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Mandatory sentencing laws

by Lenny Roth

1. Introduction

Mandatory sentencing laws became a very controversial issue in Australia in the late 1990s when they were introduced for repeat home burglary offenders in Western Australia and for property offences in the Northern Territory. These developments were outlined in two previous briefing papers: Mandatory and Guideline: Sentencing Recent Developments; and Sentencing Law: A Review of Developments in 1998-2001.

In recent years, NSW and other States, including Queensland and Victoria, have introduced mandatory sentencing laws for other types of offences. The NSW Government is now proposing to adopt further mandatory sentencing laws, as a part of a range of measures to deal with alcohol-related violence. On 21 January 2014, the NSW Premier, Barry O'Farrell announced that the Government intended to introduce:

> **Eight year mandatory minimum sentence** for those convicted under new one punch laws where the offender is intoxicated by drugs and/or alcohol, plus new mandatory minimum sentences for violent assaults where intoxicated by drugs and/or alcohol.[1]

In NSW, mandatory sentencing laws have also been raised in debates about child sex offenders[2]; and also in response to the spate of drive-by shootings involving bikie gangs in Western Sydney. A media report on 7 November 2013 suggested that the Government was considering introducing minimum five-year sentences for gang members illegally in possession of firearms.[3]

This e-brief summarises the debate about mandatory sentencing. It further outlines various measures adopted in NSW to place limits on judicial discretion in sentencing, and it reviews mandatory sentencing laws in other Australian jurisdictions.

2. What is mandatory sentencing?

Generally, criminal laws in Australia set a maximum penalty for the offence, but do not set a minimum penalty. Judges therefore retain significant discretion to decide upon an appropriate penalty in each case. They do so having regard to sentencing laws which outline the various purposes of sentencing, the types of penalties available (including non-custodial options), and the

range of factors to be taken into account (mitigating and aggravating).

Mandatory sentencing laws are generally considered to be laws that specify a minimum penalty or a fixed penalty that a judge must impose in relation to a particular offence or type of offender (e.g. a repeat offender). Minimum penalties are much more common than fixed penalties, which are usually reserved for the offence of murder. These laws may be strict in their application or they may allow judges to depart from the minimum or fixed penalty in certain (narrowly defined) circumstances.[4]

Mandatory sentencing laws have been contrasted with *presumptive* sentencing laws. The Victorian Sentencing Advisory Council notes:

> A presumptive sentencing system is one in which parliament prescribes both a sanction type and a minimum level of severity for a given offence which the court must impose unless there is a demonstrable reason—which may be broadly or narrowly defined—justifying a departure from this. Presumptive minimum sentencing schemes can differ in terms of their level of prescription, ranging from wholly voluntary guidelines to what effectively amount to mandatory sentencing regimes. A presumptive minimum sentence scheme has been adopted in New South Wales for the imposition of non-parole periods. Many of the justifications for and criticisms of mandatory sentencing similarly apply to presumptive minimums.

Mandatory sentencing laws are not a completely new concept in NSW or Australian criminal law. The abolition of the death penalty during the twentieth century resulted in almost all States and Territories adopting a mandatory sentence of life imprisonment for murder. In 1982, this mandatory provision was relaxed in NSW, and a number of other States have followed (Victoria in 1986, Tasmania in 1995; Western Australia in 2008). Mandatory life imprisonment remains the penalty for murder in Queensland, South Australia and the Northern Territory.

3. Arguments for and against

A very brief summary of the main arguments for and against mandatory sentencing laws is presented below.[5]

The main arguments for these laws include:

- The laws help to ensure that sentences reflect community standards and are not unduly lenient. In other words, to ensure that the punishment matches the crime. This is important for maintaining confidence in the justice system. Elected representatives are more sensitive to community concerns than appointed judges.

- The laws help to reduce crime by acting as a stronger deterrent to would-be offenders. The laws (particularly those that target repeat offenders) also help to prevent crime by incapacitating offenders for longer periods of time. By lessening crime in these two ways, the laws reduce the costs associated with crime.

- The laws can be drafted so that they do not result in excessively harsh sentences in some cases. For example, the laws can very specifically define the types of offences that will attract the minimum

or fixed penalty. In addition, the laws might allow judges to depart from this penalty in "exceptional circumstances".

The main arguments against these laws include:

- The laws lead to injustice because of their removal of judicial discretion. Judges will not always be able to ensure that the punishment matches the crime. There will inevitably be cases where offenders receive excessively harsh sentences.
- Increasing penalties does not deter people from committing crime. Most offenders do not act rationally; they act impulsively, and many are affected by alcohol or drugs. Laws that aim to incapacitate offenders for longer periods are unfair as they apply to some people who would not have reoffended.
- The laws impose significant costs on the justice system. They are likely to lead to lower guilty pleas, and therefore more trials. They are also likely to result in higher prison costs, with more offenders being sentenced to imprisonment, and for longer periods.
- Other less severe and costly alternatives can achieve the same objectives, including: presumptive sentencing laws, guideline judgments, and committing resources to apprehend offenders and to tackling the causes of offending.

4. Existing laws in NSW

Guideline judgments

In NSW, concerns about inconsistency and leniency in sentencing in the late 1990s resulted in the NSW Court of Criminal Appeal issuing guideline judgments for a number of different offences. Guideline judgments typically indicate a sentence, or range of sentences, that serve as a starting point for judges in a typical case. Between 1998 and 2002, guideline judgments were issued in respect of offences such as dangerous driving, armed robbery, and break, enter and steal.[6] A statutory framework for the issuing of guideline judgments was enacted in 1999.[7]

Standard non-parole periods

In the lead up to the 2003 State election, the Labor Governnment introduced a statutory Standard Non-Parole Period (SNPP) scheme for a range of serious offences. The SNPP scheme is set out in Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It originally applied to 21 offences (now 30 offences) that are set out in a Table along with the corresponding SNPPs. The scheme only applies to persons who were at least 18 years of age at the time of the offence.

As enacted, section 54A(2) stated that the SNPP represents the non-parole period for an offence "in the middle of the range of objective seriousness for offences in the Table". Section 54B stated (in part):

> (1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

> (2) When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.
>
> (3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A [a section which lists a range of mitigating, aggravating and other factors to be taken into account].
>
> (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

The level of SNPPs that were set for the different offences varied from around 20 per cent to around 70 per cent of the maximum penalty for the offence. A 2010 study by the Judicial Commission examined the impact of the scheme between 2003 and 2010 and concluded:

> The findings of this study confirm that the statutory scheme has generally resulted in a greater uniformity of, and consistency in, sentencing outcomes. It also confirms the early claims that there would be an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionately low standard non-parole period to maximum penalty ratio. Of course, it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently. To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.[8]

Until 2011, the approach taken to sentencing under the SNPP scheme was as outlined by the NSW Court of Criminal Appeal in the 2004 decision, *R v Way.*[9] In a 2011 decision in *Muldrock v The Queen,* the High Court ruled that this approach was wrong.[10] The High Court's decision is complicated and has raised some uncertainties as to the correct approach. For present purposes, it is sufficient to note that the High Court's decision has reduced the significance of the SNPP in setting a sentence.[11]

In 2012, the NSW Law Reform Commission published an interim report on its inquiry into sentencing, which examined the SNPP scheme.[12] It examined six options for reforming the scheme, including abolishing it. The report recommended, on an interim basis, retaining the scheme and preserving the approach in *Muldrock* with legislative clarification. In its July 2013 final report, the Commission confirmed its earlier view and also recommended that the government consult further with stakeholders about several aspects of the scheme, including the offences to which the scheme should apply, and the SNPPs for those offences.[13] The final report made this brief comment about mandatory sentencing:

> In favouring the retention of the [SNPP] scheme, subject to the safeguards mentioned above, we recognise the advantages that it presents compared with the introduction of the more rigid mandatory sentencing laws that have been introduced in some jurisdictions. The benefits that it provides are essentially the guidance that it gives to sentencing courts and the

> preservation of a sentencing discretion that accords with the purposes and principles discussed elsewhere in this report.[14]

In 2013, the Coalition Government introduced amendments to give effect to the Commission's recommendation on the SNPP scheme.[15] Section 54B(2) of the *Crimes (Sentencing Procedure) Act 1999* now states:

> The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.

Mandatory sentence for murder of police officer

In 2011, the Coalition Government introduced a mandatory sentence of life imprisonment for murdering a police officer in the course of his or her duty.[16] This sentence (which is expressly stated to mean the person's natural life) is to be imposed if the person convicted of the murder knew or ought reasonably to have known that the person killed was a police officer, and intended to kill the police officer or was engaged in criminal activity that risked serious harm to the police officer. The only exceptions are if the person was under the age of 18, or if the person had a significant cognitive impairment at that time (not being a temporarily self-induced impairment).

In October 2013, Michael Jacobs became the first person to be sentenced to life imprisonment under these mandatory sentencing provisions.[17] The facts of the case were that a police officer was driving a highway patrol car and followed the car that Mr Jacobs was driving because he suspected that Mr Jacobs was driving whilst disqualified. After the police officer and Mr Jacobs stopped and left their cars, the police officer told Mr Jacobs that he was going to breath-test him. Almost immediately, Mr Jacobs produced a loaded revolver, pointed it at the officer, and fired it, killing him. It was not clear why he shot the police officer. However, the sentencing judge concluded that he intended to kill the police officer.

5. Proposed laws in NSW

As noted earlier, the NSW Government is planning to introduce mandatory minimum sentences for a range of alcohol-related violence offences. This is part of its response to concerns about rising levels of alcohol-related violence, including several cases of unprovoked, fatal assaults. In one of these cases, the police charged the person with murder but the DPP accepted a guilty plea to manslaughter. The offender was sentenced to imprisonment for six years with a non-parole period of four years.[18] The victim's family and many members of the community considered that this sentence was very lenient. The DPP has appealed against this sentence to the NSW Court of Criminal Appeal and has also asked the Court to issue a guideline judgment for cases of this nature.[19]

The Premier has proposed a mandatory minimum sentence of eight years for a new offence of unlawful fatal assault (so called 'one punch' laws) if the offender was intoxicated by alcohol and/or drugs when the offence was committed. The one punch laws were announced by the NSW Attorney-General in November 2013 (in response to the above case) and the offence involves a person unlawfully assaulting another who dies as a result of the

assault, even if the first person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.[20] The offence will carry a maximum penalty of 25 years imprisonment.

The NSW Government is further planning to introduce new minimum sentences for violent assaults where the person is intoxicated by drugs and/or alcohol. According to media reports, minimum sentences are proposed for nine existing offences, where the offender is intoxicated by drugs and/or alcohol. These include:[21]

Existing offence	Minimum sentence
Assault occasioning actual bodily harm	2 years
Assault of police officer	2 years
Reckless wounding	3 years
Reckless grievous bodily harm	4 years
Affray	4 years
Sexual assault	5 years

The new mandatory minimum sentences will not apply to children.[22]

6. Comments on proposed laws

The current proposals in NSW to introduce minimum sentences for alcohol-related violence have been criticised by members of the legal community. An article in the *Sydney Morning Herald* on 22 January 2014 stated:

> Former NSW director of public prosecutions Nicholas Cowdery said there was "no justification" for mandatory minimum sentences.
>
> "There is plenty of evidence that [increasing penalties] … does not deter offenders, complicates and adds to the expense of criminal proceedings and requires courts to act unjustly"…
>
> ……
>
> NSW Bar Association president Phillip Boulten, SC, said the "knee-jerk" proposal would result in "the most sweeping and fundamental change" to the state's sentencing laws and was "likely to create a raft of unfair and unjustly harsh sentences".
>
> ……
>
> Mr Boulten said the new laws left "untouched" the penalties for manslaughter, which also carried a maximum jail term of 25 years.
>
> It meant that an alcohol or drug-affected offender who unintentionally killed a person with a single punch faced the same maximum sentence as a person who intended to kill their victim but was able to rely on a defence such as provocation to be found guilty of the lesser charge of manslaughter.
>
> "This is an anomaly the courts won't be able to deal with easily," Mr Boulten said.
>
> "We will find an increased number of complex defended hearings where there will be people choosing not to plead guilty and where there will be a real dilemma for judges and magistrates about how to deal with these issues."
>
> ……
>
> Law Society of NSW president Ros Everett said mandatory minimum sentences were "unlikely to be effective" and studies in the United States

> had shown "deterrence arises from fear of being caught, not from the length of the sentence".[23]

On the other hand, in an article on 23 January 2014, Mirko Bagaric, Professor and Dean of Deakin University Law School, commented:

> Mandatory eight-year jail terms for intoxicated "single-punch killers" announced by the O'Farrell government are a positive move towards injecting fairness into sentencing.
>
> The reform suffers from one main defect: it does not go far enough. An empirically driven and morally sound sentencing system would ensure all perpetrators of serious sexual and violent crime serve no less than five years imprisonment...[24]

Professor Bagaric argues that the current sentencing system is flawed because "it lacks transparency and an overarching rationale", and he submits that a principal objective of the sentencing system must be to ensure that offenders get their "just deserts". This "is best secured by setting penalties for all offences by way of a pre-determined grid – with mandatory terms of imprisonment only for crimes that cause the most distress to victims". He argues that none of the criticisms of mandatory sentencing "has a veneer of plausibility, where the design of the grid is informed by a clear rationale and research data". He comments:

> The problem with the US model is not the framework, but the draconian nature of the penalties. It is false that proportionate mandatory minimum penalties will result in an increase in the imprisonment rate. Studies show serious sex and violent crimes devastate the lives of victims. Perpetrators of these crimes must go to jail. Minor traffic offenders and welfare cheats don't shatter the lives of others. They won't go to jail.
>
> Proportionate mandatory penalties would result in a reduction in prison numbers, while guaranteeing the people who deserve to be in jail will not avoid prison by milking a judicial sympathy gland. The costs saved by reducing prison numbers ($80,000 a year for each prisoner) should be used to put more police on the streets, which is the only way to reduce crime.
>
> Moreover, there is no truth in the claim that offences vary too much to enable set penalties. Crimes are differentiated with enough precision to allow experts to set penalties that match the seriousness of the offence. In the end, most offenders are not unique and neither are most crimes.
>
> It is false that minimum penalties are an extreme sentencing model. Most criminal offences in Australia are already dealt with by way of formal or de facto minimum penalties. We have mandatory penalties for offences such as drink driving and speeding. In fact, over 80 per cent of criminal matters are already dealt with by on-the-spot fines (which serve as de facto minimum penalties given virtually no one challenges the fines at court).[25]

Some media reports have suggested that the proposals will lead to a large increase in the prison population. An article in *The Australian* stated that the measures "could see more than 1,000 extra people per year go to jail, leading to a 10 per cent increase in the prison population, based on analysis of current crime data".[26] Another article noted that the laws may impact heavily on indigenous communities.[27]

7. Other States & Territories

Overview

As noted earlier, Western Australia and the Northern Territory both introduced minimum sentencing provisions in the 1990s. The Northern Territory repealed some of these provisions in 2001. As discussed below, more recently, the West Australian Government has introduced and proposed minimum sentencing provisions in relation to other offences, and the Northern Territory has extended the operation of its existing provisions. Queensland has recently introduced fixed and minimum sentencing provisions for certain offences, and Victoria has enacted some minimum sentencing provisions for gross violence offences. None of these jurisdictions has a standard non-parole period scheme like in NSW.[28]

Western Australia

In 1992, the Labor Government introduced minimum sentences for repeat violent offenders (adults and juveniles alike); as well as for other juvenile repeat offenders and for juveniles committing certain offences in the course of stealing a motor vehicle.[29] These laws were repealed in 1994.

In 1996, the Liberal Government introduced minimum sentences for repeat home burglary offenders.[30] A minimum term of 12 months imprisonment applied to home burglary offenders who had committed two previous home burglary offences (i.e. a "three strikes" policy). This also applied to young offenders but they could be sentenced to juvenile detention, or to an intensive youth supervision order (IYSO). In November 2001, the Government released a review of the provisions, which concluded that they had had little effect on the criminal justice system.[31] The laws are still in force (see further below as to changes proposed in 2013).[32]

In 2009, the Liberal Government introduced minimum sentences of imprisonment for persons that commit assaults against a police officer, a prison officer or a transport security officer.[33] The provisions apply to adults as well as young persons above the age of 16 but different minimum terms are prescribed. The minimum term for adults ranges from 6 months to 12 months, while the minimum term for young persons aged 16 or over is 3 months imprisonment or juvenile detention (or an IYSO).

In 2012, the Liberal Government introduced legislation providing for the making of declarations and control orders against criminal organisations. The legislation also introduced minimum terms of imprisonment for adult offenders who commit certain offences at the direction of, in association with or for the benefit of a declared criminal organisation. In the case of a "relevant simple offence" or a "relevant indictable offence" dealt with summarily, the minimum sentence is 2 years. In the case of a "relevant indictable offence", dealt with on indictment, the minimum terms are:

- If the penalty for the offence does not include imprisonment – the minimum term is 2 years.
- If the penalty for the offence includes a period of imprisonment other than life imprisonment – the minimum term is at least 75 per cent of the maximum term (but not less than 2 years);

- If the penalty for the offence includes life imprisonment – the minimum term is 15 years.

In a February 2013 election policy, the Liberal Government announced that it would toughen up the existing minimum sentencing provisions in relation to home invasions (including by increasing the minimum term to 2 years for offenders aged 16 and above); as well as introducing higher minimum terms of imprisonment for adult offenders who commit serious physical or sexual assaults in the course of a home invasion.[34] For adults, the minimum term of imprisonment would be 75 per cent of the maximum penalty; while for young persons aged 16 or over, the minimum would be three years detention. The legislation has not yet been introduced into Parliament.[35]

Northern Territory

In 1997, the Country Liberal Government introduced minimum sentences for first-time and repeat property offenders.[36] For adults, these were:

- For a first property offence, 14 days imprisonment
- For a second property offence, 90 days imprisonment
- For a third property offence, 12 months imprisonment

Different minimum sentences were set for juveniles:

- For a first property offence, no minimum applied
- For a second property offence, 28 days detention or an order to participate in an approved program
- For a third property offence, 28 days detention

In 1999 some amendments were made to the provisions, including inserting an exception for first-time adult property offenders in the case of "exceptional circumstances". A first-time offender would only come within this exception if the offence was "trivial" and there were mitigating circumstances (not including intoxication). In October 2001, the Labor Government repealed the minimum sentencing provisions.

In 2003, the Office of Crime Prevention released a review of the impacts of these laws on adult offenders.[37] The findings included:

- Indigenous people were heavily overrepresented
- The data suggested that sentencing policy does not measurably influence levels of recorded property crime
- The proportion of sentencing occasions resulting in imprisonment was 50 per cent higher during the mandatory sentencing era than it was following the repeal of the legislation
- However, early predictions of the impact of mandatory sentencing on the prison population were overstated. At most, it contributed about 15 per cent to the daily average prison population.[38]

In 1999 the Country Liberal Government had also introduced further minimum sentencing provisions in respect of sexual offences and repeat violent offenders.[39] These provisions required courts to impose a term of

imprisonment (the minimum length of the term was not set) on persons convicted of a prescribed sexual offence, and persons convicted for a second time of a prescribed violent offence. These provisions did not apply to young persons except for those sentenced as adults. It appears that these laws had a disproportionate impact on indigenous persons.[40]

In 2008, the Labor Government extended the 1999 minimum sentencing provisions to first-time violent offenders in respect of certain offences: unlawfully causing harm or serious harm to another, aggravated assault causing harm, and aggravated assault on a police officer.[41] A 2010 paper by the NT Department of Justice examined the impacts of the legislation in the first year of its operation and noted that:

> …the average [percentage of first time serious violent offenders receiving a sentence of imprisonment] has increased from 61% to 65%, an additional 4% which equates to 17 additional prisoners.[42]

In 2013, the Country Liberal Government introduced a new minimum sentencing scheme for violent offences (replacing the previous scheme).[43] The new scheme has five levels of violent offences (5 being the most serious and 1 being the least serious), and the minimum sentences are:[44]

Level	Minimum sentence
5	First time violent offender: 3 months imprisonment Repeat violent offender: 12 months imprisonment
4	First-time or repeat violent offender: 3 months imprisonment
3	First-time violent offender, where offence causes physical harm to victim: a term of imprisonment Repeat violent offender: 3 months imprisonment
2	First time or repeat violent offender: a term of imprisonment
1	First-time violent offender, no minimum penalty Repeat violent offender, a term of imprisonment

There is an exemption from the minimum levels of imprisonment if there are "exceptional circumstances", but the offender must still be sentenced to a term of imprisonment. Intoxication by alcohol or drugs is not to be considered as an exceptional circumstance. As with the 1999 laws, these provisions only apply to young persons who are sentenced as adults. Such young persons are exempt from the prescribed minimum levels of imprisonment but must still be sentenced to a term of imprisonment.

Queensland

In 2012, the Liberal National Government introduced mandatory terms of life imprisonment (with a 20-year non-parole period) for repeat serious child sex offenders.[45] The mandatory sentencing provisions apply to adults who are convicted for a second time of a prescribed serious child sex offence committed in relation to a child under the age of 16 in circumstances in which an offender would be liable to life imprisonment. The provisions do not contain any exceptions from the mandatory terms.

The same year, the Government also introduced minimum sentencing provisions in relation to some serious firearms offences.[46] The offences and minimum sentences of imprisonment are outlined below:

- Unlawful trafficking in weapons where at least one is a short firearm, without reasonable excuse – 5 years (in the case of a Category H or R weapon) and otherwise 3 ½ years;
- Unlawful supply of certain categories of weapon where at least one is short firearm, without reasonable excuse – 3 years (if more than five weapons) and otherwise 2½ years;
- Unlawful possession of weapon which is used in the commission of an indictable offence – 18 months (if 10 or more weapons, or weapons in Category C, D, E, H or R); and otherwise 9 months;
- Unlawful possession of weapon for purpose of committing or facilitating an indictable offence –12 months (if 10 or more weapons, or weapons in Category C, D, E, H or R) and otherwise 6 months;
- Unlawful possession of short firearm in a public place (including any vehicle that is in or on a public place) without a reasonable excuse – 6 months imprisonment.

In response to concerns about outlaw motorcycle gangs, in October 2013, the Liberal National Government introduced new laws in relation to criminal organisations. This included minimum terms of imprisonment of six months or 12 months for several new offences involving participants in a criminal organisation: e.g. 6 months for the new offence of participants in a criminal organisation who knowingly gather together in a group of three or more persons; and 12 months for the offence of participants in a criminal organisation assaulting a police officer with aggravating circumstances.[47]

The laws also provided for mandatory additional terms of imprisonment for "declared offences" committed by "vicious lawless associates" (VLAs). VLAs are defined as persons who have committed a declared offence for the purpose of, or in the course of, participating in the affairs of an organisation that has as one of its purposes engaging in, or conspiring to engage in, declared offences. There are a wide range of declared offences, including certain sex offences, serious assaults, certain drug offences and certain weapons offences. When sentencing a VLA for a declared offence, the court is required to impose an additional term of 15 years imprisonment; 25 years if the VLA is an office bearer of the association.[48]

Victoria

In 2008, the Victorian Sentencing Advisory Council released a research paper on mandatory sentencing, noting that "periodically calls arise for the introduction of mandatory sentences in Victoria". The paper concluded that:

- Current research indicates that there is a very low likelihood that a mandatory sentencing regime will deliver on its aims;
- There is ample evidence suggesting that mandatory sentencing will be circumvented by lawyers, judges and juries;
- Imposing a prescribed sanction or range of sanctions for offences guarantees only a very superficial, artificial consistency;
- The costs of implementing a mandatory sentencing regime alone weigh strongly against the establishment of such a system.[49]

Notwithstanding this advice, in 2013, the Liberal Government introduced mandatory terms of imprisonment with a minimum non-parole period of four years for adults who commit an offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence.[50] The circumstances of gross violence include planning the offence, acting in company with 2 or more other persons, participating in a joint criminal enterprise, planning and using a weapon in the offence, and continuing to cause injury to the person after they were incapacitated. These provisions only apply to adults. In addition, the provisions do not apply if a court is satisfied that a "special reason" exists. This is defined to include:

- Providing assistance to law enforcement authorities
- Being below the age of 21 and having a psychosocial immaturity that has resulted in a diminished ability to regulate their behaviour
- Having impaired mental functioning
- The court proposes to make a hospital security order or a residential treatment order in respect of the offender
- There are substantial and compelling circumstances that justify making a finding that a special reason exists

8. Commonwealth laws

In 2001, the Coalition Government introduced into the *Migration Act 1958* minimum sentencing provisions for certain aggravated people smuggling offences.[51] The following minimum sentences apply:

- People smuggling of a group of 5 or more unlawful citizens – for a first offence, the minimum term is 5 years, with a 3-year non-parole period; for a repeat offence, the minimum term is 8 years, with a 5 year non-parole period (s 233C).
- Presenting forged documents or making false and misleading statements in connection with people smuggling of a group of 5 or more unlawful citizens – same as above (s 234A).
- People smuggling where victim is subject to cruel, inhuman or degrading treatment, or where conduct gives rise to danger of death or serious harm – the minimum term is 8 years imprisonment with a non-parole period of 5 years (s 233B)

In August 2012, the Labor Government modified the application of the mandatory sentencing provisions. This was response, firstly, to recommendations in an April 2012 Senate Committee report on a Greens Bill to remove the mandatory sentencing provisions;[52] and, secondly, in an August 2012 Report of the Expert Panel on Asylum Seekers.[53] In August 2012, the Attorney-General*:*

> …acting under s 8(1) of the Director of Public Prosecutions Act 1983 (Cth), directed that the Director "not institute, carry on or continue to carry on a prosecution for an offence" under s 233C of the Act unless satisfied that the accused had committed a repeat offence, the accused's role in the people smuggling venture extended beyond that of a crew member, or a death had occurred in relation to the venture…[54]

9. High Court decision

In an October 2013 judgment, the High Court decided by a 6:1 majority that the minimum sentencing provisions for people smuggling offences in the *Migration Act 1958* were constitutionally valid.[55] In that case, the appellant was charged with and pleaded guilty to an aggravated offence under s 233C and he received the mandatory minimum sentence (he was sentenced almost a year prior to the August 2012 modification noted above). The High Court noted the sentencing judge's remarks as follows:

> In sentencing the appellant, the Chief Judge of the District Court (Chief Judge Blanch) said that it was "perfectly clear that [the appellant] was a simple Indonesian fisherman who was recruited by the people organising the smuggling activity to help steer the boat towards Australian waters". Chief Judge Blanch said that the seriousness of the appellant's part in the offence fell "right at the bottom end of the scale" and that, in the ordinary course of events, "normal sentencing principles would not require a sentence to be imposed as heavy" as the mandatory minimum sentence.[56]

In the appeal to the High Court, the appellant argued that the provisions were invalid because they were incompatible with the separation of powers in Chapter III of the Commonwealth Constitution. There were a number of different strands to this argument, including that:

> ….the relevant provisions were incompatible with the separation of judicial and prosecutorial functions; second, that those provisions were incompatible with the institutional integrity of the courts; and third, that the provisions required a court to impose sentences that are "arbitrary and non-judicial".[57]

In rejecting with these arguments, the joint judgment stated:

> It is enough to conclude that the availability or exercise of a choice between charging an accused with the aggravated offence created by s 233C, rather than one or more counts of the simple offence created by s 233A, is neither incompatible with the separation of judicial and prosecutorial functions nor incompatible with the institutional integrity of the courts. Legislative prescription of a mandatory minimum penalty for the offence under s 233C neither permits nor requires any different answer.[58]

10. Conclusion

The adoption of mandatory sentencing laws in NSW and other States has reopened the vigorous debate about these laws that took place in the late 1990s. Until recently, NSW Governments had resisted calls for the introduction of laws of this kind, relying instead on guideline judgments and the standard non-parole period scheme. This changed in 2011, when the Government introduced a mandatory life sentence for murder of a police officer. The current proposals are for minimum sentences for a range of violent offences, where the offender is intoxicated. Some see these laws as an important part of the response to the problem of alcohol-related violence, both in ensuring offenders are punished appropriately; and also in sending a strong message to deter further violence. Others argue that the laws will lead to unjust sentences, they will not work in reducing alcohol-related violence, and they will be very costly.

1 B O'Farrell, 'Lockouts and mandatory minimums to be introduced to tackle drug and alcohol violence', Media Release, 21 January 2014
2 A Joint Select Committee is currently inquiring into Sentencing of Child Sexual Assault Offenders, and its terms of reference include looking at mandatory minimum sentencing.
3 A Clennell, 'Barry O'Farrell gets tough: mandatory sentences on the way for gang shooters', *The Telegraph,* 7 November 2013
4 See Y Dandurand, Exceptions from mandatory minimum penalties, A report prepared for the Uniform Law Conference of Canada, August 2012
5 This summary is largely based on H Figgis, Mandatory and Guideline Sentencing: Recent Developments, NSW Parliamentary Library Research Service, Briefing Paper 18/98, October 1998, p21-22; D Roche, Mandatory Sentencing, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No. 138, December 1999; and A Hoel and K Gelb, Sentencing Matters: Mandatory Sentencing, Victorian Sentencing Advisory Council August 2008. See also Irish Law Commission, Irish Law Commission, Mandatory Sentencing, Report 108, June 2013
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