"TOUGH ON CRIME": DISCRIMINATION BY ANOTHER NAME
THE LEGACY OF MANDATORY SENTENCING IN WESTERN AUSTRALIA

by Tammy Solonec

INTRODUCTION

For almost 25 years, mandatory sentencing has been used by successive governments in Western Australia ('WA') as a 'populist approach to sentencing'[1] to counter media hysteria, attract voter support[2] and to give the perception of being "tough on crime".[3] These laws impose minimum sentences for certain offences, preventing judges from considering the personal circumstances and mitigating factors of each case.[4] This trend continues with the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA) ('Home Burglary Bill') currently before the WA Parliament.

Mandatory sentencing laws raise serious concerns as to the WA Government's compliance with the 'separation of powers doctrine'[5] and international human rights law, especially in relation to their disproportionate impact on Indigenous people, particularly Indigenous young people.[6]

1992 SERIOUS REPEAT OFFENDER LAWS

The first mandatory sentencing regime in WA was introduced after a spate of car thefts and high-speed car chases in the early 1990s.[7] The events were sensationalised in the media causing community concern that culminated in a 20 000 strong 'Rally for Justice',[8] led by radio host Howard Sattler.[9]

On Christmas Eve in 1991, a pregnant woman and her infant child were killed after a 14 year-old boy with 200 previous convictions hit them while driving a stolen car.[10] The Lawrence Government responded by introducing the *Crimes (Serious and Repeat Offenders) Act 1992* (WA), which was passed within three months.[11] The legislation targeted 'repeat offenders' of violent crimes[12] who had, within the preceding 18 months, accumulated three or more violent offence convictions, or six or more non-violent offence convictions.[13] Such offenders faced a mandatory minimum sentence of 18 months in custody, followed by indeterminate detention.[14]

The Act was criticised as a knee-jerk response to moral panic,[15] with a WA Crime Research Centre evaluation showing that the legislation had no impact on reducing car theft.[16] The laws ceased to have effect in 1994.[17]

1996 THREE STRIKE HOME BURGLARY LAWS

In response to community concern about the 'prevalence of home invasion offences', the Court Government introduced mandatory minimum sentences for repeat home burglary offences.[18] On the day the 1996 election was announced,[19] the *Criminal Code Amendment Act (No 2) 1996* (WA) was passed amending section 401 of the *Criminal Code* to provide that an adult or juvenile offender convicted for the third time for a home burglary must receive a minimum term of 12 months imprisonment or detention.[20] This scheme became known as the "three-strikes policy".[21]

Under the regime, courts were prohibited from suspending such sentences.[22] However in 1997, the then President of the WA Children's Court, the Hon Judge Fenbury determined that the laws permitted the imposition of a Conditional Release Order in place of immediate detention, in two cases relating to children under 15 years.[23] The decision was intensely scrutinised by government and media, who labelled it a 'loophole' that would see many escape imprisonment.[24] Later that year, Judge Fenbury stepped down as President due to emotional exhaustion.[25]

In 2001, an independent review of WA's mandatory sentencing found no evidence that the laws had deterred crime, reduced recidivism, or promoted rehabilitation.[26] A Government commissioned review in the same year also indicated that the laws had little impact on crime.[27]

2009 ASSAULTING PUBLIC OFFICER LAWS

The third incarnation of mandatory sentencing was introduced in 2009 following the assault of Police Constable Butcher,[28] which left him paralysed on his left side, and with permanent brain injury.[29] A District Court jury found the attackers had acted in self-defence,[30] which resulted in public anger and 'mistrust' of the courts.[31]

In response, the *Criminal Code Amendment Act 2009* (WA) was passed, aimed at reducing attacks on public officers, including

police[32] (later amended to include Youth Custodial Officers[33]). The amendments to sections 297 and 318 of the *Criminal Code* applied a mandatory minimum term of six to 12 months imprisonment for adults, and three months for persons aged over 16.[34] Again, terms of imprisonment could not be suspended.[35]

2014 HOME BURGLARY BILL

Acting on its 2013 election promise to be "tough on crime" and address the 'escalating burglary rate',[36] in 2014 the Barnett Government introduced the Home Burglary Bill.[37] Amongst other things, the amendments seek to change 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'.[38]

Under the proposed changes, a 16 or 17 year-old charged with three counts of home burglary will be detained or imprisoned for one year,[39] or subject to a Conditional Release Order.[40] The Bill will also introduce 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.[41]

In May 2015, Amnesty International lodged a petition with the WA Parliament asking: that the Home Burglary Bill be amended to ensure that it does not apply to young people, and that the Act be reviewed after its first year of operation, and scrutinised by a Parliamentary Committee against international human rights standards. These requests have been reiterated by 11 other organisations in a joint statement to Premier Barnett in similar terms.[42] Despite this, the Bill passed through the Legislative Assembly on 19 March 2015 and is, at the time of writing, before the Legislative Council.[43]

Mandatory sentencing laws raise serious concerns as to the WA Government's compliance with international human rights law.

THE SEPARATION OF POWERS

Mandatory sentencing may be viewed as a departure from the separation of powers doctrine,[44] which asserts that the three arms of government—the executive, legislature and judiciary—must remain independent of one another as means of accountability.[45] The legislature compromises the independence of the judiciary by imposing mandatory minimum sentences.[46] Further, to the extent that the minimum mandatory sentence is imposed, the legislature prevents judicial review of the sentence, meaning there is no check on legislative power.

While the enactment of such laws have been found to be constitutional,[47] the High Court has expressed grave concerns about parliamentary interference with sentencing and the court's traditional role in determining the proportionality of punishment in all of the circumstances.[48] Courts are best placed, as neutral arbiters, to make just decisions about punishment.[49]

THE DISPROPORTIONATE IMPACT

On their face, mandatory sentencing laws do not seem overtly discriminatory.[50] However, these laws are undeniably discriminatory in their effect on Indigenous people, especially Indigenous young people.[51] From 2000 to 2013, WA has consistently had one of the highest rates in Australia of imprisonment of Indigenous people.[52] In particular, Indigenous young people in WA are detained at rates far higher than the national average,[53] are heavily overrepresented at every stage of the youth justice system, and most overrepresented at the more punitive stages of the system.[54] Between July 2013 and June 2014, Indigenous young people in WA were 52 times more likely than non-Indigenous young people to be in detention; twice the national average.[55]

An independent 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.[56] A government review found that 81 per cent of the 119 young people sentenced under the three-strikes burglary laws were Indigenous.[57]

In May 2012, the President of the Children's Court, Hon Dennis Reynolds, noted that 37 of the 93 sentenced young people in detention in WA were there due to third strike home burglaries.[58] It is not clear how many of these were Indigenous young people, however, at that time, 63 of the 93 young people in sentenced detention were Indigenous.[59] Further, both the current Judge Reynolds[60] and Chief Justice of WA, Hon Wayne Martin,[61] have opined that the proposed Home Burglary Bill amendments will heighten the problem of incarceration of Indigenous people, particularly young people.

IMPLICATIONS FOR INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

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[62] ('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.[63] 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'.[64]

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*[65] ('CAT'). The Committee highlighted that mandatory sentencing 'continues to disproportionately affect indigenous people'[66] and recommended Australia abolishes the laws.[67]

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.[68] Article 37 of the *Convention on the Rights of the Child*[69] ('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*[70] ('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.[71] 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.[72]

TOWARDS COMMUNITY-LED JUSTICE

This article has demonstrated how mandatory sentencing regimes in WA have come about through a mixture of tragic events, sensationalised media and knee-jerk political responses, despite the regimes conflicting with international human rights obligations and the separation of powers. The article has further shown how such laws have likely disproportionately impacted on Indigenous people, especially young people; and has noted serious concerns that the disproportionate impact will be increased even further if the proposed Home Burglary Bill is passed.

Amnesty International's 2015 report *There is Always a Brighter Future*[73] recommends that mandatory sentencing laws that apply to young people be repealed, and that the Government instead take a 'justice reinvestment' approach.[74] This includes investing in Indigenous-led and culturally relevant prevention, intervention and diversionary programs that target at-risk young people and empowers communities. Taking a strategic and holistic approach like this would bring WA in line with international obligations and make communities stronger and safer.

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