
The constitutionality of minimum mandatory sentencing regimes

Anthony Gray and Gerard Elmore*

This article reflects upon the increasing use by the legislature of minimum mandatory sentencing regimes, requiring courts to impose at least the minimum sentence provided for, regardless of the circumstances of the case. While judicial power may be the subject of some legislative restrictions, it is argued that minimum mandatory sentencing provisions undermine judicial independence and breach the principle of separation of powers, undermining public confidence in the independence of the judiciary. The High Court has shown an increased willingness in recent years to defend the independence of the courts contemplated by Ch III of the Constitution. Support for the authors' argument appears in some of the relevant international jurisprudence.

INTRODUCTION

Recent years have seen a growth in the extent to which Parliaments have asserted power in the area of sentencing. In part, this growth may reflect dissatisfaction in some quarters with the outcomes of a traditional system that provides courts with a broad discretion in dealing with those who have committed a crime. Clearly, there are some in society who believe courts are “too soft” on offenders, and the introduction of minimum mandatory regimes are a political response to such concerns. However, in this article the authors argue that there are constitutional difficulties with such regimes, and that recent jurisprudence in the High Court may indicate that such schemes are vulnerable to a constitutional challenge.

For discussion purposes, it may be best to be specific in terms of the types of regimes that the authors have in mind. Perhaps the best example in which such issues arise has been in the context of minimum mandatory sentencing. Such an approach appears in the provisions of the *Migration Act 1958* (Cth) dealing with so-called “people smugglers”. Section 236B of that Act contains a minimum mandatory sentencing regime in respect of certain offences in relation to people-smuggling.¹ In respect of an adult² convicted of any of these offences, the Act provides that the court must impose a sentence of at least eight years if there is a breach of s 233B or if the offence is a repeat offence and, in any other case, the court must impose a minimum sentence of five years.³ Other examples appear in State and Territory sentencing legislation.⁴

* Professor Anthony Gray, Deputy Head, University of Southern Queensland Law School and Gerry Elmore, Legal Research Officer, Office of the Director of Public Prosecutions and Ph D candidate, University of Southern Queensland. The authors wish to thank the anonymous referee.

¹ Broadly, these offences involve bringing non-citizens into Australia intending that they will be exploited or subject to cruel or inhuman treatment (*Migration Act 1958* (Cth), s 233B), where people smuggling involves at least five non-citizens (s 233C), or the knowing use of false documents or the knowing making of false statements in connection with such entry (s 234A).

² *Migration Act 1958* (Cth), s 236B(2).

³ *Migration Act 1958* (Cth), s 236B(3). Section 236B(4) also sets out minimum non-parole periods for these offences: five years, in respect of the eight-year minimum jail term; and three years, in respect of the five-year minimum jail term.

⁴ See, for example, mandatory sentencing in the Northern Territory in relation to property offenders (*Sentencing Act* (NT), s 78BA) and in Queensland for repeat driving offenders (*Transport Operation (Road Use Management) Act 1995* (Qld), s 79(1C), although that sentence of imprisonment may be suspended). Some States have mandatory life imprisonment for murder (eg *Criminal Code 1899* (Qld), s 305; *Criminal Code Act* (NT), s 157(2)). Some argue that mandatory life imprisonment for murder is a special case, because the existence of defences/excuses can reduce the charge to manslaughter, resulting in a lesser sentence. Arguably, this obviates concerns with the use of mandatory life imprisonment penalties in that context.

There is an important criminology debate about the effectiveness of mandatory sentencing regimes in achieving desired aims. If the aim of such schemes is to deter the type of activity to which the regime refers, there is substantial evidence that such schemes are not very successful in achieving this aim.⁵ However, the immediate purpose here is not to debate the effectiveness of such schemes as public policy instruments, but rather to assess their compatibility with the system of governance for which the Australian *Constitution* provides.

There are examples in other contexts of possible legislative incursions into the judicial sphere. These include the context of sentencing laws which purport to direct the courts in the exercise of their sentencing powers.⁶ For instance, various Acts relevant to sentencing purport to direct the court as to the factors that are to be taken into account at the time of sentencing. Several of these Acts use the word “must” in the provisions clarifying the factors to which the court must have regard at the time of sentencing.⁷ Such directions occur in other contexts as well; examples occur in bail legislation.⁸ They occur in the context where the court is directed, in exercising its discretion, to make a non-disclosure order, to give “greatest weight” to the Minister’s certificate pertaining to the matter.⁹ They occur in the context of preventive detention laws, where the court is sometimes told what the paramount consideration is in exercising its “discretion” to make the order or not.¹⁰ The High Court has validated the use of mandatory language in the context of judicial discretion, at least to some extent.¹¹

For the purposes of this article, and with a view to minimising complexity, the authors have chosen to focus their argument primarily on the mandatory minimum sentencing regimes, because it is considered that the strongest constitutional objections arise there. However, the authors assert that

⁵ Chief Justice Wayne Martin of the Western Australia Supreme Court made this point recently: Martin W, “Sentencing Issues in People Smuggling Cases” (Paper delivered at Federal Crime and Sentencing Conference, 11 February 2012); Schulhofer S, “Rethinking Mandatory Minimums” (1993) 28 Wake Forest L Rev 199; United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991); Schulhofer S and Nagel I, “Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months” (1989) 27 Am Crim L Rev 231; Nagel I and Schulhofer S, “A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines” (1992) 66 S Cal L Rev 501; Cassell P, “Too Severe? A Defense of the Federal Sentencing Guidelines and a Critique of Federal Mandatory Minimums” (2004) 56 Stan L Rev 1017; Morgan N, “Mandatory Sentences in Australia: Where Have We Been and Where are we Going?” (2000) 24 Crim LJ 164; Roche D, *Mandatory Sentencing*, Trends and Issues in Crime and Criminal Justice No 138 (Australian Institute of Criminology, 1999); Weinstein I, “Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing” (2003) 40 Am Crim L Rev 87.

⁶ This will obviously be a question of fact and degree. Traditionally, Parliament, for example, has provided for maximum penalties for offences. No constitutional argument is made against such laws here.

⁷ *Crimes Act 1914* (Cth), s 16A; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(1); *Sentencing Act 1991* (Vic), s 5(2); *Penalties and Sentences Act 1992* (Qld), s 9(2); *Sentencing Act 1995* (WA), s 6(2) and *Sentencing Act 1995* (NT), s 5(2). Other Acts are cast in more permissive terms, allowing courts to consider various matters: *Criminal Law (Sentencing) Act 1988* (SA) uses the word “should”; see also *Sentencing Act 1997* (Tas) and *Crimes (Sentencing) Act 2005* (ACT).

⁸ For example, *Bail Act 1978* (NSW), s 32; *Bail Act 1977* (Vic), s 4(2) and *Bail Act 1980* (Qld), s 16, where the court is directed as to the matters to be taken into account in assessing bail applications.

⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 31(8).

¹⁰ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13(6).

¹¹ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9 (provision directing a court to disregard the fact that evidence sought to be used in proceedings was acquired unlawfully upheld by majority); *Baker v The Queen* (2004) 223 CLR 513; 78 ALJR 1483; [2004] HCA 45 (court not to provide a minimum term and an additional term for a category of offenders unless special circumstances exist held valid) (analogous to some sentencing provisions which state that unless there are exceptional circumstances, certain categories of offender must be jailed, eg *Penalties and Sentences Act 1992* (Qld), s 9(5)); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; 192 A Crim R 501; 83 ALJR 327; [2009] HCA 4 (provision requiring court to take steps to maintain confidentiality of evidence presented, including steps to receive evidence and hear argument about the information in private without the parties and their representatives, upheld by majority). On the other hand, a State court invalidated, on this principle, a law requiring a court to hear a confiscation proceeding in the absence of the person who owned the property: *Re Criminal Proceeds Confiscation Act 2002* (Qld) [2004] 1 Qd R 40; [2003] QCA 249.

much of the argument here could also be used to attack the constitutional validity of the other types of regimes referred to in the preceding paragraph. Indeed, one of the present authors has written about those aspects of those regimes elsewhere.¹²

CONSTITUTIONAL PROVISIONS RELEVANT TO THE EXERCISE OF POWERS BY COURTS

The High Court of Australia has increasingly been prepared to declare laws invalid if they are contrary to the requirements of Ch III of the *Constitution* and the separation of powers it reflects.¹³ For instance, in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64, three members of the High Court declared that:

It is one thing for the Parliament, within the limits of the legislative power conferred on it by the *Constitution*, to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction ... the latter constitutes an impermissible burden into the judicial power which Chapter III vests exclusively in the courts which it designates.¹⁴

A majority of the High Court in *Lim* declared a provision purporting to direct a court not to release certain persons from custody to be constitutionally invalid.¹⁵

It is argued that the types of provisions being considered here – minimum mandatory sentencing provisions (but also legislation of other kinds, as alluded to earlier) using “must” in providing for the court’s deliberations regarding sentence – do purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. In effect, the provisions take away the courts’ discretion to order a sentence below the statutorily-prescribed minimum, or to consider factors other than those on the list provided by Parliament. While a precise definition of judicial power is notoriously elusive,¹⁶ sentencing is clearly an exclusively judicial function.¹⁷ As McHugh J put it in *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9:

¹² Gray A, “Due Process, Natural Justice, Kable and Organisational Control Legislation” (2009) 20 PLR 290; Gray A, “The Constitutionality of Criminal Organisation Legislation: The Queensland and New South Wales Versions” (2010) 17 AJ Admin L 213.

¹³ A landmark decision in this context was *R v Kirby; Ex Parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; [1956] HCA 10 confirming the fundamental separation of judicial power from non-judicial power contemplated by the structure of the *Australian Constitution*.

¹⁴ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37; [1992] HCA 64; *Nicholas v The Queen* (1998) 193 CLR 173 at 186; 99 A Crim R 57; [1998] HCA 9 (Brennan CJ). Members of the High Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560; 180 A Crim R 455; 82 ALJR 454; [2008] HCA 4 expressed very similar sentiments: “legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals” (Gummow, Hayne, Heydon and Kiefel JJ); Wheeler F, “Due Process, Judicial Power and Chapter III in the New High Court” (2004) 32 F L Rev 205; Wheeler F, “The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia” (1997) 23(2) Mon ULR 248; Bateman W, “Procedural Due Process Under the Australian Constitution” (2009) 31 Syd LR 411; McHugh M, “Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?” (2001) 21 Aust Bar Rev 235.

¹⁵ Brennan, Deane, Dawson and Gaudron JJ, Mason CJ, Toohey and McHugh JJ dissenting (not on the principle, but on the basis that the impugned provisions could be read down to achieve validity).

¹⁶ *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 532 (Mason CJ).

¹⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64 where Brennan, Deane and Dawson JJ refer to the “essentially and exclusively judicial power” of punishing criminal guilt; *Leeth v Commonwealth* (1992) 174 CLR 455 at 470; 61 A Crim R 85; [1992] HCA 29 (Mason CJ, Dawson and McHugh JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 186; 99 A Crim R 57; [1998] HCA 9 (Brennan CJ); *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518 at 580; [1989] HCA 12 (Deane J); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [39] (Lord Steyn); *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; [1918] HCA 56.

Legislation that removes from the courts their exclusive function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth will be invalidated as a usurpation of judicial power.¹⁸

Two members of the court in the *Nicholas* case would have invalidated provisions directing the court not to take into account the fact, in some cases, that evidence being used by the prosecution was obtained other than by lawful means. This was on the basis that it unacceptably compromised the integrity of, and undermined public confidence in, Ch III courts.¹⁹ Courts must not be seen to be subservient agents of the Executive of Parliament.²⁰

The High Court considered these issues again in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; [1996] HCA 24. In invalidating the Act in question, members of the majority emphasised that punishing criminal guilt was an incident of the judicial function. Toohey J, for instance, noted the “exclusively judicial function of adjudging and punishing criminal guilt”.²¹ Gaudron J referred to her comments in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460; 54 A Crim R 11; [1991] HCA 29 acknowledging the key importance of the judicial process in “protecting the individual from arbitrary punishment and arbitrary abrogation of rights”.²² Members of the majority in *Kable* all required that legislation conferring powers on courts not undermine the actuality and perception that the courts were independent of the legislature and the Executive. One of the reasons they objected to the *Kable* legislation was that it created an impression that the court was acting as a puppet:

The judiciary is apt to be seen as but an arm of the executive which implements the will of the executive which implements the will of the legislature. Thereby a perception is created which trenches upon the appearance of institutional impartiality.²³

Some of these sentiments are considered to be highly apposite to consideration of mandatory minimum sentencing regimes and regimes directing courts to consider particular factors at sentencing time. There is obvious concern, when it is expressly acknowledged that punishment is an exclusively judicial function, with a court being told, in effect, how to exercise that function. If a key role of the judicial process is to protect individuals from arbitrary punishment, as Gaudron J noted, there must be concern, for instance, with legislation that requires punishment by way of minimum imprisonment duration on a finding of guilt, with no regard to the circumstances of the offence or the offender. All members of the majority in *Kable* expressed concern with the perception that the court was being used to implement a legislative plan and was not independent of the government, such that the court’s integrity was compromised. A direction by the Parliament to the court that a minimum level of jail term must be ordered upon conviction is also apt to create an impression that a court is being asked to rubber-stamp a legislature’s determination of what is an appropriate penalty.²⁴ This undermines the impression of institutional integrity and independence.

Other academics have argued this position. For instance, Manderson and Sharp argue strongly that mandatory sentencing laws:

are so fundamentally different in character as to make a mockery of the courts’ judicial role in the sentencing of offenders. It is not the severity of the laws, but their complete and structural abrogation of

¹⁸ *Nicholas v The Queen* (1998) 193 CLR 173 at 220; 99 A Crim R 57; [1998] HCA 9 (McHugh J, dissenting in the result).

¹⁹ *Nicholas v The Queen* (1998) 193 CLR 173 at 222; 99 A Crim R 57; [1998] HCA 9 (McHugh J, dissenting); see also Kirby J (dissenting) in *Baker v The Queen* (2004) 233 CLR 513 at 547; 78 ALJR 1483; [2004] HCA 45.

²⁰ *Nicholas v The Queen* (1998) 193 CLR 173 at 256; 99 A Crim R 57; [1998] HCA 9 (Kirby J, dissenting); see also *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 607-609 (Deane J, dissenting in the result), 703-704 (Gaudron J, dissenting in the result).

²¹ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 98; [1996] HCA 24.

²² *Re Nolan; Ex Parte Young* (1991) 172 CLR 460 at 497; 54 A Crim R 11; [1991] HCA 29; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 107; [1996] HCA 24.

²³ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 134; [1996] HCA 24 (Gummow J); to like effect Toohey J (189 CLR 51 at 98), Gaudron J (189 CLR 51 at 107), McHugh J (189 CLR 51 at 124).

²⁴ Mason CJ in *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 537 agreed that “a statute which contains no declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power”; apparently then, Mason CJ would consider that an Act that did impose punishment for guilt would (or could) amount to a usurpation of power.

a meaningful judicial role in the infliction of a penalty that subverts the rule of law and is thereby an instance of the legislature requiring courts to act in a manner which is incompatible with the judicial process.²⁵

Writing extra-judicially, former New South Wales Supreme Court Justice Santow argued that mandatory sentences forced judges to lend legitimacy to unjust and oppressive punishment, in a way that was offensive to the *Kable* doctrine.²⁶

Aspects of the High Court's recent pronouncement in *South Australia v Totani* (2010) 242 CLR 1; 85 ALJR 19; 201 A Crim R 11; [2010] HCA 39 can also be used to suggest the constitutionally problematic nature of mandatory minimum sentencing. There, a majority of the court struck out provisions of a South Australian statute requiring the court to make a control order in respect of members of an organisation that a member of the South Australian Executive had "declared". The court was not given discretion not to make an order against someone who was a member of the declared organisation.²⁷ Six members of the High Court declared the law to be unconstitutional, largely on the basis of the principles espoused in *Kable*. Members of the majority were uncomfortable with the perception that the court was being conscripted to an essentially executive process, being required to make an order once a member of the Executive had made the relevant determination, without inquiring into the facts relating to specific individuals.²⁸

A mandatory minimum sentence regime is in some ways less offensive to the *Kable* principle, because it leaves untouched the court's role in determining whether or not the person is guilty of a crime. However, it then takes away a traditional aspect of the judicial role, that of discretion in determining the appropriate penalty. If the court was not impressed with the removal of judicial discretion in *Totani*, it should not be impressed with the removal of judicial discretion in the context of mandatory minimum sentencing.²⁹ Crennan and Bell JJ concluded that legislation:

drawing a court into the implementation of government policy by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes will deprive that court of the characteristics of an independent and impartial tribunal.³⁰

While Crennan and Bell JJ were discussing the context of the *Totani* provisions, where the court was required to make the control order, the comments are equally applicable where a court is directed to implement a legislative determination as to what is a minimum acceptable sentence for the commission of a crime, without following "ordinary judicial processes" of considering the specific circumstances of the offence and the offender.

Judges who have had to apply the minimum mandatory sentencing regime provided by the *Migration Act 1958* (Cth) have lamented its lack of flexibility in not allowing them to use all the circumstances of the case when considering sentence, and the potential of the Act to create disproportionality in sentencing. One example occurred in the case of *R v Hasim* (unreported, District Court of Queensland, Judge Martin, 11 February 2012), where the sentencing judge, in applying the minimum mandatory sentencing regime, lamented that such law implemented "commonly savage penalties", depriving a court from exercising full and proper sentencing discretion. Judges have

²⁵ Manderson D and Sharp N, "Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process" (2000) 22 Sydney LR 585 at 605; see also Sallmann P, "Mandatory Sentencing: A Bird's Eye View" (2005) 14 JJA 177.

²⁶ Santow GFK, "Mandatory Sentencing: A Matter for the High Court" (2000) 74 ALJ 298 at 301.

²⁷ *Serious and Organised Crime (Control) Act 2008* (SA), s 14(1).

²⁸ As Kiefel J put it, "the reputation of the judicial branch may not be borrowed by the legislative and executive branches to cloak their work in the neutral colours of judicial action": *South Australia v Totani* (2010) 242 CLR 1 at 172; 85 ALJR 19; 201 A Crim R 11; [2010] HCA 39.

²⁹ Hayne J in *Totani* used the creation/determination distinction, claiming that the legislature "created" rights and liabilities, while the court "determined" rights and liabilities: *South Australia v Totani* (2010) 242 CLR 1 at 86; 85 ALJR 19; 201 A Crim R 11; [2010] HCA 39. Presumably he would think that a legislative direction regarding a minimum penalty would be an attempt by parliament to "determine" rights and liabilities.

³⁰ *South Australia v Totani* (2010) 242 CLR 1 at 157; 85 ALJR 19; 201 A Crim R 11; [2010] HCA 39.

commented that such regimes are “the very antithesis of just sentencing”³¹ that do not allow them to take into account individual culpability and require them to depart from “normal” sentencing principles.³² Justice Blokland in his sentencing remarks in *R v Mahendra* (unreported, Supreme Court of the Northern Territory, SCC 21041400, 1 September 2011) suggested that the regime led to arbitrary and disproportionate³³ sentencing, and may have contravened some of the most fundamental and widely accepted principles of international justice.³⁴ It is axiomatic that the principle of proportionality is fundamental to sentencing in the Australian criminal justice system.³⁵

The obvious suggestion is that, if proportionality in sentencing is fundamental to the exclusively judicial function of sentencing, and judicial independence is paramount and must be maintained, a system that creates the likelihood of disproportionality in sentencing, as minimum mandatory sentencing certainly does, compromises the exercise of judicial power in the process of sentencing, and offends against the separation of powers which Ch III reflects.³⁶

On the few occasions where the High Court has squarely confronted the issue of minimum mandatory sentencing, it has validated such provisions. The leading authority is *Palling v Corfield* (1970) 123 CLR 52; [1970] HCA 53. Barwick CJ was adamant that such laws were not constitutionally objectionable:

It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded ... it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as

³¹ *R v Ambo* [2011] NSWDC 182 at [24] (Knox SC DCJ), expressing agreement with comments of Mildren J in *Trenerry v Bradley* (unreported, Supreme Court of the Northern Territory) and *R v Dokeng* (unreported, Supreme Court of the Northern Territory).

³² *R v Ambo* [2011] NSWDC 182 at [17].

³³ See also Western Australia Chief Justice Wayne Martin: “there is good reason to think that the terms of imprisonment which the courts are required to impose are often considered to be disproportionate to the culpability of the low level offenders who come before the courts”: Martin, n 5, p 15; refer also to the Law Council of Australia’s *Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* at [18]: “prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender’s criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This prescription can lead to sentences that are disproportionately harsh”.

³⁴ Blokland J referred to Art 9.1 of the *International Covenant on Civil and Political Rights* with respect to arbitrary arrest or detention. Justice Kennedy of the United States Supreme Court lamented that: “I can accept neither the necessity nor the wisdom of mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust” (Speech to American Bar Association, 2003).

³⁵ *Veen v The Queen (No 2)* (1988) 164 CLR 465; 33 A Crim R 230; [1988] HCA 14; Bagaric M and Edney R, “Imprisonment for Driving While Disqualified: Disproportionate Punishment or Sound Public Policy?” (2001) 25 Crim LJ 7.

³⁶ An argument may also be made that mandatory sentencing could breach the prohibition on arbitrary detention for which Art 9 of the *International Covenant on Civil and Political Rights* (ICCPR) provides: Flynn M, “International Law, Australian Criminal Law and Mandatory Sentencing: The Claims, The Reality and the Possibilities” (2000) 24 Crim LJ 184; Pritchard S, “International Perspectives on Mandatory Sentencing” (2001) 7(2) *Australian Journal of Human Rights* 51. This begs the question of the extent to which possible breach of the ICCPR is relevant in assessing the requirements of the Australian Constitution. Obviously, debate on the relationship between international law and the requirements of the Constitution continues: eg *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; [2004] HCA 37; *Roach v Electoral Commissioner* (2007) 233 CLR 162; 81 ALJR 1830; [2007] HCA 43; Charlesworth H, Chian M, Hovell D and Williams G, *No Country is an Island: Australia and International Law* (UNSW Press, 2006); Walker K, “International Law as a Tool of Constitutional Law Interpretation” (2002) 28 Mon ULR 85; Howell D and Williams G, “A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa” (2005) 29 MULR 95; Charlesworth H, “Dangerous Liaisons: Globalisation and Australian Public Law” (1998) 20 Adel L Rev 57.

well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament.³⁷

Menzies J was slightly more circumspect, allowing that Parliament could “to some extent” validly control the exercise of judicial power.³⁸ He concluded that “unless the *Constitution* otherwise provides, a court exercising federal jurisdiction must always act within the framework of the laws made by the Parliament”.³⁹

The submission here is that the *Constitution*’s provision for the separation of judicial power from non-judicial power does preclude a Parliament from mandating that a minimum penalty be imposed. It is difficult to reconcile the finding in *Palling* with subsequent developments in *Kable* and its progeny. By way of direct comparison of the wording, the relevant legislation in *Palling* mandated that the court “shall ... sentence him to imprisonment in respect of the offence for a period of seven days”,⁴⁰ while the section of the legislation impugned in *Totani* stated that “the court must, on application by the Commissioner, make a control order against a person ... if the court is satisfied that the defendant is a member of a declared organisation”.⁴¹ The provisions are surely materially similar, such as to cast serious doubt on the continuing correctness of the decision in *Palling*.

MINIMUM MANDATORY SENTENCING LAWS IN OTHER JURISDICTIONS

Given that the question of the constitutional validity of minimum mandatory sentencing regimes has not been the subject of a lot of litigation in Australia, it makes sense to see how such regimes have been considered elsewhere, at least as a guide. Of course, relevant differences in constitutional and/or human rights provisions must be borne in mind, and care taken before arguing that principles developed in different constitutional and statutory contexts are automatically applicable in Australia.

Europe

Provisions imposing mandatory sentencing have been challenged in Europe on at least two convention grounds – that such provisions are incompatible with Art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*,⁴² entitling a person to a fair and public hearing by an independent and impartial tribunal, and Art 3, prohibiting the use of torture, inhuman or degrading treatment or punishment.⁴³ The focus in this article is on Art 6, primarily because it is more directly transferable to Australian constitutional arrangements, specifically in a context where the High Court of Australia has recognised that there is a right to a fair trial.⁴⁴

In *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, the court was considering a sentencing practice whereby judges imposing the mandatory life sentence for murder could recommend that the offender be considered for release after a certain time. Section 29 of the *Crime (Sentences) Act 1997* (UK) gave the Home Secretary the power to order the release of a person sentenced to (mandatory) life imprisonment, if the Parole Board recommended it. A practice had developed whereby the Home Secretary would generally set minimum periods of imprisonment for life offenders; these were often very similar or identical to that recommended by the judges, but sometimes differed. This process was known as “fixing the tariff”. In the case of the applicant Anderson, the trial judge had recommended that he serve a minimum of 15 years’ imprisonment.

³⁷ *Palling v Corfield* (1970) 123 CLR 52 at 58; [1970] HCA 53. See also Walsh J: “I am not aware of any principle which would preclude it from providing that there shall be a fixed sentence for a particular offence when some stated condition is satisfied” ((1970) 123 CLR 52 at 68); see also *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100.

³⁸ *Palling v Corfield* (1970) 123 CLR 52 at 64; [1970] HCA 53.

³⁹ *Palling v Corfield* (1970) 123 CLR 52 at 65; [1970] HCA 53.

⁴⁰ *National Service Act 1951* (Cth), s 49(2)(a) and (b).

⁴¹ *Serious and Organised Crime (Control) Act 2008* (SA), s 14(1).

⁴² *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

⁴³ *Vinter v United Kingdom* [2012] ECHR 61.

⁴⁴ *Dietrich v The Queen* (1992) 177 CLR 292; 64 A Crim R 176; [1992] HCA 57.

However, the Home Secretary “fixed the tariff” in relation to that offender at 20 years. Anderson appealed the Home Secretary’s decision, based primarily on the requirements of Art 6. A unanimous House of Lords upheld his complaint.⁴⁵

Lord Bingham, for instance, accepted the applicant’s argument based on seven steps: (1) Art 6 required that an applicant receive a fair trial before an independent and impartial tribunal; (2) imposition of the sentence was part of the trial; (3) therefore sentence should be imposed by an independent and impartial tribunal; (4) the fixing of a tariff for an offender was legally indistinguishable from the imposition of sentence; (5) the tariff should be fixed by an independent and impartial tribunal; (6) the Home Secretary was not an independent and impartial tribunal; and therefore (7) the Home Secretary should not fix the tariff for a convicted murderer.⁴⁶ Lord Steyn added that the “power to determine responsibility for a crime and punishment for its commission is a function which belongs exclusively to the courts”.⁴⁷

There are obvious analogies with the Home Secretary’s fixing of a tariff in the *Anderson* case, which effectively amounted to a member of the Executive imposing a minimum length of imprisonment, despite what the court said, and minimum mandatory sentencing for which the *Migration Act 1958* (Cth) provides; it is just that, in the latter case, the “fixing” is by the Parliament, rather than the Executive, and, in the English context, the “fixing” was applied to an individual, while the “fixing” in the Australian context is applied to a category of offender. Despite these differences, concerns about the intrusion of a non-judicial body into a judicial process remain.⁴⁸

The European Court of Human Rights very recently⁴⁹ accepted the compatibility with the *Convention for the Protection of Human Rights and Fundamental Freedoms* of a sentencing regime providing for different “starting points” in terms of sentencing. However, these were only starting points, and aggravating or mitigating factors were expressly required to be taken into account. While this was not incompatible with the *Convention*, the court noted the trend in Europe away from mandatory lengthy sentences. Such regimes, while not per se incompatible with the *Convention*, raised the risk that a sentence given would be considered “grossly disproportionate”.⁵⁰ The fact that a sentence was grossly disproportionate might raise arguments that it was incompatible with the requirements of Art 3 that punishment not be cruel, inhuman or degrading.⁵¹ This is more likely where the sentence is mandatory, because it does not allow the court to take into account mitigating factors.⁵²

⁴⁵ A similar result occurred in *V v United Kingdom* (1999) 30 EHRR 121, where the court found the setting of the applicant’s “tariff” was a judicial function that could not be carried out by a member of the Executive; see also *Stafford v United Kingdom* (Application No 46295/99, 28 May 2002): “the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner’s release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary” (at [78]).

⁴⁶ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [20].

⁴⁷ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [50]; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64 where Brennan, Deane and Dawson JJ refer to the “essentially and exclusively” judicial power of punishing criminal guilt; *Nicholas v The Queen* (1998) 193 CLR 173 at 186; 99 A Crim R 57; [1998] HCA 9 (Brennan CJ); and *Re Tracey; Ex Parte Ryan* (1988) 166 CLR 518 at 580; [1989] HCA 12; *Reyes v The Queen* [2002] 2 AC 235; [2002] UKPC 11 at [47] “a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for a crime he has committed” (Lord Bingham, for the Court).

⁴⁸ It is also worth pointing out that the principle of separation of powers was never applied as strictly in the United Kingdom as it has been in Australia, although the position changed with the United Kingdom’s adoption of the *European Convention on Human Rights*.

⁴⁹ *Vinter v United Kingdom* [2012] ECHR 61.

⁵⁰ *Vinter v United Kingdom* [2012] ECHR 61 at [93].

⁵¹ In *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; *Kafkaris v Cyprus* [2008] ECHR 143; *Harkins and Edwards v United Kingdom* [2012] ECHR 45. There is also United States precedent confirming that disproportionate sentences may amount to cruel and unusual punishment, contrary to the Eighth Amendment of that country’s *Constitution*: *Solem v Helm* 463 US 277 (1983).

⁵² *Vinter v United Kingdom* [2012] ECHR 61 at [93]; *Babar Ahmad v United Kingdom* [2012] ECHR 609 at [242].

This is particularly the case where the offender has been detained beyond a period that could be justified on the basis of punishment and deterrence.⁵³

Quite independently of the *Convention*, the Privy Council in the classic constitutional decision *Liyanage v The Queen* [1965] 1 All ER 768; [1965] 1 WLR 412; [1965] UKPC 1 invalidated Ceylonese legislation passed in response to a failed revolution, and applied to the would-be revolutionaries. The then Ceylonese *Constitution* provided for a strict separation between the judicial and non-judicial functions,⁵⁴ making this case particularly appropriate in the Australian constitutional context. Speaking of the special provisions made applicable to these individuals, the Privy Council noted:

These alterations (to standard criminal law procedures) constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with those particular persons on those particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.⁵⁵

The Privy Council concluded that the provisions were inconsistent with the separation of powers provided in that nation's *Constitution*, and invalid for that reason.

North America

The issue of minimum mandatory sentencing was considered by the Canadian Supreme Court in *R v Smith* [1987] 1 SCR 1045. The court considered drugs legislation providing for a seven-year minimum jail term for the importation of drugs. A majority of the court found that the provision was contrary to s 12 of the *Canadian Charter of Rights and Freedoms*, protecting the right not to be subjected to cruel and unusual punishment or treatment. The court did not need to discuss in detail whether the provision was contrary to s 9 of the *Charter*, recognising the right not to be arbitrarily detained or imprisoned, but some comments suggest that at least one member of the court may have found so, if that had been necessary.⁵⁶

The United States Supreme Court has in most cases validated minimum mandatory sentencing provisions.⁵⁷ There is no specific prohibition in the United States *Constitution* on the use of such provisions. It has spoken about the fact that mandatory minimum penalties are in some ways reminiscent of an earlier era.⁵⁸ However, in the context of mandatory death penalty provisions, they have created something of an exception.⁵⁹ A leading case here is *Woodson v North Carolina* 428 US 280 (1976). A majority of the court in that case held that a mandatory death penalty provision was contrary to the Eighth Amendment prohibition on cruel and unusual punishment. Stewart J in the majority stated:⁶⁰

⁵³ *R v Bieber* [2009] 1 WLR 223 at [49].

⁵⁴ *Bribery Commissioner v Ranasinghe* [1965] AC 172.

⁵⁵ *Liyanage v The Queen* [1965] 1 All ER 768; [1965] 1 WLR 412; [1965] UKPC 1 (all members of the Council).

⁵⁶ *R v Smith* [1987] 1 SCR 1045 at [115] (Wilson J), to the contrary McIntyre J at [104]; the others not deciding.

⁵⁷ *McMillan v Pennsylvania* 477 US 79 (1986) (statute imposing a minimum sentence of five years' imprisonment if a defendant visibly possessed a firearm whilst committing an offence). In *United States v Grayson* 438 US 41 at 53 (1978), the court noted it was "proper – indeed, even necessary for the rational exercise of discretion – to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision ... The Government's interest, as well as the offender's, in avoiding irrationality is of the highest order" (Burger CJ, for the court); Olson E, "Rethinking Mandatory Minimums After Apprendi" (2002) 96 Nw U L Rev 811.

⁵⁸ *Williams v New York* 337 US 241 at 247 (1949): "the belief no longer prevails that every offence in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender" (Black J, for the court).

⁵⁹ *Callins v Collins* 510 US 1141 (1994).

⁶⁰ Powell and Stevens JJ joined this judgment, Brennan and Marshall JJ concurring in the result; Burger CJ, White, Blackmun and Rehnquist JJ dissenting. Sir Anthony Mason has noted the argument that mandatory sentencing could be seen as creating cruel and unusual punishment: Mason A, "Mandatory Sentencing: Implications for Judicial Independence" (2001) 7(2) *Australian Journal of Human Rights* 21.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. This court has previously recognised that for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.⁶¹

The present authors could take issue with the fact that the court has recognised the constitutional necessity of individualised sentencing only in this very limited context, whereas the principle favouring an individualised approach is, in the present authors' opinion, of universal application. However, such an argument is beyond the purposes of this article. Our purpose here is to reflect that, at least in a limited context, the United States Supreme Court has declared some types of mandatory sentence as contrary to the requirements of the United States *Constitution*. It is appropriate also to acknowledge that it is difficult to apply these North American precedents to the pertinent issues in Australia, because there is nothing in the Australian *Constitution* precluding the use of "cruel and unusual punishment". The constitutional basis for the finding in Australia would necessarily be on different grounds – for instance, to involve the court in the infliction of what in other contexts has been found to be cruel and unusual punishment sufficiently undermines the institutional integrity of the court, and requires it to act in such a non-judicial manner, that it is offensive to Ch III.

As in Europe, some American authorities (expressly) connect the Eighth Amendment prohibition on cruel and unusual punishment with proportionality,⁶² such that a grossly disproportional punishment could amount to cruel and unusual punishment. As discussed earlier, proportionality is also a fundamental feature of the judicial function of punishment in Australia. This is another way in which the American and European cases forbidding cruel and unusual punishment can be utilised in the Australian context – that the disproportionality involved in "cruel and unusual punishment" is equally objectionable in the Australian constitutional context, although the Australian *Constitution* does not specifically outlaw cruel and unusual punishment.

Limited support for the argument made here might be obtained from the recent case of *United States v Booker* 543 US 220 (2005).⁶³ There the United States Supreme Court did read down sentencing guidelines so that they were advisory rather than mandatory for judges to follow in specified cases. However, they did this because the guidelines required an increased minimum sentence if certain circumstances existed, and the judge was satisfied that those circumstances existed. The judge made this finding independently of the jury. The court found that any fact that increased the penalty for a crime had to be proven to a jury beyond reasonable doubt. These grounds make the actual precedent of limited use here; however, the case can be read broadly as being supportive of individualised sentencing that can take into account aggravating and mitigating factors, and the role of the fact-finder (in that case, the jury; in our system, the judge in terms of sentencing) in exercising discretion as part of the sentencing process, rather than having a punishment mandated by a non-judicial body.

⁶¹ *Woodson v North Carolina* 428 US 280 at 304 (1976); Stewart J went on to acknowledge that while generally individualised sentencing was preferred from a general policy point of view, rather than being constitutionally required, he insisted that in the context of the death penalty, a pre-condition of the court's acceptance of such a penalty was that it was not to be a mandatory punishment, because "death is qualitatively different from a sentence of imprisonment, however long" (at 305). The same thing occurred in respect of a mandatory death penalty provision in *Lockett v Ohio* 438 US 586 (1978) and a death penalty imposed on a minor in *Eddings v Oklahoma* 455 US 104 (1982).

⁶² *Harmelin v Michigan* 501 US 957 (1991); *Weems v United States* 217 US 349 (1910); Lowenthal G, "Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform" (1993) 81 Cal L Rev 61 at 114-116.

⁶³ Applied in *Kimbrough v United States* 552 US 85 (2007); Barkow R, "Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing" (2004) 152 U Pa L Rev 33.

CONCLUSION

We are seeing an increased number of contexts in which Parliaments are impeding on functions traditionally carried out by the judiciary. This article has focused on the most contentious of these, the use of minimum mandatory sentencing regimes. The authors have argued that these regimes are vulnerable to constitutional challenge on the basis that they require courts to act contrary to the requirements of Ch III of the Australian *Constitution*. Public confidence in the independence and integrity of our court system is fundamental to our system of governance, and the perception cannot arise that the courts are doing the bidding of Parliament in “rubber-stamping” legislatively determined outcomes for individuals found to have committed certain crimes. Such systems compromise the fundamental criminal justice concept of proportionality in sentencing, and infringe separation of powers principles. Overseas precedent, including *Liyanage* and other cases, supports this conclusion. The High Court must stand firm against legislative incursions into the judicial sphere.