Criminal Lawyers Association of the Northern Territory (CLANT)

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22 May 2018

The Honourable Natasha Fyles MLA
CC: The Hon. Michael Grant QC, Chief Justice

Via Email

Dear Madam Attorney

Proposed amendments to the *Sentencing Act* (NT) regarding 'dead time'

The issue

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, if not most, 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Many accused persons are either acquitted, have matters withdrawn or are found guilty of lesser offences, resulting in periods of incarceration that are simply unaccounted for in any meaningful sense.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".

It is also well recognised that the Northern Territory prisons are well over capacity.

The committee 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.

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. It is unlikely that the offender would ever be credited 100% for this time.

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 amendment should read:

> 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.

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.

Interstate approaches to 'dead time'

Victoria has evolved a unique jurisprudence that permits the court to take into account time spent on remand for other unrelated offences in a "broad way". Known as the Renzella discretion[1] 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.

[1] [1997] 2 VR 166.

Section 18, as it was originally formulated, prevented the court from backdating a sentence for time on remand unless it was solely referrable to the charges for which the offender was convicted. If, for example, there were additional charges that had been withdrawn, the court was not permitted to backdate the sentence of imprisonment to take into account time on remand.

Section 18 of the Act 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.[2]

A similar provision exists in the ACT,[3] Tasmania[4] and QLD.[5] A more restrictive provision exists in NSW[6] and Western Australia[7], which only allows the sentencer to back date the sentence by the amount of time spent on remand solely referrable to the offence for which the offender is being sentenced. 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'8. Arguably this would include time spent on remand on an unrelated offence. However, the interpretation to be given to this provision is not clear.[9]

In Victoria, the *Renzella* discretion has been broadened to allow, in some circumstances, the court to take into account time served in the past that has been wrongly served.[10] However, it is not applied in a 'mathematical way.'[11] An offender must be credited 100% for time on remand that falls within the purview of s18, unless the court otherwise orders. 'Dead time', however, is credited in a general way and allowance is usually made to the head sentence and non-parole period in a way that usually results in a discount of less than the full period[12]. There is no entitlement to a discount.[13] In justifying the approach to dead time the Court of Appeal in *Warwick v The Queen* [2010] VSCA 166 noted;

> we recognise the obvious injustice where a person has served a term of imprisonment which he or she should not have served. In other jurisdictions, that injustice is addressed by formal procedures for compensation for such periods. No such system exists in this State.

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[2] S18 (4).
[3] *Crimes (Sentencing) Act 2005,* s63.
[4] *Sentencing Act 1997,* s16.
[5] *Penalties and Sentences Act 1992* s159A.
[6] *Crimes (Sentencing Procedure) Act 1999,* s47. See also s24(a) which requires the court to take into account time spent on remand for the offence they are being sentenced for.
[7] *Sentencing Act 1995* s87.
[8] *Sentencing Act 2017* s44.
[9] *R v Al Zuain* [2009] SASC 123 cf *PNJ v The Queen* [2009] HCA 6 and *R v Hughey* [2007] SASC 452
[10] *R v Stares* (2002) 4 VR 314; *Karpinski v The Queen* [2011] VSCA 94 at [7], *Warwick v The Queen* [2010] VSCA 166.
[11] *R v Chimirri* [2003] VSCA 45 at [5].
[12] *R v Mc Mahon* [2006] VSCA 240.
[13] *Karpinski v The Queen* [2011] VSCA 94 at [60].

In *Karpinski v The Queen* the Court of Appeal suggested that 'dead time' be approached in the same way as the principle of totality[14], although this approach is not readily workable where the period of remand is not continuous.

In Western Australia, the Court of Appeal in *Narkle v Hamilton* [2008] WASCA 31 observed that a discretion exists to allow a discount for time spent on remand but the Court would not allow it where the time in custody related to an earlier offence which the offender had been acquitted of.[15] In *Geale v Tasmania* [2009] the Court of Criminal Appeal held that merely because the statute prescribes circumstances in which pre-sentence detention may result in a backdating of a sentence does not restrict the inherent power of the court from backdating the sentence to reflect pre-sentence remand that did not fall within the purview of the Act. In that case it was held that a period of remand for an unrelated offence, committed after the sentenced offence should have been taken into account by the sentencing court. The position in South Australia is not clear, although, arguably it would recognise the existence of the discretion to recognise dead time. The position in NSW is that "dead time" is not permitted to be taken into account, particularly where there is a broken period of custody.[16]

The effect of the proposed amendments

The proposed amendments both empower a sentencer to take account of dead time and afford a flexibility of approach in determining the commencement date of the sentence when an offender has served periods of unrecognised custody.

Such amendment provides 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 person and a financial level to the tax payers of the Northern Territory.

If the *Sentencing Act* was to be amended to take into account 'dead time' then it would be necessary to ensure that periods of remand that are not initially taken into account in the sentencing process (and so become 'dead time') are recorded in IJIS and on the offender's antecedents so that prosecutors, defence lawyers and the courts are able to ensure that it does not simply disappear into the ether. If dead time were to be taken into account, this would need to be reflected on the defendant's information for courts to ensure that there was no 'double dipping'.

Similar amendments should also be proposed to ss 81(2) and 129 of the *Youth Justice Act* (NT) to ensure consistency.

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[14] [2011] VSCA 94 at [64].
[15] *Narkle v Hamilton* [2008] WASCA 31 at [43].
[16] *R v Niass* (NSWCCA, 16 November 1988 unreported), *Hampton v R* [2014] NSWCCA 131 at [28]-[38].

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.

I look forward to discussing this matter further with you at a convenient time.

Kind Regards

Marty Aust
President