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From: Don Ditchburn
Sent: Tuesday, July 31, 2001 9:21 PM
To: legcon.sen@aph.gov.au
Subject: N.T.mandatory sentencing - Constitutional validity

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Telephone:

I would like the Senate Committee to consider the arguments raised in my letter addressed to the director of the N.T. Legal Aid Commission dated 12/5/00 which follows.

12/05/00
The Director,
N.T. Legal Aid Commission,
Darwin, N.T.

G'day Richard Coates,
I recently stumbled across some contemporary High Court findings which provide support for arguments which might be used to defeat the Northern Territory's mandatory sentencing laws. These arguments lead me to the following conclusions -
1. The Australian Constitution and the doctrine of separation of (judicial) power should prohibit federal laws from providing the N.T. Legislative Assembly with power to impose sentences on offenders by legislative edict; and,
2. The doctrine of proportionality can be used to determine whether laws which are purported to have the purpose of giving the courts power to punish offenders, but have the effect of imposing judicial sentences on all persons found guilty of prescribed offences, are within powers validly conferred.

These conclusions are derived from the following reasoning -
The Northern Territory was formerly part of the State of South Australia. Section 111 of the Australian Constitution requires parts of States which were surrendered to the Commonwealth "....shall become subject to the exclusive jurisdiction of the Commonwealth."

This section clearly required the Northern Territory to become subject to the powers of the Commonwealth, including the judicial powers. Even if sec.111 can be made redundant in respect to the government of the N.T. (by laws enacted under sec.122 of the Constitution), the exercise of judicial powers must have derived from exclusive powers of the Commonwealth. Otherwise the appellate powers of the High Court under sec.73 would not apply to N.T. courts.

This contention accords with the findings of three members of the High Court in Re Governor, Goulburn Correctional Centre; Ex parte Eastman (1999) 73 ALJR 1324 in which Territory courts are considered as 'other courts' invested with federal jurisdiction (see enclosure). In addition, Justice Kirby found that ". a Territory court is a Ch. III court and is subject to the Constitution as a whole."

Furthermore, the High Court has zealously maintained the doctrine of separation of judicial power applies to the courts specified in sec.71 of the Constitution, which includes the courts referred to by the above findings. Clearly, the N.T. Legislative Assembly is not a court to which sec.71 of the Constitution refers. As sec.58 requires the Governor-General to assent to proposed laws 'subject to this Constitution', federal Parliament could not confer judicial power on the N.T. Legislative Assembly.

Moreover sec.73 makes it clear that 'sentences' are among judicial powers which may be imposed by courts exercising federal jurisdiction as they are subject to review or appeal by the High Court. (Mandatory sentences which are non-judiciable by Territory courts, could not

be subject to review or appeal by the High Court). Therefore the power to impose sentences in a Territory must be a federal judicial power, only exercisable by courts to which Chapter III of the Constitution applies.

It follows that if the N.T. Legislature's laws have the purpose and intended effect of replacing the courts' judicial powers of sentencing offenders with mandatory sentences imposed by legislative fiat, such laws would not be within powers which could be validly conferred by federal legislation enacted subject to the Constitution.

However, I assume that the N.T. laws allow the Courts some discretion, probably imposing mandatory minimum sentences which are inconsistent with those applying to comparable crimes or considerations of natural justice. Presumably it will be claimed that such laws have the purpose of simply providing courts power to punish offenders (which would be within the powers of the N.T. Legislature).

In order to distinguish between laws having such a purported purpose and those which are effectively an exercise of judicial power by the N.T. Legislature, the doctrine of proportionality can be employed. The courts should determine whether laws claimed to be enacted pursuant to the purported purpose are "reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power." (Mason CJ, Deane and Gaudron JJ, in Davis v Commonwealth (1988) 166 CLR 79 at 100).

Obviously, if the laws imposing mandatory sentences give rise to the exercise of judicial power by the N.T. Legislative Assembly by means of legislative prescription, they should be declared invalid. Such an interpretation would be consistent with Australia's obligations under international treaties and the common law principle that punishment should fit the crime.

If this argument is sustainable, Australians are being imprisoned (and in one case dying) under laws which are unconstitutional as well as unjust. One hopes that it might be of assistance in defeating such iniquitous legislation and the function of dispensing justice can be restored to the judiciary.

Regards,

Don Ditchburn.