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The Compatibility of Mandatory
Minimum Sentencing with the
CCPR: Australia in Focus

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Abstract

In 1996 and 1997 Western Australia and the Northern Territory of Australia amended legislation to create harsher sentences for those who had committed property offences. The four pieces of legislation, the *Sentencing Act 1995 (NT)*, *Juvenile Justice Act 1983 (NT)*, *Criminal Code 1913 (WA)*, and the *Young Offenders Act 1994 (WA)*, were amended by the respective governments to create mandatory minimum terms of detention for juveniles and imprisonment for adults upon conviction of a designated property offence stipulated in the legislation. Criticism on the formulation and implementation of the legislation led to debate by Australian NGO's and United Nations treaty bodies as to whether mandatory minimum sentencing, under the respective legislation, violated offenders human rights.

Utilising the jurisprudence from the *UN International Covenant on Civil and Political Rights (CCPR)* and other international standards, each piece of legislation is analysed to the extent in which it may violate one's right from arbitrary detention, the right to an independent judiciary, the right to review of conviction and sentence by a higher tribunal, and lastly the prohibition of discrimination. Particular issues concern the formulation of the legislation in terms of defining 'exceptional circumstances', the determination of a strike, aggravated home burglary, and police and prosecutorial discretion. Furthermore, as noted by several organisations and UN treaty bodies, legislation upon implementation disproportionately impacts indigenous peoples. The test applied by the Human Rights Committee under the CCPR, whether the distinction is reasonable and objective under the Covenant, is applied with a demonstration of other international instruments and standards providing guidance in the sentencing of juvenile and adult offenders.

In conclusion, several avenues for redress of the situation in Australia are explored, including constitutional and international remedies.

Preface

In December 2001, I had the opportunity to delve through the vast files and folders of the International Centre for Penal Reform in London. After hours of reading, I came upon statistics that showed the devastating disproportionate rate in which Aborigines were being incarcerated in Australia. Upon further investigation, specific policies adopted by Western Australia and the Northern Territory received growing criticism by Australian NGO's, as well as United Nations treaty bodies. However, as to what nature these policies actually raised issues under international human rights law was not provided. Many allegations were based on theories of criminology rather than on jurisprudence of human rights law. With this in mind, my paper represents a legal foundation to the arguments put forward concerning the establishment of mandatory minimum sentencing legislation in the Northern Territory and Western Australia. Specifically focusing on the United Nations Human Rights Committee, an analysis of the respective legislation in the light of growing international jurisprudence in the field of human rights, lead to the accumulated research below. This paper is not meant to answer outright whether all legislation that imposes mandatory minimum sentences would violation *the International Covenant on Civil and Political Rights*, but only if these particular pieces of legislation, as to their formulation and implementation would lead to violations found by the Human Rights Committee.

“A free-man shall not be amerced for a small offence, but only according to the degree of the offence; and for a great delinquency, according to the magnitude of his delinquency...” Magna Carta 1215¹

¹Yale University's Avalon Project, Magna Carta 1215, para. 20.
<http://www.yale.edu/lawweb/avalon/medieval/magframe.htm>

1 Introduction

1.1 Introduction and Application of Mandatory Sentencing

An Aboriginal mother of three from the Northern Territory of Australia walks into an unknown apartment through an open door. She proceeds by taking a tin of meat and two tomatoes from the table and walks out from the apartment and feeds her hungry children. Within minutes the police arrive and arrest the mother for a property offence as stipulated in the amended *Sentencing Act 1995 (NT)*. She is convicted for theft under s78A and sentenced to a mandatory minimum of 14 days imprisonment, while her children are required to be removed from their mother during her period of incarceration.²

In Western Australia a young 12 year old Aboriginal boy named 'A' is seen before the court for his third charge of aggravated burglary under s401 of the *Criminal Code Act (No.2) 1996 (WA)* and *Young Offenders Act 1994* 'three strikes your in' legislation, in other words compulsory imprisonment upon conviction. 'A' entered an empty dwelling, in company with others, and stole a wallet containing \$4.00. His previous burglary offences include the entering of a laundry room, where no property was removed, and the removal of a can of soft drink from a school canteen. 'A' comes from a community that is socially and economically marginalized, not to mention 'A' has a history with involvement in the welfare system, and education and substance abuse problems. Due to legislation under the *Criminal Code Act (No.2) 1996 (WA)*, 'A', convicted of his third offence of aggravated burglary is sentenced to 12 months detention in a facility several hundred miles from his home. Considering he comes from a family that is dependent on the welfare system, the chances that 'A's' family will have the means to visit him in Perth is minimal. Therefore, under the newly amended 'get tough on

² Aboriginal Legal Service of Western Australia and Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, 2002, pg. 5.

serious crime' Criminal Code 1913, 'A' will spend 12 months in a facility, without contact with his family, for the theft of \$4.00.³

To further examine the nature of mandatory minimum sentencing, consider the two cases below under the Northern Territory Sentencing Act 1995.

- An Aboriginal man, 29 years old, wanders into a backyard under the influence of alcohol. He steals a towel hanging on the line with the value of \$15.00. It is his third minor property offence and is required under mandatory sentencing legislation to serve a term of incarceration of one year.
- An 18-year-old Aboriginal man is sentenced to 90 days imprisonment for stealing .90 cents from a motor vehicle.⁴

First one must ask; what is mandatory sentencing? Strictly speaking, mandatory sentencing refers to parliaments practice as lawmakers to fix a penalty for the commission of a specific criminal offence. In other words, upon conviction of this specified offence, the offender is obliged to serve a minimum sentence; in this specific case the minimum is prison or detention. Mandatory minimum sentencing is not a new phenomena, however in the early 19th century the practice of minimums was abandoned⁵, with parliament more in favour of fixing only a maximum penalty, while leaving the discretion of the judge to determine the appropriate sentence below the maximum. However, recently in Australia the practice has yet seen another phase of approval by parliament and mandatory minimums are fixed for property crimes in two provinces; the Northern Territory and Western Australia.

Questions to be answered:

- What the Northern Territory and Western Australian government's justification for implementing mandatory minimum sentencing?
- Are specific aspects of the respective legislation arbitrary within the meaning of article 9(1) of the UN *International Covenant on Civil*

³ Aboriginal Legal Service of Western Australia and Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, 2002. pg. 5.

⁴ Sheldon, G. and Gowans, K. "Dollars Without Sense: Review of the Northern Territory's Mandatory Sentencing Laws," 2000, at URL: http://ms.dcls.org.au/Dollars_Sense.htm pg. 9

⁵ Roche, D., "Trends & Issues in Crime and Criminal Justice: Mandatory Sentencing," Australian Institute of Criminology, Canberra, Dec. 1999. Pg. 1.

and Political Rights (CCPR)? Examples include: what is considered a ‘serious’ property offence, exceptional circumstances, and an ‘aggravated’ home burglary.

- Does the legislation provide a full right to review of sentence as required under article 14(5) CCPR?
- By fixing compulsory imprisonment as a punishment limit the judiciary from discretion to decide the nature of the case and therefore, prevent its independence from legislative influence?
- Does targeting a particular group when implementing the respective legislation constitute a violation under article 26 CCPR?
- Are the justifications given by the respective governments reasonable and objective to allow a differentiation in treatment?
- Do there exist other means, rather than compulsory imprisonment especially in the case of juveniles, to achieve a legitimate aim under the CCPR?
- What remedies are available at the domestic and international level if the respective legislation is in violation of the CCPR and the UN *Convention of the Rights of the Child* (CRC)?

The Northern Territory and Western Australia are the only two states/territories that have enacted mandatory minimum sentencing for home burglary and property offences. Furthermore, mostly non-indigenous people commit crimes that do not attract a mandatory minimum sentence, such as fraud and misappropriation. The Northern Territory Correctional Services Report⁶ quoted in 2000 that 91% of all white-collar crime, i.e. fraud, shoplifting, etc., was committed by non-indigenous people. Therefore the justification given by the respective governments needs to be clarified as to the reasonableness and objectiveness of its aim.

Legislation passed by a state or territory must comply with the provisions set out in the CCPR and other international human rights instruments the State has

⁶ Northern Territory Correctional Services Annual Report 1999-2000, Darwin 2000.pg.109

ratified⁷. Many NGO's in Australia argue that mandatory minimum sentencing legislation targets particular groups, i.e. women, children, and indigenous peoples, with the possibility of indirectly discriminating. However, one must apply the test of the UN Human Rights Committee's on whether legislation directly or indirectly discriminates by considering the justification of the State on enacting sentencing legislation. The Commonwealth Parliament's intention behind the legislation is the protection of society from serious offenders, based on the crime rate in both the Northern Territory and Western Australia. Therefore, the compatibility of the government's argument and the sentencing legislation with the provisions of the CCPR will be investigated to determine whether legislation violates human rights law. Not only will international human rights law be examined, but the foundation of sentencing principles, i.e. the common law, will be touched upon to give the reader a clearer understanding of criminal justice sentencing principles applied to offenders. Furthermore, it will explore the codification of common law sentencing principles in CCPR jurisprudence.

Judges, who are publicly accountable for their decisions, may be better qualified to ensure that justice is served with a greater understanding of the law and the context of the offence than parliament, which cannot make allowances for the circumstances of every criminal offence. In a common law system, judges use well established sentencing principles to ensure that the punishment fits the crime. Usually in determining the appropriate sentence to impose, a judge considers the individual facts of each case including previous conduct, acknowledgement of wrongdoing, degree of remorse, forms of justification for the actions, mitigating circumstances, and state of mind. As will be explored in detail, mandatory sentencing removes all discretion of the judge to examine these circumstances and imposes an obligation to sentence an offender, regardless of the seriousness of the offence, to a mandatory minimum term of imprisonment, as stipulated in several pieces of legislation. These principles include parsimony, proportionality, parity, and totality. Each of these sentencing principles is examined throughout the paper

⁷ The CCPR entered into force in Australia on the 12 November 1980. The Optional Protocol entered into force in Australia on the 25 December 1991.

under specific articles of the CCPR. As will be examined, mandatory minimum sentencing not only raises issues under common law sentencing principles, but also has been argued by several Australian NGO's as violating several internationally recognised human rights protected in the CCPR and the CRC.

1.2 Australia's International Human Rights Obligations

Unlike several continental legal systems (i.e. the United States), human rights treaties in Australia are not self-executing. Ratification of a treaty by the Commonwealth government does not immediately create domestic law; first the enactment of legislation to incorporate the treaty is needed. Recognition of this provision by the High Court of Australia in *Koowara v. Bjelke Petersen (1982)* reaffirms the long established provision that international law does not form part of Australian domestic law unless provisions have been legally and validly incorporated into municipal law by statute.⁸ Furthermore, ratification of an international instrument obliges Australia to ensure that not only the Commonwealth legislation, but also State and Territory laws and policies are consistent with the specific rights of the ratified instrument.⁹

In addition to the rights protected through incorporation of international treaties, common law rules of statutory interpretation allow judges to use international human rights instruments to assist them in interpreting ambiguous statutes or to fill lacunae in the common law. Justice Kirby of the High Court explained this approach in *Minister for Immigration and Ethnic Affairs v. Teoh*¹⁰:

In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law...It is also helpful in considering fundamental human rights, to take cognisance of international statements of such rights, appearing in instruments in which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint.

⁸ (1982) 153 CLR168 at 224

⁹ UN Doc. Communication No. 488 (1992) *Toonen v. Australia*

¹⁰ (1995) 183 CLR 273

These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.¹¹

In the *Toeh* case, the judge used international law to develop new rights in the common law. The High Court ruled that since Australia had ratified the *Convention on the Rights of the Child*, consideration must be given to the rights in the *Convention* when examining the applicants' interests, even though the *Convention* had been ratified but not incorporated by the Commonwealth Parliament into domestic law.¹²

Furthermore, the importance of international human rights instruments on the development of common law and its relationship with domestic decision-making was explored in the High Court decision *Mabo v. Queensland*.

[T]he opening up of international remedies to individuals pursuant to the First Optional Protocol...brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹³

Development of international remedies in national legal systems has seen a transformation since the advent of customary international human rights law and human rights treaties. International human rights treaties can be used directly if the state has incorporated the treaty or enacted legislation to give the treaty full effect.¹⁴ However, there is no explicit obligation to make the rights 'directly applicable' (i.e. amendment to the constitution) on the State, but rather an obligation "to adopt such legislation or other measures as may be necessary to give

¹¹ (1995) 183 CLR 273 at 288

¹² (1995) 183 CLR 273

¹³ No. 2 (1992) 175 CLR 1

¹⁴ Shelton, Dinah, *Remedies in International Human Rights Law*, Oxford University Press 1999.Pg. 80-81

effect” to the rights enshrined in the Covenant.¹⁵ The Permanent Court of International Justice held in the Advisory Opinion on the Jurisdiction of the Courts of Danzing (1928) that international treaties “cannot, as such, create direct rights and obligations for private individuals.”¹⁶ Therefore, enacted legislation is needed to create direct rights and obligations, which can be invoked in a court of law. In so far as enacted legislation to ensure the full and effective enjoyment of Covenant rights is concerned, it is often not sufficient to bring domestic law in line with the Covenant; constitutional provisions should, when all possible¹⁷, be implemented to give effect to the CCPR and allow for the protection and full enjoyment of all human rights.¹⁸ General Comment No. 3/13 on article 2(2) of the ICCPR exemplifies this point, “the obligation under the Covenant is not confined to the respect of human rights, but...State parties have also undertaken to ensure the enjoyment of these rights.”¹⁹

Domestic implementation is the primary mechanism envisaged by the CCPR and is purely a matter for the State, however when a State becomes a party to the CCPR duties are imposed and States are obliged to ensure that the rights are effectively protected in municipal law.²⁰ State reports, inter-state and individual complaints are only a secondary form of implementation to provide for a system of control.²¹ As seen in throughout this paper, reference is made to the CCPR when in fact under Australian legislation, the enactment of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC) gives effect under Schedule 2 to the CCPR.

¹⁵ ICCPR, article 2(2)

¹⁶ Fredman, S., *Discrimination and Human Rights: The Case of Racism*, Oxford University Press 2001. Pg. 417, See also PCIJ Ser. B No. 15 (1928), 3 et seq., (17-18).

¹⁷ Several States within Australia have been debating about the possibility of a Bill of Rights either creating constitutional protections or the establishment of a statutory bill of rights to give full effect to international human rights treaties in which Australia is a party.

¹⁸ Seibert-Fohr, Anja, “Domestic Implementation of the ICCPR Pursuant to its article 2, para. 2, “ Maz Planck Yearbook of United Nations Law Vol. 5. 2001. Pg. 453.

¹⁹ United Nations Document, General Comment No. 3/13 on article 2 (1981), Implementation at the National Level, 13th Session CCPR, 29/07/81

²⁰ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, 1993, note 2, pg. 27

²¹ Seibert-Fohr, A. 2001, pg. 400.

As demonstrated mandatory minimum sentencing runs counter to common law sentencing principles and therefore, attention needs to be turned to the greater picture of international human rights law, to protect the fundamental freedoms of adult and juvenile offenders when being sentenced. Sentencing legislation in the Northern Territory and Western Australia raises several issues under international human rights treaties that have codified common law sentencing principles and have created obligations on state parties to abide by these principles in international law at the domestic level. Taking into consideration the nature of mandatory minimum sentencing and the possible denial of fundamental rights, focus will be on the CCPR with a slight examination of the United Nations international minimum standards and principles in criminal justice and the CRC. Although, mandatory minimum sentencing may raise issues under other international treaties ratified by Australia, i.e. *International Convention on the Elimination of All Forms of Racial Discrimination*, *International Convention on the Elimination of All Forms of Discrimination Against Women*, *International Covenant on Economic, Social and Cultural Rights*, the primary focus will be on the CCPR.

1.3 Outline of Research

This paper investigates and analyses the Northern Territory's amended *Sentencing Act (No.3) 2001*, *Juvenile Justice Amendment Act (No.2) 2001* and Western Australia's *Criminal Code Act (No.2) 1996* and the *Young Offender Act 1994* in connection with Australia's international human rights obligations.

- Chapter Two will look at the Northern Territory and Western Australia's justification for adopting mandatory minimum sentencing for property and home burglary offences with an overview of the legislation under criticism.
- Chapter Three elucidates on the argument that mandatory sentencing is arbitrary as defined by Article 9(1) CCPR prohibition of arbitrary detention with an analysis of types of crimes stipulated in the legislation and the formulation of the legislation.

- Chapter Four examines Article 14(1)(5) CCPR on the independence of the judiciary and right to review of sentence is examined by applying two cases concerning mandatory minimum sentencing in the Northern Territory. Several aspects will be looked at such as the extent Parliament, by creating mandatory minimums, interferes with the independence of the judiciary and therefore, violates one's right to a fair trial. Other recommendations endorsed by Australia will clarify the issue of what is implied by independence of the judiciary, i.e. United Nations minimum rules concerning the independence of the judiciary.
- Article 26 the prohibition of discrimination with a glance at how the Human Rights Committee defines permissible differentiation under the Covenant is examined in Chapter Five. Questions to be answered concern whether the implementation of mandatory minimum sentencing, by targeting a specific group disproportionately, indirectly discriminates upon Aborigines. It is important to examine whether the justification by the Northern Territory and Western Australia for amending sentencing legislation is a reasonable and objective aim concerning all the relevant rights under the CCPR and CRC and has achieved its aim of protecting society against serious offenders.
- Lastly, considering the impact mandatory minimum legislation has on indigenous peoples, Chapter Six demonstrates how Australia can remedy this situation. Several options are demonstrated in the sixth chapter, those includes international remedies under specific United Nations treaty bodies, to Commonwealth constitutional and legislative abilities to amend, appeal, and/or enact State and Territory legislation that contravenes Australia's Constitution and international human rights law.

1.4 Methodological Limitations

Limitation in the examination of mandatory minimum sentencing in the Northern Territory and Western Australia show that statistics by both governments do not always differentiate between sentences that fall under mandatory minimum legislation and those that do not. Therefore, this paper must use the reliability of reports from the Australian Bureau of Statistics, Australian Institute of Criminology, and Western Australia and the Northern Territory's Department of Justice's Correctional Services Reports. Because incarceration rates under mandatory sentencing are not specifically mentioned in statistics, cross references will be made to the types of crime under sentencing legislation and NGO submissions to the Senate Legal and Constitutional Committee and United Nations Human Rights Committee concerning cases of mandatory sentencing before the courts and statistics of incarceration occurring for incidents of property or home burglary offences. Furthermore, Australia's third and fourth report submitted in 1998 to the Human Rights Committee and its report submitted to the Committee on the Rights of the Child, failed to mention mandatory minimum sentencing although it had been in practice from 1996. One must also consider that the Northern Territory has hampered the process of availability of statistics specifically relating to mandatory sentencing, because it lacks legislation allowing for the freedom of information.²² Western Australia's Children Court also lays restrictions on access to juvenile cases under the *Young Offenders Act 1994*. This leaves one with relying on statistics given by the Australian Institute of Criminology concerning all States and Territories in Australia, NGO's shadow reports to various United Nations treaty bodies, NGO submissions to the Commonwealth's Inquiry into mandatory minimum sentencing, and lastly, on research concluded by academics concerning the theory of mandatory sentencing and its ramifications.

²² Johnson and Zdenkowski, "Mandatory Injustice," University of New South Wales Law Journal Vol. 22 2000. Pg. 10. See also Australian Lawyers for Human Rights, Submission to the Senate Legal and Constitutional Reference Committee - Inquiry into Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000.

2 Justification for Mandatory Sentencing

2.1 Introduction and Application of Mandatory Sentencing

The application of mandatory minimum sentencing legislation on juveniles and adults represents a shift from traditional common law sentencing principles. Sentencing legislation in most Australian territories and states distinguish between adults and juveniles, by emphasising on the rehabilitation of the juvenile rather than the protection of the community, in other words, balancing the interests between the individual and the community. In the best interests of the juvenile, sentencing legislation in Australia, as seen in the *Child Welfare Act 1986*²³, shows preference for non-custodial sentences. Why, suddenly, the shift in sentencing policy towards juveniles? What has triggered the shift in the balance between the best interests of the juvenile and the protection of the community from harm?

2.2 Prevalence of Mandatory Sentencing

One could argue that mandatory sentencing is prevalent throughout Australia, but has not received similar criticism by international treaty bodies and human right's organisations. A significant reason for this insight is that there exist two types of mandatory laws in Australia: 1) mandatory penalties, which include statutory fines for transport violations and minimum fines, and 2) mandatory imprisonment laws for violent offences, sexual offences and murder. There exist major differences between the laws described above and mandatory minimum sentencing analysed below. Firstly, in the case of mandatory penalties for traffic offences the mandatory provisions do not require a deprivation of liberty. Furthermore, the mandatory imprisonment requirements for violent or sexual offences stipulate no minimum period but only compulsory imprisonment, leaving discretion on the part of the judiciary to decide the appropriate sentence. It is also

²³ *The Child Welfare Act 1986* states that detention shall be a punishment of last resort. The *Juvenile Justice Act 1983 (NT)* however, is silent on the issue of appropriate sentencing principles for juveniles.

not per se a breach of international law to have mandatory sentencing for serious violent crimes.²⁴ However, to determine whether other provisions of mandatory sentencing in Australia breach international human rights law, one would need to assess them on a similar basis, nevertheless, the focus will be on non-violent offences of home burglary and property offences within Australia.

2.3 Northern Territory's Objective

In 1996 the government of the Northern Territory enacted legislation '*Mandatory Minimum Imprisonment for Property Offences*', which established mandatory minimum terms of detention for adults and juvenile offenders. Legislation on mandatory minimum terms of detention fall under the *Juvenile Justice Act 1983*²⁵ and the *Sentencing Act 1995* respectively.²⁶ The shift in policy towards juveniles and adults alike was the political platform of zero tolerance for the crime of theft, because of public concern over the rise in property crime in the Northern Territory. This shift suggests that the previous interest in the rehabilitation through diversionary and early intervention programs has moved towards the protection of the community. The Attorney-General of the Northern Territory stated the aim of mandatory sentencing was to "send a clear and strong message to offenders that these offences will not be treated lightly..."²⁷ Hence, the direct response by the government to amend legislation for stronger terms of punishment, as a reaction of the high rate of property offences. The Northern Territory's stated objective for mandatory sentencing legislation has varied from deterrence to retribution²⁸, however, in the Senate Legal and Constitutional Committee's (SLCC) inquiry into *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, the Chief Minister of the Northern Territory, in a submission to the SLCC, stated that courts would be *forced* to take strong action:

²⁴ United Nations Document, Communication No. 802/1998 *Thompson v. St. Vincent and the Grenadines*

²⁵ *Juvenile Justice Act 1983 (NT)*

²⁶ *Sentencing Act 1995 (NT)*

²⁷ Mandatory Sentencing: Legal Information Access Centre – Hot Topics.
www.austlii.edu.au/au/au/other/liac/hot_topic/hottopic/2000/3/5.html

The mandatory sentencing laws were developed in 1997 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.²⁹

With a justification of deterrence and the shift from rehabilitation of the adult and especially the juvenile offender, one must question the impact and effect that such a policy creates. It is also important to note the restriction on the courts by the legislature in using their discretion in applying sentencing principles such as ‘the best interests of the child’. The legislature has replaced judicial discretion with discretion by the community to decide what crimes deserve more severe punishment, interesting enough, in the Northern Territory, non-violent crimes are not in focus even though from 1995 to 2000 the crime of assault increased 39% and was recorded as the most commonly recorded violent crime, accounting for 78% of violent crime victims.³⁰

2.3.1 Sentencing Act 1995 and Juvenile Justice Act 1983

In order to understand the implications of mandatory sentencing a brief review of the legislation is necessary to scrutinise its compliance with international human rights treaties and standards.

Offences covered by the amendment to the *Juvenile Justice Act 1983* are as follows:

Theft (irrespective of the value of the property, and excluding theft when the offender is lawfully on premises (i.e. shoplifting)); criminal damage; robbery; assault with intent to steal; unlawful entry; unlawful entry with intent; being armed with intent to enter; unlawful use of a vessel, motor vehicle, caravan or

²⁸ North Australian Aboriginal Legal Aid Service, Submission to the Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 282

²⁹ Senate Legal and Constitutional Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 10-11.

³⁰ Australian Institute of Criminology, Australian Crime – Facts and Figures 2001, Australian Institute of Criminology, Canberra 2002. Figure 2a.

trailer (passenger or driver); receiving stolen property; receiving to obtain reward; criminal damage; and possession of goods suspected of being stolen.³¹

Property offences for adults are the same as for juvenile offenders, with a differentiation in the determination of 'strikes' or convictions.³² Under the *Juvenile Justice Act 1983*, a compulsory minimum detention of 28 days is issued if a juvenile, aged 15 and over, was convicted of a property offence for a second or subsequent time.³³ Adults, under Section 78A of the *Sentencing Act*, receive a mandatory minimum sentence of imprisonment for 14 days on the first offence, which subsequently raises to 90 days on the second conviction or 'strike' and 12 months on the each conviction there from.³⁴ Under both forms of legislation, terms of mandatory detention and convictions incurring imprisonment for non-property offences cannot be served concurrently.³⁵

Because of the international and domestic scrutiny of the legislation and its disproportionate effect on Aboriginals and juvenile offenders, the Northern Territory repealed, but only in part, the *Sentencing Act 1995* and *Juvenile Justice Act 1983*. The decision to repeal in part mandatory detention for juvenile offenders and adult offenders (concerning minor property offences) was due to pressure from the federal government after the death in custody of an Aboriginal boy in the Don Dale Juvenile Detention Centre in Darwin, February 2000. One month after the incident, the Senate Legal and Constitutional References Committee recommended that the federal Parliament override the mandatory minimum legislation concerning juveniles by passing the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*. Rather than the Commonwealth override the legislation causing political ramifications, the Northern

³¹ *Juvenile Justice Act 1983 (NT)*, Schedule 1

³² 'Strikes' accrued according to the number of sentencing days rather than the number of offences. If a defendant was before the court for sentencing on a particular day for three offences each committed on a different day, that amounted to one 'strike' for the purposes of the mandatory imprisonment provisions.' Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001.

³³ *Juvenile Justice Act 1983 (NT)* s53AE (2)

³⁴ *Sentencing Act 1995 (NT)* ss78A(1)-(3)

³⁵ *Juvenile Justice Act 1983 (NT)* s53AE(9) and *Sentencing Act 1995(NT)* s78A(6A); cf s 52(1)

Territory reached an agreement with the Commonwealth government on the 10th of April 2000 to repeal in part.

The agreement between the Northern Territory and Commonwealth has created a change in legislation through an amendment to the *Juvenile Justice Amendment Act (No.2) 2001* and the *Sentencing Amendment Act (No.3) 2001*. The Northern Territory's argument for repealing mandatory sentencing for juvenile and amending the *Sentencing Act 1995* was that mandatory sentencing had:

Resulted in the imposition of unjust and inappropriate sentences of imprisonment while having no positive impact on the crime rate. There is no evidence to suggest that under mandatory sentencing offenders have been deterred from committing property offences. Moreover, the mandatory sentencing regime for property offences provides no scope for discretion except insofar as it commits the imposition of greater sentences. This has resulted in a regime that operates unfairly and inconsistently.³⁶

However, the recent changes in legislation have done nothing to amend the problem of unjust and inappropriate imprisonment of Aborigines, juveniles and the mentally disabled.

The *Juvenile Justice Amendment Act (No.2) 2001* repeals mandatory imprisonment for juveniles of 17 years of age and imposes only terms of detention, while the *Sentencing Amendment Act (No.3) 2001* creates an 'exceptional circumstances' clause to eliminate petty property offenders from serving terms of imprisonment. A mandatory term of imprisonment still exists for adults who commit aggravated property offences and a court must imprison the adult offender, even those who commit trivial offences, unless they can show that 'exceptional circumstances' exist.³⁷ Exceptional circumstances, however, have been ambiguously defined and leave the question open as to who is actually being diverted.

³⁶ Toyne, the Hon Dr P, Attorney-General, Hansard, Legislative Assembly (Northern Territory), Ninth Assembly, First Session, 16 October 2001. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001.

³⁷ Human Rights and Equal Opportunity Commission, Commission Welcomes Repeal of Mandatory Sentencing Laws in Northern Territory, 19 October 2001, Media release at URL: www.hreoc.gov.au/media_releases/2001/01_65.html.

The Northern Territory amendment to in the *Sentencing Act 1995 (No. 3) 2001* allows for ‘exceptional circumstances’ for only first time adult offenders. Under the amended act, the court is not required to impose a mandatory minimum term of imprisonment, if the offender falls under *all* four requirements:

- the offender must be of otherwise good character with no mitigating circumstances (which does not include intoxication) which reduce the extent to which the offender is to blame;
- the offence must have been of a trivial nature;
- the offender has co-operated with law enforcement agencies;
- the offender must have made reasonable efforts to make full restitution of the property.³⁸

The definition of exceptional circumstances has been randomly applied and is left to judicial interpretation.³⁹

For juveniles the amended *Juvenile Justice Act* allows for a wider range of sentencing options for the court, but only with respect to a first strike.⁴⁰ The Northern Territory Court may do any of the following, whether or not it proceeds to conviction: a) discharge without penalty; b) adjourn for up to 6 months with a view to discharge without penalty if the offender commits no further offence; impose a fine; d) order the offender to be of good behaviour for 2 years; e) order participation in community service; f) order participation in a punitive work program; g) place the offender on probation; h) order detention for up to 12 months; i) order participation in an approved diversionary program; j) make such an order as it could make if the juvenile were an adult. Although this leaves open several options for the court, it still has the possibility of imposing detention, and to imprison a juvenile as if they were an adult. For the purposes of the second strike, any order by the court under s53(1) is to be counted as a strike *even* if it did not involve a conviction. Finally, for the purposes of the third strike property offender, any order by the court under s53AE, even if it did not involve a conviction, is to be taken as the second strike. Second strike juveniles either serve a period of

³⁸ *Sentencing Amendmetn Act (No. 3) 1995 (NT) 2001*. See also Hughes, Gorden. ‘The Mandatory Sentencing Debate’ The Law Council of Australia, September 2001.

³⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001. Pg. 7.

⁴⁰ *Juvenile Justice Act 1995 (NT) s53(1)*

detention of 28 days or participate in a diversionary program. However, as the SLCC stated in its examination of the legislation, diversionary programs are not up and running, were not operating in areas with the highest need, and had very rigid qualifications, which, therefore, excluded those who could benefit from them, i.e. indigenous juveniles.⁴¹ In conclusion, flexibility and discretion is only open for first time offenders, but third time or subsequent offenders do not have similar treatment.

Under the new agreement, the legal definition of juvenile is changed to incorporate 17 year olds. Previously, a 17 year old offender could be sentenced under the *Sentencing Act 1995 (NT)*, however, current legislation stipulates that 17 year olds are to be treated as juveniles, this does not include, however, the possibility of a judge to use discretion under s53(1)(j) in sentencing an offender to a term of imprisonment.⁴²

The changes made to the *Juvenile Justice Act* and the *Sentencing Act* were minimal. The severity of mandatory minimums is still evident for both adults and juveniles. Only first time juvenile offenders receive a softening effect by the amendment, other aspects of the legislation continue to violate Australia's international human rights obligations.

2.4 Western Australia's Objective

In 1996, amendments were made to the *Criminal Code 1913* in Western Australia creating the *Criminal Code Act (No.2) 1996 (WA)*.⁴³ The sentencing of juveniles is governed by a combined operation of the *Criminal Code 1913* and

⁴¹ Senate Legal and Constitutional Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 17.

⁴² *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000 (NT)*, s4. It further states that a 17 year old charged as an adult, but not sentenced as the date of enactment is entitled to be dealt with as a juvenile. *Sentencing of Juvenile (Miscellaneous Provisions) Act 2000 (NT)* s7.

⁴³ Mogan, N. 'Mandatory Sentencing in Australia: Where Have We Been and Where Are We Going?,' (2000), 24, Criminal Law Journal, pp 164-183. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001. Footnote 16, 'Mandatory sentencing legislation has been introduced previously in Western Australia. In 1992 the Western Australian Labour Party enacted the short-lived *Crime (Serious and Repeat Offenders) Sentencing Act 1992*

the *Young Offenders Act 1994*. The aim behind the amendment is similar to that of the Northern Territory Government, the reduction of the communities concern about home burglary. According to the Western Australian Ministry of Justice the aim of mandatory sentencing is as follows:

The background to the three strikes legislation is that at the time the legislation was introduced into Western Australia, the state had the highest rate in the nation of home burglary. ⁴⁴...The provisions of the three strikes legislation 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. It set out to provide adequate penalties for burglary and in fact the three strikes provision was part of a slightly larger piece of legislation...[which] set out firstly to re-establish the offence of home burglary and, secondly, a greater penalty for home burglary relative to burglary...⁴⁵

It is evident from the statement made by the Western Australian Ministry for Justice that the 'three strikes' legislation was adopted as a measure of deterrence. However, the legislation applies, equally to both adults and juveniles, but as the Youth Affairs Council (WA) stated that statistically, juveniles are more likely to be subject to the three strikes legislation. This is due to the fact that instances of minor crime may be more common for juveniles than that for adults.⁴⁶

2.4.1 Criminal Code 1913 and Young Offenders Act 1994

The *Criminal Code Act (No.2) 1996* was a package deal, which included an increase in the maximum sentencing for home burglary and burglary committed in circumstances of aggravation; the creation of a new offence of home burglary; and the introduction of a mandatory minimum imprisonment or detention for repeat

(WA), which targeted high-speed pursuits in stolen vehicles. It was shown to have no deterrent effect and was repealed in 1994.'

⁴⁴ Yet as will be explained in further chapters, the rate of home burglary was decreasing when the legislation was adopted. Australian Institute of Criminology, *Australian Crime – Facts and Figures 2001*, Australian Institute of Criminology, Canberra 2002. Burglary was on the decrease in 1994 and 1995 and since the enforcement of mandatory sentencing has increased continually since 1996.

⁴⁵ Western Australian Ministry of Justice, Submission to the Senate Legal and Constitutional Committee - Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 10

home burglary, otherwise considered ‘three strikes’ and you are in. The new offence created applies to the offence of home burglary that is committed on places that are ordinarily used for human habitation (i.e. hotel rooms, caravans, tents).⁴⁷

Adults convicted under the amended *Criminal Code Amendment Act (No.2)*, receive a term of 12 months imprisonment by a court if they have previously served at least two custodial sentences for home burglary. The amendment expressly requires a term of imprisonment, without the provision of *exceptional circumstances*, which include mental disabilities, and furthermore, those offences that were committed when the offender was a child are calculated into the equation of ‘strikes’.⁴⁸

Section s401(4) reads in effect as follows:

- a person convicted for a third time of entering a home without permission and who commits an offence in circumstances of aggravation, or who intends to commit such an offence, must be sentenced to at least 12 months imprisonment.¹

Section s400(1) defines ‘circumstances of aggravation’ as including:

- being armed with a dangerous weapon;
- being in company with other persons;
- causing bodily harm;
- threatening to kill or injure.

Sentencing of juveniles, under the *Criminal Code 1913 (WA)* s401(5), provides that a court cannot suspend a term of imprisonment, with no reference to ‘detention’ (s401(4) reference to only imprisonment), therefore giving the courts discretion in respect to the term of detention.⁴⁹ Courts, therefore, have been imposing alternative sentences of an intensive youth supervision order, known as a

⁴⁶ Youth Affairs Council, Western Australia, Submission to the Senate Legal and Constitutional Committee - Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 857

⁴⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001. See also Hughes, Gordon, ‘The Mandatory Sentencing Debate,’ Law Council of Australia, September 2001.

⁴⁸ *Criminal Code 1913 (WA)*, s401.

⁴⁹ *Criminal Code 1913 (WA)*, s401(5)

Conditional Release Order (CRO), in combination with a period of detention, but a mandatory term of detention is still required.

Legislation in Western Australia is rather inflexible, as compared to the Northern Territory's exceptional circumstances clause, in that s401(5) expressly prohibits the suspension of a term of imprisonment, meaning there is no examination of mitigating circumstances, such as mental disabilities. The regime in Western Australia, furthermore, does not allow for concessions such as exceptional circumstances, only crimes in aggravation, and respect of the period that may have elapsed since the earlier convictions. Nor does the legislation differentiate "between an adult's previous offences, even if they were committed" when the offender was under the age of 18.

2.5 Concluding Analysis

Mandatory minimum sentencing laws were examined in March of 2000 and March 2002 respectively, by the Senate Legal and Constitutional References Committee's inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* and the inquiry into the *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*. The Senate Committee commented during the examination of both pieces of legislation that "we are comparing bad with bad and we are trying to prioritise badness."⁵⁰

How can one measure whether the Northern Territory and Western Australia's justification is within the ambit of a legitimate aim under the CCPR and the CRC? As will be examined in detail further, it is possible to determine whether the specific sentencing measures are justified, whether offenders targeted under either property offences or home burglary are receiving proportionate sentences for the justified aim of harsher punishment. Furthermore, the question of whether it is necessary to restrict the full discretion of the judiciary and to remove the possibility of having your sentence reviewed, proportionate to protect the community from harm due to

⁵⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report, Human Rights and Equal Opportunity Commission, Sydney 2001. See also Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 56.

non-violent property offences and instances of aggravated home burglary by adults and juveniles as young as 10 years of age. Lastly, concerning the disproportionate effect of mandatory sentencing on particular groups, i.e. women, children, indigenous peoples, and those with mental disabilities, is the enactment of legislation that creates a distinction a reasonable and objective measure that could not be achieved by other means? All of these questions must be addressed under each respective article in the CCPR, furthermore, by examining other means to achieve a legitimate aim under United Nations international minimum standards and principles of non-custodial sentences and judicial independence and the relevant articles under the CRC.

Detailed in the next Chapters are Australia's obligation under international human rights treaties and standards. Particular attention will be drawn on the CCPR concerning ones' rights under article 9(1) prohibition of arbitrary detention, article 14(1) one's fundamental right to the independence of the judiciary, article 14(5) one's right to review of a sentence and finally, article 26 prohibition of discrimination.

3 Article 9(1) CPPR: Prohibition of Arbitrary Detention

International Covenant on Civil and Political Rights

Article 9(1): 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.

3.1 Introduction and Application to Mandatory Sentencing

Issues to be discussed under Article 9(1) CCPR and common law sentencing principles concern the nature of sentence imposition for trivial and serious crimes under legislation from both the Northern Territory and Western Australia. Many NGO's and UN treaty bodies have mentioned the possibility of mandatory minimum sentencing raising issues under one's freedom from arbitrary detention when sentenced to a term of imprisonment for trivial offences.⁵¹ Lack of clarity and inconsistencies in determining what constitutes a 'strike' under the s401 of the *Criminal Code* 1913, with a consequence of 12 months imprisonment for some, but not for others, could be unreasonable and needs further clarification. This section will discuss the Human Rights Committee's definition of what constitutes arbitrary detention under Article 9(1) of the CCPR and its application to mandatory sentencing. It will, moreover, shed light on specific aspects of the legislation that may raise issues under the CCPR. Specific aspects of the legislation for the Northern Territory and Western Australia are as follows:

- Formulation of the legislation;
 - Types of Crimes;
 - What constitutes 'exceptional circumstances' under s78A Sentencing Act 1995;
 - What constitutes a 'strike' under s401 *Criminal Code* 1913;

⁵¹ Joseph, S., Schultz, J., Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 2000. Pg. 217.

- What constitutes a ‘strike’ under s78A and s78B under the *Sentencing Act 1995*;
- Reasonable and objective measure of enacting mandatory minimums to achieve a legitimate aim of the maintenance of law and order;
 - Example of trivial offences;
 - Protecting Society from Recidivists.

3.2 Requirement of Legality and Prohibition of Arbitrariness

During the examination of Australia’s 3^d and 4^h report in July 2000 to the Human Rights Committee, concern was expressed in the Concluding Observations to Australia that:

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 of the Covenant...⁵²

Australia argues that countries with sub-national governments should be allowed a degree of discretion when determining criminal sentences in the context of prevailing social circumstances. Therefore, it would be ‘open’ for the Northern Territory and Western Australian Governments to determine the sentencing, based on community concern, which in the end justify the imposition of mandatory minimums. However, to what extent the two governments can ‘openly’ determine sentencing is based on the principle of proportionality. The principle of proportionality is well established common law sentencing principle that has been codified in the CCPR though Article 9(1), among other articles.⁵³ The principle of proportionality is directly connected with the principle of parsimony (see section 5.3.1 Reasonable and Objective). Supreme Court Justice Brennan, in *Chester v*

⁵² United Nations Document, Concluding Observations of the Human Rights Committee: Australia, CCPR/C/AUS/99/3 and 4, 28 July 2000 HRC/A/55/40.

⁵³ Nowak, M. 1993.

*The Queen*⁵⁴ draws the link between the two sentencing principles by stating: “the fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.... In the light of this background of settled fundamental legal principle, the power to...sentence to detention...should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.”⁵⁵ The power to impose a punishment is installed in the judiciary, which bestows the authority of the courts to judge criminal guilt and the principle of proportionality between the crime and the punishment. Using the sentencing principles and fundamental freedoms, judges should be empowered to apply all common law sentencing principles, so that not only does the offender receive a just sentence, but also the aim of ‘incarceration’ achieves its social purpose.

The test of proportionality creates a prohibition on the courts from imposing sentences that exceed the gravity of the offence for which the offender has been convicted. Western Australia’s ‘three strikes your in’ legislation imposes gradually more severe terms of imprisonment for each conviction of theft or home burglary. The Northern Territory mandatory minimum sentencing for property offences incrementally becomes more severe after each offence despite the nature of the offence. In Western Australia an offender, convicted for the third time for theft or home burglary, can serve a minimum of 12 months regardless of the nature of the offence (loss of property, mitigating circumstances, trivial nature, necessity such as hunger), creating sentences that are disproportionate to the nature of the crime. Sentencing cannot be disproportionate to the offence committed, especially in circumstances of a trivial nature.⁵⁶

⁵⁴ (1988) 165 CLR 611 F.C. 88/060

⁵⁵ (1988) 165 CLR 611 F.C. 88/060 at 618

⁵⁶ *Michael Wayne Riggs v. California* 525 US (1999) 1114 the Supreme Court of the United States found that a third strike determination of a sentence of 25 years under California’s three strikes legislation was disproportionate for the nature of the crime. The Supreme Court emphasized that the crime in question did not involve violence or threat of violence to any person. See similar cases in *Solem v. Helm* (1983) 463 US 277; *Coker v State of Georgia* (1977) 433 US 584.

The Human Rights Committee has elucidated on this subject in its various views concerning breaches of Article 9(1) CCPR. The first sentence of Article 9(1) deals with the legality of the arrest and detention. It obliges States to arrest and detain individuals according to the application of the rules of domestic criminal procedure and that police detention and preliminary inquiries by the examining magistrate be compatible with Article 9(1), as 'provided by law'.⁵⁷ The principle of legality can, therefore, be violated if one is arrested or detained on grounds in domestic law, which are vague and ambiguous.⁵⁸ In this sense, in terms of mandatory detention, it is clear in the legislation which crimes will be considered a conviction under domestic law, however it is the application, in terms of what is 'serious' or aggravated, for example, of a first, second, or third strike, in particular with juveniles, it is vague and unclear. This brings us to the second issue under Article 9(1) CCPR.

The second sentence of Article 9(1) deals with the prohibition of arbitrariness. This prohibition flows from the principle of legality, as illustrated in *Hugo van Alphen v. the Netherlands*⁵⁹, when other factors of a otherwise lawful arrest and detention, render the actions of a State arbitrary within the meaning of Article 9(1). As seen in the drafting history of Article 9(1) and emphasised in *Hugo van Alphen v. The Netherlands*, "arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."⁶⁰ As the Committee has observed in General Comment 20/44 that remand in custody, pursuant to a lawful arrest, must be reasonable in *all* circumstances. The Australian Government's argument that mandatory sentencing only targets 'commonly committed serious' repeat offenders⁶¹ does not explain the numerous arrests and detention of individuals for offences of a trivial nature. All incidents or arrest and remand in

⁵⁷ Official Records of the General Assembly 47th Session Supplement No. 40 4/47/40 annex VI. A., General Comment 20/44. See also Nowak, M. 1993. Pg. 171,

⁵⁸ Nowak, M. 1993. Pg. 172. See also Bolanos v. Ecuador Communication No. 238/1987

⁵⁹ Communication No. 305/1988 (views adopted July 1990)

⁶⁰ Communication No. 305/1988, para. 5.8

⁶¹ United Nations Document (20 and 21 July 2000), CCPR/C/SR, 1955th, 1957th, 1958th Sessions. Australia's Dialogue with the Human Rights Committee upon submission of State Report CCPR/C/AUS/99/3 and 4.

custody must be reasonable within the meaning of Article 9(1)'s prohibition of arbitrariness.

3.3 Formulation of the Legislation

States are not only responsible to protect individuals from arbitrary arrest and detention, but they also have a duty to fulfil that obligation by ensuring that legislation passed by states and territories is not arbitrary within the meaning of Article 9(1) CCPR. Mandatory minimum sentencing legislation is formulated, without intent by the Australian government, in a nature that lacks clarity in who it really intends to target – the serious repeat offender, and therefore, captures first time offenders and even repeat offenders for minor offences. The question is whether this unpredictability in the legislation constitutes a breach under Article 9(1) CCPR. To determine what the outcome will be certain aspects of the legislation will be examined: the lack of differentiation between minor and serious offences; types of crimes selected for minimum incarceration or detention; sentencing terminology; and the justification given by the government to implement such a regime of compulsory imprisonment. The legislation is constructed in a way that captures first time offenders, which is not the government's justification for amending either the *Sentencing Act 1995* or the *Criminal Code 1913*. Furthermore, the Northern Territory and Western Australia are the only states/territories that have selected these particular offences under a regime of mandatory detention or imprisonment, and no other state or territory in Australia imposes an obligation to incarcerate or detain for minor property offences. Finally, an examination of the Commonwealth Parliaments method of choosing property offences and exempting more serious 'white collar' crime from mandatory minimum sentencing legislation.

3.3.1 Types of Crimes

In Australia's 4th report to the Human Rights Committee in 2000, written before the mandatory sentencing regime was in effect, Australia reported on the

incarceration rate of indigenous peoples. It is evident that even before the adoption of mandatory sentencing or amendment to the legislation, those most likely to commit property offences and home burglary are Aborigines.

Indigenous people are more likely than non-indigenous people to be imprisoned for assault, break and enter, motor vehicle offences, property offences and justice procedures offences and are also more likely to be arrested for good order offences. (para 73.)

Consider the distinction between property offences covered by the Northern Territory and Western Australia mandatory sentencing laws with other types of theft not subjected to mandatory terms of detention. “Whereas the theft of petrol from a bowser will attract a mandatory sentence, the theft of a tank-full of petrol through the use of a fraudulent credit card does not.”⁶² This distinction is made because legislation in both the Northern Territory and Western Australia does not cover fraud, misappropriation or shoplifting, crimes committed when one is lawfully on the premises.

Even before the inception of mandatory sentencing, one can see that indigenous peoples would be targeted by such legislation and also fall between the gaps once the legislation was amended to include exceptional circumstances, because of the prevalence of substance abuse problems throughout the State. So, is it unreasonable to enact legislation to capture repeat property offenders, when it is shown that a problem persists in both Western Australia and the Northern Territory? However, actions taken by the government must be proportionate in all cases, i.e. trivial and non-serious offenders receiving sentences not reflecting the nature of the crime. Therefore, knowing the justification by the respective governments to create such legislation, which preserves to be valid, the clarity of sentencing terminology under the specific pieces of legislation will be examined.

⁶² Aboriginal and Torres Strait Islander Social Justice, Report on National Laws Contributing to Racism, Racist Practices and / or Race Related Discrimination, at URL: http://www.hreoc.gov.au/social_justice/ntissues/law.html.

3.3.2 Exceptional Circumstances

Section 78A of the *Sentencing Act 1995*, as applied to adult offenders, is based on the number of appearances before the court, without regard to the mitigating circumstances.

- Where a court finds an offender guilty of one or more property offences and the offender has not previously been sentenced for property offences, the court, except in exceptional circumstances (in further detail below), must record a conviction and impose a term of imprisonment of not less than 14 days.⁶³
- Where the court finds an offender guilty of one or more property offences and the offender has once before been sentenced for property offences (no matter how trivial), the court must record a conviction and impose a term of imprisonment of not less than 90 days.⁶⁴
- Where a court finds an offender guilty of one or more property offences and the offender has two or more times before been sentenced for property offences, the court must record a conviction and impose a term of imprisonment of not less than 12 months.⁶⁵

The *Sentencing Act 1995* was amended in 2000⁶⁶ to provide an ‘exceptional circumstances’ clause⁶⁷ for first time adult offenders. Its object and purpose is to remove the possibility of sentencing offenders who will not become recidivist. However, an offender must fall under all five exceptional circumstances before the court does not impose a sentence of mandatory imprisonment. These include:

- Single offence of a trivial nature; and
- The offender made or tried to make full restitution; and
- The offender is otherwise of good character; and
- Mitigating circumstances in the commission of the offence reduce the offender’s blame; and
- The offender cooperated with law enforcement agencies in the investigation of the offence.

Research conducted by the Northern Aboriginal Australian Legal Aid Service, by reference to the Correctional Services reports in both the Northern Territory and Western Australia, looked at a sample of 400 cases or 50% of the mandatory

⁶³ *Sentencing Act 1995 (NT)*, s.78(1)

⁶⁴ *Sentencing Act 1995 (NT)*, s.78(2)

⁶⁵ *Sentencing Act 1995 (NT)*, s.78(3)

⁶⁶ *Sentencing Amendment Act (No. 2)*, 1999, s. 16

sentencing cases between March 1996 and August 1999 to see the effects of mandatory sentencing. To explore the possibility of the effectiveness of mandatory sentencing increasing discretion of the courts and removing the possibility of capturing first time offenders unnecessarily, statistics show the possible ineffectiveness of the exceptional circumstances clause.

Of the 400 cases, 46% had no prior criminal history for property offences, however 63% had a substance abuse problem, making it difficult to fall within the ambit of good character. Furthermore, 90% of those caught under the mandatory sentencing scheme were unemployed or students, creating a difficulty in paying full restitution. Further statistics show that the definition of the exceptional circumstances clause has a very wide interpretation that has the possibility of misuse by prosecutors and the courts if not all the information of each case is presented, therefore giving it very limited effect on those who are being sentenced under mandatory sentencing.⁶⁸ Examples of failed exceptional circumstances bring light to the ambiguity of the clause.

- A 17-year-old volunteer bush fire fighter was asked to pawn a camera by a friend who had no driver's license. The camera turned out to be stolen and the young man waited 1 ½ hours for the police to arrive, cooperated fully with the police and returned the camera. However, he did not qualify under the exceptional circumstances clause.⁶⁹
- A 19-year-old man found a bag of pearls and did not report the matter to the police for three days. He was subsequently charged for unlawful possession and served a mandatory minimum sentence.⁷⁰

Criticism, however, in how prosecutors are bending the rules to extend exceptional circumstances to a serious offender with a previous record undermines the effectiveness of the clause. In an example given by the Central Australian Youth

⁶⁷ *Sentencing Act 1995 (NT)*, s.78A (6B) and (6C)

⁶⁸ North Australian Aboriginal Legal Aid Service, Submission to the Senate Legal and Constitutional Committee - Inquiry in to Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 30. Statistics show that 68% of the offenders have English as a second language, 63% had an education level less than year 8, and 76% were from remote communities.

⁶⁹ Sheldon, G. and Gowans, K. "Dollars Without Sense: Review of the Northern Territory's Mandatory Sentencing Laws," 2000, at URL: http://ms.dcls.org.au/Dollars_Sense.htm

⁷⁰ Ibid.

Justice submission into the inquiry into the *Human Rights (Mandatory Sentencing for Property Offenders) Bill 2000*, the uncertainty of its application was exhibited.

- In a matter involving the unlawful use of a motor vehicle by an intellectually disabled man with a history of bizarre behaviour known to defence counsel, his lawyer submitted to the court that the offence was an ‘aberration’ from the defendant’s usual behaviour, and that he was otherwise of good character. However, the prosecution elected not to inform the court of the offender’s prior criminal history. It was accepted as a trivial offence even though thousands of dollars of damage was caused to the vehicle concerned and that his reasonable attempts to make restitution resulted in no payment of restitution for the damage concurred.⁷¹

The lack of predictability in the determination of what is considered an exceptional circumstance removes the purpose of the amendment and will continue to have particular offenders fall under misinterpretation of the clause.

3.3.3 Determination of a Strike

Western Australia

Many NGO’s have identified significant concerns with the operation of Western Australia’s three strikes and you’re in scheme. The Aboriginal and Torres Strait Islander Commissioner (ATSIC) submitted to the Senate Legal and Constitutional Committee during the inquiry into mandatory sentencing, that ambiguity and unpredictable ness exists in the determination of a strike. In relation to adults, a:

Lack of clarity on what constituted a strike, in combination with limited available information on police records for certain offences which made it difficult to determine whether a burglary was in a place of habitation, led to some problems in determining the status of the conviction.⁷²

‘Review of s401 of the *Criminal Code (WA)*’ showed that the three strikes provisions have had little impact on the adults courts, in terms of sentencing repeat offenders, because under most circumstances repeat offenders in home burglary

⁷¹ Ibid. Pg. 3

⁷² Department of Justice, Western Australia, Review of section 401 Criminal Code, Department of Justice, Perth. 2001. Pg. 15

would receive a sentence of imprisonment above the minimum of 12 months. This point was emphasised by the Western Australian Department of Justice in the Commonwealth Parliament's inquiry into the *Human Rights (Mandatory Sentencing of Property Offences) Bill 2000*. All offenders who were assessed, in the 'Review of s401 of the Criminal Code', to be 'repeat offenders' within the meaning of s401, received imprisonment; the majority received more than the required sentence of 12 months.⁷³ However, problems in the process of determining strikes have increased the workload for the courts and prosecutors. This increase derives from the lack of clarity in what is a strike for the purposes of sentencing, resulting in delays in court through adjournments while prosecutors review police records to establish the number of strikes.⁷⁴

Therefore, the Department of Justice concluded that the three strikes legislation under s401 of the *Criminal Code* possibly produced 'unfairly harsh and counterproductive outcomes' for adult offenders.⁷⁵ The harsh nature of 'three strikes' derives from the non-existence of a statute of limitations. In other words, there is no time limit on the accumulation of strikes for adult offenders.⁷⁶ In one case a female offender had reached the second strike stage, but had not offended for several years. She was convicted for theft under s401, while searching for food, therefore qualifying as a repeat offender and was sentenced to the mandatory minimum of 12 months.⁷⁷ This raises issues under the principle of parity in common law sentencing. Parity requires that when more than one offender is being sentenced in respect of the same offence, they should be sentenced in a similar manner. In *Leeth v. The Commonwealth*, the court states the importance of the principle of parity: "it is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner."⁷⁸ Furthermore, under s401 of the *Criminal Code* in Western Australia, the mandatory minimum term of

⁷³ Ibid. Pg. 20-21. See also Senate Legal and Constitutional Committee - Inquiry into the Human Rights (Mandatory Sentencing of Property Offences) Bill 2000, 2002.

⁷⁴ Ibid. Pg. 15

⁷⁵ Ibid. Pg. 21

⁷⁶ *Criminal Code (WA)* 1913, s401(5)

⁷⁷ Department of Justice, Western Australia, Review of section 401 Criminal Code, Department of Justice, Perth. 2001. Pg. 22

⁷⁸ (1992) 174 CLR 455 at 470

imprisonment for aggravated home burglary is 12 months, if convicted of a third strike. Section 400 of the *Criminal Code* defines circumstances of aggravation as a) being armed with a dangerous weapon; b) being in company with other person; c) causing bodily harm; or d) threatening to kill or injure.

Under s401(5) of the *Criminal Code*, despite not making concessions in respect of the period that may have elapsed between convictions, it does not differentiate between an adult's previous offences, even if they were committed when the offender was under 18 years old. Thus, in calculating prior offences for an adult, who has previously been convicted of two offences as a young person and is now convicted of a third strike, he or she will be sentenced to a mandatory 12 months imprisonment.

Strikes for young offenders, under the *Young Offenders Act*, do, however, provide for a concession for previous crimes convicted two or more years prior, in other words a statute of limitation. In *P v. The Queen*, the Supreme Court of Western Australia decided that convictions for young people that are over two years old cannot count towards a mandatory sentence, therefore a strike according to law.⁷⁹ It also signified a change from the Northern Territory, to be examined below, that previous convictions for home burglary without a penalty being recorded were not to be recorded as a strike for young offenders. Furthermore, juveniles who have been diverted as first time offenders do not receive a strike recorded on their record, however there is a difference in distinction of strikes for juveniles in the Northern Territory.

Northern Territory

The determination of a strike under the *Sentencing Act* and the *Juvenile Justice Act* differs from the Western Territory, but only slightly. Young first time offenders sentenced under the *Juvenile Justice Act* receive harsher penalties than young people under the *Young Offenders Act (WA)*. For first time offenders in the Northern Territory, the Court can impose a full range of options under s53(1). These options can include probation, participation in a community work order,

discharge without penalty, and order the offender to be on good behaviour for two years, however for the determination of a second strike, any order given by the court under s53(1) is to be taken as a strike, even if it did not involve a conviction.⁸⁰ A second strike, section 53AE, imposes a mandatory detention of 28 days or to participate in a diversionary program. In determining a third strike, and order given by the court under s53AE, even if it did not involve a conviction, is be taken as a second strike.

For adults under the *Sentencing Act*, first time offenders may fall under the exceptional circumstances clause, which is not recorded as a strike when determining a second strike. However, on a third strike for both adults and juveniles a mandatory sentence of either imprisonment or detention respectively, must be imposed, not only for the third strike but every subsequent strike thereof. Another aspect of determination of a strike that adds to the arbitrary nature of its imposition is when the strikes actually accrued. Under the *Juvenile Justice Act* and the *Sentencing Act*, strikes are accrued according to the number of sentencing days rather than the number of offences. If a defendant was before the court for sentence on a particular day for three offences each committed on a different day that amounted to one strike for the purposes of the mandatory sentencing provisions.

The scheme for determining strikes is unpredictable and results in some offenders being treated more harshly for trivial offences than more serious repeat offenders. Examples were given in the Human Rights and Equal Opportunity Commission's Social Justice Report 2001, where offenders who were familiar with the sentencing scheme, committed numerous home burglary or property offences with the knowledge that they would all contribute to a single strike under legislation. Another example provided in the Department of Justice (WA) 'Review of s401 of the Criminal Code'⁸¹, concerned an offender who pleaded not guilty to one property offence simultaneously pleading guilty to two other property offences.

⁷⁹ Supreme Court of Western Australia, Court of Criminal Appeal, SCL 97/05/08

⁸⁰ *Juvenile Justice Act 1995 (NT)*, s. 3(1)

⁸¹ Department of Justice, Western Australia, Review of section 401 Criminal Code, Department of Justice, Perth. 2001. Pg. 23

By pleading guilty to two offences he was sentenced as a repeat offender and given a 12 months mandatory imprisonment. However, he was subsequently found guilty for the third offence and sentenced to an additional 12 months. Under the *Criminal Code*, mandatory sentences cannot be served concurrently, and therefore, the offender, who would have been given only a 12-month sentence if he had been dealt with at the same time as the previous offences, had to serve a mandatory minimum of 24 months imprisonment.

3.4 Reasonable and Objective Aim under the Covenant

3.4.1 Introduction and Application to Mandatory Sentencing

Reasonableness and Objectivity as a requirement of proportionality derives from case law of the Human Rights Committee and General Comment 20/44 on Article 9(1) CCPR.⁸² In the context of sentencing legislation, it is important to examine whether specific provisions are reasonable and objective within the meaning of the Covenant and therefore, do not interfere with the rights and freedoms of others.

3.4.2 Example of Trivial Offences

Arguments by the Commonwealth Government as to the seriousness of the offence have been disputed by several NGO's in both the Northern Territory and Western Australia. As the Aboriginal Torres Strait Islander Commission (ATSIC) demonstrates that mandatory sentencing legislation removes the ability to investigate mitigating circumstances of the offence to even determine whether it is serious or of a trivial nature. Mandatory means that despite the circumstances

⁸² Official Records of the General Assembly 47th Session Supplement No. 40 4/47/40 annex VI. A., General Comment 20/44. See also Nowak, M. 1993. Pg. 171

surrounding each case incarceration of adults or detention of juveniles must be imposed even if:

- An insignificant amount of property is involved;
- The objective seriousness of the crime is minor; or
- The culpability for the offence is low.⁸³

Having regard to the circumstances of mandatory sentencing, examine the necessity of incarcerating an individual by the cases provided below.⁸⁴

Examples of Trivial Mandatory Minimum Sentences of Imprisonment

- A man from a remote Aboriginal community north east of Darwin stole a packet of biscuits and some cordial worth \$3.00 from an open office in his community. It was his third strike, which equated to 12 months imprisonment.
- A second man was also charged with the same property offence as receiving stolen goods. It was his second strike and therefore was sent to 90 days imprisonment.
- A homeless man living in Darwin stole a \$15.00 beach towel from a clothesline. It was his third property offence, therefore sentenced to 12 months imprisonment.
- A 17-year-old Aboriginal boy from a remote community east of Darwin, stole \$4.00 worth of petrol from a car to contribute to his substance abuse problem. It was his second offence as an adult offender and sentenced to 90 days imprisonment.
- A 34-year-old Aboriginal man broke an aerial of a car after an argument. He was sentenced to 14 days imprisonment.
- An 18-year-old Aboriginal boy living in a remote community stole a can of soft drink with the value of \$1.50 from the cafeteria at his school. He was sentenced to 14 days imprisonment.
- A 16 year old borrowed a bike from a friend and went for a ride. It turned out that bike was stolen. By the time the case was dealt with at court he had turned 17 and under the *Sentencing Act 1995*¹, was considered an adult offender. He spent 28 days in an adult prison.
- A 30-year-old Aboriginal man approached a commercial fisherman who had anchored his boat on the man's traditional land. He requested food as compensation for fishing and was denied. For compensation, he stole

⁸³ Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional Committee - Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, prepared by Cunneen, C., Director, Institute of Criminology, University of Sydney Law Faculty, 2000. Pg. 31.

⁸⁴ Sheldon, G. and Gowans, K. "Dollars Without Sense: Review of the Northern Territory's Mandatory Sentencing Laws," 2000, at URL: http://ms.dcls.org.au/Dollars_Sense.htm

two cartons of eggs worth \$8.00 and was convicted for a property offence. He spent 14 days in prison.

- A 16 year old from a remote community received a bottle of stolen spring water. He was sentenced to mandatory detention for 28 days.
- A 16 year old from remote community stole a small amount of petrol for his substance abuse problem. He was sentenced to detention for 28 days.
- A 16 year old broke a window after hearing that his friend had committed suicide. He was sentenced to 28 days detention.
- A 16 year old found an abandoned bicycle and rode it over a bridge before being arrested for theft. He was also sentenced for 28 days detention

Under the mandatory minimum sentencing legislation there are serious offenders being convicted, but they are rarely impacted by the legislation because they receive greater than the minimum punishment prescribed by legislation. This fact would show that the need for mandatory minimums to impose harsher sentences on repeat offenders is in all probability ineffective in creating harsher sentences for repeat serious offenders and imprisoning non-serious offenders disproportionately. Consider the mandatory minimum sentencing regime on juveniles. Its imposition is to deter offenders from recidivism, however as statistics show 80% of juveniles never reappear before the court.⁸⁵ The government has justified mandatory sentencing, which is to capture the serious repeat offender, but must it justify the sentencing of offenders in all cases having regard to trivial offences and first time offenders, not to mention sentencing juveniles to detention rather than diversion programmes? Although the Human Rights Committee has not directly answered the question of reasonableness of one's sentence, except by applying the principle of proportionality, the European Court of Human Rights, which influences the Human Rights Committee in judgments, has examined the issue of 'a court of fourth instance'. In a case concerning the United Kingdom, the European Court of Human Rights, as part of the fourth instance doctrine, will not substitute the views of the national court on the appropriateness of a sentence with those of its own

⁸⁵ Central Australian Youth Justice Submission to the Senate Legal and Constitutional Committee – Inquiry into the Human Rights (Mandatory Sentencing for Property Offenders) Bill 2000. 2002. Pg. 18

views.⁸⁶ In *T. and V. v. United Kingdom*⁸⁷, it was argued that to impose the same sentence on all child murderers, regardless of their age or circumstances, was arbitrary and therefore ‘unlawful’. However, the Court found that if the applicant’s sentence complied with English law and followed a conviction by a competent judicial authority, the issue of arbitrariness did not arise. A similar argument is being held about property and home burglary offences, all individuals who commit an offence as stipulated in the legislation will receive a prescribed sentence by the Parliament, without regard to age, value of property, or seriousness of the crime.

3.4.3 Protecting Society from Recidivists

The common law principle of proportionality and jurisprudence of the Human Rights Committee in *A v. Australia* state that preventive detention must be reasonable in all circumstances.⁸⁸ One would assume that the rule would apply to all forms of detention, not just preventive detention. Mandatory minimum sentences, by their justification and implementation, extend the penalty for a particular crime for the purpose of protecting society from recidivism. This principle has been reaffirmed in a unanimous decision of the Full Court of the High Court of Australia in *Chester v. R*⁸⁹, which stated, “our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.”⁹⁰

Furthermore, one cannot be detained and sentenced on the basis of likely future dangerousness. The High Court of Australia in *Kable v. Director of Public*

⁸⁶ Overy, C. and White, R., *Jacobs & White: European Convention on Human Rights*, 3rd Ed, Oxford University Press, 2002. Pg. 120.

⁸⁷ *T. v. United Kingdom* (App. 24724/94); and *V. v. United Kingdom* (App. 24888/94) Judgments of 16 December 1999; (2000) 30 ECHR 121. See also Overy, C. and White, R. Pg. 120.

⁸⁸ United Nations Document Communication No. 560/1993

⁸⁹ (1988) 165 CLR 611 at 618

⁹⁰ *ibid.*

*Prosecutors (NSW) (1996)*⁹¹ reiterated this point. Both Western Australia and the Northern Territory are creating harsher sentences to those who are repeat offenders and incrementally sentence more severe punishment to deter the offender from further offending, however first time offenders are being captured not to mention the extremely trivial nature of the offences committed. The legislation is created because it perceives that offenders are likely to reoffend and therefore implements harsher sentences. This issue has also been an issue addressed by the Human Rights Committee in its Concluding Observations to Portugal⁹² in 1999, that it is not compatible to sentence and detain someone on the basis that they are perceived to be likely to reoffend.

3.5 Concluding Analysis

Australian NGO's have a legitimate concern about the ambiguities of the legislation in the terminology of a strike and exceptional circumstances clause, however, as the 'doctrine of fourth instance' would state, the Human Rights Committee would only examine the legality of the arrest as to whether it was 'provided by law' and whether it was reasonable and an objective aim under the CCPR. It is a misconception of applicants to believe that the Human Rights Committee can reopen domestic proceedings or to substitute those proceedings with its own views. Therefore, the Human Rights Committee is only under an obligation to determine the legality of the arrest, as stated above, and then to examine if the proceedings under Article 14's fair trial guarantees, complied with the provisions of the CCPR.

As long as the detention was one of the sentences permitted by domestic law, and as long as the sentencing court followed the procedure provided by that law, the detention will usually be 'lawful' within the meaning of Article 9(1) CCPR. Although an excessively long period of detention, for trivial non-violent offences, might raise issues under Article 7 prohibition of torture, inhuman or degrading

⁹¹ (1996) 189 CLR 51

⁹² United Nations Document, Concluding Observations of the Human Rights Committee: Portugal. CCPR/C/79/Add.115 para. 12.

treatment and punishment, this issue will unfortunately not be discussed in this paper.

Considering statistics have shown that the crime of home burglary, and property offences are highest in Western Australia and the Northern Territory, the justification to create such legislation has a defined social purpose. Therefore, the Commonwealth government would have a legitimate reason to create such legislation. If the problem of property crime concerns a particular group it is not unjustified to enact legislation to alleviate the problem of property crime. Such legislation is enacted repeatedly when governments create sentencing legislation for the violent crime of murder. It is a well-known fact that statistically more men commit the violent offence of murder than women. The creation of the legislation is, therefore, not at question, but the vagueness of particular aspects of the legislation could raise issues under the CCPR. This brings us to the issue of the exceptional circumstances clause under the *Sentencing Act (NT)*.

Although the government's intention in the exceptional circumstances clause was to remove the 'negative stigma' mandatory sentencing was receiving for imprisoning first time offenders and trivial offences, the definition of exceptional circumstances is only cosmetic and in effect does little to alleviate the problem. It is important to note that mitigating circumstances do not include intoxication and drugs, furthermore it has been noted by several NGO's that the exceptional circumstance clause only benefits middle class non-indigenous people who have the funds to make restitution, and who are less likely to have previous convictions, and, thereby, causing considerable confusion in courts as to its definition. Clarity in what constitutes an exceptional circumstance would possibly prevent unpredictability in the legislation considering particular groups still have the possibility of falling through the gaps and the clause does not remove the possibility of sending offenders to prison for up to 12 months for extremely trivial offences. Furthermore, full discretion should be given to the judiciary in determining the trivial nature and mitigating circumstances of the offender, with the seriousness of the crime versus the protection of society.

However, mandatory sentencing in certain circumstances, removes the ability of the courts to fix a proportionate punishment, if deemed applicable under the minimum term of imprisonment, for the conviction before the courts. Discretion is only limited to the range of sentencing, the minimum term of incarceration or detention (in the case of juveniles) to the maximum, without the consideration of mitigating factors, including mental disabilities.

On to the issue of the determination of a strike, one would assume that the common law sentencing principle, parity, would afford offenders the right to not receive disproportionate sentences compared to other offenders committing similar offences. Considering the issue at hand involves non-violent crimes, the seriousness of the crime is not as serious as violent crime. When one individual is convicted for a property offence for stealing an item worth \$50 dollars and sentenced for 14 days, it would seem only logical that a second offender who has committed the same offence would serve the same sentence. However, under this legislation, one could serve a year while the other only 14 days. A similar problem persists with the time in which a conviction is committed. Why should an offender who committed two offences on two different days receive a different sentence than one who committed two offences on the same day? Logically speaking, the courts should be given full discretion to decide the sentence, considering the ineffectiveness of determining a strike by prosecutors. However, this is also to be discussed in the next chapter.

In terms of what is considered aggravated home burglary of s400 of the *Criminal Code*, as is seen in several cases concerning juvenile offenders, their offence involves a group of juveniles who decide to enter a home that is unoccupied. This is still seen as aggravated home burglary, even if nothing is removed from the premises, while an offender who enters a home with a dangerous weapon and threatens to injure or kill the occupants, is sentenced under the same mandatory minimum sentencing regime. The first offender is not being treated in a like manner with the second, more serious offender, but both are sentenced under the same section s401 of the *Criminal Code 1913*.

Finally, the determination of a strike can lead to unpredictable outcomes and harsh, unjust sentences for offenders who have committed trivial non-serious offences. The ambiguity and nature of determining a strike has led to the aversion of one's sentence by negotiation for a different non-mandatory minimum offence by a prosecutor. However, by allowing such aversion to the prosecution one must also transfer discretion from the judiciary into the hands of the prosecution, where it is more individualised and less transparent. Amended legislation in Western Australia and the Northern Territory still capture first time offenders, despite the 'exceptional circumstance' clause, and therefore seriously questions the effectiveness of mandatory minimum sentencing to deter. The system of strikes is rendered moot because judges will usually sentence serious offenders beyond the minimum. Accordingly, several aspects of mandatory sentencing legislation, offences of a trivial nature, exceptional circumstances and the determinations of strikes, raise questions to the reasonableness and objectivity of its inception to punish repeat serious offenders. Therefore, by sentencing an offender according to the number of crimes committed, rather than on the gravity of the crimes raises issues under Article 9(1) CCPR. As demonstrated early, however, if a conviction is provided by law, it is doubtful the Human Rights Committee will find a violation. However, issues of offenders being sentenced to harsh sentences for minor offences appear during sentencing, which is not an issue under Article 9(1) CCPR because the Human Rights Committee is not a court of 4th instance, but fall under one's right to review of their sentence by a higher tribunal.

States are allowed within a margin of appreciation to decide how best to deal with crime and sentencing legislation. The justifications given by the Australian governments, to create legislation because of the persistent problem of home burglary and property crime in the two respective areas would seem a legitimate aim to maintain law and order.

It would be, therefore, the job of the appellate courts to examine the facts and to review the conviction and sentence handed down by the lower court, not the Human Rights Committee. However, the possibility to have one's conviction and

sentence reviewed by a higher tribunal under mandatory minimum sentencing legislation is explored in the next chapter.

4 Article 14(1) and (5) CCPR: Judicial Discretion and Right to Review

International Covenant on Civil and Political Rights

Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(5): Everyone convicted of a crime shall have a right to his conviction and sentence being reviewed by a higher tribunal according to law.

4.1 Introduction and Application to Mandatory Sentencing

The primary argument concerning mandatory minimum sentencing and one's right to a fair trial lies in the judicial guarantee of a fair trial, as stipulated in article 14(1) and (5) CCPR. Arguments put forward concern the independent nature of the judiciary to perform its primary function during the determination and review of a sentence, because of the nature in which mandatory sentencing legislation is formulated. As the CCPR demonstrates, 'independence' of the judiciary obliges states to require an independence from the executive, as well as the legislature.⁹³ This requirement goes beyond the separation of powers, as will be demonstrated in *Wynbyne v. Marshall*⁹⁴, but an assurance that the courts are not overly influenced by powerful social groups'.⁹⁵

In a criminal trial, sentencing is a fundamental part of the judicial process. At the very heart of the sentencing process is the exercise of judicial discretion.⁹⁶ High Court Chief Justice, Sir Gerard Brennan, stated on February 17, 2000, that a 'law which compels a magistrate or justice to send a person to jail when he

⁹³ Nowak, M. 1993. Pg. 245

⁹⁴ (1997) 117 NTR 11

⁹⁵ Nowak, M. Pg. 245

⁹⁶ The New South Wales Bar Association, Submission to the Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing for Property Offences) 2000, 2002. Pg. 1

doesn't deserve to be sent to jail is immoral...Sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty.'⁹⁷ The judiciary should be entitled to use their professional expertise and have jurisdiction over all issues concerning one's conviction and sentence, including the authority to decide whether an issue, such as one's conviction and sentence, is compatible with sentencing principles and due process. These standards are not only standards in which Australia has endorsed domestically through the *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*⁹⁸, but also standards that have been endorsed at the international level⁹⁹.

Commonwealth Guidelines on Parliamentary Supremacy and Judicial Independence

Principle 1: Judges should adopt a generous and purposive approach in interpreting legislation, particularly in a human rights context...

Principle 3: Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

United Nations Basic Principles on the Independence of the Judiciary

Principle 2: The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

As the United Nations Basic Principles on the Independence of the Judiciary would suggest, the judiciary shall decide *all matters without any restrictions*, however, as legislation would stipulate, mandatory minimum sentencing does restrict the judiciary and therefore, hinders their duty to decide all matters before them. It is whether this restriction or limitation that hinders one's right to a fair trial

⁹⁷ Hughes, G. Pg. 12-13.

⁹⁸ Canberra 19 June 1998, updated March 2002

under Article 14(1) CCPR, and because of the restriction stipulated in the legislation, one's right to review of conviction and sentence, Article 14(5) CCPR, is not guaranteed. The restriction on discretion concerning convictions of property offences and home burglary on the courts undermines one's entitlement to a fair trial, and the question to be examined is how far of a restriction is compatible under the CCPR before one's right to a fair trial is violated? Restrictions or limitations on the judiciary can shift discretion lower to that of the prosecutors and police, which removes the transparency of one's criminal proceedings, and denies one's right to review if it transcends at this level. This brings us to the second aspect of mandatory minimum sentencing, one's right to review as stipulated in article 14(5).

Everyone, under the jurisdiction of Australia, is entitled to the right to appeal of a criminal conviction and *sentence*. However, the Human Rights Committee is rather silent on the issue of one's right to review of sentence, nonetheless it has delivered its views on the issue of one's right to review of conviction and these will be applied, in addition to underlining principles used by the Committee and the *travaux préparatoires*, to determine the ability of Australian courts to afford offenders a right to review of sentence under mandatory minimum sentencing legislation.

The Human Rights Committee has interpreted the phrase 'according to law' in article 14(5), as "not intended to leave the very existence of the right to review to the discretion of the State parties."¹⁰⁰ In *Charles Chitat Ng. V. Canada*¹⁰¹ the Human Rights Committee stated that they were not a court of 4th Instance and that it is not within its competence under the Optional Protocol to review sentences of the courts of States, *however* it can determine whether mandatory sentencing legislation in the Northern Territory and Western Australia allows for the right to review of sentence. This is because the expression 'according to law' is not meant to give Australia full discretion in granting that right, because this right stems from

⁹⁹ *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, New York, 1992. Pg. 151

¹⁰⁰ McGoldrick, D., *The Human Rights Committee*, Clarendon Press, Oxford, 1991. Pg. 431.

¹⁰¹ United Nations Document Communication No. 469/1991 A/49/40 pg. 221 (1994) para. 15.2

the CCPR itself. Therefore, when examining the formulation of mandatory minimum sentencing legislation combined with judicial comments and judgements one must question whether there exists a right to review of sentence compatible, not with domestic law, but with the requirements set out in the CCPR.

The review of lawfulness of one's conviction and sentence under 14(5), must include the possibility of ordering the sentence or conviction incompatible with due process rights of the offender, it is not limited to mere compliance of the sentence and conviction with domestic law. The principle of totality requires that a court that has passed a series of sentences, each in line with the principles of proportionality, parity, and parsimony, review the aggregate sentence and consider whether the aggregate sentence is just and appropriate.¹⁰²

The statements and judgments made by the judges, as just carrying out a duty of imposing sentences created by the legislature through interpretation does not allow for a full review of conviction and sentence under the requirements of article 14(5) CCPR, but a restriction limiting their role as an independent judiciary under the requirements of Article 14(1) CCPR. Review must be carried out in a way that the court has the possibility of ordering the sentence incompatible within the requirements of article 9(1). The court left the question only to the constitutionality of mandatory sentencing and its compliance with domestic law, but the court must also be able, within the meaning of 14(5), to determine if the sentence is compatible with the requirements of article 9(1). However, the Court only examined the question of constitutionality of the *Sentencing Act (NT)* with the *Judiciary Act* (federal legislation granting powers to the courts in terms of discretion) and once found to be constitutional, dismissed the question of proportionality of the sentence. The dismissal limited the case to a formal assessment of the *Sentencing Act (NT)* and not the author's right under article 14(5) to review of her sentence that was deemed disproportionate and arbitrary.

The Human Rights Committee has examined the requirements under 14(5) in *Lumley v. Jamaica*¹⁰³, and stated "that a system not allowing for automatic right

¹⁰² *Mill v Queen* (1988) 166 CLR 59 at 63

¹⁰³ United Nations Document, Communication No. 662/1995 (views of 31 March 1991)

to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a *full review* of the conviction and *sentence* and as long as the procedure allows for due consideration of the nature of the case.”(emphasis added)¹⁰⁴ As the *travaux préparatoires* would suggest the review must be a genuine one, therefore, proceedings that deal with mere question of law, and not in addition to questions of fact, will be insufficient. In General Comment on Article 14, the Committee also noted that the application of Article 14(5) does not only apply to crimes of a serious nature, trivial offences are also included in the protection provided in guarantees of Article 14(5).¹⁰⁵ In *Salgar de Montejo v. Colombia*¹⁰⁶, the Human Rights Committee found that a sentence of even a year was serious enough so that the accused must have the opportunity to seek full review by a higher tribunal.

The Human Rights Committee¹⁰⁷ in *Thompson v. St. Vincent and the Grenadines* considered the mandatory imposition of the death penalty as a form of punishment, and found a violation of the right to life, Article 6(1) CCPR. The Committee noted that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. It further stated, “that mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant’s personal circumstances or the circumstances of the particular offence.”

¹⁰⁸ Although the difference between property offences and the serious crime of murder is obvious four committee members commented in the *obiter dictum* that mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise issues under the Covenant if the disposition of the sentence is disproportionate to the crime. Although this case concerns the most serious crime

¹⁰⁴ Communication No. 662/1995 at para. 7.3; Communication No. 802/1998 at para. 7.5

¹⁰⁵ Nowak, M. 1993. Pg. 267.

¹⁰⁶ United Nations Document, Communication No. 64/1979

¹⁰⁷ United Nations Document, Communication No. 802/1998 (views of 3 April 2002, *Thompson v. St. Vincent and the Grenadines*).

of murder, the members of the committee made reference to mandatory minimum sentencing and their concern for its implementation and the provisions of the CCPR must be noted. Specific concern was made to article 14(5) and 26 and how the imposition of mandatory death penalty sentencing raised similar issues as those brought forth under Article 6(1) CCPR.

This section will examine in the context of Article 14(1) and (5), two cases that have been placed before the courts in Australia, *Wynbyne v. Marshall*¹⁰⁹ and *Trenerry v. Bradley*¹¹⁰. Each case will be introduced and then examined using the requirements of the Human Rights Committee under Article 14(1) and (5) in the concluding analysis. Furthermore, Australia's judicial comments on mandatory minimum sentencing legislation's effect on juveniles, trivial first time offenders, and indigenous peoples are provided. In conclusion, the shift of discretion from the judiciary to the police and prosecutors is examined to the effect in which problems may exist.

4.2 Case Studies

4.2.1 *Trenerry v. Bradley*¹¹¹

Trenerry v Bradley involved an adult who had stolen items from a toyshop. He later returned the goods and pleaded guilty. Under the Northern Territory sentencing legislation he faced a mandatory term of imprisonment of 14 days.

The Northern Territory Supreme Court examined "whether upon the true construction of s78A and s78B of the Sentencing Act (NT), a court was precluded from:

- a) Making orders wholly or partially suspending a term of imprisonment ordered to be served under s78A;

Answer: Yes, whatever the length of sentence ordered under s78A.

¹⁰⁸ United Nations Document, Communication No. 802/1998 (views of 3 April 2002, *Thompson v. St. Vincent and the Grenadines*. Para. 8.2.

¹⁰⁹ *Wynbyne v Marshall* (1997) 117 NTR 11

¹¹⁰ [1997] NTSC 82 (20 June 1997)

¹¹¹ *Wynbyne v Marshall* (1997) 117 NTR 11

- b) Making an order suspending a term of imprisonment ordered to be served under s 78A upon the offender entering into a home detention order;

Answer: Yes, whatever the length of sentence ordered under s78A.

- c) Fixing a period during which an offender ordered to serve a sentence of imprisonment under s78A is not eligible to be released on parole.

Answer: Yes, whatever the length of sentence ordered under s78A.

And in each case where the sentence ordered to be served is: (i) the minimum fixed by s78A, or (ii) a period in excess of the minimum fixed by s78B”¹¹²

The court found that the construction of the *Sentencing Act* contained no provision whereby the court could release the offender from a term of imprisonment. This left the question of the possible effects of s78A and 78B on persons with disabilities. Under its construction, as seen in the judgment by the court, under no circumstances can the court release an offender from a term of imprisonment even if that offender is suffering from a mental illness. The court further stated that the sentencing courts, as a fundamental duty “when imposing punishment for breaches of the criminal law not to impose a punishment which exceeds that which justice demands in all circumstances”¹¹³ However, as it is evident that the possibility remains that upon a conviction for a minor offence, which would warrant the dismissal of the charge, the court must impose a sentence of imprisonment. The preposterousness of this idea was stated by Justice Mildren J: “[t]here appears from the language of s78A and s78B no power in the court to exercise leniency, mercy or to impose otherwise than a plainly unjust sentence in such case, not even if the case involved *exceptional circumstances*.”¹¹⁴ (emphasis added) Therefore, the court may make additional orders, such as punitive work orders, but the word ‘additional’ cannot be made if its effect would be to release

¹¹² [1997] NTSC 82 (20 June 1997) pg. 1

¹¹³ [1997] NTSC 82 (20 June 1997) pg. 9

¹¹⁴ [1997] NTSC 82 (20 June 1997) pg. 10

the offender from serving a term of imprisonment under s78A, even if exceptional circumstances did exist.

4.2.2 Wynbyne v. Marshall¹¹⁵

The facts of the case are as follows: Margaret Wynbyne, on the morning of 13th March 1997 entered a premises with her older brother and was convicted for accepting stolen goods from her brother, i.e. a can of beer worth \$2.50. Damage was estimated at \$80 dollars and restitution was sought and paid in full by the appellant. Margaret Wynbyne was 23 years old at the time of the crime, had no prior convictions, held a steady job since leaving high school and was the primary caregiver for her two-year-old son. The sentencing magistrate commented that a non-custodial sentence would have otherwise been imposed were it not for the requirements of the mandatory sentencing regime, therefore, Wynbyne was sentenced to 14 days imprisonment and had to serve her term of imprisonment 763 kilometres from her home.

It was argued by counsel that legislative direction in the sentencing legislation, to the courts both mandating a conviction and sentence is invalid as it prevents full judicial discretion and therefore, the independence of the judiciary. However the Court found that if a statute nominates a penalty and imposes the court to implement it, no judicial function is invaded. “If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects.”¹¹⁶ Consequently, the court found that mandatory minimum sentencing was constitutional and dismissed the issue of arbitrariness of Wynbyne’s sentence. Justice Martin CJ noted that the mandatory sentencing legislation “deprives the courts of a range of discretionary powers otherwise available... In its operation the law will be harsher on some offenders than the law prior to its enactment. In so far as the minimum term is required to be imposed, it does not discriminate in relation

¹¹⁵ [1997] NTSC 120 (26 September 1997)

¹¹⁶ [1997] NTSC 120 (26 September 1997), pg. 10

to many matters relevant to sentencing.”¹¹⁷ The majority of the court, however, stated, “[I]t is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and...it may lay an unqualified duty on the court to impose that penalty.”¹¹⁸

An application for special leave to the High Court of Australia posed two of four questions relevant to mandatory sentencing, one concerning the power of the parliament to impose statutory obligations on a court and the other concerning the arbitrary and disproportionate nature of the *Sentencing Amendment Act (No.2) 1996*. Since the High Court found that mandatory sentencing did not invalidate the doctrine of separation of powers, it found it not necessary to examine question four, the arbitrary and disproportionate nature of Wynbyne’s sentence. In conclusion, the decision was unsuccessfully appealed to the Northern Territory Supreme Court and the High Court of Australia¹¹⁹, which leaves the possibility open for a communication to the Human Rights Committee under the *First Optional Protocol CCPR*, to determine whether Margaret Wynbyne’s right to review of sentence was violated. Two cases from Australia have been submitted to the Human Rights Committee in 2001 concerning mandatory minimum sentencing, however because of the seriousness of the issue and possible outcome of communication, the Australian government has refrained from releasing any information about the two cases.

Judges Comments on Judicial Discretion

Judge Fenbury stated in this case, “ I don’t think I can exercise my discretion in favour of placing him on a Conditional Release Order, although I must say I reach that conclusion with a heavy heart.” (p. 9) “Well, M I have to do what the law requires, unfortunately, and you have to get 12 months detention for this home burglary. If it wasn’t for the way the law is now, I wouldn’t be imposing a sentence like that upon you, because I think a Conditional Release Order might be appropriate.” (p. 9a) M was 17 years old at the time and sentenced to twelve

¹¹⁷ [1997] NTSC 120 (26 September 1997), pg. 14

¹¹⁸ [1997] NTSC 120 (26 September 1997) at 58-59

¹¹⁹ D174/1997 (21 May 1998) dismissed on the grounds that the proposed appeal did not enjoy sufficient prospects of success to justify the grant of special leave.

months detention. *DPP v M* (a child) (unreported) Children's Court of Western Australia, 20 March 1997.

Judge state in this case, "But for this legislation, I think that it would be reasonable for you to be dealt with by some other means other than detention; that is, to be given one go or one opportunity on a Conditional Release Order which you have never had. So regrettably I can't see any alternative but to apply the law as I am obliged to do by the legislation." (p. 27) F was 16 years of age, had previous care and protection issues and had difficulties with substance abuse. He was sentenced to twelve months detention for his third offence. *DPP v F* (a child) (unreported) Children's Court of Western Australia, 24 April 1997

Judge Fenbury stated in this case, "There are some very significant features in his background which I wish I could take account... but for the legislation, I don't think that he would - the matter would require a custodial term' (p. 48). R was 17 years old and sentenced to 12 months detention. *DPP v R* (a Child) (unreported) Children's Court of Western Australia, 25 June 1997 per Fenbury J.

'Mandatory sentences by their very nature are unjust in the sense that they require courts to sentence on a basis regardless of the nature of the crime and the particular circumstances of the offender...What ever else may be said about these provisions, it appears parliament intended the Courts to impose the blunt instrument of imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence'. Justice Angel in *Trenerry v Bradley* (1997) 6 NTLR 175 at 185.

'Prescribed minimum sentences are the very anti-thesis of just sentences'. (Justice Mildren *Trenerry v Bradley* (1997) 6 NTLR 175 at 187).

'[The introduction of mandatory sentencing] led me to feel that it would be unconscionable for me to remain on the Bench long enough for me to be sentencing in this very kind of case where I was imposing 12 months on people where in my view, it was simply unjust'. Former Chief Magistrate Ian Gray, *The Law Report*, Radio National, ABC 18 May, 1999.

'Rational sentencing is distorted by the mandatory sentencing regime'. Justice Kearney in *Fergusson v Setter & Gokel* [1997] NTSC 137 unreported 3 December, 1997.

4.3 Prosecutorial and Police Discretion

As expressed in several NGO submissions to the Senate Legal and Constitutional Committee and by the Court in *Trenerry Case*, the restriction on discretion by mandatory minimum sentencing on the judiciary has resulted in a shift of the

exercise of discretion to that of the police and prosecutors. The discretion process is now being conducted at the charge and plea negotiation process and therefore, lacks the transparency required in an independent judiciary. In Western Australia plea-bargaining is evident as the negotiation of aggravated burglary, requiring a mandatory sentence of imprisonment, is exchanged for a guilty plea to burglary. In the Northern Territory similar plea bargaining is occurring as prosecutors will ask for a guilty plea to 'interfering with another vehicle' rather than unlawful use, or trespass rather than break and enter, or a defendant is charged with 'attempt' to commit an offence which requires a mandatory sentence of imprisonment, because 'attempt' falls outside the requirement to compulsory imprisonment.¹²⁰ An issue that further magnifies the problem of implementing unjust and arbitrary sentences in the area of discretion, is the Northern Territory's 'no-drop policy', which forbids prosecutors from dropping charges that carry a mandatory minimum.¹²¹

4.5 Concluding Analysis

As seen in mandatory minimum sentencing, it is just that influence from the community on the legislature, because of the fear of increasing crime that has forced the judiciary to remove well-established common law sentencing principles in favour for legislation that restricts judicial discretion.

It is a well-known fact that the Parliament has full autonomy to make law, but this law must be compatible with international human rights law, in particular one's right to a fair trial. To create a law that limits the discretion of the judiciary to only impose a sentence between the minimum prescribed and the maximum provided by Parliament, denies one's right to sit before a court that is fully independent and to have a review of the facts and law of their case together with the ability of that conviction and sentence being found incompatible with due process rights.

¹²⁰ Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional Committee - Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, prepared by Cunneen, C., Director, Institute of Criminology, University of Sydney Law Faculty, 2000. Pg. 32

¹²¹ Ibid. Pg. 33

Independence of the judiciary is not only from the executive and legislature, but the offender and public must have a belief that the judiciary is independent. The High Court of Australia's decision that the *Sentencing Act* was not in any way conflicting with the *Judiciary Act*, did not answer Wynbyne question of whether her sentence was compatible with the principle of proportionality.

In the case of *Trenerry*, the judgment of the court on what powers it has to use discretion, showed that this power was also limited, or rather the construction of the legislation limited even the possibility of offenders to fall within the amended *Sentencing Act's* exceptional circumstances clause. Given this outcome, offenders will receive disproportionate sentences to the nature of the crime and fail to receive a full review of their sentence before an appeals court.

In the case of Wynbyne, the assumption that other aspects of the legislation as being valid and not conflicting with the *Judiciary Act* was not a review of Wynbyne's sentence, rather a review of the legislation's compatibility with the Commonwealth Constitution. As the Human Right's Committee in previous jurisprudence has stated, a full review of conviction and sentence is necessary to afford the offender the rights guaranteed in Article 14 CCPR.

The combined ineffectiveness of mandatory minimum's in the cases of adult property and home burglary offenders, with the unnecessary restrictions on the judiciary to use discretionary power when sentencing offenders, questions the Parliaments faith in the judiciary to fulfil their obligations. Rather than restrict judicial discretion, Parliament should afford the judiciary with the discretion to decide if particular cases are trivial in nature, to minimise the harshness and unreasonableness of some sentences. If Parliament lacks faith in the judiciary to carry out its duties, than so will the faith of the public in the judiciary's ability to pass just sentences. Comments made by the judiciary seriously question the independence of the judiciary from the legislature by impairing its duty to use discretion in cases in which full discretion should be afforded. The ability to use full discretion and to review one's conviction and sentence is not provided in the *Sentencing Act*, with similar criticism of the *Criminal Code*, because the court

does not have the ability to order the sentence incompatible with other rights, such as whether the punishment is proportionate to the nature of the crime.

The police and prosecution now use their discretion to decide whether or not an offender is subject to a period of imprisonment. Discretion is practiced outside of court proceedings removing any kind of transparency or public scrutiny that was possible with judicial discretion. Furthermore, independence is thwarted because mandatory minimums remove any check on prosecutorial power and concentrate discretion with respect to sentencing in the hands of the executive, i.e. the police.

5 Article 26 CCPR: Prohibition of Discrimination

International Covenant on Civil and Political Rights

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

5.1 Introduction and Application to Mandatory Sentencing

General Comment 18¹²² of the CCPR states that Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof (para. 12).” Therefore legislation, such as mandatory minimum sentencing, must comply with the requirements set out in Article 26 CCPR. Distinctions that will constitute discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status. However, the Committee has noted in General Comment 18 and in jurisprudence, that not all distinctions constitute discrimination for the purposes of Article 26 CCPR, therefore distinctions based on reasonable and objective criteria can be considered permissible under Article 26.

Chapter 5 investigates whether mandatory minimum sentencing by its formulation and its implementation makes a distinction by targeting indigenous peoples, and whether this distinction is a reasonable and objective criteria that is deemed permissible under Article 26 CCPR.

Therefore, this section will examine whether, by creating a distinction of particular groups by implementing sentencing legislation, the Australian government must give reasonable and objective reasons for maintaining law and order. In

¹²² United Nations Document, General Comment 18, Non-discrimination. CCPR, 37th Session 10/11/1989.

examining whether it is reasonable and objective, i.e. legitimate, the balance between protecting society and the disproportionate impact sentencing legislation has on particular groups must be assessed.

The Australian government has also stated as a justification for implementing this legislation that 'seriousness' is measured by the community's fear of becoming a victim of property offence. Therefore, to determine whether the fear of victimisation is still present in the community, an examination of victim impact statements before and after mandatory sentencing will be assessed. One must also examine whether other means to achieve a legitimate aim exist in Australia. The principle of non-custodial treatment signifies that other measures should be given weight when determining the care of juveniles rather than compulsory detention.

In conclusion, United Nations treaty bodies are concerned with the disproportionate affect of mandatory minimum sentencing on indigenous Australians. The test of proportionality in permissible differentiation by the Human Rights Committee will be examined below.

5.2 Disproportionate Impact of Mandatory Sentencing

To examine whether mandatory minimum sentencing legislation in the Northern Territory and Western Australia disproportionately impacts particular groups, statistics from the Australian Institute of Criminology, Australian Bureau of Statistics, and the Northern Territory and Western Australia's Bureau of Corrections were utilised. Statistics analysed by various well recognised organisations, i.e. UNICEF, Amnesty International, Human Rights and Equal Opportunity Commission, Aborigine and Torres Strait Islander People Commission, Australian Law Reform Commission, etc., and UN treaty bodies asserted that mandatory sentencing targets indigenous people disproportionately. Briefly, this section will run through various organisations' findings based on concluding recommendations and observations of UN treaty bodies.

Furthermore, statements by United Nations treaty bodies and the Special Rapporteur on Contemporary Forms of Racism in their assessment of Australia's

compliance with various human rights instruments, gave attention to this distinction or disproportionate incarceration of indigenous peoples under mandatory minimum sentencing legislation. In the submission of Australia's 3rd and 4th report under the CCPR, the Human Rights Committee brought to light issues to be addressed during the dialogue with the representative concerning Australia's obligations under the Covenant. The Committee requested Australia to...

comment on official reports according to which race was referred to as a determining factor in the imprisonment and the sentencing of juveniles. Please explain the system [of juvenile mandatory sentencing], in particular whether it has an inordinate effect on Aboriginals and whether it is compatible with Australia's obligations under articles 14, 24, and 26 of the Covenant.¹²³

Australia responded to the question by stating, "mandatory detention laws apply only to *selected offences* and do not discriminate against indigenous peoples. The differential impact they have on indigenous peoples is *reasonable* and *objective*. Seriousness is judged in terms of community impact. Mandatory sentences are not unjust or disproportionate taking into account their repeat nature, the level of community concern and their serious nature."¹²⁴ After an explanation, by the Australian government, as to the nature of mandatory sentencing and the reasons to justify its implementation, which will be explored below, the Human Rights Committee concluded the assessment of Australia's state report. It stated that "[l]egislation 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 of the Covenant."¹²⁵ The State

¹²³ United Nations Document (20 April 2000), List of Issues to be Taken in Connection with the Consideration of State Reports, CCPR/C/69/L/AUS, Issue 11 and 12.

¹²⁴ Human Rights and Equal Opportunity Commission, Australia's Human Rights Record Reviewed by the UN Human Rights Committee, 2000 at URL: www.hreoc.gov.au/human_rights/un_committee.

¹²⁵ UN Doc. Concluding Recommendations by the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS, para, 17 or CCPR/C/AUS/99/3 and 4. Emphasis added.

party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.”¹²⁶

Reports submitted by Australia to the Racial Discrimination Committee, treaty monitoring body for the *UN International Covenant on the Elimination of All Forms of Racial Discrimination* (CERD), and the Committee Against Torture, treaty monitoring body for the *UN Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (CAT), gave similar conclusions concerning the mandatory sentencing regimes disproportionate impact on Aborigines. The CERD Committee expressed its grave concern with the high rate of incarceration of indigenous peoples and disproportionate rate compared with the general population. Concern was also expressed to the minimum mandatory sentencing schemes for *minor* property offences in Western Australia and the Northern Territory.¹²⁷ Australia was requested by the CERD Committee and the Committee Against Torture to review all laws and practices concerning mandatory sentencing schemes that target disproportionately indigenous Australians.¹²⁸

With this in mind, we can see that the letter of the legislation applies to all who commit an offence under the legislation, it is however the implementation of the legislation that is having a disproportionate affect on a particular group. In the context of permissible differentiation, the effect mandatory sentencing has on indigenous peoples will be examined as to whether it is reasonable and justified and whether it has the pressing social need, i.e. maintenance of law and order, that the Australian government argues.

¹²⁶ Ibid. Para. 523

¹²⁷ U.N. Doc. CERD/C/304/Add.101, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 19/04/2000. para. 15 and 16.

¹²⁸ CERD/C/304/Add.101, Concluding Observations of the Committee against Torture: Australia 21/11/2000. A/56/44/, para. 53(h)

5.3 Permissible Differentiation

When examining the definition of discrimination, either direct or indirect, the Human Rights Committee elaborates in General Comment 18¹²⁹ on permissible differentiations. The Human Rights Committee confirms in paragraph 13 that not all distinctions constitute discrimination for the purposes of the CCPR. A distinction or differentiation of treatment will not constitute discrimination “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹³⁰ In other words a balance needs to be assessed between the proportionality of the measure disparately impacting a particular group versus the legitimate aim, reasonableness and justification behind the measure implemented.

The representative for the Australian government, during the consideration of Australia’s 3rd and 4th report by the Human Rights Committee, discussed the non-discriminatory nature of mandatory sentencing laws.

The relevant State and Territory Governments have identified the basis for the selection of particular offences as appropriate for mandatory detention in cases of repeat offending as being their seriousness in terms of community impact. This is a reasonable and legitimate objective of the criminal law.

The Governments in question have determined that mandatory minimum sentences for serious property offences and home burglary are not unreasonable, unjust or non proportional when taking into account the nature of the crimes in question, their repeat nature and the level of community concern about them.¹³¹

Case Law of the Human Rights Committee examines the ‘reasonable and objective’ criteria to justify a differentiation. Even though the Australian government does not acknowledge intentional discrimination or intentionally

¹²⁹ United Nations Document, General Comment 18, Non-discrimination. CCPR, 37th Session 10/11/1989.

¹³⁰ United Nations Document. CCPR/C/37 (37th session, 10/11/89), See also United Nations Communication *Vos v. the Netherlands* No. 218/1986

¹³¹ United Nations Document (20 and 21 July 2000), CCPR/C/SR, 1955th, 1957th, 1958th Sessions. Australia’s Dialogue with the Human Rights Committee upon submission of State Report CCPR/C/AUS/99/3 and 4. Aboriginal and Torres Strait Islander Social Justice, Report on National Laws Contributing to Racism, Racist Practices and / or Race Related Discrimination, at URL: http://www.hreoc.gov.au/social_justice/ntissues/law.html.

discriminates, the Human Rights Committee has confirmed in *Simunek et al. v. Czech Republic*¹³² that prohibited discrimination can occur unintentionally and/or without malice.

Since considerations by the Human Rights Committee are investigated subjectively rather than objectively, one must rely on the principle of proportionality.¹³³ As seen in article 9(1), several substantive rights contained in the CCPR rely on the principle of proportionality and to understand how one determines what is proportionate, a similar test is applied, however not as strict as those found in limitation clauses within the CCPR, with the requirement of reasonable and objective aim under the Covenant, when examining cases of discrimination. An aspect that differs between article 26 with that of article 9(1) in cases of discrimination, is that the Human Rights Committee will investigate further by exploring the possibility of whether there exists other means to achieve a legitimate aim under the Covenant.¹³⁴ The Human Rights Committee would examine whether there is a link between the justification of deterrence and the sentencing of repeat offenders for property and home burglary offences under mandatory minimum sentencing legislation, with the possibility of capturing a percentage of non-serious first time offenders. This section will also examine whether there exists other means, that do not interfere with the rights and freedoms of others under the Covenant, to sentence repeat property and home burglary offenders.

¹³² *Simunek et al. v. Czech Republic*, United Nations Communication No. 516/1992

¹³³ Nowak, M. Pg. 474

¹³⁴ See the case of *Toonen v. Australia* Communication No. 488/1992 para. 8.4 In *Toonen v. Australia* the Human Rights Committee elaborated on the concept of proportional means to achieve a legitimate aim under the Covenant with the examination of article 17 right to privacy. The case concerned the criminalization of homosexual activity under Tasmanian law. The State argued that the laws were justified on *public health* and *moral grounds* as they were ‘intended in part to prevent the spread of HIV/AIDS in Tasmania...and moral issues must be deemed a matter for domestic decision.’ The Committee rejected the public health justification as not a proportionate measure to achieve the aim of preventing the spread of HIV/AIDS. The Committee noted that there was no link between continued criminalization of homosexual activity and the effective prevention of the spread of HIV/AIDS. As for the a justification on moral grounds, the Committee noted that if moral grounds was limited to only a domestic concern, scrutiny of statutes interfering with ones privacy would be completely denied by the Committee. The Committee commented further that laws criminalizing homosexual activity had been repealed throughout Australia. Furthermore, there was no

5.3.1 Reasonable and Objective Justification

To determine whether mandatory sentencing is reasonable and objective, in the sense that it is a permissible distinction under the Covenant, we must balance the justification given by the Australian Commonwealth Government of maintenance of law and order to protect society with the rights of those who are being targeted by specific legislation. Considering Australia's influence from the common law, parsimony forbids the imposition of punishment in excess of that required to achieve a defined social purpose.¹³⁵ In other words, mandatory minimum sentencing should not impose sentences that go beyond what is necessary to achieve their aim in society. The Full Court of Australia has confirmed this principle in *R v. Valentini*, "the judge must ensure that he imposes the minimum term consistent with the attainment of the relevant purposes of sentencing taking care that he punishes only for the crimes before him."¹³⁶ Parsimony, furthermore, includes the fundamental principle that a sentence of imprisonment is a punishment of last resort and shall be imposed only when non-custodial punishment is not appropriate. As we will see in mandatory minimum legislation concerning property offences, the trivial nature of the offence or the value of the stolen property, is not taken into consideration when sentenced to a compulsory term of imprisonment, thereby contravening the concept of parsimony. It will also be further examined that the justification of deterrence and seriousness of the nature of the offences given by the Parliament to implement mandatory minimum sentencing for property offences and home burglary in the Northern Territory and Western Australia respectively, possibly goes beyond what is necessary to achieve the aim of protecting society.

In this sense we must look at the 'maintenance of law and order', which defined through measuring mandatory sentencing ability to deter crime and the

consensus as to whether the laws in Tasmania should be repealed, therefore, the provisions applied by Tasmania did not meet the reasonableness test.

¹³⁵ *R v Moyse* (1988) 38 A Crim R 169

¹³⁶ (1980) 48 FLR 416 at 420.

community's perception of seriousness of the crime legislated in both Western Australia and the Northern Territory

5.3.1.1 Deterrence Argument

To examine whether mandatory minimum sentencing legislation in the Northern Territory and Western Australia in fact deters offenders from re-offending, the crime rate before and after the implementation of sentencing legislation needs to be examined. Statistics on the crime rate during 1996 and 2001 from the Australian Institute of Criminology, Australian Bureau of Statistics, and the Northern Territory and Western Australia's Bureau of Corrections, and reports by the Human Rights and Equal Opportunity Commission (i.e. Social Justice Report 2001), and the Senate Legal and Constitutional Committee's inquiry into mandatory sentencing all expressed in reports the ineffectiveness of mandatory sentencing to deter. Statistics will show whether property offences have increased or decreased since the inception of mandatory sentencing. If it has decreased, then one could argue that it is deterring recidivists from re-offending. However, if statistics show that the crime rate has been consistent or has increased, one could conclude that mandatory minimum imprisonment, as a measure of deterrence is ineffective. However, there is significant disagreement on theories of deterrence, therefore given the Australian government a considerable margin of appreciation in analysing the deterrent effect of incarceration.

Recorded crime statistics from the Australian Bureau of Statistics¹³⁷ (bureau in charge of state by state comparisons in crime throughout Australia as of 1994) have measured crime in four categories under the mandatory minimum sentencing legislation concerning property offences: unlawful entry (property theft); unlawful entry (other); motor vehicle theft; and other theft. Even before March 1997, date of enforcement of mandatory sentencing, all four categories of crime were on a downward trend. In three of the four categories the crime rate has been increasing since 1998, having the opposite effect of deterrence. As for the fourth category it

¹³⁷ Australian Bureau of Statistics, Recorded Crime in Australia: 2000 A Report Prepared for the Corrective Services Ministers Council, Canberra 2001. Pg. 12-14

has remained relatively static since 1997. Evidence was supplied by the Aboriginal Justice Council in the Senate Legal and Constitutional Committee in the argument that mandatory minimum sentencing does not deter against home burglaries:

...the rate of residential burglaries declined in 1996 after reaching a peak in 1995. This decline cannot be attributed to the three strikes laws, which came into force only in November (1996). In fact, the then government (of Western Australia) was well aware of the downward trend; shortly before the new laws came into force, it had pointed with some pride to an 8% decline in burglary over the preceding 12 months. Even more significantly, the annual burglary rate did not decline with the new laws: it remained constant during 1997 and increased in 1998.¹³⁸

However, whenever one is using statistics to determine such theories of criminal justice, one also has to question how the statistics were collected by the Australian government and NGO's in determining which categories of crimes were considered in the determination of the effect of deterrence and crimes listed in respective legislation.

5.3.1.2 Perceived Seriousness

The Australian government, in their justification for the implementation of mandatory sentencing legislation, measured seriousness of the crimes listed in the respective legislation, through the community's impact of seriousness. The Australian Institute of Criminology (AIC) in 2001 used, as a measure of seriousness, International Crime Victims Surveys to fully understand perceptions of seriousness by victims throughout Australia. Recent studies show that, as compared to other crime in Australia that is not under mandatory minimum sentencing legislation, 'other theft' had the lowest rating across the board (Robbery, Assault, Sexual Offences). Ratings were based on the categories of very serious, fairly serious or not serious. Only less than 20% of the victims

¹³⁸ Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing for Property Offences) Bill 2000. Canberra 2002. pg. 20.

believed that theft was very serious, while over 60% believed it was not very serious.¹³⁹

However, determining the subjective perception of fear is very difficult to measure and would also be difficult to argue that the State or Territory did not have some margin of appreciation to determine the communities fear of the crimes listed in the legislation. Nonetheless, one must still question the amount of fear one has of being a victim of a violent crime as compared to a victim of a non-violent property crime. As anyone would assume, the fear factor in violent crime is much higher and would, according to the Australian government's argument for mandatory sentencing, warrant similar legislation. This is also because in statistics provided by the AIC, violent crime between 1995 (total violent crime including homicide, assault, sexual assault, and robbery) and 2000 had increased by 39%, a one percentage higher increase than property crimes.¹⁴⁰

5.4 Other Means to Achieve a Legitimate Aim

Several international treaties and standards provide for provisions of treatment towards juveniles entering the criminal justice system. The most ratified and internationally accepted legally binding treaty concerning the rights of juveniles is the *Convention on the Rights of the Child*. Accordingly, United Nations standards on the non-custodial treatment of juveniles will be applied to the provision of 'other means' in achieving a legitimate aim under the Covenant.

5.4.1 Convention on the Rights of the Child

Convention on the Rights of the Child

¹³⁹ Australian Institute of Criminology, Australian Crime – Facts and Figures 2001, Australian Institute of Criminology, Canberra 2002. Figure 4b. To further understand the statistics please see the publication with commentary on the findings by the AIC. The study was based on a survey of ICVS of a small sample of 3,031 persons, but was combined with the ABS survey of 42,200 persons. Although the ICVS sample was much smaller, the two surveys produced similar outcomes.

¹⁴⁰ Australian Institute of Criminology, Australian Crime – Facts and Figures 2001, Australian Institute of Criminology, Canberra 2002. Table 2a and 2b.

Article 37(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.

Article 40(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.

Many Australian based NGO's, Amnesty, UNICEF Australia, Youth Justice Council, etc., argue that mandatory sentencing raises serious issues under specific provisions within the CRC. Although there is no individual complaint procedure, as seen in the CCPR, violations of the CRC are taken up during the reporting process.¹⁴¹ During the consideration of Australia's report to the Committee on the Rights of the Child, the Committee concluded that it was particularly concerned "at the enactment of new legislation in two states, where a high percentage of Aboriginal peoples live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention."¹⁴² The Northern Territory Government, in its submission to the Senate Inquiry into mandatory minimum sentencing, stated that Territory laws were consistent with the CRC.¹⁴³ However, when examining the standards enshrined in the CRC, mandatory minimum sentencing raises issues under 37(b) and 40(4).

These issues were examined in a Reference Paper prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR) in collaboration with UNICEF. In the paper 'Setting Out International Standards on

¹⁴¹ The reporting process is under article 44 of the CRC and it stipulates that State Parties undertake to submit to the Committee, through the Secretary General of the UN, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.

¹⁴² United Nations Document, Concluding Observations of the Committee on the Rights of the Child; Australia. 10/10/97. CRC/C/15Add.79, para 22.

¹⁴³ Senate Legal and Constitutional Committee, Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, 2002. Pg. 66.

Mandatory Sentencing of Juveniles¹⁴⁴ the OHCHR and UNICEF utilise the CCPR, CRC, United Nations Standard Minimum Rules for the Administration of Juveniles and lastly the *International Covenant on the Elimination of All Forms of Racial Discrimination* to conclude that mandatory sentencing raises issues under article 9(1), 10(3)¹⁴⁵, 14 and 26 of the CCPR, article 37(b) and 40(4) of the CRC and several United Nations standards reverberating that detention of juveniles shall be a measure of last resort and for the minimum period of time.

In several concluding observations by the Committee on the Rights of the Child, the emphasis is on developing alternative measures to deprivation of liberty, especially in cases concerning penal policies towards juveniles committing ‘property offences’.¹⁴⁶

5.4.2 United Nations Standard Minimum Rules

Several international and national bodies have made recommendations concerning standards in Criminal Justice. These rules are principles in which countries make an effort to incorporate at a national level. Australia has endorsed the standards established by the United Nations, however, mandatory sentencing contravenes these rules and is inconsistent with the objective of these standards. Although these standards are not legally binding on Australia, Australia has made a commitment to follow these standards by endorsing them. These standards are also used in interpreting provisions embodied in the CRC as seen in the *travaux préparatoires*. It is reflected in the Convention “the fact that the drafting of articles 37(b), 37(c), 40(1), 40(2)(b)(v), and 40(4) of the Convention was based

¹⁴⁴ OHCHR and UNICEF, Reference Paper ‘Setting Out the International Standards on Mandatory Sentencing of Juveniles’, 2000
www.dfat.gov.au/media/releases/foreign/2000/fa014_2000_att.html.

¹⁴⁵ Article 10(3) CCPR states, “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.”

¹⁴⁶ United Nations Document CRC/C/15/Add.108, Concluding Observations of the Committee on the Rights of the Child: Nicaragua, 24/08/99. United Nations Document CRC/C/15/Add.20, Concluding Observations of the Committee on the Rights of the Child: France, 25/04/94.

on articles 9(1), 10(3), 14(4) and 14(5) of CCPR, as well as on Rules 13, 17, 18, and 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.”¹⁴⁷

U.N. Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

- Rule 13.1: Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
- Rule 17.1: The disposition of the competent authority shall be guided by the following principles:
- (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
 - (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
 - (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
 - (d) The well being of the juvenile shall be the guiding factor in the consideration of her or his case.
- Rule 17.4: The competent authority shall have the power to discontinue the proceedings at any time
- Rule 18.1: A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible.
- Rule 19.1: The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

When interpreting these provisions in contrast with the aim of mandatory sentencing is it more difficult when justifying the incarceration of juveniles than adults. This is because there is dispute concerning several aspects of theory in criminology: rehabilitation v. just deserts; assistance v. punishment; interests of the

¹⁴⁷ UN Doc. E/CN.4/1986/39, para. 90 and E/CN.4/1989/48, paras.537 and 564-569.

juvenile v. protection of society; deterrence v. incapacitation. However, as seen in the justification by the respective governments the interests of the community has been chosen over those of the juveniles. The commentary provided for the Beijing Rules states that the principles are only a starting point and the approach taken by a respective State must be in accordance with other internationally accepted principles.

Judicial Comments on Juvenile Detention

- A 17-year-old Aboriginal youth with a previous criminal history was sentenced to twelve months detention. Judge Fenbury expressed concern that as a juvenile offender, the young person was likely to spend more time incarcerated than if he were an adult. *DPP v DMP* (a child) (unreported) Children's Court of Western Australia, 10 March 1997
- 'He is not even old enough to vote the people out who are putting him in imprisonment'. Mr Trigg, Magistrate, Northern Territory sentencing a 17-year-old boy on 30 June, 1998.
- The Western Australian Children's Court was faced with a 14-year-old Aboriginal child who was subject to the three strikes mandatory imprisonment of twelve months. Judge Fenbury found that mandatory detention was 'contrary to the long accepted theory that when sentencing juvenile offenders, rehabilitation is of prime importance.'(p.115) *DPP v DCJ* (a child) (unreported) Children's Court of Western Australia, 10 February 1997 per Fenbury J.

Rule 17.1 (b) "implies that strictly punitive approaches are not appropriate."¹⁴⁸

When sentencing juveniles under Western Australia's three strikes legislation, compulsory detention goes against the principles embodied in the Beijing Rules, especially Rule 17.1. This would imply that a judge should have at his or her disposal alternative sanctions, as stipulated in Rule 18.1, for every time a juvenile makes an appearance before the court, not just on their first strike. Furthermore, mandatory sentencing legislation is formulated in such a way to implement detention as a measure of first resort rather than a measure of last resort.

When examining the commentary on Rule 19.1 the issues of criminology and the institutionalisation of the juveniles, research would advocate non-institutionalisation. The purpose of Rule 19.1 is to restrict institutionalisation and to limit the time a juvenile is institutionalised.

U.N. Standard Minimum Rules for Non-custodial Measures (Tokyo Rules):

Clause 1.5: Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

Clause 2.3: In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.

Clause 2.6: Non-custodial measures should be used in accordance with the principle of minimum intervention.

Clause 3.2: The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.

Clause 3.3: Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

Clause 3.7: Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognised human rights.

Again we can see that full discretion shall be afforded to the judicial authority as well as alternative sanctions when sentencing an offender. However, mandatory

¹⁴⁸ *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, New York, 1992. Beijing Rules. Pg. 175

minimum sentencing restricts judicial discretion and applies compulsory imprisonment upon conviction. However, as the commentary on the Beijing Rules would imply, juveniles because of their higher vulnerability in correctional institutions than adults, establish stricter standards to apply to juveniles. This does not mean however, that adults are not afforded similar legal guarantees as juveniles.

5.4.3 Senate Legal and Constitutional Committee

As stipulated by the CCPR and the CRC, the Commonwealth is under the obligation to review all policies that may have the effect of perpetuating racial discrimination. This provision is also incorporated in the specific legislation concerning mandatory minimum sentencing in the Northern Territory and Western Australia. Both Western Australia and the Northern Territory have reviewed their legislation and made amendments to its application, however the changes in legislation have little effect on those who are being targeted under mandatory minimum sentencing. The review was conducted by the Senate Legal and Constitutional Committee in its inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (2000)* and the *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000 (2002)*. Both pieces of legislation were tabled in Parliament as the Committee found that mandatory sentencing was an issue that needed to be addressed at the State or Territory level.

The inquiry of juvenile offenders in 1999 (2000) lead to recommendations by the Committee to primarily the Northern Territory, which in effect amended sentencing legislation in the Northern Territory, but only in part. The Committee found that the ‘third strike property offences cannot be proportionate to the circumstances of all offenders and all offences...’ and concluded by stating: “The Committee is convinced by the submissions and argument that mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and

it contravenes the Convention on the Rights of the Child.”¹⁴⁹ However, the Senate Legal and Constitutional Committee failed to mention which provisions of the CRC were being breached by the particular sentencing legislation.

The Committee found in several instances concerning the review in 2000 (2002) of property offences primarily in Western Australia, that mandatory sentencing was ineffective and believed that “it would be logical for the provision to be repealed.”¹⁵⁰ It further suggested that:

The particular negative effect of mandatory sentencing on certain socio-economic groups be noted by the Western Australian government. In this context, the Committee suggests that the Western Australian government reconsider their mandatory sentencing laws and, in doing so, take into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody Report...The Committee concludes that, in relation to adults, the legislation is ineffectual and, in relation to children, it effectively discriminates against young Aboriginal country children (para. 3.55).¹⁵¹

However, in Recommendation 4.16 the Committee stated that the “Bill not proceed at this time, in order to allow the Western Australian Government to address the serious negative impact of mandatory sentencing on Indigenous juveniles.”¹⁵² To this date mandatory sentencing in Western Australia is still in effect. The amended *Criminal Code 1996* stipulates that the Western Australian government must review the effect of its provision every four years. This would signify that mandatory sentencing will be in effect and continue to disproportionately effect particular groups and raise issues under international human rights law for another four years until it is reviewed and repealed by the Western Australian government.

¹⁴⁹ Senate Legal and Constitutional Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000. Pg. 116.

¹⁵⁰ *ibid.* pg. 13

¹⁵¹ Senate Legal and Constitutional References Committee - Inquiry into the Human Rights (Mandatory Sentencing of Property Offences) Bill 2000, March 2002. Pg. 30

¹⁵² Senate Legal and Constitutional Committee - Inquiry into Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, March 2002. Pg. 35

5.4.4 Royal Commission Recommendations

In 1987 the Royal Commission started an investigation into the over-representation of indigenous peoples in the criminal justice system and deaths in custody, which ended in late 1990 with five volumes and 339 recommendations, which remains among the most extensive and devastating examination of the impact of colonialism on the indigenous peoples. The findings of the Royal Commission concerned the 99 deaths in custody of indigenous peoples between 1988 – 1990; the commission found that the disproportionate number of indigenous deaths in custody occurred, “not because Aboriginal people in custody are more likely to die than others in custody [but because of] the grossly disproportionate rates at which Aboriginal people are taken into custody.”¹⁵³

Law reform, changes in policing strategies, and the criminal justice system were among some of the recommendations made by the Royal Commission, but these changes would not be sufficient to remove the gross disparity in the incarceration rate of indigenous with non-indigenous persons. The underlying issue to be addressed is the marginalisation of indigenous Australians, which leads to disadvantages in health care, education, access to employment and an economic base in land. Thus many recommendations¹⁵⁴ are concerning the diversion of Aboriginal and Torres Strait Islander peoples from prisons throughout Australia. Key recommendations¹⁵⁵ by the Royal Commission concerning the incarceration of indigenous persons and how mandatory sentencing legislation could fundamentally contradict the work of the Royal Commission are found provided below.

¹⁵³ Royal Commission into Aboriginal Deaths in Custody. National Report. AGPS Canberra 1991. Vol. 1, pg. 6. See also the Senate Legal and Constitutional Committee. The Report also examines other national laws such as: Native Title; Indigenous Heritage Laws; and the Criminal Justice System. The Aboriginal & Torres Strait Islander Social Justice Commission is a wing of the Human Rights and Equal Opportunity Commission created by the Commonwealth government in 1986 to combat social injustice for Aborigines and Torres Strait Islanders.

¹⁵⁴ Royal Commission into Aboriginal Deaths in Custody. National Report. AGPS Canberra 1991. Volume 1. Recommendations 92, 94, 101, 104, 216, 217, 218, 109, 111, 112, 113, 114, 116, 110, 115, 118, 119, 102, 103, 117, 120, 121, 95.

¹⁵⁵ Royal Commission into Aboriginal Deaths in Custody, National Report. AGPS Canberra, 1991.

Royal Commission Recommendations

- Rec. 92: 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.
- Rec. 62: That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice system and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need or care, detained, imprisoned or otherwise.
- Rec. 104: That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.
- Rec. 109: That State and Territory Governments examine the range of non-custodial sentencing options available in each jurisdiction with a view to ensuring that an appropriate range of such options is available.

However, after a decade of failed reform by the government, the incarceration rate of indigenous peoples is on the rise and has not improved despite the recommendations by the Royal Commission. At all levels of the government, the change in social justice for Aborigines has been insufficient and an inadequate response to the recommendations given by the Royal Commission. “In fact, these problems have been exacerbated by ‘law and order’ legislative changes, such as mandatory sentencing, which despite their apparent neutrality in terms of racial effect, continue to impact disproportionately on Indigenous Australians.”¹⁵⁶

¹⁵⁶ Aboriginal and Torres Strait Islander Commission, *Ten Years of from the Royal Commission into Aboriginal Deaths in Custody, Human Rights and Equal Opportunity Commission*, Sydney 2001.

Research conducted by the Northern Australian Aboriginal Legal Aid Service shows that since the inception of mandatory sentencing the incarceration rate of indigenous peoples has increased, despite recommendation 92 of the Royal Commission and United Nations underlying principle towards juveniles that imprisonment shall be utilised as a measure of last resort. In a report by the ATSIC, *Ten Years after the Royal Commission into Aboriginal Deaths in Custody, the progress of the State and Territory Governments preceding the recommendations by the Royal Commission are devastating*. The most tangible indicator of progress is a decrease in indigenous contact with the criminal justice system, considering that a ten year framework is reasonable and probable. However, as statistics would suggest the rate of incarceration has only increased since the implementation of the Royal Commission recommendations. In conclusion, the Aboriginal Justice Advisory Council, overseeing the implementation of the Royal Commissions recommendations stated, “[t]he impact of this approach has contradicted efforts to address indigenous over-representation in custody. At the same time as promoting or reporting on activities which aim to reduce Aboriginal contact with the criminal justice system...major government initiatives, policy and legislation seem to increase that contact.”¹⁵⁷ The most obvious legislative initiative contravening the Royal Commissions objectives is that of mandatory minimum sentencing legislation in the Northern Territory and Western Australia.

5.5 Concluding Analysis

On the surface value of the legislation, as stipulated by the Australian government, it is equally applicable to all who commit an offence provided in the respective pieces of legislation. However, it is upon implementation that the effects of its provisions show characteristics that target a particular group. With this in mind, we must examine the Australian governments justification for such legislation,

¹⁵⁷ Aboriginal Justice Advisory Council (NSW), *Where to from here? Ten years after the Royal Commission, some suggested direction for Aboriginal justice planning*, AJAC (NSW),

to the extent to which those justifications are reasonable and objective in light of the provisions in the CCPR and other means that may achieve a similar aim without interfering with peoples rights.

The justification of deterrence by the Australian government, in reality is a legitimate justification to establish legislation to incarcerate or detain offenders who are committing crime. However, several aspects concerning the statistics, which can be argued both ways, leads to further complications and doubts to the effectiveness of both NGO and the respective governments findings. However, the legitimate justification given by the government does not mean that all sentences imposed will be reasonable, as demonstrated in sample trivial offences in Chapter 3.

When considering what crimes to be included into mandatory sentencing the governments of Western Australia and the Northern Territory excluded such crimes as misappropriation, fraud and shoplifting. However, when looking at statistics and determining the rate of crime, they would have used AIC's survey on facts and figures of crime throughout Australia and the Bureau of Statistics, which does a state by state comparison of crime. Both statistic collecting bodies, including the Correctional Services Reports an umbrella department of the Bureau of Statistics, use four categories for property crime, one being 'other theft'. Therefore, when the governments established that the crimes listed in the legislation were of the highest in Australia, they failed to see or simply disregarded that statistically 'other theft' includes shoplifting. The high rate of property crime under 'other theft' could be due to a high rate of shoplifting, a predominantly white collar crime, however, without any justification, the governments of Western Australian and the Northern Territory neglected to include shoplifting into the mandatory sentencing scheme.

The same conclusion could be said when looking at perceived seriousness of crime. However, as the section would suggest, it is difficult to actually detect what is more serious than other crimes in Australia. It could possibly be that victims perceive property crime to be very serious in the Northern Territory and Western

Australia, but to be more serious than violent crimes is doubtful. Nonetheless, it would be difficult, in terms of legally defining what is perceived seriousness of a crime, to convince the Human Rights Committee that the justification by the Australian government was not reasonable and objective. Justification of maintaining law and order should be universally applied in Australia, considering that statistics show that the crime of 'property offence' is a prevalent throughout the region. Crime is serious, and measuring it on a scale of seriousness creates too much doubt, when a clearer picture would be needed to assess a definite violation of Article 26 CCPR.

A clearer picture can be seen if we look at the implementation of mandatory sentencing on an individual basis by comparing the outcome of an indigenous offender with that of a non-indigenous offender at the time of sentencing. If both have committed a property offence, under either piece of legislation, they will both receive imprisonment. If we were to compare across the board, meaning with all States and Territories within Australia, both the indigenous and non-indigenous offender would be treated on an unequal basis with other offenders in other provinces that do not have mandatory minimum sentencing for non-violent crimes. However, this comparison only sets the stage for direct discrimination, which we know is not the inherent problem with mandatory minimum sentencing in the state/territory. The implementation of this legislation and its effect on a particular group disproportionately higher than other groups brings us to the issue of indirect discrimination. Since the amended *Sentencing Act* took place in 2001, the exceptional circumstances clause could change the outcome of the indigenous offender. When crossing this threshold, you may find that the indigenous offender would have difficulty in fulfilling the criteria of exceptional circumstances. If indigenous offenders consistently were not fulfilling the criteria and crossing the threshold or 'exceptional circumstances' a clearer picture would show indirect discrimination. Without further facts on a particular case, a violation under Article 26 CCPR is not very likely to be successful. The Human Rights Committee would more likely chose an article that has this idea of strict liability, in other words articles that can show more technical problems, such as delays in appeal, or an

arrest without a warrant. This would lead the Human Rights Committee, in this particular case to focus on article 14(5) CCPR to determine if the legislation does not allow for full review of one's sentence. Considering in determining whether legislation is discriminatory the Human Rights Committee would have to declare a State's government's argument not justified in, for instance, maintaining law and order.

Politically speaking, the motivation behind mandatory legislation, although not likely to be considered discriminatory, is immoral and one needs to question the reasons for creating such legislation. This doubt comes from the fact that the Northern Territory and Western Australia have a high percentage of the Aborigine population living within its borders (26.5% of territory, 13.2% of Australian; 3% of state, 14.5% of Australian population respectively).¹⁵⁸ It has been noted that indigenous peoples are more likely to commit property offences than non-indigenous peoples. Furthermore, shoplifting, a crime predominantly committed by non-indigenous peoples is not included in the legislation, but included in the statistics for determining the rate of property offences under the category of 'other theft'. Lastly, the socio-economic situation of indigenous peoples throughout Australia, but particularly in the Northern Territory, would suggest that the amendment to the *Sentencing Act* would be unreasonably limit the possibility of indigenous peoples passing the threshold of exceptional circumstances criteria and not be treated on equal footing as non-indigenous people. Morally speaking, the legislation only perpetuates the racial attitudes found in Australia. However, the problem of why the indigenous peoples would have a higher probability of being effected by the legislation brings us to the deeper issue

The marginalisation of indigenous peoples in Australia has led to the problem of rising crime. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, submitted a report¹⁵⁹ in February 2002 from his mission to Australia. Economic and social disadvantages

¹⁵⁸ Australian Bureau of Statistics, 1996 Census, ABS Canberra 2002. Pg. 2.

¹⁵⁹ United Nations Document E/CN.4/2002/24/Add.1, Special Rapporteur on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Mission to Australia, 26 February 2002.

of indigenous peoples in the prevention and decrease of crime is linked with economic and social development of each country. It just so happens in the two provinces of Australia that have a high rate of indigenous peoples living there, would also have a problem with the full realisation of all rights of indigenous peoples. If the socio-economic problem of the indigenous peoples was improved to provide for full recognition of all economic, social and cultural rights, the accumulation of these rights would probably remove the effects of mandatory minimum sentencing targeting this particular group disproportionately.

However, the Australian government cannot ignore the recommendations given by UN treaty bodies, the Senate Legal and Constitutional Committee, and the Royal Commission on reducing the rate of indigenous incarceration. As the UN principles would suggest, mandatory minimum sentencing is not a measure of last resort, but a measure of first resort.

In conclusion, it would be difficult to find a violation of Article 26 CCPR, using the test applied by the Human Rights Committee. The Human Rights Committee will doubtfully look at aspects of theory of deterrence and the community's perception of fear; it will only apply the facts of the case to the interpretation of the CCPR. If the Human Rights Committee were to find a violation of mandatory minimum sentencing under Article 26 the ramifications would be too great. Australia is not the only country to have mandatory minimum sentencing legislation, i.e. United States, Canada, South Africa, Fiji, etc., with similar criticism about its effect on minority groups.

The next chapter will examine possible remedies to remove mandatory sentencing that are available within the United Nations and through the Australian Constitution.

6 Domestic and International Remedies

Vienna Convention on the Law of Treaties

Article 27: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

International Covenant on Civil and Political Rights

Article 2(2): Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

Article 50: The provisions of the present Covenant shall extend to all parts of federal States with out limitations or exceptions.

6.1 Introduction and Application to Mandatory Sentencing

It is important that when introduced to a problem, a solution should always be presented to resolve any further human rights violations by a State. Australia, being a party to the CCPR and CERD, has allowed the competence of the Human Rights Committee and the Racial Discrimination Committee to hear complaints by authors who allege their rights to be violated. With this in mind an examination of the possible remedies under domestic law to override, amend or repeal legislation that possibly contravenes international human rights will be assessed. Australia has several avenues for the Commonwealth Parliament to override or repeal mandatory sentencing by its very powers enshrined in the Constitution.

6.2 Domestic Remedies

6.2.1 Constitutional Remedies

Gaps in legislation, uncertainty in the common law, and political influence over full recognition of all human rights, leaves one to examine constitutional protections of human rights, which cannot be overruled by any statute passed by the Commonwealth Parliament.

In Australia's report to the CERD, the representative of the government elaborated to the committee on the difficulty of ensuring compliance by the states and territories by stating:

The federal structure does not give the national government unlimited powers – it cannot readily override the States and Territories, and even where possible would not resort to overriding legislation if there were other ways of achieving the same objective...

However, under international law Australia is obligated to ensure national compliance under the article 27 of the *Vienna Convention on the Law of Treaties* and articles 2(2) and 50 of the CCPR.

Australia, on the other hand, does have the power to ensure compliance and override legislation that conflicts with its obligations under international law. An obligation of domestic implementation, under international law, is left to the State Party, with the primary importance of result of implementation.¹⁶⁰ The Commonwealth Parliament has several powers enshrined in the constitution to enact, repeal, and amend mandatory minimum sentencing legislation, however its application is slightly different concerning Territories from that of States.

Commonwealth Constitutional Powers

- s51(xxix) - External Affairs Power - extends to matters on which the Federal Government has concluded international treaties.
- s51(xxvi) – Race Power – “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: The people of any

¹⁶⁰ Nowak, M. 1993. Pg. 53

race, ~~other than the aboriginal race in any State,~~¹ for whom it is deemed necessary to make special laws"

- S109 – State Power -“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”
- S122 – Territories Power –“The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit.”

Under each of the constitutional powers, the Commonwealth has enacted, amended, and repealed legislation that contravened its obligations, either constitutional or international. An examination of each constitutional power and how it can override mandatory minimum sentencing legislation in either the Northern Territory or Western Australia is as follows:

S51(xxix) External Affairs Powers: State Compliance

The external affairs power operates by allowing the Commonwealth Parliament to enact a law whose purpose is to give effect within Australia to an international obligation, but only if the subject-matter of that obligation is an external affair. As to whether international obligations are considered external affairs, the High Court examined this issue in *The Commonwealth of Australia v. Tasmania*.¹⁶¹ In the majority opinion of the Court held that:

It is not to be assumed that the legislative power over ‘external affairs’ is limited to the execution of treaties or conventions; and ...the Parliament may well be deemed competent to legislate for the carrying out of ‘recommendations’ as well as the ‘draft international conventions’ resolved upon by...international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.¹⁶²

Justice Deane J continued by stating:

¹⁶¹ *The Tasmanian Dam Case* (1983) 158 CLR 1

¹⁶² (1983) 158 CLR 1 at 258-259

It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation.¹⁶³

This would assume that the Commonwealth, not only could pass legislation concerning their obligations under the CCPR and CRC, but also with the recommendations enumerated in the *United Nations Minimum Rules of Non-custodial Measures* and the *United Nations Minimum Rules for the Administration of Juvenile Justice*. Acting under the 'external affairs' power, the Commonwealth Parliament has assumed obligations under international human rights treaties and recommendations, and those obligations are inconsistent with the Northern Territory and Western Australia mandatory minimum sentencing legislations. The Federal Parliament has, therefore, due to the judgment in *The Tasmanian Dam Case*, the legislative power to pass a Bill to appeal, amending or receding mandatory sentencing by virtue of the external affairs power in s51(xxix) of the Constitution.

S51(xxvi) Race Power: Protecting 'groups':

The power enshrined in s51 (xxvi) includes the power to make laws as well as a power to unmake them. This power is argued to be understood as supporting special laws for the Aboriginal peoples only where they are for their benefit or advancement. Therefore, an act or law would not be supported by s51 (xxvi) if that particular act or law was not for the benefit of people of the Aboriginal race but detrimental to them.¹⁶⁴

In a case before the High Court of Australia, the question of 'race power' was demonstrated. In *Kartinyeri v. The Commonwealth*¹⁶⁵ on the validity of the *Hindmarsh Island Bridge Act* that threatened significantly the rights of Aborigines under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*,

¹⁶³ (1983) 158 CLR 1 at 258-259

¹⁶⁴ *Kartinyeri v. The Commonwealth* (1998) HCA 22 (1 April 1998) 115(1)

and was therefore deemed invalid in so far as it was not supported by the meaning of s51 (xxvi) of the Constitution. Why this specific case is of significance to mandatory sentencing is because both the *Kartinyeri Case* and mandatory sentencing were deemed or presently are of a discriminatory nature towards Aborigines and other particular groups.

Two points came to light concerning the ‘race power’. Firstly, “law that discriminates is considered invalid on the ground that s51 (xxvi) requires that any law enacted in reliance upon it must be for the benefit or advancement of the people of any race (or not detrimental to or discriminatory against such people).”¹⁶⁶ Properly characterised, mandatory sentencing legislation in both Western Australia and the Northern Territory falls outside of this requirement. Just as the *Bridge Act* was deemed a law designed to deprive people of the given race of legal rights, which they would otherwise enjoy.

s122 Territories Powers: Overriding Territory laws¹⁶⁷

In *Spratt v. Hermes* the High Court defined the nature and scope of s122 in relation to s51 External Powers of the Commonwealth Parliament. In the *ratio decidendi*, Honourable Barwick CJ stated:

Section 22 gives to the Parliament legislative power of a different order to those given by s51. The power is not only plenary but unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory – an expression condensed in s122 to “for the government of the Territory.” This is as large and universal a power of legislation as can be granted.¹⁶⁸

In inference, any Territory law that conflicts with Commonwealth laws will be overridden because of the power embodied in s122. As elucidated in *Attorney-General (Northern Territory) v. Hand (1989)*, “it is not a question of inconsistency between the two sets which may otherwise be valid, rather it is a

¹⁶⁵ (1998) HCA 22 (1 April 1998)

¹⁶⁶ (1998) HCA 22 at 115(2)

¹⁶⁷ Commonwealth Territories encompass not only internal territories (Northern Territory, Australian Capital Territory, Jervis Bay Territory), but also external territories (Norfolk Island, Coral Sea Islands, Australian Antarctic Territory, etc¹⁶⁷) that fall under s122 of the Constitution concerning Territories Power.

question going to the competency of the subordinate legislature to enact laws or cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature.”¹⁶⁹ Section 122 has been used previously concerning legislation in the Northern Territory, and the Commonwealth government successfully created legislation to override contravening legislation by stating that it would have no force or effect in that specific territory.¹⁷⁰

s109 States Powers: Overriding State laws

The Commonwealth powers do not reach as far with States as they do with Territories. A requirement of ‘inconsistent with the law’ under s109 encompasses a restriction on the Commonwealth that is not formulated in s122. Powers included in s109 allow the Commonwealth, relevant to the inconsistency, to be identified through inclusion in the Commonwealth law of an express intention to override specific legislation, or through an inference by the Court that the Commonwealth intended to amend with its new legislation.¹⁷¹

The width of protection by s109 of the Commonwealth allows for significant scope of Federal legislation to protect human rights, especially discrimination, from actions (i.e. legislation) by States. However, the power invested in s109 can also imply that the Federal government has the power to override State legislation that protects human rights. Nevertheless, if a State law makes lawful the doing of an act, which section 9(1) of the *Racial Discrimination Act 1975* prohibits and there

¹⁶⁸ *Spratt v. Hermes* (1965) 114 CLR 226 at 241-242.

¹⁶⁹ *Attorney-General (Northern Territory) v. Hand* (1989) FCR 345 at 367.

¹⁷⁰ Senate Legal and Constitutional Reference Committee - Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, March 2002. Pg. 39. The *Euthanasia Laws Act 1997 (Cth)* was enacted by the Commonwealth Parliament to invalidate current legislation passed by the Northern Territory *Rights of the Terminally Ill Act 1995 (NT)*. The Northern Territory *Rights of the Terminally Ill Act 1995 (NT)* sought to ‘establish a statutory regime under which a competent adult with a fatal illness could request assistance to terminate their life.’ However, the Northern Territory is limited to the *Northern Territory Self-Government Act 1978 (Cth)*, a law of the Commonwealth and therefore subject to express repeal or amendment by subsequent Commonwealth laws.

The Commonwealth sought to invalidate the possibility in the Northern Territory for the intentional killing of a patient; it rather enacted the possibility of withdrawal of life-prolonging medical treatment and for palliative care. Furthermore, the s122 Territories Power availed by the Commonwealth Parliament provided that the *Rights of the Terminally Ill Act 1995 (NT)* was to have no force or effect.

¹⁷¹ Hughs, G. 2001. Pg. 17.

is no justification under section 8(1) special measures, there will be a direct inconsistency for the purposes of s109 of the Commonwealth Constitution. The sections will operate to invalidate the inconsistent State law to the extent of its inconsistency. Western Australia's *Criminal Code 1913*, as it is possibly inconsistent with the *Racial Discrimination Act 1975* section 9 and article 26 of the CCPR under Schedule 2 of the *Human Rights and Equal Opportunity Act 1986*, conflicts with s109 of the Commonwealth Constitution and could therefore become invalid to the extent in which it is inconsistent. This examination can also be used with the CCPR and the *Convention of the Rights of the Child* in so far as amendments made to the *Criminal Code Act*, *Juvenile Justice Act*, *Sentencing Act* and *Young Offenders Act*, conflict with Australia's other obligations (article 9(1), article 14(1) and (5)) under the *Human Rights and Equal Opportunity Act*, and therefore creates inconsistencies with s109 of the Constitution.

The Commonwealth Parliament has previously used the State Powers Act to override legislation that denied indigenous Australians equality before the law.¹⁷² The case confirmed that the *Racial Discrimination Act* could render subsequent discriminatory State legislation invalid.¹⁷³

¹⁷² *Mabo v Queensland (No. 1)* (1988) 166 CLR 186

¹⁷³ *Mabo v Queensland (No. 1)* (1988) 166 CLR 186. In 1982, Mr. Eddie Mabo and four other Meriam people from the Murray Islands in the Torres Strait began legal proceedings seeking recognition of native title rights to the Murray Islands. This action gave rise to two High Court decisions known as *Mabo (No. 1)* and *Mabo (No. 2)* which had a profound impact on the direction of law and policy relating to indigenous land rights and represented a turning point in the nation's history.

By a majority of 4-3, the High Court held that the *Queensland Coast Islands Declaratory Act* was invalid because it was inconsistent with sections 9 and 10 of the *Racial Discrimination Act 1975* (Cth). This was because its provisions discriminated against the Meriam people by purporting to extinguish their legal rights. The Act discriminated on the basis of race in relation to the human rights to own property and not to be arbitrarily deprived of property, in that the native title interests sought to be extinguished were only held by indigenous peoples. The Queensland law was inconsistent with the RDA and, by virtue of Section 109 of the Constitution, inoperative. *Mabo and Others v State of Queensland (No. 2)* (1992) 175 CLR 1 The High Court held by a majority of 6-1 that the Meriam people were entitled, as against the whole world, to the possession, use, occupation and enjoyment of (most of) the land of the Murray Islands. In upholding the claims of the plaintiffs, the six judges in the majority rejected the traditional doctrine that Australia was *terra nullius* ('land belonging to no-one') at the time of European settlement. Rather, the High Court recognised Australia to have been occupied by indigenous peoples at the time of settlement.

6.3 International Remedies

6.3.1 Human Rights Committee

Under article 1 of the First Optional Protocol of the CCPR, States who have ratified the First Optional Protocol recognise the competence of the Human Rights Committee to receive and consider complaints, i.e. communications, from individuals concerning violations by the State of any of the rights enumerated in the Covenant. One of the requirements of the First Optional Protocol of the Covenant is that the Human Rights Committee can only examine communications from individuals who have had their rights violated if that author passes the test of admissibility, i.e. exhaustion of domestic remedies that are not unreasonable prolonged, the same matter is not being examined under another procedure of international investigation or settlement, etc.¹⁷⁴

Hence, the Human Rights Committee can thereby assess the Federal Government on the extent to which it has met its obligations under the CCPR. However, the Committee does not have the judicial power to force a change in legislation. Despite this, political pressure and embarrassment of a decision by the Human Rights Committee may lead to a change in Australian domestic law, as happened in the *Toonen v. Australia No. 488/1992 (1994)*¹⁷⁵ - the first individual complaint upheld against Australia under the First Optional Protocol to the CCPR. The Human Rights Committee noted that a provincial law can be a violation, even though federal law was compatible. “Under article 2(3)(a) of the Covenant, the

¹⁷⁴ ICCPR, Optional Protocol Article 1 & 2, Melander, G; and Alfredsson, G., Eds., *The Raoul Wallenberg Compilation of Human Rights Instruments*, Martinus Nijhoff Publishers, 1997. Pg. 61

¹⁷⁵ United Nations Document CCPR/C/50/D/488/1992 (1994) In this case the Human Rights Committee found that the *Tasmanian Criminal Code*, by criminalizing male homosexuality, had breached an individual's right to sexual privacy under article 2 (discrimination based on sexual orientation) in connection with article 17 (right to privacy).

author, victim of a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the *Tasmanian Criminal Code*.¹⁷⁶ The Federal Government then passed the *Human Rights (Sexual Conduct) Act (1994)*, which eventually forced the Tasmanian Parliament to repeal the offending law.¹⁷⁷ In effect, Wynbyne, or any other author who has exhausted domestic remedies and claiming their rights have been violated under the stipulated legislation, can submit a communication to the Human Rights Committee and challenge the compatibility of mandatory minimum sentencing in Australia with the Covenant.

A communication has yet to be decided by the Human Rights Committee concerning Australia's obligations concerning mandatory minimum sentencing, however, as noted previously, two cases have been sent to the Human Rights Committee for consideration. A press release, on a communication sent by 'R', by the Attorney General sheds light on the allegations against the Commonwealth government concerning mandatory minimum sentencing in the Northern Territory. The communication has yet to reach the stage of determination of admissibility. As was noted previously, an earlier communication examined by the Human Rights Committee¹⁷⁸ concerning mandatory death penalty sentencing, four committee members commented in the *obiter dictum* that mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise issues under the Covenant if the disposition of the sentence is disproportionate to the crime.¹⁷⁹

Concerning the prohibition of discrimination, case law would suggest that the Human Rights Committee has previously made findings of indirect discrimination under Article 26, but because of entrenched dominant values of a post-colonial state and the systemic discrimination it creates, are so complex that a

¹⁷⁶ United Nations Document, Communication *Toonen v. Australia* No. 488/1992, CCPR/C/50/D/488/1992. at para. 10.

¹⁷⁷ See Constitutional remedies under State Powers s109. pg. 80

¹⁷⁸ The Committee was of the opinion that the mandatory nature of the death penalty, based on articles 6(2), 7, 14(5), and 26 of the Covenant did not raise issues that would be separate for the finding of a violation of article 6(1) of the Covenant. Para. 8.3.

¹⁷⁹ *Thompson v. St. Vincent and the Grenadines* United Nations Document, Communication No. 806/1998 (2000)

challenge to the Human Rights Committee would need significant proof to establish a violation of Article 26.¹⁸⁰ However, the Human Rights Committee is not obliged to follow precedent. In *Thomas v. Jamaica* Communication No. 532/1993, “any...views of the Committee based on legal grounds...can be reserved or modified at anytime, in the light of further arguments raised by Committee members during the consideration of another case.”¹⁸¹

As seen in the analysis of mandatory sentencing under Article 26, among other article in the CCPR, an individual would have the highest chance of success concerning one’s right to review. The difficulty in finding a violation of indirect discrimination should not prevent an individual or group from submitting a communication to the Human Rights Committee. Considering the submission of a communication in which the end goal would be to find at least one violation, would with all probability embarrass the Australian government to the extent in which mandatory minimum sentencing legislation would be repealed, amended or overridden.

However, there are other avenues to lodge a communication and one must examine these remedies to find a successful relief for violations of human rights when domestic legislation and remedies are insufficient or ineffective.

6.3.2 Committee on the Elimination of All Forms of Racial Discrimination

The United Nations *Covenant on the Elimination of all forms of Racial Discrimination* article 2(c)(d) obliges states to take effective measures to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists” and further stipulates that states “shall prohibit and bring to an end, by all appropriate means, including

¹⁸⁰ Joseph, S., Schultz, J., Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 2000. Pg. 563-4.

¹⁸¹ *Thomas v. Jamaica* United Nations Document, Communication No. 532/1993. See also Joseph, S. pg. 18.

legislation...”that discriminates.¹⁸² Article 14 of CERD allows States who have ratified the Convention to recognise the competence of the Committee to receive and hear communications from individuals and groups within the States jurisdiction, who claim to be victims of a violation by that State. In this instance, a complaint could be made, after the exhaustion of domestic remedies, in consideration of mandatory minimum sentencing and its possible indirect discriminatory effect on indigenous peoples.

If the presumption that indirect discrimination exists in mandatory minimum legislation, the author has an option of an individual or group complaint procedure under the CERD is a possible avenue of redress. However, a communication to the CERD Committee would only address issues concerning the possible discriminatory impact of mandatory legislation and not the questionable independence of the judiciary from the legislature, which has removed full discretion of the court in the review of sentences.

6.4 Concluding Analysis

Domestic remedies within Australia are sufficient to alleviate any problems with legislation that is found to be incompatible with their human rights obligations under respective treaties. In each of the instances provided above, the Commonwealth Parliament has the opportunity to appeal, amend or override State and Territory legislation that is unconstitutional or incompatible with federal law. Considering the CCPR is provided in federal legislation, the *Human Rights and Equal Opportunity Act 1986*, as well as the CRC and ICERD, Parliament can use this incompatibility with of State and Territory legislation as a foundation to override or amend to the extent in which the law in incompatible, with CCPR provisions.

The only aspect of domestic remedies that comes under scrutiny is the failure of Parliament to interfere in State and Territory legislation because of the political ramifications. Human rights obligations should be placed before the negative

¹⁸² International Covenant on the Elimination of All Forms of Discrimination, Melander, G; and Alfredsson, G., Eds., *The Raoul Wallenberg Compilation of Human Rights Instruments*,

impact Parliament receives because of well-founded human rights violations in a State or Territory. It is sufficient for the Parliament to allow the respective governments time to formulate amendments or to repeal the legislation, but a two-year delay is incompatible and unreasonable. A review by the Western Australian Department of Justice found that it had no intention of repealing the legislation; despite concern on the impact these laws have on indigenous peoples. The Attorney General distinguished Western Australian legislation as only capturing 'the serious offence of home burglary', however as we have seen indigenous juveniles are seriously affected by the legislation. It also raises several issues under international human rights law in which Australia is legally bound to follow. Therefore, considering it would be inappropriate to wait four years before another review would find similar conclusions to mandatory sentencing's unjust nature, the repeal by the Commonwealth Government is necessary.

Article 50 CCPR states this obligation explicitly, and the Australian government is under an obligation to change the legislation to the extent in which it contravenes human rights obligations under the CCPR. As it was demonstrated above, it is not out of reach to appeal legislation that contravenes the CCPR or any other human right provided for in the constitution or federal legislation.

As to international remedies, two communications have been sent to the Human Rights Committee. The outcome for the Australian government could be more embarrassing internationally than domestically removing legislation that could possibly be considered violating their obligations under the CCPR. What will be interesting to explore in the future is Australia's next report submitted to the Human Rights Committee, with detailed information on mandatory minimum sentencing.

7 Conclusion

Mandatory minimum sentencing has been under much debate in the last couple of years, and not just within Australia. As of December 2002, mandatory sentencing or ‘three strikes your out’ legislation in the United States went before the Supreme Court to determine the constitutionality of several provisions. The debate is deeply rooted in the conflict of how a State can decrease crime based on theories of criminology. Where the problem lies is when protecting society from crime has the possibility of violating the rights of offenders in receiving a fair trial. The balance between protecting the community from recidivists and protecting the rights of the offenders is a persistent battle between the legislature, academics and the judiciary. Arguments for and against mandatory sentencing often can go both ways: method of deterrence, cost effectiveness, consistency of sentencing, incapacitation of repeat offenders, and democratic arguments. Often the interests of the community, naturally, come before the rights of the offender. However, when law interferes with the rights of offenders, it must be examined as to what extent the law interferes to determine whether their rights are guaranteed.

In this context, the legislation created by the Commonwealth Parliament without a doubt created harsher sentences for some than for others and restricted the judiciary in determining whether that harshness was reasonable and proportionate. Although offenders are being convicted ‘according to the law’ their sentence is not being examined to the extent required under Article 14(5) CCPR. Jurisprudence of the Human Rights Committee would suggest that only one violation of the CCPR is sufficient. In this assumption, the Human Rights Committee would examine the merits of one’s claim under Article 14(5) and upon finding a violation (or not) would feel it not necessary to examine Article 26 and 9(1). As this paper noted, violations under 9(1) and 26 CCPR would be difficult avenues to pursue, however the communications sent in 2001 concerning mandatory minimum sentencing will give us a clearer answer to the compatibility of mandatory minimum sentencing with the provisions of the CCPR.

As it is evident several avenues are available from an international and domestic level to either submit a communication claiming one's rights have been violated or by repealing the specific legislation at a State or Territory level by the Commonwealth. One would assume that even after such conclusions by several United Nations treaty bodies, the Senate Legal and Constitutional Committee, the Royal Commission and Australian NGO's, the repeal of mandatory sentencing in the Northern Territory and Western Australia would only be logical to halt further violations of human rights by Australia.

It will be interesting to see the next State Report submitted by Australia¹⁸³ by the Human Rights Committee, the Committee on the Rights of the Child, Racial Discrimination Committee and by the Committee Against Torture, to see whether conditions change within the two states/territories concerning mandatory minimum sentencing legislation. Furthermore, the two cases received by the Human Rights Committee in 2001 will probably be up for review by 2003/4. Will it take a determination of a violation of the CCPR by the Human Rights Committee or will Australia override the legislation so not to be embarrassed by its international human rights record? One can only wait to see the outcome and hope that the quickest remedy is utilised to prevent any further violations of individuals' rights under the CCPR and CRC.

¹⁸³ Australia's 3rd and 4th report to the Human Rights Committee was overdue and submitted in 2000. The next report to the Human Rights Committee was due on the 12th of November 2001, however considering the delay in the last two reports, a further delay in Australia's 5th report is likely.

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