



MANDATORY SENTENCING FOR ADULT PROPERTY OFFENDERS
THE NORTHERN TERRITORY EXPERIENCE

BASED ON A PRESENTATION TO THE AUSTRALIAN AND NEW ZEALAND SOCIETY
OF CRIMINOLOGY CONFERENCE 2003.

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Mandatory Sentencing for Adult Property Offenders

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Introduction

Legislation mandating prison terms for property offenders was introduced in the Northern Territory in March 1997. The so-called *mandatory sentencing* legislation was controversial both within the Northern Territory, and throughout Australia.

Proponents of the sentencing regime believed that it would provide an effective deterrent to property offending and would see justice served in the eyes of the community. Detractors of the regime perceived a potential for the miscarriage of justice through the restriction of judicial discretion, and were concerned that the regime was specified in a way which implicitly targeted the Northern Territory's large Indigenous population.

Although mandatory sentencing legislation for property offenders was repealed in October 2001, the accompanying public debate has continued, and is likely to continue into the future.

The Northern Territory is able to contribute to a wider understanding of the implications of a mandatory sentencing regime, as data from the approximately four and a half years during which the Northern Territory's mandatory sentencing regime was in place is sufficient to generate a credible analysis of some of the major issues relevant to the public debate.

This paper progresses in six parts:

1. Overview of the mandatory sentencing legislation:
 - an informal introduction to the essential elements of the sentencing regime.
2. Offender profiles:
 - primarily describes a measure of Indigenous over-representation in the regime.
3. Reconviction under mandatory sentencing:
 - a more detailed description of Indigenous participation in the regime, including some tentative conclusions about the deterrent effect associated with the length of minimum sentences.
4. Impact on prison population:
 - a derived upper limit on the impact which mandatory sentencing may have had on the prison population.
5. Recorded property offences:
 - a time series of recorded mandatory sentencing-related property offences describing levels of recorded crime during and after mandatory sentencing.

6. Court outcomes during and after mandatory sentencing:
 - a comparison of relevant court outcomes, providing an understanding of the impact of reduced judicial discretion.

The analysis presented in this paper is based on data extracted from the Northern Territory's *Integrated Justice Information System* (IJIS), and the *Police Real-time Online Management Information System* (PROMIS). Estimated Resident Population and low series Indigenous Population Projections produced by the Australian Bureau of Statistics are used for the calculation of population-based rates.

Overview of Mandatory Sentencing Legislation

The Northern Territory's mandatory sentencing legislation was introduced on 8 March 1997. It was given effect primarily through amendments to the *Sentencing Act* and the *Juvenile Justice Act*, which defined the sentencing regimes applying to adults and juveniles respectively. The scope of this paper is restricted to an analysis of adult property offenders.

The mandatory sentencing legislation applied to a broad range of property offences, including:

- *Unlawful entry with intent;*
- *Unlawful use of motor vehicles;*
- *Property damage; and*
- *Stealing (including receiving stolen goods)*

Sections of the *Criminal Code* relating to fraud were not associated with the sentencing legislation, and shoplifting was explicitly omitted from the scope of the legislation.

The minimum penalty dictated by the mandatory sentencing legislation was completely determined by the number of previous occasions on which an offender had been sentenced for one or more relevant property offences after 8 March 1997. The term "strike", colloquially used to describe a sentencing occasion, is intuitively understood and will be used throughout this paper.

The minimum penalties associated with each strike were:

- Strike 1: 14 days imprisonment
- Strike 2: 90 days imprisonment
- Strike 3 or greater: 12 months imprisonment

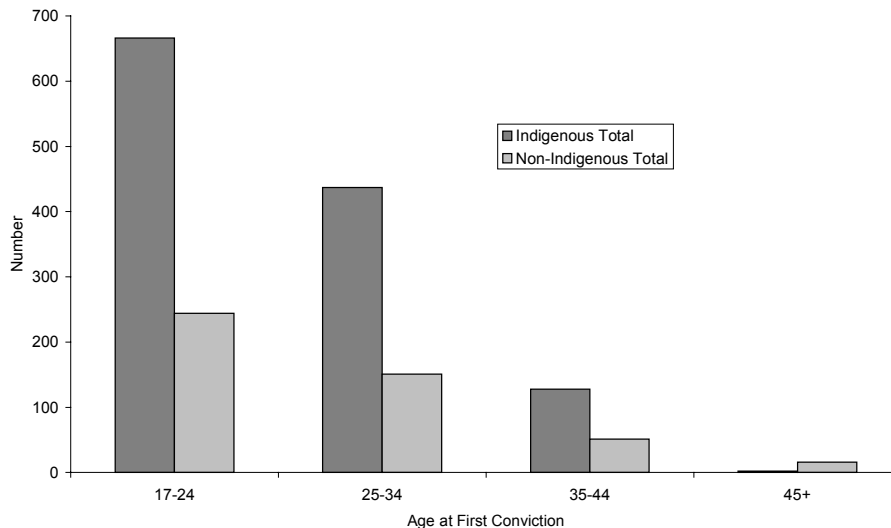
Profile of Convicted Property Offenders

The analysis performed by the Office of Crime Prevention has identified 1,715 individuals who, on at least one occasion, were subject to a mandatory minimum term of imprisonment.

1,253 (73%) of these were Indigenous, with the remaining 462 (27%) non-Indigenous.

With respect to both Indigenous and non-Indigenous offenders, approximately 90% were male.

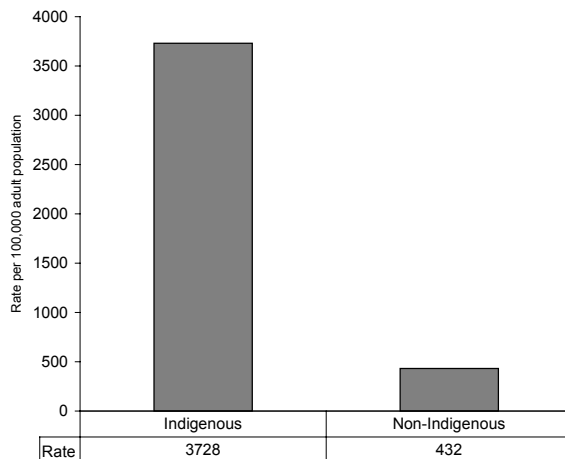
As Figure 1 suggests, those under 25 years of age were strongly represented, with 910 (53%) of offenders identified being under 25 years of age at the time of their first conviction.

Figure 1. Distinct Offenders by Age Group and Indigenous Status

The high level of participation of Indigenous people and younger adult offenders is better understood when their involvement is represented as a representation rate.

INDIGENOUS OVER-REPRESENTATION

Based on population estimates for June 2001, Indigenous people were represented in the population of mandatory sentencing-related offenders at a rate of 3,728 per 100,000 adult

Figure 2. Indigenous and non-Indigenous Representation Rates

population. An alternative expression of this result is that approximately 3.7% of Indigenous adults in the Northern Territory were subject to a mandatory minimum term of imprisonment on at least one occasion during the four and a half years of the sentencing regime.

The participation rate for non-Indigenous adults was 432 per 100,000 people; less than half a percent of the adult population.

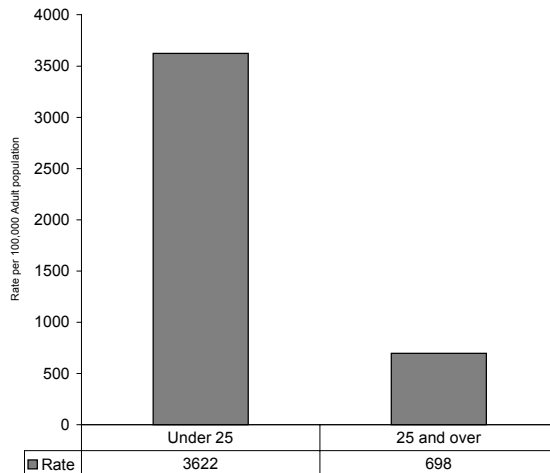
The ratio of the Indigenous and non-Indigenous rates is 8.6. An interpretation of the ratio of rates is that, if an Indigenous and a non-Indigenous adult were randomly selected from the Northern Territory population on 8 March 1997, the chance of the Indigenous

person coming into contact with the sentencing regime before its repeal in October 2001 would have been 8.6 times that of the non-Indigenous person.

OVER-REPRESENTATION OF YOUNG ADULTS

A similar analysis has been performed on the age characteristics of those sentenced under the mandatory sentencing regime. Young adults are defined here as adults under 25 years of age.

Figure 3. Representation Rates by Age Category



As illustrated in Figure 3, young adults are associated with comparatively high rates of involvement with the mandatory sentencing regime. Adults under the age of 25 years were approximately 5.2 times more likely to be subject to a mandatory minimum term of imprisonment than those 25 years or over.

Reconviction Under Mandatory Sentencing

Under the mandatory sentencing regime, the minimum term of imprisonment associated with a sentencing occasion was completely determined by the offender's number of previous strikes. A description of reconviction patterns during mandatory sentencing provides a deeper understanding of the disproportionate Indigenous representation within the system, and opens the way to a tentative conclusion about the deterrent effect associated with sentence length.

A total of 2,204 separate sentencing occasions have been identified for which a minimum term of imprisonment would have applied. These included 1,715 first strikes (14 days), 379 second strikes (90 days), and 110 third or subsequent strikes (12 months).

Of the 110 third and subsequent strikes, 17 were fourth or fifth strikes. These can occur, for example, when an offender commits a property offence while in prison, or when prior offences are discovered and prosecuted after convictions are recorded for later offences.

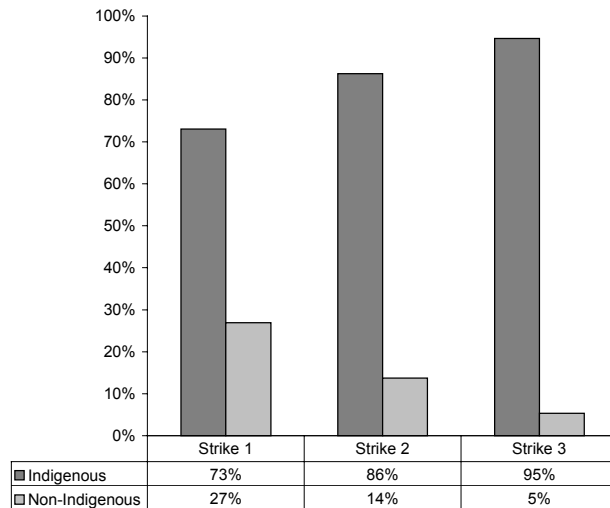
Figure 4. Indigenous and non-Indigenous proportion of offenders by Strike

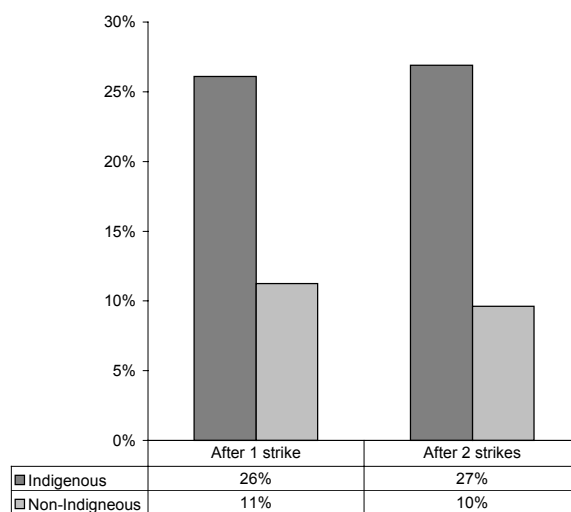
Figure 4 reveals that Indigenous people represent an ever greater proportion of sentenced offenders as the strike number increases. Interpretively, this result magnifies the effect of Indigenous over-representation, as it is for second and third strikes that comparatively serious penalties apply.

Of the sentencing occasions involving a minimum 12 month sentence, 95% related to Indigenous offenders.

EVIDENCE OF DETERRENCE

It is also of interest to understand how rates of reconviction change for Indigenous and non-Indigenous offenders after they have received more than one minimum sentence.

Figure 5 illustrates the proportion of first strikers who went on to receive a second conviction, and the proportion of second strikers who went on to receive a third conviction.

Figure 5. Indigenous and non-Indigenous Reconviction Rates

The notable feature of Figure 5 is that the rates of reconviction do not change appreciably for first and second strikers.

The factors mitigating against the rational decision to commit a property offence, and which are directly associated with the deterrent effect of mandatory sentencing legislation, are:

1. the perceived probability of being caught and successfully prosecuted;
2. knowledge that a term of imprisonment is a guaranteed penalty if convicted;
3. knowledge of the minimum length of sentence upon conviction¹.

Of these three factors, only the third varies as the length of an offender's criminal history increases. Therefore, to the extent that the length of the minimum sentence applying to a prospective offender's next strike is an effective deterrent, this fact should be revealed in a lower probability of reconviction after two strikes than is observed after one strike.

The data at Figure 5 does not provide support for the idea that the threat, or experience, of a longer sentence reduced the likelihood of a person being reconvicted for a mandatory sentencing-related property offence.

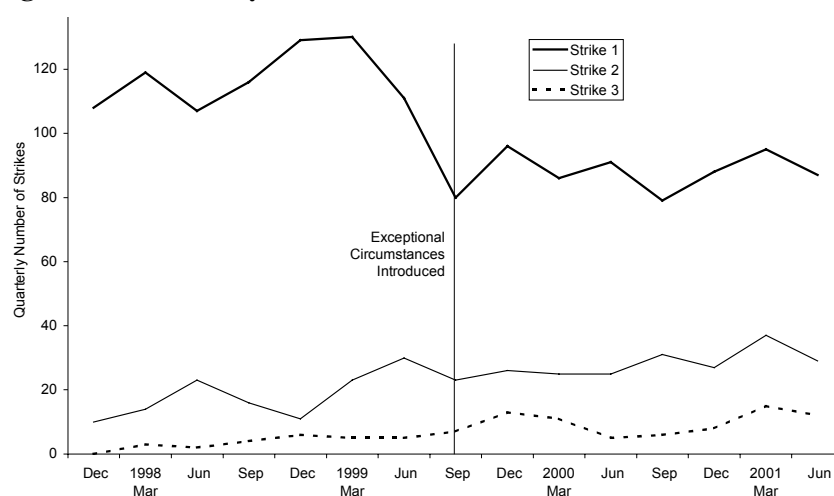
Impact of Mandatory Sentencing on Prison Population

The impact of mandatory sentencing on the prison population is of interest to policy makers, as it represents a substantial proportion of the financial burden associated with a policy of mandatory imprisonment.

The size of the prison population is conventionally measured as a daily average number of prisoners. In order to quantify the impact of mandatory sentencing on the NT prison population, it is important to recognise that the minimum penalty associated with a single third strike contributes as much to the annual daily average number of prisoners as 26 first strikes.

Figure 6 describes the quarterly number of first, second, and third strikes identified between the December quarter 1997 and the June quarter 2001. These can be used to calculate an upper limit on the impact of mandatory sentencing on the daily average prison population.

Figure 6. Quarterly Number of First, Second and Third Strikes: Dec 1997 – Jun 2001



¹ Hence perceived cost of being caught.

It is of interest, however, to first note the reduction in the quarterly number of first strikes which coincided with the introduction of exceptional circumstances provisions as part of the sentencing regime. These conditions, if satisfied, could allow a first offender to avoid a term of imprisonment.

EXCEPTIONAL CIRCUMSTANCES

Exceptional circumstances provisions were introduced as part of the mandatory sentencing regime in July 1999.

Under the exceptional circumstances provisions the presiding magistrate had the discretion not to impose a term of imprisonment once satisfied that the following conditions were met:

- that the defendant had not previously been dealt with under the exceptional circumstances provisions of the mandatory sentencing regime;
- that the court appearance related to a single property offence;
- that the offence was trivial in nature;
- that reasonable effort had been made by the defendant to provide restitution; and
- that the defendant was otherwise of good character, and had cooperated with law enforcement agencies.

The onus was placed on the defendant to satisfy the court that these conditions were met.

Figure 6 shows a reduction of approximately 25% in the quarterly average number of first strikes following the introduction of exceptional circumstances provisions.

CONTRIBUTION TO DAILY AVERAGE PRISON POPULATION

The exact impact of mandatory sentencing on the daily average prison population cannot be calculated, as the sentence an offender would otherwise have received cannot be known. However, a ceiling, or upper limit, can be set on the impact of mandatory sentencing on the prison population by assigning the entire minimum sentence to each strike, and distributing the associated number of prison days over the appropriate time period.

This upper limit reflects the hypothetical scenario that none of the property offenders convicted during the mandatory sentencing period would have received a prison term if not for the legislated requirements of the regime. This scenario is clearly not true, so the true impact of the mandatory sentencing regime is known to have been less than the limit calculated by this method.

Figure 7. Contribution of Mandatory Sentencing to Daily Average Prison Population: Upper Limit

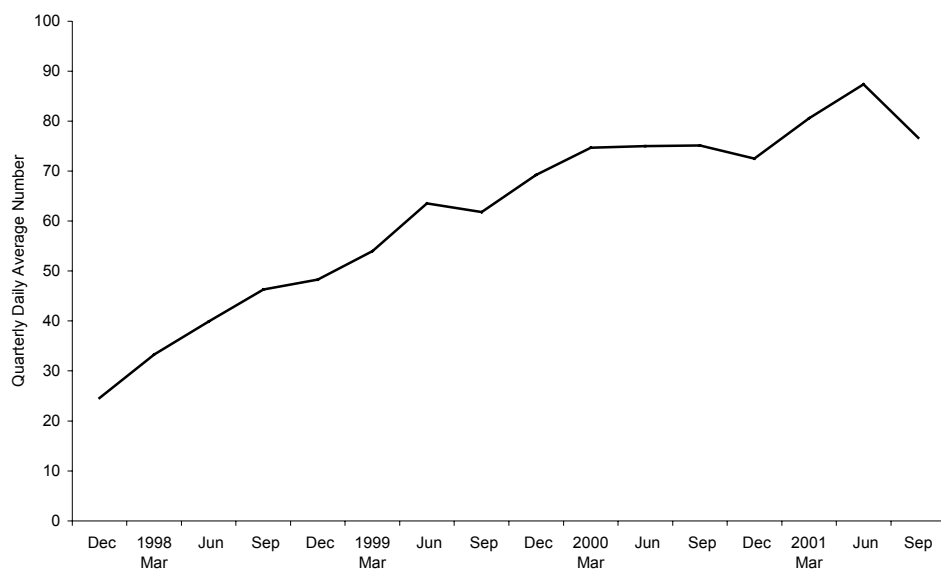


Figure 7 illustrates the maximum possible contribution of mandatory sentencing to the Northern Territory quarterly daily average prison population. The true impact of mandatory sentencing on the NT prison population lies between zero and this upper limit.

Under the Northern Territory's mandatory sentencing model, the impact on the prison population would be expected to grow rapidly at first, particularly as second and third offenders begin to enter the prison system, and then at a slowing rate, before plateauing to a value which would then grow in line with broad social and demographic trends.

An important interpretive question is whether, after four and a half years, the potential contribution of mandatory sentencing had plateaued to a long term level.

Notwithstanding the spike in Figure 7 in the June quarter 2001, caused by an unusually large number of second and third strikes in the March quarter 2001, it appears that the upper limit illustrated in Figure 7 was at, or close to, its long term level by the time the mandatory sentencing legislation was repealed. If so, the financial burden on the prison system could be assessed as the marginal cost of approximately 80 prisoners per day. If, however, the impact of mandatory sentencing was still growing when the legislation was repealed, then its potential cost to the prison system was yet to be realised.

UPPER LIMIT AS A PROPORTION OF UNDERLYING PRISON POPULATION

The limit established on the contribution of mandatory sentencing to the Northern Territory prison population is best understood as a proportion of the total prison population.

Over the period from 1996 to 2002, the Northern Territory experienced an Australia-like rate of growth in its quarterly daily average prison population. Concealed in this growth, however, is the influx of a large number of people smugglers into NT prisons from mid-1999.

Prisoners held for people smuggling are not from the Northern Territory population and are held for federal offences. As their presence in Northern Territory prisons is unrelated to Northern Territory policy, legislation, or social conditions, it is more useful to

consider the impact of mandatory sentencing relative to the *underlying* prison population: the total population *less* people smugglers.

Figure 8. Impact of MS on Northern Territory Prison Population: Upper Limit

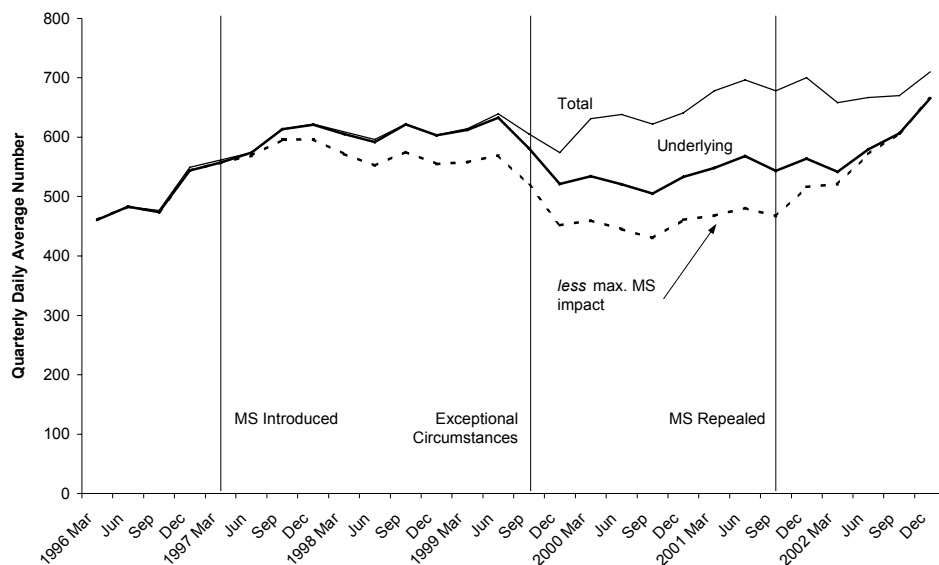


Figure 8 shows the quarterly daily average Northern Territory prison population from 1996 to 2002, the underlying prison population (heavy series), and the effect of removing the maximum possible contribution attributable to mandatory sentencing from the underlying prison population (dotted series).

Contrary to early expectations, which included the possibility of a doubling in the daily average prison population, mandatory sentencing contributed at most about 15% to the underlying daily average prison population. The true contribution of mandatory sentencing would therefore have been less than 15%, smaller than the impact of people smugglers at the same time.

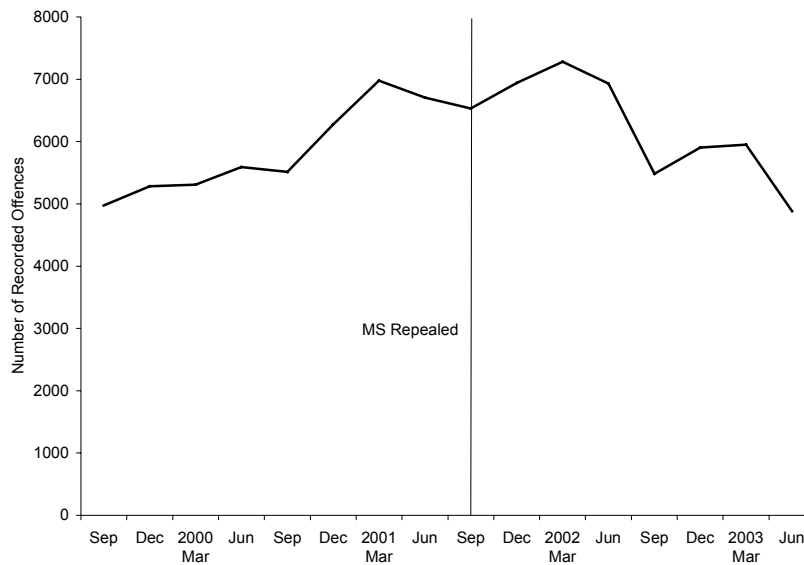
Mandatory sentencing undoubtedly increased the flow of individuals through the prison system, however as the majority were required to serve a comparatively short minimum sentence of 14 days, the effect on the daily average number of prisoners over a quarter or a year was comparatively small.

Recorded Crime During and After Mandatory Sentencing

Deterrence was a primary objective of the policy of minimum imprisonment for property offences.

Using data extracted from PROMIS, an operational database used by Northern Territory Police, it has been possible to compile a short time series of recorded offences which would have been subject to mandatory minimum sentences.

Unfortunately the interpretive value of the time series is limited by the fact that the data from which the relevant offences can be aggregated only extends as far back as July 1999, approximately two years prior to the repeal of mandatory sentencing. The available data is presented at Figure 9 (below).

Figure 9. Recorded Property Offences: Jul 1999 – Jun 2003

The time series of recorded offences appears to behave in a counter-intuitive way when interpreted in relation to the possible deterrent effect of mandatory minimum sentencing. A period of steady growth in the number of recorded offences is observed over the two years prior to the repeal of the legislation, and a period of decline commences shortly afterwards.

The data is insufficient to permit assertions about the cause of this pattern, or to suggest that mandatory sentencing did not have a deterrent effect on levels of property crime. However, in so far as changes in recorded crime behave as an effective surrogate for changes in the actual level of crime, the data suggests that sentencing policy is not as dominant a factor influencing the level of crime as may have been expected at the time that mandatory sentencing was introduced.

Court Outcomes During and After Mandatory Sentencing

The implications of the restriction of judicial discretion under a policy of mandatory imprisonment is a focal issue in the debate over mandatory sentencing.

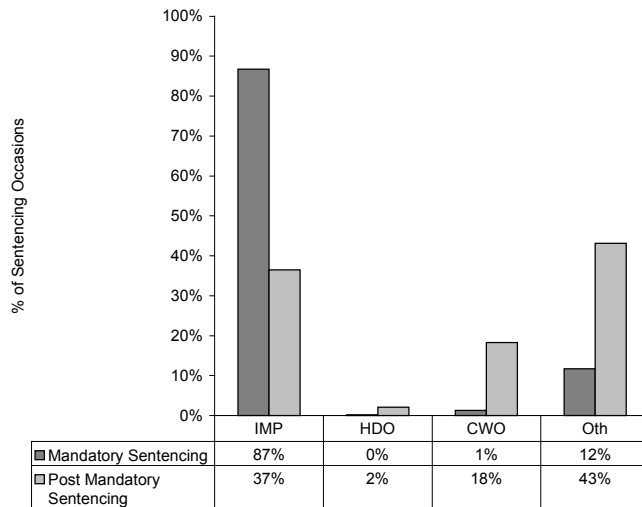
In this section the change in court outcomes brought about by the Northern Territory's mandatory sentencing regime is quantified by comparing data from a twelve month period during the mandatory sentencing era with a twelve month period following the repeal of the sentencing legislation. In both cases, a twelve month period has been selected during which the relevant sentencing legislation was well established.

The comparison is based on the most serious outcome for each sentencing occasion involving at least one offence covered by the mandatory sentencing regime. The outcomes described are:

- IMP - a term of imprisonment (not fully suspended);
- HDO - home detention order (usually associated with a fully suspended imprisonment order);
- CWO - community work order (combining community service orders and punitive work orders, as they existed before October 2001);

- Oth - other orders (including fines, good behaviour bonds and fully suspended terms of imprisonment).

Figure 10. Sentencing Occasions by Most Serious Court Outcome



As illustrated at Figure 10, the proportion of sentencing occasions resulting in imprisonment under the mandatory sentencing regime was considerably higher (87%) than for the period after its repeal (37%). The 13% of sentencing occasions not resulting in imprisonment during the mandatory sentencing period are, by definition, occasions on which exceptional circumstances were found to exist.

Serious non-custodial orders, such as home detention and community work were almost unused for property offences during the mandatory sentencing period, with nearly all instances of exceptional circumstances resulting in “other” orders, such as fines, good behaviour bonds, and fully suspended terms of imprisonment.

In the post-mandatory sentencing period, the largest proportion of court outcomes fell into the “other” order category. Further analysis, not detailed in this paper, reveals that many sentencing occasions resulting in “other” orders relate to comparatively minor property offences, such as minor property damage and stealing offences.

These results suggest a large disparity between the requirements of the sentencing regime and the inclination of the court in relation to offences covered by the mandatory sentencing legislation. A large proportion (67%) of sentencing occasions in the post-mandatory sentencing period analysed relate to categories of property offence which are themselves comparatively minor, such as stealing offences. A reluctance by magistrates to impose custodial sentences for minor offences would explain the differences in court outcomes for the two periods compared.

A further insight into these differences is revealed when the proportion of sentencing occasions resulting in imprisonment is considered with respect to the offender’s number of previous property offence convictions.

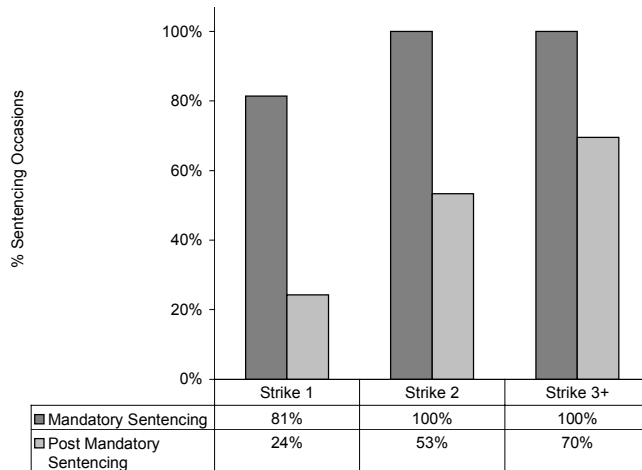
Figure 11. Percentage of Sentencing Occasions Resulting in Imprisonment by Strike

Figure 11 reveals that the impact of the mandatory sentencing regime on court outcomes was most pronounced early in an offender's criminal career, when the court would otherwise be least likely to order a term of imprisonment. This is evident in the large difference in the proportions of first offenders receiving imprisonment terms.

It is clear, however, that repeat offenders are increasingly likely to receive a term of imprisonment through the operation of judicial discretion alone, as evidenced by the steadily increasing proportion of offenders imprisoned in the post-mandatory sentencing period.

Nonetheless, approximately 30% of third or subsequent offenders did not receive a term of imprisonment during the post-mandatory sentencing period analysed. This suggests that, even for repeat offenders, important parts of the normal sentencing decision are based on the severity of the offence, and the circumstances in which it was committed.

Conclusions

The conclusions are summarised according to the major themes of this paper.

INDIGENOUS OVER-REPRESENTATION

Indigenous people were heavily over-represented in the mandatory sentencing regime. Indigenous adults were approximately 8.6 times as likely as non-Indigenous adults to receive a mandatory prison term at some time during the life of the sentencing regime.

Indigenous adults were an even higher proportion of repeat offenders, with 95% of one year minimum sentences being ordered against indigenous offenders.

DETERRENCE

The length of the minimum sentence was not an effective deterrent for the population known to have been subject to the mandatory sentencing regime. This finding does not discredit the possibility that the other elements of mandatory sentencing regime, including the publicity it generated, did deter property offenders.

Available data suggests that sentencing policy does not measurably influence levels of recorded property crime.

IMPACT ON PRISON POPULATION

Early predictions of the impact of mandatory sentencing on the Northern Territory prison population were overstated. At its maximum, the upper limit of the possible impact of mandatory sentencing was at 15% of the underlying prison population. The true impact would have been less than 15%. The upper limit may have increased if the mandatory sentencing legislation had not been repealed, however the data suggests that the impact of mandatory sentencing on the prison population was close to a long term level by the time it was repealed.

IMPACT ON JUDICIAL DISCRETION

Mandatory sentencing legislation altered court outcomes for property offences on a large proportion of sentencing occasions. The proportion of sentencing occasions resulting in imprisonment was 50 percentage points higher during the mandatory sentencing era than it was following the repeal of the sentencing legislation.

A likely explanation for the difference is the comparatively low severity of the offences which characterise a large proportion of relevant sentencing occasions.

Mandatory sentencing legislation has a lesser impact on court outcomes for repeat offenders, as magistrates are more likely to order imprisonment for offenders with a prior criminal history.