NORTHERN TERRITORY BAR ASSOCIATION

SUBMISSION TO NORTHERN TERRITORY LAW REFORM COMMITTEE

CONSULTATION PAPER

MANDATORY SENTENCING AND COMMUNITY BASED SENTENCING OPTIONS

RELEASED OCTOBER 2020

08 FEBRUARY 2021

NORTHERN TERRITORY BAR ASSOCIATION

1. In 1997 Justice Mildren in *Trennery v Bradley*[1] said the following:

   "*Courts are often described as "Courts of Justice", and Judges are entitled "Justices" because it is fundamental that, above all, they are expected to dispense justice equally to all those who come before them, without fear of favour, and according to law.*

   It is a principle of law that it is the fundamental duty of sentencing courts when imposing punishment for breaches of the criminal law not to impose a punishment which exceeds that which justice demands in all the circumstances.
   …

   Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case".

2. It is the submission of the Northern Territory Bar Association (NTBA) that nothing has changed since 1997 and prescribed minimum mandatory sentencing provisions remain the "**very antithesis of just sentences**". Accordingly, we say that all such provisions ought be repealed.

3. The NTBA agrees with the observations in Chapter 1 of the Consultation Paper that:

   - The Northern Territory's rate of imprisonment is the worst in Australia and one of the worst in the world;
   - indigenous adults and children are grossly over-represented in the prison population;
   - mandatory sentencing laws contribute to the imprisonment rate and have a disproportionate effect on indigenous people;
   - mandatory sentencing laws are costly and are not effective as a crime deterrent, noting that crime, including property crime which is the subject of mandatory sentencing has not decreased, but has in some regions drastically increased.

[1] 6 NTLR 175 at page 187, Angel J agreeing (at 185)

4. Mandatory Sentencing distorts the sentencing process by placing imprisonment as the sentence of first resort, not the sentence of last resort thereby reversing the normal sentencing discretion.

5. Mandatory sentencing provisions which are triggered by a "relevant prior offence" do not distinguish between recent "fresh" prior offending and historical "stale" offending such that a person who committed a violent offence in their 20's and does not reoffend again until they are 40 is captured by these provisions.

6. A considerable proportion of sentences which result from mandatory sentencing provisions are "short sentences", that is, sentences of less than 6 months. The most egregious example of this is the mandatory minimum sentence of 7 days imprisonment for a second or subsequent breach of a Domestic Violence Order (DVO). There has been consistent debate in countries such as the United Kingdom regarding the abolition of sentences of less than 6 months as they have not been effective in reducing crime and are antithetical to the objects of rehabilitation.

7. Prisoners sentenced to short sentences in the Northern Territory, are precluded from many, if not all, of the programs currently available within NT prisons. This is either due to the fact that they are ineligible due to the length of their sentence, or the waiting lists are such that they are released before a place becomes available.

8. Short sentences such as those imposed in relation to aggravated property offending, breach of DVOs and some drug offences often have a destructive effect on "protective factors" that are known to reduce the risk of recidivism such as stable housing and employment. The loss of accommodation and employment can be insurmountable obstacles to addressing criminal behaviour or dealing with addiction thereby in fact heightening the risk of recidivism.

9. The NTBA agrees with the arguments against mandatory sentencing (Chapter 3.2.2). There is simply no evidence that these laws are achieving anything that its proponents desire, and the moral and financial cost of imprisoning people, mostly indigenous people, is unjustifiable, indefensible and unsustainable.

10. The NTBA agrees that mandatory sentencing provisions as enacted in the NT are inconsistent with Australia's international obligations.

NT BA NORTHERN TERRITORY BAR ASSOCIATION

Questions for stakeholder comment (Chapter 3)

(3.1) Do the mandatory sentencing provisions under the *Sentencing Act* 1995, the *Domestic Violence Act* 2007 and the *Misuse of Drugs Act* 1990 achieve their postulated goals or objectives? No

(3.2) Are the mandatory sentencing provisions under the *Sentencing Act* 1995, the *Domestic Violence Act* 2007 and the *Misuse of Drugs Act* 1990 principled, fair and just? No

(3.3) Should the Northern Territory's mandatory sentencing provisions under the *Sentencing Act* 1995, the *Domestic Violence Act* 2007 and the *Misuse of Drugs Act* 1990 be maintained or repealed? Repealed.

(3.4) Are there other issues relating to the mandatory sentencing provisions under the *Sentencing Act* 1995, the *Domestic Violence Act* 2007 and the *Misuse of Drugs Act* 1990 not discussed in this Consultation Paper which the Committee should address in its report? The Committee should consider whether the imprisonment of drug users provides any protection to the community, particularly in relation to property offending, and whether or not a program of de-criminalisation of some or all drugs warrants consideration as is occurring in numerous countries around the world. The financial cost of imprisoning drug users does not compare favourably to a range of health interventions that could be considered and there is no evidence imprisonment is achieving its stated aims.

11. In relation to mandatory minimum sentences and non-parole periods for Murder, the NTBA agrees that there is an inherent injustice in the statutory requirement for the Supreme Court to fix 20 years as the "standard non-parole period". Cases such as *R v Zak Grieve*[2] are an example of such injustice and it is submitted that no "right minded" member of the public would condone the result inflicted on Zak Grieve by application of the legislation.

12. The sentencing of Roy Melbourne is another example where a court able to exercise its discretion in sentencing may have arrived at a lesser sentence and/or non parole period. Mr Melbourne was found guilty of murder in 1995 when he was over 60 years of age. But for a 1975 conviction for exceed .08 he had led a blemish-free life. He was convicted of murdering his neighbour during the course of an argument. He was sentenced immediately upon the jury reaching its verdict, because the mandatory sentencing regime mandated a sentence of life imprisonment. No submissions were heard regarding his character nor was the offence characterised as either low range, medium range

[2] [2012] NTSC 103

or high range because it did not affect the only sentence available to the court. By the time he was eligible for parole he was in his 80s and in poor health. He was granted parole, but on the cusp of his freedom he hung himself at the Darwin Correctional Centre. He was too old, and too sick and did not want to be a burden to his remaining family.[3]

13. The current sentencing regime for murder does not allow for any assessment of moral culpability, rehabilitation or community safety, it only addresses punishment and deterrence.

14. Mandatory sentencing for sexual offences suffers from the same deficiencies as mandatory sentencing for other types of offences. It fails to distinguish between a range of offending and factual circumstances that can constitute each offence. For example, an 19 year old found guilty of Aggravated Assault (Indecent) contra Section 188(2)(k) of the Criminal Code may simply have involved a young man who touched a female's breast or private area but will result in him being placed on the Child Protection Offender Register for 7 years or more regardless of his character and prospects for the future. It is submitted that no "right thinking" member of the public would conclude that such an outcome was just.

Questions for stakeholder comment

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

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

4.3 Should a judge, in appropriate circumstances, have the power to exempt a person from the requirements of the *Child Protection (Offender Reporting and Registration) Act 2004?* Yes, the lack of discretion on this issue can and does result in appalling injustice and does not promote rehabilitation in many cases.

4.4 Should the "exceptional circumstances" specified in s53A(7) of the Sentencing Act NT for murder be less restrictive? Yes

[3] Inquest into the death of Roy Melbourne [2017] NTLC 017.

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? The NTBA does not wish to raise any other issues.

15. The NTBA supports reform of community based orders so that there is

    - a legislative presumption in favour of such orders in lieu of sentences of imprisonment;
    - unless the protection of the community cannot be addressed by any other means;
    - except for offences that are punishable by a maximum penalty of 14 years or offences that can be identified as ones where the protection of the community is paramount.

16. Put another way, it is the NTBA's view that, except in the case of the most serious offending, protection of the community ought be the primary consideration in sentencing to a term of imprisonment. Where community protection can be achieved by a community based order it should be made.

17. The NTBA supports a model that recognises that the overwhelming majority of offenders who will be affected by any legislative change on this issue will be indigenous. The lack of resources in remote communities to allow community based sentencing options on country must be addressed to ensure that indigenous offenders are not prejudiced due to their place of residence. The model needs to consider what has worked in other jurisdictions but be cognisant of the very different geographical and demographic factors in the NT.

18. In relation to the issue of resources in communities, the NTBA is of the view that funding that is currently allocated to funding imprisonment of offenders can and ought be re-directed to ensure that community based orders that require things such as completion of courses can be provided "on country", and wherever possible be delivered by indigenous service providers.

19. The NTBA submits that reference needs to be given to concepts embodied in the draft Aboriginal Justice Agreement and self determination for indigenous people who are the subject of these laws, and whose lives are affected by them.

NORTHERN TERRITORY BAR ASSOCIATION

Questions for stakeholder comment

5.1 Does the Northern Territory sentencing regime currently have the right mix of community-based sentencing options? The answer is a qualified yes, however the hierarchy of sentencing options needs to be reconsidered as does the practical availability of the options in remote communities. A reconsideration of program delivery in remote areas with greater indigenous ownership and input needs to occur. If the community based option is not available to a particular offender because of lack of a residence or unavailability of options in their home community, the effect is that community based sentencing is no longer an option.

5.2 Are all types of community-based options being used effectively in the Northern Territory? No, they are not. The reasons appear to be due to legislative restrictions on their use (mandatory terms of imprisonment), lack of services to support these options in remote communities and a lack of indigenous input into appropriate programs and support services. (Community based courses that ought be funded include: drug and alcohol counselling, domestic violence and anger management, driving courses including courses required to be completed after drink driving licence disqualification)

5.3 Should greater use be made of community-based sentencing options, and if so, how might this be facilitated? Yes. Employment of more indigenous community corrections officers, and engagement with offender's communities to create better, realistic community programs. In short, engagement with the offender's community, particularly those who reside in remote areas.

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? No it is not. The quality of assessments is hugely dependent on the assessors who have vastly differing ranges of experience and qualifications. Training of existing assessors and the recruitment and training of community based assessors needs to be addressed. Assessments appear, at times, to be arbitrary or generic or impractical or inflexible.

NT BA NORTHERN TERRITORY BAR ASSOCIATION

5.5 Why are community based orders so infrequently used? There are a range of reasons including: the fact that the offender has been refused bail and remanded for such a period that non-custodial sentences are rendered obsolete, lack of options (eg. Drug and alcohol counselling, meaningful community work projects in communities), offender's previous non-engagement with orders resulting in their being deemed unsuitable, lack of indigenous input and service delivery of these programs.

5.6 Should fully or partially suspended sentences be retained as a sentencing option. If not, are there any pre-requisites to their abolition? Yes. The conceptual flaw identified by the NSWLRC is valid, that is suspended sentences require a court to decide that no sentence other than imprisonment is appropriate, yet no imprisonment actually occurs unless the sentence is breached. However, due to the risk that indigenous people will be less likely to be eligible for alternate community based orders due to a lack of services, sub-standard housing and technology limitations (eg. Electronic monitoring) there needs to be investment in communities to address these issues, otherwise indigenous people will inevitably end up prejudiced due to poverty and living remote and more likely to be imprisoned due to a lack of a viable alternative.

5.7 Does the current regime of non-custodial and custodial options available in the NT adequately meet the needs of Indigenous Territorians, in particular, those living in remote and regional communities? If not, what more can be done to ensure that Indigenous Territorians are able to take advantage of these? As per above, investment in community services, courses, housing and engagement and employment of community people to do these things.

5.8 Addressed above

Duncan McConnel
President
Northern Territory Bar Association

8 February 2021