

CLANT Conference Bali 2013

Victims of the System

A view from the Bench

The cleverly contrived theme of this conference – Victims of the System – is so amorphous as to permit me to speak on any topic that takes my fancy. I raised with your President the prospect that I could speak on Judges as victims given that we are fed an unrelenting diet of distasteful, and often distressing, issues to resolve. I could speak on Magistrates as victims given that they are fed from the same menu as Judges but, in addition, have Judges looking over their shoulders. I could speak on Counsel as victims given that you are also fed from the same menu and you have the added misfortune of having to deal with the Judges and Magistrates. However, I suspect that the victims of the system referred to in the title are not the Judges, the Magistrates or Counsel but, rather, those who get caught up in the system without making a living from it.

I may be wrong in my interpretation as I see that Suzan Cox QC will be presenting a paper on ‘Judicial Bullying’. I trust that is not a user’s guide as to how to bully the judiciary. I look forward to hearing what Suzan has to say.

I see from the program that those who may be identified as the real victims of the system are going to be the subject of individual papers presented by other speakers. I have therefore chosen to look at some broader aspects of the system and, perhaps, identify some concerns that may lead to the creation of further victims of the system.

Maintaining the status of the judiciary

Speaking broadly the first, and to my mind, the most important, of those concerns relates to the position of the judiciary in our society. As we all know, the strength of our democracy rests in maintaining the balance of power between the executive, the legislature and the judiciary. It is vital to the future of our society that the integrity and the status of each one of our three arms of government is maintained and that none of the individual arms of government is permitted to become dominant to the detriment of the remaining arms. You will not be surprised to learn that my concern rests with the position of the executive and the legislature on the one hand relative to the judiciary on the other. The relationship between the executive and the legislature is, itself, not without concerns but that is a problem for consideration by others and on another occasion.

I do not suggest that there is a conscious effort by the executive and/or the legislature to undermine the position of the judiciary but, rather, that such undermining follows from the implementation of short-term policies pursued without regard to long-term consequences. I wish to highlight three areas in which the executive and the legislature are, in effect, undermining the standing of the judiciary. The first is by legislating to require the judiciary to perform non-judicial roles or address non-judicial issues. The second is by legislating to constrain the ability of the judiciary to accord justice in individual cases. The third is by failing to provide adequate resources to enable the judiciary to carry out its functions effectively and efficiently.

Undermining the standing of the courts

In recent years there has been a range of legislative schemes developed in Australia which have pushed the constitutional limits upon the powers of the various legislatures in relation to the operation of the courts. For present purposes I am not concerned with the validity or otherwise of such legislative schemes but rather with the impact of such schemes upon public confidence in the judicial arm of government.

Examples of such schemes include legislation that curtails the individual rights of citizens in a manner which involves the judiciary in the process as a way of seeking to accord legitimacy and thereby acceptability to what might otherwise be seen by the community as unacceptable. There are also legislative schemes which confer non-judicial functions on the courts or co-opt judges in the exercise of non-judicial functions. There are schemes that impose obligations on the courts conditioned upon decisions of the executive branch of government and also schemes that impact upon the functions of courts and the ability of courts to deliver open justice. There are schemes that require the courts to impose consequences that do not reflect the justice of the situation.

The effect of some of the schemes is to ‘mislead the public to camouflage the legislative character of a social decision and shore up its acceptability by committing it to the judiciary, thereby cashing in on the judicial reputation’.¹ This point was made in the following observation of the Supreme Court of the United States in *Mistretta*² and adopted by Gummow J in *Kable*:³

¹ *Hobson v Hansen*, 265 F Supp 902 at 923, 931 per JS Wright J (1967), referred to by Gummow J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133.

² *Mistretta v United States*, 488 US 361 at 407 (1989).

³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133.

The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action.

Of course, public confidence in the judiciary will not remain high if legislation involves the judiciary in such legislative schemes. The effect over all, and in the long-term, is likely to be to undermine the faith of the community in that vital commodity, judicial integrity. If the reputation of the judiciary for integrity, impartiality and independence is lost or damaged then our system of government will suffer and we will all become victims of the system, albeit a different and lesser system from that which we now enjoy.

The legislative schemes with which I am concerned involve the courts in regimes which are, arguably, incompatible with the integrity, independence and impartiality of the courts. They impact upon the institutional and decisional independence of the courts. Examples of the type of legislation to which I refer are both diverse and numerous. Some of the schemes have been considered in the High Court with some being struck down and others permitted to continue. It is not necessary to go into detail about the various schemes but, rather, it is sufficient to identify a few of the cases. They include the following cases in which the legislation was invalidated:

- *Kable v Director of Public Prosecutions (NSW)*,⁴ which related to ad hominem legislation,
- *International Finance Trust Co Ltd v New South Wales Crime Commission*,⁵ which involved criminal property forfeiture,

⁴ (1996) 189 CLR 51.

- *South Australia v Totani*,⁶ which involved control orders over a ‘declared organisation’, and
- *Wainohu v New South Wales*,⁷ which involved legislation similar to that considered in *Totani*.

There was also a series of cases in which challenged legislation survived although, to my mind, the legislation nevertheless raised issues of concern regarding the maintenance of the reputation of, and respect for, the courts.

I will demonstrate my concern by reference to one instance from the Northern Territory. In the Northern Territory, as with other legislatures throughout Australia, the Legislative Assembly has enacted a scheme of criminal property forfeiture.⁸ Aspects of the legislation have been described as ‘draconian’ on numerous occasions.⁹ In the Territory the relevant legislation is the *Criminal Property Forfeiture Act 2002* (NT) read with the *Misuse of Drugs Act 1990* (NT). Whilst much of the legislative scheme may be thought to be unexceptional there are some elements that are disturbing. Those elements were recently addressed by the Court of Appeal in *Emmerson v The Director of Public Prosecutions*.¹⁰ The case is on its way to the High Court and I will not address the merits of the legal arguments but, rather, identify some of the

⁵ (2009) 240 CLR 319.

⁶ (2010) 242 CLR 1.

⁷ (2011) 243 CLR 181.

⁸ *Confiscation Act 1997* (Vic); *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Confiscation Act 2005* (SA); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Property Confiscation Act 2000* (WA); *Criminal Property Forfeiture Act 2002* (NT); *Proceeds of Crime Act 2002* (Cth).

⁹ Most recently by Kelly J in *Emmerson v DPP* [2013] NTCA 4 at [64] and [91].

¹⁰ *Emmerson v DPP* [2013] NTCA 4.

aspects of the legislation that may be thought to serve to undermine the reputation of the courts.

The first of those aspects is that under the legislative scheme the court is, on the application of the Director of Public Prosecutions, required to declare a person to be a ‘drug trafficker’ when the person meets the criteria provided in the *Misuse of Drugs Act*. The condition precedent which must be established by the DPP is a finding of guilt by the court of a qualifying offence on three occasions within a ten-year period. Once the condition precedent is established the court has no choice other than to declare the individual a ‘drug trafficker’.

The harsh reality is that the person may not be a drug trafficker at all in the sense that term is used in common parlance. The court does not consider whether the person in fact trades in illegal drugs or has bought and sold illegal drugs or has been commercially involved in illegal drugs. For example, the person may have had three convictions for cultivation of between 5 and 19 cannabis plants or three convictions of possessing a trafficable quantity of a drug without there being any suggestion that he or she had, in fact, been trafficking in the drug.

To describe someone as a drug trafficker is to stigmatise the person in a most serious way. The declaration may be a significant act of both legal and social censure. As Barr J pointed out in *Emmerson*,¹¹ members of the community feel strong antipathy towards drug traffickers, and yet the court was required by the legislation to declare a person to be a drug trafficker in circumstances where

¹¹ *Emmerson v DPP* [2013] NTCA 04 at [104].

that was not necessarily the case. His Honour described it as ‘pejorative branding’ and went on to observe:¹²

[T]he fact (if it became publicly known) that a declared drug trafficker had lost all his or her property may not cause great concern because once a person is branded a ‘drug trafficker’ in the way the Court is required to brand that person, a member of the public might not have much sympathy. ... It may not excite public concern that a person branded with the tainted label has lost his or her family home or life savings.

In *Emmerson* the Court, by a majority, allowed the appeal, effectively declaring the scheme constituted by s 36A of the *Misuse of Drugs Act* and the *Criminal Property Forfeiture Act* as invalid.¹³ It is yet to be seen what will happen on appeal.

Another disturbing aspect of the legislation is that it requires the Court to make orders which ultimately lead to the forfeiture of property of a person even though that property was legitimately acquired and had nothing to do with any criminal activity. The Court is not able to consider whether the forfeiture would be unjust or unfair or disproportionate to the actions or culpability of the offender.

The effect of these aspects of the legislative scheme is that the courts are involved in an exercise which, in some cases, will lead to significant injustice without the capacity to deal with or even to moderate the injustice. The involvement of the courts will, initially, serve to alleviate public concern as to what otherwise might be thought to be a drastic interference with recognised

¹² *Emmerson v DPP* [2013] NTCA 04 at [111].

¹³ I was the minority Judge.

property rights.¹⁴ The political arm of government is effectively borrowing the reputation of the judiciary ‘to cloak their work in the neutral colours of judicial action’. As cases of injustice arise and become known, the involvement of the courts must serve to diminish the standing of the judiciary in the eyes of the community.

I acknowledge that the fact that legislation or a legislative scheme detracts from public confidence in the judiciary is not, of itself, sufficient to render the legislation invalid.¹⁵ In *Emmerson*, where I was in the minority, I concluded the legislation was not invalid. My concern goes beyond questions of invalidity to argue that the legislature should not use the courts in a manner that undermines public confidence in the judicial arm of government even if that be within legislative power.

Mandatory sentencing

An obvious example of parliament legislating to constrain the ability of the courts to provide justice is to be found in the recently renewed interest in the Northern Territory in mandatory minimum sentencing. Those sentenced under such schemes are often subject to injustice and become victims of a flawed system of sentencing.

It must be accepted that in creating an offence it is open to the legislature to prescribe the range of sentences that may be imposed and it may, if it so desires, set both a maximum and a minimum penalty. In *Palling v Corfield*¹⁶ Barwick CJ noted that, whilst the imposition of a penalty consequent upon conviction for

¹⁴ *Emmerson v DPP* [2013] NTCA 4 at [131] per Barr J.

¹⁵ *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37].

¹⁶ (1970) 123 CLR 52 at 58. See also *Karim v R* [2013] NSWCCA 23.

an offence is essentially a judicial act, it remains the decision of the Parliament whether or not a discretion in the imposition of sentences is provided to the court. However, his Honour went on to say:

It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.

Mandatory minimum sentencing usually arises in circumstances of politicians wishing to be seen to be ‘tough on crime’. The debate about the issue is generally in the form of slogans of the kind ‘it is what the public wants’ and ‘people expect certain offenders to go to gaol’, rather than any detailed and informed consideration of the worth of such measures. There is no recognition of the fact that under the existing sentencing regime those who deserve to go to gaol do go to gaol. There is no attempt to have an informed debate. There is no discussion of whether the existing sentencing process has problems which need to be corrected or whether a system of mandatory minimum sentences is an appropriate response to any problem that may exist. There is no considered identification of sentencing patterns which may suggest a need for different approaches. There is no discussion of the history of failed exercises of mandatory minimum sentencing.

One of the requirements of justice is that sentencing should operate to provide punishment proportionate to the crime.¹⁷ A sentence should not ‘exceed that which is justified as appropriate or proportionate to the gravity of the crime

¹⁷ See, eg, *Crimes Act 1914* (Cth) s 16A(1).

considered in the light of its objective circumstances'.¹⁸ Mandatory minimum sentencing serves to preclude this in many cases. The imposition of a mandatory minimum penalty may lead to a penalty which is disproportionate to the seriousness of the particular offence or the culpability of the particular offender. As Mildren J has observed:¹⁹

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

The sentencing of offenders is a prime example of the exercise of judicial power.²⁰ The fixing of a minimum term of imprisonment for a particular offence is, plainly, an interference with the exercise of that power. Without any form of justification it suggests that the courts are not to be trusted by the legislature to fix an appropriate and proportionate sentence in all the circumstances of the case. The message sent by such legislation to the community is that the public cannot have confidence in the courts to impose appropriate sentences. The effect is to erode trust in the criminal justice system and the judiciary.

Simply put, the effect of mandatory minimum sentencing is to impose the will of the legislature over the views of the judiciary.²¹ Such sentencing prevents the

¹⁸ *Hoare v The Queen* (1989) 167 CLR 348 at 354.

¹⁹ *Trennery v Bradley* (1997) 6 NTLR 175 at 187.

²⁰ *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470.

²¹ Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553 at 571.

court from balancing the numerous factors that must be taken into account to determine an appropriate and proportionate sentence. It does not recognise that a mandatory sentencing scheme covers offenders with a wide range of criminality. Mandatory sentencing leads to ‘arbitrary punishment as offenders with quite different levels of culpability receive the same penalty.’²²

Of course the objective evidence is that, when the full facts of a case are explained, the public generally supports the sentences actually imposed by the Judges. Research in Australia and overseas confirms that to be so.²³ Instead of passing legislation which may have superficial popular support, the members of the legislature should be joining with the judiciary in seeking to inform and educate the public as to the effectiveness of the criminal justice system. To the extent that there is perceived to be a problem with sentencing it generally arises through opinions being formed and expressed based upon incomplete or false information. There is a disparity between what has actually occurred in a particular case and what a member of the public who has not had access to the case materials understands has happened. This disparity is fuelled by the nature of the reporting of crime and sentencing in the media and, in my view, is further inflamed by opportunistic legislative action such as mandatory minimum sentencing. The fact is that the Northern Territory has an imprisonment rate which is four times the national rate.²⁴

²² Judicial College of Australia, Submission No 11 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2, referred to in Andrew Trotter and Matt Garozzo, ‘Mandatory Sentencing for People Smuggling: Issues of Law and Policy’ (2012) 36 *Melbourne University Law Review* 553 at 557 n 15.

²³ See, eg, Warner et al, ‘Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice no 407, 2009); Austin Lovegrove, ‘Putting the Offender Back into Sentencing: An Empirical Study of the Public’s Understanding of Personal Mitigation’ (2011) 11 *Criminology and Criminal Justice* 37.

²⁴ Stephen Jackson and Fiona Hardy, ‘The Impact of Mandatory Sentencing on Indigenous Offenders’ (Paper presented at the National Judicial College of Australia Sentencing Conference, Canberra, 6 February 2010).

In the Attorney-General's second reading speech for the Sentencing Amendment (Mandatory Minimum Sentences) Bill delivered on 27 November 2012, there was no reasoned argument presented for the reintroduction of mandatory minimum sentences. There was no suggestion based upon evidence or otherwise that the courts were not imposing sentences which were proportionate to the crime. So far as I can see the only justification for the legislation, apart from the fact that it was promised in an election campaign, was that:

setting the mandatory minimum sentences in this bill is to maintain a consistent standard for sentencing for violent offences. It is intended to send a clear message to serious and repeat violent offenders that if they commit a violent offence they will serve genuine gaol time and that there is a mandated bottom line to the sentence that they will receive.

There was nothing in the material to support any suggestion that prior to the introduction of the amending legislation sentences had not been consistent or that the sentences had been inadequate.

The amending legislation also seems to ignore the fact that studies of mandatory minimum sentencing reveal no demonstrated correlation with decreased rates of offending.²⁵ The view has been expressed by academic writers that there is substantial evidence that mandatory minimum sentencing regimes are not successful in deterring the type of activity to which any given regime is

²⁵ See, eg, Judith Bessant, 'Australia's Mandatory Sentencing Laws, Ethnicity and Human Rights' (2001) 8 *International Journal on Minority and Group Rights* 369 at 378, referred to in Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553 at 580. See also Chief Justice Wayne Martin, 'Sentencing Issues in People Smuggling Cases' (Paper presented at the National Judicial College of Australia Federal Crime and Sentencing Conference, Canberra, 11 February 2012).

directed.²⁶ A review of the Western Australian mandatory sentencing laws passed in 1992 and 1996 revealed ‘compelling evidence’ that neither achieved a deterrent effect. Further, they did not work in terms of incapacitation and there was nothing to suggest they reduced recidivism.²⁷ Of the 1992 laws it was reported that they ‘failed according to every criminological criterion by which they can properly be evaluated’.²⁸

In Western Australia, the 1992 experiment was abandoned as a failure after 2 1/2 years.²⁹ In 1996 the so-called ‘three strike’ home burglary laws were introduced. Those laws remain extant but the governmental report into their operation concluded that they did not lead to any reduction in the number of offences committed after introduction of the regime.³⁰

In the Northern Territory we experienced mandatory minimum sentencing some years ago³¹ and it led to identified and disturbing injustices.³² The injustices and the community concern in turn led to the subsequent repealing of the legislation. It was described as a regime which was ‘widely condemned during the 4 1/2

²⁶ Anthony Gray and Gerard Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’ (2012) 22 *Journal of Judicial Administration* 37 at 38; David Brown, ‘Mandatory Sentencing: A Criminological Perspective’ (2001) *Australian Journal of Human Rights* 31.

²⁷ Neil Morgan, ‘Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?’ (2000) 24 *Criminal Law Journal* 164. See also the discussion in ‘Forum — Mandatory Sentencing Legislation: Judicial Discretion or Just Deserts’ (1999) 22 *University of New South Wales Law Journal* 256.

²⁸ Richard Harding, ‘Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia’, (Research Report No 10, University of Western Australia Crime Research Centre, March 1995).

²⁹ Neil Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (2002) 23 *Adelaide Law Review* 141, 144.

³⁰ WA Department of Justice, ‘Review of s 401 of the Criminal Code’ (Government of Western Australia, Policy and Legislation Division, November 2001).

³¹ Commencing with amendments to the *Sentencing Act 1995* (NT) in 1997.

³² Some of which are mentioned in David Brown, ‘Mandatory Sentencing: A Criminological Perspective’ (2001) *Australian Journal of Human Rights* 31, and Neil Morgan, ‘Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?’ (2000) 24 *Criminal Law Journal* 164.

years of its operation'.³³ Initially the federal government of Prime Minister Howard intervened to modify the application of the mandatory laws to young people³⁴ and then, with a change of government in the Northern Territory in 2001, the laws were repealed.

In more recent times we have seen an experiment with mandatory minimum sentencing in the federal sphere. The *Migration Act 1958* (Cth) was amended to provide for mandatory minimum sentences of imprisonment of five years with a three-year non-parole period for the offence popularly called 'people smuggling'. The description of the offending is inapt because there is no smuggling involved. The whole purpose of the exercise is to deliver the human cargo direct to the relevant authorities. There is nothing covert about the operations.

The legislation was the source of great injustice and led to much judicial and other criticism.³⁵ As was observed by the Judicial College of Australia, 'a significant number of Australia's most experienced judicial officers accurately described the sentences they have been obliged to impose in people smuggling cases as manifestly unjust'.³⁶ The regime required the imposition of a level of punishment far beyond what was proportionate to the offending. Further, as the

³³ Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders' (Paper presented at the National Judicial College of Australia Sentencing Conference, Canberra, 6 February 2010).

³⁴ Judith Bessant, 'Australia's Mandatory Sentencing Laws, Ethnicity and Human Rights' (2001) 8 *International Journal on Minority and Group Rights* 369 at 370; Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164.

³⁵ See, eg, Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553.

³⁶ Judicial College of Australia, Submission No 11 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2, referred to in Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553 at 557 n 15.

increasing numbers of offenders brought before the courts revealed, the mandatory sentencing regime did not serve as an effective deterrent.

In September 2012, following a Senate Inquiry,³⁷ the then Federal Attorney-General directed the Commonwealth Director of Public Prosecutions not to proceed with prosecutions that would attract the mandatory minimum penalty save in a limited number of cases.³⁸ It seems that under the new regime offenders are charged with the offence of smuggling just one person into Australia when the reality is that quite a number of people were on the particular vessel. Proceeding pursuant to this fiction avoids the mandatory minimum provisions. It is readily apparent that this experiment with mandatory minimum sentencing is yet another example of where a mandatory minimum sentencing scheme failed.

In the Northern Territory we do not need ever more punitive responses to criminal conduct. Research reveals that increased terms of imprisonment do not affect the rate of offending and may increase recidivism.³⁹ We already have the highest incarceration rate in Australia and we impose the largest proportion of custodial sentences. Of course, deterrence is only one aspect of the sentencing process and must be weighed alongside such considerations as punishment, rehabilitation, denunciation and community protection. These matters are recognised in the existing sentencing regime. If we are to adopt a more punitive justice system it must be justified by reasons other than deterrence.

³⁷ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Penalties) Bill 2012*.

³⁸ Commonwealth, *Gazette: Government notices*, No GN 35, 5 September 2012, 2318.

³⁹ Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Sentencing Advisory Council of Victoria, April 2011).

The debate regarding mandatory minimum sentences also seems to ignore the fact that certainty of apprehension and punishment do provide a significant deterrent effect. Addressing the causes of crime and focusing upon certainty of apprehension should be the focus rather than pursuing an ever more punitive response.

In 2000 Neil Morgan, the Director of Studies at the Crime Research Centre of the University of Western Australia, summarised the position relating to mandatory minimum sentences as follows:⁴⁰

We know that they do not have clear and consistent objectives. They do not meet aims of deterrence or selective incapacitation and there is no evidence that they reduce recidivism. We also know that they lead to disproportionate sentences, subvert legal processes and have a profoundly discriminatory impact.

The challenge for us as a community, and for our governments, is not to do what is merely popular. It is always easy to do what is popular. The challenge is to do what is right. Mandatory minimum sentencing of the kind I have been discussing is not right.

Customary law

Another example of the legislature interfering with the capacity of the courts to deliver justice is to be found in the sensitive area of conflict between the law of the Northern Territory and the customary law and cultural practices of some Aboriginal communities.

⁴⁰ Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164 at 182.

Over many years the courts had developed an approach to this issue whereby the primacy of the law of the Northern Territory was accepted and, subject to the law, issues of customary law and cultural practice were given appropriate weight in determining the culpability of an offender in all of the circumstances of the offence.⁴¹

In 2007 the Northern Territory experienced what has been called ‘the intervention’. Legislation passed in the Federal Parliament in support of that process included ss 90 and 91 of the *Northern Territory National Emergency Response Act 2007* (Cth). Section 90 deals with matters to be considered in bail applications in relation to persons charged or convicted of offences against a law of the Northern Territory and provides that, in determining such applications, the court must not take into account any form of customary law or cultural practice as a reason for, inter alia, lessening the seriousness of alleged criminal behaviour or aggravating the seriousness of alleged criminal behaviour. In a similar vein, but this time in relation to sentencing, s 91 provides that a court ‘must not take into account any form of customary law or cultural practice as a reason for... lessening the seriousness of the criminal behaviour to which the offence relates’.

The justification for the restriction was said to be to implement an agreement entered into by the Council of Australian Governments which provided that ‘no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse’.⁴²

⁴¹ *Hales v Jamilmira* (2003) 13 NTLR 14; *R v GJ* [2005] NTCCA 20.

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 18 (Minister for Families, Community Services and Indigenous Affairs).

The effect of those provisions is that customary law and cultural practice must not be taken into account in determining the gravity or objective seriousness of an offence.⁴³ Customary law and cultural practices are, of course, important aspects of everyday life in many remote communities in the Northern Territory. Whilst the level of moral culpability of an offender may have been substantially reduced because he or she acted in accordance with, or under pressure to perform, a cultural practice, the court is barred from taking those matters into account. This means that the court must proceed to sentence in a partial factual vacuum. In such a case the court is required to ignore the actual circumstances that led to the offending. When the legislation was subsequently amended no changes were made to ameliorate the harm done.

The following observations of Brennan J made long before the legislative action are pertinent:⁴⁴

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.

The legislation is discriminatory.⁴⁵ It is also inconsistent with principles of sentencing spelt out in the *Sentencing Act 1995* (NT).⁴⁶ It is directly contrary to

⁴³ *R v Wunungmurra* (2009) 231 FLR 180 at 182.

⁴⁴ *Neal v The Queen* (1982) 149 CLR 305 at 326.

⁴⁵ Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of 'Special Measures'', (2009) 13(1) *Australian Indigenous Law Review* 78 at 96.

the recommendations of the Law Reform Commission of Western Australia of September 2006.⁴⁷ It is an example of a legislature imposing laws which require the courts to act in a way that may lead to injustice. It unnecessarily leads to the creation of further victims of the system.

Resources

The final area upon which I wish to comment is the vexed issue of resources. It must be accepted that the resources available to governments are finite and it is the role of the executive and the legislature to prioritise the allocation of those resources. The courts must accept that, at times, there must be restraint in the justice system as in every other part of the community. However, difficult issues arise when the executive and the legislature do not allocate sufficient funds to enable the courts to carry out their important function. The failure to provide appropriate resources inevitably leads to uneven justice and to additional victims of the system.

(a) Facilities

The provision of sufficient judicial officers and appropriate facilities is obviously an expensive exercise for government. The courts, as with other parts of our society, are expected to do more with less. For example, in the Supreme Court we have, over the years, refined our management systems to enable us to get through a lot more work with the same number of judicial officers. When I joined the Court in 1999 I was appointed as the seventh Judge. When Kearney J retired a short time later he was not replaced, leaving six Supreme Court Judges.

⁴⁶ Eg, s 5(2)(c) (the extent to which the offender is to blame for the offence); s 5(2)(f) (the presence of any mitigating factor).

⁴⁷ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: the Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report (September 2006).

In 1999–2000 the total number of lodgements in the Supreme Court was 725. Twelve years later in 2011–2012 the total number of lodgements has increased to 1010. We now deal with that significantly increased workload, an increase of approximately 40%, with six Judges.

Whilst we do have problems with obtaining adequate resources in the Northern Territory they are not, at present, of the serious order found in some other jurisdictions.

The biggest concern for the Supreme Court is the accommodation of the courts in Alice Springs.

In Alice Springs, the Supreme Court shares premises with the Magistrates' Court. The premises are quite inadequate. When elected, the new Territory government, through the then Treasurer and the then Attorney-General, acknowledged the premises to be inadequate, antiquated and ageing. The fact is that the lack of resources in Alice Springs must inevitably lead to unacceptable delays in matters being heard which, of course, is unfair to victims, witnesses and accused persons. Our system of justice is brought into disrepute when unacceptable delays occur. The Judges, with the cooperation of the practitioners of Alice Springs, strive to keep delays to an acceptable level but cannot do so without appropriate facilities. The former Treasurer indicated that plans were being developed for a new justice precinct in Alice Springs and that is a welcome indication. There are other proposals under consideration. However, the time to act is now and not when the problems become so serious as to impact upon the reputation of our justice system. The present Attorney-General is actively involved in addressing both the interim and long-term problems.

(b) The funding of Legal Aid

A major cause of concern acquiring prominence in recent times is the issue of the adequate funding of legal aid bodies around Australia. The problem has come to a head in Victoria where, in the first part of this year, Judges stayed trials in the Supreme Court due to disputes with Victoria Legal Aid as to the appropriate level of representation for people charged with serious offences. Unfortunately the problem is not confined to Victoria. The legal aid bodies in the Northern Territory are continually struggling to meet their obligations to their clients.

Again I acknowledge that funding for legal aid is a considerable drain on governments around Australia and there must be a limit to what amounts to an appropriate level of funding. I do not want to venture into the Victorian dispute, but I identify this area as one of concern in relation to the effective operation of courts in the Northern Territory. It is not a secret that the offices of the Directors of Public Prosecutions and of the legal aid agencies are responsible for the efficient and effective presentation of most cases in the criminal sphere. The courts rely heavily upon those bodies and, without them, the administration of justice would be difficult in the extreme. It is therefore vital that they be provided with adequate funds to perform their important roles.

(c) Court fees

In February this year I learned of a plan substantially to increase filing fees in the Supreme Court and to introduce a new daily hearing fee in the sum of \$2318 for corporations and \$1234 for others. This is primarily of concern to those who practice in the civil field; however, it is plainly an access to justice issue. I immediately wrote to the Attorney-General highlighting my concern. We subsequently learned that the Senate Legal and Constitutional Affairs

Committee of the Federal Parliament intended to conduct an enquiry into the issues arising from the fees charged in the federal courts.

The report was published on 17 June 2013.⁴⁸ In the report the following observations are recorded:

- a) ‘As a matter of principle, citizens are entitled to have their disputes justly determined according to law by an impartial and independent judicial system. Obstacles to such determinations, such as court fees, act to deprive citizens of that right ... [This] right is a fundamental pillar of our political and social structure, and it should not be undermined by other arms of government which seek to encroach on the justice system.’⁴⁹
- b) ‘A determination by a court may not only provide finality for the parties concerned, it can provide other, broader benefits such as establishing precedents, evidencing open justice and elucidating the law.’⁵⁰
- c) The provision of court services should not be on a cost recovery basis. It is a fundamental element of maintenance of the rule of law in a civil society that citizens have fair and reasonable access to dispute resolution mechanisms. Access should be provided on the same basis as other essential public infrastructure.⁵¹

⁴⁸ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Impact of Federal Court Fee Increases since 2010 on Access to Justice in Australia* (2013).

⁴⁹ Ibid 9 (submission of the Law Society of South Australia).

⁵⁰ Ibid 10 (submission of the Rule of Law Institute of Australia).

⁵¹ Ibid 11 (submission of the Law Council of Australia).

- d) '[S]ubstantial increases to court fees and new fees impact unequally on parties, by giving a significantly greater advantage to the party with greater financial resources'.⁵²
- e) 'Increased fees necessarily act as an obstacle to access to justice.'⁵³ '[I]t is inimical to access to justice for major financial barriers to be placed in the way of litigants who have no other course.'⁵⁴
- f) To treat the courts as revenue-raising tools of government or as self-funded entities is to 'seriously undermine access to justice and, ultimately, the capacity of the courts to uphold the rule of law.'⁵⁵

The Senate Committee formed the view that it is appropriate for some of the costs of running the courts to be recouped through court fees. However, it recommended that evidence-based research be undertaken into how court fees affect court users' behaviour before further changes in court fee settings are made.⁵⁶

In additional comments, Coalition Senators recorded that any adjustment of fees must take place in the context of 'the fundamental principles of access to justice' with 'significant weighting so as not to preclude any person from the right to access the court system.'⁵⁷

⁵² Ibid 15 (submission of the Law Council of Australia).

⁵³ Ibid 16 (submission of the Law Society of South Australia).

⁵⁴ Ibid (submission of the Law Council of Australia).

⁵⁵ Ibid 20 (submission of the Law Council of Australia).

⁵⁶ Ibid ch 4.

⁵⁷ Ibid 60.

I suggest the matters set out in that report should inform any decision to increase court fees payable in the Northern Territory.

Conclusion

We have a system of justice which has served and continues to serve the people of Australia well. It is necessary for the people of Australia, and particularly members of the legal profession, to be vigilant to ensure that this valued aspect of our heritage is not diminished by the actions of the legislature or of the executive of the various governments around the country. It is not just the major initiatives of governments that must be scrutinised to ensure the maintenance of the system. Those initiatives can be readily identified and met head-on. Care must also be taken to protect against the constant chipping away of the position of the judiciary in our society. The accumulated effect of such chipping away is a matter of concern.