CHAPTER 6

RELATED INTERNATIONAL OBLIGATIONS

6.1 Some inquiry participants argued that Australia's international obligations regarding mandatory sentencing and detention may extend further than the express provisions contained in the ICCPR and the CROC.[1] The Committee was told that the practical implications of the mandatory sentencing legislation have been to disadvantage certain groups in the community in a way that conflicts with Australia's international obligations. Groups described as being either directly or indirectly disadvantaged by mandatory sentencing legislation include women, indigenous people, and people with an intellectual or other disability.

Women

6.2 Australia signed the Convention on the Elimination of all Forms of Discrimination against Women on 17 July 1980. Australia submitted its instrument of ratification on 28 July 1983 which provided that Australia was to be bound by the provisions of the Convention as of 27 August 1983. The Convention is scheduled to the *Sex Discrimination Act 1984* (Cth).

6.3 For the purposes of mandatory sentencing, the following provisions are relevant:

> Article 1 - defines the term 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
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> Article 2(f) - requires signatories to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.
>
> Article 2(g) - requires signatories to repeal all national penal provisions which constitute discrimination against women.
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> Article 15(1) - requires signatories to accord women equality with men before the law.

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1 See, for example, *Submission No. 19*, Central Australian Women's Legal Service, vol. 1, p. 122; *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 600; and *Submission No. 76*, Australian Women Lawyers, vol. 4, p. 799.

The discriminatory impact on women

Higher rates of incarceration

6.4 Several participants claimed that mandatory sentencing has the discriminatory effect of increasing the incarceration rates of women compared to those of men. This disproportionate effect arises because mandatory sentencing applies to property offences and because women offenders are more likely to be property offenders.[2] The New South Wales Director of Public Prosecutions, Mr Nicholas Cowdery QC, confirmed that, in his view, there is a discriminatory impact on women, and he advised that in the Northern Territory 67% of offences committed by women are property offences compared to 53% of offences by males.[3]

6.5 Particular concern was expressed about the increased incarceration rates of indigenous women.[4] It was claimed that:

> The dramatic and disproportionate increase in the rate of imprisonment of women, particularly indigenous women, raises questions as to whether the effect of the Northern Territory's mandatory sentencing legislation is discriminatory on the basis of both gender and race and therefore placing Australia in breach of its international obligations … .

6.6 The following, which was compiled from figures provided by the Central Australian Women's Legal Service (CAWLS), reveals the increase in the number of indigenous women imprisoned in the Northern Territory since the commencement of mandatory sentencing:[5]

	July 93-June 97	1997-98	1998-99
Indigenous women	40-60 per year	196	252
Non-Indigenous women	7-12 per year	29	24

6.7 The Northern Territory Legal Aid Commission attributed the increase in incarceration rates of women directly to mandatory sentencing:

> There can be no other explanation for the dramatic increase in the number of women incarcerated but for mandatory sentencing. Aboriginal women, of

2 *Submission No. 19*, Central Australian Women's Legal Service, vol. 1, pp. 122-123.

3 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 45.

4 *Submission No. 76*, Australian Women Lawyers, vol. 4, p. 800.

5 *Submission No. 19*, Central Australian Women's Legal Service, vol. 1, pp. 123-124, citing the Northern Territory Department of Corrective Services' Annual Report, as the source for these figures.

> any group in Australia and the Northern Territory in particular, surely must be the group that needs the greatest assistance from society.[6]

6.8 Representing the Northern Territory Government, the Acting Chief Executive Officer of the Attorney-General's Department said the Government's statistics indicated that there had been an increase in the number of women incarcerated but that the increase had commenced prior to the introduction of mandatory sentencing. In addition, he stated that the majority of sentenced females received into custody, that is 65 per cent in 1996-97 and 76 per cent in 1998-99, were received due to fine default:[7]

> Females sentenced solely on the basis of mandatory sentencing increased from two in 1996-97 to 22 in 1998-99. So, we had a 20 person increase solely due to mandatory sentencing of 182 females. These are adult women.[8]

6.9 The implication of this advice (albeit that care should be taken in the use of the words '*solely due* to mandatory sentencing'), is that the claims in relation to the numerical impact of mandatory sentencing on women may have been overinflated.

6.10 On the evidence and published statistics available, it is difficult to determine the extent of any disproportionate numerical impact, and if this is sufficient to constitute 'discrimination against women' within the meaning of the Convention on the Elimination of all Forms of Discrimination against Women. The explicit and less obvious objectives of the legislation in the Northern Territory would suggest that it was directed against a specific social group, of which indigenous women may comprise a large part but women in general do not. According to some evidence, this is borne out by the amendments to the legislation which could be seen as rescuing white, middle-class people from being inadvertently trapped by mandatory sentencing legislation.[9]

6.11 Another factor that must be taken into account is the extent to which the mandatory sentencing laws will have a disproportionate effect on female juveniles. The figures provided would suggest that this is not the case, either for indigenous or non-indigenous females. Other information provided to the committee, however, did suggest that indigenous female juveniles were discriminated against relative to non-indigenous females in respect of mandatory sentencing, for much the same reasons

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6 *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, p. 551.

7 *Transcript of evidence,* Northern Territory government, p. 45.

8 *Transcript of Evidence,* Northern Territory government, p. 45. Other organisations doubted the reliability of the Government's statistics: see, for example, *Transcript of evidence*, Law Society of the Northern Territory, p. 66; *Transcript of evidence*, Top End Women's Legal Service, p. 98.

9 *Submission No. 24*, ATSIC, vol. 1, p. 211, and see also Chapter 7, paragraphs 7.27-7.28. Thus, there may be a better claim in respect of racial rather than gender discrimination

that indigenous juvenile males and in fact indigenous people in general were adversely affected.[10]

Other discriminatory implications for women

6.12 According to CAWLS, the mandatory sentencing legislation fails to accord women equality before the law because the offences they commit are subject to harsh and unjustified penalties. As such, it is claimed, the mandatory sentencing legislation has the effect of impairing the exercise by women of human rights and fundamental freedoms and therefore is a breach of international law.[11] Listed below are some of the effects of mandatory sentencing claimed to disadvantage and discriminate against women:

- Incarceration for many women is particularly severe because of their family responsibilities which often involve caring for children. The evidence before the Committee was inconclusive as to the attitude of prison authorities to women taking their young children into prison with them;[12]

- The social impact of mandatory sentencing on Aboriginal women is far worse than for non-Aboriginal women because it affects the whole community. Mandatory sentencing cannot be looked at in isolation from other issues such as infant mortality, domestic violence and alcoholism.[13]

- Mandatory sentencing ignores experience with recidivism rates showing that women have far lower recidivism rates than men. Traditionally, lower imprisonment rates reflected this;[14] and

- Mandatory sentencing has an indirectly discriminatory effect on women as it inhibits women victims from reporting instances of assaults, which are also subject to mandatory sentencing. Victims fear that they will be subject to further assaults as retribution for the harsh punishment under the mandatory sentencing laws.[15]

6.13 It is arguable, however, whether the alleged unequal impact of the laws constitutes 'discrimination against women' within the meaning of the Convention on the Elimination of all Forms of Discrimination against Women. The Committee is of the view that these impacts, while harsh and in many cases gender specific, are not directly attributable to the concept of mandatory sentencing itself. Moreover, some of

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10 *Submission No. 24*, ATSIC, vol. 1, pp. 208-211.

11 *Submission No. 19*, Central Australian Women's Legal Service, vol. 1, p.123. See also *Submission No. 12*, Ms Carney & Ms Cregan, vol. 1, p. 69.

12 *Transcript of evidence*, Top End Women's Legal Service, p. 98; See also *Transcript of evidence*, Top End Women's Legal Service, p. 98; and *Transcript of evidence*, Australian Women Lawyers, p. 137.

13 *Transcript of evidence*, Top End Women's Legal Service, p. 98.

14 *Transcript of evidence* Australian Women Lawyers, p. 136.

15 *Submission No. 19*, Central Australian Women's Legal Service, vol. 1, pp. 122-123.

the effects (such as having to leave children behind while serving a sentence) would not be peculiar to mandatory sentencing.

Racial discrimination: Indigenous people

6.14 The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) is one of the most widely ratified of all United Nations conventions. Australia signed the CERD on 13 October 1966 and ratified it on 30 September 1975. The CERD requires State Parties to adopt legislative or other measures to give effect to the rights recognised in the CERD and to this end, the CERD was implemented in Australia when the Government enacted the *Racial Discrimination Act 1975* (Cth) and scheduled the CERD to that Act.

6.15 For the purposes of mandatory sentencing, the following provisions are relevant:

> Article 1(1) defines 'racial discrimination' as any distinction, exclusion, restriction or preference 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.
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> Article 2(2): States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. …
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> Article 2(1)(a): Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.
>
> Article 2(1)(c): Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.
>
> Article 5: In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
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> (a) The right to equal treatment before the tribunals and all other organs administering justice;

Mandatory sentencing has a discriminatory impact contrary to CERD

6.16 The weight of the evidence to the Committee was that the mandatory sentencing laws have a discriminatory impact upon indigenous people that is contrary to the provisions of the CERD, in particular articles 2 and 5. According to CAALAS, mandatory sentencing in the Northern Territory results in the right to freedom not being as widely exercised by Aboriginals as by white Australians. In particular, it indirectly discriminates against Aboriginal people because it results in their being over-represented in the prison system. As such, it is claimed that mandatory sentencing is diametrically opposed to the provisions of the CERD. Rather than being a 'concrete measure' to remedy the incarceration rate amongst Aboriginal people, mandatory sentencing is a 'concrete measure' to increase it:

> The mandatory sentencing regimes are clearly in breach of a number of articles in these conventions. The spirit of the legislation is certainly contrary to the principles espoused in them. There is an onus on the Commonwealth and Territory governments to ensure that laws do not have the effect of undermining the rights of Aboriginal adults and children.[16]

6.17 The Northern Territory Government denies that the laws have a discriminatory impact on Aboriginal people:

> Mandatory sentencing laws are completely general in their terms and do not authorise discriminatory treatment of any kind.[17]

Discriminatory impact: High incarceration rates for indigenous people

6.18 On behalf of indigenous people it was agreed that, on their face, the mandatory sentencing laws apply equally to all Territorian law-breakers.[18] The principal objection to the laws, however, is that they have a resultant discriminatory impact on indigenous people because they target property offences most frequently committed by indigenous people and exclude property offences committed by pre-dominantly non-Aboriginal people.[19] It is contended that the result is disproportionately high incarceration rates for indigenous people contrary to the provisions of the CERD.[20]

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16 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, pp. 600-601.

17 *Submission No. 91*, Northern Territory Government, vol. 4, p. 908.

18 It was pointed out that the son of a Northern Territory politician went to jail for 14 days: *Transcript of Evidence*, Tangentyere Council, p. 30.

19 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 275. See also *Transcript of evidence*, Tangentyere Council, p. 30.

20 See, for example, statistics quoted in the following evidence: *Submission No. 33*, Catholic Commission for Development, Justice and Peace, vol. 3, p. 505 citing a letter to Mr Stone, former Chief Minister of the Northern Territory dated 16 December 1997 from the National Aboriginal Advisory Committee; and *Submission No. 53*, Ngalaya Aboriginal Corporation, vol. 3, p. 633, quoting figures from Legal Information Access Centre, "Juvenile Justice", *Hot Topic*, Issue 23, July 1999, p. 5.

6.19 Representing the Western Australian Government, Dr Fitzgerald confirmed that Aboriginal offenders make up a very large proportion of the number of juveniles in detention centres:

> The number of Aboriginal juveniles who have been sentenced and received into detention centres in Western Australia is about 60 per cent, and it has been 60 per cent for many years. It has been fairly constant. It is clearly unacceptably high. The figure for the number of Aboriginals caught up in the three strikes legislation is … slightly less than 80 per cent and is about 74 per cent. That again is not a figure that we feel is acceptable. In our view the reason Aboriginal people are being caught up by the legislation is that more Aboriginal people are being charged with these offences and being brought before the courts. Home burglary is a serious offence which has to be dealt with in accordance with the legislation. [21]

6.20 Dr Fitzgerald noted the Government's concern about the high incarceration rates and drew the Committee's attention to Western Australia's Aboriginal justice plan developed by the Aboriginal Justice Advisory Council in conjunction with the Justice Coordinating Council. That plan, while emphasising interventions appropriate at the criminal justice end, also emphasises the need to work at the level of the underlying issues:

> In other words, in order to address the very high rate of Aboriginal detention and imprisonment, we must focus on those areas of disadvantage experienced by Aboriginal people which a large body of research around the world has indicated is associated with offending behaviour - economic disadvantage, social disadvantage, educational disadvantage, health, et cetera.[22]

6.21 The Australian Bar Association (ABA) expressed the view that mandatory sentencing laws produce an 'unacceptable impact on indigenous Australians', especially those from lower socio-economic backgrounds. As a policy choice, mandatory sentencing laws enable certain types of criminal activity to be selected for special attention. The crimes usually selected are those offences (for example, burglary or car stealing) in which minority and lower socio-economic groups are over represented. The ABA quoted recent statistics to demonstrate the discriminatory impact of the mandatory sentencing laws:

> There is a body of research from Western Australia which indicates that between February 1997 and May 1998 Aboriginal children constituted some 80% of the three strike cases going through the Western Australian Children's Court.[23]

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21 *Transcript of evidence,* Western Australian Ministry of Justice, p. 111.

22 *Transcript of evidence,* Western Australian Ministry of Justice, pp. 111-112.

23 *Submission No. 30,* Australian Bar Association, vol. 3, p. 484. See similar statistics quoted by *Submission No. 20,* Tangentyere Council, vol. 1, p. 131.

6.22 A similar view was put by Mr Cowdery QC who advised that because the mandatory sentencing legislation targets minor property crime and a high percentage of these crimes is committed by juveniles from Aboriginal communities, the effect of the legislation is to discriminate against indigenous people contrary to the requirements of the CERD.[24]

6.23 On behalf of the Criminal Bar Association (Vic), Mr Michael Rozenes QC noted that recommendation 92 of the Royal Commission into Aboriginal Deaths in Custody provided that Governments should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort. Given that there are high levels of property crime in many Aboriginal communities and towns with substantial indigenous populations in various parts of Australia, Mr Rozenes concluded that:

> A sentencing regime which mandates imprisonment for property offences will inevitably result in an increasingly disproportionate number of indigenous prisoners or detainees.[25]

6.24 The Committee was also advised that, because of this high level of relatively minor crime, there was a real prospect of the bulk of the male population between 17 and 30 being in gaol for years at a time for property crimes:

> Every time someone hops in the back of a stolen Toyota, smashes a window after an argument, breaks into the canteen to steal food because he is hungry or accepts some of that food, steals petrol from a car to sniff or accepts stolen fuel for sniffing, that person goes to gaol and then goes up a rung. Practitioners in the Northern Territory have seen all of the above cases with monotonous regularity. Soon each offender will get one year in prison.[26]

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24 *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 45.

25 *Submission No.16*, Criminal Bar Association (Vic), vol. 1, p. 90. See also *Transcript of Evidence*, Mr Martin Flynn, Faculty of Law, University of Western Australia, p.124. The Committee was also told, "Another generation of young indigenous people are being taken away from their families, from their communities and from their land": *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, p. 550. That submission footnoted the observation that this has been identified as a problem arising out of the juvenile justice system generally, well prior to mandatory sentencing. See the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families, 'Bringing them Home,' Sterling Press Pty Ltd, 1997, p. 489.

26 *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, p. 549. See also *Submission No. 16*, Criminal Bar Association (Vic), vol. 1, p. 90 quoting from '*Mandatory Sentencing'* by Hunyor and Goldflam, a paper presented at the Seventh Biennial Conference of the Criminal Lawyers Association of the Northern Territory. In addition, other evidence was given of the high incidence of property crime in Aboriginal communities. For example, the Committee was told that in one community there had been a rash of people charged with stealing or merely receiving half coke cans full of petrol (charges could have been but were not proceeded with). Also, in another community 8 hours drive from Darwin, young people tend to steal cars to drive around in for something to do. Under the mandatory sentencing laws, not only is the person who stole the car being punished, but also the passengers (who sometimes numbered about 6): *Transcript of Evidence*, North Australian Aboriginal Legal Aid Service, pp. 70-71.

6.25 In summary, it was claimed that instead of being seen as a positive legal framework for Aboriginal advancement, mandatory sentencing is perceived as an onerous arm of continuing oppression. While the legislation may not have been intended to address one particular race of people in the Northern Territory, the practical effect is that it does so and as such infringes Australia's international covenants.[27]

6.26 The Committee notes, however, that indigenous people have been over-represented in the prison system for many years, not only since the introduction of the mandatory sentencing laws. While there is general agreement that the incarceration rates of indigenous people have increased since their introduction, and that it is possible to easily commit offences that attract penalties almost without thinking, it is also clear that the underlying causes of high incarceration rates of indigenous people generally have not been successfully addressed.[28]

6.27 In response to the criticism that the laws target one particular race, the Committee notes that, on their face, the laws clearly target those offences that have been prevalent within communities, and not a particular race of offenders. The Committee is concerned to preserve the capacity of State and Territory Governments to legislate to address those issues that adversely affect their communities, such as the high incidence of property crimes. The Committee is also concerned to emphasise that much of the crime that occurs is within indigenous communities, against indigenous people. While acknowledging the fact that a long-term view of effects is important, the Committee considers that the needs of those persons offended against must also be considered.

6.28 On the other hand, as is discussed further in a later chapter, there is no denying the fact that a series of 'disadvantage' factors make indigenous people in particular likely to be affected by mandatory sentencing.[29] Although this may not have been intentional, it should now be sufficiently obvious that certain groups in the community are vulnerable through being more likely to commit these crimes as a result of their poverty and other factors. Given the evidence of at least indirect discrimination, it is important for states and territories to address such discrimination.

Other observations on the discriminatory impact of mandatory sentencing

6.29 Some of the observations made in relation to the discriminatory impact of mandatory sentencing laws for property offences include:

- Indigenous people in remote communities are bewildered trying to understand the mandatory sentencing law compared to their customary law:

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27 *Transcript of evidence*, Tangentyere Council, p. 26.

28 See below, Chapter 7.

29 See below, Chapter 7.

> That phrase: "That's finished business" illustrates the view of punishment under customary law. One is punished, the punishment is consistent, the punishment is swift and it is then over. Mandatory sentencing flies in the face of this. The difficulties faced by Aboriginal Legal Aid lawyers in remote communities explaining the operation of law are immense. Mandatory sentencing makes it almost impossible. The legislation places emphasis on repeat offences but takes no account of the circumstances of the offences or the value of the property.[30]

- There is an inherent honesty in indigenous communities which works against them:

> I can remember that, when we used to run the store at Port Keats, if someone had broken into the shop, they would look at the footprints and say, 'This is Tom, Dick and Harry,' and immediately they would go and pick them up. Crime is usually very easily solved in an Aboriginal community, because they all know. And another thing is that they own up as well. There is a straight forwardness about it that you do not get in other communities;[31] and

- There is concern that the high incarceration rates of indigenous people produced by mandatory sentencing may lead to an increased rate of deaths in custody:

> The difficulty is that the more black people in custody there are, the more likely it is that one of them may die. As Commissioner Elliott Johnston pointed out in 1991, the problem is not so much that the death rates of Aboriginal people are higher than the death rates of non-Aboriginal people – they are both about the same – but that the vast over-representation of black people in custody here in the territory suggests that with the same death rate we are likely to get more deaths. And, of course, our committee could not be more concerned about the fact that mandatory sentencing is increasing those numbers in custody.[32]

- Mandatory sentencing prevents courts from taking into account the special disadvantages indigenous people face.[33]

- Mandatory sentencing breaches article 5 by applying identical penalties to differently circumstanced individuals, thus ensuring unequal treatment.[34]

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30 *Submission No. 23*, Miwatj Aboriginal Legal Service Aboriginal Corporation, vol. 1, p. 188.

31 *Transcript of evidence,* Northern Territory Council of Churches, p. 59. See also *Transcript of evidence,* Anglicare Top End, p. 56 and *Transcript of evidence,* North Australian Aboriginal Legal Aid Service, p. 70.

32 *Transcript of evidence,* Northern Territory Aboriginal Justice Advocacy, p. 108.

33 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 275.

34 *Submission No 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 273.

6.30 In relation to this last point, the Committee notes that article 5(a) of the CERD refers to the right to 'equal treatment' before justice tribunals. The success of that argument, then, is dependant on the interpretation of the words in article 5(2) to mean that the application of identical penalties to different individuals results in unequal treatment.

People with intellectual and other disabilities

6.31 The Committee was advised that mandatory sentencing legislation discriminates against people with intellectual or some other disabilities and therefore violates the ICCPR and the United Nations Declaration on the Rights of Disabled Persons adopted by the United Nations in 1975.[35] It should be noted that the Declaration is not an instrument of treaty status. In recognition of the principles contained therein, however, Australia scheduled the Declaration to the *Human Rights and Equal Opportunity Act 1986* (Cth), schedule 5.

6.32 For the purposes of mandatory sentencing, the following provisions in those instruments are relevant:

> ICCPR, article 14 - people with a disability have the right to equality before the courts and tribunals.
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> Declaration on the Rights of Disabled Persons, Principle 4 - people with disabilities have the right to legal safeguards against abuse or any limitation of rights made necessary by the severity of a person's handicap including regular reviews and the right of appeal.
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> Declaration on the Rights of Disabled Persons, Principle 11 – people with disabilities have the right to qualified legal assistance to protect their rights and the right to have their condition taken into account in any legal proceedings.

The impact of mandatory sentencing on intellectually disabled people and people with other disabilities

General comments

6.33 The Committee was told that people with decision-making disabilities are disadvantaged in the criminal justice system. They require specialised assistance and services to understand and participate in the court process. They require solicitors skilled at communicating with people with disabilities, and assessments from disability experts about their fitness to instruct and to stand trial. These kinds of legal services and facilities are not readily available.[36]

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35 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 624.

36 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 624.

6.34 As a group, intellectually disabled people are over-represented in the criminal justice system,[37] as are people with psychiatric disabilities and people with brain damage.[38] It is widely accepted that the prejudices on the part of the community, police and criminal justice personnel contribute, at least in part, to the high incarceration rates. In addition, the approach to de-institutionalisation has increased the risk of incarceration as appropriate levels of funding and resources have not been provided for appropriate levels of housing, employment and recreational opportunities.[39]

6.35 The evidence to the Committee is that mandatory sentencing will exacerbate the already unacceptable position of intellectually disabled people in the criminal justice system and their incarceration rates will increase disproportionately to other sections of the community. In addition, the evidence suggests that the usual justifications for mandatory sentencing have little or no application in relation to people with intellectual, psychiatric and other similar disabilities. The concepts of punishment, retribution, rehabilitation, and deterrence have little relevance to offenders who may not understand the wrongfulness of their actions.[40]

6.36 Mr Colin McDonald QC, President, Northern Territory Bar Association, noted that mandatory sentencing carries implications for people with an intellectual disability:

> The intellectually disabled are particularly vulnerable. … These people relatively often get caught up in petty crime and commit property offences. These people may be expected to be going to gaol more frequently by reason of the mandatory sentencing laws. Their intellectual disability is part of the reason why they became involved in the criminal justice process in the first place.[41]

6.37 It was observed that offenders with an intellectual disability, a mental illness, or psychiatric disability are particularly disadvantaged by the removal of judicial discretion that mandatory sentencing entails. In many cases the offender is better served in terms of rehabilitation if redirected by a judge from the criminal justice

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37 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 623. For example, incarceration statistics for New South Wales indicate that although only 2 to 3 per cent of the general population is intellectually disabled, about 12 to 13 per cent of the prison population is intellectually disabled: *Submission No. 10*, Intellectual Disability Rights Service, vol. 1, p. 55 referring to studies commissioned by the New South Wales Law Reform Commission.

38 See below, Chapter 7, where aspects of this issue are also examined.

39 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 623.

40 *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 490. The Chief Executive Officer of that organisation referred the court to a recent New South Wales Court of Criminal Appeal decision which recognised that the concept of deterrence, usually a relevant consideration in every sentencing exercise, should be given less weight in the case of an offender suffering from a mental disorder or severe handicap. The Court stated that " … such an offender is not an appropriate medium for making an example to others."

41 *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 145.

system to the mental health system. A judge should have the freedom to explore all options designed to rehabilitate the offender and protect the community.[42]

The discriminatory impact of mandatory sentencing

6.38 It is claimed that the mandatory sentencing regimes violate the principles set down in the ICCPR and the Declaration on the Rights of the Disabled as follows:

- mandatory sentencing does not take into account the situation of the individual.[43] It effectively removes judicial discretion which is of paramount importance in determining the mitigating circumstances or the role that intellectual disability played in the commission of the crime;[44]

- mandatory sentencing laws for property offences discriminate against intellectually disabled people, those with psychiatric disabilities and those with brain injury as they are most likely to commit the kinds of unpremeditated property offences that the laws target rather than offences involving planning or forethought;[45]

- as a sentencing outcome, imprisonment is inappropriate for intellectually disabled people, those with psychiatric disabilities and those with brain injury compared to other people. They are disadvantaged in such a system because they do not have the same opportunities as other people to convince the authorities of rehabilitation and achieve eventual release;[46]

- mandatory detention sentences are a form of indirect discrimination because equal treatment disadvantages people with an intellectual disability or a disability which has a similar effect. The courts are limited in determining issues such as diminished culpability which may be due to an intellectual or similar disability. Therefore, the courts are unable to ensure that the punishment is proportionate to the gravity of the offence;[47] and

- mandatory sentencing discriminates against people with an intellectual disability or a disability which has a similar effect because imprisonment involves greater hardship and personal disruption for such persons than for others. For people with an intellectual disability, routine, patterns in daily life, familiarity and continuity are essential to their wellbeing. They have little concept of the calculation of time

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42 *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 491.

43 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 624.

44 *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 490. See also *Submission No. 10*, Intellectual Disability Rights Service, vol. 1, p. 56 and *Submission No. 8*, New South Wales Director of Public Prosecutions, vol. 1, p. 45.

45 *Submission No. 10*, Intellectual Disability Rights Service, vol. 1, p. 56.

46 *Submission No. 52*, Western Australian Office of the Public Advocate, vol. 3, p. 623.

47 *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 490; *Submission No. 10*, Intellectual Disability Rights Service, vol. 1, p. 55.

or of the full extent of the criminal process.[48] People with psychiatric disabilities or brain injury may have some of the same needs, and lack some of the same qualities required to be fully aware and involved in a criminal process.

6.39 The Committee is concerned at evidence indicating that intellectually disabled people, people with psychiatric disabilities and people with brain injury may be disadvantaged under mandatory sentencing regimes because of the limited capacity of courts to take into account the personal circumstances of individual defendants. Although it is arguable whether such disadvantage is contrary to Australia's international obligations, the Committee notes its concern in relation to the application of the regimes to those people.

Future directions

6.40 Australia has traditionally enjoyed a high reputation for recognition of human rights issues. The Committee views with concern, however, arguments advanced by several witnesses that the mandatory sentencing legislation in the Northern Territory and Western Australia may adversely affect that reputation by breaching some of Australia's obligations under international conventions to which it is a signatory. It seems appropriate, even essential, that there should be put in place a formal system of consultation between the Commonwealth and the States and Territories in relation to the implementation of Australia's international obligations at the domestic level.

6.41 In this regard, the Committee acknowledges the evidence of the representatives of the Western Australian Government that the Treaties Council is one forum where issues of international significance such as mandatory sentencing could be negotiated and considered between the Commonwealth and the States and Territories. The Treaties Council was created in 1996 as an adjunct to the Council of Australian Governments to ensure that State and Territory Governments are effectively involved in the treaty-making process. The objective was to provide a meeting place for the Prime Minister and the Premiers to discuss treaty-making matters. To date, however, the Council has met only once. The Committee was told that the Treaties Council would be an appropriate forum in which to decide whether remedial legislation is required on this issue:

> Obviously we would not wish to breach any international obligations, but if there was a perception that there had been a breach, the Treaties Council should consider those issues. There would be some considered discussion of the issue and an agreement would be reached about how the legislation should be changed or whether Commonwealth legislation was needed to rectify the situation.[49]

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48 *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 491 quoting the Kingston Legal Centre in its submission to the New South Wales Law Reform Commission Inquiry on the Criminal Justice System and People with an Intellectual Disability.

49 *Transcript of evidence*, Western Australian Ministry of the Premier and Cabinet, pp. 118-119.

6.42 The principal motivation behind the creation of the Treaties Council was to give the States and Territories a greater voice in Australia's treaty-making process. There is nothing in the operational terms of reference of that body, however, that would preclude the Commonwealth from using that forum to initiate discussion of matters of concern.

6.43 In addition, the Committee notes that the Commonwealth is required to submit a report to the CROC Committee, through the Secretary-General, at specified intervals, detailing the measures it has adopted to give effect to the rights recognised in the CROC. The next report is due to be submitted in 2003.[50] The report must indicate factors and difficulties, if any, affecting the degree to which Australia is able to fulfil its obligations under the CROC. In terms of reporting on mandatory sentencing, therefore, should those regimes still be in existence, the Commonwealth will be responsible for answering any criticisms about them.

6.44 The Committee also notes that the report of the Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, August 1998, recommended that the Government request the Standing Committee of Attorneys-General to investigate alternative options to mandatory sentencing.[51] However, it appears that this recommendation has not been implemented. There has been no Government response to that report.

50 CROC, article 44(1).

51 Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, August 1998, p. 424.