

BRIEFING PAPER

MANDATORY SENTENCING AND HOW IT CONTRIBUTES TO THE INCARCERATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN WESTERN AUSTRALIA

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

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MANDATORY SENTENCING AND HOW IT CONTRIBUTES TO THE INCARCERATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN WESTERN AUSTRALIA¹

Background

For almost 25 years, mandatory sentencing has been used by successive governments in Western Australia (WA) as a ‘populist approach to sentencing’² to counter media hysteria, attract voter support³ and to give the perception of being ‘tough on crime’.⁴ These laws impose minimum sentences for certain offences, preventing judges from considering the personal circumstances and mitigating factors of each case.⁵ This trend continues with the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015 (Act)*.

Mandatory sentencing laws raise serious concerns as to the WA Government’s compliance with the ‘separation of powers doctrine’⁶ and international human rights law, especially in relation to their disproportionate impact on Indigenous people, and particularly Indigenous young people.⁷

2009 Assaulting Public Officer laws

In 2009 following the assault of Police Constable Butcher,⁸ which left him paralysed on his left side, and with permanent brain injury⁹, the *Criminal Code Amendment Act 2009 (WA)* was passed, aimed at reducing attacks on public officers, including police¹⁰ (later amended to include Youth Custodial Officers¹¹). The amendments to sections 297 and 318 of the *Criminal Code* applied a mandatory minimum term of 6 to 12 months imprisonment for adults, and 3 months for persons aged over 16.¹² Under the regime, terms of imprisonment could not be suspended.¹³

2015 Home Burglary and Other Offences Act

Acting on its 2013 election promise to be ‘tough on crime’ to address the ‘escalating burglary rate’,¹⁴ in 2014 the Barnett Government introduced the *Home Burglary Bill*¹⁵, now the *Criminal Law Amendment*

(Home Burglary and Other Offences) Act 2015 (WA). Amongst other things, the amendments changed the counting rules for determining ‘repeat offender’ status of 16 and 17-year-olds, ensuring that multiple offences dealt with in court on one day would no longer be counted as a single ‘strike’.¹⁶

Under the changes, a 16 or 17-year-old charged with three counts of home burglary will be detained or imprisoned for one year,¹⁷ or subject to a Conditional Release Order.¹⁸ The Act also introduced mandatory minimum three year terms of detention for 16 and 17-year-olds for certain offences committed in the course of an ‘aggravated’ home burglary.¹⁹

The Disproportionate Impact

On their face, mandatory sentencing laws do not seem overtly discriminatory.²⁰ However, these laws are undeniably discriminatory in their effect on Indigenous people, and especially Indigenous young people.²¹

From 2000 to 2015, WA has consistently had one of the highest rates in Australia of imprisonment of Indigenous people.²² In particular, Indigenous young people in WA are detained at rates far higher than the national average,²³ are heavily overrepresented at every stage of the youth justice system, and most overrepresented at the more punitive stages of the system.²⁴ In the June quarter of 2019, Indigenous young people in WA were 49 times more likely than non-Indigenous young people to be in detention.²⁵

A 2001 review found that mandatory sentencing disproportionately impacted Indigenous people by the selection of offences targeted by the legislation (which were more likely to be committed by Indigenous people), and by choices made by police and prosecuting authorities about the processing of individual cases.²⁶ The review found that 81% of the 119 young people sentenced under the three-

strikes burglary laws were Indigenous.²⁷

The then President of the Children's Court, His Honour Judge Denis Reynolds, noted that 37 of the 93 sentenced young people in detention in WA in May 2012 were there due to third strike home burglaries.²⁸ It is not clear how many of these 37 third strike offenders were Indigenous young people, however, 63 of the 93 young people in sentenced detention in May 2012 were Indigenous.²⁹

Both the former WA Children's Court President³⁰ and The Hon Wayne Martin AC, former Chief Justice of Western Australia,³¹ have opined that the Act will heighten the problem of incarceration of Indigenous people, particularly young people.

International Human Rights Implications

International bodies have suggested that the disproportionate impact of mandatory sentencing in Australia is discriminatory. Article 1(1) of *Convention on the Elimination of All Forms of Racial Discrimination*³² (CERD) prohibits any distinction on the basis of race that has either the purpose or effect of restricting the enjoyment of human rights. The Committee on the Elimination of Racial Discrimination has recommended that Australia abolish its mandatory sentencing regimes on the basis that the laws may constitute direct or indirect discrimination.³³ The Committee noted that the laws 'appear to target offences that are committed disproportionately by Indigenous peoples', especially for young people, which leads to a 'racially discriminatory impact on their rate of incarceration'.³⁴

Similarly, the Committee Against Torture has voiced concerns about Australia's compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*³⁵ (CAT). The Committee highlighted that mandatory

sentencing 'continues to disproportionately affect Indigenous people'³⁶ and recommended Australia abolishes the laws.³⁷

In 2012, the Committee on the Rights of the Child expressed concern that mandatory sentencing legislation in WA applied to persons under 18 and reiterated its recommendation that the laws be abrogated.³⁸ Article 37 of the *Convention on the Rights of the Child*³⁹ (CRC) provides that State parties must ensure that the 'arrest, detention, or imprisonment of a child... shall be used only as a measure of last resort and for the shortest appropriate time'.

Mandatory sentencing also conflicts with foundational justice principles in the *International Covenant on Civil and Political Rights*⁴⁰ (ICCPR). Article 14(5) sets out the right of every person to have a conviction or sentence reviewed by a higher tribunal according to law. By its very nature, mandatory sentencing is not reviewable.⁴¹ Article 9(1) of the ICCPR states that detention must not be 'arbitrary'. The Human Rights Committee has reported that mandatory imprisonment legislation in WA has often led to punishments that were 'disproportionate to the seriousness of the crime committed' and raise 'serious issues of compliance' with the ICCPR.⁴²

Towards Community-Led Justice

Mandatory sentencing regimes are contrary to international human rights law and, arguably, the separation of powers. Such laws also disproportionately impact Indigenous people, especially young people.

The Law Society of Western Australia recommends that mandatory sentencing laws that apply to young people be repealed, and that the government instead take a 'justice reinvestment' approach.⁴³

The Law Society is opposed to mandatory sentencing in any form.

The impact of mandatory sentencing laws:⁴⁴

- Mandatory sentencing laws are undeniably discriminatory in their effect on Aboriginal and Torres Strait Islander peoples;
- These laws result in harsh and disproportionate sentences where the punishment may not fit the crime;
- These laws increase the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- Mandatory sentencing laws wrongly undermine the community's confidence in the judiciary and the criminal justice system as a whole;
- These laws remove discretion from the judiciary and dangerously displaces it to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors; and
- These laws result in significant economic costs to the community, both in terms of increasing imprisonment rates, and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime.

NOTES

1. This policy position paper is largely adapted from 'Tough on Crime: Discrimination by another name', by Tammy Solonec.
2. Megan Davis, 'Mandatory Sentencing and the Myth of the Fair-Go' (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra, 21-22 June 2001), 2.
3. Andrew O'Connor, 'Crime looms as a political battleground as Western Australia heads down long road to next election' *ABC News*, Online, 2 March 2015, <<http://www.abc.net.au/news/2015-03-01/crime-looms-as-a-political-battleground-ahead-of-wa-election/6269540>>.
4. Richard Court, 'Safer communities important part of Coalition's plan for the future' (Media Release, 28 January 2001); Michelle Roberts, 'WA takes tough action on serious offenders' (Media Release, 16 April 2007); Liza Harvey, 'Home invasions and burglary laws top priority' (Media Release, 19 February 2015).
5. Brett Le Plastrier, 'Western Australia's Mandatory Sentencing Laws and Australia's International Legal Obligations' (2005) 3(2) *Dialogue e-Journal* 1, 5.
6. A Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7(2) *Australian Journal of Human Rights* 21, 25-26.
7. Julian Cleary, *Three Strikes and You're Out: Mandatory Sentencing in WA* (24 February 2015), Amnesty International Australia <<http://www.amnesty.org.au/Indigenous-rights/comments/36651/>>.
8. 'Police officer in coma after pub brawl,' *Sydney Morning Herald*, Online, 5 February 2008, <<http://www.smh.com.au/national/police-officer-in-coma-after-pub-brawl-20080205-1q9h.html>>.
9. *The State of Western Australia v McLeod* [2009] WADC 35, [2], [13].
10. Explanatory Memorandum, Criminal Code Amendment Bill 2008 (WA), 1.
11. See Criminal Code Amendment Bill (No 2) 2013 (WA).

Recommendation

The Law Society of Western Australia recommends that mandatory sentencing laws that apply to young people be repealed, and that the government instead take a 'justice reinvestment' approach.

A justice reinvestment approach includes:

1. investing in Indigenous-led and culturally relevant prevention; and
2. intervention and diversionary programmes that target at-risk young people and empower communities.

Taking a strategic and holistic approach like this would bring Western Australia in line with international obligations and will make communities stronger and safer.

12. *Criminal Code Amendment Act 2009* (WA), ss 4, 5.
13. *Ibid.*
14. R Spooner, *Barnett's tough on crime promise*, *WAtoday* (6 February 2013) <<http://www.watoday.com.au/wa-news/state-election-2013/barnetts-tough-on-crime-promise-20130206-2dy7n.html>>.
15. Lisa Harvey and Michael Mischin, 'State Govt delivers toughest home invasion laws' (Media Release, 12 March 2014).
16. *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA), s 20.
17. See *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA), s 21(5).
18. See *DPP v DCJ*, above n 25.
19. *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) ss 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.
20. Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' [1999] *University of New South Wales Law Journal* 52.
21. See Chris Cunneen, 'Mandatory Sentencing and Human Rights' (2002) 13(3) *Current Issues in Criminal Justice* 322-327.
22. Steering Committee for the Review of Government Service Provision, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016), Tables 4A.13.1 and 4A.13.4.
23. *Ibid.*
24. Amnesty International, *There is always a Brighter Future: Keeping Western Australia's Indigenous kids in the community and out of detention* (2015), 13, <<http://www.amnesty.org.au/Indigenous-rights>>.
25. Australian Institute of Health and Welfare, 'Youth Detention Population in Australia 2019' (Bulletin No. 148, JUV 131, 2020) 17 <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2019/contents/summary>>.
26. Neil Morgan, Harry Blagg and Victoria Williams, *Aboriginal Justice Council, Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (2001), 112.
27. *Ibid.*, 4, citing WA Department of Justice, *Review of section 401 of the Criminal Code* (2001), 24-25.
28. Judge Denis Reynolds, 'Youth Justice in Western Australia – contemporary issues and its future direction' (Speech delivered at Eminent Speakers Series, The University of Notre Dame, 13 May 2014), 19.
29. Amnesty International, above n 24, 38.
30. Judge Reynolds, above n 28, 8.
31. The Hon Wayne Martin AC, Chief Justice of Western Australia, 'Indigenous Incarceration Rates - Strategies for Much Needed Reform' (Lecture delivered at Law Society of Western Australia's Law Summer School, Perth, 20 February 2015), 14.
32. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Australia ratified on 30 September 1975.
33. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (19 April 2000) (CERD 2000), [16]; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (March 2005), [20].
34. CERD 2000, [16].
35. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). Australia ratified on 8 August 1989.
36. Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, 53rd sess, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [12].
37. *Ibid.*
38. Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [84].
39. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified on 17 December 1990.
40. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia ratified on 13 August 1980.
41. Cunneen, above n 53, 323.
42. Human Rights Committee, *Concluding Observations: Australia*, 69th sess, UN Doc CCPR/A/55/40 (28 July 2000), 3.
43. See *ibid.*, 20-21; also Mick Gooda, *Australian Human Rights Commission, Social Justice and Native Title Report 2014* (2014), 102-116.
44. Law Council of Australia, 'Mandatory Sentencing Policy', May 2014, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Policy_Position.pdf



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