LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into Community Corrections

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INQUIRY INTO COMMUNITY CORRECTIONS

The ACT Law Society (the Society) appreciates the opportunity to provide input to the Inquiry into Community Corrections.

We note that input is sought on the current parole system, intensive correction orders, the Sentence Administration Board, Drug and Alcohol treatment orders, recidivism outcomes and experiences of offenders, victims and families.

We have sought input from the Society's Criminal Law Committee and based on the feedback received, we provide the following comments.

Parole System

1. *Parole Application Processes*

Part 7.2 of the *Crimes (Sentence Administration) Act 2005* (ACT) ('CSA Act') governs the making of parole orders in the ACT. For any sentence where a non-parole period is set, a person is required to make a written application for parole to the Sentence Administration Board (SAB). If the application is accepted by SAB, it must conduct an inquiry into the application. In conducting such inquiry, SAB may consider submissions from relevant parties and any relevant reports.

Practitioners working in this area report that this process often takes three months from the time the application is submitted to when the person is released from custody. This administrative delay results in unreasonable extension of imprisonment and this is especially problematic for shorter sentences.

For instance, if a person is sentenced to a period of 12 months imprisonment, with a non-parole period of 6 months, the sentence is backdated by 6 months to when the person was first remanded in custody. By virtue of the administrative process, that person may have to serve a 9 month term of imprisonment before their release, being 50% longer than the non-parole period.

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For such sentences, the non-parole period no longer reflects the shortest period of time that the person must remain in custody before they are able to be released. This frustrates the intention of the sentencing authority and results in unnecessary incarceration at the community's expense.

We also note that under section 149 of the CSA Act, if a person is convicted or found guilty of a Territory offence (that is punishable by imprisonment) while on parole, the parole order is automatically cancelled. The Court must then make an order under section 161 to recommit the person to full-time custody.[1] The person must then go through the application again to apply for parole.

For instance, if a person has been released on parole and commits a level three drink-driving offence as a first offender, even if the circumstances of that offence are such that a Magistrate dealt with the matter by way of non-conviction and dismissing the charge,[2] the parole order would still be cancelled and the person will have to serve three months before they can be released on parole again.

In this context, we consider the current parole application process to be inefficient and may result in miscarriage of justice and put unnecessary additional pressure on the already thinly stretched prison system. The Society supports an approach similar to that of New South Wales (NSW), where *automatic* parole release is allowed for sentences of less than three years of imprisonment.[3]

This approach has a number of advantages:

- Resources are focused on cases with longer sentences of imprisonment, and therefore more serious offences and offenders;
- Offenders serving shorter terms of imprisonment are spared from serving unnecessary periods of imprisonment and have the benefit of longer supervision and support upon their return into the community;
- The community is spared the expense of unnecessary detention of lower-level offenders;
- The court's sentencing intention is preserved;
- Jails are not burdened with detaining offenders unnecessarily, leading to a reduction in the number of people in custody;
- There would remain a framework for the parole authority to have an impact on when parole is granted in appropriate circumstances;
- Such system is recommended by the Australian Law Reform Commission as a way to minimise incarceration for Aboriginal and Torres Strait Islander detainees due to the reluctance to apply for parole observed in this group.[4]

One way to address this issue is amending section 149 of the CSA Act to apply only to people who commit an offence carrying a maximum penalty above a certain threshold (e.g., 3 years).

2. <u>Sentencing for Offences Committed in Custody</u>

Historically, when the court is sentencing for offences committed in custody, it has imposed largely or entirely consecutive terms of imprisonment and *adjust* the nonparole period

[1] *Crimes (Sentence Administration) Act 2005* s 161.
[2] *Crimes (Sentencing) Act 2005* (ACT) s 17(2)(a).
[3] See *Crimes (Administration of Sentences) Act 1999* (NSW) s 158.
[4] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples,* Report No 133 (2018) Recommendation 9-2.

accordingly.[5] A general power to reset a nonparole period when a further term of imprisonment is imposed is provided under section 66 of the *Crimes (Sentencing) Act 2005* (CS Act)*:*

> (1) This section applies if
> a) The offender is serving a sentence of imprisonment (the existing sentence)' and
> b) The offender is sentenced to a further term of imprisonment (the primary sentence)
>
> …
>
> (3) The imposition of the primary sentence automatically cancels any nonparole period set for the existing sentence

However, "a sentence of imprisonment imposed for an offence committed while in lawful custody" is an "excluded sentence of imprisonment" to which section 66 does not apply.[6]

For imprisonment where a nonparole period has not been set, section 118(2) of the CSA Act provides that:

> If the offender is also serving a sentence of imprisonment for which a nonparole period has not been set (the excluded sentence) and the nonparole period for the other sentence has ended, the offender's parole eligibility date is the day the excluded sentence ends

The combination of these provisions indicates that the usual imposition of a (at least) partially consecutive sentence for an offence committed in custody would result in the offender having to serve the entirety of both sentences. This is contrary to established practice and is significantly detrimental to detainees. An amendment to section 66 of the CS Act is necessary to reinstate the power of the court to reset nonparole periods when an offence is committed in custody.

Intensive Correction Orders

We note that the use of Intensive Correction Orders (ICOs) was introduced in the ACT in 2016 as an option for sentencing which aims to reduce the risks of future offending.[7] The court may order an ICO if the sentence of imprisonment is not more than 2 years. For a sentence of imprisonment between 2-4 years, the court must have regard to the factors set out in section 11(3) of the CS Act.[8]

The use of ICOs has been identified in *R v Ngerengere (No 3)* to be limited by section 29 of the CS Act,[9] which provides that (in the case of a *combination sentence*) an ICO must not be used in combination with a sentence of full-time imprisonment.[10] This full-time custody includes a sentence backdated to take account of pre-sentence custody.[11]

This section has been described by Justice Refshauge as "immensely problematic and calls for some reform" as "it is likely that a person suitable for an Intensive Correction Order will have been refused bail and remanded in custody, given the fact that he or she would be likely to be sentenced not merely to imprisonment but a term of up to four years".[12] Section 80 of the CS Act also presents similar difficulties to the courts in trying to structure sentences to take account of pre-sentence custody while ultimately imposing an ICO. A similar issue was also identified in NSW.[13]

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[5] See e.g *The Queen v Rappel* [2019] ACTCA 11.
[6] *Crimes (Sentencing) Act 2005* (ACT) s 64(2)(e).
[7] *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015* (ACT) Explanatory Statement.
[8] *Crimes (Sentencing) Act 2005* (ACT) s 11(3)..
[9] *R v Ngerengere (No 3)* [2016] ACTSC 299.
[10] *Crimes (Sentencing) Act 2005* (ACT) s 29(1)(b).
[11] See e.g, *R v Ingram* [2016] ACRSC 199, [13]; see also *Crimes (Sentencing) Act 2005* (ACT) s 63.
[12] *R v Ngerengere (No 3)* [2016] ACTSC 299, [60].
[13] See e.g *Mandranis v R* [2021] NSWCCA 97.

Whilst the court has found workarounds, these workarounds themselves often result in sentences that on their face may not meet community expectations (for example when the fact of pre-sentence custody does not get reflected in the head sentence of the ICO). This may wrongly create the impression that the offender has been treated unduly leniently. As such, reform is necessary to allow suitable individuals to be sentenced to an ICO despite pre-sentence full time custody.

Other comments

Sentencing Administration Board (SAB)

Members of the Society have reported that the SAB often requires a written authority from clients to indicate that a solicitor is acting for a client. This is problematic and burdensome as in these cases, clients are most likely to be detainees or inmates, with whom face to face interaction is often limited (particularly due to the impact of the COVID-19 lockdown). We request that more flexibility should be given in determining whether a solicitor acts for a client. We note that the Supreme Court of the ACT requires nothing be signed by a client to appoint a lawyer in the proceedings. The filing of Form 4.4 signed by the solicitor alone is enough to satisfy the Supreme Court that the solicitor acts for the client in the proceedings. Similarly, physical appearance alone is enough to satisfy the Magistrates Court of the ACT in criminal proceedings.

Drug and Alcohol Treatment orders

The Drug and Alcohol Court was introduced in the ACT in September 2019 and so far, members have reported a positive experience. On this basis, there is support for the use of Drug and Alcohol Treatment orders to be continued.

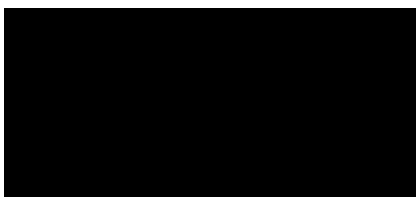
Good Behaviour Orders (GBOs)

The imposition of a Good Behaviour Order (GBO) is provided under section 13 of the CS Act. A GBO may include a community service condition that requires the offender to undertake unpaid work in the community. From experience, members of the Criminal Law Committee suggest that arrangements should be made:

- For people who may suffer from certain health issues that may make it unsafe for them to carry out community services;
- To better enforce GBO conditions, particularly when there is a continuous breach of a certain condition (such as a community service condition).

We welcome the opportunity to comment further if that would be of assistance.

Yours sincerely,



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