CHAPTER 8

SUMMARY AND CONCLUSIONS

8.1 In examining the issue of mandatory sentencing of juveniles in Western Australia and the Northern Territory, the Committee has carefully considered the substantial amount of submissions, correspondence and oral evidence received. Most of this referred to the Northern Territory, there being less discussion of the Western Australian legislation.

8.2 The Committee was asked to consider a number of issues as an integral part of determining whether mandatory sentencing legislation for juveniles should be retained in Western Australia and the Northern Territory. These issues include the power of the Commonwealth in respect of State or Territory legislation, and the extent to which obligations incurred under international law are binding.

8.3 The Committee has concluded that:

- The Commonwealth has the power to override Territory legislation and, under certain conditions, has previously done so. The most notable example is the use of the Commonwealth *Euthanasia Laws Act 1996* to override the *Northern Territory Rights of the Terminally Ill Act 1995*, by which the legislative power of the territories under their Self-Government Acts was limited. In respect of Territories, the Commonwealth has the power to override Territory legislation under S122 of the Constitution.

- International obligations incurred through ratification of treaties and conventions are binding in international law, and it is the Commonwealth that has the ultimate responsibility for ensuring that these obligations are met. The Commonwealth, under S51(xxix) of the Constitution, can use the external affairs power to regulate a subject matter which is otherwise within the jurisdiction of the States and Territories. Under S 109 of the Constitution, any conflict between State and Commonwealth laws is resolved in the Commonwealth's favour.

- Where State legislation contravenes international obligations, the Commonwealth is responsible for ensuring that these obligations are met. With respect to the Northern Territory mandatory sentencing legislation as it affects juveniles, the Committee is of the view that the legislation contravenes Australia's international obligations. With respect to Western Australian mandatory sentencing legislation as it affects juveniles, the Committee believes that the practice, as distinct from the legislation, is less obviously in contravention. Nonetheless, action to address the potential for the law to contravene obligations is required.

8.4 The Committee understands mandatory sentencing laws to be those which require courts to impose a minimum sentence. However, a court which imposes a

sentence or other punishment greater than the minimum is not imposing a mandatory sentence but exercising its own judgment. The Northern Territory Government rightly understood this point in its evidence. The social impact evidence given by the critics of mandatory sentencing did not always distinguish between the number of people on whom mandatory sentences were imposed, and the number of people convicted of offences for which the courts were required to impose a minimum sentence. This is not to say by any means that that criticism was unjustified. As is indicated in the report, people making submissions to the Committee, and the Committee itself, suffered from the failure or inability of the Northern Territory Government to produce relevant figures until the hearing in Darwin on 2 February 2000. Even then, the Northern Territory Government suggested a 5% margin for error. By necessity, witnesses and the Committee had to rely on anecdotal evidence or inference from general statistics or samples such as that undertaken by the North Australian Aboriginal Legal Aid Service (NAALAS). This was unsatisfactory.

8.5 The only conclusion that can be drawn from the statistical information produced by the Western Australian Government and (belatedly) by the Northern Territory Government in relation to the people subjected to mandatory sentencing is that its social impact may not be as great as some of its critics believed. Contrary to this, the Committee heard evidence of case after case where the social impact on individual children was terrible. It has been stated that mandatory sentencing leads to indigenous children being imprisoned at the rate of up to 9:1 relative to non-indigenous children.[1]

8.6 The effect of sentencing practices *generally* is not a matter that the Committee has been asked to consider: it has been asked to consider the social impact of *mandatory* sentencing.

8.7 As the Northern Territory Government itself warned, the statistics produced by it were summary and preliminary and subject to a variation of 5%. The Committee was told that more complete, reliable and detailed figures would be available later this year. For the time being, however, they are the best that are available. Having regard to the pre-mandatory sentencing figures relating to women and property offences, the conclusion by the Northern Territory Government that mandatory sentences were only imposed on 22 women may be suspect. The Northern Territory Government provided figures to explain the number of juveniles sentenced under the mandatory sentencing laws. The Government indicated that 113 juveniles had been convicted of mandatory sentencing property offences and 139 *"custody episodes"* had been ordered by the Courts for those offences. Only 35 were for the mandatory minimum period it was said. The Committee was originally told not to assume that the other 104 *"custody episodes"* were more severe sentences,[2] but according to further information,[3] around

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1 *Transcript of evidence*, Senator Brown, p. 49.

2 *Submission No. 91D*, Northern Territory government, p. 1. The Committee awaits further details of numbers of juveniles who were sentenced as adults (17+) for offences committed as juveniles.

3 *Submission No. 91E*, Northern Territory Government, p.1.

90% of the other custody episodes were more severe than the mandatory minimum sentence.

8.8 The Western Australian legislation requires a court to 'sentence a person to imprisonment or detention for an offence committed as a child'. The position established by the Children's Court and, apparently now accepted by the Government, is that, having regard to the other legislation, the court has a choice between imprisonment or detention on the one hand and a supervisory order of some kind on the other.

8.9 The situation with the Northern Territory 'first strike adult' and 'second strike juvenile' mandatory sentencing legislation may be different because imprisonment or detention is the first choice for the court. However, there is not even a second choice for the court in the case of 'second or third strike adult' or 'third strike juvenile' prosecutions; there is only imprisonment or detention.

8.10 So far as the Convention on the Rights of the Child itself is concerned, although the Committee has not had time, and was not required, to look at the general implications of the Convention for Australian jurisdictions, a number of issues demand further investigation. The Western Australian legislation provides for 16 and 17 year olds to be removed from detention centres and placed in prisons for the safety and welfare of other detainees and staff. Although the practice may be otherwise, the legislation appears difficult to justify under Article 37 (c) which requires States Parties to ensure that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so.

8.11 Another provision of the Convention which requires consideration is Article 40.2(b)(vi) which requires States Parties to ensure that every child alleged as, accused of, or recognised as, having infringed the penal law has the guarantee to have the free assistance of an interpreter if the child cannot understand or speak the language used. The Northern Territory Government has indicated that it is attempting to raise the standards of interpreter services available to Aboriginals.[4] Conflicting evidence was provided about interpreter services,[5] and this is not a matter the Committee can determine. However, it does believe that persons being charged must understand the matters they are facing. An appropriately resourced interpreter service must be a high priority for the Northern Territory.

8.12 Article 40.4 provides that a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and 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

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4 See *Transcript of evidence*, Northern Territory government, p. 39.

5 *Submission No. 91F*, Northern Territory government, p. 1, which responds to statements made in *Submission No. 112*, Aboriginal Interpreter Working Group, pp.2-3.

proportionate both to their circumstances and the offence. Although one can expect the Northern Territory Government to dispute the issue, it seems to the Committee that the 'one size fits all' approach towards 'third strike juvenile' property offenders cannot be proportionate to the circumstances of all offenders and all offences.

8.13 The Committee suggests that more work be done on alternatives to mandatory sentencing, such as diversionary programs, victim conferencing and the development of judicial sentencing guidelines. It would appear that the Northern Territory Government has now accepted this by its announcement on 15th February 2000 of additions to diversionary programs. For these to be effective, there has to be adequate funding. The question of funding of diversionary programs was beyond the Committee's terms of reference.

8.14 The Committee believes that the Commonwealth should have responded to and acted upon the recommendations of the Joint Standing Committee on Treaties' 17th report, *"United Nations Convention on the Rights of the Child"*, many of which bear directly on the issues examined by the Committee. While those recommendations remain relevant, the Committee is not inclined to recite them here.

8.15 The Committee is conscious of the differences between the legislation in both jurisdictions and of the apparent safeguards that are now present in the practices of the Western Australian Children's Court - practices that appear to have the acceptance of the Western Australian Government. Nevertheless, while mandatory sentencing remains "on the books" in Western Australia, regardless of the safeguards which have developed to ameliorate the harsher effects of these laws, there is a case for legislative action by the Commonwealth.

8.16 The Committee is convinced by the submissions and argument that mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and it contravenes the Convention on the Rights of the Child. Whilst there are differences between the Western Australian and Northern Territory mandatory sentencing regimes, the Committee accepts the views as expressed by the Law Council of Australia -'we are comparing bad with bad and we are trying to prioritise badness.'[6]

8.17 The Committee would prefer that the respective governments take action to *"put their own houses in order"* in accord with national objectives and obligations, but it is not convinced that this will occur. The Committee is mindful of the recent comments by the Western Australian Premier, Richard Court,[7] the Western Australian Attorney-General, Peter Foss[8] and the Northern Territory Chief Minister, Denis Burke, MLA.[9] The Committee is also aware of comments by the Leader of the

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6 *Transcript of evidence*, Law Council of Australia, p. 177.

7 Interviewed on *AM*, ABC Radio National, Thursday 17 February 2000

8 Interviewed on *AM*, ABC Radio National, Tuesday 15 February 2000

9 Northern Territory Parliament Hansard, 22 February 2000

Opposition in Western Australia, Dr Geoff Gallop[10] and the Leader of the Opposition in the Northern Territory, Ms Claire Martin,[11] about Commonwealth intervention on this matter.

8.18 The Committee is also aware of a recent advertising campaign on the mandatory sentencing regime, financed by the Northern Territory Government.

8.19 The Committee does not believe that the Northern Territory and Western Australian Governments will act on their own volition to resolve the issue.

Recommendation

The Committee therefore **recommends** that the Bill be passed by the Parliament**.**

Senator Jim McKiernan

Chair, References Committee

March 2000

10 Interviewed on *AM,* ABC Radio National, Friday 25 February and Saturday 26 February 2000.

11 Interviewed on morning program, ABC Radio 8DDD (Darwin), Friday 25 February 2000.