

## **Sentencing**

### Introduction

In judicial affairs, the area of sentencing that has been most topical is that of mandatory sentencing.

Mandatory sentencing laws impose pre-ordained prison or detention sentences of minimum periods on people convicted of specific offences. Mandatory sentencing removes judicial discretion in sentencing procedures that would otherwise enable the courts to determine the penalty based on the circumstances of the offender, the victim and the gravity of the offence.

In an atmosphere of calls for a need for increased law and order, mandatory sentencing appeals to politicians looking for a populist solution.

This paper will argue that the imposition of mandatory sentencing on the court removes the discretionary power, which is essential to just determination of the particular case, and is counter-productive to just outcomes.

The circumstances of each alleged crime obviously vary widely. It is up to the court, taking into consideration all aspects, to decide on the appropriate penalty. Imposing mandatory sentencing is legislature interference with a basic tenet of national governance, the independence of the judiciary.

Mandatory sentencing is completely counter to the provisions in the Crimes Act relating to sentencing.

### *Part 15 Sentencing*

#### *Division 15.1 General principles and procedures*

341. Purposes for which sentence imposed

The only purposes for which a sentence may be imposed are –

a) to punish the offender to an extent and in a way that is **just and appropriate in all the circumstances** (*emphasis added*).

342 Matters to which the court to have regard

1. In determining the sentence to be imposed on a person, the matters to which the court shall have regard include but are not limited to, such of the following matters as are relevant and known to the court:

a) the **nature and circumstances** of the offence

(*There follow descriptions of 22 such circumstances*)

Further, 345 states

Restriction on imposing sentences of imprisonment

1. A court shall not pass a sentence of imprisonment on any person for an offence against a Territory law unless the court, after having considered all the other available penalties, is satisfied that no other penalty is **appropriate in all the circumstances of the case**.

### 346 Sentences – imprisonment and fines

If a person is convicted of an offence against a provision of this ACT, the penalty for which is a fine or term of imprisonment, the court may, **if it thinks fit**, impose both penalties on the person.

The philosophy behind pre sentence reports is that the court takes all the circumstances into consideration.

364 Contents of pre-sentence reports list 11 particulars relevant to sentence – age, education., employment, medical condition etc

In recent times, two jurisdictions have introduced mandatory sentencing legislation: Northern Territory and Western Australia.

In relation to the NT, the Commonwealth Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 was introduced to invalidate any law requiring a court to impose mandatory detention for offences committed by a child under 18 years. This Bill was referred to a Senate Legal and Constitutional References Committee Inquiry March 2000, which covered

- a) the legal, social and other aspects of mandatory sentencing:
- b) Australia's international human rights obligations in regard to mandatory sentencing laws in Australia:
- c) the implications of mandatory sentencing for particular groups) the constitutional power of the Commonwealth Parliament to legislate with respect to existing laws affecting mandatory sentencing.

The Committee concluded that:

8.3 \* The Commonwealth has the power to override Territory legislation, and under certain conditions, has previously done so...

\* International obligations incurred through ratification of treaties and conventions are binding in international law, and it is the Commonwealth that has ultimate responsibility for ensuring these obligations are met.

\* Where State legislation contravenes international obligations the Commonwealth is responsible for ensuring that these obligations are met...

8.16 The Committee is 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 unanimously recommended passage of the bill.

### ***THE NORTHERN TERRITORY EXPERIENCE***

Legislation mandating prison terms for property offenders was introduced in the Northern Territory in March 1997. The so-called *mandatory sentencing* legislation was controversial within the Northern Territory, and throughout Australia.

Proponents of the sentencing regime believed that it would provide an effective deterrent to property offending and would see justice served in the eyes of the community.

Detractors of the regime perceived a potential for the miscarriage of justice through the restriction of judicial discretion, and were concerned that the regime was specified in a way which implicitly targeted the Northern Territory's large Indigenous population.

Although mandatory sentencing legislation for property offenders was repealed in October 2001, the accompanying public debate has continued, and is likely to continue into the future. The NT is able to contribute to a wider understanding of the implications of a mandatory sentencing regime, as data from the approximately four and a half years during which the Northern Territory's mandatory sentencing regime was in place is sufficient to generate a credible analysis of some of the major issues relevant to the public debate.

### ***Conclusions of study by the Northern Territory Office of Crime Prevention 2003***

\* Indigenous over-representation

Indigenous people were heavily over-represented in the mandatory sentencing regime.

Indigenous adults were approximately 8.6 times as likely as non-Indigenous adults to receive a mandatory prison term at some time during the life of the sentencing regime.

Indigenous adults were an even higher proportion of repeat offenders, with 95% of one year minimum sentences being ordered against indigenous offenders.

\* Deterrence

The length of the minimum sentence was not an effective deterrent for the population known to have been subject to the mandatory sentencing regime. This finding does not discredit the possibility that the other elements of mandatory sentencing regime, including the publicity it generated, did deter property offenders.

Available data suggests that sentencing policy does not measurably influence levels of recorded property crime.

\* Impact on prison population

Early predictions of the impact of mandatory sentencing on the Northern Territory prison population were overstated. At its maximum, the upper limit of the possible impact of mandatory sentencing was at 15% of the underlying prison population. The true impact would have been less than 15%. The upper limit may have increased if the mandatory sentencing legislation had not been repealed, however the data suggests that the impact of mandatory sentencing on the prison population was close to a long term level by the time it was repealed.

\* Impact on judicial discretion

Mandatory sentencing legislation altered court outcomes for property offences on a large proportion of sentencing occasions. The proportion of sentencing occasions resulting in imprisonment was 50 percentage points higher during the mandatory sentencing era than it was following the repeal of the sentencing legislation.

Mandatory sentencing legislation has a lesser impact on court outcomes for repeat offenders, as magistrates are more likely to order imprisonment for offenders with a prior criminal history.

CLA (ACT) welcomes the new bill on sentencing laws proposed by the Chief Minister (April 7 2005 media release) designed to give courts greater flexibility to match sentences to the particular conditions of the case.

### **Conclusion**

It is the view of Civil Liberties Australia (ACT) that mandatory sentencing is not in the interests of the Australian community. We urge the committee to reject it, whether it is called 'mandatory sentencing' or comes disguised by other, soft-soaping words.

Justice is best served when judicial officers dispense sentences, having heard all the facts of a case and having taken into account all surrounding circumstances.

Justice is not served when politicians attempt to:

- Introduce mandated sentences by using euphemisms such as 'sentencing guidelines', or
- Curtail the courts by legislating for mandated non-parole periods.

We support the concept of more flexible sentencing, thus allowing the courts and administrative authorities to find the correct and appropriate balance between time spent in total incarceration by comparison with the time spent on initiatives to return a 'whole' person to society, such as half-way houses, education/training and community service.

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