother, but pulled out at the last moment and was not present when the murder occurred.[60] Nevertheless, he was found guilty of aiding in the murder on the basis that he did not 'take all reasonable steps to prevent the murder'.[61] As a result, Grieve was sentenced to the mandatory term of life imprisonment with the mandatory non-parole period of 20 years. In apparent recognition of the unjust sentence, the sentencing judge recommended that the prerogative of mercy be exercised if Grieve is of good behaviour after 12 years.[62]

This case illustrates the fundamental incompatibility of the mandatory life sentence and non-parole period with proportional sentencing that is just in all the circumstances of the case.

Aboriginal Populations

Mandatory minimum sentences prevent courts from taking into account established sentencing principles created to address Indigenous disadvantage, and in doing so, further perpetuate that disadvantage. The rate of homicide offending by Indigenous people is approximately five times higher than that of non-Indigenous people.[63] This is the result of a number of factors including systemic disadvantage and institutional bias. Systemic disadvantage includes '[the] impact of colonisation and dispossession, stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education and physical and mental health issues'.[64] Australian courts have developed principles to address aspects of this disadvantage, such as those set out in *R v Fernando*.[65] That case identified the systemic issue of alcohol abuse in many Indigenous communities and acknowledged that this can be taken into account as a mitigating factor in sentencing.[66]

Courts are also unable to take into account the effect of cognitive impairments that fall short of the threshold for the partial defence of diminished responsibility.[67] For example, individuals with FASD, which is often undiagnosed,[68] have difficulty controlling impulses, poor consequential reasoning, and aggressive behaviours.[69] FASD affects certain Aboriginal communities at a rate between 3 and 7 times the rest

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[60] *The Queen v Grieve* [2014] NTCCA 2 (15 January 2014) [41] (The Court).

[61] *The Queen v Grieve* [2014] NTCCA 2 (15 January 2014) [8] (The Court); see *Criminal Code Act 1983* (NT) s 43BG.

[62] *The Queen v Grieve* [2014] NTCCA 2 (15 January 2014) [36] (The Court).

[63] Tracy Cussen and Willow Bryant, *Indigenous and Non-Indigenous Homicide in Australia* (Australian Institute of Criminology, Research Paper No 37, May 2015) 1.

[64] Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 59, quoting Aboriginal Legal Service of Western Australia, *Submission 10*, 21-2.

[65] (1992) 76 Crim R 58.

[66] *R v Fernando* (1992) 76 Crim R 58, 62-3 (Wood J).

[67] See *Criminal Code 1983* (NT) s 159.

[68] Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 23.

[69] Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 64, quoting Professor Jane Latimer, *Committee Hansard,* 23 September 2015, 1.

of the population.[70] Individuals in these situations may be less morally culpable but mandatory sentences prohibit courts from factoring this into the sentence.

As a result, the mandatory minimum sentencing laws force the courts to treat Aboriginal offenders facing unique circumstances of disadvantage the same as offenders not subject to that disadvantage, and thus operate in a discriminatory manner.[71]

Cost to the Community

Mandatory sentencing regimes lead to increased costs to the community in terms of hearings and incarceration. Mandatory sentences discourage offenders from pleading guilty and cooperating with law enforcement as this will not reduce their sentence, resulting in prolonged investigations and hearings, and additional trauma for victims.[72] Mandatory life sentences encourage offenders to appeal against their conviction, as a 'convicted murderer has nothing to lose and everything to gain by appealing'.[73] The community must also bear the cost of prolonged incarceration of an offender who might otherwise be reintegrated into the community.[74]

Mandatory sentences that apply to all offenders uniformly without taking into account the offender's background or prospects for rehabilitation reduces the likelihood of reform and reintegration.[75] Resources spent on incarceration could be better diverted to rehabilitation and preventative measures.[76]

Inconsistency with Original Purposes

At the time when the mandatory 20 year non-parole period was introduced for murder, the purpose of the amendment was to formalise the review process, as the legislation at the time provided for a mandatory life sentence in all cases.[77] The second reading speech repeatedly recognised the need for the court to have 'the ability to deal with the full range of cases that might come before it', but only responded to this with the ability to increase the non-parole period for more serious cases.[78] The narrow

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[70] Central Australian Aboriginal Congress, *Submission to the Senate Community Affairs References Committee Inquiry into Effective Approaches to Prevention and Diagnosis of FASD and Strategies for Optimising Life Outcomes for People with FASD* (2019) 4.

[71] 'There is no greater inequality than the equal treatment of unequals': *Dennis v United States* (1950) 339 US 162, 184.

[72] Law Institute of Victoria, *Mandatory Minimum Sentencing* (2011) 5.

[73] *Quo Cheng Lai* (Sentencing Remarks, 16 February 2001, Bailey J, Darwin (SCC 9909126)), quoted in Rex Wild, 'A Lifetime for a Life – Mandatory Life Imprisonment for Murder' (Paper prepared for The Bali Conference, Criminal Lawyers Association of the Northern Territory, 2001).

[74] Russell Goldflam, 'Criminal Lawyers Association of the Northern Territory (CLANT) submission in response to Discussion Paper' (CLANT, 2017) 7.

[75] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) 16, 36.

[76] Ibid 43.

[77] Michael O'Donnell, 'Mandatory Life Sentences for Murder in the Northern Territory, the New Reform Legislation and the Possibility of Parole' (Paper prepared for The Bali Conference, Criminal Lawyers Association of the Northern Territory, 2007).

[78] Minister for Justice and Attorney-General, 'Second Reading Speech to the Sentencing (Crime of Murder) and Parole Reform Bill 2003' (2003).

definition of 'exceptional circumstances' in which a shorter non-parole period was permitted reflected a very limited number of circumstances that were considered, including 'wives that have been victims of a long history of physical abuse or cases where close relatives assist to end the suffering of a loved one in the last days of a terminal illness'.[79]

As has been demonstrated above, there is a wide range of circumstances in which the culpability of the offender is objectively lower, but this is not accounted for in the narrow definition of 'exceptional circumstances'. Hence, while the amendment was intended to improve the proportionality of sentences and did serve as an improvement from a previous situation where only a life sentence could be imposed with no prospects for parole, further amendments are needed to bring the provisions into line with the principles of proportional sentencing.

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?

It is overwhelmingly clear from our responses to Q3.1 and Q3.2 above, the NAAJA 2017 Submission and Chapter 8 of the ALRC Report that all of the mandatory sentencing provisions should be repealed in full.

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?

The mandatory registration of youth and adult offenders for sex offences under the *Child Protection (Offender Reporting and Registration) Act* 2004 (NT) should be abolished and judicial discretion empowered in any replacement legislation.

Presently in the Northern Territory if an Adult defendant is found guilty of a Class 1 or Class 2 offence, they are subject to registration irrespective of the leniency of the sentence or the circumstance of the offence. There is no scope for the court to take into account any exceptional circumstances.

Reciprocal sex offender reporting legislation in other Australian jurisdictions has been examined by the Victorian Ombudsman[80], Victorian Law Reform Commission[81], and the Law Reform Commission of Western Australia[82]. It has been a consistent recommendation and commentary that there is the need for the exercise of judicial discretion.

'As a judge of 20 years standing…I can attest to a view broadly held by my former judicial colleagues that the indiscriminate nature of this scheme, and the absence of judicial discretion, has produced in far too many cases, outcomes that are absurd, unnecessary, unfair and a waste of resources of Victoria Police. I myself have imposed sentences on offenders (particularly youthful offenders), which have resulted in lifetime

[79] Ibid.

[80] Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation in the failure of agencies to manage registered offenders* (2011) 6.
[81] Victorian Law Reform Commission, *Sex Offenders Registration*, Information Paper (2011) 20.
[82] Law Reform Commission of Western *Australia 'Community Protection (Offender Reporting Act 2004,* Final Report.

registration, yet in circumstances where, in my view, the offender represented no greater risk to the community than the majority of those in his or her age group…Registration should be subject to judicial discretion'.[83]

Judicial discretion is necessary

The Western Australian Law Reform Commission recommended judicial discretion for youth be empowered, given the potential harmful effects on a young person's future, of being labelled a 'sex offender'. It stated, 'For more severe high-risk juvenile child sex offending the need to protect the community may outweigh such concerns, however for low-risk or less-serious offender registration is likely to be counter-productive'[84].

Young people engaging in 'sexting' may be subject to child pornography laws that in some cases, may not amount to sexually deviant or sexually abusive behaviour that warrants registration as an offender[85].

Considering young people with mental health issues the Western Australian Law Reform Commission recommended that *'discretion is important in order to ensure that mentally impaired or intellectually disabled juvenile offenders are only subject to sex offender registration where it is established that they pose a risk to other members of the community'*.[86]

A mechanism for discretion is necessary for offences of consensual sexual activity between two persons where the person is a young adult and the age disparity and circumstances do not suggest that there was any coercion, force, manipulation, intimidation or abuse.[87]

Arguments for maintaining the current mandatory registration of reportable offenders state that 'the law is clear and is applied predictably, uniformly and consistently'. However, *'…not all people found guilty of a reportable offence are the same and not all pose the same risk to the community. By failing to enable individual circumstances to be taken into account, the mandatory registration of every offender found guilty of a reportable offence results in inconsistency because low-risk offenders or less-serious offences are treated in exactly the same way as high-risk offenders'*[88].

Right of review

A youth and adult reportable offender should be entitled to apply for a review of his or her status as a reportable offender.

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[83] Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation in the failure of agencies to manage registered offenders* (2011) 6 at 24.

[84] Law Reform Commission of Western *Australia 'Community Protection (Offender Reporting Act 2004,* Discussion Paper 112-115.

[85] Law Reform Commission of Western *Australia 'Community Protection (Offender Reporting Act 2004,* Discussion Paper 112-115.

[86] Ibid at 30.

[87] Law Reform Commission of Western *Australia 'Community Protection (Offender Reporting Act 2004,* Discussion Paper 145.

[88] Law Reform Commission of Western *Australia 'Community Protection (Offender Reporting Act 2004,* Final Report 34.

Chief Judge Martino of the District Court of Western Australia[89] submission to the Law Reform Commission of Western Australia stated:

'While there would need to be some limitation on an offender bringing multiple applications, in my view the proposal that only one application for review that could only be brought is unduly restrictive. It may be for example that an offender's circumstances may change. I suggest that after an application has been made no further application can be made within a specified period of years or such other period as the court may specify when dismissing the application'.[90]

[89] Submission to the Law Reform Commission of Western Australia *'Community Protection (Offender Reporting Act 2004, Final Report.*
[90] At page 63.

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?

We have addressed both questions 45.2 – 5.5 in our answers below and provided responses on where reforms to the Northern Territory criminal justice system can occur.

Under-utilised sentencing options

There are many reasons why there is under-utilisation of community-based orders within Courts and lack of uptake by offenders. Foremost such orders are not tailored to the needs of Aboriginal offenders and requisite supports and programs. Community based options are often not accessible or persons deemed unsuitable due to the absence of Correctional programs and supervision in many remote Aboriginal communities.

There has been a long history of a punitive focus of Corrections with a 'zero tolerance' approach to breaches of orders and for matters to be brought back before the court, no matter how minor a breach.

Home Detention Orders

All too frequently Aboriginal people who wish to be considered for Home Detention as a sentencing option are not successful in the granting of a Home Detention Order under Part 3, Division 5, Subdivision 2 of the Sentencing Act due to the need under the current Corrections requirement for a defendant to have access to "premises" in which to live. S 44(2) of the Sentencing Act does not limit the criteria for Home detention to having only "premises" and allows for "place" to also be considered (which can be a restricted area). Despite this legislative option however, "places" are never, in NAAJA's experience, considered suitable by Corrections in assessments for Home detention.

If the Courts and corrections were to consider the use of the broader option of "place" as set out in S44 (2) of the Sentencing Act in considering whether a defendant is suitable for Home Detention, this would facilitate Aboriginal different living styles and homelessness to meet the criteria needed to satisfy the requirements to be deemed suitable for Home detention and see more Aboriginal defendants remain within the community.

The need for lateral and creative sentencing

Similarly to the Northern Territory, many international jurisdictions are similarly confronted with the absence of therapeutic courts or pre court interventions. However, this need not necessarily become a barrier to implementing reforms to sentencing practices and providing for a restorative justice approach.

Magistrate Jelena Popovic, a Churchill fellow, viewed Judges lateral and creative sentencing in British Columbia and reports an example of a dour male offender with potential FASD with a history of repeated low level offending being sentenced to probation with two conditions- that at each supervision appointment with probation and parole, he provide examples of good deeds he had carried out since the last appointment (such as carrying groceries for someone else) and to smile at his probation officer. [91] Subsequently the person returned on review with a list of good deeds, smiling and 5 years after sentencing had not re-offended.

There are examples of similar thoughtful and meaningful sentencing options that are tailored to the individual including the sentencing of Aboriginal persons before the Courts in the Northern Territory and other jurisdictions.

Former WA Magistrate, Tony Bloemen recounts placing an Aboriginal artist on bail for 6 months with the condition that he provided paintings to be hung in the Court to give meaning and respect to Aboriginal community and elders. [92]

Pre-adjudication Probation

Jelena Popovic in discussions with Professor Frase called for a '*flexible, asymmetrical spectrum of penalties for this cohort that is not limited to retributiveness. A sentencing disposition, which was mentioned, is 'Pre-Adjudication Probation'. If an offender completed the tasks which were considered appropriate by the presiding judicial officer, the prosecution would have the discretion to withdraw the charge or charges*'.[93]

Health focused orders

An example of the opportunities of improving physical health outcomes of persons before Courts overseas has occurred in Newark, New Jersey where the Judge will impose directions on persons to see a doctor. [94]

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

Both wholly and partially suspended sentences under section 40 of the *Sentencing Act* (NT) must be retained. These sentencing dispositions are vital and necessary to the effective administration of justice and ensuring that an Aboriginal offender is

[91] Churchill Fellow. 2011. Jelena Popovic 'Meaningful sentencing of low-level, indigent offenders'. p 30
[92] RN Breakfast, 'Former WA Magistrate Tony Bloemen on Indigenous Justice
[93] Jelena Popovic 2011
[94] Ibid page 31

sentenced and supervised and actually released from prison. The suspended sentence option is much more favourable than parole orders as is reflected in the low numbers of Aboriginal prisoners who apply or are released on parole.

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?

5.9 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?

A completely different approach to the Northern Territory's existing community-based sentencing regime is needed to address the systemic barriers and unacceptably high incarceration of Aboriginal men and women. Aboriginal people are more likely to return to prison after their release as 59% of Aboriginal prisoners will return to prison within two years.[95]

Aboriginal prisoners are more likely to serve their full sentence at 45% than to receive or apply for parole.[96]

Numerous reports nationally[97] and locally recognise that the current administration of justice and its associated systems are not meeting the needs of Aboriginal people.

A commitment to an Aboriginal solutions focus

In order to address Aboriginal over-incarceration and recidivism it is necessary for Government and the justice system to commit and fund necessary reform of an Aboriginal Justice Agreement for the Northern Territory including the process of greater Aboriginal involvement in the administration and supervision of persons and investment in Aboriginal designed and tailored orders, programs and services.

The failure to properly commit and resource such reforms will see the perpetuation of a system of injustice for Aboriginal people in the Northern Territory.

Need for a designed tailored Aboriginal community based orders

The 'Pathways to a Northern Territory Aboriginal Justice Agreement' spoke to the difficulties that Aboriginal people face with the present existing sentencing orders, parole and supervision requirements[98].

[95] Pathways to the Northern Territory Aboriginal Justice Agreement. Department of Justice and Attorney General 2019 page 63.
[96] Ibid page 63.
[97] Australian Law Reform Commission Pathways to Aboriginal Incarceration; Royal Commission into Child Protection and Detentions Systems; and Pathways to the Northern Territory Aboriginal Justice Agreement.
[98] Pathways to the Northern Territory Aboriginal Justice Agreement. Department of Justice and Attorney General 2019 page 63.

'Most offenders would rather do full time in prison so when they leave there are no conditions for them to manage. Arrests are no longer a deterrent. Offenders are more likely willing to serve a sentence rather than having conditions placed on them (i.e. parole conditions, good behaviour bond conditions, etc.) because conditions are often too confusing and not practical in some instances (i.e. the application of DVO orders in small communities)

When people are released on parole, they need more realistic conditions and be given alternative options to prison when in breach of conditions. Alcohol and drugs are extremely addictive and cannot be given up with sheer willpower alone.

This Review provides an opportunity to design and develop a first for the Northern Territory justice system, being the creation of Aboriginal designed and developed, culturally relevant community based orders and programs. To effectively achieve this end, it is necessary that there is time, resourcing and consultation with Aboriginal elders, Law and Justice groups, Aboriginal organisations and communities as to the design, content, and style of delivery of Aboriginal community based orders and programmes.

It is necessary to provide alternatives to the standardised non-culturally relevant and responsive community based sanctions.

The Canadian criminal justice system has for a number of years been operating to provide services tailored to individuals' unique needs and cultural backgrounds, as opposed to a *one-size-fits-all approach*.

Canadian researchers[99] found that those who participated in culturally relevant programming demonstrated an average reduction of 9% in recidivism compared to Indigenous offenders exposed to standard programming. Potential benefits of culturally-relevant programing may lead to higher rates of program completion, reductions in risk/needs after treatment, increased program satisfaction, and an increased sense of cultural identity.[100]

Indigenous elders and programs are directly involved in working with offenders and the local justice system to determine probation conditions and healing plans.

These programs seek to address a number of issues facing Indigenous communities by considering culturally appropriate alternatives to incarceration such as reintegration, probation and healing plans, mental health, access to cultural resources, family reunification, training and skills development and education.

In New Zealand culture-based interventions incorporate indigenous cultural concepts and practices into their service design and delivery. Programs source their design, content, style of delivery and personnel exclusively from the indigenous culture[101].

[99] A Meta-analysis of the Effectiveness of Culturally-relevant Treatment for Indigenous Offenders 2017 Public Safety Canada.
[100] Ibid.
[101] Culture-Based Correctional Rehabilitative Interventions for Indigenous Offenders Evidence Brief – Nov 2017 page 2.

Aboriginal led community programs

The Canadian Aboriginal Justice Strategy provides for government partnerships through cost shared funding for Indigenous led community based justice programs that are geared to non-violent property offences and lesser offences through a range of options of diversion, community sentencing, mediation, court/ community justice programs.[102]

Canadian Indigenous Communities are able to develop community based justice programs through community based funding to research traditional justice practices, assess capacity to launch a program or trial and to deliver community needs.[103]

The evaluation of Canadian community based justice programs and community justice services found, that when tailored to Indigenous needs with Indigenous communities increased involvement in local justice administration, relevant Aboriginal cultural values became reflected in the Canadian justice system administration, resulting in reduced crime and incarceration rates in communities.[104]

Aboriginal led local justice administration

A necessary reform to address the over-incarceration and over-representation of Aboriginal people in the justice system is the transition of the supervision and regulation services within the justice system to local Aboriginal communities and organisations.

It is necessary to change the Community Corrections service delivery model of 'fly-in and fly-out' of remote communities of supervision of individuals by recruiting locally based employees or Aboriginal providers on community.

It was a recommendation of the 2016 Keith Hamburger 'Report on the Review of the Northern Territory Department of Correctional Services' that local Aboriginal authorities would take on the supervision and support of offenders.

' the appointment of Probation and Parole Officers to remote communities who are from the community --- where the community is amenable --- to provide local supervision and support to offenders, and work with community members to develop Yolŋu Community Authorities, where appropriate' .[105]

[102] Canada Aboriginal Justice Strategy Evaluation Final Report November 2011, Department of Justice Canada
[103] Ibid page 6.
[104] Ibid page 23.
[105] Hamburger Review page 136.

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?

We have addressed both questions 5.8 and 5.8.1 in our answer below.

Need for an evidence based reform

Before there is any consideration of Victorian or New South Wales sentencing regimes it would be necessary to have an evidence base that those regimes have provided meaningful outcomes in lowering Aboriginal over-incarceration and that they have provided therapeutic and rehabilitative processes that meet the needs of Aboriginal people and reduction of breaches and sanctions.

As a response to the COAG deferral of raising the age of criminal responsibility for children, the Chief Minister and Attorney-Generals of the Northern Territory indicated such a reform cannot occur before there is in place 'therapeutic interventions, behaviour interventions, and social support for offending children'[106].

Likewise, such a fundamental reform and change of sentencing practice cannot occur until there are accessible and appropriate therapeutic, behavioural, rehabilitative options and social support options available across the whole of the Northern Territory and accessible to all. These supports need to be available to all persons and access to them must not be restricted due to remoteness, disability, language or lack of investment.

Need for directed funding for Aboriginal cultural, therapeutic and support programs

The Northern Territory Government must commit to real funding of programs and services in Aboriginal communities. The failure to provide adequate and real funding for therapeutic programs and support services will otherwise bring about a community based sentencing regime that is primarily punitive and retributive in its approach that fails to address the rehabilitative needs of Aboriginal people.

It is necessary that this is the primary funding priority rather than a Corrections funding of extra administration and staffing for the proposed Victorian and New South Wales model.

The New South Wales experience saw the employment of 200 new Community Correction staff to provide for the extra thousands of offenders who were previously unsupervised in the community[107].

[106] Age of criminal responsibility to remain at 10 until at least 2021. Sydney Morning Herald. 27 July 2020.
[107] NSW Communities and Justice https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx

Victorian and New South Wales sentencing models are not suitable for the Northern Territory

However, neither the Victorian nor New South Wales approach is warranted, suitable or beneficial to the needs of Aboriginal offenders of the Northern Territory who are the primary cohort in the criminal justice system and probation and parole systems.

In Victoria during the operation of the Victorian sentencing reforms of Community Corrections Orders (CCO)[108] saw the rate of adult Aboriginal incarceration double from 2009-2019 from initially 839.4 per 100,000 to 2267.7 per 100,000 persons[109]. This is in comparison to the non-Aboriginal imprisonment rate that rose from 104.9 per 100,000 to 151.7 per 100,000[110].

This stark increase shows that the Victorian community based sentencing change did not reduce the rate of Aboriginal incarceration nor address systemic barriers Aboriginal people face in the criminal justice system.

CCO's are described as bridging the gap between custodial sentences and non-custodial sentencing options, such as fines. As it is a:

'…*non-custodial order with attached mandatory conditions by the legislature and a range of conditions of the sentencing court that are variously coercive, prohibitive, intrusive and rehabilitative'*.[111]

It is likely that the adoption of these orders will see an increase in the length of the maximum term of supervision of such orders than what presently exists under the *Sentencing Act 2016* (NT). Community Based Orders under Division 4A are for a maximum of 2 years.[112]

The *Sentencing Act (1991)* (Vic) provides that a CCO imposed in the Magistrates Court must not exceed two years in respect of one offence, four years in respect of two offences, and five years in respect of 3 or more offences.[113]

The imposition of mandatory lengthy periods of supervision, fails to consider the 'existing difficulties Aboriginal prisoners face in complying without the necessary supports, assistance and culturally relevant services. There is the great risk that Aboriginal prisoners will be at an even greater risk of non-compliance, breach and return to prison. Alternatively, Aboriginal prisoners will not seek out such orders and simply 'do their time'.

[108] 2009 - 2020
[109] Sentencing Advisory Council https://www.setencingcouncil.vic.gov.au/statistics/sentencing-trends/Victoria-indigenous-imprisonment-rate
[110] Ibid.
[111] *Boulton v The Queen* [2014] VSCA 342.
[112] Section 39D of the Sentencing Act (NT)
[113] Section 38(1)(a) of the Sentencing Act (Vic)