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Mandatory Sentencing and the Role of the Academic

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This paper will begin with a survey of mandatory sentencing in Australia and attempt to analyse the rationale for the introduction, retention or repeal of these measures. It will summarise the arguments raised to challenge mandatory sentencing and conclude with a discussion of the effectiveness of academic debate in challenging populist criminal justice policies such as mandatory sentencing.

So much has been written about mandatory sentencing in Australia in the last decade or so that one wonders if there is anything more to be said. From at least 1998 and through to 2002 there was a plethora of journal articles, conference papers, book chapters, reports and other commentary addressing the issue, stimulated by the introduction of mandatory sentencing laws in Western Australia and the Northern Territory. The debate has since subsided but one of the themes underlying the critique – that of discriminatory sentencing practices – has surfaced again this year in a different context. But this time the sentencing laws and practices under scrutiny are not mandatory penalties for property offences but crimes of violence by aborigines against aboriginal women and children. However, underlying these two very different issues is a common theme: discriminatory sentencing practices. Should offenders be treated equally or does greater injustice occur by treating unequals equally? The mandatory sentencing laws in Western Australia and the Northern Territory were enacted in response to a moral panic that the criminal justice system was not taking victims' rights seriously, and that sentencing courts, by considering factors such as race and socio-economic deprivation, were passing inconsistent and excessively lenient sentences.[1] Similarly, the current debate about physical and sexual violence to aboriginal women and children raises concerns that we are not responding to this issue appropriately and the sentencing courts, again by considering such factors as race and socio-economic deprivation, are not passing adequate sentences.

Mandatory sentences: what are they?

The term mandatory *sentence* narrows the discussion immediately. It does not include the mandatory detention of asylum seekers and refugees, an issue that can fairly be claimed to demonstrate a punitive shift in political and public sensitivity.[2] The focus of this paper is on *sentences*, namely judgments of the court consequent upon conviction for an offence. Technically, a *mandatory* sentence is a sentence where the

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[1] Bronitt S and McSherry B, *Principles of Criminal Law*, 2nd ed, Lawbook Co, Sydney 2005, 138.
[2] Brown D, 'Continuity, rupture, or just more of the volatile and contradictory' in Pratt J et al, eds, *The New Punitiveness*, Willan Publishing, 2005, 27
at 35.

sentencer has only one option. The sentence is fixed. In the eighteenth and early nineteenth centuries, fixed penalties in this sense were the norm for a wide range of crimes. In England by 1819 there were 220 offences, mostly property offences, which attracted the mandatory penalty of death.[3] However, the term mandatory sentence is widely understood in a broader sense to cover the situation where Parliament sets a minimum sentence as well as a maximum sentence for a particular offence.[4] This was very common in the nineteenth century for a wide range of crimes but was abandoned in the twentieth century in favour of broader discretion with statutory maxima only.[5] Since then, minimum sentences have been the exception rather than the rule. For much of the twentieth century, the view prevailed that sentencing was largely the province of the judiciary and judicial discretion supervised by appellate decisions was likely to produce fairer sentencing than detailed legislative provisions.[6] This spilt over into statutory interpretation with penalties that looked like fixed penalties being interpreted as maxima only unless Parliament made it totally clear that the penalty was a mandatory one. The notion of sentencing belonging to the judges has now come under challenge with a trend towards Parliament taking back that which it had left to the courts. Mandatory sentences are an example of this trend. In the US mandatory minimum sentencing laws have proliferated for a wide range of crimes but most commonly for murder, aggravated rape, drug offences, felonies involving firearms and felonies committed by persons with previous convictions. In Australia the picture is different. In the last decades of the twentieth century mandatory penalties became common for offences such as drink driving and regulatory offences such as occupational health and safety offences, traffic and fisheries offences, fixed penalties or minimum penalties are rare for indictable offences.

In exploring examples of mandatory penalties it quickly becomes apparent that what qualifies as a mandatory sentence is a matter of degree. When a minimum sentence is set, Parliament may allow scope for avoiding the minimum sentence in exceptional circumstances, weakening its claim to be a mandatory sentence. On the spot fines or infringement notices could also be regarded as mandatory penalties. However, although fixed by statute and punitive, they are administrative in nature and do not require any measure of judicial involvement. Moreover, their mandatory nature may be contingent if failure to accept the notice and pay the penalty results in court proceedings rather than direct enforcement with the court having a discretion as to penalty. Infringement notices are common for parking and other traffic offences, littering and environmental offences. Expiation notices have also been used for possession of small amounts of cannabis in some Australian jurisdictions.

Standard non-parole periods are arguably mandatory sentences. In New South Wales legislation sets standard non-parole periods for a number of serious offences.

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[3] Tonry M, *Sentencing Matters*, Oxford University Press 1996, New York, 1996, 143. Interestingly the *New South Wales Act 1787*, 27 Geo IV c 2, B and C 18, gave some discretion to the Court of Criminal Jurisdiction in meting out punishment by providing that in the case of capital offences the death penalty be imposed or such corporal punishment 'as the court shall seem meet'. In non-capital cases the court could pronounce judgment of 'such corporal punishment, not extending to life or limb, as the Court shall seem meet': Castles A, *An Australian Legal History*, Law Book Company, Sydney, 1982, 61.

[4] It has been suggested that fixing a penalty below which a penalty cannot fall is no more a mandatory penalty than fixing a maximum penalty: Bagaric M, 'What sort of Mandatory Penalties should we have?' (2002) 23 *Adelaide Law Review* 113 at 117

[5] Ashworth A, *Sentencing and Criminal Justice*, 4th ed, 2005, 51.

[6] Ibid, 52.

However, because there is provision for a court to set longer of shorter sentences if there are particular reasons for doing so, the scheme is not really mandatory sentencing. Numerical sentencing grids or presumptive sentencing guidelines, common in America, can be considered a form of mandatory sentencing when they allow no downward scope for departure from the guideline. While New South Wales has flirted with the idea of grid sentencing[7] and Western Australia has gone so far as enacting the first two stages of a sentencing matrix, no Australian jurisdiction has gone ahead and implemented grid sentencing.[8] The following discussion will focus on the following: mandatory life sentences for murder; non-custodial minimum sentences for summary offences and some controversial examples of mandatory minimum sentences of imprisonment introduced in Australia in the last ten or so years.

Mandatory penalties for murder

In common law jurisdictions mandatory life imprisonment for murder has been the norm since the abolition of the death sentence. It was, it seems, part of the political price for abolition of the death penalty. In New South Wales, for example, capital punishment was abolished in 1955 and life imprisonment became mandatory for murder.[9] Its mandatory nature was ameliorated in 1982 and finally abandoned in 1989.[10] Queensland is now the only Australian jurisdiction to retain mandatory life for murder. However, a mandatory life sentence has never meant that a murderer would be imprisoned for his or her natural life. While the judicially imposed sentence was a life sentence, in practice the sentence was an indeterminate one subject to review and release at a time deemed appropriate by the executive (typically with legislative provision for recommendation to be made a parole board or equivalent).[11] In New South Wales, a person serving a life sentence from the time of abolition of the death penalty to the abolition of mandatory life could expect to serve between 13 and 20 years.[12]

Interestingly, victim concerns partly motivated the change from mandatory life sentences to fixed term sentences for murder. It seems the move to abolish mandatory life sentences for murder in New South Wales had its genesis in public concern about the injustice of life sentences for victims of domestic violence who had killed their partners after years of abuse.[13] Additionally, abolition was supported by a number of judges who argued that judicial discretion would enable the sentence to reflect the wide range of factual circumstances encompassed by the crime, would encourage

[7] Hogg R, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 22 UNSWLR 262.
[8] For a critique of the WA matrix proposals see Morgan N, 'A Sentencing Matrix for Western Australia: Accountability and Transparency or Smoke and Mirrors?' in Tata C and Hutton N, *Sentencing and Society*, Ashgate, Aldershot, 2002, 65
[9] *Crimes (Amendment) Act 1955* (NSW) (No 16).
[10] The current provision is the *Crimes Act 1900* (NSW) s 19A.
[11] And in some jurisdictions judges had some choice in relation to the minimum period that must be served before release.
[12] Anderson J, *The Sentence of Life Imprisonment for the Crime of Murder in New South Wales*, Ph D, thesis, University of Newcastle, 2003, 18-20.
[13] Ibid 22; referring to the Violet and Bruce Roberts case and the South Australian case of *R* (1981) 4 A Crim R 127 (the 'axe-murder case'). See Weisbrot D, Homicide Law Reform in New South Wales' (1982) 6 *Criminal Law Journa*l 248.

more guilty pleas, shorten trials and decrease the prison population.[14] In the Australian context, the 1985 report of the Victorian Law Reform Commission[15] was influential in the debate. Its recommendation to abolish the mandatory life sentence for murder was implemented the following year.[16] The Commission's arguments persuaded the Tasmanian Law Reform Commissioner to revise his views and recommend abolition of mandatory life for murder.[17] There were two main prongs to the argument for abolition of mandatory sentences. First, what would now be referred to as a 'truth in sentencing' argument. 'Life' does not mean life-long detention and the pretence that is does brings the law into disrepute and reduces the deterrent effect of sentences for murder. Secondly, mandatory life sentences for murder fail the test of equality before the law. Murders vary widely in nature and culpability and it is just that they be treated differently. The Victorian Law Reform Commission quoted Thomas's words:[18]

> The mandatory life sentence, part of the political price of the abolition of the death penalty, cannot be defended on any rational grounds in a system where every other offender is subject to the extensive discretion of the sentencing judge, and difference between a verdict of murder and one attempted murder or manslaughter may be the skill of the casualty officer or the sympathy of the jury.

The truth in sentencing argument effectively counters the argument of the retentionists that mandatory life sentence is a greater deterrent and needed to emphasise in an appropriate way the sanctity of human life. What remains is the argument that a mandatory life sentence better protects the public because of its flexibility - an offender can be released when it is safe to do - an argument subjected to all the criticisms of indeterminate sentences but with undoubted appeal to penal populism.

Despite the recommendations of a House of Lords Select Committee in 1989 and the Lane Committee in 1993, England too has retained mandatory life for murder relying on the argument that public confidence and public protection require such decisions to made by the Home Secretary.[19] However, the Home Secretary's right to determine the minimum term (with advice from the trial judge and the Lord Chief Justice) and the release date (with advice from the Parole Board) has now gone on the grounds it is incompatible with Article 6 of the European Convention on Human Rights because the Minister is not an independent and impartial tribunal.[20]

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[14] Weisbrot, above n 13, 250.
[15] Law Reform Commission of Victoria, *The Law of Homicide in Victoria: The Sentence for Murder*, Report No 1, 1985.
[16] *Crimes Act 1958* (Vic) s 3 as amended by 37 of 1986. In 1975 the mandatory death penalty for murder was replaced with mandatory life imprisonment.
[17] Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism*, Report No 61, 1989, at 11.
[18] Above n 15, 5 quoting Thomas D, 'Developments in Sentencing 1964-1973' [1974] *Criminal Law Review* 685 at 687.
[19] Ashworth A, *Sentencing & Criminal Justice*, 3rd ed, Buterworths, London, 2000, 51-52.
[20] Ashworth A, *Sentencing & Criminal Justice*, 4th ed, Butterworths, London, 2005, 116.

To summarise, where mandatory life sentences for murder remain, their retention is justified on grounds of public confidence/penal populism. Re-introduction in some form always remains a possibility.

Special Penalties and Mandatory Minimum Penalties for Summary Offences

A familiar kind of mandatory penalty is encountered where the sentencer is required to impose a special penalty. Special penalties are generally fines that relate to the subject matter of the offence that can be or must be imposed in addition to a general penalty. Examples include a special penalty for each fish illegally obtained, or for each of unit of excess weight when a vehicle is overloaded. They are justified by the legislature on the grounds of deterrence, for example, the deterrent effect on poachers and would-be poachers of scarce natural resources. Mandatory minimum fines are also common for regulatory offences. One of the problems with both fixed special penalties and mandatory minimum fines is that the principle that a fine must be within the offender's reasonable capacity to pay must yield to the statutory requirement to impose a fine of a minimum amount. This may well be disproportionately harsh and unfair to a person of limited means who may be liable to a term of imprisonment in default unless there are alternatives available to the court enforcing payment. Certainly, they infringe the principle of equality before the law.

Mandatory licence disqualification is a common penalty for drink driving offences. When first introduced it was subjected to considerable criticism by the legal profession on the grounds of fairness. To determine the case solely on the basis of blood alcohol level without considering the individual circumstances of the offender could lead to great injustice. A person whose livelihood depends on their licence should be treated differently from a person who exceeds the blood alcohol limit by the same amount who only needs to drive a car for leisure purposes. In some jurisdictions, such as Tasmania, the existence of exceptional circumstances allows a sentencer to avoid mandatory disqualification but in others there is no such escape from the mandatory sentence. It can be argued that the prospect of licence disqualification does deter drink driving and the social benefits outweigh considerations of fairness in the exceptional case. It can also be argued that minimum penalties and a relatively narrow penalty range for offences like drink driving enhances consistency and produces a greater degree of fairness overall. Research in New South Wales has shown clear evidence of disparities between different courts in sentencing high range PCA (prescribed concentration of alcohol) offenders with some courts never using dismissals and conditional discharge in the period studies and one court using them in 40% of cases.[21] Of course disparity can be tackled in ways other than tighter mandatory penalties, such as by a guideline judgment.[22]

For regulatory offences, the objections to the mandatory quality of the sentence seems tempered by fact that the offences are more susceptible to general deterrence than most, that the penalties do not involve imprisonment, and the interests protected, public safety on the roads or the preservation of scarce natural resources overrides

[21] Moffatt S, Weatherburn D and Fitzgerald J, *Sentencing PCA Drink Drivers: The Use of Dismissals and Conditional Discharges*, NSW Bureau of Crime Statistics and Research, November 2003.
[22] As was the case in New South Wales for high range PCA offences: *Attoney-General's Application* (No 3 of 2002) [2004] NSWCCA 303.

considerations of fairness. In summary a penalty such as mandatory licence disqualification is defensible for driving offences provided there is provision for the courts to decline to impose the order in exceptional cases or to grant a restricted licence in appropriate cases to avoid injustice.

Mandatory minimum periods of imprisonment and three strikes legislation

Fortunately, in Australia, governments have not embraced mandatory penalties of imprisonment with anything like the enthusiasm of governments in the US. Despite the arguments of social science researchers and bodies like the American Bar Association and the American Law Institute, conservative politicians have consistently promoted the passage of more and more mandatories.[23] For the last decades of the twentieth century, mandatory sentencing laws were America's most popular sentencing innovation with mandatories applying to aggravated rape, drug offences, felonies involving firearms, or felonies committed by persons who have previous felony convictions.[24] The instrumental and normative arguments to the contrary fell on deaf ears. Tonry has summarised the results of the major studies on the operation of mandatory penalties, demonstrating their ineffectiveness:[25]

> First, they increase public expenditure by increasing trial rates and case processing times. …
> Second, in every published evaluation, judges and prosecutors were shown to have devised ways to circumvent application of the mandatories. Sometimes prosecutors simply refused to file mandatory-bearing charges. Sometimes plea-bargaining was used. Sometimes judges ignored the statute and imposed sentences inconsistent with it.

As for their effectiveness as a deterrent to the would-be offender, Tonry's conclusion was that there is little basis for believing that mandatory penalties have any significant effects on rates of serious crime.[26] His normative arguments are straightforward:[27]

> First, simple justice: because of their inflexibility, such laws sometimes result in the imposition of penalties in individual cases that everyone involved believes to be unjustly severe. Second, perhaps more important, mandatory penalties encourage hypocrisy on the part of prosecutors and judges. To avoid injustices in individual cases, officials engage in the adaptive response and circumventions described in this chapter.

Tonry concludes that instrumental and normative arguments are ignored because officials who support mandatory penalties do not care about problems of implementation, patterns of circumvention or the certainty of excessively and unjustly severe penalties for some offenders. Their interests are different and their goals political and symbolic:[28]

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[23] Tonry, above n 3, 134.
[24] Ibid 146
[25] Ibid 160.
[26] Ibid 141.
[27] Ibid 160.
[28] Ibid.

> Put positively, elected officials want to reassure the pubic generally that their fears have been noted and that the causes of their fears have been acted on. Put negatively, officials want to curry public favour and electoral support by pandering, by making promises that the law can at best imperfectly and incompletely deliver.

Mandatory penalties in the Northern Territory

Tonry's explanation of the introduction of mandatory penalties resonates with the Australian experience of mandatory penalties in Western Australia and the Northern Territory. They were introduced for political and symbolic reasons in the face of instrumental and normative objections to them.

The Northern Territory scheme came into operation in March 1997. Amendments to the *Juvenile Justice Act* 1983 (NT) and the *Sentencing Act* 1995 (NT) introduced mandatory penalties for "property offenders". Property offenders included stealing but not shoplifting, criminal damage, unlawful entry into buildings, unlawful use of a vehicle and receiving. For juveniles, 15 and 16 year-olds found guilty of a second or subsequent property offence, a 28-day period of detention was made mandatory. For offenders aged 17 and over a minimum term of 14 days applied to a first offender and escalating minimum terms for repeat offenders: 90 days for second offenders and 12 months for third offenders.

The compulsory minimum terms for offenders convicted of designated property offences were considered necessary and desirable by Attorney-General Burke to:

> … send a strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.[29]

Commenting on the effects of mandatory sentencing two years later, Attorney-General Stone said:[30]

> One of the greatest challenges facing any government in Australia centres on law and order issues. Ordinary Australians are getting tired of those who steal, pilfer and damage their property… We live in an era where there is scant regard for both private and public property.

Zdenkowski commented that it is not entirely clear why selected property offences were targeted rather than offences involving interpersonal violence.[31] Perhaps because Stone's ordinary Australians were white victims of property offences.

[29] Northern Territory Parliamentary Record, Seventh Assembly First Session No 27, 17 October 1996, p 9699, quoted by Zdenkowski G, 'Mandatory Imprisonment of Property Offenders in the Northern Territory' (1999) 22 *UNSW Law Journal* 302 at 303.
[30] Ministerial Statement quoted by Zdenkowski, above n 29, 303.
[31] Zdenkowski, above n 29, 304.

Indigenous Australian victims of interpersonal violence were not on the radar at the time. Sexual offences and offences involving violence were added to the mandatory regime in 1999.

In the face of rising criticisms, the regime was modified to allow courts a limited discretion not to impose a mandatory term of adult offenders in exceptional circumstances and to refer young offenders facing their second conviction to a diversionary program. An attempt at federal intervention to overturn the laws, in so far as they applied to juvenile offenders, failed. Despite the Senate passing the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* in March 2000 following the recommendation in the Report of the Legal and Constitutional References Committee, the Government deferred consideration of he Bill indefinitely in the House of Representatives.[32] In September 2000 new legislation was introduced into the Senate, the *Human Rights (Mandatory Sentencing of Property Offences) Bill*. This Bill was similar to the Juvenile Offenders Bill but broader in that it applied to adults and children. Debate on it was adjourned and it was referred to the Senate Legal and Constitutional References Committee in May 2001. After the Northern Territory Government unexpectedly lost power in the election in August 2001, the newly elected Labor Government repealed the mandatory sentencing regime for juvenile property offences in October, replacing it in with a scheme for adult offenders convicted of robbery or burglary that still limits judicial discretion but is more flexible than the scheme it replaced.[33] Mandatory sentences of imprisonment remain for adults convicted of violent and sexual offences.[34]

Mandatory Penalties in Western Australia

In Western Australia, the first wave of mandatory sentences to attract critical attention was the *Crime (Serious and Repeat Offenders) Sentencing Act 1992*, enacted Morgan has asserted in a 'cynical effort to cling to office'.[35] From 1989 Western Australia had a serious car theft problem to which the police responded by engaging in high-speed pursuits of stolen cars. As a result, in an 18-month period, 16 people in accidents that occurred during high-speed police pursuits of stolen cars. A public rally in 2001 attracted 20,000 demanding tough action against car thieves.[36] Then on Christmas Day a pregnant mother and her baby son were killed in a collision with a vehicle which was being pursued by the police. The government responded with promises for 'the toughest laws in Australia to deal with crime'.[37] The aim of the legislation was to 'excise hard core young offenders from society'.[38] In fact the legislation extended to adults too in an effort to cocoon it from the criticism that it breached the Convention on the Rights of the Child.[39] The Act provided for indeterminate mandatory detention

[32] For a discussion of the Committee's report see Warner K,' Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355 at 357-359.
[33] *Sentencing Act* (NT) s 78B.
[34] *Sentencing Act* (NT) s 78BA and s 78BB.
[35] Morgan N, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories'(1999) 22 *UNSWLR* 267 at 269.
[36] Weatherburn D, *Law and Order in Australia: Rhetoric and Reality*, Federation Press, Sydney, 2004, 28.
[37] Ibid.
[38] Morgan N, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going' (2000) 24 *Criminal Law Journal* 164 at 169.
[39] Ibid 166 note 11.

in addition to a fixed term of at least 18 months in custody if a 'repeat offender' were convicted of prescribed offence of violence. At the same time penalties for driving offences resulting in death were increased substantially where the offence involved a stolen motor vehicle. An evaluation by the Western Australian Crime Research Centre showed the legislation had no impact on car theft which in fact increased after the new laws came into effect.[40] Nor did it fare any better in terms of incapacitating its target offender. Only two juveniles were sentenced to indeterminate detention under the legislation and one of these did not fall within the target group.[41] The Act remained in force for only two years or so. Once it became clear that the claims for selective incapacitation were unfounded, 'the government spokesman next hitched his fortunes [simply] to the notion of general deterrence'. When research disproved these claims as well, and in 1994 after losing office, members of the former Labor government conceded that the laws had not worked.[42]

The three strikes burglary law was introduced in late 1996 in the run up to the State election in early 1997. It provided that an adult or juvenile offender convicted for the third time for a home burglary must receive a 12-month minimum term of imprisonment or detention. The power to suspend sentence was expressly prohibited.[43] The mandatory law was justified by 'the community's concern about the prevalence of home invasion offences … and the devastating effect which such offences have on victims.'[44] Deterrence and incapacitation were also mentioned as aims of this measure although in evidence to the Senate and Legal Constitutional References Committee in 2000, it was asserted the legislation was not introduced to deter offenders, 'it was purely to indicate the very serious nature of the offence'.[45]

There was a change of government in Western Australia in February 2001 but the new government had gone to the election with a commitment to retain rather than repeal the three strikes law. Subsequently, two reports were released critical of the Western Australian laws. The first, commissioned by the State's Aboriginal Justice Council concluded that the only genuinely acceptable option was for the laws to be repealed with a particular emphasis on the need to exempt children under the age of 16 from the law.[46] Some months later, in March 2002, the Senate Legal and Constitutional References Committee Report on the *Human Rights (Mandatory Sentencing of Property Offences) Bill 2000* was tabled. By this time the Property Offences Bill no longer had relevance to the Northern Territory because of the repeal of the mandatory imprisonment and detention provisions but would have had the effect of overruling the Western Australian laws. The new Labor government

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[40] Weatherburn, above n 36, 29 citing Broadhurst R and Loh N, 'Selective incapacitation and the phantom of deterrence; in Harding R (ed), *Repeat Juvenile Offenders: the Failure of Selective Incapacitation in Western Australia*, University of Western Australia, Perth, 1993, 55-78.

[41] Morgan, above n 35, 275.

[42] Morgan, above n 38, 169 citing Harding R (ed), *Repeat Juvenile Offenders: the Failure of Selective Incapacitation in Western Australia*, 2nd ed. University of Western Australia, Perth, 1995, 5.

[43] The Children's Court has interpreted the legislation as permitting the use of Conditional Release Orders (essentially a form of conditional suspended sentence), exercised in around 10% of cases: Morgan N, 'Mandatory Sentences in Australia: Where have we been and where are we going'?' (2000) 24 *Criminal Law Journal* 164 at 166-7.

[44] Foss P, Ministerial Statement, 22 August 1996 quoted by Morgan N, "Going Overboard? Debates and Developments in Mandatory Sentencing June 2000 to June 2002' (2002) 22 *Criminal Law Journal* 293 at 298.

[45] Quoted by Morgan, above n 44, 298.

[46] Morgan, above n 44, 297

defended the laws on a number of grounds: Western Australia was the State with the highest rate of home burglary; the legislation's high degree of public acceptance and that in practice the legislation did not affect adults but was well-targeted at juveniles by identifying those with extensive sentencing histories.[47] The Report was highly critical of Western Australia's three strike laws and pointed out their ineffectiveness in reducing the incidence of home burglaries:[48]

> The Committee can only conclude that the mandatory sentencing legislation has not brought about a reduction in the rate of home burglaries in Western Australia. This is hardly surprising when one considers, not only that the clean up rate for burglaries is so low, but also that the legislation has been irrelevant for adults and that most of the juveniles dealt with under it have lived in the country, not in the metropolitan area.

Because third strike home burglars are likely to receive at least a 12-month sentence in any event, repeal of the legislation was the logical conclusion. In relation to juveniles, the matter was different. The Committee accepted there was evidence that younger country Aboriginals caught by the legislation were over represented, juveniles sentenced to 12 month detention were required to serve longer terms than adults, there was a lack of regional detention centres, the possibility of considerable variation between the sentences and opportunities for any two juvenile offenders and the inappropriateness of 12 month detention for some juvenile offences. This led the Committee to conclude that 'mandatory sentencing in the overall context operates against young country Aboriginals in particular in a manner that is effectively discriminatory. However, despite these strong criticisms and the Committee's view that the Commonwealth Parliament may well have the power to pass and enact the Bill using the external affairs power, the majority view was that the Bill should not proceed but the Western Australian Government should be given the opportunity to address the impact of the laws on aboriginal youth.

In the intervening years there have no new legislative developments. The three-strikes provision for home burglary in s 401(4) of the Criminal Code remains in force. The heat seems to have gone out of the debate, perhaps because in practice it has little effect on adults and the courts have circumvented mandatory detention for juveniles by imposing Conditional Release Orders.

Border control and mandatory penalties

The border control laws enacted in the run up to the federal election were enacted at a time when there was a moral panic about the numbers of refugees and asylum seekers arriving by boat from Muslim countries in particular. The new laws included mandatory penalties for a range of offences under the *Migration Act 1958* (Cth) including people smuggling which attracts a minimum of 5 years imprisonment (8 years for a repeat offence) with a non-parole period of 3 years (5 years for a repeat

[47] Ibid 298 citing the statement by the Attorney-General to the Senate Committee.
[48] Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Property Offences) Bill* 2000 (Parliament of Australia, Canberra, March 2002.

offence.[49] The same penalties apply to any person who provides misleading information to immigration officials with respect to a group of five or more arrivals.[50]

The Prime Minister has claimed that these laws have succeeded in their aim to 'deter and deny entry to asylum seekers.[51] More recently the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has confirmed this claim, asserting that s233C has operated very effectively in deterring people smuggling activities since its inclusion in the Act.[52] Even if the number of arrivals has declined, Morgan argues it is impossible to assess whether this is attributable to the new laws alone, and even more difficult to point to the mandatory penalty component of the laws as the cause.[53] The Australian Law Reform Commission has recommended repeal of these mandatory penalties arguing that mandatory sentencing has the potential to offend against principles of proportionality, parsimony and individualised justice.[54]

The role of research in mandatory sentencing debates

From the time of the enactment of Western Australian car chasing legislation in 1992 the controversy about mandatory sentencing in Western Australia and the Northern Territory gained increasing momentum and eventually international notoriety until the repeal of the Northern Territory mandatory sentencing regime for juvenile offenders in October 2001. The volume of literature devoted to the topic was considerable. It generated empirical research and scores of scholarly critiques. In addition there were a number of reports which explored the issue including two from the Senate's Constitutional and Legal References Committee; the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Human Rights Committee;[55] reports commissioned by the Aboriginal Justice Council of Western Australia from the Crime Research Centre[56] and Johnson and Zdenkowski's study of mandatory sentencing in the Northern Territory.[57]

The range of objections to the law has recently been summed up by the Australian Law Reform Commission:

> It is argued that these schemes: escalate sentencing severity; are unable to take account of the particular circumstances of the case; and redistribute discretion so that decisions by the police and prosecuting authorities become increasingly important. Some critics also claim that mandatory sentencing fails to deter criminal behaviour, leads to greater inconsistency and has a

[49] *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) amending the *Migration Act 1958* (Cth) ss 233C (penalty), the offence is in s 232A.
[50] Contrary to the *Migration Act 1958* (Cth) s 233A.
[51] Morgan, above n 44, 299.
[52] Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper, September 2005, 443.
[53] Morgan, above n 44, 299.
[54] Australian Law Reform Commission, above n 52, 444.
[55] Ibid at 442 n 77 for citations.
[56] Aboriginal Justice Council, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, 2002.
[57] Johnson D and Zdenkowski G, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory*, Australian Centre for Independent journalism and University of Technology Sydney, 2000, 104-5

> profound discriminatory impact on certain groups. In addition, many commentators have argued that mandatory sentencing schemes contravene a number of accepted sentencing principles and international human rights standards, including: the principle of proportionality; the requirement that the detention of young people should be a last resort and for the shortest appropriate time; and the requirement that sentences should be reviewable by a higher court.

It is clear from the reports of Human Rights bodies and the Senate's Committee have found that mandatory sentencing laws can infringe aspects of the ICCPR and the CROC. In addition mandatory sentencing may be unconstitutional. The High Court decision in *Palling v Cornfield* is regarded as authority for the proposition that while mandatory penalties are unusual and undesirable they were within the competence of Parliament. However, it has been suggested a *Kable* argument may succeed in relation to a mandatory sentencing provision which was found to require courts to act in a way which is incompatible with the integrity, independence and impartiality of a court required of a court exercising judicial power under the constitution.[58]

Much of this material covered the same ground varying in emphasis rather than raising new objections or new evidence of discrimination, displaced discretion, distortions of the judicial role, or failures of deterrence or incapacitation. Rather than reiterate all of these arguments in detail, I will focus on the issue of discrimination and equality of treatment.

Mandatory sentencing: discrimination or equality of treatment

There is a basic disagreement between the advocates and the opponents of mandatory sentencing. Its opponents argue it exacerbates inconsistency and inequality by denying flexibility. Its advocates argue that it creates consistency by reducing discretion and avoiding unduly lenient (or harsh) sentences. John Howard is said to have defended the Northern Territory mandatory laws as merely the 'equal operation of the law'. And Federal Attorney-General Daryl Williams argued, 'mandatory detention laws do not target Indigenous people and are racially neutral on the face of the legislation and that consequently the laws do no have a racially discriminatory purpose'.[59]

The case for exacerbating inequality is a powerful one. David Brown et al have argued that the Northern Territory and Western Australian laws were discriminatory on a number of levels and in a number of ways.

At the first level the laws are discriminatory in four ways. First, and obviously, the WA and NT laws discriminated on geographical grounds -they did not apply across the country. Secondly, they discriminated on racial lines because of the specific offences selected to attract mandatory terms. The offences were not selected on the basis of seriousness but encompassed offences such as burglary, car stealing, criminal damage, the kind of offences committed by young, Indigenous and poor people. Fraud, environmental offences or other white-collar crimes were not included in the

[58] This suggestion has less force since the High Court's decision in *Fardon v Attorney-General of Queensland* [2004] HCA 64.
[59] Morgan, above n 38, 79.

regimes. Thirdly, the racially based selectivity of the offences is amplified in the exercise of police pre-trial investigatory and prosecutorial discretions. These laws operate in a context where Indigenous offenders are grossly over-represented in prison populations. In Western Australia, the one third of juvenile offenders who are Aboriginal account for at least three-quarters of the three strike cases.[60] Fourthly, the application of diversionary schemes and exemption clauses are 'racially tuned'. In WA in 1998 Aboriginal offenders received 18% of juvenile cautions, while comprising one-third of juvenile offenders.[61]

On a second level of argument, it is discriminatory to treat unequals equally:[62]

> The equal application of the law to unequals does not produce fairness and equality but unfairness and deepening inequality. Fairness is a consequence of adjustment to the variability of circumstance, yet this is precisely what mandatory sentencing prevents.

Brown et al also argue that 'a third level of argument highlights the way mandatory sentencing policies and crime more generally provide a coded language for more overtly racial sentiments.'[63]

Preaching to the converted?

How valuable has the mandatory sentencing debate been in achieving a rational and empirically based discussion of the issue?

It seems mandatory sentencing for offences like drink driving is now accepted. This is an offence more susceptible to general deterrence than many. It is an offence which has no overtones of race or class selectivity in its application. Typically, its mandatory aspects do not involve imprisonment. For these reasons it is acknowledged that the deterrent advantages of increased consistency and certainty outweigh the advantages of broad discretion which is likely to favour the middle class offender of good character and exemplary driving record at the expense of the more socially disadvantaged. In other words it is accepted that it is an offence for which blood alcohol level and prior record for drink driving offences should determine the outcome in almost all cases.

Mandatory sentencing for predatory crime remains controversial. The literature has ensured that there is a wealth of material available indicating the shortcomings of mandatory sentencing from an instrumental and a normative point of view. So much has been written, the arguments have been re-hashed and re-stated. One could cynically argue that they have been read and cited by other critics but have converted no-one. As one of the leading commentators on mandatory sentencing in Australia

[60] Figures from 74% to 81% have been reported by the Department of Justice: Morgan, above n 44, 301.
[61] Brown D, Farrier D, Egger S, McNamara L and Steel A, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, 4th ed, Federation Press, Sydney, 2006, 1231.
[62] Ibid.
[63] Ibid 1231: see also Hogg R (2001) quoted in Brown D, 'Mandatory Sentencing; A Criminological Perspective' (2001) 7 *Australian Journal of Human Rights* 31 at (10).

has acknowledged, such work appeals to those who think like one.[64] From the point of view of the academic, the mandatory sentencing debate has provided a fertile source of publications. Has it made a difference?

It is acknowledged that the political appeal of doing something supposedly concrete about public concern with crime has trumped arguments about effectiveness, consistency and fairness. Mandatory sentences force courts to be tough, hold offenders accountable, denounce criminal acts and show support for victims. Demonstrating mandatory sentencing policies don't work in terms of their original justifications, but produce or exacerbate a range of adverse consequences, does not get to the heart of the populist roots of such policies. In Brown's words:[65]

> These populist roots lie in the thirst for retribution and vengeance, the felt need to strike back at a range of social anxieties and fears, to offer up sacrifices or scapegoats though the social exclusion and imprisonment of particular individuals and particular communities.

The decline in influence of the academic, and the portrayal of judges and lawyers and other agents of the criminal justice system as out of touch with public concern with crime and opinion on crime levels is a facet of penal populism and part of its appeal lies in its anti-elitism.[66] As Franko Aas explained, 'From the perspective of populist discourse, criminological discourse is discarded as elitist, as "high" knowledge, distant from people's feelings.' [67] Criminological experts have fallen out of favour with criminal justice policy makers, who have embraced the average citizen and the victim as sources of inspiration in their place.

If this is the case, then much of the effort in countering penal populism by academic discourse is a waste of time. However, I would argue the expert talk has not been in vain. Mandatory life sentences for murder have been abolished in all states but Queensland. The mandatory sentencing regime for property offenders was abolished in the Northern Territory and there was no legislative effort in Western Australia to override judicial use of conditional release orders to avoid of the three strikes law for juveniles. The empirical evidence was not without impact. As a number of commentators have pointed out, and the above discussion shows, as the lack of evidentiary support for mandatory sentencing regimes was demonstrated, its government supporters shifted ground from deterrence to 'community concern', to 'don't forget the victims' and 'no money for alternatives'.[68] This amounted to an admission of the ineffectiveness of the laws in crime reduction terms exposing the purely symbolic and political justifications of the laws. Forcing such a shift must be counted as a success. While it does not counter or address underlying populist roots of the laws it exposes them and forces those supporting the laws to justify them in them in symbolic and rhetorical terms. And despite underlying populist support being rooted in anxieties, fears and retributive desires, there is scope for tapping into public

[64] Morgan, above n 44, 307, quoting Auden.
[65] Brown D, 'Mandatory Sentencing; A Criminological Perspective' (2001) 7 *Australian Journal of Human Rights* 31.
[66] Brown, above n 2, 40.
[67] Franco Aas K, 'The ad and the form: punitiveness and technological culture' in Pratt J et al, eds, *The New Punitiveness*, Willan Publishing, 2005, 150 at 151.
[68] Morgan, above n 38, 171.

emotions by publicising grave injustices in individual cases, such as grossly disproportionate sentences for example or tragic outcomes. This is illustrated in the mandatory life sentence debate with cases like the Adelaide axe murder case evoking emotive sentiments on the side of abolition. During the course of the campaign against mandatory sentencing in the Northern Territory many individual examples of grossly disproportionate sentencing where exposed. Some these incidents achieved national coverage including the case of an aboriginal woman who was sentenced to 14 days imprisonment for stealing a can of beer. She was employed and had no prior convictions.[69] Johnson and Zdenkowski's research reported many examples such as the 16 year-old with one prior who received 28 days for stealing 1 bottle of spring water and the 17 year old first offender who received 14 days for stealing orange juice and minties.[70] The most tragic case to achieve national coverage was that of a 15 year-old Aboriginal boy who died in the Don Dale Correctional Centre in Darwin on 9 February 2000. He was serving a 20-day mandatory sentence for stealing pencils and stationery worth less than $100. Such individual examples did much to expose the harshness and oppressive impact of mandatory sentencing laws. In particular, the death of Wurramarrba in detention for such a trivial offence aroused emotion and anger against the laws.

Using specific examples to counter public punitiveness taps into what we know about public opinion and sentencing severity. Namely, that when confronted with the facts of individual cases, the public is not supportive of harsh sentences. Public attitudes to punishment become less punitive the more detailed the information provided in relation to facts of the offence and the offender's background.[71] In Brown's words, 'The politics of law and order feeds on the abstract, the emotive and the discursive but falters at the specific and the practical'.[72] By using specific examples, it was possible to arouse emotions of anger, emotion, shame and disgust over the disproportionate and unjust mandatory penalties, helping to remove the NT government from power and elect a new government with a mandate to repeal the laws.

There are some lessons to be learnt from the mandatory sentencing debate. The rise of the public voice and the decline in influence of views of the experts is a topic much debated.[73] Direct political pressure on decision makers to accommodate public opinion is increasing. Ordinary people, it seems, want more ownership of their 'democracy' than in the past.[74] To merely despair about penal populism in academic journals is not effective. Ryan argues such an approach suggests 'an enduring social snobbery, a last-ditch defence by an increasingly isolated academic and administrative elite against the idea that ordinary people are entitled to have their say. This is no basis on which to build a lasting, progressive criminal justice system in modern times'. [75] He asserts that governments and those running the criminal justice system

[69] Margaret Nalyirri Wynbyne; ABC Radio National Transcripts, The Law Report, 30 September 1997.
[70] Johnson and Zdenkowski, above n 104-5
[71] Roberts J, Stalans L, Indermaur D and Hough M, *Penal Populism and Public Opinion*, Oxford University Press, New York, 2003.
[72] Brown, above n 2, 39-40.
[73] Garland D, *The Culture of Control*, Oxford University Press, Oxford, 2001.
[74] Ryan M, 'Engaging with punitive attitudes towards crime and punishment. Some strategic lessons from England and Wales' in Pratt J et al, eds, *The New Punitiveness*, Willan Publishing, 2005, 139 at 145.
[75] Ibid, 148

need to find more imaginative ways of joining in the public debate, of presenting information about crime and punishment in ways that resonate with the public. Those pressuring for progressive criminal justice policies need to 'lobby outward rather than inwards. Just talking to one another, celebrating their role as part of a progressive 'moral community', is no longer an option.'[76] Debates about mandatory sentencing in Australia show the importance of 'lobbying outwards', utilising emotion and anger against punitiveness and injustice rather than relying wholly on rational and instrumental arguments. This is not to downplay the importance of instrumental arguments and empirical research. The wealth of material generated by legal and criminological scholars can be drawn upon to illustrate the lack of evidentiary support for the effectiveness of mandatory penalties of imprisonment and the adverse consequences that flow from them. [77] Bidding wars over law and order policies seem to be an entrenched feature of the political landscape at election time and mandatory penalties in one form or another are always a possibility. There is also the need to continue to attempt to understand why rationalist responses to punitive policies continue to fall on deaf ears. This requires theories to explain the public's punitive response and empirical research to explore the reasons for such attitudes.[78]

[76] Ibid at 147.
[77] Sallmann P, Mandatory sentencing: A bird's-eye view' (2005) 14 *Journal of Judicial Administration* 177 at 191-192.
[78] Freiberg A, 'Affective versus effective justice: Instrumentalism and emotionalism in criminal justice' (2001) 3 *Punishment and Society* 265 at 271.