Mandatory sentencing

Justice for young indigenous people

Judith Bessant

*Judith Bessant is a Reader at the Australian Catholic University, Fitzroy, Melbourne.
She teaches and writes in the areas of youth studies, social policy, education and sociology.*

On 10 February 2000, a 15-year-old young man, killed himself while in the Don Dale Juvenile Detention Centre serving a 28 day sentence under the Northern Territory's mandatory sentencing law. For stealing pens and paint from a local school valued at around $100, he was sent 800 kilometers from his island home to the detention centre. Five days from the end of his detention, the boy hanged himself after he was sent to his room for refusing to help clean up after a meal. He was found hanging from a sheet tied around his neck. Despite attempts to revive him he did not regain consciousness and died in hospital.

In the second half of the 1990s the governments of Western Australia (1996) and the Northern Territory (1997) introduced a 'mandatory sentencing' regime. Analysts are agreed that in both cases these governments were confronted by populist law and order concerns about 'rising crime rates' and/or saw the electoral value of 'get tough policies' to fix the 'crime problem'. Under the NT legislation young people aged between 15 and 16 face a mandatory 28 days in a detention centre for a second offence[1], while people found guilty of a third offence face a 12 month period of detention.

The death of the young man raises many questions both about mandatory sentencing and the larger context of concern about how Australia is to proceed with the task of reconciliation. In 2000, a year likely to be dominated by the Sydney Olympic games and against a background of official concern about Aboriginal protests aimed at influencing world opinion, the issue of mandatory sentencing has already attracted the attention of the world's press and of the United Nations Secretary General, Kofi Annan on his visit to Australia (20-21 February). What is all the bother about? What is the connection between mandatory sentencing and the issue of indigenous justice?

Though neither of the governments concerned have been prepared to concede the point, the mandatory sentencing legislation is implicitly racist. Offences and sentences under mandatory sentencing have included:

- The imprisonment for 28 days of a 15-year-old Aboriginal boy for taking pens and pencils.
- The imprisonment for a year of a homeless 29-year-old Aboriginal man who wandered into a backyard and 'stole' a towel from a clothes line to keep warm.
- The 14 day imprisonment of a 24-year-old Aboriginal mother who received a stolen can of beer valued at $2.50.
- The incarceration of a 21-year-old Aboriginal man for the theft of biscuits and cordial drinks valued at $23.
- The sentencing of an 18-year-old to 90 days for the theft of 90 cents from a car.
- The imprisonment for a month of a 16-year-old mentally-ill Aboriginal young man found in possession of an empty wallet valued at $2. He was convicted for receiving stolen goods.
- The sentencing for three months of a 17-year-old Aboriginal young man for the theft of $4 worth of petrol to sniff (*Age*, 15 February 2000).

Both governments have attempted to justify the legislation in a number of ways. The argument of last resort is that southern or eastern 'bleeding heart liberals' do not know what it is like to live in a community 'threatened' by 'young black criminals'. Implicit even in this argument is a belief that mandatory sentencing will fix this problem. In what follows, I briefly assess some of the leading features of the legislation, arguing that mandatory sentencing is deeply problematic because it forces certain conduct on the judicial system that undermines fundamental principles of justice, and that it has been singularly ineffective in deterring crime.

MANDATORY SENTENCING AND THE JUSTICE PRINCIPLE

Mandatory sentencing erodes the power of discretion exercised by magistrates and judges. Given the long-standing observation in Anglo-American legal systems that the principle of justice requires that 'the penalty fits the crime', mandatory sentencing has the effect of forcing the courts to act unjustly. The mandatory sentencing legislation has effectively abolished judicial discretion and the capacity of magistrates and judges to take into account extenuating circumstances or consider alternatives to incarceration for repeat offenders. It means courts are now forced to give minimum sentences for property offences, ie, theft (regardless of the value of the property), unlawful entry

[1] It is the author's understanding that, if diversionary programs are available, they are normally used as an alternative. However, such programs are only available in metropolitan areas.

to property, unlawful use of motor vehicle, and receiving stolen goods. It denies the courts their rightful authority to make judgments about the appropriateness of a punishment and whether it fits the particular crime. As Gerard Brennan, former High Court Chief Justice, explains:

> A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral. The offender becomes a victim of senseless retribution and the magistrate or judge is brutalised by being forced to act unjustly ... The punishment must fit both the crime and the criminal (*Age*, 17 February 2000: 17).

Mandatory sentencing has the effect of producing consistencies in sentencing at one level, but does this at the cost of introducing a more basic inconsistency at another. This is because an offender receives the same sentence regardless of the nature of the offence (ie, the degree of damage caused or value of the stolen property) or the circumstances surrounding the crime. For example, an offender with a history of mental illness and living in poverty who takes a $1.50 bottle of water may receive the same sentence as an affluent person with no history of mental illness or hardship and who steals a BMW car valued at $90,000 for a joy-ride[2].

Not only does mandatory sentencing create inconsistent responses by ordering the same punishment for dissimilar offences carried out under different circumstances, it also highlights the discrepancies in treatment and the discrimination against offenders from lower socio-economic backgrounds.

MANDATORY SENTENCING AND SOCIAL INEQUALITY

The discriminatory nature of mandatory sentencing and the differential treatment of Aboriginal compared to non-indigenous people are readily apparent.

Mandatory sentencing targets the crimes of the poor, while not being applied to white collar crime – a predominantly 'white skinned crime'. The majority of young people incarcerated under mandatory sentencing come from isolated communities with high levels of poverty (Jones 1999), domestic violence, homelessness, substance abuse (Hunter, Hall & Spargo 1991), high levels of joblessness (Hunter & Gray 1998), poor health, minimal health care, education and other services (Hoy 1996; Gray 1998) and where English is often not spoken (ABS & AIHW 1999). In communities with a high rate of juvenile offending there is also generally minimal family support for children and young people coinciding with significant problems to do with child protection, income support and housing (ABS & AIHW 1999; AIHW 1998a:18; AIHW 1998b).

White-collar crime is largely a non-indigenous crime involving theft and fraud with loss and damage far greater than that associated with petty property crime. The fact that a disproportionate percentage of petty crimes in NT and WA are committed by indigenous people highlights further the discriminatory nature of mandatory sentencing. Added to this is the fact that a disproportionate number of Aboriginal people already inhabit our criminal justice system (ABS 1998).

Most of those sentenced under the mandatory sentencing laws in the Northern Territory have been young Aboriginal men. One significant and distressing outcome of mandatory sentencing has been a further increase in the numbers of indigenous people incarcerated.

According to recent data released by the Productivity Commission comparing the performance of police, courts and corrective services in 1998-99 for each of the states, the number of Aboriginal people imprisoned rose from 381 to 466, while the number of non-Aboriginal people fell from 160 to 158. In the Northern Territory the number rose by 22 per cent. In WA jails the number of Aboriginal people grew 20 per cent in the year to June (from 753 to 905) (*Age*, 18/2/2000).

Under mandatory sentencing in Western Australia, if you are Aboriginal you are 60 times more likely than a non-indigenous person to end up in prison.

Aboriginal people are over-represented in the prison system. Indeed there is a disproportionately high rate of Aboriginal involvement at every level of the criminal justice system (O'Shane, 1992). This is also the case for young Aboriginal people; as the 1996 Census of Population and Housing revealed, there was an over representation of indigenous children in corrective institutions in every jurisdiction except Victoria (ABS 1996).

CRIME DETERRENT?

Do mandatory sentencing laws achieve their declared objective of reducing crime? On the available evidence the answer has to be no. The failure of mandatory sentencing laws to achieve their intended objective (ie, deterring crime) is evident in several facts:

- the imprisonment of Aboriginal people has increased since the introduction of the respective legislation;
- the rate of crimes affected by the mandatory sentencing laws has not declined in the two jurisdictions where mandatory sentencing operates;
- those who commit a third offence (like taking a $15 towel off the clothes line, or stealing biscuits and cordial drinks) apparently do so in spite of the possibility that, if caught, such action will automatically result in a sentence of up to 12 months. If mandatory sentencing acted as an effective deterrent offenders would not continue and commit the third petty offence. Given these facts, it is clear that the 'three strikes and you're in' approach simply does not work.

If we acknowledge that the reasoning underlying the laws rested on arguments and promises about their capacity to deliver as a deterrent in reducing crime, there is now evidence and therefore good reason to re-evaluate them in terms of their ability to prevent crime.

Despite the fact that mandatory sentencing is an ineffective means of

[2] It is noted that the court does have differential options in relation to the maximum penalty, although the minimum is the same.

preventing targeted crime, the governments of Western Australia and the Northern Territory spend more than any other Australian state or territory on prisons and police services. According to the annual report of the federal government sponsored Steering Committee for the Review of Commonwealth/State Services Provisions, in 1998-99 the national average spent on police services was $204 per head of the population while in NT it was $497, and in WA $232 per head. Per capita expenditure on corrective programs are similarly revealing. The Australian average was $63 per capita, while the NT spent $211 and WA spent $91 per head of the population (*Australian*, 19 February 2000: 12).

Mandatory sentencing is foolish legislation not only because it is a financially costly and uneconomical exercise in punitive futility, but also because it carries unacceptably high social costs.

There are the social costs associated with taking Aboriginal young people away (usually long distances) from their families and communities. This punishment makes family visits and the provision of family and community support for young people who are more often than not already 'at risk' very difficult, if not impossible.

The practice of mandatory sentencing places indigenous young people, many of whom already fall into the 'at risk' category, in even greater jeopardy (ie, of suicide, other forms of self harm, assault, etc). One would have hoped that Australia's unfortunate history of separating and removing Aboriginal children from their homes would have served a valuable and unforgettable lesson about the social and cultural costs of such practices. However, given these current sentencing practices, it seems such lessons have not been taken into account (Human Rights and Equal Opportunity Commission 1997). Moreover, the prospect that the prison environment will actually increase rather than diminish a criminal identity and future dispositions to unlawful conduct is highly likely on the available research evidence. Many Aboriginal people who live in remote areas do not have enough English to understand the legal system they have become part of. The legal system may diminish the chance of offenders recognising the application of the law as a just and reasonable response to wrong doing and a need to make amends.

Mandatory sentencing compounds a collective history of Aboriginal dispossession and a long history of poverty, substance abuse, poor health, poor education and general disadvantage. It is not likely to encourage a young person charged with petty offences to feel that justice has been served, that what they did was wrong or that they were treated justly. Treating people in unjust and punitive ways, especially when the official objective of the penalty is reform, is likely to result in resentment, hostility, a greater sense of disaffection and estrangement rather than a recognition of wrong doing on their part and a desire to be 'a better citizen'.

The social, cultural and material harm resulting from these laws is not conducive to the building of strong community networks and family supports which are critical for both crime prevention and the development of a certain quality of life. Beyond the socio-cultural injury is the harm caused by our betrayal of those with such a long history of persecution, of those who continue to remain the most disadvantaged Australians (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 1993).

A QUESTION OF JUSTICE

In broader terms the denial of justice inherent in mandatory sentencing, our failure to treat those subject to these laws as full human beings, as our equals, undermines the credibility and trustworthiness of Australia's criminal justice system. The mandatory sentencing laws present an obvious danger to those immediately subject to them; more generally however they also present a liability to all Australians reliant on a criminal justice system that is ostensibly grounded in moral values of fairness and equity.

The failure to bring criminals to justice in a fair and equitable way denies their full humanity, while simultaneously denying Australians our claim to be considered a just society.

Discussing the moral importance of justice for all criminals, the Australian moral philosopher, Raimond Gaita, argues that all human beings are owed inalienable respect and that this goes deep into our system of criminal justice (Gaita 1999: 9-10). No matter what the crime, offenders remain members of our community and have a legitimate claim for fair treatment (ibid). This is not to argue that those charged under mandatory sentencing committed heinous crimes; on the contrary, on the scale of things most offences were petty and in most cases they did not fit the penalties imposed. The point is that, despite the fact that the crimes were petty, the treatment, especially when compared to other more serious crimes (ie, white collar crime) where the damage caused was more extensive, was disproportionately severe and inequitable.

Mandatory sentencing is problematic because of its racially discriminatory nature. As fellow human beings, we owe those who are subject to mandatory sentencing unconditional respect, in the same way, according to Gaita, that we owe all criminals unconditional respect. A demonstration of respect reveals our own recognition that 'they' are fully human. Currently the treatment of Aboriginal people subject to mandatory sentencing means they are not treated with the respect and rights that most offenders are entitled to in Australia. The racism inherent in the legal system of both the Northern Territory and Western Australia is a denial of the offender's human rights.

THE CASE FOR FEDERAL INTERVENTION

Mandatory sentencing laws breach the International Covenant on Civil and Political Rights that Australia signed in 1980, as well as the Convention on the Rights of the Child which Australia ratified in 1990.

The racially discriminatory nature of laws makes them intolerable. The fact that Aborigines account for 25% of the

NT population, but more than a third of the prisoners makes mock of rhetoric about reconciliation. So too does the disproportionate number of Aboriginal children in the juvenile justice system, and the fact that the number of indigenous people in jail has risen since the introduction of the laws.

The principles and provisions of the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights compel Australia's federal government to either comply with the conventions or remain in breach of the international standards that we only recently supported. The racism and injustice inherent in the laws may rightfully make many of us feel obliged to protest, to demonstrate that some people care that wrong is being done.

Several leading jurists, Aboriginal leaders and other community leaders have noted a distinct lack of political will on the part of the Howard Government to intervene. These people have exhibited a moral responsiveness to what each of us has been caught up in, and despite the fact that such laws may be no fault of our own, the kind of responses offered by these people is an acceptance of responsibility; something that is not their sole preserve, but an obligation for all.

The Green Senator Bob Brown's private members bill is likely to receive support from within the Labor Party. The Opposition Labor leader, Kim Beazley, has also taken the initiative in requesting the United Nations Secretary General, Kofi Annan, to investigate Australia's mandatory sentencing to see whether it breaches international standards like the Convention on the Rights of the Child.

The Senate Standing Committee (due to report on 9 March 2000) has been considering whether mandatory sentencing for juveniles should be made unlawful. The outcome depends in part on whether it can be demonstrated that those laws contravene the International Convention on the Rights of the Child. The Howard government has already indicated its view of mandatory sentencing; in 1996-7 the Attorney-General informed the Western Australian government that it was in breach of international covenants. It is another question whether they will go so far as to refer to the Constitution which allows the Commonwealth government to override the states and make mandatory sentencing unlawful.

If the federal government fails to act, there remains the interest of the international community through the monitoring of the implementation of the Convention on the Rights of the Child. The way in which these national and international viewpoints are played out involves complex diplomacy, but it nevertheless presents a challenge to local law makers.

The continuance of mandatory sentencing is likely to be seen as suggesting that a majority at least of Australians, especially those in Western Australia and the Northern Territory, see minor crimes such as taking food or a towel to keep warm as more important than principles of justice; as more important than the social problems facing so many Aboriginal people. The continuance of mandatory sentencing laws demonstrates that a greater value is placed on property than justice and the well being of those who find themselves in a position where petty crime becomes a viable option.

Mandatory sentencing which clearly discriminates against young Aboriginal people raises serious questions about justice within Australia. Such laws make a mockery of efforts to advance reconciliation between non-indigenous and Aboriginal and Torres Strait Islander people. How can apologies and remorse about past injustices like the dispossession and the destruction of ways of life, and the abduction of generations of children, be genuinely expressed in a context where governments enact such immoral legislation? □

References

ABS & AIHW 1999, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People*, ABS & AIHW, Canberra.

ABS 1998, *National Aboriginal and Torres Strait Islander Survey: Law and Justice Issues*, Cat no 4189.0, ABS, Canberra.

ABS 1996, Census, unpublished data.

AIHW 1998a, *Child Protection Australia 1996-7*, Cat No CWS 5, Australian Institute of Health and Welfare, Canberra.

AIHW 1998b, *Juvenile Justice and Youth Welfare, A Scoping Study*, Cat No CWS 6, Australian Institute of Health and Welfare, Canberra.

Gaita, R. 1999, *A common humanity: Thinking about love and truth and justice*, Text Publishing, Melbourne.

Gray, B. 1998, *Quality of Indigenious Health Data: Summary of the Data Quality Investigations of the 1995 National Health Survey*, ABS, Internal Working paper, June, ABS, Darwin.

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 1993, *Access and Equity: Rhetoric or Reality? Report of the Inquiry into the Implementation of the Access and Equity Strategy*, AGPS, Canberra..

Hoy, W. 1996, 'Renal Disease in Australian Aboriginals', *Medical Journal of Australia*, Vol 165, no 5, pp.126-127.

Human Rights and Equal Opportunity Commission 1997, *Bringing them home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families*, HREOC, Sydney.

Hunter, B. & Gray, M. 1998, *The Relative Labour Force Status of Indigenous People 1986-1996: A Cohort Analysis*, CAEPR, Discussion Paper No 164/1998, Centre for Aboriginal Economic Policy Research, Canberra.

Hunter, B., Hall, W. & Spargo, R. 1991, 'The Distribution and Correlates of Alcohol Consumption in a Remote Aboriginal Population', Monograph no 12, National Drug and Alcohol Research Centre, UNSW, Sydney.

Jones, R. 1999, *Overcrowding and Poverty in Indigenous Households: Results from the 1996 Census*, A Consultancy Report prepared by the Housing, Infrustructure, Health and Heritage Division, Aboriginal and Torres Strait Islander Commission.

McArthur, M., Camilleri, P. & Webb, H. 1999, *Strategies for Managing Self-harm in Prison*, No 125, Trends and Issues in crime and criminal justice, August.

O'Shane 1992, 'Aborigines and the law', *Impact*, Vol 22, No 9, ACOSS, pp.14-16.