



MANDATORY SENTENCING AND THE MYTH OF THE FAIR-GO

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As a young indigenous lawyer I know that one of the major issues that has most inflamed my Aboriginal community has been the Mandatory sentencing laws in the Northern Territory and Western Australia. The title of this symposium is *new crimes or new responses*. My paper argues that Aboriginal people and the Australian nation deserve something better than the unjust laws of mandatory sentencing. Mandatory sentencing denies the complexity of the very real community issue that is Indigenous Peoples and Crime. That community issue requires a new response or new direction beyond that of the simplistic theoretical solution that Mandatory sentencing offers, which is in a sense just giving up. Mandatory sentencing is a populist response to sentencing issues, taken from the United States. However unlike other states of the world who advocate the practice, Australia is a country that places great emphasis upon nurturing national constructs that play into notions of fairness and justice. Practices like Mandatory sentencing appear to consolidate an argument that these notions are just mythology.

As a lawyer trained in the common law of Australia and with a Bachelor of Arts degree in Australian Studies, I have studied and understand how our legal system operates and the underlying principles of our democratic political system and our national mythologies. They are all inextricably linked. I know what pride Australia places upon concepts like the independence of the judiciary, separation of powers and the rule of law and how in this, the year of Centenary of Federation we trumpet those assets of the Australian legal/political system that has made us the stable civil democracy we are today.

After graduation I took a Fellowship at the United Nations Office of the High Commissioner for Human Rights. I think Mandatory sentencing has clearly demonstrated the hypocrisy in the triumphal gloating that has occurred in this year of the Centenary of Federation and it clearly demonstrates that if we do a very good job of undermining these principles ourselves.

As a young indigenous lawyer I am acutely aware of the derogation from these theoretical principles that I studied at University when it comes to Aboriginal Australia and the laws of Mandatory sentencing. And I have no doubts that educated or not educated the Aboriginal community itself is acutely aware that Australia is prepared to derogate from these principles when it comes to them, while triumphantly gloating to the rest of the world about the principles underlying our social and political civility and stability.

In considering new responses to Indigenous Peoples and crime it is absolutely essential to keep in mind that one of the problems when it comes to Crime and Aboriginal people is the ever present unspoken language of race that permeates every aspect of Australian life. The textbooks of Australian history clearly illustrate the continual presence of racial discrimination in our society. From the frontier wars with indigenous Australians, the White Australia Policy, the Aboriginal referendum through to native title debates, treaty discussions, immigration and refugee debates today it is evident that racial discrimination permeates every aspect of contemporary Aust life. It does ever more so for those groups who aren't white and those groups who have to deal with the absolutely complex "on the ground" issues emanating from breakdown or dysfunction of a social group and the resulting civil aberrance. One of the main groups who deal with this dysfunction are our law enforcement agents, the police, and the judges, (not forgetting victims of crime).

One of the main arguments in favour of Mandatory Sentencing is that the laws are not discriminatory but that they apply equally to everybody. But in fact the laws are in essence designed to target those property offences that are committed predominantly by individuals who come from a low socio-economic background.

And what sector of the low socio-economic in Northern Territory and Western Australia predominantly commit these offences? Indigenous Australians. Therefore in the Northern Territory and Western Australia we see a racially unbalanced impact of the law upon indigenous youth. And while it is argued that the laws are not aimed at Indigenous people, we know that it is because we have lived with that unspoken yet ever present underlying racial language. Aboriginal people and those who work closest with their crime and civil aberrance like the police, know that this language exists. And while it is commonly argued that it is for the protection of the victims of crime and for the community to believe that sentencing is harsher and things are being seen to be done, there has to be a balance between recognising and protecting the rights of the victim and the rights of the perpetrator. By diluting the principles of sentencing to cater to sensationalism and hysteria over the ubiquitous crime and punishment electoral mantra you are also diluting aspects legal system such as judicial independence or the separation of powers that are supposed to be the strength of the nation.

Two weeks ago as a part of my Master of Laws I did a subject on International Criminal Law with Professor Michael Scharf from the University of New England and he made the comment that he felt judges in the US no longer believed in rehabilitation. I thought that was the saddest thing I had ever heard in my life.

If the answer to solving complex social issues of which crime is a most overt indicator is to “cop-out” with electorally popular policies and give up on principles of sentencing like rehabilitation, and if Australia continues in its apparent trend of adopting American practices, then where is Australia headed? It is surely not a new direction that is consistent with the fundamental principles of fairness that underpin the civility and empathy of a supposedly intelligent democracy.

The continued laws of Mandatory sentencing are even harder to take in this year of Centenary. We are a nation that is constantly at pains to assert to itself and to the rest of the world as a people embodying those ultra mythical constructs of egalitarianism and the fair go. From the republican referendum to the UN peacekeeping force in East Timor to the Olympic Games and now the Centenary of Federation, we have been very good in painting ourselves as a fair and just nation that abides by its Constitution and upholds the rule of law. The mythology that is enlisted is extremely powerful and symbolic and that’s why an analogy of this mythology with the reality of being Aboriginal in the Northern Territory and Western Australia is important.

It is interesting to analyse some of these principles like the rule of law which is one of those ubiquitous principles that is often quoted and bandied around in the public arena for populist sensation, similar to the word “un-Australian” or “Mainstream Ostraya”. I would confidently argue that many Australians don’t understand what the rule of law means even though it is a very important legal principle upon which all just societies must operate. Contrary to popular opinion it does not mean “law and order”. It represents a list of principles that equate to justice and adherence and deliverance of justice to all people. That is that government, all organisations (including corporations) and individuals are subject to the same laws.

The rule of law represents principles such as judicial independence, natural justice and procedural fairness. It represents an honest and impartial enforcement of the law and it is also supposed to represent the principle that for the rule of law to work there must be Enlightened public opinion. It is popular for our leaders to employ concepts enshrined in the rule of law as one of the reasons for our successful civil history to date. But one of the principles of the rule of law is that there should be an enlightened public opinion that favours the application of these principles. That is to say an enlightened public opinion NOT JUST public opinion.

We often hear about other doctrines like the separation of powers or the Westminster system with the constitutional monarchy and our reliance on the common law and democracy to protect individual rights. I don't have to explain to any of you what the Separation of Powers means as it is a fundamental aspect of the Australian system. It asserts that the 3 arms of government must be separate and mutually exclusive. The executive, the legislative and judicial arms must be separate. Under Mandatory Sentencing the divisions of this doctrine are severely blurred and it is the legislature that is not only making the law but also exercising powers of the judiciary. Judicial independence for example is considered a safeguard of individual liberty and a fundamental attribute of a constitutional government. And yet under Mandatory Sentencing the judiciary is NOT free from the control or interference of the executive or legislation. Judicial discretion: Under Mandatory Sentencing laws a judge does not have the discretion to review all the facts and circumstance of a crime. The legislature effectively binds the discretion of the judiciary. And perhaps even worse for young indigenous Australians with an undeniable lack of trust in the police, it delivers judicial discretion further down the structure of the Administration of justice and essentially places greater power in the hands of law enforcement, the police.

Another interesting issue is that manner in which the republican debate was conducted. Australians for a Constitutional monarchy swore black and blue during the republic debate that any derogation or amendment of the Constitution would adversely affect the principles enshrined in the Constitution and would result in the nations stable systems being subject to the sway of undemocratic and extremist politics. Does Mandatory Sentencing not derogate from the Constitution as it is written? We chose to intervene in the Northern Territory with regards to Euthanasia laws. They believed their moral and philosophical objections and the public interest outweighed the constitutional importance of state and territory sovereignty. When one of our boys dies in detention, when we call on the Commonwealth government to intervene, the perception was that they had no philosophical objections whatsoever to the Mandatory Sentencing of Aboriginal youth. While personally I am an advocate of states rights you can see the perception in the community when the Commonwealth said that it would not impinge on the sovereign rights of states and territories. The picture to the community was that it will intervene when it comes to Euthanasia but not when it comes to laws that discriminate against indigenous Australians and offences in which sentencing is disproportionate to the offence. This is the language of race that I am saying the community picks up on.

When it comes to principles of equality in Australia much media attention is given to One Nation who say that equality means that all Australians are entitled to equal rights; the same rights as each other's and not entitled to special measures. We know that the government agrees with this theory. Yet the discriminatory measures that target and affect in essence indigenous communities of Northern Territory and Western Australia takes away aspects of fundamental rights before the law that all Australians are entitled to.

At the Centenary of Federation, Australia is the type of nation that says to its wealthy young kids from Sydney schools like Trinity Grammar, the Court shall take into consideration the circumstances surrounding your crime, intimidation and sexual abuse of your peers in the nation of GPS privileged white tradition but if you are a poor, black kid from the Territory and you come from a low socio-economic dysfunctional environment, we don't care about the facts and circumstances surrounding the commission of the offence, don't bother defending yourself, three strikes and your out. Yes, they commit these crimes and we have victims of crime, but so much effort is seen to be placed in pacifying and protecting the rights of citizens that on a public arena we no longer want to deal with or address the social problems concerning indigenous Australia or even considering the elements of what sentencing is supposed to achieve. How often do you hear a leader articulate the principles of sentencing in a 20 second grab?

Surely the greatest deterrent to continued advocacy of Mandatory Sentencing laws among the wider public must be education. If a nation really doesn't understand fundamental ideals or principles underpinning their democracy you can't expect them to understand them or critically analyse the implications of emotive and extreme suggestions for political policy. But in a civil society you should expect your leaders to. I think Sir Gerard Brennan had it right when he says that, as a nation loses trust in the calibre of our leaders they should not be surprised if the people seek a bill of rights to protect themselves and their society against the excesses which threaten the civilised character of the fair go.

In finishing I will say this: Mandatory Sentencing breaches and ignores the importance of international human rights standards as evidenced by numerous comments of the United Nations human rights treaty bodies. But UN opinions don't appeal to the Australia politic or community so we have to appeal to the fact that it breaches standards that afforded to all other Australians. The sovereignty of states and territories in Australia must not be greater than the rights of indigenous peoples to a fair trial, rights to non-discriminatory laws and the right to be treated like all Australians.

When a boy takes his life while in detention, as a direct result of these laws, then that should have been one life too many. In the head of that little boy, the hopelessness and desperate vision of the future, in his mind, was all we, as a first world wealthy nation could offer him. If you don't teach the people the underlying principles behind justice and the law and the principles that created this supposedly fair and just democratic nation, then it becomes harder to enforce the law and make good law. It allows law to be made that infringes everything that this nation of Australia in the year of Centenary asserts to represent its soul: fairness and justice and equality.

In concluding, I say this to the boys from Trinity Grammar: "There but for the grace of God go you". And to those who trumpet and celebrate the civility and fairness of this nation while making it less civil then it has ever been I take this quote from Victor Hugo: "Teach the ignorant as much as you can; society is culpable in not providing instruction for all but it must answer for the night which it produces. If the soul is left in darkness, sins will be committed. The guilty one is not he who commits the sin, but he who causes the darkness".