CHIEF JUSTICE
Northern Territory of Australia

STATEMENT IN RELATION TO YOUTH SENTENCING

1. This statement is in response to remarks made about youth sentencing in articles published in the *NT News* on 12 January, 14 January and 17 January 2017, and in the editorial published on 14 January 2017.

2. Those remarks misunderstand the considerations that the courts are required and permitted to take into account when sentencing youth offenders, the extent to which judges are able to make public comment or engage in public debate concerning sentencing outcomes, and the relationship between the rates of youth detention and the incidence of property offending.

SUMMARY

3. There are well-recognised conventions that limit the manner and extent to which judges are properly able to participate in public debate about sentencing. They include that judges should not comment publicly in relation to sentencing outcomes after they have been made and reasons given in court.

4. These conventions are designed to ensure that judges maintain their impartiality and neutrality, avoid involvement in political controversy, and do not have opinion or comment attributed to them which might give rise to allegations of bias or pre-judgement in later cases.

5. The suggestion that in these circumstances judges "owe the public an explanation" or must accord the public "the courtesy of participating in the debate" is inconsistent with the principles and practice adopted throughout Australia and in other common law countries.

6. There are special provisions in relation to the sentencing of youths contained in the *Youth Justice Act* (NT). Those provisions direct that a court must impose a sentence of detention or imprisonment on a youth only as a last resort, and a sentence of imprisonment only if there is no appropriate alternative. Those provisions were formulated and enacted by the Legislative Assembly in 2005, and have been maintained and endorsed by successive governments.

7. The statutory provisions also reflect the orthodox sentencing principles at common law. Those principles dictate that youthfulness of an offender is a valid ground for extending leniency and adopting a therapeutic approach to sentencing.

8. Any opprobrium concerning the conditions which might prevail in custodial institutions from time to time is borne by the executive government, and is a matter for the executive to address. The courts have no reticence in imposing appropriate penalties for fear of criticism on that account.

9. While the statistics show there has been an increase in property offending over the 2016 calendar year when compared to the 2015 calendar year, that increase cannot be validly attributed to a general change in youth sentencing practice by the courts over the past six months. There has not been any such change.

10. In the period between 1 January 2016 and 24 July 2016, 21.5% of cases dealt with by the Youth Justice Court resulted in a detention order. In the period between 25 July 2016 and 16 January 2017, 22.1% of cases dealt with by the Youth Justice Court resulted in a detention order.

11. The statistics for the 2015 and 2016 calendar years show that the number of youths in detention following sentence as at December 2016 was greater than or practically equal to the numbers throughout the period from January to October 2015. The numbers in the period from July to December 2016 are not attributable to some recent judicial reticence in sentencing.

12. The fact that property offending in the period from January to October 2015 (when the number of youths in detention on sentence was low) was significantly lower than it is now also demonstrates the difficulties inherent in attempting to draw some causal nexus in this context between sentencing outcomes, the number of youths in detention and rates of property offending.

13. Conversely, at the time the daily average number of youths in detention was at its peak in 2012/13, total break-in offences in Darwin and Palmerston were also at a peak, and significantly higher than they were over the course of 2016.

14. What the data suggest is that any decrease in the number of youths being sentenced in the last six months is not attributable to a change in sentencing practices by the courts; and that there is no demonstrated correlation between the rates of property offending and the number of youths in detention.

FULL STATEMENT

15. There are well-recognised conventions that limit the manner and extent to which judges are properly able to participate in public debate about sentencing. The primary function and responsibility of judges in this respect is to deliver remarks at the time they sentence offenders which explain and justify the sentences imposed.

16. In addition to sentencing remarks, it is appropriate for courts to conduct sentencing forums and similar public education and information exercises about the administration of criminal justice and the basis on which offenders are sentenced. This is done in the Territory during Law Week at the Supreme Court Open Day, and at other times. It is also appropriate for the courts to issue statements which contribute to the public's general understanding of the administration of criminal justice, and help to dispose of misunderstandings and correct false impressions.

17. However, it is well-established that judges should not comment publicly in relation to individual sentencing outcomes. That is so notwithstanding that the sentence may attract criticism from politicians, journalists or members of the public. Because the sentencing process is an individualised one which requires a consideration of the objective circumstances of the particular offending in question and the subjective circumstances of the offender, any informed discussion about the adequacy of sentences must necessarily resolve to an examination of individual sentencing outcomes. That is a discussion in which judges cannot properly participate outside the courtroom environment and in the public arena.

18. These conventions are an important aspect of the Northern Territory's constitutional arrangements and are fundamental to maintaining the rule of law. They are designed to ensure that judges maintain their impartiality and neutrality, avoid involvement in political controversy, and do not have opinion or comment attributed to them which might give rise to allegations of bias or pre-judgement in later cases.

19. As a former Chief Justice of the High Court observed, the judicial branch of government does not campaign or advocate for popular acceptance of its decisions. It makes a conscious effort to keep out of the cut and thrust of policy debate, which is the normal process by which ideas and opinions compete for acceptance. Judges do not engage in advocacy to convince the public to value their work, because to do so would be counter-productive. The job of the judicial branch is to give practical expression to the hard-core value that the law must be applied impartially, independently and fearlessly.

20. Against that background, the suggestion that in these circumstances judges "owe the public an explanation" or must accord the public "the courtesy of participating in the debate" is inconsistent with the principles

and practice adopted throughout Australia and in other common law countries.

21. The editorial also suggests that at the time of his retirement former Chief Justice Trevor Riley observed that the courts need to explain sentencing and bring people with them on their sentencing decisions. That is no doubt correct, but the manner in which that is appropriately done is by way of sentencing remarks, sentencing forums and information statements. It is not appropriately done by participation in a media discussion of sentencing outcomes. The former Chief Justice did not suggest otherwise.

22. Nor did his Honour suggest that concerns over crime rates were appropriately addressed by more punitive sentences. During the speech Chief Justice Riley gave in his final sitting before retirement, after noting that the rates of incarceration in the Northern Territory are alarmingly high, his Honour made the following observations:

> "Compelling research has demonstrated that it is not an answer to increase sentences to become ever more punitive. It is not an answer to have mandatory minimum terms of imprisonment, which give a false impression that a government is being tough on crime when, as we all know, mandatory minimum sentences have no impact on rates of crime; but, and sadly and inevitably, lead to injustice."

23. None of this is to suggest that the sentences imposed by the courts should not be broadly reflective of societal values. In saying this, however, it is important to recognise that there is a very clear and established distinction between the application of societal values to an individual case, and the periodic expression of frustration by some sectors of the community concerning the prevalence of particular types of offending.

24. Studies have demonstrated that while members of the public may express frustration in relation to the incidence of crime and call for a more punitive approach generally, when confronted with case studies which include full details in relation to the nature of the crime, the offender's background and personal circumstances and the factors relevant to rehabilitation and the public interest, there is usually a close correlation between the disposition imposed by the court and the public's view as to the appropriate disposition.

25. The *Sentencing Act* (NT) sets out the only objects for which a sentence may be imposed. Those objects are: (a) to punish the offender to an extent or in a way that is just in all the circumstances; (b) to provide conditions that will help the offender be rehabilitated; (c) to discourage the offender or other persons from committing the same or a similar offence; (d) to make it clear that the community, acting through the court,

does not approve of the sort of conduct which the offender was involved; and (e) to protect the community.

26. In addition to those general sentencing provisions, the Legislative Assembly of the Northern Territory, together with all other parliaments around Australia, has made particular provisions for the sentencing of youths. The special provisions in relation to the sentencing of youths in the Northern Territory are contained in the *Youth Justice Act* (NT). That legislation contains the following statutory directions.

    - A youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time.

    - A youth who commits an offence should be dealt with in a way that allows him or her to be reintegrated into the community.

    - A youth should not be withdrawn unnecessarily from his or her family environment and there should be no unnecessary interruption of a youth's education or employment.

    - Punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

    - The court must impose a sentence of detention or imprisonment on a youth only as a last resort, and a sentence of imprisonment only if there is no appropriate alternative. The alternatives to imprisonment under the legislation include good behaviour orders, community work orders, suspended sentences, alternative detention orders and periodic detention orders.

    - The court must not order the imprisonment of a youth who is less than 15 years of age.

27. Those provisions were formulated and enacted by the Legislative Assembly of the Northern Territory in 2005, and have been maintained and endorsed by successive governments.

28. The statutory provisions also reflect the orthodox sentencing principles at common law. Those principles dictate that youthfulness of an offender is a valid ground for extending leniency and adopting a therapeutic approach to sentencing. There are number of reasons for this. The sentencing calculus is designed to promote the rehabilitation of offenders and the protection of the community, as well as punishment, deterrence and denunciation. Rehabilitation is usually a far more important consideration than general deterrence when dealing with a youthful offender. Experience shows that for young offenders more punitive measures are likely to lead to further offending rather than to act as a deterrent.

29. For that reason, an approach which focuses on rehabilitation is considered to benefit the community as well as the offender. In addition, the therapeutic approach recognises that young offenders are less culpable due to immaturity and the fact that they have not fully developed a capacity to control impulsive behaviour.

30. Given those matters, it is unsurprising that an analysis of the sentencing dispositions made by the Supreme Court in respect of youth offenders since July 2016 discloses that eight of the 11 offenders were given either suspended sentences or good behaviour bonds, and that only "the most hopeless and recidivist young offenders" were sentenced to detention or imprisonment. That is precisely what the statutory regime requires. What the reported analysis does not address is whether the particular circumstances of those eight youths who were given suspended sentences or good behaviour bonds were such that those dispositions properly reflected the statutory requirements and the applicable legal principles.

31. In the absence of that analysis, a general assertion that the sentences imposed on youth offenders are too lenient is both uninformed and unhelpful. The sentencing remarks are available on the Supreme Court website under the tab "Sentencing Remarks", and members of the press and the public are free to examine them and draw their own conclusions.

32. It is incumbent on the courts to sentence youths in accordance with the statutory directions and principles described above. To do otherwise would be to undermine confidence in the judicial branch and the administration of justice. If the elected representatives constituting the Legislative Assembly form the view that there is a communal concern with youth offending and the adequacy of the existing sentencing provisions, it is open to the parliament to make whatever legislative amendments it considers appropriate and it would be incumbent on the courts to give effect to any amendments made.

33. For similar reasons to do with the division of responsibility between the three arms of government, the courts do not bear responsibility for the control and management of custodial institutions. Under our system of government, the parliament enacts criminal laws, the courts apply those laws in cases which are brought before them by law enforcement authorities, and the executive government (through the agency of Correctional Services) is responsible for accommodating offenders sentenced to imprisonment or detention.

34. Save that a court may take into account any exceptional hardship that may be suffered by an offender as a result of his or her personal circumstances, the conditions prevailing in a custodial institution are generally not taken into account by the courts in determining whether a sentence of imprisonment is appropriate.

35. Any opprobrium concerning the conditions which might prevail in custodial institutions from time to time is borne by the executive government, and is a matter for the executive to address. The courts have no reticence in imposing appropriate penalties for fear of criticism on that account.

36. Leaving aside the demand that judges participate in the public debate, the central thesis of the articles to which this statement is directed is the proposition that there has been an increase in property crime over the last six months caused by a corresponding decrease in the number of youths sentenced to detention over that period. The proposition is based on anecdotal accounts from unnamed sources and selective references to statistics. While these statistics no doubt show there has been an increase in property offending over the 2016 calendar year when compared to the 2015 calendar year, that increase cannot be validly attributed to a general change in youth sentencing practice by the courts over the past six months. There has not been any such change.

37. In the period between 1 January 2016 and 24 July 2016 the Youth Justice Court made 874 final orders, of which 189 were orders for detention. During that period, 21.5% of cases resulted in a detention order. In the period between 25 July 2016 and 16 January 2017, the Youth Justice Court made 715 finalisations, of which 158 were orders for detention. During that period, 22.1% of cases resulted in a detention order.

38. It may be accepted that some of those orders were in the nature of suspended sentences, alternative detention orders and periodic detention orders, rather than orders for imprisonment or detention in a juvenile detention centre. Even accepting that distinction, the proposition that there has been some unusual reduction in the number of youths sentenced to detention in the Don Dale facility since July 2016 also does not withstand scrutiny.

39. While it is true that there was a greater number of youths in detention on sentence in December 2015 than there were in December 2016, that is a feature of the fluctuations ordinarily and commonly seen in such numbers. So much is apparent from an examination of the full-year numbers for the 2015 and 2016 years, which are set out below.

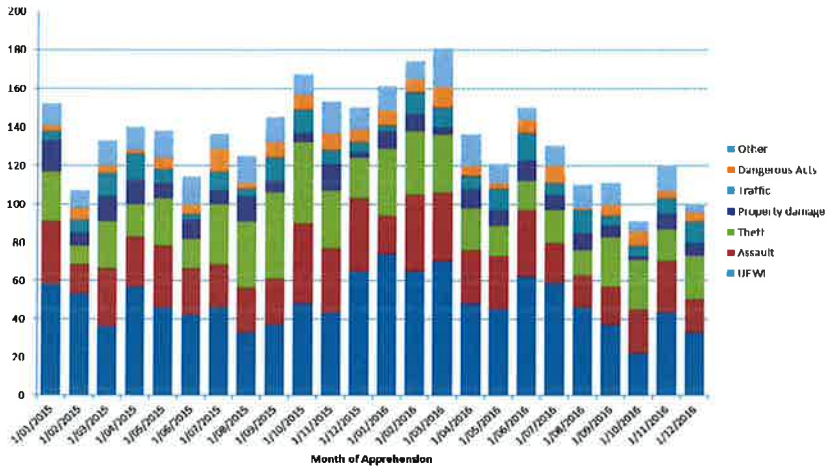
Month	Sentenced	Month	Sentenced	Month	Sentenced
Jan-15	6	Sep-15	9	May-16	13
Feb-15	6	Oct-15	8	Jun-16	12
Mar-15	4	Nov-15	11	Jul-16	12
Apr-15	6	Dec-15	14	Aug-16	10
May-15	6	Jan-16	14	Sep-16	6
Jun-15	6	Feb-16	14	Oct-16	7
Jul-15	5	Mar-16	18	Nov-16	5
Aug-15	8	Apr-16	17	Dec-16	8

40. As is apparent from those figures, the number of youths in detention following sentence as at December 2016 was greater than or practically equal to the numbers throughout the period from January to October 2015. This undermines the proposition that the numbers in the period from July to December 2016 are attributable to some recent judicial reticence in sentencing.

41. A distinction also needs to be drawn in this context between the number of youths in detention on remand (ie prior to the determination of charges and sentencing), and youths who have been sentenced to detention. Any increase or decrease in the numbers of juveniles on remand is a function of whether a juvenile accused of an offence is released on bail (by police or the court) pending hearing of the charge. The governing principle is that juvenile offenders ordinarily should not be kept in custody pending determination of charges. Increases or decreases in numbers in that category have nothing to do with sentencing outcomes.

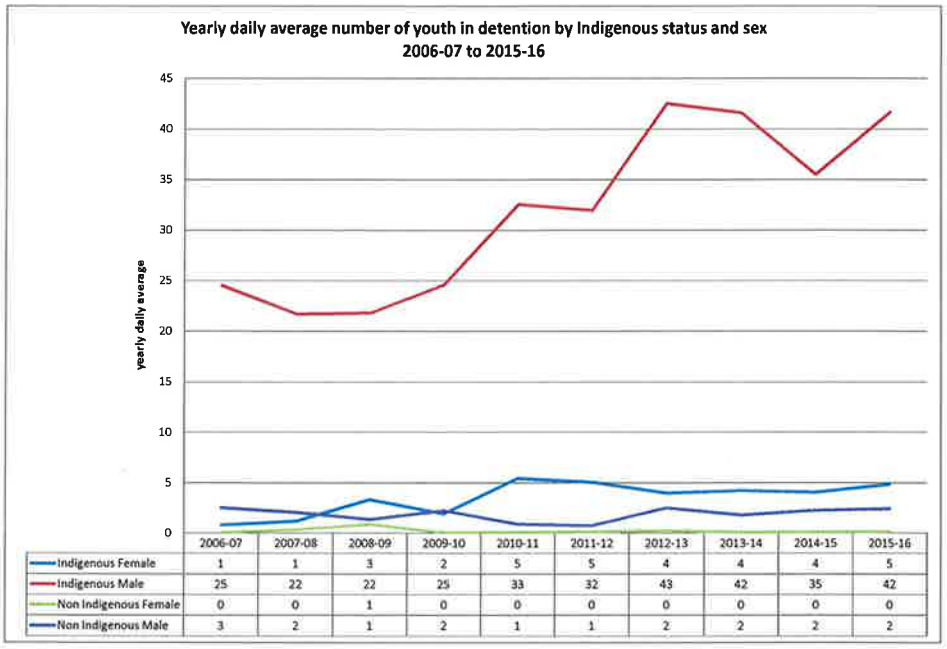
42. Moreover, the fact that property offending in the period from January to October 2015 (when the number of youths in detention on sentence was low) was significantly lower than it is now also demonstrates the difficulties inherent in attempting to draw some causal nexus in this context between the number of youths in detention and rates of property offending. The equation is far more complex, and includes factors such as the number of youth apprehensions in the relevant period, the number and profile of participants in the offending behaviour, and the percentage of youths who are subjected to some diversionary program rather than being processed through the court system.

43. By way of illustration, although there was an increase in property crime over the course of the 2016 calendar year, the number of youths apprehended for offences by police declined significantly over the course of the same period (see graph below). The courts only deal with and sentence youth offenders who have been charged by police, and there is an obvious and direct correlation between rates of charge and detention.



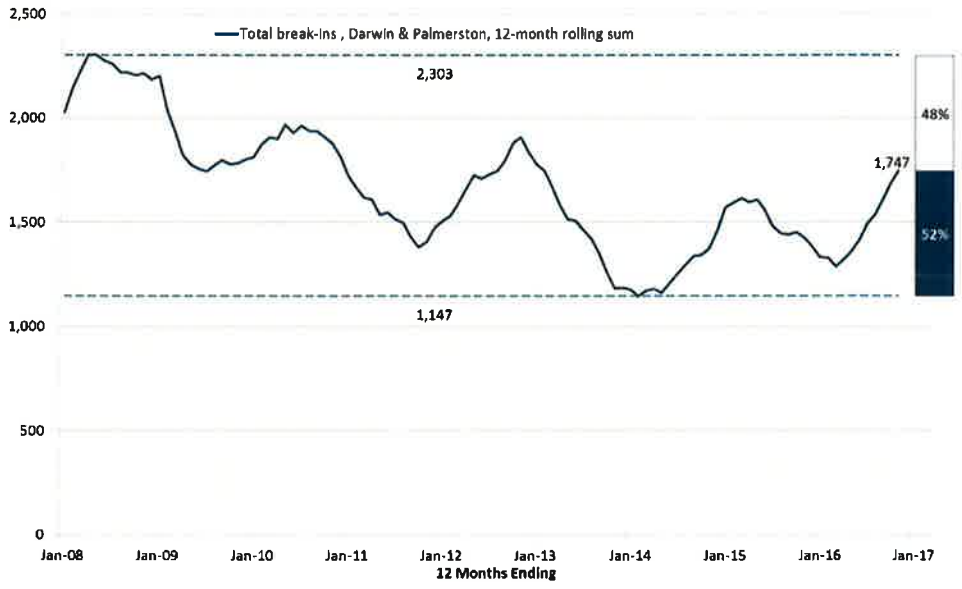
Youth: aged less than 18 at the time of the offence, and for this analysis aged less than 20 when apprehended

44. It is also important to consider these matters in a broader historical context. So, for example, an examination of the daily average number of youths in detention over the last 10 years shows that between 2006/07 and 2009/10 the daily average was between 25 and 29 detainees (including both sentenced and on remand). That average rose to a peak of 49 in 2012/13 and has fluctuated between 41 and 49 since that time (see graph and table below).



	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Indigenous Female	1	1	3	2	5	5	4	4	4	5
Indigenous Male	25	22	22	25	33	32	43	42	35	42
Non Indigenous Female	0	0	1	0	0	0	0	0	0	0
Non Indigenous Male	3	2	1	2	1	1	2	2	2	2

45. Over that same period, there has been no correlation between the rates of property offending and the number of youths in detention. So, for example, at the time the daily average number of youths in detention was at its peak in 2012/13, total break-in offences in Darwin and Palmerston were also at a peak, and significantly higher than they were over the course of 2016 (see graph below).



46. Finally, as at 08:00 hours on 16 January 2017 there were 33 youths in detention (including both sentenced and on remand). There is no great disparity between that figure and the range which has prevailed since 2006/07.

47. By way of summary, it may be accepted that there has been an increase in property offending in Darwin and Palmerston over the last 12 months as compared to the previous 12 month period. Some portion of that increase is no doubt attributable to youth offending. What the data reviewed above suggest is that any decrease in the number of youths being sentenced in the last six months is not attributable to a change in sentencing practices by the courts; and that there is no causal nexus in this context between the number of youths in detention and rates of property offending.

Dated: 20 January 2017
