

**NORTHERN TERRITORY LAW REFORM COMMITTEE**

**MANDATORY SENTENCING AND COMMUNITY-  
BASED SENTENCING OPTIONS  
FINAL REPORT**

Report No 47

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## RECOMMENDATIONS

**Recommendation 3-1:** The Northern Territory Government should repeal the current mandatory minimum sentencing provisions in Part 3, Division 6 and Division 6A of the *Sentencing Act 1995*, ss 121 and 122 of the *Domestic and Family Violence Act 2007* and s 37(2) of the *Misuse of Drugs Act 1990*.

**Recommendation 3-2:** The Northern Territory Government should repeal the mandatory minimum non-parole periods in ss 54, 55 and 55A of the *Sentencing Act 1995*.

**Recommendation 3-3:** Should the Northern Territory Government not accept recommendation 3-2 as it applies to s 54 of the *Sentencing Act 1995*, that provision should be amended so as to provide that a non-parole period of 50% of a head sentence should be considered as a standard non-parole period, and that if a court determines to impose a lower non-period, it must give reasons for doing so.

**Recommendation 4-1:** The Northern Territory Government should abolish the penalty of mandatory life sentence for murder. The maximum penalty for murder should be imprisonment for life with a power in the court to impose a lesser sentence if the circumstances of the offence or of the offender warrant that course.

**Recommendation 4-2:** The Northern Territory Government should abolish 'special' minimum non-parole periods applicable to sentencing for the crime of murder. The Supreme Court should have the power to impose not only an appropriate sentence but also an appropriate non-parole period.

**Recommendation 4-3:** Should the Northern Territory Government not accept recommendation 4-2, the 'exceptional circumstances' presently specified in s 53A(7) *Sentencing Act 1995* should be made less restrictive, for example, by allowing the Supreme Court to fix a non-parole period of less than 20 years for offending in the low range of objective seriousness (or, to adopt the words of s 53A(2): 'an offence below the middle of the range of objective seriousness').

**Recommendation 4-4:** The Northern Territory Government should repeal s 78F of the *Sentencing Act 1995*.

**Recommendation 4-5:** The Northern Territory Government should repeal ss 55 and 55A of the *Sentencing Act 1995*.

**Recommendation 5-1:** The Northern Territory Government should pursue a justice reinvestment strategy to ensure that community correction programs are adequately funded and, where appropriate, include specific funding allocated to support victims of

crime to manage their ongoing safety and wellbeing while the offender is in the community.

**Recommendation 5-2:** The Northern Territory Government should maintain the current mix of community-based sentencing options, however, how such options are set out in the *Sentencing Act 1995* should be simplified.

## CHAPTER 1 – INTRODUCTION TO THE INQUIRY

### [1.1] Introduction

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

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

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

## [1.2] Background to the inquiry

The *Report of the Review of the Northern Territory Department of Correctional Services: Summary, Findings and Recommendations* notes:<sup>1</sup>

The Northern Territory imprisonment rate is by far the worst in Australia and ranks with the world's worst, with the Territory accounting for about 1% of the Australian population but about 5% of all prisoners. Even worse, in our view, is that fact that 85% of the adult prisoner population and 95% of youth detainees are Indigenous people with a very high recidivism rate.

While the statistics tell a discouraging tale, '[f]rom June 2019 to 30 June 2020, total prisoners [in the Northern Territory] decreased by 6% (97) to 1,634 ... proportionally the second largest decrease after Victoria'.<sup>2</sup> The total percentage of Aboriginal and Torres Strait Islander prisoners in the Northern Territory also decreased by 5 per cent (72) during this period to 1,371.<sup>3</sup>

The Northern Territory's mandatory sentencing laws contribute to the imprisonment rate. The Australian Law Reform Commission ('ALRC') in its report, *Pathways to Justice – an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, observed:<sup>4</sup>

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

There is little question that mandatory sentencing laws have a disproportionate impact on the Northern Territory's First Nations peoples. During 2019-20, 9,690 defendants' matters were finalised in the Northern Territory criminal courts. Of the matters finalised, 86 per cent (8,304) had a guilty outcome. 79 per cent of the defendants finalised in the Northern Territory identified as Aboriginal and Torres Strait Islander.<sup>5</sup> While not all of the defendants' matters finalised related to crimes which attracted a

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

<sup>2</sup> Australian Bureau of Statistics ('ABS'), *Prisoners in Australia*, released 3 December 2020 and available at: <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2020>> (accessed 15 February 2021).

<sup>3</sup> Ibid.

<sup>4</sup> Australian Law Reform Commission ('ALRC'), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017), 273 [8.1].

<sup>5</sup> ABS, *Criminal Courts, Australia, 2019-20*, released 25 March 2021 and available at: <<https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/2019-20>> (accessed 26 March 2021).

mandatory sentence, 48 per cent (4,008) received a custodial order<sup>6</sup> The statistics indicate that ‘the most common sentence for Aboriginal and Torres Strait Islander defendants was a custodial sentence, with 64%... sentenced to custody in a correctional institution (2,623 defendants)’.<sup>7</sup> Finally, rates of incarceration among Aboriginal and Torres Strait Islander defendants has a disproportionate impact on those living in regional or remote communities.<sup>8</sup>

The Committee is cognisant of the fact that there is legitimate concern in the community over incidents of crime, and particularly property crime and domestic and family violence. Rarely a week passes where headlines such as ‘Northern Territory Break-ins at highest level in more than a decade, with Alice Springs leading the pack’,<sup>9</sup> or, ‘Out of Control: Shocking CCTV vision sparks warning that frustrated residents will take matters into their own hands’,<sup>10</sup> grace the front page of Northern Territory newspapers or feature on television news. Behind the headlines are stories of individuals whose home life or business have been severely disrupted by criminal offending.

The question arises, therefore, whether mandatory sentencing is a necessary and effective way to deal with such offending, and other serious offending such as domestic violence, sexual offences, drug offences or murder. Does it add beneficially to the application of long-standing sentencing principles by judges who are in a position to carefully assess the particular circumstances of each case? Alternatively, are there community-based sentencing options that can address more effectively some or all such offending?

### **[1.3] Overview of the Report**

In a Consultation Paper released in October 2020, the Committee sought the views of professionals, agencies and individuals in the Northern Territory and other jurisdictions on the issues of mandatory sentencing in the Northern Territory and community-based sentencing options. The Consultation Paper provided some background information relevant to the inquiry and posed questions which assisted the Committee in forming its recommendations for reform.

The Report is divided into five chapters. Chapter 1 provides some background to the inquiry and provides information about the law reform process. Chapter 2 provides an overview of sentencing in the Northern Territory. Chapter 3 focuses specifically on

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<sup>6</sup> Ibid. ‘The most common principal offence for both Aboriginal and Torres Strait Islander and non-Indigenous defendants [in the Northern Territory] was [a]cts intended to cause injury (39% or 2,215 and 26% or 365, respectively)’.

<sup>7</sup> Ibid.

<sup>8</sup> ALRC (n 4), 235 [7.19].

<sup>9</sup> Jano Gibson, ‘Northern Territory break-ins at highest level in more than a decade, with Alice Springs leading the pack’. *ABC News* (online, 2 September 2019) <<https://www.abc.net.au/news/2019-09-03/northern-territory-break-in-levels-highest-in-decade/11457442>>.

<sup>10</sup> Judith Aisthorpe and Will Zwar, ‘Out of Control: Shocking CCTV vision sparks warning that frustrated residents will take matters into their own hands’, *NT News* (Darwin, 28 August 2019).

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

#### **[1.4] The Law Reform Process**

The Committee is a volunteer, non-statutory committee established to advise the Attorney-General on law reform in the Northern Territory. The members of the Committee are noted at the front of this report. It is the role of the Committee to make recommendations for reform of the law the subject of an inquiry. Implementation of such recommendations is a matter for the Northern Territory Government.

The initial draft of Committee reports is prepared by a sub-committee of the full Committee. The sub-committee with carriage of this reference consisted of the following members:

- Professor Les McCrimmon (President);
- Mr Russell Goldflam (Deputy President);
- Justice Peter Barr;
- Dr John Lowndes;
- Ms Peggy Cheong;
- Mr Ron Levy;
- Ms Eilish Copelin (Executive Officer to the Committee).

The report prepared by the sub-committee then must be approved by the full Committee before submission to the NT Attorney-General.

In all of our inquiries an attempt is made to consult with relevant stakeholders. Given the importance of the subject-matter of this inquiry to residents of the Northern Territory, a Consultation Paper was prepared and circulated widely to inform submissions to the inquiry. The questions for stakeholder comment contained in the Consultation Paper are attached to this report as Appendix 1.

The Committee received 25 written submissions, including from the following individuals and organisations:

1. the Australian Law Reform Commission;
2. Glenice Grieve;
3. Sisters Inside Inc.;
4. Honourable Acting Justice Dean Mildren AM RFD;
5. Territory Criminal Lawyers;
6. Felicity Gerry QC and Julian Murphy;
7. Mary Keaney and Gerard Elmore;
8. Rene Laan;
9. the Office of the Children's Commissioner;
10. Danila Dilba Health Service;
11. Jesuit Social Services;
12. North Australian Aboriginal Justice Agency;
13. Law Society Northern Territory;
14. Northern Territory Police, Fire and Emergency Services;
15. Northern Territory Legal Aid Commission;
16. the Anti-Discrimination Commission;
17. Criminal Lawyers Association of the Northern Territory;
18. the Department of Territory Families, Housing and Communities;
19. Aboriginal Peak Organisations Northern Territory;
20. Community Corrections, Northern Territory Correctional Services;
21. Northern Territory Women's Legal Services;
22. Indigenous Labor Network;
23. Northern Territory Bar Association;
24. the Northern Territory Police Association;
25. confidential.

The Committee also conducted consultations with the Northern Territory Police, the Northern Territory Police Association, the Crime Victims Advisory Committee and Community Corrections, Northern Territory Correctional Services.

## CHAPTER 2 – OVERVIEW OF SENTENCING LAWS IN THE NORTHERN TERRITORY

### [2.1] Introduction

When discussing sentencing laws, it is important to distinguish between the sentence, which 'is the penalty or punishment for an offence',<sup>11</sup> and sentencing law, which is 'the body of statute and common law which governs the sentencing process'.<sup>12</sup> With respect to the former, it is generally accepted that the rationales for punishment of offenders are as follows:<sup>13</sup>

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

All of the above rationales for punishment are embodied in s 5(1) of the *Sentencing Act 1995*. As that section stipulates, such rationales are the 'only purposes for which

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<sup>11</sup> Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2<sup>nd</sup> ed, 2012), 283.

<sup>12</sup> *Ibid.*

<sup>13</sup> New South Wales Law Reform Commission, *Sentencing* (Report No 79, December 1996), [14.12]. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006), [2.1]; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006), [4.1]-[4.22].

sentences may be imposed on an offender'. Factors to which the court must have regard are set out in s 5(2) and include 'the maximum and any minimum penalty prescribed for the offence',<sup>14</sup> the aggravating factors that make the offending more serious, and the mitigating factors that may lessen the seriousness of the offending.

It has been noted that, while the predominant rationale for sentencing can change over time, in the Northern Territory the prevailing rationale has been retribution.<sup>15</sup> As Gray and Blokland noted in 2012:<sup>16</sup>

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

This is not to suggest that alternatives to imprisonment are absent from the Northern Territory's sentencing regime,<sup>17</sup> however, as the imprisonment rates referred to in Chapter 1 indicate, the emphasis on retribution remains. How such an emphasis accords with the well-recognised principle of criminal law that a sentence of imprisonment should be used by the court only as a last resort<sup>18</sup> is explored in Chapters 3 and 4.

## **[2.2] Sentencing principles**

In addition to the rationales for punishment, sentencing principles have developed over time, through legislation and common law, and form the basis of sentencing decisions. As the Victorian Sentencing Advisory Council notes, these principles include:<sup>19</sup>

- parsimony – the sentence must be no more severe than is necessary to meet the purposes of sentencing;
- proportionality – the overall punishment must be proportionate to the gravity of the offending behaviour;
- parity – similar sentences should be imposed for similar offences committed by offenders in similar circumstances;

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<sup>14</sup> *Sentencing Act 1995* s 5(2)(a).

<sup>15</sup> Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2<sup>nd</sup> ed, 2012), 284.

<sup>16</sup> *Ibid.*

<sup>17</sup> See Chapter 5.

<sup>18</sup> *Dinsdale v The Queen* (2000) 202 CLR 321, [14] ('*Dinsdale*'). While the High Court in *Dinsdale* was applying the *Sentencing Act 1995* (WA), it has been held that the same principle applies in the Northern Territory. See *Mamarika v Ganley* [2013] NTSC 6, [22].

<sup>19</sup> Sentencing Advisory Council, *Sentencing Principles, Purposes, Factors* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors>>.

- totality – where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour.

### [2.3] Conclusion

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

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

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

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

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

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

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

...where a variety of considerations, often tending in opposing directions, operate in the context of a statutory maximum, there must finally be a quantification of the sentence to be imposed. There must be a synthesising of the relevant factors. In that process, greater and lesser weight will be allocated to some factors depending on their

relevance to the person convicted and his or her crime. Ultimately, community and legal values are translated into a number of years, months and days. That process must involve an instinctive judgment.<sup>20</sup>

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

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

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

The question of mandatory non-parole periods contained in Part 3, Division 5, Subdivision 3 of the *Sentencing Act 1995* also are addressed in this report. While mandatory non-parole periods were not referred to specifically in the Terms of Reference for this inquiry, they do in effect constitute a form of mandatory sentencing of offenders because they impact on the length of time an offender is imprisoned and they constitute a legislative restriction on the discretion of the sentencing judge. Consequently, they are discussed in Chapters 3 and 4.

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

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<sup>20</sup> *Markarian v The Queen* (2005) 228 CLR 357, [73].

## CHAPTER 3 – MANDATORY SENTENCES OTHER THAN MURDER OR SEXUAL OFFENCES

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

### [3.1] Overview of mandatory sentencing provisions

#### [3.1.1] *Aggravated property offences*

Part 3, Division 6 of the *Sentencing Act 1995* ('the Act') prescribes mandatory sentencing for 'aggravated property offences'.<sup>21</sup> Section 78A of the Act states that the purpose of Part 3, Division 6 is to ensure that community disapproval of persons committing aggravated property offences is adequately reflected in the sentences imposed on those persons. Section 78B creates the mandatory sentencing regime in relation to aggravated property offences. That section provides:

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

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

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

Although s 78B creates a mandatory sentencing regime, it gives the court some discretion as to the type of disposition to be imposed, namely a community work order,

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<sup>21</sup> 'Aggravated property offence' is defined in the *Sentencing Act 1995*, s 3 to mean any of the following:

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

a home detention order or an actual term of imprisonment. However, the section gives no guidance as to how that discretion is to be exercised.

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

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

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

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

### **[3.1.2] Violent offences**

Part 3, Division 6A of the Act prescribes mandatory sentencing for violent offences. Section 78C of the Act provides that a 'violent offence' means:<sup>22</sup>

- (a) an offence against a provision of the Criminal Code listed in Schedule 2 (of the Act<sup>23</sup>); or
- (b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:
  - (i) a law that has been repealed; or
  - (ii) a law of another jurisdiction (including a jurisdiction outside Australia).

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<sup>22</sup> *Sentencing Act 1995* s 78C.

<sup>23</sup> Provisions of the Criminal Code listed in Sch 2 include, among others: s 54 (Terrorism); s 55 (Contribution towards acts of terrorism); s 155A (Assault, obstruction etc of persons providing rescue, medical treatment or other aid); s 156 (Murder); s 160 (Manslaughter); s 161A (Violent act causing death); s 165 (Attempt to murder); s 166 (threats to kill); s 175 (Disabling in order to commit indictable offence); s 176 (Stupefying in order to commit indictable offence); s 177 (Acts intended to cause serious harm or prevent apprehension); s 181 (Serious harm); s 182 (Attempting to injure by explosive substances); s 185 (Setting man-traps); s 186 (Harm).

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

A 'level 5 offence' is:

- (a) an offence against s 181 of the Criminal Code;<sup>24</sup>
- (b) an offence against s 155A (if the offender assaulted the other person), 186, 188 (if the offence is committed in circumstances mentioned in section 188(2), other than paragraph (k)), 188A, 189A, 190, 191, 193 or 212 of the Criminal Code if:
  - (i) commission of the offence involves the actual or threatened use of an offensive weapon (as defined in section 1 of the Criminal Code);<sup>25</sup> and
  - (ii) the victim suffers physical harm<sup>26</sup> as a result of the offence.

A 'level 4 offence' is an offence against s 188A or s 189A of the Criminal Code provided the victim suffers physical harm<sup>27</sup> as a result of the offence. A 'level 3 offence' is an offence against s 188 of the Criminal Code provided it is committed in circumstances mentioned in s 188(2) (other than paragraph (k)). A 'level 2 offence' is an offence against s 186 of the Criminal Code provided the victim suffers physical harm<sup>28</sup> as a result of the offence. A 'level 1 offence' is any other violent offence.

Part 3, Division 6A, Subdivision 2 of the Act prescribes mandatory terms of imprisonment in respect of all levels of violent offences. If an offender is found guilty of a level 5 offence but has not been previously convicted of a violent offence, the court must impose a minimum sentence of three months actual imprisonment.<sup>29</sup> The minimum sentence of actual imprisonment is increased to 12 months if an offender is found guilty of level 5 offence and has previously been convicted of a violent offence (whenever committed).<sup>30</sup>

In the case of an offender who is found guilty of a level 4 offence (whether or not the offender has been previously convicted of a violent offence), the court must impose a minimum sentence of three months actual imprisonment.<sup>31</sup>

If an offender is found guilty of a level 3 offence, the victim having suffered physical harm,<sup>32</sup> and the offender has not previously been convicted of a violent offence, the

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<sup>24</sup> Unlawfully causing serious harm to another.

<sup>25</sup> An 'offensive weapon' means 'any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person.'

<sup>26</sup> Section 1A(2) of the Criminal Code provides that 'physical harm' includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.

<sup>27</sup> Criminal Code s 1A(2).

<sup>28</sup> Ibid.

<sup>29</sup> *Sentencing Act 1995* s 78D.

<sup>30</sup> Ibid s 78DA.

<sup>31</sup> Ibid s 78DB.

<sup>32</sup> Criminal Code s 1A(2).

court must impose a term of actual imprisonment.<sup>33</sup> In such cases, the term of imprisonment is not specified in the section. However, where an offender is found guilty of a level 3 offence and has previously been convicted of a violent offence (whenever committed) the court must impose a minimum sentence of three months actual imprisonment.<sup>34</sup>

In the case of an offender who is found guilty of a level 2 offence, the court must impose a term of actual imprisonment.<sup>35</sup>

If an offender is found guilty of a level one offence and has previously been convicted of a violent offence, the court must impose a term of actual imprisonment.<sup>36</sup>

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

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

Where the court is required to impose a minimum sentence of a specified period of actual imprisonment, the court:<sup>37</sup>

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

However, if the offender is a youth (as defined in s 6 of the *Youth Justice Act 2005*), the minimum terms of actual imprisonment prescribed by Part 3, Division 6A, Subdivision 2 of the Act do not apply.<sup>38</sup> The court must instead impose a term of actual imprisonment in accordance with s 78DG of the Act.

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<sup>33</sup> *Sentencing Act 1995* s 78DC.

<sup>34</sup> *Ibid* s 78DD.

<sup>35</sup> *Ibid* s 78DE.

<sup>36</sup> *Ibid* s 78DF.

<sup>37</sup> *Ibid* s 78DH.

<sup>38</sup> *Ibid* s 78DH(2)(a).

### [3.1.3] *Exceptional circumstances*

The minimum sentence provisions in Part 3, Division 6A, Subdivision 2 of the Act are subject to an 'exceptional circumstances' exemption.<sup>39</sup> The effect of the exemption is that the prescribed minimum sentences are presumptive and can be displaced by the demonstration of 'exceptional circumstances'. In other words, if the court is satisfied the circumstances of the case are exceptional, the court is not required to impose the prescribed minimum term of actual imprisonment. In those circumstances, the court is instead mandated to impose an actual term of imprisonment.<sup>40</sup>

In deciding whether the circumstances of the case are exceptional, the court may have regard to:<sup>41</sup>

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

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

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

In *R v Duncan* (2015) 34 NTLR 201 ('*Duncan*'), the Court of Criminal Appeal considered the 'exceptional circumstances' exemption at length. The Court reviewed a number of authorities that have attributed meaning to the expression 'exceptional circumstances', and noted the following:<sup>42</sup>

- (a) the word 'exceptional' must be construed as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely or normally encountered: *R v Kelly* [2000] 1 QB 198 at 208; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];

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<sup>39</sup> *Ibid* s 78DI.

<sup>40</sup> *Ibid* s 78DI(2)(b).

<sup>41</sup> *Ibid* s 78DI(3).

<sup>42</sup> *R v Duncan* (2015) NTLR 201 ('*Duncan*'), [25] – [26].

- (b) exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2001] 1 WLR 1262; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];
- (c) exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [26]; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66];
- (d) beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *AWA v Independent News Auckland* [1996] NZLR 184 at 186; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66].

In *Duncan*, the Court of Criminal Appeal went on to observe that when considering whether exceptional circumstances arise:<sup>43</sup>

...the whole of the circumstances of the particular case must be considered. The 'mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances'<sup>44</sup> for the purpose of the legislation. Although individual factors may not be exceptional, the relevant factors, considered in combination, may amount to exceptional circumstances.<sup>45</sup> Whilst reasons should be given for the exercise of the discretion, the exercise remains part of the overall instinctual synthesis that is undertaken by the sentencing judge.

The content of the expression 'exceptional circumstances' in the mandatory minimum sentencing provisions of the *Sentencing Act* should not be filled by the ad hoc examination of individual cases.<sup>46</sup> In *Baker v The Queen*, Gleeson CJ observed:<sup>47</sup>

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

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<sup>43</sup> *Ibid* [27] – [29].

<sup>44</sup> *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273, [25].

<sup>45</sup> *Griffiths v The Queen* (1989) 167 CLR 372, 379; *Baker v The Queen* (2004) 223 CLR 513, 574.

<sup>46</sup> *Owens v Stevens* (unreported, Supreme Court, Vic, Hedigan J, No 6834 of 1991, 3 May 1991), 16-17 per Hedigan J.

<sup>47</sup> *Baker v The Queen* (2004) 223 CLR 513, 523.

These observations apply to the exceptional circumstances provided for in the *Sentencing Act*.<sup>48</sup>

It should be noted that the Court of Criminal Appeal in *Duncan* also said:<sup>49</sup>

It is important to appreciate that the [mandatory minimum sentencing] regime has application only where the sentence which would otherwise have been imposed is less than the legislatively prescribed mandatory minimum. If, having regard to all the surrounding circumstances, including: the circumstances of the offending; the circumstances of the offender; the maximum penalty and the terms of any other statutory requirement, the appropriate sentence exceeds the mandatory minimum sentence, then the need to consider exceptional circumstances does not arise.

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

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

Blokland J observed that in *Duncan*, the Court of Criminal Appeal emphasised that the question of satisfaction of 'exceptional circumstances' in the sentencing context involves the intuitive synthesis process.<sup>50</sup>

In dealing with the relationship between general principles of sentencing and the 'exceptional circumstances' exemption, Her Honour was not convinced that proportionality (an important sentencing principle) had no role to play in the assessment of whether the circumstances of the case were exceptional, commenting:<sup>51</sup>

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

Her Honour noted that the principle of proportionality was broadly understood to be embodied in s 5(1)(a) of the *Sentencing Act*, which provides that a purpose of sentencing is 'to punish the offender to an extent or in a way that is just in all the circumstances'.<sup>52</sup>

Her Honour at [40] concluded:

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<sup>48</sup> *Duncan* (n 42), [22].

<sup>49</sup> *Ibid* [22].

<sup>50</sup> *Orsto v Grotherr* (2015) 249 A Crim R 518, [23].

<sup>51</sup> *Ibid* [34].

<sup>52</sup> *Ibid* [20]

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

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

General sentencing principles, including proportionality can be relevant when assessing whether or not exceptional circumstances apply.<sup>53</sup> However, a mere disparity between the mandatory minimum term and the sentence the Court would impose in the absence of such a regime is alone not sufficient to amount to exceptional circumstances.

His Honour went on to quote from Blokland J's judgment in *Dhamarrandji v Curtis* [2014] NTSC 39 where it was noted the mandatory minimum terms 'must be given their full effect, however, this includes giving full effect to the broadly based 'exceptional circumstances' provision'.<sup>54</sup>

#### **[3.1.4] Drug offences**

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

- (2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without fine) is:
  - (a) 7 years imprisonment or more; or
  - (b) less than 7 years imprisonment but the offence is accompanied by aggravating circumstance,

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

In *Maynard v O'Brien* (1991) 78 NTR 16, Angel J held, at 22, that 'particular circumstances' as used in s 37(2) means, 'circumstances sufficiently noteworthy or out of the ordinary, relative to the prescribed conduct constituting the offence, or of the offender, to warrant a non-custodial sentence'. However, Angel J adopted the remarks of Asche CJ in *Fejo Ilett; Wilton v Ilett*<sup>55</sup> that 'such particular circumstances will be the exception rather than the rule'.<sup>56</sup>

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<sup>53</sup> *Dhamarrandji v Curtis* [2014] NTSC 39; *Orsto v Grotherr* [2015] NTSC 18.

<sup>54</sup> *Douglas v Dole & Ors* [2019] NTSC 80, [32], quoting *Dhamarrandji v Curtis* [2014] NTSC 39, [26].

<sup>55</sup> *Fejo v Ilett; Wilton v Ilett* (1991) 1 NTLR 27.

<sup>56</sup> *Maynard v O'Brien* (1991) 78 NTR 16, 22.

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

In agreeing with the view that s 37(2) is designed to reverse the normal approach to sentencing of first deciding non-custodial dispositions, Mildren J said:<sup>57</sup>

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

Mildren J rejected the view that 'particular' is to be equated to 'exceptional' and concluded as follows:<sup>58</sup>

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

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

### **[3.1.5] Breaches of domestic violence orders**

Section 121(1) of the *Domestic and Family Violence Act 2007* provides that if an adult is found guilty of an offence against section 120(1),<sup>59</sup> the offender is liable to a penalty

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<sup>57</sup> *Duthie v Smith* (1992) 83 NTR 21, 28.

<sup>58</sup> *Ibid* 30.

<sup>59</sup> Contravening a domestic violence order.

of 400 penalty units or imprisonment for 2 years. Section 121(2) requires the court to record a conviction and to sentence the offender to imprisonment for at least 7 days if the offender has previously been found guilty of the offence of contravening a domestic violence order.<sup>60</sup> However, the section is subject to subsection (3) which provides:

- (3) Subsection (2) does not apply if:
  - (a) the offence does not result in harm<sup>61</sup> being caused to a protected person; and
  - (b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

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

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

The effect of the mandatory sentencing provisions of ss 121(2) and 121(3) of the *Domestic and Family Violence Act 2007*, especially the 'particular circumstances' test, was comprehensively discussed by Riley J in *Midjumbani v Moore* (2009) 229 FLR 452. Riley J observed that s 121(3) of the *Domestic and Family Violence Act 2007* enables a court to avoid the imposition of the minimum 7 days imprisonment prescribed by s 121(2) if the circumstances specified in s 121(3) are satisfied.<sup>62</sup> The requirements of subsection (3) are 'cumulative and it is for an offender seeking to rely upon the provision to raise matters which may bring him or her within the ambit of the subsection'.<sup>63</sup>

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

In applying the section the court must consider whether it is 'not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence'. The first thing to notice is that the reference is to the

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<sup>60</sup> Section 121(4) provides that this mandatory sentencing provision does not apply to a police DVO that has not been confirmed by the court under Part 2.10 of the *Domestic and Family Violence Act 2007*.

<sup>61</sup> Criminal Code s 1A.

<sup>62</sup> *Midjumbani v Moore* (2009) 229 FLR 452, [12]. See also *The Queen v Anzac* [2020] NTSC 58.

<sup>63</sup> *Ibid*.

'circumstances of the offence' rather than of the offender. The respondent submitted that the provision is to be distinguished from similar directions provided for in the *Misuse of Drugs Act 1990* (NT) where, in s 37(2), there is reference to 'the particular circumstances of the offence or the offender'. ....

Notwithstanding the different wording, in my opinion the reference to 'the particular circumstances of the offence' should be given a wide interpretation to achieve the purpose of the legislation. Where appropriate such circumstance will include relevant circumstances of the offender. Such factors as immediate remorse, immediate cooperation with the authorities and an early plea of guilty may be so closely connected to the offender's culpability as to affect the seriousness of the offence.<sup>64</sup> ...

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

His Honour held, consistent with the similar 'particular circumstances' test under s 37(2) of the *Misuse of Drugs Act 1990*, that 'particular circumstances' as used in s 121(3) of the *Domestic and Family Violence Act 2007* meant circumstances 'sufficiently noteworthy or out of the ordinary to warrant a non-custodial sentence'.<sup>65</sup>

### **[3.1.6] Minimum non-parole period under the Sentencing Act 1995**

Under the *Sentencing Act 1995*, minimum non-parole periods constitute another form of minimum mandatory sentencing. Subject to the provisions governing the fixing of non-parole periods for the crime of murder,<sup>66</sup> where a court sentences an offender to be imprisoned for 12 months or longer, and the sentence is not suspended in whole or in part, the court must fix a non-parole period of not less than 50% of the period of imprisonment that the offender is to serve under the sentence.<sup>67</sup> Of course, the mandatory non-parole period only applies if the court considers the fixing of a non-parole period to be appropriate.<sup>68</sup>

Further, ss 55(1) and (3) of the *Sentencing Act 1995* mandate that when a court sentences a person in relation to drug offences or an offence of sexual intercourse without consent to a sentence of imprisonment of 12 months or longer, and considers that a non-parole period is appropriate, the non-parole period must not be less than 70% of the head sentence. Finally, s 55A of the *Sentencing Act* prescribes a mandatory minimum non-parole period of not less than 70% of the sentence imposed for a range of offences against persons under the age of 16 years.

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<sup>64</sup> *R v Crabbe* (2004) 150 A Crim R 523 at 543.

<sup>65</sup> *Midjumbani v Moore* (2009) 229 FLR 452, [24].

<sup>66</sup> This is dealt with in Chapter 4.

<sup>67</sup> *Sentencing Act 1995* s 54(1). However, this is subject to s 54(2) which does not permit a court to fix a non-parole period of less than 8 months.

<sup>68</sup> *Sentencing Act 1995* s 54(3).

### **[3.2] Issues concerning mandatory sentencing**

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

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

Proponents of mandatory sentencing provisions argue that mandatory sentencing laws:<sup>69</sup>

- deter individuals from offending;<sup>70</sup>
- denounce the proscribed conduct;
- ensure appropriate punishment of the offender;<sup>71</sup>
- protect the community through incapacitation of the offender; and
- promote consistency in sentencing.<sup>72</sup>

In addition, it is argued that mandatory sentencing provisions have community support and a popular mandate.<sup>73</sup> Mandatory sentencing provisions are also seen as a means of addressing community concerns that sentences handed down by courts are too lenient when sentencing offenders.<sup>74</sup>

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<sup>69</sup> See generally Law Council of Australia ('LCA'), *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014).

<sup>70</sup> For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that these provisions were intended to 'send a clear message to serious and repeat violent offenders that if they commit a violent offence they will serve genuine gaol time'. See Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

<sup>71</sup> For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that the 'mandatory minimum sentences are also intended to demonstrate to victims of serious violent offenders that perpetrator will suffer the consequence of prison for their violent offence'. See Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

<sup>72</sup> For example, the Second Reading Speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 stated that the 'purpose of setting the mandatory minimum sentences in this Bill is to maintain a consistent standard for sentencing for violent offences.' Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 29 November 2012, 635, Mr Elferink (Attorney-General).

<sup>73</sup> LCA, *The Mandatory Sentencing Debate* (Report, September 2001), 10; Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) *Alternative Law Journal*, 211.

<sup>74</sup> LCA (n 69), 9.

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

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

### **[3.2.2] *The arguments against mandatory sentencing***

Opponents of mandatory sentencing argue that mandatory sentencing provisions:

- ‘impose unacceptable restrictions on judicial discretion’<sup>75</sup> and ‘interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime’;<sup>76</sup>
- ‘displace discretion to other parts of the criminal justice system, most notably to police and prosecutors’.<sup>77</sup> ‘In addition, it places an unfair onus on law enforcement officers and serves to distort the role of law enforcement officers’;<sup>78</sup>
- ‘are inconsistent with the rule of law and the separation of powers, by directing the manner in which the judicial power should be exercised’;<sup>79</sup>
- ‘violate well-established sentencing principles that a sentence and retribution should be proportionate to the gravity of the offence. Unjust cases demonstrate how there is a real risk that mandatory sentencing goes against the principle of retribution because the punishment does not fit the crime’;<sup>80</sup>
- ‘contradict the principle of imprisonment as a last resort’;<sup>81</sup>

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<sup>75</sup> Ibid 5.

<sup>76</sup> Ibid 21.

<sup>77</sup> ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017), 78.

<sup>78</sup> LCA, *The Mandatory Sentencing Debate* (Report, September 2001) 13.

<sup>79</sup> ALRC (n 77), 78.

<sup>80</sup> LCA (n 69), 11.

<sup>81</sup> ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) 78. This Discussion Paper also notes, at 78, that all Australian jurisdictions (except Tasmania

- 'offend against the principle of proportionality';<sup>82</sup>
- 'do not operate to deter offenders, and may in fact increase the likelihood of reoffending, as periods of incarceration diminish employment prospects, positive social links and other protective factors that prevent recidivism';<sup>83</sup> and
- 'reduce the incentive to plead guilty, resulting in increased workloads for the courts'.<sup>84</sup>

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

[T]here are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all.<sup>85</sup>

It is also argued that mandatory sentencing provisions such as those that prevail in Western Australia and in the Northern Territory target disadvantaged and vulnerable members of the community and disproportionately affect Aboriginal and Torres Strait Islander offenders because:<sup>86</sup>

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

Although the Northern Territory mandatory sentencing provisions are subject to statutory exceptions allowing courts to depart from the mandatory sentencing regime,

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and the Northern Territory) have legislated to enforce the principle: *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) ss 4S, 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 991* (Vic) ss 4B, 5(4); *Sentencing Act 1995* (WA) ss 6(4), 86.

<sup>82</sup> Ibid 79. This Discussion Paper also notes, at 79, the following observations made by the High Court in *Chester v The Queen* (1988) 165 CLR 611, [20]: 'It is now firmly established that our common law does not sanction preventative detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender'.

<sup>83</sup> Ibid 78.

<sup>84</sup> Ibid.

<sup>85</sup> See also *Markarian v The Queen* (2005) 228 CLR 357, [37].

<sup>86</sup> ALRC (n 77), 79.

these exceptions make judicial officers answerable to the legislature in the event they are satisfied that there are either 'exceptional circumstances' or 'particular circumstances' warranting a non-custodial sentence.<sup>87</sup>

Mandatory sentencing has also been criticised for violating a number of provisions in the International Covenant on Civil and Political Rights ('ICCPR') including the prohibition on arbitrary detention in Article 9.<sup>88</sup> The ALRC expressed particular concern in relation to Northern Territory and Western Australian provisions affecting youth offenders. It considered these provisions to be serious violations of international and common law norms, recommending federal legislation to override these laws unless the parliaments of the Northern Territory and Western Australia repealed them.<sup>89</sup>

The ALRC considered that, in contravention of the ICCPR and the Convention on the Rights of the Child ('CROC'), mandatory sentencing violates the principle of proportionality in sentencing, fails to represent a sentence of 'last resort', and breaches the requirement that sentences be reviewable by a higher court.<sup>90</sup>

The Law Council of Australia is similarly of the view that mandatory sentencing provisions are inconsistent with Australia's international obligations, including:<sup>91</sup>

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

Mandatory sentencing has also attracted criticism due to its unjust impact on offenders with a mental illness or cognitive impairment.<sup>92</sup> As the Law Council of Australia has observed:<sup>93</sup>

The idea of mandatory sentencing is in part based on the principle of deterrence. However, a deterrent sentence is not usually appropriate in dealing with a person with

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<sup>87</sup> LCA (n 78), 19.

<sup>88</sup> ALRC, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) [19.63]. Mandatory sentences may also be discriminatory and breach Article 2 of the ICCPR by reason of their disproportionate impact on Aboriginal and Torres Strait Islander peoples.

<sup>89</sup> *Ibid* [19.63] – [19.64] and Recommendation 242.

<sup>90</sup> *Ibid* [19.63]. See also Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (17<sup>th</sup> Report, August 1998) [8.26]-[8.34].

<sup>91</sup> LCA (n 69), 21.

<sup>92</sup> *Ibid* 32.

<sup>93</sup> *Ibid* 32. See also Disability Discrimination Legal Service, Submission No 67 to Senate Legal and Constitutional References Committee, *Inquiry into the Provisions of the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (undated).

mental illness or intellectual disability because the punishment can be meaningless to the offender.

Mandatory sentencing has also been objected to because it sometimes results in anomalous and disproportionately harsh and unjust sentences.<sup>94</sup> Indeed, mandatory sentencing provisions over the last two decades have been the subject of judicial criticism.<sup>95</sup>

### **[3.3] Submissions made to the Committee and Committee's views**

The Committee received a total of 23 submissions concerning the arguments for and against mandatory sentencing, and in particular whether the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* should be repealed or maintained. The submissions, to varying degrees, responded to a number of questions posed in the Consultation Paper<sup>96</sup> published by the Committee as part of this inquiry.

#### **[3.3.1] 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?**

##### ***The goal of deterrence***

A primary goal or objective of mandatory sentencing is to deter people from committing criminal offences.

In a submission in favour of mandatory sentencing provisions, the Northern Territory Police Association ('NTPA') focused on such provisions in relation to violent offences and on 'the issue of dealing with offenders who assault police, ambulance/paramedic officers and other 'first responders' acting in the course of their duties in serving and protecting the public and the need for a mandatory sentencing regime in this area of public concern'.<sup>97</sup> It was submitted that, 'having such measures in place would be a significant deterrent to offenders in many circumstances and would assist in protecting members from this kind of workplace harm'.<sup>98</sup> Furthermore, 'in instances where an

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<sup>94</sup> LCA (n 69), 5.

<sup>95</sup> *Trenerry v Bradley* (1997) 6 NTLR 175, 185; *Norris v The Queen* [2020] NTCCA 8, 46; *Hayes v Hollamby* [1997] NTSC 185, 12 (per Kearney J); *Karim v The Queen* (2013) 83 NSWLR 268, [105] – [123] per Allsop P (Bathurst CJ, Hall and Bellew JJ concurring); *Cobiac v Liddy* (1969) 119 CLR 257, 269 per Windeyer J; *R v Mahndra* (unreported, NT Supreme Court, 1 September 2011) per Blokland J; *R v Nafi* (unreported, NT Supreme Court, 19 May 2011) per Kelly J; *R v Balu and Seukh* (unreported, NT Supreme Court, 4 February 2011) per Barr J; *R v Santoso, Waran and Bin Senean* (unreported, NT Supreme Court, 18 January 2011) per Riley CJ; *R v Dokeng* (unreported, NT Supreme Court, 2 December 2010) per Kelly J; *R v Tahir and Beny* (unreported, NT Supreme Court, 28 October 2009) per Mildren J.

<sup>96</sup> Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-based Sentencing Options Consultation Paper* (October 2020), 24.

<sup>97</sup> NTPA, Submission, p. 1.

<sup>98</sup> NTPA, Submission, p. 2.

offender chooses to assault a member of the police force or other first responder, the focus of sentencing' should be on retribution, deterrence and denunciation.<sup>99</sup>

In support of the need for deterrence, the NTPA drew upon the Western Australian and Victorian experience:<sup>100</sup>

Both Western Australia in 2009 and more recently Victoria in 2018 have introduced mandatory sentencing regimes of assaults against police and other emergency workers. The rationale behind the introduction of these sentencing changes has been summarised as communicating the unacceptability of this behaviour, reflecting current community expectations that those delivering emergency and other publicly funded services should be able to do so as safely as possible and that the dominant purpose was described in terms of denunciation and condemnation.

A review of the mandatory sentencing laws for assaulting police and emergency workers in Western Australia in 2014 found that there was a 33 percent decrease in the number of police being assaulted over the five year period prior to the review and 27 percent less assaults of public officer generally.

The Northern Territory Police, Fire and Emergency Services ('NTPFES') also supported the retention of mandatory sentencing provisions. It noted:<sup>101</sup>

As a result of the mandatory sentencing provisions for violent offences, statistics show that the average full-term and minimum prison sentence lengths for repeat offenders increased. The increase in the length of sentence is justified given the recidivism and the principles of deterrence and denunciation. Re-offending dropped following the introduction of mandatory minimum prison terms for violent offences although it is unclear whether the drop is a direct result of the introduction of mandatory sentencing.

The above submissions in favour of the deterrent effect of mandatory sentencing provisions did not constitute the majority view. A number of submissions received by the Committee argued that mandatory minimum sentences have no deterrent effect and, therefore, do not achieve one of their postulated goals or objectives.

The Australian Law Reform Commission ('ALRC') referred to its recent discussion of mandatory sentencing in its report, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2017). In that report the ALRC concluded that, 'evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent'.<sup>102</sup>

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<sup>99</sup> NTPA, Submission, p. 3.

<sup>100</sup> NTPA, Submission, pp. 3-4 (citation omitted).

<sup>101</sup> NTPFES, Submission, p. 3.

<sup>102</sup> ALRC, Submission, p. 2.

Similarly, the Honourable Acting Justice Dean Mildren AM RFD submitted that there is 'no evidence whatsoever to support' the proposition that mandatory sentencing operates as a deterrent.<sup>103</sup>

Although there is evidence that the rates for homicide have fallen gradually over the last 20 years, there is no empirical evidence that the rate has fallen because of the introduction of mandatory minimum sentencing. During the period from 1998-1999 to 2019-2020 the numbers of prisoners in the Northern Territory have increased steadily each year from 623 in 1998-1999 to 1370 in 2019-2020. Aboriginal prisoners have always, as far as I can remember, represented over 80% or more of the total prison population.

These views were echoed by Danila Dilba Health Service ('Danila Dilba'), which noted that, '[r]esearch has well established mandatory sentencing is an ineffective deterrent to offending, as imprisonment increases rates of future imprisonment'<sup>104</sup> and 'this is reflected in the fact that the NT and WA, the only two jurisdictions with broad mandatory sentencing regimes, have the highest levels of imprisonment in Australia'.<sup>105</sup>

The Law Society Northern Territory ('LSNT') referred to the 2011 review undertaken by the Victorian Sentencing Advisory Council, which found that 'increasing the length of imprisonment resulted in no corresponding increase in a deterrent effect'.<sup>106</sup> According to the LSNT, 'the Victorian Sentencing Advisory Council found that mandatory sentencing increased the likelihood of recidivism because it placed prisoners in a learning environment for crime, reinforced criminal identity and failed to address the underlying causes of crime'.<sup>107</sup>

Territory Criminal Lawyers, citing the work of Weatherburn<sup>108</sup> and Cox and others,<sup>109</sup> argued that mandatory sentences do not work as a specific deterrent and antidote to recidivism because:<sup>110</sup>

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<sup>103</sup> Acting Justice Dean Mildren, Submission, [1.1] (citation omitted). See also the submissions to similar effect made by the Criminal Lawyers Association of the Northern Territory, p. 1; the Law Society Northern Territory, p. 2; and the Northern Territory Legal Aid Commission, p. 3.

<sup>104</sup> Danila Dilba, Submission, p. 10 (citation omitted).

<sup>105</sup> Danila Dilba, Submission, p. 10 (citation omitted). The submission went on to note that 'in the NT, nearly two thirds of prisoners (59.4%) return to prison within 2 years, the highest rate nationally: citing the Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, *Report on Government Services 2020*, Part C Table CA 4 (2020).

<sup>106</sup> LSNT, Submission, p. 2.

<sup>107</sup> Ibid. See also the submission made by Danila Dilba at pp. 3-4 that, apart from not being an effective deterrent, mandatory sentencing provisions may have the contrary effect because 'instead of addressing the social determinants that lead to offending, mandatory sentencing simply leads to higher rates of incarceration and high recidivism'.

<sup>108</sup> Don Weatherburn, 'The effect of prison on adult offending' (2010) 143 *Crime and Justice Bulletin*, Bureau of Crime Statistics and Research.

<sup>109</sup> Dorinda Cox, Mandy Young and Alison Bairnsfather-Scott, 'No justice without healing: Australian Aboriginal people and family violence' (2009) 30 *Australian Feminist Law Journal*, 151.

<sup>110</sup> Territory Criminal Lawyers, Submission, [29(b)], [29(g)] and [29(h)].

1. Mandatory sentencing laws enhance our focus on punishing the *criminal behaviour* of the offender (by imprisoning them) and detract from efforts to focus on the *underlying causes of a person's offending*, which has better prospects of stopping the offending.
2. To the extent that spending time in prison is a factor that *increases* the chance that an individual will reoffend, mandatory sentencing laws contribute to recidivism and work, in practice, to create a society that is less safe for victims and communities.
3. To the extent that prison represents a missed opportunity for effective community based rehabilitation, restoration or healing, mandatory sentencing laws contribute to such missed opportunities.

The argument that mandatory sentencing has a deterrent effect rests on the assumption that the commission of offences is the product of a rational choice. As was noted by Danila Dilba:<sup>111</sup>

...the nature of the targeted offences is often alcohol-fuelled and impulsive, committed by vulnerable and marginalised community members, who (as outlined above) often experience overlapping vulnerabilities. Many are also from remote communities and so often have limited understanding of the criminal justice system. These factors render mandatory sentencing an ineffective deterrent.

In a similar vein, Acting Justice Mildren submitted that, 'what acts as a deterrent is not the length of the possible sentence, but whether the person who contemplates committing a crime is prepared to take the risk of being caught by the police, charged with the relevant offence and possibly going to prison'; and the rate of offending is largely linked to socio-economic factors.<sup>112</sup> His Honour also strongly doubted that 'members of the public generally have any idea of what mandatory sentences are available for various offences'.<sup>113</sup> His Honour also doubted that 'mandatory sentencing acts as a specific deterrent in the majority of cases and indeed may have the opposite effect'.<sup>114</sup>

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<sup>111</sup> Danila Dilba, Submission, p. 10 (citation omitted). See also the submission made by NAAJA at [3.1] noting that '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'.

<sup>112</sup> Acting Justice Dean Mildren, Submission, [1.1]. See also the NAAJA submission at [3.1] that mandatory sentencing 'fails to account for the social determinants of crime' and 'does not pay due regard to factors that may compel someone to commit crime such as socio-economic status, unemployment and substance abuse'. NAAJA also noted at [3.1] that mandatory sentencing 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.

<sup>113</sup> Acting Justice Dean Mildren, Submission, [1.1]. See also NAAJA, Submission, [3.1].

<sup>114</sup> Acting Justice Dean Mildren, Submission, [1.1].

## ***The protection of the community***

Another important goal or objective of mandatory sentencing is that it protects the community. This is closely related to goal of deterrence.

As noted above, the submission made by the NTPA focused on the need to protect police and other first responders through the introduction of mandatory sentencing provisions in relation to offences of violence committed on these important members of the community. The NTPFES maintained that the mandatory sentencing provisions are consistent with the *Sentencing Act 1995* principles contained in s 5(1)(a)–(f), and with the goals or objectives of the *Misuse of Drugs Act 1990* and the *Domestic and Family Violence Act 2007*.<sup>115</sup>

The majority view of those making submissions to the inquiry was that mandatory sentencing did not achieve its goal of protecting the community. The general theme of such submissions is reflected in the following comments:

- ‘There is no evidence that mandatory sentencing works to reduce crime or make the community a safer place’. ... [W]hen 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. There has been little or no support for the proposition that harsher sentences reduce crime’.<sup>116</sup>
- ‘Across the developed world there is now near consensus among experts that mandatory sentencing laws have little effect on crime rates and community protection’.<sup>117</sup>
- ‘A review of [the Northern Territory’s ‘three strikes’ laws for property offences (introduced in 1997 and repealed in 2001)] by the Office of Crime Prevention revealed that the available data did not support the claim that the laws reduce recidivism or deter potential offenders’.<sup>118</sup>
- ‘Imprisonment, which is generally devoid of the appropriate therapeutic and rehabilitative services, is ineffective in reducing rates of offending and recidivism. This in turns fails to make communities safer’.<sup>119</sup>
- ‘Protection of victims is an extremely important objective of our criminal justice system. It has been observed that prison is implicated in the development of a new ‘bullshit (male) culture’ that justifies violence. In other words, imprisonment in its current form

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<sup>115</sup> NTPFES, Submission, pp. 1-2.

<sup>116</sup> NAAJA, Submission, [3.2]. See also the submission from Sisters Inside Inc (p 2): ‘Empirical data has demonstrated that mandatory sentencing laws do not succeed in protecting the community’.

<sup>117</sup> Felicity Gerry and Julian Murphy, Submission, [25], citing M Tonry ‘Functions of Sentencing and Sentencing Reform’ (2005) 58 *Stanford Law Review* 37, 52-53.

<sup>118</sup> Felicity Gerry and Julian Murphy, Submission, [26], citing Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience*, Discussion Paper (2003) 10.

<sup>119</sup> Danila Dilba, Submission, p. 3.

simply kicks the problem 'down the road', and upon the expiration of the sentence society is often faced with a person for whom criminal behaviours have been normalised by their most recent environment. ... Prison will only ever be an effective tool for preventing future victimisation if a person who is sent there is less likely to offend when they return to the community.'<sup>120</sup>

### ***The denunciatory function and ensuring appropriate punishment***

Another postulated twin goal or objective of mandatory sentencing is to denounce the proscribed conduct and to ensure that the offender is appropriately punished.

The submission made by the NTPA stressed the need for 'the message to get through' in relation to offences committed against police and other first responders, with the focus being on denunciation as well as deterrence and retribution.<sup>121</sup>

Territory Criminal Lawyers points out that 'mandatory sentencing laws assume that imprisonment is always, in all circumstances and for all offences of a particular category, the most appropriate punishment'.<sup>122</sup> The North Australian Aboriginal Justice Agency ('NAAJA') submitted that, by focusing only on denunciation, deterrence and retribution, mandatory sentencing provisions fail to give due weight to the other purposes of sentencing stipulated in s 5 of the *Sentencing Act 1995*.<sup>123</sup>

Mandatory sentencing is also founded on the assumption that judges impose sentences that are too 'soft' or lenient, a premise that Acting Justice Mildren questions:<sup>124</sup>

A third premise is that judges are soft on crime (referred to as 'ensuring appropriate punishment for the offender') and that harsher sentences are need for the purposes of denunciation, just punishment and retribution. This was the result of the truth in sentencing campaign led in part by American academics and picked up by the media. Part of the impetus for the campaign was to get rid of the remissions systems, but it took on a much wider momentum especially in the USA which ultimately took root in Australia. The system in America was that there was no system. Individual judges were free to impose whatever sentence they thought fit, subject to the maximum penalty provided. They were not required to provide reasons and sentencing appeals were very hard to win. There was evidence that individual judges sitting in the same court would impose vastly different sentences for the same crime. There was no principled system for the imposition of sentences. The proposition in Australia was very different. Australian courts kept sentencing records which enabled judges to keep track of sentences imposed by other judges for the same offence. Courts were required to give reasons. There was an effective system of sentencing appeals, including the right of the Crown to

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<sup>120</sup> Territory Criminal Lawyers, Submission, [27]-[28]. See also NAAJA, Submission, [3.2]; Aboriginal Peak Organisations Northern Territory, Submission, p. 3.

<sup>121</sup> NTPA, Submission, pp. 2-3.

<sup>122</sup> Territory Criminal Lawyers, Submission, [29(1)].

<sup>123</sup> NAAJA, Submission, [3.1].

<sup>124</sup> Acting Justice Dean Mildren, Submission, [1.5] (citations omitted).

appeal against a sentence. The introduction of mandatory minimum sentences in Australia was not only unnecessary but, in effect, a rejection of the basic methodology of sentencing, which must take into account not only retribution and punishment, but the possibility of reform, and in some cases, considerations of mercy.

While the Committee acknowledges that mandatory sentencing provisions appear to have a significant amount of community support,<sup>125</sup> it also takes into account the following observations of Jesuit Social Services:<sup>126</sup>

One academic study, comprised of a nationally representative telephone survey of more than 6,000 people, found that a majority of respondents expressed approval for high levels of punitiveness and thought that sentencing was too lenient. However, the same body also found strong support for alternatives to detention, including 64 percent who agreed that community correction orders should be used instead of prison for non-violent offenders. The researchers surmised that public opinion is therefore 'more diverse and complex than standard opinion polls would suggest.

NAAJA observed that, while mandatory sentencing is supported by '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'.<sup>127</sup>

### ***Promoting consistency in sentencing outcomes***

Another stated aim of mandatory sentencing is to promote consistency in sentencing outcomes.

Acting Justice Mildren noted that there is no empirical evidence for the premise that 'mandatory sentencing enhances parity (or consistency) in the sentencing of offenders for similar offending'.<sup>128</sup> His Honour submitted that:<sup>129</sup>

...the problem is that parity in sentencing assumes that the crime, the victims and perpetrators are sufficiently similar to warrant similar sentences. This is hardly ever the case in practice. Even the most cursory study of sentencing remarks by judges shows that these factors are infinitely variable warranting different outcomes in most cases. Parity as a sentencing consideration most often comes into play where there are joint co-offenders. In any event, parity in sentencing is

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<sup>125</sup> LCA, *The Mandatory Sentencing Debate* (Report, September 2001), 10; Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) *Alternative Law Journal*, 211.

<sup>126</sup> Jesuit Social Services, Submission, p. 3, citing Geraldine MacKenzie, Caroline Spiranovic, Kate Warner, Nigel Stobbs, Karen Gelb, David Indermaur, Lynne Roberts, Rod Broadhurst and Thierry Bouhours, 'Sentencing and Public Confidence' Results from a National Australian Survey on Public Opinions Towards Sentencing' (2012) 45 *Australia and New Zealand Journal of Criminology* 45, 45-65.

<sup>127</sup> NAAJA, Submission, [3.2].

<sup>128</sup> Acting Justice Dean Mildren, Submission, [1.4].

<sup>129</sup> Ibid.

not the issue. The issue is *disparity*, so that a sentence should not bear an inappropriate disparity with other sentences taking into account the differences in the circumstances of the offenders and of the offences. Of course Judges do try to ensure that sentences imposed are within the broad range of sentences for similar offences and offenders and have always done so.

In the dissenting opinion of Mildren J<sup>130</sup> in the Full Court decision in *Trenerry v Bradley* (1997) 6 NTLR 175 at 187, another inherent problem with mandatory sentencing laws was identified:

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.

The inherent unfairness of the mandatory sentencing regime also was highlighted by the Aboriginal Peak Organisations Northern Territory ('APO NT'):<sup>131</sup>

Proponents also argue that the regimes *promote consistency in sentencing*. In APO NT's view, this argument confounds consistency with fairness. We agree that mandatory sentencing regimes promote consistency - they apply a one-size fits all approach for each type of crime. However, in promoting consistency, they demote fairness.

### ***The Committee's view***

The great majority of the submissions received by the Committee took the view that mandatory sentencing provisions, such as those enacted under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990*, do not achieve their stated goals or objectives. The Committee agrees for the following reasons.

Relevant research and the available statistical data do not support the proposition that mandatory sentencing provisions such as those enacted by the Northern Territory legislature operate either as a general or specific deterrent. The argument that mandatory sentencing is an effective deterrent assumes that all criminal offences are committed as a matter of rational choice. This is a false assumption. The reality is that many offences are committed impulsively – often alcohol-fuelled or the product of socio-economic factors – without any thought being given to consequences of the offending.

If mandatory sentencing is to have any prospect of serving as either a general or specific deterrent it is necessary that 'the person concerned is aware of the mandatory

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<sup>130</sup> But with whom Angel J agreed on this point: *Trenerry v Bradley* (1997) 6 NTLR 175 at 185. Angel J stated that 'mandatory sentences by their very nature are unjust in the sense that they require courts to sentence on a basis regardless of the nature of the crime and the particular circumstances of the offender'.

<sup>131</sup> APO NT, Submission, p. 3. (Emphasis in original)

minimum penalty, has considered planning the offence and decided that it is worth taking the risk'.<sup>132</sup> In practice, this is unlikely to occur in most cases. Even in the case of a person who has previously offended, it is very doubtful that mandatory sentencing operates as a specific deterrent. In fact, mandatory minimum sentences may have the contrary effect. If the offender is aware of the prescribed mandatory minimum, he or she may think that such minimum is the penalty they will receive and therefore take the risk.<sup>133</sup> Finally, there is no evidence that mandatory sentences are any better in acting as an effective deterrent than sentences of imprisonment imposed by applying the usual principles of sentencing.

The fact is that mandatory sentencing may increase the likelihood of recidivism (and therefore afford the community no protection) because of its focus on punishing the criminal behaviour of the offender rather than addressing the underlying causes of a person's offending (the social determinants). As pointed out in the submission made by Territory Criminal Lawyers, to the extent that incarceration is a factor increasing the likelihood that a prisoner will re-offend, mandatory sentencing provisions may contribute to recidivism and ultimately render the community less safe.<sup>134</sup>

The Committee also does not accept the argument that mandatory sentencing provisions achieve the denunciatory function of sentencing and its objective of ensuring appropriate punishment. The argument assumes that sentences handed down by the courts are either too lenient or too 'soft'. Research suggests that this argument is fallacious. In the absence of mandatory sentencing provisions, research suggests that judges on average tend to impose a harsher sentence than members of the public, with access to the facts of the case, would impose.<sup>135</sup>

A more fundamental difficulty with the argument is that it assumes that, to achieve the goals of denunciation and retribution, imprisonment (and in some cases, a particular duration of imprisonment) is always the appropriate punishment for a particular offence and/or particular offender. This is misconceived. It ignores the salient fact that the retributive theory of punishment requires a person who has broken the law to suffer 'to an extent or in a way which is just in all the circumstances'.<sup>136</sup>

The Committee also is of the view that mandatory sentencing does not promote consistency in sentencing. By adopting a 'one size fits all' approach, mandatory

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<sup>132</sup> Acting Justice Dean Mildren, Submission, [1.2].

<sup>133</sup> Ibid [1.1].

<sup>134</sup> Territory Criminal Lawyers, Submission, [29(g)], citing D Weatherburn, 'The effect of prison on adult offending', (2010) 43 *Crime and Justice Bulletin* 10.

<sup>135</sup> Julian Roberts and Anthony Doob, 'News media influences on public views of sentencing' (1990) 14 *Law and Human Behaviour* 451; Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 *British Journal of Criminology* 93.

<sup>136</sup> *Sentencing Act 1995* s 5(1)(a).

sentencing in fact leads to inconsistent sentencing outcomes. As noted by Nicholas Cowdery AM QC, former Director of Public Prosecutions in New South Wales:<sup>137</sup>

[I]f the penalty is the same every time the offence is committed, there certainly will be consistency: but sentencing must first be fair and just or consistency means nothing more than repeated injustice. And there is a qualified meaning of consistency: it is the imposition of consistent punishment for like behaviour by similar persons, rather than just for the offence for which an offender happens to have been convicted.

By treating offenders who are different in terms of their culpability and other relevant circumstances the same, mandatory sentencing provisions have the potential to result in harsh, disproportionate and unjust sentences 'where offenders of unequal blameworthiness and culpability are sentenced to the same result'.<sup>138</sup> This, in turn, leads to 'a worrying and unjustifiable inconsistency in the cases for which mandatory minimum sentences are [imposed]'.<sup>139</sup> Furthermore, 'mandatory sentencing does not eliminate inconsistency in sentencing: it simply displaces discretion to other parts of the criminal justice system, most notably prosecutors'.<sup>140</sup>

### **[3.3.2] 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?**

#### ***Minimum mandatory terms of imprisonment***

Whether the mandatory minimum sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* are principled, fair and just can only be answered by examining not only the substantive mandatory minimum sentencing provisions, but also the ameliorative provisions<sup>141</sup> such as the 'exceptional circumstances' and 'particular circumstances' tests discussed above.

The submission made by NTPFES sought to support the Northern Territory's mandatory sentencing provisions on the basis that they are principled, fair and just, placing particular emphasis on the threshold for their operation under the *Misuse of Drugs Act 1990* and the statutory exception:<sup>142</sup>

In relation to serious drug offending, mandatory sentencing doesn't apply until a threshold is met. There is an exception provided under the provision of section 37(2) of the MDA, and as such the court has to consider the circumstances of the

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<sup>137</sup> Nicholas Cowdery, 'Mandatory Sentencing: Getting Justice Wrong 2014', (2014) Sydney Law School Distinguished Speakers Program (15 May 2014), 3.

<sup>138</sup> Law Institute of Victoria, *Mandatory Minimum Sentencing*, p. 10.

<sup>139</sup> Cowdery (n 137), p. 3.

<sup>140</sup> LCA (n 69), [55].

<sup>141</sup> The ameliorative provisions purport to overcome any perceived harsh effects of the substantive provisions by allowing courts to depart from imposing the mandatory minimum sentence in certain circumstances.

<sup>142</sup> NTPFES, Submission, p. 2.

offence and the offender in each case prior to the imposition of the sentence. This affords the defendant an opportunity to provide information to the court that particular circumstances exist for the exception to take place. ...

On occasion if the circumstances are of a particular type, it is obvious to investigating members that the offender/defence will be able to address the exception and mandatory sentencing will not be imposed on those occasions. These instances would generally not meet the criteria or circumstances where the offender would be remanded in custody.

In contrast to this submission, the Committee received a considerable number of submissions asserting that mandatory sentencing provisions are unprincipled, unfair and unjust. A recurrent theme of the submissions was that mandatory sentencing fetters judicial discretion and interferes with the ability of judges to arrive at a just and fair sentence in the individual case by applying well-established sentencing principles.

For example, the LSNT adopted the position taken by the Law Council of Australia:<sup>143</sup>

The Law Council of Australia's Mandatory Sentencing Policy Position explains its opposition [to mandatory sentencing] rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the system of justice.

NAAJA noted that mandatory sentencing laws do not allow for judicial discretion in weighing competing purposes and considerations normally associated with the sentencing process.<sup>144</sup> Danila Dilba maintained that mandatory sentencing regimes adopt a uniform response to a range of unique circumstances which 'fetters judicial discretion by preventing the court from considering the individual circumstances of each case'.<sup>145</sup>

Territory Criminal Lawyers submitted that mandatory sentencing outcomes are the antithesis of individualised justice.<sup>146</sup>

Mandatory sentencing laws detract, without good reason, from the principle of *individualised justice*. Parliaments make laws that apply generally; only courts are able to consider the individual circumstances of each offender, in order to determine the appropriate sanction in each case. Individualised justice is a fundamental principle that sets liberal democracies apart from other political systems. When parliaments make laws requiring courts to impose minimum penalties *regardless of the offender's individual circumstances*, parliaments undermine the principle.

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<sup>143</sup> LSNT, Submission, p. 2.

<sup>144</sup> NAAJA, Submission, [3.1], citing Elena Marchetti and Thalia Anthony, 'Sentencing Indigenous Offenders in Canada, Australia and New Zealand' (2016) 27 University of Technology Sydney Law Research Series 27.

<sup>145</sup> Danila Dilba, Submission, p. 12. See also Jesuit Social Services, Submission, p. 2; LSNT, Submission, p. 2.

<sup>146</sup> Territory Criminal Lawyers, Submission, [29m] (emphasis in original). See also ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) [21.63].

Felicity Gerry QC and Julian Murphy noted that the concept of 'equal justice', which has 'long been a cornerstone of Australia's legal system and has been described as a value of constitutional significance',<sup>147</sup> necessitates like cases being treated alike and different cases being treated differently.<sup>148</sup> Further, the High Court of Australia has described 'equal justice' as 'an aspect of the rule of law'.<sup>149</sup> Gerry QC and Murphy maintained that mandatory sentencing provisions preclude the administration of 'equal justice', which requires 'accuracy in the imposition of sentences that take into account differences between offenders, victims and circumstances of offending'.<sup>150</sup>

Barristers Gerard Elmore and Mary Keaney identified another significant difficulty with mandatory sentencing which renders it unprincipled, unfair and unjust.<sup>151</sup>

[Mandatory sentencing provisions] strip a sentencing court of any opportunity to reasonably moderate sentences according to well-established sentencing principles, including parity, youth, personal and general deterrence and totality. What is forgotten by the introduction of mandatory sentencing regimes is the common law principle that there is no, *one correct sentence*, but rather the sentencing of a criminal defendant is a process. Through the imposition of a mandatory minimum regime, a correctness of a sentence is presumed, which ignores an otherwise integrated process involving facts and circumstances of victims and criminal defendants.

Territory Criminal Lawyers pointed out that mandatory sentencing laws subvert two well-established principles of sentencing:<sup>152</sup>

Mandatory sentencing laws undermine the long-established sentencing principle that punishment should be proportionate to the gravity of the offence and the context within which it took place. Mandatory sentencing laws create the very real risk that a particular punishment does not fit the crime.

Mandatory sentencing laws detract from the principle of imprisonment as a last resort, and instead often make imprisonment a first resort.<sup>153</sup>

The submission went on to assert that the mandatory sentencing provisions under the three pieces of legislation under consideration in this chapter were neither principled, fair or just on the following bases:<sup>154</sup>

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<sup>147</sup> Felicity Gerry QC and Julian Murphy, Submission, [3], citing as authority C Saunders and M Donaldson, 'Values in Australian Constitutionalism' in Dennis Davis, Alan Richer and Cheryl Saunders (eds), *An Inquiry in to the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Oxford: Hart Publishing 2015) 15, 34-38; A Simpson, 'Equal Treatment and Non -Discrimination through the Functionalist Lens' in Rosalind Dixon (ed) *Australian Constitutional Values* (Oxford: Hart Publishing 2018) 195, 216-217.

<sup>148</sup> Felicity Gerry QC and Julian Murphy, Submission, [3], citing *Lowe v The Queen* (1984) 154 CLR 606, 609.

<sup>149</sup> *Green v The Queen* (2011) 244 CLR 462, [28].

<sup>150</sup> Felicity Gerry QC and Julian Murphy, Submission, [4]-[5].

<sup>151</sup> Gerald Elmore and Mary Keaney, Submission, [3.2].

<sup>152</sup> Territory Criminal Lawyers, Submission, [29(p)], [29(r)].

<sup>153</sup> See also Jesuit Social Services, Submission, p. 2, to the effect that mandatory sentencing regimes undermine the core principle that 'prison is only ever an option of last resort'.

<sup>154</sup> Territory Criminal Lawyers, Submission, [34]. See also NAAJA, Submission, [3.2].

The mandatory sentencing provisions clearly accord with none of the ordinary sentencing principles (parsimony, proportionality, parity and totality), which have themselves developed to give effect to the liberal principles which underpin the notion of individualised justice. Mandatory sentencing laws impose a requirement on the sentencing court to sentence on the basis of the offending behaviour alone, insofar as it fits into a general category described by parliament. While the offending behaviour is a very substantial factor that a court takes into account when considering a sentence, it shouldn't be the only factor: to give proper effect to the accepted principles, a sentencing court should also be taking into account the offender's background, the context of the offending and the impact the offending had on the victim(s), if any. In many cases, mandatory sentencing laws obviate the need for courts to properly consider these other factors.

The Northern Territory Legal Aid Commission ('NTLAC') drew attention to the inconsistency between the well-established common law 'instinctive synthesis' approach to sentencing and the 'one size fit all' model of mandatory sentencing:<sup>155</sup>

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'.<sup>156</sup> 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.

NAAJA submitted that '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'.<sup>157</sup> It also stated that 'fundamentally, mandatory sentencing law contradicts these principles in focusing on punitive and retributive aspects of sentencing and the fallacy of crime prevention through deterrence'.<sup>158</sup> Finally, it noted the incontestable fact that First Nations Territorians bear the brunt of mandatory sentencing laws.<sup>159</sup>

### ***Misuse of Drugs Act 1990 and Domestic and Family Violence Act 2007***

In its submission, the Criminal Lawyers Association of the Northern Territory ('CLANT') expressed concern about the injustice occasioned by the mandatory minimum sentencing laws applying to an aggravated drug offence. It was noted that a previous finding of guilt under the *Misuse of Drugs Act 1990* or an equivalent provision interstate is a 'circumstance of aggravation' that enlivens the mandatory minimum sentence of

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<sup>155</sup> NTLAC, Submission, p. 3. The relevant and competing considerations are to be found in ss 5(1) and (2) of the *Sentencing Act 1995*.

<sup>156</sup> *Markarian v The Queen* (2005) 228 CLR 357, [51] (per McHugh J).

<sup>157</sup> NAAJA, Submission, [3.2].

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* See also Jesuit Social Services, Submission, p. 2; Sisters Inside Inc., Submission, pp. 1-2; NTLAC, Submission, pp. 2-3.

28 days. It was further noted that 'even if no conviction has been recorded, if the person is subsequently found guilty of a second drug charge they are liable to 28 days in prison unless particular circumstances are found'.<sup>160</sup>

The submission then went on to address the urgent need to repeal the mandatory sentencing provisions of the *Domestic and Family Violence Act 2007*, particularly s 121(5):<sup>161</sup>

As recently observed by Justice Kelly in the matter of *Arnott v Blitner* [2020] NTSC 63 at [55], s 121(5) prevents the suspension of *any part* of a term of imprisonment imposed for a subsequent DVO contravention offence. This interpretation, which appears correct on the face of the statute, flies in the face of the common practice of Judges of the Local Court who regularly impose sentences of imprisonment in such circumstances which are partially suspended after the 7 days imprisonment mandated under s 121(2) of the Act.

The injustice CLANT maintained was occasioned by s 121(5) was explained as follows:<sup>162</sup>

Say for example a recidivist offender commits a subsequent contravention offence deemed worthy of 2 months imprisonment. A Judge who has discretion to suspend part of that sentence may impose conditions designed to meet the risk of reoffending and minimise the risk of further harm to the community or to an individual. Such conditions are tailored to each offender's individual needs and could include supervision by a probation or parole officer, mandated participation in a family violence program, abstinence from alcohol for a short, defined period and so forth. These conditions provide an incentive for an offender to take steps to change their behaviour which, if successful, ultimately benefit the community generally and, perhaps more importantly, minimise the risk of harm to the very persons these orders are designed to protect.

The Crimes Victims Advisory Committee ('CVAC') noted that one of the stated purposes of mandatory sentencing provisions in the *Domestic and Family Violence Act 2007* was to protect the victims of domestic violence. It was suggested that if the Committee were to recommend the abolition of mandatory sentencing provisions, such recommendation should be made only if there were proper alternatives to incarceration which protected the victim, and properly funded victim support services. Further, if a term of imprisonment was not imposed and the offender was allowed to return to the community, the victim should be informed so that she could take steps to protect her own safety. CVAC advocated for properly funded services to enhance the safety of the victim. Finally, CVAC stressed that, if mandatory sentence provisions were abolished, there would need to be an effective public education campaign

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<sup>160</sup> CLANT, Submission, p. 5.

<sup>161</sup> Ibid.

<sup>162</sup> CLANT, Submission, p. 6. For an example of how the provision might work unfairly in practice, see pp. 6-7.

because the community would see the removal of such provisions as a weakening of the system.<sup>163</sup>

NLAC, while acknowledging ‘the high level of domestic and family violence in the Northern Territory and the need for protection of those experiencing domestic violence’,<sup>164</sup> noted that the mandatory sentencing provisions under the *Domestic and Family Violence Act 2007* are ‘particularly restrictive’:<sup>165</sup>

There is no option for a partially suspended sentence for a person who has a prior for breaching a domestic violence order and sentences must be cumulative on other sentences. 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.

### ***Exceptional circumstances and particular circumstances***

NAAJA highlighted the difficulties with the ‘exceptional circumstances’ exception in relation to mandatory sentencing for violent offences, noting the very high threshold that must be met to enliven the statutory exemption:<sup>166</sup>

It is clear that the interpretation of section 78D(1)(b) of the *Sentencing Act* places an onerous evidential burden on the offender 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.

NLAC was also critical of the ‘exceptional circumstance’ provision in the *Sentencing Act* in relation to mandatory sentencing for violent offences:<sup>167</sup>

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.<sup>168</sup> 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.

NAAJA made the following submission in relation to the ‘particular circumstances’ test:<sup>169</sup>

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<sup>163</sup> CVAC, Consultation, 12 March 2021.

<sup>164</sup> NLAC, Submission, p. 5.

<sup>165</sup> Ibid. In support of this submission, NLAC cited ss 121(5), (6) and (7) of the *Domestic and Family Violence Act 2007*, and the case of *Idai v Malagorski* [2011] NTSC 102.

<sup>166</sup> NAAJA, Submission, [3.2], citing *Heath v Armstrong* (2017) NTSC 35 at [14].

<sup>167</sup> NLAC, Submission, p. 5.

<sup>168</sup> *Duncan* (n 42), [25]-[26].

<sup>169</sup> NAAJA, Submission, [3.2].

Mandatory sentencing inhibits the instinctive synthesis of judicial discretion. With the over-representation 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 could be categorised as significantly noteworthy or out of the ordinary. The recent decision of *Arnott v Blitner* (2020) NTSC 63 [at [59]] confirmed that ‘particular circumstances of the offence’ does include ‘relevant circumstances of the offender’.

### **Mandatory non-parole periods**

Acting Justice Dean Mildren did not consider that the 50% rule discussed at [3.1.6] above was necessarily unreasonable. His Honour noted, however, that ‘there are hard cases where the court must impose a head sentence greater than 5 years in circumstances where the court would have probably suspended part of the sentence rather than fix a non-parole period’.<sup>170</sup> His Honour suggested that it ‘would be more just for there to be flexibility’.<sup>171</sup>

Acting Justice Mildren also did not consider the 70% rule<sup>172</sup> to be unreasonable in many cases. His Honour noted, however, that ‘it is not hard to envisage circumstances where it might result in injustice’.<sup>173</sup> His Honour went on to observe:<sup>174</sup>

One of the problems of this type of mandatory sentencing is that in most cases the courts have tended to fix the mandatory minimum of either 50% or 70% as the case may be; there is often no submission by the Crown that this would be inadequate, and not a great deal of thought is given to real question which should be asked: what is the minimum term that the prisoner should serve before being eligible for release on parole. In my view these limitations are unnecessary, deflect from sentencing principle and should be repealed.

NTLAC stated that the mandatory minimum non-parole periods prescribed by ss 55(1) and (3) of the *Sentencing Act 1995* have resulted ‘in many people serving longer and disproportionate prison sentences than would have otherwise been the case’.<sup>175</sup> The Commission recommended that the provisions be repealed as they cause ‘substantial unfairness and injustice’.<sup>176</sup>

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<sup>170</sup> Acting Justice Dean Mildren, Submission, p. 17. His Honour’s observation was made in the context that the *Sentencing Act 1995* does not allow a term of imprisonment greater than 5 years to be suspended. CLANT noted that as a result of the statutory prohibition on partially suspending a sentences greater than 5 years, the court is ‘unable to impose a sentence that accurately reflects the seriousness of the offending but also protects the community by encouraging rehabilitation at an appropriate stage of the sentence’: CLANT, Submission, p. 4.

<sup>171</sup> Acting Justice Dean Mildren, Submission, p. 17.

<sup>172</sup> Discussed above at [3.1.6].

<sup>173</sup> Acting Justice Dean Mildren, Submission, p. 17.

<sup>174</sup> Ibid.

<sup>175</sup> NTLAC, Submission, p. 6.

<sup>176</sup> Ibid.

### ***The Committee's view***

Apart from a small minority of submissions, the general view of those making submissions to the inquiry is that the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Misuse of Drugs Act 1990* and the *Family and Domestic Violence Act 2007* are unprincipled, unfair and unjust.

The purposes of sentencing are well established in common law.<sup>177</sup> These are replicated in s 5(1) of the *Sentencing Act 1995*:

- (1) The only purposes for which sentences may be imposed on an offender are the following:
  - (a) to punish the offender to an extent or in a way that is just in all the circumstances;
  - (b) to provide conditions in the court's order that will help the offender to be rehabilitated;
  - (c) to discourage the offender or other persons from committing the same or similar offence;
  - (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;
  - (e) to protect the Territory from the offender;
  - (f) a combination of 2 or more of the purposes referred to in this subsection.

The sentencing purposes set out in s 5(1) of the *Sentencing Act 1995* reflect 'sentencing principles established by the common law which provide guidance to sentencers'.<sup>178</sup> They serve to structure and confine the exercise of the sentencing discretion. As such they provide a principled basis for the sentencing of offenders.

In the case of mandatory minimum sentences, the legislature, rather than the trial judge hearing the case, determines the purpose or combination of purposes that apply to the imposition of the mandatory sentence – namely deterrence, protection of the community, denunciation and retribution. This is a pre-emptive approach whereby the legislature has not only determined the penalty that will apply to a prescribed class of offence and offender, but also the purpose or purposes for which the penalty is imposed.

This legislative pre-selection and weighting of certain sentencing purposes to the exclusion of other prescribed sentencing purposes in s 5(1) of the *Sentencing Act 1995* necessarily strips courts of their well-established sentencing discretion. In particular,

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<sup>177</sup> See Chapter 2.

<sup>178</sup> 'Sentencing Principles' the Supreme Court of the Northern Territory – [https://supremecourt.nt.gov.au/data/assets/pdf\\_file/0009/748980/Sentencing\\_Principles.pdf](https://supremecourt.nt.gov.au/data/assets/pdf_file/0009/748980/Sentencing_Principles.pdf).

it deprives courts of the authority and opportunity to consider and weigh the various sentencing purposes in arriving at an appropriate sentence.

The mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence 2007* and the *Misuse of Drugs Act 1990* also either offend or are inconsistent with the fundamental principles of sentencing noted in Chapter 2 at [2.2]; as pointed out in the various submissions received by the Committee.

Finally, considerations that a court is otherwise mandated to take into account in s 5(2) of the *Sentencing Act 1995*, such as the gravity of the offending, the culpability of the offender and the degree of harm caused by the offending, are in some cases rendered superfluous in a case where a mandatory minimum term of imprisonment is prescribed because the category of offending has been legislatively pre-determined to warrant that mandated term of imprisonment. Furthermore, several of the sentencing factors set out in s 5(2) are mitigating circumstances, however, the mandated minimum term of imprisonment ignores such circumstances.

The departure from the fundamental purposes and principles of sentencing inherent in a mandatory sentencing regime results, in certain cases, in a sentencing outcome that is unfair and unjust. The Committee agrees with and adopts the various submissions highlighting the potential of mandatory sentencing provisions to produce outcomes that are anomalous, harsh, unfair and unjust due to the abandonment of traditional sentencing methodology.

The Committee also is of the view that the ameliorative provisions place an unfair evidential burden on offenders to demonstrate either 'exceptional circumstances' or 'particular circumstances' as the case may be. The Committee agrees with the submission of the NTLAC that such provisions do not provide a sufficient safeguard against arbitrary imprisonment.<sup>179</sup> One can readily envisage cases where an offender, and in particular a First Nations offender, would not be able to show circumstances that are 'out of the ordinary course or unusual or special of uncommon'<sup>180</sup> or are not 'regularly, or routinely or normally encountered'<sup>181</sup> in order to escape the net of mandatory sentencing. One can equally foresee cases where an offender may not be able to satisfy the sentencing court that there are circumstances that are significantly noteworthy or out of the ordinary in order to avoid the prescribed mandatory minimum term of imprisonment. However, in such cases the circumstances of the offending or the offender may still not warrant a term of imprisonment. The statutory exceptions do not make the mandatory minimum sentencing provisions principled, fair and just.

Even in cases where the offender is ultimately able to satisfy this evidential burden, the need for the parties and the court to address these complex preconditions adds substantially to the time and resources that must be committed to the sentencing

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<sup>179</sup> NTLAC, Submission, p. 5.

<sup>180</sup> *Duncan* (n 42), [25].

<sup>181</sup> *Ibid* [25].

process. In an already overburdened justice system, this added complexity is unhelpful and unwarranted.

The prescribed mandatory minimum non-parole periods under the *Sentencing Act 1995* cause similar concern. The principles governing the fixing of non-parole periods as well as the factors relevant to setting the non-parole period are well established at common law. In particular, at common law there should be 'no judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise)<sup>182</sup> for the period that an offender should actually serve in prison before being eligible for parole. In *Power v The Queen* (1984) 131 CLR 623, the High Court held at 628 that the length of the non-parole period should be the 'minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention'.

In the Northern Territory, Gallop J in the Court of Criminal Appeal in *R v Mulholland* (1991) 1 NTLR 1 at 9 referred to the factors relevant to the fixing of a non-parole period at common law:<sup>183</sup>

The starting point must be the minimum period which the prisoner must serve before being eligible for parole, which will be arrived at by taking account the nature of the crime and its gravity in the scale of crimes of its type, the need to give close attention to the danger which the offender presents to the community, the prospects of future progress of the offender and the danger he would be in the community, and all the subjective factors, including his prospects of rehabilitation.

The problem with the Territory's minimum non-parole periods are that they arbitrarily standardise the minimum non-parole period for particular types of offending, regardless of the factors identified by Gallop J in *Mulholland*. These legislatively determined norms (or starting points) deprive a court of the flexibility in fixing non-parole periods in accordance with the well-established principles in the same way as the mandatory sentencing provisions deprive a court of the ability, in the exercise of its sentencing discretion, to determine an appropriate sentence according to traditional principles of sentencing. Like the mandatory sentencing provisions, the mandated minimum non-parole periods have the potential to produce anomalous, harsh, unfair and unjust sentencing outcomes.

### **[3.4] Conclusions and recommendations**

The mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* should be repealed. The Committee has reached the same conclusion in relation to the mandatory minimum non-parole periods prescribed under the *Sentencing Act 1995*. The provisions, while removing an offender from the community for the period of the mandatory sentence or parole-period, do so in a way that is unprincipled, unfair and

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<sup>182</sup> *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520, [44].

<sup>183</sup> See also, *TRH v The Queen* [2018] NTCCA 14, [44].

unjust. It is, therefore, in the interests of the administration of justice that the Northern Territory judiciary regain its traditional sentencing discretion in relation to those matters that are currently the subject of mandatory sentencing and mandatory non-parole period legislation.

**Recommendation 3-1:** The Northern Territory Government should repeal the current mandatory minimum sentencing provisions in Part 3, Division 6 and Division 6A of the *Sentencing Act 1995*, ss 121 and 122 of the *Domestic and Family Violence Act 2007* and s 37(2) of the *Misuse of Drugs Act 1990*.

**Recommendation 3-2:** The Northern Territory Government should repeal the mandatory minimum non-parole periods in ss 54, 55 and 55A of the *Sentencing Act 1995*.<sup>184</sup>

**Recommendation 3-3:** Should the Northern Territory Government not accept recommendation 3-2 as it applies to s 54 of the *Sentencing Act 1995*, that provision should be amended so as to provide that a non-parole period of 50% of a head sentence should be considered as a standard non-parole period, and that if a court determines to impose a lower non-period, it must give reasons for doing so.

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<sup>184</sup> See also Recommendation 4-5 below.

## CHAPTER 4 – MANDATORY SENTENCING FOR MURDER AND SEXUAL OFFENCES

This chapter focuses on mandatory sentencing for murder and sexual offences, and the mandatory parole periods relevant to such offending.

### [4.1] Mandatory sentencing for murder – introduction

In the Northern Territory, murder historically carried a mandatory sentence of death, which survived the enactment of the *Criminal Law Amendment Ordinance 1939*.<sup>185</sup> In nearly all cases, however, the penalty was avoided by the exercise of the prerogative of mercy by the Governor-General. Eventually, the death penalty was abolished in 1973 and replaced with imprisonment for life with hard labour (without the possibility of parole).<sup>186</sup> It was not until 2004 that the Supreme Court had the power to impose a non-parole period as a result of the enactment of the *Sentencing (Crime of Murder) and Parole Reform Act 2003*. The only sentence then available was imprisonment for life but, for the first time, the Court was able to fix a non-parole period. Mandatory minimum non-parole periods were fixed by the Act, and these are discussed in [4.2].

### [4.2] Mandatory sentencing for murder

For adult offenders, the crime of murder carries a mandatory sentence of imprisonment for life.<sup>187</sup> When the Supreme Court sentences an offender to imprisonment for life for the offence of murder, if the court fixes a non-parole period, it must be at least 20 years (referred to as the ‘standard non-parole period’). If any one of a number of specified circumstances applies, the minimum non-parole period that may be fixed is 25 years.<sup>188</sup> In either case, the court may fix a longer non-parole period if satisfied that a longer non-parole period is warranted ‘because of any objective or subjective factors affecting the relative seriousness of the offence’.<sup>189</sup> The court may also fix a shorter non-parole period, but its discretion to do so is limited by the requirement for ‘exceptional circumstances’, which are restricted by the legislation.<sup>190</sup>

A person commits the crime of murder when he or she engages in unlawful conduct which causes the death of another person (‘the deceased’), and the person intends by

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<sup>185</sup> Between 1934 and 1984 the courts had the power to sentence an Aboriginal found guilty of murder at the discretion of the court rather than to impose capital punishment – see *Crimes Ordinance 1934* (SA).

<sup>186</sup> *Criminal Law Consolidation Ordinance 1973* (NT).

<sup>187</sup> Criminal Code s 157(1) and (2). In the case of a youth found guilty of murder, the Supreme Court is not bound to sentence the offender to imprisonment for life and may sentence the youth to a shorter period of detention or imprisonment as it considers appropriate: see *Youth Justice Act 2005* s 82(3). Reference to the ‘Criminal Code’ is to the code of criminal law contained in Schedule 1 to the *Criminal Code Act 1983*, s 4(2) of which provides that, for the purposes of the *Interpretation Act 1978*, ‘the Code’ is to be construed as if it were a separate Act.

<sup>188</sup> *Sentencing Act 1995* s 53(1) and s 53A(1).

<sup>189</sup> *Ibid* s 53A(4).

<sup>190</sup> *Ibid* s 53A(6) and (7).

that conduct to cause the death of, or serious harm to, the deceased or any other person.<sup>191</sup>

Under the Criminal Code, 'harm' is 'physical harm, or harm to a person's mental health, whether temporary or permanent'.<sup>192</sup> The definition of 'serious harm' is 'any harm (including the cumulative effect of more than one harm) that endangers or is likely to endanger a person's life' or 'that is likely to be significant and long-standing'.<sup>193</sup> As a result, the requisite intent for the crime of murder may be an intent to cause a relatively low level of harm, which nonetheless qualifies as 'serious harm' under the Criminal Code definition because it is likely to be significant and long-standing. This may be contrasted with the intent to kill or the intent to cause harm that is likely to endanger a person's life.

#### **[4.3] Varying degrees of moral culpability for murder**

Because the crime of murder can be committed in many different circumstances, not every murder carries the same degree of moral culpability. Murders in the more or most serious category would include murders involving multiple victims as a result of a terrorist act such as a gun massacre or causing a passenger plane to crash; murders involving several victims as a result of hatred or revenge, such as a father murdering his wife and children; murders involving torture and planned murders, where there may be only one victim. Some murders are objectively less serious, for example, where a person kills another, even with the requisite intent, but in the course of an argument which has got out of hand. An objectively further less serious example of murder would be where a person kills another in the course of an argument which has got out of hand and where the relevant intent is to cause serious harm rather than to kill.

A person may be convicted of murder solely as the result of accessorial liability. In the case of *R v Zak Grieve*,<sup>194</sup> the offender was convicted on the basis that he had aided the principal offenders in the planning of the deceased's murder, although he did not participate in the actual killing. As an aider and abettor, he was liable because he had not taken all reasonable steps to prevent the commission of the offence.<sup>195</sup> Although the sentencing judge found that Grieve was 'troubled in his conscience' and had withdrawn at the last minute,<sup>196</sup> the offender's circumstances did not come within the 'exceptional circumstances' provisions of the *Sentencing Act 1995* which would have

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<sup>191</sup> Criminal Code s 156.

<sup>192</sup> Ibid s 1A.

<sup>193</sup> Ibid s 1, definition of 'serious harm'.

<sup>194</sup> *R v Buttery & Ors* [2012] NTSC 103.

<sup>195</sup> On Grieve's appeal against conviction, it was held that, for proof of intention to aid murder, it was not necessary for the Crown to prove intention at each point through to the moment of death. It was sufficient if the intent exists at some time prior to the death or (if relevant) prior to withdrawing from involvement. See *Grieve v The Queen* [2014] NTCCA 2, [9].

<sup>196</sup> *R v Bronwyn Buttery, Christopher Malyschko and Zac Grieve*, SCC 21140102, 21136198 and 21136195, Sentencing Remarks, Mildren J, 9 January 2013.

enabled the judge to fix a non-parole period of less than 20 years.<sup>197</sup> At the same time, one of the *actual participants* in the killing was given a non-parole period of 18 years because the sentencing judge considered that the victim's conduct had amounted to an extreme level of provocation to that offender.

#### [4.4] Statutory injustice

There is an inherent injustice in the statutory requirement for the Supreme Court to fix 20 years as the 'standard non-parole period'. This is apparent from the explanation contained in the legislation:<sup>198</sup>

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

If a non-parole period of 20 years is appropriate for offences in the mid-range, then logically the minimum non-parole period for offences in the low range of objective seriousness should be less than 20 years. However, the court does not have a discretion to go below the standard non-parole period of 20 years, except in the restricted circumstances set out in s 53A(6) and s 53A(7) *Sentencing Act 1995*, which do not include the circumstance that the offence is in the low range of objective seriousness. In *R v Deacon*, the Northern Territory Court of Criminal Appeal referred to this anomaly in the context of the principle of equal justice, observing as follows:<sup>199</sup>

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

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

- the offender has committed the murder in circumstances where the deceased provoked the offender, but falling short of 'legal provocation' which, if established, leads to a conviction for the lesser offence of manslaughter

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<sup>197</sup> *Sentencing Act 1995* ss 53A (6) and 53 (7)(b), which refer to where the victim's conduct substantially mitigates the conduct of the offender.

<sup>198</sup> *Ibid* s 53A (2).

<sup>199</sup> *R v Deacon* [2019] NTCCA 22, [39]. See also [32] and [38], paras (a) and (g).

(carrying a maximum penalty of imprisonment for life but for which there is no mandatory minimum sentence or non-parole period);<sup>200</sup>

- the so called ‘excessive self-defence’, where an offender engages in defensive conduct but where his or her conduct is not a reasonable response to the perceived circumstances;
- the offender co-operates with the authorities, for example, surrenders to police, possibly even before the police are aware that there has been a homicide;
- the offender is genuinely remorseful and pleads guilty at an early opportunity;<sup>201</sup> or
- the offender pleads guilty and gives evidence against co-offenders.

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

#### **[4.5] Submissions made to the Committee and Committee’s views – mandatory sentencing for murder**

The inquiry has received multiple submissions in relation to the abolition of the mandatory life sentence for murder and the related issue of ‘standard’ non-parole periods referred to in [4.2] and [4.4].

NAAJA provides legal services to Aboriginal people in the Northern Territory in the areas of criminal, civil and family law, prison support and through-care services. NAAJA made detailed submissions in relation to the ineffectiveness of mandatory sentencing, the failure of mandatory sentencing to prevent crime, and the fact that mandatory sentencing restricts a court’s capacity to ensure that punishment is proportionate to the offence and otherwise fair. In relation to sentencing for murder, the NAAJA submission argues for the abolition mandatory sentencing and, in the alternative, contends that the definition of ‘exceptional circumstances’ in s 53A(7) *Sentencing Act* should be expanded.<sup>202</sup>

The governing group of the APO NT made a detailed submission disputing the arguments in favour of mandatory sentencing. Two significant arguments may be noted: (1) the claim that mandatory sentencing promotes consistency in sentencing actually confounds ‘consistency’ with ‘fairness’, and (2) that mandatory sentencing

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<sup>200</sup> Section 158 of the Criminal Code requires that a person be convicted of manslaughter and not murder if the elements of the partial defence of provocation apply, in brief, loss of control induced by conduct of the deceased; the deceased’s conduct being such that it could have induced an ordinary person to have lost self-control to such an extent as to have formed an intent to kill or cause serious harm.

<sup>201</sup> This would ordinarily justify a discount of about 25%: see *R v Wilson* (2011) 30 NTLR 51, [39].

<sup>202</sup> NAAJA, Submission, pp. 14-19.

does not properly take into account the intergenerational disadvantage and discrimination that Aboriginal people in the Northern Territory have experienced and continue to experience, in effect, that mandatory sentencing regimes add another layer of discrimination.<sup>203</sup> APO NT recommends that mandatory sentencing (for all offences) be abolished and that a sentencing regime be developed, tailored to the unique needs of the Northern Territory, in particular Aboriginal community members.<sup>204</sup> By way of justification for the suggested new sentencing regime, specific reference was made to the developmental delay of Aboriginal children, exposure to trauma and alcohol misuse in Aboriginal communities and families, high rates of cognitive impairment, including Foetal Alcohol Syndrome Disorder (FASD), high rates of hearing loss and high rates of violent crime associated with hazardous alcohol use.<sup>205</sup>

Danila Dilba is an Aboriginal Community Controlled Health Service (ACCHS) servicing the greater Darwin region. Although no part of its very detailed submission was specifically directed at sentencing for murder, the organisation strongly supports the repeal of all of the Northern Territory's mandatory sentencing laws, irrespective of the offence, on the basis that mandatory sentencing is costly, discriminatory and ineffective.<sup>206</sup>

The Committee does not accept that mandatory sentencing regimes are directly discriminatory in the legal sense. However, they disproportionately affect Aboriginal people in the Northern Territory because Aboriginal people – in numbers disproportionate to the percentage of Aboriginal people in the overall population – commit offences which are subject to mandatory sentencing. Aboriginal people are also disproportionately represented as victims of domestic, family and sexual violence and intimate partner homicide.

Sisters Inside Inc. is an independent community organisation which 'exists to advocate for the human rights of women in the criminal justice system'.<sup>207</sup> In general, the submission of its CEO, Debbie Kilroy, contended that mandatory sentencing is a system which leads to disproportionate and anomalous outcomes and which affects the most marginalised and vulnerable communities in Australian society: 'The expansion of the NT's mandatory sentencing regime has crept inexorably outwards, and now encompasses the whole array of serious and non-serious offences'.<sup>208</sup> The submission did not deal specifically with mandatory life sentences and non-parole periods for murder. With respect to mandatory sentencing generally, however, Sisters Inside Inc. submitted that the judiciary should have 'full authority to determine a

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<sup>203</sup> APO NT, Submission, p. 3.

<sup>204</sup> Ibid p. 4.

<sup>205</sup> Ibid p. 5.

<sup>206</sup> Danila Dilba, Submission, p. 3.

<sup>207</sup> Sisters Inside Inc., Submission, p. 1.

<sup>208</sup> Ibid p. 2.

situationally-appropriate sentence and non-parole period and impose any other conditions'.<sup>209</sup>

Women are a growing prison population in Australia. Between 30 June 2017 and 30 June 2018, there was a 10 percent increase in women in prison and between 1995 and 2002, the female imprisonment rate increased by 58 percent.<sup>210</sup> As at June 2016, nearly 34 percent of women in prison identified as Aboriginal or Torres Strait Islander, despite making up 2 percent of the general population at that time and the last 30 years have seen the number of Aboriginal and Torres Strait Islander women in prison more than double.<sup>211</sup> Further, studies consistently report that a high proportion (around 70-90%) of women in custody have a history of emotional, sexual and/or physical abuse, with key perpetrators being spouses or partners.<sup>212</sup>

The ALRC discussed mandatory sentencing in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*. The evidence from that inquiry suggested that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent. It may also disproportionately affect particular groups within society including Aboriginal people. However, the ALRC submission placed significant emphasis on the desirability of community-based sentencing options,<sup>213</sup> which are of limited relevance to the issue of mandatory sentencing for murder.

In a very detailed submission, Acting Justice Dean Mildren wrote that the introduction of mandatory minimum sentences in Australia was not only unnecessary but also 'a rejection of the basic methodology of sentencing', which usually must take into account not only retribution and punishment, but the possibility of reform, and in some cases, considerations of mercy.<sup>214</sup> He argued that, because the mandatory minimum only comes into play if a judge considers that a sentence less than the mandatory minimum is appropriate, it follows logically that imposing the mandatory minimum sentence will inevitably lead to injustice.<sup>215</sup> As discussed in detail in Chapter 3, the Committee accepts that argument.

Based on his long experience as a Northern Territory lawyer and judicial officer, Acting Justice Mildren postulated that crime rates are determined by such factors as poverty, poor housing, lack of jobs, boredom, alcoholism, drug taking and particular social attitudes (evidenced by conduct by some men to control and impose their will upon

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<sup>209</sup> Ibid p. 3.

<sup>210</sup> Australian's National Research Organisation for Women's Safety, 'Women's imprisonment and domestic, family and sexual violence', p. 3 <<https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/ANROWS-Imprisonment-DFV-Synthesis.1.pdf>> (citations omitted).

<sup>211</sup> Ibid (citations omitted).

<sup>212</sup> Ibid p. 5 (citations omitted).

<sup>213</sup> Discussed in Chapter 5.

<sup>214</sup> Acting Justice Dean Mildren, Submission, p. 7.

<sup>215</sup> Ibid.

the female members of their household).<sup>216</sup> Acting Justice Mildren argued that there is no evidence to support the premise that mandatory sentencing acts as a deterrent. He contends that the real deterrent in the mind of a potential offender is the risk of being caught by police, charged with the offence and going to prison to serve a sentence of indeterminate length.<sup>217</sup>

As Acting Justice Mildren points out, the mandatory minimum sentence of life imprisonment for murder is out of step with the maximum penalties for murder in all other jurisdictions in Australia. The Northern Territory is the only jurisdiction where there is a mandatory sentence of imprisonment for life which cannot be departed from. In all other jurisdictions, the maximum penalty is life, although the court retains a power to impose a lesser sentence if it is warranted by the circumstances of the offence or the offender, or, in the case of Western Australia, if the sentence of life would be unjust having regard to the circumstances of the offence or the offender and the offender would not be a threat when released, in which case the offender is liable to imprisonment for 20 years.<sup>218</sup> Although in some jurisdictions the power to impose a lesser sentence than life is restricted by a mandatory minimum head sentence (e.g. Western Australia), the majority of other Australian jurisdictions do not impose any mandatory minimum non-parole periods.<sup>219</sup>

That leaves for consideration the related issue of mandatory minimum head sentences (other than imprisonment for life), whether by legislation such as that in Western Australia referred to above, or via the 'standard sentence' provisions under Victorian legislation, which imposes guidelines. It may be noted that, in Queensland, there is a mandatory minimum non-parole period of 30 years if the offender causes the death of more than one person or has a prior conviction for murder, and 25 years if the victim was a police officer. These higher mandatory minimum head sentence provisions correspond to some extent with the higher statutory minimum non-parole period of 25 years specified in s 53A(1) *Sentencing Act 1995*.<sup>220</sup>

A submission made by the managing principal solicitor, Central Australian Women's Legal Service ('CAWLS'), on behalf of the Northern Territory Women's Legal Services ('NTWLS'), advocated for the establishment of a Sentencing Advisory Council as an independent statutory body to conduct research on sentencing policy; to collect and analyse statistical data; to provide current sentencing information to the Government, judiciary and to the public, and to provide feedback on the effectiveness of sanctions

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<sup>216</sup> Ibid p. 4.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid p. 11.

<sup>219</sup> Ibid p. 12.

<sup>220</sup> The 25 year minimum non-parole is triggered where the victim was, inter alia, a police officer (a number of other occupations are also specified) killed in the course of or for a reason connected with his or her occupation; where the conduct causing death included the commission of a sexual offence against the victim; where the victim was under 18 years of age; where the offender is being sentenced for multiple convictions for unlawful homicide, or where the offender had previously been convicted of unlawful homicide.

imposed.<sup>221</sup> The NTWLS submission supported the abolition of mandatory life sentences for murder, on the basis that a Sentencing Advisory Council were established to monitor, review and report on sentencing trends including non-parole periods.<sup>222</sup> The submission also raised a matter not specifically discussed in the consultation paper, namely, the particular impact of mandatory sentencing for murder on women who use fatal violence to resist ongoing partner abuse.<sup>223</sup>

It is important to refer finally to the submission made by the Senior Director, Legal and Strategic Policy, NTPFES, on behalf of the Commissioner. The essential contention is that mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* are 'principled, fair, and just'.<sup>224</sup> However, in relation to whether the mandatory sentence for murder should be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period, the Commissioner's view is that further information in relation to the nature of the murder, mitigating factors and moral culpability would need to be considered in order to make an informed recommendation whether for or against abolition.<sup>225</sup> Consideration of the issue warrants investigation as part of a 10-year review proposed in relation to mandatory sentencing for violent offences generally, which could occur in 2025.

In relation to the Commissioner's submission, the Committee's view is that there is no reason to delay the consideration of abolishing mandatory life sentences for murder because, as explained in [4.1], the regime of mandatory life sentences for the crime of murder has been in place for more than 60 years, with the mandatory minimum non-parole periods in force since 2004.

#### **[4.6] Conclusions and recommendations – mandatory sentencing for murder**

The Committee's conclusions are set out below:

1. In the view of the Committee, the penalty of mandatory life sentence for murder should be abolished. The maximum penalty for murder should be imprisonment for life with a power in the court to impose a lesser sentence if the circumstances of the offence or of the offender warrant that course.
2. In the further view of the Committee, there should be no 'special' minimum non-parole periods applicable to sentencing for the crime of murder. The Supreme

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<sup>221</sup> NTWLS, Submission, p. 4.

<sup>222</sup> Ibid p. 8.

<sup>223</sup> Ibid. The Committee notes that women in such circumstances may have available to them the partial defence of provocation (s 158 Criminal Code) which would result in a manslaughter conviction in lieu of a murder conviction. That may resolve at least part of the concern raised in the NTWLS submission.

<sup>224</sup> NTPFES, Submission, p. 2.

<sup>225</sup> Ibid p. 3.

Court should have the power to impose not only an appropriate sentence but also an appropriate non-parole period.

3. In the alternative to 2 the Committee is of the view that the 'exceptional circumstances' presently specified in s 53A(7) *Sentencing Act 1995* should be made less restrictive, for example, by allowing the Supreme Court to fix a non-parole period of less than 20 years for offending in the low range of objective seriousness (or, to adopt the words of s 53A(2): 'an offence below the middle of the range of objective seriousness').

**Recommendation 4-1:** The Northern Territory Government should abolish the penalty of mandatory life sentence for murder. The maximum penalty for murder should be imprisonment for life with a power in the court to impose a lesser sentence if the circumstances of the offence or of the offender warrant that course.

**Recommendation 4-2:** The Northern Territory Government should abolish 'special' minimum non-parole periods applicable to sentencing for the crime of murder. The Supreme Court should have the power to impose not only an appropriate sentence but also an appropriate non-parole period.

**Recommendation 4-3:** Should the Northern Territory Government not accept recommendation 4-2 the 'exceptional circumstances' presently specified in s 53A(7) *Sentencing Act 1995* should be made less restrictive, for example, by allowing the Supreme Court to fix a non-parole period of less than 20 years for offending in the low range of objective seriousness (or, to adopt the words of s 53A (2): 'an offence below the middle of the range of objective seriousness').

#### **[4.7] Mandatory sentencing for sexual offences**

Mandatory sentencing for sexual offences is governed by Part 3, Division 6B of the *Sentencing Act 1995*. Section 78F of the Act provides:

- (1) Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve:
  - (a) a term of actual imprisonment; or
  - (b) a term of imprisonment that is suspended by it partly but not wholly.
- (2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order under subsection (1).

The term 'sexual offence' is defined in s 3 of the *Sentencing Act 1995* to mean 'an offence specified in Schedule 3 [of the *Sentencing Act*]'. Included in Schedule 3 are 13 Criminal Code offences found in Schedule 1 of the latter Act.<sup>226</sup>

While the imposition of a mandatory term of imprisonment for sexual offences may be seen by some as an effective crime control strategy, it is questionable whether the imposition of a short term of imprisonment for relatively minor offending achieves sentencing objectives other than short term incapacitation.<sup>227</sup> Further, 'Indigenous people are more likely to be sentenced to short term imprisonment'.<sup>228</sup> As Cunneen, Collins and Ralph note:<sup>229</sup>

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

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

The requirement in s 78F(1)(a) that an actual term of imprisonment must be imposed for a sexual offence limits the ability of the court, in appropriate circumstances, to impose a community-based sentencing option. For example, for less serious forms of sexual offending such as publishing indecent articles,<sup>230</sup> which carries a maximum sentence of two years imprisonment, a community-based sentencing option may be more appropriate.

The mandatory sentencing provisions for sexual offences are distinctive, in that, unlike their counterparts for violent, drug and domestic violent offences, first, they do not specify a minimum length of the mandatory period of imprisonment, and secondly, they do not allow for exceptional or particular circumstances to mitigate their effect.

In practice, it has not been uncommon for courts to resort to the imposition of 'rising of the court' sentences to avoid any injustice the requirement in s 78F(1)(a) may cause. Unfortunately, such practices can tend to impair confidence in the integrity of the criminal justice system. It is preferable that courts be empowered to impose just

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<sup>226</sup> Possession of child abuse material (s 125B); publishing an 'indecent' article (s 125C, with the term 'indecent' defined in s 125A); sexual intercourse or gross indecency involving a child under 16 years (s 127), or over 16 years under special care (s 128); sexual intercourse or gross indecency involving by a provider of services to a mentally ill or 'handicapped' person (s 130); attempting to procure a child under 16 to have sexual intercourse or to engage in any act of gross indecency (s 131); as an adult, having a sexual relationship with a child under 16 (s 131A); dealing indecently with a child under 16 (s 132); incest (s 134); bestiality (s 138); indecent assault (s 188(2)(k)); sexual intercourse or gross indecency without consent (s 192); coerced sexual self-manipulation (s 192B).

<sup>227</sup> Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement*, (Institute of Criminology, 2005), [9.2].

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> *Sentencing Act 1995* s 125C.

sentences other than in a manner that may appear to be inconsistent with the intent of the legislature.

Section 55 of the *Sentencing Act 1995* requires that a non-parole period for an offence against s 192(3) of the Criminal Code (sexual intercourse without consent) must be not less than 70% of the head sentence.<sup>231</sup> Similarly, section 55A of the *Sentencing Act* provides that a non-parole period for a broad range of sexual and violent offences committed by an adult against a child must be not less than 70% of the head sentence.<sup>232</sup>

The imposition of a mandatory term of imprisonment for sexual offences also can result in the offender being placed on the Child Protection Offender Register. Pursuant to the *Child Protection (Offender Reporting and Registration) Act 2004*, a person found guilty of a sexual offence stipulated in Schedule 1<sup>233</sup> or 2<sup>234</sup> of the Act is a person deemed to be a reportable offender. The offender is required to register and report to the police for a prescribed period. That period can range from 7 years to life, depending on the circumstances and the nature of the offending. The reporting conditions can be onerous, and a breach of the conditions often will attract a term of imprisonment.

Sexual assault is prevalent, but rarely reported, rarely prosecuted, and rarely punished: it is estimated that less than two per cent of sexual offences committed in Australia result in conviction.<sup>235</sup> In these circumstances, it is obvious that current Northern Territory mandatory sentencing laws for sexual offences have had marginal if any effect in reducing the incidence of sexual offending in the Northern Territory.

#### **[4.8] Submissions made to the Committee and Committee's views – mandatory sentencing for sexual offences**

As noted elsewhere, a large majority of the submissions received by the Committee advocated the abolition of mandatory sentencing. Although the principal focus of those submissions was in relation to mandatory sentencing for violent offences, the reasons advanced for generally opposing mandatory sentencing is for the most part applicable to mandatory sentencing in relation to sexual offences. As the Northern Territory Bar Association ('NTBA') submitted:<sup>236</sup>

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<sup>231</sup> Similar laws also apply to certain specified offences under the *Misuse of Drugs Act 1990*, as discussed in Chapter 3.

<sup>232</sup> Specifically, offences against ss 127, 130, 131, 131A, 132, 134, 177(a), 181, 184, 186, 186B, 188 or 192(4) of the Criminal Code.

<sup>233</sup> Schedule 1 offences to which a mandatory sentence applies are ss 127, 130, 131A, 134(2) or (3), 192 and 192B of the Criminal Code.

<sup>234</sup> Schedule 2 offences to which a mandatory sentence applies are ss 125B, 125C, 128, 131, 132 and 188(1) of the Criminal Code.

<sup>235</sup> Kathleen Daly, 'Conventional and innovative justice responses to sexual violence' *ACSSA Issues* (No. 12, 2011) Australian Centre for the Study of Sexual Assault (Australian Government), accessed at <<https://core.ac.uk/download/pdf/143870356.pdf>>.

<sup>236</sup> NTBA, Submission, [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.

Similarly, APO NT submitted that ‘we recommend that all mandatory sentences in the NT be repealed and replaced with a sentencing regime that focuses on therapeutic alternatives to custody’.<sup>237</sup>

However, not all stakeholders subscribed to this view. The NTPFES submitted that the Territory’s ‘mandatory sentencing provisions are principled, fair and just’, and, in relation to sexual offences, the NTPFES submitted that:<sup>238</sup>

Given disparate sentencing seen in many cases, and the nature of the harm that is caused through sexual offending that carry lifelong trauma for the victims, we believe it is considered that mandated sentencing provisions ought to remain.

The Committee received a number of submissions directed specifically to the issue of mandatory sentencing for sexual offences. Acting Justice Dean Mildren, who has served as a Justice of the Supreme Court for some thirty years, submitted:<sup>239</sup>

I do not think that s 78F(1)(a) achieves anything much except nuisance value. In the case of serious offending, the courts have always taken the view that a considerable sentence is usually justified.

The NTWLS submitted that mandatory sentencing for sexual offences should be abolished however, a Sentencing Advisory Council should be established to monitor, review and report on sentencing trends including non-parole periods.<sup>240</sup>

Several stakeholders pointed to the injustice that flows from the current provisions when teenagers in consensual relationships are prosecuted. Territory Criminal Lawyers provided the following examples:<sup>241</sup>

an 18-year-old girl and a 17-year-old boy create, by mutual consent, a video of their consensual sexual activity; a 16-year-old girl takes a photo of herself engaging in sexual activity and sends it to her 18-year-old girlfriend; a boy who has just turned 18 has sexual intercourse with his girlfriend who is just about to turn 16. Each of the 18-year-olds in the above examples would be guilty of an offence that requires a court to impose a sentence of actual imprisonment.

The Committee considers that s 78F of the *Sentencing Act 1995* serves no useful purpose, has not reduced harms or conferred benefits, and is undesirable for the same reasons as mandatory sentencing generally. The Committee disagrees with any contention that this mandatory sentencing provision is principled, fair or just.

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<sup>237</sup> APO NT, Submission, p. 2.

<sup>238</sup> NTPFES, Submission, p. 4.

<sup>239</sup> Acting Justice Dean Mildren, Submission, p. 12.

<sup>240</sup> NTWLS, Submission, p. 8.

<sup>241</sup> Territory Criminal Lawyers, Submission, [42].

#### **[4.9] Conclusions and recommendations – mandatory sentencing for sexual offences**

**Recommendation 4-4:** The Northern Territory Government should repeal s 78F of the *Sentencing Act 1995* (NT).

For the same reasons, the Committee considers that ss 55 and 55A of the *Sentencing Act 1995* as they apply to sexual offences and violent offences against children, are unprincipled, unfair and unjust. As discussed in Chapter 3, the Committee has reached a similar view of this provision in relation to drug offences.

The Court of Criminal Appeal has recently adverted to this issue:<sup>242</sup>

It is not the place or function of this Court to express opinion or pass judgment on the merits of the legislative policy which underpinned the enactment of a mandatory minimum non-parole period of 70 percent for offences of this nature. However, what can be said is that mandatory minima of this type will, in cases such as the present, inevitably interfere with the courts' capacity to maintain parity and consistency in sentencing. If there is injustice in this case, it is as a consequence of the operation of the mandatory minimum non-parole period. [Citation omitted]

In the view of the Committee, these provisions are not only unfair, but also anomalous and arbitrary, in that they apply to some but not all offences of a certain kind: the Northern Territory Court of Criminal Appeal has confirmed that they do not extend “to offences of a similar or even identical kind under previous legislation.”<sup>243</sup> Furthermore, in the view of the Committee the operation of these provisions has given rise to excessive and unnecessary controversy and complexity: judges have been required to determine whether or not the enactment of these provisions:

- amounted to an increase in penalty for the offences concerned (it did not);<sup>244</sup>
- had the potential to lead to more punitive dispositions (it did);<sup>245</sup>
- requires a court to fix a non-parole period of at least 70% when imposing an aggregate sentence for offences that include at least one offence to which section 55 or 55A applies (they do);<sup>246</sup> and
- requires a court to fix a non-parole period of at least 70% when imposing a non-aggregate sentence for offences that include at least one offence to which section 55 or 55A applies (they do not).<sup>247</sup>

**Recommendation 4-5:** The Northern Territory Government should repeal ss 55 and 55A of the *Sentencing Act 1995* (NT).

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<sup>242</sup> *Norris v The Queen* [2020] NTCCA 8, 46.

<sup>243</sup> *R v Cumberland* [2019] NTSCFC 13,[19], approving *JL v The Queen* [2019] NTCCA 7, [38].

<sup>244</sup> *Ibid* [43].

<sup>245</sup> *Ibid* [44].

<sup>246</sup> *Ibid* [48].

<sup>247</sup> *Ibid* [46].

The Committee commends the proposal by Northern Territory Women's Legal Services to establish a Sentencing Advisory Council in conjunction with the repeal of mandatory sentencing. It is the view of the Committee that the proposal warrants serious consideration by the Northern Territory Government.

Several stakeholders submitted that registration of offenders on the Child Protection Offender Register should be subject to the exercise of limited judicial discretion and review. The Committee considers that these submissions are soundly based and persuasively made. However, the fact that an offender is liable to be placed on the Register is ordinarily irrelevant to the sentencing process.<sup>248</sup> The purpose of the Child Protection Offender Register and the statutory schemes that support it in all Australian jurisdictions, including the *Child Protection (Offender Reporting and Registration) Act 2004*, is not to punish offenders but to protect the community.<sup>249</sup> Accordingly, the Committee accepts that consideration of this issue falls outside the terms of reference of this inquiry, which are limited to matters of sentencing.

Nevertheless, the Committee notes and commends to the Northern Territory Government the findings and recommendations of the 2012 Final Report of the Law Reform Commission of Western Australia inquiry (Project 101) into the *Community Protection (Offender Reporting) Act 2004* (WA), and the 2012 Final Report of the Victorian Law Reform Commission (VLRC) inquiry, 'Sex Offenders Registration', with particular reference to Recommendations 4 to 16.

As noted above, the conviction rate for sexual offending is unacceptably low. In the view of the Committee, sentencing reforms in themselves are unlikely to effectively address this serious issue. Several stakeholders proposed to the Committee that the justice system response to sexual abuse should be broadened to include therapeutic and restorative justice approaches. The Committee agrees, as set out in greater detail in Chapter 5. By way of example, Danila Dilba referred to a Canadian therapeutic justice program:<sup>250</sup>

Canadian Community Holistic Circle Healing Program (**CHCH**) served a restorative justice function in an Indigenous community that suffered high rates of child sexual assault...

The program worked whereby once criminal charges are laid, the offender can undergo the traditional criminal justice route or enter a guilty plea, assume full responsibility and enter the Healing program. The team then requests a delay in sentencing so they can begin their healing work and prepare a pre-sentence report. This report comprehensively assesses the offender's state of mind, chance of rehabilitation, and also takes into account

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<sup>248</sup> *Incani v Davis* [2008] NTSC 44 per Mildren J at [44], applying *Director of Public Prosecutions (Vic) v Ellis* (2005) 11 VR 287 at 294, [17].

<sup>249</sup> See Final Report of the Law Reform Commission of Western Australia inquiry (Project 101) into the *Community Protection (Offender Reporting) Act 2004* (WA), pp. 55-56.

<sup>250</sup> For a critical examination of CHCH, and the feasibility of its transference to Australia, see Kylie Cripps and Hannah McGlade, *Indigenous family violence and sexual abuse: Considering pathways forward* Journal of Family Studies Volume 14:240-253 (October 2008).

the role of the victim, the non-offending spouse and the families of each offender. An action plan is proposed based on a Healing Contract spanning 2-5 years. Failure to adhere to the contract will result in the offender being subject to criminal prosecution.

The Healing Circle program was evaluated in 2001 with significant health and wellness improvements reported by the community. Similarly, recidivism was substantially reduced, with only 2 out of 107 offenders reoffending. Research attributed the program's success to its cultural sensitivity and access to financial and human resources.

Lessons from the Hollow Waters experience and other restorative justice projects globally, based on traditional notions of healing, could be used to develop similar programs for youth and adults in the Northern Territory. [Citations omitted]

The RMIT University's Centre for Innovative Justice has undertaken considerable work in developing restorative justice-based responses to sexual offending, including a detailed submission to the current inquiry by the VLRC into improving the response of the justice system to sexual offences.<sup>251</sup>

Although these matters are outside the terms of reference of this inquiry, the Committee encourages the Northern Territory Government to establish and develop alternative justice system responses to sexual offending.

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<sup>251</sup> Accessed at <<https://cij.org.au/cms/wp-content/uploads/2018/11/cij-submission-to-vlrc-january-2021.pdf>>.

## CHAPTER 5 – COMMUNITY-BASED SENTENCING OPTIONS

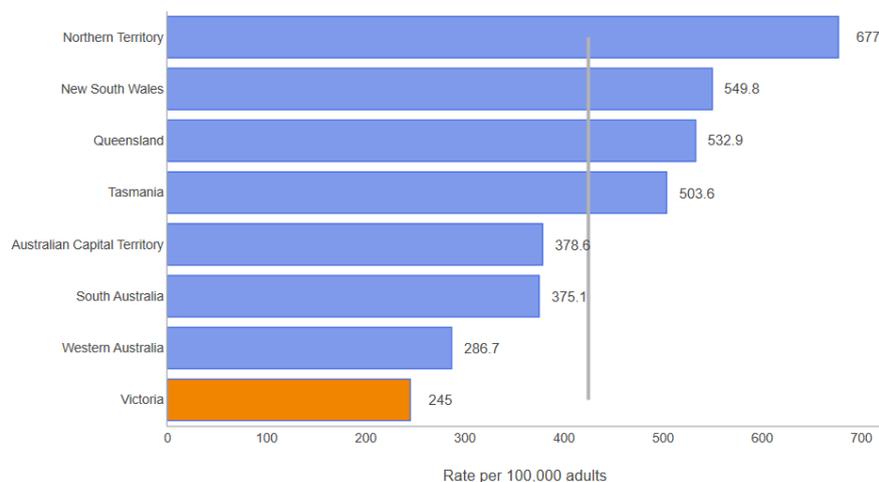
### [5.1] Introduction

Community-based sentences can be defined as ‘sentences that are not primarily based in a prison setting but rather are carried out wholly, or to a large extent, in the community’.<sup>252</sup> While retaining a punitive effect, the objectives of such sentencing options ‘recognise more clearly and explicitly the community’s interest in the rehabilitation of the offender’.<sup>253</sup>

Australian Bureau of Statistics (‘ABS’) data collated by the Victorian Sentencing Advisory Council indicate that, as at December 2019, the Northern Territory had the highest rate of offenders serving community-based sentences; 677 people per 100,000 adults as evidenced in the following table.<sup>254</sup>

**Table 1**

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



<sup>252</sup> Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.13].

<sup>253</sup> *R v Morris* (unreported, 14 July 1995, NSWCCA) 4. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.16].

<sup>254</sup> ABS, *Corrective Services, Australia, December Quarter 2019*, (Catalogue No 4512.0, 2019) quoted by Sentencing Advisory Council, *Community-Based Sentences* (Web Page, 26 February 2021) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/community-based-sentences>>. Note that the vertical line on the graph indicates the national rate.

In the Northern Territory, community-based sentencing orders are divided into non-custodial orders and custodial orders. The former is not an alternative to custody. Rather, such orders are made when the court concludes that the offending is not serious enough to warrant the offender's imprisonment. When the court makes a custodial order, a determination has been made that the conduct does warrant the imprisonment of the offender but suspends incarceration of the offender on the condition that the offender comply with the terms of the custodial order. It has been suggested that the:<sup>255</sup>

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

The Northern Territory is the only Australian jurisdiction with more sentenced offenders in prison than on community-based orders. In the June Quarter 2020, there were 1,202 sentenced persons in full time custody in the Northern Territory, compared with 1,246 in community-based corrections (49.1% and 50.19% respectively).<sup>256</sup> The most recent ABS data for the December Quarter 2020 shows that this proportion has not markedly changed; there were 1,145 sentenced persons in full time custody, compared with 1,258 persons in community-based corrections (47.6% and 52.4% respectively).<sup>257</sup>

By contrast, the equivalent nationwide proportion is 26.4% compared with 73.6% (27,913 sentenced persons in full-time custody, compared with 77,919 persons in community-based corrections). NSW has four times as many sentenced offenders on community orders than in prison.

## **[5.2] Non-custodial orders**

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

- supervised and unsupervised bonds;<sup>258</sup>
- community work orders,<sup>259</sup> and
- community-based orders.<sup>260</sup>

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<sup>255</sup> ALRC (n 4), 250 [7.82].

<sup>256</sup> ABS, *Corrective Services, Australia, June Quarter 2020*, datacubes Table 1, available at <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/jun-quarter-2020>, as cited in Community Corrections, Submission, [3.2].

<sup>257</sup> ABS, *Corrective Services, Australia, December Quarter 2020*, datacubes Table 1, released 11 March 2021 and available at <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>> (accessed 22 March 2021).

<sup>258</sup> *Sentencing Act 1995* ss 11 and 13.

<sup>259</sup> *Ibid* pt 3 div 4.

<sup>260</sup> *Ibid* pt 3 div 4A.

### **[5.2.1] Supervised and unsupervised bonds**

A bond, whether supervised or unsupervised, is ‘an order of the court requiring that the offender not commit any further offences for a specified period’.<sup>261</sup> In the Northern Territory, the period of such a bond cannot exceed 5 years.<sup>262</sup> Those subject to a bond must appear before the court if called on to do so, be of good behaviour for the period of the order and observe any conditions imposed by the court.<sup>263</sup> Supervised and unsupervised bonds are imposed for low level offending, and generally are not available if a mandatory minimum sentence applies. It is open to a court to impose a bond if particular circumstances are demonstrated in accordance with s 37(2) of the *Misuse of Drugs Act 1990* or s 121(3)(b) of the *Domestic and Family Violence Act 2007*. A bond is not available, however, as an option in relation to violent offences even if exceptional circumstances are demonstrated because an actual term of imprisonment must be imposed.

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

### **[5.2.2] Community work orders**

Community work orders require an offender to participate in an approved project<sup>264</sup> for a period not exceeding 480 hours.<sup>265</sup> The purpose of such an order is expressly stated ‘to reflect the public interest in ensuring that a person who commits an offence makes amends to the community for the offence by performing work that is of benefit to the community’.<sup>266</sup> While no exclusions to eligibility are expressed in the *Sentencing Act 1995*, as with supervised bonds a community work order is not available if a mandatory minimum sentence applies. The options available to the court in the event an offender breaches a community work order are articulated in the *Sentencing Act 1995*, s 39.

### **[5.2.3] Community-based orders**

Community-based orders are similar to community work orders but differ in a number of respects. First, those convicted of a sexual offence, a violent offence, a common assault offence which falls within s 188(2) of the Criminal Code or another offence

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<sup>261</sup> Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community based sentencing options for rural and remote areas and disadvantaged populations* (Report No 30, March 2006) [2.20].

<sup>262</sup> *Sentencing Act 1995* s 11(1)(a) (release on bond without conviction) and s 13(1)(a) (release on bond following conviction).

<sup>263</sup> *Ibid* ss 11(1) and 13(1).

<sup>264</sup> An ‘approved project’ is defined in the *Sentencing Act 1995* s 3, to mean ‘a rehabilitation program or work, or both, approved by the Commissioner under the *Correctional Services Act 2014*.’

<sup>265</sup> *Sentencing Act 1995* s 34(1).

<sup>266</sup> *Ibid* s 33A.

prescribed by regulation, are not eligible for such an order.<sup>267</sup> Secondly, a prerequisite to the court making such an order is the receipt of a pre-sentence report.<sup>268</sup> Thirdly, the maximum period a community-based order can be in force is two years.<sup>269</sup> Finally, there are a number of conditions that apply to community-based orders that do not apply to community work orders.<sup>270</sup> As was noted in the Second Reading Speech to the Justice (Corrections) and Other Legislation Amendment Bill 2011, the introduction of community-based orders aimed ‘to provide supervision in the community and mandate programs, treatment or training with the option for a court to order electronic monitoring and community work’.<sup>271</sup>

### **[5.3] Custodial orders**

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

- home detention orders;<sup>272</sup>
- community custody orders;<sup>273</sup> and
- suspended sentences.<sup>274</sup>

#### **[5.3.1] Home detention orders**

Home detention orders can be made where the court ‘is satisfied that it is desirable to do so in the circumstances.’<sup>275</sup> Such an order cannot remain in force for a period longer than 12 months,<sup>276</sup> and may be made subject to such terms and conditions as the court thinks fit.<sup>277</sup> Three conditions which are not mandatory, but which are commonly included in a home detention order are set out in s 44(3)(a)-(c) of the *Sentencing Act 1995*. The order can stipulate that the offender:

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

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<sup>267</sup> Ibid s 39A.

<sup>268</sup> Ibid s 39B.

<sup>269</sup> Ibid s 39D.

<sup>270</sup> Ibid ss 39E-39G.

<sup>271</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, Thursday 5 May 2011, 7974, Mr McCarthy (Correctional Services).

<sup>272</sup> *Sentencing Act 1995* pt 3 div 5 subdiv 2.

<sup>273</sup> Ibid pt 3 div 5 subdiv 2A.

<sup>274</sup> Ibid pt 3 div 5 subdiv 1.

<sup>275</sup> Ibid s 44(1).

<sup>276</sup> Ibid s 44(2).

<sup>277</sup> Ibid s 44(3).

equipment or device necessary for the efficient operation of the monitoring device; and

- (c) obey the reasonable directions of the Commissioner.

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

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

- suitable arrangements have been made for the offender to live at the premises or place specified in the report;<sup>278</sup>
- the premises or place specified in the report is suitable;<sup>279</sup> and
- the making of the home detention order is not likely to inconvenience or put at risk other persons living in those premises or at that place or the community generally.<sup>280</sup>

Finally, in preparing the report for the court, the Commissioner of Correctional Services may, but is not required by statute to, 'take into account the views of those members of the community who, in the opinion of the Commissioner, may be affected by the making of the home detention order'.<sup>281</sup>

The circumstances in which an offender will breach a home detention order are set out in s 48(1) of the *Sentencing Act 1995*. If the breach does not result from conduct punishable by imprisonment, the court may allow the order to continue on the same or varied terms and conditions.<sup>282</sup> If the offender's conduct resulting in the breach does constitute an offence punishable by imprisonment, or even if it is not such an offence but the court considers that it is not appropriate to continue or vary the order, the order must be revoked.<sup>283</sup> Should the order be revoked, 'the offender must be imprisoned for the term suspended by the court on the making of the order as if the order had never been made and despite any period that the offender has served under the order'.<sup>284</sup> For example, if an 11 month home detention order is revoked in the 10th month, the offender must serve the full 11 months of imprisonment. No credit is given

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<sup>278</sup> Ibid s 45(1)(a)(i).

<sup>279</sup> Ibid s 45(1)(a)(ii).

<sup>280</sup> Ibid s 45(1)(a)(iii).

<sup>281</sup> Ibid s 45(2).

<sup>282</sup> Ibid s 48(9) and (10).

<sup>283</sup> Ibid s 48(6)(a).

<sup>284</sup> Ibid s 48(6)(b).

for the 10 months the offender has completed without breaching the terms and conditions of the order.

### **[5.3.2] Community custody orders**

A community custody order is a sentence of imprisonment in which the offender serves their sentence in the community.<sup>285</sup> Those convicted of a sexual offence, a violent offence or a common assault with aggravating circumstances as specified in a 188(2) of the Criminal Code, are not eligible to be sentenced to a community custody order.<sup>286</sup> A community custody order cannot be made in conjunction with a suspended sentence,<sup>287</sup> or where the offender is convicted of more than one offence and the total period of imprisonment exceeds 12 months (which is the maximum duration of a community custody order).<sup>288</sup> Before the court can make a community custody order it must receive a pre-sentence report,<sup>289</sup> which is prepared by the Commissioner of Correctional Services.<sup>290</sup>

A community custody order is subject to the statutory conditions set out in s 48E of the *Sentencing Act 1995*. These include being supervised by a probation and parole officer;<sup>291</sup> not committing another offence punishable by imprisonment; and performing 12-20 hours per week of community work, undertaking a prescribed program,<sup>292</sup> or undergoing counselling or treatment as directed by the Commissioner of Correctional Services. The court may also impose other conditions stipulated in s 48F, including that the offender must undertake one or more prescribed programs;<sup>293</sup> not consume or purchase alcohol or illicit drugs;<sup>294</sup> live at a specified place;<sup>295</sup> wear an approved monitoring device;<sup>296</sup> and allow for the installation of monitoring equipment.<sup>297</sup> As was noted by Barr J in *Mamarika v Ganley* [2013] NTSC 6 at [23], while a community custody order is a sentence of imprisonment served in the community, the order 'establishes a very intensive regime'.

If the offender breaches the conditions of a community custody order, the court must revoke the order unless the 'court is satisfied it would be unjust to do so because of

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<sup>285</sup> Northern Territory Government, *Community Custody Order*, (Web Page, 6 February 2019) <<https://nt.gov.au/law/prisons/community-custody-order>>.

<sup>286</sup> *Sentencing Act 1995* s 48A(1)(a).

<sup>287</sup> *Ibid* s 48B(2).

<sup>288</sup> *Ibid* s 48B(3).

<sup>289</sup> *Ibid* s 48B(1).

<sup>290</sup> Note the definition of 'pre-sentence report' in the *Sentencing Act 1995* s 3.

<sup>291</sup> In *Mamarika v Ganley* [2013] NTSC 6, Barr J noted at [28] that the reporting requirement in s 48E(1)(d) meant the offender must have four contacts per week with his or her probation officer; 'two reports by the offender and two visits by the probation officer.'

<sup>292</sup> A 'prescribed program' is defined in the *Sentencing Act 1995* s 3 as 'a course, training, education or similar activity prescribed by regulation for the order.'

<sup>293</sup> *Sentencing Act 1995* s 48F(1)(a).

<sup>294</sup> *Ibid* s 48F(1)(b).

<sup>295</sup> *Ibid* s 48F(2)(a).

<sup>296</sup> *Ibid* s 48F(2)(b).

<sup>297</sup> *Ibid* s 48F(2)(c).

exceptional circumstances that have arisen since the order was made'.<sup>298</sup> If such exceptional circumstances do not exist and the order is revoked, the court must sentence the offender 'to imprisonment for the unexpired term of imprisonment under the order at the date of the breach of the condition'.<sup>299</sup> In this regard, a community custody order differs markedly from a home detention order.

### **[5.3.3] Suspended sentences**

A suspended sentence, as the name suggests, is a custodial prison sentence that is not put into immediate effect. In the Northern Territory, the option of a suspended sentence is available provided the term of imprisonment does not exceed five years<sup>300</sup> and a sentence of imprisonment would be appropriate in the circumstances having regard to the *Sentencing Act 1995*.<sup>301</sup> The court has the option to suspend the sentence fully, in which case the offender will spend no time in custody if the conditions of the sentence are not breached, or partially, in which case the offender will spend a portion of the sentence in custody. The court may attach such conditions to the order suspending the sentence 'as the court thinks fit',<sup>302</sup> although such conditions 'should not be unduly harsh or unreasonable or needlessly onerous'.<sup>303</sup> Common conditions include supervision by a probation and parole officer, non-association conditions, refraining from consuming alcohol or taking drugs and participation in rehabilitation programs.

A unique aspect of the suspended sentence is the 'operational period'. This is a condition which must be attached by the court to the order suspending the sentence during which the offender is not to commit another offence punishable by imprisonment.<sup>304</sup> If the offender commits such an offence within two years of the 'operational period' of the suspended sentence, the statutory provisions relating to a breach of a suspended sentence apply.<sup>305</sup>

If the offender commits another offence punishable by imprisonment during the term of the suspended sentence the court may restore all or part of the sentence suspended and order the offender to serve all or part of such sentence. The same applies if the offender breaches a condition of the order suspending a sentence during the term of the suspended sentence.<sup>306</sup> In the event of a breach, there is a presumption in the *Sentencing Act 1995* that the sentence held in suspense will be restored.<sup>307</sup> The

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<sup>298</sup> Ibid s 48L(2).

<sup>299</sup> Ibid s 48L(2)(b).

<sup>300</sup> Ibid s 40(1).

<sup>301</sup> Ibid s 40(3).

<sup>302</sup> Ibid s 40(2).

<sup>303</sup> *Mamarika v Ganley* [2013] NTSC 6, [29], citing *R v S W Bugmy* [2004] NSWCCA 258, [61] and *Dunn v Woodcock* [2003] NTSC 24, [7].

<sup>304</sup> *Sentencing Act 1995* s 40(6).

<sup>305</sup> Ibid s 43.

<sup>306</sup> Ibid s 43(5).

<sup>307</sup> Ibid s 43(7).

rationale for such a presumption was articulated by Riley J in *Bukulaptji v The Queen* (2009) 24 NTLR 210 (*'Bukulaptji'*) at [33]:

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

Such a presumption can be rebutted if in the opinion of the court 'it would be unjust to do so in view of all the circumstances that have arisen since the suspended sentence was imposed'.<sup>308</sup> In *Bukulaptji*, Riley J (with whom Thomas J agreed) set out the factors that may be relevant in determining whether it would be unjust to restore the sentence:<sup>309</sup>

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

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<sup>308</sup> Ibid s 43(7).

<sup>309</sup> *Bukulaptji v The Queen* (2009) 24 NTLR 210, [35].

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

The number of non-custodial and custodial sentencing orders commenced and completed in the period from 1 July 2019 to 30 June 2020 are noted in Table 2 below.

**Table 2 – Commencement and completion rates of community-based options<sup>310</sup>**

<b>2019-2020</b>	<b>Supervised bond</b>	<b>Community-based order</b>	<b>Community custody order</b>	<b>Community work order</b>	<b>Home detention order</b>
<b>Commenced</b>	63	1	48	234	26
<b>Completed<sup>311</sup></b>	74	2	63	214	22
<b>Successfully completed<sup>312</sup></b>	62	2	44	150	20
<b>Success rate (%)<sup>313</sup></b>	84%	100%	70%	70%	91%

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

**Table 3 – Imposition of and order for partially or fully suspended sentence (1/7/19-30/6/20)**

<b>NT court</b>	<b>Partially suspended sentence</b>	<b>Fully suspended sentence</b>
<b>Court of Criminal Appeal</b>	3	0
<b>Supreme Court</b>	184	25
<b>Local Court</b>	1038	613

<sup>310</sup> Source: Integrated Offender Management System ('IOMS') 271 – Order commencements, IOMS 272 – Order completions. Notes: Completed orders may include orders that commenced before 1 July 2019. With the exception of Community Work Orders, if an offender had multiple case numbers with orders of the same type ordered on the same day, only one order was counted (the 'primary' order).

<sup>311</sup> 'Completed' includes all 'primary' orders with a completion date within the period and all Community Work Orders with a completion date within the period.

<sup>312</sup> 'Successfully completed' refers to orders which ended in the period 1 July 2019 to 30 June 2020 in which offenders have fulfilled all the requirements of the orders.

<sup>313</sup> 'Success rate' refers to the number of successful orders divided by the total number of orders completed during the year.

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

**Table 4 – Imposition of an order for imprisonment (1/7/19-30/6/20)**

<b>NT court</b>	<b>Imprisonment</b>
<b>Court of Criminal Appeal</b>	5
<b>Supreme Court</b>	146
<b>Local Court</b>	2043

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

Submissions to the inquiry identified the reasons community-based orders were used so infrequently. Acting Justice Mildren noted that the need for a pre-sentence report, whether necessary or not, means that sentencing of the offender will be delayed while the report is obtained. This is a particular problem in more remote sittings of the Local Court given that the judge who ordered the pre-sentence report may not be sitting when the pre-sentence report is received and the offender can be sentenced.<sup>314</sup> The NTLAC and CLANT noted that the conditions for the imposition of such an order are overly prescriptive and there is inadequate resourcing in remote communities to ensure successful completion.<sup>315</sup> Finally, the NTBA noted that lack of options such as drug and alcohol counselling and meaningful work projects in communities results in such orders being unavailable, particularly to Aboriginal offenders.<sup>316</sup>

It was also noted by Territory Criminal Lawyers that the existence of mandatory sentencing laws restricts the use of community-based orders. It noted:<sup>317</sup>

[T]he non-use of CBOs demonstrates like few other statistics the practical effects of the NT's various mandatory sentencing laws: these laws ensure that a large group of offenders, who would normally have been suitable for a CBO (or another non-custodial penalty), are going to prison.

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<sup>314</sup> Acting Justice Dean Mildren, Submission, [20].

<sup>315</sup> NTLAC, Submission, p. 12; CLANT, Submission, p. 9. The fact that the condition for the granting of such an order are overly prescriptive was also noted in the submission of the Territory Criminal Lawyers at [63].

<sup>316</sup> NTBA, Submission, p. 8.

<sup>317</sup> Territory Criminal Lawyers, Submission, [63].

## [5.5] Legislative change in New South Wales and Victoria

In Victoria and New South Wales, suspended sentences have been abolished. In New South Wales, the abolition of suspended sentences was recommended by the New South Wales Law Reform Commission ('NSWLRC') in its *Sentencing* report published in 2013.<sup>318</sup> In coming to this conclusion, the NSWLRC noted at [10.26]:

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

In recommending the abolition of suspended sentences, however, the NSWLRC stipulated that abolition should take place only if a community detention order is made available as a sentencing option. It was the view of the NSWLRC that sentencing legislation should not provide for both suspended sentences and community detention orders.<sup>319</sup> The community detention order recommended was designed to be 'a flexible community-based custodial order to replace home detention, intensive correction orders and suspended sentences'.<sup>320</sup>

### [5.5.1] New South Wales

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

The intensive correction order is a custodial sentence of up to two years that can be served in the community. Supervision of the offender pursuant to such an order is mandatory. Conditions can be added to an intensive correction order such as:<sup>321</sup>

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

If the offender has been convicted of the following offences, an intensive correction order cannot be made: 'murder, manslaughter, sexual assault, any sexual offence against a child, offences involving discharge of a firearm, terrorism offences, breaches of serious crime prevention orders, or breaches of public safety orders'.<sup>322</sup> While those

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<sup>318</sup> New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) 230.

<sup>319</sup> *Ibid* 230 [10.38].

<sup>320</sup> *Ibid* 243.

<sup>321</sup> New South Wales Government, *Sentencing Reform* (Web Page, 3 June 2019), <<https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>>. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2).

<sup>322</sup> *Ibid*. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1).

convicted of a domestic violence offence are eligible for an intensive correction order, before granting such an order the court must be satisfied that the victim, or co-residents of the victim, can be protected adequately.<sup>323</sup>

Community correction orders are intended to be used 'to punish offenders for crimes that do not warrant imprisonment or an [intensive correction order] but are too serious to be dealt with by a fine or lower level penalty'.<sup>324</sup> Such orders can be imposed for a period not exceeding three years,<sup>325</sup> and a range of conditions can be attached to such orders.<sup>326</sup>

A conditional release order is intended to be used for first time and less serious offending 'where the offender is unlikely to present a risk to the community'.<sup>327</sup> A range of conditions can be attached to such orders, for example that the offender abstain from using drugs or alcohol,<sup>328</sup> participate in a rehabilitation or treatment program,<sup>329</sup> or refrain from associating with particular persons.<sup>330</sup> A supervision condition also can be attached to the order.<sup>331</sup> The maximum term of a conditional release order is two years.<sup>332</sup> According to information published<sup>333</sup> by the New South Wales Department of Communities & Justice:<sup>333</sup>

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

### **[5.5.2] Victoria**

In Victoria, suspended sentences, along with community-based orders, intensive correction orders and combined custody and treatment orders were abolished in 2012. They were replaced with a community corrections order,<sup>334</sup> which is intended to be a more flexible order.<sup>335</sup>

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<sup>323</sup> New South Wales Government (n 321).

<sup>324</sup> Ibid.

<sup>325</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 85(2).

<sup>326</sup> Ibid pt 7 div 3.

<sup>327</sup> New South Wales Government (n 321).

<sup>328</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2)(b).

<sup>329</sup> Ibid s 99(2)(a).

<sup>330</sup> Ibid s 99(2)(c).

<sup>331</sup> Ibid s 99(2)(e).

<sup>332</sup> Ibid s 95(2).

<sup>333</sup> New South Wales Government (n 321).

<sup>334</sup> Sentencing Advisory Council, *Abolished Sentencing Orders* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/abolished-sentencing-orders>>.

<sup>335</sup> ALRC (n 4), 251 [7.84]. See also Sentencing Advisory Council, *Community Correction Order* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order>>.

The maximum length of a community corrections order is five years,<sup>336</sup> although restrictions on the length apply if the order is made by the Magistrates' Court.<sup>337</sup> A broad range of conditions can be attached to a community corrections order.<sup>338</sup>

There are a number of offences for which a court cannot impose a community correction order. These are described as Category 1 and Category 2 offences<sup>339</sup> for which a mandatory sentence of imprisonment must be imposed. A broad range of serious offending is included in these categories.<sup>340</sup>

### **[5.5.3] Legislative change based on either the New South Wales or Victorian model**

In the Consultation Paper stakeholders were asked whether the approach to community-based sentencing in Victoria or New South Wales was preferable to the current approach in the Northern Territory. There was little support for an overhaul of current community-based sentencing options based on either the New South Wales or Victorian regime.

NAAJA stated that neither the Victorian nor New South Wales approach was 'warranted, suitable or beneficial to the needs to Aboriginal offenders of the Northern Territory who are the primary cohort in the criminal justice system and probation and parole systems'.<sup>341</sup> NAAJA noted that, following the implementation of the new regime in Victoria, the rate of adult Aboriginal incarceration doubled.<sup>342</sup>

Territory Criminal Lawyers noted that it would be difficult to adopt either the New South Wales or Victoria regimes in the Northern Territory given the differences in demographics and distance. It recommended that the Territory should pursue reforms suited to its particular circumstances.<sup>343</sup> CLANT expressed the view that the current community-based sentencing options available in the Territory, while currently too restrictive, could be amended to suit the needs of Territorians. In particular, CLANT expressed support for the retention of suspended sentences as an option.<sup>344</sup>

The retention of suspended sentences also was supported by those making submissions. For example, while acknowledging the conceptual flaw underpinning

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<sup>336</sup> *Sentencing Act 1991* (Vic) s 38.

<sup>337</sup> *Ibid* s 38(1)(a).

<sup>338</sup> *Ibid* pt 3A div 4.

<sup>339</sup> *Ibid* s 3.

<sup>340</sup> For a list of such offences, see Sentencing Advisory Council, *Community Correction Order* (Web Page, 1 October 2019) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order>>.

<sup>341</sup> NAAJA, Submission, p. 28.

<sup>342</sup> *Ibid*, citing Sentencing Advisory Council, *Victoria's Indigenous Imprisonment Rates* (Web Page) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-indigenous-imprisonment-rate>>.

<sup>343</sup> Territory Criminal Lawyers, Submission, [67].

<sup>344</sup> CLANT, Submission, p. 10.

suspended sentences identified by the NSWLRC, the NTBA nonetheless supported the retention of such orders. It noted:<sup>345</sup>

[D]ue to the risk that indigenous people will be less likely to be eligible for alternative community based orders due to a lack of services, substandard 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.

Acting Justice Mildren was of the view that the Victorian and New South Wales regime lacked flexibility and recommended that neither regime should be implemented in the Northern Territory.<sup>346</sup> Jesuit Social Services expressed a similar view with respect to the Victorian regime.<sup>347</sup>

Both the NTLAC<sup>348</sup> and NAAJA<sup>349</sup> noted that the Victorian and New South Wales regimes required a significant level of administration and staffing which may not be feasible given the Northern Territory's current budgetary constraints. In New South Wales, for example, close to 200 new Community Corrections staff needed to be hired to supervise offenders on intensive corrections orders and community corrections orders.<sup>350</sup>

Danila Dilba recommended that, rather than focusing on an overhaul of the community-based sentencing regime, the emphasis should be on the implementation within the existing Territory regime of programs that have been proven to work elsewhere, particularly for Aboriginal offenders. Examples of such programs include:<sup>351</sup>

- community healing programs;
- community justice programs;
- family group conferencing;
- justice reinvestment; and
- youth diversion.

Three such models – justice reinvestment, community healing programs and community justice programs – are discussed in greater detail below.

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<sup>345</sup> NTBA, Submission at p. 8.

<sup>346</sup> Acting Justice Dean Mildren, Submission at [24].

<sup>347</sup> Jesuit Social Services, Submission at p. 7.

<sup>348</sup> NTLAC, Submission at pp. 11-12.

<sup>349</sup> NAAJA, Submission at p. 27.

<sup>350</sup> See <[www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx](http://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx)>.

<sup>351</sup> Danila Dilba, Submission, pp. 15-19.

## [5.6] Community-based sentencing and Indigenous Territorians

The ALRC highlighted an issue pertaining to community-based sentencing options which is of particular interest to policy makers given the high rate of Indigenous incarceration in the Northern Territory:<sup>352</sup>

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

The ALRC also identified an issue with the Victorian approach. It observed that:<sup>353</sup>

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

While there has been an improvement in the number of Aboriginal and Torres Strait Islander offenders in community-based corrections since the publication of the ALRC report,<sup>354</sup> whether Indigenous Territorians are able to take full advantage of such orders remains a concern. In particular, in regional and remote areas of the Northern Territory, access to supervision, work, counselling and treatment programs is limited.

In the Northern Territory during 2018-19, the proportion of offenders commencing community-based sentencing options who identified as Aboriginal or Torres Strait Islander was 81% for supervised bonds; 89% for commenced community custody orders; 88% for community work orders; and 19% for home detention orders.<sup>355</sup>

There was general agreement amongst those making submissions to the inquiry that, to be successful, community-based sentencing options must be culturally appropriate, and available to those living in remote communities.<sup>356</sup> Further, there was general support for the involvement of Aboriginal people in the design and delivery of such options. As Jesuit Social Services stated, '[i]f sentencing is at the core of the criminal justice system, the engagement of cultural authority and community participation in

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<sup>352</sup> ALRC (n 4), 230 [7.4] (citations omitted).

<sup>353</sup> Ibid 252 [7.91] (citations omitted).

<sup>354</sup> ABS, *Corrective Services, Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019). According to this source, '[t]he average number of Aboriginal and Torres Strait Islander persons in [community-based corrections] for the June quarter 2019, was 16,680. This represents an increase of 15% (2,168 persons) over the year'.

<sup>355</sup> Source: Integrated Offender Management System ('IOMS') 271 – Order commencements. With the exception of Community Work Orders, if an offender had multiple case numbers with orders of the same type ordered on the same day, only one order was counted.

<sup>356</sup> NTLAC, Submission, pp. 11-12; LSNT, Submission, pp. 3-4; NAAJA, Submission, pp. 24-25; Jesuit Social Services, Submission, p. 8; Territory Criminal Lawyers, Submission, [57]; Danila Dilba, Submission, p. 14; Anti-Discrimination Commission, Submission, p. 5.

the sentencing process is a fundamental and necessary shift towards 'two-way justice'.<sup>357</sup>

While there was general support for the existing regime of community-based sentencing orders available in the Northern Territory, provided existing restrictions on their use is addressed and such options are properly resourced, both Community Corrections and the Crimes Victims Advisory Council expressed concern about the complexity of such orders, and the difficulty in explaining how such orders work to, in particular, Aboriginal offenders. Community Corrections stated:<sup>358</sup>

Community Corrections would support any reform aimed at simplifying the mix of community based sentences, whilst maintaining as much flexibility as possible to support the sentencing process as well as the management of offenders subject to supervision.

It is possible that one community supervision order could be sufficiently broad to support a number of current sentencing options. For example, community service work or conditions similar to home detention could be achieved as conditions of a standard community supervision order. The current Bonds, Community Based Order, Community Custody Order and Home Detention Order could all be incorporated into one Community Supervision Order.

Having one standard community supervision order, with flexibility to attach any conditions appropriate in the circumstances, could also standardise the breach process and consequence. Rather than numerous Order types, all with different procedures and penalties applying to breach, there can be one clear process.

Stakeholders also expressed strong support for the implementation of more creative approaches to incarceration. Many of those making submissions to the inquiry encouraged the Committee to recommend that the Northern Territory Government implement a justice reinvestment strategy.<sup>359</sup> For example, Danila Dilba stated:<sup>360</sup>

The most effective way to address the underlying causes of criminal behaviour and to achieve rehabilitation is through a justice reinvestment strategy. Justice reinvestment diverts funds from incarceration to community-based programs and rates of reoffending. It aims to invest in preventative programs that address the underlying causes of crime so as to save money in the long run dealing with the outcomes of crime.

The Productivity Commission's *Report on Government Services 2019* noted that, in the Northern Territory, the recurrent expenditure for an adult prisoner in 2017-2018

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<sup>357</sup> Jesuit Social Services, Submission, p. 8.

<sup>358</sup> Community Corrections, Submission, [5.1].

<sup>359</sup> LSNT, Submission, p. 3; Jesuit Social Services, Submission, p. 8; CLANT, Submission, p. 10; Sisters Inside Inc, Submission, p. 2.

<sup>360</sup> Danila Dilba, Submission, p. 18.

was over \$300.00 per day<sup>361</sup> or \$109,500 per year. For the same period, the total net operating expenditure and costs of prisons in the Northern Territory was \$196,592,000, whereas the total net operating expenditure and capital costs of community corrections was substantially less, \$24,451,000.<sup>362</sup> This, coupled with the fact that 59.4% of prisoners released during 2016-2017 returned to corrective services in the Northern Territory in the two years to 2018-2019<sup>363</sup> lends support to the argument that a more creative approach to corrections needs to be implemented.

## **[5.7] The Committee's views and recommendations**

Should the Northern Territory Government accept the Committee's recommendation and abolish mandatory sentencing, it is anticipated that the rate of incarceration in the Northern Territory will decrease. This, coupled with the fact that statistics indicate that incarceration rates in the Northern Territory are decreasing as noted above at [1.2], makes it both possible and desirable for the Northern Territory Government to pursue a justice reinvestment strategy. However, unless the repeal of mandatory sentencing is supported by the resourcing and extension of community-based sentencing options, the rate of offending is unlikely to be reduced.

**Recommendation 5-1:** The Northern Territory Government should pursue a justice reinvestment strategy to ensure that community correction programs are adequately funded and, where appropriate, include specific funding allocated to support victims of crime to manage their ongoing safety and wellbeing while the offender is in the community.

The Committee also agrees with stakeholders who submitted that community-based sentencing options for Indigenous Territorians should be both culturally appropriate, and available to offenders living outside of urban areas. Further, Aboriginal people and organisations should be involved in the development and implementation of such programs. While not exhaustive, the Committee is of the view that the following programs, discussed in the Danila Dilba submission, warrant consideration. Whether any such program is appropriate for a particular community will depend on further consultation with the community and appropriate resourcing, both in terms of money and a skilled workforce.

### ***Community healing program***

A community healing program is a restorative justice program based on a cultural framework that encourages communities 'to develop community healing from

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<sup>361</sup> Productivity Commission, Report on Government Services 2019, Ch 8, Figure 8.10. Recurrent expenditure includes net operating expenditure and capital costs.

<sup>362</sup> Productivity Commission, Report on Government Services 2019, Ch 8, Figure 8A.1.

<sup>363</sup> Sentencing Advisory Council Victoria, Released Prisoners Returning to Prison, at: <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/released-prisoners-returning-to-prison>> (accessed 15 February 2021).

intergenerational trauma'.<sup>364</sup> One such program was established in Manitoba, Canada in the early 1980s in the First Nation community of Hollow Waters.<sup>365</sup> As Danila Dilba notes:

The program worked whereby once criminal charges are laid, the offender can undergo the traditional criminal justice route or enter a guilty plea, assume full responsibility and enter the Healing program. The team then requests a delay in sentencing so they can begin their healing work and prepare a pre-sentence report. The report comprehensively assesses the offender's state of mind, chance of rehabilitation, and also takes into account the role of the victim, the non-offending spouse and the families of each offender. An action plan is proposed based on a Healing Contract spanning 2-5 years.

Should the requisite infrastructure be in place for a community healing program, it could be accommodated within the existing community-based order, provided the restrictions on the implementation of such orders are addressed as recommended in this report. Should the offender breach the Healing Contract, the matter would return to the court for review pursuant to s 39L of the *Sentencing Act 1995*.

### ***Community justice***

While a community justice program can take a variety of forms, it 'broadly refers to all variants of crime prevention and justice activities that explicitly include the community in their processes and set the enhancement of community quality of life as a goal'.<sup>366</sup> An example of such a program is the Neighbourhood Justice Centre ('NJC') established by the Victorian Government in the City of Yarra, Victoria in 2007. As Fanning notes, the NJC program includes:<sup>367</sup>

- a multi-jurisdictional court which sits as a venue of the Magistrates' Court (criminal, family violence and personal safety intervention orders), the Victorian Civil and Administrative Tribunal ... (residential tenancies), the Victims of Crime Assistance Tribunal and the Children's Court (criminal division) with one judicial officer;
- an integrated, onsite Client Services Team providing a 'one-stop shop' model for holistic wrap-around court and social services spanning; mental health, alcohol and other drugs, family violence, financial counselling, generalist counselling, employment, training and education, resettlement, housing, dispute settlement and mediation, pastoral care and court-based support;

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<sup>364</sup> Danila Dilba, Submission, p. 15. See also the discussion of this program in Chapter [4.9].

<sup>365</sup> Department of Justice (Canada), Community Holistic Circle Healing Program at: [Community Holistic Circle Healing Program - COMPENDIUM ANNEX: DETAILED PRACTICE DESCRIPTIONS \(justice.gc.ca\)](https://www.justice.gc.ca/justice/gc.ca) (accessed 15 February 2021).

<sup>366</sup> David Karp, 'Community Justice: Six Challenges' (1999) 27 *Journal of Community Psychology* 751. See also David Fanning, 'The Neighborhood Justice Centre Model' (2018) 13 *Newcastle Law Review* 76, 77.

<sup>367</sup> David Fanning, 'The Neighborhood Justice Centre Model' (2018) 13 *Newcastle Law Review* 76, 76-77. For more information see: <[www.neighbourhoodjustice.vic.gov.au](http://www.neighbourhoodjustice.vic.gov.au)> (accessed 16 February 2021).

- legal services and community correctional services located on-site at the NJC;
- prosecutorial service;
- Community Corrections team;
- a Neighbourhood Justice Officer ... a legislated role unique to the NJC, acts as a conduit between the court, clients and the NJC's support services. The NJO also facilitates problem solving processes and meetings, working with accused persons, victims or members of the community to address issues impacting their lives, their risk of re-offending or breaching orders;
- a Program and Innovation Team that oversees crime prevention, community engagement, education and policy initiatives as well as identifying and developing innovations to increase accessibility to the court and its services; and
- an information team that are the primary interface with individuals, the community and stakeholders.

In 2015, the NJC was evaluated by the Australian Institute of Criminology. It found that, since the NJC was established:<sup>368</sup>

- overall crime in the community reduced by 31%, with property crime decreasing by 40%;
- the rate of reoffending was 25% lower than other Magistrates' Courts;
- offenders in the NJC program were 3 times less likely to breach Community Corrections Orders than the state-wide average; and
- offenders in the NJC program had lower breach of intervention orders than the state-wide average.

The Australian Institute of Criminology concluded that:<sup>369</sup>

One of the defining features of the community justice model is that it seeks to be effective across a variety of domains – individual, community and justice systemic. The results presented here show that the NJC has achieved significant improvements in at least two areas critical to the justice system: community order compliance and recidivism. To the extent that government decision making about justice programs is driven by cost-effectiveness considerations, it seems likely that these traditional outcome measures will remain a central component in evaluations.

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<sup>368</sup> Danila Dilba, Submission, p. 17. See also R Stuart, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program' (2015) Australian Institute of Criminology, Canberra at <[www.aic.gov.au/publications/tandi/tandi499](http://www.aic.gov.au/publications/tandi/tandi499)> (accessed 16 February 2021).

<sup>369</sup> Ross Stuart, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program' (2015) Australian Institute of Criminology, Canberra at <[www.aic.gov.au/publications/tandi/tandi499](http://www.aic.gov.au/publications/tandi/tandi499)> (accessed 16 February 2021).

Danila Dilba submitted that '[i]mplementing a community justice model would ... be a more effective way to rehabilitate offenders, repair harms caused by crime and prevent crime from occurring'.<sup>370</sup> The Committee agrees that the Northern Territory Government, in consultation with the chosen community, should consider the feasibility of implementing a community justice program in a targeted Northern Territory community.

We also note that the Committee has made recommendations regarding a form of community justice in the report, *Two Justice Systems Working Together*” Report on the Recognition of Local Aboriginal Laws in Sentencing and Bail (NLTRC, Report No 46, November 2020). In that report, the Committee recommended the establishment and maintenance of Law and Justice committees (Rec 3), amendments to the *Sentencing Act 1995* to give effect to the exercise of local Aboriginal law which is not inconsistent with other laws (Rec 6) and the resumption of the operation of Community Courts where supported by, designed and run in consultation with Aboriginal communities (Rec 7). The report is currently under consideration by the Northern Territory government.

Finally, the Committee agrees with the submissions made by Community Corrections and the Crimes Victims Advisory Council that the current mix of community-based sentencing options, while being maintained, should be simplified in the *Sentencing Act 1995*. How this is done is a matter for the statutory drafters, however, Parliamentary Counsel should keep in mind that orders, once made, must be explained to the offender: often in a language in which the offender is not fluent. The simpler the regime, the more likely it is that the conditions attaching to such orders will be understood.

The Department of Correctional Services submission advocated for the establishment of a single standard community supervision order to replace the complex mix of currently available community based sentencing options. One advantage of such a course would be the provision of greater flexibility to courts when dealing with a breach of an order. The Committee considers that this proposal is worthy of serious consideration by government.<sup>371</sup>

**Recommendation 5-2:** The Northern Territory Government should maintain the current mix of community-based sentencing options, however, how such options are set out in the *Sentencing Act 1995* should be simplified.

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<sup>370</sup> Danila Dilba, Submission, p. 17.

<sup>371</sup> Community Corrections, Submission, [5.1].

## [5.7] Conclusion

It is the Committee's view that, generally, the existing suite of community-based sentencing options are appropriate for the needs of the Northern Territory. It is not necessary or desirable, therefore, to overhaul the community-based sentencing regime to implement a version of either the New South Wales or Victorian model. How such options are set out in the *Sentencing Act 1995*, however, should be simplified in the way suggested by Community Corrections.

Managing the exercise of judicial discretion through restrictions on the granting of community-based sentencing options needs to be addressed. We are fortunate in Australia in that we have an independent, well qualified, judiciary. Such judges are in the best position to determine the appropriate sentence based on the nature of the offending, the impact on the victim and the characteristics of the offender. Legislation which fetters judicial discretion has frequently lacked evidential support for effectiveness, has not been based on accepted sentencing principles and has contributed to the unacceptably high rate of Indigenous incarceration.

To ensure that community-based sentencing options achieve their primary objective, which is the successful rehabilitation of the offender, such programs need to be adequately resourced and available to all offenders, regardless of where they live. Given the number of remote communities in the Northern Territory, and the significant over-representation of Indigenous offenders in the criminal justice system, the Committee acknowledges that the funding of rehabilitation programs is challenging. It is important to keep in mind, however, that the Northern Territory, through mandatory sentencing and unnecessary restrictions on the grant of community-based sentencing orders, is defaulting to the most expensive form of sentence, incarceration. While incarceration will always be necessary for many who commit serious crimes, to date this sentencing option has been overused through legislative requirements which preclude a judge from making a different order in an appropriate case.

## APPENDIX 1 – CONSULTATION PAPER QUESTIONS FOR STAKEHOLDER COMMENT

### **Mandatory sentences other than murder or sexual offences**

- 3.1 Do the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* achieve their postulated goals or objectives?
- 3.2 Are the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* principled, fair and just?
- 3.3 Should the Northern Territory's mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* should be maintained or repealed?
- 3.4 Are there other issues relating to the mandatory sentencing provisions under the *Sentencing Act 1995*, the *Domestic and Family Violence Act 2007* and the *Misuse of Drugs Act 1990* not discussed in this Consultation Paper which the Committee should address in its report?

### **Mandatory sentencing for murder and sexual offences**

- 4.1 Should the mandatory sentence for murder be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?
- 4.2 Should the mandatory sentence for sexual offences be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?
- 4.3 Should a judge, in appropriate circumstances, have the power to exempt a person from the requirements of the *Child Protection (Offender Reporting and Registration) Act 2004*?
- 4.4 Should the 'exceptional circumstances' specified in s 53A(7) of the *Sentencing Act 1995* for murder be less restrictive, for example, to allow the court to fix a non-parole period of less than 20 years for offending in the low range of objective seriousness, or in the circumstances referred to at [4.3] above?
- 4.5 Are there other issues relating to the mandatory sentencing regime for murder or sexual offences not discussed in this Consultation Paper which the Committee should address in its report?

## **Community-based sentencing options**

- 5.1 Does the Northern Territory sentencing regime currently have the right mix of community-based sentencing options?
- 5.2 Are all types of community-based sentencing options being used effectively in the Northern Territory?
- 5.3 Should greater use be made of community-based sentencing options and, if so, how might this be facilitated?
- 5.4 Is the current process for assessing and reporting on suitability for and conditions of a community-based sentence working effectively? If not, how might the process be improved?
- 5.5 Why are community-based orders so infrequently used?
- 5.6 Should fully or partially suspended sentences be retained as a sentencing option? If not, are there any pre-requisites to their abolition?
- 5.7 Does the current regime of non-custodial and custodial sentencing options available in the Northern Territory adequately meet the needs of Indigenous Territorians, and in particular, Indigenous Territorians living in rural and remote communities? If not, what more can be done to ensure that Indigenous Territorians are able to take advantage of community-based sentencing options?
- 5.8 Is a different approach to community-based sentencing, such as that in place in New South Wales or Victoria, preferable to the regime currently in place in the Northern Territory?
  - 5.8.1 If either the New South Wales or Victorian approach to community-based sentencing is recommended, what changes, if any, should be made to the recommended regime?
- 5.9 Are there other issues relating to the community-based sentencing options not discussed in this Consultation Paper which the Committee should address in its report?