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## **The Impact of Mandatory Sentencing on Indigenous Offenders**

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The Northern Territory has an imprisonment rate of 646/100,000 population, which is four times the national rate of 171/100,000. Indigenous people constitute 82% of our prison population. For the year 2007/2008 our prisons were operating at 103% capacity. The following year, 2008/2008, this had risen to 120% capacity. This paper examines mandatory sentencing in the Northern Territory over the period 2008/2009, looking at its impact on prison population and in particular on indigenous offenders.

Historically, the Northern Territory is well-known when it comes to legislation for mandatory sentencing. In 1997 the notorious regime of mandatory sentencing for property offences was introduced in the Northern Territory. Many of you will be aware of that regime. It was widely condemned during the four-and-a-half years of its operation. Although the legislation was repealed when the Labor government was elected in 2001, the Northern Territory retains, - anecdotally - a reputation as the leading proponent of mandatory sentencing, despite the repeal of that legislation in 2001.

The impact of the property offences legislation was that it accounted for up to fifteen percent of the adult prison population at the time of its operation. It was a significant contributor to prison population during that time. Also, as far as indigenous representation was concerned, an indigenous person was 8.6 times more likely to be imprisoned than a non-indigenous person. Finally, there was the significant impact of the legislation on judicial discretion. After the legislation was repealed in 2001 it became apparent that the proportion of sentencing occasions resulting in imprisonment was 50% higher during the period that the legislation was in operation than in the period immediately after its repeal.

So, what has prompted an examination of mandatory sentencing now? In December 2008, there was an Amendment to section 78 B(a) of the Sentencing Act (NT), that came into operation on the 10 December 2008. It introduced a sentencing regime of mandatory imprisonment for first-time assault offenders in situations where the injury interferes with the victim's health or results in 'serious harm', which is the new name in the Territory for what was 'grievous harm'. This Amendment prompted some revival amongst the legal profession of the criticisms of mandatory sentencing. Those

criticisms are well-known. At a previous sentencing conference, (Canberra February 2008) Justice DeBelle of the South Australian Supreme Court delivered a paper on this very point. Given that in the Northern Territory acts intended to cause injury account for 17% of the matters before magistrates courts compared to 7.6% nationally, there were a number of concerns raised at the time the legislation was passed.

These concerns were: first of all, what effect the legislation would have on the prison population, and secondly what impact it would have on indigenous offenders in particular, given the high rate of indigenous imprisonment in the Territory, or the high numbers of indigenous people in prison in the Territory?

This paper examines those questions, first in relation to the 2008 Amendment to the *Sentencing Act*, and also looks at mandatory imprisonment provisions in the Northern Territory more generally. This allowed the overall effect of mandatory sentencing on prisoner numbers and the representation of indigenous offenders in the criminal justice system to be assessed, and to compare the effect of the current mandatory sentencing regime with the 1997 property offence mandatory sentencing regime.

There are three main areas to which mandatory sentences of imprisonment apply today. First, in 1999 a wide range of violence offences and sexual offences became subject to a mandatory sentencing regime; these were an extension of the 1997 property offences regime. Those offences are scheduled in the *Sentencing Act*. For the violence offences the mandatory scheme was in effect up until 2008. However, it was applicable only in the case of a second offence. It did not apply to first offenders except in cases of sexual offence. Like the property offences regime it prescribes the type of sentence- mandatory imprisonment - however, unlike the property offences regime no minimum sentences are prescribed. As long as an actual sentence of imprisonment is imposed then that satisfies the legislation, which in appropriate circumstances allows courts to impose a sentence of 'the rising of the court'.

The legislation was amended on 10 December 2008. Section 78 B(a) was amended and the effect of the Amendment was that for certain violence offences – the more common types of violence offence (aggravated assaults causing harm for example) the regime will apply for first-time offenders.

The second category where mandatory sentencing applies is of course murder, which carries a mandatory sentence of life imprisonment. Until 2004 there was no possibility of parole in the Northern Territory. Generally speaking there is for murder: a standard minimum non-parole period of 20 years imprisonment, with 25 years in circumstances of aggravation. There is a provision that a lower-than-20-year period can be imposed in exceptional circumstances but to date there have been, as far as I am aware, no cases in which exceptional circumstances have been found.

The third category of offences, which we have included in offences that carry a mandatory sentence, is, in fact two groups of offences where there is actually a presumptive minimum sentence. First section 37 of our *Misuse of Drugs Act* provides that a 28-day minimum sentence is to be imposed for a number of serious offences, however it is presumptive because it contains a proviso that the court does not have to impose that sentence if, having regard to the particular circumstances of the offence or the offender, the court is of the opinion the penalty should not be imposed.

The final category falls under section 121 of the *Domestic and Family Violence Act*, which has a presumptive minimum sentence of seven days imprisonment for a subsequent breach of a domestic violence order. However, that provision does not apply if no harm is caused or if the court is satisfied that it is not appropriate in the circumstances to record a conviction and sentence. The provision of the *Domestic and Family Violence Act* is of considerable interest because it came into operation on 1 July 2008. Under the previous legislation, which was in force until that date, there was no proviso. There was just the seven days imprisonment required.

The statistics show the magnitude of the implications of some of this legislation, the impact on indigenous offending, and the impact on our prison population.

The first offence for consideration is repeat conviction for violent offending. What is clear is that subsequent conviction for a violent offence would lead to a term of imprisonment, no minimum stated. In the first three years, we see that the proportion was around at 570-600/100,000 for indigenous offenders and around 25/100,000 or so for non-indigenous offenders. In 2008/2009 there was a big increase. Further, of those sentenced to a term of imprisonment in the last year 96% were indigenous people.

In the Northern Territory for every indigenous adult male we have three non-indigenous adult males; an indigenous adult male is 68 more times likely to come into contact with, or be convicted by this legislation than their non-indigenous counterpart. The sentencing outcomes over the last four years show that over 90% of those convicted were sentenced to a term of imprisonment. In the last year, of the indigenous offenders, 96% were sentenced to a term of imprisonment and of the non-indigenous offenders, 94% were sentenced to a term of imprisonment. There was very little discernible difference in terms of the sentencing outcomes once there was a finding of guilt for this type of offence.

The next offence of interest is the first-time conviction for a serious violent offence. In the first year of operation of the Amendment of 10 December 2008, there were 286 offenders who were sentenced to a term of actual imprisonment and of those, 91%, or 244, were indigenous offenders. Again, an indigenous adult is 20 times more likely to be convicted under this legislation than their non-indigenous counterpart. In terms of sentencing outcomes, for the four years before the Amendment came in, exactly 61% of the offenders were sentenced to a term of imprisonment.

There was considerable concern with the major impact this legislation was to have on the NT prison population and particularly on indigenous people being incarcerated. In fact, in the first year of the operation of this legislation the average has increased from 61% to 65%, an additional 4% which equates to 17 additional prisoners. So, in the first year of operation this legislation, which was causing great fear and trepidation, in fact resulted in 17 additional offenders going to prison.

For a first conviction for sexual assault in the Northern Territory you will go to prison. The level of people being sentenced to a term of imprisonment in the Northern Territory is averaging 18 per annum for the non-indigenous community and, with some fluctuation, is around about 45 per annum for the indigenous community. An indigenous adult male is eight times more likely to be convicted under this legislation

than their non-indigenous counterpart. As to sentencing, around 91% of persons convicted will end up in prison under this legislation. In the last year of operation, 87% of indigenous offenders were imprisoned, and 90% of non-indigenous offenders were given a custodial sentence. Again, there is very little difference in the sentencing outcome once you are convicted of this particular type of offence.

With breach of domestic violence restraining orders, (recalling that the Amendment came in on 1 July 2008) – the years preceding that saw huge increases in the number of indigenous people being sentenced to prison for this offence, with non-indigenous people averaging about 24: a huge impact on the indigenous offenders. The legislation came in and effectively provided that there has to be harm to the victim before sentence to a term of imprisonment can be imposed. This was a major change, resulting in a significant reduction in the numbers actually imprisoned. It should also be remembered that an indigenous adult is 43 times more likely to be convicted under this legislation than their non-indigenous counterpart, again a significant over-representation.

In relation to sentencing outcomes, before the legislation on average 90% of people convicted of a subsequent breach were imprisoned. In the first year of operation of this legislation this has dropped from over 90% to 63% going to prison. For indigenous people the sentencing outcomes prior to the Amendment showed that they were very more likely to end up with a term of imprisonment for a subsequent breach of a DVO. With the introduction of the Amendment it has –very marginally turned the other way. The most important aspect of all this is that in the previous year 96% of indigenous offenders ended up in prison and now 63% ended up in prison.

Murder and Drug offences represent a very small proportion of offences. In 2008/2009 there were four convictions for murder in the Northern Territory which resulted in the mandatory minimum life sentence: they were all indigenous offenders.

For drug convictions, there were four offenders who received the presumptive 28 days and they were all indigenous offenders. What we see now is that the actual offences to which a mandatory minimum sentence applies, whether it is presumptive or not, is this category here [refers to slide presentation] and it sums to 3.65%. 3.65% of our prison population are in there because they have been sentenced to some form of mandatory minimum term of imprisonment, and of that 3.65% the majority are those convicted of murder. Those people convicted of an offence attracting a mandatory minimum sentence are, in fact, a very small proportion of our prison population. It is not significant. What is much more significant is the fact that 36% of our prison population on any one day are in for an assault. It does not carry a mandatory minimum sentence but of that 36% who are in for an assault 34% are indigenous people. If we look at sexual assaults, 13% in total of our prison population on any one day are in for a sexual assault. Nine percent are indigenous people. 13% of our prison population on any one day are in for a driving offence.

The contention is that whilst mandatory sentencing may be some ogre, a cloud over the Northern Territory, the reality is that in terms of its effect on the prison population it is not significant. There are much more significant issues out there in other offending categories.

It is clear that indigenous adults are much more likely to be convicted of violence offences, sexual assault, and subsequent breach of DVO, than their non-indigenous counterparts and the statistics are quite alarming in that regard. However, if convicted, there is little discernible difference in the likelihood of an indigenous or non-indigenous person being sentenced to imprisonment. Once convicted, the outcomes are similar. Since the introduction of the *Domestic and Family Violence Act* there has been a significant reduction in the imprisonment rate for the subsequent breach of DV; the new rebuttable presumption suggests that a considerable percentage of offenders before the legislation came into operation were imprisoned when in fact no harm had been caused by the breach of the domestic violence order.

The modest increase in the percentage for first-time offenders receiving a sentence of actual imprisonment, since the December 2008 amendments to the Sentencing Act was surprising. It was expected that it would be much higher than the 65% which the statistics reveal.

Finally, and this perhaps on a slightly positive note, despite the high rate of imprisonment overall in the Northern Territory the NT indigenous imprisonment rate is 2,194/100,000 of the relevant population which works out at 7.5%, and is in fact less than the national rate of indigenous incarceration. Even though the Northern Territory has a lot of indigenous people in prison the imprisonment rate is actually lower than the national average.

Thank you.