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MANDATORY SENTENCING AND COMMUNITY-BASED SENTENCING OPTIONS

We thank the Committee for the opportunity to provide this submission.

Introduction

Mandatory sentencing laws are an affront to justice. The reasons for this have been recited with relative frequency over many years and include an unjustifiable removal of the discretion of the sentencing Courts[1], as well as an intrusion upon the doctrine of Separation of Powers so fundamental to our legal system.[2]

The mandatory sentencing provisions as set out in Chapters 3 and 4 of the Consultation Paper (**the mandatory sentencing regime**) are further evidence of policymakers' ignorance of the sentencing process within a criminal court and fall well below a standard of human rights to be expected in Australia for criminal defendants.

The erosion of sentencing discretion through the imposition of mandatory sentencing regimes has the same injustice as would changing the standard and onus of proof in a criminal trial from beyond a reasonable doubt to balance of probabilities. The retention of sentencing discretion by courts safeguards against ideologically motivated sentencing regimes that are directed at classes of persons (i.e. organised crime or sex offenders).

Tragically, one class of persons which may not be the deliberate target of mandatory sentencing regimes, but which bears the heaviest load of their effects, are indigenous Australians. True though it is that some Australian state and territory legislatures have now passed human rights laws which protect against arbitrary detention; those same jurisdictions still maintain various mandatory sentencing regimes.

[1] As discussed, for example in *Veen v The Queen* [No 2] (1988) 164 CLR 465; *R v Engert* (1995) 84 A Crim R 67; and, *Markarian v The Queen* (2005) 228 CLR 357.
[2] Anthony Gray and Gerard Elmore, "The constitutionality of minimum mandatory sentencing regimes" (2012) *Journal of Judicial Administration* 37.

It is tragic irony that (as a result of the mandatory sentencing regime) the application of the important principles of *Bugmy*[3] sound hollow in the jurisdiction where perhaps the greatest application should be expected.

It is unnecessary in this submission to recite the well-known statistics of over-representation of Indigenous people in our prisons but the Committee ought rightly take note of those, as well as the flavour and recommendations of the Royal Commission Into Aboriginal Deaths in Custody (**the Royal Commission**), when considering recommendations relating to the mandatory sentencing regime.

Response to specific questions

3.1 *Do the mandatory sentencing provisions under the* Sentencing Act 1995*, the* Domestic and Family Violence Act 2007 *and the* Misuse of Drugs Act 1990 *achieve their postulated goals or objectives?*

No. Please see the matters outlined in the introductory comments above as to the impact of the mandatory sentencing regime. In addition, it might also be speculated that an unintended corollary of the regime is that the administration of justice is slowed by an increase in contested matters in a jurisdiction where a 'plea of convenience[4]' is essentially rendered futile as a result of the attempted 'one size fits all' justice.

3.2 *Are the mandatory sentencing provisions under the* Sentencing Act 1995*, the* Domestic and Family Violence Act 2007 *and the Misuse of Drugs Act 1990 principled, fair and just*?

No. These provisions apply so as to affect Indigenous defendants disproportionately. They are, in that respect alone, axiomatically unfair, unjust and unprincipled. They strip a sentencing court of any opportunity to reasonably moderate sentences according to well-established sentencing principles, including parity, youth, personal and general deterrence, and totality. What is forgotten by the introduction of mandatory sentencing regimes is the common law principle in Australia that there is no, *one correct sentence*, but rather the sentencing of a criminal defendant is a process. Through the imposition of a mandatory minimum regime, a correctness of a sentence is presumed, which ignores an otherwise integrated process involving facts and circumstances of victims and criminal defendants.

3.3 *Should the Northern Territory's mandatory sentencing provisions under the* Sentencing Act 1995*, the Domestic and Family Violence Act 2007 and the Misuse of Drugs Act 1990 should be maintained or repealed*?

The provisions should be repealed.

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[3] *Bugmy v The Queen* (2013) 249 CLR 571.

[4] See, for example, *Meissner v The Queen* (1995) 184 CLR 132

3.*4* *Are there other issues relating to the mandatory sentencing provisions under the* Sentencing Act 1995*, the* Domestic and Family Violence Act 2007 *and the* Misuse of Drugs Act 1990 *not discussed in this Consultation Paper which the Committee should address in its report?*

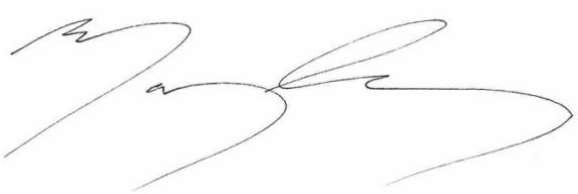
Specific attention should be paid to the disproportionate effect upon Aboriginal people, noted at pages 21–2 of the Consultation Paper, in the context of the principles discussed in *Bugmy* and the findings and recommendations of the Royal Commission.

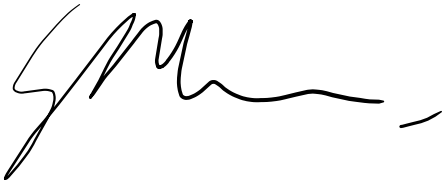
4.1 *Should the mandatory sentence for murder be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?*

Yes. The discretion of the Courts to impose sentences on criminal defendants should exist without qualification on outcomes.

4.2 *Should the mandatory sentence for sexual offences be abolished altogether, leaving it to the court to impose an appropriate sentence and non-parole period?*

Yes. The discretion of the Courts to impose sentences on criminal defendants should exist without qualifications on outcomes.





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