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Northern Territory Law Reform Committee
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Dear Committee,

Mandatory Sentencing and Community Based Sentencing Options Consultation Paper

Thank you for the opportunity to make a submission on the Mandatory Sentencing and Community Based Sentencing Options Consultation Paper.

Background

The Northern Territory Anti-Discrimination Commission (ADC) administers the *NT Anti-Discrimination Act 1992 (the Act)*. We are a very small office charged with promoting the recognition of equality of opportunity in the Northern Territory (NT). The NT Community Visitor Program is also auspiced by the ADC and monitors mental health facilities and forensic disability facilities.

Summary of recommendations

Repeal mandatory sentencing for all offences in the NT.

The conventional sentencing approach of Judges exercising their discretion, guided by the legislative framework is the best way to address community concerns for safety, rehabilitation, restoration to victims and the community for offending, where there is a need to separate an offender for a time from the community.

In all other circumstances, a far greater number and tailored community sentencing options need to be available. Commencing with diversionary programs aimed at preventing or reducing contact with the criminal justice system, as well as an array of place-based community sentencing options. A combination of these options should be available for Judges so that the community order fits the offender and their offending, while addressing the underlying causes of offending that includes treatment and rehabilitation of the offender and restoration of victims and the community.

Areas for comment

1. Mandatory Sentencing disproportionately impacts Aboriginal Territorians

The repeal of mandatory sentencing for all offences is necessary as a crucial part of the overarching strategy to reduce Aboriginal incarceration. Mandatory sentencing increases incarceration rates. Aboriginal people are disproportionately incarcerated, so any measure that increases incarceration rates has a greater impact on Aboriginal people.

There is a need for more data and data analysis to measure and reveal the disproportionate impact of mandatory sentencing on Aboriginal people as well as other groups protected by the *Anti-Discrimination Act 1992*. The data and any analysis needs to also consider the intersectionality of attributes and the cumulative impact of levels of disadvantage arising from this intersectionality, e.g. an Aboriginal man with cognitive impairment etc.

As stated in the “Pathways to the Northern Territory Aboriginal Justice Agreement” at page 50¹, “the lack of robust data prevents an analysis of the extent to which mandatory sentencing provisions disproportionately impact on Aboriginal Territorians”.

Mandatory sentencing removes the proper consideration of a person’s personal characteristics and circumstances, which are usually taken into account in the synthesis that is sentencing. Personal characteristics do not carry the same weight in sentencing for offences where mandatory sentencing applies and are outweighed by the need for a statutory minimum to be imposed. There is also the additional burden of leading evidence to establish exceptional circumstances, if a mandatory sentencing is to be avoided.

An area of increasing concern is the high level of incarceration of Aboriginal women. The majority of women have a primary caring role for children. This is an area that needs additional research and acknowledgement in the NT. The Australian Institute of Health and Welfare paper published in November 2020, titled “The health and welfare of women in Australia’s prisons”, sets out the backgrounds of women prisoners in Australia; $\frac{3}{4}$ had recently used illicit drugs, and nearly two in three female prison entrants had received a mental health diagnosis.²

The female prison population has grown faster than the male population over the last 10 years.³ Further, Indigenous women were imprisoned at a much higher rate than non-Indigenous women, 453 or 24 per 100,000 of the adult female population respectively.⁴

¹ Pathways to the Northern Territory Aboriginal Justice Agreement p50

² Australian Institute of Health and Welfare paper “The health and welfare of women in Australia’s prisons” p1

³ Australian Institute of Health and Welfare paper “The health and welfare of women in Australia’s prisons” p2

⁴ Australian Institute of Health and Welfare paper “The health and welfare of women in Australia’s prisons” p4

Women prisoners are more likely than male prisoners to experience mental health problems, more likely to have a history of physical and sexual abuse than men and experience drug and alcohol dependence at higher rates than men.⁵

Other considerations in the removal of mandatory sentencing in increased incarceration and the compounding effect of such a measure is that “children are more likely to become involved with the criminal justice system if their parents have been involved in the system” (Troy et al., 2018).⁶ Many women in prison are mothers and are the primary carers for their children. More than half (54%) in this survey had a least one dependent child.

It is clear that in sentencing women the matters to be taken into account and the impact of the sentence are very different from for men including the impact of mandatory sentencing.

2. Domestic and Family Violence

The removal of mandatory sentencing for Domestic and Family Violence requires additional consideration, due to the prevalence of domestic and family violence and in particular the impact on Aboriginal women in the NT. Aboriginal women are the victims of violence in over 70% of all reported cases in the NT..

The current seven day minimum sentence serves many purposes; including education, acknowledging the seriousness of the violence within the wider community, and shifting attitudes from treating it as ‘just a domestic’ to it being seen as a crime that the whole community condemns. Further, in practical terms it is important to provide a break for the women and children from the pattern of violence, to regather, to move etc., and to support the overarching aim to protect women and children.

Australia’s National Research Organisation for Women’s Safety Limited (ANROWS),⁷ is the third arm of Australia’s strategy to support the reduction of domestic violence, they commission research. Their research with Aboriginal women and families and the array of approaches and options needs to be reviewed in detail so these evidence based approaches can be utilised in the NT to keep the community safer.

The removal of mandatory sentencing in this context, more than others, needs to be done in conjunction with having in place a broad range of community sentencing options, as the domestic and family violence incidents are part of a coercion and control the pattern of behaviour. A starting point is the options available in the Alice Springs model, which are being trialled, including residential men’s behaviour change programs. ANROWS has also commissioned and made available research on perpetrator programs, including evidence based intersectional programs.

⁵ Australian Institute of Health and Welfare paper “The health and welfare of women in Australia’s prisons” p6 and p10

⁶ Australian Institute of Health and Welfare paper “The health and welfare of women in Australia’s prisons” p5

⁷ <https://www.anrows.org.au/>

3. Drug offences

With the array of drug offences criminalised in the NT, consideration needs to be given to what behaviour should be considered criminal. This approach is explored in the Queensland Productivity Commission report titled “Imprisonment and Recidivism August 2019”, in particular at recommendation 5, broadly titled “reduce the scope of criminal offences”.⁸

Aspects of the current mandatory sentencing in drug offences are particularly harsh such as the need to serve 70% of any sentence imposed. As set out above, other jurisdictions acknowledge drug addiction as a health issue and are resourcing diversionary programs to ensure these matters are dealt with outside the criminal justice system.

4. Community based sentencing orders

Diversion

The discussion should not just include community based sentencing orders but should also include implementation of community led and place based diversion programs, to either prevent or minimise early contact with the criminal justice system.

The Pathways to the Northern Territory Aboriginal Justice Agreement Aboriginal Justice Agreement talks about the features diversion needs to include such as culturally appropriate treatment and rehabilitation programs involving Aboriginal leaders etc.⁹ It also refers to the need for programs for youth and for women etc.

The Queensland Productivity Commission report also refers to expanding diversionary options beyond youth. In the NT, a review of Police and Court data should be undertaken to ascertain the use of diversion for adults.

Adult diversion programs particularly aimed at addressing drug abuse are increasing in prominence in other jurisdictions, such as Law Enforcement Assistance Diversion (LEAD).¹⁰

What type of community-based sentencing options/features?

The need for community sentencing options to be available in communities where offending or offenders reside and to be community led is called for in the Australian Law Reform Commission’s, Pathways to Justice Report in Chapter 7.¹¹

In practical terms, the NT has commenced to implement and design two alternatives to custody in the women’s faculty in Alice Springs and the Groote Eylandt option for young men. However, there needs to be more than just residential options, other options to enable victim and community restoration, options allowing offenders to remain connected to community, which are factors that assist in combatting

⁸ Queensland Productivity Commission Imprisonment and Recidivism summary report August 2019 p38

⁹ Department of the Attorney General and Justice, Pathways to the Northern Territory Aboriginal Justice Agreement, p51

¹⁰ <https://www.leadbureau.org/>

¹¹ Australian Law Reform Commission Pathways to Justice, An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples ALRC Report 113 December 2017 pp 229 - 272

recidivism, not just placing offenders into short-term custodial orders where an increase in criminogenic effects is seen.

The Queensland Productivity Commission's Report comments on findings such as:

- Well-designed community corrections (appropriately funded) can reduce recidivism without compromising community safety.
- Also in the summary report at page 25, they outline the features and benefits of community corrections orders.
- They recommend a wider array of community orders and a capacity to combine various options, addressing:
 - Treatment
 - Education and training
 - Employment.
- Victim and community restoration approaches have the dual benefit that they reduce recidivism and involve victims/community.

Programs that address causes of offending, including early intervention, prevention of offending, rehabilitation and restoration if offending occurs, all contribute to the aim of long-term community safety.

Community based sentencing options should not just be provided by government through community corrections but also be provided by Aboriginal Controlled organisations, or non-government providers.

Bold thinking is needed so that:

- Programs or options that are offered deal with the particular issues of concern.
- The options that are available are mobile, so that they can be offered at a remote community or homeland.
- The person can access these sentencing options rather than being imprisoned, having regard to the nature of their offending and its objective seriousness.

There is a need to research and then evaluate a range of alternative community based sentencing options, designed for the NT and in particular for Aboriginal people in the NT.

It is time for community-based orders to be Aboriginal community led, holistic, strengths-based, trauma-informed and grounded in Aboriginal culture and knowledge.

Conclusion

There is a need for bold leadership for the long-term safety and wellbeing of the whole NT community, such as that contained in the Queensland Productivity Commission August 2019 Report titled "Imprisonment and Recidivism" not short-term reactive options.

Mandatory sentencing for all offences should be repealed. Sentencing should rely on established sentencing principles and discretion exercised by NT Judges who are appointed for their expertise and experience and where appeal mechanisms are in place to review decisions made.

Innovative and community directed sentencing options are needed to address the underlying causes of offending, not just the failures of the system. We need alternatives to police and correction responses to behaviour of concern in the community.

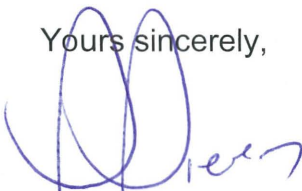
We need alternatives to imprisonment, if there is a need to separate people from the mainstream community. Imprisonment must be a last resort, not a catch-all. We must recognise the broader context and have a whole of government approach to address poverty, homelessness or chronic overcrowding and other social and health issues.

Other structural responses such as paperless arrests that lead to increased incarceration also need to be removed.

Reconsideration must be given to whether matters currently designated criminal offences, such as drug offending should be treated as health issues and resources reallocated to deal with underlying trauma, intergenerational and other, disabilities, mental health and wellbeing concerns such as self-medicating etc.

It is time to be bold and courageous, to step away from the last 30 years of measures such as mandatory sentencing that increase incarceration and are failing our community.

Yours sincerely,



Sally Sievers

Northern Territory Anti-Discrimination Commissioner

15 December 2020