Contemporary Comments

Mandatory Sentencing and Human Rights

Mandatory detention provisions for young people and adults convicted of certain property offences were introduced in the Northern Territory and Western Australia in 1996. The Northern Territory provisions were repealed in October 2001. Mandatory sentencing regimes in both Western Australia and the Northern Territory have led to grossly unjust outcomes and have been subject to widespread criticism by judges, lawyers, Indigenous organisations, advocates for young people, religious groups and international human rights bodies.[1] Many of these criticisms were echoed in an inquiry by the Commonwealth Senate's Legal and Constitutional Reference's Committee. The Committee's report provides a comprehensive discussion of the issues, particularly as they apply to mandatory sentences of detention and juvenile offenders (Senate Legal & Constitutional References Committee 2000).

The purpose of this comment is more modest: I want to raise some of the specific human rights issues which emerged in relation to mandatory sentencing and to speculate on the political effect of using international human rights as a strategy for criminal law reform.

Conflict with Key Human Rights Standards

It has been argued that mandatory sentences of imprisonment and detention breach a number of key articles in Convention on the Rights of the Child (CROC), the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Elimination of All Forms of Racial Discrimination (CERD). In summary these include the following (Senate Legal & Constitutional References Committee 2000).[2]

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1 For reference to specific cases where judicial offices have criticised the sentences outcome imposed by mandatory sentencing regimes in both Western Australia and the Northern Territory see the ATSIC submission to the Senate Legal and Constitutional References Committee Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999. <http://www.atsic.gov.au/default_ns.asp>. Specific cases include *DPP v DCJ* (a Child) (unreported) Children's Court of Western Australia, 10 February 1997 per Fenbury J; *DPP v DMP* (a Child) (unreported) Children's Court of Western Australia, 10 March 1997 per Fenbury J; *DPP v M* (a Child) (unreported) Children's Court of Western Australia, 20 March 1997 per Fenbury J; *DPP v F* (a Child) (unreported) Children's Court of Western Australia, 24 April 1997 per Fenbury J; *DPP v R* (a Child) (unreported) Children's Court of Western Australia, 25 June 1997 per Fenbury J; *Trenerry v Bradley* (1997) 6 NTLR 175 per Angel J and Mildren J; *Wynbyne v Marshall* (1997) 117 NTR 11 per Martin CJ.

2 See also discussion on whether mandatory sentencing breaches the Convention for the Elimination of All Forms of Discrimination against Women, and international obligations in relation to people with intellectual disabilities.

- *The best interests of the child:* Mandatory sentencing fails to allow consideration of the best interests of the individual child when formulating a sentence.
- *The primacy of rehabilitation for young offenders:* The prospects of rehabilitation through integration into the community are ignored with mandatory sentences of detention.
- *Proportionality and the need for a wide range of sentencing options for young offenders*: Mandatory sentencing ignores the requirement of a variety of dispositions and alternatives to institutionalisation to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.
- *Participation in decisions*: Mandatory sentencing makes irrelevant the requirement that children participate and be given a voice in any decisions which affect them.
- *Imprisonment as a sanction of last resort*: The requirement that children be deprived of their liberty only as a last resort and for the shortest appropriate time is ignored by mandatory sentencing.
- *Prohibition on arbitrary detention*: Mandatory sentences of detention may breach the prohibition on arbitrary detention because arbitrariness can incorporate elements of inappropriateness or injustice. Injustice arises because of gross disproportionality.
- *Prohibition on inhuman and degrading punishment*: Mandatory sentencing can give rise to inhuman treatment through the use of incarceration for trivial offences. In these cases, gross disproportionality of sentence can give rise to cruel, inhuman or degrading punishment.
- *Requirement that sentences be reviewable by a higher or appellate court:* Mandatory sentences by their nature are not reviewable in terms of their severity.
- *Prohibition on racial discrimination*: Mandatory sentences disproportionately impact on Indigenous young people and adults.

Discrimination and Mandatory Sentencing

As will be evident from the responses by United Nations treaty monitoring bodies, of particular concern has been the argument that mandatory sentencing is racially discriminatory. The relevant points can be summarised briefly.

Indigenous young people are more harshly dealt with by the juvenile justice system *prior* to their appearance in court. Discriminatory treatment through the adverse use of discretion within the justice system means that Indigenous young people are more likely to appear before a court, are more likely to have a prior record, and they are more likely to fall within the mandatory sentencing regimes. These issues directly affect the impact of mandatory sentencing. For example, in Western Australia if a child receives a police caution or is referred to a juvenile justice team (conference), instead of being charged over an offence, then the matter does not count as a 'strike' under the three strikes mandatory imprisonment legislation.

Northern Territory court data showed clearly that mandatory sentencing would have an overwhelming impact on Aboriginal rather than non-Aboriginal people. The vast majority of both adults and juveniles appearing before the courts for the principal offences which fell under the mandatory sentencing regime were Aboriginal. For example in 1996, 84 per cent of all court appearances for 'steal motor vehicle' offences involved Aboriginal defendants; and 77 per cent of all juvenile court appearances for break and enter involved Aboriginal young people.[3]

Conversely, the types of property offences (fraud) *excluded* from the mandatory sentencing regimes are *precisely* the offences where the majority of both adult and juvenile offenders are non-Indigenous. For example, 77 per cent of adult fraud cases involved non-Indigenous defendants.

Aboriginal adults and juveniles appearing in court are significantly more likely to have a previous offending history and are more likely than non-Aboriginal people to be among those with extensive offending histories.

A further discriminatory factor is the location of detention centres and the removal of Indigenous children and young people from their families and communities. Most detention centres in Western Australia and Northern Territory are potentially hundreds, if not thousands of kilometres away from many Aboriginal communities they service. It is an issue that *particularly* affects Indigenous children and young people because they are more likely to come from a non-urban background.

Amendments to the legislation in the Northern Territory which allowed an offender to avoid mandatory sentencing because of 'exceptional circumstances' further disadvantaged Indigenous defendants and entrenched the discriminatory aspects of the law. 'Exceptional circumstances' were introduced purely to avoid the embarrassing situations where middle-class, respectable and non-Indigenous people were inadvertently caught-up in mandatory sentencing regimes.

Thus mandatory sentencing regimes, although they appear to be facially neutral, are *foreseeably* discriminatory in their impact.

Criticism by United Nations Human Rights Bodies

A number of organisations have submitted reports to UN monitoring bodies over the last five years which have been critical of mandatory sentencing, at the time when those monitoring bodies have been reviewing the Australian Government's periodic reports. Government periodic reports are required under various treaties and are designed to outline Government compliance with various treaty obligations. The review process provides an opportunity for non-government organisations (NGOs) to supply important information on possible breaches of human rights obligations. In particular, the Aboriginal and Torres Strait Islander Commission (ATSIC) has used the opportunity to draw the attention of UN monitoring bodies to the problems associated with mandatory sentencing. The text of ATSIC submissions to the various UN Committees can be found on their web site (www.atsic.gov.au).

The impact of ATSIC and other NGO submissions have been important. No less than four UN treaty monitoring bodies have made adverse comments on the impact of mandatory sentencing, particularly in relation to the potential discriminatory effect of the laws.

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3 The data in this section is drawn from the ATSIC submission to the Senate Legal and Constitutional References Committee Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999. See <http://www.atsic.gov.au/default_ns.asp>.

In October 1997 the Committee on the Rights of the Child noted in its Concluding Observations that

> The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention (United Nations 1997 at 22).

In March 2000 the Committee on the Elimination of Racial Discrimination made the following comments in its Concluding Observations:

> The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by Indigenous peoples within Australia, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field (United Nations 2000b at 16).

In July 2000 the Human Rights Committee noted in its Concluding Observations that:

> Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of Indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.
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> The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected (United Nations 2000c at 17).

In November 2000 the Committee Against Torture, in its concluding observations on Australia, expressed its concern about:

> ... legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the Indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system [United Nations 2000a at 6(e)].

The Committee recommended that

> The State Party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instrument, particularly with regard to the possible adverse effect upon disadvantaged groups [United Nations 2000 at 7(h)].

Observations by the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee show the incompatibility of the mandatory sentencing regimes with Australia's international human rights obligations. The Committee Against Torture was less forthright but still makes clear its concern regarding a potential lack of compliance.

Federal Government Response

What has been the Government's response to United Nations criticism? Basically the response was to deny the credibility of the UN Committees. For example, Senator Herron chastised the UN for the CERD Committee's criticism of Australia's non compliance with CERD. Senator Herron told the UN Working Group on Indigenous Populations in Geneva that the Government 'was disappointed that the views of the Committee did not record the substance of the Government's submission'. He further suggested that criticism by the CERD Committee which were levelled at the Australian Government would result in the validity and credibility of UN Treaty bodies suffering (Herron 1999).

The Government also went on the attack domestically against the United Nations treaty monitoring bodies. The federal Attorney-General responded to the CERD report, calling it 'unbalanced' and ruled out overturning mandatory sentencing laws (Press release, 26 March 2000). As a further response to the CERD report the Government announced a review into the operation of the United Nations treaty committee system as it affects Australia (Press release, 27 March 2000).

NAALAS Communication to the United Nations High Commissioner for Human Rights

In June 2000 the North Australian Aboriginal Legal Aid Service (NAALAS) lodged a communication with the United Nations High Commissioner for Human Rights on behalf of an Aboriginal client, alleging that mandatory sentencing legislation in the Northern Territory contravened a number of articles of the International Covenant on Civil and Political Rights (ICCPR).

The communication alleged that mandatory sentencing breached the following articles:

- Article 2(1) prohibition on racial discrimination and Article 26 non-discrimination and equality before the law
- Article 9(1) prohibition on arbitrary detention
- Article 7 prohibition of cruel, inhuman or degrading treatment or punishment
- Article 14(1) right to a fair hearing by an independent tribunal
- Article 14(5) right to review of sentence by a higher tribunal

The United Nations High Commissioner for Human Rights accepted the communication and required the Australian Government to respond to the complaint. The Australian Government responded and NALAAS was given the opportunity to further respond to the Australian Government. At the same time there was a change of government in the Northern Territory and in October 2001 the Northern Territory mandatory sentencing legislation was repealed. Since the repeal of the legislation NALAAS has been instructed by their client to withdraw from the proceedings currently before the Human Rights Committee.

Conclusion

During the second reading speech for the legislation repealing mandatory sentencing, the new Northern Territory Attorney-General, Dr Toyne noted that 'the repeal of mandatory sentencing is one of this Government's major election promises and we are keen for this to be one of our first initiatives'. He noted that many people had spoken out against the law, including the legal profession and that magistrates had repeatedly indicated 'that they have been forced to impose sentences that they consider to be manifestly excessive in the particular circumstances of the case'. The Attorney-General also noted the complaint to the UN (Toyne 2001).

Right up to the day of the Northern Territory election, the CLP ran a campaign that 'a vote for Labor was a vote to abolish mandatory sentencing'. However, for once the law and order tactic failed. In the end, it may well have been an array of issues other than mandatory sentencing that persuaded the electorate to vote out the CLP and vote Labor into Government. Even more speculative is the role played by the appeal to human rights standards as one of the rationales for the abolition of mandatory sentencing. At the very least, it has provided an important set of principles underpinning the demand for the repeal of the laws in both Western Australia and the Northern Territory - principles that a range of professional and community-based organisations have been able to draw on.

The appeal to international human rights standards has been a key political tactic for Indigenous organisations in Australia for well over a decade. And this is not surprising given the absence of faith in the ability of states to provide justice for Indigenous peoples. By and large, states have been seen as part of the problem of the dispossession and lack of political status for Indigenous people. However, the appeal by a range of non-Indigenous organisations to international human rights standards as a tactic to bring about the reform of the criminal law is perhaps far more novel. It reflects a growing awareness of, and resort to international standards as a means of challenging oppressive processes of criminalisation.

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