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Discretion in Sentencing: Mandatory Sentencing Laws

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Judicial discretion in sentencing is a topical subject. It is a recurring theme in a country such as Australia where there exists a separation of powers. This paper will discuss the mandatory sentencing regimes that are currently in place in Western Australia and the Northern Territory and why they are a restriction on judicial discretion in sentencing.

I would not argue that mandatory sentencing does not have a place in today's society. This is not to say that mandatory sentencing is correct for all offences. Having a mandatory law that suspends a drivers' licence when a traffic conviction is received is not the same as a mandatory sentence of imprisonment for a property offence. Many jurisdictions have had mandatory life sentences following the abolition of capital punishment for crimes such as murder.[1] In Western Australia, the *Criminal Code* 1913 (WA), was amended so that the crime of wilful murder carries a mandatory punishment of strict security life imprisonment or life imprisonment and murder, a mandatory sentence of life imprisonment.[2] Under section 90 of the *Sentencing Act* 1995 (WA), if a court imposes life imprisonment for murder it must set a period of between seven and fourteen years before the offender is eligible for parole. For wilful murder, the period must be between fifteen and nineteen years. Section 91 states that a court that imposes strict security life imprisonment must set a period between twenty and thirty years before the offender is eligible for parole, unless the court orders that there be no eligibility for parole. Mandatory sentences for life are justified for wilful murder and murder as the represent a reasonable

[1] G. Zdenkowski, *Limiting Sentencing Discretion: Has there been a paradigm shift?*, Current Issues in Criminal Justice, Volume 12, No. 1, July 2000, p. 60
[2] Section 282 (a) and (b)

compromise in the context of a situation where there was already in existence a mandatory sentence of death.

In 1992, Western Australia introduced the *Crimes (Serious and Repeat Offenders) Sentencing Act 1992 (WA)*.[3] This Act was specifically to provide for the sentencing of juveniles involved in stealing cars and juvenile and adult repeat offenders. A repeat offender was an offender who had made 6 or more conviction appearances for a prescribed offence or 3 or more for violent offences in the 18 months preceding the current offence.[4] If a juvenile was convicted of an offence other than a violent offence, sentencing guidelines were provided for the court to have regard to matters such as the circumstances of the victim and the offence, the offenders age and past record and the degree of remorse shown by the offender.[5] For violent repeat juvenile offenders, the Act specified that the court must sentence the offender to a period of detention and direct that the offender continue to be detained after the expiration of this term of imprisonment until released by order of the Supreme Court.[6] Section 7 allowed the review of this indeterminate sentence upon the application of the chief executive officer to the Court, but not before 18 months had been served by the juvenile offender. For violent repeat adult offenders, except if convicted of wilful murder or murder, the court was directed to sentence the offender to a term of imprisonment and direct that the offender then be detained at the Governor's pleasure.[7]

[3] N. Morgan, *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?*, Criminal Law Journal, Volume 24, June 2000, p. 166
[4] *Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA),* Schedule 1, Part 1 or 2
[5] *Ibid.* section 5 and Schedule 3
[6] *id.* section 6
[7] *id*. section 8

This Act was only in force from 9 March 1992 to 8 June 1994.[8] I believe that only one person, a juvenile offender, qualified to be dealt with under this legislation. Western Australia's three-strike burglary laws came into force in November 1996.[9] Section 401(4) of the *Criminal Code* states that a repeat offender, being a person convicted for the third or more time of home burglary[10] must be sentenced to at least 12 months imprisonment.[11] Any home burglary, however minor, counts as a strike.[12] A broad definition is given to the word conviction so that it includes cases where no conviction was recorded.[13] The provisions apply to adults in respect of prior offences they committed as juveniles.[14]

Juvenile offender sentencing is regulated by the combined operation of the *Criminal Code* and the *Young Offenders Act* 1994 (WA).[15] Under these Acts, a juvenile may be sentenced to at least 12 months imprisonment or at least 12 months detention,[16] notwithstanding section 46(5a) of the *Young Offenders Act* which provides that a court is not obliged to impose a mandatory or minimum penalty where required by law.

[8] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit.*, p. 166
[9] *Ibid.*
[10] Section 401 – a place ordinarily used for human habitation
[11] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit.*, p. 166
[12] *Ibid.*
[13] *id*., p. 167
[14] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, Bills Digest No. 62 1999-2000, p. 2
[15] *Young Offenders Act* 1994 (WA), section 124 – Division 9 (Dealing with young persons who repeatedly commit serious offences) applies if 2 prior offences have been committed, the court is satisfied that the juvenile would reoffend and the offence is in Schedule 2 of the Act or is an offence under section 401 of the *Criminal Code* (burglary)
Criminal Code, section 401(4)(b) – extends section to apply to juveniles
[16] *Criminal Code*, section 401(4)(b)
The Law Council of Australia, *The Mandatory Sentencing Debate*, Position Paper Update March 2000, p.1

Section 401(5) of the *Criminal Code* provides that a court shall not suspend a term of imprisonment made under section 401(4). As there is no reference to detention in this section, it has been held that the court retains a discretion in respect of the period of juvenile detention. Courts have imposed the alternative sentence of an intensive youth supervision order combined with a period of detention or Conditional Release Order.[17]

The Northern Territory legislation came into effect on 8 March 1997 and mandatory sentencing applies to both adults and juveniles for property offences.[18] For adult offenders (over 17 years), the *Sentencing Act* 1995 (NT) applies and provides mandatory sentences in respect of certain property offences of 14 days' jail for the first offence, 90 days' jail for the second and 1 year's jail for a third offence.[19] These sentences were extended in June of 1999 to apply to second offences of assault and first offences of sexual assault where a jail term is mandatory but no minimum is prescribed.[20] The exception to these mandatory sentences is "exceptional circumstances", and the exception only applies to a single first adult property offence.[21] For the exceptional circumstances to be met, four criteria must be satisfied. The offence must have been of a trivial nature.[22] The offender must have made reasonable efforts to make full restitution.[23] The offender must be otherwise of good character and that there were

[17] *id.* pp. 1-2
[18] Law Council of Australia, *The Mandatory Sentencing Debate*, Position Paper Update, 10 March 2000, p. 2
Property offences include theft (irrespective of value), criminal damage, unlawful entry , unlawful use of a motor vehicle, receiving stolen goods, assault with intent to steal and robbery
[19] *The Mandatory Sentencing Debate*, *op cit.*, p. 2
[20] *Ibid.*
[21] section 78A(6B), *Sentencing Act* 1995 (NT)
[22] *Ibid*., section 78A(6C)(a)
[23] *id*., section 78A(6C)(b)

mitigating circumstances (which do not include intoxication or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame and demonstrate the offence was an aberration from usual behaviour.[24] The offender must have cooperated with the law enforcement agencies.[25] The onus of proving the existence of these circumstances is on the offender.[26]

With juveniles in the Northern Territory, the *Juvenile Justice Act* 1983 (NT) provides mandatory sentencing provisions if there is at least one prior conviction.[27] A second offence produces a mandatory sentence of at least 28 days. The court can order a juvenile to participate in a diversionary program rather than a sentence of imprisonment, but these programs are of limited value to juveniles not living in Darwin, Katherine and Alice Springs[28] and aboriginal offenders are less likely to have access to these diversionary schemes.[29] If a diversionary program is ordered, mandatory sentencing provisions are revived for future convictions.[30] Third and subsequent strikes are subject to the mandatory 28 days detention without the option of diversion.[31]

By late 1997 the Northern Territory prison population had increased by 42% since the introduction of mandatory sentencing.[32] The Northern Territory has an imprisonment rate three times that of any other Australian

[24] *Ibid*., section 78A(6C)(c)
[25] *The Mandatory Sentencing Debate*, *op cit.*, p. 2
section 78A(6C)(d), *Sentencing Act* 1995 (NT)
[26] *Ibid*., section 78A(6C)
[27] *The Mandatory Sentencing Debate*, *op cit.*, p. 3
[28] *Ibid.*
[29] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?*, *op cit.*, p. 180
[30] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*,*op cit.*, p. 3
[31] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?*, *op cit.*, p. 168

jurisdiction except Western Australia.[33] The gathering of accurate information and statistics is made difficult in the Northern Territory due to the absence of Freedom of Information legislation.[34] In Western Australia, up until 31 December 1999, 88 juveniles had served or were serving 12 month mandatory sentences. Indigenous children comprised 80% of cases facing mandatory sentencing charges before the Children's Court.[35] There exists anecdotal evidence that in the first six months of the Northern Territory mandatory sentencing laws, virtually no matter proceeded by way of a plea of guilty at the earliest opportunity and there was an increase in the number of young people failing to attend court hearings.[36]

It is notoriously difficult to measure the deterrent effect of laws. When the mandatory sentencing laws were introduced in Western Australia, the definition of burglary was revised.[37] Added to the definition was home burglary and aggravated burglary.[38] These changes present major problems for the evaluation of the impact of the mandatory sentencing laws.[39] However, the home burglary rate in Western Australia increased in the period from 1991 to 1995 but declined in 1996 prior to the introduction of mandatory sentencing laws.[40] In 1997 it was constant but in

[32] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999,op cit.,* p. 4
[33] *Ibid.*
The imprisonment rate in the Northern Territory is 459.3 per 100,000. In Western Australia it is 165 per 100,000
[34] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999,op cit.,* p. 4
[35] *Ibid.*
[36] *id.*
[37] N. Morgan, *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories*, University of NSW Law Journal (1999), Volume 5 No 1, p. 6
[38] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit.*, p. 166
[39] *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories, op cit.,* p. 6
[40] *Ibid.*, p. 7

1998 it again increased.[41] The rate of robberies and armed robberies increased dramatically in 1996 and 1997 so there may have been a degree of displacement.[42]

The mandatory sentencing laws are on their face non-discriminatory but they are discriminatory in effect as they involve the policy choice to select certain types of criminal activity for attention and such offences are invariably those in which minority and lower socio-economic groups are over represented.[43] The class of people most likely to be caught up in the mandatory sentencing regime are those who will be unable to satisfy the exceptional circumstances exception in the Northern Territory legislation.[44] In the Northern Territory, where 73% of the prison population is Aboriginal, lawyers have dubbed the exceptional circumstances provision the "white middle class escape clause."[45]

Mandatory sentencing laws also cause great damage to the legal system.[46] They encourage offenders to avoid going to court as there is no incentive to attend when a mandatory sentence will be imposed.[47] There is no incentive to plead guilty at the first instance. These two factors alone will increase the costs of the administration of justice. In any other sentencing matter, a court may consider issues such as mental illness or intellectual disability however, these factors are unable to be considered

[41] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit.,* p. 172
[42] *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories, op cit.,* p. 6
[43] *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories, op cit.,* p.9
[44] R. Goldflam & J. Hunyor, *Mandatory sentencing and the concentration of powers,* Alternative Law Journal, Volume 24, No. 5, October 19999, p. 214
[45] *Dollars Without Sense – A Review of the Northern Territory's Mandatory Sentencing Laws,* http://ms.dcls.org.au/Dollars_Sense.htm, 20 March 2001
Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit., p. 180
[46] *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories, op cit.,* p. 9

under the mandatory sentencing regime.[48] Northern Territory Magistrate John Lowndes had no discretion in the sentencing of a 24 year old intellectually disabled man to 90 days' jail due to mandatory sentencing laws.[49]

International Obligations

The Joint Standing Committee on Treaties of the Commonwealth Parliament was critical of mandatory sentencing as it contravenes the *Convention on the Rights of the Child* (CROC) in the case of juveniles and the *International Convenant on Civil and Political Rights* (ICCPR).[50]

The CROC came into force on 16 January 1991 and requires that in dealing with children, courts should have the best interest of the child as the primary consideration (Article 3) and sentences must be proportionate to the circumstances of the offence and be subject to appeal (Article 40).[51] Article 37(b) states that:

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

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[47] *Ibid.*
[48] *Mandatory sentencing and the concentration of powers, op cit.,* p. 214
[49] T. O'Loughlin & D. Jopson, *New call to end mandatory laws,* Sydney Morning Herald, 25 July 2000 at http://www.smh.com.au/news/0007/25/national/national1.html, 20 March 2001
[50] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999,op cit.,* p. 6
H. Baynes, *Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory* University of New South Wales Law Journal 22 (1) 1999
[51] *Ibid.*

This Article is defeated if juveniles are incarcerated after a first offence conviction. Article 40.1 states that children who have been convicted of an offence should be:

> "…treated in a manner consistent with the promotion of a child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role

Contrary to the general perception that harsher treatment of juvenile offenders will deter others, Western Australia's high rate of imprisonment would appear to have had little effect on the proportion of juvenile offenders arrested. The proportion of juvenile offenders arrested as part of the total number of offenders arrested in Western Australia remains high and, in some cases, is rising. In 1997, juveniles represented only 8.6% of the total number of offenders arrested by police.[52] 36.4% of the total number of offenders charged with burglary were juvenile offenders. This figure compares to 30% in 1996 and 31% in 1995.[53]

Western Australia's high juvenile imprisonment rate casts doubt on the value of imprisonment per se as a deterrent to juvenile crime. Mandatory sentencing accelerates contact between offenders and the prison system that will lead to higher and more serious re-offending, an increase

[52] A. Ferrante, N. Loh & J. Fernandez, *Crime and Justice Statistics for Western Australia 1997,* (1988) at p. 40
[53] I*bid*. p. 54
A. Ferrante., N. Loh & M. Maller, *Crime and Justice Statistics for Western Australia: 1996* (1997), p. 52
A. Ferrante & N. Loh, *Crime and Justice Statistics for Western Australia: 1995* (1996), p. 54

in the rates of recidivism.[54] Offenders, especially juveniles are given the chance to learn from their fellow inmates.[55]

The ICCPR entered into force for Australia on 13 August 1980.[56] Article 9 prohibits arbitrary detention and Article 14 provides that prison sentences must be subject to appeal.[57] Detention that is lawful can nevertheless be arbitrary if the relevant individual circumstances are ignored.[58] The mandatory sentencing laws ignore the great variation in circumstances in which a single type of offence may be committed.[59]

Whilst neither the ICCPR nor the CROC directly prohibit mandatory sentencing,[60] there has been judicial support for the contention that Australia is in breach of its international obligations. In *Ferguson v Setter & Gokel*[61] Kearney J expressed the opinion that the mandatory sentencing provisions of the Northern Territory's *Juvenile Justice Act* were "directly contrary" to Article 37 of the CORC.[62] He went on to say that this had no bearing on their legal validity and that detention had been legislatively mandated as a first resort sentence in the cases of juvenile repeat property offenders.[63]

[54] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999,* p. 5
[55] *Ibid.*
[56] *id.* p. 7
[57] *id.*
[58] M. Flynn, *International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities,* Criminal Law Journal, Volume 24, June 2000, p. 188
[59] *Ibid.* p. 189
[60] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, op cit.,* p. 9
[61] [1997] NTSC 137
[62] *Ibid.*
[63] *id.*

Perhaps it is more the case that the mandatory regimes offend apprehended obligations.[64] The Northern Territory and Western Australian governments submitted to the Senate Committee enquiry that mandatory sentencing laws did not infringe Australia's international obligations.[65] In a submission to the Prime Minister dated 27 February 2000, 34 Australian legal academics severely criticised these governments for placing the interests of the general community by reason of the alleged threat to the community posed by juvenile offenders above the best interests of the children concerned contrary to Article 3 of the CROC.[66] They stated that it was "indefensible" to argue that mandatory sentencing laws were a part of a larger juvenile justice regime or that they were an appropriate and proportionate response to the worst case offender.[67] It was also pointed out that 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. A claim that the governments had a popular mandate to implement the laws is likewise no justification for such a failure.[68] The academics pointed to other international obligations that may have been breached including the *Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Prevention and Punishment of the Crime of Genocide.*[69]

The United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) monitors the domestic implementation

[64] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, op cit.*, p. 10
[65] The Law Council of Australia, *op cit*., p. 7
[66] *Ibid.* p. 8
[67] *id*.
[68] *id*.
[69] *id*. p. 9

of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).[70] In its 2000 report on Australia it expressed concern over mandatory sentencing laws because they appeared to target offences that are committed disproportionately by Aboriginal Australians, especially juveniles.[71] The Commonwealth Government's reaction was to attack the Committee's report and state that they were unaware of any complaint being made about the mandatory sentencing laws under the *Racial Discrimination Act*.[72]

Although the mandatory sentencing laws are racially neutral on their face, Article 1(1) of CERD includes in its definition of racial discrimination any distinction that has the effect of impairing human rights.[73] Thus if a law has the effect of infringing human rights on one group greater than another then it can be inferred that the law is based on race.[74]

Popular mandate

The argument has been made time and time again that the people of Western Australia and the Northern Territory want mandatory sentencing.[75] It is said that it is for the community through the legislature to fix the range of penalties and minimum penalties and if these are harsh then this simply

[70] *International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities, op cit.,* p. 185
[71] *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia,* CERD/C/56/Misc.42/rev.3 (24 March 2000) at para 16 as cited in *Ibid.*
[72] *id.*
[73] *International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities, op cit.,* p. 189
[74] *Ibid.*
[75] *id.* p. 10

reflects the democratic will of the people.[76] It has generally been found in surveys that people underestimate the severity levels of penalties imposed by the courts.[77] But to what extent should public opinion influence sentencing policy? [78]

Sentencing is generally considered to serve four objectives: rehabilitation, deterrence, retribution and incapacitation.[79] Mandatory sentencing appears to be based firmly on deterrence, retribution and incapacitation with rehabilitation being diminished or dismissed.[80] Both the Northern Territory and Western Australian Governments point to the high rate of home burglaries and the effects on the victims of these crimes.[81] They have emphasised the notion that judicial discretion must give way to community opinion and parliamentary sovereignty.[82]

There is clearly a need to look to longer term strategies that address the underlying causes of crime including poverty, homelessness, discrimination, family breakdown, mental illness and substance abuse.[83] As young people looking for money for their drug addictions commit 80 to 85 per cent of all burglaries, it would not matter if sentences were doubled, as they would still commit these crimes.

[76] G. K. F. Santow, *Mandatory Sentencing: A Matter for the High Court?*, The Australian Law Journal, Volume 74, May 2000, p. 302
[77] *Limiting Sentencing Discretion: Has there been a paradigm shift?*, *op cit*., p. 68
[78] *Ibid.*
[79] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, *op cit.*, p. 10
[80] *id.*
[81] *id.*, p. 5
[82] *id.*
[83] *id.*,. p. 3

It is difficult to address the causes of criminal behaviour from within prisons.[84] Statistical evidence shows that imprisonment or detention has little deterrent effect on offenders.[85] The form of punishment or length of a period of imprisonment does not affect the rate of recidivism.[86] As an example, in California after the introduction of tougher sentencing laws, the prison population quadrupled in the 10-year period from 1980 to 1990.[87] This represents an actual increase of 120,000 prisoners.[88] Over the same period, a comparison made between California's crime rates and incarceration levels and 16 other American states showed there was no causal connection between the use of imprisonment and a reduction in crime.[89]

In the mid 1990's California introduced a three strike mandatory sentencing regime resulting in a further increase in the number of those in prison.[90] An accused with one prior serious or violent felony conviction must be sentenced to double the term that person would have received for the offence.[91] Those with two or more convictions must be sentenced to life imprisonment with the minimum term being either 25 years, three times the term otherwise provided for the instant offence or the term applicable for the instant offence plus appropriate enhancements, whichever is the

[84] M. Bagaric, *Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals*, Criminal Law Journal, Volume 24, February 2000, p. 28 as quoted in the Hon Justice Kennedy, *Youth are our Future. Spare the Rod and Save the Child,* Rotary District 9450 Conference, 24 March 2001, p. 14
[85] *Ibid.*
[86] *id.*, p. 15
[87] *id.*
[88] *id.*
[89] *id.*
[90] *id.*
[91] *id.*

greater.[92] The current offence does not have to be a serious or violent felony.[93] Studies have shown that this law has had no observable influence on the rate of serious crime and it has not achieved its objective of reducing crime through deterrence or the incapacitation of career criminals.[94] The cost of enforcing this mandatory sentencing law would be $5.5 billion annually, doubling the corrections budget from 9% to 18% of the overall State budget.[95]

Early intervention with families and the social development of children has positive effects in reducing the likelihood of children offending later in life.[96] Very few early intervention programs and services explicitly have crime prevention as an objective. These programs can have a major impact on at risk children to prevent future offending.[97] The concept of restorative justice includes practices such as victim/offender and family conferencing, sentencing circles and victim-offender mediation schemes that focus on repairing the harm caused by crime.[98] Restorative justice practices can be used as a diversion from court, as a pre-sentencing option or following the release of an offender from prison.[99] In Western

[92] *id.*, p. 16
[93] *id.*
[94] *id.*
[95] *id.*
[96] *Early Intervention and Developmental Approaches to Crime Prevention*, National Anti-Crime Strategy, http://www.cpu.sa.gov.au/nacs_eidacp.htm, p. 1, 28 March 2001
Professor P. Wilson, *Crime expert calls for rethink on prison sentences*, Bond University Media Release, http://www.bond.edu.au/news/1999/19990311.htm, p. 1, 28 March 2001
K. Fletcher, *The growing razor wire empire*, http://www.greenleft.org.au/back/2000/414/414p10b.htm, p. 1, 28 March 2001
[97] *Ibid.*, p. 2
[98] *Restorative Justice: an International Perspective*, Australian Institute of Criminology, http://www.aic..gov.au/rjustice/international.html, p. 1, 28 March 2001
[99] *Ibid.*

Australia it is estimated that approximately 1,400 conferences are held each year under the provisions in the *Young Offenders Act* 1994 (WA).

Judicial Independence

After the announcement in Western Australia of the introduction of mandatory sentencing, much focus was placed on the role of the judiciary in the sentencing process and the perceived failure of the judiciary to reflect the concerns of the community.[100] On 17 July 1998, a young man appeared before the Supreme Court charged with the armed robbery of an elderly Cambodian man. In the course of hearing submissions about sentence, the Judge commented on the media's "cry for extreme punishment" rather than focussing on the problems faced by individuals dependent on drugs and alcohol. His Honour also commented on the need for the community to assist in deterring crime and rehabilitating offenders. His Honour's comments were reported as laying the blame for this particular offence at the feet of the community.[101] There was, predictably, community outrage at the comments as incorrectly reported by the media. Few could understand how community could be held to blame for the actions of an individual.[102]

The Judge was subjected to further criticism when it was revealed that the plea in mitigation that the Court had heard was largely inaccurate. Counsel for the accused had submitted that the offence was committed in desperation because the accused was unable to meet the needs of his young family. In a subsequent media interview given by the accused's de facto

[100] The Hon D. K. Malcolm, *Judicial Independence in Sentencing*, Stipendiary Magistrates' Society Magistrates Conference, 11 November 1999, p. 8
[101] C. Wilson-Clark, *Mugger: Judge Blames Society,*, The West Australian, 18 July 1998, p. 7
[102] C. Morgan, *Outrage at Judge's Line on Criminal*, The West Australian, 20 July 1998, p. 11

partner, it was revealed that the bulk of the accused's income went on drugs and alcohol and that he was in receipt of Commonwealth welfare benefits.[103] It was suggested that the Court had been misled. The media reports reinforced the perception that the Courts were failing in their responsibilities to the community. A subsequent editorial published in the *West Australian* questioned whether the community should place its confidence in the Courts to deal with offenders. The Editor attempted to rationalise the concern that had been raised in the community over the role of the Courts:

> "The intention [of the report] was to test the basis of [the sentencing Judge's] remarks, which might be regarded as appropriate for a social worker but questionable for a judge. In doing this, the newspaper was also testing court procedures and how effectively they serve the community... The community might have more confidence in the court system if those who make their living from it appeared to act less like members of an exclusive club and more like citizens concerned to serve the public's thirst for justice."[104]

The manner in which the public perceives the judiciary can be highly influenced by the media. Whilst public and community values are matters which the judiciary can and must take into account, the judiciary have a duty and a responsibility to impose sentences consistent with the judicial oath or affirmation to do what is right without fear or favour. Where the prosecution in a case considers that a sentence is unduly lenient, the

[103] C. Morgan, *Mugger's Partner: It Was His Fault,* The West Australian, 22 July 1998, p. 1
[104] Editorial, *Mugger Case Exposes Deficiencies,* The West Australian, 23 July 1998, p. 12

remedy is to appeal. Appeals and applications for leave to appeal are the only objective measure of the Crown and offenders dissatisfaction with sentences. In 2000, there were 34 appeals and applications for leave to appeal from sentences imposed by Judges in the Supreme Court of Western Australia of which 8 were allowed and 26 dismissed.[105] From District Court matters, there were 100 appeals and applications of which 43 were allowed and 57 dismissed.[106] This represents an extremely small percentage of the 4,500 to 5,000 sentences imposed in these courts in that year.[107]

It has been argued that mandatory sentencing laws offend the doctrine of separation of powers as by prescribing sentences, parliament is interfering with judicial discretion and undermining the integrity and independence of the judiciary.[108] In the Northern Territory's *Sentencing Act*, section 78A prescribes the periods of imprisonment for property offences and leaves the court with no discretion not to impose the prescribed period of imprisonment unless the "exceptional circumstances" criteria are met.[109] Section 78A takes from the court the discretion they ordinarily have to decide what punishment or penalty is appropriate in the circumstances of the offence and the offender.[110] Former High Court Chief Justice Sir Gerard Brennan said on 17 February 2000:

> " 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

[105] *Supreme Court of Western Australia, Statistical Returns for the Year Ended 31 December 2000*
[106] *Ibid.*
[107] *Judicial Independence in Sentencing, op cit.,* p. 13
[108] *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, op cit.,* p. 5
[109] *Mandatory Sentencing, Implications for Judicial Independence, op cit.,* p. 1

> is the most exacting of judicial duties because the interest 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."[111]

Kable v DPP (NSW)[112] extended to State courts the restriction that Parliament cannot entrust courts with the exercise of non-judicial functions, except when they are incidental to the exercise of judicial power, or interfere with the exercise of the judicial function.[113] Further decisions of the Courts would seem to indicate that the mandatory sentencing laws are not a usurpation of judicial power.[114] In the case of *Pulling v Corfield*[115] the High Court unanimously rejected an argument that a mandatory sentence at the request of the prosecutor imposed on a person who failed to respond to a national service notice was a contravention of the separation of powers.[116] The legislative power to prescribe penalty was comparable to the legislative power in determining the elements of the offence.[117] Chief Justice Barwick stated in this case:

> " The exercise of judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded:

[110] *Ibid.*
[111] *The Mandatory Sentencing Debate, op cit.*, p. 11
[112] (1996) 189 CLR 51
[113] *Mandatory Sentencing, Implications for Judicial Independence, op cit.*, p. 2
[114] *Ibid.*
[115] (1970) 123 CLR 52
[116] *Mandatory Sentencing, Implications for Judicial Independence, op cit.*, p. 2
[117] *Ibid.*

> nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute."[118]

He added however that it is unusual and undesirable that the court be denied discretion in the penalty and sentence imposed and that it was a traditional function of the court to tailor the punishment so that it was appropriate to the nature and circumstances of the offence.[119]

The High Court considered that judicial participation in an executive function would place the judiciary at risk of eroding public confidence in the integrity of the judicial system.[120] This argument was used in the special leave application to the High Court of *Wynbyne v Marshall.*[121] The applicant was a 23 year old Aboriginal mother from a remote Northern Territory community with no previous offences. She had paid full restitution and the evidence was that she was of good character and did not normally consume alcohol.[122] The applicant pleaded guilty to stealing a can of beer and unlawful entry and was sentenced to 14 days imprisonment under the Northern Territory's mandatory sentencing requirements but the Magistrate observed that but for the mandatory sentencing law, it was unlikely that he would have imposed a term of imprisonment.[123] Special

[118] (1970) 123 CLR 52 at 58
[119] *Mandatory Sentencing, Implications for Judicial Independence, op cit.*, p. 2
[120] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (*the *Hindmarsh* Island case) (1996) 189 CLR 1 as discussed in *Ibid.*
[121] (1997) 117 NTR 11
[122] *Mandatory Sentencing: A Matter for the High Court?, op cit.*, p. 299
[123] *Ibid.*
Mandatory Sentencing, Implications for Judicial Independence, op cit., p. 2

leave was refused by the High Court on the grounds that the appeal did not have sufficient prospects of success.[124]

A further impediment to the finding of unconstitutionality was the pronouncement of Chief Justice Brennan in *Nicholas v the Queen*[125] that a criterion on the constitutional validity of a law would not be a court's opinion as to the effect of that law on the public perception of the court.[126] This does not, however, preclude a court from taking into account notorious fact and the Western Australian and Northern Territory mandatory sentencing regimes apply to an essential judicial function.[127] A broad ranging mandatory sentencing regime says to the public that judges and magistrates are no longer to be trusted to exercise their discretion with regards to sentencing.[128]

Harsh mandatory sentencing laws create other problems for judicial independence, as judges may want to say when imposing a sentence, that they have no alternative but to impose the sentence.[129] It may be that judges are bound to make this comment to protect the judiciary from mistaken public perception that they rather than the politicians are responsible for any injustices.[130] Otherwise judges are at risk of pronouncing the mandatory sentence as if it is their own and giving the courts judicial sanctity to the legislature's pre-ordained outcome.[131]

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[124] *Ibid.*
[125] (1998) 193 CLR 173
[126] *Mandatory Sentencing: A Matter for the High Court?, op cit.,* p. 301
[127] *Ibid.*
[128] *id*., p.302
[129] *Mandatory Sentencing, Implications for Judicial Independence, op cit.*, p. 4
[130] *Ibid.*
[131] *Mandatory Sentencing: A Matter for the High Court?, op cit.*, p. 299

It has been said that the mandatory sentencing legislation applicable to juvenile offenders in Western Australia allows judicial discretion to be retained.[132] The argument is made that there is an almost unlimited discretion to avoid the mandatory sentencing provisions through other provisions of the *Young Offenders Act* 1994 (WA) which allow for diversion and conferencing.[133] As a result, juveniles who are detained are normally the serious recidivist offenders for whom little alternative is available.[134] The provisions that divert the juveniles from the court system however in some cases, also divert discretion from the judiciary to others. Under section 22B, a police officer decides whether no action is taken or whether a caution is issued. Once the matters reach Court, the Court can then refer a juvenile offender to a Juvenile Justice Team[135] whose role is the prevention of further offending by juveniles through the use of restorative justice involving the victim.

One of the assumptions made in support of mandatory sentencing is that decisions will become more predictable, consistent and fair.[136] Mandatory sentencing in practice transfers sentencing discretion to the police and prosecution through plea-bargaining that may lead to the undermining of respect for the law and judicial independence.[137] It is the prosecutors who will chose when to invoke such laws against repeat offenders with the consequence that they will have extra bargaining

[132] Hon. P. Foss QC MLC, *Mandatory Sentencing,* p.11
[133] *Ibid.*
Section 22B
[134] *Mandatory Sentencing, op cit.*, p. 12
[135] *Young Offenders Act* 1994 (WA), Section 28
[136] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit.*, p. 177
[137] *Ibid.*, p. 298

power.[138] The decisions determining outcomes in the criminal process are rendered less open to public scrutiny and inconsistencies will be produced.[139] The prosecutor's decisions are unpublished, unrecorded and unreviewable unless there is an abuse of power.[140] The mechanics of the law can now be used to coerce defendants.[141] In terms of the separation of powers, it comes close to giving the prosecutors what Lord Diplock warned against in *Hinds v R*:[142]

> " What parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body… a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."[143]

Defence lawyers in Western Australia now seek to have multiple home burglary charges heard together so they only constitute one "strike."[144] There is also evidence that offenders may be pressured to plead guilty to non-mandatory offences to avoid the mandatory laws.[145]

While I acknowledge that there is a need for some mechanism for improving the community's understanding of the sentencing process, and the exercise of discretion, in my view mandatory sentencing laws will not achieve those objectives. It may, in the short term, satisfy the community's desire for retribution against those offenders, and for those offences, which

[138] *Mandatory Sentencing Laws and the Symbolic Politics of Law and Order, op cit*., p. 4
[139] *Ibid.*
[140] *Mandatory sentencing and the concentration of powers, op cit.*, p. 213
[141] *Ibid.*
[142] [1977] AC 195
[143] as cited in *Mandatory sentencing and the concentration of powers, op cit.*, p. 212
[144] *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?, op cit*., p. 178
[145] *Ibid.*

the community fears. It will not, however, enhance or improve the sentencing process and may, in the long term, serve to devalue the criminal justice system.

An alternative is the promotion of guideline judgments. A guideline judgment generally goes beyond the point which is raised in the particular appeal to suggest a sentencing scale or appropriate starting point for one or more categories of the offence before the Court. The judgment may give an indication of the range within which a sentence is appropriate taking into account particular aggravating or mitigation factors. Guideline judgments were first initiated in the United Kingdom in the 1970s by the English Court of Appeal and developed by Lord Chief Justice Lane to provide authoritative guidance to trial judges in certain areas of sentencing.

The advantage of guideline judgments is that the discretion to sentence an offender remains with the judicial officer. The judgment is not in itself binding but provides an authoritative statement of the most appropriate approach to be taken in dealing with particular offences. In the context of raising public awareness, it also provides a clear statement to the public by the Courts of what can be expected by the community.

In November 1998, for the first time in Western Australian history, I provided a report to Parliament on guideline judgements as a sentencing regime.[146] In the context of the interference with the Court, I wrote:

[146] The Hon David K Malcolm AC, *Report to Parliament: Sentencing Legislation Amendment and Repeal Bill 1998 and Sentence Administration Bill 1998*, (1998), pp. 6-7

" The provisions regarding the requirements of sentencing reports and other matters to be prescribed by regulations constitute a substantial interference with this power and jurisdiction... There is a substantial question whether the various reporting requirements sought to be imposed upon Judges ... may be the subject of constitutional challenge as representing an attempt by Parliament to impose upon Judges executive or administrative functions incompatible with judicial independence".[147]

In Western Australia legislative provision has been made for guideline judgements. Section 143 of the *Sentencing Act* 1995 (WA) provides that:

"(1) The Full Court of the Supreme Court or the Court of Criminal Appeal may give a guideline judgment containing guidelines to be taken into account by courts sentencing offenders.

(2) A guideline judgement may be given in any proceeding considered appropriate by the court giving it, and whether or not it is necessary for the purpose of determining the proceeding.

(3) A guideline judgment may be reviewed, varied or revoked in a subsequent guideline judgment."

The decision of the Court of Criminal Appeal in New South Wales in *R v Jurisic*[148], which established a guideline judgement for the offence of dangerous driving causing death, was a landmark decision.[149] It was the

[147] *Ibid*, p. 14
[148] (1998) 45 NSWLR 209
[149] *Limiting Sentencing Discretion: Has there been a paradigm shift?, op cit.,* p. 63

first case in Australia in which a court issued a formal sentencing guideline judgement.[150] Unlike Western Australia, there was no statutory basis for this development however shortly after its delivery, New South Wales introduced legislation which permits the Attorney General to request the Court of Criminal Appeal to consider providing guidelines without a pending appeal.[151] Whilst the structuring of sentencing discretion and the enhancement of consistency and public confidence have been welcomed, reservations have been expressed that such guidelines are an unacceptable engagement by the judiciary with populist views and an acknowledgement of the law and order crisis.[152] Courts must show they are responsive to public criticism of sentencing and guideline judgements structure discretion rather than restrict.[153]

A further alternative is sentencing grids or matrix that usually involve a two-dimensional graph whose axes reflect offence seriousness and prior criminal record.[154] Over 20 of the 50 United States jurisdictions have these grids but they can be quite restrictive.[155] In October 1998, Western Australian introduced legislation authorising a sentencing matrix system which although claiming to provide greater accountability, transparency and consistency appears to be driven by political

[150] *Ibid.*
[151] *id.*
[152] *id.*
[153] D. Spears, *Structuring Discretion: Sentencing in the* Jurisic *Age,* UNSW Law Journal Forum Volume 5, No 1, 1999, p. 19
[154] *Limiting Sentencing Discretion: Has there been a paradigm shift?, op cit.,* p. 65
[155] *Ibid.*

considerations.[156] The Bill establishes a three-stage framework but decisions by the Executive will effectively prevail.[157]

Conclusion

It is inappropriate that judicial discretion, and thereby judicial independence, should be sacrificed. Mandatory sentencing policies are focused on reducing crime rates outside jails.[158] Little importance is given to what happens inside jails or how to keep people out of them.[159] Little thought is also given to the effect of imprisonment on the offender and the great majority of offenders will be released back into the community at some stage.[160]

In my opinion one of the most fundamental aspects of our corrections or prison system must be the preparation of men and women for their release into the community. I have advocated on a number of occasions a change to move community emphasis away from imprisonment as a method of dealing with crime, particularly juvenile crime. I am not suggesting that imprisonment as a punishment and as a deterrent to crime has no place in the sentencing process. Calls from some sections of the community to imprison offenders more often and for longer terms misunderstand what can be reasonably achieved by the criminal justice system in reducing or addressing the causes of crime. In my view, a great deal more stands to be achieved if we, as a community, identify and

[156] *id.*
[157] *id.*
[158] D. Roche, *No. 138 Mandatory Sentencing*, Australian Institute of Criminology Trends & Issues in crime and criminal justice, December 1999, p. 4
[159] *Ibid.*
[160] The Hon J. F. Nagle AO QC, *Punishment, parliament and the People*, Judicial Officers' Bulletin, Volume 10, Number 3, April 1998, p. 2

address the cultural, social and economic causes of crime. This approach has attracted criticism from some quarters of the community that I am a "do-gooder" or "welfare worker". I am as concerned about crime in our community as anyone. That is why I have been searching for the best way to reduce and prevent crime. Effort must be put into rehabilitation and the prevention of crime, as it will be more cost effective and will ultimately lead to a better society.[161]

[161] The Hon Sir Anthony Mason AC KBE, *Mandatory Sentencing, Implications for Judicial Independence*, Judicial Officer's Bulletin, Volume 13 Number 1, February 2001, p. 4