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MANDATORY SENTENCES IN AUSTRALIA: WHERE HAVE WE BEEN AND WHERE ARE WE GOING?

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This paper discusses and develops themes which are discussed in the author's article:
'Mandatory Sentences in Australia: Where Have We Been and Where are We
Going?' (2000) 24 *Criminal Law Journal* 164 – 183.

MANDATORY SENTENCES IN AUSTRALIA: **WHERE HAVE WE BEEN AND** **WHERE ARE WE GOING?**

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INTRODUCTION

Mandatory components can feed in to a sentence in a number of different ways. Since these mechanisms may have different aims, it is important to avoid generalisations about whether they 'work' or not. Strictly speaking a 'mandatory' sentence describes the situation where the sentencing court has only one possible option. In the eighteenth and early nineteenth centuries, mandatory penalties in this strict sense existed for a wide range of offences and it was only in the course of the nineteenth century that such strategies were largely abandoned in favour of greater discretion, with parliament generally just setting the maximum penalty. In some jurisdictions, life imprisonment remains the mandatory penalty for murder but even then it is rare for judges to have no choice at all in the matter.¹

This paper focuses on the more recent forms of 'three strikes' laws and their variants in WA and the Northern Territory. These laws do not prescribe 'mandatory penalties' as such but mandatory *minimum* penalties based on the offender's 'track record' of offending. In other words, the sentencer's discretion is confined within far narrower limits. Although the baseball analogy may be new, the idea is not. For example, systems of minimum and maximum penalties, with enhanced penalties for persistence have been in operation for many years under traffic legislation in Western Australia.² However, a crucial difference with the new laws is that the minimum penalties take the form of custodial terms.

Although the focus in public debates and in this paper has been on restrictions on judicial discretion, it is most important to remember that mandatory components can feed into sentencing at other stages. There may, for example, be legislative restrictions on the powers of Parole Boards. In Western Australia, new parole laws (which have been assented to but not yet proclaimed) will severely limit the power of the Parole Board to re-release any person who commits a 'crime' whilst on parole and who is sentenced to a term of imprisonment by a higher court for that offence. Limitations of this sort generate similar issues and difficulties problems to those which arise with respect to sentencers.

WA introduced 'three strikes' home burglary laws in November 1996. Shortly afterwards, in March 1997, the Northern Territory introduced mandatory sentencing laws for a range of property offences. There have already been some legislative changes to the NT laws and a formal review of the WA laws must be tabled in State Parliament by November 2001.

¹. For example, the judge may well be able to set the minimum period for which the person must be detained under the life sentence; see I Morgan, 'Sentences for Wilful Murder and Murder' (1996) 26 UWAL Rev 207.

². For example, under s.63 of the *Road Traffic Act 1974* (WA), there is a 'code' for offences of driving under the influence (DUI) which includes escalating minimum and maximum fines.

This paper draws out eight key ‘lessons’ from recent experience in Western Australia and the Northern Territory with respect to mandatory minimum sentences. In this paper, I do not address arguments with respect to the constitutionality of mandatory sentences as it seems very unlikely that constitutional challenges would succeed.³ However, I do discuss these issues in the paper on WA’s proposed sentencing matrix which would, I believe, be open to constitutional challenge.

Much of the material is drawn from N Morgan, ‘Mandatory Sentences in Australia: Where Have We Been and Where are We Going?’ (2000) 24 *Criminal Law Journal* 164 – 183.

Other particularly useful sources include:

- D Johnson and G Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory*, Sydney, Australian Centre for Independent Journalism, February 2000.
- Special Issue of the University of New South Wales Law Journal, Vol 22, No.1.
- The Senate Legal and Constitutional References Committee, *Report of the Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* and the evidence to that Committee (especially from the WA and NT Governments).
(http://www.aph.gov.au/senate/committee/legcon_ctte/mandatory/index)
- R Harding (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia*, 2nd ed., March 1995, Crime Research Centre, University of Western Australia.

LESSON ONE: WHO HAS THE TOUGHER LAWS?

In evidence to the Senate Inquiry, the WA Government sought to distance its three strikes burglary laws from the Territory’s laws (though the Senate Committee’s Report concluded: ‘we are comparing bad with bad and we are trying to prioritise badness.’)

The argument is also too simplistic. As the following table shows, the NT laws are broader in many respects but the WA laws have a particularly draconian impact on third strike juveniles.

³. *Palling v Corfield* (1970) 123 CLR 52. See also *Sillery v The Queen* (1981) 180 CLR 353; *Cobiac v Liddy* (1969) 119 CLR 257; *Wynbyne v Marshall* (High Court, 21 May 1998). See also A Mason, ‘Mandatory Sentencing: Implications for Judicial Independence’ (2001) *Judicial Officers Bulletin*, 1.

	Northern Territory	Western Australia
What Offences?	A range of property offences including Stealing; Robbery; Criminal Damage; Unlawful Entry and Offences relating to Receiving property which is stolen or suspected of being stolen (But not including fraud, forgery etc).	Burglary of a place ‘ordinarily used for human habitation’ (‘home burglary’).
Adults	<p><i>First Strike:</i> minimum 14 days, unless ‘exceptional circumstances’ (narrowly defined) exist.</p> <p><i>Second Strike:</i> minimum 90 days.</p> <p><i>Third Strike:</i> minimum 12 months.</p>	Only applies to Third strike offenders:- minimum 12 months imprisonment.
Juveniles	<p>Applies to those aged 15 and above.</p> <p><i>First Strike:</i> Normal Range of Sentencing Options apply.</p> <p><i>Second Strike:</i> minimum 28 days detention unless a diversionary programme is available to the sentencing court</p> <p><i>Third Strike:</i> minimum 28 days.</p>	<p>Applies to all children over 10</p> <p>Third Strike offenders are subject to a minimum of 12 months detention. (Diversions do not count as strikes)</p> <p>However, the Children’s Court has ruled that it has the power to use a Conditional Release Order.</p>

LESSON TWO: SHIFTING RATIONALES

1. Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA)

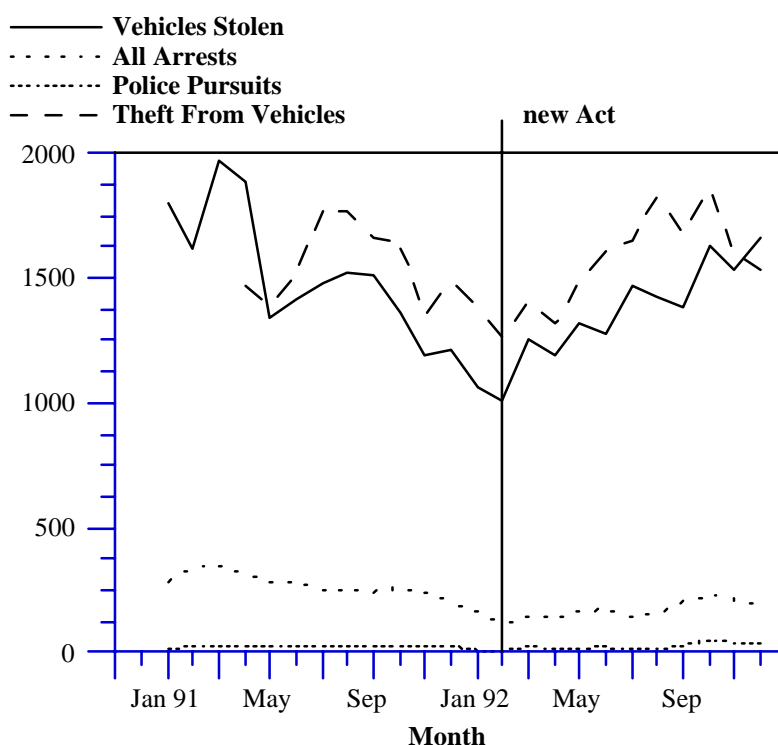
Certain ‘third strike’ offenders were subject to a minimum of 18 months in custody, followed by indeterminate detention. These laws ceased to have effect in June 1994.⁴

- Initially the laws were justified on the basis that they would ‘excise hard core offenders’ (selective incapacitation). But they largely missed the target group (young car thieves in the metropolitan area) and caught those they did not target (older Aboriginal men from remoter parts of the State).
- Then it was claimed that the laws aimed for general deterrence. However, the rate of car theft was declining before the laws came in and then went up:⁵

⁴. Generally on these laws see R Harding (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia*, 2nd ed., March 1995, Crime Research Centre, University of Western Australia

⁵. R Broadhurst and N Loh, ‘Selective Incapacitation and the Phantom of Deterrence’ in R Harding (ed), *ibid.*

Reported Stolen Motor Vehicles, thefts from vehicles, police pursuits of stolen motor vehicles and arrests for vehicle theft: 1991-1992



2. WESTERN AUSTRALIA 1996-2001

August 1996: Deterrence and Incapacitation

“The aim of the Bill is to deter burglars and incapacitate those who commit such offences by providing for much tougher penalties.”
(Attorney General, P. Foss).

February 2000: Public Concern

“The background to the three strikes legislation is that the State had the highest rate in the nation of home burglary.... The provisions ... were intended to reflect the views of the community that the existing penalties for home burglary were manifestly inadequate and did not give due weight to the distressing effect of home burglary on the victims....

The legislation was not introduced as a means of deterring offenders from committing offences; it was purely to indicate the very serious nature of the offence... The [forthcoming review] will not be judging the success of the legislation by the extent to which it deters offenders.”

(WA Government: Evidence to the Senate Legal and Constitutional References Committee, emphasis added).

March 2000: Reducing Recidivism and Helping Young Offenders

Mandatory sentences can help to “turn around the lives of repeat offenders.”
(Attorney General, P. Foss).

The Senate Committee’s Conclusion

“The objective of the Western Australian legislation appears clearly to be deterrence.”

February 2001: The Coalition’s Election Promise

“We will extend ... [three strikes laws] ... to ensure appropriate sentences for serious crimes.”

3. NORTHERN TERRITORY

1997: Deterrence

“I do believe the deterrent element of sentencing has validity...it is... the government’s hope that the legislation will lead in time to a reduction in the crime rate.”

(Then Chief Minister, Shane Stone).

2000: Public Concern

“The Mandatory sentencing laws were developed in response to popular concern about the prevalence of property crime, particularly break and enter into residential dwellings, and a perception that sentences imposed by criminal courts did not properly reflect the seriousness with which the community viewed these offences. The Government was particularly conscious of the inconvenience and trauma that was caused to victims of such crimes.”

(N.T. Government, evidence to Senate Committee).

“Territorians, like most Australians, are sick and tired of grubs who break into their homes, steal their cars and anything else that is not nailed down.”

(Former Chief Minister, Shane Stone).

LESSON THREE

EVIDENCE ON EFFECTIVENESS

1. WHAT ARE THE BENCHMARKS?

As the rationales shift, so do the benchmarks for evaluation.

2. ADDRESSING PUBLIC CONCERN

If the laws were intended “purely to indicate the very serious nature of the offence” or to show that people are ‘sick and tired of grubs’, further evaluation is pointless: the laws achieved this goal simply by virtue of their enactment.

However, in April 2000, when asked about the impact of the laws, the WA Government insisted that they would take a full 18 months to evaluate: so other issues are, presumably, at stake.

3. GENERAL DETERRENCE

(a) Measuring Deterrent Effects

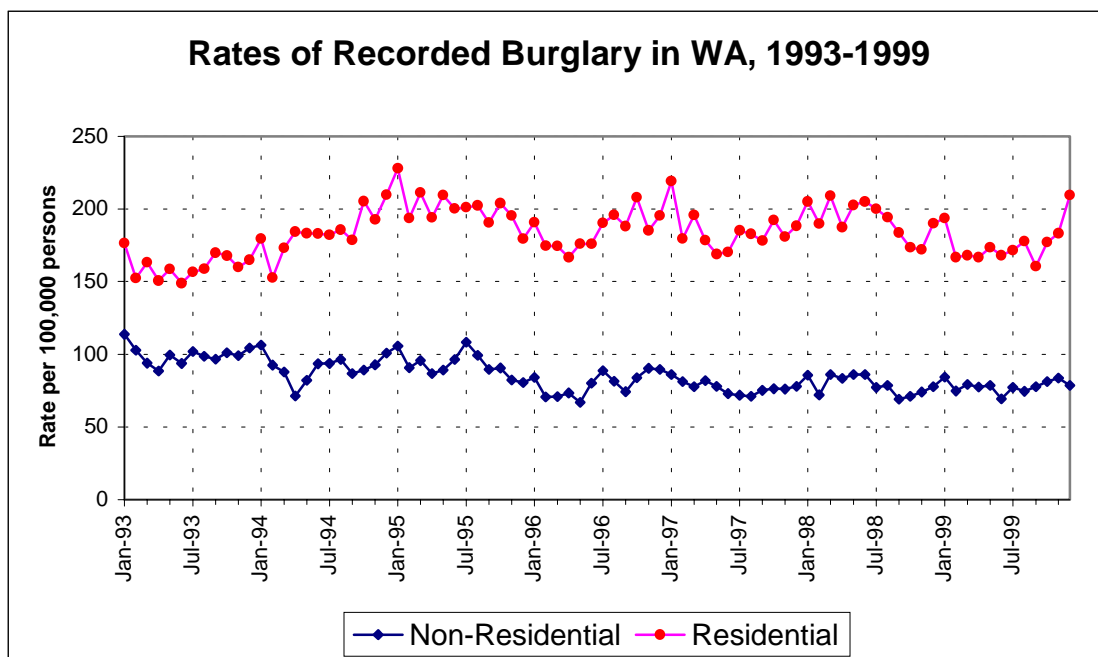
It is notoriously difficult to measure deterrence⁶ but some very important preconditions were present in these examples:-

- Unambiguous increase in sentence severity.
- Greater certainty of a custodial sentence.
- Extensive publicity.
- Potentially measurable impact as the laws targeted specific offences.

(b) What is the Evidence?

No reliable data on crime rates are available for NT.

Significantly, the WA Government avoided any reference to crime rates in their written evidence to the Senate Inquiry and declined to enter any discussion during hearings. They sidestepped questions by stating that at the time the laws were introduced, WA had the highest rate of home burglary in the country as judged by ABS figures; but that there were no equivalent up-to-date ABS data. In fact, Crime Research Centre and Police data were readily available (so, in fact, were more up to date ABS data), on both annual and monthly bases:



(c) Conclusions on Deterrence

1. The three strikes home burglary laws have had no general deterrent effect as judged by:
 - rates of residential burglary
 - rates of non-residential burglary.
2. Burglary rates have a lifecycle that is, to some extent, seasonal; and that is independent of punishment levels.

⁶. A Von Hirsch, AE Bottoms, E Burney and P-O Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, Oxford, 1999.

4. SELECTIVE INCAPACITATION

Selective incapacitation is no longer seen as a major justification. In addition to philosophical objections (which do not always deter politicians and policy makers), there are two main reasons:-

- Criminal offences are based on broad offence definitions, embracing a wide range of activities (as shown by WA's 1992 laws)
- Mandatory penalties have a particular impact on the less serious offenders. Serious offenders receive long sentences by operation of normal sentencing principles.

5. REDUCING RECIDIVISM

The most recent defence of mandatory sentences in WA is to the effect that they can break the cycle of a young person offending. This, of course, begs the question: what is the point of the laws for *adults*? But, leaving that issue aside and focusing on juveniles:

(a) What are the Claims?

“The fact that only 7 out of 57 three strikes juveniles have been resentenced under the same laws suggests that in respect of serious offenders, the law has been effective.

I also draw...attention...to the fact that only one-twelfth of juveniles who were detained under the three-strikes provisions repeated their offending behaviour. In comparison, one third of those juveniles who were given Conditional Release Orders reoffended and were again sentenced under the three-strikes provisions.

These statistics show significantly higher incidence of recidivism by juveniles who received community supervision than by juveniles who were detained.”

(P. Foss, 15 March 2000, Statement to the Legislative Council).

(b) Do the Claims Stand Up?

- The benchmark seems to be ‘being again caught by the three-strikes laws.’ This is incomplete and flawed (what about being reconvicted of other offences?)
- What is the sample? (The figures given by the Government as to the numbers caught by the laws have been somewhat unclear and it is not clear who the 57 are).
- The sample size is very small (what conclusions can be drawn from the fact that 2/6 or 3/9 offenders who received CRO's were reconvicted under the same laws?).
- Period of follow-up? (None specified in the figures to date)
- Reconviction rates need a point or points of comparison: What are these?

(For example, what are the reconviction rates of home burglars sentenced prior to the Act; and the reconviction rates of fraudsters, rapists and other types of offenders?)

6. CONCLUSIONS ON ‘EFFECTIVENESS’

- The WA and NT laws have achieved their self-fulfilling prophecy of marking out “community concern.”
- Despite the essential preconditions for deterrence being present, there is not a skerrick of evidence that the laws have had a deterrent effect.
- Laws of this type do not, and cannot, serve as tools for selective incapacitation.
- There is no statistically valid evidence to sustain claims that the laws reduce recidivism rates.

LESSON FOUR

JUDICIAL INTERPRETATION, APPLICATION AND ADAPTATION

Three issues arise when examining judicial responses to these laws: legal interpretation; application in individual cases; and the ‘adaptation’ of practices.

Interpretation

Within the parameters of the rules of statutory interpretation, the courts have sought to interpret the laws so as to give some flexibility.

WA examples include:-

- Ruling that the Children’s Court has the power to impose a conditional release order in lieu of immediate custody. (*DCJ(A Child)* and *RJM(A Child)*).⁷
- Interpreting the legislation so as to disregard some previous court outcomes in calculating the strikes. (*P(A Child)* and *G(A Child)*).⁸

NT cases reveal similar pattern, including:-

- Disregarding ‘strikes’ prior to the legislation coming into force (*McMillan v Pryce*).⁹
- Interpreting legislation which appeared to require cumulative sentences as permitting concurrent sentences (*Hallam*).¹⁰
- *Schluter*;¹¹ the defendant pleaded guilty to two sets of charges on the same day but the Supreme Court held that ‘once before’ referred to a ‘previous day’

However, although the WA and NT courts seem to have shared a common goal, it is interesting to observe that they have used rather different techniques of interpretation. The WA courts have adopted the traditional approach that the words of the legislation should be strictly construed in favour of the defendant. In all the cases I have examined, they eschewed any reference to ‘the intention of Parliament’.¹² By contrast, the NT Supreme Court has adopted a more purposive approach, using the argument that the Parliament could never have intended the ‘astounding result’¹³ that would accord with a literal interpretation.

Application

In considering the application of the laws to individual defendants, the courts have insisted on strict proof of all requirements, including previous strikes. This has sometimes been problematic – for example, was a previous burglary a ‘home burglary’? Were there ‘convictions’?

⁷ . *DCJ (A Child)*, unreported, Children’s Court of Western Australia, 10 February 1997 and *RJM (A Child)* unreported, Children’s Court of Western Australia, 19 March 1997. See M Yeats, ‘Three Strikes and Restorative Justice in Australia’ (1997) 8 Criminal Law Forum 369 and D Saylor ‘Three Strikes by the Burglar’ (1997) 4 (2) Indigenous Law Bulletin 14. This practice has been endorsed by the Court of Criminal Appeal; see *G (A Child)*, (1997) 94 A Crim R 593 at 596.

⁸ . (1997) 94 A Crim R 586; and (1997) 94 A Crim R 593 respectively.

⁹ . Unreported, NT SC, 20 June 1997

¹⁰ . Unreported, NT SC, 17 September 1998

¹¹ . (1997) 6 NTLR 194

¹² . This is despite the fact that *Interpretation Act* 1984 (WA) s.18 states that courts are to prefer an interpretation which accords with the ‘purpose or object’ of legislation rather than an interpretation which does not.

¹³ . *Hallam*, above, per Mildren J., at 9. Generally see R Goldflam and J Hunyor ‘Mandatory Sentencing and the Concentration of Power’ (1999) 24(5) Alt LJ 211 and Johnson and Zdenkowski, 66-67 and 80-82.

Adaptation

Courts may adapt their practices to fill gaps in the law or to meet the needs of the case.

For example:-

- In WA, the Children's Court started to backdate sentences without express statutory authority.
- In NT, some cases were adjourned pending changes in the law to increase the age of juveniles to include 17 year olds.

LESSON FIVE PROPORTIONALITY

Mandatory sentences distort proportionality:-

- They are irrelevant to those convicted of the most serious offences (who receive lengthy custodial sentences in any event).
- They impact primarily on the least serious offenders.
 - 17 year old yo-yo thief: 14 days
 - 18 year old cigarette lighter thief : 14 days
 - the homeless towel thief who stole a \$15 towel to use as a blanket: 12 months
 - the young man who stole biscuits and cordial worth \$23: 12 months
 - the one legged pensioner who damaged a fence: 14 days
- They impact primarily upon the young and less experienced offenders (see also 'discriminatory impact', below)
- They iron out differences in sentencing for offences of a particular type. (eg two offences of burglary of differing gravity may attract the same sentence).
- They distort relativities between different types of offence (eg a minor opportunistic home burglary may attract a harsher sentence than a more serious fraud/assault).

LESSON SIX JUDICIAL DISCRETION: AND WHY YOU SHOULD KEEP THE BITS THAT DON'T WORK

(a) A 'Timeline'

• 1996/1997

Proponents of mandatory sentencing were dismissive of arguments that judicial discretion is desirable. For example, these arguments were brushed aside when the laws were introduced and in early 1997, the WA Government reacted strongly to the Children's Court using Conditional Release Orders and foreshadowed legislative change

• Late 1997/1998 - 1999

We can identify an increasing (if grudging) acceptance of the need for some judicial discretion. For example:

NT - exceptional circumstances provision

WA - Government drops its proposal to remove power of Children's Court to use CRO.

- 2000

“The Fact that the judiciary has, and uses, its discretion under the legislation when dealing with juveniles undermines the argument that the WA legislation is in breach of United Nations conventions.”

(WA Government evidence to Senate Inquiry).

(b) **The Ironies**

1. Advocates of the three-strikes laws are now defending them by reference to the bits that didn't work.

2. By their inventiveness and their desire / duty to strive for justice in individual cases, the courts have helped to defend – and probably to preserve – the laws they never wanted.

LESSON SEVEN

THE REDISTRIBUTION OF DISCRETION

Proponents of mandatory sentencing claim that decisions are more consistent, predictable and fair if judicial discretion is restricted. However, mandatory sentencing leads to a 'redistribution' of discretion to other parts of the criminal process and especially to police and prosecuting authorities. All of these involve decisions which can be inconsistent and unpredictable. Crucially, they are less transparent and accountable than decisions in open court. The 'redistribution of discretion' includes:

Diversion and alternative dispute resolution. In Western Australia, cases which have been processed by means of cautioning or juvenile justice teams do not constitute a 'strike'. Johnson and Zdenkowski found that in the NT, because of the mandatory sentencing laws, some cases of criminal damage were resolved through other means.

Choice of charge. The NT study provides numerous examples of the importance of the choice of charge and the role of the defence lawyer as bargain hunter / lobbyist. When the laws were first introduced, there was widespread use of the charge of 'unlawful possession' (which was not a 'mandatory offence') instead of stealing or receiving (both of which were mandatory offences). This 'loophole' was plugged in April 1998 when unlawful possession was added to the list of mandatory offences. However, other examples of overlapping offences remain.¹⁴

Negotiating multiple charges. In WA, it is common for defence lawyers to seek to get multiple home burglary charges heard en bloc so they constitute only one 'strike'. According to Goldflam and Hunyor, NT practices are similar but 'this is a discretion the prosecution have not always been prepared to exercise in favour of a defendant, and this has influenced in a very real and direct way, the sentences received by offenders.'¹⁵

Plea negotiation. Prosecutors are, of course, more likely to agree to a proposed course of action if there is 'something in it' for them. Related to the previous points, there is mounting evidence that defendants may feel pressure to plead guilty to non-mandatory offences in order to avoid the mandatory laws.¹⁶

Blissful Ignorance. There is evidence in WA that a number of people have not been sentenced under the three strikes laws for the simple reason that the matter was not brought to the attention of the court.¹⁷

¹⁴ . Ibid, 89

¹⁵ . R Goldflam and J Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) Alt LJ, 211

¹⁶ . Ibid

¹⁷ . Written Evidence to Senate Inquiry; Submission 95, p8.

LESSON EIGHT DISCRIMINATORY IMPACT(PAWNS IN A GAME ARE NOT VICTIMS OF CHANCE)

(a) Introduction

“Mandatory detention laws do not target indigenous people and are racially neutral on the face of the legislation and ... consequently the laws do not have a racially discriminatory purpose.”

(Daryl Williams QC, Federal Attorney General, March 2000).

However, the clear evidence is that whilst the laws may appear ‘facially neutral’, they are discriminatory in impact.

Crucially, I would argue that **discriminatory impact is not accidental; it is the result of two sets of conscious and deliberate choices:** -

- **Offence Selection:** Three strikes laws and their variants inevitably target offences in which young, minority and lower socio-economic groups are over-represented.
- **Choices with respect to the processing of cases** and the use of alternatives.

(b) Aboriginal & Non Aboriginal Rates

The issues with respect to Aboriginal and non-Aboriginal rates are best considered by asking not only ‘who gets caught?’ but also ‘who doesn’t get caught but gets diverted?’

- **Who Gets Caught?**

NT: No figures available (but there has been a big overall increase in the rate of Aboriginal imprisonment since 1996).

WA: No figures have been collected for adults.

Some figures are available for juveniles, though there seems to have been no systematic data collection. Nevertheless, it is accepted that:-

- Aboriginal children constitute around one third of all offenders in the Children’s Court.
- Three quarters (or more) of the three-strike juvenile offenders are Aboriginal.

So the one third of Children’s Court offenders who are Aboriginal provide three quarters of the three-strikes cases. The two thirds who are non-Aboriginal provide one quarter.

- **Who Doesn’t Get Caught?**

Diversion plays a key gatekeeping role. The evidence is clear that Aboriginal children in WA are less likely to access diversionary schemes than non-Aboriginal children.

- **The Official Response**

The official explanation for these figures is two-fold:

- “More Aboriginal people are being charged with these offences and brought before the court.”
(WA Government evidence to the Senate Committee):

Staggering in its simplicity, this truism misses the point about offence selection and the issues surrounding the processing of cases.

- The WA Government has also argued that three strikes laws have minimal impact in that they constitute only 0.5% of cases in the Children’s Court. It has described the laws as ‘a small component of a progressive juvenile justice system that emphasises the needs of young offenders.’¹⁸ In making these arguments, it has pointed to the State’s Aboriginal Justice Plan and to various multi-agency intervention programmes which target underlying issues relating to the over-representation of Aboriginal people in the justice process.¹⁹

In truth, mandatory sentences are not a ‘component’ of a progressive system but are anathema to one. It is particularly disingenuous and distasteful to use progressive (and glossy) policy statements and practices based on Aboriginal empowerment to defend laws which have a profoundly discriminatory impact.²⁰

(c) The NT “Exceptional Circumstances” Provision

There are five conditions, all of which must be met, before a first strike adult can avoid the mandatory minimum:

- good character
- co-operation with police
- making or attempting to make restitution
- mitigating circumstances
- trivial offence.

Not surprisingly this is known as the “white middle-class escape clause.”

(d) Impacts on Children and Adults

The NT laws do at least have a different regime for children. In setting a mandatory minimum of 12 months for both children and adults, the WA laws inevitably impact more heavily on children to whom a less punitive approach would normally be applied.

(e) WA: Actual Periods of Detention for Adults and Juveniles

Three-strikes offenders do not have to serve the term but are eligible for early release. Adults are eligible after one third of their sentence. Juveniles must serve one half.

The Government has defended these differences on two grounds:

- That the laws with respect to adults *will* change to require them to serve 50% before parole. (Hardly the point, four and a half years on; and given that the new adult parole laws were not even on the drawing board in 1996)
- That juveniles are given shorter sentences than adults. (Which seems utterly irrelevant in the context of mandatory as opposed to discretionary sentences).

¹⁸ . WA Government, Submission 96 to the Senate Inquiry, at 1 and 6. See also oral submissions.

¹⁹ . Ibid.

²⁰ . See below

CONCLUSION

WHERE ARE WE HEADING?

We now know far more about mandatory sentences. The news is not good:

- No clear and consistent rationale
- No deterrent effect
- Not tools for selective incapacitation
- No statistically valid evidence that they reduce recidivism
- They lead to disproportionate sentences on minor offenders
- They distort proportionality
- They subvert proper legal processes
- They have a profoundly discriminatory impact as a result of :
 - Offence selection
 - Processing of cases
 - The drafting of exceptions
 - The operation of early release schemes

There are some signs that some of these problems have, at least to some extent, been recognised:

- The shifting rationales
- Claims about deterrence and incapacitation are no longer seriously made
- Recognition of the need for some judicial discretion
- Increased focus on diversionary programmes

It is unlikely that the laws will be repealed or overridden by Federal legislation; and there continues to be political posturing on extending mandatory sentences. However, at risk of appearing unduly optimistic, it seems plausible to suggest that:

- The WA and NT laws may well continue be reduced in scope by a process of incremental change; and
- Mandatory sentences appear rather less likely to be introduced in other jurisdictions