WHEN GETTING TOUGH IS GUTLESS

President of the Criminal Lawyers Association, Mr John Lawrence.

Predictably my first column as President addresses mandatory sentencing. It was written prior to the death in custody of the 15 year old Groote Eylandt boy who suicided in Don Dale on 10 February 2000. He was serving a mandatory sentence for unlawful entry and stealing of paints and other material from the Alyangula Council Office and local school.

I appreciate that *most* of the following article appeared in last week's *NT News*. For reasons best known and maybe not known to the *NT News*, they omitted part of the article concerning the lack of Government consultation re its recent amendments and the lack of statistics relied on by the Government when initially introducing mandatory sentencing.

At the Federal Senate Committee hearing in Darwin on 2 February mandatory sentencing was revealed, for what it is: a political tool to achieve a political end. Just like most other western democracies in the last 20 years law, order and sentencing is an area in society which the politicians have been able to use to excite the votes sought to get office. The lack of statistics and data is convenient, if not deliberate, in such instances. A climate of ignorance alongside the undoubted anxiety which exists in late twentieth and early twenty-first century western society is a climate sought by the politicians. Prior to each election politicians of all ilks and parties beat their chests declaring "toughness" on sentencing.

Northern Territory mandatory sentencing is the bastard child of such a creation.

On 2 February 2000 the Commonwealth Senate Legal and Constitutional Reference Committee sat in Darwin inquiring into Senator Brown's proposed Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999.

The Committee's terms of reference were:

(a) the legal, social and other impacts of mandatory sentencing;

(b) Australia's international human rights obligations in regard to mandatory sentencing laws in Australia;

(c) the implications of mandatory sentencing for particular groups, including Australia's indigenous people and people with disabilities;

(d) the constitutional power of the Commonwealth Parliament to legislate with respect to existing laws affecting mandatory sentencing.

The Committee had sat and heard submissions in Alice Springs the previous day.

On 2 February the Committee received and heard submissions from interested parties. The Reference Committee consisted of six Senators plus the Bill's author, Senator Brown. The procedure was for each interested party to make a brief oral submission talking to their written submission following which the Committee members would ask questions.

There were 14 parties which presented submissions in Darwin. The government and one other were in support of mandatory sentencing. The other 12 were all agin. Those groups ranged from the Northern Territory Law Society and Bar Association to the Group for the Rights of Homeless Children and the Council of NT Churches comprising Uniting, Anglican and Roman Catholic Churches.

The sitting of this Committee proved a revelation in that for the first time since mandatory sentencing came onto the books three years ago, the rationale for its introduction, its efficacy and the general consequences of its introduction, including the cost to the taxpayer, were widely canvassed and revealed.

The wide ranging terms of reference which applied to mandatory sentencing *per se* not just to juveniles, allowed the Committee to listen to arguments from all interested parties and to disseminate and examine the legislation and its effects in detail. Further, and importantly, the Committee consisted of experienced Federal legislators from *all sides of politics*, well versed in the art of democratic politics, who through their expertise, examined the law thoroughly and the submissions of the appearing parties analytically.

It was an ideal forum for this law to at last be properly assessed and judged.

Having listened to the arguments presented and the many incisive questions asked of the presenters by the Committee members, the conclusion as regards mandatory sentencing was compelling. It's a disaster.

History

The government submitted that before mandatory sentencing was brought in the subject was "*widely canvassed*". The history re these amendments to the Sentencing Act is that they were introduced and passed about six weeks after the Sentencing Act itself. The Sentencing Act was legislation which the government had consulted extensively with relevant interest groups including the Law Society and NT Bar Association, before its introduction. As to the amendments containing mandatory sentencing there was absolutely no consultation with any interest groups. This is an historical fact. The subject may have been "*widely canvassed*" (whatever that means) but there was no consultation made with any of the relevant interest groups previously canvassed re the Sentencing Act.

The government gave its reasons for introducing the law in the first place. The government spokesman used terms

like "there was popular concern regards property crime at the time". "The Courts were not reflecting in their sentences that popular concern".

It was revealed in answer to particularly perceptive questions from the Committee that there had been no scientific studies done before the legislation was introduced to examine the accuracy of this claimed "public perception" re the crime rate and if it did exist, was it merited? In other words there was no scientific data (statistics) used by the Government to confirm that crime was increasing and hence the concern; or that sentences were failing to take on board that "fact".

For many years now interest groups like CLANT and individual members of the profession, including the magistracy, have been calling for an independent Bureau of Criminal Statistics to allow for any trends to be accurately recorded and assessed, thus allowing the public and government to be more accurately informed. The government has continually failed to establish such a body. There still is none. As it happens the government presented some statistics to the Committee during their submissions concerning juvenile detention rates. They conceded as they had to that they were compiled "hot off the press", ie at the eleventh hour, from the Integrated Justice Information System, a system not designed for creating such statistics.

And so it was found that without any consultation, without any data but with an apparently populist brief, the laws were passed.

Their effect

Needless to say a large proportion of the submissions outlined instances of gross injustices occurring as a consequence of the new laws. Grossly severe sentences brought down against offenders for relatively minor offences were the order of the day. Such lamentable tales have been all too frequent throughout the three year history of the new order. Stories of people being gaoled for receiving a can of VB, snowdropping a towel, etc are sadly now part of Territory legal lore.

The injustices meted out through mandatory sentencing have been numerous and consistent. The Committee were informed accordingly.

What was also examined and discovered, unequivocally, was that the three year regime has had no effect on the crime rate. The government conceded there was no evidence that mandatory sentencing has in any way reduced crime in the Territory.

An anti-mandatory sentencing rally held in Darwin on Tuesday 22 February 2000 was attended by 600 people .

Questions as to the costs of the regime were posed by several parties criticising mandatory sentencing as well as the Committee itself. Similar to the basis for introducing it the government had no figures to show the Committee and the general public just how much this three year regime has cost us. It was clear that costs were direct and indirect. Their actual cost is probably unquantifiable. It would include not only the cost of keeping more prisoners but the extensions and necessary infrastructures built at Correctional Services facilities. We are told that a new gaol will have to be built in the near future. The USA experience of the gaol built economic recovery comes to mind. Not to forget that increasingly in the USA and, for example, in Victoria, gaols are being privatised. More inmates, more gaols and more profits for some.

Other costs are incurred by the pressures placed on the court systems: lists blowing out due to the inevitable increase in contested charges involving "property offences"; plus the large number of appeals which have graduated through the NT Appeals structures with several going to the High Court of Australia. Most of these costs will inevitably be paid by the taxpayer. All for an "order" which does not reduce the commission of crime; apparently one of the reasons which led to its introduction.

Political history tells us that the actual author of the Act lost the unlosable Referendum and exited stage left. The new order then indicated to the public a willingness to discuss and hear suggestions to change this regime. While so indicating they went ahead and passed its cosmetic ameliorations without any such real consultation occurring.

Throughout the day of the hearing, other more specific criticisms, were laid against mandatory sentencing operating in the Northern Territory. It necessarily hits hard against Aboriginals, thus flying in the face of the Deaths in Custody Recommendations. It attacks the independence of the judiciary. Further, it has led to a significant increase in gaol for women as well as breaching Australia's international obligations.

Arguably the most outrageous submission made by the NT Government was their expression of "disappointment" in the proposed Federal Bill as it didn't supply any "hints as to a solution to the crime and sentencing problem". To think that years and hundreds of thousands of Australian taxpayer's dollars have been expended on the Muirhead Royal Commission of Inquiry Into Deaths in Custody.

That Royal Commission, tasked initially to investigate the prevalence of Aboriginal Deaths in Custody soon expanded to enquire into and address the gross cancer it quickly discovered, namely the high disproportionate number of Aboriginal people in gaol. That Royal Commission, after hearing evidence across the field from experts

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in all walks of life, then laid out literally hundreds of recommendations to attack this blight. It was found, inevitably, that the reason for this gross disproportion was due to the extreme social and economic disadvantage experienced by Aboriginal people.

The Commission then set out in their recommendations more than "hints" on how to address the same. There were recommendations across the board on health, education, the criminal justice system, social and economic areas all designed to assist state and territory governments avoid this shameful situation.

Of course, the thrust of all of their recommendations, including the ones on criminal law and sentencing law, was aimed at avoiding the continued gaoling of Aboriginal people. The mandatory sentencing provisions, of course, brutally fly in the face of such recommendations. These recommendations are presumably now gathering dust in the halls of government.

Conclusion

The proceedings before the Senate Committee presented for all to see and hear, a whole day of qualified speakers presenters and inquisitors analysing the history and effect of mandatory sentencing over the last three years.

Noone from the media, print or otherwise, took the opportunity to report this and present it to the general public. The newspaper, radio and TV news presented their usual thirty second "grabs" which were, in the main, the government's arguments from the morning.

The legislation was exposed for what it is: a populist means for the government to win votes. It doesn't reduce crime. It creates many unjust sentences and it costs the taxpayer lots.

Its raison d'etre is unequivocal: this government sees it as a means to retain office.

That was why it was brought in initially and that is why it is to be retained. "If you don't want it vote Labor" said Chief Minister Burke on ABC Radio 31.01.00. This reads, we can retain government by maintaining our tough stand on sentencing. It doesn't work, it creates pitifully unjust sentences and it will cost the government (you) a fortune to maintain but it's our ticket to retain government.

We find ourselves in lamentable times. The government isn't tough at all. It never was and it's not maintaining that. The government, in fact, lacks the courage to look at the uncontrovertible and compelling evidence displayed before the Senate Committee last week and say, "we tried this legislation and it doesn't work in reducing crime. It's also unbalanced, it's far too expensive to continue and so, in the interests of the community, it shall end."

CLANT and many other legal groups and individuals are at one on their critique of the regime. Politically, that's probably manna from heaven as far as the NT Government's concerned. Whether the government is correct in that they have the continued support of the "majority" to continue with mandatory sentencing is probably debatable. I am inclined to think they still do but to a lesser extent than they

Continued page 13

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perceive. It doesn't make a wrong right. The law is "odious" and should be scrapped.

Post script

A lot has been said and done since the Groote boy's death.

The mandatory sentencing laws have since been subjected to universal and strident criticism and approbation from all quarters of the Australian community. From UNICEF to Bob Hawke; from Sir Gustav Nossel to Bob Carr; all have roundly condemned the retention of mandatory sentencing. Perhaps the most strident of the critiques laid at the Government's door was the editorial in the *Weekend Australian* of 12-13 February which described the retention of the laws as a "despicable act of political grandstanding that condemns its perpetrators as inhuman".

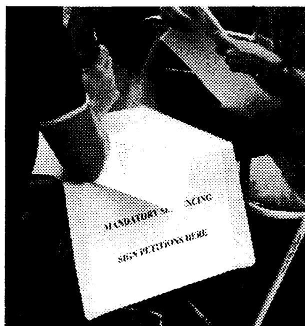
Yours truly weighed in on this on11 February suggesting on ABC radio a moratorium of the mandatory provisions in the *Sentencing Act* coupled with a review consisting of input from all interested parties from government to Bar Association to Victims of Crimes to Neighbourhood Watch, etc. Predictably this has been rejected by the government.

Sadly the theme of the above article re the true purpose of the Government's stance on these laws has been unequivocally confirmed.

The government's performance in responding to the criticisms has been fatuous and pitiful. In many ways their response tellingly reflects the law's mean spiritedness and lack of principle.

To get up on national television and seriously suggest that this was not a Death in Custody issue but a youth suicide issue was an insult to the intelligence of everyone unfortunate enough to be watching it. Then to adopt the "Joe Bjelke"- like behavior of "we don't care about you southern do-gooders" increased the cringe. Sadly, that attitude has persisted. If anything, the government has become more entrenched in its resolve to retain the laws. Politicking is to the fore by them in their defence. They will no doubt use the threatened intervention by the Federal Parliament to stoke up support for the retention of mandatory sentencing.

In the meantime the law remains. More gross injustices will occur, more taxpayers' money will be spent, all without any effect at all on the Territory's crime rate. The ultimate, yet predictable horror occurred on 10 February with a young Aboriginal boy taking his own life while serving a mandatory term of detention. Is anybody game enough to say that such a disaster won't occur again?



In excess of 4000 signatures have been collected on petitions against mandatory sentencing at information stalls and other locations throughout the Territory.

Opening of the Legal Year

The Opening of the Legal Year 2000 was attended by staff of the Office of the Director of Public Prosecutions in both Darwin and Alice Springs.

An admission ceremony in Alice Springs Law Courts for DPP article clerk Josie Burness was witnessed by nearly the entire office of the Alice DPP. Chief Justice David Malcolm joined Justice Angel on the bench for the admission hearing. Director of Public Prosecutions Rex Wild QC moved the admission which was unopposed by the Law Society represented by President Jon Tippett.

Josie Burness is now working for the police in Alice Springs and will be featured in next month's *People In the Law.*

The staff of the Alice Springs DPP left to right: Lisa Ewenson, Tracy Wise, John Birch, Merle Thomas, Dr. Nanette Rogers, Josie Burness, Rex Wild QC, Chris Roberts, Jason Abbott, Sean Davenport, Angela Lindfield and James Watson.

Oustide St Marys Cathedral in Darwin DPP staff gathered for an Opening of the Legal Year photograph. Back row: Jo Down, Michael Carey, Grant Hayward, Shahleena Musk, Georgia McMaster. Front row: Kylie Dow, Jack Karczewski, Rex Wild QC, John Adams, Janelle Martin and Peter Tiffin.