CHAPTER 5

AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND MANDATORY SENTENCING

Introduction

5.1 The introduction of mandatory sentencing legislation by the Northern Territory and Western Australian Governments has raised questions as to Australia's international human rights obligations. In particular, concern has been expressed that the legislation violates Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CROC).

5.2 There is also concern that mandatory sentencing for property offences discriminates against certain groups in the community, namely indigenous people, women and intellectually disabled people. It is claimed that the discriminatory impact of the legislation on those groups is contrary to other international conventions, such as the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the United Nations Declaration on the Rights of Disabled Persons. These claims are considered in Chapter 6.

5.3 The Committee was advised by the Commonwealth Attorney-General's Department that if a part of Australia was breaching any of the terms of an international instrument which Australia had ratified (such as the ICCPR and the CROC), Australia would be in breach of its international obligations under that instrument. However:

> It is a matter of opinion to a large extent whether or not a particular act of parliament or a particular action taken by government is in breach of the covenant.[1]

5.4 The purpose of this chapter is to examine the claims that mandatory sentencing laws contravene Australia's international human rights obligations under the ICCPR and CROC, thereby jeopardising Australia's international reputation.[2]

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1 *Transcript of evidence*, Attorney-General's Department (C'th), p. 155. See also *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 364; and *Transcript of evidence*, Mr Flynn, Law School, University of Western Australia, p. 121. See also 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 international obligations. This includes the situation in federal states.

2 *Transcript of evidence*, NAALAS, p. 73. Mr Renouf of that organisation said that NAALAS has received instructions to take a matter to the international forums, and may well be doing so, which could cause embarrassment to Australia: p. 72. *Transcript of evidence*, Attorney-General's Department (C'th),

The International Covenant on Civil and Political Rights

5.5 The ICCPR was adopted by the United Nations in 1966 and ratified by Australia in 1980. Although the ICCPR has not been strictly incorporated into federal law, it has been scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act),[3] with the result that the HREOC Act's definition of 'human rights' has been enlarged.

Claims that mandatory sentencing breaches the ICCPR

5.6 The Northern Territory Government and the Western Australian Government rejected the contention that their legislation was in breach of a number of Australia's human rights obligations under the ICCPR[4] and the Tasmanian Government, although not itself supporting mandatory sentencing, described the link between it and Australia's obligations under the ICCPR (and the CROC) as 'at best, tenuous'.[5]

5.7 Most witnesses who addressed the question of Australia's compliance with the ICCPR believed that the legislation in place in both the Northern Territory and Western Australia had placed Australia in breach of ICCPR.[6] However, in many respects, the Committee believed that the arguments put forward to support this position were not thoroughly developed.

ICCPR, article 7: Cruel, inhuman and degrading treatment or punishment

> **Article 7: No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment …**

ICCPR, article 9(1), Prohibits arbitrary detention

> **Article 9(1): … No one shall be subjected to arbitrary arrest or detention …**

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p. 153: Ms Leon of the department advised the Committee that were such a claim to be made to the United Nations Human Rights Committee, the Australian Government, and not the Northern Territory Government, would respond to such a communication because the Australian Government is the party to treaties.

3 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), schedule 2.

4 *Submission No. 96*, Western Australian Ministry of the Premier and Cabinet, p. 15; *Submission No. 91*, Chief Minister, Northern Territory Government, vol. 4, pp. 900-901.

5 *Submission No. 7*, Acting Premier, Tasmanian Government, vol. 1, p. 39.

6 See for example: The Law Society of New South Wales, Northern Territory Legal Aid Commission, International Commission of Jurists (Qld), Logan Youth Legal Service, Central Australian Aboriginal Legal Aid Service, Australian Law Reform Commission, Northern Territory Bar Association, Covenanting, Uniting Church in Australia, North Australian Aboriginal Legal Aid Service, Amnesty International Secretariat, The Victorian Bar, Mr Martin Flynn, Lecturer, Law School, The University of Western Australia.

5.8 A number of submissions argued that the above articles were contravened by the legislation on the ground that both the articles themselves, and relevant international jurisprudence, emphasised that there should be basic standards:

- Legislation should not be arbitrary in the sense of selecting certain crimes or patterns of behaviour and ignoring others; [7]
- Punishment must be proportionate and fixed terms of detention *per se* are not appropriate for minor matters;
- Punishment should not be too high for trivial offences;[8] and
- Decisions about prosecution should not be subject to bias and outside the review process.

Arbitrary choice

5.9 The President of the Northern Territory Bar Association, Mr Colin McDonald, claimed the detention imposed for an arbitrary range of property and violence offences is 'arbitrary' within the meaning of article 9(1).[9] He described the selection of offences that attract a mandatory sentence as completely arbitrary, targeting only certain blue collar property offences, there being no reference to white collar offences.[10] A similar point was also made by CAALAS.[11]

Proportionate

5.10 Several inquiry participants argued that mandatory sentencing laws impose detention properly described as arbitrary contrary to article 9(1),[12] arbitrary in this context including 'elements of inappropriateness, injustice and lack of predictability'.[13]

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7 See *Transcript of evidence,* Youth Affairs Council Juvenile Justice Portfolio Group, p. 128; 'Someone like an Alan Bond in Western Australia removes a billion dollars from the business scene and he gets an extra three years' incarceration. A young person steals a video tape and he gets one year.'

8 *Submission No. 24*, ATSIC, vol. 1, p. 233; *Submission No. 39*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 597.

9 *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 144.

10 *Transcript of evidence,* Northern Territory Bar Association, pp. 84-85.

11 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 597.

12 See, for example, Australian Law Reform Commission, ATSIC, Human Rights and Equal Opportunity Commission, Northern Territory Bar Association, Covenating, Uniting Church in Australia, National Children's and Youth Law Centre, and North Australian Aboriginal Legal Aid Service.

13 *Van Alphen v Netherlands*, United Nations Human Rights Committee Communication Number 305/1988. See *Submission No. 24*, ATSIC, vol. 1, p. 232 citing the following sources Blokland J, 'International Law Issues and the Northern Territory Sentencing Regime', Sixth Biennial Conference, Criminal Lawyers Association of the Northern Territory, Bali, 22-26 June 1997; Wilkie M, 'Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective', *University of Western Australia Law Review*, vol. 22, no. 1, pp. 187-196.

5.11 HREOC argued that the concept of arbitrariness should not be confined merely to sentences that are unlawful, subscribing to the view that the concept is also applicable to sentences that are 'unjust', 'unreasonable', 'an abuse of power' or 'incompatible with the principles of justice or with the dignity of the human person'. Individualised sentences should be proportionate to the circumstances of the offender, but mandatory sentencing restricts the sentencer's ability to have this choice.[14]

Appropriate

5.12 The North Australian Aboriginal Legal Aid Service (NAALAS) submitted that mandatory sentences are arbitrary because they restrict any attempt to discriminate between serious and minor offending and restrict any attempt to differentiate between those for whom offending is out of character and those who display elements of recidivism. In addition, NAALAS contended that the laws are arbitrary because they do not allow courts to sentence individuals according to the circumstances of the particular case.[15]

5.13 NAALAS provided some case illustrations to demonstrate the 'arbitrary' nature of mandatory sentence laws:[16]

Facts	**Result**
Man* stole biscuits, cordial worth $3.00	12 months imprisonment
Second man* stole the same $3.00 worth	90 days imprisonment
Homeless Darwin man stole beach towel	12 months imprisonment
17 yr old* stole $4.00 petrol for sniffing	90 days imprisonment
Man* broke car aerial after an argument	14 days imprisonment
18yr old* stole drink can at school, $1.50	14 days imprisonment
16yr old borrowed stolen bike to ride	Turned 17** served 28 days in adult's gaol

14 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 418, being attachment, *Human Rights Brief No. 2*, p. 5. The Uniting Church in Australia similarly argued that mandatory detention laws are arbitrary, contravening the principles of proportionality and consistency because they do not allow consideration of either the seriousness of the offence or the circumstances of the offender (*Submission No. 29*, Covenanting, Uniting Church in Australia, vol. 2, p. 475). Article 9(1), it was stated, requires the making of individualised sentences (ibid.) as opposed to the imposition of mandatory minimum sentences. Contrary to that requirement, under mandatory sentencing, detention is imposed without regard to individual factors or the triviality of the offence (*Submission No. 67*, National Children's and Youth Law Centre, vol. 4, p. 720).

15 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 262.

16 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 262.

Man requested food from commercial fishing boat on his traditional land as compensation. Request denied and he stole 2 cartons of eggs	14 days imprisonment
19 yr old* stole lollies, iced coffee	14 days imprisonment

* These people were from remote communities. ** See paragraph 5.21 below.

5.14 NAALAS claimed that because mandatory sentencing sets minimum severe sentences for minor offences, it is unjust and therefore arbitrary:

> It is the traditional function of a court of justice to make the punishment appropriate to the circumstances as well as the nature of the crime. An unjust law brings the rule of law into disrepute and creates tears in the fabric of legitimate government.[17]

Arbitrariness in decision to prosecute

5.15 CAALAS developed this argument by stating that mandatory sentencing involves arbitrary decision-making on two levels, the socio-economic referred to above,[18] and the arbitrariness that arises when much of the power to prosecute resides in the hands of those outside the court. While this is not novel or peculiar to mandatory sentencing, the decision to prosecute or not may depend on a range of factors that disadvantages some people. It may not be based on a dispassionate approach, and is not amenable to review:

> The exercise of police and prosecutorial discretion effectively means that the outcome of imprisonment is determined at a stage outside of court proceedings and in relation to that decision there is no accountability or public knowledge …[19]

5.16 The Committee does not see that the application of different punishments to different offences of itself constitutes arbitrariness, even if some offences tend to be committed by members of one group more than others. The Committee can see that a minimum sentence where the circumstances of the offence and the offender may vary widely is not proportionate or appropriate. The point about arbitrariness in the decision to prosecute is rather forced in so far as the outcome of imprisonment is not decided until after a conviction is recorded, the level of imprisonment is decided by the court and arbitrariness is not the same as absence of public knowledge.

17 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 268.

18 See above, Paragraph 5.9.

19 *Submission No. 40*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 597.

ICCPR, article 10(1): Persons deprived of their liberty shall be treated humanely

Article 10(1): All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

5.17 NAALAS claimed that the mandatory sentencing regimes breach article 10(1) because persons deprived of their liberty are subjected to conditions in jails that are inhumane, and also because they are separated by huge distances from their families and communities.

Inhumane conditions

5.18 NAALAS advised that there has been an overwhelming increase in the number of prisoners sentenced to prison after conviction and that this has resulted in prisoners being detained in conditions that breach this fundamental requirement. During the March quarter of 1999, the daily average number of people in prison was 629. This represents an increase of nearly 40% in just two and a half years. According to NAALAS, 'property offenders are detained in prisons which are filled to bursting'.[20] NAALAS quoted the Northern Territory Correctional Services Annual Report 1996-97:

> Paramount in transfer decisions was the duty of care issue relating to the overcrowding of the Darwin facility, with associated health and security concerns. The Darwin Correctional Centre population was nearly 200% of its design capacity.[21]

5.19 NAALAS advised that many Aboriginal prisoners are 'forcibly' transferred to Alice Springs as a result of overcrowding, and this prevents many from having any contact with family or other visitors during their prison term.[22] NAALAS claimed that this is cruel and inhumane and contravenes the recommendations of the Royal Commission into Aboriginal Deaths in Custody.[23] NAALAS also referred to other conditions for prisoners:

> Equally inhumane, is the current prison policy of 20 hour lock downs on Wednesdays and Fridays at Berrimah prison. Prisoners instruct NAALAS that they are imprisoned in dormitories with between 8 and 10 other Aboriginal people. The dormitories have beds, a toilet, a jug and a television. Prisoners are allowed to enter a courtyard at 8:30am and remain outside their cells until 3:30pm. While outside their cells they can play pool, basketball or cards. The NT News is delivered once a day. However,

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20 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 270.

21 *Northern Territory Correctional Services Annual Report 1996-97*, p. 34.

22 A similar point was made by *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 597 and Tangentyere Council (*Transcript of evidence*, Tangentyere Council, p. 26) in relation to juveniles (all detained in Darwin) as well as adults.

23 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, pp. 270-271.

> a significant number of Aboriginal prisoners speak only limited English. There are very limited work or educational opportunities.[24]

5.20 The Committee notes that, according to the figures given in evidence by Mr Anderson, any overcrowding for women and juveniles in Northern Territory prisons and detention centres would not have been caused by mandatory sentences against them. Mr Anderson gave evidence[25] that the number of females sentenced solely on the basis of mandatory sentencing was 22 out of 276 receptions of sentenced females in 1998-99. No material has been provided on the number of men on whom mandatory sentences have been imposed. Apart from that, the claims really relate to the prison system in the Northern Territory, not to mandatory sentencing.

5.21 Similar points can be made in relation to the situation in Western Australia, where the only figures relating to mandatory sentencing given to the Committee relate to juveniles. Material was provided to the Committee by the Western Australian Government indicating that the number of juveniles detained had diminished over the last few years and that the juveniles detained on mandatory sentences would only amount to about one-tenth of the current total.

ICCPR, article 10(3): Juvenile offenders shall be segregated from adults

> **Article 10(3): The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.**

5.22 CAALAS asserted that the mandatory sentencing laws in the Northern Territory violate article 10(3) because not all juveniles are segregated from adults during periods of detention and imprisonment. Under Northern Territory law, 17 year olds are dealt with as adults under the mandatory sentencing regime and serve terms of imprisonment in adult prisons.[26] This is arguably also contrary to article 1 of the CROC which defines a child as every human being under the age of 18 years unless, under the law applicable to the child, majority is attained earlier.[27].

5.23 At this point, the Committee only points out that this is a criticism of the penal system in the Northern Territory, not of mandatory sentencing.

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24 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 271.

25 *Transcript of Evidence*, Northern Territory Government, p. 45.

26 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, pp. 597-598. See also *Transcript of evidence*, Attorney-General's Department (Cth), p. 154: Ms Leon of the Department advised that the question of whether 17 year olds being dealt with as adults for the purpose of the criminal law in the Northern Territory is in conflict with the CROC, "strays into the field of seeking a legal opinion …".

27 See above Chapter 2, Paragraphs 2.7-2.14

ICCPR, article 14(1): Fair trial

> **Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, … everyone shall be entitled to a fair and public hearing …**

5.24 It was submitted that due process and treatment appropriate to offences proved against the person are critical aspects of fair trial and dispensation of sentence and that, to this end, the mandatory sentencing laws are at odds with Australia's obligations under article 14(1).[28] In addition, CAALAS stated that the removal of discretion in sentencing from the courts undermines the entitlement to a fair, public, competent, independent and impartial tribunal as required by article 14(1).[29]

5.25 It seems to the Committee that mandatory sentencing does not 'remove' but only restricts the discretion of the court as to sentence if, after a fair and public hearing, it finds the defendant guilty.

ICCPR, article 14(3): Language and the right to interpreters

> **Article 14(3): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**
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> **(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; …**

5.26 Witnesses raised concerns about the availability of interpreters for Aboriginal people appearing before the courts under the mandatory sentencing regimes. Mr Renouf of NAALAS,[30] Mr Richard Coates, Director of the Northern Territory Legal Aid Commission (NTLAC),[31] Mr Jon Tippett, President of the Law Society of the Northern Territory,[32] and Mr Flynn, Law School, University of Western Australia,[33] were all critical of the lack of an effective Aboriginal interpreting service. Mr Anthony Fitzgerald from Anglicare Top End mentioned a recent inquiry surrounding the creation of an Aboriginal interpreter service although, as far as he was aware, it still did not exist.[34]

5.27 Mr David Anderson from the Northern Territory Attorney-General's Department assured the Committee that an interpreter service was being developed

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28 *Submission No. 33*, Catholic Commission for Development, Justice and Peace, vol. 3, p. 505.

29 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 598.

30 *Transcript of evidence*, NAALAS, p. 76.

31 *Transcript of evidence*, Northern Territory Legal Aid Commission, p. 83.

32 *Transcript of evidence*, Law Society of the Northern Territory, p. 69.

33 *Transcript of evidence*, Mr Flynn, Law School, University of Western Australia, p. 125.

34 *Transcript of evidence*, Anglicare Top End, p. 59.

although he was unaware how effective it was. He said that the service could be contacted by telephone.[35] He also said:

> In relation to interpreters, I can inform the committee that, apart from in the Northern Territory, there are not any such programs. I think there is a minor program in South Australia, but that is all. The Territory leads the field in this respect.

5.28 He agreed that there are special problems associated with indigenous people accessing and understanding the justice system. He was aware of the assertion that people 'in the bush' do not know about mandatory sentencing, but explained that the cost of interpreters and education awareness programs is very expensive. The population of the Northern Territory is thinly spread over an enormous land area and there is the vast diversity of Aboriginal languages to take into account. Requests for financial assistance had been made to the Commonwealth Government but those requests had been rejected. Mr Anderson described some of the problems associated with providing adequate interpreter facilities:

> The problems include the logistics of transporting people. Obviously if you have someone in Darwin who is from a remote community, you are going to have to get someone from his or her community to come in. If that person is female, you may have to bring the family in. You cannot just ring up. If you require an Italian interpreter, you just ring up and someone is there on the spot. Here you might have to charter a plane. You might take three days of a person's time as against half an hour.
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> There are also cultural problems – who can speak to whom. There is the system of poison aunties – people in East Arnhem cannot talk to their aunties, for example, young men. Certain age groups cannot speak to others, certain genders cannot speak in certain situations, there are skin affiliations and all kinds of things like that. So it makes it more difficult to find the person.[36]

5.29 The Committee notes that this criticism does not relate to mandatory sentencing as such but to the criminal justice system as a whole. It also notes the assertion by Mr Anderson that the Northern Territory leads the field in relation to the provision of interpreters.

ICCPR, article 14(4): For juveniles, take account of age and promote rehabilitation

> **Article 14(4): In the case of juvenile persons, the procedure will be such as to take account of their age and the desirability of promoting their rehabilitation.**

35 *Transcript of evidence*, Northern Territory government, p. 49.

36 *Transcript of evidence*, Northern Territory government, p. 39.

5.30 Mr NR Cowdery QC, the New South Wales Director of Public Prosecutions, advised that the mandatory sentencing legislation in relation to juveniles fails to take into account a juvenile's age and the desirability of promoting his or her rehabilitation as required by article 14(4) of the ICCPR.[37] CAALAS similarly complained that under mandatory sentencing, issues such as age and rehabilitation cannot be taken into account in determining whether a period of detention is warranted or not.[38]

5.31 It is not clear to the Committee that this clause relates to the penalty for an offence. In terms, it relates to the procedure to be followed by the court in hearing a matter.

ICCPR, article 14(5): The right to have sentences reviewed

> **Article 14(5): Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.**

5.32 Several submittors claimed that mandatory sentencing breaches article 14(5) because the severity of mandatory sentencing cannot be reviewed on appeal.[39]

5.33 Mr Tippett of the Law Society of the Northern Territory confirmed that if the person has been found guilty of a particular crime that attracts a mandatory sentence and the sentence imposed was the minimum period of imprisonment,[40] a sentence can only be reviewed in terms of its severity if the sentence appealed from is more than the minimum mandatory sentence.

5.34 It appears to the Committee that there may well be merit in this argument.

ICCPR, article 14(7): Prohibits double punishment for the same offence

> **Article 14(7): No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or aquitted in accordance with the law and penal procedure of each country.**

5.35 It was submitted that the mandatory sentencing regimes breach article 14 (7) because the laws are contrary to the concept that a person should be punished once

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37 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 48.

38 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 598.

39 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p.49; *Submission No. 24*, ATSIC, vol. 1, p. 233; *Submission No. 29*, Covenanting, Uniting Church in Australia, vol. 2, p. 475; *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 272; and *Transcript of evidence*, Northern Territory Bar Association, p. 86.

40 *Transcript of evidence*, Law Society of the Northern Territory, p. 68. Mr Tippett of the Law Society said that there is an appeal as to whether or not that sentence ought to have been imposed on the ground that the provisions of section 6 of the *Sentencing Act* have not been exercised properly. Further, Mr Tippett said that an appeal can also be made on the ground that the new provision that allows a court in relation to trivial offences to impose a sentence other than a mandatory sentence of imprisonment has not been properly applied.

and once only for a crime. The mandatory sentencing laws represent double punishment:

> This means that should a finding of guilt be made for a property offence, the extent of the penalty to be imposed is determined not by the finding of guilt in the property offence before the Court, but on previous findings of guilt. In other words, he is being punished again for matters [for which] he has already received punishment.[41]

5.36 The Committee considers that, if this argument is valid, the longstanding practice of courts taking account of a person's prior convictions when determining sentence for the conviction just imposed is invalid. There does not seem to be any logical difference in this respect between a court exercising its discretion as to the weight to be given to prior convictions and a legislative direction that they must result in a certain term of imprisonment at least.

ICCPR, article 26: Equality before the law.

> **Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

5.37 NAALAS advised the Committee that available statistics support their contention that the mandatory sentencing provisions are primarily affecting the incarceration rates of Aboriginal people and juveniles. The resulting discriminatory impact of the laws offends against the requirement in article 26 for equality before the law. According to NAALAS, the statistics show that:

- 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.

5.38 The Committee points out that, in fact, the evidence given by Mr Anderson for the Northern Territory Government[42] strongly suggests that the large increase in the number of women prisoners (especially Aboriginal women), in the last 3 years is

41 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 271.

42 See *Transcript of evidence*, Northern Territory government, pp. 36-37.

due to the fine default system. Mr Anderson's statement also points to a *recent* diminution in the number of juvenile detainees during the half year 1999/2000 (July to December 1999), which may coincide with the amendments to the legislation allowing for the grouping or bunching of charges.

5.39 It appears from the figures in Attachment B of the Northern Territory government's second supplementary submission[43] that the process of fine default was also the major cause of the increase in adult male sentence receptions between 1996-97 and 1998-99.

5.40 From the available evidence, the Committee concludes that mandatory sentencing may contribute to the high level of incarceration of indigenous people in the Northern Territory, but the relative impact of mandatory sentencing on Aboriginal men, as distinct from women, is not necessarily greater than that of the criminal law in general.

ICCPR, article 27: Minority groups shall not be denied their own culture or language

> **Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.**

5.41 ATSIC submitted that the forced imprisonment of indigenous children and adults hundreds or**,** in some cases thousands, of kilometres from their families and communities, casts doubt on Australia's compliance with Article 27 of the ICCPR.[44]

5.42 Mr Martin Flynn from the Law School of the University of Western Australia, advised that the significance of article 27 in relation to mandatory sentences is that:

> If you take young men unnecessarily into prison, ... at a time when they would normally be participating in ceremonies, assuming responsibility and starting to realise that being an important member of their own community has benefits, as an alternative to committing property offences, you are causing great problems.[45]

5.43 The Committee notes the supplementary submission from the Northern Territory government, which says that there are some communities where the elders believe that it is in the best interests of the community that the young offenders are temporarily removed from the community.[46] In any case, the ground relates, not only

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43 *Submission No. 91B*, Northern Territory government, Attachment B.

44 *Submission No. 24*, ATSIC, vol. 1, p. 233.

45 *Transcript of evidence*, Mr Flynn, Law School, University of Western Australia, p. 125.

46 *Submission No. 91B*, Northern Territory government, pp. 3-4.

to mandatory sentencing, but to the whole sentencing practice in relation to Aboriginals, which is beyond the scope of this inquiry.

The United Nations Convention on the Rights of the Child

5.44 Australia ratified the United Nations Convention on the Rights of the Child (CROC) on 17 December 1990 and it came into force for Australia on 16 January 1991. On 22 December 1992, the Commonwealth Attorney-General declared the CROC to be an instrument relating to human rights and freedoms pursuant to section 47(l) of the *Human Rights and Equal Opportunity Commission Act 1986* In addition, the CROC has been appended to that Act as schedule 3.

5.45 Although the CROC has not yet been incorporated directly into the domestic law of Australia, the ratification of the CROC and the Attorney-General's declaration provide a strong indication of Australia's acceptance of the international standards set out in the CROC.[47]

5.46 Other initiatives indicate Australia's commitment to the CROC. In December 1995, Australia presented its first report under the CROC to the United Nations Committee on the Rights of the Child.[48] That report asserts Australia's commitment to the Convention and Australia's commitment to the legislative implementation of its provisions. Further, the 1998 report of the Joint Standing Committee on Treaties, United Nations Conventions on the Rights of the Child, confirmed and endorsed Australia's ratification of the CROC and recommended several actions to implement Australia's obligations under it.[49] It was noted, however, that although the States were supportive of ratification, concerns were raised in relation to some issues including the separate imprisonment of juveniles.[50] It has been argued that, as a matter of international law, the CROC is binding upon Australia and, by necessary implication, on the Northern Territory.[51] It is claimed that the scheduling of the CROC to the HREOC Act and the declaration that the CROC is a 'declared instrument' under section 47 of the same Act, gives HREOC the power to investigate complaints that rights under the CROC have been violated by or on behalf of the Commonwealth or a Commonwealth agency, but only in the exercise of a discretion or an abuse of power. According to HREOC, it also enables HREOC to include those treaties in its broader role of monitoring and promoting compliance with human rights.[52]

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47 *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 144.

48 Attorney-General's Department, Australia's Report under the Convention on the Rights of the Child. Attorney-General's Department, Canberra, 1996.

49 Noted by Professor David Weisbot, *Submission No. 64*, Australian Law Reform Commission, vol. 4, p. 678.

50 Joint Standing Committee on Treaties, *Executive Summary: United Nation Convention on the Rights of the Child*, 17th Report, August 1998, p. 2. It is also noted that the Government has not responded to or implemented the recommendations of that report.

51 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 258.

52 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 364.

Other instruments

5.47 The basic principles set out in the ICCPR and CROC have been significantly elaborated upon through international consultation. Standards have been developed and adopted by the General Assembly. These standards have been adopted by the Committee on the Rights of the Child[53] as elaborating upon the provisions in the CROC. Although not having the force of international law:

> … they are highly authoritative and persuasive, especially in this country which has been a leading participant in their drafting and a sponsor at the General Assembly stage.[54]

5.48 The three most relevant standards developed to date are:

- the Beijing Rules, the UN Standard Minimum Rules for the Administration of Juvenile Justice adopted by the UN General Assembly in 1985;
- the Riyadh Guidelines, the UN Guidelines for the Prevention of Juvenile Delinquency adopted by the UN General Assembly in 1990;[55] and
- the Tokyo Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the UN General Assembly in *1990.*[56]

5.49 The level of Australia's commitment to these standards is evidenced in a statement made on behalf of the Australian delegation to the Fifty-Second Session of the Commission on Human Rights in Geneva on 4 April 1996. Referring to the Secretary-General's report entitled *Human Rights in the Administration of Justice, in particular of Children and Juveniles in Detention*, it was stated:

> The report urges states to take into account in their national legislation and practice, and to disseminate widely, the United Nations standard minimum rules for the administration of juvenile justice (the Beijing rules), the United Nations guidelines for the prevention of juvenile delinquency (the Riyadh guidelines) and the United Nations guidelines for the protection of juveniles deprived of their liberty. The report also urged states to take appropriate steps to ensure that compliance with the principle that depriving children

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53 The Committee was established under article 43 of the CROC.

54 Anne Bonney, *Background to Mandatory Sentencing of Juvenile Offenders: A Northern Territory Perspective*, Darwin, October 1996, p. 109.

55 The Riyadh Guidelines seek to prevent juvenile delinquency by reinforcing the integrity of young people by reference to the family first and to the social net second, by the cooperation of society economic, social and cultural levels, and by policies to divert young people away from the justice system.

56 The Rules for the Protection of Juveniles for their Liberty enunciate the fundamental principle that the juvenile justice system should uphold the rights and safety and promote the physical and mental wellbeing of juveniles. In particular, the rules require that imprisonment should be imposed upon juveniles (under the age of 18 years) as a last resort and only for the minimum necessary period. Further, the length of the sanctioned should be determined by judicial authority, without precluding the possibility of early release (Rule 2).

> and juveniles of their liberty should only be used as a measure of last resort.
>
> Australia welcomes these recommendations and encourages states to adhere to these fundamental rules in dealing with children and juveniles in detention within their jurisdiction. We acknowledge that there are issues that Australia itself must address in this context - and we are committed to doing so.

5.50 Submitters claimed that the mandatory sentencing provisions breach Beijing Rules 1.1, 1.2, 1.3, 1.4, 5.1 and 17.1(b) and that the mandatory sentencing legislation does not adhere to the principles enunciated in the Riyadh Guidelines.[57] In the discussion that follows, the Committee will note the evidence it received in relation to both the CROC and these other instruments.

Summary of claims that Mandatory sentencing breaches CROC (and Beijing Rules)

5.51 Most inquiry participants who addressed the question of Australia's compliance with international obligations concluded that Australia's obligations under the CROC have been contravened by the mandatory sentencing laws.[58] This claim has been rejected by the Northern Territory and the Western Australian Governments in their submissions.[59] As noted above, the Tasmanian Government described the link between mandatory sentencing and Australia's obligations under both the ICCPR and the CROC is at best, tenuous.[60]

5.52 The Committee was told that although there is widespread agreement that mandatory sentencing regimes breach Australia's international obligations under the CROC there are no individual grievance procedures under CROC and violations of the Convention can only be taken into account during the reporting process.[61] In fact, the United Nations Committee on the Rights of the Child, commenting on Australia's first report under the CROC, stated:

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57 *Submission No. 26*, The University of Queensland, School of Social Work and Social Policy, vol. 3, pp. 333-334. *Submission No. 73*, Amnesty International Secretariat, vol. 4, pp. 790-791.

58 See, for example, The Law Society of New South Wales, Catholic Commission for Development, Justice and Peace, International Commission of Jurists (Qld), Logan Youth Legal Service, Central Australian Aboriginal Legal Aid Service, Northern Territory Legal Aid Commission, Australian Law Reform Commission, Law Institute of Victoria, Convenanting, Uniting Church in Australia, North Australian Aboriginal Legal Aid Service, Amnesty International Secretariat, The Victorian Bar.

59 *Submission No. 96*, Western Australian Ministry of the Premier and Cabinet, p. 15; *Submission No. 91*, Chief Minister, Northern Territory Government, vol. 4, pp. 900-901.

60 *Submission No. 7*, Acting Premier, Tasmanian Government, vol. 1, p. 39.

61 The reporting process is established under article 44 of the CROC; States Parties undertake to submit to the Committee, through the Secretary General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights; (a) Within two years of the entry into force of the Convention for the State Party concerned; (b) Thereafter every five years.

> 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.[62]

5.53 Mr David Anderson, representing the Northern Territory Government, said that:

> In our submission, the Territory law does not override Australia's international obligations in any regard. In fact, it is consistent with the provisions of the CROC.[63]

CROC article 1: A child means every human being under eighteen years

Article 1: For the purpose of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

5.54 Mr Colin McDonald of the Northern Territory Bar Association said that it was anomalous that for the purposes of the *Sentencing Act 1995* (NT) a juvenile is a person under the age of 17. Mr McDonald asserted that it is clearly inconsistent with the CROC**,** article 1:

> Our Age of Majority Act says 18, and international standards clearly set out in the convention in relation to the rights of the child that is 18 years. Again, that is one of the unfathomable mysteries - how for a youth elsewhere in the world it is 18, but here in the Northern Territory it is 17. The effect has been that the mandatory sentencing laws bite earlier for 17-years-olds for a first offence, and persons who would qualify as juveniles elsewhere do not in the Northern Territory.[64]

5.55 The Northern Territory Government, however, interpreted article I to mean that the age of 18 years is fixed subject to the law of the particular country or State, which may lawfully prescribe a majority age less than 18 years, even for particular purposes like the criminal law. In the Northern Territory, the age of majority for criminal law purposes had been 17 years since at least 1983.[65]

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62 Concluding observation of the Committee on the Rights of the Child; Australia. 10/10/97. CRC/C/15Add.79, Para 22 referred to in *Submission No. 24*, ATSIC, vol. 1, p. 234.

63 *Transcript of evidence*, Northern Territory Government, p. 50.

64 *Transcript of evidence*, Northern Territory Bar Association, p. 85.

65 *Transcript of evidence*, Northern Territory Attorney-General's Department, p. 36. See also *Transcript of evidence*, Attorney-General's Department (C'th), p. 154. Ms Leon of the Department advised that the question of whether 17 year olds being dealt with as adults for the purposes of criminal law in the Northern Territory is in conflict with the CROC, "strays into the field of seeking a legal opinion …" She also said: "the Convention leaves to State's Parties a certain margin to define the age of majority for themselves, … The default provision under the Convention is 18, but under the law applicable to the child, majority may be attained earlier than that date". Ms Leon advised that the criminal law does set different ages for criminal responsibility to apply and that this varies from State to State. There is not

5.56 The Committee points out that the age at which people are treated as adults for the purposes of the criminal law in Queensland and Victoria is 17 years and that Tasmania changed the age from 17 to 18 years only on 1 February 2000.[66] On the evidence of Mr Anderson, the Northern Territory has been treating 17 year olds as adults for the purposes of the criminal law since well before Australia became party to the CROC. On the other hand, reference has already been made to the growing international convergence on treating 17 year olds as children.[67] The Commonwealth Attomey-General's Department has indicated in answer to a question on notice that the States and Territories were consulted during drafting of the Convention and before Australia became a party. In consultation during the drafting process, there were discussions about the implications of proposed articles of the Convention, including the age of majority. The Convention was ratified without objection from the States and Territories.[68]

CROC, article 3(l) The best interests of the child

Article 3(l): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

5.57 Representing the Western Australian Government, Dr Robert Fitzgerald, contended that the 'three strikes legislation' in Western Australia was intended to reflect the views of the community that the existing penalties for home burglary were manifestly inadequate and did not give due weight to the distressing effect of home burglary on the victims. The aim of the legislation was to provide adequate penalties for burglary.[69] Referring to article 3(l), Dr Fitzgerald explained that, in sentencing, the interests of the child need to be balanced against the interests of the community and that sometimes that balance necessitates detention as a penalty. Certain extreme circumstances can demand that the community be given primary consideration and it is not the intention of article 3(l) to discount the interests of the community.[70]

5.58 HREOC claims that the mandatory sentencing provisions for juveniles contravenes article 3. 1 (and Beijing Rule 17. 1)[71] because they fail to make 'the best interests of the child' a primary consideration:

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any Commonwealth legislation that specifies that a child is at a particular age, although in most States, the legal majority is 18.

66 *Youth Justice Act 1997*, s.3, proclaimed 22 December 1999.

67 See above Chapter 2, Paragraphs 2.9 – 2.10.

68 *Submission No. 107B*, Commonwealth Attorney-General's Department, p. 1.

69 *Transcript of evidence*, Western Australian Ministry of Justice, p. 110.

70 *Transcript of evidence*, Western Australian Ministry of Justice, p. 117.

71 Beijing Rule 17.1(a): The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the juvenile, as well as to the needs of the society. (Refers to CROC article 40.1)

> The enactment of mandatory detention provisions clearly constitutes an "action concerning children" undertaken by "legislative bodies". Neither the Northern Territory nor Western Australia has indicated ... that the interests of the children were considered in the development of the mandatory detention laws. On the contrary, these provisions are harsh and punitive and were specifically intended to achieve deterrence and retribution rather than rehabilitation.[72]

5.59 Other witnesses similarly submitted that the mandatory sentencing laws are founded upon primary considerations such as deterrence, and retribution rather than the best interests of the child and that for this reason, the laws contravene article 3(1).[73]

5.60 Other claims made in relation to the assertion that mandatory sentencing laws do not make the best interests of the child a primary consideration include:

- the high incarceration rates of Aboriginal children (according to NAALAS 75% of juvenile detainees in the Northern Territory are Aboriginal) conflicts with the modem approach to sentencing for juveniles that recognises that early and repeated detention is not in the best interests of children. Rather it can be harmful and agitates against the aim of the CROC and the Beijing Rules to reintegrate young offenders into society;[74]
- mandatory incarceration and the removal of offenders from their families is not in the best interests of children and such automatic imprisonment is a breach of the CROC at a legal and legislative level. In addition, the transferral of children from Central Australia to Darwin is a breach at an administrative level;[75]
- mandatory sentencing regimes do not permit a judicial officer or judge to take account of a child's best interests.[76]

Beijing Rule 17.1(b): Restrictions on the personal liberty of juveniles shall be imposed only after careful consideration and shall be limited to the minimum.

Beijing Rule 17.1(c): Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.

Beijing Rule 17.1(d): The wellbeing of the juvenile shall be the guiding factor in the consideration of his or her case.

72 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 365. See also *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 48; *Submission No. 24*, ATSIC, vol. 1, p. 232; *Submission No. 29*, Covenanting, Uniting Church in Australia, vol. 2, p. 475; *Submission No. 82*, Ms Catherine Stokes, vol. 4, p. 843.

73 *Transcript of evidence*, Anglicare Top End, p. 55. See also *Submission No. 67*, National Children's and Youth Law Centre, vol. 4, p. 722.

74 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, pp. 259-261.

75 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 599.

76 *Submission No. 67*, National Children's and Youth Law Centre, vol. 4, p. 720.

5.61 The Committee points out that the best interests of the child are to be a primary consideration under Article 3(l) of the CROC, not the primary consideration. Other interests can be taken into account. Regarding the incarceration rates of Aboriginal children, it is not at all clear that these are related to mandatory sentencing. The transfer of detained children from Alice Springs to Darwin is not related to mandatory sentencing but to prison practice and administration. Mandatory sentencing limits, but does not remove, the capacity of a judicial officer to take account of a child's best interests.

CROC, article 12: Participation of the child

> **Article 12(l): States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**
>
> **Article 12(2): For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, ...**

5.62 ATSIC submitted that mandatory sentencing fails to ensure that children can participate and be given a voice in any decisions which affect them as required by article 12[77] (and Beijing Rule 14.2 16).[78]

CROC, article 37(a): Prohibits inhuman and degrading punishment

Article 37(a): No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. ...;

5.63 It was claimed that mandatory sentencing allows inhuman and degrading punishment that is prohibited under article 37(a). The argument is that mandatory sentencing can give rise to inhuman treatment through the use of incarceration for trivial offences.[79]

CROC, article 37(b) (in part): Detention or imprisonment a measure of last resort

> **Article 37(b): 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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77 *Submission No. 24*, ATSIC, vol. 1, p. 232.

78 Beijing Rule 14.2: The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

79 *Submission No. 24*, ATSIC, vol. 1, p. 233.

5.64 There were several claims that mandatory sentencing fails to ensure that the detention or imprisonment of juveniles is a last resort measure and therefore breaches article 37(b)[80] (and Beijing Rule 19.179).[81]

5.65 It is argued that article 37(b) clearly requires the exercise of judicial discretion to consider other alternatives to detention and mandatory detention laws remove this discretion.[82] Courts are unable to take into account the child's personal circumstances, the facts of the offence, the availability of more advantageous sentencing options and the need to resort to detention only as a last resort.[83]

5.66 Representing the Western Australian Government, Dr Fitzgerald argued that the compliance of the three strikes legislation in Western Australia with the requirements of Article 37(b) is assured by the fact that, although the legislation states that a juvenile subject to the three strikes legislation must receive a mandatory minimum detention sentence of 12 months, the court may place the young offender on a conditional release order.[84] Under a conditional release order, the offender is immediately released into the community. If the offender fails to comply with the conditions of the, the court may order him/her to go straight to detention. Although 88 juveniles have been sentenced since the introduction of mandatory sentencing, that figure includes nine juveniles released under a conditional release order (with detention as default) and two cases overturned on appeal.[85]

5.67 It is arguable that a sentence of 12 months' detention, either directly or in default, for a third offence is not a measure of last resort or detention for the shortest appropriate period of time. In this context, a minimum period of detention of 28 days seems more justifiable.

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80 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 49. See also *Submission No.16*, Criminal Bar Association (Vic), vol. 1, p. 91, quoting from *Mandatory Sentencing* by Hunyor and Goldflam, a paper presented at the seventh biennial conference of the Criminal Lawyer Association of the Northern Territory, Bali, 1999 which cites *Ferguson v Setter and Gokel* [1997] NTSC 137 (unreported decisions JA 112 and JA 113 1997 delivered by Carney J at Darwin on 3 December 1997); *Submission No. 29*, Covenanting, Uniting Church in Australia, vol. 2, p. 475; *Submission No. 82*, Ms Cathryn Stokes, vol.4, p. 844; *Transcript of evidence*, Northern Territory Council of Churches, pp. 54-55; and *Transcript of evidence*, Law Society of the Northern Territory, pp. 64-65.

81 Beijing Rule 19.1: The placement of juveniles in an institution shall always be a disposition of last resort and for the minimum necessary period.

82 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 364.

83 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 261.

84 The Committee was told that conditional release orders were not an initiative of the Western Australian Government but were created by Justice Fenbury in interpreting the mandatory sentencing legislation. Following submissions from Counsel, Justice Fenbury found that there was a discretion under the criminal code to impose a conditional release order. The Government has not legislated to remove the discretion: *Transcript of evidence*, Aboriginal Legal Service of Western Australia, p. 150.

85 The term "conditional release order" in the Act also refers to an intensive youth supervision order with detention as default: *Transcript of evidence*, Western Australian Ministry of Justice, p. 111.

5.68 The Committee notes that the Joint Standing Committee on Treaties in its report on the CROC, stated in paragraph 8.26 that minimum sentences are in contravention of Article 37(b) of the CROC which requires that deprivation of liberty not be arbitrary and is a measure of last resort. The Committee also recommended that the Government request the Standing Committee of Attomeys-General to investigate the alternative options to mandatory sentencing.[86] The Government has not responded to, nor implemented, that report.

CROC, article 37(b) (in part): Detention to be for shortest appropriate period of time

5.69 The Human Rights Commissioner, Mr Chris Sidoti, asserted that the meaning of 'appropriate' in article 37(b) can only be determined by reference to the individual case rather than a blanket statutory rule of the type that applies in mandatory detention laws. What is 'appropriate' should be guided by the best interests of the child and how a child should be treated under article 40 of the CROC, especially taking into account the emphasis on rehabilitation which is also required under Beijing Rule 17.[87]

CROC, article 37(b) (in part): Deprivation of liberty should not be arbitrary

5.70 The concept of 'arbitrariness' arises in relation to both the ICCPR (discussed above) and the CROC. It should be noted that the arguments advanced in relation to the ICCPR are also relevant to the CROC.

5.71 According to the Human Rights Commissioner, Mr Chris Sidoti, the term 'arbitrary' means 'unjust' and 'arbitrary detention' means detention 'incompatible with the principles of justice or with the dignity of the human person'.[88] The Commissioner contended that in Australia, the accepted principles of sentencing are that sentences should be individualised to reflect proportionality between the sentence and the offence. In his view, on that criterion alone, mandatory sentencing falls outside the accepted principles of just sentencing. The United Nations Human Rights Committee stated in the 1990 case of *Van Alphen v The Netherlands*[89] that 'arbitrariness' must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody must be reasonable in all the circumstances:

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86 Joint Standing Committee on Treaties, 17th Report, *United Nations Convention on the Rights of the Child*, Recommendation 44.

87 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 366. See also *Submission No. 82*, Ms Catherine Stokes, vol. 4, p. 844.

88 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 367, quoting MJ Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff publishers, Boston 1987, pp. 198-201. See also *Submission No. 67*, National Children's and Youth Law Centre, vol. 4, p. 722.

89 *Van Alphen v The Netherlands*, UN Human Rights Committee Communication No. 305/1988.

> The 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.[90]

5.72 Similarly, it was argued that mandatory sentencing prevents all factors affecting a particular child from being taken into consideration when sentencing and that this represents a key deficiency in the implementation of CROC sentencing principles in Australia.[91] The Committee was also referred to the case of *Ferguson v Setter & Gokel* 7 NTLR II 8, in which (in December 1997) Kearney J of the Northern Territory Supreme Court dealt with the question whether the common law principle that detention should be a last resort still held good in view of the mandatory sentencing provisions. He expressed the view that the mandatory sentencing provisions were directly contrary to Article 37(b) of the Convention on the Rights of the Child.[92]

5.73 In considering whether the mandatory sentencing laws can be characterised as arbitrary within the meaning of article 37(b), the Committee was told that the mandatory sentencing laws in Western Australia discriminate against juveniles. One witness stressed that an adult sentenced to the mandatory minimum twelve months for a third strike, would probably serve four months in prison, four months on parole, and the last four months would be remitted. A juvenile sentenced for the same offence would also receive the mandatory minimum 12 months, but would have to serve at least six months in prison or in a juvenile detention centre before being released on a supervisory release order. Therefore, the juvenile would serve two months longer in jail than the adult and two months longer on supervised release.[93]

5.74 It appears from the evidence given by the Western Australian government representative, Dr Fitzgerald, that the legislation in relation to adult sentencing is to be made more stringent. He also said that juvenile offenders were relatively advantaged in that they, unlike adults, could be placed on conditional release orders (which, like sentences more than two years old) are not counted as strikes if they are fulfilled.[94]

CROC, article 37(c): Juveniles to be separated from adults

> **Article 37(c): Every child deprived of his or her liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or**

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90 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 367 (emphasis in original).

91 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 49.

92 *Submission No. 22*, The Law Society of the Northern Territory, vol. 1, p. 165.

93 *Transcript of evidence*, Law Society of Western Australia and Criminal Lawyers Association of Western Australia, per Mr Prior, pp. 143-144.

94 *Transcript of evidence*, Western Australian Ministry of Justice, p. 119.

> **her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;**

5.75 It was claimed that the mandatory sentencing provisions in the Northern Territory violate article 37(c) because 17 year olds are treated as adults and transferred to adult prisons during incarceration under section 53AG(2) of the *Juvenile Justice Act 1995.*[95]

CROC, article 40(l): Rehabilitation to be the objective of sentencing

Article 40(l). States Parties recognize the right of every child

> **... recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the chfld'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 chfid's assuming a constructive role in society.**

5.76 The Committee was told that the mandatory sentencing laws breach article 40(l) (and Beijing Rule 17) because they fail to make the rehabilitation of the offender the objective of sentencing.[96] The importance of rehabilitation in relation to juvenile offenders was summarised thus:

> Experience has shown that if a juvenile offender can be kept out of prison until his/her twenties, there is a very strong likelihood he or she will remain out of prison, and out of the criminal justice system for the rest of his or her life. However, if a juvenile is introduced into a custodial situation, then the chances of him/her later being incarcerated as an adult increase dramatically.[97]

5.77 CAALAS argued that contrary to the emphasis on rehabilitation under the CROC, the removal of children from home and family does nothing to address the

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95 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 599. Article 1 of the CROC states that a child is any person under the age of 18 years. This was confirmed on behalf of the Northern Territory Government: see *Transcript of evidence*, Northern Territory Attorney-General's Department, p. 51.

96 *Submission No.8,* New South Wales Director of Public Prosecutions, vol. 1, p. 49; *Submission No.24,* ATSIC, vol. 1, p. 232.

97 *Submission No. 14*, New South Wales Public Defenders Office, vol. 1, p83.

underlying causes of offending. Further, detention with other offenders may result in juveniles becoming entrenched in the criminal justice system.[98]

5.78 The Committee can well accept that mandatory sentencing does nothing to address the underlying causes of offending. However it notes that the assertions as to the long-term benefits of keeping juvenile offenders out of prison are not accepted in Mr Michael Cain's study on recidivism in New South Wales.[99]

CROC article 40(2)(b): Right to competent tribunal and review

> **Article 40(2)(b): Every child alleged as or accused of having infringed the penal law has at least the following guarantees:**
>
> > **(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, ... ;**
> >
> > **(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;**

5.79 It was the view of several submitters that mandatory sentencing regimes fail to ensure that sentences are capable of being reviewed as required by article 40.2(b). Except as discussed above, [100] mandatory sentences are incapable of revision.[101]

5.80 The Committee considers that, so far as third strike offenders are concerned, the Northern Territory legislation may well be incompatible with this provision.

CROC, article 40(4): Range of sentencing options required

> **Article 40(4): A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and**

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98 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 599. See also *Submission No. 67*, National Children's and Youth Law Centre, vol.4, p. 723.

99 *Recidivism of Juvenile offenders in New South Wales*, Department of Juvenile Justice 1996, p. 62: "That the more severe sanctions are associated with higher recidivism of juvenile offenders, however, should not be seen as evidence that these sanctions, as first penalties, cause or even contribute to further offending, although this possibility cannot be totally discounted. The results of any justice intervention (eg. Recidivism) should not be considered as being dissociated from those offender characteristics, including increased propensity for re-offending, which influenced the choice of disposition in the first place".

100 See paragraphs 5.31 – 5.32.

101 See *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 49; *Submission No. 24*, ATSIC, vol. 1, p. 233; *Submission No. 29*, Covenanting, Uniting Church in Australia, vol.2, p. 475; *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 368; *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 263; *Submission No 82*. Ms Catherine Stokes, vol. 4, p. 843.

vocational training programs and other 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.[102]

5.81 It was submitted that mandatory sentencing of juvenile offenders to detention and imprisonment fails to provide a range of sentencing options as required by article 40.4.[103] The significance of rehabilitation is an essential principle in article 40(4), as is the desirability of non-custodial sentences for juveniles.[104]

5.82 In relation to the provision of diversionary programs for second-strike offenders in the Northern Territory, the Government's submission referred to 'the reformation and social rehabilitation of the offender'[105] and 'numerous diversionary programs'.[106] Eight such programs are listed in the submission. The Committee was told in oral evidence, however, that there are in fact ten such diversionary programs:

> Anecdotally, they are working and people are very enthusiastic about them and about the future for them. But I would prefer to give you a more comprehensive answer than that, so I will take it on notice.[107]

5.83 The Northern Territory Government, in answers to questions taken on notice at the hearing, indicated that a further eleven programs have been approved, mostly in remote areas, and that a further ten are being developed in consultation with community groups. Eight juveniles have been assessed as eligible, three as ineligible and four other assessments were to be presented to the court in the next few weeks.[108] The programs are aimed at enhancing self esteem, training and employment programs and sports programs aimed at encouraging potential. One such diversionary program is said to be the victim/offender conference.

5.84 Evidence about diversionary programs was mixed and lacking in detail. It is far from clear to the Committee if the programs were actually running successfully and what in fact they did. The numbers of persons referred over the time period are so low that it seems difficult to talk of a 'program', although it was mentioned that there was a program co-ordinator, a position established in August 1999.[109] Information

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102 See also Beijing Rule 5.1: The juvenile justice system shall emphasise the wellbeing of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

103 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 49.

104 *Submission No. 24*, ATSIC, vol. 1, p. 232; *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 263.

105 *Submission No 91*, Chief Minister Northern Territory Government, vol. 4, p. 903.

106 *Submission No. 91*, Chief Minister Northern Territory Government, vol. 4, p. 905.

107 *Transcript of evidence*, Northern Territory Attorney-General's Department, p. 40.

108 As at the end of February 2000, *Submission No. 91B*, Northern Territory Government, p. 4.

109 *Submission No. 91B*, Northern Territory Government, p.3.

from the Northern Territory Government[110] provided numbers of programs – originally ten and then another eleven, with a further ten being developed - but the level of funding available was not apparent.[111] In evidence to the Committee, ATSIC Commissioner Ms Alison Anderson stated that funding was 'stop-start', and hence of limited value:

> These diversionary programs cannot work if the government does not fund them properly, and that is the problem with the Northern Territory Government. They set all these programs up, but they do not fund them properly and therefore they fall down.[112]

5.85 If it is true, as has been suggested, that some of the diversionary programs are run by small community groups which lack sufficient funding, it would be important for these to be provided with adequate resources, including staff, especially in light of the funding available for incarceration.[113] In Alice Springs, the Committee was advised of an informal program which had been running since 1985 in a remote area, with the objective of helping indigenous people overcome alcohol addiction and petrol sniffing.[114] This appeared to be an inexpensive, culturally appropriate, service which might be introduced into other areas.[115]

5.86 The Committee notes from the press release by the Northern Territiory Minister for Correctional Services on 15 February 2000 that no program has yet been established in Port Keats[116] and suggests that priority should have been given to that area in view of the evidence given by Mr Sheldon on behalf of the North Australian Aboriginal Legal Service. He said that in 1996-97, 2.5 per cent of juvenile detainees came from the Port Keats community but that in 1998-99, 18 per cent came from there.[117]

CROC, article 40(4): Children must be dealt with in a manner proportionate to their circumstances and the offence

5.87 It was argued that mandatory sentencing fails to ensure proportionality as required by article 40(4)1[118] (and Beijing Rule 5).[119] The concept of proportionality in

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110 Referred to in the above paragraph – *Submission No. 91B*, Northern Territory Government, pp. 3-4.

111 *Submission No. 91B*, Northern Territory Government, pp. 3-4.

112 *Transcript of evidence*, ATSIC, p. 180.

113 *Transcript of evidence*, Anglicare Top End, p. 57.

114 *Transcript of evidence*, Central Australian Aboriginal Legal Aid Service, p. 33.

115 For details of similar programs in other areas, see *Submission No. 26*, University of Queensland, School of Social Work and Social Policy, vol. 2, pp. 347-350.

116 *Submission No. 91A*, Northern Territory Government, p. 2.

117 *Transcript of evidence*, North Australian Aboriginal Legal Aid Service, p. 72.

118 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 49; *Submission No. 24*, ATSIC, vol.2, p. 232; *Submission No. 29*, Convenanting, Uniting Church in Australia, vol. 2, p. 475.

119 See above, Footnote No. 102.

sentencing means sentencing in a manner appropriate to the well-being of the juvenile and proportionate to the juvenile's circumstances and the offence as required.[120] Mr Flynn said:

> . . . the Convention on the Rights of the Child emphasises proportionality; the importance of a court being able to deliver individual, proportionate justice. Any legislative instrument of any state which takes that away is a serious risk of being in breach of the Convention on the Rights of the Child.[121]

5.88 The Australian Law Reform Commission Report stated at paragraph 19.63:

> The Northern Territory and Western Australian laws a breach a number of international human rights standards . . . They violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with Article 40 of CROC. They also breach the requirement that in the case of children detention should be a last resort and for the shortest appropriate period, as required by article 37 of CROC. Mandatory detention violates a number of the provisions in the ICCPR including the prohibition on arbitrary detention in article 9. Both CROC and ICCPR require that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed.[122]

5.89 Recommendation 242 said:

> The Attomey-General through SCAG should encourage Western Australia and the Northern Territory to repeal their legislation providing for mandatory detention of juvenile offenders. In the event that this is not successful, the Attomey-General should consider federal legislation to override the Western Australian and Northern Territory provisions.[123]

5.90 The Government has not responded to, nor implemented, the recommendations of the ALRC.

Conclusions

5.91 In general, the Committee believes that many of the provisions of the two major conventions, ICCPR and CROC, have been breached by the legislation, particularly that of the Northern Territory.

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120 *Submission No. 27*, Human Rights and Equal Opportunity Commission, vol. 2, p. 368.

121 *Transcript of evidence*, Mr Martin Flynn, Law School, University of Western Australia, p. 124.

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

123 ALRC/HREOC Report No. 84, *Seen and Heard: Priority for Children in the Legal Process*, 1997, p. 700.