MANDATORY SENTENCING: THE FAILURE OF THE AUSTRALIAN LEGAL SYSTEM TO PROTECT THE HUMAN RIGHTS OF AUSTRALIANS

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INTRODUCTION

The purpose of this paper is to examine the inadequacy of the Australian legal system to protect the human rights of indigenous Australians. The context for this examination is the recent debate over mandatory sentencing laws in the Northern Territory and Western Australia. It is a premise of this paper that fundamental human rights should be protected.[1]

The recent mandatory sentencing debate in Australia illustrates the inadequacy and inability of the Australian legal system, its institutions, and philosophical foundations to provide fundamental protection of the rights of its indigenous peoples. Rights per se are an anathema to the Australian legal system with its philosophically utilitarian basis and distinctive combination of democratic safeguards and mechanisms. In the Australian legal system, the mechanisms of representative democracy, responsible government, federalism, and separation of powers have been institutionalised to ensure the operation of the rule of law. These mechanisms are the traditional liberal legal tools of limiting the power of governments and protecting citizens against the arbitrary exercise of power of the state. They have failed, however, to protect the human rights of minorities in Australia, particularly those of indigenous Australians.

It is this failure of the fundamental underlying principles of the Australian legal system to prevent human rights violations that will be addressed in this paper. The recent debate over mandatory sentencing laws in the Northern Territory and Western Australia, used here as an example of that failure, is first summarised.

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1 The arguments of those who criticise rights discourse and the rights discourse of the United Nations in particular, including cultural relativists, are noted.

Mandatory sentencing legislation in the Northern Territory & Western Australia

Much attention has been drawn to the implementation of mandatory sentencing regimes in two Australian jurisdictions, Western Australia and the Northern Territory.

The Committee on the Rights of the Child made the following observations in relation to Australia in 1997:

'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.'[2]

Both schemes provide for mandatory sentencing of juveniles as well as adults. The Western Australian legislation is restricted to home burglary and the Northern Territory legislation applies to a range of property offences.

The Western Australian Legislation

The contentious Mandatory Sentencing legislation in Western Australia was incorporated into that state's *Criminal Code* in November 1996. The amendments to the *Criminal Code* (WA) provide, in relation to adults, that a person with two or more previous convictions of home burglary must be sentenced to a minimum of twelve months imprisonment if convicted again of home burglary.[3] In relation to young persons (those who have not attained the age of 18), the Code provides that repeat offenders (those with two or more previous convictions) must be sentenced to at least twelve months imprisonment or detention.[4]

The Northern Territory Legislation

The Northern Territory's mandatory sentencing legislation was introduced via amendments to the *Sentencing Act 1995* and the *Juvenile Justice Act 1983.* These amendments came into effect on 8 March 1997. For the purposes of the mandatory sentencing legislation, persons 17 years and older are treated as adults[5], while juveniles are persons aged 15 and 16 years.[6] The Northern Territory's mandatory sentencing legislation applies to a range of property offences, such as theft (except where the offender was lawfully on the premises), criminal damage, unlawful entry to buildings, receiving stolen goods, assault with intent to steal and robbery (armed or unarmed).

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2 CRC/C/15/Add.79.

3 *Criminal Code* (WA), s. 401.

4 *Criminal Code*, s. 401(4)(b).

5 *Sentencing Act 1995* (NT), s. 4.

6 *Juvenile Justice Act 1983* (NT), s.53.

Persons over the age of 17 who are found guilty of property offences will be subject to a mandatory imprisonment term of at least 14 days for a first offence (except in exceptional circumstances), 90 days for a second offence and 12 months for third or subsequent offences.[7] For juveniles (those aged 15 and 16 years), second and third time offenders are subject to mandatory detention for at least 28 days (with some discretion to courts to order participation in diversionary programs for second time offenders).

Do mandatory sentencing provisions in Western Australia and the Northern Territory breach Australia's international human rights obligations?

Under international law, the Australian government has the responsibility of implementing its international obligations. Federal arrangements that provide for jurisdiction of states over certain legislative areas do not alter this. Under the *Vienna Convention on the Law of Treaties* 1969 article 27, the general rule under international law is that a country cannot rely on its internal law as a reason for breaching its international obligations. This includes the situation of federal States.

It is now clear that the Commonwealth government has the constitutional power under section 51(xxix) (the external affairs power) to legislate over areas that are the subject matter of its international obligations. This is so even where these ordinarily fall within the jurisdiction of states and territories.[8]

Claims that the Western Australian and Northern Territory legislation breach Australia's international obligations can be divided into those concerned with human rights generally and those that relate particularly to juveniles.

Generally

The relevant international human rights obligations are contained for the most part in the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CROC), *The International Convention on the Elimination of all Forms of Racial Discrimination* (CERD), and the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW).

The ICCPR was ratified by Australia in 1980. Article 9(1) of the ICCPR prohibits arbitrary arrest or detention. The Human Rights and Equal Opportunity Commission (HREOC) stated in its submission to the Senate Legal and Constitutional References Committee Inquiry, (the Senate Inquiry),

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7 *Sentencing Act 1995* (NT), s78A.

8 *The Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416. See also support for this in the Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, 13 March 2000.

that the term 'arbitrary' in this context generally means unjust.[9] The HREOC submission cites the case of *Alphen v The Netherlands* where the Human Rights Committee said that arbitrariness includes 'elements of inappropriateness, injustice and lack of predicability.'[10] According to the HREOC submission, '[t]he jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a *proportionate* means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights...Sentencing that is discriminatory in its impact may also be arbitrary.'[11]

Given the trivial nature of many of the offences that attract a mandatory sentence and the severity of the sentence prescribed, sentencing under these schemes is frequently disproportionate.[12] There is also overwhelming evidence to suggest that the schemes are discriminatory in their impact on indigenous Australians in particular.[13]

Submissions to the Senate Inquiry claimed breaches of many other provisions of the ICCPR, including the requirement that the essential aim of treatment of prisoners be reformation and rehabilitation;[14] the separation of juvenile offenders from adults;[15] entitlement to a fair hearing;[16] the right to have sentences reviewed;[17] equality before the law and entitlement to the full protection of the law without discrimination.[18] The Senate Legal and Constitutional References Committee concluded that many of these provisions had been breached particularly by the Northern Territory legislation.

The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) was ratified by Australia in 1975. Article 2(1)(c) requires state parties 'to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'. Racial discrimination is defined in Article 1(1) as 'any

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9 Human Rights and Equal Opportunity Commission, *Submission to the Inquiry by the Senate Legal and Constitutional References Committee into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, November 1999, p.8.

10 Note 9.

11 Note 9.

12 See for example the discussion of proportionality in the Senate Legal and Constitutional References Committee, n 8, pp 53-55.

13 See generally the discussion in the Senate Legal and Constitutional References Committee, n 8, pp 83-89.

14 *International Covenant on Civil and Political Rights (ICCPR)*, GAOR xxi Supp. 16A/6316, pp. 49-52, Art 10 (3).

15 *ICCPR*, Art 10 (3).

16 *ICCPR*, Art 14 (1).

17 *ICCPR*, Art 14(5).

18 *ICCPR*, Art 26. See also Arts 10, 14 & 27.

distinction... based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. (Emphasis added).

Many critics of the mandatory sentencing regimes in Western Australia and the Northern Territory have noted the discriminatory impact of these laws on indigenous Australians and those from disadvantaged backgrounds.[19] For instance, it has been pointed out that the offences targeted by the legislation, such as burglary and car theft, are those offences more likely to be committed by indigenous Australians. Whereas, for instance, white collar crimes such as fraud, predominantly committed by non-indigenous Australians, are excluded. Although the Senate Inquiry was cautious about the adequacy of available statistics, it had received numerous submissions containing statistics which confirmed that Aboriginal incarceration had increased since the introduction of mandatory sentencing. For example, the submission of the North Australian Aboriginal Legal Aid Service (NAALAS) contained the following statistics:

- 'the Territory imprisons four times as many of its citizens than any State;
- Aboriginal people make up 73% of the Northern Territory's prison population;
- between June 1996 and March 1999 adult imprisonment increased by 40%;
- Aboriginal juveniles make up over 75% of those detained in juvenile detention;
- in 1997-98, the number of juvenile detainees increased by 53.3%;
- the number of women in prison in the NT has increased by 485% since the laws were introduced'.[20]

Such submissions support the claims of discrimination against indigenous people as a result of the introduction of mandatory sentencing. This clearly exacerbates the serious problem of indigenous Australians in relation to the criminal justice system which was the focus of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). It is ironic that not only has there been very little progress on serious implementation of the Commission's recommendations aimed at addressing these problems (with Aboriginal representation in the criminal justice system and deaths in custody continuing to increase), but that major amendments to criminal laws have had the

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19 See eg, Louis Schetzer, 'A Year of Bad Policy: Mandatory Sentencing in the Northern Territory' (1998) 23(3) *Alternative Law Journal* 117, Helen Bayes, 'Punishment is blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) 22(1) *UNSWLJ* 286, and many of the submissions to the Senate Legal and Constitutional References Committee Inquiry.

20 Senate Legal and Constitutional References Committee, n 8, p.61.

opposite effect. Arguably, this places Australia in breach of its obligations under the CERD and brings into question Australia's commitment to the principles and values of the treaty.

Juveniles

It is the effect of mandatory sentencing on juveniles that has drawn the greatest criticism and concern. The *Convention on the Rights of the Child* (CROC), which was ratified by Australia in 1990, defines a child as, 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[21]

Generally, eighteen is the age of majority in all Australian jurisdictions, however, the criminal law of some jurisdictions treats people of 17 years as adults.[22] This breaches the requirements that children be treated separately from adults,[23] and that they be treated in a manner appropriate to their age.[24] The claim is that the mandatory sentencing legislation in the Northern Territory and Western Australia breaches many provisions of the CROC including the requirement that the best interests of the child be a primary consideration in all actions concerning children;[25] prohibition of arbitrary detention,[26] the requirement that imprisonment be a last resort and for the shortest appropriate period of time;[27] the right of the child 'to be treated in a manner...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 in society';[28] and the requirement that 'alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.[29].

In 1997, the Australian Law Reform Commission in its Report, *Seen and Heard: Priority for Children in the Legal Process*, concluded that the Northern Territory and Western Australian laws breach a number of the international human rights standards relating to juveniles.[30] The Report recommended that the Commonwealth Attorney-General encourage Western Australia and the

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21 *Convention on the Rights of the Child (CROC)*, UN Doc A/44/49 (1989) Art 1.

22 *Children and Young Persons Act 1989* (Vic), s. 3(1), *Juvenile Justice Act 1992* (Qld), s. 5, and *Juvenile Justice Act 1995* (NT), s. 3.

23 *CROC*, Art 37(c); *ICCPR*, Art 10 (3).

24 *CROC*, Art 40(1).

25 *CROC*, Art 3(1).

26 *CROC*, Art 37(b).

27 *CROC*, Art 37(b).

28 *CROC*, Art 40(1).

29 *CROC*, Art 40(4).

30 ALRC/HREOC Report No. 84, *Seen and Heard: Priority for Children in the Legal Process*, 1997, pp. 554-555.

Northern Territory to repeal their legislation providing for mandatory detention of juvenile offenders. In default of this, the Attorney-General should consider federal legislation to override the Western Australian and Northern Territory provisions.[31] As yet, these recommendations have not been implemented.

It has also been pointed out that the laws in both jurisdictions appear to be more severe in some respects on juveniles than on adults. Bayes says:

> 'Both pieces of legislation are more harsh on children than adults. In the NT young offenders receive multiples of 28 days, whereas adults (those 17 and over) receive multiples of 14 days for the same offence. In WA, children must serve half of their sentence (six months) before becoming eligible for release under supervision, whereas adults need serve only one third (four months).'[32]

The Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999

It was concern over the mandatory sentencing of juveniles that prompted the introduction of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* into the Senate, and the referral of the issue to the Senate Legal and Constitutional References Committee. The Bill prohibited mandatory sentencing of persons for offences committed as a child (under the age of 18), and invalidated laws that have that effect. The Senate Legal and Constitutional References Committee handed down its report on 13 March 2000. It concluded that the legislation breaches many of Australia's international obligations, in particular those contained in the ICCPR and CROC.[33] The Committee noted in its report that mandatory minimum sentencing is inappropriate in a society where human rights are valued. While it would prefer that the respective governments take action to change the legislation, the Committee 'does not believe that the Northern Territory and Western Australian Governments will act on their own volition to resolve the issue.'[34] It was recommended that the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* be passed by the Federal Parliament.

The Response of the Commonwealth Government

In a joint statement released by the Prime Minister and the Chief Minister of the Northern Territory on 10 April 2000,[35] it was announced that the mandatory sentencing legislation of the Northern Territory would remain unchanged except that the age for the treatment of a person as an adult

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31 ALRC/HREOC Report No. 84, n 30, p. 700.

32 Bayes, n 19, 286.

33 Senate Legal and Constitutional References Committee, n 8, p.116.

34 Senate Legal and Constitutional References Committee, n 8, p.117.

35 http://www.pm.gov.au/media/pressrel/2000/jointstatement1004.htm.

would be increased from 17 to 18.[36] The Commonwealth promised $5 million per annum to fund diversionary programs and an Aboriginal interpreter service. Police in the Northern Territory will be required to divert juveniles into diversionary programs at the pre-charge stage in the case of minor offences, and will have discretion to divert in more serious cases.[37]

This outcome gives more discretion to the police, ignores the traditional tension between Aboriginal Australians and the police and the problem of police prejudice, and contradicts the recommendations of the RCIADIC Report. The possibility of police attitudes being a contributing factor to the high rate of incarceration of indigenous children was raised by the Committee on the Rights of the Child in 1997, when it observed:

> '...The Committee is also of the view that there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islander children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.'[38]

The Inadequacy of the Response

The response of the Commonwealth and Northern Territory Governments is inadequate for a number of reasons. In the first place, it only addresses those breaches of the international obligations that concern juveniles, and not other human rights breaches. Even then, mandatory sentencing provisions for juveniles remain unchanged, the only change in the legislation being the raising of the threshold age for being treated as an adult. More discretion is given to police and law enforcement agencies, not the courts. Effectively the mandatory sentencing laws remain intact.

The *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* would also have been inadequate, as it only addressed the issue of mandatory sentencing of juveniles and not mandatory sentencing generally. Even had the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* been passed, it would have been yet another example of the Commonwealth government implementing international human rights obligations in a piecemeal and ad hoc fashion, leaving many other of its obligations in this respect unimplemented. Furthermore, the human rights violations in the mandatory sentencing laws are but a part of a much broader problem of indigenous Australians and the criminal justice system in particular, and the Australian legal system in general.

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36 The Federal Attorney-General has written to Victoria and Queensland requesting similar changes be made to the criminal law of those states.

37 Joint Statement, n 35.

38 CRC/C/15/Add.79

The Inadequacy of the Australian Legal System to protect the rights of Indigenous Australians

Throughout the history of colonisation in Australia, the Australian legal system has denied the human integrity of indigenous Australians. Indigenous Australians have been excluded by the legal system, and have been denied many basic rights and liberties enjoyed by non-indigenous Australians. To use post-structuralist parlance, the Australian legal system has perceived its subject as essentially non-indigenous and has thus excluded 'other' (indigenous) Australians. Many of the laws and procedural aspects of the legal system, while seemingly just on their face have a discriminatory impact on indigenous Australians. This is particularly so in the case of the criminal justice system.[39] The political reality of the Australian system of government means that mechanisms thought to protect its citizens from excessive state power are incapable of preventing this occurring. The reality is that despite the rhetoric, powerful executive governments at state and territory level, relatively unchecked by the party-dominated legislature and unwilling federal government, are subject only to the will of the majority of the electorate who may be insensitive to the concerns of minorities.

Despite an increased willingness on the part of the courts in Australia to bring the common law into line with accepted international standards on human rights,[40] the doctrine of parliamentary sovereignty precludes common law protection of individuals against rights violations by legislatures. Australia does not have a constitutionally entrenched bill of rights[41] and although some fundamental rights have been implied into the Constitution[42] these offer very limited rights protection. Further, although Australia has accepted the accountability procedures of the United Nations, the response of the

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39 RCIADIC, *National Report,* (AGPS, Canberra, 1991), HREOC *Bringing Them Home: Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their Families* (AGPS, Canberra, 1997), ALRC (1986) *The Recognition of Aboriginal Customary Laws* Report No 31 (AGPS, Canberra). A thorough examination of these issues can be also be found in McRae, H., Nettheim, G. & Beacroft, L., *Indigenous Legal Issues: Commentary and Materials*, 2nd Ed., LBC, Sydney, 1997.

40 As evidenced in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *Dietrich v The Queen* (1992) 177 CLR 292 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353. See also Kirby, M, 'The Role of International Standards in Australian Courts' in Alston,P & Chiam,M (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?*, Federation Press, Sydney, 1995, and Fitzgerald, B, 'International Human Rights and the High Court of Australia' 1 *JCULR* 78.

41 It is noted that there is some criticism of the adequacy of rights protection in those countries that do have constitutionally entrenched bills of rights and that an entrenched bill of rights is not a panacea to the problem of rights protection. It is not within the scope of this paper to address the arguments for and against an entrenched bill of rights for Australia.

42 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide Newspapers Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Australian Government[43] to the criticisms of the Human Rights Committee in relation to mandatory sentencing indicates that reliance upon international standards and procedures for rights protection in Australia is also inadequate.

It is the underlying principles of the Australian legal system that have long been thought to protect the rights of the Australian people.[44] Underlying Australia's constitutional system are certain democratic or liberal legal assumptions. Of these the most fundamental is the rule of law – the idea that everyone, including governments, are subject to the law and that citizens are thereby protected from arbitrary abuse of power by governments. The operation of the rule of law in Australia is ensured by a number of political mechanisms that operate to limit or disperse political power. These mechanisms (which operate to a greater or lesser extent) include representative democracy, responsible government, the separation of powers doctrine and federalism.

These principles have all been argued in support of the mandatory sentencing regimes of the Northern Territory and Western Australia, or at least against any contrary action by the federal government. The mandatory sentencing schemes have each been enacted by a legislature elected by a majority of voters (representative democracy), within its sphere of legislative competence under our federal system (federalism). Responsible government and separation of powers preclude the actions of the executive government in entering international treaties becoming law without the endorsement of the legislature.

As philosophical concepts however, these democratic principles are not unproblematic. One of the main problems is, as pointed out by Crommelin:

> '[t]he framers of the Commonwealth Constitution were practitioners rather than philosophers. Little time was devoted to articulation of the federal principle, and no attempt was made to provide a comprehensive statement of that principle in the Constitution. In that regard, federalism was accorded similar treatment to other foundation stones of the system of government, such as separation of powers, representative government and responsible government.'[45]

Representative democracy is philosophically utilitarian. Frequently expressed as 'the greatest happiness of the greatest number', Bentham's concept of a 'felicic calulus' according to which the will of the majority could be ascertained, and which it must be the object of legislation to implement, has

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43 On the review of Australia's interaction with the UN treaty committee system, see Joint News Release Minister for Foreign affairs, Attorney-General & Minister for Immigration and Multicultural Affairs, 29 August 2000, http://law.gov.au/aghome/agnews/2000newsag/joint14_00.htm.

44 In relation to the United Kingdom, see Jennings, I, *The Approach to Self-Government*, Beacon Press, Boston, 1963, p.20.

45 Crommelin, M., 'Federalism' in Finn, P.(ed), *Essays on Law and Government*, Vol. 1, LBC, 1995, p.168 at 169.

been the subject of much justified criticism.[46] Modern representative democracy remains largely utilitarian and reflects many of its problems. For example, just how far should the will of the majority be allowed to override the rights of those in the minority? In this instance the popularly elected Northern Territory and Western Australian legislatures have enacted legislation which infringes particular fundamental human rights of certain minority groups.

> Hilary Charlesworth has identified majoritarian democracy as one of the main reasons for Australia's poor record of implementing its obligations despite its high international profile on human rights. In 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia',[47] she states: '[t]hose who argue....that assigning the protection of rights to institutions other than parliament is endangering democracy, rely on a monolithic majoritarian notion of democracy that is inadequate for today's multicultural, heterogeneous Australian society. Human rights protection requires a long-term view: it involves fettering the choices of political majorities 'in order to reap the rewards of acting in ways that would elude them under pressures of the moment."[48]

Recent indications are that the simplistic majoritarian premise of representative democracy is outmoded. Kirby points out succinctly:

> 'Modern notions of democracy are more sophisticated than they formerly were. They involve more than simply the reflection in law-making of the will of the majority, intermittently expressed upon a broad range of issues. It is now increasingly accepted that the legitimacy of democratic governance depends upon the respect by the majority for the fundamental rights of minorities.'[49]

Contemporary Australian jurisprudence suggests support for the Dworkian notion that the majoritarian mandate of the government is limited by the fundamental rights of the people. Finn argues that governments in Australia are trustees for the people.[50] Consequently, according to Finn, there is an implied common law limitation on the legislative powers of parliament not 'to exercise its powers in a way that interferes with such inherent rights as people may have despite or because of their union in our polity'.[51] Similarly, Doyle suggests that legal sovereignty resides in the Australian people, and

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46 For a summary of some of these criticisms, see Harris, J., *Legal Philosophies*, Butterworths, London, 1980, pp 40-41.

47 Charlesworth, H., 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Alston,P & Chiam,M (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?*, Federation Press, Sydney, 1995.

48 Note 47, p.138.

49 Kirby, n 40.

50 Finn,P., 'A Sovereign People. A Public Trust' in Finn, P.(ed), *Essays on Law and Government*, Vol. 1, LBC, 1995, p.1.

51 Note 50, p.21.

that therefore the delegated power to parliament must be subject to the people's fundamental common law and democratic rights.[52]

If this is so, it is not reflected in present reality. The mandatory sentencing legislation is one example of Australian governments exercising their powers in a way that does interfere with basic rights. It seems that where those rights are the rights of minorities, there is little redress. The practical operation of the doctrine of parliamentary sovereignty ensures that, despite incremental advances in common law rights protection by the courts, the common law is largely inadequate as a mechanism for protection from rights violations by legislation. Just as the traditional view of representative and responsible government adequately protecting the rights of Australians has been shown to be an inaccurate and largely a romantic view (see below), so too the view that the utilitarian majoritarian will is legitimate only in so far as it respects fundamental rights is a romantic vision and unfounded in reality. This perhaps is more a view of how things should be, rather than what they are.

Traditionally the doctrine of responsible government has been held out as an adequate mechanism for rights protection in Australia. To use the oft-quoted words of Sir Robert Menzies, 'responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights'.[53] According to the doctrine of responsible government the executive government is responsible to the legislature which is in turn accountable to the Australian people. The doctrine of responsible government has been criticised for failing to take into account the reality of the party political system in Australia.[54] The domination of political parties in the legislature and the fact that the executive is drawn from the party with the majority in the lower house ensures that the actions of the executive are largely unchecked by the lower house. Galligan argues that 'party responsible government' has replaced parliamentary responsible government. And of course as Charlesworth points out, '[r]esponsible government relies ultimately for its effectiveness upon the electorate's disapproval of the action, and that disapproval is unlikely if the action affects a minority.'[55]

Federalism is also advanced as a reason for Australia's inadequate implementation of its international human rights obligations. Charlesworth asserts that '[s]erious implementation of all Australia's human rights obligations would entail incursions into the politically volatile area of 'States'

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52 Doyle,J., 'Common Law Rights and Democratic Rights' in Finn, P, *Essays on Law and Government*, Vol. 1, LBC, 1995, p.144.

53 Menzies, R., *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*, Cassell, London, 1967, p. 54.

54 See eg, Charlesworth, H., 'The Australian Reluctance About Rights', and Galligan, B., 'Australia's Political Culture and Institutional Design', both in Alston, P. (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, ANU, and Human Rights and Equal Opportunity Commission, 1994.

55 Charlesworth, H., 'The Australian Reluctance About Rights', n 54, p. 23.

rights' and Commonwealth politicians are typically wary of entering the fray for the sake of politically marginal groups.'[56] Federalism is a geographical means of dispersing, and thereby protecting citizens from, a concentration of state power. Legislative powers are distributed between state and federal parliaments by the federal Constitution. In Australian federalism, federal legislative powers are defined, whereas state legislative powers are not. States retain the residue of non-allocated legislative powers. According to Crommelin, the 'founding fathers' intended to limit Commonwealth powers by defining them, while leaving State powers unlimited except for those defined areas of federal legislative competence.[57] Crommelin, along with other advocates of this traditional view of federalism, laments the erosion of the powers of the states' parliaments by expansive interpretation of Commonwealth powers (in particular the external affairs power), and the failure of the High Court to preserve the states' legislative domain.[58]

Human rights are traditionally such an area. Since the High Court decision in *The Commonwealth v Tasmania,*[59] it is clear that the external affairs power includes power to legislate to implement treaties. Although the Commonwealth has the power, it remains reluctant to use it.[60] Such reluctance is exemplified by the Commonwealth's response to the issue of mandatory sentencing. In the report of the Senate Inquiry, the Committee expressed the view that it would prefer that the respective state and territory governments take action to *"put their own houses in order",*[61] and it was only because the Committee did not believe that the Northern Territory and Western Australian Governments would do so that the Committee recommended that the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* be passed by the Federal Parliament.

The Commonwealth Government's response showed an even greater desire not to interfere with the traditional jurisdiction of the states and territories governments. The joint statement released by the Prime Minister and the Chief Minister of the Northern Territory on 10 April 2000, announcing their agreement on a resolution of the issue expressly stated this:

> 'Both the Prime Minister and the Chief Minister recognised that these matters are normally dealt with by the criminal laws of the States and

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56 Charlesworth, H., 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia', n 47, p.138.

57 Crommelin, n 45.

58 Crommelin, n 45.

59 (1983) 158 CLR 1.

60 Even on those occasions when it does rely on the external affairs power to implement treaties, often the legislation is introduced as an ad hoc response to particular situations and then only partial implementation of a treaty or some obligation under it, eg the *Human Rights (Sexual Conduct) Act 1994* (Cth) which was introduced in response to the decision of the UN Human Rights Committee in *Toonen v Australia* UN Doc. CCPR/C/50/D/488/1992.

61 Senate Legal and Constitutional References Committee, n 8, p.116.

> Territories...They agreed that their common objective was to prevent juveniles entering the criminal justice system...Accordingly, they have agreed on a number of initiatives designed to achieve this goal and which address particular Commonwealth concerns *while continuing to respect the role of the Northern Territory Parliament'*.[62](Emphasis added)

Because of the tension between Australia's international obligations and federalism, an extensive system of state-commonwealth consultation in the negotiation and implementation of international treaties has been established.[63] This procedure is expressed to be 'subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia'.[64]

The CROC was ratified by Australia after extensive consultation with the states. At the time, the Commonwealth's position was that no specific implementing legislation was necessary as the existing laws were largely adequate.[65] As Charlesworth points out however this position provides no safeguards against future legislation such as the mandatory sentencing legislation which infringes those obligations.[66] Despite the extensive pre-treaty consultation, legislation has been introduced at a state and territory level which breaches CROC. Yet the Commonwealth government would still prefer to defer its constitutional power to implement the treaty out of excessive deference to the traditional interpretation of Australian federalism.

Rather than seeing federalism as a threat to human rights protection, Galligan argues that federalism (rather than parliamentary responsible government) may be adequate to check the potential threat to human rights from what he terms 'party responsible government'. Unchecked executive action may constitute a threat to human rights and federalism is a vital check on party political parliamentary power. He argues further:

> '[s]uch dispersion of power substantially checks and restrains government in Australia and is a powerful institutional protection for human rights....the failure to articulate and appreciate the potency of the federal constitution for protecting rights has led to a superficial and unrealistic public debate about the adequacy of rights protection in Australia.....A more enlightened public debate over the adequacy of Australia's established institutions for protecting rights would need to recognise the erosion of *parliamentary*, and its subversion by *party*

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62 http://www.pm.gov.au/media/pressrel/2000/jointstatement1004.htm.

63 Australia and International Treaty Making Information Kit, http://www.austlii.edu.au/au/other/dfat/reports/infokit.html.

64 Note 63.

65 Attorney-General's Department, *Australia's First Report Under Article 44(1)(a) of the United Nations Convention on the Rights of the Child*, Attorney-General's Department, Canberra, 1996.

66 Charlesworth, H., 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia', n 47, p.133.

> responsible government and the potential threat to human rights from party responsible government would need to be balanced against the substantial restraints imposed by the federal Constitution'.[67](Emphasis in original)

Galligan does not, however, spell out exactly how federalism may be more conducive to human rights protection than parliamentary responsible government. His argument seems to consist of no more than the concept of federalism as a check on the otherwise unrestrained powers of (executive) governments.[68] Federalism however only limits government power by protecting governments' respective fields of legislative power. Any cases where this results in human rights protection are merely fortuitous. However, a newer modern interpretation of Australian federalism may be a more effective means of human rights protection.

The High Court interpretation of the external affairs power allows the Commonwealth to legislate to implement international human rights principles. Australia's federal system thus allows for limitations on the otherwise unchecked power of state and territory governments in this regard. This depends however on the willingness of the federal government to use the external affairs power to implement its human rights obligations. Even where the Commonwealth government is prepared to do so, implementation in the past has often been piecemeal and ad hoc. An example of this is the *Human Rights (Sexual Conduct) Act 1994* (Cth) which was introduced by the Commonwealth government in response to the decision of the UN Human Rights Committee in *Toonen v Australia*.[69] Had the Commonwealth passed the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, it would only have addressed the juvenile aspect of mandatory sentencing, and not the general human rights violations occasioned by mandatory sentencing nor the broader problems of indigenous Australians and the criminal justice system.

As in the case of mandatory sentencing, where the Commonwealth government is reluctant to implement human rights obligations by using the external affairs power, and state governments have no such international obligation, there is nothing in the Australian system to check human rights abuses by state or territory governments. None of these mechanisms protect the human rights of minorities.

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67 Galligan, n 54, pp. 71-72.

68 It may be that Galligan envisages an entrenched bill of Rights in the Australian constitution. He states at p.72 that "Australia's federal constitutional culture is more congenial to a Bill of Rights which is a further constraint on legislatures and governments."

69 UN Doc. CCPR/C/50/D/488/1992.

CONCLUSION

The mandatory sentencing regimes in the Northern Territory and Western Australia breach Australia's international human rights obligations. The Commonwealth government has declined to legislate to implement those human rights obligations even though it has the legislative power to do so. The mechanisms of the Australian legal system long thought to be the protectors of the rights of Australians, are clearly inadequate to provide fundamental protection of the rights of 'minority' Australians, particularly Australia's indigenous peoples. There is hope for the future however, as with increasing globalisation, there is an increasing expectation of accountability by sovereign states to the international community. International bodies (with as yet admittedly little power) monitor violations of treaty obligations of member states. As well as these international accountability procedures, the Australian courts have played a significant role in incorporating international human rights into the common law, and the High Court has found certain (albeit limited) rights in the Constitution. These developments are as yet in their infancy. Traditional mechanisms for limiting the power of governments, such as federalism, may need to be reinterpreted or risk becoming obsolete, as the international forum increasingly takes on that role.