

# A Year of BAD POLICY

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## ***Mandatory sentencing in the Northern Territory.***

The past 18 months have seen the development of a repressive and unreasonable response by the Northern Territory's (NT) Country-Liberal Party (CLP) Government to a perceived increase in criminal activity in the NT. Without providing any statistical evidence to substantiate statements that the NT was in the midst of a 'crime wave', the Government adopted measures which are in clear contravention of international human rights conventions, particularly in their effect on young people. These measures include:

- introduction of mandatory sentencing for property offenders;
- imprisonment of young people in the maximum security section of the Alice Springs prison;
- incarceration of young people for the non-payment of infringement notices (Community Service Orders are no longer available as an option);
- a proposal to review the right to silence;
- a proposal for electronic surveillance of young people under curfew;
- proposed increases in police armoury and numbers.

As the harsh reality of mandatory sentencing became apparent in the courts and the casework of various legal aid organisations, concern from the community about the economic and human rights implications, and the doubtful deterrent value of this sentencing regime became more conspicuous. By November 1997, concern over the state of human rights in the NT was being expressed nationwide and in international forums. Community workers, academics and solicitors from all over Australia concerned with juvenile justice issues, gathered in Alice Springs in late November for 'Three Days of Action' in response to what has been described as a human rights emergency in the NT. The 'Three Days of Action' campaign was co-ordinated by the National Children's and Youth Law Centre, and Central Australian Youth Justice.

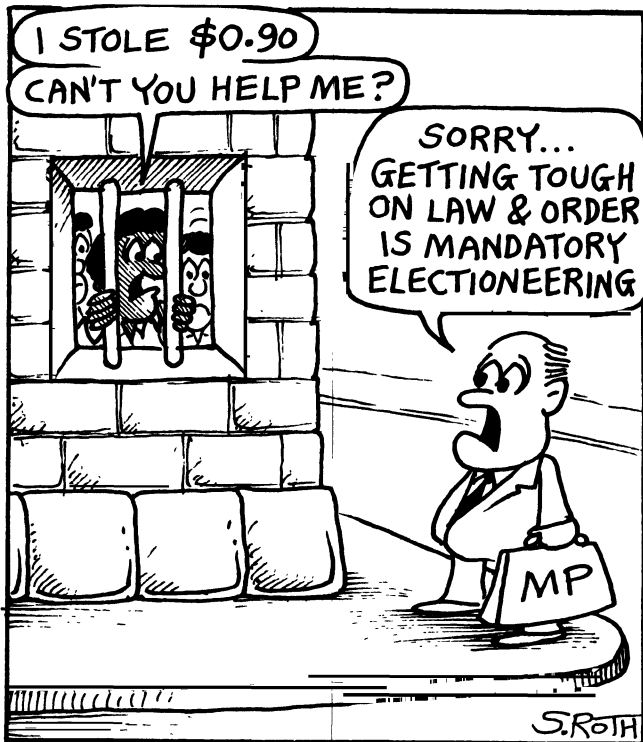
### **What is mandatory sentencing?**

On 8 March 1997, amendments to the NT *Sentencing Act* and the *Juvenile Justice Act* were proclaimed and came into effect. From that date, any person over the age of 17 found guilty of one of the relevant property offences listed below, has been liable to a mandatory minimum term of imprisonment of 14 days for a first offence. A person over the age of 17 who has one prior conviction for a property offence committed after 8 March 1997, must, if found guilty of a relevant property offence, be sentenced to at least 90 days imprisonment. A person over the age of 17 who has two prior convictions receives a mandatory sentence of one year in prison if convicted of a third property offence.<sup>1</sup>

Under the amended *Juvenile Justice Act*, a magistrate or judge must impose a period of at least 28 days detention on a 'juvenile' (anyone aged 15 or 16 years of age) who has been found guilty of one of the

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relevant property offences, and has at least one prior conviction for a property offence committed after 8 March 1997 (s.53AE).

The property offences which trigger the operation of the mandatory sentencing provisions are:

- theft (regardless of value of property, excluding shoplifting and theft when the offender was lawfully on the premises);
- criminal damage;
- unlawful entry to buildings;
- unlawful use of vessel, motor vehicle, caravan, or trailer (irrespective of whether as a passenger or driver);
- receiving stolen property (regardless of value);
- receiving after change of ownership;
- taking reward for recovery of property obtained by means of a crime;
- assault with intent to steal;
- robbery (armed or unarmed).<sup>2</sup>

Ironically, white collar crime, such as fraud, obtaining financial advantage by deception, and related offences are not subject to mandatory sentencing.

Since the legislation came into effect, both adults and young people have been incarcerated in bizarre circumstances, or for trifling offences. These include the following examples:

- A 17-year-old school student convicted of theft of yo-yos and computer games from a Darwin toy shop, and criminal damage, was sentenced to 14 days jail, after pleading guilty. The youth had no previous criminal convictions, had handed himself into police, and was fully co-operative with police.
- A 20-year-old man with no prior convictions, convicted of theft of \$9.00 worth of petrol was sentenced to 14 days jail.

- An 18-year-old man was sentenced to 90 days jail after being found guilty of stealing \$0.90 from a motor vehicle.
- A Katherine woman was sentenced to 14 days jail after being found guilty of theft of a can of beer.
- In Darwin, two 17-year-old women with no previous criminal convictions were each sentenced to 14 days imprisonment after being convicted of theft of clothes from other girls who were staying in the same room.
- Another Darwin 17-year-old woman with no previous criminal convictions was sentenced to 14 days imprisonment after being convicted of receiving jewellery stolen by other young people. The jewellery was later recovered.
- At the Aboriginal community of Point Keats, a number of young people joy riding on the back of a trailer attached to a tractor which was stolen, and was being driven around the community by the offender, were charged with unlawful use of a vehicle. Those older than 17, and those who were 15 and 16 with a previous conviction, were convicted and sentenced under the mandatory sentencing provisions.

(Case studies obtained from Central Australian Aboriginal Legal Aid Service, Katherine Regional Aboriginal Legal Aid Service, Northern Australian Aboriginal Legal Aid Service and NT Legal Aid Commission.)

## NT: behind bars

The legislation reinforces the NT as a jurisdiction obsessed with imprisonment. Before the legislation came into effect, the NT had the highest rate of imprisonment of any jurisdiction in Australia, some three times more than the State with the next highest rate of imprisonment, Western Australia. (As at March 1997, in the NT the average daily prisoner population per 100 000 population was 305.7).<sup>3</sup> The seriousness of the situation becomes clearer when one considers the following:

- For every non-indigenous adult imprisoned in the NT, there were on average two Aboriginal adults imprisoned (Aboriginal people make up only 25% of the NT's overall population);
- 90% of under 17-year-olds held in detention in the NT are Aboriginal.

This situation can only be further exacerbated by the mandatory sentencing laws. Whilst there are no available figures on the total number of people sentenced to mandatory periods of imprisonment to date, the rate of imprisonment in the NT has clearly increased since the mandatory sentencing laws were introduced. By the end of 1997, the NT prisoner population per 100 000 population had increased to 435.2 — an increase in excess of 42% since mandatory sentencing was introduced.<sup>4</sup>

It should be emphasised that most legal professionals take the view that the full impact of mandatory sentencing is yet to be seen as most cases which attract the relevant penalties have been adjourned for as far as possible in an attempt to avoid the serious consequences of the legislation. Also many cases are subject to appeals to the Supreme Court and the High Court.

The legislation is in clear contravention of Recommendation 92 of the Royal Commission Into Aboriginal Deaths in Custody, which urges governments to enact legislation which ensures imprisonment is a sanction only of 'last resort'. The NT Government has continually held the Royal

Commission's Recommendations in contempt, and has viewed them as irrelevant to the NT in spite of the massive over representation of Aboriginal people in Territory prisons.

The NT has also received savage criticism for its failure to adhere to the UN Convention on the Rights of the Child. In October, the UN Experts Committee on the Convention of the Rights of the Child was strongly critical of Australia's failure to implement the Convention. Coming in for specific criticism was the NT and its system of mandatory sentencing, which is in clear breach of Articles 3, 37(b) and 40 of the Convention, which stipulate that imprisonment must be viewed as an option of absolute last resort.

At the November 1997 action in Alice Springs, magistrates and court staff acknowledged to visitors that mandatory sentencing was going to result in increases in delays in court hearings and huge increases in the numbers of people, both adults and young people, being incarcerated. They were unable to adequately explain where the increased number of detainees were going to be held, how they were going to be transported to Darwin to serve their sentences, and how the court administration and police would handle the influx and court delays.<sup>5</sup>

According to research undertaken by Ms Jenny Hardy of the Northern Territory Legal Aid Commission, imprisonment rates for women are likely to increase by at least six times the current rate under mandatory sentencing, if offending rates of women committing property offences follow similar patterns to previous years. In 1994-95 a total of 25 women were imprisoned for property offences, but 206 women were convicted of offences to which mandatory sentencing now applies. Even if one estimates that 50% of the 158 women convicted of stealing during this period had committed shoplifting offences, once one takes into consideration the number of women convicted of break and enter, and unlawful use of a motor vehicle, a total of 127 women would have been imprisoned under mandatory sentencing.<sup>6</sup>

The fact that 67% of offences committed by women are property offences (compared to 53% of offences committed by men) means that mandatory sentencing for property offences will have a far more drastic effect on rates of imprisonment for women than for men.<sup>7</sup>

### The cost to the community

The full economic effect of mandatory sentencing is yet to impact on the community and, in particular, the NT taxpayer. Undoubtedly, resulting increased incarceration rates will involve significant extra costs. The 1995-96 NT Correctional Services Annual Report stated that it costs \$12,432 to accommodate each young person sentenced to a 28-day period of detention.<sup>8</sup> In relation to adults, according to 1997 figures obtained from the Commonwealth Grants Commission, the average daily cost of imprisoning one adult for one day in the NT is \$169.44. On these figures, the cost to the public purse for every adult sentenced under mandatory sentencing for the minimum 14-day period is approximately \$2400.<sup>9</sup>

In addition, there will be extra cost to the community arising from the strain on court administration and the extra delays that will arise in court lists. A defendant facing charges covered by the mandatory sentencing provisions will have no incentive to plead guilty, in order to obtain the benefits that are otherwise provided for in the *Sentencing Act*, for not wasting the court's time and resources. A guilty plea uses far less court time and administrative resources

than a not guilty plea. However, under mandatory sentencing, a person has nothing to lose by pleading not guilty and requiring the prosecution to prove their case beyond reasonable doubt. Defendants are likely to appear before the court at numerous mention hearings which will involve more witnesses who will be called and subjected to complex cross-examination.

Such changes in the conduct of cases place a further strain on legal aid services, which are now facing a severe funding crisis.

The NT Government has acknowledged that mandatory sentencing will significantly increase prison numbers. In 1996, NT Correctional Services received a 20% increase in budget allocation to reflect increased prisoner numbers. An extra \$3 million is being spent to create an additional 140 places in Darwin.<sup>10</sup>

### Mandatory sentencing: will it act as a deterrent?

The community is entitled to question whether they are getting value for their law and order dollar, or whether the money could be better spent elsewhere (such as health, public and emergency housing, and education).

As stated earlier, the prime motivation for the introduction of mandatory sentencing was a perception that property crime rates in the NT were far too high. The assumption that a tougher system of sentencing will act as a deterrent may be a political vote winner, but is contrary to an overwhelming weight of evidence across Australia and from overseas.

In Western Australia, a study in 1993 revealed that the mandatory sentencing of young people did not reduce offending.<sup>11</sup> The study concluded that reported crime rates did not decline following the introduction of mandatory sentencing. A NSW study in 1996 revealed that a term of detention for a young person offending for the first or second time increased the likelihood of that young person re-offending.<sup>12</sup> The ineffective nature of imprisoning young people was also identified by the NT Correctional Services Department in their 1991 publication, *Information on Departmental Juvenile Justice Services in the NT*:

The evidence is clear that the more access juveniles have to the criminal justice system the more frequently and deeper they will penetrate it ... it has been shown that punishment of criminal offenders through incarceration in a juvenile detention centre or a prison ... has little positive effect. What happens in many cases is that the detainees learn from their fellow inmates how to become more effective in committing crime.<sup>13</sup>

It is clear that such a system of sentencing does not act as a deterrent to committing property crime.

The NT system of mandatory sentencing has been in place now for just over 12 months. The absence of any freedom of information legislation in the NT makes it difficult to hold the NT Government accountable for its original assertion that mandatory sentencing will send a strong message to criminals. However, figures obtained from Neighbourhood Watch in Darwin indicate that there has been no material reduction in property-related crime in the Darwin and Palmerston areas. In 1996 (when mandatory sentencing was not in existence) there was a total of 2071 reports of unlawful entry in the Darwin and Palmerston areas. In 1997 (which saw the introduction of mandatory sentencing in March) there were 2039 reports of unlawful entry in those areas. A reduction of only 1.5% is hardly a justification for the enormous public expenditure that mandatory sentencing

involves.<sup>14</sup> Unfortunately, there has been no in-depth study of other property-related offences.

It should also be noted that approximately 80% of reported property crime in Darwin remains unsolved. Mandatory sentencing is unlikely to have any effect on this statistic. These matters bring into serious question the deterrent effect of this system of sentencing.<sup>15</sup>

### Current legal developments

It would be pleasing to report after 12 months of practice, and taking into account the opposition voiced during the Three Days of Action in Alice Springs in November, that the NT Government will be repealing these pieces of legislation. Unfortunately, however, the opposite is true, as in late February 1998, the NT Parliament passed several amendments that had the effect of widening the reach of mandatory sentencing.

The two most serious amendments involve the provision that now theft from an employer will attract the mandatory sentencing provisions as will the summary offence of unlawful possession.<sup>16</sup> Unlawful possession, which involves being in possession of property reasonably suspected of being stolen, is a 'reverse onus' offence, where the defendant must establish that s/he had a reasonable belief that the items found in his/her possession were lawfully obtained.

In late 1997, the Katherine Regional Aboriginal Legal Aid Service (KRALAS) filed an Application for Special Leave to Appeal to the High Court in relation to the case mentioned above, where a Katherine woman was convicted of theft of a can of beer. The basis of the appeal was that the mandatory sentencing legislation was invalid under the Commonwealth Constitution, or alternatively the Commonwealth's *Northern Territory (Self Government) Act 1978*, or alternatively by reason of the operation of the Commonwealth *Judiciary Act 1903*. The central argument of the appeal related to the mandatory sentencing law contravening the doctrine of separation of powers, by removing from the judiciary the power to apply the law as it relates to property crime in the way it saw fit. On 21 May 1998, Justices Hayne and Gaudron of the High Court rejected the constitutional invalidity argument and refused to grant special leave to appeal.

### Conclusion

In spite of criticism and condemnation from around the country and internationally, NT politicians have at best shown apathy and disregard for the comments expressed. At worst, they have shown outright contempt for the concerns expressed about the seriousness of the human rights abuses occurring as a result of the legislation. Whilst members of the NT Labor opposition have indicated public opposition to the legislation, there has been a conspicuous reluctance on their part to directly challenge the Government on the basis and need for mandatory sentencing, and they have lobbied federal senators not to intervene to seek to overturn the legislation. This has led those involved with the Three Days of Action in Alice Springs to question their commitment to ensuring that young people within the NT are valued and recognised as being eligible to have their human rights recognised.

With an ineffective political opposition, the CLP Government continues to act as if it is completely unaccountable for the current human rights crisis. It has disregarded the concerns expressed by such organisations as Amnesty International, the National Children's and Youth Law Centre and

the UN Committee on the Convention of the Rights of the Child. The failure to release independent statistics, to support the assertion that mandatory sentencing was needed and is effective, and the failure to disclose the total cost to the community of this legislative regime, indicate that the Government is not capable of displaying the accountability expected of western democratic governments. One is entitled to question whether the NT Government is therefore mature enough for the NT to assume the responsibilities of full statehood.

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7. Hardy, Jenny, above, p.4.
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10. Darwin Community Legal Service, above, p.9, statement by Mr Steve Hatton, Correctional Services Minister, 7 March 1997.
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14. Neighbourhood Watch News, February and March 1998 for Darwin and Palmerston.
15. Darwin Community Legal Service, above, p.7.
16. Section 21, *Sentencing Amendment Act 1998* (NT).