Chapter Six:
Mandatory Sentencing: A Catalyst for Debate

Hon Denis Burke, MLA

I appreciate the opportunity to address such a gathering of those learned in the law, particularly on a subject which has sparked such intense debate.

There is nothing wrong with debate, of course. What is unfortunate is that this debate is mostly based not on the legal and parliamentary principles behind minimum mandatory sentencing, but on a series of the most blatant falsehoods about the operation of this legislation.

For instance, I quote from *The Sydney Morning Herald's* coverage on 30 October at a University of New South Wales Symposium 2000 on *Mandatory Sentencing – Rights and Wrongs*. The story reads:

> "Police found it easy to arrest an Aboriginal woman who walked into a flat through an open door and took a tin of meat and two tomatoes from a table, according to Alice Springs black leader Mr William Tilmouth. 'She was on the pavement in front of the flat feeding the meat and tomatoes to her three children', he said. 'Under mandatory sentencing laws, she went to jail and her children had to be cared for by another family' ".

Now, you will all agree that sounds like pretty rough justice – the sort of thing to justify the language used in the March issue of *Bar Brief*, the newsletter of the New South Wales Bar Association. It described mandatory sentencing as "this modern version of the 18th Century transportation laws".

But what are the real facts in this case, according to court records? They show that on the evening of 7 February this year, a woman smashed windows to gain entry to a flat occupied by a frail 85 year old pensioner. He was unable to prevent the home invasion or the stealing of his food. Police, alerted by neighbours, apprehended the 25 year old woman eating the food nearby. There was no mention of children being involved. *Their first appearance* on the court transcript is when defence counsel made submissions on sentencing.

The magistrate was not impressed for she then gave the offender 28 days imprisonment – *double* the 14 day sentence for a first striker under the mandatory minimum sentencing legislation. And the offender had priors for criminal damage and stealing before the new legislation came in. No appeal against the 28 day sentence has been lodged, so whilst the misquoting of the facts of the case at the Sydney conference is grist for the misinformation mill, the legal aid lawyers are not about to chance their arm by going back to court.

That is why I am grateful to be invited here today by the Conference convenor, Mr John Stone. It is an opportunity to set the record straight. I do not intend doing a case by case rebuttal of the misreported cases – I do not have time; but I am concerned when even the judiciary and senior legal professionals are seriously debating the fallacies, not the facts.

The fallacies about mandatory sentencing have now graduated from the daily media to law journals, and I refer again to the *President's Column* in the March edition of the New South Wales *Bar Brief*. The author is the previous speaker, Bar Association President Ruth McColl, SC.

President McColl reported that the coverage of mandatory sentencing was sparked in part by, and I quote:

> ".... the suicide of a 15 year old Aboriginal boy serving a 28 day mandatory sentence for stealing stationery worth about $150".

For obvious reasons, I am not going to pull that statement apart bit by bit, especially as it involves the nation-wide tragedy of youth suicide.

But that 21-word statement contains numerous factual errors and major omissions, including the reasons the lad was under detention. In fact, I can guarantee that in every case of mandatory sentencing highlighted by the media, the basic facts are so wrong you would have difficulty reconciling the media reports with the court transcripts.

In the same article, Law Society President McColl reports that:

> "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".

These figures are also incorrect. The facts are that during 1997-98 a total of 197 Aboriginal women were sentenced to detention in the Northern Territory. In 1999-2000, the number was 124. That represents a *reduction* of 37 per cent.

Numbers of juveniles in detention have generally declined over the past decade. Throughout this year, with the debate at its height, juvenile detention numbers have been at their lowest on record. As of last Wednesday, there were 10 juveniles in detention Territory-wide, only one of whom is serving a mandatory sentence. This compares with levels of between 30 and 40 during the late 1980s.

One of the eight objectives of The Samuel Griffith Society is to "restore the authority of Parliament as against that of the Executive". So I think it is important to track back on the political and democratic processes which accompanied the gestation of minimum mandatory sentencing legislation in the Northern Territory.

And since it is commonly condemned as racist law, I will outline the attitude of many Aboriginal communities to these laws. Like everybody else, Aboriginal Territorians have voted on these laws twice, and I have spent hours and days discussing them with Aboriginal community leaders.

The first point is that this legislation was developed in the Country Liberal Party (CLP) party room – not the Cabinet room. In other words, it came from constituents, through their elected Members – it was not imposed on the Party wing or the Parliament by the Executive. And at that stage it enjoyed the support of the Labor Opposition as well.

In 1994, the governing CLP put to Territorians the following policy for the general election that year:

> "Introduce compulsory imprisonment of 28 days for repeat offenders (including juveniles) for crimes such as unlawful entry, unlawfully on the premises, stolen motor vehicle, interfere with motor vehicle, shoplifting and criminal damage".

As a central plank of CLP election policy, it was heavily advertised in the media, including radio and television. The same ads ran on Imparja radio and television, which goes into every Aboriginal community in the Northern Territory, as were run in the urban media of Darwin and Alice Springs. So there was no secrecy about the intentions of the CLP government.

In the 1994 election, voters returned 17 CLP Members to the Territorian Parliament of 25, including, for the first time since self-government, the big bush seat of Victoria River, with its majority of Aboriginal voters.

In the Darwin seat of Millner, with our largest concentration of urban residents of Aboriginal descent, voters also opted for a CLP government Member for the first time since 1977.

As Attorney-General in 1996 I saw the first cut of mandatory sentencing legislation through the Legislative Assembly after exhaustive community consultation and parliamentary debate. This came into effect on 8 March, 1997. During those parliamentary debates, I made a number of points, such as:

> "I believe the government's duty can be simply put: the safety and protection of the community is paramount. The first principle of law and order is that Territorians have the

right to be protected from those who would do them harm. The second principle is that, if a person chooses to abuse that first principle, that person will pay the price".

The next point is as relevant to the race debate as it is to the points raised about the age of offenders:

"I have to stress again that the government's proposals for compulsory imprisonment apply to those who persist in flouting the law. It is not aimed only at adults and it is not aimed only at juveniles. It is aimed at the guilty, whether they be 15 or 50".

Please keep in mind that these laws have been changed a couple of times since 1996 – in the case of juveniles, quite radically.

But I am trying to import some of the flavour of the parliamentary debate, and the community, or if you like, the democratic pressure which drove it. One of the more illustrative quotes from Hansard is this, during debate on amendments in 1999:

"Mandatory minimum sentencing is all about providing a base line below which the courts cannot go because it is unacceptable to the community. Because of the endless variety of fact situations that may come before the courts, it is desirable, within the limits set by the baseline of mandatory minimum sentencing, to give some discretion back to the courts to determine the appropriate sentence.

"The parliament sets maximum penalties, so why is it unable to set minimum penalties? The community demands its government intervene and set the framework on many issues. If the community believes that the punishment meted out by the courts is not sufficient or appropriate, then governments have no option but to act upon the will of the people".

As I said, the proposal was put to the electorate in 1994, and they had another opportunity to express their will at the general election in August, 1997. By this time, spokesmen for the Aboriginal industry – not the Aborigines themselves – and legal aid lawyers had convinced the Labor Opposition to turn against mandatory sentencing, so the political differences were clear cut and heavily advertised.

The result of that ultimate exercise in democracy? Another seat to the governing CLP, and a majority Aboriginal seat at that. The voters of McDonnell, which runs from the fringes of Alice Springs, out to both the West Australian and Queensland borders and down to South Australia, voted out Labor after 23 years and turned to the CLP. And the new member for McDonnell was a CIB detective, well known in the various Aboriginal communities through his police work.

I hope that outline provides you with the political context in which mandatory sentencing for a number of offences against the person and property has been enacted by the Northern Territory Parliament.

I will now expand briefly on the attitude of Aboriginal communities, and also mention in passing the role of the United Nations. Commentators keep quoting the UN to me to prove that the Northern Territory is somehow an international embarrassment to Australia.

Many commentators assume Aboriginal people are targeted by law and order measures, and therefore automatically oppose laws like mandatory sentencing. Those commentators do Aborigines a great disservice. They also forget that the activities of Aboriginal criminals mostly leave Aboriginal families as victims of crime.

In fact, I am dismayed at the utterances of some civil liberty advocates, many of whom were in full cry at the mandatory sentencing symposium at the University of New South Wales a fortnight ago. These people seem to assume Aborigines don't mind their possessions being stolen. Somehow, they are different from the rest of us. I say to those civil libertarians, Aborigines have property rights, they want those rights defended. As has been put to me at meeting after meeting, Aborigines are not just over-represented in Territory jails – although nowhere near as over-represented as they are in other Australian jails – they are also massively over-represented in the long list of victims of crime.

Where Aboriginals do have difficulty with the law is in trying to understand the long-winded

and circuitous nature of our court system. In Aboriginal society, you do not lie about your guilt if you have done the wrong thing, so the role of defence counsel is very confusing to traditional Aboriginal people. In those societies, if you have done the wrong thing, you don't lie about it – you cop it, and get the punishment over as soon as possible so the healing can begin. Many Aborigines have told me of their dismay when a known community devil was transformed into a courtroom angel by the silver tongue of a Legal Aid lawyer.

And many Aboriginal communities have become active partners with NT police in the raft of pre-court diversionary programs resulting from my talks with the Prime Minister and Attorney-General on mandatory sentencing legislation.

Under this scheme, juveniles who would previously have been charged with minor offences have, since the end of August, been diverted away from the criminal justice system. That diversion is into programs designed to prevent juveniles from further offending. The diversions include oral and written cautions, victim offender or family conferencing and community-based programs.

I will touch briefly on the United Nations. I admire much of the work the United Nations does, and in fact I wore the blue beret on peacekeeping duties in the Middle East some years ago. I am not so enthusiastic about some of the criticisms from UN Committees about our legal system, our environmental policies and so on. And it appears I am not alone. In Radio National's Law Report of April 18 this year, Professor Arie Freiberg of the Department of Criminology at Melbourne University did an international comparison of legal regimes.

He found that, compared with the United Kingdom and United States mandatory sentencing regimes, the Territory and Western Australia look positively wimpy. Professor Freiberg goes on to say that if UN organisations are indignant about mandatory sentencing, they should apply their indignation equitably!

And I have just the place for the UN to start. They actually run prisons in one place in the world, and that is East Timor. A Darwin-based lawyer, Mr Martin Hardie, fell foul of the legal system in East Timor and spent some time in the UN administered prison at Becora, outside Dili. When he got out, he was reported in *The Australian* newspaper of August 24 this year as saying:

> "There's a heap of kids and others who have been sitting in jail for up to six months without their cases being investigated or being tried.
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> "Sixteen kids were arrested after a fight on the beach at Baukau five months ago. No investigation has taken place.
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> "The Court has just detained them for the period without a hearing. They're just sitting there waiting for a trial to happen. They don't understand. These kids are in the same cells as militia members".

Lawyer Hardie went on to explain that he was the first to appeal the detention order, and he told *The Australian*:

> "I only did it because I've got contacts and I know what I'm doing".

I make no other comment apart from the observation that the United Nations' flag flies over Becora prison.

I now turn to the overall role of the judiciary, particularly when duly elected Parliaments pass laws with which some members of the legal fraternity have difficulty. And mandatory sentencing can be seen as such a law. It has certainly provided a catalyst for broad community debate on the role of judicial officers in our society.

There have been a number of legal and political challenges to the laws. It is not surprising that the legal attacks have been unsuccessful, given the High Court's specific recognition that Parliament may provide mandatory sentences. That proposition was established in the case of *Sillery v. The Queen* in 1981. The political challenges are another matter, but I believe have been equally unsuccessful.

My own view is that mandatory sentencing laws repair an eroded public confidence in the administration of the criminal law, in much the same way that the 1998 decision of the Court of

Criminal Appeal in New South Wales established a judicial minimum tariff of imprisonment for culpable driving offences.

A common criticism of the Northern Territory laws is that they abrogate the usual judicial discretions for sentencing and in some way damage the administration of justice. Such superficial comment overlooks the history and practise of sentencing.

Each of the Parliaments within Australia has exercised its undoubted legislative powers to express society's requirements for appropriate penalties to be provided by the criminal law. Each of the Commonwealth and the States maintains its own mandatory sentencing laws for some crimes, ranging from murder or drug offences (which may carry mandatory life imprisonment), to culpable driving, drunk driving and driving unlicensed.

The notion of mandatory terms of imprisonment is not new. Nor is it anathema in other jurisdictions throughout the world. In the United States – considered to be a democratic, civil libertarian country – it is accepted that it conforms with the *Bill of Rights* for federal laws to impose mandatory imprisonment that has largely nullified the judiciary's sentencing discretion. This has been achieved by the introduction of guidelines for sentencing judges. The guidelines are mandatory – not optional.

After the judge has worked through each level of the guidelines he or she arrives at a penalty points score. The score precipitates a prison term, which is fixed and ranges from 6 months to life.

Let me turn now to the publicly expressed opinions of some senior and prominent holders of judicial office.

There has been comment on the statement by Justice Wood of the NSW Supreme Court in a November, 1999 address at the Uniting Church in Ashfield, Sydney. After discussing some contemporary issues such as drug injection rooms His Honour said, from the pulpit:

> "There are those who say that Judges have no business expressing such ideas – that they should quietly apply the law and policy set by others without question or protest. I do not believe that Judges can successfully complete their spiritual journey by silence.
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> "It is my hope that there will be Judges in the next century who are prepared to dare, to listen to their consciences and their faith, and to take a stand against the unjust laws and policies of the secular state. At least let them not allow injustice to be committed in their names".

I would be disturbed if Justice Wood sought to enjoin the judges and the magistracy of the Northern Territory to defy their duties of office and to act in breach of their obligations, which are to apply dispassionately the laws of the Territory in their courts. I take it however that no more was intended than to say that in some circumstances a Judge might choose to resign rather than to apply a law that is inconsistent, as Justice Wood puts it, with "their consciences and their faith". As to this I have no objection.

Such a position has the recent authority of the Chief Justice of Australia in his speech to the Australian Bar Association Conference in New York on 2 July, 2000:

> "... if a judge is unable in good conscience to implement the law, he or she may resign. There may be no other course properly available. Judges whose authority comes from the will of the people, and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule. No judge has a choice between implementing the law and disobeying it".

Mr Justice Gleeson may have been inspired to make his comments by such outbursts as that of Mr Justice Einfeld of the Federal Court, who on 15 February, 2000 published an article in *The Sydney Morning Herald* criticising the Northern Territory and Western Australian mandatory sentencing laws as an insult to "the standards of justice and morality that Australians believe in".

Justices Fitzgerald, Stein, Beazley and Wood of the New South Wales Court of Appeal wrote a letter to *The Sydney Morning Herald* which attacked the mandatory sentencing laws in the

Northern Territory as racist and cowardly. Their Honors asserted:

> "[t]he inability of the national political process to achieve reconciliation with indigenous Australians and to terminate mandatory sentencing provides a disturbing insight into the practical operation of the simplistic notion that democracy is merely the majority will".

Having engaged the fourth estate as its vehicle for this denunciation of the laws of a body politic outside their jurisdiction, and from their publicly funded chambers, three of the Judges then made themselves available for interviews. On the resignation issue, Justice Wood told ABC Radio:

> "You have a duty to apply the laws if you're a judge. Your only choice really is to resign if you feel you can't do the job. But the real problem with that is if judges start resigning who have strong principles they may well be replaced by judges who have no principles, and are prepared to bow to the will of the State".

Justice Fitzgerald was reported as saying that members of the judiciary had to be very careful not to buy into political debate, but opined that mandatory sentencing was "beyond being a political question". To this day I am not sure what he meant by that.

This extraordinary outburst by judges caught public and political attention. The Commonwealth Attorney-General issued a news release:

> "I respect the right of the judiciary to raise community awareness about legal issues by explaining the role of the courts and the process of judicial decision making. However, I also believe that judges should refrain from commenting on politically contentious issues, which are properly the domain of the democratic political process.
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> "[t]he doctrine of the separation of powers means that not only should the judiciary be free of interference from the executive, but that the judiciary should not interfere in matters that are the clear responsibilities of democratically elected Parliaments".
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> The Prime Minister also warned judges to keep out of the political debate, saying that:
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> "... it was one thing for a judge to talk about the law, it is another thing for the judge to wander into making political comment"; and
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> "if politicians want to be judges they should stay in the law, and if judges want to go into politics then they should go into politics".

I entirely agree with these rebukes by senior Commonwealth Ministers directed to senior members of a State judiciary. It is interesting to note that there was no such published rebuke, at the political or judicial level, in New South Wales, the resident jurisdiction of these publicly vocal judges.

Let me add that these overt lapses in conventional judicial behaviour are not limited to mandatory sentencing. In September this year the media reported a public speech by Justice Wilcox in support for Aboriginal land rights as a way of healing "the running sore of racial antagonism in our country". He was reported as saying that the restoration of Aboriginal rights to traditional land was "an essential first step" to resolving the problems that afflict indigenous people, and as calling on the States and Territories to support native title regional agreements.

On the Federal Court bench, Justice Wilcox has jurisdiction over native title applications and anti-discrimination cases falling within the Court's jurisdiction. In my view, his comments, as reported, should not have been made publicly by any judge of the Federal Court. They are likely to be perceived by the public as an expression of partiality and bias, and may form a ground for his disqualification from hearing matters within the mainstream of the Court's jurisdiction.

An articulate and authoritative proponent of judicial reticence in Australia is Justice Thomas of the Supreme Court of Queensland. In *Judicial Ethics in Australia,* he wrote that "with few exceptions, the taking of a public stand by a judge on any controversial topic lowers his or her effectiveness as a judge". Further, he said:

> "It is now quite clear that the making of statements by judicial officers on controversial political subjects is improper, unless the issue directly concerns the law, the legal system or the administration of justice. The reference to 'the law' must be limited to matters of a

legal kind in which policy matters do not intrude".

I fully agree. Most judges justify maintaining judicial silence off the bench as being required to ensure judicial independence, to maintain impartiality and to sustain public confidence, both in appearance and in reality.

Chief Justice Gleeson considered it a wise observation that "enthusiasm for a cause is usually incompatible with impartiality, and is always incompatible with the appearance of impartiality". The Chief Justice has emphasised the need to avoid any appearance of pre-judgment. To my mind the Chief Justice speaks with a high authority compounded by commonsense. His statements reflect the required standards of the community.

One qualification accepted by those who support the view that judges should not make extra-curial comments on governmental policy is that judges should be able to reply to unfair and misleading criticism. I agree, and hasten to add that it should be carefully exercised and not be a response to each "pin-prick". A Chief Justice, as the Chairman of his or her Board, may be obliged by circumstances to express a public position to preserve the professional reputation of his or her Court.

However, this judicial capacity to defend the integrity of a court does not extend a licence to the entire bench to indulge in the multi-media equivalent of the soapbox on Hyde Park corner.

In Canada, following a public and controversial outburst by a Supreme Court Judge from British Columbia about a constitutional accord between the Canadian Prime Minister and nine provincial Premiers, the Judicial Council in Canada resolved that:

> "The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts.
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> "[j]udges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem".

and:

> "If a judge feels compelled by his conscience to enter the political arena, he has, of course, the option of removing himself from office. By doing so, he is no longer in a position to abuse that office by using it as a political platform".

I urge the Australian judiciary collectively to take steps down the same considered path taken by Canada. At the request of the Council of Chief Justices, the Australian Institute of Judicial Administration is researching and writing guidelines for judicial ethics. I await those published guidelines, and will be interested in the collective opinion of the profession on whether the AIJA has taken full advantage of this golden opportunity to set the ground rules for judicial ethics.

At the lowest level of criticism, it is plain that a publicly expressed opinion on almost any social and political issue may compromise a judge's capacity to appear impartial in judicial office. Any such statement may give rise to a justified apprehension of bias sufficient to satisfy the test for objective disqualification. The publicly expressed enthusiasm for a cause by a judge may be incompatible with the impartiality demanded of the office and the absolute requirement for the retention of appearances of impartiality.

Such technical considerations suffice to demand judicial reticence. However, the rule has broader justification. Our society requires – in fact, demands – confidence in the judiciary as the entrenched and dispassionate referee of disputes between its citizens.

What I have said this afternoon may be viewed as controversial in some of the more radical quarters of the legal profession. Should this paper generate wider and more public discussion that will, indeed, point to the fact that mandatory sentencing has played a number of useful roles within the community, including acting as a catalyst for debate.