5. Deaths in custody and mandatory sentencing

5.1 It is in the interaction of Indigenous Australians and the criminal justice system that the consequences of the failure to deliver social justice to Indigenous Australians are most starkly seen. This submission brings to the attention of the Committee two aspects of this interaction: deaths in custody, and mandatory sentencing.

5.2 In respect of these matters, there are grave concerns that Australia is not meeting its international obligations to Indigenous people. This is in terms of Articles 1 and 2 of the Covenant, as well as under the ICCPR, the ICERD, and general principles of international law prohibiting discrimination on racial grounds and protecting the rights of Indigenous peoples.

Deaths in custody

5.3 The Royal Commission into Aboriginal Deaths in Custody was established in 1987 in response to concerns at the high number of Indigenous people dying in custody. The Royal Commission inquired into the deaths of ninety-nine Aboriginal and Torres Strait Islander people who had died in custody during the period between 1 January 1980 and 31 May 1989. The terms of reference of the Royal Commission required that the underlying causes of incarceration be considered.

5.4 The RCIADIC found that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. The reason for so many Aboriginal deaths is the far greater proportion of the Aboriginal population in custody. The Aboriginal population is grossly over-represented in custody: "Too many Aboriginal people are in custody too often".[1]

5.5 The recommendations of the RCIADIC sought to address this problem of over-representation at two levels. Firstly, at the level of the underlying issues such as poverty, alcoholism, poor health, lack of education, inadequate housing and high unemployment. Here the RCIADIC emphasised the importance of self-determination:

> The thrust of this report is that elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.[2]

5.6 At a second level, a significant number of recommendations concerned the operation of the criminal justice system itself. These were directed to ending discrimination against Aboriginal defendants, who were found to be more likely to be sought by police, more likely to be charged with an offence rather than cautioned, more likely to be arrested rather than charged by summons, less

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[1] Royal Commission into Aboriginal Deaths in Custody, National Report, AGPS 1991,Volume 1, para 1.3.1 - 1.3.3

[2] Ibid, Volume 1, para 1.7.6

likely to be granted bail, and when convicted to have fewer appropriate sentencing options.

5.7 The Royal Commission made 339 recommendations, which received widespread governmental support at the time. Despite the recommendations, the rates at which Indigenous people come into contact with the criminal justice system has not improved in the past decade.[3]

5.8 From 1988 to 1998, the Indigenous prisoner population (across all age groups) has more than doubled. It has grown faster than non-Indigenous prisoner rates in all jurisdictions. Nationally, Indigenous prison populations have increased by an average of 6.9% per year for the decade. This is 1.7 times the average annual growth rate of the non-Indigenous prison population.[4]

5.9 Figures for the June 1999 quarter indicate that 76% of all prisoners in the Northern Territory (NT) and 34% of all prisoners in Western Australia (WA) were Indigenous. The rate of imprisonment of Indigenous people in Western Australia was 21.7 times higher than that of the non-Indigenous population. The rates in the other states for which statistics are available are also unacceptably high - 15.7 times higher in South Australia, 12.2 times higher in Victoria, 11.3 times higher in Queensland, 9.9 times higher in the Northern Territory and 5.1 times higher in Tasmania.[5]

5.10 The number of Indigenous deaths in custody in the decade since the Royal Commission has been 150% the rate in the decade prior to the Royal Commission. To September 1999 there have been 147 Indigenous deaths in custody, compared to 99 in the decade before the Royal Commission.[6] From October 1999 to 30 May 2000, there have been a further 8 Aboriginal deaths in custody in Western Australia alone.[7]

5.11 17.2% of all prison deaths in the 1990s have been Indigenous people, compared to 12.1% in the 1980s.[8]

5.12 All levels of government have failed to adequately respond to the recommendations of the Royal Commission into Aboriginal Deaths in Custody, and also the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.[9] These reports make numerous

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3 See also Australian Report to the HRC, CCPR/C/AUS/98/4, paras 67-75.

4 Carcach, C., Grant, A. and Conroy, R., *Australian corrections: The imprisonment of Indigenous people* Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 137*, AIC, Canberra, 1999, p2.

5 Australian Bureau of Statistics, *Corrective Services*, June Quarter 1999, Ref: 4512.0, pp5, 21-22.

6 Dalton, V., *Aboriginal deaths in prison 1980 to 1998: National overview*, Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 131*, AIC, Canberra, 1999, p2. This figure is to September 1999, and includes the death of two Torres Strait Islanders.

7 Statistics provided by Western Australian Deaths in Custody Watch Committee.

8 Dalton, V., *op.cit.*, p6.

9 One of the terms of reference required the inquiry to examine contemporary forms of separation, such as contact with juvenile justice and the care and protection systems.

recommendations aimed at redressing the underlying causes of Indigenous over-representation in the criminal justice system, juvenile justice and care and protection systems. Many of the recommendations have not been acted upon or have been actively rejected by governments.

5.13 The situation in respect of Indigenous deaths in custody and over representation in the prison system represent a major failure of social justice in Australia. Clearly, there are major problems in respect of the adequacy, appropriateness and effectiveness of response by government in Australia to this situation, raising concerns over Australia's compliance with its international human rights obligations, including under the Covenant. These problems have been exacerbated by "law and order" legislative changes, such as mandatory sentencing, which despite their apparent neutrality in terms of racial effect, are generally understood to impact disproportionately on Indigenous Australians.

Mandatory sentencing

5.14 Mandatory sentencing laws were enacted in Western Australia in 1996 (through amendments to the *Criminal Code (WA) 1913*) and in the Northern Territory in 1997 (through amendments to the *Sentencing Act* (NT) 1995 and the *Juvenile Justice Act* (NT) (1993)).

5.15 The Western Australian laws provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of twelve months imprisonment or detention.[10] This is regardless of the gravity of the offence.

5.16 In the Northern Territory, the *Sentencing Act* (NT) provides that persons over the age of 17 (now 18 by agreement between the Northern Territory and the Commonwealth Governments) found guilty of certain property offences shall be subject to a mandatory minimum term of imprisonment of fourteen days for a first offence, ninety days for a second property offence and one year for a third property offence.[11]

5.17 For juveniles in the Northern Territory, the *Juvenile Justice Act* provides that a person aged 15, 16, or 17 who has been convicted for a certain property offence and has at least one prior conviction for such an offence, must be detained for at least twenty-eight days.[12] Although the Northern Territory *Sentencing Act* has been recently amended to provide for ‘exceptional circumstances’, these provisions do not apply to juveniles who are sentenced under the *Juvenile Justice Act*. The WA regime applies regardless of whether one is a juvenile or an adult offender.

5.18 An agreement has recently been reached between the Government of the Northern Territory and the Commonwealth that has resulted in some minor

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10 *Criminal Code* (WA) 1913, s401(4).

11 *Sentencing Act* (NT) 1995, s78A.

12 *Juvenile Justice Act* (NT) 1993, s53AE.

amelioration of these laws. The age of 'adulthood' has been raised to 18. Other changes are the introduction of a pre-charge diversionary option for police in the case of juvenile property offenders and Commonwealth funding to support further diversionary programs in the Northern Territory and interpreter services. Although welcome, such changes do not fully address the problem. They do not remove mandatory sentencing; only relate to juvenile offenders in the Northern Territory (ie, they do not affect adults in the NT or the Western Australian legislation at all).

Relevance to ICESCR

5.19 Mandatory sentencing laws raise serious concerns with Australia's compliance with CERD, CROC and the ICCPR. Each of the Committees established under these conventions has expressed concern at these laws.[13]

5.20 They also raise issues of compliance with ICESCR.

5.21 The Royal Commission into Aboriginal Deaths in Custody graphically illustrated the correlation between social and economic disadvantage and the over-representation of Indigenous people in the criminal justice system:

> Changes to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant in over-representation.[14]

5.22 In relation to young Aboriginal people and the criminal justice system Commissioner Johnston stated:

> Socio-economic factors are a critical determinant in crime… criminal statistics consistently show an over-representation of the poor, unemployed, those living in particular socio-economic areas, in property, street crime and public order offences, 'as perpetrators and as victims'… The significant number of property offences committed by Aboriginal youth would seem to indicate, in part, that economic factors are a significant motivation in crime.[15]

5.23 *Bringing them home* argued that 'Child welfare and juvenile justice law, policy and practice must recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.'[16]

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13 CERD: Un Doc: CERD/C/56/Misc.42/rev.3, 24 March 2000, para 16; HRC: UN Doc: CCPR/CO/69?AUS, 28 July 2000, para 17; CROC: Un Doc: CRC/C/15/Add.79, 10 October 1997, para 22.

14 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 4*, AGPS, Canberra 1991, p1.

15 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, AGPS, Canberra 1991, p287.

16 HREOC, *Bringing them home*, *op.cit*, p556.

5.24 Socio-economic disadvantage is a relevant factor in explaining the impact of mandatory detention provisions. As Helen Bayes has stated:

> What is not acknowledged by the politicians is that many of these young offenders are children who have suffered years of physical and emotional neglect, have effectively been abandoned by their families and the welfare system, and are trying to live independent of violent and abusive homes. These are children and young people who have learned to live by their wits and whose survival may already have depended on it.[17]

5.25 Socio-economic conditions are a highly relevant factor in explaining the disproportionate impact of those laws on Indigenous people. The following cases highlight the economic and social disadvantage of many young people affected by the Northern Territory mandatory detention laws.[18]

- Robert is a 15 year old Aborigine. He was first referred to the Department of Family, Youth and Children's Services when he was 12 due to a lack of parental support. Since the age of 14 Robert has mostly looked after himself. This year he attempted suicide while in police custody, having been arrested for a mandatory detention offence. The offence was one of property damage. He broke a window after hearing about the suicide of a close friend.

- Andrew is a 17 year old Aborigine. He lives in a town camp outside of Alice Springs. He is well known to youth services in Alice Springs, having accessed the court system and income and accommodation support since he was 15. His literacy skills are low and English is his third language. As with many young people in Alice Springs, Andrew has been identified as high risk and survived a suicide attempt recently. He was charged with a mandatory detention offence when he was 16 years old.

- Tony is 17 years old and lives between Alice Springs and several bush communities. Tony has been accessing crisis accommodation with youth services since he was 14 years old. He has a history of multiple substance dependency. Tony has minimal education and his literacy skills are low. English is his third language. He has never had his own income and workers who know him believe the bureaucracy of the system and the excessive paperwork is what deters him from accessing this entitlement. Tony is considered to be an adult in the Northern Territory. He was charged with a mandatory detention offence (unlawful entry into a shop) and faced imprisonment in an adult jail.[19]

5.26 Having noted the correlation between Indigenous disadvantage and offending behaviour the Royal Commission into Aboriginal Deaths in Custody made numerous recommendations which emphasised that state and territory legislative and administrative policies on sentencing should reflect the principle that imprisonment be a sanction of last resort and that alternatives to imprisonment should be utilised wherever possible.

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17 Bayes, H., *op.cit.*, p286.

18 Human Rights and Equal Opportunity Commission, *Mandatory detention laws in Australia – An overview of current laws and proposed reform, op.cit.*, pp 6-7. Names have been changed to avoid identification.

19 Further case studies are provided in: Human Rights and Equal Opportunity Commission, *Social Justice Report 1999*, Chapter 5.

5.27 As argued in Issue 3 of this submission, Australia has obligations under ICESCR to redress the disadvantage faced by Indigenous young people. These obligations include the development and implementation of sufficient programs that are focused on progressively realizing the rights of Indigenous people, as well as ensuring that the level of rights enjoyed does not fall below a core minimum level. Policies and programs for the sentencing of Indigenous offenders should be considered alongside these obligations.

5.28 To the extent that there is a link between the involvement of young Indigenous people in the criminal justice system and the failure of the State to meet its obligations to redress the inequality and disadvantage faced by Indigenous youth, a response by the State that mandates detention – with no regard to the circumstances of the offender – is retrogressive and does not meet Australia's obligations under Article 2 of the Covenant to progressively realize the economic, social and cultural rights of Indigenous Australians.