

MANDATORY SENTENCING FOR PEOPLE SMUGGLING: ISSUES OF LAW AND POLICY

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[The mandatory minimum terms of imprisonment for people smuggling have attracted substantial judicial criticism in recent years. A series of legislative amendments has broadened their application; decisions of intermediate courts of appeal have increased their effect; and a Senate inquiry has recommended against their repeal. Difficult questions of law surround the constitutionality of the regime and its compatibility with Australia's obligations at international law. In addition, the effect of these developments on indictees and their families raises important questions of policy. Does the punishment match the culpability of offenders? If not, is it justified by the need for deterrence? If so, does the scheme achieve that objective? An analysis of the laws and their application reveals that the answers to all three are in the negative. This article contends that mandatory sentencing for people smuggling is unjust and unnecessary, if not invalid, and locates areas for change in all three arms of government.]

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I INTRODUCTION

In 1937, Gordon Picklum, who assisted nine Chinese non-citizens to be transported to Australia hidden on a boat in the night, was sentenced to two months' imprisonment.¹ Much has changed since then.² Since 1999, the approach to sentencing people smuggling offenders has been incrementally hardened: maximum penalties have been raised, mandatory minimum penalties introduced, and the scope of the offences broadened in various ways. Those convicted of people smuggling now face a mandatory minimum of five years' imprisonment with a three-year non-parole period, increased to eight years with five years' non-parole for aggravated or repeat offences.³ The effect of these legislative amendments was confirmed by a 2011 decision of the Western Australian Court of Appeal ruling that the mandatory minimum penalty should be reserved for the least serious category of offenders, departing from the views of many first-instance judges.⁴ The adoption of this position by the Queensland Court of Appeal in 2012⁵ consolidates this precedent and sets a new high-water mark for the sentences imposed on those who assist asylum seekers to travel to our shores.

There is considerable debate over the desirability, and the validity, of this mandatory sentencing scheme.⁶ Especially in light of recent statements by the Judicial Conference of Australia ('JCA'), there are serious concerns about its compatibility with the separation of powers. It sits equally uncomfortably with Australia's obligations at international law towards refugees, and the prohibition on arbitrary detention. Aside from its compatibility with such legal frameworks, however, are questions about its consonance with principles of sentencing, the legitimacy of its aims, and its effectiveness in achieving them. Experience has shown that the main effect of the scheme is to jail uneducated

¹ See *R v Goldie; Ex parte Picklum* (1937) 59 CLR 254, 264 (Starke J).

² The legislative history is discussed in more detail below: see below Part IVA.

³ *Migration Act 1958* (Cth) s 236B ('*Migration Act*'). The mandatory minimum penalty applies only where the smuggling involves five or more people, but experience has shown that in practice this is invariably the case: see below text accompanying n 408.

⁴ *Bahar v The Queen* (2011) 255 FLR 80.

⁵ *R v Karabi* [2012] QCA 47 (14 March 2012); *R v Nitu* [2012] QCA 224 (24 August 2012); *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012); *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012).

⁶ See, eg, Mirko Bagaric, 'The Rift between the Judiciary and Parliament over Mandatory Prison Terms for People Smugglers' (2012) 36 *Criminal Law Journal* 3; G F K Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74 *Australian Law Journal* 298; Martin Flynn, 'Fixing a Sentence: Are There Any Constitutional Limits?' (1999) 22 *University of New South Wales Law Journal* 280.

Indonesian fishermen, who may have been pressured into committing a crime, the consequences of which they are often unaware, for a term of at least three years, with debilitating consequences for them and their families. Significantly, by the expiration of that term, most of those they bring to the country will have been recognised as legitimate refugees. Despite such arguments, a Senate committee has recommended against passing a Bill that would repeal the controversial provisions.⁷ However, more recently there have been promising developments with the options for change suggested by the Expert Panel on Asylum Seekers including the restoration of sentencing discretion to the courts,⁸ and the Attorney-General directing the Commonwealth Director of Public Prosecutions ('CDPP') not to proceed with prosecutions that would attract the mandatory minimum except in certain cases.⁹

The severe approach to sentencing people smugglers has been the cumulative product of the legislative amendments made by the Parliament, their interpretation by intermediate appellate courts, and, until recently, the exercise of discretion by the CDPP. Part II of this article questions whether the scheme is desirable and compatible with the principles and objectives of sentencing, by comparing the punishment to the crime and evaluating the need for deterrence and the effectiveness of the scheme in achieving it. Part III takes the inquiry a step further to consider the legal validity of the mandatory sentencing regime against constitutional and international law. Part IV then reviews the developments in the legislature, the judiciary and the CDPP that have given rise to the current situation, to identify areas where there is room for change.

⁷ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (2012) vii [2.70].

⁸ Amongst the matters that the Panel suggested 'should be pursued as a matter of priority' were [c]hanges to Australian law *in relation to Indonesian minors and others crewing unlawful boat voyages* from Indonesia to Australia ... with options including crew members being dealt with in Australian courts with their sentences to be served in Indonesia, *discretion being restored to Australian courts in relation to sentencing*, or returning those crews to the jurisdiction of Indonesia.

Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers* (2012) 42–3 [3.22] (emphasis added) ('Houston Report'). It is not clear why such a recommendation, made under the consideration of 'Specific initiatives with key regional countries — Indonesia': at 41 [3.19]–[3.20] should not be equally applicable to defendants of people smuggling charges of all ethnicities and backgrounds: see below Part IIIA1(e).

⁹ See below Part IVC3.

II DESIRABILITY OF THE SCHEME

The overarching function of criminal law must necessarily be to reduce the net amount of crime in society.¹⁰ To this end, sentencing must operate to provide punishment proportionate to the crime, general and special deterrence, means for rehabilitation and the protection of the community from offenders.¹¹ There is something of a consensus that people smuggling is rightly criminal; the behaviour of high-level organisers in people smuggling, generally motivated by profit, to contravene the law and the sovereignty of nations is worth preventing.¹² International law contains instruments to combat people smuggling as well as to promote relocation of refugees, and the two are not incompatible.¹³ However, the imposition of statutory mandatory minimum sentences inhibits (at best) or distorts (at worst) the intricate process of weighing one factor against another that this requires.¹⁴ As highlighted by the JCA:

the administration of justice, through the application of established sentencing principles, can be compromised by a mandatory minimum term ... there is the practical inevitability of arbitrary punishment as offenders with quite different levels of culpability receive the same penalty.¹⁵

Several objectives of sentencing that are critical in relation to other offences are inapplicable to those convicted of people smuggling. Rehabilitation, for example, 'protects the community by reducing the risk of reoffending [and is]

¹⁰ See generally Malcolm Thorburn, 'Criminal Law as Public Law' in R A Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 21.

¹¹ As to the requirement for proportionality, see *Crimes Act 1914* (Cth) s 16A(1). For particular considerations at state level see *Penalties and Sentences Act 1992* (Qld) s 9 and equivalent legislation. See generally Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010).

¹² On the profit structure of the people smuggling business, see Fabrizio Sarrica, 'The Smuggling of Migrants: A Flourishing Activity of Transnational Organized Crime' (2005) 5(3) *Crossroads* 7, 9–10.

¹³ See *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004).

¹⁴ See further below Part IVB.

¹⁵ JCA, Submission No 11 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2.

perhaps the most fundamental justification for incarceration'.¹⁶ However, it has been repeatedly noted that the great majority of those uneducated Indonesian fishermen apprehended for people smuggling offences have little to no risk of reoffending or otherwise bringing significant harm to the Australian public.¹⁷

The first question must be whether the statutory scheme tends to produce, directly or indirectly, punishments that are prima facie unfair in that they exceed the objective culpability of offenders.¹⁸ If it does, the inquiry that naturally arises is whether there is some other legitimate goal that justifies that outcome. General deterrence is often advanced as that legitimate goal, raising two further questions: whether the crimes in question are so socially disruptive that especial attention to general deterrence is justified;¹⁹ and, if it is, whether the regime is effective in achieving that deterrence.²⁰

A Punishment and Culpability

1 Culpability: A Profile of the Offenders

One of the greatest difficulties with the mandatory sentencing scheme is that it covers offenders with a broad range of criminality.²¹ It is consistently premised in the need for punishment of high-level organisers: the Attorney-General, for example, in support of the 2010 amendments to strengthen the regime noted that '[p]eople smugglers are motivated by greed and work in

¹⁶ *R v Waszkiewicz* [2012] QCA 22 [37] (24 February 2012) (Atkinson J). See also *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(3) ('ICCPR').

¹⁷ Transcript of Proceedings (Sentence), *R v Mimin* (District Court of Queensland, 1221/2011, Farr DCJ, 10 February 2012); Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011); Transcript of Proceedings (Sentence), *R v Faeck* (District Court of Queensland, 842/2011, Farr ADCJ, 8 June 2011) 4–5; Transcript of Proceedings (Sentence), *R v Magang* (Supreme Court of Queensland, 298/2011, Philippides J, 22 March 2012).

¹⁸ See below Part IIA.

¹⁹ See below Part IIB1.

²⁰ See below Part IIB2.

²¹ Cf former Prime Minister Kevin Rudd's characterisation of people smugglers as 'the absolute scum of the earth' and the 'vilest form of human life' who should 'rot in hell': quoted in Emma Rodgers, 'Rudd Wants People Smugglers to "Rot in Hell"', *ABC News* (online), 17 April 2009 <<http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814>>, quoted also in part in Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2010, 2678 (Alex Hawke). See also *R v Yu* [2003] NSWSC 1153 (4 December 2003) 8 [68] where Wood CJ at CL refers to the 'evil trade of people smuggling'.

sophisticated cross-border crime networks [and] have little regard for the safety and security of those being smuggled'.²² Yet, the Attorney-General's department has recognised the equal applicability of mandatory sentences to ordinary crew,²³ who comprise the overwhelming majority of offenders before the courts.²⁴ The organisers typically do not board the boats, and are only prosecuted by extradition.²⁵ By contrast, those found on board are often young, impecunious, uneducated and illiterate fishermen or farmers who may have been subject to financial or other pressures to participate in the operation.²⁶ Their participation is also at varying degrees — as owners or captains of the vessel,²⁷ crew assisting with the voyage,²⁸ or simply cooks or deck-hands.²⁹

A review of sentencing remarks reveals that most people smuggling journeys take place on overcrowded fishing boats of around 10 to 15 metres long, carrying between 15 and 50 passengers.³⁰ They are generally not equipped with enough food and water for the four- to five-day journey, and passengers

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2010, 1645 (Robert McClelland, Attorney-General). See also below nn 396–7 and accompanying text.

²³ Attorney-General's Department, Submission No 17 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2.

²⁴ The numbers of organisers are barely significant — 10 of 493 people arrested between 1 January 2009 and 18 October 2011: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 18 October 2011, 98 (Andrew Colvin); five of 228 convictions between 1 September 2008 and 22 February 2012 and three of the 199 defendants before the courts as at 22 February 2012: Attorney-General's Department, Submission No 17, above n 23, 5; three of the 208 defendants before the courts as at 8 February 2012: CDPP, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2012, 3. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2011, 12 355 (Adam Bandt).

²⁵ See, eg, Transcript of Proceedings (Sentence), *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 9.

²⁶ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 7 (Catherine Branson, President, Australian Human Rights Commission). See also Michael Duffy, 'Tough Laws on People Smuggling Are a Con', *The Sydney Morning Herald* (Sydney), 13 February 2012, 13.

²⁷ See cases cited below at nn 101–102.

²⁸ See cases cited below at nn 33–40.

²⁹ See, eg, Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 2–3.

³⁰ See, eg, *R v Alif* [2012] QCA 355 (18 December 2012) [30] (McMurdo P).

frequently help the crew by bailing water from unseaworthy boats.³¹ Sufficient life jackets are rarely available.³² Passengers have usually paid upwards of \$5000, and the great majority of this money goes to the organisers.³³ Crew members typically receive between \$400 and \$600,³⁴ taking the life-threatening voyage out of need rather than greed,³⁵ and completely unaware of the consequences they face.³⁶ Some have said that they find themselves outnumbered by desperate passengers at sea and with little choice but to comply with their demands.³⁷ Indeed, the exploitation of the operators of boats has been termed as 'of a higher order' than that of the passengers.³⁸

Offenders frequently leave the port without the knowledge of their destination, or in some cases, carrying cargo rather than people, only to have their

³¹ Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012) 1 ('vessel was overcrowded, unseaworthy and ill-provisioned ... Passengers assisted in bailing water from the boat'); Transcript of Proceedings (Sentence), *R v Bahri* (District Court of Queensland, 351/2012, Wolfe CJDC, 31 August 2012).

³² In some instances, the boats are better equipped, but it is fair to say that such instances are the exception rather than the rule: see, eg, Transcript of Proceedings (Sentencing), *R v Mulyono* (District Court of Queensland, 1209/2011, Martin DCJ, 3 February 2012) 2 ('vessel, whilst in a poor condition, was not unseaworthy. The vessel was adequately provisioned').

³³ See, eg, Transcript of Proceedings (Sentence), *R v Mimin* (District Court of Queensland, 1221/2011, Farr DCJ, 10 February 2012) 3–4 (between US\$5000 and US\$11 000); Transcript of Proceedings (Sentence), *R v Tambunan* (Supreme Court of Queensland, 184/2011, Byrne SJA, 15 April 2011) 2 (between US\$5000 and US\$15 000).

³⁴ See, eg, Transcript of Proceedings (Sentence), *R v Faeck* (District Court of Queensland, 842/2011, Farr ADCJ, 8 June 2011) 7 (\$550). See also CDP, *Annual Report 2010–2011* (2011) 86. The upper limit of this may be \$1500: see, eg, Transcript of Proceedings (Sentence), *R v Mulyono* (District Court of Queensland, 1209/2011, Martin DCJ, 3 February 2012) 2.

³⁵ See, eg, Transcript of Proceedings (Sentence), *R v Mulyono* (District Court of Queensland, 1209/2011, Martin DCJ, 3 February 2012) 5.

³⁶ *Ibid*; Transcript of Proceedings (Sentence), *R v Faeck* (District Court of Queensland, 842/2011, Farr ADCJ, 8 June 2011) 5.

³⁷ See, eg, Transcript of Proceedings (Sentence), *R v Pandu* (District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 10. Cf Transcript of Proceedings (Sentence), *R v Hasanusi* (Unreported, District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 2; *R v Mahendra* [2011] NTSC 57 (29 July 2011) 14–17 [27]–[32] (Blokland J); *Kia v The Queen* [2011] WASCA 104 (20 April 2011) 2–3 [8]–[10] (Martin CJ, McLure P and Mazza J). See also the reports of one group of asylum seekers who 'became very aggressive and the master of [the cargo ship that rescued them] made the decision to turn the vessel around and head to Christmas Island': 'Coalition Flags Deploying Troops on Asylum Boats', *ABC Radio Australia* (online), 16 August 2012 <<http://www.radioaustralia.net.au/international/2012-08-16/coalition-flags-deploying-troops-on-asylum-boats/1000350>>.

³⁸ Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012) 2.

itinerary changed once at sea.³⁹ Those who are aware are generally told that they will be repatriated to Indonesia after a short time in Australia, and have no good reason to believe otherwise.⁴⁰ The boat need not even reach Australian waters before they have committed the offence.⁴¹ Some offshore islands for which maritime arrivals are destined are so remote as to raise questions regarding whether the defendants knew they formed a part of Australian territory at all. Ashmore Reef,⁴² for example, is considerably closer to Indonesia than mainland Australia and is also known by the Indonesian name Pulau Pasir.⁴³ It has a number of Indonesian gravesites that are hundreds of years old, and there is a Memorandum of Understanding that allows for Indonesian fishing there.⁴⁴ Otherwise, it is an ‘uninhabited coral cay’ with no signs of civilisation,⁴⁵ and only one tree.⁴⁶ The Victorian Court of Appeal has recently alleviated the danger existing in relation to such places, ruling that it is not sufficient to facilitate the bringing of passengers to a place that is in law

³⁹ See, eg, *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) 3–4 [5], referring to the unchallenged factual finding of the sentencing judge that the accused initially believed that the vessel was to carry freight and ‘had no other choice’ once he discovered to the contrary but to stay on board. Fraser JA expressed some scepticism, stating that that finding ‘may have been generous’ although there was no evidence either way on the matter: at 12–13 [23]. See also Victoria Legal Aid, ‘Response to Detering People Smuggling Bill 2011’ (2011) 8–11 <http://www.legalaid.vic.gov.au/dir_lr_20111109_ResponseDeteringPeopleSmugglingBill.pdf>; CDP, *Annual Report 2010–2011*, above n 34, 87; *Bahar v The Queen* (2011) 225 FLR 80, 84–5 [14]–[18] (McLure P), where the appellants submitted that the trial judge was required to direct the jury on the issue of mistake because they believed they were transporting cargo and it was too late to disembark by the time they discovered otherwise. The appeal was unsuccessful because the fault elements of the offence — ‘positive knowledge of the purpose and destination of the voyage and an intention to facilitate it’ — were proven, leaving no room for the defence of mistake: at 87 [28].

⁴⁰ See, eg, Transcript of Proceedings (Sentence), *R v Santoso* (Supreme Court of the Northern Territory, 21034360, Riley CJ, 18 January 2011) 3.

⁴¹ The offence encompasses organising or facilitating a ‘proposed entry to Australia’, which does not require actual entry: *R v Ahmad* (2012) 31 NTLR 38, 43–44 [17] (Mildren J), 47 [40] (Southwood and Martin JJ); *R v Alif* [2012] QCA 355 (18 December 2012) [21]–[24] (McMurdo P).

⁴² Recent prominent cases involving Ashmore Reef include *Bahar v The Queen* (2011) 225 FLR 80, 83 [7] (McLure P); *R v Jufri* [2012] QCA 248 (13 September 2012); *R v Razak* [2012] QCA 244 (11 September 2012); *Sunada v The Queen* [2012] NSWCCA 187 (27 August 2012).

⁴³ Transcript of Proceedings, *R v Auli* (District Court of Queensland, 1973/2011, Shanahan DCJ, 14 May 2012) 7–8.

⁴⁴ *Ibid.*

⁴⁵ *R v Jufri* [2012] QCA 248 (13 September 2012) [22] (Fraser JA).

⁴⁶ Transcript of Proceedings, *R v Auli* (District Court of Queensland, 1973/2011, Shanahan DCJ, 14 May 2012) 8.

Australia; a defendant must know that the destination formed part of Australia.⁴⁷ An appeal was upheld and verdicts of acquittal entered on the same grounds in New South Wales, but not before the appellants had spent more than two and a half years in custody.⁴⁸

As observed by one Western Australian judge, '[i]t is the nature of this nefarious trade in human cargo that persons ... will often be recruited from among the poorer peoples of the region to supply the necessary transport and to take all the risks.'⁴⁹ Another noted that they are 'deliberately targeted because of their lack of sophistication and naïveté [and because they are] not sufficiently aware or sophisticated to appreciate the danger of apprehension by Australian authorities and the consequences of it.'⁵⁰ Following the guilty pleas of Wira Cita and Tarjuddin Lamaha, the Western Australian Court of Appeal observed that '[o]ne may well feel for the applicants who have become pawns in the illegal machinations of other persons in their country and victims of their own impoverished circumstances.'⁵¹ It affirmed their sentences of seven and five-and-a-half years respectively.⁵²

The severity of such sentences is even greater when considered in the context of the suffering they inflict.⁵³ Defendants are typically young fishermen with young, dependent families.⁵⁴ The natural consequence is for their wives

⁴⁷ *P J v The Queen* [2012] VSCA 146 (29 June 2012) [39]–[44] (Maxwell P, Redlich and Hansen JJA), followed in *R v Alif* [2012] QCA 355 (18 December 2012) [40] (McMurdo P). See also *R v Ladoke* (2011) 13 DCLR (NSW) 252, 254 [6] where Haesler DCJ stated that '[i]t is axiomatic that if each accused's intention did not involve knowledge that the vessel's destination was Australia they had not turned their minds to the question of whether those persons had a lawful right to come to Australia.' Cf the recent Queensland decision predicated largely on the unstable assumption that the appellant's primary school education equipped him to read a map: *R v Jufri* [2012] QCA 248 (13 September 2012) [17], [22] (Fraser JA).

⁴⁸ *Sunada v The Queen* [2012] NSWCCA 187, [8] (Macfarlan JA, Price and McCallum JJ), where the appeal was not resisted by the Crown after the jury was instructed that 'the Crown does not have to prove that they knew that [Ashmore Reef] was part of Australia': at 3.

⁴⁹ *Ilam v Dando* (1999) 109 A Crim R 47, 49 [13] (McKechnie J).

⁵⁰ Transcript of Proceedings (Sentence), *R v Pandu* (District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 9. See also Transcript of Proceedings (Sentence), *R v Basuk* (District Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 3.

⁵¹ *Cita v The Queen* (2001) 120 A Crim R 307, 315 [35] (Malcolm CJ, Owen and Parker JJ).

⁵² *Ibid* 308 [2]–[3], 316 [36] (Malcolm CJ, Owen and Parker JJ).

⁵³ For the relevance to sentencing of hardship occasioned by incarceration, see, eg, *Boyle v The Queen* (1987) 34 A Crim R 202, 204–5 (Burt CJ); *Arnold v Trenerry* (1997) 118 NTR 1, 4 (Mildren J); *R v Bartorillo* [1996] QCA 381 (11 October 1996). Cf *R v Le* [1996] 2 Qd R 516, 522 (Thomas J).

⁵⁴ See, eg, Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012) 2.

to be forced into hard and underpaid work, and their children out of school and into labouring jobs.⁵⁵ A lack of English proficiency makes the prospect of extended incarceration all the more grim.⁵⁶ The cost of calling home is prohibitive, so they may be unable to speak except occasionally with family.⁵⁷ They may be forced to save whatever money they can earn to send to their families, which they would otherwise spend on basic amenities such as soap and toothpaste.⁵⁸

Amin, Alif and Zolmin were three crew members operating a small fishing boat who were prosecuted for people smuggling. Amin was an uneducated fisherman of 81 years of age, in poor health and had a wife with a heart condition; the other two were in their twenties and had young children.⁵⁹ In addition to the suffering occasioned on their families by their incarceration, they feared that their families would be made to pay for the boat that had been destroyed by the Australian authorities, a cost far beyond their means.⁶⁰ By the time the three were sentenced, 22 of the 24 asylum seekers they transported had been granted protection visas; the remaining two were still being processed. Amin and Alif would spend at least three years in custody; Zolmin served all but 12 weeks of that period before the Court of Appeal found that the guilty verdict was unreasonable because the evidence did not indicate that he knew the boat was bound for Australia.⁶¹

2 *Punishment: A Survey of Sentences Imposed*

(a) *Sentences before the Mandatory Regime*

Let us accept for a moment that tenured judges, considering the circumstances of each case, are better equipped to arrive at a just sentence according to

⁵⁵ See, eg, Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 5.

⁵⁶ See, eg, Transcript of Proceedings (Sentence), *R v Magang* (Supreme Court of Queensland, 298/2011, Philippides J, 22 March 2012) 6.

⁵⁷ See, eg, Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 5.

⁵⁸ *Ibid.*

⁵⁹ Transcript of Proceedings (Sentence), *R v Amin* (District Court of Queensland, 917/2011, Devereaux DCJ, 14 October 2011).

⁶⁰ *Ibid.*

⁶¹ *R v Alif* [2012] QCA 355 (18 December 2012) [56]–[58] (McMurdo P). See also *R v Zainudin* [2012] SASCFC 133 (14 December 2012) [75]–[84] (Blue J). Cf *R v Razak* [2012] QCA 244 (11 September 2012) [15]–[18] (Fraser JA).

principles of law than a legislature, acting on the will of the populace,⁶² to determine a generally applicable minimum.⁶³ Historically, those responsible for facilitating breaches of immigration law were dealt with far more moderately, even in the absence of the mitigating circumstances discussed above. Two Chinese men were sentenced in 1999 to 15 and 12 months respectively for smuggling 69 people in the steel hull of an 18-metre vessel with no legitimate cargo.⁶⁴ In *R v Ilam*, the Western Australian Court of Appeal considered that a sentence of 16 months' imprisonment showed that 'courts ... deal[t] strongly with the appellants and those like them for the purpose of deterrence',⁶⁵ but, allowing the appeal, that that objective could be met while providing for release on recognisance after eight months.⁶⁶ Naturally, these cases were imposed under a different sentencing regime with a substantially lower maximum sentence and so are not directly comparable. Nonetheless, the attitude of the courts to the need for heavy sentences is persuasive.

A brief review of sentences imposed according to common law principles under the current maximum, but before the introduction of mandatory minimums, yields a similar conclusion. In respect of offences committed before the regime was introduced in September 2001, only 39 of 515 people convicted of people smuggling offences were given sentences at or above the current minimum statutory sentence.⁶⁷ Of these, only one was given a

⁶² The fact that Acts of Parliament are executed by the mechanisms of democracy to give effect to the will of the majority is not a complete defence:

The self interests of the majority, if not restrained, can be destructive of the interests of the minority. And particularly is that so when the minority are ... unable to participate in [society's] benefits ... The civilized standards of a society are to be judged by the way in which the society deals with its minorities and its misfits.

Sir Gerard Brennan, 'Mandatory Sentencing: Rights and Wrongs' (2001) 7(2) *Australian Journal of Human Rights* 3, 5.

⁶³ This broader argument is beyond the scope of this article, but is made elsewhere cogently and frequently: see, eg, Judge Louis F Oberdorfer, 'Mandatory Sentencing: One Judge's Perspective' (2003) 40 *American Criminal Law Review* 11. As observed by the European Court of Human Rights, '[t]he vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court': *Ahmad v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012) [242].

⁶⁴ *R v Chen* [2000] NSWCCA 267 (14 July 2000) [1], [5] (Grove J); *R v Lin* [2000] NSWCCA 542 (11 August 2000) [2]–[3] (Beazley JA).

⁶⁵ *Ilam v Dando* (1999) 109 A Crim R 47, 49 [14] (McKechnie J).

⁶⁶ *Ibid* 50 [20].

⁶⁷ Attorney-General's Department, Submission No 17, above n 23, 5.

sentence of eight years, the current statutory minimum for repeat or other aggravated offences.⁶⁸ By contrast, 47 were released immediately and 97 received terms of less than one year.⁶⁹

Most notably, the scheme has changed the definition of heavy sentencing: those who would find it difficult to blend into the 'least serious category of offenders' to whom the mandatory minimum must now be confined⁷⁰ once received substantially more moderate sentences on the application of judicial thought and discretion.⁷¹ Three examples suffice. In New South Wales, the sentence of four years with a non-parole period of two years given to Feng Lin, a young Chinese fisherman, was reduced to three years with one year and eight months without parole on appeal.⁷² Unlike the typical Indonesian people smuggler, he had the benefit of a tertiary education and a bright career path, was paid US\$3000 for each of the three passengers he hid on a cargo ship coming to Australia, and realised that his actions were contrary to Australian law.⁷³ In a Western Australian case, Abdul Hussein Kadem, who together with his pregnant wife and five children and 252 other illegal immigrants made his third attempt to come to Australia, had paid the organisers \$8500 for the journey on the promise of a refund in exchange for his assistance as an interpreter for the asylum seekers. On appeal, his sentence was reduced from four to three years' imprisonment.⁷⁴ In the Northern Territory, five Indonesian fishermen charged with smuggling 12 non-citizens were sentenced to two years with a 12-month non-parole period,⁷⁵ and a further five were released after 13 months upon good behaviour for 18 months.⁷⁶ These offences were regarded as 'substantial and also ... increased from what ha[d] been the general range in the past'.⁷⁷

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ See below Part IVB.

⁷¹ Compare the examples which follow with the circumstances of offending in *R v Karabi*: see below nn 369–71 and accompanying text.

⁷² *R v Feng Lin* (2001) 119 A Crim R 194, 203 [74] (Carruthers AJ).

⁷³ Ibid 196 [11]–[12], [20], 198 [35].

⁷⁴ *Kadem v The Queen* (2002) 304 A Crim R 304, 304 [1] (Wallwork J).

⁷⁵ Transcript of Proceedings (Sentence), *R v Guruapin* (Supreme Court of the Northern Territory, 9919773, Riley J, 22 November 1999) 60, 64.

⁷⁶ Transcript of Proceedings (Sentence), *R v Nursia* (Supreme Court of the Northern Territory, 9921457, Bailey J, 12 January 2000) 50.

⁷⁷ Ibid 47.

(b) Mandatory Minimum Sentences

The fact that most of those convicted of people smuggling offences have received the minimum penalty⁷⁸ is an indication that the regime is excessive. As stated by the JCA, ‘the least serious of cases will require the imposition of a sentence, namely the prescribed minimum, which is so disproportionate to the criminality and circumstances of that case that injustice is done.’⁷⁹ Such cases have not been rare. Amos Ndolo, an Indonesian fisherman arrested by the Australian Navy in October 2008, carried 14 immigrants in a rotting fishing boat.⁸⁰ Rudi Suwandi, another fisherman, lived in a village in a hut with no electricity and carried 36 Middle Eastern passengers to Australia in June 2010.⁸¹ Basu Basuk brought 50 Afghan citizens to Australia in exchange for approximately \$600 on a vessel owned by his boss.⁸² Jufri and Nasir were merely the deckhand/mechanic and the cook on the boat ‘performing relatively menial roles’.⁸³ In each of these cases, the court had no choice but to sentence them to five years, with at least three years in custody.⁸⁴

The unfortunate breadth of this category of cases has been the impetus for criticism of the regime by ‘a significant number of Australia’s most experienced judicial officers [who] accurately describe the sentence which they have been obliged to impose in people smuggling cases as manifestly unjust.’⁸⁵ Amongst such criticisms are that it is ‘completely out of kilter’,⁸⁶ ‘savage’⁸⁷ and

⁷⁸ Attorney-General’s Department, Submission No 17, above n 23, 2.

⁷⁹ JCA, above n 15, 2–3.

⁸⁰ CDP, *Annual Report 2008–09* (2009) 73.

⁸¹ Transcript of Proceedings (Sentence), *R v Suwandi* (Supreme Court of the Northern Territory, 21037950, Riley CJ, 18 February 2011) 2, 4.

⁸² Transcript of Proceedings (Sentence), *R v Basuk* (District Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 2. Shanahan DCJ reduced a sentence of six years to five years for guilty plea: at 4.

⁸³ Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 2–3.

⁸⁴ As a consequence of cases such as these, the regime has been said to result in a compression of sentences towards the lower end of the scale: see below nn 367–70 and accompanying text.

⁸⁵ JCA, above n 15, 3.

⁸⁶ Transcript of Proceedings (Sentence), *R v Nafi* (Supreme Court of the Northern Territory, 21102367, Kelly J, 19 May 2011) 6.

⁸⁷ Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012) 2. See also Christine Flatley, ‘Judge Slams Mandatory Sentence for People Smugglers’, *The Sydney Morning Herald* (online), 11 January 2012 <<http://www.smh.com.au/action/printArticle?id=2886030>>.

the ‘antithesis of just sentenc[ing]’.⁸⁸ In many instances, courts have expressly noted that, but for the requirement imposed upon them by the legislature, the just penalty must be less than the statutory minimum.⁸⁹ Others have taken the extra step of recommending that the Attorney-General provide relief after a term of imprisonment.⁹⁰

One such case was that of Tahir and Beny, two uneducated Indonesian 19-year-old fishermen who were persuaded by older men in their village to transport 47 Afghan nationals on a 15-metre wooden boat.⁹¹ Justice Mildren of the Supreme Court of the Northern Territory commented that ‘[b]ut for the mandatory minimum sentences which I am required to impose, I would have imposed a much lesser sentence than I am now required by law to do.’⁹² In sentencing Andi Ridwan, another offender in respect of whom the Crown conceded that no more than the mandatory minimum was appropriate, Martin DCJ commented:

If my hands were not tied by the legislation, you would receive a significantly lesser penalty than the mandatory minimum. It is difficult to understand how

⁸⁸ *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J).

⁸⁹ Transcript of Proceedings (Sentence), *R v Dokeng* (Supreme Court of the Northern Territory, 21032177, Kelly J, 2 December 2010) 4; Transcript of Proceedings (Sentence), *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) 7; Transcript of Proceedings (Sentence), *R v Balu* (Supreme Court of the Northern Territory, 21031840, Barr J, 4 February 2011) 8; Transcript of Proceedings (Sentence), *R v Tahir* (Supreme Court of the Northern Territory, 20918263, Mildren J, 28 October 2009) 4; Transcript of Proceedings (Sentence), *R v Santoso* (Supreme Court of the Northern Territory, 21034360, Riley CJ, 18 January 2011) 4; Transcript of Proceedings (Sentence), *R v Dopong* (Supreme Court of the Northern Territory, 21041382, Barr J, 25 January 2011) 6; Transcript of Proceedings (Sentence), *R v Suwandi* (Supreme Court of the Northern Territory, 21037950, Riley CJ, 18 February 2011) 4; Transcript of Proceedings (Sentence), *R v Syukur* (Supreme Court of the Northern Territory, 21101380, Riley CJ, 15 March 2011). See also Jared Owens, ‘Harsh Penalties for Boat Crew “Target Wrong People”’, *The Australian* (Sydney), 31 December 2011, 3; Victoria Legal Aid, Submission No 19 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 7 March 2012, 5–6.

⁹⁰ Transcript of Proceedings (Sentence), *R v Nafi* (Supreme Court of the Northern Territory, 21102367, Kelly J, 19 May 2011) 6. See also Transcript of Proceedings (Sentence), *R v Tahir* (Supreme Court of the Northern Territory, 20918263, Mildren J, 28 October 2009) 5.

⁹¹ Transcript of Proceedings (Sentence), *R v Tahir* (Supreme Court of the Northern Territory, 20918263, Mildren J, 28 October 2009) 2.

⁹² *Ibid* 4.

the legislature cannot appreciate the potential for unjust outcomes on a sentence as a result of this legislation.⁹³

In sentencing two 21-year-old fishermen to the mandatory minimum, Farr DCJ similarly observed:

Were it not for the statutory minimum period, I have no doubt that a sentence less than five years imprisonment would have been imposed ... but unfortunately for yourselves, the statutory minimum does apply and I must sentence you accordingly.⁹⁴

With the statutory minimum in place, 'ordinary sentencing principles play no function'.⁹⁵

(c) *Aggravating Factors and Sentences beyond the Mandatory Minimum*

The analysis would be incomplete without a consideration of the factors that have, on occasion, led to sentences greater than those required by statute. The courts have cited the unseaworthiness of vessels,⁹⁶ the lack of life jackets, the scarcity of food and the consequent danger to passengers as aggravating factors.⁹⁷ In other cases, this danger has been noted but not necessarily seen as a circumstance of aggravation.⁹⁸ The number of people brought by each offender has not been proportionate to the length of sentences,⁹⁹ but it has been taken into account in the context of safety of passengers on overcrowded

⁹³ Transcript of Proceedings, *R v Ridwan* (District Court of Queensland, 918/2011, Martin DCJ, 23 June 2011) 1.

⁹⁴ Transcript of Proceedings (Sentence), *R v Faeck* (District Court of Queensland, 842/2011, Farr ADCJ, 8 June 2011) 8.

⁹⁵ Transcript of Proceedings (Sentence), *R v Tahir* (Supreme Court of the Northern Territory, 20918263, Mildren J, 28 October 2009) 4.

⁹⁶ See, eg, Transcript of Proceedings (Sentence), *R v Magang* (Supreme Court of Queensland, 298/2011, Philippides J, 22 March 2012) 12–13. Cf Transcript of Proceedings (Sentence), *R v Basuk* (District Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 3–4.

⁹⁷ See, eg, Transcript of Proceedings (Sentence), *R v Hamid* (District Court of Western Australia, 256/2009, Stevenson DCJ, 5 March 2009) 4–5; Transcript of Proceedings (Sentence), *R v Ndolo* (District Court of Western Australia, 221/2009, O'Brien DCJ, 3 April 2009) 3–4. See also Transcript of Proceedings (Sentence), *R v Pombili* (District Court of Western Australia, 438/2009, Yeats DCJ, 17 April 2009) 3, cited in CDPP, *Annual Report 2008–09*, above n 80, 73.

⁹⁸ Transcript of Proceedings (Sentence), *R v Dopong* (Supreme Court of the Northern Territory, 21041382, Barr J, 25 January 2011) 3.

⁹⁹ Charles Martin, 'Scum of the Earth? People Smuggling Prosecutions in Australia 2008–11' (Research Paper, University of Queensland Migrant Smuggling Working Group, July 2011) 27.

boats.¹⁰⁰ Naturally, the extent to which the defendant was involved in the organisation of the crimes has also played a role. Heavier sentences have generally been handed to organisers¹⁰¹ and masters or captains of vessels¹⁰² than to ordinary crew members. Nonetheless, in some instances the mandatory minimum caused the same sentence to be imposed on members of the same crew with substantially different levels of responsibility and culpability.¹⁰³ However, with the latest developments in the appellate courts of Western Australia and Queensland, it appears that that is about to change.¹⁰⁴

In most cases, the application of these aggravating factors has, even under the new approach to mandatory sentencing, persuaded courts to deviate only slightly from the mandatory minimum. For example, the non-parole period for Haji Latif and Niko Selu (sentenced to six and six-and-a-half years respectively) was increased from three to four years on appeal because, *inter alia*, they had been convicted of people smuggling before.¹⁰⁵ Ahmat Bala, the captain of a fishing boat that encountered a vessel in distress and agreed to carry its 28 passengers to Ashmore Reef was sentenced to five years and nine months, with three years and four months' non-parole because 'the lives of the passengers during the course of this journey were potentially at risk'.¹⁰⁶ Abdul Hamid, a farmer who had taken over control of a vessel carrying 14 asylum seekers after four other crew members abandoned the ship before entering Australian waters, was sentenced to six years with a non-parole period of three years, taking into account the need for deterrence and the expense incurred by Australia in detection and punishment.¹⁰⁷ Hasanusi, the owner

¹⁰⁰ See Transcript of Proceedings (Sentence), *R v Basuk* (District Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 3–4.

¹⁰¹ *R v Ahmadi* (Unreported, District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) (seven-and-a-half years with four-year non-parole period).

¹⁰² See, eg, Transcript of Proceedings (Sentence), *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) 7, where the Court sentenced Wetangky, the master of the vessel, to seven years with a non-parole period of four years and six months; Transcript of Proceedings (Sentence), *R v Hasanusi* (District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 2 (Hasanusi's role as captain of the boat was taken into account in imposing a heavier sentence).

¹⁰³ Transcript of Proceedings (Sentence), *R v Min* (Supreme Court of the Northern Territory, 21038796, Blokland J, 18 February 2011) 7.

¹⁰⁴ See below Parts IVB1–2.

¹⁰⁵ *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [6]. Fraser JA also referred to 'the large number of passengers on the vessel' and 'the substantial nature of his role in the voyage': at [28]; *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012).

¹⁰⁶ CDPP, *Annual Report 2010–2011*, above n 34, 88–9.

¹⁰⁷ CDPP, *Annual Report 2008–09*, above n 80, 72–3.

and sole crewman on a vessel intercepted en route to Christmas Island carrying 38 Iraqi nationals, was sentenced to six-and-a-half years' imprisonment with a three-and-a-half year non-parole period despite his protests that he was recruited for a fishing charter and later threatened and forced to take passengers to Australia.¹⁰⁸ The Court commented that '[t]he people smugglers will always prey upon people like you ... But there is nothing I can do about that. The law requires me to punish you'.¹⁰⁹

By contrast, the sentences on the higher end of the scale have either been exceptional or have come with their own peculiarities of logic to supplement legitimate aggravating factors. The extradition and arrest in May 2009 of Hadi Ahmadi, an organiser of at least four vessels carrying a total of 911 passengers, was something of a victory for Australian authorities. However, the sentencing judge recognised that he was nonetheless a 'middleman' rather than a primary organiser, sentencing him to seven-and-a-half years with four years without parole.¹¹⁰ Another defendant whose vessel carried 55 Afghan asylum seekers had a prior conviction in 2001, but because it predated the mandatory sentencing regime, the higher mandatory penalty for repeat offenders did not apply. Despite the obvious difficulties in the pragmatism of such an approach, the Western Australian District Court found the higher mandatory penalty a 'helpful guide' in sentencing him to eight years with a five-year non-parole period.¹¹¹ The only high-level organiser convicted to date, who was exposed to the eight-year mandatory minimum because his 'conduct gave rise to a danger of death or serious harm',¹¹² was sentenced to 14 years with a non-parole period of nine-and-a-half years in October 2012.¹¹³ He had organised four vessels to travel to Australia, one of which resulted in 48 fatalities, in return for sums of up to US\$7000 per passenger.¹¹⁴ In contrast, a sentence of six years was imposed by an Indonesian court on Sergeant Ilmun Abdul Said, who

¹⁰⁸ See also above n 37 and accompanying text.

¹⁰⁹ Transcript of Proceedings (Sentence), *R v Hasanusi* (District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010).

¹¹⁰ *R v Ahmadi* (Unreported, District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 9.

¹¹¹ CDP, *Annual Report 2010–2011*, above n 34, 86.

¹¹² *Migration Act* ss 236B(3)(a), (4)(a).

¹¹³ Transcript of Proceedings (Sentence), *R v A K H* (District Court of Western Australia, Scott DCJ, 22 October 2012).

¹¹⁴ *Ibid* 4.

admitted to playing a key role in coordinating at least seven boats carrying around 1000 asylum seekers, at least 200 of whom died en route.¹¹⁵

The facts of the cases suggest, and the voices of those in the best position to judge support the proposition, that the imposition of mandatory minimum penalties results in terms of imprisonment that would not otherwise be imposed in respect of conduct of equivalent criminality according to long-established common law principles. So much is perhaps unsurprising: the purpose of mandatory sentencing on any view is to impose the will of the Parliament over the view of the judiciary for one reason or another. It is nonetheless worth demonstrating, because it sets a standard for the question that follows: whether the need for and the effectiveness of attaining the policy objective that requires the departure from those principles is desirable and justifiable to the extent of that departure and the individual suffering that it creates.

B *Deterrence*

The justification for the mandatory sentencing regime has depended consistently and heavily upon the need for deterrence. The amendments in 2010, for example, aimed 'to provide greater deterrence of people smuggling activity'.¹¹⁶

1 *The Need for Deterrence*

The need for such deterrence seems to spring from two sources: concerns for the safety of asylum seekers posed by people smugglers; and concerns about unauthorised arrivals by sea based on an invasion of sovereignty as a matter of law, or, more crudely, based on the capacity of Australia to absorb that number of refugees as a matter of fact.¹¹⁷ Although the former is more legitimate in reason, the latter is perhaps more prominent in popular thought.

¹¹⁵ 'Indonesian Soldier Jailed for People-Smuggling', *The Australian* (online), 24 September 2012 <<http://www.theaustralian.com.au/news/world/indonesian-soldier-jailed-for-people-smuggling/story-e6frg6so-1226480385418>>. People smuggling carries a maximum 15-year term in Indonesia.

¹¹⁶ Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2010 (Cth) 1.

¹¹⁷ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 January 2010, 1645-7 (Robert McClelland, Attorney-General); Janet Albrechtsen, 'Rudd Has No Right to Silence Refugee Debate', *The Australian* (Sydney), 22 April 2009, 14.

(a) *Danger to Passengers*

The statistics on fatalities at sea illustrate the dangers of people smuggling. At least 17 incidents involving asylum boats en route to Australia in the last 14 years have resulted in the deaths of more than 1000 people.¹¹⁸ However, the need of some people to seek asylum should not be underestimated. The effects of poverty, war, natural disasters or the threat of persecution from oppressive regimes may leave them little choice. The danger of long-distance sea travel onboard patently unfit vessels would be known to passengers.¹¹⁹ If the prospect of death at sea is not a deterrent, then mandatory sentencing is unlikely to be any more effective.

In at least one case, a conviction has been quashed on the grounds that a jury should properly have been instructed that such circumstances may constitute an extraordinary emergency and a defence to criminal responsibility.¹²⁰ Van Hoa Nguyen was convicted of bringing a group of 53 persons to Australia from Vietnam via Indonesia. He was wanted and had a long history of being persecuted by the Vietnamese government for political activity, including a sentence of 20 years' imprisonment for treason, charges on which two of his co-accused were executed. He escaped, came via Thailand to Australia, and was granted asylum and eventually citizenship. The group of 53 people he brought to Australia feared for their safety on similar grounds.¹²¹

In the absence of an effective and efficient administrative arrangement for the relocation of refugees, and in light of the demonstrated high proportion of asylum seekers who have proven to be genuine refugees,¹²² there is at least some question over whether seeking asylum by dangerous means is a greater evil than not seeking asylum at all. For this reason, one judge has commented

¹¹⁸ Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 *Griffith Law Review* 238, 246–7. See also the more conservative estimate of 964 in Houston Report, above n 8, 19 [1.2].

¹¹⁹ Notwithstanding the tendency of organisers to misrepresent the nature and condition of vessels: see, eg, Transcript of Proceedings, *R v A K H* (District Court of Western Australia, Scott DCJ), 22 October 2012) 5 (false representations that each passenger would have their own room).

¹²⁰ *Nguyen v The Queen* [2005] WASCA 22 (16 December 2004) [28] (Templeman J). See also *Warnakulasuriya v The Queen* (2012) 261 FLR 260. Cf *Ahmadi v The Queen* (2012) 254 FLR 174, 183–4 [47]–[51], where Buss JA refused to leave the common law defence of necessity to the jury on this basis, with the evidence taken at its highest; CDPP, *Annual Report 2009–10* (2010) 61; CDPP, *Annual Report 2010–2011*, above n 34, 85.

¹²¹ *Nguyen v The Queen* [2005] WASCA 22 (16 December 2004) [8]–[14] (Templeman J).

¹²² See below text accompanying nn 143–144.

that ‘it cannot be said that, apart from the existence of that law, there is any moral culpability in helping to transport willing passengers to a place where they want to go.’¹²³

(b) *Sovereignty and Asylum*

The introduction of mandatory penalties was described as ‘overwhelmingly in Australia’s national interest’,¹²⁴ because ‘[t]hose who enter our territorial waters contrary to an express direction from the government should not be rewarded by being allowed to stay in our waters or, even worse, by having the opportunity to enter our land territory.’¹²⁵ This is consistent with the current view of the Attorney-General’s Department that ‘there is no right for an individual to enter Australia to seek protection or asylum’.¹²⁶ Article 14(1) of the *Universal Declaration of Human Rights* (‘UDHR’) provides that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’.¹²⁷

In 2011, the Parliament legislated to clarify¹²⁸ that a non-citizen without the right to come to Australia includes a person with a valid claim to asylum under the *Convention relating to the Status of Refugees* (‘*Refugees Convention*’).¹²⁹ It explained that the amendment had ‘[n]o impact on individuals seeking protection or asylum’ because the provisions ‘deal with the serious crimes of people smuggling and aggravated people smuggling, and do not affect the treatment of individuals seeking protection or asylum in Aus-

¹²³ Transcript of Proceedings (Sentence), *R v Nafi* (Supreme Court of the Northern Territory, 21102367, Kelly J, 19 May 2011) 5.

¹²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30 873 (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs).

¹²⁵ *Ibid* 30 872 (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs).

¹²⁶ Attorney-General’s Department, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Deterring People Smugglers Bill 2011*, 7.

¹²⁷ GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). Cf *R v Husen Baco* (2011) 29 NTLR 221, 227 [16] where Kelly J stated that ‘of itself, that Article confers no legal rights on anyone, and it is clear that neither under Australian law nor under international law, does a refugee have a legal right to “enjoy ... asylum from persecution” in Australia.’ See also Office of the United Nations High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (2009) 123 (Conclusion No 82 (XLVIII) (d)(ii)–(iii)).

¹²⁸ *Deterring People Smuggling Act 2011* (Cth) sch 1 item 1, inserting *Migration Act* s 228B(2).

¹²⁹ Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

tralia.¹³⁰ Yet, the clear and intended effect of the legislation is to limit the means by which they might do so.

Under the *Refugees Convention*, Australia has an obligation not to *refouler* or punish genuine refugees with a well-founded fear of persecution following their arrival on its shores.¹³¹ However, the position in domestic law is that arts 31 and 33 of the *Refugees Convention* confer rights and obligations on states, not on individuals, in respect of asylum.¹³² Under this view, refugee status does not entitle a person to demand entrance to a state, which is always at the discretion of the receiving country;¹³³ and art 26 of the *Refugees Convention* confirms that a contracting state retains the ability to regulate entry into its territory.¹³⁴ In addition, any obligations that do exist are said to apply only to those refugees coming directly from their country of origin — not for example, via Indonesia.¹³⁵ Domestic law is to be interpreted as far as possible to be consistent with international law,¹³⁶ but, of course, to whatever extent the two are inconsistent, the former prevails.¹³⁷

¹³⁰ Explanatory Memorandum, Detering People Smuggling Bill 2011 (Cth) 6.

¹³¹ *Refugees Convention* arts 31–3. The definition of ‘refugee’ is provided at art 1A.

¹³² *NAGV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 169 [14]–[16] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *R v Husen Baco* (2011) 29 NTLR 221, 229–30 [25]–[28] (Kelly J); *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68, 79 (Lords Goff and Hoffmann, dissenting). See also Houston Report, above n 8, 80–1.

¹³³ *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68, 79 (Lords Goff and Hoffmann, dissenting).

¹³⁴ *R v Ambo* (2011) 13 DCLR (NSW) 229, 236 [44] (Knox DCJ). It is not at all clear from the wording of art 26 that it has that effect: it provides ‘[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, *subject to any regulations applicable to aliens generally in the same circumstances*’ (emphasis added).

¹³⁵ Mary Crock, ‘In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 12 *Pacific Rim Law and Policy Journal* 49, 71. See the submissions of the prosecutor in Transcript of Proceedings, *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 24 November 2011) 8–11 (Ms Bain). Note, however, that this has been qualified by the Expert Panel on Asylum Seekers, which stated that ‘[d]epending on the circumstances, transit through third countries may still constitute coming directly from a territory where a refugee’s life or freedom was threatened’: Houston Report, above n 8, 80.

¹³⁶ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 234 [247] (Kiefel J); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ); *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J).

¹³⁷ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and

This narrow construction creates some anomalies. For example, '[o]nce in Australia, a person has a right to claim asylum. But that does not affect his or her status as having arrived unlawfully and without a visa and, under Australian law, becoming an unlawful non-citizen'.¹³⁸ Further, a person who is prohibited from coming to Australia commits no offence by doing so and has a right to claim asylum once arrived; however, if they assist another person in any way to do the same, they are liable to a significant term of imprisonment.¹³⁹ Objectionable though such logic may be, the weight of authority to this effect makes it difficult to call into issue,¹⁴⁰ and the task is better left to the body of literature that cogently argues to the contrary.¹⁴¹ It is sufficient for current purposes to note that, whatever the status of the right to seek asylum, processing records demonstrate that nearly all boats arriving in Australia carry persons who have a well-founded fear of persecution.¹⁴² In the same calendar year that the penalty for smuggling a boatful of people into Australia increased by a factor of 10, 97 per cent of Iraqi and 92 per cent of Afghan asylum seekers who arrived on those boats were eventually recognised as legitimate refugees.¹⁴³ Similarly, fewer than one in 10 people held on Christmas Island are refused refugee status.¹⁴⁴ Such figures call into question

Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 8–9 [19]–[20] (Gleeson CJ), 66–7 [225] (Kirby J).

¹³⁸ *R v Ambo* (2011) 13 DCLR (NSW) 229, 237 [52] (Knox DCJ).

¹³⁹ *R v Ladoke* (2011) 13 DCLR (NSW) 252, 256 [19] (Haesler DCJ).

¹⁴⁰ See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 45–6 [137] (Gummow J); *R v Mahendra* (2011) 252 FLR 303, 308 [19] (Blokland J); *R v Husen Baco* (2011) 29 NTLR 211, 229–30 [25]–[28] (Kelly J). For similar comments in other jurisdictions, see *Sale v Haitian Centers Council*, 509 US 155, 188 (Stevens J for Rehnquist CJ, Stevens, White, O'Connor, Scalia, Kennedy, Souter and Thomas JJ) (1993); *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68, 79 (Lords Goff and Hoffmann, dissenting).

¹⁴¹ See, eg, Julian Lehmann, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 *Goettingen Journal of International Law* 733, 743–4; Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 *International Journal of Refugee Law* 443; Ellen F D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 *Vanderbilt Journal of Transnational Law* 279, 301.

¹⁴² Janet Phillips, 'Asylum Seekers and Refugees: What Are the Facts?' (Background Note, Parliamentary Library, Parliament of Australia, 2011) 8–10.

¹⁴³ Refugee Council of Australia, 'Statement on "Illegal" Boat Arrivals' (Statement, 15 November 1999) 1 <<http://www.refugeecouncil.org.au/docs/resources/ppapers/pp-boatarrivals-nov99.pdf>>.

¹⁴⁴ See Answers to Questions Taken on Notice, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 9 February 2010, Questions 30, 32 (Immigration and Citizenship Portfolio) <http://www.aph.gov.au/Parliamentary_Business/>

whether the offence of people smuggling is so socially destructive that it requires heavy deterrent mechanisms on this ground alone.

Separate problems surround the manner in which this situation came about. The Act that excluded the *Refugees Convention* applied retrospectively to any offence in respect of which original or appellate proceedings remained on foot.¹⁴⁵ When the Senate Standing Committee for the Scrutiny of Bills pointed out that ‘liberal and democratic legal traditions have long expressed strong criticisms of retrospective laws that impose criminal guilt’ and ‘retrospectivity is generally considered to compromise basic “rule of law” values’,¹⁴⁶ the Minister defended the Bill, saying that ‘[t]here was a risk large numbers of past convictions and current prosecutions of serious Commonwealth criminal offences would be defeated or overturned as a result of a previously unidentified technical argument’.¹⁴⁷ The Committee was, understandably, ‘not persuaded’.¹⁴⁸ In fact, the Act was pushed through the House of Representatives two days before a case on that point was to be heard by the Victorian Court of Appeal.¹⁴⁹ The issue had been the subject of inquiry in a number of first-instance decisions,¹⁵⁰ but it was the first time it was to be considered by an

Committees/Senate_Committees?url=legcon_ctte/estimates/add_0910/diac/index.htm>. See also Houston Report, above n 8, 27 (table 3) showing an 88 per cent success rate in the years 2010–11 and 2011–12.

¹⁴⁵ *Deterring People Smuggling Act 2011* (Cth) sch 1 item 2, inserting *Migration Act* s 2(b).

¹⁴⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2012* (2012) 15.

¹⁴⁷ *Ibid* 17.

¹⁴⁸ *Ibid*.

¹⁴⁹ At least two Members of Parliament raised their concerns in this respect with some vehemence: Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2011, 12 355–6 (Adam Bandt), 12 357–8 (Robert Oakeshott). The Bill passed the House of Representatives on 1 November 2011: at 12 360 (Brendan O’Connor). It passed the Senate on 25 November 2011 and received royal assent on 29 November 2011: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2012*, above n 146, 16. Two days after the Bill passed the House of Representatives, the Senate referred it to the Senate Standing Committee on Legal and Constitutional Affairs. On 21 November 2011, this Committee recommended that the Bill be passed subject to an amended explanatory memorandum giving further justification for the Bill’s retrospective application (at 16), but by the time the Senate Committee had a chance to publish its report scrutinising the Bill, it had passed both houses of Parliament: at 17. The Law Council of Australia said that the period for submissions was ‘clearly inadequate’: Law Council of Australia, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Deterring People Smuggling Bill 2011*, 9 November 2011, 4 [13].

¹⁵⁰ See, eg, *R v Ambo* (2011) 13 DCLR (NSW) 229, where the parties did not apply for a case stated regarding the ‘statutory definition for the phrase “no lawful right to come to Australia”’: at 323 [15] (Knox DCJ). Both parties relied on the same arguments advanced in the written

appellate court.¹⁵¹ The matter in the Victorian Court of Appeal was adjourned once the Bill was presented,¹⁵² and ultimately never heard once it was rendered moot by the passing of the Bill. Such interference with the function of the courts, criticised vehemently in Parliament,¹⁵³ is ‘inconsistent with fundamental principle under our system of government.’¹⁵⁴

(c) *Capacity and Priority*

The introduction of mandatory penalties,¹⁵⁵ together with the excised territories and the Pacific Solution,¹⁵⁶ was motivated at least in part by public concerns about the social effects of the perceived influx of asylum seekers.¹⁵⁷ Such concerns are poorly founded. Australia depends heavily on legal migration and has, in relative terms, a very small problem with illegal immigrants. There are only approximately 22 illegal immigrants present in Australia for every 10 000 citizens at any given time,¹⁵⁸ compared to approxi-

submissions filed before the Victorian Court of Appeal in *DPP v Payara* (2011) (proceedings filed but discontinued): at [13]–[14]. See also *R v Husein Baco* (2011) 29 NTLR 221, 226 [14] (Kelly J); *R v Ladoke* (2011) 13 DCLR (NSW) 252, 257 [27] (Haesler DCJ).

¹⁵¹ *DPP (Cth) v Payara* (2011) (proceedings filed but discontinued), cited in *R v Ambo* (2011) 13 DCLR (NSW) 229, 232 [13]–[14] (Knox DCJ). Victoria Legal Aid had identified this question and sought to have had it dealt with before any of the other 61 trials for people smuggling commenced: Victoria Legal Aid, ‘Response to Deterring People Smuggling Bill 2011’, above n 39, 3–4.

¹⁵² ABC Local Radio, ‘People Smuggling Case Appears Doomed’, *PM*, 2 November 2011 (Mark Colvin) <<http://www.abc.net.au/pm/content/2011/s3354540.htm>>.

¹⁵³ Commonwealth, *Parliamentary Debates*, Senate, 25 November 2011, 9695 (Bob Brown), 9700 (Sarah Hanson-Young).

¹⁵⁴ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 610 (Deane J). See also *DPP (Cth) v Poniatowska* (2011) 244 CLR 408, 424–5 [45] (Heydon J, dissenting) on the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth).

¹⁵⁵ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), sch 2 item 5, inserting *Migration Act* s 233C; Explanatory Memorandum, *Border Protection (Validation and Enforcement Powers) Bill 2001* (Cth) 3 [11].

¹⁵⁶ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). In this context the potential impact of the recent recommendations of the Expert Panel in the Houston Report, above n 8, should not evade consideration: in particular those in relation to offshore processing: at 47–52 [3.44]–[3.70]; and the extension of the legal anomalies attending the excised territories to the whole of the mainland: at 52 [3.72]–[3.73].

¹⁵⁷ The Bill was introduced ‘in response to the increasing threats to Australia’s sovereign right to determine who will enter and remain in Australia’: Explanatory Memorandum, *Border Protection (Validation and Enforcement Powers) Bill 2001* (Cth) 2 [5].

¹⁵⁸ Crock and Ghezelbash, above n 118, 243, citing Department of Immigration and Citizenship, *Fact Sheet 86 — Overstayers and Other Unlawful Non-Citizens* (2009) <<http://www.immi.gov.au/media/fact-sheets/86overstayers-and-other-unlawful-non-citizens.htm>>.

mately 350 in the United States.¹⁵⁹ About 30 per cent of these have simply overstayed a valid visa.¹⁶⁰ Much has been made of the new record set for maritime asylum seeker arrivals in 2012, but it gives some context to say that the figure remains less than half that of asylum seeker arrivals by air,¹⁶¹ and has for the first time crept only marginally over one per cent of Australia's total immigration.¹⁶² The recent Expert Panel Report has recommended that the refugee quota be immediately doubled, with a view to further increases in the future.¹⁶³

There has been some suggestion that even where asylum seekers are granted refugee status, the victims of the crimes of people smugglers are other legitimate refugees whose places have been taken.¹⁶⁴ This is the sophisticated version of the popular argument that has given momentum to the unfortunate colloquial term 'queue-jumpers'. There are at least two problems with this proposition. First, there is nothing to say that Australia is reaching some sort of capacity: other jurisdictions receive significantly more claims per capita.¹⁶⁵ In 2009, 6500 asylum claims were lodged in Australia and New Zealand combined, compared to 286 700 in Europe, nearly 50 000 in the United States,

¹⁵⁹ Based on a US Census Bureau estimated total population of 308.4 million: Robert Schlesinger, 'US Population, 2010: 308 Million and Growing', *US News* (online), 30 December 2009 <<http://www.usnews.com/opinion/blogs/robert-schlesinger/2009/12/30/us-population-2010-308-million-and-growing>>, and 10.8 million unauthorised immigrants as at January 2010: Michael Hofer, Nancy Rytina and Bryan Baker, 'Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009' (Report, Department of Homeland Security, Office of Immigration Statistics Policy Directorate, January 2010).

¹⁶⁰ Department of Immigration and Citizenship, above n 158.

¹⁶¹ Houston Report, above n 8, 24 [1.15] (33 412 maritime arrivals and 79 498 air arrivals from 1 July 1998 to 27 July 2012).

¹⁶² Compare *ibid* 23 (Table 1: IMAs to Australia by Calendar Year) with Australian Bureau of Statistics, *Year Book Australia 2012*, ABS Catalogue No 1301.0 (2012) 'International Migration' <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~International%20migration~53>>.

¹⁶³ Houston Report, above n 8, 14 recommendation 2, 39 [3.8].

¹⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 2010, 2465–6 (Michael Keenan); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2010, 2680 (Alex Hawke), 2671 (Stuart Robert); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2744 (Luke Simpkins).

¹⁶⁵ In 2011, Australia received only two-and-a-half per cent of asylum claims globally: Houston Report, above n 8, 24 [1.16]. That figure had increased marginally from less than two per cent in 2010: United Nations High Commissioner for Refugees, *Asylum Levels and Trends in Industrialized Countries 2010* (28 March 2011) 9 (Table 3) <<http://www.unhcr.org/4d8c5b109.html>>. See also Janet Phillips, 'Asylum Seekers and Refugees: What Are the Facts?' (Research Note, Parliamentary Library, Parliament of Australia, 2011) 12 (Graph of 'Irregular Arrivals by Sea').

42 000 in France, and 33 000 in Canada.¹⁶⁶ The restriction lies in the administrative systems that facilitate the transfer of legitimate refugees to Australia, not in the capacity of Australian society to absorb more refugees.¹⁶⁷ Second, the only premise upon which other legitimate refugees have a greater entitlement to come to Australia than those on the boat is a law the objective of which, this paper contends, is misguided. It should not be forgotten that although people smuggling is illegal, seeking asylum is not.¹⁶⁸ Those who do so by overcrowded fishing boat, a patently dangerous means of crossing the ocean, are in no less need.¹⁶⁹

2 Evaluation of Deterrent Effect

Even if people smuggling is such an egregious crime that the need for general deterrence justifies the imposition of excessive sentences, the evidence is that this scheme is ineffective in meeting that need.¹⁷⁰ Of course, it is difficult to argue that the imposition of severe penalties has no effect at all on deterrence.¹⁷¹ However, it is fairly uncontroversial that it is not the most effective of deterrent mechanisms.¹⁷²

¹⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2010, 5343 (Mark Dreyfus). See also Houston Report, above n 8, 25 (Figure 2: Asylum Applications in Selected Industrialised Countries by Calendar Year), 69 (Figure 13: Quarterly Number of Claims Submitted in Selected Regions 2009–2011), 104 (Figure 10: Asylum Applications in Industrialised Countries, 2011) showing the comparatively minor influx of asylum seekers in Australia.

¹⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2749 (Sid Sidebottom); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2010, 2655 (Tony Zappia). See also Houston Report, above n 8, 135–6, which addresses the backlog of 20 100 asylum applications in the Special Humanitarian Program.

¹⁶⁸ This is so on whatever view might be taken of Australia's position under the *Refugees Convention*: see above nn 138–40 and accompanying text.

¹⁶⁹ See Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2010, 2653 (Julie Owens).

¹⁷⁰ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 10 (George Williams).

¹⁷¹ Sir Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7(2) *Australian Journal of Human Rights* 21, 29.

¹⁷² See, eg, Kevin M Carlsmith, John M Darley and Paul H Robinson, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 *Journal of Personality and Social Psychology* 284; Johannes Andenaes, 'The Morality of Deterrence' (1969) 37 *University of Chicago Law Review* 649, 655–6; David Brown, 'Mandatory Sentencing: A Criminological Perspective' (2001) 7(2) *Australian Journal of Human Rights* 31, 39–42; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Research Paper, Sentencing Advisory Council (Vic), April 2011) 2; David Brown, 'The Limited Benefit of Prison in Controlling Crime' (2010) 22 *Current Issues in Criminal Justice* 137, 140–2.

Studies on mandatory sentencing in particular reveal no demonstrated correlation with decreased rates of offending.¹⁷³ The correlation is weaker still in the case of people smuggling, where the chain of information from the Australian legislature to the villages in Indonesia is broken in many places.¹⁷⁴ Not the least of these obstacles are language, literacy, financial vulnerability, and access to media such as television and the internet.¹⁷⁵ As Barr J observed in *R v Dopong*, mandatory sentencing of people smugglers will not function effectively as a deterrent

unless the fact of minimum mandatory sentencing and details of the actual prescribed minimum sentences is widely disseminated throughout the Indonesian Archipelago and, in particular, to those poorer and more remote parts where fishermen and other seamen may be enticed into becoming crew members ...¹⁷⁶

Although their immediate families and dependents no doubt become painfully aware of the penalties imposed on offenders, there is nothing to suggest that the message is effectively passed on to the rest of the 450 million people comprising the Indonesian population. Even for those who do know of the consequences that await them, their poverty may be so dire and their need so great that it does not deter them.¹⁷⁷ In light of these considerations, the utility of the comparison between the role of general deterrence for a ‘poor Indonesian fisherman’¹⁷⁸ and for ‘serious tax frauds’¹⁷⁹ must be attended with

¹⁷³ Judith Bessant, ‘Australia’s Mandatory Sentencing Laws, Ethnicity and Human Rights’ (2001) 8 *International Journal on Minority and Group Rights* 369, 378. See also the various studies to this effect cited in Anthony Gray and Gerard Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’ (2012) 22 *Journal of Judicial Administration* 37, 38 n 5.

¹⁷⁴ See *Bahar v The Queen* (2011) 225 FLR 80, 94 [60] (McLure P); Transcript of Proceedings (Sentence), *R v Basuk* (District Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 4.

¹⁷⁵ See Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012).

¹⁷⁶ Transcript of Proceedings (Sentence), *R v Dopong* (Supreme Court of the Northern Territory, 21041382, Barr J, 25 January 2011) 5. See also *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012) [30] (McMurdo P).

¹⁷⁷ See, eg, *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012), where the defendant, an impecunious 66-year-old fisherman, had been imprisoned for people smuggling in 2001; Transcript of Proceedings (Sentence), *R v Heri* (District Court of Queensland, 992/2011, Clare DCJ, 21 October 2011), where the defendant’s cousin had done the same voyage and been caught and charged, but the amount of payment, equal to four years’ earnings, was too great to resist despite that knowledge. The Rp 380 000 was forfeited.

¹⁷⁸ *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [6] (Fraser JA).

some doubt. Certainly, a number of judges have expressed reservations about the effectiveness of the regime as a deterrent.¹⁸⁰

Detailed empirical studies suggest that the individual decision to seek asylum by sea is, unsurprisingly, determined almost exclusively by war, poverty or environmental hazards, or the risk of arrest, detention, repression or other harm to the particular person.¹⁸¹ Hence, the spikes in unauthorised boat arrivals to Australia and the numbers and ethnicity of refugees correlate with marked precision with international events: the fall of Saigon in 1976, the People's Republic of China's clearance of slums in Beihai Province in 1994, the rise of oppressive regimes in Iraq and Iran in 1999, and the end of the Sri Lankan civil war in 2010.¹⁸² None of these push factors can be negated by deterrents imposed by the Australian legislature. Similarly, the pull factors that encourage immigration to Australia, most notably economic prosperity in an otherwise developing region, are not altered by domestic immigration policy.

Regardless, the minimum penalty of five years' imprisonment must be imposed even where '[t]here is no finding that [defendants] understood the serious consequences that awaited them on their arrival in Australia.'¹⁸³ As Fenbury DCJ observed, judges are 'obliged to apply the theory of general deterrence, irrespective of realities on the ground'.¹⁸⁴

III VALIDITY OF THE SCHEME

The conclusion that the statutory minimum sentences for people smuggling are undesirable allows a recommendation that they be repealed by Parliament, but it says nothing of their legality. The further step of questioning validity is substantially more difficult, but it is worth noting that there are two important supervening legal systems with which the mandatory sentencing regime

¹⁷⁹ Ibid [28].

¹⁸⁰ See, eg, Transcript of Proceedings (Sentence), *R v Dopong* (Supreme Court of the Northern Territory, 21041382, Barr J, 25 January 2011) 5; Transcript of Proceedings (Sentence), *R v Pandu* (District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 14–15; Transcript of Proceedings (Sentence), *R v Hasanusi* (District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 3.

¹⁸¹ See Mary Crock, *Seeking Asylum Alone — Australia: A Study of Australian Law, Policy and Practice regarding Unaccompanied and Separated Children* (Themis Press, 2006) ch 3.

¹⁸² Crock and Ghezelbash, above n 118, 248–52.

¹⁸³ *Bahar v The Queen* (2011) 225 FLR 80, 95 [64] (McLure P).

¹⁸⁴ Transcript of Proceedings (Sentence), *R v Hasanusi* (District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 3.

potentially conflicts: the constraints placed on the legislature by international law and by the *Constitution*.

A *Validity under International Law*

Efforts have been made to justify the objectives of the scheme based on international instruments relating to people smuggling, such as the *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*.¹⁸⁵ However, mandatory sentencing goes further than the legislative action authorised by this and related instruments. It actively conflicts with certain maxims of international law. This is especially significant in light of a 2011 High Court decision, albeit one that turned largely on statutory interpretation, striking down a legislative arrangement to circumvent international obligations under the *Refugees Convention*.¹⁸⁶

1 *Infringement of Civil Rights Guaranteed by International Law*

(a) *Arbitrary Detention*

The mandatory sentencing regime risks infringing a number of individual rights protected by international law. First, art 9(1) of the *International Covenant on Civil and Political Rights* ('ICCPR') prohibits the arbitrary detention of an individual. The period between arrest and trial has frequently been well in excess of one year, and in some cases closer to two years.¹⁸⁷ Although such offenders, with no criminal record or risk of reoffending, would be almost certain to secure bail, a bail application in such cases would mean only a move from one detention facility to another.¹⁸⁸ In some cases, such detention was followed by a ruling that the evidence did not support the charges, and there was no case to answer; the defendants had been in custody

¹⁸⁵ Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2010 (Cth) 11.

¹⁸⁶ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

¹⁸⁷ See, eg, Transcript of Proceedings (Sentence), *R v Magang* (Supreme Court of Queensland, 298/2011, Philippides J, 22 March 2012) 14 (752 days); Transcript of Proceedings (Sentence), *R v Nasir* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 7 (632 days); *R v Karabi* [2012] QCA 47 (14 March 2012) 2 [1] (Muir JA) (602 days). See also cases cited at below n 430. As to delays generally, see Victoria Legal Aid, 'Response to Deterring People Smuggling Bill 2011', above n 39, 9.

¹⁸⁸ Victoria Legal Aid, 'Response to Deterring People Smuggling Bill 2011' above n 39, 9.

for between 19 and 25 months.¹⁸⁹ It is clear that detention may be arbitrary even if permitted by law¹⁹⁰ if the detention the law requires is inappropriate and unjust.¹⁹¹ The European Court of Human Rights has consistently affirmed that a core principle of the prohibition is that detention must be necessary in the circumstances to achieve a government's stated aim.¹⁹² The concept of proportionality requires that detention be used 'only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.'¹⁹³ The reasons for which the political ends do not justify the custodial means in this instance have already been considered.¹⁹⁴ Rather, mandatory detention is arbitrary in that it allows no differentiation between offenders of different levels of culpability.¹⁹⁵

(b) *Cruel, Inhuman or Degrading Treatment*

In addition, the severity or disproportionality of sentences is a relevant factor in determining whether the punishment amounts to a breach of the prohibition on 'cruel, inhuman or degrading treatment or punishment,' prohibited by

¹⁸⁹ This was generally on the basis that there was insufficient evidence of recklessness as to the right of the persons to come to Australia, having regard to considerations such as their level of education and involvement in the enterprise, and that the defendants generally speak a different language to the passengers. See, eg, Transcript of Proceedings, *R v Neso* (District Court of Queensland, 1050/2011, Shanahan DCJ, 21 November 2011) 17–21 (19 months); Transcript of Proceedings, *R v Albahruliilmi* (District Court of Queensland, 1209/2011, Griffin DCJ, 22 March 2012) 2 (25 months); Transcript of Proceedings, *R v Pahal* (District Court of Queensland, 1776/2011, Dick DCJ, 24 May 2012) 31–4 (23 months). Cf Transcript of Proceedings, *R v Jubair* (District Court of Queensland, 1556/2011, Griffin DCJ, 10 May 2012) (the offence does not require actual arrival in Australia).

¹⁹⁰ Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2] ('*A v Australia*').

¹⁹¹ Human Rights Committee, *Views: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8] ('*van Alphen v Netherlands*').

¹⁹² See, eg, *Litwa v Poland* [2000] III Eur Court HR 289, 310 [78]; *Saadi v United Kingdom* (2008) 47 EHRR 427, 450–1 [69]–[71]; *Hafsteinsdóttir v Iceland* (European Court of Human Rights, Chamber, Application No 40905/98, 8 June 2004) [51]; *Enhorn v Sweden* [2005] I Eur Court HR 97, 117–18 [42].

¹⁹³ *Saadi v United Kingdom* (2008) 47 EHRR 427, 450 [70]. See also *Jablonski v Poland* (2003) 36 EHRR 455, 483–4 [84]; *Wemhoff v Federal Republic of Germany* (1968) 7 Eur Court HR (ser A) 25 [15]; *Matznetter v Austria* (1967) 10 Eur Court HR (ser A) 33–4 [11].

¹⁹⁴ See above Part II.

¹⁹⁵ Sarah Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51, 52.

art 7 of the *ICCPR*.¹⁹⁶ There is support for this proposition in the United States,¹⁹⁷ and a mandatory sentencing regime has been successfully challenged based on a conflict with this guarantee in Canada.¹⁹⁸ An appeal to the European Court of Human Rights on this basis was dismissed, but only because it could not be shown that the sentences ‘were grossly disproportionate’ or ‘serve[d] no legitimate penological purpose’ in that particular case.¹⁹⁹ The same could perhaps not be said of many people smuggling cases.²⁰⁰

(c) *Detention of Children*

Article 37(b) of the *Convention on the Rights of the Child* (‘*CRC*’) requires that detention of children be a last resort and for the shortest possible time.²⁰¹ The mandatory sentencing provisions are explicitly excluded from operation in the case of persons more likely than not to be minors.²⁰² However, those apprehended upon entering Australian waters rarely possess adequate documentation and such proof is a source of controversy. The prescribed procedure for age determination, which includes an X-ray of a part of the person’s body,²⁰³ typically the wrist, is dangerously inaccurate,²⁰⁴ in some cases creating a margin of error of up to four years.²⁰⁵ That the burden of proof regarding an accused’s majority is only on the balance of probabilities does

¹⁹⁶ Human Rights Committee, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment* (Art 7), 44th sess, UN Doc CCPR/C/GC/20 (3 October 1992) [4]. See also *Smith v The Queen* [1987] 1 SCR 1045, where the Supreme Court of Canada declared mandatory sentencing laws invalid due to conflict with the constitutional guarantee against cruel and unusual punishment.

¹⁹⁷ *Weems v United States*, 217 US 349 (1910); *Solem v Helm*, 463 US 277 (1983). But see *Harmelin v Michigan*, 501 US 957 (1991).

¹⁹⁸ *R v Smith* [1987] 1 SCR 1045.

¹⁹⁹ *Vinter v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 66069/09, 130/10 and 3896/10, 17 January 2012) [95]. See also *Ahmad v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012) [243].

²⁰⁰ See above Parts IIA, IIIB2.

²⁰¹ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁰² *Migration Act* s 236B(2).

²⁰³ *Crimes Act 1914* (Cth) s 3ZQA(2); *Crimes Regulations 1990* (Cth) reg 6C.

²⁰⁴ Lindsay Murdoch, ‘Wrist X-ray Won’t Prove Child’s Age, Says Expert’, *The Sydney Morning Herald* (Sydney), 27 June 2011, 6.

²⁰⁵ *R v Daud* [2011] WADC 175 (25 October 2011) [254] (Bowden DCJ).

nothing to mitigate that danger.²⁰⁶ This is the same method that has been abandoned in the United Kingdom²⁰⁷ and discounted at the International Criminal Tribunal for the former Yugoslavia, where it was acknowledged by an expert witness that it was ‘not a precise science’ for determining the age of cadavers found in mass graves.²⁰⁸ Domestically, it has been criticised by experts, stating that it does ‘not [produce] an accurate, definite result’²⁰⁹ and ‘was never designed to do that’,²¹⁰ and that ‘we cannot rely upon [it] to actually assist the court’.²¹¹ Its results have been found to be inconclusive by judges, who have regarded the method as ‘if not weak, not well established’.²¹² Senate committee inquiries have also determined that ‘[i]t is now seen as somewhat outdated’²¹³ and ‘the accuracy of the technique could not be assured’.²¹⁴ As much is clear from the early release of 15 imprisoned people

²⁰⁶ Legal Aid New South Wales, Submission No 19 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011*, January 2012, 20. It is also unclear in the legislation who bears the onus of proof, although in at least one case the prosecution has conceded that it bears the onus: Transcript of Proceedings, *DPP (Cth) v Syarifudin Ari Hasan Min* (Victorian Magistrates Court, Magistrate Collins, 1 December 2011) 2. A representative of the CDPP has opposed raising this standard of proof on the grounds that ‘it would be very difficult to establish’: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 18 (John Thornton).

²⁰⁷ Sir Al Aynsley-Green Kt, Submission No 16 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011*, March 2011, 30.

²⁰⁸ Transcript of Proceedings, *Prosecutor v Karadžić*, (International Criminal Tribunal for Former Yugoslavia Trial Chamber, IT-95-5/18-I, Kwon J, 2 December 2011) 22 366.

²⁰⁹ Transcript of Public Hearing for Key Medical Experts, Australian Human Rights Commission, *Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say That They Are Children*, 9 March 2012, 65 (Ella Onikul).

²¹⁰ *Ibid* 11 (Anthony Hill).

²¹¹ *Ibid* 20 (Paul Hofman). See also Tim Cole explaining that determining age using dental X-rays is ‘too variable to be informative to the court’: at 34. See also the statements of the Royal Australian and New Zealand College of Radiologists noting the effect of race on age determination and concluding that there is ‘overwhelming evidence that bone age estimation is too inaccurate to be used for determining chronological age for legal reasons’: Royal Australian New Zealand College of Radiologists, Submission No 8 to Senate Legal and Constitutional Affairs, *Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011*, January 2012, 1.

²¹² *R v Daud* [2011] WADC 175 (25 October 2011) [254] (Bowden DCJ).

²¹³ See, eg, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001* (2001) 23 [3.58].

²¹⁴ See, eg, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Amendment (Fairness for Minors) Bill 2011* (2012) 12 [2.10], citing *ibid* 24 [3.62].

smugglers who were revealed to be juveniles.²¹⁵ The sentences consequent on such an error under the current legislation, far from a last resort and the least possible, are automatically applied and expressly inflated for the purpose of deterrence. In the voluminous inquiry conducted by the Australian Human Rights Commission, its former President Catherine Branson QC condemned the practice of wrist X-rays and argued for its immediate discontinuance, finding that the practice has led to ‘numerous breaches’ of the *CRC* and *ICCPR*.²¹⁶ Even where minors are identified and discharged, they spend an average of 9.3 months in adult prisons.²¹⁷ In light of such circumstances, there is currently a Bill before the Senate to discontinue the use of this method and replace it with more stringent evidentiary procedures.²¹⁸

(d) *Right to a Fair Trial*

The right to a fair trial is guarded by every major human rights instrument.²¹⁹ An impartial and independent judiciary is an essential element of that right. Where the legislature mandates penalties, the courts are stripped of their discretion to impose a lesser sentence to adequately reflect the criminality of a given accused, prevented from properly considering all mitigating factors,²²⁰ and consequently ‘cannot exercise [their] jurisdiction in an independent and

²¹⁵ Simon Cullen, ‘SBY Presses Gillard on Underage People Smuggling’, *ABC News* (online), 3 July 2012 <<http://www.abc.net.au/news/2012-07-03/yudhoyono-gillard-finish-talks/4107424>>. Indonesian President Yudhoyono reportedly expressed his hopes that another 54 would be released for the same reason.

²¹⁶ Australian Human Rights Commission, *An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say That They Are Children* (2012) 327.

²¹⁷ Victoria Legal Aid, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Amendment (Fairness for Minors) Bill 2011*, March 2012, 15.

²¹⁸ Crimes Amendment (Fairness for Minors) Bill 2011 (Cth) sch 1 item 1 (proposing inter alia to amend *Crimes Act 1914* (Cth) s 3ZAQ(2) and insert new sub-ss (2A)–(2B)).

²¹⁹ *UDHR* art 10; *ICCPR* art 14; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8(1) (‘*ACHR*’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1) (‘*ECHR*’); *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 7(1) (‘*African Charter*’). Note, however, the limit of the right under Australian law being ‘a right to a trial as fair as the courts can make it’: *Jago v District Court of New South Wales* (1989) 168 CLR 23, 49 (Brennan J).

²²⁰ See *Lockett v Ohio*, 438 US 586, 603–4 (Burger CJ for Burger CJ, Stewart, Powell and Stevens JJ on this point) (1978).

impartial manner'.²²¹ In the UK, for example, a provision that would allow the Home Secretary to fix a non-parole period higher than that considered otherwise appropriate by the sentencing judge was held to deprive the defendant of a fair trial.²²² Mandatory sentences also affect the right to have one's conviction and sentence 'reviewed by a higher tribunal according to law',²²³ insofar as it bars appellate courts from substituting lesser sentences where appropriate.²²⁴ Whether or not such interference renders the laws unconstitutional,²²⁵ it limits the right of the accused to a fair trial under international law.

(e) *Discrimination*

Finally, the criticisms of the mandatory sentencing regimes in Western Australia and the Northern Territory for targeting Indigenous people²²⁶ may be applicable to the current regime: 'an indirectly racially discriminatory effect' may arise where 'it can be shown that [the regime] operates to disproportionately affect a particular racial group compared to others.'²²⁷ The Attorney-General's Department notes that '[w]hile many persons convicted of people smuggling offences are Indonesian nationals, other foreign nationals are also charged with people smuggling offences'.²²⁸ However, like that in Western Australia, it applies to all in theory but only, or predominantly, to one racial group in practice.²²⁹

²²¹ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 9 (Jane MacAdam).

²²² See *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 880–1 [20]–[24] (Lord Bingham), 890–1 [50] (Lord Steyn).

²²³ ICCPR art 14(5).

²²⁴ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 9 (Jane MacAdam).

²²⁵ See below Part IIIB.

²²⁶ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 69th sess, UN Doc A/55/40 (24 July 2000).

²²⁷ Ben Saul, Submission No 2 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 21 February 2012, 1.

²²⁸ Attorney-General's Department, Submission No 17, above n 23, 6.

²²⁹ Such is the presumption implicit in the recommendation of the Houston Report to remove mandatory sentencing in relation to Indonesian offenders: see Houston Report, above n 8, 43 [3.22].

2 Noncompliance with Obligations under the Refugees Convention

There is a further danger that, when combined with the existing provisions on criminal responsibility,²³⁰ the statute may attribute accessorial liability to refugees,²³¹ contravening the prohibition on imposing penalties on them by reason of their illegal entry or presence.²³² Accessorial liability arises where a person, knowing the essential circumstances of an offence,²³³ intentionally assists or encourages²³⁴ its commission.²³⁵ Asylum seekers clearly encourage or assist the commission of the offence, not least by their presence on the boat throughout the voyage²³⁶ and by paying for the offence to occur.²³⁷ The mental element, which must be proven even for offences of strict liability,²³⁸ requires, first, knowledge of the essential facts and circumstances of the offence;²³⁹ and second, that the act was done for the purpose of assisting the commission of the crime and not for some other reason.²⁴⁰ It is clear that those onboard the boat would have such knowledge — significantly, there is no requirement that

²³⁰ *Criminal Code Act 1995* (Cth) sch div 11 ('*Criminal Code*').

²³¹ The effect of Australia's non-*refoulement* obligations in the context of the need for deterrence of people smuggling has already been discussed: see above nn 131–44 and accompanying text.

²³² *Refugees Convention* art 31(1).

²³³ As to the requisite mental element, see *Giorgianni v The Queen* (1985) 156 CLR 473, 482, 487–8 (Gibbs CJ), 494 (Mason J), 500, 504–5 (Wilson, Deane and Dawson JJ) ('*Giorgianni*').

²³⁴ *R v Russell* [1933] VLR 59, 66–7 (Cussen ACJ), cited with approval in *ibid* 480 (Gibbs CJ), 493 (Mason J).

²³⁵ The offence must actually have occurred: *Criminal Code* s 11.2(2)(b); *Walsh v Sainsbury* (1925) 36 CLR 464, 477 (Isaacs J).

²³⁶ See, eg, *R v Coney* (1882) 8 QBD 534, 540, 543 (Cave J), where the presence of spectators at a prize fight was evidence of them encouraging the illegal fight; *R v Beck* [1990] 1 Qd R 30, 37 (Macrossan CJ). See also Transcript of Proceedings, *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 24 November 2011) 4.

²³⁷ See, eg, *Natale v The Queen* [2011] VSCA 28 (11 February 2011) (incitement to murder by hiring an assassin); *Bou-Antoun v The Queen* [2008] NSWCCA 1 (1 February 2008) (ancillary liability to murder for hiring an assassin).

²³⁸ *Giorgianni* (1985) 156 CLR 473, 500 (Wilson, Deane and Dawson JJ); *Bayly v Scarica* [1990] VR 731, 736–7 (McGarvie J).

²³⁹ *Giorgianni* (1985) 156 CLR 473, 487–8 (Gibbs CJ), 495 (Mason J).

²⁴⁰ *R v Roberts* [2012] QCA 82 (5 April 2012) [170] (Atkinson J); *Stokes v The Queen* (1990) 51 A Crim R 25, 37 (Hunt J), cited in *R v Adam* (1999) 106 A Crim R 510, 524 [70] (Spigelman CJ, James and Bell JJ); *Re Pong Su* (2005) 159 A Crim R 300, 313 [49] (Kellam J); *R v Beck* [1990] 1 Qd R 30, 41 (Derrington J); *R v Johnson*; *Ex parte A-G (Qld)* [2007] QCA 76 (16 March 2007) [48] (Holmes JA); *Bayly v Scarica* [1990] VR 731, 736 (McGarvie J).

they be aware of the illegality of the act²⁴¹ — and no other reason for their payments and presence could be reasonably inferred.²⁴²

No refugee has yet been charged for accessorial liability. However, it has been noted on at least one occasion that refugees as witnesses may unwittingly making incriminating admissions in response to questioning.²⁴³ The CDPP has acknowledged that there was nothing to prevent such prosecutions, but said they were not pursued as a matter of policy.²⁴⁴ That policy is not in writing, and, in the words of the prosecutor, ‘may well change and evolve depending on the situation and the development of the law [and] political situations.’²⁴⁵ Some witnesses have not yet been granted refugee status and so might not fall within that policy in any event.²⁴⁶ The order in that case, requiring that witnesses in such a situation be given independent legal advice before testifying,²⁴⁷ and the subsequent provision by the CDPP of formal indemnities²⁴⁸ suggests that the court and the CDPP consider that their prosecution is legally possible. Compliance with Australia’s international obligations is not a matter that should be left to prosecutorial discretion.²⁴⁹ The mandatory sentencing legislation contravenes international law and is dangerously uncertain in its operation.

B Constitutional Validity

There are also concerns about the compatibility of the statutory minimum sentence with the separation of powers.²⁵⁰ The separation of judicial from

²⁴¹ *Giorgianni* (1985) 156 CLR 473, 500, 506 (Wilson, Deane and Dawson JJ); *Abley v Crosaro* [1946] VLR 53, 55–6 (Gavan Duffy J); *Yorke v Lucas* (1985) 158 CLR 661, 667 (Mason ACJ, Wilson, Deane and Dawson JJ); *R v Jervis* [1993] 1 Qd R 643, 648 (McPherson ACJ).

²⁴² See generally *R v Beck* [1990] 1 Qd R 30, 37 (Macrossan J).

²⁴³ Transcript of Proceedings, *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 23 November 2011) 72.

²⁴⁴ *Ibid* 72–4.

²⁴⁵ Transcript of Proceedings, *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 24 November 2011) 11.

²⁴⁶ *Ibid* 11–12.

²⁴⁷ *Ibid* 17.

²⁴⁸ Transcript of Proceedings, *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 28 November 2011) 2.

²⁴⁹ See below n 441 and accompanying text.

²⁵⁰ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, above n 7, 14 [2.32]–[2.34].

legislative and executive power acts not only to preserve the independence of the courts, but is also 'necessary for the protection of the individual liberty of the citizen'.²⁵¹ As stated at the Senate inquiry into the legislation, 'there is a clear argument that mandatory minimum sentences ... breach that principle by undermining the independence of the courts'.²⁵² The policy arguments for the imposition of mandatory minimum penalties have regularly invoked a sense of parliamentary emergency in responding to either perceived threats to border security or, more recently, to the safety of passengers aboard the vessels. However, these concerns are no justification. When mandatory penalties were enacted as part of legislation in response to a failed coup d'état in Ceylon, the Privy Council warned that urgency could not justify incursions on the constitutional integrity of the judiciary:

It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the *Constitution*. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded.²⁵³

The desired policy in this instance can only be said to be one such lesser crisis.

1 *The State of the Law*

The doctrine of the separation of powers is breached if the legislature usurps or interferes with the judicial power of the courts,²⁵⁴ or attempts to vest the courts with non-judicial power.²⁵⁵ In general, the more closely a power is tied to the authoritative determination of legal rights and liabilities, the more likely

²⁵¹ *R v Davison* (1954) 90 CLR 353, 381–2 (Kitto J). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28–9 (Brennan, Deane and Dawson JJ).

²⁵² Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 9 (George Williams).

²⁵³ *Liyanage v The Queen* [1967] AC 259, 291–2 (Lord Pearce for Lords Macdermott, Morris, Guest, Pearce and Pearson).

²⁵⁴ See *Polyukhovich v The Queen* (1991) 172 CLR 501, 607 (Deane J); *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J), 150–1 (Gaudron J).

²⁵⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), aff'd *A-G (Cth) v The Queen* (1957) 95 CLR 529. Cf criticism in *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ), 102 (Mason J). See also *Nicholas v The Queen* (1998) 193 CLR 173, 220–1 [112] (McHugh J).

it is to be a judicial power.²⁵⁶ This categorisation is imprecise,²⁵⁷ and some powers are said to be judicial primarily because they have always been regarded as such.²⁵⁸ Some powers are exclusively judicial, some exclusively non-judicial, and others are neither, such that they may be exercised by either the legislature or the judiciary.²⁵⁹ The sentencing of offenders belongs unambiguously to the first category: the High Court has affirmed that '[t]he sentencing of offenders, including in modern times the fixing of a minimum term of imprisonment, is as clear an example of the exercise of judicial power as is possible.'²⁶⁰ Similarly, the question of whether a particular intrusion upon the exercise of judicial power is a breach of the doctrine involves an analysis of 'historic functions and processes of courts of law'.²⁶¹

The Court in *Bahar v The Queen* ('Bahar') observed that '[n]o-one has (yet) suggested that a minimum statutory penalty itself substantially impairs or is incompatible with the institutional integrity of the courts'.²⁶² Although judicial consideration of the constitutionality of mandatory sentencing is sparse, in the few instances it has been raised, no serious doubts have been

²⁵⁶ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 199 (Latham CJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 463 (Isaacs and Rich JJ).

²⁵⁷ See, eg, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *R v Davison* (1954) 90 CLR 353, 380 (Kitto J).

²⁵⁸ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). See also Colin Howard, *Australian Federal Constitutional Law* (Lawbook, 3rd ed, 1985) 281.

²⁵⁹ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178–9 (Isaacs J).

²⁶⁰ *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ), in the context of finding that a non-judicial power had not been conferred on the courts and that therefore the law, which required a court to impose sentences under federal legislation with reference to the minimum penalties provided under state legislation, was valid. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 (Toohey J); *Nicholas v The Queen* (1998) 193 CLR 173, 186–7 (Brennan CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 886 [39] (Lord Steyn).

²⁶¹ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J), quoted in *Nicholas v The Queen* (1998) 193 CLR 173, 233 [148] (Gummow J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 353 [50] (French CJ).

²⁶² (2011) 255 FLR 80, 91 [46] (McLure P).

cast on its validity. In *Palling v Corfield* ('*Palling*'), often cited as a complete answer to any doubts on the matter,²⁶³ Barwick CJ held that '[i]t is not, in my opinion, a breach of the *Constitution* not to confide any discretion to the court as to the penalty to be imposed.'²⁶⁴ The High Court refused special leave to appeal the constitutionality of the Northern Territory's mandatory minimum sentence regime in 1998.²⁶⁵ Although decisions on special leave are of little precedential value,²⁶⁶ two more former Chief Justices of the High Court have extra-curially acknowledged that 'there are perhaps no constitutional grounds, or no substantial constitutional grounds, for challenging the validity ... of mandatory sentencing regimes.'²⁶⁷ In relation to the instant scheme, the first constitutional challenge in the Western Australian Court of Appeal was not considered, as the appeal against conviction was upheld on other grounds.²⁶⁸ In another, the Queensland Court of Appeal held that '[i]t is not easy to see how s 233C in any way undermines the institutional integrity of the State courts',²⁶⁹ although it did not explore the issue in detail.²⁷⁰ Any argument against the constitutionality of the regime must proceed against the weight of this authority.

2 *The Room for Argument*

It is well established that the Parliament may, within the confines prescribed by the *Constitution*, withhold or grant jurisdiction to the courts.²⁷¹ In *Palling*,

²⁶³ See *R v Ironside* (2009) 104 SASR 54, 68 [71] (Doyle CJ); *R v Nitu* [2012] QCA 224 (24 August 2012) [42] (Fraser JA). But see below n 270 and accompanying text.

²⁶⁴ (1970) 123 CLR 52, 58; see also similar statements at 65 (Menziez J), 65 (Windeyer J), 67 (Owen J), 68 (Walsh J), 70 (Gibbs J). The constitutionality of mandatory sentencing has also been upheld in the Supreme Court of the United States: *McMillan v Pennsylvania*, 477 US 79 (1986), and Canada: *R v Bressette* [2010] 4 CNLR 202, 208 [19] (Desotti J).

²⁶⁵ Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998).

²⁶⁶ Mason, above n 171, 25.

²⁶⁷ Sir Gerard Brennan, above n 62, 3, referring to Mason, above n 171, 28.

²⁶⁸ *Fonseka v The Queen* (2003) 140 A Crim R 395, 402 [35] (Wheeler J).

²⁶⁹ See *R v Nitu* [2012] QCA 224 (24 August 2012) [31] (Fraser JA). In this regard, see below nn 308–16.

²⁷⁰ The issue was decided principally on the point of whether the laws could be held to be invalid on account of any significant discrimination between low-level and high-level offenders it occasioned, rather than legislative incursion onto judicial territory: *ibid* [32]–[42] (Fraser JA).

²⁷¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 186 [15] (Brennan CJ), 232 [146] (Gummow J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [49] (French CJ).

the High Court upheld a provision under which the Court was required to impose a certain penalty upon the request of the prosecutor.²⁷² However, this has been taken only to mean that a law does not infringe the separation of powers merely because ‘the satisfaction of a condition enlivening the court’s statutory duty depends upon a decision made by a member of the Executive branch of government’.²⁷³ That is, the Parliament may grant or withhold jurisdiction, and the granting of that jurisdiction may be conditional upon a decision of the member of the executive.²⁷⁴

However, it arguably does not follow from that precedent that the Parliament may grant jurisdiction and then purport to interfere with its exercise of that jurisdiction. No law may confer jurisdiction and proceed to direct how it is to be exercised.²⁷⁵ In *Liyanage v The Queen* (*‘Liyanage’*), a decision that predates *Palling*, the Privy Council found invalid a law whose ‘aim was to ensure that the judges in dealing with these ... particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences’.²⁷⁶ That precedent was binding on the High Court at the time *Palling* was decided and was not considered or distinguished.²⁷⁷ It must be acknowledged that additional difficulties attended the legislation impugned in *Liyanage*: it was also retrospective and ‘clearly aimed at particu-

²⁷² (1970) 123 CLR 52.

²⁷³ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [49] (French CJ).

²⁷⁴ Note, however, the disapproval of this position by the Privy Council in *Hinds v The Queen* [1977] AC 195, 226–7 (Lord Diplock for Lords Diplock, Simon and Edmund-Davies), quoting the statements of the Supreme Court of Ireland in *Deaton v A-G (UK)* [1963] IR 170, 182–3 (Ó Dálaigh CJ). See also *Browne v The Queen* [2000] 1 AC 45 (where a provision stipulating that juvenile sentences are subject to executive discretion was held invalid); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. See also below n 299 and accompanying text.

²⁷⁵ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 186 [15] (Brennan CJ), 232–3 [146] (Gummow J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [50] (French CJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 669 [47] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

²⁷⁶ [1966] 2 WLR 682, 696 (Lord Pearce for Lords Macdermott, Morris, Guest, Pearce and Pearson).

²⁷⁷ *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74, 83 (Kitto J); *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, 240 (Windeyer J). Cf the position after the passage of the *Privy Council (Appeals from the High Court) Act 1975* (Cth): *Viro v The Queen* (1978) 141 CLR 88; *Kitano v Commonwealth* (1975) 132 CLR 231.

lar known individuals'.²⁷⁸ Accordingly, that case has since been read down to apply 'only to legislation that can properly be seen to be directed ad hominem'.²⁷⁹ However, such subsequent later developments in the law cannot alter the clear principle advanced by the case at the time that the circumstances in *Palling* fell for consideration — that such interference with the sentencing discretion was incompatible with an entrenched separation of powers.²⁸⁰ These contextual observations support limiting the authority of *Palling* in order to leave open the possibility that it may impermissibly offend the separation of powers for a law to compel a judge 'to sentence each offender on conviction to [a prescribed number of] years' imprisonment ... even though his part in the [crime] might have been trivial'.²⁸¹

It is in any event a well-established principle that no law may confer jurisdiction and proceed to direct how it is to be exercised²⁸² by requiring the courts to 'depart to a significant degree from the methods and standards which have characterised judicial activities in the past',²⁸³ or to act in a 'manner which is inconsistent with the essential character of a court or with

²⁷⁸ *Liyanage* [1967] AC 259, 289 (Lord Pearce for Lords Macdermott, Morris, Guest, Pearce and Pearson).

²⁷⁹ *Nicholas v The Queen* (1998) 193 CLR 173, 192 [28] (Brennan CJ). See also *Baker v The Queen* (2004) 223 CLR 513, 547 [94] (Kirby J). Cf *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 625–6 (Deane J).

²⁸⁰ Lord Pearce 'wholly agree[d]' with the trial court's observations that the Act impermissibly interfered with the judicial function because it

removed the discretion of the court as to the period of the sentence to be imposed, and compels the court to impose a term of 10 years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it.

Liyanage [1967] AC 259, 291 (Lord Pearce for Lords Macdermott, Morris, Guest, Pearce and Pearson), quoting *R v Liyanage* (1965) 67 NLR 193, 424 (Sansoni CJ, Fernando SPJ and de Silva J).

²⁸¹ *Liyanage* [1967] AC 259, 290–1 (Lord Pearce for Lords Macdermott, Morris, Guest, Pearce and Pearson).

²⁸² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 186 [15] (Brennan CJ), 232–3 [146] (Gummow J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [50] (French CJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 669 [47] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

²⁸³ *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ), quoted in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 353 [52] (French CJ).

the nature of judicial power.²⁸⁴ The mandatory minimum of five years for people smuggling has had both of these effects: it requires a significant departure from well-established principles of sentencing, requiring the courts to act in a way in which, as several judges have highlighted in their sentencing remarks, it would not otherwise.²⁸⁵ As Santow J stated extra-curially, it 'lend[s] the court's odour of judicial sanctity to the legislature's pre-ordained outcome as adjusted by the discretion of the prosecuting executive.'²⁸⁶

The unsound destination of this argument, of course, is that it is permissible for the Parliament to confer on the courts no discretion, but not limited discretion. An argument with a similar deficiency met its fate in the Queensland Court of Appeal earlier this year.²⁸⁷ Counsel for the appellant argued that, because the scheme resulted in a 'compression of sentences at the lower end of the range', it negated any scope for differentiation between low-level offenders, and therefore impermissibly interfered with the Court's jurisdiction.²⁸⁸ Fraser JA rejected the proposition that any such compression had been accepted in Queensland,²⁸⁹ but noted that in any event, if such limits on differentiation as that in *Palling* are permissible, then it is illogical to say that a sentencing range of 15 years is not.²⁹⁰ However, it may be that such arguments, premised on the requirement for parity in sentencing rather than the independence of judicial power, are undermined on different grounds by the lack of constitutional protection for that principle in Australia.²⁹¹ Although

²⁸⁴ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 411 [247] (Gummow J).

²⁸⁵ See above nn 85–94 and accompanying text.

²⁸⁶ Santow, above n 6, 298–9.

²⁸⁷ *R v Nitu* [2012] QCA 224 (24 August 2012) [42] (Fraser JA).

²⁸⁸ *Atherden v Western Australia* [2010] WASCA 33 (26 February 2010) [43] (Wheeler JA), quoted in *Bahar v The Queen* [2011] WASCA 249 (15 November 2011) [56] (McLure P). See also *R v Nitu* [2012] QCA 224 (24 August 2012) [38] (Fraser JA).

²⁸⁹ *R v Nitu* [2012] QCA 224 (24 August 2012) [33]–[36] (Fraser JA), quoted in *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [20] (Fraser JA); *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012) [41] (Fraser JA). See below n 370 and accompanying text.

²⁹⁰ *R v Nitu* [2012] QCA 224 (24 August 2012) [42] (Fraser JA). See also *R v Ironside* (2009) 104 SASR 54, 68 [70]–[71] (Doyle CJ).

²⁹¹ See *Leeth v Commonwealth* (1992) 174 CLR 455, 471 (Mason CJ, Dawson and McHugh JJ), 479 (Brennan J); *R v Nitu* [2012] QCA 224 (24 August 2012) [39] (Fraser JA); *R v Ironside* (2009) 104 SASR 54, 95 [173] (Kourakis J). Cf *Leeth v Commonwealth* (1992) 174 CLR 455, 492 (Deane and Toohey JJ, dissenting); *T v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 24724/94, 16 December 1999) [113], where the fixing of a sentence by the British Home Secretary, in the entire absence of a review facility in the hands of a court, breached the right to a fair trial; *V v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 24888/94, 16 December 1999) [114].

such a requirement could perhaps be found by implication,²⁹² such arguments have notably enjoyed more success in jurisdictions where they are supported by express constitutional guarantees.²⁹³

3 *Developments since Palling*

Much turns, then, on the extent to which the body of High Court jurisprudence has shown momentum away from this deferential approach to the legislature since 1970. It is not beyond reason to suggest that it has. The High Court has in recent times fortified its approach, for example, to privative clauses that purport to completely exclude jurisdiction.²⁹⁴ At a state level, *Kable v Director of Public Prosecutions (NSW)* ('*Kable*') recognised the integrated court system of the Commonwealth and the importance of preventing state laws from undermining repositories of federal judicial power.²⁹⁵ One of the 'extremely beneficial effects' of that decision would be to influence governments to include 'within otherwise draconian legislation ... certain objective and reasonable safeguards for the liberty and the property of

Contrast the suggestion that such a prohibition on discriminatory laws 'might be limited to Commonwealth laws and to laws applied in the exercise of Federal jurisdiction': *R v Ironside* (2009) 104 SASR 54, 74 [94] (Doyle CJ), quoting *Cameron v The Queen* (2002) 209 CLR 339, 352–3 [44] (McHugh J).

²⁹² The separation of powers guarantees the right to a fair trial, which by implication requires equality and proportional treatment: see above Part IIIA1(d). This would not be the first time that deficiencies in the *Constitution* have been remedied by implication, to the great benefit of civil liberties — consider the implied freedom of political discourse: see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. For an example of implications drawn from the requirement for democracy in other jurisdictions, see *Mauritius v Khoyratty* [2007] 1 AC 80, 96–7 [29] (Lord Rodger).

²⁹³ See, eg, *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 673–4 (Lord Diplock for Lords Diplock, Keith, Scarman and Roskill). Cf *Lockett v Ohio*, 438 US 586, 603–4 (Burger CJ) (1978); *Woodson v North Carolina*, 428 US 280 (1976). Of course, the difference may also be that 'the morality and legitimacy of condemning a person to death are in a different area of discourse from the morality and legitimacy of sending a person to jail': Brennan, above n 62, 3. See also *Smith v The Queen* [1987] 1 SCR 1045 (where mandatory sentencing laws were held to be invalid due to conflict with guarantee against cruel and unusual punishment). Cf *R v Bressette* (2010) 4 CNLR 202, 208 [19] (Desotti J) (mandatory minimum sentences are not contrary to the *Charter* merely because they fetter discretion).

²⁹⁴ See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 578–81 [91]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 [103]–[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

²⁹⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51, 116 (McHugh J). See also Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 212–14.

persons affected by that legislation.²⁹⁶ In 2008, Gummow, Hayne, Heydon and Kiefel JJ observed that ‘legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.’²⁹⁷ In 2009, the High Court found invalid a provision²⁹⁸ that made judicial power conditional on executive discretion by requiring the Court to make an order for the restraint of dealings with property if a member of the executive suspected that it was derived from serious crime, and the Court was satisfied that there were reasonable grounds for that suspicion.²⁹⁹ Chief Justice French noted that ‘[a]n accumulation of such intrusions, each “minor” in practical terms, could amount over time to death of the judicial function by a thousand cuts’.³⁰⁰ Two further cases heard in 2010 and 2011 invalidated legislation outlawing organisations perceived to be criminal on the basis that they impeded the judicial function of state courts.³⁰¹ In light of such developments, commentators have called for the constitutionality of the mandatory sentencing regime to be challenged in the High Court.³⁰²

In a submission to the Senate committee investigating the removal of the mandatory minimums from the *Migration Act 1958* (Cth) (*Migration Act*), the JCA said that ‘[m]andatory minimum sentences impact upon the separation of powers between the legislative and judicial arms of government, and upon the quality of justice dispensed by the courts.’³⁰³ Indeed, the ‘legislative involvement in the essentially judicial function of pronouncing individual

²⁹⁶ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 379 [140] (Heydon J).

²⁹⁷ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 [39].

²⁹⁸ *Criminal Assets Recovery Act 1990* (NSW) s 10(2)(b).

²⁹⁹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. If it is the position that laws which require a court to abdicate the sentencing discretion to the executive are invalid, the present mandatory sentencing scheme might also be challenged on the basis that it leaves the sentence in the hands of the prosecutor in determining the charges through plea bargaining, exposing defendants to different minimum penalties.

³⁰⁰ *Ibid* 355 [57] (French CJ).

³⁰¹ *Wainohu v New South Wales* (2011) 243 CLR 181; *South Australia v Totani* (2010) 242 CLR 1.

³⁰² See, eg, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 9 (George Williams). The only people smuggling matter brought before the High Court to date was on unrelated grounds: see Transcript of Proceedings, *Mahendra v The Queen* [2012] HCATrans 249 (5 October 2012) (special leave refused).

³⁰³ JCA, above n 15, 1.

sentences' was a central theme of the submission.³⁰⁴ The submission was regarded as 'exceptional' because of a general reluctance to 'improperly intrude' on the legislative or executive arms of government, but it was made because the inquiry was of 'great importance to the administration of justice.'³⁰⁵ Other authors have supported the JCA in its criticism of the incursion into the judicial realm of sentencing.³⁰⁶

Significantly, this is the first time since *Palling* that a Commonwealth law has purported to impose a significant mandatory minimum term of imprisonment for an offence of, on any view, intermediate gravity.³⁰⁷ In *R v Nitu* ('*Nitu*'), the Queensland Court of Appeal noted that cases concerning state legislation distorting the institutional integrity of state courts as a repository of federal jurisdiction³⁰⁸ 'do not bear upon the validity of the Commonwealth legislation'.³⁰⁹ However, it did not explain in any detail why the inapplicability of those cases makes the constitutional credentials of an equivalent Commonwealth law any stronger, or why recourse to such cases is necessary in the first place. Constitutional challenges to state laws, for example those prescribing mandatory 14-day custodial sentences for petty theft in Western Australia and the Northern Territory,³¹⁰ or mandatory non-parole periods for serious offences against the person in South Australia,³¹¹ face the immediate obstacle that there is no formal separation of powers that restricts state legislatures.³¹²

³⁰⁴ *Ibid* 3.

³⁰⁵ *Ibid* 1.

³⁰⁶ See, eg. Neil Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141; Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the *Constitution*: Discretion, Responsibility and Judicial Process' (2000) 22 *Sydney Law Review* 585; Santow, above n 6, 298–9; Flynn, above n 6.

³⁰⁷ See above Parts IIA1 and IIB1.

³⁰⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ), 76 [63]–[64] (Gummow, Hayne and Crennan JJ), 122 [195] (Kirby J).

³⁰⁹ [2012] QCA 224 (24 August 2012) [31] (Fraser JA).

³¹⁰ See, eg. Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998) (special leave refused); Manderson and Sharp, above n 306, 586–7.

³¹¹ *R v Ironside* (2009) 104 SASR 54; *R v Barnett* (2009) 198 A Crim R 251.

³¹² *Kable v DPP (NSW)* (1996) 189 CLR 51, 118 (McHugh J). See the rejection of a submission to that effect in various states: *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *Collingwood v Victoria [No 2]* [1994] 1 VR 652.

The principle is more qualified still in the territories.³¹³ The same applies to mandatory life sentences for murder in Queensland, South Australia and the Northern Territory.³¹⁴ It is for that reason that, to invalidate offending state legislation, courts ‘perform the legal acrobatics needed to develop and apply the “incompatibility” principle in *Kable*’.³¹⁵ By contrast, it is trite to say that such a separation is a ‘fundamental principle’ at Commonwealth level.³¹⁶

As has been observed, an additional aspect of mandatory sentencing for people smuggling is that the mandatory penalty is grossly excessive,³¹⁷ and therefore in practice interferes with the exercise of judicial discretion to a greater degree. The imbalance is arguably substantially greater than, for example, the mandatory recognisance or seven-day term in *Palling*,³¹⁸ or at the other end of the spectrum, mandatory life for murder.³¹⁹ In dismissing special leave to appeal, one question posed by Hayne J suggested that to evaluate the ‘conflict with the elements of judicial power’ of mandatory sentencing, one must ‘[l]eave aside ... whatever might be said about the wisdom or social utility of such a rule’.³²⁰ However, the incursion on judicial power cannot be considered in a vacuum. As his Honour went on to say, it is necessary to consider not only the restriction on the exercise of the sentencing discretion in the abstract, but what ‘it [is] about the court applying the law prescribed by Parliament that brings the court into disrepute’.³²¹ As noted in

³¹³ *Kruger v Commonwealth* (1997) 190 CLR 1, 62–3 (Dawson J), 80 (Toohey J); *Northern Territory v GPAO* (1999) 196 CLR 553; *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 334 [18] (Gaudron J).

³¹⁴ *Criminal Code Act 1899* (Qld) sch 1 s 305; *Criminal Code Act 1983* (NT) sch 1 s 157; *Criminal Law Consolidation Act 1935* (SA) s 11. For another example of mandatory penalties imposed by state legislation, see *Transport Operation (Road Use Management) Act 1995* (Qld) s 79(1C).

³¹⁵ Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: *Engineers’ Case* and Federalism’ (2002) 76 *Australian Law Journal* 678, 714. Professor Emeritus Walker also noted that ‘[t]he result in *Kable* could have been reached on the simpler and sounder ground ... that British colonial legislatures had never been invested with judicial power, and attainer-type laws are predominantly judicial’: at 714 n 239. The fact that it was not is significant.

³¹⁶ *New South Wales v Commonwealth* (1915) 20 CLR 54, 88 (Isaacs J). See also *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540 (Viscount Simonds for Viscounts Simonds and Kilmuir LC, Lords Morton, Tucker, Cohen, Keith and Somervell) (*‘Boilermakers’ Case*).

³¹⁷ See above Part IIA2.

³¹⁸ *National Service Act 1951* (Cth) s 49(2)(b).

³¹⁹ *Criminal Code Act 1899* (Qld) sch 1 s 305(1); *Criminal Code Act 1983* (NT) sch 1 s 157(1); *Criminal Law Consolidation Act 1935* (SA) s 11.

³²⁰ Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998). See Manderson and Sharp, above n 306, 588–9.

³²¹ Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998).

the United Kingdom, 'the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state'.³²² Of course, the fact that an Act detracts from public confidence in the courts does not of itself render it invalid.³²³ However, an incursion on judicial power will be impermissible if it is 'of such a nature that public confidence in the integrity of the judiciary as an institution ... is diminished'.³²⁴ That integrity requires both actual and apparent independence and impartiality.³²⁵ Where the Parliament requires a court to impose a penalty that is manifestly unjust, it may deprive it of that appearance.

The potential weakness of this argument is of course that it verges on requiring an assessment of the policy merits of specific laws, which is no ground for a finding of unconstitutionality. The *Kable* principle, by analogy, focuses on 'constitutional legitimacy' and is not 'an invention of a method by which judges may wash their hands of the responsibility of applying laws of which they disapprove'.³²⁶ This argument could be met, somewhat ironically, with the criticism that it imports an evaluation of a legislative nature into the judicial consideration. However, much time has passed since it was first acknowledged that judges create law and often have regard to policy considerations in doing so.³²⁷ In any event, it need only do so insofar as it compares the consequence of the legislation with the ordinary outcome demanded by common law sentencing principles in the process of determining the degree to which it

³²² *Jennings v Crown Prosecution Service* [2006] 1 WLR 182, 198 [56] (Laws LJ), affd [2008] 1 AC 1046, quoted in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 365 [92] (Gummow and Bell JJ).

³²³ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ); Mason, above n 171, 25.

³²⁴ *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ), quoted in *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 (Toohey J); *Wainohu v New South Wales* (2011) 243 CLR 181, 206 [38] (French CJ and Kiefel J). See also *South Australia v Totani* (2010) 242 CLR 1; Mason, above n 171, 24.

³²⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ), citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7]–[8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

³²⁶ *Baker v The Queen* (2004) 223 CLR 513, 519 [6] (Gleeson CJ).

³²⁷ See, eg, *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178 (Denning LJ); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1032 (Lord Reid); *Williams v New York*, 127 NE 2d 545, 550 (Froessel J) (NY Ct App, 1955); *Andrews v Parker* [1973] Qd R 33, 104 (Stable J); *Perre v Apand* (1999) 198 CLR 180, 199–200 [31]–[33] (Gaudron J); Justice Michael McHugh, 'The Law-Making Function of the Judicial Process: Part II' (1988) 62 *Australian Law Journal* 116. On the desirability of that approach, see Robert N Clinton, 'Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society' (1982) 67 *Iowa Law Review* 711; Jack G Day, 'Why Judges Must Make Law' (1976) 26 *Case Western Reserve Law Review* 563.

interferes, in actual terms, with the exercise of the sentencing discretion in the range in which it might otherwise be exercised. In light of these considerations, it may be that a mandatory minimum of five years' imprisonment for people smuggling encroaches too far on the 'essentially judicial function' of sentencing. If it does not, then it says not so much about the virtue of these laws as the weakness of the constitutional protections against them.³²⁸

IV CONTRIBUTING FACTORS AND AREAS FOR REFORM

A *The Parliament*

The most obvious starting point for reform is the legislature. It is instructive at this point to observe the rapid and unsatisfactorily explained changes that have occasioned the situation criticised above in order to ascertain what needs to be undone.

1 *Penalties for People Smuggling*

For the best part of the 20th century, the offence of people smuggling carried a maximum penalty of two years' imprisonment.³²⁹ In July 1999, that penalty was increased to 10 years,³³⁰ or 20 years if the offence involved aiding five or more people.³³¹ In 2001, the same Act which retrospectively validated the government's dealings with the *MV Tampa* to preclude a High Court appeal³³²

³²⁸ Sir Anthony Mason, former Chief Justice of the High Court, said of the proposition that the judicial function in sentencing *necessarily* entails a sufficient element of discretion ... [u]nfortunately, the cases do not lend support to that proposition. ... Draconian legislation of this kind strengthens my view that it is time that we joined the other nations of the Western world in adopting a Bill of Rights.

Mason, above n 171, 28–30 (emphasis added). The symposium occurred before many of the developments referred to, so Mason's observation does not entirely deprive our arguments of their force.

³²⁹ *Migration Act* s 233, later amended by *Migration Legislation Amendment Act (No 1) 1999* (Cth) sch 1 item 6.

³³⁰ *Migration Legislation Amendment Act (No 1) 1999* (Cth) sch 1 item 6, amending *Migration Act* s 233.

³³¹ *Migration Legislation Amendment Act (No 1) 1999* (Cth) sch 1 item 5, inserting *Migration Act* s 232A.

³³² *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) ss 5(a), 6; Explanatory Memorandum, *Border Protection (Validation and Enforcement Powers) Bill 2001* (Cth) [6]–[7]. The challenge in the Federal Court had been successful but was reversed by the Full Court: *Ruddock v Vadarlis* (2001) 110 FCR 491. See also *R v Disun* (2003) 27 WAR 146, 151 [20] (Anderson J). This legislation was enacted to preclude the possibility of a further appeal to the High Court: *Border Protection (Validation and Enforcement Powers) Act 2001*

introduced the first mandatory minimum sentences for people smuggling offences — five years with a three-year non-parole period, increased to eight years with a five-year non-parole period for repeat offenders.³³³ This higher mandatory penalty was extended in 2010 to any cases involving a danger of death or serious harm.³³⁴ The only charges brought under this section to date have been in respect of voyages that either actually caused death or were organised after another voyage that did so,³³⁵ but a wider application is not inconceivable given the perilous nature of most such voyages.³³⁶ The mandatory term of imprisonment was justified only by reference to the seriousness of offences as reflected by the high maximum penalties created a decade earlier.³³⁷

2 Definition of People Smuggling

The same amending legislation that drove these increases in sentences also broadened the scope of the offences to which they were applicable. By the end of the same year that the maximum sentence was increased by a factor of ten, the requisite mens rea was reduced from actual knowledge to recklessness³³⁸ in order to ensure that offenders could not ‘avoid liability ... on the basis that they did not have technical knowledge that the people being trafficked would

(Cth) s 7(1). Justice Gaudron expressed reservations about the constitutionality of such an endeavour, but the action having been rendered moot by the government subsequently transferring the passengers to New Zealand or Papua New Guinea, it was not useful to consider that proposition. Note in this respect Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, M93/2001, Hayne J, 29 October 2001) (granting request for expedited application for special leave); Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, M93/2001, Gaudron, Gummow and Hayne JJ, 27 November 2001).

³³³ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) sch 2 item 5, inserting *Migration Act* s 233C. The captain of the boat whose passengers boarded the *MV Tampa* was sentenced to seven years with a minimum of three years without parole: *R v Disun* (2003) 27 WAR 146, 149 [10], 151–2 [21]–[28] (Anderson J), 153 [30] (Templeman J).

³³⁴ *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 8, inserting *Migration Act* s 233B. See also *Criminal Code* s 73.2; Explanatory Memorandum, *Anti-People Smuggling and Other Measures Bill 2010* (Cth) 16. The increased penalty was ‘to reflect the serious nature of this offence’.

³³⁵ Transcript of Proceedings, *R v A K H* (District Court of Western Australia, Scott DCJ, 22 October 2012) 2.

³³⁶ As to the dangers of depending on the exercise of prosecutorial discretion in good faith, see below Part IVC, in particular at n 441.

³³⁷ Explanatory Memorandum, *Anti-People Smuggling and Other Measures Bill 2010* (Cth) 17.

³³⁸ *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 51.

become, in Australia, “unlawful non-citizens”.³³⁹ In 2008, an evidential burden was placed on the accused to prove that visa exemptions applied.³⁴⁰ In 2010, the definition of ‘repeat offence’ was extended to allow the higher mandatory penalty to apply to those facing court for the first time for multiple offences as well as those who had already been convicted of an offence.³⁴¹ The reference to the visa exemptions was removed altogether, as was the availability of the defence of mistake of fact in both the ordinary and aggravated offence.³⁴² Further offences of supporting people smuggling and concealing and harbouring non-citizens were also created, each punishable by ten years’ imprisonment,³⁴³ and other amendments conferred broader investigative powers on authorities.³⁴⁴

The 2010 amendments also saw the words ‘people smuggling’ introduced into the division for the first time.³⁴⁵ There is of course no requirement that the people be ‘smuggled’ as such — the offences as they currently stand require only that the person ‘[organise] or [facilitate] the bringing or coming to Australia.’³⁴⁶ Offenders face the same sentence even where they openly bring asylum seekers to Australian authorities for consideration. In *R v Pot*, for example, the three defendants sentenced were openly ‘transporting the

³³⁹ Explanatory Memorandum, Border Protection Legislation Amendment Bill 1999 (Cth) 48 [37]. ‘Unlawful non-citizen’ means any person on Australian land or seas who is neither an Australian citizen nor holds a valid visa: *Migration Act* ss 5, 13, 14.

³⁴⁰ *Migration Legislation Amendment Act (No 1) 2008* (Cth) sch 3 item 12, inserting *Migration Act* s 232A(2).

³⁴¹ *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 10, amending *Migration Act* s 236B(5) to include an offence against s 233C as an offence that may give rise to a ‘repeat offence’. See also Explanatory Memorandum, *Anti-People Smuggling and Other Measures Bill 2010* (Cth) 16–17.

³⁴² *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 8, repealing *Migration Act* ss 232A–233C and inserting ss 233A–233E. The effect of this was to move old s 232A to s 233C, and old s 233 to s 233A, with amendments so that the sections reflect each other in particular subs-ss (1)(c), (2)–(3). See also *Criminal Code* ss 5.6(1)–(2); Explanatory Memorandum, *Migration Legislation Amendment (Application Of Criminal Code) Bill 2001* (Cth) 17 [105].

³⁴³ *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 8, inserting *Migration Act* ss 233D–233E. These offences are not the subject of mandatory minimum sentences.

³⁴⁴ See amendments in *Anti-People Smuggling and Other Measures Act 2010* (Cth) to *Telecommunications (Interception and Access) Act 1979* (Cth), *Surveillance Devices Act 2004* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth).

³⁴⁵ *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 7.

³⁴⁶ *Migration Act* ss 233A, 233C.

non-citizens to Australia for presentation to Australian authorities' with 'no attempt to hide from the authorities or disguise what they had done.'³⁴⁷

A further Bill assented to on 29 November 2011 served to 'clarify'³⁴⁸ that the words 'no lawful right to come to Australia' do not prevent a person being criminally responsible for people smuggling if Australia has an obligation under the *Refugees Convention* to accept them.³⁴⁹ The result is that courts are obliged to sentence a person who assists five or more genuine refugees to seek the asylum to which they are entitled under international law to at least three years in custody.

3 *Proposed Repeal*

In February 2012, a Bill was introduced in the Senate that proposed to repeal s 236B and, with it, the mandatory sentences for people smuggling offences.³⁵⁰ Although the submissions, with the exception of those submitted by the Attorney-General and the CDP, were overwhelmingly in favour of the repeal of the mandatory sentencing provisions,³⁵¹ the Senate inquiry recommended against the passage of the Bill.³⁵² However, it recognised the injustices produced by the current legislation, and suggested that courts be given discretion to impose a lower sentence where it is 'clearly unjust' or in the case of 'boat crew members ... [who] have limited culpability and mitigating circumstances'.³⁵³ These proposals would undoubtedly mitigate the effect of the current legislation, but they have been criticised as effectively removing the mandatory minimum by unnecessarily clouding the questions of sentencing, which are best left, as such suggestions recognise in part, to the judiciary.³⁵⁴

³⁴⁷ Transcript of Proceedings, *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) 2.

³⁴⁸ Explanatory Memorandum, *Deterring People Smuggling Bill 2011* (Cth) 1.

³⁴⁹ *Deterring People Smuggling Act 2011* (Cth) sch 1 item 1, inserting *Migration Act* s 228B.

³⁵⁰ *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (Cth) sch 1 item 5.

³⁵¹ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, above n 7, 25 [1.7] (Sarah Hanson-Young).

³⁵² *Ibid* 23 [2.70].

³⁵³ *Ibid* 21 [2.61].

³⁵⁴ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 10 (George Williams).

B The Courts

1 Approaches to Mandatory Minimums

Even while the laws remain in place, however, there are options as to how they should be applied. There has been a degree of disagreement between jurisdictions as to how the mandatory minimum sentencing regime ought to be handled by the courts. The Northern Territory has preferred to apply sentencing principles at common law to reach a just penalty first, and then apply the statutory minimum if required.³⁵⁵ Chief Justice Riley noted that to displace the ordinary sentencing discretion of the court a 'clear expression of such an intention would be expected and is not present.'³⁵⁶ Such a clear expression of intention is present, for example, in South Australian legislation prescribing mandatory minimum non-parole periods for certain offences.³⁵⁷ For a time, decisions in Queensland followed this approach.³⁵⁸ However, in November 2011, the Western Australian Court of Appeal delivered *Bahar*, in which it preferred the exercise of the sentencing discretion between the two limits set by the legislature and reserved the mandatory minimum for the least serious offences.³⁵⁹ Queensland decisions since then have, sometimes reluctantly, reverted to this approach, which tends naturally to produce greater sentences.³⁶⁰ In March 2011, the Queensland Court of Appeal formally adopted the

³⁵⁵ Transcript of Proceedings (Sentence), *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) 4. See also Transcript of Proceedings (Sentence), *R v Tahir* (Supreme Court of the Northern Territory, 20918263, Mildren J, 28 October 2009) 4; Transcript of Proceedings (Sentence), *R v Dokeng* (Supreme Court of the Northern Territory, 21032177, Kelly J, 2 December 2010) 2; Transcript of Proceedings, *R v Suwandi* (Supreme Court of the Northern Territory, 21037950, Riley CJ, 18 February 2011) 3.

³⁵⁶ Transcript of Proceedings (Sentence), *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) 4.

³⁵⁷ *Criminal Law (Sentencing) Act 1988* (SA) s 32A(1). See *R v Ironside* (2009) 104 SASR 54.

³⁵⁸ See, eg, Transcript of Proceedings (Sentence), *R v Amin* (Supreme Court of Queensland, 917/2011, Devereaux DCJ, 14 October 2011); Transcript of Proceedings (Sentence), *R v Tambunan* (Supreme Court of Queensland, 184/2011, Byrne SJA, 15 April 2011); Transcript of Proceedings (Sentence), *R v Faek* (District Court of Queensland, 842/2011, Farr DCJ, 8 June 2011).

³⁵⁹ *Bahar* (2011) 255 FLR 80, 92–3 [54] (McLure P).

³⁶⁰ Transcript of Proceedings (Sentence), *R v Basuk* (Supreme Court of Queensland, 1050/2011, Shanahan DCJ, 24 November 2011) 2; Transcript of Proceedings (Sentence), *R v Hasim* (Supreme Court of Queensland, 1196/2011, Martin DCJ, 11 January 2012) 2; Transcript of Proceedings (Sentence), *R v Mimin* (Unreported, Supreme Court of Queensland, 1221/2011, Farr DCJ, 10 February 2012) 3; Transcript of Proceedings (Sentence), *R v Mulyono* (District Court of Queensland, 1209/2011, Martin DCJ, 3 February 2012) 3–4 (criticising the regime heavily but still adopting this approach).

Western Australian position in *R v Karabi* ('*Karabi*'), noting that it was 'obliged to follow the decision of another intermediate appellate court unless persuaded that it is plainly wrong'.³⁶¹

2 Consequences

What are the consequences of *Bahar*, which binds the trial division and forms a precedent for other jurisdictions?³⁶² In defining the limits of the 'least serious category of offending',³⁶³ it has been noted that the minimum sentence does not necessarily require a guilty plea,³⁶⁴ or that all mitigating factors be present.³⁶⁵ The contrary view is not without its advocates — Fenbury DCJ in *R v Hasanusi*, for example, considered that it was not open to his Honour to award the minimum mandatory sentence to a defendant who contested his innocence.³⁶⁶ This does not seem to be the approach that has taken hold.³⁶⁷ Accordingly, it was observed in *Bahar* that 'the result will be that there is a compression of sentences towards the lower end of the range'.³⁶⁸ Justice Philippides, who originally sentenced *Karabi*, has expressed the same view.³⁶⁹ Yet, it may be that the position taken in the recent Queensland authorities will result in higher sentences than the position taken in *Bahar*, given that Fraser JA has since doubted whether the approach that was adopted in *Karabi* should be taken to denote any greater 'compression' than that which occurs as

³⁶¹ [2012] QCA 47 (14 March 2012) [35] (Muir JA). See also *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [20] (Fraser JA); *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012) [41]–[42] (Fraser JA).

³⁶² See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

³⁶³ *Bahar* (2011) 255 FLR 80, 93 [55] (McLure P).

³⁶⁴ *Ibid* 91 [43] (McLure P); *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [21] (Fraser JA).

³⁶⁵ *Bahar* (2011) 255 FLR 80, 93 [55] (McLure P).

³⁶⁶ Transcript of Proceedings (Sentence), *R v Hasanusi* (District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 4.

³⁶⁷ See, eg, Transcript of Proceedings (Sentence), *R v Pandu* (District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 15; Transcript of Proceedings (Sentence), *R v Amin* (Unreported, Supreme Court of Queensland, Indictment No 917/11, Devereaux DCJ, 14 October 2011).

³⁶⁸ *Atherden v Western Australia* [2010] WASCA 33 (26 February 2010) [42]–[43] (Wheeler JA), cited in *Bahar* (2011) 255 FLR 80, 93 [56] (McLure P).

³⁶⁹ *Atherden v Western Australia* [2010] WASCA 33 (26 February 2010) [43] (Wheeler JA), cited in Transcript of Proceedings (Sentence), *R v Magang* (Supreme Court of Queensland, 298/2011, Philippides J, 22 March 2012) 9.

a natural result of reserving the maximum sentence for the most serious 'category' of offending.³⁷⁰

The yardstick of greatest certainty is the circumstances of Dahlan Karabi, who pleaded guilty to the aggravated offence of smuggling five people or more and was sentenced to six-and-a-half years' imprisonment.³⁷¹ Karabi was a 47-year-old Indonesian fisherman with a high school education and eight dependent children.³⁷² As is typical, he and two other crew members including his 16-year-old son transported six passengers on a 12-metre wooden fishing boat.³⁷³ The Court observed that the son probably accompanied the father on fishing expeditions that were no less hazardous than this trip,³⁷⁴ that the reward received by the appellant was not regarded as an aggravating factor,³⁷⁵ and that his involvement in the preparation was 'not ... of great significance in the scheme of things'.³⁷⁶ He had three prior convictions, including one for people smuggling,³⁷⁷ but the Court held that the need for deterrence in this case 'did no more than echo similar statements in previous decisions'. In his favour, there was a life jacket on board for each passenger, the boat was not nearly as overcrowded as most,³⁷⁸ and the defendant was himself making the trip out of fear of violent creditors and based on a belief — although mistaken — that that fear entitled him to asylum.³⁷⁹ Nonetheless, Muir JA, with whom Fraser and Chesterman JJA agreed,³⁸⁰ affirmed the sentence because his Honour was 'unable to conclude that the applicant's conduct falls within the least serious category of offending'.³⁸¹

³⁷⁰ *Nitu* [2012] QCA 224 (24 August 2012) [38]. See also *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012) [20]–[21] (Fraser JA); *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012) [42] (Fraser JA). Cf the dissent of the President: at [29] (McMurdo P).

³⁷¹ *Karabi* [2012] QCA 47 (14 March 2012) [1] (Muir JA).

³⁷² *Ibid* [3].

³⁷³ *Ibid* [5].

³⁷⁴ *Ibid* [18].

³⁷⁵ *Ibid* [10].

³⁷⁶ *Ibid* [19].

³⁷⁷ *Ibid* [4].

³⁷⁸ *Ibid* [5].

³⁷⁹ *Ibid* [16].

³⁸⁰ *Ibid* [39] (Fraser JA), [40] (Chesterman JA).

³⁸¹ *Ibid* [38].

3 Arguments

It remains only to ask whether these are the inexorable consequences of the statute, produced only by the sound and obligatory application of the law; or whether there is some flaw in such reasoning that could attract independent criticism. For we cannot, of course, expect our judiciary to employ creative measures to save us from the perils of undesirable but valid legislative endeavours.³⁸² In *Bahar* it was held that, regardless of judicial criticism, ‘a statutory minimum penalty, like a statutory maximum, is a legislative direction as to the seriousness of the offence.’³⁸³ Having referred to the lack of jurisprudence suggesting otherwise, the Court proceeded on the basis that mandatory minimum sentences should be treated the same way as maximum penalties.³⁸⁴ However, the reservation of the statutory minimum for the least serious category of offenders ‘suffers from a fatal flaw; that is, that it assumes that the limits set by the legislature on judges’ sentencing discretions are necessarily, by reason of that fact alone, just.’³⁸⁵ Experience has shown that is not the case.

If a constitutional requirement for parity can be found,³⁸⁶ it could perhaps be said that such a construction should be preferred in order to save the provisions from any conflict with that principle.³⁸⁷ However, the difficulty with that reasoning is that it would make sentences more proportionate as between offenders but less proportionate to the crime. Such an application of mandatory sentences contradicts the stated objective of sentencing for

³⁸² See *Tasmania v Commonwealth* (1904) 1 CLR 329, 358–60 (O’Connor J); *Eastman v The Queen* (2000) 203 CLR 1, 41–2 [134] (McHugh J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 569 [150] (Kirby J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 369 [885] (Callinan J) (*‘Work Choices Case’*).

³⁸³ (2011) 255 FLR 80, 91 [46] (McLure P). See also *Nitu* [2012] QCA 224 (24 August 2012) [37] (Fraser JA).

³⁸⁴ *Bahar* (2011) 255 FLR 80, 91 [46] (McLure P).

³⁸⁵ Transcript of Proceedings (Sentence), *R v Dokeng* (Supreme Court of the Northern Territory, 21032177, Kelly J, 2 December 2010) 3.

³⁸⁶ Although, as it seems more likely that it cannot, a justification in these terms is speculative in any event: see above n 291 and accompanying text.

³⁸⁷ *Acts Interpretation Act 1901* (Cth) s 15A. See, eg, *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 92–4 [246]–[251] (Gummow, Crennan and Bell JJ); *R v Hughes* (2000) 202 CLR 535, 555–6 [39]–[41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Pidoto v Victoria* (1943) 68 CLR 87, 109 (Latham CJ); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 493 (Barwick CJ); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 485–7 (Brennan and Toohey JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 509 [87] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

Commonwealth crimes of proportionality between crime and punishment.³⁸⁸ It would also see state incursions on individual liberty brought within power by being amplified rather than minimised. It is mandatory sentencing in its least favourable light, and should be resisted.

The principle of legality requires that the courts not impute to the legislature an intention to curtail individual rights or freedoms any further than is expressed in clear and unambiguous terms.³⁸⁹ In this regard, there is a distinction between statutory maximum and minimum sentences in their implications of each for punishment and deprivation of liberty. With maximum sentences, the legislature indicates the seriousness of an offence,³⁹⁰ and provides judges with an important yardstick;³⁹¹ it restricts the extent to which a person can be punished in relation to a certain offence where the circumstances warrant it. On the other hand, a statutory minimum mandates a certain level of punishment, even if not otherwise justified.³⁹² In light of the differing policy objectives of each, there are good reasons for treating maximum and minimum penalties in considerably different ways. The maxims of *favor rei* and *in dubio pro reo* require that the application of criminal law be uniformly subject to the resolution in favour of the accused of doubts in relation to law³⁹³ and fact respectively.³⁹⁴ In particular, the former requires

³⁸⁸ *Crimes Act 1914* (Cth) s 16A(1).

³⁸⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]–[20] (Gleeson CJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582–3 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Byrnes v The Queen* (1999) 199 CLR 1, 26 [50] (Gaudron, McHugh, Gummow and Callinan JJ). This consideration is integral to the approach taken in Transcript of Proceedings (Sentence), *R v Pot* (Supreme Court of the Northern Territory, 21037929, Riley CJ, 18 January 2011) and the line of authority that followed.

³⁹⁰ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 61.

³⁹¹ *Markarian v The Queen* (2005) 228 CLR 357, 372 [30]–[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

³⁹² See above Part IIA2(b).

³⁹³ See, eg, *Ex parte Manico; Re Manico* (1853) 3 De G M & G 502; 43 ER 197; *Henderson v Main* (1918) 25 CLR 358, 367 (Isaacs J); *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 291 (Kirby P). For international application of this principle, see, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2000) art 22(2); *Prosecutor v Akayesu (Sentencing Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [500]–[501]; *Prosecutor v Krstić (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T 2 August 2001) [502].

³⁹⁴ See, eg, *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC); *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ). On an international level, see also, eg, ICCPR art 14(2); ECHR art 6(2); ACHR art 8(2); African Charter art 7(2).

that, if there is any doubt as to which of the approaches to mandatory minimum sentences should be preferred — and it seems from the divergence between Northern Territory trial division judges and the Queensland and Western Australian Courts of Appeal that there is — the law should adopt the approach most favourable to the accused. Rightly or wrongly, it currently does not.

C The Prosecutor, the Commonwealth Director and the Attorney-General

Finally, if it is accepted that such periods of incarceration are excessive for such offenders, the discrepancy may in part be attributable to the exercise of prosecutorial discretion.³⁹⁵ It has been suggested that the legislation is aimed at prosecuting high-level organisers.³⁹⁶ In the words of the Minister for Home Affairs and Justice, the ‘focus is on the organisers of people smuggling activity, not the crew.’³⁹⁷ However, the majority of indictees have been crew members.³⁹⁸ In one recent trial of a boat captain and his crew, the cross-examination of the investigating detective revealed that his investigation was so uninterested in the organiser, who had been extensively discussed by other witnesses, that he did not even know his name.³⁹⁹

³⁹⁵ This observation can be directed at least at two levels. Although the CDPP is an ‘independent prosecuting agency’, it is subject to directions or guidelines given to it by the Attorney-General: *Director of Public Prosecutions Act 1983* (Cth) s 8(1). On the ‘large measure of independent discretion’ vested in individual Crown prosecutors, see *Vasta v Clare* (2002) 133 A Crim R 114, 116–17 [7], 117–18 [12] (de Jersey CJ).

³⁹⁶ Transcript of Proceedings (Sentence), *R v Jufri* (Supreme Court of Queensland, 300/2011, Atkinson J, 2 December 2011) 2.

³⁹⁷ Brendan O’Connor, ‘Cooperation with Indonesia on People Smuggling, Human Trafficking and Age Determination’ (Media Release, 6 December 2011). See also Peter Alford and Paul Maley, ‘Boat Traffic Flows Freely, Policy Stuck in a Jam’, *The Australian* (Sydney), 7 December 2011, 1.

³⁹⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, above n 7, 21 [2.61].

³⁹⁹ See Transcript of Proceedings, *R v Auli* (District Court of Queensland, 1973/2011, Shanahan DCJ, 16 May 2012) 61. Consider also the report by Four Corners on one organiser resident in Australia ‘right under the nose of police and immigration authorities’: ABC, ‘Smugglers’ Paradise: Australia’, *Four Corners*, 16 July 2012 (Sarah Ferguson and Deb Masters) <<http://www.abc.net.au/4corners/stories/2012/05/31/3515475.htm>>. See also below n 428.

1 Guidelines and Prosecutions

(a) Public Interest

The guidelines for prosecutions provide that '[i]t is not the rule that all offences brought to the attention of the authorities must be prosecuted'.⁴⁰⁰ Amongst the factors that determine whether it is in the public interest to proceed with a prosecution are the 'relative triviality of the alleged offence', 'whether the consequences of any resulting conviction would be unduly harsh and oppressive' including any 'special vulnerability of the alleged offender', the 'degree of culpability', and the 'availability and efficacy of any alternatives to prosecution'.⁴⁰¹ In light of the observations above, it can be said with some confidence that the people smuggling offences that have been tried are of relative triviality.⁴⁰² The harsh and oppressive consequences of conviction have been discussed,⁴⁰³ and it has been observed that the punitive effect of incarceration on such offenders is greater than it ordinarily would be.⁴⁰⁴ An immediately available alternative would be to deport people smugglers whom it is not expedient to prosecute, in addition to a forfeiture order depriving them of the proceeds of their voyage. Indeed, provision is already made for their detention until deportation,⁴⁰⁵ and prosecution requires the exercise of the Attorney-General's discretion to stay that deportation to allow 'the administration of criminal justice'.⁴⁰⁶

(b) Public Cost

This is a question of resources in the CDPP, as well as one of public interest. The cost of each people smuggling trial has been estimated at \$20 000.⁴⁰⁷

⁴⁰⁰ CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (November 2008) 6–7 [2.8] <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

⁴⁰¹ *Ibid* 7 [2.10].

⁴⁰² See above Part IIA1.

⁴⁰³ See above Part IIA2.

⁴⁰⁴ See above nn 53–61 and accompanying text.

⁴⁰⁵ *Migration Act* ss 189, 196.

⁴⁰⁶ *Ibid* s 147.

⁴⁰⁷ Answers to Questions Taken on Notice, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 February 2011, Question 71 (Attorney-General's Department) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/add_1011/ag/071_SID.pdf>; Ben Packham, 'States Struggle to Pay for Legal Costs of People Smuggling Cases', *The Australian* (online), 18 April 2011 <<http://www.theaustralian.com.au/national-affairs/states-struggle-to-pay-for-legal-costs>>.

Because most boats tend to carry significantly more than five people,⁴⁰⁸ most defendants are liable to the mandatory penalty, removing any incentive to plead guilty and save the state this expense.⁴⁰⁹ The number of trials steadily increased until recently, with the number of people before the courts nationally on people smuggling charges rising from 30 at the end of 2008–09,⁴¹⁰ to 102 at the end of 2009–10,⁴¹¹ to 304 at the end of the 2010–11 financial year.⁴¹² Other reports suggest 326 individuals were charged in 2011 alone.⁴¹³ Cases were referred to Victoria from the Northern Territory when the courts were unable to deal with the volume.⁴¹⁴ The portion of the CDPP budget expended on such trials was \$11.3 million from 2009 to 2011.⁴¹⁵ Further, most trials are defended at public expense,⁴¹⁶ consuming an additional \$4 million in 2011 alone.⁴¹⁷ Those expenses have included not only the conduct of trials to achieve the mandatory minimum penalty, but also appeals to further increase that sentence where it is considered inadequate.⁴¹⁸ In addition, the cost of imprisoning a person convicted of people smuggling for the mandatory minimum term is in excess of \$170 000 per person.⁴¹⁹ Quite aside from the public inconvenience, the increased volume of cases causes objectionable

-of-people-smuggling-cases/story-fn59niix-1226041046996>. Cf the more extravagant estimates of \$450 000 to \$750 000 per trial given by others: Christine Jackman, 'Caught in the Net', *The Weekend Australian Magazine* (Sydney), 16 April 2011, 14.

⁴⁰⁸ Victoria Legal Aid, 'Response to Deterring People Smuggling Bill 2011', above n 39, 14; Attorney-General's Department, Submission No 17, above n 23, 2.

⁴⁰⁹ Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7, 15.

⁴¹⁰ CDPP, *Annual Report 2008–09*, above n 80, 72.

⁴¹¹ CDPP, *Annual Report 2009–10*, above n 120, 60.

⁴¹² CDPP, *Annual Report 2010–2011*, above n 34, 84.

⁴¹³ Lanai Vasek and Sean Parnell, 'Pressure on Canberra to Pay for People-Smuggler Prosecutions', *The Australian* (online), 10 December 2010 <<http://www.theaustralian.com.au/national-affairs/pressure-on-canberra-to-pay-for-people-smuggler-prosecutions/story-fn59niix-1225968555400>>.

⁴¹⁴ Victoria Legal Aid, 'Response to Deterring People Smuggling Bill 2011', above n 39, 3.

⁴¹⁵ Australian Government, *Budget Measures: Budget Paper No 2 — 2009–10* (2009) 97.

⁴¹⁶ Victoria Legal Aid 'Response to Deterring People Smuggling Bill 2011', above n 39, 2 (53 of 55 Victorian prosecutions were publicly funded at the time the *Deterring People Smuggling Act 2011* (Cth) was passed).

⁴¹⁷ Lanai Vasek, 'Legal Aid for Crews Tops \$4m', *The Australian* (online), 19 April 2011 <<http://www.theaustralian.com.au/archive/national-affairs-old/legal-aid-for-crews-tops-4m/story-fn59nju7-1226041212968>>.

⁴¹⁸ See, eg, *R v Latif; Ex parte DPP* [2012] QCA 278 (19 October 2012).

⁴¹⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, above n 7, 13 [2.30].

delays to trials.⁴²⁰ Given the finite resources, there are serious questions over the social utility of devoting such expenditure to these prosecutions at the expense of serious Commonwealth crimes.

(c) *Rising Rate of Acquittals*

This situation is at its most concerning if substantial numbers of the persons detained are found not guilty. Although not a single defendant of the 54 charged between 2008 and 2010 was acquitted, there is an increasing trend of acquittals, with 30 of the 140 trials in the 2010–11 year ending other than by conviction, and that figure rising to more than half of the cases in 2012 (only 68 convictions from 151 cases). That is, of all cases heard since 2008, more than one third have not yielded convictions.⁴²¹ If those charged are not guilty of the offence, then the lengthy pre-trial detention is regrettable and substantial expenditure is misguided. However, given the nature of the offence and certainty of arrest this hypothesis seems inherently unlikely. It has been postulated that such acquittals are entered in the knowledge of the severe penalties mandated by law, out of ‘sympathy ... shown to these people once the jurors realise how insignificant a role they play and where they actually really do not understand the full extent of the criminality.’⁴²² On one occasion, a jury passed a note to the judge to ask about the penalty to which a guilty verdict would expose the defendants, and proceeded to acquit them after being informed of the mandatory minimum.⁴²³ Juries have something of a history of entering acquittals in nullification of laws that they consider to be extremely unjust.⁴²⁴ If that is the case, then it shows the disapproval of the informed public of the nature of the laws and the exercise of prosecutorial discretion.

⁴²⁰ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 1 (Phillip Boulten). On the effect of mandatory sentencing of causing added delays and expense, see Cumaraswamy, above n 409, 14–15. As to the consequent breaches of the rights of the accused to a prompt trial and not to be arbitrarily detained, see above Part IIIA1.

⁴²¹ CDPP, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, above n 24, 3.

⁴²² Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 16 March 2012, 2 (Phillip Boulten).

⁴²³ See Transcript of Proceedings, *R v Auli* (District Court of Queensland, 1973/2011, Shanahan DCJ, 17 May 2012) 4–9.

⁴²⁴ For a detailed discussion on this point, see Steven M Warshawsky, ‘Opposing Jury Nullification: Law, Policy and Prosecutorial Strategy’ (1996) 85 *Georgetown Law Journal* 191.

2 Recent Developments

Following the release of the Houston Report,⁴²⁵ the Attorney-General issued a direction to the CDPP not to institute or continue any prosecution for the aggravated offence of smuggling five or more people, unless the person was a repeat offender or more than a crew member, captain or master of a vessel, or if a death occurred.⁴²⁶ Instead, such offenders are to be charged with the *simpliciter* offence of smuggling a single person, which attracts half the maximum penalty and, notably, no mandatory minimum.⁴²⁷ This is a commendable move that will go a long way towards restoring justice in these cases, and focusing on high-level organisers rather than low-level crew.⁴²⁸ It was welcomed from the Bench by the Chief Judge of the District Court of Queensland, ‘congratulat[ing] the Director on such a vital response [and] improvement in the administration of justice’.⁴²⁹ Its consequence has been that a number of defendants have been given a sentence shorter than the time already spent in custody, and deported immediately.⁴³⁰

However, the direction is not a complete solution insofar as it applies only to sentences passed after it was made.⁴³¹ A spokesperson for the Attorney-General’s Department said that ‘[t]he Government ... decided to act swiftly to implement one of the panel’s recommendations — to restore discretion to

⁴²⁵ Houston Report, above n 8.

⁴²⁶ Commonwealth, *Gazette: Government Notices*, No GN 35, 5 September 2012, 2318.

⁴²⁷ *Migration Act* s 233A.

⁴²⁸ See, eg, the sentence of an Iraqi-Australian organiser based in Indonesia: Transcript of Proceedings, *R v A K H* (District Court of Western Australia, Scott DCJ, 22 October 2012). However, this conviction came about not because of a formal extradition, but after the defendant bribed Indonesian prison authorities and travelled to Australia: at 9. See also text accompanying above nn 113–14.

⁴²⁹ Transcript of Proceedings, *R v Bahri* (District Court of Queensland, 351/2012, Wolfe CJDC, 29 August 2012) 8.

⁴³⁰ Transcript of Proceedings (Sentence), *R v Rifai* (District Court of New South Wales, 2011/352985, Blanch CJDC, 29 August 2012) (14 months in pre-sentence custody); *R v Bahri* (Verdict and Judgment Record, District Court of Queensland, 351/2012, Wolfe CJDC, 3 September 2012) (17 months in pre-sentence custody); *R v Mulik* (Verdict and Judgment Record, District Court of Queensland, 1239/2012, Dick DCJ, 17 September 2012) (13 months in pre-sentence custody); *R v Resmid* (Verdict and Judgment Record, District Court of Queensland, 846/2012, Shanahan DCJ, 20 September 2012) (18 months in pre-sentence custody); *R v Djunina* (Verdict and Judgment Record, District Court of Queensland, 947/2012, Rafter DCJ, 21 September 2012) (17 months in pre-sentence custody); *R v Ali* (Verdict and Judgment Record, District Court of Queensland, 680/2012, Rafter DCJ, 21 September 2012) (23 months in pre-sentence custody).

⁴³¹ Commonwealth, *Gazette: Government Notices*, No GN 35, 5 September 2012, 2318.

Australian courts in regard to people-smuggling offences'.⁴³² Unfortunately, this leaves those sentenced prior to 27 August 2012 serving mandatory terms of imprisonment that two arms of government have accepted to be unjust. At least two such sentences have since been *increased* by the Court of Appeal.⁴³³ This would seem to open the door for other sentences imposed before this date and under the former approach to sentencing to be increased.⁴³⁴ If the approach in *Bahar* and *Karabi* is accepted,⁴³⁵ then the responsibility to avoid such a bizarre outcome falls to the CDPP to exercise its discretion properly and consistently, or to the Attorney-General to mandate that it be so exercised. It is well-established that 'prosecutorial discretion may be exercised to refrain from charging in accordance with some adopted policy but once a matter is brought before a court it must be determined according to applicable law'.⁴³⁶

Further, it is rather an oblique solution that rests on charging defendants for smuggling a single person, even where they are invariably involved in the transportation of many. A direction of that nature is easily susceptible to revocation, especially in the event of a change of government. In the absence of such a direction, the CDPP itself has not shown any inclination to refrain from such prosecutions; to the contrary, its reaction to the direction suggests that it is reluctant to accept the lower sentences in which it inevitably results. When the Crown attempted to delay the first sentence following the issue of the direction so that a 'consistent' approach could be taken, the Chief Judge of the Queensland District Court observed that it 'smel[t] of judge-shopping'.⁴³⁷ In the end, there was nothing particularly consistent about the approach except the goal of severity in sentencing. One argument raised by the Crown is that the introduction of the aggravated offence of smuggling five or more people had the effect of amplifying the sentencing range for the *simpliciter*

⁴³² Margaret Scheikowski, 'Judges Get Their Way on People Smugglers', *The Sydney Morning Herald* (online), 10 September 2012 <<http://news.smh.com.au/breaking-news-national/judges-get-their-way-on-people-smugglers-20120910-25o07.html>>.

⁴³³ *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012); *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012).

⁴³⁴ See, eg, above n 358.

⁴³⁵ And it may not be: see above Part IIIB3.

⁴³⁶ *R v Stringer* (2000) 116 A Crim R 198, 201–2 [18] (Grove J) (prosecution for sodomy after decriminalisation of homosexual acts between consenting males).

⁴³⁷ Transcript of Proceedings, *R v Bahri* (District Court of Queensland, 351/2012, Wolfe CJDC, 29 August 2012) 7. See generally at 1–7.

offence of smuggling a single person.⁴³⁸ Conversely, other prosecutors sought heavier sentences based on the number of passengers on board, an ‘artificial’ argument given the basis of the *simpliciter* charge.⁴³⁹ Although prevented from initiating new prosecutions under the provisions to which mandatory sentences apply, it has pursued appeals against inadequate sentences previously imposed under that section.⁴⁴⁰

This step by the Attorney-General can only sensibly be considered a temporary fix en route to a more permanent and secure solution. To enact unduly broad legislation in the trust that executive discretion will be properly exercised is, after all, an unsatisfactory approach to governance.⁴⁴¹ It follows that the comments directed at the CDPP and the Attorney-General can only be secondary to those directed at the legislature.

V CONCLUSION

The dialogue on mandatory sentences for people smugglers is not unlike the 16th century debate recalled by Sir Thomas More in his satire *Utopia*. Having noted the incredulity of an English lawyer at the number of thieves who continue to offend, despite the pleasing numbers of those hanged daily,⁴⁴² he replies that

there was no reason to wonder at the Matter, since this way of punishing Thieves was neither just in it Self, nor good for the Publick; for as the Severity was too great; so the Remedy was not effectual; simple Theft not being so great

⁴³⁸ Transcript of Proceedings, *R v Bahri* (District Court of Queensland, 351/2012, Wolfe CJDC, 3 September 2012).

⁴³⁹ Transcript of Proceedings, *R v Resmid* (District Court of Queensland, 846/2012, Shanahan DCJ, 20 September 2012) 7.

⁴⁴⁰ See *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345 (7 December 2012), heard on 19 November 2012, nearly two months after the direction was issued on 27 August 2012: Commonwealth, *Gazette: Government Notices*, No GN 35, 5 September 2012, 2318. In the other appeal, *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278 (19 October 2012), judgment was delivered after, but the matter was argued on 20 July 2012, before the direction was issued.

⁴⁴¹ See, eg, J R Spencer, ‘The *Sexual Offences Act 2003*: Child and Family Offences’ [2004] *Criminal Law Review* 347 (criticising a law which criminalises all kissing and intimate touching between children under 16 on the understanding that there will not be a prosecution unless there is evidence of exploitation or abuse). See also *R v Smith* [1987] 1 SCR 1045 (exercise of prosecutorial discretion no remedy for constitutional invalidity of mandatory sentencing laws).

⁴⁴² Sir Thomas More, *Utopia* (Gilbert Burnet trans, Rose and Crown, 1684) 15 [trans of: *Libellus Vere Aureus, nec Minus Salutaris quam Festivus, de Optimo Rei Publicae Statu deque Nova Insula Utopia* (first published 1516)].

a Crime that it ought to cost a Man his Life; and no Punishment how severe soever, being able to restrain those from robbing who can find out no other way of livelihood ...⁴⁴³

There are many questions to be answered in the defence of the mandatory minimum sentences imposed on people smuggling offenders. The incursion on judicial power is, at least on one view, offensive to the separation of powers under the *Constitution*. The incursion on human rights is offensive to, and certainly not supported by, any principles of international law. Whatever its legality, however, the punishment the regime imposes is objectionable in that it greatly exceeds both the iniquity of the offence and the culpability of the typical offender. There is little evidence that people smuggling is a crime that requires such draconian measures in the name of deterrence, and even less evidence that those measures achieve it. Instead, the scheme results primarily in the lengthy imprisonment of uneducated, uninformed and profoundly unindictable men, at a great human expense to themselves and their families, and with no identifiable benefit to the community. As posited by the JCA, '[t]he question for the Parliament is whether those injustices are a price which must be paid if the desired policy is to be implemented.'⁴⁴⁴ This article has sought to illustrate that they are not. It has also sought to extend further questions to other arms of government, as to whether the execution and application of the law unduly exacerbates those injustices where options are available which are preferable both in principle and in consequence. Whatever might turn on such questions, however, their answers could only mitigate, not eliminate, the situation, and they are by their nature secondary to that demanded of the legislature. Whether by reason of its legal invalidity or factual undesirability, the interests of justice, the legitimacy of the courts and the human rights credentials of the government would gain much from the repeal of the mandatory sentencing regime.

⁴⁴³ Ibid 16.

⁴⁴⁴ JCA, above n 15, 3.