Dead Time: The Inhumane Toll of an Imperfect System

Wasted lives

It is well understood that the *Bail Act* (NT) imposes presumptions against the grant of bail in such a broad range of circumstances that many accused persons spend a significant amount of time on remand prior to contested matters proceeding either in the Local Court or on indictment in the Supreme Court.

Many accused persons are either acquitted, have matters withdrawn or are found guilty of lesser offences, resulting in periods of incarceration that are simply unaccounted for in any meaningful sense. This is colloquially referred to as "dead time".

Northern Territory prisons are well over capacity.[1] Many of our prisoners[2]- most coming from a history of entrenched social disadvantage and plagued by chronic health issues including alcoholism, drug addiction and mental health issues- spend weeks, months and even years of their lives on remand with limited access to any meaningful rehabilitative services or training and employment opportunities. There is a recognised dearth of supportive or rehabilitative facilities available upon release from prison and as such we see many persons trapped in an inescapable cycle.[3]

CLANT is of the view that it is time for a legislative response that would reduce, to some extent, the prison population while at the same time providing a means of redress for the hardships of unrecognised periods of time on remand.

There is overwhelming support from the profession for the recognition of dead time. The Law Society of the Northern Territory, the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission have each endorsed our proposed amendments.

Dead time is not a bank balance to be called upon by an offender, nor is it some 'green light' to commit offences. It should be treated as any other mitigating circumstance relevant to the personal circumstances of an offender.

The *Bail Act* is currently under review and it is hoped there will be legislative amendments regarding the presumptions for and against bail. However, that is a separate issue.

Although no other jurisdiction has enacted specific dead time provisions, several (as is discussed below) have utilised their sentencing laws so as to make allowance for dead time. Owing to the Northern Territory's uniquely high over-incarceration rate, our dead time problem is uniquely serious. Fortunately, it is a problem that can be simply remedied by way of statutory reform.

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[1] As at 13 June 2018 there were almost 1800 prisoners in custody, almost 9% over capacity. See www.abc.net.au/news/2018-02-13/nt-prisoners-at-record-levels-of-overcrowding/9443028.

[2] The vast majority of whom are Aboriginal.

[3] See also for example, *The Queen v Peter Skeen* [2018] NTSC 28 Grant CJ.

Current position in the Northern Territory

Section 5(2)(k) *Sentencing Act* (NT) requires the court to take into account time spent in custody by the offender for the offence before the offender is sentenced including:

> time the offender resided at a specified place in accordance with a conduct agreement under the *Bail Act* that contained a provision mentioned in section 27A(1)(iaa), (iab) or (ia) of that Act;

This must be viewed in conjunction with section 63 of the same Act, the relevant subsections of which are set out below:

> (4) Except as expressly provided or expressly ordered, a sentence of imprisonment on conviction, takes effect from the day the court passes sentence on the offender and a sentence of imprisonment on summary conviction takes effect from the commencement of the offender's custody under the sentence.

(5) Where an offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment must be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day on which the court passes sentence.

Proposed amendments

To ensure that courts take 'dead time' into account, there are at least two legislative amendments that could be made. The first is to mandate under s5(2) of the *Sentencing Act* (NT) that a sentencing court **must** have regard to

> "time spent in custody that has not already been taken into account by a sentencing court".

This would require the court to take the 'dead time' into account in the manner it chose, most likely through adjustment of the head sentence and/or the non-parole period, or an adjustment of the period of time served before a sentence is suspended.

The second, and perhaps preferable way, is to also amend section 63(5) of the same Act such to allow the court to backdate a sentence beyond the date of arrest, thereby allowing the court to backdate the sentence to more accurately reflect the recognition of the dead time:

> The court may direct that a sentence of imprisonment is taken to have started on a day before the day the sentence is imposed.

And insert section 63(6)

> For subsection (5) the court must take into account any period of custody during which the offender has been held in relation to the offence, or any other offence which has not already been taken into account by a sentencing court.

Either way, it is unlikely that an offender would ever be credited 100% for dead time. The amount of credit given would be at the discretion of the court, having regard to the circumstances of the offender, and in accordance with the interests of justice. That is the approach recently endorsed by the Northern Territory Court of Criminal Appeal in relation to credit given to compliance with strict conditional bail on electronic monitoring.[4]

Interstate approaches to 'dead time'

There is no settled approach to the issue of dead time. A very brief summary of interstate jurisprudence reveals that Victoria permits the court to take into account time spent on remand for other unrelated offences in a "broad way" utilising the *Renzella* discretion[5] it evolved because of the restrictive terms of the then s18 of the *Sentencing Act* (Vic) which prescribed the power of the sentencing court to backdate a sentence of imprisonment to take into account time spent on remand.

Section 18, has since been amended to allow the sentencing court to backdate a sentence of imprisonment to take into account time spent on remand for offences that were subsequently withdrawn or not proven when imposing a sentence of imprisonment for offences that were proven so long as the period of remand is a single unbroken period and includes time spent on remand for the offences for which the offender is being sentenced.[6]

A similar provision exists in the ACT,[7] Tasmania[8] and QLD.[9] The broadest provision, and most ambiguous, exists in South Australia where, provided the offender has spent time in custody on the charge they are being sentenced for, the sentencing court can take into account 'time already spent in custody'[10]. Arguably this would include time spent on remand on an unrelated offence. However, the interpretation to be given to this provision is not clear.[11]

The effect of the proposed amendments

The amendments would provide a transparent and consistent approach to dealing with and recognising dead time without circumscribing judicial discretion or interfering in the process of instinctive synthesis in sentencing. An accused person would have the benefit of understanding that previously unrecognised periods of incarceration were not meaningless; the 'flow on effect' may result in prisoners better engaging with available rehabilitative services whilst remanded and implicitly should act to mitigate to a degree the cost of incarceration suffered on both a personal level to the accused

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[4] *Lovegrove v The Queen* [2018] NTCCA 3.
[5] [1997] 2 VR 166.
[6] S18 (4).
[7] *Crimes (Sentencing) Act 2005,* s63.
[8] *Sentencing Act 1997,* s16.
[9] *Penalties and Sentences Act 1992* s159A.
[10] *Sentencing Act 2017* s44.
[11] *R v Al Zuain* [2009] SASC 123 cf *PNJ v The Queen* [2009] HCA 6 and *R v Hughey* [2007] SASC 452.

person and a financial level to the tax payers of the Northern Territory, which is estimated to be around $212 million per year.[12]

The committee is certain that this legislative reform is necessary, just and humane and will ultimately have an added benefit as serving as a cost saving tool for the Government.

Marty Aust
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[12] That estimate is based on 1800 prisoners costing $322 per prisoner per day ($211,554,000). See Australian Productivity Commission *Report on Government Services 2016*, ('Total net operating expenditure and capital costs per prisoner per day', table 8A.7) accessible at http:www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/correctiveservices/rogs-2016-volumec-chapter8.pdf