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MANDATORY SENTENCING AND THE MENTAL HEALTH COURT

LAW REFORM SUBMISSION AGAINST THE CRIMINALISATION OF MENTAL IMPAIRMENT

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SUBMISSION

BACKGROUND

This is a submission from the Mental Health Law Centre (the Centre) about the introduction of mandatory minimum sentencing laws for assaults on public officers on 22 September 2009[1] (Mandatory Sentencing) and how these laws will adversely impact on the efficacy and success of the new Mental Health Court.

The Centre is an independent specialist community legal centre, which specialises in providing free legal advice and representation[2] to people with a mental illness when their legal issue is causally related to their mental illness, but it is always subject to available scarce resources.

Accordingly, the Centre is uniquely placed to observe the impacts of the criminal justice system on people with a serious mental illness who are not culpable for the offences and crimes they commit.

The minimum Mandatory Sentencing provisions introduced by the present government require the Court to sentence the adult[3] offender to a term of imprisonment of at least six[4], nine[5] or twelve[6] months in prescribed circumstances.

A Court cannot suspend the term of imprisonment if the offence of serious assault or unlawfully doing grievous bodily harm is committed in prescribed circumstances.[7]

Prescribed circumstances are that:

a) the victim is a public officer who is performing a function of his office or employment[8];

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[1] As per the Criminal Code Amendment Bill 2008
[2] Articles 12,13 "The Convention on the Rights of Persons with Disabilities" (CRPD) require that persons with a disability have support to exercise their legal capacity; Article37 of "The Convention on the Rights of the Child" (CROC) gives children the right to legal assistance if they are deprived of their liberty
[3] See below the Mandatory Sentencing provisions for 16 - 18 year old offenders
[4] The *Criminal Code Act Compilation Act 1913* s318(4)(b)
[5] The *Criminal Code Act Compilation Act 1913* s318(4)(a)
[6] The *Criminal Code Act Compilation Act 1913* s297
[7] The *Criminal Code Act Compilation Act 1913* s297(5)
[8] The *Criminal Code Act Compilation Act 1913* s297(4)(a)

b) the offence against the public officer is committed against that person because he is the public officer[9];

c) the public officer is a police officer, a prison officer or a *Public Transport Authority Act 2003* Security Officer[10]; or

d) the victim is an ambulance officer[11], an officer contracted by the Court Security and Custodial Services Authority[12] or an officer contracted by the Prison Authority[13].

The Centre opposes the minimum Mandatory Sentencing laws because of the adverse effects on non-culpable accused with a mental illness or impairment by the criminal justice system; and in particular that there is no exception for people with a serious but treatable mental illness, which is causally related to their offending.

The adverse impact of the minimum Mandatory Sentencing provisions is exacerbated by the extreme nature of the Custody Order under the *Criminal Law (Mentally Impaired Accused) Act 1996*, which inhibits people who were of an unsound mind at the time of more minor offences from pleading the section 27 unsound mind defence. The lack of a "declared place" in Western Australia means mentally impaired accused persons made the subject of a Custody Order will be detained indefinitely and it is likely that they will be held in a prison.

> ***It cannot be that, in an enlightened wealthy western society, laws such as these are acceptable to those who understand their impacts on vulnerable non-culpable mentally impaired accused people***.

ADVERSE IMPACTS OF MANDATORY SENTENCING

a) Positive Discrimination for Mental Impairment in Criminal Justice System

While a criminal justice system does not and perhaps cannot fairly manage mentally ill or impaired accused persons, there has been

[9] The *Criminal Code Act Compilation Act 1913* s297(4)(b)
[10] The *Criminal Code Act Compilation Act 1913* s297(8)
[11] The *Criminal Code Act Compilation Act 1913* s297(4)(d)(i)
[12] The *Criminal Code Act Compilation Act 1913* s297(4)(f)
[13] The *Criminal Code Act Compilation Act 1913* s297(4)(g)

historical recognition of the difference between the culpable accused and the non-culpable accused. This has been facilitated through statutory recognition of mental illness as a mitigating factor in sentencing, and by the adoption of special legislation for mentally impaired accused persons. Minimum Mandatory Sentencing laws adversely reduce and/or negate these very important statutory distinctions. Mandatory Sentencing is a blunt instrument, and it discriminates unfairly and wrongly against children and adults with a mental illness and/or mental impairment.

Case Study 1[14]

A 22 year old woman faced a mandatory six month jail term for allegedly assaulting an ambulance officer. The woman suffered post-traumatic stress disorder, severe anxiety and depression. She had recently been admitted to the psychiatric ward at Sir Charles Gairdner Hospital after attempting suicide. Before being arrested for the assault, the woman had been drinking alcohol. She was hit by a motor vehicle and the police and ambulance were called to attend. She assaulted a paramedic who was left with a cut nose, but returned to work the following day. The woman was charged under the new Mandatory Sentencing laws for serious assaults against public officers.

b) Impact of Mandatory Sentencing on People with Mental Illness

Research studies in Australia and internationally have reported that people with an intellectual disability are over-represented in prison populations.[15] Minimum Mandatory Sentencing laws exacerbate the problems, which people with serious intellectual and mental disabilities already face by placing them in the criminal justice system[16], and will have the tendency to increase their over-representation in our prisons.

Mentally impaired accused persons are adversely affected by minimum Mandatory Sentencing laws in a variety of ways, some of which are described below:

[14] *Patient puts Mandatory Sentencing to first test,* The West Australian, 13 October 2009
[15] NSW Law Reform Commission Report 80 (1996) - People with an Intellectual Disability and the Criminal Justice System at 2.5
http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80CHP2
[16] Australian Human Rights Commission

c) Removal of protective legal framework established for benefit of people with mental illness/impairment

The mental illness or impairment of a person convicted of an offence has always been a relevant factor in sentencing, in a general mitigating sense and a causal mitigating sense.

When mental illness or impairment is causally connected to an offence, assuming the charges are to be heard in the Magistrates Court, a disposition of the charges against someone who is mentally ill will follow a section 27 unsound mind defence.

Acquittal following a successful section 27 defence can result for example, in a non-custodial program requirement to obey a psychiatrist's directions. The Community Corrections Officer cannot do anything without the psychiatrist concurring, so the effect of the order is care and/or treatment, rather than punishment. In that way, a person who is mentally ill or impaired, and is on a program requirement, experiences a different response (compared to culpable offenders) from the criminal justice system because illness and disposition are meshed together, as a result of a demonstrated lack of culpability (established through expert evidence to the Court).

Minimum Mandatory Sentencing laws remove the complete discretion open to a Judge or Magistrate to consider the mental illness or impairment of an accused following a plea of guilty[17]. Ordinarily, Judges and Magistrates would take the relationship between culpability and mental illness or impairment into account in considering how an offender should be sentenced. The effect of minimum Mandatory Sentencing laws is that a legal framework designed to take into account the mental illness or impairment and culpability of accused persons is removed or reduced.

This framework includes:

1. the trust we rightly place in judicial officers to arrive at the best outcome and sentence in all the circumstances; and

[17] Although mitigating factors may influence the imposition of a sentence greater than the minimum sentence

2. independence of the judiciary, because an integral part of achieving that best outcome includes the separation of powers established under our Constitution.

The Disability Discrimination Legal Service, when giving evidence to the Senate Inquiry into the *Human Rights (Mandatory Sentences of Property Offences) Bill 2000* (WA), noted that minimum mandatory sentences exacerbate difficulties faced by people with a disability engaged in the justice system by making a person's disability irrelevant to the Court.[18] This is the effect of Western Australia's minimum Mandatory Sentencing laws.

While it might be argued that such a person should avail themselves of a section 27 unsound mind defence, the risk of a Custody Order, even if remote, and all the very serious consequences that being subject to a Custody Order in Western Australia brings (possibility of indefinite detention at the Governor's pleasure, in a prison, without appeal rights – other than against the initial making of the Custody Order - and without the right to a legal representative, and for a longer period than a term of imprisonment following a guilty verdict, and without PBS and Medicare entitlements), is a risk that a mentally ill or impaired accused person may not be willing to take, or simply may not understand, especially when they are unrepresented.

Furthermore, a mentally impaired accused person may have been seriously affected by the symptoms of their mental illness but still not satisfy the very strict criteria required to satisfy the section 27 unsound mind defence. The onus of proof for the section 27 defence rests on the mentally impaired accused person who may not have the resources to obtain the relevant opinions to substantiate their illness to the extent required by the Court, or find a lawyer willing to act given the lack of power for a court to order costs against the Crown even when a section 27 unsound mind defence is successfully pleaded.

This state of affairs in turn disguises and hides from any statistics the number of mentally impaired accused persons who appear and are

[18] Ibid.

sentenced in our Courts because some do not avail themselves of the section 27 defence for fear of being made subject to a Custody Order.

The hurdles that the mentally impaired accused person faces in mounting a section 27 unsound mind defence include:

1. There is a presumption of sanity, even if the mentally impaired accused person is an involuntary patient detained in hospital at the time of the offence/crime;
2. The mentally impaired accused person is required to rebut the presumption of sanity on the balance of probabilities;
3. The requirements to establish a section 27 defence are rightly onerous (although arguably should be less for disorderly conduct on the Perth train station than for murder);
4. Expert reports are costly and beyond the reach of most mentally impaired accused persons who are the clients of the Centre;
5. The costs of expert reports are met by the Legal Aid Commission when the mentally impaired accused person receives a grant of Legal Aid;
6. If Legal Aid is refused, the Centre will act (resources permitting) but it does not have funds for expert reports, unless it manages to obtain a disbursements only grant from Legal Aid (rare);
7. The mentally impaired accused person's treating psychiatrists in the public mental health system may be unwilling to write a section 27 defence reports and be even more unwilling to appear in Court;
8. (If they do not agree to appear and are subpoenaed to appear in Court, they may be completely inexperienced in the Court process and may make poor or disgruntled witnesses.)
9. The mentally impaired accused person's treating psychiatrist may be part of the mental health team, a member of whom is the victim of the assault the subject of the assault charge. This leads to a conflict for the psychiatrist, which may leave the mentally impaired accused person without an independent witness as to their state of mind;

10. Some charges may be seen as too minor for the expenditure on evidence from scarce resources to establish successfully a section 27 defence. Thus, a criminal record begins, fines accrue and criminal charges for breach of Court orders mount. By the time the mentally impaired accused person commits a serious offence that warrants the effort and expenditure of the section 27 defence, he or she may by then have an extensive but unwarranted criminal record to overcome; and
11. The evidence requirements under a section 27 defence, for example disorderly conduct at the Perth Train Station, are not distinguished from that required for a section 27 defence against a murder charge. This leads to guilty pleas to many summary offences because the cost/benefit disparity of establishing the unsound mind defence is too high, and thus we criminalise mentally impaired behaviour.

d) The deterrence argument does not hold for persons with mental illness or impairment

A common argument for the introduction of minimum Mandatory Sentencing is that it sends a message to the community that assaults on public officers are unacceptable.

Deterrence is unlikely to be relevant or applicable to a person afflicted with a serious mental illness or impairment at the time of the actions that led to the charges.[19] A person suffering such symptoms in many cases may have, or have had at the time of the offence, a limited ability to understand the wrongfulness of their actions or the ability to control them. This is particularly so when a person with a mental illness or impairment commits an offence while experiencing psychosis, obsession and/or compulsion.

One client, when well, wrote to us saying that:

> ***"The worst it gets is when I think God is going to hurt me with indescribable pain..."***

[19] The Mandatory Sentencing Debate p 7, September 2001, Law Council of Australia.

Deterrence sentences will not work in these circumstances because people,

> ***"…cannot and don't stop to think about the consequences".***[20]

Another motivation for introducing minimum Mandatory Sentencing schemes appears to be concern about increased crime rates and assaults on public officers.

As happened to one of our clients recently:

Case 2 *Six uniformed officers entered the home of our client, a mentally impaired accused person who was found cowering, scared, in terror and naked in his bath. He defended himself against a misunderstood threat. He was charged with assault in prescribed circumstances after he defended himself against this misunderstood invasion.*

There is significant research to show that rather than acting as a deterrent, the sentencing system accelerates contact with either the juvenile detention system or the adult correctional system, and will in the long run lead to higher, more serious re-offending and ultimately higher crime rates.[21]

The Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations", which is a publication of the Justice Policy Institute, cites Timothy Roche, Natassia Walsh and Jason Ziedenberg in *Maryland's Mandatory Minimum Drug Sentencing Laws: Their Impact on Incarceration, State Resources and Communities of Color* (Washington DC Justice Policy Institute 2007) to say that policy choices, such as the imposition of mandatory minimum sentences, are

[20] Joint Media Statement, 17 August 2009, The Law Society of Western Australia.
[21] "The Mandatory Sentencing Debate" Law Council of Australia 2001, Inquiry into Mandatory Sentencing, p 16

considered a more significant driver of high incarceration rates than crime rates.[22]

On that basis it is arguable that in the long term a policy that produces minimum Mandatory Sentencing laws is ill informed, short sighted and quite completely conflicts significantly with its stated objective.[23]

e) Minimum mandatory sentencing affects the most vulnerable and disadvantaged groups in society

Minimum Mandatory Sentencing laws indirectly discriminate on socio–economic and racial lines because of the nature of the offences, which attract mandatory terms.[24] Morgan (2002)[25] has argued that minimum Mandatory Sentencing laws based on broadly defined offence categories are an inappropriate strategy for addressing what may be welfare related issues, as much as criminal behaviour.

In relation to the Criminal Code Amendment Bill 2008 Second Reading (18 August 2009), the Hon Allison Xamon MP[26] correctly argued in parliament that:

1. Mandatory detention and sentencing have a drastically disproportionate impact on incarceration rates for Indigenous Australians;
2. The laws will result in the increased removal of Aboriginal children from their homes as in many cases they will be sent away to the Rangeview Remand Centre; and
3. The [Mandatory Sentencing] Bill is also contrary to recommendation 92 of the 1991 report of the Royal Commission into Aboriginal Deaths in Custody that called on the States and

[22] Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations: which is a publication by the Justice Policy Institute, page 3; www.justicepolicy.org 1012 14th Street, NW, Suite 400, Washington, DC 20005

[23] *Patient puts Mandatory Sentencing to first test,* The West Australian, 13 October 2009

[24] Glen Cranny, "Mandatory Sentences – Where From, Where to and Why?"(Paper submitted for the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, Queensland, 2 – 6 July 2006) p 9

[25] Morgan, Neil "Capturing Crims or Catching Votes? The Aims and effects of Mandatories (1999) Vol 2291 UNSW Law Journal 267

[26] Member of the Greens Party and Upper House Member of the WA parliament

Territories to ensure that imprisonment was a sanction of last resort.[27]

f) Impact on juvenile offenders

The minimum Mandatory Sentencing provisions require, in respect of juvenile offenders, that the Court must:

1. sentence the juvenile offender to a term of imprisonment of at least three months[28];
2. not suspend the term of imprisonment; and
3. record a conviction against the offender,

when the offence of serious assault or unlawfully doing grievous bodily harm is committed in prescribed circumstances, as outlined above. [29]

A significant number of young people in the justice system have a mental illness.[30]

The [WA] Auditor – General has found there are significant numbers of young people with high levels of offending who have mental health problems. He also found there is no 'structure or process to ensure that mental health and substance abuse problems associated with repeated offending are identified and treated.'[31]

We are deeply concerned about the potential for harm of mentally impaired children who are subjected to minimum Mandatory Sentencing laws, which apply to children between the ages of 16 -18.

The Hon Allison Xamon noted in her Second Reading for the Criminal Law Amendment Bill 2008 that the inclusion of the compulsory jailing of children might be contrary to a number of treaties to which Australia is a

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[27] *Criminal Code Amendment Bill 2008* Second Reading, 18 August 2009.
[28] The *Criminal Code Act Compilation Act 1913* s318,s297
[29] The *Criminal Code Act Compilation Act 1913* s297(5)
[30] April 2011 "Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia" (the 2011 Report) from the WA Commissioner for Children and Young People; Page78, para.7
[31] April 2011 "Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia" (the 2011 Report) from the WA Commissioner for Children and Young People; Page78, para.8.

party, in particular Australia's obligations under the United Nations Convention on the Rights of the Child. In the words of the parliamentary Joint Standing Committee on Treaties, Mandatory Sentencing does not take into account:

1. the child's age;
2. the facts of the current offence;
3. the individual circumstances of the person; or
4. consideration of an appropriate period of time or the application of judicial discretion.

WA Criminal Lawyers Association Vice President Jonathan Davies evinced his concern that the laws apply to children, which put WA in contravention of its obligations under international law.[32]

Similarly, in the Third Reading of The Bill, Hon Phillip Gardiner[33] noted that nations, which ratify the United Nations Convention of the Rights of the Child are bound to it by international law. Australia ratified the Convention on the Rights of a Child on 17 December 1990.

Article 1 of the Convention defines "child" as a person below the age of 18. Article 37 states that no-one is to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly or imprisoned with adults. It appears that the minimum Mandatory Sentencing provisions are in breach of this Convention because they apply to children between the ages of 16 and 18.

Minimum Mandatory Sentence laws restrict the Court's capacity to ensure that punishment is proportionate to the seriousness of the offence and how punishment relates to the rehabilitative options.[34]

The Hon Giz Watson[35] has argued that including children in the Mandatory Sentencing Bill between the ages of 16-18 is inconsistent with the *Young Offenders Act 1994*. This act requires children to be treated

[32] Joint Media Statement, The Law Society of Western Australia, 17 August 2009.
[33] Member of the National Party and MLC WA parliament
[34] Criminal Code Amendment Bill Second Reading, 18 August 2009
[35] Member of the Greens Party and MLC WA parliament

differently from adults because they are less culpable and have a greater chance of rehabilitation.[36]

The April 2011 "*Report of the inquiry into the mental health and wellbeing of children and young people in Western Australia*" (the 2011 Report) from the WA Commissioner for Children and Young People recommends reform of the *Mental Health Act 1996* and the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act) and notes that,

"*… the fundamental principles in the CLMIA Act should stipulate that in dealing with young mentally impaired accused the best interests of the child is a primary consideration and the special needs of the young mentally impaired accused should be recognised.*" [37]

The opinion of the WA Commissioner for Children and Young People about the minimum Mandatory Sentencing provisions was not provided in her 2011 Report but should be obtained to inform the government's response to the issues raised in this submission.

g) Increased Court time, rates of imprisonment and crime rates

Minimum Mandatory Sentencing schemes contribute significantly to imprisonment rates for juveniles and adults and have a direct adverse impact on the administration of the criminal justice system[38].

Schetzer and Sandor[39] note that the efficiency of the criminal justice system relies heavily on a high proportion of defendants pleading guilty to their criminal charges. Provisions in the sentencing legislation of all Australian states provide incentives for defendants to plead guilty to their criminal charges at the earliest opportunity, by providing that it is a relevant matter for the sentencing Magistrate to take into account in determining the appropriate sentence.

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[36] Criminal Code Amendment Bill Third Reading, 10 September 2009

[37] April 2011 "Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia" (the 2011 Report) from the WA Commissioner for Children and Young People; Page 69, para.4

[38] Inquiry into Mandatory Sentencing, Submission to the Senate Legal and constitutional References Committee, October 1999, p 10

[39] Inquiry into Mandatory Sentencing, Submission to the Senate Legal and constitutional References Committee, October 1999, p 10

A *guilty plea* uses far less court time and administrative resources than a *not guilty plea*. Minimum Mandatory Sentencing laws remove most of the incentive for defendants charged with those offences to plead guilty at an early opportunity. Thus, there is the potential to increase Courts' administrative costs because a *not guilty* plea means that defendants are required to attend court on many occasions leading to a time and resource consuming trial.[40]

h) Reluctance to involve police

The Hon Alison Xamon noted in Parliament in relation to the Criminal Code Amendment Bill (No. 2) 2011 Second Reading (6 September 2011), that since the introduction of Mandatory Sentencing laws, carers for people with a mental impairment are more reluctant to involve police in the transportation of people who are in serious need of medical or psychiatric assistance. This may mean that the ill health of a mentally impaired accused person may deteriorate to a greater extent before intervention or help is sought and received. This is also the experience of the Centre.

i) Restriction of judicial discretion

For the proper exercise of judicial discretion there cannot be a pre-determined penalty for a specific offence.[41] Such a restriction threatens our constitutional democracy by diminishing the role of the judicial branch of government.

In *South Australia v Totani* [2010] HCA 39 (11 November 2010) (the Finks Case) the High Court held that legislation that required a Magistrate to make a control order following a declaration that an organisation was a risk to society by the South Australian Attorney General, was invalid. It was held to be invalid because it was in breach of Chapter III of the Commonwealth Constitution concerning the judicial arm of government. The overturned law breached two principles:

[40] Inquiry into Mandatory Sentencing, Submission to the Senate Legal and constitutional References Committee, October 1999, p 10

[41] Glen Cranny, "Mandatory Sentences – Where From, Where to and Why?"(Paper submitted for the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, Queensland, 2 – 6 July 2006), p 7

1. The separation of executive and judicial powers; and
2. The *Kable* principle, which holds that parliament (State or Federal) cannot legislate in a manner, which would violate the real or even perceived independence of the judiciary from the executive and the legislature.[42]

The relevant area of law in respect of minimum Mandatory Sentencing laws, which remains undecided, is whether or not the sentencing discretion is part of the judicial process.

Some remarks in the judgment of His Honour, the Chief Justice, give some support to the proposition that the sentencing discretion is part of the judicial process.[43]

Another objection is the need to ensure natural justice for the mentally impaired accused person, which provides that every person has a right to be heard and to put forward their own case in answer to the case against them. So either the accused person has no right to put his or her case as to punishment, or they have the right but the court is forced to be deaf to it. This cannot be accurate on either scenario because one of ultimate purposes of the justice system is making punishment fit the crime.[44]

The Honourable Justice Santow of the NSW Supreme Court has indicated that minimum Mandatory Sentencing cases will sooner or later go to the High Court and be argued on the basis of the threat to the integrity of the Courts, and their independence from the legislature and the executive.

Minimum Mandatory Sentencing laws relocate judicial power from the Courts to those exercising pre-Court decisions, namely the police and prosecutors.

This is because individuals within these agencies decide whether or not to prosecute, and which offence provision of the *Criminal Code* is applied.

[42] *Kable v DPP (NSW)* [1996] HCA 24
[43] *South Australia v Totani* [2010] HCA 39 (11 November 2010)
[44] *Sentencing Act 1995* (WA) s. 6(1)

By the choosing of a particular offence provision, individual officers of these agencies decide, in effect, whether or not the accused will go to jail if found guilty.

Other than whether or not to impose a greater sentence than the pre-set minimum Mandatory Sentence, these laws remove the relevance of judicial officers considering the subjective characteristics of offenders, the particular circumstances of the offence and the relative impact or non-impact of the offences on victims, thus leading to injustice for mentally impaired accused children and adults.[45]

Minimum Mandatory Sentencing laws mean that a person who has reached the age of 18 must, *notwithstanding any other written law*, be sentenced to a term of imprisonment of at least between 6 to 12 months for the prescribed offences. This removes the discretion from the Court about whether or not a person should be imprisoned. As the Honourable Barwick CJ, as he then was, noted in *Palling v Corfield*[46], it is unusual and undesirable that a Court should not have discretion in the imposition of penalties and sentences. Circumstances alter cases and **it is the traditional function of a Court to endeavour to make the punishment appropriate to the circumstances and nature of the crime.** Judicial officers are restrained from making appropriate sentencing orders for particular offenders in particular circumstances when minimum Mandatory Sentencing laws apply.

In the United States of America, the 1990 US Sentencing Commission's report on *Minimum Mandatory Penalties in the Federal Criminal Justice System* found that minimum Mandatory Sentencing laws:

1. unwarrantedly shift discretion from judges to prosecutors;
2. result in higher trial rates;
3. lengthen case processing times;
4. arbitrarily fail to acknowledge salient differences between cases; and

[45] Inquiry into Mandatory Sentencing, Submission to the Senate Legal and constitutional References Committee, October 1999
[46] *Palling v Corfield* (1970) 123 CLR 52 at 58

5. often punish minor offenders much more harshly than anyone believes is warranted.

Case 3[47]

A woman was charged with assaulting a public officer. The woman had pulled a clump of hair from the police officer's head. This occurred in a public place with the woman's husband and children. The woman and her partner had been drinking. The man assaulted the woman, pushing her to the ground. There had been a 15 year history of domestic violence suffered by the woman from her partner. After the woman became hysterical, the family was removed from the public place. The woman was screaming and attracting public attention as she walked away from the place. Police then attended her and arrested her for being disorderly. The woman raised an arm at the police officer and he arrested her, forcibly taking her to the ground and handcuffing her. The woman suffered bruises to her legs and told her lawyer she could not walk for several days. In the paddy wagon after being arrested, the woman grabbed the hair of a police woman and in the struggle pulled some hair from her head. A few weeks after this, the accused's partner died from a drug overdose. The woman and her teenage son found the body. The woman was left with four children and no income. The woman became stressed and suffered a stroke and was hospitalised. At the time of sentencing, the woman was on the mend, was treated for long standing depression, and had stopped smoking and drinking. Because she was not charged under the section that leads to a mandatory term of imprisonment, the woman received a period of community supervision and to her lawyer's knowledge has not re-offended.

j) Media Impact

It appears that media and party politics might have a significant influence[48] on the imposition of policies such as minimum Mandatory Sentencing laws for assaults on public officers:

[47] Criminal Code Amendment Bill Second Reading, 18 August 2009

[48] See the UK Leveson Inquiry into the influence of the media on political decision making (amongst other things) http://www.levesoninquiry.org.uk/

"In the US and the UK, in particular, the media has significant influence over policy makers.[49] *The media must create a story to sell papers or win viewers. In nations like Finland, news is almost exclusively sold by subscription, eliminating the competition for daily attention*."[50]

The community should have the benefit of the evidence that shows that the policy of minimum Mandatory Sentencing is not simply media and vote driven, given the relevant evidence and arguments against its efficacy.

k) Politics

i. Creating uncertainty regarding Court processes

There appears little doubt that politics has played a large role in the legislation and implementation of Western Australia's minimum Mandatory Sentencing laws. The laws are celebrated in certain sectors because they are said to be aimed at curbing violence against public servants performing their work. The impression of the Centre is that there is a great reluctance in the parliament against softening these laws for fear that they would erode the erroneously perceived deterrence.

One National Party MP has stated that amending the minimum Mandatory Sentencing laws to take into consideration the special needs of people suffering from mental illnesses would cause 'a great deal of uncertainty and appeals in relation to the definition of mental illness',

[49] Anthony N Doob and Cheryl Marie-Webster "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate" *Law Society Review 40(2), 2006* cited in Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations: which is a publication by the Justice Policy Institute, page 3; www.justicepolicy.org 1012 14th Street, NW, Suite 400, Washington, DC 20005; page 7

[50] John Pitts and Tarja Kuula "Incarcerating Young People: An Anglo-Finnish Comparison: *Youth Justice 593_, December 2005, 147-164* cited in Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations: which is a publication by the Justice Policy Institute, page 3; www.justicepolicy.org 1012 14th Street, NW, Suite 400, Washington, DC 20005; page 7

which in turn would allow people with good legal representation to use the defence of mental illness unjustly.[51]

With the greatest of respect, this assertion is unfounded for the following reasons:

1. The *Criminal Code 1913* (WA) (the Code) quite rightly provides the section 27 defence;
2. Reliance on the section 27 defence is never unjust because the requirements for a successful section 27 defence are onerous, for the reasons outlined above;
3. All people including, and especially, mentally impaired accused persons, should have good legal representation;
4. The section 27 defence is provided to positively and appropriately discriminate between culpable and non-culpable accused, as rightly it should; and
5. The suggestion that a good lawyer argues defences unjustly is offensive and reveals ignorance of the objectives and operation of the criminal justice system.

Furthermore, amendments to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) could eliminate the MP's perceived uncertainty. In particular in Western Australia, there is insufficient provision for any hearing to establish whether or not the prosecution can establish that the mentally impaired accused person has in fact committed the offence, for which they have been charged.

This can be contrasted with other Australian jurisdictions. For example, in New South Wales, if it is unlikely that a mentally impaired accused person will be fit to be tried for an offence within the next 12 months, the Court must conduct a 'special hearing' to ensure that, despite the unfitness of the person to be tried, the person is acquitted unless it can be proved beyond reasonable doubt that the person committed the offence

[51] Email from MP, dated September 11, 2011

charged or an alternative offence.[52] There are various approaches to this issue, which are more broadly canvassed in our submission on reform of the *Criminal Law (Mentally Impaired Accused) Act 1996*, February 2013.

The position is similar in Victoria[53], Tasmania[54], the Australian Capital Territory[55] and the Northern Territory[56].

In Western Australia, a mentally impaired accused person remains an accused person until they are fit to plead, they are released, or a custody order is made. It is our submission that there must be a similar enactment to that in New South Wales, which would have assisted inhibiting the injustice against Marlon Noble[57] and others like him.

ii. Avoiding responsibility

There seems to be a perception that if the application of minimum Mandatory Sentencing laws is relaxed at all, it will lead to people using the exception for mental illness or impairment as a loophole to avoid responsibility and punishment.

If minimum Mandatory Sentencing legislation adopts a similar procedure to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) to determine the eligibility of the accused person for mentally impaired accused status, there is no need to fear that this defence will open the flood gates for people to escape punishment for their offences. It certainly did not before the minimum Mandatory Sentencing laws were introduced. This is why we have Magistrates and Judges who are independent of parliament and police, and who are trained, paid, and

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[52] *Mental Health (Forensic Provisions) Act 1990* (NSW) ss. 19 and 21.

[53] *Crime (Mental Impairment and Unfitness to be Tried) Act 2007* (Vic) ss. 15-18

[54] *Criminal Justice (Mental Impairment Act) 1999* (Tas) ss. 15-18

[55] *Crimes Act 1900* (ACT) ss. 316-319

[56] *Criminal Code Act* (NT) Schedule 1 s.43R.

[57] Marlon Noble was detained on a Custody Order in a prison for a long time on the basis of being unfit to plead to offences, the facts of which were never tested, see one media report at http://www.sbs.com.au/news/article/1652201/Marlon-Noble-seeks-justice

appointed to the Court and entrusted to make these decisions on behalf of our community according to law. This is what our constitutional forefathers foresaw in including the separation of powers in the Constitution.

It also seems that at least some members of the current WA legislature believes that the only purpose of the Court system and criminal legislation is to make sure that the guilty people get punished, whether or not the person is blameworthy and culpable. This is reflected in the statements of the a National Party MP when she expressed her fear that amending Mandatory Sentencing laws would allow people with good legal representation to use the defence of mental illness unjustly.[58]

Cornerstones of the Western judicial system include the right of an accused to defend themselves according to our Constitution and our laws, and the right of the legal presumptions of sanity and innocence. To reject laws directed to protection of a class of mentally impaired accused persons only to prevent another class of more culpable accused people from benefiting from it unjustly, should be abhorrent to the concept of justice. If there is concern that exceptions to legislation would be open to abuse this should be addressed at the level of the legislation, not at individuals, as decided by the police as it is with Mandatory Sentencing[59].

Addressing this concern should be done by ensuring that sufficient expert evidence is required in support of a claim of mental impairment, not by declaring a blanket ban. Every mentally impaired accused person should have the right to present his or her serious mental impairment without fear and as a mitigating factor following a plea of guilty, or when a section 27

[58]

[59] The police decide who will be imprisoned by deciding whether or not to charge the person with a charge that attracts mandatory sentence of imprisonment

defence has been unsuccessful, which the Court should be in a position to accept or not based on the evidence presented to it.

To deny a defence to people who are eligible, on the basis that someone else might take advantage of it, is clearly wrong. Following the same logic, our parliaments should do away with tax-deductible items, concessions for pensioners and every other exception and right granted to a specific class of people for fear that they might be abused by people outside the class.

People with connections, wealth and affluence are usually in a position to choose expert legal representation. It might be reasonably argued that the justice system is skewed in favour of better outcomes for wealthy influential people for this reason. This will continue to occur regardless of any legislative changes or omissions and whether or Mandatory Sentencing legislation is in place. It is unacceptable, but it is part of our system. Prohibiting the airing of mitigating factors as to whether or not imprisonment is appropriate under the minimum Mandatory Sentencing laws will not affect this, but will only affect the people our proposed exceptions would be capable of protecting - the vulnerable accused person with a serious mental impairment.

iii. Positive discrimination?

Surprisingly and bizarrely, it has been stated by some parliamentarians that amending the minimum Mandatory Sentencing laws to accommodate mentally impaired accused persons would have the effect of stigmatising them. This argument reveals these legislators' lack of understanding of the issue.

To "stigmatise" means to "brand".

To provide a person with protection against a mandatory sentence brought about by symptoms of an underlying illness does not brand the

person. However, a criminal record and imprisonment does brand and stigmatise.

Furthermore, it has long been a tradition of criminal justice to discriminate in favour of people with an established mental illness and/or impairment under various sentencing legislative frameworks.

SENTENCING STATISTICS

Statistics used to showcase the safe operation of the minimum Mandatory Sentencing laws are said to reveal that at no time during the last three years has a Mentally Impaired Accused person been made subject to a custody order as a result of fear of the minimum Mandatory Sentencing laws. It is hard to test the accuracy of such statements.

These statistics do not reveal how many Mentally Impaired Accused people have pleaded guilty because of:

1. their fear of the section 27 defence outcome of a Custody Order;
2. their inability to afford production of the evidence for their section 27 defence; or
3. their lack of legal representation,

which led them to plead guilty or be found guilty.

AS AN INSTRUMENT OF SOCIAL CONTROL

It is arguable that minimum Mandatory Sentencing laws are more than a system of punishment but that they are:

> *"…an instrument of social control and management of certain groups of people. … Cross nationally, criminal justice systems seem to operate to affect some groups more than others."*[60]

[60] Lois Wacquant "Deadly symbiosis: When ghetto and imprisonment and mesh" *Punishment & Society* 391), 2001:94-134 cited in Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations: which is a publication by the Justice Policy Institute, page 3; www.justicepolicy.org 1012 14th Street, NW, Suite 400, Washington, DC 20005; page 8

In Australia, Aboriginal people make up 24% of the prison's population but 2% of the general population.[61] There is a similarly disproportionate representation of people with a mental illness and/or mental impairment in prisons.

The detention centre and prison systems should be seen as a place of punishment that fits a crime **committed by a culpable guilty person**. It sends the wrong message if these systems are used as a mechanism and/or the cheapest way to control people with a mental illness and/or mental impairment who are not culpable or blameworthy. This society uses prison as a place of punishment for wrongs knowingly done by people who **choose** not to play by the rules.

Mandatory Sentencing laws used as a form of social control, in our respectful submission are abhorrent.

RECENT DEVELOPMENTS IN MENTAL HEALTH LAW AND THE WA JUSTICE SYSTEM

The Mental Health Court Diversion Program

On 21 May 2012, the Law Society of Western Australia welcomed a State Government decision to establish Western Australia's first Mental Health Court Diversion Program for people with mental illness,[62] as does the Centre.

According to the Budget Bulletin 2012/13 released through the Government of Western Australia Mental Health Commission:

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[61] Australian Bureau of Statistics "Experimental Estimates of Aboriginal and Torres Strait Islands Australians, June 2006 cited in Executive Summary of "Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations: which is a publication by the Justice Policy Institute, page 3; www.justicepolicy.org 1012 14th Street, NW, Suite 400, Washington, DC 20005; page 8

[62] The Law Society of Western Australia, 'Law Society of WA welcomes Mental Health Court' 21 May 2012 Retrieved From: <http://www.lawsocietywa.asn.au/article.php?article_id=1448> as at 20 may 2012

- $5million will be provided over two years to trial a new mental health court diversion and support program servicing Perth metropolitan Magistrates' Courts, which aims to limit re-offending, improve the mental health and wellbeing of offenders with mental illness, and where applicable prevent them from going to prison.
- A further $1.7 million will also be provided over 2 years to place special mental health expertise within the Perth Children's' Court.
- The establishment of the Mental Health Court Diversion Program is a step toward the right direction in relation to the Mandatory Sentencing Laws as it will provide mentally impaired accused persons another avenue with access to more informed decisions in relation to their rights under a section 27 defence.

However, this does not divert from the issue that Western Australia's minimum Mandatory Sentencing needs require review. It only further highlights the legislation's inadequacy to deal with accused persons who suffer from a mental illness or mental impairment.

If the new Mental Health Court is merely to be a sentencing court that requires a guilty plea to enter it, then the two primary objectives of such a court for a mentally impaired accused person would be defeated.

1. **Treatment not punishment:**

A person who successfully pleads an unsound mind defence or is found unfit to stand trial will not be eligible and will remain subject to the iniquitous *Criminal Law (Mentally Impaired Accused) Act 1996*;

A mentally impaired accused person who pleads guilty to a charge generating a minimum mandatory term of imprisonment cannot be helped by the Mental Health Court; and

2. **To minimise the risk of a criminal record: A guilty plea will lead to a criminal record in the absence of a Spent Conviction Order.**

Even if the new Court does not require a guilty plea to enter, the minimum Mandatory Sentencing laws will mean that the Court will make

little difference to the outcome for mentally impaired accused persons charged under the minimum mandatory imprisonment legislation.

The most vulnerable mentally impaired accused persons are those who are unfit to stand trial, those who are acquitted on the basis of an unsound mind defence, and those who plead guilty to a charge that attracts a mandatory term of imprisonment. Will they be eligible to the Mental Health Court?

RECOMMENDATIONS

On the basis of the above submissions, it is our respectful submission that a review of Western Australia's minimum Mandatory Sentencing laws take place **now <u>before</u>** the review required by the statute, as follows at section 74A of the *Criminal Code*,

"…*as soon as practicable after the third anniversary of the day on which those amendments came into operation*…":

Minimum Mandatory Sentencing laws of the *Code* should be repealed, in the interests of justice, and decriminalising and safeguarding the human rights of people with a mental illness and/or impairment.

In the alternative, if they are not repealed, we respectfully urge an exception to minimum Mandatory Sentencing laws for people with a mental illness or impairment when that mental impairment is causally linked to the offence for which they have been charged.

In the further alternative, we urge an exception to the Mandatory Sentencing laws that exclude children from its operation.

ANNEXURE ONE: *CRIMINAL CODE* PROVISIONS

297. Grievous Bodily Harm

(1) Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 10 years.

Alternative offence: s. 304, 313 or 317 or *Road Traffic Act 1974* s. 59.

(2) If the offence is committed in the course of conduct that, under section 371 or 371A, constitutes the stealing of a motor vehicle, the offender is liable to imprisonment for 14 years

(3) If the offence is committed in circumstances of aggravation, the offender is liable to imprisonment for 14 years.

(4) If —

(a) the victim of the offence is a public officer who is performing a function of his office or employment; or

(b) the offence is committed against a public officer on account of his being such an officer or his performance of a function of his office or employment; or

(c) the victim of the offence is the driver or person operating or in charge of —

(i) a vehicle travelling on a railway; or

(ii) a ferry; or

(iii) a passenger vehicle as defined in paragraph (a) of the definition of ***passenger vehicle*** in section 5(1) of the *Road Traffic Act 1974*; or

(d) the victim of the offence is —

(i) an ambulance officer; or

(ii) a member of a FESA Unit, SES Unit or VMRS Group (within the meaning given to those terms by the *Fire and Emergency Services Authority of Western Australia Act 1998*); or

(iii) a member or officer of a private fire brigade or volunteer fire brigade (within the meaning given to those terms by the *Fire Brigades Act 1942*), who is performing his or her duties as such; or

(e) the victim of the offence is a person who —

(i) is working in a hospital; or

(ii) is in the course of providing a health service to the public; or

(f) the victim of the offence is a contract worker (within the meaning given to that term by the *Court Security and Custodial Services Act 1999*) who is providing court security services or custodial services under that Act; or

(g) the victim of the offence is a contract worker (within the meaning given to that term by section 15A of the *Prisons Act 1981*) who is performing functions under Part IIIA of that Act, the offender is liable to imprisonment for 14 years.

(5) If the offence is committed in prescribed circumstances by a person who has reached 16 but not 18 years of age, then, notwithstanding the *Young Offenders Act 1994* and in particular section 46(5a) of it, the court sentencing the offender —

(a) must sentence the offender either —

(i) to a term of imprisonment of at least 3 months, notwithstanding the *Sentencing Act 1995* section 86; or

(ii) to a term of detention (as defined in the *Young Offenders Act 1994* section 3) of at least 3 months, as the court thinks fit; and

(b) must not suspend any term of imprisonment imposed under paragraph (a)(i); and

(c) must record a conviction against the offender.

(6) Subsection (5) does not prevent a court from making a direction under the *Young Offenders Act 1994* section 118(4) or a special order under Part 7 Division 9 of that Act.

(7) If the offence is committed in prescribed circumstances by a person who has reached 18 years of age, then, notwithstanding any other written law, the court sentencing the offender —

(a) must sentence the offender to a term of imprisonment of at least 12 months; and

(b) must not suspend the term of imprisonment imposed under paragraph (a).

(8) In subsections (5) and (7) —

prescribed circumstances means any of these circumstances —

(a) where the offence is committed in the circumstances set out in subsection (4)(a) or (b) and the public officer is —

(i) a police officer; or

(ii) a prison officer as defined in the *Prisons Act 1981* section 3(1); or a security officer as defined in the *Public Transport Authority Act 2003* section 3;

(b) where the offence is committed in the circumstances set out in subsection (4)(d)(i), (f) or (g).

[Section 297 amended by No. 1 of 1992 s. 4; No. 51 of 1992 s. 16(2); No. 29 of 1998 s. 3; No. 23 of 2001 s. 3; No. 38 of 2004 s. 65; No. 70 of 2004 s. 36(6); No. 2 of 2008 s. 5; No. 21 of 2009 s. 4.]

*[**298-300.** Deleted by No. 4 of 2004 s. 19.]*

….

318. Serious Assaults

(1) Any person who —

[(a)-(c) deleted]

(d) assaults a public officer who is performing a function of his office or employment or on account of his being such an officer or his performance of such a function; or

(e) assaults any person who is performing a function of a public nature conferred on him by law or on account of his performance of such a function; or

(f) assaults any person who is acting in aid of a public officer or other person referred to in paragraph (d) or (e) or on account of his having so acted; or

(g) assaults the driver or person operating or in charge of —

(i) a vehicle travelling on a railway; or

(ii) a ferry; or

(iii) a passenger vehicle as defined in paragraph (a) of the definition of ***passenger vehicle*** in section 5(1) of the *Road Traffic Act 1974*; or

(h) assaults —

(i) an ambulance officer; or

(ii) a member of a FESA Unit, SES Unit or VMRS Group (within the meaning given to those terms by the *Fire and Emergency Services Authority of Western Australia Act 1998*); or

(iii) a member or officer of a private fire brigade or volunteer fire brigade (within the meaning given to those terms by the *Fire Brigades Act 1942*), who is performing his or her duties as such; or

(i) assaults a person who —

(i) is working in a hospital; or

(ii) is in the course of providing a health service to the public; or

(j) assaults a contract worker (within the meaning given to that term by the *Court Security and Custodial Services Act 1999*) who is providing court security services or custodial services under that Act; or

(k) assaults a contract worker (within the meaning given to that term by section 15A of the *Prisons Act 1981*) who is performing functions under Part IIIA of that Act,

is guilty of a crime and is liable —

(l) if at or immediately before or immediately after the commission of the offence —

(i) the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) the offender is in company with another person or persons, to imprisonment for 10 years; or

(m) in any other case, to imprisonment for 7 years.

Summary conviction penalty: in a case to which subsection (1)(m) applies: imprisonment for 3 years and a fine of $36 000.

(2) If a person is convicted of an offence against this section committed in prescribed circumstances at a time when the person had reached 16 but not 18 years of age, then, notwithstanding the *Young Offenders Act 1994* and in particular section 46(5a) of it, the court sentencing the person —

(a) must sentence the offender to either —

(i) a term of imprisonment of at least 3 months, notwithstanding the *Sentencing Act 1995* section 86; or

(ii) to a term of detention (as defined in the *Young Offenders Act 1994* section 3) of at least 3 months, as the court thinks fit; and

(b) must not suspend any term of imprisonment imposed under paragraph (a)(i); and

(c) must record a conviction against the person.

(3) Subsection (2) does not prevent a court from making a direction under the *Young Offenders Act 1994* section 118(4) or a special order under Part 7 Division 9 of that Act.

(4) If a person is convicted of an offence against this section committed in prescribed circumstances at a time when the person had reached 18 years of age, then, notwithstanding any other written law, the court sentencing the person —

(a) if the offence is committed in the circumstances set out in subsection (1)(l) — must sentence the person to a term of imprisonment of at least 9 months;

(b) if the offence is not committed in the circumstances set out in subsection (1)(l) — must sentence the person to a term of imprisonment of at least 6 months, and must not suspend the term of imprisonment imposed under paragraph (a) or (b).

(5) In subsections (2) and (4) —

prescribed circumstances means any of these circumstances —

(a) where the offence is committed under subsection (1)(d) or (e) against a public officer who is —

(i) a police officer; or

(ii) a prison officer as defined in the *Prisons Act 1981* section 3(1); or

(iii) a security officer as defined in the *Public Transport Authority Act 2003* section 3, and the officer suffers bodily harm;

(b) where the offence is committed under subsection (1)(h)(i), (j) or (k) and the person assaulted suffers bodily harm.

[Section 318 inserted by No. 119 of 1985 s. 13; amended by No 106 of 1987 s. 24; No. 70 of 1988 s. 29; No. 82 of 1994 s. 8; No. 70 of 2004 s. 35(3); No. 2 of 2008 s. 9; No. 21 of 2009 s. 5.]