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

For almost 25 years, mandatory sentencing has been used by successive governments in Western Australia (WA) as a ‘populist approach to sentencing’ to counter media hysteria, attract voter support and to give the perception of being ‘tough on crime’. These laws impose minimum sentences for certain offences, preventing judges from considering the personal circumstances and mitigating factors of each case. 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’ and international human rights law, especially in relation to their disproportionate impact on Indigenous people, and particularly Indigenous young people.

2009 Assaulting Public Officer laws

In 2009 following the assault of Police Constable Butcher, which left him paralysed on his left side, and with permanent brain injury, the Criminal Code Amendment Act 2009 (WA) was passed, aimed at reducing attacks on public officers, including police (later amended to include Youth Custodial Officers). 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. Under the regime, terms of imprisonment could not be suspended.

2015 Home Burglary and Other Offences Act

Acting on its 2013 election promise to be ‘tough on crime’ to address the ‘escalating burglary rate’, in 2014 the Barnett Government introduced the Home Burglary Bill, 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’.

Under the changes, a 16 or 17-year-old charged with three counts of home burglary will be detained or imprisoned for one year, or subject to a Conditional Release Order. 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.

The Disproportionate Impact

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

From 2000 to 2013, WA has consistently had one of the highest rates in Australia of imprisonment of Indigenous people. In particular, Indigenous young people in WA are detained at rates far higher than the national average, are heavily overrepresented at every stage of the youth justice system, and most overrepresented at the more punitive stages of the system. 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.

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. The review found that 81% of
the 119 young people sentenced under the three-strikes burglary laws were Indigenous.27

The 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 current WA Children’s Court President30 and The Hon Wayne Martin AC, 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 the Convention on the Elimination of All Forms of Racial Discrimination32 (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 Punishment35 (CAT). The Committee highlighted that mandatory sentencing ‘continues to disproportionally 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 Child39 (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 Rights40 (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 disproportionally 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.
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).

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.
13. Ibid.
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.
23. Ibid.
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].
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].
41. Cunneen, above n 53, 323.