CHAPTER 7

THE SOCIAL AND LEGAL IMPACTS OF MANDATORY SENTENCING

Social effects

7.1 In the above chapters on international obligations, the Committee found in many instances that it was difficult to disentangle the effects of general policies from any effects of mandatory sentencing. Thus, it was not always possible to agree that mandatory sentencing by itself had a particular effect in relation to international obligations. However, in some instances, it appeared to the Committee that there were detrimental effects arising primarily from mandatory sentencing, and these are discussed in the following sections. It should be noted, nonetheless, that certain of these effects may not be peculiar to juveniles.

Strengthening stereotypes

7.2 In theory, mandatory sentencing should affect all persons equally. In reality, the nature of the crimes which are specifically targeted results in there being a disproportionate effect on people from lower socio-economic groups, people with intellectual disability and psychiatric illness or disability; persons affected by drug-related brain damage; and indigenous people in particular.[1] The major reason for this is that the targeting of specific crimes helps to enforce stereotypes of behaviour, and may also help to create more offenders who continue in a life of crime, rather than passing through it at one point:

> 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/her life. However, if a juvenile is introduced into a custodial situation, then the chances of him/her later being incarcerated as an adult increases dramatically.[2]

7.3 The particular types of crimes that attract mandatory sentencing for juveniles were generally[3] not crimes of violence nor did they necessarily involve careful pre-meditation. Aside from people who may already have an established pattern of criminal behaviour, it appears that a number of persons affected in the Northern Territory are people who inadvertently get caught up, participate after the main event,

---

1 See *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 143; See also *Submission No.30*, Australian Bar Association, vol. 3, p. 484.

2 *Submission No. 14*, New South Wales Public Defenders Office, vol. 1, p. 83.

3 Amendments to the legislation in 1999 also made some crimes of violence subject to mandatory sentencing.

or are repeat offenders on a minor scale. For the law to reach such people, the heavy-handed approach is probably not the most effective, especially if there is no knowledge or understanding of the criminality of the action (for instance, riding in a car not known to be stolen).[4] Thus, for certain groups of people, the key components of some factors of some crimes are almost identical to their lifestyle, making it less likely they can avoid fitting the pattern.[5] The legislation was also amended in 1999 in order to ameliorate effects for some people who did not fit the stereotype. In theory, it is a beneficial change which could limit the adverse effects of an action that is out of character; nonetheless it is noticeable that all the factors which are taken into account are ones that people from disadvantaged backgrounds are unlikely to demonstrate.[6]

- First appearance under mandatory sentencing;
- Only one offence;
- Substantial restitution has been made;
- Behaviour is uncharacteristic;
- The person is otherwise of good character;
- The offence is trivial; and
- There were mitigating circumstances.[7]

In addition, the amendment only applies to adults, not juveniles.[8]

The effect on indigenous people

7.4 Insofar as much of the indigenous population is severely disadvantaged economically, the effects of mandatory sentencing have been said to be especially obvious on them. Some of the property crimes which mandatory sentencing seeks to address are relatively minor in the Northern Territory and some may reflect unmet needs for food, clothing etc. However, insufficient information was provided to demonstrate that material need is the main causal factor precipitating crimes which attract mandatory sentencing penalties.[9] It is likely that many factors, including health, lack of opportunities, boredom, and drugs have contributed to the

4 See, for example, *Submission No. 16*, Victoria Criminal Bar Association, vol. 1, p. 90, which refers to the paper by Hunyor and Goldflam, 'Mandatory Sentencing'.

5 There was some recognition originally that the law in the Northern Territory would unfairly affect some people, but this was not seen as sufficient to prevent the implementation of the legislation.

6 See *Submission No. 24*, ATSIC, vol. 1, p.243.

7 See *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 106.

8 See *Submission No.19*, Central Australian Women's Legal Service, vol 1, p. 118.

9 *Submission No. 20*, Tangentyere Council, vol. 1, p. 128.

predominance of certain behaviour, a point which has been raised in many reports concentrating particularly on the problems of indigenous people:[10]

> Studies seem to indicate (e.g. break enter and steal offences) that that there is a correlation between offenders and areas of social problems. For example, in New South Wales (although there would be no reason to suppose the position would be any different in the Northern Territory), among the top twenty-five local government areas experiencing break enter and steal in dwellings, there are nine centres containing substantial Aboriginal populations, which also have high levels of unemployment and poverty. Similarly, where the break and enter was into a non-dwelling, twenty four of the twenty five areas were outside of the Sydney metropolitan region and were areas of high Aboriginal population.
>
> Break enter and steal is most often committed in areas where more than 10% of the population are unemployed or when 9% or more of the population are 15 to 24 year old males…
>
> Similarly, studies of assault show correlations between social conditions and offenders. Alcohol, abuse of certain drugs, and disinhibiting brain damage are all closely linked to assault. So too is youth.[11]

7.5 This point was further developed by ATSIC which noted that indigenous young people in particular were more likely to have been 'more harshly dealt with by the juvenile justice system prior to their appearance in court', and were thus likely to be more quickly affected by mandatory sentencing. [12]

Mandatory sentencing in the context of recommendations of RCADC

7.6 Some submissions related not so much to the results of mandatory sentencing as to the fact that its introduction reflected a failure of the Northern Territory Government in particular to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCADC). The Northern Territory Aboriginal Justice Advocacy Committee (NTAJAC), for example, criticised the Northern Territory Government for the difficulties with on-going consultations on implementation of those recommendations, and pointed to the failure of the Northern Territory Government to adopt the 1997 recommitment to implementation. [13]

7.7 Even where some recommendations had been implemented, it was argued, the process had been imperfect. Mr William Tilmouth of the Tangentyere Council

---

10 See *Submission No. 17*, Department of Education, Training and Youth Affairs, vol. 1, p.99-101; *Submission No. 24*, ATSIC, vol. 1, pp. 201-203, 209-210.

11 *Submission No. 14*, NSW Public Defenders Office, vol. 1, p.84; See also *Submission No. 16*, Victoria Criminal Bar Association, vol. 1, p. 90.

12 See *Submission No. 24*, ATSIC, vol. 1, p. 199; and see below, Paragraphs 7.35 – 7.38, which refer to the discretion of police and others in matters of charging.

13 *Submission No. 39*, Northern Territory Aboriginal Justice Advocacy Committee, vol. 3, pp. 524 –534.

referred in particular to a number of RCADC recommendations, such as Nos. 88, 214, 215, and 223 (on indigenous police services). If these had been implemented properly, it was argued, some of the problems that had arisen could have been avoided.[14]

7.8 In particular, the Tangentyere Council referred to recommendation 239, that legislation and instructions be reviewed to ensure that young people are not proceeded against by way of arrest unless such an action is necessary. The witness argued that research demonstrates the use of arrest remains the preferred option of police in most jurisdictions, contrary to the recommendation.[15]

7.9 The committee has noted this information, which was also referred to in other submissions.[16] The progress of implementation of recommendations of the Deaths in Custody report may have adversely affected relationships between communities and governments in the Northern Territory and elsewhere, and may have made it easier for mandatory sentencing to have been developed. What is apparent is that there is a need for better consultation. To the Committee, it was clear that some of the problems which mandatory sentencing sought to address, in the Northern Territory at least, could only be addressed effectively by a system in which there was mutual respect and a belief in a better future. Otherwise, mandatory sentencing is only another symptom of disorder, and not a constructive means of addressing complex issues.

Stolen Generation

7.10 Some submissions referred to the potential for another Stolen Generation, as remote communities were being cleared of their young people.[17] The Committee considers this to be an exaggeration in some respects, although it does note the potential for the development of anti-social 'rites of passage' whereby young people may value detention. In those areas where young people are being removed as a result of criminal activity - however minor - the issue does arise about the reaction of other members of those communities.

7.11 Although there was not a substantial amount of information about the response of some members of Aboriginal communities to the actions of young people and others, it is important that the rights of persons offended against also be taken into account. While the thefts may appear to be of small amounts, the loss of goods would have a greater effect on people who themselves may have very little. [18]

7.12 This is not necessarily to say that members of the community always support mandatory sentencing *per se*, or the removal of young people, but that they support

---

14 *Submission No. 20*, Tangentyere Council, vol. 1, p. 128. The Council's submission acknowledges that its conclusions are based on the research by Professor Chris Cunneen et al.

15 *Submission No. 20*, Tangentyere Council, vol. 1, p. 129.

16 See, for example *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 111.

17 *Submission No.25*, North Australian Aboriginal Legal Aid Service, vol. 1, p 262.

18 See *Transcript of evidence*, Tangentyere Council, p. 30.

the need for some control of those committing the offences. The problem that may perhaps be directly attributed to mandatory sentencing is that it is a system which *may* catch too many people at too young an age, when they do not have sufficient experience to cope with detention at a distant location. It is this factor that may then turn the crime and the punishment into a perverse rite of passage which helps settle people into an alienated lifestyle. This is supported to a degree by the Northern Territory Bar Association:

> The impact on juveniles of imprisonment is well documented … there is an increased risk of recidivism and alienation by early (and one would have thought unnecessary) imprisonment imposed [on] a juvenile. When such imprisonment is mandatory, the risk of alienation can only be increased, especially where the sentence far outweighs the gravity of the offence.[19]

7.13 It has also been stated that another adverse effect on the indigenous community is the decrease of knowledge and experience in traditional culture, a situation worsened by juveniles being taken from communities in order to serve detention elsewhere, and thereby missing various ceremonies:

> This removal of young men from a community will in turn … create a significant risk of irrevocably disrupting the maintenance of traditional cultural practices and law, which depend on the oral transmission of ceremonially acquired knowledge and skills to the next generation.[20]

7.14 However, this interpretation may not be as straightforward as is suggested. It is likely that there is already some difference of opinion within communities, and possibly some distancing from their traditional values. That these are replaced by what in the longer term could be a negative and self-destructive lifestyle is a matter which does need to be addressed, and no doubt is, in a number of ways. However, the causal relationship between this and mandatory sentencing is somewhat tenuous.

7.15 Insofar as indigenous communities are in fact stating that it is nonetheless important to maintain traditional ways and practices in spite of the behaviour of the young, the absence of young males in particular would be detrimental. The possibility of maintaining a particular culture may be limited, thus reducing later opportunities.

The effect on others within the community

7.16 It was also noted that the removal of young men - as a result of mandatory sentencing - would have a substantial effect on the demographics of a community; its workforce and economic development; and on the availability of a positive role model for boys.[21] Although the Committee notes that this is not wholly the result of mandatory sentencing of juveniles, it accepts that the long-term effects can be

---

19 *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 143.

20 *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 110.

21 *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 110.

considerable. Insofar as mandatory sentencing may penalise juveniles for relatively minor offences and help establish a pattern of behaviour, it contributes to the effect. [22]

7.17 Whether this problem can be overcome by a greater involvement by the indigenous community in sentencing matters has been canvassed, and was one of the recommendations of the RCADC. ATSIC noted:

> The recommendation recognises that members of Aboriginal and Torres Strait Islander communities are in the best position to understand the impact of criminal behaviour on the communities, the needs of individual offenders and victims, and the likely impact of particular sentences. Mandatory sentencing regimes completely undermine this recommendation.[23]

Disability

People with an intellectual disability

7.18 Limited information was available to the Committee on the specific effects of mandatory sentencing on people with a disability, particularly those with intellectual disabilities.[24] However, substantial research does exist in this area already,[25] demonstrating that people with certain forms of disability are overrepresented in the prison population across Australia.[26] The reasons for this vary. It is claimed that people with intellectual disabilities are more likely to be suspected of, charged with, prosecuted for and convicted of crimes than other members of the community because of prejudices on the part of the community, police and criminal justice personnel; the causes of criminal activity by people with intellectual disabilities are said often to relate directly to the fact that they suffer acute socioeconomic and psychological disadvantages.[27]

7.19 Other evidence provided suggested that the compulsive or impulsive nature of some behaviour of people with an intellectual disability could ensure that the principle of deterrence was unworkable. The factors that may help define the individual are also those which fit well into mandatory offences:

> 'Frank' is an 18 year old with a moderate intellectual disability and a genetically acquired obsessive-compulsive disorder. He does not have a mental illness as defined in the Criminal Code or the Mental Health Act …. throughout his adolescence he has exhibited challenging behaviour when

22 See *Submission No. 38*, Anglicare Top End, vol. 3, p. 519.

23 *Submission No. 24*, ATSIC, vol. 1, p. 227, and also p. 231.

24 See *Submission No.10*, Intellectual Disability Rights Service, vol. 1, pp. 53-60. See also above, Chapter 5.

25 See New South Wales Law Reform Commission, Report 80: *People with an Intellectual Disability and the Criminal Justice System*, December 1996

26 See *Submission No. 31*, Disability Employment Action Centre, vol. 3, p. 489.

27 *Submission No. 10*, Intellectual Disability Rights Service, vol. 1, p. 56; *Submission No. 21*, Northern Territory Bar Association, vol. 2, p. 145.

> under stress … he has been before the courts on a number of occasions, and has served 14 days in prison for damaging property at a police station after being arrested and then 'losing it' while in custody.[28]

People with a psychiatric disability

7.20 The specific problems of people with psychiatric disabilities were discussed in a number of submissions,[29] and it is known that people with some psychiatric disabilities are also overrepresented in the prison population.[30] The submission by ATSIC also noted that mental illness was one of the factors which could pre-dispose an indigenous person towards early contact with the justice system.

7.21 The Disability Employment Action Centre set the case out clearly for people with psychiatric disabilities and mental illness:

> [they] are particularly affected and disadvantaged by the removal of judicial discretion that mandatory sentencing entails. In many cases offenders are better served in terms of rehabilitation if redirected by a judge from the criminal justice system to the mental health system … People with mental illness often commit offences whilst experiencing psychosis, depression, obsessions and compulsions.[31]

7.22 It was also noted in the case *Trenerry v Bradley* that an exemption from a term of imprisonment that might otherwise be available and be considered humane, would not be possible under the legislation.[32]

7.23 The Mental Health Legal Centre Inc noted that, while not all people with a mental illness who commit crimes do so because of their illness, 'many consumers due to compulsions, obsessions, depression, psychosis and other symptoms will commit crimes - mostly minor offences that this mandatory sentencing covers':

> The secondary effect of lack of social support and housing and employment creates an environment where many person[s] with a mental illness may be committing crime as an expression of poverty and other disadvantage …[33]

---

28 *Submission No.18*, Central Australian Youth Justice, vol. 1, p. 109.

29 See, for example, *Submission No. 3*, Attachment, Territorians for Effective Sentencing, vol. 1, p. 14; *Submission No. 5*, President, Queensland Court of Appeal, vol. 1, p.27; *Submission No 9*, New South Wales Director of Public Prosecutions, vol. 1, p. 45; *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 77.

30 *Submission No. 26*, University of Queensland, School of Social Work and Social Policy, vol. 2, p.344; see also *Submission No. 21*, Northern Territory Bar Association, vol. 1, pp. 144-145.

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

32 *Trenerry v Bradley* 1997 NTSC 82.

33 *Submission No. 32*, Mental Health Legal Centre Inc, vol. 3, p. 497. The Centre notes also that many young people may be affected adversely by being directed into justice rather than health systems.

Juveniles and mental health problems

7.24 Some submissions particularly noted the problems of young people in respect of mental health. Certain major disorders can begin to manifest during adolescence, and will have a substantial effect on people with very limited support systems in place. In cases where there is undiagnosed illness, people may get caught up in the justice system prior to diagnosis:

> What I have noted changing over the last 10 years or so is that a number of young male offenders around the ages of 16 through to 22 or so, are often before the court because of undiagnosed and/or untreated psychiatric problems. Some of them have been before the courts on a number of occasions before their condition is 'disclosed'. What often occurs is that they feel more and more unwell in their late teenage years about the same time that they are exposed to drugs and alcohol. Unfortunately they continue to take drugs and alcohol because the effect is that their difficulties are temporarily treated. And then of course they enter the spiral of offending to be able to afford whatever they are abusing.[34]

People with acquired brain damage

7.25 The extent to which people with acquired brain damage are likely to be affected by mandatory sentencing was raised in submissions, directly and indirectly. People affected by various drugs including petrol sniffing, may be more vulnerable under a mandatory sentencing regime, in that they are likely to commit the offences which are subject to mandatory penalties and may also share other characteristics of those most vulnerable to being convicted of certain crimes:

> The overwhelming characteristics of persons appearing before courts (at least in New South Wales, and no doubt also true for the Northern Territory, for offences which would attract mandatory sentences in the Northern Territory are likely to be Aborigines, drug abusers, young persons, alcoholics, brain damaged individuals, unemployed and indigent persons. [35]

7.26 For brain damaged individuals, the use of mandatory sentencing as a deterrent is unlikely to work because people are not rational at the time of committing a crime.[36] Although legislation may refer to the use of substances at the time of committing the crime,[37] the residual damage from drug abuse would limit the capacity for rational thought even further. Similarly, people affected by brain damage arising from accidents and assault would be limited in their capacity to understand their actions or control them. In such instances, deterrence becomes irrelevant:

---

34 *Submission No.75*, Legal Services Commission of South Australia, vol. 3, p. 574.

35 *Submission No. 14*, New South Wales Public Defenders Office, vol. 1, p. 84; See also *Submission No. 16*, Criminal Bar Association of Victoria, vol. 1, p. 90.

36 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 288.

37 Such use may not be an acceptable explanation, even if mitigating factors were taken into account.

> Put bluntly, the fact is that when about to throw a rock through a window or break into a store, the prospect of detention is simply not on the mind of a young person, particularly when the mind of that person is substantially affected by alcohol or other substances, as is overwhelmingly typical of property offences committed in the Territory.[38]

Women

7.27 The extent to which *young* women were likely to be affected by mandatory sentencing, as juveniles, was not easy to determine.[39] Much of the evidence given to the Committee related to women generally, and not people 15-16 years old (Northern Territory) or 16-17 (Western Australia). From the material provided to the Committee, it appeared that the majority of persons sentenced under mandatory sentencing are males, both adults and juveniles. Nonetheless, the available data indicates an increase in the number of women being imprisoned, primarily indigenous women.

7.28 Beyond this, much of the information offered to the Committee appeared to be speculative,[40] although possibly based on experience. It was stated, for example, that women may be more at risk in a society in which mandatory sentencing operates, because there will be pressure on them not to report offences that would attract such sentences.[41] The Central Australian Women's Legal Service also raised the issue of the effect of imprisonment on the wider community, including children, when women were given custodial sentences.[42] However, while much of this information is likely to be true, it is difficult to see if the effects described would be significantly different for female juveniles. In respect of young women, there is limited evidence available to determine if the roles they have are adversely affected through mandatory sentencing.

7.29 One of the outcomes of early sentencing for relatively trivial offences could be similar to that for male juveniles, the effect of a custodial sentence on an adolescent who has limited coping mechanisms.[43] Insofar as indigenous youth may not benefit to the same degree as non-indigenous youth from the discretion exercised more by the police and prosecutors, [44] mandatory sentencing may have a substantial effect at an earlier age:

> Such use of discretion is arbitrary and Aboriginal and Torres Strait Islander young people are less likely to receive the benefit of such decisions. At the

---

38 *Submission No.18*, Central Australian Youth Justice, vol. 1, p. 107.

39 See above Chapter 5.

40 See above, Chapter 5.

41 *Submission No.19*, Central Australian Women's Legal Service, vol. 1, p. 120.

42 *Submission No.19*, Central Australian Women's Legal Service, vol. 1, p. 121; *Submission No. 21*, Northern Territory Bar Association, vol. 1, p. 142.

43 See above, Paragraph 7.12

44 See below, Paragraph 7.36

> court level, a case might be found to be proven and dismissed (s67, Young Offenders Act) which also does not count as a strike. Again, however, it is clear from the evidence that Indigenous young people are less likely to receive these beneficial outcomes.[45]

Effect on the law

7.30 A substantial number of submissions and oral evidence referred to the adverse effect on the law of mandatory sentencing, and made a clear distinction between this effect and attitudes to the law in general. Although there are some exceptions to this - for example, the difficulty that many indigenous communities may have generally in respect of European-based law,[46]or the lack of comprehension of law by others[47] - the opposition to mandatory sentencing appears to be based on its apparently random, arbitrary and disproportionate nature which contrasts sharply with the nature of the law in general.

Judges and magistrates

7.31 The most obvious legal effect of mandatory sentencing that has been identified is the reduction of the power of discretion. However, the extent of this effect varies, given that there are some options available in respect of juveniles.

7.32 The Northern Territory Bar Association noted that judges and magistrates had a reduced capacity to provide justice 'in individual cases':

> A system of pre-ordained imprisonment for a range of arbitrary offences deprives the courts from giving just sentences, i.e. sentences where the punishment fits the crime.[48]

7.33 A number of statements were made by judges and magistrates who were opposed to the legislation,[49] believing that the loss of discretion affected the most important part of the law – the ability to impose appropriate sentences which could take circumstances into account.

7.34 The submission by ATSIC also noted the reaction of some judges to Western Australian and Northern Territory legislation, including a number of statements by Fenbury, J, such as:'If it wasn't for the way the law is now, I wouldn't be imposing a sentence like that upon you, because I think a Conditional Release Order might be appropriate.'[50] In the Northern Territory, Angel J stated:

---

45 *Submission No.24*, ATSIC, vol. 1, p.223.

46 *Submission No.23*, Miwatj Aboriginal Legal Service, vol. 1, pp.187-188.

47 See *Submission No.13*, Associate Professor John Willis, vol 1, p. 77.

48 *Submission No. 21*, Northern Territory Bar Association, vol. 1, pp. 141-142.

49 See, for instance, those quoted in *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p. 266.

50 *Submission No. 24*, ATSIC, vol. 1, pp. 216-217.

> Mandatory sentences by their very nature are unjust in the sense that they require courts to sentence on a basis regardless of the nature of the crime and the particular circumstances of the offender…
>
> Whatever else may be said about these provisions, Parliament, it appears, intended that courts impose the blunt instrument of imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence and of the offender.[51]

7.35 Similar points were made by other submissions. It was further noted that the removal or limitation of discretion was accompanied by a transfer of discretion to other parties, notably the police and prosecutors.[52] In itself, the use of discretion by the police and prosecution is not new, and is an accepted part of practice. However, this has generally been in a context where other substantial discretion remains, thus allowing for a balance and less likelihood of inappropriate bias. Mandatory sentencing, it is argued, creates a situation with few controls:

> Mandatory sentencing removes the discretion customarily invested in the Court. However, police and prosecutors retain a discretion as to whether to charge and at what level to charge. Mandatory sentencing therefore, takes the discretion away from the independent courts and leave the residual discretion with the prosecuting authorities. As well as representing a perversion of justice, there is a danger that police and prosecutors will abuse this discretion and use mandatory terms to encourage defendants to plead guilty, by offering to charge lesser offences in return for pleas of guilty.[53]

7.36 In Western Australia, it is stated, it was the objective of the legislation that 'repeat adult and home burglars be sentenced to a mandatory 12 months imprisonment or detention'.[54] However, Justice Fenbury, then President of the Children's Court, used the existing Intensive Youth Supervision Order under the *Young Offenders Act 1994* to avoid a mandatory sentence for a juvenile repeat offender.[55] This decision was accepted, and thus does offer a judicial discretion.

7.37 The point regarding the transfer of discretion was further developed by the Northern Territory Legal Aid Commission which argued that the lessening of judicial discretion in fact upset the balance between the executive and the judiciary:

> Mandatory sentencing means that the exercise of the Prosecutorial discretion has effectively supplanted the exercise of sentencing discretion in

---

51 *Submission No. 24*, ATSIC, vol. 1, p. 217; see also *Submission No. 21*, Northern Territory Bar Association, vol. 2, p. 140; *Submission No. 111*, Johnson/Zdenkowski, pp. 70-76. For some different judicial responses, see also ibid., pp. 76-77.

52 See *Submission No. 70*, Alice Springs Youth Accommodation and Support Services, vol. 4, p.765.

53 *Submission No. 11*, Boys Town Link Up, vol. 1, pp.63-64; See also *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 76.

54 *Submission No. 96*, Western Australian Ministry of Justice, p. 6.

55 *Submission No. 96*, Western Australian Ministry of Justice, pp. 6-7.

> many cases. The discretionary choices…have a direct bearing on not just the length of the sentence that a person may receive but whether or not someone will go to gaol at all…
>
> Considerable pressure has therefore been put on the prosecution to withdraw and modify charges, and it is a pressure which undoubtedly which many prosecutors have not enjoyed. Nevertheless, the laws have meant that the police and prosecution are often placed in the position of sentencers. And, of course, unlike judicial decisions, the DPP's decisions are unpublished, unrecorded and unreviewable (save perhaps in exceptional circumstances of abuse of power).[56]

Concentration of Powers

7.38 This issue of separation of powers has been raised in the Wynbyne[57] case, and is also described as the 'concentration of powers'. The argument of invasion of judicial power was not successful in that case, but, the Northern Territory Legal Aid Commission argues:

> What was not argued in that case was the effect of the shift of power on the police and prosecution, and how that might amount to what might be called a concentration of powers. In his decision … Mildren J cited ... the decision of Lord Diplock:
>
> "What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body … a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."
>
> What becomes apparent when examining the operation of mandatory sentencing is that through the mechanics of the law, this is in effect what parliament has achieved.[58]

Other effects of prosecutorial discretion

7.39 It has been noted that there are other adverse effects of such arrangements, including an arbitrary operation of more 'lenient' systems, thus decreasing access to justice especially for the already disadvantaged: 'the administration of justice in this regard remains arbitrary and highly localised':

---

56 *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, pp. 546-547; See also *Submission No. 16*, Criminal Bar Association of Victoria, vol. 1, p. 89; *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 76; and *Submission No. 22*, Law Society of the Northern Territory, vol. 1, p. 158. As a result of this, it is argued, some lawyers find that they are in fact arguing their case in full before the prosecutor instead of to the court *Submission No 22*, Law Society of the Northern Territory, vol. 1, p. 167.

57 *Wynbyne v Marshall* (1998) 117 NTR 11.

58 *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, p. 546.

> There are also new pressures placed on defendants, particularly when they might plead guilty to a 'non-mandatory' charge rather than risk an unsuccessful defence of a charge covered by the mandatory sentencing regime … Payment of restitution has also affected whether prosecutions are continued with charges … there has been no consistency in the application of this discretion. Furthermore, it inevitably advantages those with the material resources to make restitution. [59]

Discretion given to the 'victim'

7.40 One submission in particular also noted that an element of discretion could move to the victim, as there was some possibility of choosing to proceed with a relatively minor matter (or, alternatively, to avoid prosecution): 'Victims are increasing[ly] realising they have the power to bend matters to their ends given that the courts' role in sentencing has been marginalised in many instances.'[60]

7.41 Other submissions also noted that the disadvantaged, including those with psychiatric and intellectual disabilities, would be further dispossessed under such a system: 'the judiciary must be free to impose the full range of dispositions, including redirection of such offenders from the criminal justice system into the health system as this is often the most appropriate course from the perspective of rehabilitation and community protection.'[61]

The law is seen as random and unfair if the principle of proportional punishment is ignored

7.42 A number of witnesses have argued that the particular circumstances of the individual have to be taken into account, and that this cannot be done if a discriminatory system is perpetuated.[62] Where this is a public perception, people will lose respect for the law and the legal process:

> If the mandatory sentences that are imposed happen, in fact, to fall in large measure on a specific group of the society, that group may well see the penalties being imposed as proof that the law is not concerned to do justice, but is rather concerned with unjustly and unfairly discriminating against them. Such an attitude is unlikely to engender respect for the law or assist in motivating certain groups to accept the rules and laws of the wider society.[63]

---

59 *Submission No.24*, ATSIC, vol. 1, p. 224.

60 *Submission No.51*, Katherine Regional Aboriginal Legal Aid Service, vol. 3, p.613.

61 *Submission No. 32*, Mental Health Legal Centre Inc, vol. 3, p. 495.

62 See *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol 2, pp 274-275.

63 *Submission No.13*, Associate Professor John Willis, vol. 1, p. 75. *Submission No 22*, Law Society of the Northern Territory, vol. 1, p.159.

7.43 One of the consequences of this attitude is that offenders will believe they have nothing to lose by increasing the magnitude of their crimes, or possibly moving on to other components, such as violence.[64] A similar point was also made by the Queensland branch of the International Commission of Jurists, which referred to the increasing risk of violence in the United States because of the three strikes legislation. Where offenders face mandatory imprisonment, they may well feel they have nothing to lose:

> At least arguably, therefore, legislation of this kind creates additional and foreseeable dangers to the health and well-being of our law-enforcement personnel; as well as additional risk of physical harm to the youth against whom they face off … Paradoxically, were such a policy to be set in train by the private sector, with such foresight of the risk that it creates, then it would amount to actionable negligence. Why therefore, can we allow legislative policy that has the same result?[65]

7.44 Another submission noted that there appeared to have been an increase in violence or a threat of violence towards possible witnesses because of mandatory sentencing.[66] Although the details of such threats were not given, this point has also been made by the Central Australian Women's Legal Service in relation to women being under pressure not to report matters that carry a mandatory penalty.[67]

7.45 In addition, it is argued, the development of mandatory sentencing and then, in the Northern Territory, the amendments allowing for 'exceptional circumstances' for adults, have combined to limit common law rights, including the right of silence:

> In addition to the obligation on the defendant to make restitution to avoid a mandatory jail term, the requirement that "the offender has co-operated with law-enforcement agencies in the investigation of the offence" is an obvious infringement of the right to silence.[68]

Community distrust of the legal system

7.46 Not only will the individual offender or accused have a lessening of respect for the law, it is argued, but the community itself may also feel that the arbitrary nature of the law must be evaded. In some circumstances, this leads the jury to take a role similar to that of the prosecutor or police, by ignoring evidence or making a decision as to guilt that may not otherwise have been made:

---

64 *Submission No.5*, Queensland Supreme Court, vol. 1, p. 27.

65 *Submission No.43*, International Commission of Jurists (Qld), vol. 3, p. 560.

66 *Submission No. 51*, Katherine Regional Aboriginal Legal Aid Service Inc, vol. 3, p.613.

67 See above, Paragraph 7.28.

68 *Submission No. 41*, Northern Territory Legal Aid Association, vol. 3, pp. 545-546.

> There is even cause to believe that witnesses and jurors may not honestly take part in the criminal justice system if they think a verdict of guilty will result in an unfair mandatory sentence.[69]

7.47 It has also been stated that there may be a reduction in the number of offences reported, and this could be for at least two reasons. The first can be that the community does not approve of mandatory sentencing and thus may limit its reporting. The second, as noted above, may be more harmful to individuals - that they are afraid to report offences because they may be further punished by the perpetrators if mandatory sentences result.[70]

Increase in court time and costs

7.48 Many submissions argued that because every adult charged with more than one property offence and every juvenile person charged for the third time with property offences must be sentenced to imprisonment, defence lawyers advise against guilty pleas. Where cases are defended, the accused has at least the same or possibly a better chance of avoiding a mandatory penalty.[71]

7.49 The additional number of defended prosecutions is said to have created a substantial backlog in the courts, and increased the costs of justice at a time when mandatory sentencing - especially of juveniles - has also been said to have drained funding from other services such as health and education[72]:

> Mandatory sentencing will inevitably result in fewer pleas of guilty and place increased time and resources pressure on the courts, the prosecution, police and legal aid, with a flow-on increased cost to the community …
>
> Inevitably, mandatory sentencing will cause a substantial increase in the number of prisoners with ancillary increased costs to the community.[73]

Access to the legal system

7.50 Although not peculiar to mandatory sentencing, the issue of access to a fair hearing and an understanding of cultural factors may have been adversely affected because of the pressure placed on the legal system by mandatory sentencing. As noted above, the arbitrary nature of penalties may be difficult to comprehend,

---

69 *Submission No.5*, Queensland Supreme Court, vol. 1, p. 27; See also *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 76.

70 *Submission No 19*, Central Australian Women's Legal Service, vol. 1, pp. 119-120.

71 *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 76.

72 *Submission No. 38*, Anglicare Top End, vol. 2, p. 521 ; Alice Springs Youth Accommodation and Support Services, *Submission No. 70*, vol. 3, p. 762 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service vol. 2, p. 586; *Submission No. 51*, Katherine Regional Aboriginal Legal Aid Service, vol. 3, p. 612; *Submission No. 67*, The National Children's and Youth Law Centre, vol.4, pp. 705-706; *Submission No. 22*, Law Society of the Northern Territory, vol. 1, pp. 169-170.

73 *Submission No. 5*, Queensland Supreme Court, vol. 1, p.26.

especially for those whose first language is not English.[74] The links between earlier and subsequent offences may also be a difficult concept to grasp,[75] leading not only to a lack of comprehension of the law but possibly a disrespect for it.[76] In addition, the problems involved in explaining the issue and explaining it to more people, while seeking to undertake additional work in bargaining with prosecutors and police, must place considerable strain on the legal profession.

7.51 In this context, the problem of lack of a fully operative interpreter service is likely to compound problems, to the point where it is difficult to see to what extent the objectives of the law are met, whether as punishment or even as a deterrent.

Interpreters

7.52 From evidence provided to the Committee, it appeared that access to justice through understanding the nature of mandatory sentencing could be severely limited because of language problems and the very limited availability of interpreters. For many indigenous people especially in more remote areas, English can be a second, third or other language. More complex concepts often do not translate easily into other languages, as well as also being contradictory to the understanding of how things work.[77] Central Australian Aboriginal Legal Aid Service[78] stated that public and media discussion of mandatory sentencing has not been in a form or language which has been easily accessible to the Aboriginal community.

7.53 A number of submissions gave anecdotal evidence of people in the criminal justice system with little English.[79] The Miwatj Aboriginal Legal Service[80] refers to an *Inquiry into the Provision of Interpreter Services in the Northern Territory* in the first half of last year. NAALAS [81] listed the results of a study of a sample of approximately 400 (40-50%) of its 'mandatory sentencing' cases between 8 March 1996, (before sentencing began) and 30 August 1999. This showed that of the people caught by mandatory sentencing 76% were from remote communities, 70% committed the offences in remote communities, 68% had a first language other than English and 63% had an education level less than year 8.

7.54 The effect of this situation, though presumably not peculiar to mandatory sentencing, is that people will not have the chance to understand the reason for their conviction. Therefore the likelihood of sentencing being a deterrent is minimised.

---

74 See above, Paragraph 7. 30.

75 See *Submission No. 13*, Associate Professor John Willis, vol. 1, pp. 74-75.

76 See *Submission No. 22*, Law Society of the Northern Territory, vol. 1, p. 173.

77 See *Submission No.25*, North Australian Aboriginal Legal Aid Service, vol. 2, pp. 287-288.

78 *Submission No. 49*, Central Australian Aboriginal Legal Aid Service, vol. 3, p. 591.

79 See, for example, *Submission No. 25*, North Australian Aboriginal Legal Aid Service, vol. 2, p.288.

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

81 *Submission No. 25*, North Australian Aboriginal Legal Aid Service, Vol. 2, p. 263.

7.55 It is also obvious that in any case where a person may be unable to understand the issues and the consequences of action, the standing of the court case must be limited. The best efforts of a lawyer will not necessarily allow for justice to be done.

7.56 The Alice Springs Youth Accommodation and Support Services[82] noted that the Northern Territory Government disclaims responsibility for providing interpreters for Aboriginal people. However, this information contrasted with that provided by government representatives. According to the Government, the issue of interpreters was a crucial one, and the Government had taken a lead in this area:

> The Territory leads the field in [respect of interpreters]. A full interpreters trial was run in 1997 with the benefit of Commonwealth seeding money, and that led to an Aboriginal Interpreters Referral Service, which is now in operation; it is a type of registry system. Research is presently being done on training and an extension of that service.
>
> There are several problems but the major one is that it is very, very expensive. The committee would be aware of the thin population spread over an enormous land area and the vast diversity of Aboriginal languages to take into account.[83]

7.57 The Government representative also noted that the problems surrounding the lack of interpreters are overcome to some extent by the work of legal aid services; thus, charged persons who did not understand English were not necessarily at a disadvantage.[84]

7.58 Representatives of the Western Australian Government noted that interpreters were needed for some court hearings,[85] and later provided information on the Aboriginal interpreter service:

> As a result, there are now 27 NAATI accredited Aboriginal people available to work as interpreters at a para-professional level …
>
> It is intended that, over time, a sufficient pool of Aboriginal people from different language groups will be developed to provide interpreter services for the Ministry of Justice and other government agencies.[86]

---

82 *Submission No. 70*, Alice Springs Youth Accommodation and Support Services, vol. 4, p. 766.

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

84 *Transcript of evidence*, Northern Territory government, p.39. Further information on the interpreting service in the Northern Territory was provided in Submissions 91 B and 91 F from the Northern Territory Government. Criticism of government evidence was made in Submission No. 112, Aboriginal Interpreter Working Group.

85 *Transcript of evidence*, Western Australian Ministry of Justice, p. 113.

86 *Submission No. 96A*, Western Australian Ministry of Justice, p. 2.

Appeal to international bodies

7.59 Another issue raised by some witnesses was that the Australian legal system may eventually be revealed as inadequate if cases are able to be heard by bodies such as the United Nations Human Rights Committee:

> In the event that the Commonwealth fails to resolve the inconsistency, there is little doubt that persons adversely affected by mandatory sentencing laws, having exhausted domestic remedies, will take their cases to the Human Rights Committee in Geneva and other international forums. This will be deeply embarrassing to Australia.[87]

7.60 This point was also made by other submissions. The Northern Territory Bar Association, for example, stated that the provisions 'may well fall for determination in the international Human Rights Committee as being in breach of human rights, especially the human rights of juveniles.'[88]

87 *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 112.

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