Chapter Five:
The Argument against Mandatory Sentencing

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"My object all sublime
I shall achieve in time,
To let the punishment fit the crime ...
The punishment fit the crime;"[1]

What is a Mandatory Sentence?

Before embarking upon a detailed consideration of this topic it is essential that the subject matter be defined. "Mandatory sentences" are those sentences which a judicial officer is required to impose no matter what the circumstances of the offence. In other words, the judicial officer has no discretion to impose a higher or lower sentence depending upon the nature of the crime.

Mandatory sentences by definition fall foul of the fundamental principle of law that a sentencing court should not impose a punishment which does not fit the crime.

The thesis of this paper is that the imposition of mandatory sentences is inconsistent with proper sentencing principles.

The Criminal Justice System

In 1988 the Australian Law Reform Commission identified two main criteria by which the community will judge the justice of the criminal justice system. They were:

> "First, the criminal justice system must involve imposing on offenders punishments of sufficient severity that it is possible rationally to say that a breach of the law, when detected, is attended by significant consequences. Secondly, the system must be consistent in the apprehension, identification and punishment of offenders. The need for consistency pervades all elements of the system. One of the most damaging criticisms that can be made of any aspect of the criminal justice system is that it is inconsistent. This is so whether the inconsistency is in sentencing, or differential police or prosecution practices".[2]

Given those are the goals of the criminal justice system, it is essential to understand how those objectives are sought to be achieved in the area of sentencing before the nature of mandatory sentencing can be considered.

The Purpose of Sentencing

In 1996 the New South Wales Law Reform Commission identified the objectives and aims of punishment as being "retribution, deterrence, rehabilitation, incapacitation and denunciation".[3] These goals are said to operate as "guide posts to the appropriate sentence".[4] That being said, it is acknowledged that "sometimes [the guide posts] .. point in different directions".[5]

It cannot be doubted that the law of sentencing is contentious.[6] The balancing of even the primary objectives of punishment is, of a necessity, a complex exercise. To that might be added the secondary but multiple factors which may be regarded as mitigating in the penalty. Thus, in *Pavlic v. The Queen*[7] Justice Slicer referred to studies in Australia and England which had shown that judges had identified over 200 factors which might mitigate a sentence. He concluded that "it is impossible to allocate to each relevant factor a mathematical value, and from that, extrapolate a sum which determines the appropriate penalty".[8] It is no surprise then that the Full Court of the Victorian Supreme Court has held that:

> "Ultimately every sentence imposed represents the sentencing judge's instinctive synthesis

of all the various aspects involved in the punitive process".[9]

Further, while the primary objectives of sentencing are reasonably well settled, they have been given different emphasis from time to time. In determining what emphasis should be given to any one of the factors, it is important to bear in mind that:

> "... one of the main purposes of punishment, .. is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages that has been the main purpose of punishment and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offence. *On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment".*[10] (emphasis added)
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> To like effect are some observations of Brennan J (as he then was). His Honour said:
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> "The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose. In *R. v. Cuthbert* (1967) 86 WN (Pt. 1) (NSW) 272 at 274, Herron CJ in a judgment in which Sugerman and Walsh JJA agreed, said:
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> > 'The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime. The sentence should be such as, having regard to all proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others: per Jordan CJ, *R. v. Geddes* (1936) 36 SR (NSW) 554. Courts have not infrequently attempted further analysis of the several aspects of punishment (*Reg v. Goodrich* (1952) 70 WN (NSW) 42), where retribution, deterrence and reformation are said to be its threefold purposes. In reality they are but the means employed by the Court for the attainment of the single purpose of the protection of society'.
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> Retribution, deterrence and reformation are related, however, to the specific conduct in respect of which the offender is sentenced. Deterrence (whether of the offender or others) from committing other kinds of crime, reformation in respect of other failures, or retribution for other kinds of social misconduct are not purposes to which the judicial discretion in sentencing is directed. But a sentence which is imposed with the object of deterring the offender from committing offences *of the same kind* again, and with the object of rehabilitating him by reducing or eliminating the factors which contributed *to the conduct for which he is sentenced*, serves the appropriate purpose provided that the sentence is apt to secure those objects ... though punishment is not the end which sentencing seeks to achieve, it is usually the only means which the Court has at its disposal

> ... though the punishment of imprisonment must be imposed to protect society in appropriate cases, severity in sentencing is tempered by society's respect for the liberty and physical integrity of the offender and the weight given to these values frequently and inevitably limits the achievement of the ends of sentencing. The *lex talionis* may be an efficient law for protecting society from criminal recidivists, but it has no place in the administration of contemporary criminal justice. Sometimes, where the protection of society from a dangerous offender cannot be reasonably secured without imposing a lengthy or indefinite sentence of imprisonment, the interests of the offender have to be overridden (although only where stringent criteria are met: *Reg v. Hodgson* (1967) 52 Cr. App. R. 113). In other cases, the interests of the offender are more evenly balanced against the protection of society, and the offender is sentenced to a shorter period of imprisonment, or no imprisonment at all. The sentence is moulded by reference to its appropriateness to deter, to rehabilitate and to provide retribution relevant to the conduct in respect of which the sentence is imposed, and its severity is limited to what is reasonably necessary to secure the protection of society balanced against the offender's liberty and physical integrity. Though guidance is thus given in the exercise of the sentencing power, the sentence depends largely upon the pragmatic evaluation by the court of the weight to be given to the various factors...".[11]

Principle of Proportionality

The fundamental sentencing principle reflected in the last part of the passage above from *Channon's Case* reflects the well established sentencing principle long observed in our society that a sentence "should be proportionate to the gravity of the offence"[12] *or, to use the Mikado's words, "the punishment [should] fit the crime".*

In *Veen [No. 2]*, it was held that:

> "The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen [No. 1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the defender".

Some idea of the durability of the principle of proportionality in sentencing can be seen from the following outline:

> "The notion of proportionate punishment, which seems so deeply rooted in common law jurisprudence, has had a chequered history. It is an old idea which has been expressed in both lay and legal literature in a variety of ways. The *lex talionis* of the book of Exodus required a high degree of equivalence between the offence and the sanction: 'eye for eye, tooth for tooth, hand for hand, foot for foot'. Cicero saw proportionality as only setting outer limits: 'take care that the punishment does not exceed the guilt'. In 1215, three chapters of the Magna Carta were devoted to ensuring that *'amercements'* were not excessive. The 1689 *Bill of Rights* prohibition on excessive fines and cruel and unusual punishments conveys the same notion. In Italy, in 1764, the father of the classical school of criminology, the Marchese de Beccaria, published a much translated and influential *Essay on Crimes and Punishments* in which he argued for the Courts to be bound by a graduated and legislatively defined scale of crimes and punishments".[13]

Since *Veen [No. 2]*, the High Court has reaffirmed the principle of proportionality as common to sentencing practices throughout Australia in *Chester v. The Queen,*[14] *Baumer v. The Queen,*[15] *Hoare v. The Queen,*[16] and *Bugmy v. The Queen*.[17] These cases arose respectively from prosecutions in New South Wales, Western Australia, the Northern Territory, South Australia and Victoria.

In *Baumer's Case* the High Court said (in words redolent of Gilbert and Sullivan):

> "In applying a section like s. 154 [of the *Criminal Code (N.T.)*], the sole criterion relevant

to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence".

Mandatory sentencing can never satisfy this fundamental requirement.

A Brief History of Sentencing

The principle of proportionality was enshrined in our law very early in the piece. It was given legislative recognition at times when the people exerted their will over oppressive government. Thus, in 1215, clause 20 of the Magna Carta provided that:

> "A free-man shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced gravity of the offence …Earls and barons shall be amerced ... only according to the degree of the misdeed...".

When, in 1688, the English people permitted constitutional monarchy to continue, they did so subject to the monarchs agreeing to observe the *Bill of Rights* 1689. The *Bill of Rights* provided:

> "Excessive baile ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted".

The preamble to the *Bill of Rights* recited that King James II had engaged in various iniquities, which included requiring excessive bail of persons committed in criminal cases in order to elude the benefit of the laws made for the liberty of the subjects, the imposition of excessive fines, and the inflicting of illegal and cruel punishment. It was in that context that the *Bill of Rights* prohibited such matters occurring in the future.

Despite the Magna Carta and the *Bill of Rights*, mandatory penalties were available for a wide range of offences in the 18th and early 19th Centuries. It was only during the 19th Century that such penalties gave way to a more enlightened system of justice in which the judiciary was given discretion as to the penalties which could be imposed.[18]

At the outset of the 19th Century capital punishment was the mandatory penalty for a wide range of offences. By 1810 Blackstone estimated that there were 160 capital statutes in force. He wrote:

> "Yet, although in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by Act of Parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death".[19]

The capital punishment laws applied irrespective of gender and with little regard to age. Children over the age of seven could be sentenced to death, and indeed were. Not all those sentences were carried out but some were. Radzinowicz records that in 1814 a boy of 14 was hanged at Newport for stealing.[20] The uniform nature of the sentences which had to be imposed, irrespective of the nature of offence, drew early criticism. A useful illustration of the indiscriminate nature of the mandatory penalties can be seen in considering the crime of arson. By the mid-18th Century arson was, with limited exceptions, punished by death without benefit of clergy.[21] This drew criticism from Eden who, after referring to a section of the *Waltham Black Act* which imposed a sentence of death for setting fire to any house, barn or out-house, to any hovel, cock, mow or stack of corn, straw, hay or wood, mused:[22]

> "I have given a literal transcript of this clause as a strong instance of the vague, unfeeling, undistinguished carelessness with which penal laws are imposed, even in the most polished times ... every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small

heap of dried grass".[23]

Starting from 1800, however, Sir Samuel Romilly, an enlightened jurist, introduced into the House of Commons bills to abolish the death penalty for the multitude of crimes which carried that punishment.[24] In trying to introduce his reforms, Romilly drew the House of Commons' attention to the objects of punishment, which he suggested should primarily be deterrence and prevention as well as reform.[25]

There was resistance to Romilly's novel ideas. On five occasions he succeeded in getting through the Commons a Bill to remove the death penalty for the offence of stealing from a shop goods to the value of 5 shillings, but the House of Lords rejected the Bill.[26]

It should not be thought that the reforms that were effected in relation to punishment in the 19th Century were received uncritically. Professor Sir William Holdsworth records:

> "It was said by Ellenborough that the removal of the death penalty for privately stealing from the person had increased a number of these offences 'to a serious and alarming degree'; and it was in vain pointed out that the mitigation of the penalty had led to a greater willingness to prosecute and therefore to a larger number of convictions".[27]

Gradually, however, Beccaria's teachings on the necessity for proportionality in sentencing became increasingly influential. Between 1826 and 1832 *Peel's Act* abolished the death penalty for a large number of felonies with, in many cases, seven years transportation being its substitute.[28] At the same time, Peel created the modern English police force. Its development had a tendency to shift the focus of criminal law from draconian punishment to effective administration.

As the 19th Century progressed, utilitarian views and humanitarian principles gained increasing acceptance and assisted in liberalising the criminal law. By 1861 the death penalty remained only in cases of treason, murder and piracy with violence.[29]

In 1846 judges were given increased power to vary the punishment imposed in certain cases. At about the same time, the principle that the age and antecedents of offenders should affect punishment was also recognised.[30]

Despite these measures and the reduction of the number of offences for which capital punishment was the penalty, in the mid-19th Century the criminal law was still the subject of much criticism for the absence of its systematic rules of sentencing. There was no consistency as between the imposition of alternatives to maximum penalties. There was no attempt to draw analogies between corresponding crimes to allocate punishment commensurate to similar offences. Further, there was no attempt to make the punishment proportionate to the offence. Thus the same penalty was imposed, for example, upon three men who broke into a building and stole property to the amount of £1,000 as for a youth who stole an apple from a stall.[31]

It was in these circumstances that the famous words of the Mikado were penned, to mock the fact that, due to the vast disparity in the laws of sentencing indeed, more often than not, the punishment did not fit the crime!

It should be noted that in the late 19th Century, the NSW Parliament made a brief attempt to create a sentencing structure with five steps, and with both minimum and maximum sentences. This led to such injustice that *The Sydney Morning Herald* of 27 September, 1883 wrote:

> "We have the fact before us that in a case where a light penalty would have satisfied the claim of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion".[32]

Within a year the scheme was abandoned.

Contemporary Approaches to "Cruel and Unusual Punishment"

In *Boyd v. R.,*[33] the New South Wales Court of Criminal Appeal considered the effect of the *Bill of Rights* prohibition on "cruel and unusual punishment" and the issue of proportionality.

Although those clauses are frequently cited in support of that notion, it is clear from the consideration given to that provision by the Supreme Court of the United States in *Harmelin v. Michigan*[34] in relation to the Eighth Amendment that the "cruel and unusual punishment" to which the provision was directed was not one which was disproportionate to the offence but, rather, punishments which represented a "departure..from the laws and usages of the kingdom".[35]

By way of contrast, however, in Canada the Supreme Court has held that a statute, which required a minimum term of imprisonment for seven years for anyone guilty of a certain type of drug offence, was unconstitutional because it infringed the prohibition in the *Canadian Charter of Rights and Freedoms* of "cruel and unusual treatment or punishment". In *Smith*[36] the Supreme Court held:

> "A punishment would be cruel and unusual and violate s. 12 of the Charter if it has any one or more of the following characteristics:
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> (i) the punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
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> (ii) the punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
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> (iii) the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards".

The Reaction to Mandatory Sentences

The fact that there are many guide posts to inform a judicial officer exercising a power of sentencing underlines the proposition that there are a number of ways in which the punishment may be made to fit the crime. Having said that, it will be immediately apparent that a sentence which a judicial officer is required to impose, there being no discretion to enable that judicial officer to mould the sentence to the circumstances of the crime or the offender, is unusual. Barwick CJ described the nature of such a penalty in the following terms:

> "Ordinarily the Court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the Court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases *and it is a traditional function of a Court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime*".[37] (emphasis added)
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> Along similar lines, in *Cobiac v. Liddy*, Windeyer J said:
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> "The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. The more strict a rule is made, the more serious become the consequences of breaking it, the less likely it may be that Parliament would intend to close all avenues of exception. Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon a conviction, that it would abolish it, not directly but by a side wind. This is not because mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice".[38]

In 1977, Professor Norval Morris described mandatory minimum sentences in the following way:

> "This is the most extreme form of legislative limitation of judicial discretion – a fixed term or a fixed minimum term for a defined crime. A popular example is the minimum of a 5-year sentence for anyone carrying a gun at the time of the commission of a felony. Legislation of this kind is unprincipled and morally insensible; it cannot encompass the

factual and moral distinctions between crimes essential to a just and rational sentencing policy. It is based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press in the United States.[39] Nevertheless, recently it has become politically fashionable to demand the imposition of such stringent limits upon sentencing discretion, and in many jurisdictions statutory provisions for mandatory sentencing have already been adopted. In practice, such provisions have always met with non-enforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of plea bargaining inevitably ensures the reduction of charges for offences carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable. In fact, the attempt to eliminate sentencing discretion results in its being transferred from the judge to the prosecutor, who exercises such discretion in the process of charge and plea negotiations. In an overcrowded Court system, it is as though discretion were like matter, the quantity of which Helmholtz described as 'eternal and unalterable'; it cannot be destroyed, it can only be displaced".[40]

In an attempt to illustrate the consequences of mandatory minimum sentences, Professor Morris gave the following illustration:

"In Detroit during the 1950s State statutes prohibited probation for burglary in the night-time and imposed a significant, mandatory minimum sentence for armed robbery. In practice...burglaries committed after dark resulted in pleas to day-time burglary and...robberies committed with a gun ended up as pleas of guilty to unarmed robbery. So common was the practice that the Michigan Parole Board would often start the interview with 'I see you were convicted of unarmed robbery in Detroit. What calibre of gun did you use?' Without even a smile, the inmate would respond, 'a .38 calibre revolver' ".[41]

This brief outline of the principles of sentencing law highlights the inherent injustice of mandatory sentences. Such sentencing provisions fly in the face of permitting the courts to apply the varied and complex objectives of sentencing principles.

Despite this, mandatory sentences have been legislated in a number of Australian States in relation to a variety of offences ranging from murder to fines for traffic infringements. At the lower end of the equation (fines for traffic infringements), the relatively minor nature of the penalty tends to lead to acceptance. It is at the higher end of the range of penalty (life imprisonment for murder) or the imposition of sentences which allow of no application of judicial discretion that criticism abounds.[42]

In November, 1996 amendments to the Western Australian *Criminal Code(WA)* commenced operation. They have become known colloquially as the "three strikes and you're in" provisions. Section 401(4)(a) required a sentence of at least 12 months imprisonment to be imposed on an adult convicted of home burglary if the offender had been previously convicted of at least two counts of the same offence. Conviction included a finding or admission of guilt, whether or not a conviction had been recorded. The legislation prohibited the suspension of a term of imprisonment. It did not permit the sentencing officer to take into account the circumstances in which the third offence had been committed, the time which had elapsed since the prior convictions or, for example, to give the offender any benefit for a plea of guilty.

The Northern Territory legislation was introduced at about the time the Western Australian legislation commenced operation. The Northern Territory amended its *Sentencing Act 1995(NT)* effective from March, 1997 to apply mandatory sentences of imprisonment to a wide range of property offences. These included theft, receiving stolen goods, criminal damage. For a first offence the mandatory sentence was 14 days imprisonment, for a second offence, not less than 90 days, and not less than 12 months for a third offence.

These provisions have recently been ameliorated by the introduction of an exceptional circumstances provision for single offences of a trivial character where restitution had been made, the offender was of good character and there were mitigating circumstances.

Proponents of mandatory sentencing have advanced a number of justifications for its introduction. At the time the Northern Territory introduced the amendments to its *Sentencing Act* which led to the first version of its mandatory sentencing in relation to property offences, the Attorney-General, Mr Burke said:

> "The Government believes that the proposal for compulsory imprisonment will: send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted".[43]

Other arguments advanced to support mandatory sentencing, in the Northern Territory at least, include that "its purpose was punishment rather than deterrence, the legislation being developed to ensure that offenders paid for their crimes".[44] This has unfortunate tones of pre-19th Century punition. Moreover, as the Senate Committee inquiring into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999 observed, the introduction of mandatory sentencing in both Western Australia and the Northern Territory was "a direct response by government to community concern about home burglary (Western Australia) and a number of property crimes (Northern Territory)".[45] The Senate Committee concluded that the objective of the Western Australian legislation appeared to be deterrence, while that of the Northern Territory was a mixture of deterrence and retribution.[46]

In fact, it has been pointed out that the rationale for their introduction has shifted as it has been demonstrated that they have not achieved any of their "claimed justifications of deterrence, selective incapacitation and reduction in crime rate..". Now the justification is said to be " 'community concern'; 'don't forget the victims' and 'no money for alternatives' ".[47]

Law and order policies are said to be a response to community concern about inadequacies in the enforcement of the criminal justice system. But is such concern justified? In a speech on *Sentencing Guideline Judgments*,[48] Chief Justice Spigelman of the NSW Supreme Court noted:

> "Research throughout the western world has indicated that there is a widely held belief that sentences actually imposed are not commensurate with the seriousness of the crimes for which they are imposed. However there are now numerous studies which show that the public opinions expressed in polls, through the media and talk-back radio and various other expressions of public opinion, are often ill informed. The belief that there exists a significant disparity of a systematic character between actual sentencing practice and what the public sees as appropriate sentences is wrong. More detailed and sophisticated methods of gauging popular opinion suggest that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentence actually imposed or, at least, to express the opinion that they are lenient to a significantly lesser extent than answers to general, undirected questions would suggest. This is true of research in the United States, the United Kingdom and in Canada. These studies have been replicated in Australia with generally similar results".

Of course, the principal reason why mandatory sentencing has become such a notorious topic, particularly in the year 2000, is because of the Senate Inquiry into Mandatory Sentencing Legislation which was triggered, in turn, by the tabling in the Senate of a private Bill, the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999. The Bill was intended to have the effect of prohibiting mandatory sentences in respect of offences committed by juveniles. At about the same time as the Senate inquiry was proceeding, a 15 year old Aboriginal boy committed suicide in the Northern Territory while serving a 28 day mandatory sentence for stealing stationery worth about $150.

His death provoked an Australia-wide furore. What was particularly sad about the debate which followed was that politicians and the media had overlooked the substantial criticisms made over the period since the mandatory sentencing legislation was introduced in both Western Australia and the Northern Territory.

The amendments to the *Sentencing Act* 1995 (NT) which led to the mandatory sentencing provisions were passed in March, 1997. Soon after, in *Trenerry v. Bradley*,[49] the Full Court of the Supreme Court of the Northern Territory held that they operated, according to their true construction, to require the Court to impose a mandatory term of imprisonment in the prescribed circumstances. It was clearly an unpalatable conclusion, with at least two members of the Court (Angel and Mildren JJ) describing the mandatory provisions as leading to unjust sentences.

In the same year, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission published their report: *Seen and Heard: Priority for Children in the Legal Process*.[50] The Report concluded:

- That the mandatory sentencing provisions breached the *United Nations Convention on the Rights of the Child* (*CROC*). Article 40 of *CROC* requires the principle of proportionality to be applied, so that the facts and circumstances of the offence and offender are taken into account in sentencing. Article 37 requires that "in the case of children detention should be the last resort and for the shortest appropriate period".[51]
- That the mandatory sentencing provisions then in force in the Northern Territory and Western Australia had a disproportionate effect on the Aboriginal community.[52]
- The "violations of international and common law norms" in the mandatory sentencing laws were so serious that it recommended federal legislation to override the laws unless they were repealed by Northern Territory and Western Australia.[53]

  The Federal Government has never formally responded to this recommendation.

In August, 1997 the Northern Territory Bar Association passed a resolution opposing mandatory sentencing. It wrote to both the Northern Territory Attorney-General and the Commonwealth Attorney-General advising them of its concerns about the injustices which would flow from mandatory sentencing. In November, 1997 the Australian Women Lawyers' Association expressed concern over the likely effect of the mandatory sentencing provisions on the imprisonment rates of women. In March, 1999 the Law Council wrote to the Chief Minister and Attorney-General of the Northern Territory, Mr Burke, informing him of the Council's opposition to the legislation as "far too harsh, arbitrary and ineffective".

Since 1997, imprisonment rates in the Northern Territory, particularly of indigenous children and women, have soared. In the year following the introduction of mandatory sentencing, imprisonment rates of juveniles increased by 53 per cent. The imprisonment rate of indigenous women has increased by 232 per cent. While the precise cause of these dramatic increases appears to be the subject of debate, the coincidence of the introduction of mandatory sentencing legislation and the higher rates of imprisonment suggests a strong correlation.[54]

Mandatory sentencing is said to be unjust for several reasons including:

(i) Its inflexibility (and consequent inability to take account of the circumstances of the offence and the offender), which will inevitably lead to harsh, unfair and discriminatory outcomes;
(ii) its potential or actual violation of international human rights law;
(iii) the shift of discretion from the judiciary to the police, which is less visible and less accountable (lack of review);
(iv) the prospect of fewer guilty pleas and the resulting additional cost and delay. [55]

Evidence from both the United States and Western Australia is said to indicate that "mandatory sentencing does not produce the effects of deterrence, selective incapacitation and crime reduction which are its stated justifications and does produce a range of damaging side

effects in terms of distortion of the judicial process, widely disproportionate sentencing, additional financial and social costs and deepening social exclusion of individuals and particular communities".[56]

The United States experience is particularly useful because mandatory sentencing provisions have been enacted there since the 1950s. In the United States the 1990 US Sentencing Commissions report *Minimum Mandatory Penalties in the Federal Criminal Justice System* was described as demonstrating:

> "...that mandatory minimum sentencing laws unwarrantedly shift discretion from judges to prosecutors, result in higher trial rates and lengthened case processing times, arbitrarily failed to acknowledge salient differences between cases and often punish minor offenders much more harshly than anyone believes is warranted. Interviews with judges, lawyers and probation officers at twelve sites showed that heavy majorities of judges, defence counsel and probation officers disliked mandatory penalties; prosecutors are about evenly divided. Finally, and perhaps not surprisingly given the other findings, the report shows that judges and lawyers not uncommonly circumvent mandatories".[57]

Research in Australia indicates that the shift from judicial to prosecutorial discretion is already occurring.[58] While this may deflect the harsh application of the mandatory sentencing provisions, it has the undesirable connotation of closed door and unaccountable justice which is inimical to the criminal justice system.

The cheap attraction of mandatory sentences was well described by the NSW Director of Public Prosecutions, Nicholas Cowdery, QC when he wrote:

> "If one says 'mandatory life imprisonment' quickly and often, without thinking about it too deeply, it sounds tough and that is what politicians like to do. It is easier and cheaper than taking time and committing resources to the development of policies that can address the causes of crime and reduce its incidence. The 'tough' approach appeals to people who are driven by retribution; and they vote".[59]

The tragedy of mandatory sentencing provisions can be seen from a few examples of their application. Margaret Wynbyne was sentenced to 14 days for stealing a can of beer. This sentence cost Australian taxpayers $2,400. Kevin Cook was jailed for a year on a third strike offence for stealing a towel to use as a blanket. Many more examples of clearly disproportionate sentences can be given.[60]

Judges oppose mandatory sentences because of the prospect that such provisions lead to the prospect of injustice. As the Chief Justice of NSW has said: "No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice".[61]

Endnotes:

1. *The Mikako*.

2. The Australian Law Reform Commission, *Sentencing*, Report No. 44, par. 26.

3. New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), par. 3.2.

4. *Veen v. The Queen [No. 2]*, (1988) 164 CLR 465 at 476.

5. *Ibid*, at 476 – 477.

6. *Hoare v. The Queen* (1989), 167 CLR 348 at 354.

7. (1995) 5 Tas. R. 186.

8. *Ibid*, at 202.

9. *R. v. Williscroft* [1975] Vic R. 292 at 300.

10. *R.v. Raddich* [1954] NZLR 86 at 87, cited with approval in *R. v. Rushby* [1977] 1 NSW LR 594 at 597 – 598.

11. *Channon v. The Queen* (1978) 33 FLR 433 at 437.

12. *Veen v. The Queen [No. 2]*, *supra*.

13. R.G. Fox, *The Meaning of Proportionality in Sentencing*, 19 Melbourne University Law Review, 489 at 490.

14. (1988) 165 CLR 611.

15. (1988) 166 CLR 51, 58.

16. (1989) 167 CLR 348.

17. (1990) 169 CLR 525.

18. Morgan, N., *Capturing Crimes or Capturing Votes? The Aims and Effects of Mandatories*, Volume 22 (1) (1999) UNSW Law Journal, 267.

19. Blackstone 4 *Commentaries* 18, quoted in Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Volume 1, Stevens & Sons (1948) at 3.

20. Radzinowicz, *op.cit.* at 11–14.

21. *Ibid*., at 654.

22. *Ibid*., at 654.

23. *Ibid*., at 10.

24. WJV Windeyer, CBE, MA, LLB, *Lectures on Legal History*, The Law Book Company of Australasia Pty Limited (1949) at 307.

25. *Ibid*.

26. *Ibid*.

27. *The Movement for Reforms in the Law*, 56 Law Quarterly Review at 214.

28. Windeyer, *supra*, at 307-308.

29. *Ibid*., at 308.

30. *Ibid*.

31. Sir William Holdsworth, *A History of English Law*, Volume XV, Methuen & Co. Limited (1965) at 165.

32. Cited by the Honourable JJ Spigelman, AC, Chief Justice of New South Wales, *Sentencing Guidelines Judgments*, Address to the National Conference of District and County Court Judges, 24 June, 1999.

33. (1995) 81 A. Crim. R. 260.

34. 501 US 597 (1991).

35. *Boyd v. R.*, *supra* at 268.

36. (1987) 34 CCC (3d) 97.

37. *Polling v. Corfield* (1970) 123 CLR 52 at 58.

38. (1969) 119 CLR 257 at 269.

39. For this might be substituted elements of the press in Australia.

40. *Sentencing and Parole*, a paper presented on 7 July, 1977 at the 19th Australian Legal Convention by Professor Norvall Morris, Dean, Law School, University of Chicago, 51 ALJ 523 at 529.

41. *Ibid.*, at 529.

42. See, in relation to murder, Nicholas Cowdery, QC, *Mandatory Life Sentences in New South Wales*, Volume 22(1) (1999) UNSW Law Journal, 290.

43. Northern Territory Parliamentary Record, Seventh Assembly First Session No. 27, 17 October, 1996 cited in Zdenkowski, G., *Mandatory Imprisonment of Property Offenders in the Northern Territory*, Volume 22(1) (1999) UNSW Law Journal at 303.

44. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights(Mandatory Sentencing of Juvenile Offenders) Bill 1999* at par. 2.21.

45. *Ibid*.

46. *Ibid*, at pars. 2.22, 2.25.

47. Professor David Brown, *Mandatory Sentencing, a Criminological Perspective*, paper delivered to the UNSW Symposium 2000: *Mandatory Sentencing – Rights and Wrongs*, p.11.

48. *Supra*.

49. (1997) 15 NTR 1.

50. Australian Law Reform Commission Report 84.

51. *Ibid*., par.19.63.

52. *Ibid*., par.19.60.

53. *Ibid.*, par.19.64; Recommendation 242.

54. Senate Inquiry at pp. 26-36.

55. Zdenkowski, G., *op.cit.*, at 312.

56. Brown, *supra*.

57. *Ibid*, pp. 5-6.

58. *Ibid*., at p.9.

59. Cowdery, *supra*, at 291.

60. Brown, *supra*, at p.9.

61. Spigelman CJ, *supra*.