

Australia

Attention in Australia in late 1999, early 2000, was focused on the issue of mandatory sentencing. The disproportionate effects that it had on indigenous people, particularly juveniles, was noted by the Committee on the Rights of the Child in 1997, and reaffirmed by the Committee for the Elimination of All Forms of Racial Discrimination in March 2000. A mandatory minimum sentence also places unwarranted restrictions on judicial discretion and is a threat to independent judicial decision making. These laws were widely condemned by members of the judiciary and human rights groups.

The Commonwealth of Australia is a federated union of six states and three territories, formed in 1901. It has a long history of representative parliamentary democracy at the federal and state level. A written federal Constitution provides for a separation of powers and it cannot be amended except by an affirmative vote by an overall majority of voters, and by a majority of voters in the majority of states.

Article 61 of the Constitution vests the executive power of the Commonwealth in the Queen of the United Kingdom of Great Britain and Northern Ireland, which is exercisable by the Governor-General of Australia as the Queen's representative. The Governor-General is appointed by the Queen on the advice of the Prime Minister. The Governor-General appoints a Prime Minister who, by convention, must be the parliamentary leader of the party with a majority of seats in the House of Representatives.

A Federal Executive Council, consisting of all ministers and the Prime Minister, is chosen by the Governor-General to advise him/her, and s/he is obliged to act on its advice. The ministers are all members of the party with the majority in the House of Representatives. In reality the Prime Minister and the Cabinet, a senior group of ministers, wields executive power, with the Governor-General playing a largely ceremonial role. The current Prime Minister is Mr John Howard, who was elected for a second term in 1998.

The legislative power of the Commonwealth is vested, by Section 1 of the Constitution of Australia, in the Queen and a bicameral federal parliament consisting of the House of Representatives and a Senate. The House of Representatives consists of members directly chosen in proportional elections by the general public every three years. Currently there are 148 members of the House of Representatives. The Senate is composed of 76 representatives directly elected by the voters of the states and territories. Each state is represented by six senators who serve for six year terms, and the Northern Territory and Australian Capital Territory by two senators each who serve three year terms. The federal parliament has the power to legislate on the subject matters enumerated in Section 51 of the Constitution.

Australia has a federal and state judicial system. The federal judicial power is vested by Section 71 of the Commonwealth Constitution in the High Court of Australia, in other federal courts as parliament creates and in any other courts in which the parliament invests federal jurisdiction. Currently the federal court structure consists of the High Court, Federal Court, Family Court and the Industrial Relations Court of Australia. Judges in the federal judiciary are appointed by the Governor General, acting on the advice of the Federal Executive Council. They hold office until the age of 70 years and can only be removed on the grounds of proved misbehaviour or incapacity.

In November 1999, a referendum was held to determine whether Australia should become a republic. The proposal was defeated with 55% of the population voting to retain the monarchy. It was widely reported that the failure of the referendum was due to dissatisfaction with the particular model for a republic, the replacement of the Queen with a president elected by the parliament, proposed to the public.

Mandatory Sentencing

The CIJL has often raised concerns over mandatory sentencing requirements in various countries, such as the United States of America, the United Kingdom and Canada, that act as an impediment to judicial independence.

In Australia, several states have developed mandatory sentencing regimes, usually for serious repeat offenders. The Northern Territory and Western Australia use mandatory sentences for certain property offences which apply to both adult and juvenile offenders.

Northern Territory

On 8 March 1997, the Northern Territory introduced mandatory sentencing for property offences. The legislation was amended in 1999 to provide for further judicial discretion in relation to certain offences.

Section 78A of the Sentencing Act 1995 (NT) establishes the mandatory sentencing regime for property offences committed by adults, i.e. those 17 years and older. Property offences are defined by Section 3(1) of the act to mean those offences specified in Schedule 1, committed after 8 March 1997. Schedule 1 defines them as various offences specified by the Criminal Code including, inter alia, robbery, assault with intent to steal, unlawful entry into buildings, receiving stolen property or general criminal damage. Stealing is also included except where the offence occurred at premises, or a place, where goods are sold, the offender was lawfully in the premises or place, or the offender was not employed at the premises or place at the time of the offence.

Section 78A provides for three categories of sentencing for offenders:

- those found guilty of a first property offence, in the absence of exceptional circumstances, must be convicted and imprisoned for not less than 14 days: s78A(1);
- those found guilty of a property offence, and have previously been sentenced under this section, must be convicted and imprisoned for not less than 90 days: s78A(2);
- those found guilty of a property offence, and have previously been sentenced under this section on two previous occasions, must be convicted and imprisoned for not less than 12 months: s78A(3).

Under s78A(6B), in the case of exceptional circumstances the court can impose any sentence generally available under the act. Exceptional circumstances include the offence being trivial; the offender is of good character and there were mitigating circumstances, excluding drug and alcohol intoxication; and the offender had made reasonable attempts at restitution or co-operated with police in the investigation of the offence. The onus of proof for this lies with the offender and is only available for first offences.

Persons under the age of 17 are dealt with by the Juvenile Justice Act 1995 (NT). Section 53AE(1) provides that juveniles between the ages of 15 and 17 who commit property offences, as defined above, are covered by the mandatory sentencing provisions. Generally, a wide range of sentencing options are given under s53(1) to courts for juveniles who have committed their first offence. These include, inter alia, discharge, adjournment for 6 months, a fine, release subject to good behaviour and other forms of conditional release or imprisonment. However, under the mandatory sentencing provisions, if a court establishes the guilt of a juvenile for a property offence, the court must:

- if the juvenile has previously been dealt with under s53(1) for a property offence, order the juvenile to participate in a diversionary program, or detain the juvenile for not less than 28 days: s53AE(2);
- if the juvenile has failed to participate in a diversionary program or is found guilty of other offences, the court must record a conviction and order a detention period of not less than 28 days: s53AE(5).

Diversionary measures include diverting the offender into employment, training, victim/offender counselling or other development programs.

Western Australia

The mandatory sentencing regime was introduced into Western Australia for property offences on 14 November 1996. The Western Australian provisions only apply to the crime of home burglary.

Section 401 of the Criminal Code (WA) provides that a court must impose a minimum sentence of at least 12 months imprisonment on a person 18 years or older who has previously been convicted on two occasions of home burglary. The previous convictions do not have to have involved imprisonment; a finding of guilt and the imposition of some other punishment is sufficient. Convictions under the age of 18 years are included as a prior offence.

Persons 18 years or younger are usually dealt with by the Young Offenders Act 1994 (WA). Section 46 provides that the court, when sentencing young persons, is to consider the nature of the offence, the history and cultural background of the offender and dispose of the matter in a way that is proportionate to the seriousness of the offence and is consistent with the treatment of other young persons who commit offences. Section 46(5a) states that where a mandatory penalty is required to be imposed for an offence the court is not obliged to impose it on a young person.

Section 401(4)(b) requires the court to impose a sentence of at least 12 months imprisonment or detention on a young offender who has been convicted for a home burglary for a third time, and explicitly excludes the operation of s46(5a). In a decision by the President of the Children's Court, Justice Fenbury, on 10 February 1997, it was ruled that a court may use Sections 98 and 99 of the Young Offenders Act 1994 (WA) to make an intensive youth supervision or a conditional release order in lieu of the sentence imposed by Section 401(4)(b). The Supreme Court of Western Australia also decided in "P"(A child) v The Queen SCL 970580 that convictions that occurred more than two years prior to a current offence cannot be used towards a mandatory offence.

Judicial Discretion

The requirement to impose a mandatory sentence on an offender constitutes a threat to the independence of the judiciary. Mandatory sentencing laws are often said to be enacted in response to, as stated by a Northern Territory government submission to the Senate Legal and Constitutional References Committee inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, "a perception that sentences imposed by criminal courts did not properly reflect the seriousness with which the community viewed these offences." This shows that these laws are aimed at limiting judicial discretion.

A mandatory minimum sentence deprives judges of choice, except in imposing a higher penalty. Irrespective of the relative seriousness of the offence or any extenuating circumstances a judge is required to impose an order for detention or imprisonment of a predetermined length. For less serious offences this removes any proportionality between the punishment and the crime. Further, judicial discretion is limited at the appellate level as those convicted of an offence are precluded from appealing the length of their sentence, except for an amount imposed over the mandatory minimum.

Numerous examples of the arbitrary effect of these sentencing laws were highlighted during the public debate on mandatory sentencing. These included:

- a 24 year old indigenous mother was sentenced to 14 days in prison for receiving a stolen \$2.50 can of beer;
- a 29 year old indigenous man was imprisoned for a year after he wandered into a backyard when drunk and took a towel worth \$15. It was his third minor property offence;
- an 18 year old man was sentenced to 90 days prison for stealing 90 cents from a motor vehicle;
- a 15 year old girl was detained for 28 days for unlawful possession of a vehicle in which she was a passenger.

In the case of juveniles, Australia is required by Article 3(1) of the Convention on the Rights of the Child (CRC), in all actions concerning children, to place the best interests of the child as a primary consideration. Further, Article 37(b) of the CRC also provides that detention or imprisonment of a child shall only be used as a measure of the last resort and for the shortest period of time. By having a mandatory requirement to detain for a minimum period judges are precluded from determining whether this is the appropriate treatment in the circumstances.

Several UN human rights treaty monitoring bodies have expressed concern about mandatory sentencing. In 1997, the Committee on the Rights of the Child, in its Concluding Observations (CRC/C/15/ADD.79) on Australia's initial report submitted under the Convention on the Rights of the Child, expressed concern over the mandatory sentencing laws. Two points in particular were addressed:

- the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them;

- the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.

In March 2000, the Committee for the Elimination of All forms of Racial Discrimination also expressed concern regarding the mandatory sentencing laws. The Committee stated in its Concluding Observations (CERD/C/56/Misc.42/rev.3) that:

mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the state party's obligations under the Convention and recommends the state party to review all laws and practices in this field.

During the debate in Australia many serving and former members of the judiciary, bar associations and law societies, and legal academics voiced concern over the mandatory sentencing laws. On 17 February 2000, former High Court Chief Justice, Sir Gerard Brennan, stated that "sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and the offender have all to be taken into account in imposing a just penalty." The Law Society of the Northern Territory was concerned about the shifting of discretion from the judiciary to the police and prosecutors and called mandatory sentencing laws "an unwarranted attack on the independence of the judiciary."

However it is a concern that the Attorney General criticised four judges of the Supreme Court of New South Wales for publicly stating their opposition to the mandatory sentencing laws. Mr Williams stated that "judges should refrain from commenting on politically contentious issues which are properly the domain of the democratic political process." Principle 8 of the UN Basic Principles on the Independence of the Judiciary reaffirms that judges, like all others, are entitled to the freedoms of expression and belief.

Mandatory sentencing laws also have other negative effects on the administration of justice. By restricting discretion at the judicial level, discretionary decision making is shifted to lower levels. This enables prosecutors or police to use the future imposition of a mandatory sentence as a bargaining tool. Prosecutors can offer those accused of an offence a lesser charge that does not entail a mandatory sentence in exchange for a plea of guilt. This exercise of discretion is less transparent and offers less guarantees that it will be applied in an equal manner. Judicial sentencing procedures, however, are public, making judges accountable for their reasoning and decisions.

The certainty of a mandatory sentence also places extra burdens on the judicial system. When defendants are certain to receive a minimum sentence if convicted for a particular crime, they are more likely to contest the case. This creates delays and places an extra financial burden on the court system.

One final concern is that mandatory sentencing encourages judges to attempt to circumvent the sentencing laws in order to avoid harsh or disproportionate outcomes in individual cases. This is evidenced by the development, by the President of the Children's Court in Western Australia, of conditional release orders. These orders are not provided for explicitly in the Young Offenders Act 1994 (WA), but the court created them by combining an intensive youth supervision order with a suspended period of detention. The court reasoned that as

Section 401(5) of the Criminal Code (WA) only provided that mandatory sentences of imprisonment imposed on juveniles under s401(4)(b) may not be suspended, the court could suspend any period of detention, other than prison, imposed. Although this development has been accepted by the Western Australian Government it illustrates that judges may feel forced to engage in restrictive interpretation in order to do justice in a case.