Mandatory sentencing: a criminological perspective

David Brown*

Introduction

This paper will give a 'criminological perspective' on mandatory sentencing. It will, however, largely avoid the issues of the effect of mandatory sentencing provisions on the judicial process and judicial independence, as this has already been covered by Sir Anthony Mason. It will also avoid the legal issues concerning the constitutional, human rights and international law aspects of mandatory sentencing which will be covered by later speakers. The aim will be to give a brief overview of research which evaluates the effects of mandatory sentencing provisions in terms of the available evidence of whether they meet their stated aims of deterrence, selective incapacitation and the reduction of crime rates. This will be done in two parts, first in relation to the more extensive experiment in mandatory sentencing in the US which has provided some of the impetus and metaphors ('three strikes') for recent Australian developments; and second the recent mandatory sentencing provisions in Western Australia and the Northern Territory.

Evidence from both the US and Western Australia (Northern Territory is hard to assess because of the lack of proper monitoring and criminal statistics) indicates that mandatory sentencing does not produce the effects of deterrence, selective incapacitation and crime reduction which are its stated justifications and does produce a range of damaging side effects in terms of distortion of the judicial process, wildly disproportionate sentencing, additional financial and social cost and deepening social exclusion of individuals and particular communities. So what is left are the less acknowledged underpinnings of mandatory sentencing in the form of the symbolic politics of law and order, the politics of social exclusion and a displacement of racial anxieties and hostilities onto the terrain of the legal.

In fashioning this necessarily brief overview a number of sources have been heavily drawn upon, in particular the excellent work by Neil Morgan from UWA (Morgan 1995; 1999; 2000); Dianne Johnson and George Zdenkowski in their detailed report to

* Professor, Faculty of Law, University of New South Wales.

the Senate Inquiry (2000); and a number of articles appearing in 1999 in an excellent special issue of the *UNSW Law Journal*, all of which are highly recommended for further reading.

US experience

The US experience in mandatory sentencing can be divided very roughly into three categories. First, there are the various federal and State enactments from the 1950s on, mainly but not exclusively aimed at providing mandatory minimum penalties for possession and sale of narcotics. Second, there are the mandatory minimums provided in federal sentencing guidelines, which are to an extent entwined with the first category. The third category is the emergence in the 1990s of so called 'three strikes' provisions, enacted in approximately half the US States which provide extremely heavy sentences and in many cases life imprisonment for second and third repeat serious offences of violence. California is an exception in this category with a far more extensive scheme which also involves minor property and drug offences.

As in colonial Australia, mandatory sentencing in the US has a long history. 'In 1790 mandatory sentences were enacted for crimes including murder, piracy, refusing to testify before Congress, failure to report seaboard saloon purchases, or causing a ship to run aground by use of a flash light' (FAMM 2000:3). Their more recent history began with the so called 'Boggs Act' in 1951 which provided for mandatory minimum terms for federal narcotic offences: two to five years for a first offence, five to 10 years for a second and 10 to 20 years with no parole on the third. These penalties were made harsher in 1956. In a rare moment of rationality they were repealed by Congress in 1970 as part of the *Comprehensive Drug Abuse and Control Act* on the now familiar grounds that they:

- over-penalised first time casual offenders;
- interfered with judicial discretion to appropriately individualise sentencing; and
- produced no reduction in drug violations.

But the respite was short lived. In 1973 the 'Rockerfeller drug laws' were passed in New York State. These required mandatory 15 year prison sentences for possession or sale of small amounts of narcotics. Other States followed suit and by 1983, 40 of the 50 States had mandatory minimum terms. In 1984 Congress established the US Sentencing Commission to work on federal sentencing guidelines. While the Commission was working on formulating these guidelines which themselves involved minimum penalty ranges albeit with residual sentencing discretions, federal and State legislators were continually increasing mandatory minimums, especially for drug offences (for example the *Anti-Drug Abuse Act 1986*, the *Omnibus*

Anti-Drug Abuse Act 1988). The US Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) regarded by many as the 'most authoritative and thorough review of mandatory minimums to date' (FAMM 2000:8) concluded that 'the honesty and truth in sentencing intended by the guidelines is compromised [by mandatory minimums]'. The Report found that 91 per cent of the 59,780 defendants sentenced under federal mandatory minimum laws from 1984 to 1990 were convicted of drug offences (Hofer and Vincent 1994:3).

In 1991 the US Supreme Court in a narrow 5-4 decision in *Harmelin v Michigan* upheld a Michigan statute which provided mandatory life imprisonment for possession, sale or conspiracy to sell or possess 650 grams of cocaine or heroin, as not in violation of the 8th amendment against cruel and unusual punishment. Effectively the majority held that although extraordinarily long sentences may be cruel, they were not unusual. In a speech the following year, Stevens J argued that the *Harmelin* decision 'condoned the use of mandatory sentences that are manifestly and grossly disproportionate to the moral guilt of the offender' (FAMM 2000:8). Fifty senior federal judges had by May 1993 refused to hear drug cases. In a poll 90 per cent of 400 judges belonging to the American Bar Association opposed federal mandatory minimums for drug offences (FAMM 2000: 9). A Department of Justice report, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994) found that more than one in five federal prisoners (21.5 per cent) are low level drug offenders with no record of violence, no involvement in sophisticated criminal activity, and no prior prison record (FAMM 2000: 10). The *Omnibus Crime Control Act 1994* contained a 'safety-valve' provision which exempted non-violent first offenders from mandatory minimums subject to certain criteria, indicating an acknowledgement of the inequities caused by mandatory minimum sentencing laws. But this has not stopped legislators from enacting more such laws and proposing others in a Pythonesque parody of the 'bloody luxury/you had it easy/we used to live in a cardboard box/get up before we went to bed' sort. That great luminary, Newt Gingrich is reported recently as calling for a mandatory life sentence for first offenders caught smuggling narcotics for sale, together with a 'two strikes and you're dead' death penalty for second offences. 'If you sell it, we're going to kill you' he said (FAMM 2000: 12). One wonders whether 'unusual' (as in 'cruel and unusual') isn't an oxymoron in the US context, rendering the 8th amendment an irrelevance. One is really struck in reading the US research by a mixed sense of unreality, excess, absurdity and barbarity. The marked attenuation of the capacity to feel empathy for offenders apparent in US law and order policies of mass incarceration and state sanctioned homicide in recent decades is characteristic of what we usually think of as pre-modern or totalitarian regimes. Which makes the desire to copy US developments and models even more unfathomable (Hogg 1999:266).

Loss of voting rights

A little known by-product of the policies of mass incarceration in the US, of which mandatory penalties are only one manifestation, is that large numbers of offenders have been disenfranchised. Forty six States and DC prohibit inmates from voting while serving felony sentences; 32 States prohibit felons from voting while on parole and 10 States disenfranchise all ex-offenders who have completed their sentences (Sentencing Project [nd]; NYT 2000). An estimated 3.9 million Americans, or one in every 50 adults, have currently or permanently lost their rights to vote through felony conviction including 1.4 million people who have complete their sentences; 13 per cent of black men are disenfranchised, seven times the national average and in the seven States that deny the vote to ex-offenders, one in four black men is permanently disenfranchised (31 per cent in Florida and Alabama, 29 per cent in Mississippi and 25 per cent in Virginia: NYT 2000). In the forthcoming US election more than 1 in 8 black men will be ineligible to vote. While defenders of democracy and fundamental civil rights of citizenship might regard this as shocking once again we seem to be in a realm of the bizarrely 'usual'.

Lest we think we in social democratic Australia are entirely immune from this sort of attempts to revive feudal notions of civil death, it bears remembering that the Howard government attempted in the Electoral and Referendum Amendment Bill (No 2) 1998 to remove from those prisoners currently entitled (those serving sentences of less than five years) the right to vote. Fortunately the attempt was defeated in the Senate by the combined votes of the ALP, Democrats, Greens, and Senators Harradine and Colston.

The highly racialised character of the US policies of mass imprisonment, of which mandatory sentencing is only one component can be seen in the following brief and shocking statistics (Young 1999: 146):

- The US prison population has more than doubled in the 11 years from 1985-96 (there are now more than 1.6 million inmates, the equivalent of the population of a city the size of Philadelphia).

- There are a further 3.5 million people on probation or parole, meaning that 1 in 37 US citizens is under some form of corrective supervision, enough to comprise a city of 5 million adults, which would be the second largest in the US.

- The rates of violence in the US are far higher than any comparable western nation, its homicide rate is 5 times ours and 7 times the British.

- One in 9 African American males aged 20-29 is in prison at any one point in time and 1 in 3 is either in prison or on probation or parole.

- If we added in poverty, removing the growing middle class black community we would see that in many ghetto areas a young black man who had not been or was not under some form of correctional supervision would be an oddity, abnormal.

- Homicide is the most likely cause of death among young black men.

Rather than a place for Australian politicians to flock to learn how to emulate the US experience we would do best to treat it as a lesson about mistakes to avoid.

Effects of mandatory sentencing policies

Leading US researcher Michael Tonry in a review of the results of decades of research evaluating the effectiveness of mandatory minimum drug and firearm laws concluded:

> Mandatory penalties do not work. The record is clear from research in the 1950s, the 1970s, the 1980s, and thanks to the US Sentencing Commission, the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh. From research in the 1970s and 1980s, the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short terms effects that rapidly waste away (Tonry 1990: 243-4).

Of all the research reports the most systematic and most devastating was the US Sentencing Commission's report *Mandatory Minimum Penalties in the Federal Criminal Justice System* of 1990. Tonry remarks:

> Were federal officials more interested in rational policy making than political posturing, the US Sentencing Commission report ... would result in withdrawal of all mandatory sentencing proposals and the repeal of those now in effect.

The Commission's report demonstrates that mandatory minimum sentencing laws unwarrantedly shift discretion from judges to prosecutors, result in higher trial rates and lengthened case processing times, arbitrarily fail to acknowledge salient differences between cases, and often punish minor offenders much more harshly than anyone believes is warranted. Interviews with judges, lawyers, and probation officers at 12 sites showed that heavy majorities of judges, defence counsel, and probation officers dislike mandatory penalties; prosecutors are about evenly divided. Finally, and perhaps not surprisingly given the other findings, the report shows that judges and lawyers not uncommonly circumvent mandatories (Tonry 1990: 254).

1990s 'three strikes' legislation

A slightly different species of mandatory sentencing has emerged in the US since 1993. This takes the form of the so called 'three strikes' legislation which has been enacted in 24 States as of 1996. These laws have the following characteristics:

- while the various statutes differ, the vast majority of 'strikeable offences' are serious offences of violence such as murder, rape, robbery, arson and assaults;
- there are variations in the number of strikes required to trigger the mandatory penalties, some States requiring two strikes;
- the laws differ in the length of mandatory sentences imposed, although most are extremely long sentences designed to incapacitate the offender and many are life penalties with no possibility of parole;
- the Californian statute passed in 1994 included a number of less serious felonies such as residential burglary and drug sales to minors.

A recent comprehensive review of this form of mandatory sentencing reached the following conclusion:

> From a national perspective, the 'three strikes and you're out movement' was largely symbolic. It was not designed to have a significant impact on the criminal justice system. The laws were crafted so that in order to be 'struck out' an offender would have to be convicted two or more often three times for very serious but rarely committed crimes. Most states knew that very few offenders have more than two prior convictions for these types of crimes. More significantly, all of the states had existing provisions which allowed the courts to sentence these types of offenders for very lengthy prison terms. Consequently, the vast majority of the targeted offender population was already serving long prison terms for those types of crimes. From this perspective, the three strikes law is much ado about nothing and is having virtually no impact on current sentencing practices. For example, in Washington, the state that started the three strikes movement, only 115 offenders were admitted to the Washington State prison system on their third strike since 1993. The Federal Bureau of Prisons reports that no inmates have been sentenced under the three strikes law as of 1998. In Georgia, a two strikes state, Fulton County (Atlanta) reports less than 10 cases are being prosecuted under the new law. The only noted exception to the national trend is California ... (Austin et al 1999:142).

The Californian law is of a different order because:

- it included less serious offences;

- a second strike offence for any felony where the offender has a prior strikeable offence requires a sentence of double the term provided for the offence, 80 per cent of which must be served in prison;

- the third strike is any felony, and persons with two or more qualifying convictions who commit a third felony of any sort are sentenced to an indeterminate term of life imprisonment;
- plea bargaining is prohibited;
- comparable out of state prior convictions count;
- in sentencing a second or third strike the court is prohibited from granting probation, suspended sentence, diversionary schemes, or committing an offender to other than a state prison (Austin et al 1999: 142-3).

The California Department of Corrections estimated that the state prison population would more than double in five years from 115,534 in 1993 to 245,554 by 1999. The Rand Corporation in a much quoted 1996 analysis projected that the California prison population would rise to over 350,000 by 2000 and eventually reach 450,000 (Greenwood et al 1996). Indeed as of 1998 40,000 people had been sentenced under the California two or three strike regime. However, as Austin points out in a major review, 'the projected effects of the law have not been realised as the state's local criminal justice system (the courts in particular) has found ways to circumvent the law and use it along with local political and organizational interests' (Austin et al 1999:144).

This mitigation of the projected effects has occurred in the following ways:

- trial judges have been using their discretion, supported by the California Supreme Court in *People v Superior Court (Romero)* to discount prior convictions;
- an increase in the number of preliminary hearings and an increase in the length of preliminary hearings as a result of the three strikes law, resulting in a backlog of cases and longer delays;
- an increase in not guilty pleas;
- considerable variation in the application of the law by local county prosecutors (the law provided prosecutors' discretion to drop charges and not request application of two and three strike provisions 'in the interest of justice');
- reduction of felony charges to misdemeanours by judges and prosecutors;
- refusal of some victims to testify in two and three strike cases because of the wildly disproportionate sentences which would follow.

The effects of the Californian policies have included:

- an increase in the prison population from 115,534 to 170,000 in 1999, an increase of just under 50 per cent, compared to the projected increase by the Department of Corrections of 100 per cent;
- the vast majority of California second and third strike inmates have been sentenced for non-violent crimes (80 per cent for second and 60 per cent for third strike);

- the most frequent crime is drug possession with over 10,000 prison admissions;
- of a sample of 100 inmates convicted of drug crimes and sentenced to very lengthy terms of imprisonment under second or third strike provisions only one was convicted of more than $20 worth of cocaine or marijuana (Austin 1999:154);

After conducting a major review of the Californian experience Austin et al concluded: 'the incarceration costs associated with these offenders in most cases dwarf the cost of their crimes — especially the drug and property crimes' (Austin et al 1999: 154). For example, three strike property offenders would serve a mean minimum time of 31.1 years and cost the State an estimated $669,360; three strike drug offenders would serve a minimum of 21.9 years and cost US$535,144 (Austin et al 1999: 155). After looking at crime rate data they conclude that 'the data suggest no clear pattern of crime reduction occurring in relation to the application of California's three strike laws with crime rates being driven by factors other than aggressive strike prosecution policies pursued in Los Angeles, San Diego and Sacramento Counties' (Austin et al 1999: 156).

Austin et al argue that 'California has provided a clear example of "justice by geography" where similarly situated offenders are receiving very dissimilar sentences' (Austin et al 1999: 158). Although designed to limit discretion the laws have had the effect of enlarging prosecutorial discretion at the expense of judicial discretion. Mandatory sentencing policies produce a shift from judicial sentencing to sentencing by parliament and prosecutors, a significant and undesirable shift in our constitutional arrangements and understandings. There is no evidence that the policies have affected crime rates, which seem to have fallen independently, including in States that do not have three strikes policies and equally in counties with high enforcement of the laws as in those with low enforcement.

In short, US experience with various forms of mandatory sentencing policies over several decades shows clearly they do not deter, they do not incapacitate high risk repeat offenders and have little or no effect on crime rates. As we will see, the Australian research reaches similar conclusions. Which begs the question, why on earth do we keep looking to the US for inspiration in the law and order area? (Brown and Hogg, 1998).

Recent Australian experience

WA and NT laws

The *Crimes (Serious and Repeat Offenders) Act 1992* (WA) which was in force from 1992 to 1994 was targeted at young offenders involved in high speed police pursuits in stolen vehicles after a number of such pursuits had resulted in fatalities to the drivers, passengers and other road users. A repeat offender (three conviction

appearances for prescribed offences of violence and six for other offences) convicted of offences of violence was to be sentenced to at least 18 months in custody followed by mandatory indeterminate detention (Harding 1995).

In 1996 Western Australia introduced three strikes burglary laws, adding to the previous single offence of burglary punishable by 14 years imprisonment so called home burglary punishable by 18 years and aggravated burglary by 20 years. A 12 month minimum penalty applies to third and subsequent offences. Morgan points out that media and political justification at the time focused on 'home invasions' but any home burglary counts. Parliament attempted to cut off the usual judicial sentencing discretion including prohibiting the courts from imposing a suspended sentence, although the courts have held that they have the power to release under a Conditional Release Order, exercised in around 10 per cent of cases (Morgan 2000:166-7).

The Northern Territory mandatory sentencing provisions were introduced in 1997 by way of amendment to the *Sentencing Act 1995* (NT) (ss 78A-78B) and apply to a wide range of property offences including stealing, robbery, assault with intent to steal, criminal damage, unlawful entry, unlawful use of a motor vehicle, receiving stolen property and possession of goods reasonably suspected of being stolen. For adults the courts must impose a 14 day term of imprisonment for a first conviction on a prescribed offence, subject to an exceptional circumstances provision which came into effect on 4 July 1999 (single offence of a trivial nature, restitution made, good character, mitigating factors which significantly reduce culpability, co-operation with law enforcement authorities); a minimum of 90 days imprisonment on a second prescribed offence and 12 months imprisonment on the third. Juveniles on a second offence must serve a minimum of 28 days detention unless ordered to attend a diversionary program of which there are few and in some areas none. A third offence results in a further mandatory minimum of 28 days without the option of diversion.

Evidence of effectiveness?

The effectiveness of mandatory sentencing is a complex issue for a number of reasons. First, benchmarks need to be identified and that is difficult when the rationales for the measures keep shifting. Second, neither Western Australia nor Northern Territory have set up tracking procedures. Worse still in the Northern Territory it is hard to obtain any comprehensive data about efficacy or cost. Third, it is difficult to show clear cut causal links between the introduction of particular provisions and effects such as general deterrence, selective incapacitation or reduction of crime rates. Western Australia has good crime statistics and a sophisticated Crime Research Centre at UWA so it is possible to reach conclusions here based on the work of this unit (Broadhurst and Loh 1995; Ferrante et al 1998)

and researchers such as Neil Morgan (2000). The findings are as follows:

- 'there is compelling evidence from WA that neither the 1992 nor the 1996 laws achieved a deterrent effect' (Morgan 2000:172);
- indeed 'there was a leap in residential burglaries immediately after the introduction of the new laws at precisely the time when the greatest reduction would have been expected' and the 'irresistible conclusion is that the three strikes home burglary laws had no general deterrent effect' (Morgan 2000);
- selective incapacitation was not achieved as the Western Australia laws mostly impacted on offenders convicted of relatively trivial offenders. They had relatively little effect on so called hard core serious offenders because they receive long sentences as a matter of the normal sentencing process independently of mandatory sentencing laws;
- in terms of reducing recidivism Morgan concludes 'the statistics on recidivism rates cannot be regarded as indicative of the success of the WA laws, either in general or in terms of the greater efficacy of detention as opposed to conditional release orders' (Morgan 2000: 174).

At the Senate inquiry the Western Australian governmental representative said that 88 juveniles had been sentenced since the introduction of the legislation. Northern Territory government representatives said that 113 juveniles had been convicted of second or subsequent property offences up to December 1999. The ABS National Prison Census for 1999 shows a significant increase in prison numbers in the Northern Territory from 482 in 1996 to 606 in 1997 (25 per cent) followed by a levelling out to 635 in 1998 and 618 in 1999. To what extent mandatory sentencing provisions are responsible for the 1996-97 rise is unclear. The ABS shows the Western Australian prison population jumping suddenly from 2352 in 1998 to 3048 in 1999 (an increase of 30 per cent) but again the role of mandatory sentencing policies in this increase is unclear.

The ABS Corrective Services Report for the June 2000 quarter reveals that the imprisonment rate in the Northern Territory per 100 000 adult population is at 455, more than twice the next State (WA at 221.3) and more than triple the Australian average (143.5) (ABS 2000: 7). Freiberg and Ross constructs a measure of 'punitiveness' in the form of the ratio between the number of crimes recorded in each jurisdiction for each person imprisoned (Freiberg and Ross 1999: 161). On this measure the Northern Territory is the most punitive Australian jurisdiction. The ABS in its 1999 National Prison Census stated that 77.2 per cent of prisoners in the Northern Territory are indigenous, an increase from 72.6 per cent in 1998. The ratio of indigenous to non-indigenous rates of imprisonment were 14.7 nationally at June 2000 (ABS 2000:22), 5.3 for the Northern Territory and 19.9 for Western Australia. The proportion of

indigenous people imprisoned in the Northern Territory as a rate per 100,000 indigenous adult population in June 2000 is at 1154.7 well below the national average and half that of Western Australia (ABS 2000:21).

The Senate inquiry report after listing a variety of statistics from local sources concluded rather lamely:

> Mandatory sentencing per se in the Northern Territory, on the figures provided by the NT Government, does not appear to be having the effect predicted and suggested, by many of the submissions and witnesses, with respect to the numbers and percentages of different groups. The Committee is cautious about accepting the figures uncritically and it would have appreciated more time to study and asses the data in detail in order to determine the extent to which mandatory sentencing as opposed to high levels of sentencing in general is responsible for high imprisonment levels among the Indigenous population (Senate 2000: 35-6).

Johnson and Zdenkowski's research in the Northern Territory context provided the following findings about the effects of the Northern Territory laws:

- discretion has not been removed but has shifted from judges to prosecutors and police;
- defence lawyers are forced into behind the scenes negotiations with prosecutors to try to get designated mandatory offences replaced by other similar non-designated offences (for example, interference with a motor vehicle rather than criminal damage or unlawful use of a motor vehicle);
- local arrangements are being struck between communities and prosecutors to pursue restitution and alternative dispute resolution;
- decisions to delay laying charges and decisions in relation to the order in which charges will be laid directly affect penalties received;
- lawyers negotiate with prosecutors to get a number of charges heard together so they only constitute one strike;
- while some of these negotiations can produce results which help ameliorate the harshness of the regime they are far less visible and accountable than the exercise of judicial discretions in open court;
- bail is being refused on minor offences because people have mandatory imprisonment hanging over them;
- the Commonwealth Grants Commission estimates that the average daily cost of imprisoning an adult in the Northern Territory is $169.44 and the annual cost is $62,000 (as Johnson and Zdenkowski point out this would mean that the jailing of Margaret Wynbyne for 14 days for the theft of a can of beer cost taxpayers throughout Australia $2400 and Kevin Cook jailed for a year on a third strike theft of a towel to use

as a blanket $62,000);
- trespass notices are being issued to specific people which have the effect that a person issued a notice who steals from a shop is subject to mandatory penalties while shop lifting is not a mandatory imprisonment offence.

The North Australian Aboriginal Legal Aid Service provided Johnson and Zdenkowski (2000: 104-5) the following examples of mandatory sentencing in relation to juveniles:

- 16 year old — 28 days receiving 1 bottle of spring water, 1 prior offence;
- 16 year old — 28 days stealing petrol for sniffing;
- 17 year old — 28 days stealing stole $2 worth of petrol for sniffing;
- 17 year old — 14 days stealing, first offence, offered a lift by friends who on the way went into a building and stole encyclopaedias;
- 17 year old — 90 days unlawful entry to a building, second offence;
- 16 year old — 28 days stealing bicycle, found abandoned, rode it over bridge and was arrested;
- 17 year old — 14 days criminal damage, snapped an aerial after an argument;
- 16 year old — 28 days criminal damage (broke window);
- 17 year old — 14 days stealing, first offence, walked into open premises and stole orange juice and minties;
- 17 year old — 14 days criminal damage, complained of auditory hallucinations, in confusion damaged property in restaurant.

Shift of justifications

As the evidence that mandatory sentencing policies do not work in terms of their claimed justifications of deterrence, selective incapacitation and reduction in crime rates, so the justifications and rationales for these policies put forward by Ministers and government spokespeople have shifted. Morgan (2000:170-1) details the minutiae of these shifts and I will quote his summary here:

> All three sets of legislation started life to strong utilitarian claims that they would reduce crime, especially through general deterrence. The Federal Attorney General has continued to refer to general deterrence to defend the laws against international criticism. However, the Western Australian and Northern Territory governments now make no such claims. The fact that they have attempted to shift the focus is tantamount to an acceptance of the evidence ... namely, that none of the laws has achieved any demonstrable effect on crime rates. As deterrence has faded, the purported justifications for mandatory sentences have become increasingly rhetorical; 'community concern'; 'don't forget the victims' and 'no money for alternatives'.

The equal operation of law?

John Howard, and many other supporters of mandatory sentencing see in it merely the 'equal operation of law'. As federal Attorney General Daryl Williams put it in response to international criticism: 'mandatory detention laws do not target Indigenous people and are racially neutral on the face of the legislation and that consequently the laws do not have a racially discriminatory purpose' (quoted in Morgan 2000:179). Such claims are flawed in various ways.

Racially discriminatory in formulation and operation

At the most obvious level the provisions are unequal and discriminatory in a number of ways. First, the policies discriminate on geographical grounds, in that residents in one part of the country, namely Western Australia and Northern Territory, do not receive equality of treatment with citizens living in other parts of the country.

Second, the policies discriminate on racial lines because of the specific offences selected to attract mandatory terms. Those offences selected are not selected in terms of their seriousness as in most of the US legislation. They are by contrast relatively minor property offences such as car stealing, burglary and criminal damage, of a sort committed disproportionately by young, indigenous and poor people, in contrast to a range of other minor (and not so minor) property offences such as fraud, more serious white collar crime property offences, more likely to be committed by whites. This racially based selectivity in the prescribed offences is not a matter of coincidence or accident, but is an integral part of the mandatory sentencing regimes in Western Australia and Northern Territory. As Paul Barry has pointed out, Alan Bond's release after 1298 days imprisonment on charges of a $15 million fraud involving the Manet painting La Promenade and $1.2 billion fraud on shareholders of Bell Resources '... means that he has spent roughly one day behind bars for every million dollars he stole. Recently in the Northern Territory a young Aboriginal man was sentenced to a year in prison for stealing $23 worth of cordial and biscuits. Had the same formula been applied to Mr Bond, he would have been locked away for 50 million years' (Barry 2000).

Third, the racially based selectivity in the type of offences to which mandatory sentencing provisions apply is amplified in the exercise of police pre-trial investigatory and prosecutorial discretions. After all, the laws are going to be put into practice in a context in which a third of Western Australia and over three quarters of Northern Territory prisoners are indigenous at rates 20 times and 5 times their population numbers respectively. Morgan reports that WA figures for the three strikes legislation show that the one third of juvenile offenders who are Aboriginal account for three quarters of the three strike cases (Morgan 2000:179).

Fourth, the application of diversionary schemes and exemption clauses are racially tuned. Morgan notes that in WA in 1998 Aboriginal juveniles received 18 per cent of juvenile cautions, while comprising around one third of juvenile offenders. In relation to the NT's 'exceptional circumstances' provisions, these are referred to openly by NT lawyers as the 'white middle class escape clause' (Morgan 2000: 180). A Northern Territory lawyer has written a satirical piece in which he argues that Jesus Christ would not have been able to meet the 'exceptional circumstances' criteria (Hunyor 1999).

Discrimination involved in treating unequals equally

Anatole France once wrote of 'the majestic equality of the law which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'. The satirical point he was making is that most of us don't have much need to steal biscuits to eat, textas to draw or towels to use as blankets, because we can easily afford to buy these things. The equal application of law to unequals does not produce fairness and equality but unfairness and deepening inequality. Fairness is a consequence of adjustment to the variability of circumstance, yet this is precisely what mandatory sentencing prevents.

Discriminatory in the way it provides a coded language for more overtly racial sentiments

Russell Hogg puts it this way:

> Without denying the reality of high Aboriginal crime rates there is no lack of evidence of the manner in which law and order campaigns and public discourse around crime afford a coded language for the expression of racial anxieties and antipathies which are especially prominent in local sites of contact in the post 'protection' era. It is not simply that more offences are committed by individuals of Aboriginal background than by other individuals. Crimes do not, after all, speak for themselves. If they did the violence inflicted on Aboriginal communities throughout the last 200 years — much of it amounting to 'crimes against humanity' to use the language of contemporary human rights — would have attracted unqualified condemnation. The point is rather that Aboriginal conduct and presence is apprehended, interpreted and policed within a field of vision prestructured by racial anxieties, social friction and the anticipation of danger in various forms. This is why local talk about crime irresistibly gravitates to representations, understandings and lay aetiologies in terms which make it an *'Aboriginal* problem' and assign causal significance to Aboriginality. In many local settings and in much political discourse around law and order this need not be made explicit and indeed much of its power derives from avoiding a statement of the obvious and relying on the ostensibly neutral forms and categories of

> criminal law. But the appeal to racial sensibilities concealed within apolitical statements about crime and punishment is frequently unmistakable. Often it is little more than a more refined version of those discourses that extolled the virtues of a prompt recourse to corporal punishment in the event of insubordination, lest the natives mistake leniency for weakness and get out of hand. (Hogg 2001)

Deaths in custody and the destructive effects of criminalisation

One of the many consequences of mandatory sentencing laws is the increased likelihood of deaths in custody, a far from hypothetical consideration given the tragic death of Wurramarrba, a 15 year old Aboriginal boy from a Groote Eylandt community who died in Don Dale Correctional Centre in Darwin on 9 February 2000. He had been automatically sentenced under the mandatory sentencing regime to a 28 day prison term for stealing textas and other items worth less than $100 in total. This was a second property offence.

Aboriginal people are significantly over-represented in relation to deaths in custody. In 1999, 19 (22 per cent) of the 85 deaths in custody in Australia were of indigenous people. Nationally, indigenous adults represent less than 2 per cent of the Australian prison population, but approximately 19 per cent of the total prison population (Dalton 2000).

As well as an increased likelihood of deaths in custody, mandatory sentencing policies exacerbate social dislocation and sabotage familial and community involvement in restoration and reparation. High levels of criminalisation and contact with the police, courts, juvenile institutions and prisons affect not only the individuals prosecuted but whole communities. Legal marginalisation through the pervasive impact of the criminal justice system in the daily life of communities and families, compounds the conditions of economic and social distress and further undermines social cohesion. Potential breadwinners and carers are removed in large numbers from the communities, the already meagre opportunities to maintain stable and continuous employment are further eroded, and large numbers of young people are in detention centres and prisons learning the skills for a life of crime rather than in schools acquiring an education. Such levels of criminalisation are a social disaster. They further entrench the long term impoverishment that pervades many Aboriginal communities. And at a more general level mandatory sentencing impoverishes our collective ability to respond to wrongdoing and its causes in ways other than the populist soft option of hyping the penal.

Conclusion

The difficulty facing those opposed to mandatory sentencing policies is that while it is possible to demonstrate that they don't work, in terms of their original justifications, and further that they produce or exacerbate a range of damaging consequences to the individuals, families, communities, the integrity of the criminal justice system and the wider polity, such a demonstration does not in itself fully cut off the populist roots of such policies. These populist roots lie in the thirst for retribution and vengeance, the felt need to strike back in some way at a range of disparate social anxieties and fears, to offer up sacrifices or scapegoats through the imprisonment and social exclusion of particular individuals and particular communities.

The desire for vengeance is a very powerful and deeply rooted one which is not entirely met by pointing out the failure of imprisonment to deter, and the social and economic costs it entails. We are not going to stop people being punitive and vengeful about crime. But while it is important to acknowledge the power of punitive sentiments, a corollary is that it is therefore imperative that the processes of criminal justice operate in such a way as to ensure that yet further crimes are not committed in the name of populist justice. Mandatory sentencing policies, particularly those aimed at relatively minor property offences and at relatively socially and economically marginalised individuals and communities, are but one manifestation of a wider uncivil politics of law and order which exacerbates social division and rents the bonds of social cohesion so central to the maintenance of our social democracy. ●

Domestic cases

Harmelin v Michigan 501 US 957 (1991)
People v Superior Court (Romero) 14 Cal 4th 497 (1996)

References

Austin J et al 'The impact of "three strikes and you're out"' (1999) 1(2) *Punishment and Society* 131

Australian Bureau of Statistics *Prisoners in Australia 1999* ABS Canberra 2000

Australian Bureau of Statistics *Corrective Services in Australia* ABS Canberra June Quarter 2000

Barry P 'One day in jail for every stolen million' *The Sydney Morning Herald* 10 March 2000

Bayes H 'Punishment is blind: mandatory sentencing of children in Western Australia and the Northern Territory' (1999) 22(1) *University of New South Wales Law Journal* 286

Broadhurst R, Loh N 'The phantom of deterrence: the *Crime (Serious and Repeat Offenders) Sentencing Act'* (1993) 26 *Australia and New Zealand Journal of Criminology* 251

Brown D 'Penalty and imprisonment in Australia' in South and Weiss (eds) *Comparing Prison Systems: Toward a Comparative and International Penology* Gordon and Breach Publishers, Amsterdam 1998

Cowdery N 'Mandatory life sentences in New South Wales' (1999) 22(1) *University of New South Wales Law Journal* 290

Dalton V *Australian Deaths in Custody and Custody Related Police Operations 1999* Australian Institute of Criminology Trends and Issues No 153, Canberra 2000

FAMM (Families Against Mandatory Minimums) *History of mandatory sentences* http://www.famm.org/about3.htm (accessed 2000)

Hofer P, Vincent B *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* Federal Judicial Center, Washington DC 1994

Feeley M, Kamin S 'The effects of three strikes and you're out on the courts' in Shichor D and Sechrest D (eds) *Three strikes and you're out: vengeance as public policy* Sage Publishers, Thousand Oaks, Ca. 1996

Ferrante AM, Loh NSN, Fernandez J *Crime and Justice Statistics for Western Australia 1997* Crime Research Centre, University of Western Australia 1998

Flynn M 'Fixing a sentence: are there any constitutional limits?' (1999) 22(1) *University of New South Wales Law Journal* 280

Flynn M 'International law, Australian criminal law and mandatory sentencing: the claims, the reality and the possibilities' (2000) 24(3) *Criminal Law Journal* 184

Freiberg A 'Three strikes and you're out — it's not cricket: colonisation and resistance in Australian sentencing' in Tonry M and Frase R (eds) *Sentencing and Sanctions in Western Countries* Oxford University Press, New York 2001

Freiberg A and Ross S *Sentencing Reform and Penal Change* Federation Press, Sydney 1999

Goldflam R, Hunyor J 'Mandatory sentencing and the concentration of powers' (1999) 24(5) *Alternative Law Journal* 211

Greenwood P et al 'Estimating benefits and costs of calculating new mandatory-sentencing law' in Shichor D and Sechrest D (eds) *Three strikes and you're out: vengeance as public policy* Sage Publishers, Thousand Oaks, Ca. 1996

Harding R (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (2nd ed) Crime Research Centre, University of Western Australia 1995

Hogg R 'Mandatory sentencing and the symbolic politics of law and order' (1999) 22(1) *University of New South Wales Law Journal* 262

Hogg R 'Punishment and Race in Colonial Settler Society: the Australian Case' *Punishment and Society* (forthcoming)

Hogg R, Brown D *Rethinking Law and Order* Pluto Press, Annandale NSW 1998

Howse C 'Covering a multitude of sins' (1999) 24(5) *Alternative Law Journal* 209

HEREOC 'Mandatory detention laws in Australia' http://www.hreoc.gov.aulhuman-rights/h5_1_7.html (accessed 2000)

Hunyor J 'The Queen v Jesus Christ' (1999) August *Journal of the Law Society of NT.*

Johnson D, Zdenkowski G *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* Submission to Senate Legal and Constitutional References Committee *Inquiry into the Human Rights Manditory Sentencing of Juvenile Offenders Bill 1999*

Lagan B 'The boy condemned to jail for stealing $3.50 biscuits' *Sydney Morning Herald* 25 August 1999

Morgan N *'The Sentencing Act 1992*: subverting criminal justice' in Harding (ed) *Repeat Juvenile Offenders: the Failure of Selective Incapacitation in Western Australia* Crime Research Centre, University of Western Australia 1995

Morgan N 'Capturing crims or capturing votes? The aims and effects of mandatories' (1999) 22(1) *University of New South Wales Law Journal* 267

Morgan N 'Mandatory sentences in Australia: where have we been and where are we going' (2000) 24(3) *Criminal Law Journal* 164

Associate Press 'Convictions keep blacks from voting' *New York Times* September 21 2000

Roche D *Mandatory Sentencing* Australian Institute of Criminology Trends and Issues No 138, Canberra 1999

Senate Legal and Constitutional References Committee *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders Bill 1999* March 2000)

Sentencing Project *Policy Reports, Losing the Right to Vote: The Impact of Felony Disenfranchisement Laws in the United States* http://www.sentencingproject.org/policy/9080.htm

Sydney Morning Herald (2000) http://www.smh.com.aulnews/specials/natllms/index/html

Tonry M 'Mandatory penalties' (1990) 16 *Crime and Justice: A Review of Research* 243

Wilkie M *'Crime (Serious and Repeat Offenders) Sentencing Act 1992:* a human rights perspective' (1992) 22 *University of Western Australia Law Review* 187

Young J *The Exclusive Society* Sage, London 1999

Zdenkowski G 'Mandatory imprisonment of property offenders in the Northern Territory' (1999) 22(1) *University of New South Wales Law Journal* 302

Zdenkowski G 'Sentencing trends: past, present, and prospective' in Chappell D and Wilson P (eds) *Crime and Criminal Justice in Australia: 2000 and Beyond* Butterworths, Sydney 1999