SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

INQUIRY INTO MANDATORY SENTENCING

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by:
Louis Schetzer, Director & Principal Solicitor
National Children's and Youth Law Centre
C/- University of NSW, Sydney 2052
Ph.: 02 9398 7488
Fax.: 02 9398 7416
Email: ncylc@unsw.edu.au or l.schetzer@unsw.edu.au

Danny Sandor, President
Defence for Children International – Australia
GPO Box 3131
Canberra City ACT 2601
Ph.: 0409 311 510
Fx.: 02 9398 7416
Email: dannysan@ozemail.com.au

THE NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

The National Children's and Youth Law Centre (NCYLC) is the only Australian national community legal centre working exclusively for and with children and young people. It is a joint project of the University of New South Wales, the University of Sydney and the Public Interest Advocacy Centre, initially funded by the Australian Youth Foundation.

Since its inception, the NCYLC has operated under the credo of rights, advocacy and action for Australia's children and young people. The touchstone of NCYLC's efforts is the UN Convention on the Rights of the Child, and its mandate is to promote understanding of and adherence to children's rights as fundamental human rights, and to hold governments accountable to meeting both the spirit and the letter of Australia's commitment to the Convention.

NCYLC promotes the rights and interests of all Australian children and young people by advocacy, lobbying, test case litigation, information collection and dissemination and research. Since it inception in 1993, NCYLC has made over 100 submissions on laws and policies which affect children and young people and has handled over 8 000 inquiries.

The NCYLC seeks to empower children and young people and to give them the information and support necessary to assist them in making decisions for themselves. We advocate for governments, business and the community to take children and young people into account and include them in decision making. We advocate for all levels of society to realise that the views of children and young people are important.

As Australia's only national community legal centre dedicated to children and young people, the NCYLC is on the frontline of children's issues. The NCYLC undertakes community legal education, policy work, casework and test case litigation aimed at increasing young people's access to legal assistance and improving the legal status of children and young people in Australia.

DEFENCE FOR CHILDREN INTERNATIONAL – AUSTRALIA

The Australian Section of Defence for Children International (DCI-Australia) is a nation-wide organisation independent of government. DCI-Australia is the local link in a global chain of children's rights agencies recognised by the United Nations. The Convention on the Rights of the Child sets out the principles which guide DCI's actions and campaigns: children's rights to protection, provision, promotion and participation.

Apart from some specifically funded projects, DCI-Australia's activities are undertaken by volunteers from within its ranks. Our efforts concentrate upon raising community

understanding about the Convention, lobbying for the reform of laws that infringe children's rights and highlighting issues affecting children around the globe

In 1996, DCI-Australia prepared Australia’s **Alternative** Report to the United Nations Committee on the Rights of the Child in which we highlighted gaps between the rhetoric and reality of children’s rights in Australia. We promoted the findings through leading a delegation of non-government organisations to meetings with the Committee and will actively promote similar input into Australia’s Second Report (due 2002) through the preparation of a second Alternative Report.

DCI-Australia has documented an analysis of overseas initiatives and concluded that Australia needs a specialist human rights commissioner for Children and Young People. We have drafted a comprehensive and realistic model for the Australian environment that has been endorsed by more than 50 other influential children’s service and advocacy organisations.

INTRODUCTION

"Punishments that exceed what is necessary for the protection of the deposit of public security are by their very nature unjust."

- Cesare Beccaria, "Of Crimes and Punishment", 1764

Case Study 1

Robert, a homeless Aboriginal man, was charged in relation to a theft of a $15 towel from a clothesline. He intended to use the towel as a blanket. After being apprehended, the towel was returned to its owner. This was Robert's third property offence under the Northern Territory's mandatory sentencing laws. Upon conviction, he was sentenced to the mandatory minimum term of imprisonment of twelve months.

Case Study 2

Daniel is a 15 year old Aboriginal young man. He was first referred to the Department of Family Youth and Children's Services (FYCS) when he was twelve, due to a lack of parental support and a petrol sniffing dependency. The Department's response was to send him to relatives in another area. Eighteen months later, he returned to Alice Springs, now with an alcohol dependency. FYCS were unaware that he had returned.

Daniel has had to look after himself since the age of fourteen. He was arrested and charged for property damage, after breaking a window, after hearing about the suicide of a close friend. Sentenced to 28 days mandatory detention under the Northern Territory's mandatory sentencing laws, he attempted suicide whilst in custody.

The Sentencing process is a significant part of criminal procedure which has traditionally been undertaken by the judicial officers in a manner which allows the exercise of appropriate discretion within general guidelines provided by relevant Parliaments through legislation. This judicial discretion in criminal sentencing allows judicial officers to consider circumstances such as the nature and triviality of the offence, the impact on victims, the character, economic and social background of the offender, the offender's age, the likelihood of reoffending, and other relevant circumstances, to allow for the most appropriate penalty to be imposed. Essentially, the discretion allows for judges and magistrates to consider the various interests of relevant stakeholders in a particular matter, including the victims and their families, the offender and his/her family, the community, and the standing of the criminal justice system as a whole. The weight to be applied to these various interests will vary from case to case, and cannot be cemented into a fixed formula.

In recent years, this judicial sentencing discretion has been significantly eroded in various Australian jurisdictions, by the enacting of legislation which imposes inflexible and arbitrary sentencing formulae, which either severely limits or removes the judicial discretion in determining the appropriate sentence in particular matter, for a particular offender. This is exemplified by the sentencing regimes which prescribe a mandatory minimum term of imprisonment in specified circumstances, so that the court must impose the minimum sentence, but has a discretion to impose a higher sentence. This has become known as Mandatory Sentencing, and is best exemplified by the sentencing regimes introduced for specific offences in Western Australia in 1996 and the Northern Territory in 1997.

Mandatory Sentencing raises issues that are fundamental to the criminal justice system. Essentially, it challenges the notion that a range of factors need to be taken into account in determining appropriate penalties, by removing the discretion of judges and magistrates to consider the subjective characteristics of individual offenders, and the unique circumstances of their offences and their impacts (or lack of impacts) on their victims.

This submission will look at the details of the mandatory sentencing legislation in Western Australia and the Northern Territory, and the legal and social consequences of those systems. In particular, it will focus on the impact of the sentencing systems on young people, both those defined as juveniles, and those offenders aged between 18-25. It will also look at the implications for indigenous young people within these age groups. The submission will also discuss Australia's international human rights obligations to address the issues relating to mandatory sentencing, and discuss the options available to the Commonwealth Parliament and the Federal Government to address the fundamental breaches of those obligations by existing mandatory sentencing laws. Throughout the submission, individual case studies will be interspersed, which will portray in real terms the inflexibility and injustice which mandatory sentencing produces. These have been supplied by the Alice Springs Youth Accommodation and Support Service, the Central Australian Aboriginal Legal Aid Service, the Katherine Regional Aboriginal Legal Aid Service, the Northern Australian Aboriginal Legal Aid Service, and the Northern Territory Legal Aid Commission.

A. THE LEGAL, SOCIAL AND OTHER IMPACTS OF MANDATORY SENTENCING

LEGAL IMPACTS

1. Current Mandatory Sentencing Laws in Western Australia and Northern Territory

a) Western Australia

On 14 November, 1996, amendments to the WA Criminal Code introducing a system of mandatory sentencing came into effect. The amendments provide that if a person is convicted of a home burglary, and is a "repeat offender", than that person shall be sentenced to at least 12 months imprisonment. If the offender is a young person as defined in the Young Offenders Act 1994 (under the age of 18), than that young person will be sentenced either to at least 12 months imprisonment, or to a term of at least 12 months detention.[1] A "repeat offender" is defined as having two previous convictions for the same offence. The legislation prohibits a court to suspend a term of imprisonment imposed under the mandatory sentencing provisions[2]. Under a 1997 decision by the WA President of the Children's Court (*The Police – v – DCJ* [3]), magistrates are able to order, in very limited circumstances, a Conditional Release Order along side the period of detention, for young offenders, with the effect that the young person will not serve the sentence during the duration of the CRO.

Whilst the availability of a CRO revives some element of judicial discretion, it should be emphasised that it is only available in extremely limited circumstances, and in no way alters the arbitrary nature of mandatory sentencing. Indeed, the sentence imposed under the mandatory sentencing provisions remains, and is reactivated if the CRO is breached. The Perth based Youth Legal Service advises that legal practitioners who practice in the WA Children's Court report that only 10%-15% of mandatory sentencing related matters receive dispositions with a CRO attached. This clearly indicates that this limited discretionary option is only operating at the fringe of the process.

Case Study 3

In two years, one 11-13 year old boy from the north of Western Australia has received two sets of 12 months detention, two 12 month conditional release orders, and one supervised release order of six months. He has had little family care and was stealing food from houses because he was hungry.

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1 Section 401(4) Criminal Code (WA)
2 Section 401(5) Criminal Code (WA)
3 *The Police – v – DCJ* (Children's Court of WA, Unreported 3/97)

b) Northern Territory

Mandatory Sentencing became part of sentencing landscape in the Northern Territory on 8 March, 1997, when amendments to the *Sentencing Act 1995* (NT) and the *Juvenile Justice Act 1983* (NT) came into effect.

Under the amendments to the *Sentencing Act 1995*, adults (over the age of 17) found guilty of specified property offences shall be sentenced to a mandatory minimum term of imprisonment of 14 days for a first offence. For a second property offence the mandatory minimum sentence is 90 days, and for a third property offence the mandatory minimum term of imprisonment is one year.[4] In June 1999, the legislation was amended to provide courts with a limited discretion not to impose a term of imprisonment under the mandatory sentencing provisions, in "exceptional circumstances". These have been defined to include where the offender has committed a trivial offence, co-operated with police, is of good character, and has attempted to make restitution.[5] The limited nature of the discretion is such that it will only be operable in very few cases, and fails to address the inflexibility and arbitrariness of the mandatory sentencing laws.

Amendments to the Juvenile Justice Act 1983 provided that in relation to juveniles aged 15 and 16, that if a young person is convicted of a relevant property offence and has at least one prior conviction for such an offence, than that person must be sentenced to a period of detention for at least 28 days.[6] Under amendments passed in June 1999, where the young person is looking at receiving a second conviction for a relevant property offence, thus invoking the mandatory detention provisions, magistrates have now been granted a discretion to refer the young person to attend a diversionary program rather than face 28 days in detention. Once the program has been completed by the young person, the matter is referred back to court for final decision, at which time magistrates still have a discretion to sentence the young person to a period of detention. Importantly, once a young person has been referred to a diversionary program, they can never be referred to such a program again in the future, thus reviving the mandatory detention provisions for future convictions.[7]

Again, the apparent discretion that has been introduced in relation to the mandatory detention provisions in the *Juvenile Justice Act* (NT) are more illusory than real. At this stage, resources for administration and operation of diversionary programs is limited, particularly in regional and remote areas of the Northern Territory, thus limiting the availability of this option in several areas. In addition, once a young person has been referred to a diversionary program, that option for judicial discretion is removed, and the

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4 Section 78A, *Sentencing Act 1995* (NT)

5 *Sentencing Amendment Act 1999* (NT)

6 Section 53AE, *Juvenile Justice Act 1983* (NT)

7 *Juvenile Justice Amendment Act 1999* (NT)

mandatory detention provisions apply again.

For the purpose of the NT mandatory sentencing and detention provisions, relevant property offences include:

- Theft (irrespective of the value of the property, and excluding theft where the offender was lawfully on premises – i.e. shoplifting);
- Criminal damage;
- Unlawful entry to buildings;
- Unlawful use of vessel, motor vehicle, caravan or trailer (whether as a passenger or driver);
- Receiving stolen goods;
- Receiving after change of ownership;
- Taking reward for the recovery of property obtained by criminal means;
- Assault with intent to steal;
- Robbery (armed or unarmed).[8]

Under amendments to the *Sentencing Act 1995* passed in June 1999, the mandatory sentencing and detention provisions have been extended to cover sexual offences, and violent offences against the person.

Case Study 4

At a remote Aboriginal community in the NT, a number of young people were charged with unlawful use of a vehicle after joy riding on the back of a trailer attached to a tractor, both of which were reported as stolen. Those older than 17, and those who were 15 and 16 and had a previous conviction, were convicted and sentenced under the mandatory sentencing provisions.

Case Study 5

Two 17 year old girls in Darwin were charged and convicted of theft of clothes from other girls who were staying in the same crisis accommodation facility. Neither of them had any previous contact with the criminal justice system. Upon conviction, they were both sentenced to the mandatory minimum period of imprisonment of 14 days.

2. The impact on Judicial Discretion

The system of mandatory sentencing introduced into Western Australia as it applies to young people, now has provision for the exercise of judicial discretion in extremely limited circumstances, as outlined above. There is no provision for the exercise of judicial discretion in relation to adults. The system introduced in the Northern Territory initially had absolutely no provision for judicial discretion. Only recent amendments to

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8 Schedule 1, *Sentencing Act 1995* (NT)

the *Sentencing Act 1995* and the *Juvenile Justice Act 1983* have made some provision for the exercise of judicial discretion in limited and exceptional circumstances.

As has been outlined, the limited availability of judicial discretion in Western Australia and the Northern Territory has been at best marginal, operating only at the very fringes of the operation of the mandatory sentencing regimes. The exercise of judicial discretion in sentencing, in relation to the offences covered by the mandatory sentencing regime, even after taking into account the recent amendments in the Northern Territory and the decision by the President of the Children's Court in Western Australia, has been significantly eroded and curtailed, by the imposition of an inflexible and arbitrary sentencing formula. Judicial officers have been severely restrained in the extent to which they can consider the subjective characteristics of individual offenders, the particular circumstances of the offences committed, and the relative impact or non-impact of the offences on victims. Inevitably, this will produce sentences and results which are anomalous and unjust.

According to the Hon. Justice Michael Adams of the NSW Supreme Court:

> In proposing schemes either of mandatory or grid sentencing, the politicians are explicitly or implicitly, calling into question the sentencing patterns and procedures that have been developed by the courts in accordance with statutes of long standing. To do so without any attempt at reasoned justification or to analyse the alleged shortcomings of the existing sentencing regimes, to my mind seriously undermines public confidence in the courts.
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> ….. To my mind, a grid sentencing scheme introduces a new and significant limitation on the independence of the judiciary in its vital role of standing between the state and the individual as well as attempting to do justice by reference to standards which are generally accepted in the community and responsive to the particular circumstances of each case.[9]

This issue has also been the subject of comment by the High Court. Chief Justice Barwick commented in *Palling – v – Corfield* ((1970) 123 CLR 52 at 58):

> It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases, and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.[10]

It is submitted that the limited discretion now available under the sentencing regimes of

[9] The Hon. Justice Michael Adams, *University of NSW Law Journal*, Vol 22(1) 1999, p. 257

[10] Barwick CJ in *Palling v Corfield* (1970)123 CLR 52 at 58

the Northern Territory and Western Australia do not alter the fact that the systems of mandatory sentencing and detention as they currently operate in those jurisdictions involve significant erosions and restrictions on the exercise of judicial discretion in the sentencing process. Judicial officers have been restrained in their ability to make appropriate sentencing orders for particular offenders in particular circumstances, for particular offences, no matter how trivial.

Case Study 6

Sam is a 17 year old young man who lives between Alice Springs and a couple of remote Aboriginal communities. He has been accessing crisis accommodation with youth services since he was 14 years old. He has a history of multiple substance dependency. Sam has minimal education and his literacy skills are low. English is his third language. Sam has never had his own income and workers who know Sam believe the bureaucracy of the system and the excessive paperwork is what deters him from accessing this entitlement. He was charged with unlawful entry into a shop, and was sentenced to 14 days imprisonment in an adult jail.

Case Study 7

Michael is an 18 year old Aboriginal young man, currently undertaking a full time tertiary course. He is also a talented sportsman. He has only one previous criminal conviction for minor theft as a 16 year old, at which time he was given a small fine. He was charged with Unlawful Possession of a bicycle which he found and decided to ride home because it was raining. He was sentenced 14 days imprisonment in an adult jail under the NT's mandatory sentencing laws.

3. The impact on Court Administration

The introduction of mandatory sentencing regimes has a direct adverse effect on the administration of the criminal justice system. The efficiency of the criminal justice system relies heavily on a high proportion of defendants pleading guilty to their criminal charges. State based Departments of Public Prosecutions estimate that at least 80% of all criminal matters appearing before the magistrates' courts proceed by way of a plea of guilty. Provisions in Sentencing legislation in all states and territories provide for incentives for defendants to plead guilty to their criminal charges at the earliest opportunity, by indicating that it is a relevant matter for the sentencing magistrate to take into account in determining the appropriate sentence. A guilty plea uses far less court time and administrative resources than a not guilty plea.

The introduction of mandatory sentencing for specific offences effectively removes any incentive for defendants charged with those offences to plead guilty at an early opportunity. Indeed, they are less likely to plead guilty at any stage, given the

inflexibility of the penalties to be imposed on a finding of guilt, and will be more inclined to require the prosecution to prove their case beyond reasonable doubt. Defendants will be required to appear before the court at numerous mention hearings, and will require witnesses to be called and subjected to complex cross examination at their final hearing.

Whilst there are no figures available from the Northern territory in relation to this point, legal practitioners reported that in the first six months of operation of the mandatory sentencing provisions in the Northern Territory, virtually no matters proceeded by way of a plea of guilty at the earliest opportunity, and nearly all matters were adjourned pending the resolution of appeals in relation to the mandatory sentencing provisions from other cases.

This issue was recognised by the New South Wales Law Reform Commission Discussion Paper 33 on Sentencing:

> The potential rigidity of such sentences interferes with the discretion of the sentencing judge, which must be preserved if justice is to be done in individual cases. Further, it is likely to have an adverse impact on the efficiency of the criminal justice system. Persons facing such sentences are likely to be less willing to plead guilty to the charges laid against them. This will place an increased burden on the courts, and prosecution and law enforcement agencies.[11]

In November 1997, magistrates and staff at the Alice Springs Magistrates' Court acknowledged to the National Children's and Youth Law Centre that mandatory sentencing was going to result in increases in delays in court hearings and huge increases in the numbers of people, both adults and young people, being incarcerated. They were unable to explain where the increased number of detainees were going to be held, and how the court administration and police would handle the influx and consequent court delays.[12]

Unfortunately, there are no figures available to indicate accurately the effect of mandatory sentencing on case flow management in the Northern Territory, or the degree to which mandatory sentencing has caused delays in the processing of criminal matters in the magistrates' courts. There is no Freedom of Information legislation in the Northern Territory which would allow access to this information through the Attorney-General's Department.

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[11] New South Wales Law Reform Commission Discussion Paper 33, *Sentencing*, April 1996, paragraph 4.76 at 114.

[12] Antrum, Michael, *"NT Mandatory Sentencing – Politics & Prejudice", Rights Now Newsletter of the National Children's and Youth Law Centre*, January 1998.

Case Study 8

A 17 year old Darwin school student with no previous criminal convictions was charged and convicted in relation to the theft of yo-yos and computer games from a Darwin toy shop, and criminal damage. He handed himself into police, was fully co-operative, showed extreme remorse, and pleaded guilty at the first opportunity. He was sentenced to 14 days jail under the mandatory sentencing provisions.

IMPACT ON CORRECTIVE SERVICES

There is almost universal acknowledgement that the direct effect of mandatory sentencing is an increase in juvenile detention and adult imprisonment rates. Whilst this is clearly borne out by statistics regarding general rates of imprisonment, there is no statistical information available in the Northern Territory to indicate the exact contribution mandatory sentencing is having to the increases in detention and imprisonment rates. Again, the lack of access to Freedom of Information remedies in the NT prevents this level of statistical analysis.

In 1996 the NT Government acknowledged that mandatory sentencing would significantly increase prison numbers. That year NT Correctional Services received a 20% increase in budget allocation to reflect increased prisoner numbers. An extra $3 million was allocated to create an additional 140 beds in Darwin's Berrimah prison.[13]

In Western Australia, mandatory sentencing only applies to one particular offence, and accordingly, it is difficult to assess the full impact of mandatory sentencing on imprisonment and incarceration rates. It should also be acknowledged that at the same time mandatory sentencing was introduced in WA, other stringent sentencing provisions were also introduced in relation to other offences.

1. Juvenile Detention

According to Table 1, Northern Territory and Western Australia have consistently had the highest rate of Juvenile Detention of all of Australia's States and Territories. Between the years 1996 – 1998, both WA and the NT recorded significant increases in Juvenile detention rates, against a national trend, which indicated an overall reduction in juvenile detention rates. This corresponds with the years in which mandatory sentencing regimes took effect in both the NT and WA.

The increase in NT from 1997 to 1998 is particularly dramatic. According to the Northern Territory Correctional Services Annual Report for 1997/1998, the daily average number of juvenile detainees in Northern Territory juvenile detention centres during the

[13] Statement by Mr. Steve Hatton, Correctional Services Minister, 7 March, 1997

1997/98 year increased by 53%. The most common offence for sentenced juvenile detainees held during the year was break and enter - a mandatory sentencing offence.[14]

According to the 1997/98 Annual Report, it costs the taxpayer $12 500 to accommodate each young person sentenced to a 28 day period of detention. Unfortunately, due to the lack of Freedom of Information legislation in the NT, there are no figures available as to the overall cost to the taxpayer of the increase in juvenile detention as a result of mandatory sentencing.

In WA, in the four months after the legislation came into force, each month saw an average of 7 young people receiving mandatory sentences. Since then, on average, one young person per month has received mandatory sentences. Over 50 young people in WA have served or are serving the 12 month mandatory sentences in the State's one juvenile justice detention facility, Banksia Hill, near Perth. Although most are released on an intensive supervision order after 6 months, approximately one-third to one-half breach the supervision order and return to finish the full 12 months in detention. The conditions of release are usually excessive compared with adults, and often unrealistic for Aboriginal children, and for children in rural and remote areas.[15]

Table 1

Persons aged 10-17 years in Juvenile Corrective Institutions per 100 000 relevant population

	NSW	**VIC**	**QLD**	**SA**	**TAS**	**ACT**	**WA**	**NT**	**Aust.**
1990	51.8	29.3	29.7	22.9	17.5	23.6	63.0	138.0	40.4
1991	48.2	13.8	20.7	28.7	29.9	18.5	58.3	166.2	34.2
1992	38.9	10.3	20.1	33.3	8.8	26.8	46.5	127.1	28.6
1993	46.4	10.2	22.7	38.5	15.8	16.2	51.6	102.7	32.2
1994	54.8	12.9	24.9	36.4	17.6	24.3	64.3	57.5	36.9
1995	57.9	14.9	35.0	24.4	17.5	37.8	49.3	74.8	38.3
1996	49.39	14.0	34.44	51.6	45.4	18.9	50.4	56.1	37.7
1997	51.4	14.1	24.9	47.8	40.2	43.8	52.0	89.4	37.1
1998	48.0	13.2	33.6	30.9	33.5	30.4	62.7	103.5	37.1

Source: Compiled from figures in *Juveniles Corrective Institutions Australia 1981-1998*, by C.Carcach and G.Muscat, Australian Institute of Criminology

[14] Northern Territory Correctional Services 1997/1998 Annual Report

[15] Helen Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory", *University of NSW Law Journal*, Vol 22(1), 1999, p286.

Case Study 9

A 15 year old girl was charged after being a passenger in a stolen vehicle. She was convicted of being in unlawful possession of a vehicle, and was sentenced to 28 days detention under the NT's mandatory sentencing provisions.

2. Adult Imprisonment

According to Table 2, the jurisdictions with the highest rates of adult imprisonment per 100 000 adult population are Western Australia and the Northern Territory. The increases in adult imprisonment rates in the NT and WA between 1996 and 1999 have been dramatic, and far in excess of the national trend. This corresponds with the period from which mandatory sentencing regimes took effect in those jurisdictions.

As with juvenile detention rates, the increase in adult imprisonment rates has been particularly dramatic. According to the Northern Territory Correctional Services Annual Report for 1997/1998 the average number of prisoners in the NT during the 1997/98 year was 610, an increase of 13% from the previous year, and considerably higher than the number for the previous ten years (See Table 3).

NT Correctional services acknowledges the role that mandatory sentencing has played in this increase. According to the 1997/98 Annual Report:

> Since the 1994/95 year, there has been a steady increase in the number of prisoners held. This may be the result of several factors, such as more stringent penalties being applied by the courts, the adoption of truth in sentencing principles and perhaps more recently, mandatory sentencing laws.[16]

According to the annual report, 41% had sentences of less than twelve months. The most common offences were assault, break and enter (a mandatory sentencing offence) and driving under the influence of alcohol. This was the same for both Aboriginal prisoners, who made up a staggering 73% of the prison population, and non-Aboriginal prisoners.[17]

According to the Commonwealth Grants Commission, the average daily cost of imprisoning one adult for one day in the NT is $169.44[18]. On these figures, the cost to the public purse for every adult sentenced under mandatory sentencing for the minimum 14 day period is approximately $2 400. In the case of Case Study 1, involving the theft of a $15 towel, the cost of imprisonment under the mandatory sentencing regime of the convicted offender will be $62 000.

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16 *Northern Territory Correctional Services Annual Report 1997/98*

17 *Ibid*

18 Commonwealth Grants Commission, *Report on Government Service Provision*, Vol. 2, 1997.

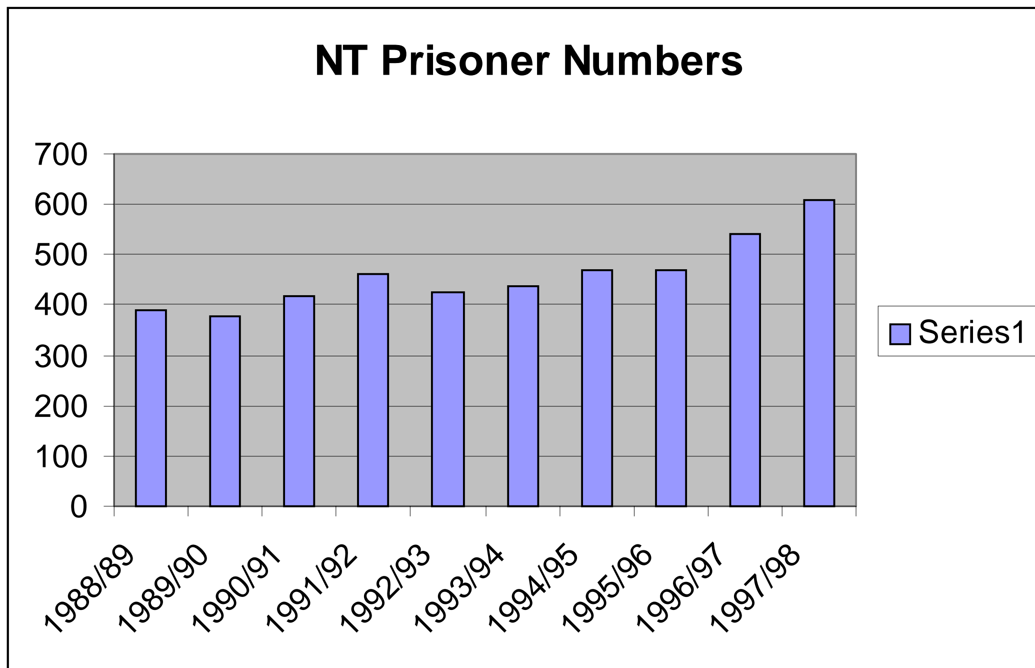
Again, there are no figures available as to the overall cost to the taxpayer of the increase in adult imprisonment rates as a result of mandatory sentencing.

Table 2
Average Daily Adult Prisoner Population per 100 000 adult population (June)

	NSW	VIC	QLD	SA	TAS	ACT	WA	NT	Aust.
1995	138.8	71.8	117.4	123.0	68.0	34.9	167.2	397.1	117.7
1996	133.9	70.9	141.8	130.6	79.0	39.1	172.5	397.9	121.9
1997	134.7	74.9	150.6	130.9	73.5	51.7	169.6	443.6	125.0
1998	136.3	79.9	188.9	121.2	86.5	48.0	174.8	458.7	133.9
1999	150.1	80.6	194.0	123.9	96.9	12.8	220.2	469.3	144.7

Source: Australian Bureau of Statistics, National Correctional Statistics: Prisons, 1995-1999.

Table 3



Source: Northern Territory Correctional Services Annual Report 1997/1998

Case Study 10

A twenty year old Aboriginal man living on a remote community 300km west of Alice Springs was charged with theft of $9 worth of petrol, which he siphoned into his car, so he could drive his wife to the Alice Springs hospital. He had no previous convictions. He was sentenced to 14 days imprisonment.

IMPACT ON CRIME RATES AND RECIDIVISM RATES

The prime motivation for introducing mandatory sentencing schemes appears to be perceptions of an increased crime rate, often colloquially referred to by politicians and other as a "crime wave". Responding to such perceptions with such a sentencing regime continues an increasing trend amongst State and Territory political parties to embark on "law and order" bidding competitions, particularly in the lead up to State and Territory elections. Such competitions will usually be flavoured with emotive comments that "one's streets and homes are not safe" and that "the law favours the criminals" with little factual basis or proof.

Indeed, the then Chief Minister of the NT, Shane Stone, stated:

> One of the greatest challenges facing any government in Australia centres on law and order issues. Ordinary Australians are getting tired of those who steal, pilfer and damage their property …. We live in an era where there is scant regard for both private and public property.[19]

However, there is significant research to indicate that, rather than acting as a deterrent, a sentencing system which accelerates contact with either the juvenile detention system, or the adult correctional system, will in fact lead to higher and more serious re-offending, higher rates of recidivism, and ultimately higher crime rates. According to the Human Rights and Equal Opportunity Commission, there is an increasing community danger, not safety in adopting increasingly harsher approaches to the treatment of young offenders.[20]

According to extensive research undertaken in New South Wales in 1996 by Michael Cain into Juvenile recidivism, the term of detention for a young person offending for the first or second time, increased the likelihood of that young person re-offending. Cain discovered that there is exists a strong relationship between first penalty type and juvenile recidivism, and that the more severe Children's Court sanctions were associated with higher levels of re-offending. Sanctions characterised by minimalist intervention were associated with relatively low levels of re-offending. He went on to quote from several research studies which found that the more severe sanctions, particularly custodial sentences, can have a direct bearing upon a juvenile's return to criminal activity. He concluded that incarceration had several damaging effects for young people, including contamination and promotion of procriminal attitudes.[21]

In his study on sexual assault of young prisoners, David Heilpern discovered that as high as one in four prisoners aged between 18 and 25 were sexually assaulted in adult prisons. He asserted that given such prisoners are more likely to inflict self harm, and have an

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[19] Attorney-General S. Stone QC, Effects of Mandatory Sentencing, Ministerial Statement 21 April, 1998.

[20] Human Rights and Equal Opportunity Commission, Submission No. 336, P. S 1919, to the Inquiry into Children and the Legal Process.

[21] Cain, M., *Recidivism of Juvenile Offenders in NSW*, NSW Department of Juvenile Justice 1996.

increased involvement in drugs, whilst in prison, than it is more likely that they will be prone to re-offend upon release.[22] A sentencing system that accelerates contact with the prison system will therefore lead to increased incidence of re-offending.

The ineffectiveness of imprisoning young people was also identified by the NT Correctional Services in 1991:

> The evidence is clear that the more access juveniles have to the criminal justice system the more frequently and deeper they will penetrate it …. It has been shown that punishment of criminal offenders through incarceration in a juvenile detention centre or a prison …. has little positive effect. What happens in many cases is that the detainees learn from their fellow inmates how to become more effective in committing crime.[23]

These assertions are supported by the correlation between low imprisonment rates and low crime rates. According to the Australian Bureau of Statistics, for both 1997 and 1998, Victoria had either the lowest rate or the second lowest rate of reported theft, unlawful entry offences, murder, and assault.[24] Referring to Tables 1 and 2 above, Victoria has also had by far Australia's lowest rates of juvenile detention and adult imprisonment, consistently over the last ten years. In 1998, Victoria's Chief Commissioner Neil Comrie asserted that Victoria "was Australia's safest place in which to live, work, holiday, visit, or go to school."[25]

By comparison, according to the 1998 Australian Bureau Statistics on recorded crime, Northern Territory had the highest victimisation rates for murder, assault and sexual assault. This would support the theory that once a person has entered the correctional system, it is likely that they will re-offend in a far more serious manner. Western Australia had the second highest vicitmisation rates for sexual assault, armed robbery, unarmed robbery, and the highest victimisation rates for unlawful entry with intent (the mandatory sentencing offence in WA), motor vehicle theft and other theft.[26] As is indicated in Tables 1 and 2 above, the jurisdictions with the highest rates of juvenile detention and adult imprisonment are the Northern Territory and Western Australia.

Accordingly, one could conclude that mandatory sentencing and the consequent increased rates of detention and imprisonment is not achieving its stated aim of reduced vicitimisation of crime, and in the case of the Northern Territory, is in fact accompanied by high rates of violent criminal activity. General deterrence from criminal activity has not been achieved.

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22 Heilpern, D., *Fear or Favour – Sexual Assault of Young Prisoners* 1998, P. 111.

23 *Information on Departmental Juvenile Justice Services in the NT*,1991, NT Correctional Services Department.

24 Australian Bureau of Statistics, *Recorded Crime – Australia, 1997-1998*

25 Victorian Police Chief Commissioner, Neil Comrie, as quoted in the Herald Sun, July 1998.

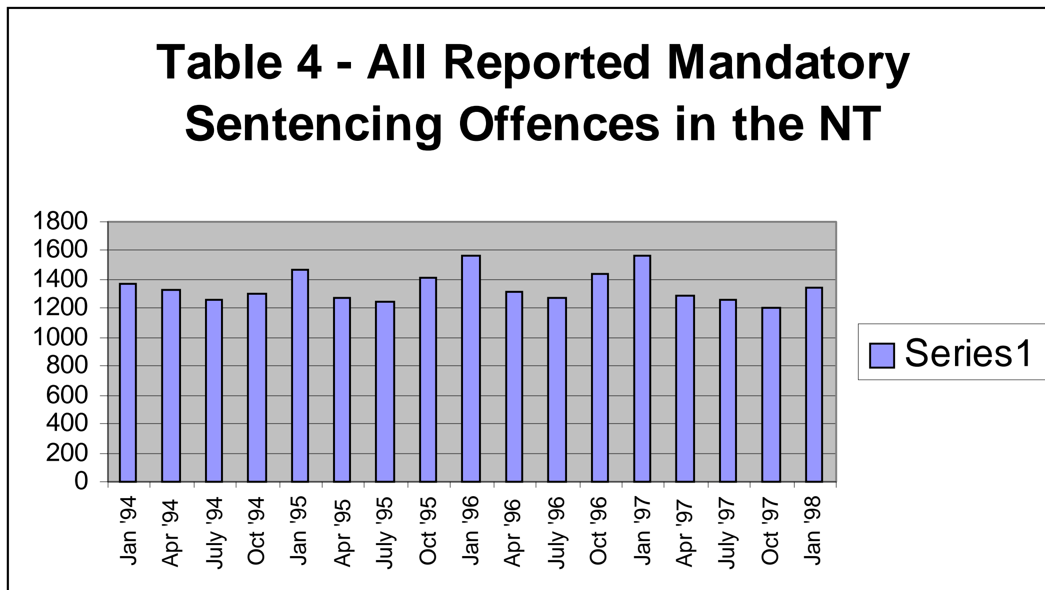
26 Australian Bureau of Statistics, *Reported Crime – Australia*, 1998

In terms of the reported crime rates for those offences in the NT to which mandatory sentencing applies, there is disagreement as to whether there has been any material decrease. In April, 1998, then Chief Minister Shane Stone QC tabled in parliament statistics covered by mandatory sentencing laws over the period January 1994 to January 1998. He asserted that the figures showed a 9% reduction in reported crime in the year following the introduction of mandatory sentencing.[27]

There are two issues regarding this assertion which require further analysis:

1. There is no consideration of the long term effects of increased incarceration rates, on the overall reported crime rate, or on the reported crime rates for mandatory sentencing offences. An analysis of crime report figures for just twelve months will not take into account such factors. As sated above, overwhelming research supports the assertion that in the long term, the inevitable result of increased juvenile detention and adult imprisonment is one of higher reported crime rates, particularly for more serious offences.

2. The actual analysis of the figures is highly suspect. Whilst Mr. Stone is correct in observing a reduction in reported crime for the previous 12 months, when one looks at the full history of the figures, there has in fact been very little overall reduction in the reported crime rate from 1994 until 1998, as is indicated by Table 4, which replicates the figures released by Mr. Stone on a quarterly basis since January 1994.



According to Neil Morgan of the Crime Research Centre at the University of Western Australia:

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[27] Chief Minister Shane Stone QC, Ministerial Statement on the effects of Mandatory Sentencing in the Northern Territory, 22 April, 1998.

> Ultimately, …. crime rates appear to have a life independent of punishment rates. Crime rates are more likely to be affected by "target hardening" crime prevention measures than tougher punishment. At the very least, the onus is clearly on those who argue for a deterrent effect to produce evidence to support their thesis. Furthermore, even if it could be shown that mandatories for one type of crime have led to a reduction in such crimes, it would be necessary to measure any "displacement" effect …. where the reduction is counterbalanced by an increase in offences against other targets.[28]

Case Study 11

A 24 year old Katherine woman was given a can of beer worth $2.50 which had been stolen from an esky. The woman was charged with receiving stolen goods, convicted, and received a mandatory minimum term of imprisonment of 14 days.

B. AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN REGARD TO MANDATORY SENTENCING LAWS IN AUSTRALIA

RELEVANT CONVENTIONS

Many international instruments applicable to Australia touch on matters concerned with young offenders and their treatment.[29] This section of the submission focuses upon the two United Nations conventions ratified by Australia that have principal force and relevance to mandatory sentencing laws in Australia: The International Covenant on Civil and Political Rights which applies to persons of all ages, and The Convention on the Rights of the Child which additionally applies to persons under the age of 18 years. We submit that mandatory sentencing laws demonstrably contravene Articles of both Conventions.

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28 Morgan, N., Capturing Crims or Capturing Votes, *University of NSW Law Journal*, Vol. 22(1), 1999, p. 267.

29 For example: *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (the Beijing Rules); *The United Nations Guidelines for the Prevention of Juvenile Delinquency* 1990 (the Riyadh Rules); *The Uniter Nations Rules for the Protection of Juveniles Deprived of their Liberty* 1990. These Rules provide illustrative guidance as to the implementation of CROC, particularly Articles 37 and 40. See Sajadi, S. (1998)'The 18th Session on the Committee on the Rights of the Child' Vol 1 No 1 *Juvenile Justice Wordlwide,* pp.17 - 20, which illustrates the Committee's reference to the allied instruments.

Ratification

Ratification of a Convention imposes an obligation on State and Territory governments as well as the Commonwealth government, to ensure that laws, policies and practices are consistent with the rights set out in the ratified Convention. The obligation arising from ratification is a legal one in international law.

So far as domestic law is concerned:

> Unlike the United States and continental legal systems, where the entry into treaties or conventions creates self executing law, the English and Australian position is that such treaties do not enter into domestic force unless and until there is a legislative act. In Koowarta v Bjelke Petersen (1982) 153 CLR 168 at 224 Mason J (as he then was) said:-
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>> "It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v The King (1948) 77 C.L.R 449, at p. 478; Bradley v The Commonwealth (1973) 128 C.L.R 557, at p. 582). In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (Foster v Neilson (1829) 2 Pet.253 at p.314".
>
> See also Teoh's case (1995) 183 CLR 273 per Mason CJ and Deane J at 286-7.[30]

Mason CJ and Deane J there said:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.[31]

Although there is scope for using international treaties for the interpretation of doemstic law, a domestic law which is free of ambiguity prevails notwithstanding any violation of

[30] The Full Court of the Family Court of Australia in B and B (1997) FLC 92-755 at para 10.2.
[31] Footnotes omitted.

international law.

The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR entered into force for Australia on 13 August 1980. The rights and freedoms prescribed by the ICCPR are defined as human rights by s.3(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) ("HREOCA"). It is Schedule 2 of that Act. The relevant provisions of the ICCPR are found in Articles 9 and 14:

Article 9(1)
Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

Article 14(5)
Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The Convention on the Rights of the Child (CROC)

CROC brings together in one child-centre covenant, a range of protections, rights and freedoms found in other international instruments. Australia played a leading role in the development of CROC with consultations taking place throughout the drafting process among Federal, State and Territory Governments.

> From 1980 the Convention was on the agenda of the Standing Committee of Attroneys-General. Australian delegations attended all sessions of the Convention drafting committee and the States and Territories were represented on the delegation on each occasion.[32]

Australia signed CROC on 22 August 1990 ratified it on 17 December 1990. CROC came into force on 16 January 1991. Ratification was preceded by a detailed process of consultation with State and Territory governments.

> Negotiations conducted by the [Standing Committee if Attorneys-General] resulted in unanimous agreement by Australian Governments to ratification of the Convention.[33]

Subsequent to ratification, on 13 January 1993, the then Attorney-General made a declaration in respect of CROC pursuant to s.47(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) ("HREOCA"), that CROC is "an international

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32 Human Rights and Equal Opportunity Commission, *submission to the Inquiry by the Joint Standing Committee on Treaties Into the Status of the United Nations Convention on the Rights of the Child,* July 1997 p. 6.

33 Ibid, p. 9.

instrument relating to human rights and freedoms for the purposes of [HREOCA]". The effect of the declaration was that CROC became a "relevant international instrument" for the purposes of defining "human rights", pursuant to s.3(1) of HREOCA, akin to the ICCPR which appears as a Schedule to the Act.

The fact that CROC does not appear as a Schedule is of no importance. Like CROC, there is no schedule to HREOCA containing Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief. That is because the Declaration, like CROC was given recognition by the s.47(1) declaration process.

The declaration as to CROC had effect from 13 January, 1993. Attempts were subsequently made in each House of Parliament pursuant to sub-s.47(3) of the Act to disallow the Minister's declaration.[34] Those attempts were defeated.

Three matters are drawn to the Committee's attention.

First, although ratification of the Convention was an act of the Executive, its incorporation as a declared instrument was the subject of a democratic vote by the Commonwealth Parliament. In this regard it is apposite that in Teoh's case, Mason CJ and Deane J said:

> In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s.47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.[35]

This indicates that the significance of there having been a declaration pursuant to s.47(1) of HREOCA was not argued before the High Court and remains an open question. The Full Court of the Family Court of Australia made reference to this matter in the child relocation case brought under the *Family Law Act* 1975 (Cth) known as B and B (1997) FLC 92-755 because submissions to the Court addressed the status of CROC in domestic law. Their Honours said at para 10.20:

> … we adhere to the view expressed by Nicholson CJ and Fogarty J in *Murray's case* and supported by the view expressed by Einfield J in *Magno's case*, that the fact that [CROC] is expressed as a schedule to the Human Rights and Equal Opportunity Commission Act may give it a special significance in Australian law. Indeed the Attorney-General did not necessarily disagree with this, preferring to rely upon the submission that the Family Law Act operated as in effect a code and that it would therefore be necessary to refer to the whole of the Convention only in very limited circumstances.

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[34] See *House of Representatives Hansard* 1 September, 1993, pp.691-701*; Senate Hansard* 30 September, 1993 pp.1473-98 and 1595-8; 5 October pp.1682-85.

[35] (1995) 183 CLR 273 at 287.

Secondly, it may also be noted that CROC was the subject of a recent inquiry by the Commonwealth Parliament's Joint Standing Committee on Treaties.[36] Although the Committee expressed concerns as to the perceived implications of CROC in family matters,[37] such concerns were entirely separate from the issue of mandatory sentencing and the provisions pertaining to mandatory sentencing.

Thirdly, as noted above, the obligation to implement CROC is a legal one at international law. Article 4 sets out the solemn undertaking of State Parties that have ratified CROC:

> States Parties shall undertake **all appropriate legislative, administrative and other measures** for the implementation of the rights recognized in the present Convention. With regard to economic social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation. (emphasis added).

The provisions most directly relevant to mandatory sentencing are Articles 3, 37 and 40:

Article 3(1)

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 37(b)

Sates Parties shall ensure that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

36 *17th Report*, August 1998.

37 Ibid, *Executive Summary*, recommendation 49 and associated text.

Article 40

(1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

(2) To this end, and having regard to the relevant provisions of international instruments, States parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.

(4) A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

THE CONFLICT BETWEEN MANDATORY SENTENCING LAWS AND THE RELEVANT ARTICLES OF THE ICCPR AND CROC

Article 9(1) ICCPR

The prohibition on arbitrary detention contained in this Article is replicated in Article 37(b) of CROC.

It is submitted that the articles are breached by mandatory sentencing legislation as detention is imposed without regard to individual factors or the triviality of the offence. This submission of a contravention is supported by the 1997 report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission titled *Seen and Heard - priority for children in the legal process*.[38]

More recently, the Human Rights and Equal Opportunity Commission has observed that:

> Arbitrary detention is detention 'incompatible with principles of justice or with the dignity of the human person'.
>
> …

[38] (1997) A.G.P.S., Canberra, p. 554-555.

> Principles of justice include the principle of proportionality, the principle of consistency and the principle of non-discrimination.[39]

In discussing the unequivocal principle of proportionality, it was further said that:

> The sentencer must make the decision in the *individual* case. A sentence which is proportionate to the circumstances of the offender must be an individualised sentence.
> …
> This principle of individualised sentencing further means that mandatory sentencing further means that mandatory sentences of any kind, and particularly of detention contravene CROC.[40]

The data elsewhere in this submission as to the disproportionate impact of mandatory sentencing laws upon Indigenous people also indicate that such laws contravene the requirement of non-discrimination on the basis of race, a feature of both the ICCPR and CROC. In this regard, the Committee on the Rights of the Child established by Article 43 of CROC, commented as follows on Australia's first report on the implementation of CROC at para 22:

> The Committee is particularly concerned by the enactment of new legislation in two States, where a high percentage of Aboriginal people lives, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high representation of Aboriginal juveniles in detention.[41]

Article 14(5) ICCPR

The requirement of a guarantee of review of a criminal justice sentence is breached by mandatory sentencing laws. That guarantee is also contained in Article 40(2)(b)(v) of CROC. We submit that it is contravened where the Legislature of a jurisdiction has ousted the scope for judicial discretion by legislating that a penalty of detention shall be imposed for certain offences.

As a consequence of the High Court's refusal of special leave to appeal in the Northern Territory case of Wynbyne v Marshall,[42] it is submitted that the only available remedy while mandatory sentencing laws are in effect would be a "communication" to the Human Rights Committee under the First Optional Protocol to the ICCPR.

This avenue was successfully pursued in comparable circumstances by Mr. Nick Toonen in respect of Tasmania's prohibition on consensual sexual activity between men and in A

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39 *Human Rights Brief No. 2* at www.hreoc.gov.au/human_rights/brief/h_9_2.html, footnotes omitted.

40 Ibid.

41 Committee on the Rights of the Child, Sixteenth Session, *Concluding Observations: Australia*, adopted by the Committee on 10 October 1997. CRC/C/15/Add.79.

42 D171/1997 heard 21 May 1998 at www.austlii.edu.au/au/other/hca/transcripts/1997/D174/1.html

v Australia concerning the protracted detention of asylum seekers.[43] There is no equivalent individual grievance procedure available under CROC.

Article 3(1) CROC

This provision requires the best interests of the child to among the first considerations in the establishment of legislation and in decision-making.

It is submitted that that best interests of the child liable to be sentenced under mandatory sentencing legislation was not an evident consideration in the development of the mandatory sentencing legislative schemes, let alone a primary one. These schemes are founded upon primary considerations such as deterrence, retribution and incapacitation.

Furthermore, contrary to Article 3(1) the regimes do not permit a Judicial Officer or Judge to take account a child's best interests where the legislation requires the imposition of a mandatory sentence.

Article 40(4) takes Article 3(1) further in one significant respect. Article 40(4) concerns a particular feature of a child's bets interests - the child's "well-being". It mandates the availability of a variety of dispositions to this end. Where the Judicial Officer or judge has no discretion to utilise these options in a particular case due to the obligation to impose a mandatory sentence, the range of dispositions are not, in fact, available.[44]

Article 37(b) CROC

Reference has already been made to the prohibition on arbitrary deprivation of liberty under the heading "**Article 9(1) ICCPR**" and we incorporate those submissions at this point also.

This Article of CROC additionally requires detention to be as a measure of last resort and for the shortest appropriate period of time.[45] These principles reflect contemporary approaches to juvenile justice in other Australian jurisdictions and elsewhere including the commentary to Beijing Rule 19 which states:

> Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting

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43 Toonen v Australia, Views of the Human Rights Committee, Fiftieth Session, concerning Communication No 488/1992, 25 December 1994; A v Australia, Views of the Human Rights Committee, Fifty - ninth Session, concerning Communication No 560/1993, 30 April 1997.

44 Beijing Rule 17(1)(d) elaborates on this expectation: *"The well-being of the juvenile shall be the guiding factor in the consideration of his or her case."*

45 See also Beijing Rule 17(1)(b).

> evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.

As, the *Seen and Heard* report noted, and we agree, mandatory sentencing laws breach these requirements,[46] due to the lack of individualisation in sentencing that mandatory outcomes impose, and the violation of the principle of proportionality which requires the circumstance of both the offence and the offender to be taken into account.

Article 40 CROC

Article 40(1) recognises the importance of providing special protections for the dignity of child offenders and rehabilitation focussed justice responses. Read together with the foregoing discussion of Article 37(b) as to minimising the use of incarceration and the reasons why that principle is in place makes it plain that a sentencing policy that mandates incarceration of children is inconsistent with this Article. We agree with the following observation from *Human Rights Brief*:

> Detention is not just one more sentencing option. It has the capacity to cause harm - contrary to the obligation to protect the child's well-being at all times and contrary to the right of other members of the community to live in safety.[47]

In the circumstances of the Northern Territory and Western Australia where incarcerated children may be removed thousands of miles from their families, this raises further issues in terms of the protection against children's separation from their families contained in Article 9(1) of CROC.

Article 40(2)(b)(v) has been considered above under the heading "**Article 14(5) ICCPR**" and we incorporate those submissions at this point also.

Article 40(4) has been considered above under the heading "**Article 3(1) CROC**" and we incorporate those submissions at this point also.

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46 (1997) A.G.P.S., Canberra, p. 555.

47 *Human Rights Brief No. 2* at www.hreoc.gov.au/human_rights/brief/h_9_2.html

C. THE IMPLICATIONS OF MANDATORY SENTENCING FOR PARTICULAR GROUPS, INCLUDING AUSTRALIA'S INDIGENOUS PEOPLE AND PEOPLE WITH DISABILITIES

YOUNG PEOPLE

The NCYLC and DCI are particularly concerned about the effect of mandatory sentencing on the young people of the Northern Territory and Western Australia. However, attention in this section will be given particularly to the state of young people in the Northern Territory.

Young People in the Northern Territory

On the basis of 1996 census figures, 23% of all people counted in the NT were aged between 12 and 25. In the NT, 32% of 12-25 year olds reported they were of indigenous origins – the highest proportion in Australia. In the NT, 21% of young people reported that they spoke an Australian Indigenous language at home – the most common non English language spoken. A total of 28% reported that they spoke a non English language at home – the highest proportion in Australia (c.f. national average of 15%). In the NT, 11% of 12-25 year olds reported that they did not speak English well – the highest rate in Australia. Fewer than 30% of 12-25 year olds were living with their parents as dependent children (c.f. national average of 42%). A total of 1.5% reported that they had no usual place of residence (c.f. national average of 0.07%). The NT also reported the lowest rate of 12-17 year olds attending schools (75%), and 18-25 year olds attending educational institutions (14%) compared to national averages of 87% and 30% respectively. Only 32% of Indigenous 12-25 year olds were attending an educational institution, with 84% of 12-14 year olds, 39% of 15-17 year olds, and only 12% of 20-25 year olds (c.f. national averages of 94%, 65% and 25%).[48] In 1998, the NT Government withdrew funding for the indigenous language programs in schools, providing even further discouragement for indigenous young people to remain at school.

In summary, almost one-third of young people in the Northern Territory are of indigenous background. NT young people are more likely to speak a language other than English, and in fact have trouble with English, they are more likely to be homeless, or not living with their families, and are more likely to not be attending schools or educational institutions, particularly if they are of indigenous background.

Given this background, it is therefore not surprising that sentencing regimes such as mandatory sentencing, and policing practices such as zero tolerance policing have a particularly harsh impact on the NT's young people, particularly indigenous young people. This is borne out by the fact that the growth in Juvenile detention since 1996,

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[48] ABS Catalogue No. 4123.7 – *Northern Territory's Young People, 1996.*

when mandatory sentencing was introduced, has been higher in the NT than in any other jurisdiction, and that the rate of juvenile detention in the NT massively exceeds those of other jurisdictions (see Table 1 above). In particular, the increase of young males in juvenile corrective institutions in the NT is cause for great concern (Table 5).

Table 5
Males aged between 10-17 years in Juvenile Corrective Institutions at 30 June, per 100 000 Relevant Population

	NT	**Aust.**
1994	111.29	67.85
1995	127.87	70.66
1996	108.49	67.93
1997	172.15	66.27
1998	202.17	67.70

Source: *Juveniles in Corrective Institutions Australia, 1981-1998*, C.Carcach and G.Muscat, Australian Institute of Criminology, 1999,

Given the disadvantaged position of young people in the Northern Territory, serious concerns have been expressed by youth agencies as to the lack of essential youth services in the NT, particularly in regional and remote areas, and also in regional centres such as Alice Springs, Tenant Creek and Katherine. In Alice Springs alone, a town of in excess of 27 000 people, there are only 7 crisis accommodation beds for young people aged between 15 and 18.

In addition, concern has also been expressed as to the lack of effectiveness of the Department of Family, Youth and Children's Services (FYCS) to provide adequate assistance for children and young people at risk. Inadequate intervention for children and young people at risk, or in serious situations of abuse, has too often resulted in those same young people entering the criminal justice system subsequently, and facing the inflexibility of the court sentencing regime. For many young people at risk, mandatory detention as ordered by the court is the first form of "crisis accommodation" that has become available, due to inaction on the part of FYCS.

Youth agencies in the Northern Territory have also reported that as more young people face the prospect of mandatory detention under the *Juvenile Justice Act*, there is an increased incidence of young people failing to attend court hearings. Mandatory sentencing is providing no incentive to young people facing criminal charges to seek to have their matters dealt with according to law. The effect of this is that more young people are entering their late teens and adult lives with unresolved and outstanding criminal charges, for which they face periods of detention or imprisonment. This produces a situation where young people who are at risk, or who are the victims of criminal offences, or who are in need of crisis services, are reluctant to report these situations or seek assistance, out of fear that they may be exposed to apprehension by police or law enforcement officials, and then face the inflexible sentencing regimes administered by the courts. Young people are becoming more willing to continue to

endure abusive or dangerous situations, rather than risk being sent to a youth training facility under mandatory sentencing. In addition, there is little incentive for young people to render assistance when they witness a criminal offence taking place, for similar reasons. Essentially, it is discouraging young people with a term of mandatory detention or imprisonment hanging over their heads, from participating fully in society.

There is also an interesting, and somewhat seriously discriminatory anomaly in the mandatory detention provisions of the *Juvenile Justice Act*. Section 53AG(2) provides as follows:

> Where the Court, under this Division, sentences a juvenile to a period of detention in a detention centre during which the juvenile will attain the age of 17 years, the juvenile shall, not later than 28 days after attaining the age of 17 years, be transferred from the detention centre to a prison, within the meaning of the *Prisons (Correctional Services) Act*, to serve the remainder of the sentence.[49]

A 16 year old who has been sentenced to a period of detention under the mandatory detention provisions, who subsequently turns 17 a week after his conviction will be transferred to an adult prison to serve the remaining 21 days of his sentence. By the end of his sentence, he will have served 7 days in a juvenile detention facility, and 21 days in an adult prison. Yet adults who commit the same offence, would serve 14 days in an adult prison. The position of the juvenile is disadvantaged merely because of his age and the timing of his birthday in relation to his court appearance.

As far as adult imprisonment is concerned, the average age of adult prisoners was 31.[50] Of particular concern is the fact that 79% of Aboriginal people jailed under mandatory sentencing, were under the age of 25[51]. Given that 73% of prisoners are of Aboriginal or Torres Strait Island descent, it is quite clear that mandatory sentencing is disproportionately affecting young indigenous adults aged between 17-25.

As has already been stated, the long term affects of a sentencing system which disproportionately impacts upon young people, is that it increases the likelihood of further and more serious offending in adulthood.

Case Study 12

Tony is a 16 year old Aboriginal young man who lives between town camps and youth refuges in Alice Springs. When he was 12 he was found semi-conscious from alcohol consumption. He was first referred to the Dept. of Family, Youth and Children's Services when he was thirteen and youth workers found him sleeping on a roof, as he was unable to stay with his mother at the women's shelter. He has been repeatedly referred to FYCS over the years.

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49 Section 53AG(2) *Juvenile Justice Act 1983*.
50 Northern Territory Correctional Services Annual Report 1997 – 1998.
51 Territorians for Effective Sentencing, Issue #3, September 1999.

Tony has a history of multiple substance dependency. In 1998 he attended court for several property offences. The matters were adjourned and set for hearing six months later. He was again referred to FYCS due to issues of neglect, lack of safe accommodation, self-harming behaviour and the subsequent risk of re-offending behaviour. Suicide ideation has been a constant in Tony's life and his alcohol consumption is increasing. He will turn 17 before he is sentenced, so he will serve his mandatory period of detention in an adult prison. Tony failed to attend court, and consequently a warrant was issued.

INDIGENOUS PEOPLE

It will come as no surprise that mandatory sentencing has a drastic and disproportionate effect on indigenous people in the NT and WA.

In the NT, Aboriginal people make up 25% of the overall population, and 32% of the population aged 12-25. However, as at 30 June, 1999, 76% of all adults in prison custody were Aboriginal.[52] The imprisonment rate for Aboriginal people in the NT was almost 10 times as high as that of non Aboriginal offenders, with a rate of approximately 1460 per 100 000 adults jailed, compared with 169 per 100 000 non indigenous adults. The most common offences for which indigenous people are imprisoned are those punishable by mandatory sentencing.[53]

According to a review conducted by the Northern Australian Aboriginal Legal Aid Service of all of its clients charged under mandatory sentencing since the legislation came into effect in March 1997, 70% of offences for which Aboriginal people were jailed were committed on Aboriginal communities. According to police crime clean up rate statistics, close to 100% of offences committed on Aboriginal communities are solved, compared to only 16% in metropolitan Darwin.[54] By virtue of policing practices on Aboriginal communities resulting in more offenders being apprehended, the effect of mandatory sentencing for minor property offences is having a far greater impact on Aboriginal people.

According to the same review, 79% of Aboriginal people jailed under mandatory sentencing were under the age of 25. Only 21% had completed secondary school, and 68% spoke English as a second language.

According to the Northern Territory Correctional Services, 73% of all juveniles in juvenile corrective institutions were indigenous. The most common offence for them was break and enter, a mandatory sentencing offence.

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52 Australian Bureau of Statistics, *Corrective Services in Australia, 4512.0*, June 1999.
53 Northern Territory Correctional Services Annual Report, 1997-1998.
54 Territorians for Effective Sentencing, Issue #3, September 1999.

WA is second only to the NT in terms of the percentage of adults imprisoned being of Indigenous origin. According to the most recent Australian Bureau of Statistics report on Corrective Services, 34% of all prisoners in WA prisons were of indigenous origin, although Aboriginal and Torres Strait Islanders made up only 3% of the population. WA also had the highest rate of indigenous imprisonment out of all jurisdictions (3 050 Indigenous persons per 100 000 adult population) and the highest ratio of Indigenous to non-Indigenous rates of imprisonment (indigenous rate of imprisonment was 22 times the non-Indigenous rate).[55]

In terms of young people, WA has the highest rate of indigenous youth detention of all jurisdictions (549.5 indigenous young people per 100 000 relevant population – 53% higher than the national average, and 28% higher than the state with the next highest, New South Wales (430.6)). Indigenous people make up over 55% of young people in juvenile detention in WA, yet are only 4% of the population of 10-17 year olds.[56]

From February 1997 until May 1998, Aboriginal children and young people constituted 80% of the mandatory sentencing cases in the Children's Court of Western Australia.[57]

Mandatory sentencing in both NT and WA has a disproportionate effect on indigenous people. Given the already high rates of incarceration of indigenous people in those jurisdictions, there is little doubt that the legislation in both cases fundamentally contravenes Recommendation 92 of the Royal Commission Into Aboriginal Deaths in Custody, which urged Governments to enact legislation which ensured that imprisonment and detention are sentencing sanctions only of last resort. The NT Government has continually held the Royal Commission's Recommendations in contempt, and has viewed them as irrelevant to the NT in spite of the, massive over representation of Indigenous people in Territory prisons and juvenile detention facilities.

Case Study 13

An 18 year old indigenous man was charged with theft of a $2.50 cigarette lighter. Feeling extreme remorse, on the advice of his father, he made a full and voluntary confession to police. He was sentenced to the mandatory minimum period of imprisonment of 14 days.

WOMEN

In 1997, the Northern Territory Legal Aid Commission conducted research which predicted that imprisonment rates for women could increase by at least six times the

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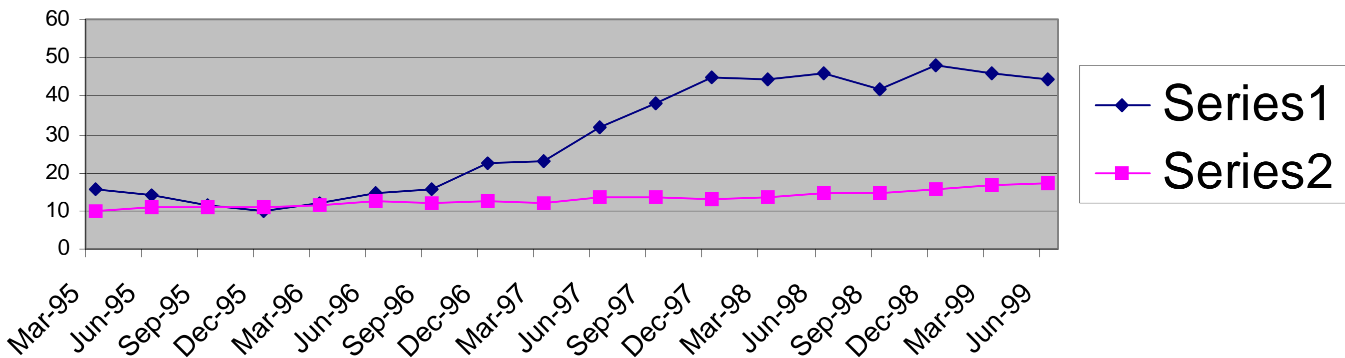
55 Australian Bureau of Statistics, Corrective Services, Australia, 4512.0, June 1999.

56 C.Carcach & G.Muscat*, Juveniles in Corrective Institutions Australia, 1981-1998*, Australian Institute of Criminology, 1999.

57 C.Stokes, *Three Strikes and You're In: Mandatory Minimum Sentences for Repeat Home Burglars in Western Australia*, unpublished Honours Thesis, University of Western Australia, 1998.

present rate at that time under mandatory sentencing, if offending rates for women committing property offences followed similar patterns to previous years. In 1994-95, a total of 25 women were imprisoned for property offences, but 206 women were convicted of offences to which mandatory sentencing now applies. If one estimated that 50% of the 158 women convicted of stealing during this period had only committed shoplifting

Average Daily Female Prisoner Population Rates in the NT (Series 1) and National Average (Series 2) per 100 000 adult female population



offences (which are not covered by mandatory sentencing), and once one takes into consideration the number of women convicted of break and enter, and unlawful use of a motor vehicle, a total of 127 women would have been imprisoned under mandatory sentencing.[58]

According to NT Court statistics, 67% of offences committed by women are property offences, compared to 53% of offences committed by men. Accordingly, the study predicted, mandatory sentencing in the NT would lead a marked increase in the rate of imprisonment of women in the NT.

This has been borne out by prison population statistics, as is indicated by the above table (Average Daily Prisoner Population Rates in the NT (Series 1) and National Average (Series 2) for women per 100 000 adult female population).
Source: Australian Bureau of Statistics, Persons in Prison Custody by Gender, 1995-1999.

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58 Hardy, J., *Mandatory Sentencing – Impact on Imprisonment Rates of Women in the NT*, November 1997, pp.2-3.

Case Study 14

Sara is a 19 year old Aboriginal young woman who moves between Alice Springs and bush communities. She has been accessing youth services since she was 15 years old. At her first referral to crisis accommodation she reported sexual abuse from a number of males. Her chronic petrol sniffing commenced at this time. Other issues Sara identified included family fighting, drinking, and lack of family available with whom to stay. Sara had been notified to Family Youth and Community Services as a child requiring care, on nine separate occasions.
Sara was charged with damage to property, after she broke a car window, because she was hungry and needed some money to buy food. She was sentenced to 14 days imprisonment under the Northern Territory's mandatory sentencing laws.

Case Study 15

A 28 year old female teacher with no criminal convictions disputed the quality of a hot dog at a Darwin fast food outlet. In a fit of temper, she poured water onto the till causing damage. She was fully co-operative with police, showed extreme remorse, pleaded guilty made full restitution for the damage. She was sentenced to 14 days imprisonment under the mandatory sentencing laws.

D. THE CONSITUTIONAL POWER OF THE COMMONWEALTH PARLIAMENT TO LEGISLATE WITH RESPECT TO EXISTING LAWS AFFECTING MANDATORY SENTENCING

Australia's federal constitutional system imposes different constraints upon the legislative power of the Parliaments of the Commonwealth the States and the Territories.

This submission contends that the requisite Constitutional power of the Commonwealth for this term of reference is established for both States and Territories by legal authority. The submission also proceeds on the basis that Commonwealth legislation with respect to existing laws concerning mandatory sentencing should have effect throughout all States and Territories of Australia.

In Part B of this submission, reference was made to the grave concerns raised by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in the *Seen and Heard* report.[59] The Commissions concluded at paragraph 19.64:

> The Inquiry considers these violations of international and common law norms so

[59] (1997) A.G.P.S., Canberra, pp. 554-555

serious that it recommends federal legislation to override the laws unless the Parliaments of Western Australia and the Northern Territory repeal them. [60]

Like the Commissions, we are confident that legal authority supports the competence of the Commonwealth Parliament to legislate to achieve the effect of a national prohibition on State and Territory mandatory sentencing legislation.

The Position in Respect of Territories

Section 122 of the Constitution empowers the Commonwealth Parliament to make laws for the government of Territories. That power extends to territories surrendered by a State. Such Territories are the Northern Territory[61] and the Australian Capital Territory.[62]

The nature of the power is not circumscribed in the same way by s.51 of the Constitution as it is for the States. In the recent family law case of Northern Territory v GPAO and JAW and Separate Representative, Gleeson CJ and Gummow J specifically discussed the law-making power of the Northern Territory Parliament and the Commonwealth Parliament and said:

> The [Northern Territory Self-Government Act 1978 (Cth)], which gives life to and sustains the Legislative Assembly and the laws made by it, is a law of the Commonwealth and, as such, itself is subject to express or implied repeal or amendment by subsequent Commonwealth laws[63]. In addition, a later law of the Commonwealth may expressly override an existing law made by the Legislative Assembly of the Northern Territory. Such a later law of the Commonwealth is a law made for the government of this Territory within the meaning of s 122 of the Constitution.[64]

Their Honours then provided an illustration of the use of Commonwealth law overriding Territory law which is both apposite to the current Inquiry and indicative of the Commonwealth Parliament's competence to legislate:

> The *Euthanasia Laws Act* 1997 (Cth) took two steps. It both removed the power of the Legislative Assembly otherwise conferred by s 6 of the Self-Government Act to make laws permitting euthanasia and provided that the enactment of the *Rights of the Terminally Ill Act* (NT) had no force or effect as a law of the

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60 Ibid, p.555

61 *Northern Territory Surrender Act* 1907 (SA) *and Northern Territory Acceptance Act* 1907 (Cth)

62 *Jervis Bay Territory Surrender Act* 1915 (NSW) and the *Jervis Bay Territory Surrender Act* 1915 (Cth)

63 See *Katinyeri – v – The Commonwealth* (1998) 72 ALJR 722 at 727-728, 740 –741; 152 ALR 540 at 547, 564-565

64 (D172 – 1997) [1999] HCA 8 decided on 11 March 1999 at para 54.

> Territory, except as regards the lawfulness or validity of anything done in accordance with it prior to the commencement of the Commonwealth law.[65]

Their Honours' reasoning on this point was not the subject of dissent from the other five members of the Court.

We would therefore submit that s.122 of the Constitution provides the necessary power for an Act of the Commonwealth to override and prohibit mandatory sentencing laws in the Territory. We submit that it would be desirable to follow the statutory structure seen in the *Euthanasia Laws Act* 1997 (Cth).

States

The Commonwealth's legislative power in respect of the States is not plenary. The most relevant limitation for the purposes of this submission are the declared legislative powers found in s.51 of the Constitution. The most relevant source of power for Commonwealth legislation in respect of mandatory sentencing is placitum 51(xxix), the external affairs power.

In what is known as The Tasmanian Dams Case[66] the High Court by a majority established the following basic Constitutional principle - that it is competent for the Commonwealth Parliament to legislate to implement any international obligations arising from a *bona fide* convention which a Commonwealth Government has entered into, "*notwithstanding that the subject matter of the treaty is of an entirely domestic nature*.".[67]

We submit that the treaties discussed in Part B of this submission [68]are indisputably *bona fide*,[69] and that the domestic nature of Commonwealth legislation to override mandatory sentencing law does not compromise the competence of such legislation

Subsequent cases have drawn attention to the need for the Commonwealth legislation to conform to the terms of the treaty,[70] but we submit that this caveat does not go to the question of Commonwealth legislative power in and of itself.

Section 51(xxix) is a valid source of power providing the legislation is drafted appropriately.

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65 Ibid.

66 (1983)158 CLR 1

67 The quoted expression in italics was used by Dawson J in *Queendland – v – Commonwealth* (1989) 167 CLR 232 at 247 referring to the Dams case in which his Honour dissented.

68 The International Covenant on Civil and Political Rights and The Convention on the Rights of the Child.

69 See *B and B* (1997) FLC 92-755 at paras.10.11 – 10.14.

70 *Richardson – v – The Forestry Commission* (1987-8)164 CLR 261.

The Effect of Commonwealth Legislation Where There is Existing State or Territory Legislation

Legislative drafting is of considerable importance, we would submit, to ensure that the Commonwealth Parliament's power is realised and insulated from inappropriate challenge.

The mechanism by which a law of the Commonwealth prevails over a law of a State is governed by s.109 of the Constitution. That section provides that the Commonwealth law shall prevail *" to the extent of the inconsistency"* with a State law. The test is whether the law of the Commonwealth has "covered the field". Where the law of the Commonwealth is within Constitutional power, that question can be answered by the inclusion of an express intention in the law to do so.[71] Otherwise, and less certain, the Court may infer an intention to "cover the field.

The situation in respect of a law of a Territory differs. Where, as with the *Euthanasia Laws Act* 1997 (Cth), the Territory law is specifically overridden, no issue arises. Where, instead, the effect of the Commonwealth law has to be discerned due to a dispute, as was the case in Northern Territory v GPAO and JAW and Separate Representative, the observations of Gleeson CJ and Gummow J should be noted. Their Honours said:

> Section 122 of the Constitution supports the stipulation by the Parliament, in the law by which a territorial legislature is established, of the criteria which determine concurrent operation of territorial laws and other laws which are made by the Parliament and are in force in the Territory concerned. Section 28 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) ("the ACT Self-Government Act") is an example. Section 8 thereof establishes the Legislative Assembly for the Australian Capital Territory and s 22 confers upon that body the power to enact laws for the peace, order and good government of that Territory. By s 28, a provision of a law made by the Assembly has no effect to the extent that it is inconsistent with a law in force in the Australian Capital Territory, not being an enactment of the Assembly or a subordinate law. However, such a provision "shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law" (s 28(1)). It will be apparent that s 28 operates not as a denial of power otherwise conferred by s 8, but as a denial of effect to a law so made "to the extent" of its inconsistency. To that extent the analogy with s 109 will be apparent. However, the criterion for inconsistency - incapacity of concurrent operation - is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth.[72]

Their Honours then considered the situation in the Northern Territory and said:

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[71] *Western Australia – v – Commonwealth* (1995) 128 ALR 1

[72] (D172-1997) [1999] HCA 8 decided on 11 March 1999 at para 60, footnote omitted.

> There is no provision in the [Northern Territory Self-Government Act 1978 (Cth)] which corresponds to s 28 [of the ACT Self-Government Act]. In a case such as the present, the task is that indicated above. It is to ascertain whether it is necessarily implied by the enactment… [73]

Having regard to the matters raised in this Part of the submission, we submit that the Committee's concern should lie elsewhere than with the Constitutional power of the Commonwealth to legislate with respect to existing laws affecting mandatory sentencing.

We would submit to the Committee that it should find that legal authority supports the Constitutional power to legislate and that the Committee should emphasise the importance of the Commonwealth Parliament enacting a law that:

- Expressly relies upon both the Territories power (s.122) and the external affairs power (s.51(xxix));
- Expressly identifies the international treaties upon which the external affairs power draws its validity;
- Expressly identifies the field to be covered;
- Expressly precludes the operation of State and Territory laws in the identified field;
- Is drafted to take account of the observations of Gleeson CJ and Gummow J cited above, as to the different legislative schemes of the Northern Territory and the Australian Capital Territory, and is drafted to also considers any similar factors in other Territories of the Commonwealth.

We would conclude this Part of the submission with the following two observations.

First, so far as children's rights in particular are concerned, Australia's First Report Under the Convention on the Rights of the Child began with the following statement:

> Successive Australian Governments have acknowledged the rights of children as fundamental human rights.". [74]

Paragraphs 5 and 6 of the Report then contained the following statements:

> 5. In addition to the rights provided under the Human Rights and Equal Opportunity Act 1986, the provisions of the Convention are implemented by a wide range of Federal, State and Territory legislation, policies, and programs which affect children. This includes … juvenile justice.
>
> 6. Australia does not propose to implement the Convention on the Rights of the Child by enacting the Convention as domestic law. **The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the convention prior to**

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[73] Ibid at para 61.
[74] December 1995, Attorney-General's Department, Canberra, p.1

ratification. …" (emphasis added).[75]

This Part of the submission has sought to demonstrate that the Commonwealth has the power to apply that approach to mandatory sentencing through application of its legislative power and correct the violations of CROC identified in Part B above.

The second concluding observation for this Part of the submission addresses what we perceive to be a political wariness in the use of Commonwealth legislative power having regard to critique about Commonwealth intrusion into so-called State and Territory matters.

In Western Australia v Commonwealth, a majority of the high Court explained the effect of overriding Commonwealth legislation that precluded the operation of State laws saying:

> Such a state law is rendered inoperative not because the Commonwealth law directly invalidates the State law but by force of s109 of the Constitution…[76]

It would be naïve to ignore that there are some sensitivities as to use of the Commonwealth Parliament's legislative power. But another reality should also not be forgotten. A law of the Commonwealth crafted in conformity with constitutional interpretation is an element of the safeguards within our Constitution, and for the purposes of the people liable mandatory sentencing laws, those constitutional safeguards extend to them too.

CONCLUSION

For many critics of this review into mandatory sentencing, the question of criminal law sentencing is seen as a responsibility of the various State and Territory Governments, and an issue in which the Commonwealth has no right to intervene. Whilst under the constitution, and more particularly, under convention of Federal-State relations, there is considerable force in this argument, the issue of mandatory sentencing raises issues that go much deeper than the notion of "State rights" or "Territory rights". The issues go to the very heart of principles which have been enshrined in international conventions to which Australia is a signatory, which refer to the fundamental dignity and worth of human beings. The issues go beyond the autonomy of State or Territory Governments to determine their own criminal sentencing guidelines, but extend to the preservation of essential elements of the administration of justice, such as the independence of judicial officers, the ability of judicial officers to exercise appropriate discretion, and the right of convicted persons to have sentencing decisions reviewed by an appeal process.

Accordingly, whilst there may be a tangible political expediency for those Governments

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[75] Ibid, p.2.
[76] (1995) 128 ALR 1 at 48.

which have sought to capitalise on a general community fear of perceived crime waves and lawlessness, the enacting of mandatory sentencing laws has served to attract significant criticism for the nation as a whole in international human rights forums. The United Nations Committee on the Convention of the Rights of the Child, the International Commission of Jurists, Amnesty International and Defence for Children International are just some of the international organisations which have been critical of the human rights implications of mandatory sentencing.

Accordingly, as the standing of Australia as a nation in international human rights forums has been called into question as a result of mandatory sentencing, the issue can no longer be seen as purely an issue for Western Australia or the Northern Territory. It is an issue which is of concern to all State and Territory Governments, as well as the Federal Government. It warrants the attention of the Federal Government to actively work towards the repealing of existing mandatory sentencing laws, and ensuring that no other jurisdiction passes similar legislation. The Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill is an appropriate vehicle by which this can be achieved.

Whilst it would be ideal for Western Australia and the Northern Territory to repeal their respective mandatory sentencing systems, both Governments have displayed considerable stubbornness and belligerence to the concerted efforts of human rights organisations lobbying for such repealing legislation. Indeed, Federal intervention to encourage or coerce the efforts to convince the Governments of the NT and WA to take such a step would assist in such efforts. Accordingly the issue of mandatory sentencing should be entered as a running agenda item on the Standing Committee of Attorneys General.

This submission has sought to crystallise the key concerns regarding mandatory sentencing. Underlying the key concerns of the principles enshrined in the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the principles of judicial independence and discretion, and the increase in imprisonment, juvenile detention and recidivism rates, is the fact that mandatory sentencing produces results which conflict with basic notions of justice, decency and fairness. Nowhere is this more clear than in the fifteen case studies which are interspersed throughout this submission. When society accepts mandatory imprisonment and detention as an appropriate disposition in circumstances of hardship, neglect and poverty, it has admitted its failure to provide a fair and just environment for all its citizens. Accordingly, we are all demeaned by such a response.