



LAW COUNCIL  
— OF —  
AUSTRALIA

## **THE MANDATORY SENTENCING DEBATE\***

***September 2001***

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\* *Note: This paper is based on a paper prepared in March 2000 by the then President of the Law Council of Australia, Dr Gordon Hughes. It has since been updated to include important developments that have occurred since that time.*

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## 1 INTRODUCTION

This paper sets out the views of the Law Council of Australia in relation to the appropriateness of mandatory sentencing laws.

The Law Council is opposed to mandatory sentencing because, except in very limited circumstances, it excludes the exercise of judicial discretion.

This paper also sets out the Law Council's views in relation to available options and relevant obligations for the Commonwealth government arising under international law.

## 2 LEGISLATION

### 2.1 *Western Australia*

The law came into effect on 14 November 1996 through amendments to the *Criminal Code*.

Section 401(4) states, in effect, that a person convicted for a third time of entering a home without permission and who commits an offence in "circumstances of aggravation", or who intends to commit such an offence, must be sentenced to at least 12 months' imprisonment.

Section 400(1) defines "circumstances of aggravation" as including:

- being armed with a dangerous weapon;
- being in company with other persons;
- causing bodily harm;
- threatening to kill or injure.

The section is specifically extended to juveniles. If the offender is a young person (as defined in the Young Offenders Act 1994), the offender may be sentenced either to at least 12 months' imprisonment or to a term of at least 12 months' detention (as defined in the Young Offenders Act).

The sentencing of young offenders is effectively governed by the combined operation of the Criminal Code and the Young Offenders Act 1994. Section 401(5) of the Criminal Code provides that a court shall not suspend a term of imprisonment under Section 401(4). Because Section 401(5) makes no reference to detention (referred to in the Young Offenders Act), it has been held that the court retains discretion in respect of a period of detention. Courts have proceeded to impose the alternative sentence of an intensive youth supervision order, which when combined with a period of detention, is known as a Conditional Release Order ("CRO").

A decision in 1997 by the President of the Children's Court in Western Australia in *The Police vs. DCJ*, Magistrates decided that in limited circumstances a Conditional Release Order ("CRO") for young offenders is an alternative to a mandatory jail term. The mandatory jail term is reactivated if the CRO is breached. It is estimated that 10-15% of mandatory sentencing related matters involving young offenders attract a CRO.

## **2.2 Northern Territory**

*[Note: The newly elected Northern Territory Government has indicated that it intends to repeal mandatory sentencing laws. This is discussed further in **Section 6.8.**]*

The relevant laws came into effect on 8 March 1997. Two Acts are involved – the Sentencing Act 1995 and the Juvenile Justice Act 1983.

### **2.2.1 Sentencing Act 1995**

The Act applies to persons aged 18 and older.<sup>1</sup> Section 78A provides, in respect of certain property offences, the following mandatory sentences:

- first offence – 14 days' jail;
- second offence – 90 days' jail;
- third offence – one year's jail.

In June 1999, the Sentencing Act was amended to extend mandatory sentencing to cover second offences of assault and first offences of sexual assault. This applies to adults. A jail term is mandatory, but no minimum sentence is prescribed.

The mandatory sentencing provisions do not apply in "exceptional circumstances". The "exceptional circumstances" exception was introduced in June 1999 but only applies to a single first adult property offence and is limited in its applicability because four criteria have to be fulfilled, namely:

- the offence must have been of a trivial nature;
- the offender must have made reasonable efforts to make full restitution;
- the offender must be of otherwise good character with no mitigating circumstances (which do not include intoxication) which reduce the extent to which the offender is to blame;
- the offender must have cooperated with law enforcement agencies.

### **2.2.2 Juvenile Justice Act 1983**

The relevant section is section 53AE. The mandatory sentencing provisions only apply if there is at least one prior conviction. A second offence attracts mandatory imprisonment of at least 28 days.

Under section 53AE(2)(c), a court can order a juvenile to participate in a program, generally referred to as a "diversionary program", which if satisfactorily completed can avoid the imposition of a sentence.

Once a young person has been referred to a diversionary program, he or she cannot be referred to such a program again, thus reviving the mandatory detention provisions for future convictions. Diversionary programs are discussed further in **Section 6.6.**

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<sup>1</sup> Note that 17 year olds had been treated as adults in the Northern Territory. This was increased to 18 as part of the agreement between the Commonwealth and Northern Territory made in July 2000 - see **section 6.6.1.**

Under both Northern Territory Acts, mandatory sentencing applies to "property offences". "Property offences" are defined in each Act as including:

- theft (irrespective of the value of the property, and including theft when the offender was lawfully on premises);
- criminal damage;
- unlawful entry to buildings;
- unlawful use of a motor vehicle;
- receiving stolen goods (regardless of value);
- assault with intent to steal;
- robbery (armed or unarmed).

### **3 THE EFFECTS OF MANDATORY SENTENCING**

#### **3.1 Impact**

##### *3.1.1 General*

It is difficult to gather useful statistics about the impact of mandatory sentencing. In 1999, the Law Society of the Northern Territory made the following points:

- Collation and analysis of available data is vital in assessing the success or failure of mandatory sentencing;
- The ability to evaluate the impact and costs of mandatory sentencing is hampered by the Northern Territory government's failure to provide information in the form of crime statistics;
- The accessing of information in the Northern Territory is further hampered by the absence of Freedom of Information legislation;<sup>2</sup>
- Although statistics are now being collated by the Chief Minister's Department in relation to court time involved with mandatory sentencing, there is no previous data with which to make a reliable comparison;
- There are no readily available statistics or assessment of recidivism regarding mandatory sentencing.

One problem in assessing the impact of mandatory sentencing has been the fact that imprisonment statistics are based on the offence, and do not record whether the incarceration is the result of a mandatory sentence. However, the following facts are known about imprisonment rates generally:

- The Northern Territory and Western Australia have the two highest imprisonment rates in Australia;
- According to the Australian Bureau of Statistics, as at 30 June 2000 the imprisonment rate in the Northern Territory was 458.1 per

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<sup>2</sup> The NT ALP Government, elected in August 2001, has announced that it intends to introduce Freedom of Information Legislation.

100,000 and in Western Australia it was 218.4 per 100,000, compared to a national imprisonment rate of 147.7 per 100,000;

- In late 1997 the Northern Territory prison population had increased by 42% since mandatory sentencing was introduced;
- According to the National Convenor of Defence for Children International, in 1999 over 50 children in WA had served or were serving 12 month mandatory sentences.

### 3.1.2 *Impact on Particular Groups*

Statistics on the impact of mandatory sentencing on juveniles reveal the following:

- According to the Northern Territory Correction Services Annual Report 1997/1998, from 1997 to 1998, the daily average number of juvenile detainees in the Northern Territory increased by 53%, the most common offence being breaking and entering (a mandatory sentencing offence);
- Over 50 young people in Western Australia have served or are serving a 12 month mandatory sentence;
- Between 1997 and June 2000, 92 juveniles were convicted under the WA three strikes law. Of these, 81 were juveniles sentenced to detention. Eight were given conditional release orders;
- In 1999 Indigenous children constituted 80% of cases facing mandatory detention charges before the Children's Court of WA;
- Between 1996 and 2000, the national juvenile imprisonment rate per 100,000 of population dropped steadily from 37.66 to 31.46. During the same period, the rate in the Northern Territory fluctuated between 88.34 and 60.7, with a high of 103.59 in 1998. In Western Australia, the rate fluctuated between 51.95 and 51.9, with a high of 62.72 in 1998.

Many critics of mandatory sentencing laws have noted that they appear to impact most harshly on Indigenous offenders. In the Northern Territory, for example, shoplifting (a predominantly white, middle class crime) is not covered by mandatory sentencing provisions.

- On 31 December 2000, 77% of juveniles in detention in the Northern Territory and 64% in Western Australia were Indigenous. This compares to a national average of 40%;
- In December 1998, Indigenous prisoners represented 73% of the Northern Territory adult prison population, 32% of the Western Australian adult prison population and 19% of the prison population nationally;
- In 1999, 34% of all prisoners in Western Australian were of Indigenous origin, compared with making up 3% of the general population;
- Mandatory sentencing laws have a disproportionate effect on Indigenous women. There was a 223% increase in the number of

Indigenous women incarcerated in the first year of operation of the legislation in the Northern Territory. At 30 June 1999, Indigenous women made up 91% of all women prisoners in the Northern Territory;

- In Western Australia, in the four months after the legislation came into force, an average of seven young people per month received mandatory sentences and since then on average one young person per month has received a mandatory sentence.

Mandatory sentencing also has a particularly unjust impact on those with mental illness or intellectual disabilities. The idea of mandatory sentencing is in part based on the principle of deterrence. A deterrent sentence is not usually appropriate in dealing with a person with mental illness or intellectual disability. The Disability Discrimination Legal Service also gave the following evidence to the Senate Inquiry into the *Human Rights (Mandatory Sentencing of Property Offenders) Bill 2000*:

- Mandatory sentencing exacerbates difficulties faced by the disabled when dealing with the justice system by preventing the court from taking into account the person's disability;
- Up to 50% of indigenous offenders may have a hearing impairment;
- In cases where a person has an intellectual disability, punishment can be meaningless.

### **3.2 Anomalous and Unjust Sentences**

Numerous examples have been cited, including:

- 14 days' jail for receiving a stolen \$2.50 can of beer;
- 14 days' jail for admitting to police the theft of a \$2.50 cigarette lighter;
- one year for stealing a \$15 towel;
- 90 days' jail for stealing 90c from a motor vehicle;
- one years jail (in Perth) for an eleven year old boy from a remote community in the far north of WA who broke into houses for food; and
- in the case of a child, 28 days for being a passenger in a stolen vehicle.

## **4 THE ARGUMENTS SURROUNDING MANDATORY SENTENCING**

### **4.1 Overview**

Objections to mandatory sentencing have included the following:

- Discretion is removed from the courts;
- The laws target vulnerable and disadvantaged groups;
- Penalties are sometimes disproportionately harsh;

- There are significant economic costs associated with large increases in prison and detention centre population;
- The laws do not deter criminal activity;
- The Joint Standing Committee on Treaties was critical of mandatory sentencing in a 1998 report, noting in particular that it restricted the courts' capacity to ensure that punishment is proportionate to the seriousness of the offence and noting further that minimum sentences contravened the Convention on the Rights of the Child (CROC) in the case of juveniles;
- The National Inquiry into Children in the Legal Process, jointly published by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) in 1997, criticised the NT and WA Laws because, in contravention of ICCPR and CROC, the laws violated the principle of proportionality in sentencing, did not represent a sentence of "last resort" and the sentences were not reviewable by a higher court;
- Various other studies have criticised the laws for targeting jurisdictions with a high Indigenous population, for being economically unjustifiable and for underpinning populist or cynical political opportunism.

## **4.2 A Breach of Australia's International Obligations**

Two international treaties are commonly cited as containing provisions inconsistent with mandatory sentencing laws.

### *4.2.1 International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) entered into force for Australia on 13 August 1980, and prohibits arbitrary detention (Article 9) and provides that prison sentences must in effect be subject to appeal (Article 14).

### *4.2.2 Convention on the Rights of the Child*

The Convention on the Rights of the Child (CROC) was ratified by Australia on 17 December 1990 and came into force on 16 January 1991. Ratification was preceded by a detailed process of consultation with State and Territory governments and was the subject of unanimous agreement by all Australian governments.

CROC applies to persons under the age of 18. It requires that in dealing with children, courts should have the best interests of the child as the primary consideration (Article 3), detention must be used as a last resort and for the shortest appropriate period (Article 37) and sentences must be proportionate to the circumstances of the offence and must be subject to appeal (Article 40).

There is judicial support for the contention that Australia is in breach of its international obligations. In *Ferguson vs Setter and Gokel*, Kearney J of the Northern Territory Supreme Court expressed the opinion that the mandatory sentencing provisions introduced into the *Juvenile Justice Act* were "directly contrary to article 37(b) of the



Convention on the Rights of the Child", even though the laws were legally valid in the Northern Territory.

#### 4.2.3 Academics' Opinions

The Western Australian and Northern Territory governments submitted to the Senate Committee inquiry (discussed below) that mandatory sentencing laws in their respective jurisdictions did not infringe CROC in particular.

By way of rebuttal, a letter to the Prime Minister on 27 February 2000, signed by 34 respected Australian legal academics, stated that:

*It is our opinion that the impact of Western Australian and Northern Territory mandatory sentencing laws amounts to the violation of Australia's obligations under CROC, in particular those provisions that provide:*

- *the best interests of the child shall be the primary consideration in actions by courts of law and legislative bodies (Article 3);*
- *the detention of a child shall be used only a measure of last resort for the shortest appropriate period of time (Article 37);*
- *a variety of dispositions shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence (Article 40).*

Points made in an accompanying submission included the following:

- Article 3 of CROC provides that in all actions concerning the child, the best interests of the child must be a primary consideration. The Western Australian and Northern Territory governments had submitted to the Senate that their mandatory sentencing laws contemplated an alternative valid consideration, namely, the protection of the community. The academics concluded that "any threat posed to the community by a child who is a property offender is insufficient to displace the best interest of the child as the primary consideration in sentencing";
- Articles 37 (b) and 40 (iv) of CROC provide that detention of a child must be a measure of last resort and for the shortest appropriate period of time. The Western Australian and Northern Territory Governments submitted to the Senate Inquiry that mandatory sentencing laws were an appropriate and proportionate response to the "worst case" offender, but in the academics' opinion, the mandatory sentencing laws in those jurisdictions were the "first resort for relatively minor offences" and that it was "preposterous to suggest that a 15, 16 or 17 year old child who, while hungry, steals food from a house is a worst case offender". It was also "indefensible" for the Western Australian and Northern Territory governments to argue that the mandatory sentencing laws were a minor part of a larger "beneficial" juvenile justice regime, as mandatory sentencing ignored both the circumstances of an individual child and the circumstances of a particular offence;
- The submissions by the Western Australian and Northern Territory governments that they had a popular mandate to implement mandatory sentencing laws overlooked the obligations of the

Federal government to implement the terms of treaties to which it was a party. Article 27 of the *Vienna Convention on the Law of Treaties* provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Article 50 of *ICCPR* provides that the provisions of the Covenant shall extend to all parties of federal states without any limitations or exceptions, and popular sentiment in one state or territory is no justification for inaction by the Federal government for implementing conformity with international human rights standards in all parts of Australia;

- The detention or imprisonment of a child is "cruel, inhuman or degrading punishment" where an insignificant amount of property was involved and contrary to Article 37(a) of CROC which provides that no child should be subjected to "cruel, inhuman or degrading treatment or punishment";
- Article 37(b) of CROC provides that no child shall be deprived of his or her liberty "unlawfully or arbitrarily". The Western Australian government argued that this provision was not infringed because the criteria for the detention were contained in legislation. The academics were of the view that the mandatory detention of a child would always be arbitrary, in that it would never meet the criterion of appropriateness;
- The academics pointed to other international obligations which may have been breached including the *Convention on the Elimination of all Forms of Racial Discrimination (CERD)* which prohibits acts which have a discriminatory purpose or effect, Article 6 of CROC which provides that a child has the inherent right to life, Article 30 of CROC which requires States to take steps to ensure that indigenous children are able to enjoy their own culture with other members of their community, and Article II of the *Conventional on the Prevention and Punishment of the Crime of Genocide* which defines "genocide" as any one of a number of acts committed with intent to destroy a racial group including "forcibly transferring children of one group to another group".

### **4.3 The 'Popular Mandate' Argument**

A common justification for mandatory sentencing amongst its supporters is that the electorates in the respective jurisdictions of the Northern Territory and Western Australia have endorsed it at election time.

To this end, Mr Burke released on 8 March 2000 the results of a public opinion poll, conducted outside the Northern Territory (but commissioned by the Northern Territory Government), which concluded that 58.7% of respondents were in favour of mandatory sentencing.

The poll was flawed because of inaccurate background information that accompanied the questionnaire. The background information stated that mandatory sentencing applied to juveniles after 3 offences, when in fact it applies after 2 offences; by stating that juveniles are persons aged between 15-17 years, it implied that 17 year olds were

juveniles when in fact they are treated as adults under the *Sentencing Act* in the Northern Territory; and the background information failed to emphasise the triviality of some offences which can result in mandatory sentencing.

Whether or not the poll was an accurate reflection of public opinion is in any event only peripheral.

As pointed out in the academics' opinion referred to above, endorsement of this nature does not necessarily override legal obligations to which the jurisdiction itself might otherwise be bound. Furthermore, some issues are of national significance and "popular opinion" must sometimes be gauged by having regard to the views of the broader Australian community.

In the context of the national debate on this matter in early 2000, a succession of newspaper editorials discussed mandatory sentencing.

On 12 February 2000, *The Australian* stated in its editorial:

*The issue is not about popularism, it is about decency in a civilised society. There can be no doubt that Aborigines are the victims, if not the targets of [mandatory sentencing] laws and tactics, in both the Territory and Western Australia. The laws do nothing to address the underlying issues of aboriginal land rights, health, welfare and crime... Mandatory sentencing for juveniles is sufficiently damaging to Australia's international reputation, never mind being an issue of absolute morality, for the [Federal] Government to intervene.*

On 14 February 2000, *The Sydney Morning Herald* in its editorial described the Northern Territory mandatory sentencing laws as "dangerous and requiring repeal", adding that:

*Just as it was necessary for Federal Parliament to use its constitutional power to override the Northern Territory Assembly on euthanasia, so too is it necessary now to do the same to end mandatory sentencing before more needless harm is done.*

On 15 February 2000, *The Courier Mail* stated that the Northern Territory mandatory sentencing law was so bad that the Federal government should act, adding that:

*Mandatory sentencing laws in the NT are most likely contrary to several international treaties to which Australia adheres such as those concerning the rights of children and imprisonment generally. That being so, the Howard government has the power as well as the duty to overturn any such laws applied by territories or states anywhere in Australia. It should do so.*

The same day, the *Advertiser* stated in its editorial that if the Northern Territory legislature would not reverse its mandatory laws, "the Federal Government must intervene".

On 16 February 2000, *The Australian* stated in its editorial:

*What is ... mystifying in a supposedly humane society .... is the hesitation of the Federal government to intervene, as it has the power to do, in the Northern Territory.*

On 16 February 2000, *The Canberra Times* in its editorial described mandatory sentencing as "an affront to the notion that punishment should fit the crime", adding that the governments of Western Australia and the Northern Territory should be asked to explain "exactly why they find it necessary to implement laws which would be regarded

as intolerable and unjust in most other parts of the country". The editorial went on to answer the rhetorical question as follows:

*The answer if honestly given, would probably be that such laws, which allow politicians to give the impression that they are serious about tackling crime, are only 'necessary' because the jurisdictions which resort to them have comprehensively failed to tackle the social problems which lead to crime in the first place: poverty, lack of education, joblessness, drug abuse and so on.*

On 17 February 2000, *The Sydney Morning Herald* stated:

*The NT and WA laws reflect a public perception that very strict punishment is necessary to deal with persistent criminal offenders, among whom juvenile aborigines are seen as especially threatening. Those defending mandatory sentencing laws stress, accurately, the strong community support for them. Yet that is no answer to the complicated question of how best to deal with the problems these laws are supposed to address... popular feeling and emotion are not a sound basis for deciding how justice should be done when dealing with all the varieties of criminal behaviour.*

On 18 February 2000, *The Age* stated in its editorial:

*The Federal government must intervene promptly in NT where it has the power. It should also examine whether its obligations to international human rights conventions allow it to use its external affairs powers to validate the laws in WA.... There are political difficulties ... yet there are fundamental issues of human rights that override any of these concerns. It is time for political leadership to be shown.*

On 18 February 2000, *The Daily Telegraph* described the Northern Territory's mandatory sentencing laws as "obnoxious" and then added:

*From time to time, issues emerge upon which moral judgements must be made. In this instance, it is up to the Prime Minister to put the business of politics to one side and make a simple decision on the rights and wrongs of the issue.*

On 10 March 2000, *The Courier Mail* stated in its editorial:

*The problems raised by mandatory sentencing will not go away if Mr Howard prevents the Commonwealth Parliament from overturning the mandatory sentencing laws ... (T)he issue is not about public opinion which, for example, was strongly supportive of Northern Territory's euthanasia law that was overturned by the Federal Parliament with Mr Howard's consent. The law here is a bad law, not just because it imposes very heavy penalties but also because it does not allow judges to take account of individual circumstances of people found guilty of trivial criminal actions. It is worse than silly, it is draconian, illiberal and at odds with Australia's human rights obligations and several international treaties. It should be struck down.*

#### **4.4 Criticisms by Prominent Judges**

Again, in the context of the national debate, a number of prominent judges expressed their condemnation of mandatory sentencing, including the following:

On 17 February 2000, former High Court Chief Justice, Sir Gerard Brennan stated:

*A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral... Sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty.*

On 18 February 2000, the Chief Justice of the Family Court of Australia, Alistair Nicholson stated that he was ashamed of mandatory sentencing laws:

*I'm ashamed of our country that these breaches of human rights can occur and nothing is being done about them.*

On 8 March 2000, seven former High Court judges were cited in the *Herald Sun* as being opposed to mandatory sentencing – Sir Gerard Brennan, Sir Ronald Wilson, Sir Ninian Stephen, Sir Anthony Mason, Sir Harry Gibbs, Sir Daryl Dawson and John Toohey.

On 10 March 2000, Justice John Dowd of the New South Wales Supreme Court published an article in *The Australian Financial Review* in which he opposed mandatory sentencing.

On 16 March 2000, four judges of the New South Wales Court of Appeal – Justices Fitzgerald, Stein, Beazley and Wood – wrote a letter to *The Sydney Morning Herald* condemning mandatory sentencing, stating, inter alia:

- it is unjust to imprison offenders without regard to their personal circumstances, life experience, prospects of rehabilitation or other, more suitable, sentences.
- It is racist (and cowardly) to enact and implement laws which apply most harshly to a disempowered minority.

The statement by the NSW judges was subsequently condemned by the Prime Minister and Commonwealth Attorney General as being unduly politicised.

#### **4.5 The Reaction of the Legal Profession**

The mandatory sentencing laws of the Northern Territory and Western Australia have been condemned by lawyers across the country. The views of a number of law associations were expressed in submissions to the Senate Committee Inquiry. Some of these are summarised below. It must be emphasised that the law societies and bar associations mentioned below are not "special interest" groups in relation to the rights of criminals, indigenous people, unprivileged people or political philosophy. In each case, they have expressed an objective opinion as to the utility of mandatory sentencing and its effect on the justice system.

##### *4.5.1 Law Council of Australia*

Noting that mandatory sentencing has a particularly adverse effect on Indigenous people, the Law Council's submission stated, inter alia:

*The Law Council is concerned that mandatory sentencing legislation impinges on the discretion afforded to judicial officers in sentencing matters. Mandatory sentencing legislation removes the discretion of courts to decide a penalty which fits the individual circumstances of the crime and the offender. In addition, it places an unfair onus on law enforcement officers and serves to distort the role of law enforcement officers.*

##### *4.5.2 The Law Society of Western Australia*

The Law Society complained that WA's mandatory sentencing overrode the normal discretion available to a sentencing authority otherwise applicable at both common law and under the *Sentencing Act* 1995 (WA) and this was of particular concern in the case of juveniles "when it is clear at law that the sentencing discretion should be exercised in a more liberal way when dealing with offenders under the age of eighteen".

One point emphasised in the Law Society's submission was that the only facilities for detaining juveniles sentenced pursuant to Section 401 (4) are in Perth. As a result, juvenile offenders living in country communities are particularly prejudiced when sentenced under the mandatory sentencing provisions. Visiting access by families is either not possible or severely limited.

#### 4.5.3 *The Law Society of the Northern Territory*

Described mandatory sentencing as "an unwarranted attack on the independence of the judiciary", the LSNT noted with concern that the laws represented "the shifting of discretion away from trained judicial officers to police and prosecutors". The Law Society was also concerned at the potential loss of community confidence in the justice system as a result of perceived unfair or arbitrary sentences being imposed.

Specific concerns advanced by the Law Society included:

- The erosion of judicial discretion, noting that "an independent judiciary is internationally recognised as a cornerstone of democracy";
- The disparity in sentences for offences which are or are not subject to mandatory sentencing;
- The financial implications of mandatory sentencing;
- The impact on court time of mandatory sentencing which encourages most offenders to plead "not guilty";
- The increase in the prison population, noting that it is estimated to cost \$2,057.16 to imprison an adult for a minimum of 14 days and \$9,285.36 to detain a juvenile for 28 days;
- The reality that incarceration of offenders often "results in better trained criminals";
- The social fact that in Indigenous communities, the rate of imprisonment "hampers the health and education process, while shattering the social fabric of their society"; and
- The absence of available proof that mandatory sentencing deters crime (and indeed the findings to the contrary of studies in the United States).

#### 4.5.4 *The New South Wales Bar Association*

Describing mandatory imprisonment for minor offences as being "repugnant to basic principles of justice", the Bar Association noted, in particular, the following negative implications:

- *sentences which will sometimes be too heavy and sometimes too light, thereby reducing consistency of sentencing, not increasing it;*
- *there will be an increase [in] the number of persons sentenced to full-time imprisonment and the length of time they spend in prison;*
- *more accused persons will plead not guilty, leading to greater cost and delay;*

- *prosecutors will have greater power to determine sentencing outcome (replacing judicial discretion with prosecutorial discretion) and there will be a consequent increase in American-style plea bargaining;*
- *the independence of the judiciary, standing between the citizen and the State, will be diminished.*

The Bar Association urged that greater emphasis be given to rehabilitation, with magistrates being given alternatives to full-time imprisonment such as weekend detention, home detention, fines and community service.

#### 4.5.5 *The Victorian Bar Council*

The Victorian Bar Council condemned mandatory sentencing, noting that:

*Mandatory sentencing expressly offends the independence of the judiciary, and the principle that a judge should have a wide discretion as to the appropriate sentence in each particular case. It offends the principle that decisions of inferior courts should be subject to review by courts with appellate jurisdiction. For these reasons, mandatory sentencing legislation effectively guarantees that, to a greater or lesser extent, sentences will be inappropriate in each particular case.*

#### 4.5.6 *The Law Society of New South Wales*

The Law Society of New South Wales expressed its "strong opposition" to mandatory sentencing for a variety of reasons including:

- The removal of the "wisdom and balance of the judiciary from the sentencing process" and the undermining of the judiciary's role in considering aspects of the offence or the particular characteristics of the offender;
- The possibility for causing perverse jury verdicts;
- The inability to consider more appropriate alternative sentences;
- The removal of incentive for prisoners to be on good behaviour;
- The fact that mandatory sentencing in the NT and WA specifically targets vulnerable and disadvantaged groups, provides penalties which are unduly harsh given the sometimes minor nature of the offences and the fact that there are negative economic implications in large increases in prison and detention centre population; and
- Evidence that mandatory sentencing laws are ineffective in deterring criminal activity.

### **4.6 *National Children's and Youth Law Centre (NCYLC)***

The National Children's and Youth Law Centre (NCYLC) is an Australian national community legal centre working exclusively for and with children and young people, being a joint program of the University of New South Wales, the University of Sydney and the Public Interest Advocacy Centre, initially funded by the Australian Youth Foundation. In its submission to the first Senate Committee inquiry, it concluded:

*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 subjective characteristics of individual offenders, and the unique circumstances of their offences and their impacts (or lack of impacts) on their victims.*

Addressing the fact that diversionary programs and CROs are available in certain circumstances in the Northern Territory and Western Australia respectively, the NCYLC stated:

*It is submitted that the limited discretion now available under the sentencing regime for the Northern Territory and Western Australia does not alter the fact that the systems of mandatory sentencing as they current 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.*

The NCYLC has also made the following observations:

- Whilst mandatory sentencing may be perceived as a solid "law and order" issue, there is significant research to indicate that rather than acting as a deterrent, a sentencing system which accelerates contact with the prison system will in fact lead to higher and more serious re-offending, higher rates of recidivism and ultimately higher crime rates;
- The Northern Territory Correction Services Department itself stated in a publication in 1991 that "what happens in many cases is that the detainees learn from their fellow inmates how to become more effective in committing crime";
- Victoria, which has the lowest rates of imprisonment of both juveniles and adults, has, according to the Australian Bureau of Statistics, the lowest or second lowest offence rate in all relevant categories;
- There is anecdotal evidence that during the first six months' of operation of the mandatory sentencing provisions in the Northern Territory, virtually no matter proceeded by way of a plea of guilty at the earliest opportunity;
- Although it has been stated that the Northern Territory crime rate has decreased since the introduction of mandatory sentencing, these figures are "suspect" and in any event it is more relevant to consider the acceleration of the crime rate in the long term as a direct result of initial imprisonment; and
- There is anecdotal evidence of an increased incidence of young people failing to attend court hearings, as mandatory sentencing provides no incentive to young people to seek to have their matters dealt with according to the law.



#### **4.7 Views of the Commonwealth Attorney-General**

On 15 February 2000, the Commonwealth Attorney-General announced that he intended to write to the relevant State and Territory governments urging them to review mandatory sentencing laws in respect of young people to ensure they do not adversely impact on people under the age of 18. The Attorney General has indicated that he is not in favour of mandatory sentencing. He is not, however, prepared to argue in favour of using Commonwealth powers to override mandatory sentencing laws, considering that sentencing policy is a state and territory matter.

### **5 ALTERNATIVES**

#### **5.1 Overriding Federal Law**

##### *5.1.1 Territories Power*

Section 122 of the Commonwealth Constitution empowers the Commonwealth Parliament to make laws for the government of Territories, including the Northern Territory.

This power is not circumscribed by Section 51 of the Constitution as it is for the States. The *Northern Territory Self Government Act 1978* is a law of the Commonwealth and is therefore subject to express or implied repeal or amendment by subsequent Commonwealth laws. An example of this was the *Euthanasia Laws Act 1997* (Cth).

##### *5.1.2 External Affairs Power*

Section 51 (xxvix) of the Constitution contains the Commonwealth's external affairs power. As illustrated in the *Tasmanian Dams Case*, the Commonwealth Parliament has the power to legislate to implement any international obligations arising from a bona fide Convention which the government has entered into, "notwithstanding that the subject matter of the treaty is of an entirely domestic nature".

##### *5.1.3 Overriding State and Territory Laws*

By virtue of Section 109 of the Constitution, a Commonwealth law will prevail to the extent of any inconsistency with a State law. The relevant inconsistency can be identified either through the inclusion in the Commonwealth law of an express intention to override specific, inconsistent State legislation, or through an inference by the Court that the Commonwealth intended to "cover the field" with its new legislation.

In its December 1999 submission to the Senate Legal and Constitutional References Committee for the Committee's Inquiry into *the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, the Law Council of Australia acknowledged that it would be naive to ignore that there are some sensitivities as to the use of the Commonwealth Parliament's legislative power to override the mandatory sentencing laws in the Northern Territory and Western Australia, but added:

*The issues go beyond the autonomy of the 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.*

The legal profession is nevertheless opposed to individual jurisdictions within Australia being targeted by the Federal government and would only favour intervention on the

basis that the Commonwealth expresses an intention to "cover the field" throughout Australia with its new legislation.

This view is shared by the Law Society of the Northern Territory:

*The Law Society of the Northern Territory rejects any move by the Commonwealth to single out the Northern Territory from the rest of the nation and exercise its constitutional powers to overturn legislation passed by its democratically elected Legislative Assembly. The Law Society, however, supports the Commonwealth legislating Australia-wide to prevent the abuse of basic human rights of Australian citizens.*

Accordingly, the Law Society of the Northern Territory would be opposed to use by the Commonwealth of section 122 of the Constitution as a means of addressing its concerns about the mandatory sentencing laws in the Northern Territory.

The Law Society of Western Australia has expressed similar reservations, but is prepared to make an exception in the case of the mandatory sentencing of juveniles, having passed the following resolution in January 2000:

*While the Law Society of Western Australia opposes and will continue to oppose the use by the Commonwealth of the external affairs power to give powers to the Commonwealth in areas that are traditionally the province of the states and territories, the Society supports the Human Rights (Mandatory Sentencing) of Juvenile Offenders Bill 1999.*

## **5.2 Sentencing Alternatives**

### *5.2.1 Matrix Sentencing*

In 199, the (then) Western Australian Government foreshadowed the introduction of matrix, or grid sentencing. This involves a schedule of recommended sentences using numerical guidelines. A table sets out the sentence that should be imposed, based on the seriousness of the offence and the offender's criminal record.

The Law Council of Australia has indicated its opposition to matrix sentencing on the basis that it still fetters the discretion of the judge.

Matrix sentencing was developed in the United States where:

- There are elected judges;
- There is no effective superior court supervision of sentencing; and
- Judges often do not give reasons for their sentencing decisions.

The problems with matrix sentencing are:

- It increases secret plea bargaining;
- It shifts substantial discretion and power to prosecutors;
- It removes judicial discretion and leaves little scope for a proper regard to the importance of subjective and individual factors; and
- The impact of the victim plays no role.

Although under the WA proposal a judge could depart from the grid by publishing specific reasons for doing so, this still means the judge is answerable to the legislature for the sentence imposed.

### 5.2.2 *Sentencing Guidelines*

There is a need to ensure consistency in sentencing decisions. Inconsistency offends the principle of equality before the law and is a manifestation of injustice.

The NSW Supreme Court has adopted a procedure of developing guideline judgements to assist trial judges in assessing appropriate penalties. Guideline judgements have been made in the following areas:

- Driving causing death;
- Armed robbery;
- Guilty pleas;
- Drug importation; and
- Break, enter and steal.

Guideline judgements are indicative only, and are not intended to be applied in every case as if they were rules binding on sentencing judges. They are a mechanism for structuring judicial discretion rather than restricting it.

Guideline judgments reinforce public confidence in the integrity of the process of sentencing. They also help ensure that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole.

## **6 OTHER DEVELOPMENTS**

### **6.1 Bills**

#### *6.1.1 Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*

The Bill was introduced into the Senate on the motion of Senators Brown (Greens), Bolkus (ALP) and Greig (Democrats) on 25 August 1999. The preamble to the Bill draws upon Australia's human rights obligations in relation to children pursuant to Articles 37(b) and 40(iv) of CROC. Clause 5 of the Bill states "a law of Commonwealth, or of a State or of a Territory must not require a Court to sentence a person to imprisonment or detention for an offence committed as a child".

On 13 March 2000, the Senate Legal and Constitutional References Committee supported the passing of the Bill. On 14 March 2000, the Bill passed the Senate but debate was gagged in the House of Representatives on a motion from the Attorney General.

On 14 March 2000, Liberal MP Danna Vale announced her intention to introduce a Private Members' Bill directed at overturning the Northern Territory's mandatory sentencing laws as they applied to juveniles. She issued a press release on 15 March

2000, however, stating that the following discussions within the joint party room she would not be proceeding.

#### *6.1.2 Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000*

This Bill was introduced into the House of Representatives as a private members bill by the leader of the Opposition, Kim Beazley MP, on 10 April 2001. The Bill was intended to give effect to Australia's international obligations under the CROC by prohibiting the mandatory imprisonment of juvenile offenders under Commonwealth, state or territory law.

The Bill received a first reading and could not progress any further without the co-operation of the Government. This was not forthcoming and the Bill was removed from the Notice Paper in accordance with Standing Order 104B.

#### *6.1.3 Amendment of the Northern Territory (Self Government) Act 1978 Act Bill 2000*

This Bill was introduced into the House of Representatives by the independent member for Calare, Mr Peter Andren MP, on 10 April 2001. It seeks to override the Self Government Act to prevent the mandatory sentencing of persons under 18 years of age.

As with the ALP Bill, this Bill could not proceed without the support of the Government. It was also removed from the Notice Paper in accordance with Standing Order 104B.

#### *6.1.4 Human Rights (Mandatory Sentencing of Property Offenders) Bill 2000*

This Bill was introduced into the Senate by Senator Bob Brown (Greens) and had its second reading on 6 September 2001. The Bill purports to override mandatory sentencing for a stated list of property offences for all people.

The Bill was referred to the Senate Legal and Constitutional References Committee on 24 May 2001. Public hearings have been held in Sydney and Canberra, with a further hearing scheduled for Darwin. The Committee is expected to report in November 2001.

### **6.2 Senate Committee Report**

As noted in **section 6.1.1**, on 13 March 2000, the Senate Legal and Constitutional References Committee supported the passing of the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999. Key findings were:

- The Commonwealth has the power to override territory legislation and has previously done so in relation to the Euthanasia Laws Act 1996, by virtue of section 122 of the Constitution;
- International obligations are binding in international law. The Commonwealth can use the external affairs power under section 51(xxix) of the Constitution and effect the of overriding inconsistent state and Commonwealth laws by virtue of section 109 of the Constitution;
- When State legislation contravenes international obligations, the Commonwealth is responsible for ensuring these obligations are met. Both the Northern Territory and Western Australian laws, insofar as they affect juveniles, are inconsistent with Australia's

international obligations although the Western Australian legislation is in practice “less obviously in contravention”;

- The Committee concluded that “it was convinced by the submissions and argument that mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and it contravenes the Convention on the Rights of the Child”;
- The Committee would prefer the respective governments to rectify the problems themselves but does not believe this is likely;
- The Committee therefore recommended that the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill be passed. Two members of the committee – Senator Marise Payne and Senator Helen Coonan – did not support the immediate passage of the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill. Senator Payne recommended that the Western Australian and Northern Territory Government be encouraged to investigate other models of rehabilitative justice for juveniles and Senator Coonan thought that Commonwealth intervention at this stage would be premature, pending further consultation and discussion with the Western Australian and Northern Territory governments.

### **6.3 United Nations Reports**

On 18 February 2000, the Secretary-General of the United Nations, Kofi Annan, arrived in Darwin for an Australian visit. Subsequently, it was reported on 21 February 2000 that Mr Annan agreed to initiate an assessment of mandatory sentencing laws in the Northern Territory and Western Australia by the United Nations Human Rights Commissioner. It was subsequently announced that he had asked the UN High Commissioner for Human Rights, Mrs Mary Robinson, to assess whether the laws were in fact a breach of UN conventions.

On 13 March 2000, a United Nations report was published which listed Australia’s obligations in respect of the rights of the child but failed to pronounce upon whether Australia’s mandatory sentencing laws infringed those rights.

It was reported on 17 March 2000 that conclusions in an earlier draft of the report, which had been critical on Australia’s mandatory sentencing laws, had been deleted. It was asserted that these conclusions had been deleted from the final report as a result of diplomatic pressure applied by the Australian Government. This prompted Senator Brown to call for the resignation of the Minister for Foreign Affairs, Mr Downer, following Mr Downer’s earlier statement that the report contained “no judgment about Australia’s conformity with international standards”.

The excised portion of the report allegedly read, inter alia:

*The exercise of juvenile justice in Australia appears to be in violation of human rights ... The practice of mandatory sentencing is, in reality, a violation of the right to a fair trial by an independent and impartial court... The possibility for a sentence to be reviewed is internationally accepted in all but the most serious of cases, such as those involving murder. From the information provided, it would seem that this right has not been respected ... Mandatory sentencing rules are typically imposed by political authorities on the judiciary and they thus violate the usual requirement that the executive be separated and distinct from the judiciary.*

According to an Amnesty International Report:

- In March 2000, the Committee on the Elimination of Racial Discrimination recommended changes to the mandatory sentencing regimes, stating that they "appear to target offences that are committed disproportionately by indigenous Australians, especially in the case of juveniles".
- In July 2000, the Human Rights Committee observed that mandatory sentencing schemes raised a "serious issue of compliance" with the ICCPR.

#### **6.4 "Corruption" of the Judiciary**

On 22 February 2000, the Northern Territory Chief Minister and Attorney General, Mr Denis Burke, told the Northern Territory parliament (while defending mandatory sentencing laws) that "the justice system is corrupt". He said that the system was "perceived by Australians as corrupt ... It's perceived as not serving their interests in one way, shape or form. It's perceived as having its whole focus on the criminal".

The next day, a case involving the *Mis-Use of Drugs Act* came before Chief Justice Martin of the Northern Territory. He adjourned the case on the following basis:

*Bearing in mind what the Attorney-General has said and the circumstances of this case, I consider it to be my duty to invite both parties, the Crown as the executive arm of the criminal justice system and the defendant, to consider whether I should disqualify myself from further participation in it.*

*It seems to be that the Crown might apprehend that following the alleged focus on the criminal, the court would err on the side of leniency and that the defendant might apprehend that the court being acquainted with the views conveyed and expressed by the Attorney-General, might decide that it had to weigh in on the side of punishment.*

The Australian Bar Association issued a statement of support for the Chief Justice:

*The Australian Bar Association supports Chief Justice Martin in the handling of this matter and finds it difficult to understand how the Attorney-General, as first law officer of the Northern Territory can make such ill-considered and inappropriate remarks about a branch of government which he is duty bound to protect from unwarranted attacks on its independence and integrity.*

The following day, the Chief Justice concluded that it would be in order for him to remain in the case:

*The unrestrained nature of the language [of Mr Burke] is enough to demonstrate that no fair-minded person, acquainted with the facts, especially with the remarks that were made in the context in which they were made, could possibly accept that they represent the truth or even an inkling of the truth.*

#### **6.5 NAALAS v Bradley**

On 27 February 1998, Mr Bradley was appointed Chief Magistrate from 8 March 1998, with no limitation as to the appointment contained in the instrument of appointment. In March 2000 the ABC's *7.30 Report* revealed that a special remuneration package had been negotiated with the Chief Magistrate, Hugh Bradley, where it was claimed the special remuneration package applied for a period of two years.

Subsequently, the Northern Australian Aboriginal Legal Aid Service (NAALAS) made an application in the Supreme Court of the Northern Territory to disqualify Chief Magistrate Bradley from sitting in judicial cases involving mandatory minimum sentences. The application also sought an order that the 1998 appointment of the Chief Magistrate was invalid.

The application was summarily dismissed by Justice Olney on 13 June 2000. This decision was appealed to a specially constituted full bench of the Supreme Court. The Full Court held that NAALAS had an arguable action and remitted the matter back to the Supreme Court.<sup>3</sup> The High Court refused an application for special leave to appeal the Full Court decision in May 2001.

On 7 June 2001, the Chief Minister held a press conference, during which he made the following statement

*What is disturbing is that some sections of the legal community seem to be co-operating in a way which is disturbing and the real issue here is that it's a continuation of what is a waste of taxpayers' money, a nonsense in its intent. It started off as a move to try and overturn mandatory sentencing, it's now widened to attempt to destroy the reputation of the Chief Magistrate.*

The Chief Minister went on to say that the case involved using taxpayers money that should be directed towards Aboriginal constituents in an "irresponsible way" and that it was an attempt to "rip the whole judicial system apart by allegations which are unfounded".

On 24 July 2001, Justice Wilcox found the Chief Minister guilty of contempt of court in relation to his statements in the 7 June press conference. Justice Wilcox found that the Chief Minister "deliberately used the press conference of 7 June 2001 to revive his campaign of disparagement of the principal proceeding and criticism of NAALAS for pursuing it". He found that the Chief Minister's comments had a clear tendency to put pressure on NAALAS to discontinue the case, and also a tendency to deter persons from supplying information to NAALAS or from willingly giving evidence on its behalf.<sup>4</sup>

The Chief Minister was fined \$10,000. In imposing the fine, Justice Wilcox noted that he "would be prudent to proceed on the basis that, if he were to repeat his contempt, the Court would be likely to impose a very significant penalty; quite possibly a term of imprisonment".

It is understood that Mr Burke lodged an appeal against this decision; however, the change of government in the Northern Territory has meant that he is unlikely to pursue this appeal. The new Attorney General has announced that he will not provide public funding for any such appeal.

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<sup>3</sup> The case was later cross vested to the Federal Court of Australia. At the time of writing, the matter had been heard and the decision reserved.

<sup>4</sup> NAALAS v Bradley and the Northern Territory [2001] FCA 908, 24 July 2001.

## **6.6 Diversionary Programs in the Northern Territory**

### *6.6.1 The Agreement Between NT and Commonwealth*

As noted in **Section 2.2**, in some circumstances it is possible to send juvenile first offenders to diversionary programs in the Northern Territory. Initially, the programs were of limited value because they were concentrated in Darwin, Katherine and Alice Springs. On 16 February 2000, the Northern Territory Correctional Services Minister announced the establishment of 11 new diversionary programs and foreshadowed the development of a further 10 programs in the future.

The concerns expressed by Commonwealth Government Members and Senators about the impact of the mandatory sentencing regime in the Northern Territory on juveniles eventually led the Commonwealth to agree to a funding package to establish additional diversionary programs. In July 2000, the Commonwealth and Northern Territory signed an agreement under which the Commonwealth agreed to provide \$20 million over four years to the Northern Territory to divert juveniles from the criminal justice system, and to jointly fund an Aboriginal interpreter service. Under the agreement, police are required to divert a juvenile who has been apprehended for a minor property offence. Juveniles who commit some more serious offences may also be diverted depending on the circumstances of the individual case. The Northern Territory was also required to amend its legislation to ensure that 17 year olds were treated as juveniles, not adults.

The funding was due to commence on 1 September 2000. However, on 31 August the Commonwealth Attorney General announced that the Northern Territory was not ready to commence the full range of diversionary programs for juveniles required under the agreement. The Northern Territory advised that it had instead put in place an interim juvenile pre-court diversion policy to ensure that juveniles facing charges before legislation was passed establishing the formal diversion scheme were treated within the spirit of the formal scheme.

On 16 October 2000 the Attorney-General announced that Commonwealth funding to enable the diversion of juveniles from the Northern Territory criminal justice system and to provide for joint funding of an Aboriginal interpreter service would commence with a payment of approximately \$1 million that week. The Northern Territory also advised that, since 1 September 2001, all juveniles had been diverted as required under the agreement with the Commonwealth.

### *6.6.2 Impact of the Agreement*

According to the Commonwealth Attorney-General, during the first seven months of the agreement:

- 855 juveniles were diverted, mainly by way of verbal or written warnings from the police;
- 85 existing programs have been approved by the police as suitable for diversion; and
- 100 organisations, committees and groups have been briefed or consulted by the NT Police about the scheme;
- The Aboriginal Interpreter Service has registered 176 interpreters covering 104 languages.



At the time of writing, statistics from the first year of operation of the diversionary scheme were not yet available. Evidence given by the Attorney General's Department in August 2001 was:

- As of the end of July 2001, 1142 juveniles had undertaken some form of diversion;
- Of these, 492 had received verbal warnings, 308 had received written warnings; 278 had undergone family conferencing; and 64 had undertaken victim offender conferencing;
- By the end of May 2001, 46% of the police force had received training how the diversion scheme would operate, 179 police had been trained in facilitating victim offender conferences, 42 trained to work as trainers, and 17 trained to conduct victim offender conferences.

As noted, the new diversionary scheme came into operation on 1 September 2001. The first full quarter under the new scheme is thus the December 2001 quarter. While statistics on imprisonment rates obviously do not directly reveal the effects of either mandatory sentencing or diversionary programs, Northern Territory juvenile incarceration rates from the Institute of Criminology reveal the following:

- In the September 2001 quarter, there were 10 Indigenous and six non Indigenous juvenile prisoners. This represented imprisonment rates per 100,000 of population of 191.4 and 79.4 respectively;
- In the December 2001 quarter, there were 20 Indigenous and six non Indigenous juvenile prisoners. This represented imprisonment rates per 100,000 of population of 382.8 and 79.4 respectively.

The National Children's and Youth Law Centre (NCYLC) has noted that the agreement has meant that the number of young people who are coming before the courts has significantly reduced, and that young people who are now being sentenced have 'extensive form'.

### 6.6.3 Criticisms

The availability of diversionary programs is at the discretion of the police. A number of bodies providing evidence to the most recent Senate Committee Inquiry have expressed concern at the level of discretion being placed in the hands of the police. Mr Louis Schetzer of the NCYLC gave evidence that:

*...whilst the practice of diversion in the Northern Territory is such that it is now exceptionally rare for a young person to be sentenced to a period of detention who would not otherwise have been sentenced but for mandatory sentencing, the failure to implement a diversionary system together with restoring judicial discretion has had the effect of transferring discretion from the judiciary to the police. It is almost the case that the police are now the sole arbiters of referral to those programs.*

The Uniting Church noted that, in Western Australia, diversionary programs are used in a "very limited way" in relation to juvenile Indigenous offenders. The Church noted that "it seems that incarceration is often a first option for Indigenous young people, but other young people with perhaps different access to different resources are disproportionately

represented in the diversionary programs". The following points were also made by witnesses to the most recent Senate Inquiry:

- Diversion is only available for "minor offences". A minor offence is defined as a property offence where the value of the property does not exceed \$100. Offences involving unlawful entry are not considered minor, irrespective of the value of any goods stolen;
- While diversion is reducing the number of juvenile appearances before the courts, it is not going to stop young people facing mandatory imprisonment, particularly where a relatively high proportion of young offenders are excluded from diversion;
- It is not known how many of those who are recorded as being diverted would have been subject to the mandatory sentencing regime;
- There is anecdotal evidence that some young people may be receiving informal warnings or cautions where they have not made admissions or where there may be insufficient evidence to satisfy a court that an offence has been committed;
- Only 27 programs have been implemented in communities outside the major centres, which are the places where mandatory sentencing has the greatest impact;
- The indications are that the overwhelming majority of the funding package is being devoted to resourcing the police force and assisting police to implement cautions and warnings, rather than on developing programs to deal with issues such as substance abuse;
- The previous Northern Territory Government introduced a number of new law and order initiatives, including legislation to deal with 'anti social conduct'. These undermine the diversionary mechanisms by accelerating young people's contact with the criminal justice system, as they accumulate 'form' at an earlier age for new offences;
- Some of the organisations that are being funded by the police to conduct diversionary programs were originally set up to provide advocacy and support services for young people. These organisations are concerned that the fact that young people's contact with them as part of a diversionary program is involuntary will label the organisation as part of the "punishment" rather than part of a support network, thus undermining their purpose.

### **6.7 Change of Government in Western Australia**

In early 2001, an ALP Government replaced the Coalition Government in Western Australia. The incoming Attorney-General, Jim McGinty, indicated that the WA laws would not be changed. Mr McGinty noted that the WA laws still give the option of a conditional release orders. However, the Chief Executive Officer of the Aboriginal Legal Service, Mr Dennis Eggington, noted that the WA Laws jail younger juveniles for longer periods than the NT Laws.

In September 2001, the Western Australian Government commenced a review of the legislation after three years of operation, and must report to parliament by November. At the same time, Greens MP Giz Watson announced her intention to introduce legislation to repeal that state's "three strikes" law. Ms Watson claimed that the laws have had no significant change to the home burglary rate, but had resulted in Indigenous youths being jailed at eighteen times the rate of white youths.

The Law Council understands that the Federal ALP may include the repeal of mandatory sentencing provisions as they apply to juveniles as part of its election platform. The ALP Federal Legal Affairs spokesman, Robert McClelland, has indicated that the Federal Labor party will press the WA Government to water down the state's mandatory sentencing laws if the ALP wins the Federal election.

### **6.8 Change of Government in Northern Territory**

In August 2001 the Country Liberal Party Government was replaced with an ALP Government led by Claire Martin. Ms Martin has indicated that the new government intends to repeal the current mandatory sentencing laws. She has stated that there will be a presumption that, for "serious" crimes such as housebreaking and car theft, the offender will receive a jail sentence. However, magistrates and the judiciary would be given the discretion to decide whether there were extenuating circumstances that mitigated against the imposition of a jail sentence. It is understood that this legislation will be introduced in the near future.

As a result of this development, Magistrate David Loadman indicated that he would refuse to impose any further mandatory sentences on offenders, stating "I'm not prepared to put myself in the position of incarcerating people...for offences that do not warrant that...I and other magistrates have imposed sentences which were manifestly unjust."

### **6.9 Commonwealth Mandatory Sentencing**

On 26 September 2001, the Commonwealth Parliament passed the *Border Protection (Validation and Enforcement Powers) Act 2001*. This Act provides, *inter alia*, for mandatory minimum sentences of five years for a first offence, and eight years for further offences, with mandatory non parole periods of three and five years respectively, for what have become colloquially known as "people smuggling" offences under the *Migration Act 1958*. The mandatory sentencing provisions do not apply if it is established, on the balance of probabilities, that the offender was under 18 at the time the offence was committed.

The Bill was included in a package of seven bills that made sweeping changes to Australia's treatment of asylum seekers who attempt to make onshore applications. No specific justification for the mandatory sentencing provisions is mentioned in either the second reading speech or explanatory memorandum for the Bill, except a general statement in the explanatory memoranda:

*The amendments in these Bills are being made in response to the increasing threats to Australia's sovereign right to determine who will enter and remain in Australia. These threats have resulted from the growth of organised criminal gangs of people smugglers who bypass normal entry procedures.*

The Minister for Justice and Customs, Senator Chris Ellison, gave the following justification for the mandatory sentencing provision during debate in the Senate on 25 September 2001:

*We have looked at penalties in relation to people smuggling. Previously, there was a two-year maximum, which we increased to 10 years if it involved fewer than five people, and 20 years if it was five or more. Those penalties were quite rightly brought in by this government in recognition of the seriousness of people smuggling. When we looked at the implementation of that direction from the legislature, we saw that the average sentence was about two years—in real terms, somewhere between six and 12 months. The government thought that was totally inadequate. What we have done is seek to address that by imposing penalties which will have truth in sentencing and will act as a deterrent to anyone who might consider bringing people to Australia's shores illegally.*

Despite previous criticisms of mandatory sentencing in Western Australia and the Northern Territory, the Australian Labor Party did not oppose any part of the package of bills, including the mandatory sentencing provisions. The Democrats, Greens and independent Senator Brian Harradine opposed the Bills. On 24 September 2001, during the second reading debate on the package of seven bills that included this provision, Senator Bob Brown (Greens) made the following comments:

*One of the more outrageous components of these seven migration bills, which comprehensively wind back not just the rights of asylum seekers but Australians who are interested in their welfare, is the introduction for the first time ever of mandatory sentencing into federal law. Let me tell you what a very prominent Australian had to say about mandatory sentencing very recently:*

*"Mandatory sentencing breaches both international human rights provisions as well as longstanding common law principles. ... mandatory sentencing breaches the fundamental common law principle of proportionality, which requires that the particular circumstances of an offence and an offender need to be taken into account in the process of sentencing."*

*That was the honourable Kim Beazley, Leader of the Opposition, speaking in this parliament just last year. We have there a Labor Party quite properly defending not just the rights of citizens of this country or people within its boundaries to have access to the courts—which are being cut by this legislation—but the right of the courts to determine what the fit and proper sentence is for people who break the law. That is a time-honoured principle and the opposition was supporting it. But suddenly we have the situation where the opposition has done a 180-degree about-turn and is here assisting Prime Minister Howard to bring mandatory sentencing into the laws of this land.*

*What an extraordinary turnaround of self-interest, of reneging on principle and of turncoating on Australian values and, in the process, breaching international covenants, many of which the Labor Party moved...*

## 7 CONCLUSION

The key points arising out of this paper are that, in the Law Council of Australia's view:

- The mandatory sentencing laws in Western Australia and the Northern Territory impose unacceptable restrictions on judicial discretion;
- The laws are ill-conceived as a means of addressing the crime rate;
- The laws tend to target Indigenous persons;
- The laws have resulted in unjust sentences;
- The laws contravene Australia's international obligations under at least two treaties;
- The Commonwealth could invalidate the Northern Territory law by use of its territories power and can invalidate the laws in both jurisdictions through the use of its external affairs power;
- The Law Council does not favour Commonwealth legislation which would target a specific jurisdiction, but favours Commonwealth legislation of broad application which would have the incidental effect of invalidating the mandatory sentencing laws in Western Australia and the Northern Territory;
- The mandatory sentencing provisions contained in the Commonwealth *Border Protection (Validation and Enforcement Powers) Act 2001* should be repealed;
- The Law Council supports the *Human Rights (Mandatory Sentencing of Property Offenders) Bill 2000*.

**Law Council of Australia**  
**September 2001**