

6 January 2021

Eilish Copelin
Executive Officer
Northern Territory Law Reform Committee
GPO Box 1535
Darwin Northern Territory 0801

By email to Lawreformcommittee.DDJ@nt.gov.au

Dear Ms Copelin,

MANDATORY SENTENCING & COMMUNITY-BASED SENTENCING OPTIONS CONSULTATION PAPER: SUBMISSION

On 2 October 2020, the Northern Territory Law Reform Committee (the Committee) released a Consultation Paper regarding Mandatory Sentencing and Community-Based Sentencing Options. Submissions were required by 25 November 2020.

The Northern Territory Womens Legal Services (NTWLS) – comprised of the Central Australian Womens Legal Service (CAWLS), Katherine Womens Information and Legal Service (KWILS) and Top End Womens Legal Service (TEWLS) – became aware of the Consultation Paper through informal channels in late October 2020.

In response to a request for an extension of time, the Committee advised NTWLS by letter dated 28 October 2020, that submissions received after 25 November 2020 will be accepted. A submission on behalf of NTWLS is set out below.

About NTWLS

The Northern Territory Women's Legal Services are part of a national network of community legal centres specialising in women's legal issues. Each member service promotes a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. NTWLS are specialised frontline services with a wealth of experience working closely with victims of violence and community organisations, particularly Women's Services.

Member services provide advice, information, casework and legal education to women particularly in relation to family law and family violence matters as well as related or stand alone civil law issues including child protection, housing and tenancy, debt and victims of crime compensation. Our services also drive and contribute to systemic law reform.

Northern Territory Women's Legal Services have extensive expertise in delivering high quality, empowering, community connected and culturally safe services to all women

including Indigenous and culturally and linguistically diverse women.

Importance of consulting with victims of crime

The process of reforming mandatory sentencing frameworks must:

- involve victims of crime;
- prioritise the safety and wellbeing of victims of crime, particularly victims of family violence; and
- be accompanied by fully funded, culturally appropriate and evidentially supported community-based sentencing options.

NTWLS supports measures designed to reduce the incarceration rate in the NT, on the basis that these measures focus on reducing *offending*. Consequently, in principle, NTWLS is supportive of the potential repeal of mandatory sentencing, subject to the process and development of the alternative framework involving appropriate consultation and involvement of victims and victims services.

NTWLS believes it is vitally important to consider the views and experiences of victims of violent crimes and family and domestic violence when addressing the impact of mandatory sentencing and community-based sentencing options. The Consultation Paper makes little reference to the importance of engaging victims. There is reference in footnote 66 which acknowledges that mandatory minimum sentences were initially intended to demonstrate to victims of serious violence offences that the perpetrator would suffer the consequence of prison for their use of violence.

The vast majority of NTWLS clients have experienced ongoing family and domestic violence. NTWLS frequently provides advice and representation in relation to Domestic Violence Orders and provides support to women to produce victim impact statements and appear as witnesses. NTWLS also act in related civil law matters including family law, child protection and victims of crime applications. Any proposed changes to the mandatory sentencing provisions as well as community-based sentencing options are likely to have a significant impact on our clients.

NTWLS appreciates the background to the inquiry encompasses a need to address the contribution of mandatory sentencing to the over-incarceration of Aboriginal and Torres Strait Islander men and women.¹ This is particularly important to our services as collectively approximately 70-80% of our clients are Aboriginal and Torres Strait Islander women, the fastest growing prison population in Australia.² However, NTWLS is concerned that repeal of mandatory sentencing alone will not reduce offending rates for family violence offences and may have an adverse impact on exposure of some family violence victims to further offending. Accordingly, any repeal of mandatory sentencing must be concurrent with the establishment of fully funded, culturally appropriate and evidentially supported community-based sentencing options and therapeutic programs which prioritise risk assessment, perpetrator visibility and accountability and victim's safety and wellbeing. At the same time, it is necessary for real

¹ set at at [1.2] of the Consultation Paper.

²TEWLS provides a face to face civil and family law clinic to women incarcerated at Darwin Correctional Centre where 76% have experienced DFV either as a child or an adult, and 76% had received an injury from a violence act

investment in both primary and secondary preventative activities relating to family and domestic violence.

The potential reform of mandatory sentencing is a significant law reform issue which has the potential to cause conflict and exacerbate tensions within the broader community and to reduce victim safety. It is vitally important that the general community is engaged, and for mandatory sentencing in particular, that the proposals have the support of victims of crime. NTWLS is concerned that a failure to engage victims of crime will divide the community and reignite a polarising 'law and order' debate.

Consultation recommendations:

1. NTWLS recommends a formal consultation programme with victims of crime and victims of crime services prior to any reform;
2. NTWLS recommends that the Committee consult with the Crimes Victims Advisory Committee concerning the structure of a formal consultation programme prior to any reform;
3. NTWLS recommends that reform proposals relating to the *Domestic and Family Violence Act 2007*, be dealt with separately from all other proposed reform and be formulated with the benefit of a review of the Alice Springs Domestic and Family Violence Court Pilot. Further, recommendations should be informed by an independent evaluation of the effectiveness of ss 121-122 in deterring repeat offenders and disrupting the cycle of violence/facilitating victim safety.

Issues for consideration

NTWLS expects that consultation with victims of crime will identify a range of significant issues for consideration including those set out below.

Transparency, accountability and sentencing consistency:

Any repeal of mandatory sentencing has the potential to indicate to the legal profession and to the broader community that current sentencing practice, including for family violence offences, is either too severe or is adequate.

A proposed law reform package should ensure there are safeguards in place to ensure that sentencing is consistent with other states and territories, adequately denounces the offending behaviour and holds perpetrators to account. NTWLS is concerned that some sentencing trends for serious violent offences against women remain low. Serious and repeated family violence offenders should expect to receive a significant sentence of imprisonment.

NTWLS recommends that any reform of mandatory sentencing be designed to ensure:

- Consistency with other states and territories in sentencing for serious family violence offences;

- Sentencing decisions are made publicly available to increase transparency and public understanding of sentencing processes and sentencing trends and further the purposes of general deterrence and denunciation in the absence of mandatory sentencing;
- Judicial officers are provided with tailored training in non-collusive language upon induction and at regular intervals;
- The NT Government establish a Sentencing Advisory Council that reflects all voices as an independent statutory body to:
 - conduct research on sentencing policy;
 - collect and analyse statistical data;
 - provide current sentencing information to the government, judiciary and the public; and
 - provide feedback on the effectiveness of sanctions imposed on offenders.³

Funding, risk management and perpetrator visibility

Any repeal of mandatory sentencing has the potential to increase a victim's risk of exposure to further violence, including homicide, if the perpetrator would otherwise have been incapacitated through a period of imprisonment. NTWLS recommends that any reform of mandatory sentencing to be designed to ensure:

- Risk management, the safety and wellbeing of victims of family violence and perpetrator visibility are at the forefront of the design for therapeutic and community-based sentencing options relating to family violence offending;
- All justice stakeholders – including defence, police, prosecution and judicial officers, corrections and parole officers – are required to participate in ongoing education on the nature and dynamics of family violence, risk management, perpetrator accountability and best practice for communication with both victims and perpetrators of family violence;
- Crisis family violence response services – including safe houses – and specialist women's legal services are fully funded and available throughout the NT, and in particular, in every location where community-based sentencing options and therapeutic programs are operating to ensure the safety and wellbeing of victims of family violence;⁴

³ See, eg, 108C *Sentencing Act 1991 (Vic)*.

⁴ Specialist Women's Legal Services in the Northern Territory are not appropriately funded to provide advice and support in urban or remote communities. NTWLS contributed to the recent call by Women's Legal Services Australia for an urgent injection of \$25 million to respond to unmet legal need, particularly in relation to family and domestic violence matters. See: WLSA, Media Release, 7 October 2020 (http://www.wlsa.org.au/media_releases/federal_budget_fails_to_respond_to_call_for_urgent_funding_for_specialist_womens_legal_services)

- Therapeutic and community-based sentencing options are fully funded, accessible and culturally appropriate and available in remote communities;
- Alternative to custody programs for both men and women are further developed and expanded throughout the Northern Territory;
- Post-release support is fully funded, comprehensive and culturally appropriate and addresses the known drivers of recidivism and includes partner-contact support for victims of family violence.

Trauma-informed practice and victim-centred design

Any repeal of mandatory sentencing provides an opportunity to embed trauma-informed practice in the alternative framework. NTWLS recommends that any reform of mandatory sentencing to be designed to ensure:

- Victims are engaged in the consultation process and contribute to the design of the reform;
- The assessment of suitability for therapeutic and community-based sentencing options include informed consideration of the needs and views of the victim, particularly victims of family violence;
- A statutory obligation is introduced to ensure victims of crime are consulted and updated in relation to the prosecution of violent crimes and family violence offences and the subsequent progress of the perpetrator through therapeutic programs and/or the release of the prisoner; and
- Police and judicial officers be required to consider the needs of the ‘person in most need of protection’ when responding to reports of violence to limit misidentification of the primary perpetrator.⁵

Consultation Paper questions

As noted in our request for an extension of time, the Committee’s Consultation Paper includes 20 questions for consideration. This is a significant piece of work for frontline services. Given the restricted timeframe, we have provided preliminary responses to some of the questions which echo our key concerns set out above. We look forward to an opportunity for further engagement as the consultation process progresses and we reiterate our strong recommendation that a consultation programme be developed to engage victims of crime.

⁵ A recent development in efforts to curtail cross-applications and cross-orders: See Australia’s National Research Organisation for Women’s Safety (2020) ‘Accurately identifying the “person most in need of protection” in domestic and family violence law: Key findings and future directions’ (Research to policy and practice, 23/2020). Sydney: ANROWS. See also joint report of the Australian Law Reform Commission and New South Wales Law Reform Commission: Family Violence – A National Legal Response (ALRC 114) and *Domestic and Family Violence Protection Act 2012 (Qld)* and *Restraining Orders Act 1997 (WA)*.

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?

The effectiveness of the mandatory sentencing provisions under the *Domestic and Family Violence Act 2007* has not been formally evaluated. Anecdotally, our experience suggests they achieve their postulated goals to a minor degree only. The provisions seek to provide a transparent accountability mechanism and focused deterrence for repeat offending.

In the absence of an evaluation of the effectiveness of these provisions or time to formally consult with our clients, NTWLS recommends that reform proposals relating to these provisions be dealt with separately from all other proposed reform. Recommendations in relation to these provisions should be made with the benefit of a review of the Alice Springs Domestic and Family Violence Court Pilot. Further, recommendations should be informed by an evaluation of the effectiveness of ss 121-122 in deterring repeat offenders and breaking the cycle of violence.

Deterrence (specific and general)

The increasing rates of domestic and family violence related assaults, in addition to our frontline experience indicate system strengthening is required. The increasing rates of domestic and family violence related assaults, as well as our frontline experience, suggest that mandatory sentencing provisions have not had the intended deterrent effect in relation to family violence.⁶

In our experience mandatory sentencing is not particularly effective in deterring women's use of violence. We find that many of our clients who have used violence often have a significant history of victimisation which includes ongoing physical and sexual assault resulting in frequent hospitalisation.⁷ The use of violence by women against their perpetrator is better understood as protective or defensive and is unlikely to be prevented by mandatory sentencing. Further, mandatory sentencing does not allow for family violence 'incidents' to be viewed in the context of an ongoing pattern of abuse and control and contributes to the increasing criminalisation of women who are victims of family violence.⁸

Denunciation

Mandatory sentencing provisions serve the denunciatory purpose of sentencing to some degree only, but they do accord with legislative provisions that require mandatory reporting of specified DFSV. A greater emphasis on denunciation could be supported by further training and support for judicial officers in relation to the formulation and delivery of

⁶ See, eg, NT Police, Fire & Emergency Services (2020) Alice Springs Crime Statistics (Website, 2020) (<https://pfes.nt.gov.au/police/community-safety/nt-crime-statistics/alice-springs>)

⁷ See, eg, *The Queen v Kelly* (Unreported, Supreme Court of Northern Territory, Blokland J, 20 February 2020).

⁸ See, eg, *The Queen v Dandy* (Unreported, Supreme Court of Northern Territory, Barr J, 4 November 2020)

sentencing remarks including non-collusive language, public transparency in relation to the publication of sentencing remarks and wider media coverage.

It is crucial that any process of reform of mandatory sentencing provisions is managed so that it does not send a message to victims of crime that their experience of victimisation do not warrant serious denunciation and punishment of the offender. Sentencing trends must be closely monitored and publicly accessible to enable a feedback loop between the community, legislature and judiciary. As noted above, an independent Sentencing Advisory Council could play a crucial role in this respect.

Incapacitation – protection of the victim

The incapacitation of a perpetrator of family violence as a result of mandatory sentencing provisions can in some instances offer some reprieve for victims of crime from ongoing domestic violence. It can cause a temporary break in the cycle of physical violence. However, it is our experience that victims are often at significant risk of physical re-victimisation when the offender is released after a short period of imprisonment and offenders repeatedly perpetrate family violence from prison via phone or messages. Our clients, and in particular our Indigenous clients, also report experiencing threats, abuse and physical violence from extended family when their partners are imprisoned for family violence related offences. This is often a significant reason that our clients are reluctant to give evidence to support the prosecution of their partner or former partner.

Prioritising risk management and perpetrator visibility and accountability within community-based sentencing options for family violence offending should be prioritised to ensure victim safety.

Does mandatory sentencing have community support due to a public perception that sentences imposed by the courts are too lenient?

We believe that this view is prevalent within segments of the Northern Territory community. If mandatory sentencing were to be repealed, we recommend that the repeal be accompanied by the introduction of a Sentencing Advisory Council – an independent statutory body – charged with similar functions to the Victorian Sentencing Advisory Council. This body would play an important role in monitoring and reporting on sentencing trends and informing public debate with robust, transparent data.

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?

Mandatory sentencing provisions should be repealed however the law reform framework must address the considerations listed on pages 3-5 of this submission. Further, as noted above, any reform proposals relating to the *Domestic and Family Violence Act 2006* should be dealt with separately from other proposed reform. Recommendations in relation to these provisions should be made following a review of the Alice Springs Domestic and Family Violence Court Pilot. Further, recommendations relating to these provisions should be informed by an independent evaluation of the effectiveness of ss 121-122 in deterring

repeat offenders.

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?

As set out above, the impact on victims of crime, particularly the impact on victims of family violence was not addressed in the Consultation Paper. Any changes to mandatory sentencing provisions must prioritise the safety and wellbeing of victims of family violence and the ongoing visibility and accountability of the perpetrator of family violence. Further, to ensure that reform in this area is effective, it is essential that all voices in the community are engaged in consultation to avoid an otherwise inevitable 'law and order' v 'soft on crime' debate.

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?

Yes – however, a Sentencing Advisory Council should be established to monitor, review and report on sentencing trends including non-parole periods.

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

Yes – see 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?

The particular impact on women who use fatal violence to resist ongoing abuse has not been identified as an issue in the Consultation Paper.

We trust this submission has been of assistance and we respectfully request the opportunity to be involved in any ongoing consultation process.

We look forward to hearing from you in due course.

Yours faithfully,



Janet Taylor, Managing Principal Solicitor, CAWLS
On behalf of the NTWLS