Northern Territory
Legal Aid Commission

SUBMISSION ON BEHALF OF THE

NORTHERN TERRITORY LEGAL AID COMMISSION

Consultation Paper
Mandatory Sentencing and Community-Based Sentencing Options

OVERVIEW OF OUR SERVICE

The Northern Territory Legal Aid Commission ('NTLAC') provides information, community legal education, legal advice, representation and assistance to persons in a range of matters, including:

- Criminal law,
- Civil law,
- Domestic violence, via the Domestic Violence Legal Service ('DVLS')
- Family law, including Family Dispute Resolution; and
- Child Protection Matters.

NTLAC also provides early intervention and prevention services. These services include legal information, education, referral, advice, advocacy and minor assistance.

NTLAC also provides non-legal support services including social and clinical support services to:

- Victims of domestic and family violence in the DVLS;
- Vulnerable clients in the Darwin Family Law Practice;
- Youth clients in the Darwin Criminal Law Practice;
- Respondents to domestic violence proceedings; and
- Vulnerable clients of the Commission in Alice Springs.

In addition, we have a community legal education and outreach function, which includes the development and delivery of information, resources and projects. We have offices in Darwin, Palmerston, Katherine, Tennant Creek and Alice Springs.

The Northern Territory Legal Aid Commission ("NTLAC") is pleased to have the opportunity to provide comments on the Consultation Paper.

Background

"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."[1]

NTLAC has voiced opposition to mandatory sentencing since it was first introduced in 1996 and we have continued to advise the Government of the day that such legislation does not address either the causes of crime, deter criminal offending or provide a just sentencing regime. The Sentencing Guidelines set out in s. 5 (1) (a) the *Sentencing Act 1995* reflect the fundamental principle of proportionality in sentencing:

5. (1) The only purposes for which sentences may be imposed on an offender are the following:

(a) To punish an offender to an extent or in a way that is just in all the circumstances.

The NTLAC supports the basics of Australia's legal system which include the principles of procedural fairness, judicial precedent, the rule of law and the separation of powers. These principles are central to the protection of a citizen's right to justice and equality before the law. Mandatory sentencing laws run contrary to these fundamental tenets.

Any consideration of the criminal justice system in the NT in general, and of sentencing in particular, must be done in the context of the NT having the largest imprisonment rate in Australia, and one of the highest in the world. The fact that 85% of the NT prison population is comprised of First Nations people is a disgrace. There is no doubt that mandatory sentencing has contributed to the growth in numbers of First Nations people in our prisons in Darwin and Alice Springs. Of course, there have been other contributing factors such as the Intervention in the NT and the addition of 18 more remotely placed police stations. In addition, mandatory sentencing denies the

[1] *Robin Laurence Trenerry v Matthew Robert Bradley* 6 NTLR 175, per Mildren J at 187.

flexibility required to accommodate the different cultural needs of First Nations people and to fashion a sentence that takes into account both the objective gravity of the offending and the individual subjective needs of the offender.

There is also no doubt that mandatory sentencing was introduced to assuage community concerns at the rate of criminal offending, particularly property crime but also violent crime, and that any repeal or winding back of the mandatory sentencing provisions will need to be done in a way that will reassure the community that their safety and security is center stage.

Added to this context is the enormous cost of processing offenders through the criminal justice system and then housing those convicted and sentenced in prisons. The NTLAC has long championed Justice Reinvestment[2] as a criminal justice strategy rather than building bigger and better prisons to accommodate the increasing numbers of prisoners. In terms of the current mandatory sentencing legislation the NTLAC's position can be summarized as follows:

1. Mandatory sentencing is not working either to deter would-be offenders, or to protect the community.

2. The current mandatory sentencing provisions should be repealed. Sections 5 (1) and (2) of the *Sentencing Act* (1995) set out the Guidelines for judges and what the courts must have regard to in sentencing an offender. These sections properly summarise the sentencing jurisprudence that has been developed by the courts under the common law over many years.

3. The High Court identified the role of the sentencing judge as being to identify all the factors that are relevant to the sentence and to then arrive at an appropriate sentence by way of "instinctive synthesis"[3]. Mandatory minimum sentences are not conducive to this approach and make the sentencing exercise unnecessarily complicated and in many cases, unjust. One size does not fit all and the sentencing discretion to weigh up all the relevant and competing considerations before arriving at a duly proportionate sentence is informed by proper application of sentencing principles and not by a legislated mandatory minimum term.

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[2] Justice Reinvestment works to reduce the number of First Nations people being imprisoned by putting resources into building stronger communities rather than expensive and ineffective prisons. See The Maranguka Justice Reinvestment project, Bourke, NSW https://www.justreinvest.org.au/justice-reinvestment-in-bourke/.

[3] *Makarian v The Queen* (2005) 228 CLR 357. At [51] per McHugh J.

4. Together, the NTLAC and NAAJA, have the largest criminal practices in the Northern Territory. The NTLAC is very conscious of the cost implications of mandatory sentencing which does not encourage early pleas of guilty and has resulted in more contested hearings and trials. These costs impact on the legal service providers, the courts and ultimately the prisons.

***Questions for Stakeholder comment**:*

3.1-3 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? Are they principled, fair and just? Should they be repealed?

A. In respect to **aggravated property offences** the *Sentencing Act* prescribes mandatory sentencing, the stated purpose being "**to ensure that community disapproval of persons committing aggravated property offences is adequately reflected in the sentences imposed on those persons." (s.78A)**

There is no evidence to support that the stated purpose is achieved by this particular legislative provision rather than a sentencing judge applying the sentencing Guidelines as set out in s.5 (1) which provides for the only purposes for which sentences may be imposed on an offender and includes (1) (d), ***"to make it clear that the community acting through the court, does not approve of the sort of conduct in which the offender was involved"***. Furthermore, the practical application by the courts in the majority of cases of these mandatory provisions means that the mandatory provisions are in reality superfluous. Nonetheless, the mandatory provisions can on occasion result in a disproportionate sentence and result in an injustice.

The provision can result in real injustice to an offender who is required to perform community work, be subject to Home Detention or actual imprisonment for a minor offence. For example, any damage to property is captured by these provisions. Additionally, it is not uncommon for our clients to be ineligible for community work, due to health reasons or be unsuitable for Home Detention due to unstable or inappropriate living conditions. In such cases the only real option is imprisonment.

In our view the stated purpose of s.78A is not achieved by the mandatory provisions but by sentencing judges properly applying the sentencing guidelines and having regard to all the relevant sentencing matters, aggravating and mitigating.

B. In respect to the ***Domestic and Family Violence Act 2007*** the Commission fully acknowledges the high level of domestic and family violence in the Northern Territory and the need for protection of those experiencing domestic violence from the perpetrators. Mandatory sentencing is not the answer in our view. Although a sentence of imprisonment must be available for appropriate cases, it should not be mandatory. The mandatory sentencing provisions under this legislation are particularly restrictive. There is no option for a partially suspended sentence for a person who has a prior for breaching a domestic violence order[4] and sentences must be cumulative on other sentences[5]. This results in unjust sentences as well as courts artificially reducing an appropriate sentence to arrive at a just result, rather than merely applying the sentencing principle of totality.[6]

There must also be available sentencing options for perpetrators to receive counselling and, more importantly, to attend Behaviour Change Programmes – as a form of secondary prevention (early intervention) so as to develop:

i. awareness that domestic violence is unacceptable and harmful; and
ii. Insight into the need for behaviour change to stop the violence.

NTLAC, through our Family Advocacy and Support Services (FASS), which includes the Respondent Early Assistance Legal Service (REALS) programme, is working in this space towards this end.

C. In respect to **violent offences** the mandatory provisions are subject to an exceptional circumstance exemption under the *Sentencing Act.* In order to engage this provision it is not sufficient that a sentence be disproportionate, but the circumstances need to be sufficiently out of the ordinary, noteworthy or uncommon.[7] It therefore does not provide a sufficient safeguard against arbitrary imprisonment. Furthermore, the exceptional circumstances exception removes the minimum term but still requires actual imprisonment.

In our view the provisions relating to the five violent offence levels are confusing, unduly complicated and do not achieve the stated purpose. They can also cause, and have resulted in, an injustice. The maximum penalties for violent offences in the *Criminal Code Act* are significant ones and with the proper application of the intuitive synthesis sentencing process duly proportionate sentences to the objective gravity of the offending are achieved. If they are not, then there can be an appeal.

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[4] *Domestic and Family Violence Act 2007*, s 121(5).
[5] *Domestic and Family Violence Act 2007* s 121 (6) and (7).
[6] See for example, *Idai v Malagorski* [2011] NTSC 102
[7] *R v Duncan* (2015) NTLR 201, [25]-[26]

D. The mandatory provisions in the ***Misuse of Drugs Act*** have given rise to considerable judicial interpretation and application over the years but in view of the number of drug cases that the NTLAC deals with each year, it is apparent that the mandatory provisions have not deterred people from drug offending. The NTLAC supports a therapeutic approach to drug offending in the majority of cases and was a big supporter of the previous CREDIT/Bail program and SMART courts and supports the introduction of a similar alternative sentencing option. In terms of sentencing drug offenders it is our view that this is best achieved by application of the intuitive sentencing process. It is not achieved by lawyers spending time arguing that the circumstances of the particular case qualify as "particular circumstances" for the purposes of concluding that the minimum 28 days imprisonment needs not be imposed. The end result is that the minimum 28 days most regularly captures drug users and low-level offending whereas the more serious offenders ordinarily receive at least 28 days imprisonment.

Ultimately, the only effect of mandatory sentencing provisions is that they result in imprisonment for those who would not receive it according to ordinary sentencing principles.

3.4 Are there other issues relating to the mandatory sentencing provisions not discussed in this Consultation Paper which the Committee should address in its report?

Yes. Of particular concern to the NTLAC is s.55 (1) and (3) (b) of the *Sentencing Act 1995* which mandates that a court sentencing a person in respect to drug offences to a sentence of imprisonment with a non-parole period, then the non-parole period must not be less than 70% of the head sentence. This particular amendment was brought in without any opportunity for public comment or scrutiny and has resulted in many people serving longer and disproportionate prison sentences than would otherwise have been the case. It is our firm view that this particular provision causes substantial unfairness and injustice and must be repealed as a matter of urgency.

<u>**Mandatory Sentencing for Murder and Sexual Offences**</u>

Mandatory sentences for murder

The NTLAC agrees with all the comments in the Consultation Paper in regard to the mandatory provisions for sentencing for murder in the NT.

In addition we make the following observations:

The NTLAC welcomed the repeal of the felony murder provisions and it is notable that in the NT we do not have reckless murder. That said, the sentencing for murder because of the mandatory minimum sentencing regime is unjust and should be repealed.

We note that only Queensland[8] and South Australia[9] have similar sentencing regimes for the offence of murder with mandatory life and minimum non-parole periods of 20 years. The ACT[10] and Tasmania[11] have what we regard as sensible and just sentencing regimes, providing for a maximum of life imprisonment which is not mandatory, with both the head sentence and the non-parole period, if any, to be determined by proper application of established sentencing principles. Similarly, Victoria also has the maximum penalty of life imprisonment for murder and it is discretionary but a non-parole period must be fixed. The non-parole period is also discretionary unless a sentence of actual life imprisonment is imposed in which case a minimum non-parole of 30 years must be set.[12]

WA has a maximum of life imprisonment for murder, unless such a sentence would be clearly unjust, and provides for a mandatory minimum of 10 years unless the offence was committed by an adult in the course of an aggravated home burglary, in which case the mandatory minimum is 15 years. NSW has a maximum penalty of life imprisonment which is not mandatory (except for the murder of a police officer and then only in certain circumstances) and stipulates a standard non-parole period of 20 years or 25 years in certain circumstances[13]: standard non-parole periods are not mandatory and the mean non-parole period has been calculated at 18.9 years. [14]

In 2001, Chief Justice Spigelman of NSW, while acknowledging the assistance provided by comparative sentences at a sentencing hearing observed:

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[8] *Criminal Code* (QLD) s305(1). The court must set a non-parole period of 30 years if the offender has previously been convicted of another murder or 25 years if the victim is a police officer *Corrective Services Act*,(QLD), ss181(2)(a) and (b). A parole date of 20 years applies in other cases, Corrective Services Act, s181(2)(c).

[9] *Criminal Law Consolidation Act 1935*(SA) s47(1)(a), s47(5)(e).

[10] *Crimes Act 1900*(ACT) s12(2); *Crimes (Sentencing) Act 2005* (ACT) 65(1)-(4).

[11]*Criminal Code* (TAS) s158, *Sentencing Act 1997* (Tas) s17(2), s18(1).

[12] *Crimes Act 1958* (Vic) s3(1), *Sentencing Act 1991* (Vic) s11(1).

[13] *Crimes Act 1900* (NSW) s19A(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1; item 1 A, 1 B.

[14] Consultation Paper: Homicide, NSW Sentencing Council, October 2019, 2.27.

"Murder is a crime which can be committed in a wide range of circumstances. There is also a significant range of differences in the subjective circumstances. This is a context where the maximum penalty is life and, accordingly, the range over which the sentencing discretion can be exercised is the largest open to a judge in our justice system".

The significance of the remarks of Chief Justice Spigelman is the acknowledgement of both the wide range of gravity and objective circumstances of the crime of murder on the one hand and the significant range of differences in the subjective circumstances of those who commit murder on the other. The crime of murder, like the crime of manslaughter, has been described aptly as a protean offence:

"[E]ach case, to a large extent, depends upon its own facts. Axiomatically, differences in facts and circumstances will often lead to differences in the resulting sentence." [15]

In the NT the mandatory sentencing for the crime of murder makes reflection of these differences impossible. A contract killing will in all probability receive the same mandatory minimum, 20 years, as an intoxicated female First Nations person who momentarily intended only to cause serious harm to her sister but caused her unintended death.

There is no incentive to plead guilty to murder and those charged with murder will almost always run expensive trials as they have nothing to lose. There is also no incentive to cooperate with the authorities or give evidence against a co-accused. The plea and the cooperation cannot be reflected in the sentencing disposition.

The Consultation paper refers to the case of *R v Zak Grieve*[16] but also charged with the same murder was Darren Halfpenny, who pleaded guilty to the murder. He had fully confessed to his role when interviewed by police which quickly led to the arrest of the three co-accused. He gave evidence against his co-accused at their trial. His evidence was crucial to the convictions and it was done at great cost to himself: as a prisoner he would serve his sentence with a constant and elevated risk of retaliation from other prisoners. He had only been previously convicted of a stealing and minor traffic offences. There was expert evidence that he was cognitively impaired. He was remorseful and ashamed.

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[15] *Perkins v R* [2018] NSWCCA 62[63]-[64].

[16] *R v Buttery and Ors* [2012] NTSC 103.

In sentencing Darren Halfpenny Justice Mildren said:

> *"My own view is that I think that the current provisions of s.53 (A) (7) of the Sentencing Act need to be amended. It is unjust and unfair and contrary to public interest that prisoners who plead guilty to murder and are contrite and remorseful and who, by virtue of their conscience prepared to give evidence against their co-offenders, are left in a situation where early release on parole is left in the hands of the Executive.*
>
> *The executive is ill-trained to consider these matters and should leave such questions in the hands of the courts, which are not subject to political pressure but which will determine the matters according to law and in accordance with the evidence. Furthermore, the decisions of courts are subject to appeal, both by the Director of Public Prosecutions and by the prisoner. Executive review is unappellable".*[17]

In his sentencing remarks, Justice Mildren recommended to the Administrator that Darren Halfpenny be released after serving 14 years but then went on to formally sentence him to life imprisonment with a non-parole period of 20 years.

The case of Darren Halfpenny will be the subject of a petition for the exercise of the prerogative of mercy for his early release which may or may not be successful, despite being supported by the Director of Public Prosecutions and the then Solicitor General, now Chief Justice. The case is a stark example of the injustice caused by the mandatory minimum sentencing regime which prevented Justice Mildren taking proper account in arriving at an appropriate sentence of all the mitigating matters, including the early plea, remorse and the giving of crucial evidence against his co-accused, at great personal cost.

The NTLAC has long called for the repeal of the mandatory sentencing provisions for murder. We are of the firm view that the maximum penalty for the crime of murder should remain as one of life imprisonment but that it should not be mandatory, that determinate sentences be available and that the minimum non-parole periods be repealed to enable the determination of the correct sentence by the instinctive synthesis of all relevant considerations.

[17] *R v Darren Halfpenny* SCC 21136189, Sentencing Remarks, delivered 3 July, 2012.

In the alternative, s.53A should be amended to allow for a non-parole period of less than 20 years for an offence below the middle range of objective seriousness and allowing, without prescription, for other matters such as an early plea and cooperation to be given effect.

Mandatory sentencing for sexual offences

The NTLAC agrees with all the matters referred to in the Consultation paper in respect to the mandatory sentencing for sexual offences. We note that there are always cases which have unusual or particular circumstances and where a term of imprisonment is inappropriate. For example, in the rare case of bestiality the offender invariably suffers from an intellectual disability and a sentence of imprisonment is inappropriate. There are many forms of sexual offending which result in short sentences which have negative impacts on the offender and do not serve the interest of either the offender or the community such as cases involving under age consensual sexual relations contra s.127 (1) (a), where for example, the offender is aged 16 years and the victim is aged 15 years and 6 months. The 16 year old offender will receive a conviction and a prison sentence (albeit to the rising of the court). If the offender was 19 years old and in a consensual relationship with the 15 year old female he would in addition be automatically a reportable offender pursuant to the *Child Protection (Offender Reporting and Registration) Act* 2004 and will be required to register and report to the police for a period of at least 8 years. The NTLAC supports amendment of this *Act* to give a sentencing judge the power to exempt a person from having to register and report pursuant to *the Child Protection (Offender Reporting and Registration) Act.*

In addition, the NTLAC, supports the repeal of s 55 of the *Sentencing Act* which stipulates a mandatory non-parole period for certain sexual offences. If a sentencing judge decides that a non-parole period is warranted then the non-parole period must not be less than 70% of the head sentence. In most cases this is not an issue, but there is always a situation where a lower non-parole period would be appropriate and just in the circumstances of the particular case and the court should have the necessary flexibility.

Questions for stakeholder Comment

The NTLAC answers the questions as follows:
4.1
Yes.

4.2
Yes.
4.3
Yes.
4.4
No.

Community Based Sentencing Options

The NTLAC participated in and contributed to the Australian Law Reform Commission (ALRC) inquiry in 2017: *Pathways to Justice –Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 1333, 2017). The NTLAC endorses the key findings in that Report and recommends the Report and findings to the NT Law Reform Committee. In addition the NTLAC makes the following observations:

The NTLAC supports greater use of community based sentences but only if properly resourced. The NTLAC previously supported the Community Courts when they were operational. The remoteness and accessibility issues of our communities in the NT require agility and versatility in crafting suitable community based sentences to suit the conditions or people will fail on the orders. Working with communities to establish culturally appropriate and realistic community based orders which can accommodate offenders with complex needs should be a priority. The NTLAC is aware of the alternative to custody project currently being implemented in Alice Springs for female offenders and we are very optimistic that projects such as this, if extended and funded properly, would be of great benefit in reducing recidivist offending. NTLAC also understands that an alternative to custody project is being established through non–government funding on Groote Eylandt, which is of particular significance as it will be an alternative to prison which is community owned and funded. We look forward to the establishment of this centre as it may well provide a blue print for other community based alternatives to imprisonment.

Until community based sentences become a properly resourced and viable option for those in remote communities fully and partially suspended sentences must be retained as a sentencing option.
The different approach to community based sentencing in NSW and Victoria is currently out of the reach of the NT: we do not have the resources in our Correctional Services. This Inquiry should make a very strong recommendation

to the NT Government to commit to the necessary resources that are so obviously needed to decrease our current and growing prison population by providing achievable alternatives to incarceration.

In the meantime the NTLAC supports removing from the current sentencing legislation those impediments to flexibility in sentencing as well as essentially unfair provisions such as on revocation of a Home Detention order not being able to give any credit for the successful completion of part of that order.[18] We also support community based orders and community custody orders for those convicted of violent offending where this is appropriate rather than such offenders being automatically excluded from any consideration of such an order.

Questions for stakeholder comment

5.1 No
5.2 No
5.3 Yes, but to be facilitated there needs to be an injection of resources into the communities to be able to accommodate such sentencing.
5.4 No. Properly trained correctional officers, preferably from the community, need to be based in the community.
5.5 The offences for which such orders can be used are restricted. The courts do not use them as the necessary infrastructure and resources are not available in all communities. Additionally, there needs to be legislative direction to courts to utilise such orders as a preference to custodial sentences.
5.6 Yes. Suspended sentences should only be replaced by proper alternatives such as exist in NSW.
5.7 No. A Justice Reinvestment pilot project should be trialled in the NT. Again, resources need to be invested in communities to enable non-custodial sentencing options to succeed including, importantly, drug and alcohol rehabilitation on country.
5.8 It could be but only with all the necessary resources invested in our local and remote communities.
5.9 Justice reinvestment.

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[18] *Sentencing Act* 1995, s48 (6)(b).

Conclusion

The NTLAC is aware of the considerable amount of literature on the efficacy of mandatory sentencing and is in no doubt that the NTLRC is also cognizant of the literature. We do refer the Committee to the 2014 paper prepared by the Australian Law Council: https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf.

The NTLAC is also aware of the need to improve our sentencing options in the NT and is hopeful that, if mandatory sentencing is repealed as we strongly urge it should be, then improving the non-custodial sentencing options, adopting therapeutic sentencing courts, and piloting a Justice Reinvestment model in a particular remote community, can be given the priority, the necessary attention and the resources required.

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