

## MANDATORY IMPRISONMENT OF PROPERTY OFFENDERS IN THE NORTHERN TERRITORY

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The introduction of mandatory sentencing laws in the Northern Territory has important implications for punishment policy not only for that jurisdiction but for others which may seek to embrace similar measures. The traditional judicial discretion to select the penalty type and quantum (subject only to the constraints of a legislatively prescribed maximum) is under challenge in Australia.

The landmark decision of the NSW Court of Criminal Appeal in *R v Jurisic* on judicial sentencing guidelines in October last year was swiftly followed by the introduction of the Criminal Procedure Amendment (Sentencing Guidelines) Bill into the NSW Parliament. The Coalition Opposition countered with a proposal for US style sentencing grid legislation. The WA Parliament has introduced the Sentencing Amendment Bill 1998 which introduces sentencing matrix legislation in three phases.<sup>1</sup> Do these developments indicate a decisive shift away from broad judicial sentencing discretion in Australia?

This article will very briefly examine the genesis of the Northern Territory sentencing reform, its theoretical basis, the legislation itself and various actual and potential challenges to it. It concludes by raising a number of unresolved issues which, it is argued, may influence the course this legislation ultimately takes.

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1 E McWilliams, "Sentencing guidelines: Who should be the arbiter, the judiciary or parliament?" (1998) 36(11) *Law Society Journal* 48.

## I. GENESIS

Although various specific rationales<sup>2</sup> for mandatory imprisonment have been offered from time to time, it is fair to say that they appear to be permutations of classic law and order rhetoric.<sup>3</sup> In essence, at the time of the introduction of this reform, the Northern Territory Government's position was that compulsory minimum prison terms for offenders convicted of designated property offences were both necessary and desirable.<sup>4</sup> The then Attorney-General Burke commented:

The government believes that the proposal for compulsory imprisonment will: send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.<sup>5</sup>

Attorney-General Stone QC, in a Ministerial Statement, said:

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.<sup>6</sup>

He expressed similar sentiments during parliamentary debates as to amendments to strengthen the reform: "My government is serious about getting tough on crime and offenders".<sup>7</sup>

Several law and order themes are regularly invoked: apparently escalating crime rates; the need for tougher penalties; and the lenient approach of the courts

2 For example, the need for consistency: "The government, having expressed continuing concern about what appeared to be disparity in sentencing, took the step that it was entitled to take to ensure the community understood clearly and unequivocally that the government will no longer tolerate property related crime" S Stone QC, Attorney-General, "Effects of Mandatory Sentencing", Ministerial Statement, 21 April 1998, p 2. However, even here, the cure offered for disparity is one type of consistency: severity. For an interesting parallel see *R v Jurisic* [1998] NSWSC 597 (12 October 1998). See also G Zdenkowski, "Judging the judgments" *Sydney Morning Herald*, 15 October 1998, p 15.

3 R Hogg and D Brown, *Rethinking Law and Order*, Pluto Press (1998), see especially chapter 2.

4 The ALP Opposition vacillated. Initially, it supported the law subject to a review after 12 months but opposed it as far as juveniles (15 and 16 year olds as defined by the reform) were concerned. Later, following an election defeat, the Opposition changed its mind and also opposed it in relation to adult offenders.

5 Northern Territory Parliamentary Record, Seventh Assembly First Session, No 27, 17 October 1996, p 9688. See also S Stone QC, Attorney-General, Ministerial Statement "Effects of Mandatory Sentencing" Northern Territory Parliamentary Record, Eighth Assembly First Session, No 5, 21 April 1998; and S Stone QC, Attorney-General, Second Reading Speech, Juvenile Justice Amendment Bill (No 2) 1997, Sentencing Amendment Bill 1997, Northern Territory Parliamentary Record, Eighth Assembly First Session, No 2, 1 December 1997.

6 Stone, note 2 *supra*.

7 Attorney-General S Stone QC, Northern Territory Parliamentary Record, Eighth Assembly First Session, No 2, 1 December 1997, p 346.

towards sentencing.<sup>8</sup> An interesting variant is offered by former Attorney-General Burke: the need to ensure that the efforts of law enforcement authorities “in apprehending villains will not be wasted” (see above). This conflation of the executive and judicial processes raises interesting questions about the role of the police who ought, on one view, not to be concerned about conviction or acquittal, let alone the type or quantum of penalty imposed. Moreover, terminology such as “apprehending villains” betrays scant regard for the presumption of innocence.

Leaving aside such issues as the desirability or efficacy of the reform, it is not entirely clear (within the Northern Territory Government’s own law and order paradigm) why selected property offences were targeted rather than offences involving interpersonal violence. Or, if property offences were to be targeted, why the range included the most trivial first offence rather than, say, serious property offences and/or repeat offences. A possible explanation is that the Government wished to toughen penalties at the trivial end of the range (on a ‘zero tolerance’ rationale) and assumed that more serious property offences and violent offences would normally attract prison terms anyway.

### A. Terminology

Mandatory penalties can loosely refer to a range of sentencing options. Technically, a mandatory sentence allows but one penalty choice which is inexorably imposed.<sup>9</sup> A typical modern mandatory penalty is the mandatory penalty payable via a traffic infringement notice.<sup>10</sup> Such mandatory penalties have not attracted opprobrium because of the relatively minor nature of the financial penalty.<sup>11</sup> Many jurisdictions have mandatory life sentences for murder but have executive mechanisms for mitigating the effect through conditional release mechanisms.<sup>12</sup> The court imposed penalty is mandatory but the likely actual penalty will be less. In other cases, legislation prescribes a mandatory minimum in specified circumstances so that the court must impose the minimum but has a discretion to impose a higher sentence. The Northern Territory measures under review here (which require courts to impose minimum prison terms on persons convicted of certain property offences) fall into the last category.

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8 See generally, Hogg and Brown, note 3 *supra*, pp 18-39.

9 Arguably any penalty, including a mandatory one, can be mitigated or waived wherever the prerogative of mercy has not been removed.

10 Even here it is arguable that its mandatory nature is contingent. In most cases, there is an option to contest liability and penalty in court. The court often retains a discretion as to the penalty.

11 See generally O’Malley’s discussion of technocratic justice: P O’Malley, “Technocratic Justice in Australia” (1984) 2 *Law in Context* 31.

12 For example, the UK or NSW prior to 1982.

## II. THEORETICAL BASIS

Several traditional justifications for punishment are called in aid of mandatory penalties (including mandatory minimum penalties). These include retribution, deterrence and incapacitation. Each has been criticised.

There is no doubt that mandatory minimum penalties for property offenders have a retributive effect. However, given the inflexible and discriminatory impact of the mandatory minimum prison term on differently circumstanced offenders and offences, it is inevitable that the penalty will be disproportionate in some cases. To the extent that retribution in Australia is desert based (rather than vengeance based)<sup>13</sup> a sentence which violates proportionality principles is problematic.

Deterrence, though frequently claimed as an objective of mandatory minimum penalties (including by the Northern Territory Government in introducing the measures under review: see above), is very difficult to demonstrate as an outcome. Indeed, there is a considerable body of evidence that mandatory minimum sentences have no real impact on the rate of crime.<sup>14</sup>

Mandatory imprisonment is sometimes justified in terms of incapacitation: the philosophy that irrespective of whether other sentencing aims are being achieved by such sentences, offenders are prevented from pursuing crime while temporarily isolated.<sup>15</sup> There has been considerable debate in the US about the desirability and efficacy of selective incapacitation – the targeting of theoretically identifiable ‘hard core’ serious offenders – via the imposition of mandatory prison terms. The notorious ‘three strikes and you’re out’ regimes introduced into several US jurisdictions<sup>16</sup> require long term imprisonment following conviction of two prior offences no matter how minor the third offence. The assumption is that prior offences will accurately predict hard core offenders and allow targeting by the criminal justice system. The extent to which such a strategy might be effective in controlling crime is at best modest and the social and penal costs of pursuing it are dramatic especially in terms of the extreme rates of imprisonment required to achieve marginal impact.<sup>17</sup>

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13 See A Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Rutgers University Press (1985); *Veen (No 2)* (1988) 33 A Crim R 230.

14 A Ashworth, “Structuring Sentencing Discretion” in A Von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing (2nd ed, 1998) pp 215 and 234-5 citing M Tonry, *Sentencing Matters*, Oxford University Press (1996) chapter 5 and M Tonry, *Sentencing Reform Impacts*, National Institute of Justice (1987). For critiques of deterrence generally in terms of the inability of escalating penalties to produce a significant reduction in crime, see A Blumstein, J Cohen and D Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, National Academy of Sciences, Washington DC, (1978); F Zimring and G Hawkins, *Deterrence: The Legal Threat in Crime Control*, University of Chicago Press, (1973).

15 The theory is usually discussed in terms of mandatory imprisonment.

16 In Australia, the best known example is the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA). See R Broadhurst and N Loh, “The Phantom of Deterrence: The *Crime (Serious and Repeat Offenders) Sentencing Act*” (1993) 26(3) *ANZ Journal of Criminology* 251.

17 J Chan, “The Limits of Incapacitation as a Crime Control Strategy” (1995) 5 *Crime and Justice Bulletin* 1.

However, the Northern Territory reform is not a typical selective incapacitation measure. While certain property crimes are targeted, there is no evidence that they are the source of greater social harm than non-targeted property offences (especially as there is no requirement of seriousness) or, indeed, offences involving personal violence. Further, at least as far as adults are concerned, first offenders are incarcerated, unlike the ‘three strikes’ laws.<sup>18</sup>

Finally, it might be said that mandatory sentencing laws, including mandatory minimum prison penalties such as those introduced in the Northern Territory, do not necessarily reflect a concern with any of the traditional justifications offered for punishment but rather are linked to law and order symbolism.<sup>19</sup> This issue is pursued in the concluding remarks.

### III. THE LEGISLATIVE SCHEME

On 8 March 1997, amendments to the *Sentencing Act* 1995 (NT) required the imposition of mandatory minimum prison sentences on adults convicted of designated property offences.<sup>20</sup> The regime provided for a minimum term of 14 days for first time offenders and escalating minimum terms for repeat offenders: 90 days for second offenders and one year for third offenders. Mandatory minimum imprisonment of 28 days was introduced at the same time for repeat juvenile property offenders (aged 15 or 16) with escalating penalties for subsequent offences.<sup>21</sup>

The discussion will be confined to provisions relating to adult offenders although in broad terms (apart from the criteria triggering mandatory penalties and the quantum of these penalties) the provisions for juveniles are in similar terms. The potential for an extremely draconian impact resulting from multiple minor offences was mitigated somewhat by the ‘single criminal enterprise’ provision which allowed several property offences arising out of the same incident to be treated as a single property offence for the purpose of the mandatory minimum term.<sup>22</sup> Likewise, findings of guilt for unrelated property offences, specified in the same information, complaint or indictment were to be treated as a single finding of guilt.<sup>23</sup> The precise scope of these provisions remains unclear (see below).

In 1998, a series of amendments were introduced to ‘clarify’ various aspects of the compulsory imprisonment regime. These included: creating “the concept of a mandatory period which is to be regarded as a discrete, sacrosanct or unalterable aspect of the sentence imposed” to reinforce the majority decision in *Trenerry v Bradley*, (see below); ensuring a mandatory period cannot be

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18 Juvenile offenders are automatically imprisoned for a minimum period upon a second or subsequent conviction for a designated offence.

19 Von Hirsch and Ashworth (eds), note 14 *supra*, pp 410-23.

20 *Sentencing Act* 1995 (NT), ss 78A and 78B; see also *Trenerry v Bradley* (1997) 6 NTLR 175.

21 *Juvenile Justice Act* 1996 (NT), s 53AE.

22 *Sentencing Act* 1995 (NT), s 78A(5).

23 *Ibid*, s 78A(4).

included in an aggregate sentence; ensuring that the mandatory period cannot be taken into consideration in the case of a term longer than the mandatory period for the purpose of determining the non-parole period; ensuring the mandatory period cannot be served concurrently with the term of imprisonment for another offence; and precluding the operation of general sentencing principles which might otherwise mitigate the mandatory period.<sup>24</sup> The precise effect of these changes is still being worked through in the courts.

At the time of writing, the Northern Territory Government had just introduced the Sentencing Amendment Bill (No 3) 1998 which requires<sup>25</sup> a court sentencing a person to imprisonment for an offence against a person determined by it to constitute a 'vulnerable victim' to increase by 25 per cent the term of imprisonment it would have otherwise imposed.

The original legislative scheme (and subsequent amendments) have proved very controversial. Criticism has included: scepticism about the need for such reform; concern about the removal of judicial discretion and the potential for draconian or capricious operation of the law; increased costs to the community via escalating imprisonment and court delays; dismay at the violation of international treaties to which Australia is a party;<sup>26</sup> emphasis on the potential discriminatory impact of the laws on the Indigenous community, especially juveniles; and doubt about the capacity of the reform to deliver its claimed deterrent effect.<sup>27</sup>

#### IV. THE LAW IN OPERATION

A number of cases have attracted public attention to the inflexibility of the law and the injustice which may be wrought as a result.

One juvenile offender broke into a toy shop and stole some computer games. He was gaoled for 14 days despite the fact that his parents, on discovering the offence, persuaded him to confess to police and arranged for compensation to be paid to the owner.<sup>28</sup>

Margaret Wynbyne, an employed Aboriginal woman with no prior record, was imprisoned for 14 days for stealing a can of beer. Her appeal (see below) was unsuccessful.<sup>29</sup>

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24 See Attorney-General Stone QC, Northern Territory Parliamentary Record, Eighth Assembly First Session, No 2, 1 December 1997, in the Second Reading Speech for the Sentencing Amendment Bill 1997 (NT) and the Juvenile Justice Amendment Bill (No 2) 1997 (NT), both of which came into effect on 29 April 1998.

25 Under the new s 49A(3).

26 For example, the UN Convention on the Rights of the Child.

27 See, for example, L Schetzer, "A Year of Bad Policy: Mandatory Sentencing in the Northern Territory", (1998) 23 *Alt LJ* 117; M Antrum, "NT Mandatory Sentencing - Politics and Prejudice" *Rights Now*, Newsletter of the National Children's and Youth Law Centre, January 1998; M Flynn, "One Strike and You're Out!" (1997) 22 *Alt LJ* 72.

28 ABC Radio National Transcripts, *The Law Report*, 30 September 1997.

29 *Ibid.*

Two young apprentices, both first offenders, were imprisoned for 14 days each; one for breaking a light worth \$9.60 and the other for breaking a window.<sup>30</sup>

A 28 year old teacher, Joanne Coghlan, poured water on an electronic till in a fit of temper when she was refused a full refund for a hot dog she considered unsatisfactory. The damage was estimated at \$1 325. Her appeal failed.<sup>31</sup>

## V. LEGAL CHALLENGES

The Northern Territory reform has been the subject of sustained challenges at the legal and political level. These have included questioning the constitutional validity of the reform, litigation seeking to restrict the impact of the laws through interpretation, and raising potential violations of international law relating to Australia's human rights obligations.

### A. Constitutionality

It is sometimes claimed that mandatory penalties per se are unconstitutional because they amount to an impermissible encroachment on judicial sentencing discretion. Although (for good reason, see below) many would argue that mandatory sentences are undesirable or inappropriate, it is incorrect to state that such a law per se violates the Commonwealth Constitution. In *Palling v Corfield*<sup>32</sup> the High Court of Australia ruled otherwise. In *Sillery v The Queen*<sup>33</sup> the High Court unanimously found that a statute which on its face appeared to impose a mandatory life sentence should be construed as imposing a discretionary maximum of life. However, the court had no objection to a mandatory penalty provided the statutory language was unambiguous. Ashworth has pointed out<sup>34</sup> that this conflation of the two issues is misleading and that the correct position is to be found in the 1990 English White Paper:

No Government should try to influence the decisions of the courts in individual cases. The independence of the judiciary is rightly regarded as a cornerstone of our liberties. But sentencing principles and sentencing practice are matters of legitimate concern to Government.

In Australia, the High Court in *Kable*<sup>36</sup> has not even disavowed ad hominem punitive laws in principle, although the law which authorised the incarceration of a named individual in that case was held to be unconstitutional on the different ground that the law effectively compromised the judicial power of the

30 M Ceresa, "Hot dog teacher's appeal cuts no mustard" *The Australian*, 4 July 1998, p 2.

31 M Ceresa, "Where a hot dog can cost you your freedom" *The Australian*, 10 July 1998, p 4.

32 (1970) 123 CLR 52.

33 (1981) 180 CLR 353.

34 Von Hirsch and Ashworth (eds), note 14 *supra*, pp 213-14.

35 Home Office, *Crime, Justice and Protecting the Public*, (1990) paragraph 2.1; cited *ibid*, p 214.

36 *Kable v DPP (NSW)* (1996) 138 ALR 577.

Commonwealth. This aspect of *Kable* was relied on in *Wynbyne v Marshall*<sup>37</sup> to assert that the Northern Territory mandatory sentencing law was unconstitutional. The High Court refused special leave to appeal. Flynn<sup>38</sup> argues that *Palling v Corfield* is distinguishable because in that case the prosecutor did not effectively impose the sentence; therefore, there is no final determination of the rights of the defendant. However, Flynn argues, a mandatory minimum penalty law does involve such a determination by the prosecutor (the executive). Thus, the principle in *Kable* is infringed not because of any violation of the separation of powers doctrine<sup>39</sup> but because the 'manifestly unjust' sentence required to be imposed by a State or Territorial court compromises the judicial power of the Commonwealth.<sup>40</sup> It should be observed that Mr Castan QC, counsel for the appellant in *Wynbyne v Marshall*, conceded that not every mandatory sentencing regime would have this effect. He was faced with the difficult task of persuading the High Court that the relatively low mandatory minimum penalties (at least for adult first offenders) necessarily had that effect against a background, at least historically, of the acknowledged constitutional legitimacy of mandatory capital punishment for felonies or mandatory life sentences for murder.

Bob Brown, Federal Green Senator for Tasmania, has announced an intention to introduce a private member's Bill to override the Northern Territory legislation. This would be modelled on the *Euthanasia Laws Act 1996* (Cth) which restricted the power of the Northern Territory Government to pass laws authorising euthanasia by limiting the relevant head of power under the *Northern Territory (Self-Government) Act 1978* (Cth). The Federal Parliament is empowered to enact such a law under s 122 of the Constitution.

## B. Interpretation

Since its inception, the Northern Territory law has been tested in a series of appeals which have, in essence, sought to curtail the ambit of its operation. Just a few will be considered.

In *Trenerry v Bradley*<sup>41</sup> the relationship of mandatory minimum prison terms to suspended sentences, home detention orders and parole arose. By majority (Martin CJ and Angel J), the Supreme Court held that a court is precluded from (i) making orders wholly or partially suspending a term of imprisonment ordered to be served under s 78A; (ii) making an order suspending a term of imprisonment ordered to be served under s 78A upon the offender entering into a home detention order; and (iii) fixing a period during which an offender ordered to serve a sentence of imprisonment under s 78A is not eligible to be released on parole. Mildren J dissented, holding that s 78B(2) should not be interpreted as

37 (1997) 117 NTR 11.

38 M Flynn, "Fixing a Sentence: Are there any Constitutional Limits?" in this issue of the *UNSWLJ Forum*.

39 This would not assist the defendant unless the High Court was prepared to overrule *R v Bernasconi* (1915) 19 CLR 629.

40 For a detailed discussion of *Kable* see G Zdenkowski, "Community Protection Through Imprisonment Without Conviction: Pragmatism Versus Justice" (1997) 3(2) *AJHR* 8.

41 Note 20 *supra*.



precluding a court from suspending so much of a prison term as exceeds the mandatory minimum. This would be a capricious and absurd outcome. The High Court refused special leave to appeal.<sup>42</sup>

*Schluter v The Queen*<sup>43</sup> concerned the interpretation of s 78A(2) which provides:

where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days.

Martin CJ held that the Magistrate had erred in law in ruling that a finding of guilt on the same day as a separate and later finding of guilt counted as a finding that the offender had “once before” been found guilty of a property offence. The Magistrate’s view had led to an automatic escalation of the penalty because the defendant became a second time offender. His Honour determined that “once before” referred to a previous day. The practical effect of *Schluter* is that offenders facing multiple property charges for property offences will face the mandatory minimum penalty for one offence if the informant commences proceedings for these charges on the same day. Note also that s 78A(4) provides that findings of guilt for more than one property offence specified in a single information are to be taken as a single finding of guilt. It will be apparent that there is considerable scope for capricious outcomes depending on the exercise of prosecutorial discretion and timing.

In *McMillan v Pryce*<sup>44</sup> a majority of the Supreme Court (Martin CJ and Mildren J) rejected the proposition that the Act was retrospective in its operation and held, for the purpose of sentencing property offenders, that “a property offence” and “before been found guilty of a property offence” refer only to an offence committed, and a finding of guilt made, after the commencement of the Act.

In *Williams*, the appellant argued that the mandatory minimum imprisonment provisions should be read subject to s 118 of the *Sentencing Act* 1995 (NT) on the basis that this permits a court to impose a fine instead of imprisonment. Section 118 provides:

An offence ... that is punishable by a term of imprisonment ... is, unless the contrary intention appears, punishable, in addition to or instead of imprisonment, by a fine.

The Supreme Court rejected this argument on the basis that s 78A did manifest a contrary intention.<sup>45</sup>

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42 *Bradley v Trenerry* D164/1997 (High Court of Australia, Transcripts, 21 May 1998).

43 (1997) 6 NTLR 194.

44 Unreported judgment, NT SC, Martin CJ, Angel and Mildren JJ, 20 June 1997.

45 In doing so, the court distinguished *Healey v Festini* [1958] VR 225 and the High Court decision in *Rose v Hvrlic* (1963) 108 CLR 353.

### C. International Law Issues

It is now accepted that the interpretation of Australia's domestic law (both common law and statute) may be influenced by international law in cases of ambiguity or uncertainty. However, where the domestic law is clear in its meaning it shall prevail notwithstanding any potential violation of international law principles.<sup>46</sup>

Although it would appear arguable that the Northern Territory mandatory sentencing regime may infringe aspects of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory,<sup>47</sup> the regime unambiguously declares its intentions.

Accordingly, the only available remedy in relation to an infringement of the ICCPR is a petition (strictly "a communication") by the aggrieved individual to the Human Rights Committee under the procedure established pursuant to the First Optional Protocol to the ICCPR.<sup>48</sup>

Two successful petitions have been lodged by Australian individuals to date: *Toonen* (a challenge to Tasmania's criminal laws prohibiting consensual sexual activity between adult males) and *A v Australia* (concerning the protracted detention of asylum seekers).<sup>49</sup>

Blokland<sup>50</sup> argues that the Northern Territory mandatory sentencing regime may infringe the international principle of proportionality and specifically analyses the implications of Articles 7, 9, 10, 14 and 15 of the ICCPR in this context. There is no space here to pursue these interesting and provocative arguments.

As far as juvenile offenders are concerned, the violation of international law principles is clearcut. Several provisions of the United Nations Convention on the Rights of the Child (CROC), to which Australia is a signatory, are manifestly infringed.<sup>51</sup> It should be noted, however, that there is no individual grievance procedure under this international treaty, so violations can only be taken into account in the UN reporting process with such political opprobrium as this may engender.

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46 *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Jago v The District Court of NSW* (1989) 168 CLR 23; *Jumbunna Coal Mine NL v Victorian Coalminer's Association* (1908) 6 CLR 309; *Mabo v State of Queensland* (1992) 175 CLR 1.

47 For an interesting review of the issues see J Blokland, "International Law Issues and the New Northern Territory Mandatory Sentencing Regime", paper delivered to the Northern Territory Criminal Lawyers Association Sixth Biennial Conference, 22-26 June 1997; see also M Flynn, note 27 *supra*, and M Wilkie, "Crime (Serious Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective" (1992) 22 *UWAL Rev* 187.

48 For a detailed discussion of this process see S Pritchard and N Sharp, *Communicating with the Human Rights Committee: A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights*, Australian Human Rights Information Centre, July 1997.

49 *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.

50 Note 47 *supra*.

51 See Blokland *ibid*; Flynn, note 27 *supra*; and H Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory" in this issue of the *UNSWLJ Forum*.

## VI. POLITICAL CHALLENGES

The mandatory sentencing regime has been criticised on the basis of cost, lack of efficacy and injustice.

Although there is anecdotal evidence of significant increases in the prison population,<sup>52</sup> there are no accurate and comprehensive data indicating the precise impact of the regime. Advocates of the laws would, in any case, support such prison population increases and consequent costs as justifiable.

A similar lack of precise and rigorous data bedevils discussion of the effectiveness of the reforms. Attorney-General Stone QC released a Ministerial Statement<sup>53</sup> which purported to prove a decline in property offences attributable to the new regime. However, this evidence is at best equivocal. The result has been rhetorical claim and counterclaim. At this stage, it can only be said that there is no satisfactory proof of the success or failure of the reform in terms of crime reduction.

While these utilitarian criteria are difficult to assess, it is submitted that normative concerns are less equivocal. The mandatory sentencing regime is unjust for several reasons, including:

- its inflexibility (and consequent inability to take account of the circumstances of the offence and the offender) which will inevitably lead to harsh, unfair and discriminatory outcomes;
- its potential or actual violation of international human rights law (see above);
- the shift of discretion from the judiciary to the police<sup>54</sup> which is less visible and less accountable (lack of review);
- the prospect of fewer guilty pleas<sup>55</sup> and the resulting additional cost and delay.

## VII. FUTURE PROSPECTS

Arguably, the Northern Territory Government has created a rod for its own back by characterising the solution to the complex problem of property crime in a simple manner. It has raised public expectations that this particular punitive policy will improve the situation. As Hogg and Brown note, “[t]he short-term exploitation of popular concerns and expectations can turn into a long-term disaster in public policy”<sup>56</sup> if, as is likely, the escalation of imprisonment does

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52 Personal communication from offices of the DPP, Court Administration, NTLAC, Darwin Community Legal Service and NAAILAS. Several people commented that this has led to a prisoner overflow in Darwin which has necessitated transfers to Alice Springs prison with consequent disruption for social and community ties of the offenders.

53 Stone, note 2 *supra*.

54 See Flynn, note 38 *supra*; and Von Hirsch and Ashworth (eds), note 14 *supra*, p 235.

55 This is a consequence of mandatory regimes in the US: Von Hirsch and Ashworth (eds), note 14 *supra*, p 235 citing Tonry.

56 Hogg and Brown, note 3 *supra*, p 39.

not halt property crime. Indeed, if the traditional law and order pattern is followed, such policy failure will be followed by calls for an escalation in punishment.<sup>57</sup>

The Northern Territory experiment with compulsory minimum prison terms for property offenders would appear to be bristling with problems both in terms of justice issues and practical concerns. However, given the lack of thorough empirical evaluation to date, it would be unfair to make a premature assessment on cost and effectiveness. Nevertheless, the signals are sufficiently clear for those other jurisdictions watching the Northern Territory experiment to proceed with extreme caution in this area. As Tonry observed (in adapting George Santayana's famous aphorism to sentencing policy), "those jurisdictions that refuse to learn from the experiences of others are condemned to repeat their mistakes".<sup>58</sup>

Even assuming that a case could be made out that the law is ineffective and costly, that is not the end of the matter. Rational argument or evidence do not automatically lead to policy change.

As long as the populist symbolic appeal of harsh punishment for property offenders prevails, a rational critique is likely to have a marginal effect in terms of reform.<sup>59</sup> As Von Hirsch and Ashworth point out,<sup>60</sup> such symbolism has little to do with success or failure in relation to traditional sentencing objectives. Hogg and Brown<sup>61</sup> have eloquently elaborated the constituent elements of law and order commonsense and its power of persuasion.

Nevertheless, while rational argument, evidence and sentencing theory are capable of being sidelined in this way, I would argue it is wrong to assert that there is no articulation between populist notions and considerations of cost, justice and efficacy. Nor are the traditional aims of punishment irrelevant.

The erosion of popular support for a harsh mandatory sentencing regime is likely to result from the interaction of a complex set of emotional influences and attitudes with the various factors outlined earlier. For example, an absurd case of injustice which attracts international attention. Or a ridiculous cost blowout.

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57 There have been suggestions that the scope of the regime be extended to other offences. The Government has also lauded the New York policy of 'zero tolerance' which, in effect, removes discretion at the point of arrest. Such a policy, coupled with mandatory sentencing, would seek to remove the last vestige of discretion although, in practice, it is difficult to imagine how this could happen: a police judgment as to whether an offence has occurred involves the exercise of discretion. The scope for legal challenge appears to be limited. Communications to the Human Rights Committee are slow and cumbersome. Eventual success could, however (as in the *Toonen* case), lead to pressure for the introduction of remedial federal legislation of the kind currently being proposed by Senator Brown.

58 M Tonry, "Sentencing Reform Across Boundaries" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press (1985), p 282.

59 Compare the so-called mandatory life penalty for horrific murders in NSW discussed by N Cowdery, "Mandatory Life Sentences in New South Wales" in this issue of the *UNSWLJ Fourth*.

60 Von Hirsch and Ashworth (eds), note 14 *supra*, pp 410-23.

61 Hogg and Brown, note 3 *supra*, chapter 2.

Or a case involving the relative of a politician.<sup>62</sup> There may also be regional variation in prosecutorial practices to avoid manifest injustice because of the fear of bringing criminal justice agencies into disrepute.<sup>63</sup> Further research into these issues (not least the impact of the laws on the Indigenous community, especially juvenile members) is required before the actual effect of the law and its prospective longer term trajectory can be fully understood.

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62 A charge of stealing against the son of Eric Poole, Minister for Correctional Services, has attracted considerable public attention: M Ceresa, "Prison Minister's son caught in 'one-strike' net" *The Australian*, 3 July 1998, p 1. The matter has been adjourned several times and is due to be heard later this year.

63 There is anecdotal evidence that the correctional authorities are less than pleased about the regime.