# GO DIRECTLY TO GAOL!

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## *Truth in sentencing in the Northern Territory.*

An election was held in the Northern Territory on 4 June 1994. Before the election, the conservative Country Liberal Party Government introduced the *Sentencing Bill* (NT) (the Bill) into Parliament. The Government 'Law, Order and Public Safety' election policy promised that the Bill would be passed as part of an emphasis on tough new sentencing laws. The Government was returned to office. This article outlines the changes to the sentencing laws contained in the Bill.

### Background

The Northern Territory has consistently recorded the highest imprisonment rate, expressed as the number of prisoners per 100,000 of the population, of any Australian State. In 1992, imprisonment rates in descending order were:[1]

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|---|---|---|---|
| NT | 387 | Qld | 89.4 |
| NSW | 165.9 | Tas | 77.3 |
| WA | 154.4 | Vic | 67.4 |
| SA | 103.2 | | |

Three statistical observations may be made in relation to the high imprisonment rate in the Northern Territory. First, the Northern Territory has among the highest non-Aboriginal imprisonment rates in Australia. The non-Aboriginal imprisonment rate in the Northern Territory, expressed as the number of non-Aboriginal prisoners per 100,000 of the non-Aboriginal population, is 134.4 compared to a national average of 101.6 (1992). Second, a relatively high proportion of the population is Aboriginal and the Northern Territory has a high Aboriginal imprisonment rate. The Aboriginal imprisonment rate, expressed as the number of Aboriginal prisoners per 100,000 of the Aboriginal population, is 1431.2 (1992 figures). Third, the Northern Territory imprisonment rates 'are undoubtedly affected also by the youthfulness and the high masculinity ratio of the (NT) population'.[2]

The figures speak for themselves. The Northern Territory, proportionally, has many more people in prison than any other State in Australia.

### Application of the Bill

The Bill collates the statutory law on sentencing into one piece of legislation and follows a logical format. However, the Bill does not purport to be a complete 'Code' of sentencing law. The effect is that, to the extent that the Bill allows, common law sentencing principles will remain applicable. The Bill does not apply to the sentencing of juveniles (s.4 of the Bill).

### Relevant factors in sentencing

The Bill provides that the sentencing court 'shall have regard to' ten specified matters in sentencing an offender (s.5). The matters mentioned are unremarkable and include the maximum and minimum penalty, current sentencing practice, the stage at which the offender pleaded guilty, the offender's previous character, effect of the offence on the victim and 'any

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aggravating or mitigating factor'.

The Bill does not require the court to have regard to the cultural background of the offender in determining an appropriate sentence. One possible reason for this omission is that the proponents of the Bill may be anxious to avoid an accusation that the law treats Aboriginal people leniently when sentencing. It is a common misapprehension that aboriginality is a mitigating factor in sentencing. In fact in *Neal v R* (1982) 42 ALR 609 at 629, it was said that:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group.

The proper approach to the fact that the offender is an Aboriginal has been described as follows:

> The relevance of aboriginality is not necessarily to mitigate; rather it is to explain or throw light on the circumstances of an offence. In so doing it may point the way to an appropriate penalty. Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases it may be the very reason why the offence was committed.[3]

As a result of this approach, courts frame sentences with regard to evidence of the effect of Aboriginal law, culture and tradition. The evidence may reveal a fact that would be relevant to the sentencing disposition: the motivation for the defendant's actions in committing the offence (*R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court, 28 May 1984); the consequences (pursuant to Aboriginal law) for the defendant because of the crime (*R v Minor* (1992) 79 NTR 1); and an indication of the views of the defendant's community (*Robertson v Flood*, unreported, NT Supreme Court, 29 October 1992). Each of these matters is clearly relevant to framing a 'just' sentence and was considered in detail by the Law Reform Commission in its reference on the Recognition of Aboriginal Customary Laws. The Commission concluded that legislative endorsement of these principles was desirable in a 'difficult and controversial area, (and) one in which the judges might fairly expect guidance from Parliament'.[4] The relevance of aboriginality is not confined to situations where there is evidence of Aboriginal law. In a number of cases, such as *R v Herbert and others* (1983) 23 NTR 22 at 31 and (on appeal) *Sampson and others* 1985 68 FLR 331, reference has been made to the emotional stress on the defendant arising from the economic, political, cultural and social deprivation endured by many Aboriginal people which is particularly evident in many Aboriginal communities. The relevance of the fact that the defendant was under the influence of alcohol at the time of the offence has been described in *R v Stanley Edward Fernando* unreported, Supreme Court of NSW, 13 March 1992 as follows:

> While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor.

The Law Reform Commission Report No 57, 'Multiculturalism and the Law' recommended the inclusion of 'the cultural background of the offender' in a statutory list of matters relevant to the sentencing disposition.[5] The omission of this factor in the Bill is surprising in light of the activity of the Northern Territory courts in developing a considerable jurisprudence on the relevance of cultural background in the sentencing disposition in order to meet the needs of the Aboriginal community of the Northern Territory.[6]

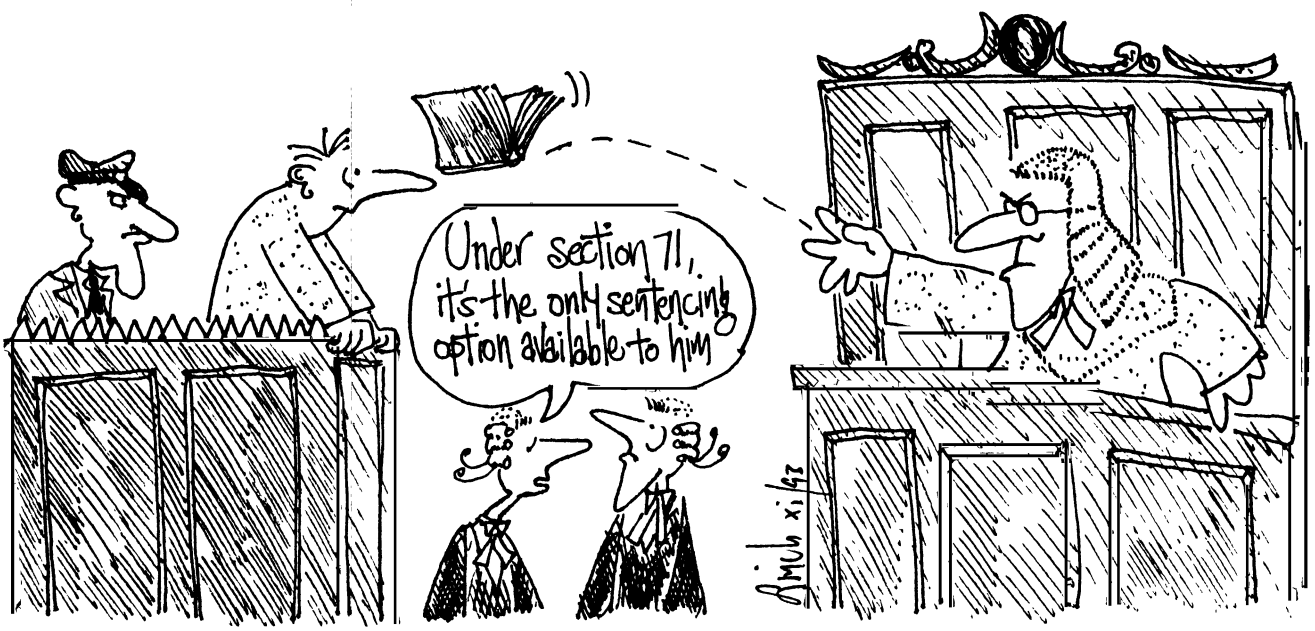
## Sentencing options

Once an offender is found guilty, the court is given specified sentencing options (s.7). The court may:

- without recording a conviction, dismiss the charge or release the offender and adjourn the hearing on conditions;
- with or without recording a conviction, release the offender and adjourn the hearing on conditions, impose a fine or make a community service order;
- record a conviction and order imprisonment. Imprisonment may be suspended wholly or partly (where the imprisonment term is not more than two years: s.46(1)) or it may be suspended on the offender entering a home detention order (s.7(1)). The court may combine any of the sentencing options (s.7(2)).

## Recording a conviction

One welcome reform is that the Bill places an emphasis on the function of recording (or not recording) a conviction as part of the sentencing disposition. In deciding whether or not to record a conviction, the court is required to have regard to the circumstances of the case including the nature of the offence, the character of the offender and the impact of a conviction on the offender's 'economic or social well-being' or employment circumstances (s.8).



## Adjournment on undertaking

One of the sentencing options open to the court is (with or without conviction) to adjourn the hearing of a matter for not more than five years on certain conditions (s.7). The 'conditions' take the form of an undertaking by the offender to be of good behaviour and to observe special conditions imposed by the court (s.11).

The court may impose as a condition a requirement that the offender undertake a prescribed treatment program (s.96). The offender's consent must be obtained to the conditions (s.97).

The court must, before making the order, explain to the offender in language likely to be readily understood by the offender the purpose and effect of the proposed order (s.98). This is an explicit recognition of the communication difficulties of many offenders in the Northern Territory. These communication difficulties are frequently attributable to the unavailability of an interpreter of Aboriginal language.[7] The reason for the unavailability of interpreters is controversial. The reasons offered include the lack of resources of courts and Aboriginal legal services to pay the interpreters and the unavailability of qualified interpreters. In an appropriate case, the unavailability of a qualified interpreter may found a successful application for a stay of proceedings (*Nagatayi v R* (1980) 30 ALR 27).

## Fines

When determining the level of fine, the court is required to take into account the financial circumstances of the offender, the nature of the burden on the offender of payment of the fine (s.17(1)) and may have regard to the level of loss of the victim and the value of any benefit to the offender (s.17(5)).

### *Default in payment of fine*

An offender who is in default of payment of a fine for more than 14 days is liable to be arrested and brought before the original sentencing court. The court may make an order for community service, imprisonment, sale of property etc. (s.28(2). The court cannot order imprisonment unless satisfied that no other order is appropriate (s.28(4)). The court cannot order community service or imprisonment where the offender did not have the capacity to pay the fine or had another reasonable excuse for payment of the fine (s.28(3)). Where the court makes an order for imprisonment, the offender may apply to the Director of Correctional Services to perform community service in satisfaction of the fine (s.30).The provisions of the Bill concerning assessing fines and the consequences of default reflect recommendation no. 21 of the Royal Commission into Aboriginal Deaths in Custody.

## Community service orders

The court may order a person found guilty to perform approved work for a period not exceeding 480 hours (s.39). This maximum applies where the offender is being sentenced for more than one offence or is already serving a community service order (s.41).

## Suspended sentence

Where an offender is sentenced to imprisonment for a term not exceeding two years, the court may suspend the sentence on such conditions as the court thinks fit (s.46(1),(2)). The two-year maximum applies to each proceeding so that a sentence cannot be suspended where the aggregate of sentences for offences exceeds two years (s.46(4)).

## Home detention order

The court may order a term of imprisonment be suspended if the offender enters a home detention order of not longer than 12 months (s.50). There are preconditions to the making of a home detention order: a suitable residence, no likely inconvenience or risk to other residents and the consent of the offender (s.51). The Bill makes it clear that in the case of Aboriginal offenders, the order may be served by being confined to a geographical area rather than a residence (s.50(2)).

Whenever a home detention order is revoked (e.g. for breach of the order), the offender must serve the full period suspended; no regard is had to the time period served on home detention (s.54(6)).

## Non-parole periods

The court must fix a non-parole period whenever it imposes a sentence of 12 months or longer (s.59). However, the court need not fix a non-parole period where it would be inappropriate by reason of the nature of the offence, the history of the offender or the circumstances of the case (s.59(1)).

### *Fixed non-parole period*

The introduction of a fixed non-parole period for sex offenders was a specific promise contained in the Government election policy. In the case of an offender convicted of assault with intent to have carnal knowledge or commit gross indecency under s.192(1) of the Criminal Code (NT) (which also applies to the same offence where aggravating factors of causing grievous harm or having carnal knowledge are present) the court must fix a non-parole period of 70% of the term of imprisonment (s.60). The court is not required to set a 70% period where 'exceptional circumstances' exist (s.60(2)).

## Remissions are abolished

All Northern Territory prisoners currently enjoy a one third reduction in their head sentence by way of remissions. Remissions are to be abolished for all offenders except those sentenced to less than 12 months imprisonment (see below) by amendment to the *Prisons (Correctional Services) Act*. The Bill is silent on the manner in which courts are to take into account the abolition of remissions. Having regard to the NSW experience of abolishing remissions, the likely effect is that courts will not have regard to the abolishing of remissions when determining sentence (*R v Macleay* [1990] 19 NSWLR 112; 46 A Crim R 340). Offenders will simply serve longer periods in prison.

The abolition of remissions was justified by the familiar catch cry of 'truth in sentencing'. The immediate consequences of the Bill were not highlighted: the prison population will grow. An alternative is illustrated by the legislation introduced in Victoria.[8] The goal of 'truth in sentencing' was achieved by the abolition of remissions under the *Corrections (Remissions) Act 1991* (Vic.). However, the legislation directed courts to take the abolition of remissions into consideration when determining the length of the sentence (s.10 *Sentencing Act 1991* (Vic.)). The result is that offenders serve the period sentenced ('truth') and, all things beings equal, the prison population does not change. The Bill provides that an offender sentenced to less than 12 months imprisonment is to be released after serving 50% of the term on condition that the offender does not commit another offence punishable by imprisonment (s.63(1)). If the offender breaches this condition, he or she shall serve the remainder of the sentence (s.63(2)). I am not aware of any useful statistics on recidivism in the Northern Territory that will

allow the effect of s.63(2) to be measured. Anecdotal evidence suggests that many young Aboriginal men commit offences at regular intervals of 3-12 months for short periods (2-5 years) of their life. The effect of this provision is that such offenders will be almost continually in prison serving the remainder of their previous sentence!

## Indefinite sentences

The Bill provides that the court may impose an indefinite term on an offender convicted of a 'violent offence' where the court is satisfied that the offender is a serious danger to the community (s.71). A 'violent offence' is defined to include, first, any crime that involves the use of violence that is punishable by imprisonment for life and, second, a range of nominated sexual offences. In considering whether the offender is a serious danger to the community, the court must consider the offender's antecedents, character, age, health or mental condition, the severity of the violent offence and any special circumstances (s.71(7)). The onus is on the prosecution to prove, by acceptable and cogent evidence of sufficient weight to justify the finding, that the offender is a serious danger to the community (s.76). Where the court imposes an indefinite sentence it must impose a nominal sentence of a period it would otherwise have imposed (s.71(4)). The court is required to review the sentence after the offender has served 50% of the nominal sentence and thereafter at two-yearly intervals (s.78). On such a review the court must discharge the indefinite sentence and re-sentence the offender unless the court is satisfied that the offender is still a serious danger to the community (s.80).

## Conclusion

The Bill contains a number of welcome reforms, particularly in relation to the imposition of a conviction and the consequences of a default in payment of fines. However, the Bill also conforms to a national trend of legislative fettering of judicial discretion in sentencing. The Bill creates a minimum non-parole period for sex offenders. The Northern Territory Government promises still more intervention. The Government 'Law, Order and Public Safety' election policy promises to:

> [i]ntroduce compulsory imprisonment of 28 days for repeat offenders (including juveniles) for crimes such as, unlawful entry . . . stolen motor vehicle . . . shoplifting and criminal damage.

There is much anecdotal evidence that mandatory sentences distort the operation of the criminal justice system and can lead to unjust results: more 'not guilty' pleas; the acceptance of pleas to inappropriate charges; and, in some instances, crushing penalties. Politicians are quick to respond to arguments in favour of unfettered judicial discretion in sentencing with the irrefutable and unprovable observation that 'the community is demanding that offenders go to gaol'.

### References


1. Walker, J., *Australian Prisoners 1992,* Australian Institute of Criminology, Canberra, 1993.
2. Walker, above, p.107.
3. Toohey J in an unpublished paper 'The Sentencing of Aboriginal Offenders' delivered to 2nd International Criminal Law Congress, Surfers Paradise, June 19-24 1988 at p.21.
4. Australian Law Reform Commission, Report No. 31, *Recognition of Aboriginal Customary Law*, Sydney, 1986, Vol. 1 at para. 517.
5. Australian Law Reform Commission, Report No. 57, *Multiculturalism and the Law,* Sydney, 1992, paras 8.13 ff.
6. See *R v Minor* (1992) 79 NTR 1 and the cases cited in the judgment of Mildren J.
7. See generally, Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System – Report*, AGPS, April 1991, Chapter 4; ALRC Report No. 31, above, para. 596 ff.
8. See generally, Freiberg, A., 'Truth in Sentencing? The Abolition of Remissions in Victoria: Sentencing Act 1991 (Vic)', (1992) 16 *Crim. LJ* 165.