International perspectives on mandatory sentencing

A paper delivered by Sarah Pritchard at the symposium 'Mandatory Sentencing: Rights and Wrongs', University of New South Wales, 28 October 2000

Introduction

In 1991, the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') recommended 'that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort' (recommendation 92). Since the RCADIC reported in 1991, two Australian jurisdictions, Western Australia and the Northern Territory, have introduced mandatory sentencing legislation.

In 1996, the West Australian Parliament introduced mandatory sentencing laws through amendments to the *Criminal Code 1913* (WA). In 1997, the Northern Territory Legislative Assembly enacted amendments to the *Sentencing Act 1995* (NT) and *Juvenile Justice Act* 1993 (NT). The West Australian regime provides for a mandatory minimum term of twelve months detention upon conviction for a third time for home burglary. Under the Northern Territory regime, adults face a mandatory sentence of imprisonment upon conviction for certain property offences, including for a first offence. Originally, the Northern Territory regime provided for mandatory imprisonment of juveniles with at least one prior conviction. The legislation has since been amended to provide for diversionary arrangements and greater police discretion in relation to juvenile offenders.

In these remarks, I address three questions:

- international standards of relevance to mandatory sentencing;
- observations by international human rights bodies upon Australia's mandatory sentencing laws; and
- responses by Australian governments to international human rights scrutiny of Australia's mandatory sentencing laws.

International standards of relevance to mandatory sentencing

International human rights standards relevant to mandatory sentencing include the following.

Prohibition of cruel, inhuman or degrading treatment or punishment

Article seven of the International Covenant on Civil and Political Rights ('ICCPR') provides that 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.' It is settled that in some cases, imprisonment or a disproportionate sentence of imprisonment for a trivial offence can amount to cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee, the body responsible for supervision of States' parties implementation of their obligations under the ICCPR, had adopted a General Comment on article seven. This General Comment refers to severity of punishment as a factor relevant in determining whether there is violation of the prohibition or cruel, inhuman or degrading treatment or punishment.

Prohibition of arbitrary arrest or detention

Article 9(a) of the International Covenant on Civil and Political Rights provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

In 1990, the Human Rights Committee confirmed in the case of *Van Alphen v The Netherlands* that 'arbitrariness' must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable. That is, detention must be a proportionate means to achieve a legitimate aim, having regard to whether or not there are alternative means available, which are less restrictive of rights.

It can be said that mandatory sentencing is arbitrary because:

- it allows no differentiation between serious and minor offending;
- it allows no differentiation between those for whom offending is out of character and those

who display elements of recidivism;

- it does not allow courts to sentence individuals according to the circumstances of the particular case; and
- it does not allow courts to sentence individuals according to the circumstances of the particular offender.

In the case of Aboriginal offenders, arbitrariness is particularly manifest because mandatory sentencing laws prevent courts taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties often associated with Aboriginality.

A further element of arbitrariness arises in that the exercise of police and prosecutorial discretion effectively means that whether or not an offender is subject to a period of imprisonment is determined outside of court proceedings. In relation to such decision-making there is no transparency or public scrutiny.

Treatment of persons deprived of their liberty with humanity

Article 10 of the International Covenant on Civil and Political Rights provides that:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
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> …
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> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Numerous commentators have suggested that the mandatory detention of Aboriginal offenders is inhumane because they are:

- subjected to overcrowded conditions resulting from a dramatic increase in the number of prisoners; and
- separated by huge distances from their families and communities.

Right to a hearing before an independent tribunal and to review of sentence by a higher tribunal

Article 14 of the International Covenant on Civil and Political Rights provides that:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, … everyone shall be entitled to a fair and public hearing. …
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> …
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> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
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> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

It can be said that mandatory sentencing violates the right to a hearing before an independent tribunal and to review of sentence by a higher tribunal because:

- the sentence is effectively imposed by the legislature and not subject to judicial control; and
- there is no system for review of sentences.

There are particular concerns in relation to the availability of interpreters for Aboriginal people appearing before the courts under mandatory sentencing laws.

Right to the enjoyment of culture

Article 27 of the International Covenant on Civil and Political Rights provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Aboriginal organisations have argued that the mandatory imprisonment of indigenous children and adults hundreds, in some cases thousands, of kilometres from family and country raises concerns in relation to the implementation of article 27 of the ICCPR. There are particular concerns in relation to the impact of imprisonment upon young people at an age when they would normally be participating in ceremonies and assuming responsibilities in their communities.

Prohibition of racial discrimination

The prohibition of racial discrimination is found in a range of human rights instruments, including the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the Convention on the Rights of the Child ('CROC'). There can be little doubt that the impact of mandatory sentencing laws upon indigenous Australians amounts to an egregious violation of the prohibition of racial discrimination. The evidence is unequivocal: mandatory sentencing laws lead to disproportionately high rates of detention for Aboriginal offenders.

In a submission to the Senate Legal and Constitutional References Committee, the North Australian Aboriginal Legal Aid Service ('NAALAS') adduced the following statistics:

- the Northern Territory imprisons four times as many of its citizens than any other State;
- Aboriginal people make up 73 per cent of the Northern Territory's prison population;
- between June 1996 and March 1999 adult imprisonment increased by 40 per cent;
- Aboriginal juveniles make up over 75 per cent of those detained in juvenile detention; and

- in 1997-98, the number of juvenile detainees increased by 53.3 per cent;

The impact of mandatory sentencing laws upon Aboriginal women has been particularly devastating. NAALAS has suggested that the number of women in prison in the Northern Territory has increased by 485 per cent since the laws were introduced.

The discrimination is exacerbated because:

- mandatory sentencing legislation targets property offences which indigenous Australians are more likely to commit; and
- judicial discretion is retained in sentencing in relation to other property offences and more serious crimes such as crimes of violence.

For example, crimes not subject to the Northern Territory's mandatory sentencing regime include obtaining credit by deception (s63 *Summary Offences Act* 1996), false statements of officers of corporations (s234 *Criminal Code Act* 1983), and false accounting (s233 *Criminal Code Act* 1983).

Equal treatment before the tribunals and or gans administering justice

Article 5 of CERD provides that:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
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> (a) the right to equal treatment before the tribunals and all other organs administering justice …

The rights of the child

Article 37 of the Convention on the Rights of the Child specifies that States Parties shall ensure that:

> ...
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
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> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

Article 40 of the Convention on the Rights of the Child provides:

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
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> 2. … States Parties shall, in particular, ensure that:
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> …
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
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> ...
> (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
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> …
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> 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Observations by international human rights bodies upon Australia's mandatory sentencing laws

Australia's mandatory sentencing laws have been examined by three of the United Nations independent human rights treaty bodies: the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee. Each has concluded that the laws violate Australia's obligations under relevant international human rights instruments.

On 10 October 1997, the Committee on the Rights of the Child adopted, amongst others, the following Concluding Observations in relation to Australia:

> 22. The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new legislation in two states where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.
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> ...
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> 32. ...The Committee is also of the view that there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islander children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.

On 24 March 2000, the CERD Committee adopted, amongst others, the following Concluding Observations:

> 15. The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population. Concern is also expressed that the provision of appropriate interpretation services is not always fully guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalisation, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes.
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> 16. The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.

On 28 July 2000, the Human Right Committee adopted, amongst others, the following Concluding Observations:

> 17. Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.
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> The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.

Responses of Australian Governments to international human rights scrutiny

It cannot be said that the responses of Australian governments to concerns expressed by international human rights bodies has been particularly positive. In March 2000, the United Nations Secretary General Kofi Annan asked UNICEF and the UN High Commissioner for Human Rights to prepare a reference paper on international standards relevant to mandatory sentencing. On 13 March 2000, the Foreign Minister Alexander Downer released the paper, announcing that it confirmed the 'view expressed by the Secretary General during his recent visit that the mandatory sentencing issue remains one of domestic responsibility.'

With all due respect to the Foreign Minister, it is difficult to see how one could possibly draw such a conclusion from the UN reference paper. After a detailed enumeration of numerous of the human rights standards referred to above, the reference paper concluded:

> This matter is a very important one from the human rights perspective and all States should give the principles involved the closest attention in both legislation and practice. In those cases where the meaning of the international standards is not clear, a request should be considered to the appropriate body for clarification and/or technical assistance. The OHCHR and UNICEF stand ready to provide whatever assistance is possible in light of their mandates regarding the rights and welfare of children.

It was subsequently revealed that the reference paper released by the Foreign Minister had been revised by the Office of the High Commissioner for Human Rights in response to pressure placed upon it by the Australian Government.

Australia's relations with the CERD Committee have been more than a little strained since the adoption by that Committee on 18 March 1999 of an 'early warning' procedure in relation to the 1998 amendments to the *Native Title Act* 1993 (Cth). On that occasion, the Attorney-General rejected the Committee's conclusions as:

> ...an insult to Australia and all Australians as they are unbalanced and do not refer to the submission made by the Australian Government on the issue. ... It is up to the Australian courts and the Australian Parliament to determine the validity of native title legislation. The comments made by the Committee are unbalanced and fail to understand Australia's system of democracy.

Despite the Federal Government's hostile response, the CERD Committee reiterated its conclusions pursuant to the early warning procedure on 16 August 1999 and again on 24 March 2000. The response of the Foreign Minster was that if the United Nations continued to 'meddle' in Australia's domestic affairs, it would get its 'nose bloodied'. On 30 March 2000, the Foreign Minster announced 'a whole-of -government review of the operation of the UN treaty committee system as it affects Australia.' The Government 'was appaled at the blatantly political and partisan approach' taken by the CERD Committee in examining Australia's periodic report.

The response of former prime minister the Rt Hon. Malcolm Fraser to the conclusions of the CERD Committee has been was somewhat more measured:

> I have read the comments contained in the report of the Committee on the Elimination of Racial Discrimination. If those comments had been made by any person in Australia, the Government would have had to regard them as reasoned and thoughtful. They were not offensive.

In the opinion of this writer, it is a matter of regret that whilst numerous members of the Federal Government have recorded their personal opposition to mandatory sentencing laws, the Government as a whole has declined to show any leadership on the issue. All three United Nations human rights bodies which have considered Australia's mandatory sentencing laws have concluded that these laws involve serious violations of Australia's international human rights obligations. From the perspective of the international legal regime, it is no defence to a charge of breaches of international obligations to defer to federal sensitivities and the concerns of some domestic constituencies. Both the CERD Committee and the Human Rights Committee have recently reminded the Federal Government of its obligation to ensure the application of international human rights instruments at all levels of government, including States and Territories, if necessary by calling on its power to override Territory laws and using the external affairs power with regard to State laws.

Again The Rt Hon Malcolm Fraser in his recent Vincent Lingiari lecture:

> Let me speak to the role of Government. ... mandatory sentencing is one issue where only the government can act. ... If ever there was a case for the use of our External Affairs Power, it was surely in relation to a matter of 'human rights' which affects in particular the condition of the indigenous minority.

Why, at the and of the day, does it matter that there has been such a falling out between Australia and the United Nations in relation to the human rights of indigenous Australians, including through mandatory sentencing laws? One reason might be that many Australians derive considerable pride from the leading role played by Australia in the establishment of the United Nations. Australia has an outstanding record of participation in UN human rights treaty regimes. We have previously taken a vigorous approach to the protection of human rights in Australia and abroad. Our representations in relation to other countries human rights situations have been listened to because we have been seen as serious in acknowledging and

addressing our own imperfections.

There is also a double standard in the rejection of international concerns in relation to mandatory sentencing. It is surely inconsistent to say that we live in a globalised world economy and that our financial market places must be open and transparent, and at the same time to reject the inevitable consequences of internationalisation in relation to matters such of human rights.

These altercations with the UN's human rights bodies not only diminish Australia and our capacity to offer credible commentary on matters of international concern, they also threaten the principle of universality of human rights and the integrity of the UN human rights system. It must be in Australia's best interests to assist the United Nations and its bodies in establishing an international rule of law which applies to the powerful, as well as the weak. Whatever the imperfections of the international legal order, we do not advance the international rule of law by heaping scorn on the instruments and bodies of international order.

RECENT DEVELOPMENTS

Appeals from the Court of Arbitration for Sport

Angela Raguz v Rebecca Sullivan & Ors [2000] NSWCA 240

By Robert Glasson

Ms Rebecca Sullivan competed in the women's under 52kg judo category at the Sydney Olympics after the Court of Appeal (Spigelman CJ and Mason P, Priestley JA agreeing) declined to adjudicate in a dispute concerning her selection in the Australian Olympic team. In doing so, the Court considered:

- the law as to multipartite agreements;
- the arbitral role of Court of Arbitration for Sport ('CAS');
- the concept of the juridical 'seat' or 'place' of arbitration as distinct from the place of hearing of an arbitration; and
- the changing attitudes of judges and the common law towards arbitration generally and in particular to arbitration agreements that attempted to oust the jurisdiction of the courts.

In May 2000 the Judo Federation of Australia Inc ('JFA') nominated Ms Angela Raguz for selection as a member of the Australian Olympic team in the women's under 52kg judo category. Ms Raguz's nomination was challenged by Ms Sullivan, who appealed to the JFA Appeal Tribunal claiming that, applying the selection criteria, she ranked higher than Ms Raguz. That appeal was dismissed, but Ms Sullivan succeeded in her subsequent appeal to the CAS (Oceanic Registry), which was heard in Sydney pursuant to the *Code of Sports-Related Arbitration*. The CAS made an award in her favour, on the ground that the nomination criteria had not been properly followed and implemented and that, if properly followed, Ms Sullivan would have been the nominated athlete. Ms Raguz then sought leave to appeal on a question of law arising out of the decision of the CAS, which application was removed to the Court of Appeal.

Ultimately, the Court did not consider the merits of the dispute. It decided that the jurisdiction of the Supreme Court had been excluded by the combined effect of various interlocking agreements signed by Ms Raguz, Ms Sullivan and the JFA with the Australian Olympic Committee Inc ('AOC'), including athlete's nomination forms, concerning participation of athletes in the Sydney Olympics. Together, those agreements submitted all disputes concerning team selection exclusively to arbitration, including appellate arbitration, before the CAS in