ıtencing and on of powers

n application for special leave in the challenge to the e Northern Territory's mandatory sentencing laws for doctrine of separation of powers,[1] the High Court took a ıutes to squirt out Ron Castan QC with a firehose, ' by Bernasconi,[2] and inscribed with the dictum 'It is ion that the Parliament can prescribe such penalty as it he offences it creates'.[3]

ıe great arms and organs of government were concerned, vas a welcome relief: the Territory's constitutional fabric ıct. For a particular group of youngsters in Darwin and ver, it meant some half-forgotten indiscretion had finally roost in the form of 14 days in the coop, now that their ıd to be abandoned.

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ver since *Wynbyne*, we've known that mandatory sentencing the NT. Nevertheless, there remain some disquieting ut its effect on the administration of criminal justice, and whether there's something, if not exactly rotten, then a little too potently on the nose in the State of the Northern Territory.

This article looks at the politics of mandatory sentencing laws. It identifies a disturbing concentration of power, and a style of governance characterised by punitive and socially divisive targeting of already disempowered groups in the community.

The legislative framework

The mandatory sentencing regime in the Northern Territory came into force on 8 March 1997 (*Sentencing Amendment Act (No 2) 1996*). The regime introduced compulsory minimum terms of imprisonment of 14 days, 3 months and 1 year for, respectively, first, second and third property offenders over the age of 17. 'Property offences' are defined by a schedule which includes stealing (excluding shoplifting), receiving, unlawful possession of property,[4] criminal damage, robbery, unlawful use of a vehicle and unlawful entry of a building.

Similar provisions were introduced for juvenile offenders over 15 years old, imposing a compulsory minimum term of 28 days detention for second and subsequent offences (*Juvenile Justice Amendment Act (No 2) 1996*).

On 29 April 1998, amendments to the 1997 Act commenced ('the 1998 amendments') which allowed partial suspension of, and the fixing of non-parole periods for, mandatory sentences. The 1998 amendments also restricted the power of courts to impose sentences concurrently (*Sentencing Amendment Act* No. 14 of 1998; *Juvenile Justice Amendment Act 1998*).

On 4 July 1999 further amendments ('the 1999 amendments') came into force, removing a number of anomalies in the pre-existing

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legislation, and introducing an 'exceptional circumstances' safety valve to enable some first property offenders to avoid prison (see below). In addition, mandatory sentencing was extended to some violent and all sexual adult offenders. 'Diversionary programs' have also been introduced for juveniles as an alternative to gaol in limited circumstances (*Sentencing Amendment Act 1999*, *Juvenile Justice Amendment Act (No 2) 1999*).

Why mandatory sentencing?

Mandatory sentencing has little to do with preventing crime. It was born of an election campaign, similar to most other State and Territory elections, in which bidding wars develop to see who can get the toughest on crime — dare and double dare, policy making by knee-jerks on both sides.

It was introduced without consultation with the judiciary, broader legal profession, or other interested parties as to the structure or operation of the laws. This is not peculiar to the NT. As Morgan notes: 'there is a clear pattern of mandatories being introduced at times of political pressure without adequate data to support their introduction and to permit effective follow-up evaluation'.[5]

And although the laws are generally defended by the government on the ground that 'that's what the community wants', it is still the case that people in the community know very little about the extent of the laws.

Even that oracle of the North, the *NT News* has asked:

> What exactly were the voters asked about mandatory sentencing? Were all the implications explained? Because 12 months down the track many of those who supported the concept might just be thinking they've created a monster. [Editorial, July 13, 1998]

Implications for 'the law'

It is clear that somewhere in the genealogy of this monster lies the notion that judges and magistrates cannot be trusted to impose sentences which reflect prevailing community concerns.

This perception is, of course, fuelled by the often sensational and unbalanced media coverage of the courts, and played up by politicians looking to talk tough. One parliamentarian complained of 'the soft, cuddly, pussy-cat magistrates and judges' who she claimed were 'helping' the 'epidemic of property offences'. This particular MLA stated her research methodology: 'I do not attend court cases, and I believe 99.9% of people in the community do not either. We read the newspapers, and we watch television.'[6]

In the face of these sorts of attacks, the Chief Justice of the NT has felt obliged to step down into the bearpit to defend the Bench. In his speech at a recent admission ceremony, reported under the headline 'Judge tells pollies to back off', he acknowledged the right of parliamentarians to criticise the courts, but commented that 'reckless and unfair criticism amount to a threat to this vital institution of our democracy ...'[7]

The Chief Justice also wrote (for publication) a comprehensive reply to a letter which had queried sentencing procedure and the reasons for giving a discount on punishment. In closing, the Chief Justice suggested that resources be made available to allow the courts to properly respond to issues of community concern, through publishing judgments in accessible form and having a spokesperson available for inquiries.[8]

If the law ever thought it really could or should keep out of the grubby world of politics, it is clear that such time has long since past. Mandatory sentencing is such a serious executive intrusion on judicial power that the judiciary has little option but to shrug off its traditional reticence, and actively engage in public debate to defend the rule of law.

This reflects the trend in other jurisdictions. The 'guideline judgment' in *R v Jurisic* (1988) 101 A Crim R 259 for example, was handed down in a blaze of publicity generated and managed by the Court itself, with Spigelman CJ explaining it directly to the people on the box and in the paper.[9]

Hopefully, the initiative shown by the New South Wales judiciary in *Jurisic* will be sufficient to stave off the imposition of a legislative bludgeon in that jurisdiction. As to its imposition in the Northern Territory, former Chief Minister Shane Stone, had this to say:

> The government, having expressed continuing concern about what appears to be a disparity of sentencing, took the step that it was entitled to take to ensure the community understood clearly and unequivocally that we would no longer tolerate property-related crimes. Parliament is paramount.[10]

The mandatory sentencing regime — a user's guide

The member for Katherine, Mike Reed, offered the following analysis of the separation of powers when the mandatory sentencing laws were being debated:

> [The] courts have had their chance to support the separation of powers. In any case, I do not agree that we are tinkering with the separation of powers. As legislators, we are seeking to ensure that the measures sought by society are applied by the courts.[11]

The issue was raised in the Supreme Court in the case of *Wynbyne v Marshall* (1998) 117 NTR 11, where it was argued that the legislative direction to the courts which mandated both conviction and sentence violated the doctrine of the separation of powers. The Court, without deciding whether or not the doctrine in fact existed, held that to nominate a minimum penalty did not impermissibly invade any judicial power or function.

What was not argued in that case was the effect of the shift in power on the police and prosecution, and how that may amount to what we have called a concentration of powers. In his decision in *Wynbyne* (1998) 117 NTR at 23, Mildren J, with whom Bailey J agreed, cited with approval the decision of Lord Diplock in *Hinds v R* [1977] AC 195 as follows:

> 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.

What becomes apparent when examining the nitty gritty of mandatory sentencing is that through the mechanics of the law, this is in effect what parliament has achieved.

We examine below how mandatory sentencing has in practice dangerously unbalanced the distribution of powers between the judicial and executive arms of government.

Prosecutorial discretion

Mandatory sentencing means that the exercise of the prosecutorial discretion has effectively supplanted the exercise of sentencing discretion in many cases. The discretionary choices, not only whether to proceed or not, but also as to what shape a prosecution will take (including what particular

charges will be laid or will proceed) have a direct bearing on not just the length of the sentence that a person may receive but whether or not someone will go to gaol at all.

Negotiations between defence and prosecution have often resulted in the substituting of charges which attract mandatory sentencing with others which do not. For example, the charge of interfere with a motor vehicle under s.49A of the *Summary Offences Act* (NT), which does not come under the regime, has been substituted for the charge of criminal damage *(Criminal Code Act* (NT), s.251), and in other cases for unlawful use of a motor vehicle *(Criminal Code Act* (NT), s.218). Similarly, a defendant charged with an attempt, rather than the offence itself, is not caught in the net of mandatory sentencing. Nor is a person who is charged as an accessory after the fact.

Considerable pressure has therefore been put on the prosecution to withdraw and modify charges, and it is a pressure which undoubtedly many prosecutors have not enjoyed. Nevertheless, the laws have meant that the police and prosecution are often placed in the position of sentencers. And, of course, unlike judicial decisions, the DPP's decisions are unpublished, unrecorded and unreviewable (save perhaps in exceptional circumstances of abuse of power).[12]

This is the first level of the power shift. But the real sting in the workings of the law has been in the detail.

Prosecutorial indiscretion

Following the 1998 amendments, the mandatory sentencing regime provided for cumulative mandatory sentences for offences which did not form part of one criminal enterprise, or which were not contained on the one information, complaint or indictment.

Defendants have therefore faced multiple 'mandatory periods' for their various groups of charges — with potentially outrageous results for 'third strikers' facing many multiples of one year. The situation has often been avoided by having multiple offences from various criminal enterprises contained in one information or complaint. This, however, is a discretion the prosecution have not always been prepared to exercise in favour of a defendant, and this has influenced in a very real and direct way, the sentences received by offenders.

This particular situation has been resolved by the 1999 amendments which provide that a defendant is exposed to only one minimum period on any one 'day in court', regardless of the number of files or offences involved *(Sentencing Amendment Act 1999,* s.16).

The police and prosecution have also been given a large amount of power by virtue of their control of the timing of laying charges. Prior to the commencement of the 1999 amendments, the law operated as follows: an offender who had committed three sets of property offences faced either a minimum of 14 days if the offences were consolidated onto one complaint, information or indictment; multiples of 14 days if they were contained in different informations or complaints or indictments; or cumulative sentences of 14 days, 3 months and one year if the matters were brought to court at different times.

The legislation further provided that an offender moves up a level on each occasion they were found guilty, so that each finding of guilt constituted a 'strike' regardless of the chronology of the offences, and the order in which the matters are brought to court *(Sentencing Act,* s.78(6)).

The decision to delay laying charges, and decisions in relation to the order in which charges will be laid have therefore directly affected penalties received by defendants. Some people have been charged for offences which occurred long before they appeared in court to answer their previous 'strike', thus moving the offender up a level in the mandatory sentencing regime, to face a three-month or one-year minimum penalty. In at least one case admissions in recorded interviews were made by a defendant before he appeared in court on the other matters, but charges were not laid until after those matters were resolved, and his 'first strike' sentence had been served.[13]

No doubt some of these results have come about by honest error, and the ordinary time lags of any bureaucracy. In some cases, the prosecution have exercised their discretion not to proceed because of the manifest unfairness to the defendant.

However, it has also made it possible for the mechanics of the law to be misused to coerce defendants. A number of defendants have alleged to their lawyers that they were told by police that they knew the defendant had committed a number of offences, and if he or she did not provide them with full admissions, they would simply charge him or her with them one by one, resulting in them receiving multiple cumulative sentences of increasing increments.

Whether or not one chooses to believe such allegations, the power has undeniably been there. As noted above, it is power exercised behind closed doors, and is very difficult to challenge. Furthermore, in terms of the separation of powers, it comes dangerously close to giving the police and prosecution what Lord Diplock described as 'a discretion to determine the severity of the punishment to be inflicted'.

This situation is largely remedied by the 1999 amendments. Now an offender will only move up the ladder for offences committed after they were sentenced to their last mandatory period. Indeed the government has now said that the sort of situations considered above were never intended. We might generously call that wilful blindness.

Individual rights

Another consequence of the mandatory sentencing legislation has been a shift in the balance of power between the individual and the state, with the resultant erosion of defendants' rights, a trend which has in some respects been aggravated by the 1999 amendments.

The fact that mandatory gaol attaches to some charges and not others has meant that pressure is placed on defendants to plead guilty to 'non-mandatory' charges rather than risk conviction of a charge carrying a mandatory gaol term. This trade-off inevitably leads to people pleading guilty to charges which cannot be proven, or of which they are simply not guilty.

One particularly difficult issue has been the payment of restitution before matters have been resolved. It has been the case on many occasions, generally in cases involving criminal damage, that following the payment of restitution, the prosecution has not proceeded with the charge(s). As has been noted above, the decision is ultimately one for the prosecutor alone, and there has been no real consistency in the results which have been achieved. Furthermore, the situation places defendants in a bind. Although presumed innocent, if they pay restitution, conduct which itself might imply guilt, it is possible that the charges will not proceed, and the defendant will not face the prospect of gaol.

This situation is exacerbated by the 'exceptional circumstances' exception contained in the 1999 amendments. The exception provides that a first offender facing a single property offence will avoid mandatory sentencing if they can satisfy the court of all of the following:

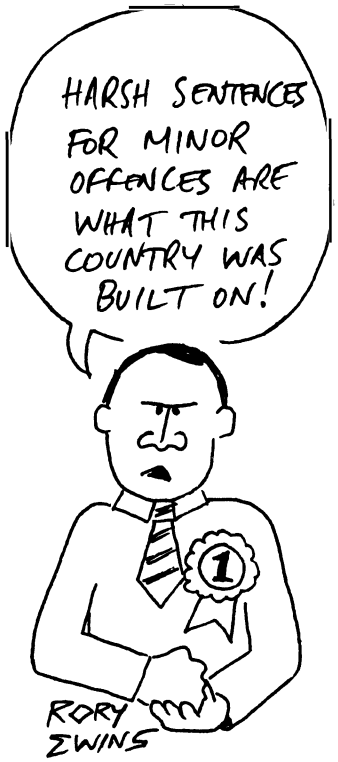
(a) that the offence was trivial in nature; ['trivial' is not defined]

(b) that the offender has made, or has made reasonable efforts to make, full restitution;

(c) that the offender is otherwise of good character and that there were mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender's usual behaviour; and

(d) that the offender co-operated with law enforcement agencies in the investigation of the offence.

In addition to the obligation on a defendant to make restitution to avoid a mandatory gaol term, the requirement that 'the offender has co-operated with law enforcement agencies in the investigation of the offence' is an obvious attempt to curtail the right to silence. Defendants are damned if they do and gaoled if they don't.



The targets and the collateral damage[14]

The legislation purports to target the 'grubs' who break into the homes and cars of honest Territorians.[15]

This is the cheap rhetoric needed to sell something as unjust mandatory sentencing, but, of course, it is not just the 'grubs' that go in. There is collateral damage — a fact conceded by the government when the laws were introduced:

> ... there will be a small percentage of people who will be treated unfairly and the impact on them will be considered to be too harsh. In my view, that is a price that society is willing to pay.[16]

A few years down the track, it appears in fact that society is not willing to pay that price, particularly when it is their kids getting locked up. The government has therefore been forced to try and ameliorate some of the collateral damage by introducing the 'exceptional circumstances' exception in the 1999 amendments. This is little consolation — as noted above, the exception is a stick dressed up as a carrot, which requires those accused of an offence to implicate themselves before they are entitled to beg for their liberty.

However, what is most obvious from this exception is that only the class of people least likely to be caught in the web of mandatory sentencing is likely to be able to satisfy its rigorous requirements — the sort of people who have never been in trouble for anything, can afford to make restitution, and can get impressive references to prove good character. It entrenches a central feature of the mandatory sentencing regime, namely the disparate impact of the laws on certain groups in the community, some of which are already significantly disadvantaged.

People with mental illnesses, intellectual disabilities and behavioural disorders

The 1993 Human Rights and Equal Opportunity Commission report into Human Rights and Mental Illness noted that the population affected by mental illnesses in the Northern Territory includes a particularly high proportion of criminal offenders.[17]

It is obvious that in any sentencing matter before a court, issues as to mental illness, intellectual disability and behavioural disorder may be highly relevant, and may touch directly on the culpability of the offender, as well as on such issues as general and specific deterrence. However, such factors are not able to sway the court from the mandatory sentencing regime. There have been a number of cases in which defendants with intellectual disabilities, mental illnesses and behavioural disorders have committed offences involving minor property damage (one in which a young man broke a car aerial after an argument), and have been sentenced to 14 days gaol.

Indeed frequently people are only diagnosed with a mental illness after they have found themselves in trouble with the law. The NT Parliament's prescription is shock treatment by incarceration, administered with ever-increasing severity.

Young people

Young people, who are the most likely to find themselves in trouble, are therefore the most likely to find themselves receiving unjust sentences under the mandatory sentencing regime. The principles of rehabilitation and 'gaol as last resort' have been abandoned in the NT. Until the 1999 amendments commenced in August 1999, juveniles (between ages of 15 and 17) got one chance, and then it was 28 days in detention. For those 17 and over, one strike and you're in. This approach to juvenile justice has been condemned in the Amnesty International 1999 Annual Report, which singles out the Northern Territory for particular criticism (http://www.amnesty.org/ailib/aireport/ar99/asa12.html).

Recent amendments focus on 'diversionary programs' as a sentencing option for a juvenile second offender. A court can order that a juvenile second offender participate in such a program, which it is anticipated will involve victim/offender conferencing.[18] Satisfactory participation in such a program gives a juvenile one more chance of avoiding detention. A third offence carries 28 days with no such option.

Indigenous people

High levels of property crime are a feature of many Aboriginal communities, and the prospect of the bulk of the male population between 17 and 30 being in gaol for years at a time for property crime is a real one.

Every time someone hops in the back of stolen Toyota, smashes a window after an argument, breaks into the canteen

to steal food because they are hungry or accepts some stolen food, steals petrol from a car to sniff or accepts stolen fuel for sniffing, that person goes to gaol and then goes up a rung. Practitioners in the Northern Territory have seen all of the above cases with monotonous regularity. Soon each offender will get one year in prison.

Another generation of young indigenous people are being taken away from their families, from their communities and from their land.[19] This was raised in the original parliamentary debates surrounding the legislation,[20] and was met with the predictable, and dishonest, rhetoric of 'do the crime, do the time'.[21]

The unacceptably high level of property crime on some Aboriginal communities is a product of specific social, historical, and economic conditions. Mandatory sentencing can only serve to perpetuate the underlying causes of the high levels of property crime in those communities. With young men being removed for lengthy stretches of time, the disruption to the ceremonial life of a community is just one way in which the fabric of such communities will continue to be undermined.

The laws also demonstrate contempt for the key recommendations of the Royal Commission into Aboriginal Deaths in Custody that imprisonment be used only as a punishment of last resort.[22]

Those Recommendations were initially supported by the Northern Territory government,[23] but within five years after the publication of the report, the Northern Territory government's commitment to these principles had vanished, and mandatory sentencing was on the drawing board.

The introduction of the 'exceptional circumstances' provisions in the 1999 amendments does nothing to deal with these problems. It seems clear that they have been introduced solely to avoid the sort of damaging publicity which is attracted by cases involving suburban middle class offenders from electorates which keep the government in office. Indeed the provisions would seem to be so skewed that a challenge under the *Racial Discrimination Act 1975* (Cth) on the basis of indirect discrimination may be available.

Conclusion

The 1999 amendments have removed some of the worst excrescences of mandatory sentencing, but the body of the law remains seriously diseased. In some respects the condition of the patient will deteriorate further as a result of this latest treatment.

- The law will be more punitively discriminatory — particularly on the basis of race and disability — than ever.
- The rights of those suspected and accused of breaking the law, notably the right to silence, and the right to defend charges, will in practice be further eroded.
- There will be a welter of litigation, with attendant delays and injustices, as the meaning of 'exceptional circumstances' is contested and clarified.
- By extending the regime, albeit, it would appear, only symbolically, to other offence categories, the cancer of mandatory sentencing is spread.
- The mitigation of some of the harsher and more anomalous aspects of the regime lends it a veneer of legitimacy, blunting the attacks of its critics.

For those of us living in the Northern Territory, mandatory sentencing is something which diminishes us all. For those 'down South', take note: the mandatory sentencing bandwagon is a roadtrain which is heading your way.

References

1. *Wynbyne v Marshall* (HC Gaudron and Hayne JJ) D174/1997 (21 May 1998).
2. *The King v Bernasconi* (1915) 19 CLR 629: s.80 of the Constitution (and by implication, Ch 3 'The Judicature') does not apply to Territory Courts.
3. *Palling v Corfield* (1970) 123 CLR 52, per Barwick CJ at 58.
4. This offence was added to the schedule by 'the 1998 amendments', below.
5. Morgan, N., 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' UNSW Law Journal Vol 5 No 1 January 1999 at 6.
6. Noel Padgham-Purich MLA, Legislative Assembly of the NT, Hansard, Seventh Assembly, First Session, 19 November 1996, Parliamentary Record No 28, 21 November 1996.
7. *NT News*, 2 June 1999, p.4.
8. 'Gaol and the Law', *NT News*, 16 June 1999, pp.16-17.
9. See Morgan, N. and Murray, B., 'What's in a Name? Guideline Judgments in Australia' (1999) 23 *Crim Law J* 90 at 90. See also Spears, D., 'Structuring Discretion: Sentencing in the Jurisic Age' (1999) 5(1) *UNSW Law Journal Forum* 18.
10. Legislative Assembly of the NT, Hansard, Eighth Assembly, First Session, 21 April 1998, Parliamentary Record No 5, 22 April 1998.
11. Legislative Assembly of the NT, Hansard, Seventh Assembly, First Session, 19 November 1996, Parliamentary Record No 28, 21 November 1996.
12. See *Spencer v Loadman & Trenerry* [1999] NTSC 48 (unreported decision of NTSC No 29/99 (9905489) delivered by Thomas J at Darwin on 5 May 1999).
13. See for example *Spencer v Loadman & Trenerry,* above.
14 See Morgan, above.
15. Shane Stone MLA, Legislative Assembly of the NT, Hansard, Eighth Assembly, First Session, 25 November 1997, Parliamentary Record No 1, 26 November 1997.
16. Mike Reed MLA, Legislative Assembly of the NT, Hansard, Seventh Assembly, First Session, 19 November 1996, Parliamentary Record No 28, 21 November 1996.
17. Human Rights and Equal Opportunity Commission, 'Human Rights and Mental Illness', Australian Government Publishing Service, Canberra, 1993. See pp.752-804.
18. See Legislative Assembly of the Northern Territory, Hansard, Eighth Assembly, First Session, 1 June 1999, Parliamentary Record No 16, 1 June 1999.
19. This has been identified as a problem arising out of the juvenile justice system generally, well prior to the introduction of mandatory sentencing; see the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from the Families, 'Bringing them Home', Sterling Press Pty Ltd, 1997, p.489.
20. See Neil Bell MLA, Legislative Assembly of the NT, Hansard, Seventh Assembly, First Session, 19 November 1996, Parliamentary Record No 28, 21 November 1996.
21. See the interjection by the member for Nelson, Noel Padgham-Purich MLA, and the response of Mike Reed MLA, Legislative Assembly of the NT, Hansard, Seventh Assembly, First Session, 19 November 1996, Parliamentary Record No 28, 21 November 1996.
22. Royal Commission into Aboriginal Deaths in Custody, 'Aboriginal Deaths in Custody — Response by Governments to the Commission', Australian Government Publishing Service 1992; see Recommendations 62 (Vol. 1, p.211), 92 (Vol. 1, p.332) and 109 (Vol. 1, p.396).
23. See, for example, Royal Commission into Aboriginal Deaths in Custody, above, vol.1, pp.218 and 335.