

## **5. Mandatory Sentencing laws in the Northern Territory and Western Australia**

*This issue relates to questions 3, 11 and 12 of the List of issues to be taken up in connection with the consideration of the third and fourth reports of Australia*

### **Summary of issue**

- Mandatory sentencing laws were enacted in Western Australia and the Northern Territory in 1996 and 1997 respectively, for juvenile and adult offenders. These laws require that offenders automatically go to jail for minimum prescribed periods for particular offences.
- Case studies of the impact of the laws demonstrate their arbitrary and discriminatory nature.
- Mandatory sentencing laws are arbitrary, and are not proportionate to the crime.
- The overriding aim of mandatory sentencing laws is incapacitation rather than rehabilitation. They do not have regard to the circumstances of juvenile offenders.
- Mandatory sentences are not reviewable by a court.
- They breach several provisions of the Convention on the Rights of the Child, and in some circumstances can result in harsher treatment for juveniles than adults who commit the same crime.
- Mandatory sentencing laws target particular property offences that are generally committed by people of lower socio-economic backgrounds. They are discriminatory in effect against Indigenous people in particular.
- The federal government has constitutional power to override mandatory sentencing laws but has explicitly chosen not to do so, in breach of its obligations under Article 50. The Committee on the Elimination of Racial Discrimination has expressed concern at the failure to ensure compliance with these obligations.
- There are alternatives to mandatory sentencing that are consistent with Australia's obligations under the Convention.

### **Relevance to ICCPR**

- Article 9: Liberty and security;
- Article 10: Rehabilitation;
- Article 14: Juvenile offenders and right to appeal a sentence;
- Article 24: Rights of the child;
- Articles 2 and 26: non-discrimination and equality; and
- Article 50: federal obligation to ensure compliance with obligations

**The following section expands on this summary under the following headings:**

- Mandatory sentencing laws;
- Case studies; and
- Relevance to ICCPR (analysis of relevant Articles of the Convention).

### **Mandatory sentencing laws**

*This issue responds to question 3, 11 and 12 of the list of issues to be taken up in connection with the consideration of the third and fourth reports of Australia*

- 5.1 Mandatory sentencing laws were enacted in Western Australia in 1996 (through amendments to the *Criminal Code (WA) 1913*) and in the Northern Territory in 1997 (through amendments to the *Sentencing Act (NT) 1995* and the *Juvenile Justice Act (NT) (1993)*).
- 5.2 The Western Australian laws provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of twelve months imprisonment or detention.<sup>1</sup> This is regardless of the gravity of the offence.
- 5.3 The Northern Territory Sentencing Act provides that persons over the age of 18<sup>2</sup> found guilty of certain property offences shall be subject to a mandatory minimum term of imprisonment of fourteen days for a first offence, ninety days for a second property offence and one year for a third property offence.<sup>3</sup> The *Juvenile Justice Act* provides that a person aged 15 to 18 who has been convicted for a certain property offence and has at least one prior conviction for such an offence, must be detained for at least twenty-eight days.<sup>4</sup> Additional punitive orders may be made on top of this mandatory period.
- 5.4 Although the Northern Territory *Sentencing Act* was amended in 1999 to provide for alternatives to sentencing in ‘exceptional circumstances’, these provisions do not apply to juveniles.
- 5.5 An agreement was reached in April 2000 between the Northern Territory Chief Minister and the Prime Minister of Australia that relates to the mandatory sentencing regime in the Northern Territory. The deal, which is yet to be finalised and implemented, provides that:
- all persons under 18 will be treated as juveniles rather than as adults. Prior to this agreement children between 17-18 years were treated as adults under the *Sentencing Act* rather than under juvenile justice legislation;

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<sup>1</sup> *Criminal Code (WA) 1913, s401(4).*

<sup>2</sup> Prior to June 2000, this provision required that children aged 17-18 years be treated as adults (including in adult correctional centres).

<sup>3</sup> *Sentencing Act (NT) 1995, s78A.*

<sup>4</sup> *Juvenile Justice Act (NT) 1993, s53AE.*

- for ‘minor’ offences, police will be required to divert juvenile offenders to special programs; and
- for ‘serious’ offences, police officers will have a discretion whether to divert juvenile offenders to special programs and need take no further action if the program is successful.

5.6 The Northern Territory will receive an extra \$5 million per year to fund these diversionary programs. At this stage there is no clarification as to what is a ‘minor’ or a ‘major’ offence. The new regime does not address mandatory sentencing for adults at all, apart from raising the age at which one is termed an ‘adult’ offender.

### **Case studies**

5.7 The following are some examples of offenders sentenced under the NT and WA laws.

#### *Children<sup>5</sup>*

- Two 17 year old girls with no previous criminal convictions were both sentenced to 14 days in prison for theft of clothes from other girls who were staying in the same room.
- A 17 year old girl with no prior convictions was sentenced to 14 days in prison for receiving jewellery stolen by other young people. The jewellery was later recovered.
- A 17 year old boy was incarcerated for 28 days in an adult prison for a second conviction of minor theft. If the second offence had been committed on or after his 17<sup>th</sup> birthday the period of imprisonment would have been 14 days only.
- A 15 year old girl was detained for 28 days for unlawful possession of a vehicle. In fact she was only a passenger in a stolen vehicle.
- A 17 year old petrol sniffer from an Aboriginal community was sentenced to seven months plus 120 days for stealing food, alcohol, cigarettes, soft drink and petrol and causing associated minor property damage. The stolen items were consumed with friends. His sentence was based on the mandatory detention formula (120 days) with an additional seven months. He had very little family support and his record was clean until June 1998.
- Robert is a 15 year old Aborigine. He was first referred to the Department of Family, Youth and Children's Services when he was 12 due to a lack of parental support. Since the age of 14 Robert has mostly looked after himself. This year he attempted suicide while in police custody, having been arrested for a mandatory detention offence. The offence was one of property damage. He broke a window after hearing about the suicide of a close friend.
- Tony is 17 years old and lives between Alice Springs and several bush communities. Tony has been accessing crisis accommodation with youth services since he was 14

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<sup>5</sup> Note: These examples include 17 year olds who were treated as adults under the NT criminal justice system and, prior to amendments in June 2000, were therefore subject to the adult mandatory detention provisions in the *Sentencing Act*. Not all the examples are of Indigenous children.

years old. He has a history of multiple substance dependency. Tony has minimal education and his literacy skills are low. English is his third language. He has never had his own income and workers who know him believe the bureaucracy of the system and the excessive paperwork is what deters him from accessing this entitlement. Tony is considered to be an adult in the Northern Territory. He has been charged with a mandatory detention offence (unlawful entry into a shop) and is facing imprisonment in an adult jail.

### *Adults*

- A 24 year old Indigenous mother was sentenced to 14 days in prison for receiving a stolen \$2.50 can of beer.
- A 27 year old white teacher disputed the quality of a hotdog at a Darwin fast food bar and poured water onto the till. She paid in full for the damage she caused. She was sentenced to 14 days in prison.
- A 29 year old homeless Indigenous man wandered into a backyard when drunk and took a \$15 towel. It was his third minor property offence. He was imprisoned for one year.
- A 20 year old man with no prior convictions was sentenced to 14 days in prison for theft of \$9.00 worth of petrol.
- An 18 year old man was sentenced to 90 days in prison for stealing 90 cents from a motor vehicle.<sup>6</sup>

### **Relevance to ICCPR**

5.8 Mandatory detention provisions raise concerns in relation to the following Articles of the ICCPR.

#### **Article 9: Liberty and Security**

5.9 Article 9(1) of the ICCPR provides that ‘No one shall be subject to arbitrary arrest or detention’.

5.10 A sentence may still be arbitrary notwithstanding that it is authorised by law. The term ‘arbitrary’ includes not only actions that are unlawful per se but also those that are unjust or unreasonable.<sup>7</sup> In *Van Alphen v The Netherlands* (305/88), the Human Rights Committee (or HRC) stated at paragraph 5.8:

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<sup>6</sup> Sources: Schetzer, L., ‘A year of bad policy: mandatory sentencing in the Northern Territory’, 23(3) *Alternative Law Journal* 117, p118; HREOC, *Mandatory detention laws in Australia: An overview of current laws and proposed reform*, *op.cit.*, pp5-6. An interesting comparison to these examples is the cost of accommodating prisoners in the NT. The 1995-96 NT Correctional Services Annual Report stated that it costs \$12,432 to accommodate each young person sentenced to a 28 day period of detention, whereas the cost to the public purse for every adult sentenced under mandatory sentencing for the minimum 14 day period is approximately \$2,400: Schetzer, L., *ibid.*, p119. Mandatory sentencing also imposes greater costs on the court system, as accused parties are more likely to contest charges than plead guilty.

<sup>7</sup> Documentary references and a summary of these debates are given in M Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Dordrecht, 1987), p343.

The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable in all the circumstances*. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime. (emphasis added)

5.11 In *A v Australia* (560/93), the HRC stated the following at paragraph 9.2:

[T]he Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not *necessary in all the circumstances of the case*, for example to prevent flight or interference with evidence: the element of *proportionality* becomes relevant in this context. (emphasis added)

5.12 Decisions of the HRC therefore indicate that detention must be a *proportionate* means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights. Mandatory sentencing clearly breaches article 9(1) as it is imposed for the most trivial of offences.<sup>8</sup> The punishment of imprisonment in many cases simply does not fit the crime.

#### **Article 10: Rehabilitative purpose for detention**

5.13 Article 10(3) states, *inter alia*, that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

5.14 Incarceration is generally accepted as being ineffective in promoting rehabilitation.<sup>9</sup> With mandatory detention, the overriding aim is incapacitation and not rehabilitation.

5.15 The HRC has referred to article 10(3) in its Concluding Comments on Belgium:

¶ 16. [A]lternative sentencing, including community service, should be encouraged in view of its rehabilitative function. ...

¶ 19 Bearing in mind that pursuant to article 10, paragraph 3, of the Covenant, the essential aim of incarceration should be the reformation and social rehabilitation of offenders, the Committee urges the State party to develop rehabilitation programs both for the time during imprisonment and for the

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<sup>8</sup> See S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights* (OUP, Oxford, 2000), forthcoming publication.

<sup>9</sup> There is also evidence that mandatory detention is of limited effect as a deterrence mechanism. See further: L. Schetzer, *op.cit.*, pp119-120; G. Zdenkowski, ‘Mandatory imprisonment of property offenders in the Northern Territory’ (1999) 22(1) *University of New South Wales Law Journal* 302 at pp302-303; R. Hogg, ‘Mandatory sentencing laws and the symbolic politics of law and order’ (1999) 22(1) *University of New South Wales Law Journal* 262; N. Morgan, ‘Capturing crims or capturing votes? The aims and effects of mandatories’ (1999) 22(1) *University of New South Wales Law Journal* 267, pp268-269.

period after release, when ex-offenders must be reintegrated into society if they are not to become recidivists.<sup>10</sup>

5.16 Mandatory sentencing regimes in Western Australia and the Northern Territory raise similar concerns under Article 10(3) of the Convention.

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<sup>10</sup> (1998) UN doc. CCPR/C/79/Add. 99. See also Madame Chanet in *Hankle v Jamaica* (710/96)

#### **Article 14(4): Age and rehabilitation of juvenile offenders**

5.17 Article 14(4) provides that in the case of juveniles the procedure shall take account of their age and promote their rehabilitation. Mandatory detention removes the court's discretion to take these factors into account. The recent amendments to the NT regime do not redress this situation. Mandatory sentencing breaches Article 14(4) for the reasons cited above regarding Article 10(3).

#### **Article 14 (5): Right to appeal a sentence**

5.18 Article 14(5) provides that the sentence be reviewable by a higher tribunal according to law. The HRC has interpreted the phrase 'according to law' in Article 14.5 of the ICCPR as 'not intended to leave the very existence of the right to review to the discretion of the States parties.'<sup>11</sup>

5.19 In *Reid v Jamaica* (355/89), the HRC stated at paragraph 14.3:

The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to substantially review the conviction and sentence. ...

5.20 The mandatory detention laws in Northern Territory and Western Australia do not allow for a right of appeal against the sentence, if the sentence should equate with the minimum permitted, and is therefore in breach of the ICCPR.

5.21 As noted above, the Commonwealth government and the Northern Territory government have recently concluded an agreement for the diversion of juveniles from custody. This agreement provides that police in the Northern Territory will have discretion to divert juveniles at the pre-charge stage. This agreement does not confer any greater discretion upon the courts. Rather, vast discretion is vested in police officers to decide whether to pursue a matter through the courts, in which case mandatory sentencing will apply, or through diversionary programs.

5.22 There is empirical evidence on problems with the exercise of police discretion in relation to Indigenous people in Australia. Indigenous offenders do not receive the benefit of cautioning at the same rate as the general youth population.<sup>12</sup> For example, in 1994-95 only 11.3% of Aboriginal alleged juvenile offenders in Victoria received formal cautions compared with 35.65% of non-Aboriginal juveniles.<sup>13</sup> This is despite the fact that the Royal Commission into Aboriginal Deaths in Custody recommended that police administrators encourage officers to make greater use of cautioning for Indigenous suspects.<sup>14</sup> In 1996, the Aboriginal and Torres Strait Islander

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<sup>11</sup> *Salgar de Montejo v Colombia* (64/79), paragraph 10.4.

<sup>12</sup> Social Justice Report 1999, p. 161.

<sup>13</sup> M Mackay *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper* Monash University Koori Research Centre, Melbourne 1996, p9.

<sup>14</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report – Vol.4*, Recommendation 240a.

Social Justice Commissioner commented on the use of cautions in Western Australia:

Between August 1991 and December 1994 Western Australian police cautioned 12,887 juveniles: only 12.3 per cent were Indigenous. Considering that Aboriginal representation among juveniles who are charged is as high as 69 per cent, it is clear who is not benefiting from this diversionary option.<sup>15</sup>

#### **Article 24: Rights of the Child**

5.23 The *Juvenile Justice Act* (NT) provides that a person aged 15, 16, or 17 who has been convicted for a certain property offence and has at least one prior conviction for such an offence, must be detained for at least twenty-eight days.<sup>16</sup> Although the Northern Territory *Sentencing Act* was amended in 1999 to provide for 'exceptional circumstances', these provisions do not apply to juveniles who are sentenced under the *Juvenile Justice Act*. The WA regime applies regardless of whether one is a juvenile or an adult offender.

5.24 The Northern Territory mandatory sentencing regime treats juveniles differentially from adults. A juvenile can possibly be sentenced to 28 days' imprisonment whereas an adult would be sentenced to 14 days' imprisonment for the same crime under the NT regime.<sup>17</sup>

5.25 In General Comment 17, at paragraph 1, the HRC stated:

Article 24 of the International Covenant on Civil and Political Rights recognises the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.

5.26 Mandatory sentencing raises concerns in relation to this obligation. No inherent concession is given to juveniles under the Western Australian system, apart from the possibility of detaining such people in a prescribed 'detention centre' rather than a prison. Some concessions are given to children under the Northern Territory regime, although the NT regime is harsher than the WA regime.

5.27 Mandatory sentencing is also inconsistent with several Articles of the Convention on the Rights of the Child, namely:

- Article 3.1: In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or

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<sup>15</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report* AGPS Canberra 1996, p38.

<sup>16</sup> *Juvenile Justice Act* (NT) 1993, s53AE.

<sup>17</sup> See H. Bayes, 'Justice is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory', (1999) 22(1) *University of New South Wales Law Journal* 286, p. 286.

legislative bodies, the best interests of the child shall be a primary consideration.

- Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- Article 40.2(b): Every child... accused of having infringed the penal law has at least the following guarantees... (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; and
- Article 40.4: A variety of dispositions... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

5.28 In considering Australia's first report under CROC, the Committee on the Rights of the Child expressed its concern at these pieces of legislation:

The situation in relation to juvenile justice and the treatment of children deprived of their liberty is of concern to the Committee, particularly in light of the principles and provisions of the Convention and other relevant standards such as the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

The Committee is also concerned about the unjustified disproportionately high percentage of Aboriginal children in the juvenile justice system... The Committee is particularly concerned at the enactment of new legislation in two States, where a high proportion of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high representation of Aboriginal juveniles in detention.<sup>18</sup>

5.29 Violations of the above Articles of CROC constitute persuasive evidence of violations of article 24 of the ICCPR.

### **Articles 2 and 26: Equality and non-discrimination**

5.30 Where a pattern of sentencing reveals that certain groups are more likely to receive the harshest penalties, sentencing is discriminatory.<sup>19</sup> The discriminatory effect of NT and WA mandatory sentencing laws has been explained as follows:

On the face of it, mandatories are not discriminatory. Indeed they appear to be the very opposite; they allow for no differentiation according to race, sex or age. However, it is clear that mandatories are discriminatory in effect... (they) involve

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<sup>18</sup> Committee on the Rights of the Child, *Concluding Observations on Australia*, 10 October 1997, UN Doc: CRC/C/15/Add.79, paras 22, 23.

<sup>19</sup> Human Rights and Equal Opportunity Commission *Human Rights Brief No.2: Sentencing Juvenile Offenders*, p5.

the policy choice to select certain types of criminal activity for special attention. These policy choices invariably involve the selection of offences... in which minority groups and lower socio-economic groups are over-represented... Recent research<sup>20</sup> has confirmed expectations with the three strikes burglary laws (in WA); Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children's Court of Western Australia from February 1997 to May 1998.<sup>21</sup>

- 5.31 The National Children's and Youth Law Centre also notes the disparate impact of mandatory detention laws on Indigenous people:

While there are few reliable estimates of how many people have been gaoled under mandatory sentencing laws since they took effect in mid-1997, those Territorians familiar with the effects of the regime say it runs into the hundreds. The majority of those sentenced have been young, Aboriginal men.<sup>22</sup>

- 5.32 Indigenous women have also been disproportionately affected by mandatory sentencing laws. The Australian Women Lawyer's Association has estimated, based on figures from the Northern Territory Correctional Services Department, that there was a 223% increase in the number of Indigenous women incarcerated in the first year of operation of the legislation. As of 30 June 1999, Indigenous women made up 91% of all women prisoners – an increase on the figure in previous years.<sup>23</sup>

- 5.33 The offences targeted for mandatory sentencing are more commonly committed by Indigenous offenders than non-Indigenous offenders. In the Northern Territory, the targeted offences are: theft, criminal damage, unlawful entry to buildings, unlawful use of a vessel, motor vehicle, caravan or trailer (whether driver or passenger), receiving stolen goods, receiving after change of ownership, taking reward for the recovery of property obtained by criminal means, assault with intent to steal, and robbery (armed or unarmed). Obtaining goods via fraud, and shoplifting, are excluded from this list. The arbitrariness of the distinction between property offences and other types of theft, the latter not being subjected to mandatory sentencing, is demonstrated by the following example. Whereas the theft of petrol from a bowser will attract a mandatory sentence, the theft of a tankful of petrol through the use of a fraudulent credit card does not.<sup>24</sup> Indigenous peoples do not commonly commit the latter type of 'white collar' crimes.

- 5.34 On this basis, the WA and NT mandatory sentencing regimes indirectly discriminate against Indigenous peoples on the basis of race. Indirect

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<sup>20</sup> Stokes, C, *Three strikes and you're in: Mandatory minimum sentences for repeat home burglars in Western Australia*, Unpublished Honours thesis, University of Western Australia, 1998.

<sup>21</sup> Morgan, N, 'Capturing crims or capturing votes? The aims and effects of mandatories' (1999) 22(1)*University of New South Wales Law Journal* 267, p272.

<sup>22</sup> National Children's and Youth Law Centre, 'Mandatory Sentencing Continues to Disgust', *Rights Now*, July 1999.

<sup>23</sup> This is based on unofficial Department of Correctional Services (NT) figures for the 1998-99 financial year. In numerical terms there were 43 Indigenous women imprisoned in the 1995-96 financial year, increasing to 225 in 1997-98 and 276 in the 1998-99 financial year: Australian Women Lawyer's Association, *Submission to Senate Legal and Constitutional Legislation Committee inquiry into mandatory detention laws*, October 1999

<sup>24</sup> Martin, G, seminar on Mandatory Sentencing, at Indigenous Human Rights Conference, Byron Bay, February 2000.

discrimination is prohibited under articles 2(1) and 26 of the Covenant. In General Comment 18, at paragraph 7, the HRC has stated:

‘discrimination’ ... should be understood to imply any distinction ... based on any ground ... which has the *purpose or effect* of nullifying and impairing the recognition enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (emphasis added).

5.35 CERD has confirmed that CERD prohibits indirect discrimination on the basis of race in General Recommendation 14 (1993):

¶ 2 ... In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

5.36 Indeed, in its recent Concluding Observations on Australia, CERD stated the following at paragraph 16 with regard to mandatory sentencing:

The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field.<sup>25</sup>

### **Alternatives to Mandatory Sentencing<sup>26</sup>**

5.37 Mandatory detention provisions were introduced as measures to combat perceived law and order problems in the Northern Territory and Western Australia. It is contended that alternative means, which are compatible with Australia's ICCPR obligations, are more suitable for combating crime.

5.38 The most effective anti-crime programs are the ones that address poverty, homelessness, discrimination, child abuse and neglect, family breakdown, exclusion from education and other problems. Programs that provide support for people at risk of offending are the most successful in preventing crime. Early intervention and social support programs are essential as a means of protecting against later offending. They are relatively inexpensive and have major long term benefits in terms of children's physical and social development. Intervention and welfare programs are far less effective once young people have reached their late teens and are already in a lifestyle of offending. Such provisions are compatible with and are even required by CROC and article 24 of the ICCPR.

5.39 Diversionary programs are those that, where appropriate, keep offenders out of the formal court system. They include mechanisms such as cautions and

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<sup>25</sup> CERD/C/56/Misc.42/Rev.3, 14 March 2000.

<sup>26</sup> Social Justice Report 199, pp155-168.

family conferencing. These programs aim to avoid trapping young people with a previously good record in a pattern of offending behaviour.

- 5.40 Finally, non-custodial sentencing options should be available, such as probationary orders, community service orders, treatment programs (for persons with psychological problems or drug/alcohol dependencies), and fines.

## Article 50

- 5.41 The Commonwealth government has plenary constitutional power under section 122 of the Commonwealth Constitution with regard to the Northern Territory. Under section 51(xxix) of the Constitution, the external affairs power, the Commonwealth has undoubted power to implement its international treaty obligations, including the ICCPR. Accordingly, the federal government has power to override mandatory sentencing laws in Western Australia and the Northern Territory.

- 5.42 Australia's failure to protect human rights in areas within state or territory jurisdiction was cited by CERD as a cause for concern in its Concluding Comments on Australia in 1994. The Committee expressed its concern that:

Although the Commonwealth government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of the states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws.<sup>27</sup>

- 5.43 As a consequence of this, and in relation to the treatment of Indigenous Australians, the Committee expressed the view that:

The Commonwealth Government should undertake appropriate measures to ensure the harmonious application of the provisions of the Convention at the federal and state and territory levels.<sup>28</sup>

- 5.44 The Committee on the Elimination of Racial Discrimination repeated these concerns in its concluding observations on Australia of March 2000:

The Committee expresses concern and reiterates its recommendation that the Commonwealth Government undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.<sup>29</sup>

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<sup>27</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 April 1994, UN Doc A/49/18, para 542.

<sup>28</sup> *ibid.*, para 547.

<sup>29</sup> Un Doc: CERD/C/56/Misc.42/Rev.3, 24 March 2000, paragraph 7.

- 5.45 In 1999, a private members bill (*Human Rights (Mandatory sentencing of Juvenile Offenders) Bill 1999*) was introduced to the Australian Senate (the upper house of the federal Parliament). The bill sought to override mandatory sentencing laws in relation to juvenile offenders. The bill passed through the upper house in March 2000. The federal government, which controls the lower house, does not support the bill. The bill has not been considered by the lower house of Parliament, and consequently has not been introduced.
- 5.46 The obligation to ensure consistency with Australia's international obligations lies with the federal government, which is accountable for failures of the states to comply with these obligations.