EASY SCAPEGOATS AND SIMPLISTIC REACTIONS: THE CONTINUING SAGA OF MANDATORY SENTENCING

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Since 1996, there have been two main targets of discussion with respect to mandatory sentences in Australia: Western Australia's 'three strikes' home burglary laws (introduced in late 1996) and the Northern Territory's minimum penalties for a range of property offences (introduced in March 1997). However, there have also been other developments. In Western Australia, the ground has been laid for the introduction of a 'sentencing matrix' akin to the grids which operate in some US jurisdictions. Contemporaneously, there have been debates about the role of guideline judgments, developed by the courts, as a means of structuring sentencing discretion and providing suggested ranges of sentence.

This paper builds on earlier thematic reviews[1] and analyses mandatory sentences in the light of debates and developments over the past two years. Over this time, there have been new reviews[2] and journal articles (both critical and supportive) on the general role and impact of mandatory sentences[3] and their constitutionality[4] and compliance with Australia's international obligations.[5] Just two years after an earlier report, the Senate Legal and

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1. N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going? (2000) 24 *Crim LJ* 164; see also N Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 UNSWLJ 267.
2. These include Northern Territory Aboriginal Legal Aid Service (NAALS), *Dollars Without Sense: A Review of the NT's Mandatory Sentencing Laws'* (Darwin: NAALS, 2000); N Morgan, H Blagg and V Williams, *Mandatory Sentencing in Western Australia and the Impact on Indigenous Youth* (Perth: Aboriginal Justice Council of Western Australia, 2001) – available at http://www.waajc.org.au; Western Australian Department of Justice, *A Review of Section 401 of the Criminal Code* (Perth: Department of Justice, 2001) - available at http://www.justice.wa.gov.au.
3. A useful collection of essays is contained in a '*Special Issue: Mandatory Sentencing; Rights and Wrongs'* (Papers from the Mandatory Sentencing Symposium, University of New South Wales, 28 October 2000) (2001) 7(2) *Australian Journal of Human Rights*. The conference papers are generally critical of mandatory sentences (see especially the essays by M Langton, D Brown, W Tilmouth and E Wynne) but include a defence of mandatory sentences by then Attorney General for Western Australia, P Foss. Another advocate is M Bagaric, 'Consistency and Fairness in Sentencing: The Splendor of Fixed Penalties' (2000) *California Criminal Law Review* 1.
4. Recent articles on constitutional issues and mandatory sentences include G Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74(5) ALJ 298 and N Manderson and N Sharp, 'Mandatory sentences and the Constitution: Discretion, Responsibility and the Judicial Process.' (2000) 22(4) Syd LR 585.
5. For a recent summary, see C Cuneen, 'Mandatory Sentencing and Human Rights' [2002] 13 Current Issues in Criminal Justice 322.

Constitutional References Committee has again examined the question[6] and mandatory sentencing and grid schemes have featured prominently in general reviews of sentencing in Victoria and New South Wales.[7] There have also been significant legislative changes both in the Northern Territory and federally. In brief, the main developments have been as follows:

Northern Territory

- In mid – 2000, legislation was introduced to mitigate the impact of the mandatory minimum penalty regime by increasing the age of adulthood from 17 to 18 and to develop more diversionary options.
- In October 2001, the mandatory minimum regime for property offences was abandoned. It has been replaced by a scheme that still limits judicial discretion but is far more flexible.

Western Australia

- In November 2000, legislation was enacted to permit the introduction of the first two stages of a 'Sentencing Matrix'. The third (and tightest) stage was rejected. However, a new government was elected in February 2001 and the matrix provisions have not been proclaimed.
- In late 2001 and early 2002, the State government vigorously defended the three strikes home burglary laws against stringent criticism and stated that it remains committed to the laws.

Commonwealth Legislation

- In March 2002, the Senate Legal and Constitutional References Committee reported on the *Human Rights (Mandatory Sentencing of Property Offences) Bill* 2000. This Bill no longer has pertinence to the Northern Territory but would have the effect of overriding Western Australia's laws on the basis that they conflict with Australia's international obligations. The Report was highly critical of Western Australia's three strikes laws but the majority view was that the Bill should not proceed and that the State government should be given the opportunity to address the 'deleterious effect of mandatory sentencing on indigenous youth.' However, the Committee did promise to revisit the issue if the State government chooses to ignore the problem.
- In October 2001, the Commonwealth Parliament enacted new 'border control' laws. These include tough mandatory minimum penalties for some offences under the *Migration Act* 1958.

In many respects, the landscape has therefore altered in the last two years, in some rather unpredictable ways. This paper first discusses the terms and scope of the new Northern Territory and Commonwealth laws and outlines the current 'state of play' in Western Australia. It then analyses a range of themes and issues surrounding the impact of mandatory sentences in general,

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[6]. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Property Offences) Bill 2000* (Canberra: Parliament of Australia, March 2002)

[7]. A Freiberg, *Sentencing Review: Discussion Paper* (Victoria: Department of Justice, 2001) – available at www.sentencing.review@justice.vic.gov.au; R Johns, *Sentencing Law: A Review of Developments in 1998 – 2001*, Briefing Paper No 2/02 (Sydney: NSW Parliamentary Library 2002).

and the Western Australian laws in particular. The conclusion reflects on the current landscape. It argues that debates about the role of judicial discretion and techniques for statutory regulation will not go away and canvasses likely future challenges.

In order to place the more recent developments in their broader historical context, Table One provides a 'timeline' of key events in the mandatory sentencing saga from November 1996 to March 2002.

Table One
Key Events November 1996 to April 2002

November 1996	Western Australia	Mandatory minimum of 12 months introduced for third strike home burglars.
February 1997	Western Australia	Children's Court rules that it can impose a Conditional Release Order (minimum 12 months) in lieu of immediate detention.
March 1997	Northern Territory	Mandatory minimum penalties introduced for a range of property offences.
October 1998	Western Australia	Bill introduced for the development of a 'sentencing matrix.' (Bill also heralds major changes to parole and remission laws). Chief Justice responds with an unprecedented report to Parliament.
October 1998	New South Wales	Court of Criminal Appeal launches the first formally 'tagged' guideline judgment in Australia, to considerable publicity. The Court subsequently hands down further such judgments.
May 1999	Western Australia	Provisions relating to the proposed Sentencing Matrix are split from those relating to parole and remission. The Sentencing Matrix Bill is then referred to the Legislative Council Standing Committee on Legislation.
July 1999	Northern Territory	Court-initiated diversion scheme introduced for second strike juveniles and a restricted 'exceptional circumstances' exception for first strike adults
August 1999	Common-wealth	*Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999 introduced in Senate.
February 2000	Northern Territory	A 15 year old boy, sentenced under the Territory's mandatory laws, commits suicide in a Darwin detention centre. This, and examples of grossly disproportionate sentences under those laws, attract national media attention.
March 2000	Common-wealth	Senate Legal and Constitutional References Committee hands down its report on the *Human Rights (Mandatory Sentencing of Juveniles) Bill* 1999.
March/ April 2000	Common – wealth	*Human Rights (Mandatory Sentencing of Juveniles) Bill* passed by Senate. Labor Party then introduces an equivalent Bill in House of Representatives. However, neither Bill proceeds as Federal (Liberal/National) Government reaches a 'deal' with the Northern Territory to fund more diversionary schemes.

June 2000	Northern Territory	Age of adulthood for the purposes of the criminal law was raised from 17 to 18.
July 2000	Northern Territory	*Police Administration Amendment Act* 2000 enacted to permit police-initiated diversion by cautioning or referral to a 'pre court diversionary programme.'
September 2000	Common-wealth	*Human Rights (Mandatory Sentencing of Property Offences) Bill* introduced but debate adjourned to May 2001.
October/ November 2000	Western Australia	The Standing Committee on Legislation of the Legislative Council reports on the proposed matrix. After extensive debates and political deals, the third (and tightest) stage is rejected. Legislation for the first two stages is enacted.
February 2001	Western Australia	Labor Party elected to office in State election. New government's platform includes commitment to retaining three strikes laws but not to the matrix.
August 2001	Northern Territory	Labor Party elected to office in Territory election. New government's platform includes opposition to mandatory sentencing laws.
October 2001	Northern Territory	Mandatory minimum sentencing regime abolished. Courts to have broad discretion with respect to children. Adults convicted of an 'aggravated property offence' must be given a term of imprisonment or community work order unless exceptional circumstances exist.
October 2001	Common – wealth	In the run up to a Federal election (mid-November) and during a 'moral panic' about unauthorized arrival of applicants for refugee status, new border control laws introduce tough minimum penalties for certain offences under the *Migration Act* 1958.
November 2001	High Court	In *Wong*,[8] High Court held that guideline judgments cannot be handed down in the case of Federal offences; and raises questions about their role under State legislation, especially if there is no enabling legislation.
November/ December 2001	Western Australia	Reviews of three strikes laws handed down by the Department of Justice and the Aboriginal Justice Council of Western Australia, the latter being very critical. State government accepts that the laws did not reduce burglary rates and impact disproportionately on Indigenous youth but says they will be retained.
March 2002	Common-wealth	The Senate Legal and Constitutional References Committee Report on the *Human Rights (Mandatory Sentencing of Property Offences) Bill* is very critical of the WA laws. However, majority recommend that the Bill should not proceed and that the State government should address the deleterious impact of the laws on Indigenous youth.

[8] . [2001] HCA 64

Developments in the Northern Territory

- **Prior to 22 October 2001**

Prior to 22 October 2001, the Northern Territory legislation prescribed mandatory minimum penalties for a wide range of property offences, including stealing, burglary, damage and robbery (but excluding fraud). As shown in Table Two, the minimum penalties escalated according to the number of prior strikes. However, juveniles were subject to a less strict regime than adults and the laws only applied to those aged 15 and over. From July 2000, the Northern Territory legislation also provided a framework for the diversion of juveniles through police cautioning and community supervision schemes.[9] As a consequence of the legislative changes in October 2001, the Senate Legal and Constitutional References Committee did not analyse the availability and effectiveness of these diversionary options but, in evidence to that Committee, a number of organisations did express concern at their lack of coverage.[10]

Table Two
Property Offences in the Northern Territory: Pre-22 October 2001

ADULTS	JUVENILES AGED 15 AND OVER[11]
First Strike Minimum 14 days except (from July 1999), in narrowly-defined 'exceptional circumstances'	**First Strike** No minimum: normal range of options applied
Second Strike Minimum 90 days	**Second Strike** Minimum 28 days or an approved, court-ordered programme (introduced in July 1999).
Third Strike Minimum 12 months	**Third Strike** Minimum 28 days

- **After 22 October 2001**

A Labor government was elected to office, somewhat unexpectedly, in August 2001. Part of its election platform was the abolition of the mandatory regime for property offences, a task which was effected when the *Sentencing Amendment Act (No 3)* 2001 (NT) and the *Juvenile Justice Amendment Act (No 2)* 2001 (NT) were proclaimed on 22 October 2001. In the case of juveniles, the same principles of sentencing and the full range of sentencing options now apply to all offences. However, a more restrictive regime applies to adults who are convicted of 'aggravated property offences'. This builds

9. *Police Administration Amendment Act* 2000 (NT).
10. See, for example, NAALS, op cit n2.
11. Prior to 1 June 2000, the adult regime applied to those aged 17 and over. Between 1 June 2000 and 22 October 2001, the adult regime applied only to those aged 18 or more.

upon – but differs in detail from – the regime which has applied since March 1997 to scheduled violent and sexual offences. The varying schemes for aggravated property offences, violent offences and sexual offences are set out in Table Three.

It is immediately apparent that, for a wide range of offences in the Northern Territory, judicial discretion is still significantly constrained post-22 October 2001. In the case of offenders who are found guilty of a scheduled sexual offence or of a second or subsequent violent offence, the court must impose a sentence of imprisonment. No minimum term is prescribed, but the sentence must be served either in full or in part and cannot be fully suspended. The legislation also requires that a conviction be recorded in the case of sexual offenders and repeat violent offenders. This rules out options such as bonds and discharges.[12] Although these provisions have been in force since 1997, they have not attracted anything like the same level of debate or appellate scrutiny as the mandatory regime for property offences. Now that those laws have been repealed, it is likely that they will attract greater scrutiny.

The regime for aggravated property offences is designed to ensure that greater weight is given to 'community disapproval'. The laws are less restrictive than those which apply to sexual offences and repeat violence in two key respects. First, the range of presumptive options is wider. If a conviction is recorded, the options can include a fully suspended sentence (provided the person accepts home detention) or approved community work. Further, the court is not bound to record a conviction; this means that it is able, in trivial cases, to utilise dispositions such as bonds and discharges. There are some potential anomalies with this system, not least in that only the least and most severe non-custodial options are open to the court – with nothing in between. For example, other forms of community based sentence and simple suspended sentences (without home detention) are not available. In other words, important intermediate rungs in the penalty ladder have been removed from the presumptive penalty scale.

Secondly, in the case of aggravated property offences, the court may use the whole range of sentencing options if there are 'exceptional circumstances' relating to the offence or the offender. The phrase 'exceptional circumstances' varies according to context and it remains to be seen how it will be interpreted here. It is certainly not as limited as the 'exceptional circumstances' provision which previously applied to first strike adults – and which was so restrictive that it became known as the 'white, middle class escape clause'.[13] However, it is generally accepted that, to be 'exceptional', circumstances do not need to be unique but must not involve regular or routine events. [14] If interpreted and applied in this way, the provision does generate a degree of flexibility but falls well short of giving the courts *carte blanche* to utilise the missing rungs in the sentencing ladder.

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[12]. *Sentencing Act* (NT) Part 3.

[13]. NAALS, op cit n2.

[14]. For recent High Court discussions in the criminal justice area, see *Cabal v United Mexican States* [2001] HCA 42 (on the grant of bail to a person who is subject to extradition) and *Eastman v The Queen* [2000] HCA 29 (on the admission of new evidence). For UK interpretations, see below, 22.

Table Three
Current Northern Territory Laws

	Aggravated Property Offences	Violent Offences	Sexual Offences
General Scope	- Robbery and related offences; - Burglary and related offences; - Some cases of criminal damage (notably where damage to value of $500 or more intended or caused); - Unlawful use of vehicles in certain circumstances.[15]	- Terrorism; - Threats to kill; - Attempted murder; - Grievous harm; - Bodily harm; - All forms of assault other than indecent assault; - Disabling offences.[16]	- Sexual assault; - Indecent assault; - Sexual offences against children; - Incest; - Bestiality - Pornography - Indecency.[17]
Legislative Purpose	'To ensure that community disapproval of persons committing [such] offences is adequately reflected in the sentences imposed'[18]	No stated legislative purpose / priority and general principles in the *Sentencing Act* apply[19]	No stated legislative purpose / priority and general principles in the *Sentencing Act* apply
Regime	Unless there are 'exceptional circumstances in relation to the offence or the offender', a court that records a conviction must impose one of the following sentences: - immediate imprisonment; - a partly suspended term of imprisonment; - a suspended term of imprisonment provided the person is subject to home detention; - a community work order involving an approved project (ie approved by a government committee).[20]	Where the offender has been found guilty on at least one prior occasion of a violent offence, the court must record a conviction; and must impose one of the following sentences: - immediate imprisonment - a partly suspended term of imprisonment.[21]	The court must record a conviction; and must impose one of the following sentences: - immediate imprisonment - a partly suspended term of imprisonment.[22]

[15] . *Sentencing Act* (NT) s.3; *Criminal Code* (NT) sections 211, 212, 213, 215, 218(2), 226B(3) and 251

[16] . *Sentencing Act* (NT) s.3 and schedule 2; *Criminal Code* (NT) sections 54, 55, 163, 165, 166, 175, 176, 177, 181, 182, 185, 186, 188, 189A, 190, 191 and 193

[17] . *Sentencing Act* (NT) s.3 and schedule .3; *Criminal Code* (NT) sections 125B, 125C, 128(2), 129, 130, 131, 131A, 132, 134, 135, 138, 188(2)(k), 192 and 192B.

[18] . *Sentencing Act* (NT) s.78A.

[19] . Sections 5-6 set out the general principles. Public disapproval is one of those factors, along with retribution and deterrence; but is not afforded particular priority.

[20] . Ibid s.78B

[21] . Ibid s.78BA

[22] . Ibid s.78BB

Going Overboard: Australia's New Border Control Laws

In November 2001, in the run up to an election, and in a reaction to the arrival of a number 'boat people' – especially from Afghanistan - the federal Parliament enacted tough new border control laws. Political and public reactions – fuelled by claims (which turned out to be false) about children being thrown overboard - bring to mind Auden's chilling words of 1939:

> **Refugee Blues**
>
> Say this city has ten million souls,
> Some are living in mansions, some are living in holes:
> Yet there's no place for us, my dear, yet there's no place for us.
> ...
> The consul banged the table and said:
> 'If you've got no passport, you're officially dead':
> But we are still alive, my dear, we are still alive.
>
> Went to a committee: they offered me a chair;
> Asked me politely to return next year:
> But where shall we go today, my dear, where shall we go today?
>
> Came to a public meeting; the speaker got up and said:
> 'If we let them in, they will steal our daily bread';
> He was talking of you and me, my dear, he was talking of you and me.
> ...
> Went down to the harbour and stood upon the quay,
> Saw the fish swimming as if they were free:
> Only ten feet away, my dear, only ten feet away.
>
> Walked through a wood, saw the birds in the trees;
> They had no politicians and sang at their ease;
> They weren't the human race, my dear, they weren't the human race.
>
> Dreamed I saw a building with a thousand floors,
> A thousand windows and a thousand doors;
> Not one of them was ours, my dear, not one of them was ours.

The most obvious manifestations of the new policies were the refusal to admit to Christmas Island, the Norwegian-registered vessel *Tampa*, which had rescued people from a sinking boat; and the decision to find far flung foreign placements for these and other new arrivals. However, the new laws also include long mandatory minimum sentences for a range of broadly defined offences under the *Migration Act* 1958 (Cth). Anybody who 'facilitates' the coming to Australia of five or more unauthorised people will face a minimum of five years' imprisonment, with a minimum non-parole period of three years. The same penalties also apply to any person (such as an incoming applicant for refugee status) who provides misleading information to immigration officials with respect to a group of five or more such arrivals (or anybody in such a group).[23] 'Repeat offenders' in both categories face a mandatory minimum of eight years, with a minimum non parole period of five years.

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23. *Border Protection (Validation and Enforcement Powers) Act* 2001 (Cth), Schedule 2, amending the *Migration Act* 1958 (Cth) ss 232A and 233A.

Developments in Western Australia

- **Three Strikes Laws**

As mentioned earlier, there have been two main battlegrounds on the 'Western Front'. The first is the State's three strikes home burglary laws, introduced in November 1996. In the case of 'repeat offenders', the court must impose a custodial sentence of at least 12 months' duration. The same minimum applies to both adults and juveniles and the laws apply to offenders of all ages. A repeat offender is one who is convicted of home burglary and who has been convicted on two prior separate occasions of such an offence. In the case of adults, there is no power to suspend the sentence. However, in the case of juveniles, the Children's Court has interpreted the legislation so as to permit the use of an Intensive Youth Supervision Order of at least 12 months' duration. Such orders are more generally called Conditional Release Orders (CRO) and are essentially a form of conditional suspended sentence.

As Table One shows, these laws remain in place and there have been no legislative changes or major judicial initiatives over the past couple of years. However, there have been two major reviews. A Department of Justice Review ('the DOJ Review'), required by legislation, was tabled in November 2001.[24] This was essentially an internal review which involved little external consultation, and none with key Indigenous organisations such as ATSIC.[25] Bland in both title and substance, it contained no reference to other studies, little critical analysis and no options for reform by the State government. Shortly afterwards, a far more critical report, commissioned by the State's Aboriginal Justice Council, was released ('the AJC Report'). This concluded that the only 'genuinely acceptable option' was for the laws to be repealed but also canvassed possible reforms: "The alternative, but less palatable option is for the minimum period to become a presumptive starting point rather than a mandatory minimum, and for the laws to cease to have any application to children under the age of 16."[26]

- **The Sentencing Matrix**

The second area of debate has been the proposed sentencing matrix. The original model, first floated in the second half of 1998, anticipated three levels of control over the judiciary. After heated debate, legislation for the first two stages was enacted in November 2000, but the third level was rejected by the very narrowest of margins.[27] If implemented, level one (*reporting offences*) will see the judiciary reporting to the Executive, in a prescribed format, on their sentencing decisions. Level two (*regulated offences*) will involve a

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[24]. Op cit n 2. The three strikes laws required that a Review be tabled in Parliament within five years.

[25]. This lack of consultation emerged very clearly during the Senate Committee hearings; see Legal and Constitutional References Committee, transcripts of evidence, 25 January 2002 (Canberra: Parliament of Australia, 2002).

[26]. Op cit n 2, 8

[27]. The then government had the numbers in the Legislative Assembly for the legislation to pass but fell one vote short of stage three in the Legislative Council: N Morgan, 'A Sentencing Matrix for Western Australia: Accountability and Transparency or Smoke and Mirrors?', in N Hutton & C Tata (eds) *Sentencing and Society: International Perspectives* (UK: Ashgate, forthcoming, 2002).

regime of 'indicative sentences' set by regulations. The judge will be able to impose a different sentence, but will have to explain, in a sentencing report, the reasons for departure. The sentencing report will be in a format prescribed by regulations. Level three (*controlled offences*) would have given virtually no scope for departure.

The matrix legislation is complex and raises major issues of principle, including constitutional questions about the excessive use of regulations and the relationship between the judiciary and the executive. Following the election of a Labor State government in February 2001, the scheme has not been proclaimed and, as there are no immediate plans for its introduction, this paper will not rehearse the detailed criticisms that have been voiced elsewhere.[28] However, it is important not to lose sight of the legislation. Had it not been for a change in government, it would certainly have been implemented. The current Opposition continues to call for its introduction and has promised to resurrect the matter if elected in the future and to develop controls at or akin to level three. The scheme has also attracted the attention of political parties in other jurisdictions, including New South Wales.[29]

The paper now turns to a thematic review of the problems to which these laws give rise, recent research evidence, and the findings and recommendations of the Report of the Senate Legal and Constitutional References Committee. Given that the Northern Territory government has now abandoned its regime of mandatory minimum penalties (in recognition of these problems), the primary focus is on Western Australia.

Shadow Boxing with Sentencing Rationales

Evaluating the laws has been akin to shadow-boxing: as soon as commentators have exposed the fallacies of one set of alleged justifications, ministers and senior bureaucrats have attempted to change the terrain. However, the cupboard of excuses is increasingly mouldy and bare.

Western Australia's three strikes home burglary laws were devised against the backdrop of "the community's concern about the prevalence of home invasion offences ... and the devastating effect which such offences have on victims."[30] In the words of the then Attorney General, a major objective was deterrence:

> "The aim of the present Bill is to deter burglars and incapacitate those who commit such offences by providing for much tougher penalties."[31]

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[28] . Ibid and N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (2000) 28 UWAL Rev 259.

[29] . For a review paper prepared for the New South Wales Parliament, see R Johns, op cit n 7. This paper includes a review of developments in NSW and comparisons with other jurisdictions and includes discussion of both the three strikes laws and the matrix in WA.

[30] . P Foss, Ministerial Statement, 22 August 1996.

[31] . Ibid

Evidence quickly emerged that burglary rates were unaffected by the three-strikes laws[32] and official policy statements duly changed tack. When addressing the first Senate Inquiry in January 2000, the government spokesman contradicted his Minister's earlier remarks and provided the following 'justification':

> "The legislation was not introduced as a means of deterring offenders from committing offences; it was purely to indicate the very serious nature of the offence."[33]

As noted during the hearings of the first Senate Inquiry, this circular and self-fulfilling proposition left nothing to evaluate: the laws had 'indicated' the seriousness of the offence simply by their enactment.

In March 2000, the then government – obviously searching for a quantifiable measure of supposed success, produced a rabbit from the hat. Claiming that the laws aimed to 'turn around the lives of young offenders', it provided data purporting to show that mandatory detention reduced recidivism rates.[34] However, studies soon exposed the data as irretrievably flawed.[35] Significantly, this rationale no longer rates any mention in either the DOJ Review or other government statements.

The new Labor government now defends the laws on four grounds:[36]

- The State has the highest rate of home burglary in Australia;
- The legislation has high acceptance by the people and bipartisan support;
- The legislation does not affect adults in practice but is 'well-targeted' at juveniles - 'affecting few offenders but identifying, with few exceptions, those who have extensive sentencing histories';
- In appropriate cases, juveniles may be given a conditional release order in lieu of detention.

In terms of a rationale or purpose behind the laws, the third point is the key; that the laws 'successfully target hard core juvenile offenders'. The first point is simply a factual statement, from which a number of policy initiatives might flow, other than three-strikes laws. For example, as happened with subsidies for motor vehicle immobilisers, one response might be to provide state assistance for more effective home security measures. The second is an assertion that is probably true, given that neither of the major political parties has ever presented an alternative voice. The last point is not a justification of

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32. See N Morgan op cit n 1

33. WA Government, evidence to the Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, 3 February 2000 (Canberra: Parliament of Australia).

34. See also P Foss op cit n 3.

35. For more detailed analysis, see N Morgan op cit n 1, 173-174 and Morgan, Blagg and Williams, op cit n 2.

36. Statement by the Hon J McGinty MLA, Attorney General of Western Australia, to the Senate Legal and Constitutional References Committee, January 2002, reproduced as Appendix E to the Committee's Report

the laws so much as an attempt to defend them against criticism that they are too inflexible.

If the rationale is that the laws successfully target hard core juvenile offenders, an obvious question remains unanswered: why do the laws apply to adults?

Crime Rates and Mandatory Sentencing Laws

Western Australia still has the highest rate of home burglary in Australia and there is nothing to suggest that the three strikes laws have been of any assistance in tackling the problem. As early as 1999, it was clear that the laws had no identifiable impact on recorded rates of home burglary,[37] undermining claims that the laws acted as a deterrent or protected the public by successfully targeting the hard core. However, even under direct questioning from the first Senate Committee in 2000, the government attempted to dodge the issue, claiming that up to date statistics were not available and/or that unavailable victim surveys are more accurate and valuable than police statistics.[38] Somewhat belatedly, the government has finally conceded the point, relying on precisely the data that were available in 2000.[39]

It was, of course, entirely predictable that the laws would have no effect on crime rates. As the recent Senate Report put it:

> "[T]he mandatory sentencing legislation has not brought about a reduction in the rate of home burglaries.... This is hardly surprising when one considers, not only that the clean up rate for burglaries is so low, but also that the legislation has been irrelevant for adults and that most of the juveniles dealt with under it have lived in the country, not in the metropolitan area.'[40]

Similarly, there is no evidence to suggest the Northern Territory's laws had any impact on the rates of targeted property crimes.[41]

It has been claimed that the new border control laws have succeeded in their aim to 'deter and deny entry' to asylum seekers.[42] However, whilst it is true that the number of unlawful arrivals declined in the period from October 2001 to April 2002, it is impossible to assess how much this has been attributable to seasonal factors and general world events and how much to Australia's uncompromising stance. Even assuming that the drop in arrivals by sea can be partly attributed to the new border protection practices and laws, it probably has nothing to do specifically with the mandatory minimum penalties; they form a small component of the new procedures, and attracted virtually no publicity in their own right.

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37. N Morgan op cit n 1.
38. Ibid
39. Department of Justice, op cit n 2; McGinty, op cit n 36.
40. Para 3.28. For more discussion see Morgan, Blagg and Williams, op cit n 2.
41. NAALS, op cit n 2; G Zdenkowski and D Johnson, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (Sydney: Centre for Independent Journalism, 2000)
42. Prime Minister John Howard, on ABC News, 16 April 2002.

Targeted Injustice

In claiming that the laws successfully target hard core offenders with a record of 'very serious repeat offending', the Western Australian government placed great weight on 118 'Case Studies' contained in the DOJ Review.[43] There is no doubt that some of the offenders in these case studies do have long records and convictions for serious offences. However, even the most sophisticated and supposedly accurate weapons can cause immense 'collateral damage' and the three strikes home burglary laws are no exception. The first point to note is that, as a matter of ordinary sentencing practice, courts impose tough sentences on serious hard-core offenders. Thus, the most serious offenders are sentenced to 12 months or more irrespective of the three strikes laws. It follows inexorably that the major impact of the laws is in the context of less serious offences or offenders with less entrenched criminal histories.

Secondly, doing justice means having the capacity to reflect differences between offenders and not forcing different cases into one straitjacket.[44] The three strikes laws iron out such differences. In evidence to the Senate Inquiry, the Aboriginal Justice Council pointed to the distortions that arise from the fact that virtually all the juveniles sentenced to detention have received the same sentence – 12 months:

> "They were not all the same types of offenders. I would draw your attention to two examples.... Case 17 [in the DOJ Review] involved a 17 year old with 181 previous charges, 18 sentencing appearances and 61 burglaries. He received the same sentence as Case 118 who was two years younger and had just 5 charges, 4 sentencing appearances and 4 burglaries. This is gross injustice. Further problems arise in terms of the relativities between different offence types. For example, a relatively minor home burglary may attract a heavier sentence than a relatively more serious physical or indecent assault."[45]

The third point is that the case studies reveal a sad litany of socio-economic disadvantage, chaotic family circumstances, substance abuse, intellectual and cognitive disabilities and physical and sexual abuse. Mandatory laws based on broadly defined offence categories are a singularly inappropriate strategy for addressing what may be welfare as much as criminal problems. For example, one of the youngest people in the case studies was an 11 year-old Aboriginal boy from the north of the State. He had been left to fend largely for himself by his parents, who were heavy alcohol users. It was accepted that his offences – which consisted of stealing food, water, cigarettes and small quantities of cash - were committed mainly to feed himself. He was first placed on a conditional release order for the minimum of 12 months. However, as ATSIC poignantly commented: '12 months is a long time to remain hungry'.[46] Inevitably, he

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43. Op cit n 2, Appendix 8.

44. Generally, see B Hudson 'Doing Justice to Difference', in A Ashworth & M Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford: OUP, 1998); B Hudson 'Mitigation for Socially Deprived Offenders', in A von Hirsch & A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* 2nd edn (Oxford: Hart Publishing, 1998)

45. *Transcript of evidence*, op cit n 25, Aboriginal Justice Council, 228.

46. Ibid, Aboriginal and Torres Strait Islander Commission, 253.

breached the order by further similar offences and by the age of 13, he was serving the minimum 12 months sentence in detention in Perth.

Conditional Release Orders: The Limits and Dilemmas of Judicial Ingenuity

International evidence shows that, when faced with mandatory sentences, judges will often explore avenues to inject flexibility into the system. The Northern Territory and Western Australian courts shared a common goal in this regard. Within the confines of the rules of statutory interpretation, they sought to interpret the laws in such a way as to limit their application. The best example of this is probably the decision of the WA Children's Court, in February 1997, to read in the power to impose a 12 month Conditional Release Order in lieu of immediate custody.[47] The then government never intended the CRO to be used in this way and immediately condemned the courts and promised legislative change.[48] However, by early 2000, it was singing the opposite tune: "The fact that the judiciary … uses its discretion … when dealing with juveniles undermines the argument that the WA legislation is in breach of United Nations conventions." The recent DOJ review and the current government also place great store by the fact that the CRO affords flexibility.

Four main comments must be made about this view of the role of CRO's:

- The Children's Court must choose between a CRO for a minimum of 12 months and a minimum 12 months detention. This is far too stark a choice. In some cases, a less severe option than a 12 month CRO might be appropriate and in others, a shorter period of detention.[49]

- CRO's do **not** ensure that children are kept out of custody. The AJC Report found that juveniles who appear to be third strike offenders and for whom a CRO appears to be a possible option are generally remanded in custody for sentencing; and that the average period on remand is 30 days.[50] It also revealed cases in which juveniles who were *thought* to be third strikers were remanded in custody; only to be released with a non-custodial penalty when it transpired that they were not third strikers at all.

- It is utterly disingenuous for advocates of three-strikes laws to defend them by reference to the 'bits that didn't work.'

- It is ironic that, by their inventiveness, the courts have helped to defend – and perhaps to preserve – the laws they never wanted. Sadly, the unfair sentencing of a few very young children would probably have been more effective in promoting change.

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47. See N Morgan, op cit n 1.
48. Ibid
49. This was clearly the view of some judges interviewed for the DOJ Review, op cit n 2.
50. Morgan, Blagg and Williams, op cit n 2.

Discriminatory Impact

- **The Facets of Discriminatory Impact**

In papers written between 1999 and 2001, I suggested a number of ways in which the three strikes laws have impacted with particular force on young and Indigenous people. Proponents of mandatory sentences initially regarded some of these suggestions as misguided and others as exaggerated. However, eleven facets of concern can now be charted with little fear of contradiction:

1. *The laws impact almost exclusively on children* and are essentially irrelevant to adults. No data have been systematically collected on adults and, in practice, judges and counsel appear largely to have ignored the issue. In any event, third strike adult home burglars are likely to face at least 12 months in prison irrespective of the three strikes laws.[51]

2. *Children as young as 10 or 11 are caught by the Western Australian laws*. The Northern Territory's discredited laws only applied to those aged 15 and over. There is also ample research evidence of the fact that Indigenous youth experience far more contact with the justice system from an early age than non-Indigenous youth. [52]

3. *By far the greatest impact of the laws has been on Aboriginal juveniles.* Early figures suggested that 81% of juveniles dealt with under the laws were Aboriginal.[53] In a number crunching exercise of mind-numbing pointlessness, the government 'corrected' that figure to 74% in evidence to the first Senate Inquiry.[54] For what it matters, the DOJ report now puts the figure back at 80%. In other words, four fifths of the three strikes cases are drawn from less than 4% of the State's general population and from around 30% of all offenders appearing in the Children's Court.

4. *The younger the offenders, the worse the picture.* The DOJ Review confirmed earlier fears: around 90% of those aged 15 and under are Aboriginal; and 100% of those aged 13 and under.

5. *The picture is particularly bad in country areas.* 70% of Aboriginal juveniles in the DOJ sample and 83% in the AJC Report were from country areas. The Kimberley and Pilbara alone provided almost half the AJC sample.

6. *Aboriginal juveniles have less access to diversionary options (such as cautioning and referrals to Juvenile Justice Teams) which do not constitute 'strikes'.* The Crime Research Centre and the Aboriginal

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51. *Cheshire* (unreported WA CCA 7 November 1989; *Pezzino* (1997) 92 A Crim R 135.
52. See, for example, the data in Aboriginal Justice Council of Western Australia, *Our Mob Our Justice: Keeping the Vision Alive* (Perth: Aboriginal Affairs Department, 1999).
53. C Stokes, *Three Strikes and You're In: Mandatory Minimum Sentences for Repeat Home Burglars* (unpublished, Honours thesis, University of Western Australia, 1998)
54. See N Morgan, op cit n 1.

Justice Council have made this point for many years[55] but, at the time of the first Senate Inquiry, the State government refused seriously to acknowledge the problem. Significantly, the State government has now conceded the point, albeit somewhat grudgingly.[56] The Senate Report unequivocally shared the AJC / Crime Research Centre position:

> "[Aboriginal] children suffer most from the operation of the mandatory sentencing legislation because they are not protected from its excesses by factors such as diversionary processes to anything like the same extent as other children."[57]

It should also be stressed that early entry into the formal criminal justice system has a massive influence on future criminal careers.[58]

7. *The 12 month minimum is the same for both adults and juveniles.* Under the discredited Northern Territory laws, third strike juveniles faced a minimum of only 28 days compared with 12 months for adults In Western Australia, adults and juveniles face the same paper minimum despite the generally accepted view that children should be treated more leniently.

8. *Juveniles face more custody time than adults.* The paper sentence is only part of the story. An adult given 12 months may be released on parole after four months but a juvenile must serve at least 6 months in custody. Thus, a third striker who has just turned 18 may well be in a more favourable position than a 17 year-old.

9. *Place of incarceration.* Juveniles in detention must 'do their time' in Perth. However, most of the three strikes offenders are from more remote regions of the State. In terms of distance and family and cultural dislocation, their situation is akin to offenders from London serving time in Reykjavik, Tunisia or Budapest. The Department of Justice conceded that this was something of a problem but praised the use of videoconferencing:

> "It is truly amazing to see how quickly these kids take up the technology, such that they were talking to the camera and screen where their parents were, in Derby or wherever, just as if they were right next door. It was quite an amazing sight.' [59]

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55 . See Aboriginal Justice Council, op cit n 50.

56 . DOJ Review, op cit n 2, 26.

57 . Op cit n 4, para 3.53

58 . See R Harding and R Maller, 'An Improved Methodology for Analyzing Age-Arrest Profiles: Application to a Western Australian Offender Population' (1997) 13 *Journal of Quantitative Criminology* 349. Harding and Maller conclude (at 369) that: male Aborigines … on average commence their arrest careers at a younger age, accelerate them more rapidly, and accumulate them to a markedly greater extent than any of the other race/sex subdivisions…. Data like these lend presumptive support to the notion that early entry into the criminal justice system is itself a factor which exacerbates persistence, and that the longer that formal entry into the criminal justice system can be deferred, the fewer will be the subsequent contacts. In other words, diversion, if feasible… may be highly desirable.'

59 . *Transcript of evidence*, op cit n 26, 219

What *is* truly amazing is that governments see video links as a substitute for personal contact.[60]

10. *Conditions of incarceration in adult prisons.* Adults from regional areas, and some of the older juveniles, may be able to serve their sentences closer to home, in a regional prison. However, there is a sting in the tail here too. The Inspector of Custodial Services recently concluded that Aboriginal prisoners in regional prisons often serve time in conditions which 'simply would not be tolerated if non-Aboriginal prisoners were the predominant prisoner groups'.[61]

11. *Conditions upon release.* Generally speaking, the Supervised Release Board, which deals with the release of juveniles, places more stringent monitoring conditions on offenders than the Parole Board does on adults.

- **Government Explanations**

This parlous state of affairs calls out for explanations from Government. Two main lines of argument have emerged. First, both State and Federal governments have defended WA's three strikes laws against claims that they are racially discriminatory on the basis that they do not, on their face, target Aboriginal people.[62] However, facial neutrality is simply not the issue: in the words of the Inspector of Custodial Services, structural racism is measured by outcomes not intentions.[63]

Secondly, official accounts 'explain' the figures on the basis that they reflect the fact that more Aboriginal juveniles are convicted of home burglary - the implication being that the figures are just 'one of those things'. However, it has previously been argued that the figures cannot be dismissed as 'accidental'; they are the result of two sets of conscious and deliberate decisions.[64] The first of these is Parliament's decision to target offences in which Indigenous youth are over-represented. The second are decisions by police and prosecuting authorities about how cases are to be processed and the use of diversionary options.

In evidence to the Senate Inquiry, the government spokesman was stung by comments that the decision to target home burglary was discriminatory, describing them as cynical. In 'correcting' them, he stated that burglary is not the 'offence which most Aboriginal people are involved in' and is, in fact, the 'fifth most frequent reason why Aboriginal people are jailed.' If the State government had intended discriminatory legislation, it would, he said, have chosen the offence of assault.[65] Contrary to these comments, none of the

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[60]. Senate Report, op cit n 6, para 3.49 and *transcript of evidence*, op cit n 26, 230.

[61]. Office of the Inspector of Custodial Services, *Report of an Unannounced Inspection of Eastern Goldfields Regional Prison*, August 2001 (www.custodialinspector.wa.gov.au)

[62]. See N Morgan op cit n 1, 248.

[63]. Office of the Inspector of Custodial Services, *Annual Report for 2000-2001*, 17 (www.custodialinspector.wa.gov.au).

[64]. N Morgan, op cit n 1 and Morgan, Blagg and Williams, op cit, n 2.

[65]. *Transcript of evidence*, op cit n 26, 221

critics ever made the extraordinary claim that 'most Aboriginal people are involved in' burglary; nor did they say that burglary was the offence in which Indigenous people were *most* over-represented. The point was just that burglary is *one* of a number of offences in which young Indigenous people *are* over-represented compared with other offences such as fraud. It was therefore transparently obvious from the outset that the laws would have a discriminatory impact. This has been confirmed by the reviews and the Senate Report agreed:

> "The Committee considers that mandatory sentencing in the overall context operates against young country Aboriginals in particular in a manner that is effectively discriminatory."[66]

The Redistribution of Discretion

Many writers have argued that the removal or restriction of judicial discretion through mandatory minima or grid regimes does not mean that discretion disappears or that the criminal process becomes more certain; rather, it leads to a 'redistribution' of power from the courts to pre-trial decisions by police and prosecuting authorities.[67] These executive agencies control the decision to prosecute rather than to use alternative mechanisms and the choice of charge. Consequently, their decisions have a major bearing both on the outcome of the present matters and on the person's criminal record. The precise mechanisms by which this has occurred in the Northern Territory and Western Australia have been charted elsewhere and need not be repeated in detail here.[68] They include the use of diversionary options, plea and charge bargaining and the general exercise of prosecutorial discretion. Such decisions, it is argued, are far less transparent and accountable than those made by courts.

Western Australia's then Attorney General poured scorn on such criticisms during debates about the sentencing matrix, claiming that they reflected American not Australian experience.[69] However, the Senate Report's findings with respect to the differential access of Indigenous and non-Indigenous youth to diversionary programmes reinforce the point: by reducing judicial discretion, the laws have undoubtedly increased the importance of pre-trial decisions by the police and prosecuting authorities.

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66 . Op cit n 6, para 3.53; see also para 3.55

67 . See for example, AW Alschuler, 'Sentencing Reform and Prosecutorial Power' (1978) 126 University of Pennsylvania Law Review 550, Hogg R, 'Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order' (1999) 22 UNSWLJ 262, Knapp K, 'Arizona: Unprincipled Sentencing, Mandatory Minima and Prison Overcrowding' (1991) 2 Overcrowded Times 10 and M Tonry 'Mandatory Sentences', in M Tonry (ed) *Crime and Justice: A Review of Research* vol 16, 1992, 243.

68 . Zdenkowski and Johnson, op cit n 40; N Morgan, op cit n 1, n 27 and n 28.

69 . P Foss, Parliamentary debates on the Sentencing Matrix Bill, Parliament of Western Australia, *Hansard*, 7 November 2000.

A Small Component of a Good System?

As in the first Senate Inquiry, the government continues to attempt to deflect attention from the three strikes laws by focusing on the system as a whole. Its figures purport to show:

> "a system that is working pretty effectively at weeding out or diverting minor offenders and dealing with other offenders in a graduated way, ending up with the most serious offenders who have to be detained. To put this in context, since 1996, over 17,000 juveniles have been sentenced in our courts and yet only 143 have been dealt with under the three strikes legislation."[70]

The Senate Committee was neither fooled nor impressed:

> "This description of the criminal justice system in general and the mandatory sentencing system in particular differs from much of the evidence received by the Committee. This evidence includes the overrepresentation of younger country Aboriginals, the longer terms for which juveniles serve sentences, the lack of regional detention centres, the possibility of considerable variation between circumstances and opportunities for any two juvenile offenders and the inappropriateness of twelve month detention sentences for some juvenile offenders."[71]

The government also uses the same broad brush deflection technique on the question of Indigenous over-representation:

> "You need to see ... the figures ... in the context of the whole system. The answer lies in changing the whole system and intervening at every point in the system. The answer is not simply in removing one part of the system."[72]

He went on to speak of the need for a whole of government approach. However, the Royal Commission into Aboriginal Deaths in Custody showed that overrepresentation results from the cumulative impact of a range of factors and there is no single 'big hit' cause.[73] Consequently, it is essential that each facet of discriminatory impact, however small it may appear, is excised. In a field as important as this, one cannot wait for the inevitable demarcation disputes between agencies to be resolved or for the paraphernalia of modern government (memoranda of understandings, business plans, management structures, local service agreements, key performance indicators and so on) to be finalized. There is also the 'black hole syndrome':

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70. *Transcript of evidence*, op cit n 26, 208
71. Op cit n 6, Para 3.49
72. *Transcript of evidence*, op cit n 26, 208-209
73. *Royal Commission into Aboriginal Deaths in Custody (*Canberra: AGPS, 1991); C Cunnen and D Macdonald *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*. (Canberra: ATSIC, 1996).

> "[The] 'all of government approach' ... can lead to situations where responsibility is shared out to such an extent that individual agencies are let off the hook. A smorgasbord of agencies becomes responsible in general and no single agency in particular. Inter-agency co-operation becomes a means of off-loading responsibility for difficult issues."[74]

The Senate Committee criticized the DOJ Review for failing to take count of the work of the Royal Commission and described as 'cogent' the AJC's contention that:

> "There is only one genuinely acceptable option for Western Australia's mandatory sentencing laws. They should be repealed in view of their manifest faults and as a gesture of commitment to indigenous concerns."[75]

Future Challenges

Due to the political nature of the beast, it is hazardous to attempt to predict future developments. Twelve months ago, new border control laws were not even on the radar screen and few would have predicted the changes in the Northern Territory. However, we are likely to see further developments in a number of areas, including constitutional and human rights issues and the role of guideline judgments. Each of these involves some complex matters but, in very brief terms, the issues would appear to be as follows.

- **Constitutional Issues.**

There have been some spirited attempts to suggest avenues of constitutional challenge. These generally take the form of a '*Kable*[76] argument'; to the effect that mandatory sentences and their ilk may constitute an impermissible interference with the exercise of federal judicial power. In this writer's view, such arguments have a good chance of success in the context of Western Australia's proposed sentencing matrix. This is because the matrix empowers the executive to decide which offences are to be targeted; requires the courts to report to the executive, in a manner to be prescribed by regulations; and gives the executive the power to prescribe, by regulations, a matrix of presumptive sentences. It can be argued that, even without the third level, this involves a systemic attack on the structure and independence of the courts; and that the attack is so fundamental that it undermines the integrity of the courts and their ability to act – or to appear to act – independently of the executive.[77]

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74. Morgan, Blagg and Williams op cit n 2, 52.
75. Op cit n 6, Para 3.52.
76. *Kable v DPP (NSW)* (1996) 189 CLR 51.
77. N Morgan op cit n 27 and n 28.

However, it appears more difficult to argue that mandatory minima, set by legislation, are unconstitutional even after *Kable*. The orthodox view has been that Parliament has the authority to set mandatory or mandatory minimum penalties. Thus, in *Palling* v *Corfield*,[78] the High Court made broad statements to the effect that mandatory penalties are undesirable but not unconstitutional; and in *Wynbyne* v *Marshall*, it refused to grant special leave to appeal on the issue of the constitutionality of the Northern Territory laws. [79] Recent articles have questioned that orthodoxy. Justice Santow, whilst acknowledging the force of previous authority, has suggested that the laws may undermine equality of justice to such an extent as to undermine the integrity of the courts.[80] Manderson and Sharp are more forthright and question the strength of previous authorities. They contend that *Palling* v *Corfield* is 'entirely distinguishable' and that the broad statements in that case 'are merely obiter' and 'go demonstrably too far.'[81] In their view, the Northern Territory laws could have been successfully challenged under *Kable* because:

> "Discretion is central to the idea of judicial process .... Undoubtedly, there are limits to these powers in some legislation but these limits cannot completely eliminate judicial discretion although they may constrain it. These arguments were never put in *Palling v Corfield* or in *Wynbyne v Marshall*."[82]

The constitutionality of the Northern Territory's former laws is now, of course, a moot point; and the terms of any challenge to the Western Australian or federal laws would need further detailed exposition. However, a *Kable* challenge still appears to this writer to be unlikely to succeed where the issue is a mandatory minimum set by Parliament; and far more likely to succeed where the executive is 'pulling the strings.'

- **International Human Rights**

There is little doubt that international criticism was a significant factor in the new Northern Territory government's decision to repeal its mandatory sentencing regime.[83] In this sense, international obligations can have an indirect – but potentially powerful – influence on Australian law through political pressure. It is possible that, with the abolition of the Northern Territory laws, there will be more international focus on the impact of the Western Australia laws and also on the border control laws.

In principle, it is also clear that international obligations can be relevant in the courts in two ways: First, if legislation is ambiguous, it should be interpreted in a manner which is consistent with Australia's international obligations,[84] and there is a presumption that legislation is not intended to derogate from

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78. (1970) 123 CLR 52. See also *Sillery* (1981) 180 CLR 353
79. High Court, Transcripts, 21 May 1998.
80. Op cit n 4
81. Op cit n 4, 588 and 605
82. Ibid, 589
83. Cuneen op cit n 5.
84 *Minister for Immigration v Teoh* (1995) 183 CLR 273; *Kruger v Commonwealth* (1997) 190 CLR 1.

the principles of international law.[85] Secondly, the common law should be interpreted against the backdrop of these international obligations. Interestingly, a Western Australian judge has recently pleaded with criminal law practitioners to keep up-to-date with international law and to include such issues in argument before the courts.[86] However, when the legislation is clear and unequivocal, the avenues for challenge are very limited in the absence of a 'Bill of Rights' or 'Human Rights Act'.

Attempts to entrench the International Covenant on Civil and Political Rights in Australian domestic law failed in the mid-1970s and mid 1980s,[87] but the enactment of human rights legislation in countries such as Canada and the United Kingdom may increase the pressure for similar legislation in Australia. There is no doubt that human rights legislation fundamentally alters the framework for legal developments and court challenges. For example, the *Crime (Sentences) Act* 1997 (UK) provides for 'automatic life sentences' for offenders convicted of a second 'serious offence' unless there are 'exceptional circumstances relating to either of the offences or to the offender'.[88] Serious offences include: manslaughter; attempted murder; rape and attempted rape; wounding or doing grievous bodily harm with intent; and armed robbery. As with Australia's three strikes law, problems arose because these offences are broadly defined and cover a wide range of behaviour.

Prior to the *Human Rights Act* 1998 (UK) coming into force (on 1 October 2000), the courts were constrained by normal principles of statutory interpretation. They duly held that 'exceptional' circumstances were restricted in scope; they did not need to be 'unique, unprecedented or very rare' but could not be 'regularly or routinely, or normally encountered'.[89] Under this interpretation, exceptional circumstances did not include age, relative triviality of the offence or a long gap between the two serious offences. However, the *Human Rights Act*, which gave the European Convention on Human Rights force in domestic law, forced a reconsideration. In *Offen*,[90] the Court of Appeal held that, in some situations, automatic life sentences were justifiable on the grounds that the person posed an unacceptable risk. However, the *Human Rights Act* might well be contravened in cases where the circumstances of the offence were not grave or where the offender was young:

> "A life sentence in such circumstances may well be arbitrary and disproportionate and contravene Article 5. It could also be a punishment which contravenes Article 3."[91]

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85 *Polites v Commonwealth* (1945) 70 CLR 60.

86 MA Yeats 'Criminal Justice Without a Bill of Rights' (2001) 30 UWAL Rev 99.

87 The Human Rights Bill 1973 (Cth) and the Human Rights Bill 1985 (Cth) both failed to make it through federal parliament.

88 *Powers of Criminal Courts (Sentencing) Act* 2000, s 109.

89 *Kelly* [1999] 2 Cr App R (S) 176, Lord Bingham CJ 182. See also *Williams* [2001] 2 Cr App R (S) 2; and *Turner* [2000] 2 Cr App R (S) 472.

90 [2001] 2 Cr App R (S) 10.

91 . Article 5 deals with the 'right to liberty and security' and Article 3 contains a prohibition on 'torture or inhuman or degrading treatment or punishment'.

- **Guideline Judgments**

Formal guideline judgments were pioneered in New South Wales in October 1998, with the decision in *Jurisic*.[92] Subsequently, a number of other such judgments were also delivered.[93] Guideline judgments can take many forms, ranging from a description of the general factors that are to be taken into account to a statement of suggested starting points or ranges of sentence for certain types of offence. Advocates of guideline judgments argue that suggested ranges / starting points help to clarify and demystify sentencing; and that, properly constructed, they can help to structure, without unduly restricting judicial discretion.[94] They also seem to have assisted in holding back calls for mandatory and grid schemes in New South Wales. By contrast, the absence of such judgments has arguably contributed to the vulnerability to political attack of the Western Australian courts.[95]

The future of guideline judgments is somewhat unclear following the High Court decision in *Wong and Others*.[96] The decision revealed differences of opinion as to the value of guideline judgments and the ramifications of the decision remain to be seen. This is not the place for detailed analysis but guideline judgments that involve the quantification of suggested penalty ranges appear to have no future in the context of federal laws. There may also be limitations within State jurisdictions, unless there is express statutory authority for such judgments to be delivered.

Conclusion: Politics, Principles and Research

In his later life, Auden came to question the worth of poems such as *Refugee Blues*:

> "All the verse I wrote, all the positions I took in the thirties, didn't save a single Jew. These writings, these attitudes only help oneself. They merely make people who think like one admire and like one – which is rather embarrassing."[97]

Similar questions must be asked with respect to the worth of papers such as this. The arguments may have some objective merit and will, no doubt, appeal to those who 'think like one'. But so what? Do 'these writings, these attitudes' really make any difference? The problem is that sentencing is the most politicized area of law in Australia and mandatory sentencing is the clearest

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92. (1998) 45 NSWLR 209.
93. *Henry* (1999) 46 NSWLR 346, *Re Attorney General's Application [No 1]* (1999) 48 NSWLR 327, *Wong* (1999) 48 NSWLR 340
94. J Spigelman, 'Sentencing Guideline Judgments' (1999) 73 ALJ 876 and (1999) 11 Current Issues in Criminal Justice, 5. N Morgan and B Murray, 'What's in a Name? Guideline Judgments in Australia' (1999) 23 Crim LJ 90.
95. Morgan and Murray op cit n 94.
96. *Wong* v *The Queen, Leung v The Queen* [2001] HCA 64
97. Quoted by Alan Bennett, *Poetry in Motion* (London: BBC audio collection, 1990).

manifestation of this.[98] During the Tampa incident, 'going overboard to make a splash' was the political imperative - and principles were swamped by symbolism and simplistic reactions. The same is true in Western Australia:

> "For the Western Australian government, the retention of the laws in its arsenal of responses to law-breaking may symbolize its willingness to get tough on crime. However, for Aboriginal Australians, the laws symbolize government's willingness to exploit racist sentiments in a search for easy scapegoats and simple solutions."[99]

Politics was also at play with the recent Senate Report. As we have seen, the body of the Report largely accepted the lessons of research; it made strong criticisms of Western Australia's laws and concluded that the Commonwealth Parliament probably had the power to enact the proposed laws under the external affairs power.[100] However, the majority recommended that the Bill should not proceed. This weak response hardly reflects the strength of the criticisms. But, in retrospect, it was perhaps no great surprise. After all, the Western Australian legislation was introduced by the Coalition and is now supported by Labor; there are obvious limits to the degree to which Federal Parliamentarians will make life difficult for their State colleagues. Much of the Senate's moral high ground was also lost when the Federal Parliament enacted the border control laws.

However, we should end on some more positive notes – and there are several. The worst of the mandatory schemes (in the Northern Territory) has been abolished and strong pressure remains on the Western Australian government with respect to its three strikes laws. The toughest stage of Western Australia's proposed matrix has been rejected and the other two stages are unlikely to be activated, at least in the foreseeable future. There is little doubt that research evaluations (combined, in the Northern Territory, with international pressure) have played an important role in such debates.[101] The Territory's experience also confirms that tough law and order politics do not guarantee electoral success. Finally, although the new border control laws are a cause for concern, the experience in the Northern Territory and Western Australia may mean that we are less likely to see mandatory penalties or matrices in other jurisdictions. It will be interesting to see whether the new Northern Territory laws, involving looser set of presumptions, will provide a model which is considered or adopted elsewhere.

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98. For recent discussion, A Freiberg 'The Politics of Sentencing' (2000) 4(4) *The Judicial Review* 357.

99. Morgan, Blagg and Williams, op cit n 2, 4.

100. Op cit n 6, para 4.14

101. In the Northern Territory, the work of NAALS, op cit n 2 and other agencies undoubtedly had an influence on debates. This paper has shown that, in Western Australia, the Senate Inquiry's report was strongly shaped by published critiques, as were debates on the matrix; op cit n 27 and n 28.