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Mandatory Sentencing, Remand and "Actual Imprisonment" in the Northern Territory

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Abstract

In October 2024, the Country Liberal Party (CLP) in the Northern Territory (NT), Australia expanded the NT's mandatory sentencing regime in respect of assaults on frontline workers. It also expanded mandatory sentencing for contraventions of Domestic Violence Orders. The expansion of mandatory sentencing is just one aspect of the CLP's "tough on crime" reforms to the NT criminal justice system, whose effect will likely be to entrench the vicious circle of trauma, poverty and criminalisation in Indigenous communities. There is a scholarly and law reform consensus against mandatory sentencing, which has received uptake in the form of community advocacy against the CLP's reforms. In this article, I argue for the need to supplement this advocacy with a focus on the negative impacts of remand and of restrictions on bail. The true driver of mass incarceration in the NT is not mandatory sentencing, but the use of restrictions on bail as a tool of community safety. I examine the impact of the CLP Government's October 2024 and April 2025 bail reforms. Nearly half of the NT prison population is on remand, with remand conditions tending to be worse than the conditions faced by sentenced prisoners. Calling for urgent reform where remand and bail are concerned should be a priority for law reformers and community advocates alike.

Keywords: Indigenous incarceration; bail; mandatory sentencing; Northern Territory; Country Liberal Party; tough on crime.

Introduction

Successive governments in the Northern Territory (NT), Australia have implemented "tough on crime" measures that have resulted in escalating imprisonment rates for Indigenous people. In October 2024, the newly elected Country Liberal Party (CLP)[1] continued this general pattern, lowering the age of criminal responsibility from 12 to 10,[2] and introducing a suite of reforms to bail and sentencing laws discussed in this article.[3] The number of prisoners in the NT has reached a record high, with 45% of prisoners held on remand (Australian Bureau of Statistics, 2024; Hathaway-Wilson, 2025). The NT is a jurisdiction where Indigenous people are 89% of the adult prison population (Australian Bureau of Statistics, 2024), and 91% of the youth detention population (Australian Institute of Health and Welfare, 2024). In these circumstances, the effect of "tough on crime" measures are to entrench vicious cycles of intergenerational trauma, poverty and criminalisation (Atkinson, 2002; Marks, 2022).

One advocacy response to the CLP's punitive agenda has been to resist against any further expansions of mandatory sentencing, various forms of which have been in place in the NT since at least the 1990s. Mandatory sentencing, as is well-understood, limits the discretion of the trial judge, meaning that the most appropriate sentence in the circumstances cannot be imposed. When the mandatory sentence is imprisonment, the judge acts as nothing more than a rubber stamp, a superfluous intermediary between the prosecutor and the prison. It is understandable that mandatory sentencing should be a focal point of agitation for law reformers and momentum for its repeal must continue to be built. However, given the current driver of mass incarceration is the use of remand as a tool of community safety, I suggest greater focus should be paid to supporting advocacy efforts urging repeal of presumptions against bail. Indigenous defendants, technically innocent until proven guilty, are being indefinitely

detained on remand because the NT court system is overstretched and apparently under-resourced (Fitzgerald & Roussos, 2024). By the time defendants are mandatorily sentenced, they may well have served longer on remand than their mandatory minimum sentence would require them to serve. In such circumstances, remand and bail emerge as the more urgent reform areas, if the aim is to mitigate the well-known harms associated with incarceration, not least of which is the risk of dying in custody.

Mandatory Sentencing in the NT

Although "tough on crime" approaches have received bipartisan support in the NT, historically the CLP has taken a more hardline approach, pioneering carceral responses to what it considered "anti-social behaviour."[4] In the late 1990s, the CLP introduced its policy of "compulsory imprisonment" for addressing property crime. Under this policy, a three-strikes regime applied to even the most minor property offending. In 1997, the (now amended) *Sentencing Act 1995* (NT) s. 78A required the court to order anyone found guilty of a property offence "to serve a term of imprisonment."[5] A first property offence incurred at least 14 days' imprisonment: s. 78A(1); a second property offence incurred at least 90 days' imprisonment: s. 78A(2); and a third or subsequent offence incurred at least 12 months' imprisonment: s. 78A(3). The NT Supreme Court confirmed that the government's intention had been to deprive the court of its discretion to suspend sentences or order home detention – the time *actually* had to be served in prison: *Trenerry v Bradley* (1997) 6 NTLR 175.

This mandatory sentencing regime resulted in the suicide of a 15-year-old Indigenous boy who was serving a mandatory sentence inside an NT youth detention centre for stealing (Morgan, 2000).[6] Other people imprisoned during the operational period of this mandatory sentencing regime included a woman who stole a chicken from a supermarket (Marks, 2022), a homeless man who stole a towel from a clothesline to use as a blanket, and another Indigenous man who stole biscuits and cordial worth AU$23 (Morgan, 2000). The mandatory sentencing amendments were introduced despite rates of property offending in the NT being "comparable" to (that is to say, no worse than) other Australian jurisdictions (Gibson, 2000, p. 105). As one criminal lawyer wrote, there existed a perception at the time that the laws had been "enacted to put poor, homeless, drunken Aboriginal people who commit petty offences against property in prison for inordinate and quite unjustified periods of time" (Tippett, 1999, p. 11).

The three-strikes regime was repealed by the NT Labor government when it won office in 2001, but mandatory sentencing continued to be part of the fabric of NT criminal law in various forms, whether in relation to "aggravated" property offences, the prescription of non-parole periods for murder, drug charges, or "aggravated" assaults (see for discussion, Marks, 2022, Chap. 8). One criminal lawyer has argued the NT is a unique jurisdiction in Australia because in the NT "people [are] subject to *minimum* prison terms for such 'crimes' as possessing cannabis, breaching a DVO or merely pushing another person in the chest" (Marks, 2022, p. 169).

Assaults against police or emergency workers are taken particularly seriously. Even before the CLP came to power in August 2024, the gravity of such assaults was duly reflected in the *Criminal Code Act 1983* (NT) ('Criminal Code'). Any person who assaults a "police officer or emergency worker" in the execution of their duty is liable to five years' imprisonment: s. 189A(1). Where the worker suffers harm, the maximum penalty increases to seven years' imprisonment: s. 189A(2)(a). Where the worker suffers harm and the defendant has spat on the worker, the maximum penalty increases to 10 years' imprisonment: s. 189A(2)(ab). If the defendant is found guilty of an offence against Criminal Code s. 189A, the court must sentence a defendant under s. 78DA of the *Sentencing Act 1995* (NT) ('Sentencing Act'): s. 78DA(1). There was, prior to the October 2024 amendments, already mandatory sentencing in place for assaults against police and emergency service workers. The court was required to impose a minimum sentence of three months' "actual imprisonment" if the worker suffered harm (and no offensive weapon was used): Sentencing Act s. 78DA(3). What the October 2024 amendments did was expand the mandatory sentencing regime in respect of police and emergency service workers by inserting a new section s. 78DA(3A) into the Sentencing Act under which the court is also required to impose a minimum sentence of three months' "actual imprisonment" if the circumstances in Criminal Code s 189A(2)(ab) are satisfied – i.e., if harm is suffered and spitting is involved.[7]

Naturally, a question that arises here is: what is "actual imprisonment"? The Sentencing Act clarifies that where a court is required to impose a term of "actual imprisonment" it must record a conviction: s. 78CB(1)(a). It must also impose a term of imprisonment: s. 78CB(1)(b). However, the court retains two discretionary powers. Firstly, it may order a partly suspended sentence: s. 78CB(2)(a). Secondly, it may order an intensive community correction order (ICCO) subject to a home detention condition: s. 78CB(2)(b). A suspended sentence is an available option when the term of imprisonment to which the defendant has been sentenced does not exceed five years: s. 40(1). The court may impose the conditions it thinks fit on a suspended sentence: s. 40(1). An ICCO is an order that the defendant serve out the term of imprisonment "in the community" in such a way that will ensure the person is "held accountable" and that the "personal factors" contributing to the criminal behaviour are

addressed: ss. 44(a)-(b). The court can impose conditions other than a home detention condition (s. 48(1)(a)) on an ICCO, such as requiring completion of a rehabilitation program in relation to domestic and family violence: s. 48(1)(c).

Where, however, the court is required to impose a "minimum sentence of a specified period" of actual imprisonment, it must neither make an order suspending the sentence nor make an ICCO: ss 78CA(1)(c)-(d). This rule applies unless the person found guilty is a youth, for whom those options remain open: s. 78CA(2). In short, the mandatory sentencing regime in respect of assaulting police or emergency service workers will result in the following best-case scenarios: if the defendant is a youth, either home detention for the term of imprisonment, or a partly suspended sentence; if the defendant is an adult, at least three months served in prison.

Two points are worth emphasising here. The first is that mandatory sentencing in the NT applies differently to youth and adults. The second is that "actual imprisonment" does not mean what one would expect it to mean. There has clearly been a shift in policy from the CLP's mandatory sentencing heyday in the 1990s. The policy of "compulsory imprisonment" is no longer being pursued by the CLP. The Sentencing Act allows for "actual imprisonment" to have a non-custodial interpretation, unless there is a prescribed minimum sentence, which there is for the offence of assaulting a frontline worker. There is no such minimum, however, in a further extension of mandatory sentencing that passed the NT Legislative Assembly.

Section 5 of the *Domestic and Family Violence and Victims Legislation Amendment Act* 2025 (NT) inserted a new s. 122 into the *Domestic and Family Violence Act 2007* (NT) ('DFV Act') requiring a term of "actual imprisonment" be imposed following a finding of guilt for breaching a Domestic Violence Order (DVO) where there has been a prior breach of a DVO, where there are three or more breaches of a DVO occurring in a 28-day period, or where harm or a threat to commit harm is involved.[8] Given the foregoing discussion of the relevant provisions in the Sentencing Act, the fact that there is no requirement that a minimum sentence be imposed for a breach of DVO means that the court would retain its discretion under Sentencing Act s. 78CB to order a partly suspended sentence or an ICCO subject to a home detention order. What the court would not have discretion to do is not record a conviction.

In practical terms, then, what the CLP's mandatory sentencing reforms are guaranteed to do, whether the reforms concern assaults against frontline workers or contraventions of DVOs, is ensure that a greater number of defendants have convictions recorded against their name. As we will see in this article, having more convictions recorded against one's name creates a significant barrier to obtaining bail, and can result in lengthy periods spent remanded in custody. For now, however, let me make one final point about the CLP's mandatory sentencing regime, before turning to what the scholarly consensus says about mandatory sentencing, and how advocates have made use of this scholarly consensus in their advocacy against the CLP's "tough on crime" measures.

The CLP bills itself as the only political party in the NT that is truly "tough on crime" and indeed distinguishes itself from the Labor Party by its promise to be tough where it claims Labor is soft. What is interesting about the October 2024 mandatory sentencing reforms is their relative reticence compared to the mandatory sentencing reforms of the 1990s. In the 1990s, the CLP was advocating – and legislating – for the "compulsory imprisonment" of those found guilty of the most trivial property offences, resulting in more Indigenous men, women and children going to jail. In the 2020s, the CLP no longer defends such a policy, evidenced by the fact that mandatory sentencing for property offending has not been re-introduced, but more significantly by the fact that the meaning of "actual imprisonment" in the legislation does not automatically result in a custodial sentence unless a minimum sentence is prescribed – and youth are exempted from the mandatory sentencing regime. This is a marked shift in policy, notwithstanding the other reforms which are clearly designed to target Indigenous children and their behaviour, such as lowering the age of criminal responsibility from 12 to 10 years old, and criminalising the act of posting about criminal behaviour on social media.[9] One is left to wonder what has changed for the CLP that it now presumably regards it as politically unpalatable to crack down as harshly on property offending. A potential answer is found in the changing role of bail so as to achieve similar ends – discussed later.

The Campaign Against Mandatory Sentencing

Following the CLP's introduction of its "compulsory imprisonment" policy in the late 1990s, there was much debate about the efficacy of mandatory sentencing. Commentators noted that there was "no empirical basis" for the policy (Gibson, 2000, p. 105); that the policy as applied to children violated the *United Nations Convention on the Rights of the Child*, specifically art. 37(a) on imprisonment being a measure of last resort (Hardy, 2000; Thomson, 1999); that mandatory sentencing resulted in disproportionate sentences for trivial offences (Morgan, 2000); and that the policy clearly targeted Indigenous people (Tippett, 1999). The momentum against the NT's mandatory sentencing regime was such that a private member's bill – the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 – was introduced into the Federal Parliament (though not

passed) such as would have allowed the Commonwealth to override the NT's mandatory sentencing regime by imposing minimum safeguards in line with international obligations.

The Senate Inquiry that accompanied that bill heard evidence that in the NT "mandatory sentencing leads to indigenous children being imprisoned at the rate of up to 9:1 relative to nonindigenous children" (Senate Legal and Constitutional References Committee, 2000, p. 114). The Inquiry accepted the argument that 'mandatory minimum sentencing is not appropriate in a modern democracy that values human rights' (Senate Legal and Constitutional References Committee, 2000, p. 116). In the years since the NT's mandatory sentencing regime was introduced, and noting that forms of mandatory sentencing existed and exist across Australian jurisdictions, including at the Commonwealth level, there have been multiple high-level legal reports, including reports by the Australian Law Reform Commission (2005a, 2005b) and the Law Council of Australia (2001, 2014) which have canvassed substantive arguments against mandatory sentencing. The Law Council of Australia, for example, outlined the economic costs (2014, pp. 26–29), the disproportionate social costs (including the disproportionate impact on Indigenous people) (2014, pp. 29–34), and the inconsistency with Australia's international obligations (2014, pp. 21–26), of mandatory sentencing policies.

In 2021, the Northern Territory Law Reform Committee (NTLAC) fully embraced the arguments against mandatory sentencing, recommending (rec. 3-1) the abolition of all mandatory sentencing provisions across the Sentencing Act, the DFV Act and the *Misuse of Drugs Act 1990* (NT) (NTLAC, 2021, p. 1). The Committee said mandatory sentences failed to be general or specific deterrents, risked increasing recidivism, disproportionately impacted Indigenous people, and made for increased public costs of the administration of justice (discussed in Mildren, 2022, p. 159). Although the NTLAC's recommendations have not been implemented, it can be taken as a well-established consensus among scholars and the law reform community in the NT that mandatory sentencing causes more harm than good. This consensus precedes an increasing national focus on the concept of justice reinvestment (Brown et al., 2016; Wood, 2014), which has raised questions about the appropriateness of continued investments in police and prisons in the absence of evidence as to their effectiveness (Cunneen, 2023), and which has supported Indigenous-led initiatives as part of the decolonisation of criminal justice in Australia (Blagg & Anthony, 2019; Cunneen & Tauri, 2016; DesLandes et al., 2022). Indeed, in a broader sense, the same critiques that can be made of prisons in general (Chen & Shapiro, 2007; Davis, 2003; Mathiesen, 1974/2015) can be relied on to criticise mandatory sentencing for entrenching vicious cycles of trauma, poverty and criminalisation that imperil the long-term goal of safer and thriving communities.[10]

Given the scholarly and law reform consensus on the harms of mandatory sentencing, and the urgent need to reduce the Indigenous incarceration rate in the NT, particularly in relation to children,[11] it is unsurprising that mandatory sentencing should have emerged as a focal point of grassroots advocacy in the wake of the CLP's renewed assault on Indigenous families and communities through its "tough on crime" package introduced in October 2024. One campaign led by frontline workers has been gathering signatures on an open letter addressed to the CLP government that calls for a repeal of the mandatory sentencing provisions. The open letter demands the CLP not use the issues of workers' rights and workplace safety to push its "tough on crime" laws. The campaign has been building momentum. On 26 March 2025, Independent Member of the Legislative Assembly (MLA) Justine Davis read out the open letter in the NT Legislative Assembly:

> We the undersigned are frontline workers who do not support mandatory sentencing for assaults against frontline workers, and reject the CLP Government's attempt to use our workplace circumstances to push their agenda to increase criminalisation and incarceration rates … Given the current prison system is unsafe for children and adults and those experiencing acute medical conditions, including psychiatric disorders, it would conflict with our code of ethics to report [assaults] knowing they could result in the imprisonment of many of our most vulnerable clients … The NT Government should repeal these bad laws and work in good faith with unions to develop evidence-based policies that will actually keep the front line workers safe. (Davis, quoted in Legislative Assembly of the Northern Territory, 2025, pp. 71–73)

One thing should be highlighted about this open letter, since it will become relevant in the next section. The workers signal that the mandatory sentencing policy conflicts with their code of ethics, such that many frontline workers think twice before reporting any assaults, given the incarceration of their (potentially vulnerable) clients is a likely consequence. However, as the next section will show, being remanded in custody is a much more serious and immediate threat to the clients' safety than the mandatory sentencing policy.

Notwithstanding that point to be fleshed out below, the importance of grassroots campaigns such as this cannot be overstated because, despite the view that "political leaders quickly discover that promising to be 'tough on crime'… is infinitely more popular than promising to be tough on the *causes* of crime" (Marks, 2022, p. 166), there is evidence that the electoral advantage of promoting mandatory sentencing laws has historically been unreasonably inflated (Roberts, 2003). Well-orchestrated campaigns run by "ordinary people" (Simonson, 2023) that build momentum within NT communities are arguably the only

mechanism that can entrench the social changes needed to abolish destructive "tough on crime" measures.[12] For the avoidance of doubt, I am not suggesting that this grassroots campaign against mandatory sentencing is unimportant; it is entirely appropriate and laudable that workers who are first responders are organising politically to challenge regressive reforms implemented in their name. What I am suggesting, to be expanded upon later, is that the campaign against mandatory sentencing should be supplemented by advocacy efforts focussing on how the changing use of remand and bail is driving the current incarceration crisis. To the extent that the concern with mandatory sentencing is that it exposes Indigenous people further to the harms of incarceration, in practice these harms are present from the moment of being arrested and remanded in custody.

Refocussing on Remand and Bail

In October 2024, the CLP made reforms to the bail regime in the NT.[13] It imposed a single bail regime applying both to adults and youth, reinstated the offence of breach of bail for youth,[14] and amended the definition of "serious violence offence" in the *Bail Act 1982* (NT) ('Bail Act') to include robbery and assault with intent to steal.[15] It also expanded the presumption against bail for all "serious" or "prescribed" offences so that, if the person applying for bail in relation to a charge for a serious or prescribed offence has in the last two years been found guilty of at least two serious or prescribed offences, then there is a presumption against bail: Bail Act ss. 7A(1)(dea), 7A(2). A "serious offence" is any offence with a maximum penalty of at least five years' imprisonment: Bail Act s. 3(1). A serious offence thus includes theft, which attracts a maximum penalty of 10 years' imprisonment: Criminal Code s. 217. A "prescribed offence" is any offence listed in the *Bail Regulations 1983* (NT): Bail Act s. 3B(a). An example of a prescribed offence is breaching a DVO: reg. 2A(c).

In April 2025, the CLP Government again made reforms to the bail regime, recalling the NT Parliament on urgency after a shopkeeper in Darwin was allegedly stabbed to death by a person on bail (Walsh, 2025a). Section 4 of the CLP's *Bail and Youth Justice Legislation Amendment Act 2025* (NT) inserted a more stringent test for bail into the Bail Act at s. 7A(2AB), whereby a person must not be granted bail unless the court has "a high degree of confidence" that the person, if bailed, will not "commit a prescribed offence or a serious violence offence" or "otherwise endanger the safety of the community". The *Bail and Youth Justice Legislation Amendment Act 2025* made "the risk (if any) to the safety of the community" the "paramount consideration" for decision-makers under s. 7A(2AA) of the Bail Act: s4. It also removed the Bail Act s. 24A(2)(a) requirement that bail decision-makers "consider all other options before remanding the youth in custody", removed the s. 24A(2)(e) requirement to consider "the need to minimise the stigma to the youth resulting from being remanded in custody", and amended the *Youth Justice Act 2005* (NT) to remove the overarching principle in s. 4(c) that imprisonment should be a measure of last resort for youth: ss. 7, 10. Following the CLP's October 2024 and April 2025 bail reforms coming into force, as noted earlier, the remand population in the NT has reached a new high at 45-50% of the total prison population (Australian Bureau of Statistics, 2024; Hathaway-Wilson, 2025; Roussos, 2025).

Commentators have remarked on the changing role of bail in the Australian criminal justice system (Auld & Quilter, 2020; Bartels et al., 2018; Brown, 2013; McMahon, 2019; Quilter & Brown, 2014). Where traditionally the most significant—and at times the *sole*—ground for refusing bail was a determination that the defendant was unlikely to attend court at the specified time, from the 1970s and 1980s Australian jurisdictions starting taking into account community safety concerns, such as whether the person applying for bail would commit a further offence if released (Bartels et al., 2018; McMahon, 2019). Increasingly, with the introduction of presumptions against bail,[16] bail has come to be seen as a privilege rather than a right attaching to the presumption of innocence.[17]Australian Bureau of Statistics data show that the percentage of total prisoners on remand across Australia increased from 20% in 2004 to 40% in 2024 (Australian Bureau of Statistics, 2004, 2024), reflecting the changing role of bail as a strategy of community safety.

This changing role of bail is problematic when one considers the discriminatory nature of policing in the NT. In the consultations leading up to the NT's Aboriginal Justice Agreement, for example, notes were made about "Aboriginal people believing they were treated differently by police" (Aboriginal Justice Unit, 2019, p. 92).[18] The Royal Commission into the Protection and Detention of Children in the Northern Territory (RCPDCNT) found in 2017 that "Northern Territory Police overcharge children and young people with offences" (White & Gooda, 2017, p. 20), a fact which is particularly significant when one recalls that 91% of the youth detention population is Indigenous in the NT (Australian Institute of Health and Welfare, 2024). The coronial inquest into the death in custody of Kumanjayi Walker (a 19-year-old Aboriginal man fatally shot by former NT police officer Zachary Rolfe in Yuendumu in November 2019) found that NT Police was "an organisation with significant hallmarks of institutional racism."[19]

All other things being equal, presumptions against bail increase the remand population. There are at least three problems with remand in the NT: (1) remand conditions are inhumane; (2) remand is a form of indefinite detention; and (3) remand creates an incentive to plead guilty, perpetuating a vicious cycle of incarceration.

Defendants in the NT who are denied bail are remanded either in police watchhouses (given the lack of prison space) or in the Darwin or Alice Springs prisons. The conditions inside NT police watchhouses have included significant overcrowding, with up to 20 women to a cell, no access to fresh air, light or daily showers, and the only water source being situated above a toilet frequently blocked with vomit (Atta, 2025; Brennan, 2025b). Women who are menstruating have been refused showers and detained in cells where the walls are smeared with menstrual blood (Lathouris, 2025). An 11-year-old girl was detained in an NT Police watchhouse for two days and one night in effective solitary confinement with the lights on 24 hours a day (Dick, 2025c).

NT remand conditions inside police watchhouses are so bad that even the NT Police Association, the union representing police officers, has complained that the conditions are dangerous (Lathouris, 2025). The inhumane remand conditions in general, across both police watchhouses and prisons, prompted the Independent Member representing the seat of Mulka Yingiya Mark Guyula to complain to the United Nations and to request a special visit from the United Nations Special Rapporteur on the Rights of Indigenous Peoples (Brennan, 2025a; Dick, 2025a). There is a wealth of evidence about the negative consequences for the public health system of refusing bail, particularly for vulnerable people whose difficulties accessing support services are exacerbated by being remanded in custody (Bartkowiak-Theron & Colvin, 2022). The NT Aboriginal Justice Agreement consultations identified "the poor treatment of Aboriginal offenders while incarcerated" as one issue of concern to Indigenous people in the NT (Aboriginal Justice Unit, 2019, p. 93). Negative effects associated with remand have been found to include an increased risk of suicide and mental distress, as well as the disintegration of employment, housing and social support networks (Australian Law Reform Commission, 2017). When that evidence is considered alongside the fact that remanded prisoners typically have no (or limited) access to the rehabilitation programs that sentenced prisoners can access (Australian Law Reform Commission, 2017), it is not far-fetched to suggest that remand conditions tend to be worse than the conditions faced by prisoners who have already been sentenced.

One thing about remand that is rarely remarked upon is that it is effectively a form of indefinite detention. There are no time limits on how long a defendant can be held on remand, and there are no remedies available for false imprisonment if a defendant should subsequently be acquitted of the charges against them, or if they were mistakenly arrested. As early as 1976, the Australian legal activist Elizabeth Eggleston expressed alarm at how long people were spending on remand, recording up to ten months in her research (Eggleston, 1976). In the NT, however, as criminal defence lawyer Russell Marks explains, extraordinarily long periods on remand have become normalised: "The Local Court in Darwin and Katherine … routinely lists hearing dates for charges such as assaults and theft many months, and up to an entire year, after the accused was first charged" (2022, p. 172). The hearing date is not necessarily set in stone because administrative adjournments may continually push the date back and in this sense remand can be regarded as an indefinite form of detention. The situation is such that it is "far from uncommon" for people to serve longer on remand waiting to contest a charge than they would have served if they had just pleaded guilty (Marks, 2022, p. 173).

There is evidence to suggest that defendants in the NT criminal justice system prefer to plead guilty for precisely this reason, namely, to avoid languishing on remand for an indefinite period. Marks (2022) discusses the example of his client Lucy, an Indigenous woman with a three-decades-long criminal record for violent offences:

> I ask her about the most recent [assault conviction], about a year ago. That's when Jimmy was chucking stones at her, Lucy says, so she chucked a can of XXXX Gold at him and it hit him on the forehead. I tell her that sounds like self-defence. She says it was. Then why did she plead guilty? Because a judge refused her bail and she didn't want to wait around in prison for months waiting for a hearing…The judge gave her a certain three months in a green shirt [the colour for sentenced prisoners] – the mandatory minimum – which was better than months of uncertainty in an orange shirt [the colour for remanded prisoners]. (pp. 206–207)

This experience prompts Marks (2022) to wonder whether Lucy has ever actually been the instigator of the episodes of violence in respect of which numerous convictions have been recorded on her criminal record. It is at least possible that, in the majority of cases, Lucy would have had a plausible self-defence argument, but that the practical realities of waiting on remand were considered too onerous, leading her to prefer a guilty plea, despite the impact that a recorded conviction would have on future bail applications and sentencing proceedings. Marks discusses another example:

> A client calls me from Darwin' s prison. An Aboriginal man, he's been held on remand for nearly four months on a charge of assaulting his wife, she says by cracking her head against a wall. But police observed no injury on her when they arrived, and I know – after summoning various police records – that she has a history of making false complaints about him, especially when she's intoxicated. Police took her statement while she was drunk. He's got two assaults on his record, both times for hitting other men. We're speaking now because a judge has just refused him bail, citing his lengthy history of bail breaches, all associated with his chronic alcoholism. Even if he's found guilty at the summary trial, he's unlikely to do

> more time than he's already done. But the trial is still another three months away. 'I have to get out,' he says. Covid-19 has been rampant in the prison, causing staffing shortages and extensive 'lockdowns'. 'I didn't do anything wrong,' he tells me, 'but I want to plead guilty.' He does, and is sentenced to just under four months' prison: the time he's already served. (p. 281)

There are several things to note in relation to this example. Firstly, even when bail is granted, magistrates tend to impose bail conditions that are difficult to comply with, such as requiring those with an alcohol dependency to refrain from drinking alcohol, or requiring those in a codependent relationship to stay away from their partners (Marks, 2022). Such bail conditions increase the likelihood of incurring charges for breaching bail and thus increase the likelihood of spending time on remand. Secondly, the final sentence imposed on Marks' client in this case was less than the prisoner had already served on remand, and there is nothing that can be subsequently done about that. There is no entitlement to claim against the government for false imprisonment in relation to the gap created by the term of the sentence and the actual time served on remand. In such circumstances, it is difficult to see what value the presumption of innocence retains in the NT in respect of the entitlement to liberty.

Sentencing is the outcome of a lengthy criminal law process culminating in a finding of guilt, but before sentencing there is already a long exposure to the harms of incarceration faced by Indigenous people in the NT. The true meaning of "actual imprisonment" is the time served on remand by Indigenous defendants *prior* to their substantive matter even being heard by a court, during which time they apparently enjoy the presumption of innocence. In 1991, the Royal Commission into Aboriginal Deaths in Custody said that "imprisonment should be utilised only as a sanction of last resort" (Johnston, 1991, rec. 92). What is noteworthy is that the changing role of bail across Australia has meant that imprisonment is not primarily being used as a sanction at all, but as a pre-emptive measure to address a perceived risk of harm. The result is the exposure of Indigenous men, (increasingly) women, and children to the risk of dying in custody. In 2018, *The Guardian* reported that from 2008-2018 more than half of the Indigenous people who died in custody were on remand (Wahlquist et al., 2018).

Here it is important to consider an objection.[20] I have been implying throughout that there is something wrong about the role of remand and bail having changed to become a key strategy of community safety, but what if restraint in the use of bail does in fact lead to a decreased risk of harm to members of the community? Would that not be an acceptable justification for increasing restrictions on the grant of bail? This is, indeed, precisely the justification adopted by the CLP, which prides itself on placing victims at the forefront of criminal justice reform. As one government media release put it: "For too long, the rights of offenders have been prioritised over the rights of victims" (Boothby, 2025). The CLP routinely contrasts itself to the previous Labor government by claiming that the former government implemented "offender-first policies", including maintaining a lenient bail regime that the Chief Minister of the NT described as a "catch and release scheme" (Walsh, 2025b). If restrictions on bail do make the community safer, then it would seem there can be little to quibble with regarding the increased remand population under the CLP.

There are three responses that can be made to an objection of this nature. Firstly, there is evidence to suggest that most people on bail do not offend whilst on bail and that most offences committed whilst on bail are non-violent (McMahon, 2019). Thus, it is possible to deflate the objection by exposing its alarmist character, i.e., by pointing out that it does not track the empirical evidence about offending whilst on bail. Indeed, there is evidence to show that restrictions on bail tend to be the outcome of law-and-order campaigns, aided by sensationalist media reporting, that unreasonably inflate the likelihood of persons on bail committing serious offences (Quilter & Brown, 2014).

Secondly, Indigenous women are the fastest-growing prison population in Australia and the main reason for their increasing incarceration rate is male violence against them (Howard-Wagner & Brown, 2021; Watego et al., 2021). There is a wealth of evidence about how women tend to be mistaken as the perpetrators in domestic violence situations, and how carceral responses to addressing domestic and family violence, ostensibly designed to protect women, in fact criminalise Indigenous women further and result in their incarceration (Tarrant, McGlade & Bahemia, 2024; Watego et al., 2021). Bail restrictions tend to be justified at least partly on the basis of protecting women from an increased risk of harm (Boothby, 2025), but if it is the case that carceral responses to domestic and family violence only increase the risk that Indigenous women will be criminalised and incarcerated, then it is difficult to see how tighter bail laws in fact reduce the risk of harm against Indigenous women. The objection can be resisted by highlighting this point.

Thirdly, and perhaps most importantly, there is an implicit dehumanisation in the objection and in the rhetoric of the CLP of those arrested and detained, a dehumanisation which dovetails with the racialised nature of the prison population. As detailed above, the remand conditions inside police watchhouses and prisons are such that arresting and remanding an alleged offender significantly increases their risk of experiencing harm. When police watchhouses and prisons are grossly overcrowded, when

the conditions amount to cruel and degrading treatment, it is conceivable to see detainees as victims, or at least as potential victims, of harm. If the aim of refusing bail is to protect the community from harm, then this aim can only be regarded as satisfied if a rigid separation is maintained between those who are part of the community (non-prisoners) and those who are not (prisoners). Such a rigid separation is explicit in the Bail Act, which now makes "the risk (if any) to the safety of the community" the "paramount consideration" for bail decision-makers: s. 7A(2AA). Maintaining such a rigid separation between those who are part of the community and those who are not is dehumanising and – given the prison population in the NT is overwhelmingly Indigenous – arguably racist. Thus, the objection can be resisted by pointing out that, if the aim is to protect the (entire) community from harm, it cannot make sense to support bail reforms that increase the risk of harm for those arrested and remanded in custody.

A related objection is that the CLP should make no special concessions for Indigenous defendants, i.e., that the law should apply equally to everyone. If there is a high Indigenous incarceration rate, the reason is that Indigenous people commit more crimes than non-Indigenous people, and the solution is simply for Indigenous people to stop committing crimes. This view is also part of the rhetoric of the CLP, which stresses the doctrine of individual responsibility and rejects any assertion that its law-and-order policies are racist. As one CLP politician said during the debate on the October 2024 reforms:

> What we are pushing is not racially based. There is nothing in [the bail reforms], in lowering the age of criminal responsibility, in legislation against ramraids, post and boast acts, nuisance public drinking or to protect workers that is racist. If anyone can highlight it to me, please show me because I will not support any race-based legislation … (Howe, quoted in Legislative Assembly of the Northern Territory, 2024, p. 79)

The problem with this objection is that it is a form of denial about the history of Australia; it fails to problematise the Australian Government's sovereignty claim over Indigenous territories and lives. Indigenous people in Australia maintain they have not ceded their sovereignty, and Treaties have never been signed (Referendum Council, 2017). Criminological analyses which do not foreground this foundational political problem risk perpetuating the idea, confirmed by data indicating severe deficits along a range of indicators, that "the problematic people [i.e., Indigenous people] are the ones who, through their behaviour and their choices, are ultimately responsible for their own inequality" (Walter, 2016, p. 83). The Government routinely invokes the rhetoric of individual responsibility to distance itself from any claims that its laws target Indigenous people, but this rhetoric relies on what decolonial criminologists Harry Blagg and Thalia Anthony call a "façade of neutrality", namely the idea that the criminal legal process is not "socially and historically constructed" (Blagg & Anthony, 2019, pp. 81–82).

Given the criminal legal system is socially and historically constructed, it becomes important to highlight the way in which Indigenous people are subjected to forms of structural racism that result in their increased criminalisation and incarceration precisely through laws and policies that appear to apply to everyone equally. The changing role of remand and bail is not a politically neutral response to an increased risk of harm, but is rather a community safety strategy which, in the NT at least, targets and incarcerates Indigenous children, women, men, and gender-non-conforming people in conditions which increase their risk of experiencing harm. In the circumstances, it is vitally important for there to be urgent return of power to Indigenous communities. When Indigenous-led community safety initiatives are implemented, the results tend to be satisfactory in terms of the dominant criminological metrics. In the town of Lajamanu, for example, the Kurdiji Law and Justice Group has been operating since 1996 and a 2013 study showed that, since 1996, there had been a 50% reduction in criminal cases in Lajamanu (Anthony & Crawford, 2014).

To return to the main thrust of my argument, the CLP's October 2024 mandatory sentencing reforms relating to assaults on frontline workers, and the mandatory sentencing reforms to the DFV Act, will have – and indeed are already having – significant consequences for Indigenous defendants in the NT. Under the reforms, more convictions will be recorded, making bail less likely to be granted in the future. This negative impact on the likelihood of being granted bail should be understood as the principal harm of the mandatory sentencing reforms, given the incentive that being remanded in custody creates for pleading guilty to avoid spending more time on remand than the minimum sentence that would otherwise be imposed. A focus on mandatory sentencing in advocacy efforts is thus, on one view, starting the conversation far too late, because the harms of incarceration are already being felt from the moment of arrest.

In making my argument here, I am not suggesting that there are no advocacy efforts underway resisting the use of remand and bail to drive up Indigenous incarceration rates.[21] The four NT-based land councils have made a historic statement calling out the CLP's human rights abuses inside watchhouses and prisons and resisting the "tough on crime" approach that has resulted in a record high prison population (Garrick, 2025). Grassroots advocacy groups like *Justice not Jails* have consistently singled out the CLP Government's bail reforms as a "direct attack" on Indigenous families and communities (Enciso, 2025), as have advocacy groups of those with lived experience of incarceration (National Network of Incarcerated and Formerly Incarcerated

Women and Girls, 2025). More recently, Federal Labor Senator for the Northern Territory and Minister for Indigenous Affairs Malarndirri McCarthy has explicitly identified remand and restrictions on bail as the "key drivers" of the high Indigenous incarceration rates in the NT (Brennan, 2025c). These advocacy efforts must be supported to build as much momentum as possible against the weaponisation of bail reforms against Indigenous families and communities in the name of community safety. My suggestion is that campaigns against mandatory sentencing should at the very least be supplemented by, and perhaps might even have to give way to, more urgent campaigns to repeal the stringent bail laws which are causing the current incarceration crisis.

The significant problem in the NT may well be, not so much that judges are deprived of their discretion when sentencing, but that the changing role of bail exposes technically innocent Indigenous defendants to lengthy periods on remand in cruel and degrading conditions, negatively impacting on their physical and mental health, and ultimately entrenching the vicious cycle between trauma, poverty and criminalisation.

Conclusion

In this article, I have touched on only a few of the reforms that the CLP introduced in October 2024 and then in April 2025.[22] I have focused on the mandatory sentencing provisions in respect of assaulting frontline workers because I wanted to highlight how mandatory sentencing has captured the scholarly and activist imagination in a way that might under-emphasise the current driver of the mass incarceration crisis, namely the changing role of bail to become a key strategy of community strategy. Bail reforms across Australia have resulted in over 40% of the total prisoners being held on remand and with the NT having reached a record high of 45% of its prisoners on remand (Australian Bureau of Statistics, 2024). Incarceration is happening more so because of the court and police, influenced by legislated presumptions against bail, exercising their discretions against Indigenous defendants. However, these remain *presumptions* against bail. It is worth asking whether focussing on *mandatory* sentencing might distract from the fact that nearly half of all prisoners in the NT are there by a deliberate order of a police officer or judge in the (burdened) exercise of their discretion.

I have suggested that advocacy efforts against the use of remand and restrictions on bail should be supported as matter of urgency to give a full account of Indigenous criminalisation and how the vicious circle of trauma, poverty, and incarceration is propagated. I have suggested that there is sufficient evidence to think remand conditions are worse than the conditions enjoyed by sentenced prisoners. One element of what makes remand worse is that it is a form of indefinite detention, creating an incentive for defendants to plead guilty precisely to avoid that very uncertainty, even when the case against them is weak, such as when the defendant has grounds for making a self-defence argument. The presumption of innocence in the NT no longer has much practical meaning for Indigenous defendants who are detained on remand sometimes for longer than the term of imprisonment that is finally imposed on them when they are sentenced. As Marks puts it, with the NT prison system very much in mind, "Australia's prisons have become twenty-first century warehouses for First Nations poverty and disempowerment" (Marks, 2022, p. 182).[23]

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[1] The Country Liberal Party (CLP) is the current ruling Party of the Northern Territory, Australia as of publication of this article in 2025.
[2] *Criminal Code Amendment Act 2024* (NT). The previous NT Labor Government had raised the age from 10 to 12 in 2022 through the *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT). Raising the age to 12 was recommendation 27.1 of the Royal Commission into the Protection and Detention of Children in the Northern Territory (White & Gooda, 2017).
[3] All references to NT law are references to the law as of May 2025.
[4] Given the victims of "tough on crime" measures in the NT are overwhelmingly Indigenous, the CLP's hardline approach to law-and-order has to be seen in light of its historical opposition to Indigenous aspirations (Smith, 2011). The CLP, for example, has a history of changing town boundaries to thwart Aboriginal land claims under the *Aboriginal Land Rights Act (Northern Territory) 1976* (NT) – see, regarding a claim over the Cox Peninsula area: *R v Toohey* (1981) 151 CLR 170. It is also important to note that the term "anti-social behaviour", which

has become a mainstay of government rhetoric and media reporting, originated as "a euphemism for being black and being in town" and continues to be used with reference primarily to Indigenous people (Scambery, 2007, p. 159).

[5] The "three strikes" provisions for any property offence were introduced in *Sentencing Amendment Act (No. 2) 1996* (NT) s. 8. They were repealed through *Sentencing Amendment Act (No. 3) 2001* (NT) s. 6, being substituted with a new regime applying only to "aggravated property offences."

[6] See *Findings in the death of Johnno Johnson Wurramarba* [2001] NTMC 84.

[7] The October 2024 mandatory sentencing amendments were made law through the *Sentencing Amendment Act 2024* (NT).

[8] In 2022, ss. 121 and 122 of the *Domestic and Family Violence Act 2007* (NT) had included what was effectively a presumption in favour of imprisonment for breaches of DVO. Under that regime, the court had to "record a conviction and sentence the person to imprisonment for at least seven days" if the person was found guilty of breaching a DVO, harm was involved, and the court found it appropriate to order imprisonment. That regime applied to both adult and youths. The presumptions in favour of imprisonment were repealed by the *Justice Legislation Amendment (Domestic and Family Violence) Act 2022* (NT). The *Domestic and Family Violence and Victims Legislation Amendment Act* 2025 replaced what was previously a presumption with a mandatory provision requiring a term of 'actual imprisonment' be imposed for certain DVO breaches.

[9] *Criminal Code Amendment Act 2024* (NT).

[10] In line with the abolitionist invitation to consider the relevance of a prison-industrial complex, it is worth noting that, while there are no privately-operated prisons in the NT, private companies are becoming increasingly prominent players in the criminal justice context (Dick, 2025b; Parry, 2025). There are already private security guards that patrol public areas with dogs to "move on" Indigenous people (King & Burns, 2025), and one would expect the value of the contracts for the electronic monitoring of Indigenous defendants released on bail to be substantial.

[11] This urgency was stressed over 34 years ago in the final report of the 1991 Royal Commission into Aboriginal Deaths in Custody, which said: "there is an urgent need … to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise" (Johnston, 1991, rec. 62). The need to reduce Indigenous incarceration rates in general was recognised in the NT government's flagship Indigenous justice policy, the *Aboriginal Justice Agreement 2021-2027* (Aboriginal Justice Unit, 2021).

[12] Such campaigns may be of particular resonance in the NT given the phenomenon of urban bias (Gerritsen, 2010). NT elections are won or lost in the urban centres of Darwin and Alice Springs where the majority of the non-Indigenous population lives, a fact which must necessarily affect campaign strategizing for securing electoral commitments from political parties.

[13] The reforms were introduced in the *Bail Legislation Amendment Act 2024* (NT).

[14] The Royal Commission into the Protection and Detention of Children in the Northern Territory had recommended that breach of bail be scrapped as an offence applying to children (White & Gooda, 2017, rec. 25.19(4)). The NT Labor government scrapped the offence for youth in 2019 through the *Youth Justice and Related Legislation Amendment Act 2019* (NT).

[15] *Bail Legislation Amendment Act 2024* (NT) s. 4 counts as a serious violence offence "an offence against section 211 or 212 of the Criminal Code, as in force immediately before the commencement of section 10 of the *Criminal Code Amendment (Property Offences) Act 2022* (NT)." Section 10 of that amending Act replaced the "robbery" and "assault with intent to steal" provisions in the previous Criminal Code ss. 211-212.

[16] The *Bail Amendment Act 2015* (NT) made it harder for certain repeat offenders to be granted bail by expanding the presumption against bail. The *Bail Amendment Act 2017* (NT) expanded police powers to impose electronic monitoring as a condition of bail. Sensationalist media coverage of cases where defendants commit offences whilst on bail are used to justify even more restrictive bail regimes. The death of a Darwin bottle-shop worker at the hands of a person on bail was used by the CLP to justify its October 2024 reforms, with the Government even naming the bail package "Declan's law" in memory of the deceased (Lathouris, 2024). For a good critique of the racial bias in mainstream media coverage of law-and-order issues, see McQuire (2024).

[17] For an authoritative statement about the common law presumption of innocence as it applies in Australia, see *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [54] (French CJ).

[18] Leanne Liddle, who directed the development of the NT's Aboriginal Justice Agreement, described the Wadeye police-court process to which Indigenous defendants are subjected as like a "cattle yard" (Albeck-Ripka, 2020). Following the 2007 NT Intervention, a situation has been created in remote communities like Wadeye whereby "police are available 24/7 to lock people up, but people can't access the clinic at night or on weekends, even during emergencies" (Marks, 2022, p. 160). Due to the increased police presence in remote communities, the Intervention led to a 250% increase in traffic offences in the Warlpiri communities of Yuendumu, Mutitjulu and Lajamanu between 2006-2010 (Anthony & Blagg, 2013).

[19] *Inquest into the death of Kumanjayi Walker* [2025] NTLC 8, [211].

[20] I thank an anonymous reviewer for suggesting discussion of this and the following objection.

[21] I thank an anonymous reviewer for prompting me to make this clear.

[22] The other reforms are deserving of analysis because they will surely increase the number of Indigenous people who are arrested, charged, remanded and ultimately sentenced. These reforms include criminalising "ram raiding" public or private property with a stolen vehicle, a new offence carrying a maximum penalty of 10 years' imprisonment: *Criminal Code Amendment Act 2024* (NT); expanding police powers to fine, charge and arrest individuals for "nuisance" public drinking: *Liquor Legislation Further Amendment Act 2024* (NT); and expanding police powers to use handheld metal detectors in public places, on public transport, and in schools: *Police Administration Amendment Act 2024* (NT).

[23] Marks' quote here echoes Angela Davis' sentiment that "the prison has become a black hole into which the detritus of contemporary capitalism is deposited" (Davis, 2003, p. 16).

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