

WHY WE SHOULD NOT HAVE MANDATORY PENALTIES: THEORETICAL STRUCTURES AND POLITICAL REALITIES

In Australia, mandatory sentencing schemes have been subject to trenchant criticism in legal and academic circles and their defence has generally been a matter for politicians and government agencies.¹ Dr Bagaric's spirited and provocative article therefore provides a useful counterpoint to most of the existing literature. The issues are complex, and I do not intend to rehearse the detailed criticisms of mandatory sentencing which I have voiced elsewhere.² However, in this article I will highlight the main reasons why I believe we should oppose mandatory and grid sentencing schemes. Some of the observations are triggered by Dr Bagaric's article and others are rather more freestanding. In my view, advocates of mandatory sentencing have not established the case for their introduction and have also failed to provide details of any model which would overcome the manifold problems experienced with 'mandatories' to date. Particular difficulties arise with Dr Bagaric's proposals to differentiate the regimes for non-custodial and custodial sentences. Major issues also arise with respect to the

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¹ Some of the most instructive expositions and interchanges are found in the evidence of the WA State Government to the Inquiries of the Senate Legal and Constitutional References Committee in February 2000 <<http://www.apf.gov.au/hansard/senate/committee/s687.pdf>> and January 2002 <<http://www.apf.gov.au/hansard/senate/committee/s5336.pdf>>. For the politicians' direct views, see P Foss (then Attorney General for Western Australia), 'Mandatory Sentencing' (paper to a Mandatory Sentencing Symposium, University of New South Wales, 28 October 2000) reprinted in (2001) 7 (2) *Australian Journal of Human Rights*; J McGinty, (current Attorney General for Western Australia), Media Statement (15 November 2001) accessible through <<http://www.ministers.wa.gov.au/main>>.

² N Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of Western Australia Law Review* 267; N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164; 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) <<http://www.waajc.org.au>>. For overviews of recent developments, see W Jonas (Aboriginal and Torres Strait Islander Social Justice Commissioner), Social Justice Report 2001 (Sydney, Human Rights and Equal Opportunity Commission, 2002) <http://www.humanrights.gov.au/socialjustice>; N Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing 2000–2002', *Criminal Law Journal* (forthcoming).

theoretical basis for mandatories, their impact on other parts of the criminal process and their constitutional ramifications. Finally, whatever the theory may be, the political reality of mandatory sentences is that they have been used for political gain and have had a profoundly discriminatory impact, especially on Indigenous youth.

WHY MANDATORY PENALTIES?

Dr Bagaric certainly does not pull his punches in calling for a ‘widespread fixed penalty regime’. He asserts that there is a ‘large amount of disparity in sentencing’; that the ‘rule of law virtues of consistency and fairness are trumped by the idiosyncratic intuition of sentencers’; and that the ‘courts and legislatures appear to have largely ignored the need for sentencing principles and rules’. These are strong criticisms and it is impossible, within the confines of this paper, to discuss them in detail. However, I remain of the view, expressed elsewhere, that they are exaggerated and that the case for mandatory penalties in Australia has not been established. Three brief points should be made here.

The first is that there is a tendency amongst advocates of mandatory sentences to overstate the flaws in the current system. For example, it may well be that courts and legislatures across Australia have not developed sentencing principles and guidelines in the manner or to the extent that many of us would consider desirable.³ However, given the barrage of legislative and judicial activity over the past 15 years or so, it cannot be said that they have simply ‘ignored’ such matters. Nor can it fairly be said that consistency and fairness are being ‘trumped’ by judicial officers, as if they regard sentencing as some kind of lottery or card game.

The second point concerns the notion of ‘disparity’ in sentencing. Individual examples of disparity can, no doubt, be found but the question is whether the problem is so systemic and pervasive as to require such a radical new sentencing structure. Disparity is a complex question but advocates of mandatory sentences tend not to define the term or to back up their arguments with examples or empirical evidence.⁴ Some of the problems with the very definition of disparity can be

³ For my views, see N Morgan and B Murray, ‘What’s in a Name? Guideline Judgments in Australia’ (1999) 23 *Criminal Law Journal* 90.

⁴ Towards the end of the paper, Dr Bagaric does refer to recent English research (at 138-9) but does not consider the Australian evidence. Probably the most useful debates surround Don Weatherburn’s report, *Sentence Disparity and its Impact on the NSW District Criminal Court*, Report No 34 (1994), NSW Bureau of Crime Statistics and Research. Weatherburn concluded that substantial disparity existed. The New South Wales Law Reform Commission seems to have conceded that some disparity exists but rejected claims that it was widespread. It stated that Weatherburn’s research had selected judges whose sentences fell ‘at the extremes

illustrated by the example of the sentencing of Indigenous people from remote communities. Dr Bagaric apparently holds the view that objectively equivalent offences must always receive the same penalty and states, quite unequivocally, that ‘considerations relating to the personal circumstances of the offender should be ignored’.⁵ This would leave no scope for the courts to take account of: the general socio-economic circumstances of Indigenous offenders; the fact that they may face punishment within their own communities as well as in the general courts; or the cultural dislocation which may result from imprisonment far away from their own ‘country’.⁶ Others, including this writer, would argue that the concept of ‘parity’ should be interpreted in a less rigid manner in order to accommodate such differences.⁷

The third issue is whether the proposed cure is worse than the disease. For the sake of argument, let us assume that the current system is fundamentally flawed. The question then arises as to whether the prescribed cure (a hearty dose of fixed penalty sentencing) will fix the symptoms. To some extent, the answer may depend on the specific model which is adopted. However, for reasons which are discussed later in this paper, the prescription appears likely to exacerbate rather than to cure the problem. Fixed penalty regimes often lead to different cases being sentenced in the same way, thereby entrenching disparity. ‘Rule of law virtues’ are undermined as a result of the fact that public decision making by judges assumes less importance than largely unaccountable pre-trial decision making. Finally, it is naive to believe that fixed penalty schemes will lead to a more systematic and principled focus on sentencing issues; both nationally and internationally, the history of mandatory sentences has been one of legislatures riding roughshod over issues of principle in the pursuit of political gain.

WHAT SORT OF MANDATORY PENALTIES?

Schemes which impose constraints on judicial discretion vary widely in terms of their aims, structure and degree, and they have been developed against very different legal and political backdrops. This, in turn, impacts upon the desirability

of relevant ranges’ and that they had failed to take account of all relevant factors: New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [2.17]–[2.19].

⁵ At 136.

⁶ Leading cases include *Juli* (1990) 50 A Crim R 31, *Fernando* (1992) 76 A Crim R 58, *Minor* (1992) 59 A Crim R 227 and *Miyatatawuy* (1996) 87 A Crim R 574.

⁷ See generally B Hudson, ‘Doing Justice to Difference’, in A Ashworth & M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998) 223–50; B Hudson, ‘Mitigation for Socially Deprived Offenders’, in A von Hirsch & A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 205–9.

and success of such schemes. In the USA, for example, the Minnesota and Oregon sentencing grids (which set presumptive starting points) have been well received, in their particular historical and socio-political contexts,⁸ but the Federal Guidelines have attracted savage criticism.⁹ In assessing the ‘sort of mandatory sentences we should have’ (as opposed, presumably, to those we should not have), it is therefore necessary to have a clear indication of the model which is at issue.

However, Dr Bagaric does not really answer this question. In fact, he states that his paper ‘is primarily concerned with the threshold question of the desirability of a fixed penalty regime’ and that ‘the precise mechanics of such a system are somewhat peripheral.’¹⁰ Most of the article is therefore devoted to broad issues and to general theories of punishment. Consequently, subject to what is said below, it is not clear what his model would look like. To say the least, this is unfortunate because the form and structure of any proposed scheme dictate the relevance and force of arguments surrounding constitutionality, consistency, transparency and justice. Put simply, it is far easier to make broad calls for new schemes than to produce a workable and acceptable model; and much of the devil of fixed penalty systems lies in the detail.

The Australian experience provides ample evidence of this. In October 2001, the Northern Territory abandoned its discredited system of mandatory minimum penalties for property offences after just four and a half years.¹¹ In Western Australia, mandatory minimum sentences were introduced for ‘serious and repeat offenders’ in 1992, only to be abandoned as an abject failure two and a half years later.¹² In 1996, Western Australia introduced its three strike home burglary laws, under which a mandatory minimum of 12 months’ detention or imprisonment applies to third strike home burglars. These laws remain on the books despite having failed in their original objectives, having no clear rationale, causing great injustice, and having a profoundly discriminatory impact on Indigenous youth.¹³

⁸ See for example, RS Frase, ‘Sentencing Guidelines in Minnesota and Other American States: A Progress Report’, in CMV Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 169–98.

⁹ See, for example, A Doob, ‘The US Sentencing Commission Guidelines: If You Don’t Know Where You are Going, You Might not Get There’, in CMV Clarkson & R. Morgan (eds), *The Politics of Sentencing Reform* (1995) 199–250.

¹⁰ At 133.

¹¹ *Justice Act (No 2) 2001* (NT) and *Sentencing Amendment Act (No 3) 2001* (NT).

¹² R Harding (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (2nd ed, 1995).

¹³ Jonas and Morgan, Blagg and Williams, above n 2. For a rather more bland account (but one which still accepts the basic points), see Department of Justice of Western Australia, *Review of Section 401 of the Criminal Code* (November 2001), accessible at <<http://www.justice.wa.gov.au>>.

In 1998, the Western Australian government proposed the development of a 'sentencing matrix'. However, the enabling Bill lacked detail on most of the fundamental sentencing issues, such as the sentencing of multiple offences and the relevance of prior record.¹⁴ It did attempt to provide detail on one much simpler question; namely, when one form of sentence would be 'more severe' or 'less severe' than another. However, at this point, it became unintelligible.¹⁵ Along with concerns about the role of the executive in the proposed scheme, criticisms to this effect proved important in the parliamentary debates. The result was that legislation for the first two stages of the matrix was enacted but the third (and tightest) stage was rejected.¹⁶ Following a change in government, the matrix legislation has not been proclaimed but it remains on the statute books.

Advocates of fixed penalty systems would no doubt claim that these are just examples of things being badly done, that better systems can be devised, and that the details can be fine-tuned. However, consistent badness¹⁷ and habitual failure suggest that the problems are very deeply rooted and not simply technocratic. The onus is firmly on advocates of fixed penalties to provide detailed models and to explain how these specific models will avoid the problems encountered to date.

NON-CUSTODIAL SENTENCING

Although he declines to be drawn into the 'mechanics' of the proposed system, Dr Bagaric does sketch some broad parameters. It is important to understand his terminology. The phrase 'mandatory sentences' is used to cover both strict mandatory penalties (ie, where there is only one possible sentence) and mandatory minima. 'Presumptive' sentences are where the 'penalty is fixed and must be imposed unless there is a demonstrable reason not to do so'. 'Fixed penalties' is used as a generic term to cover both mandatory and presumptive sentences. It should be noted that, for most of the article, Dr Bagaric uses the generic term 'fixed' penalties; thus, despite the title, he turns out to be a less than whole-hearted advocate of 'mandatory' sentences.

¹⁴ N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (2000) 28 *University of Western Australia Law Review* 259.

¹⁵ Ibid.

¹⁶ 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* (forthcoming).

¹⁷ In 2000, the Senate Legal and Constitutional References Committee concluded that comparing the mandatory sentencing laws in WA and the NT was an exercise in 'prioritising badness'; *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* [8.16].

The distinction between ‘mandatory’ and ‘presumptive’ sentences assumes particular significance in differentiating the proposed regimes for custodial and non-custodial sentences:

Human foresight has its limits and accordingly a mandatory system, no matter how well designed, will at times lead to unfairness. However, the danger with making the guidelines presumptive, and incorporating a clause along the lines that the fixed penalty must be imposed unless ‘exceptional’ or ‘special’ circumstances exist is that this leaves the door ajar for the splendour of a fixed penalty regime to be readily diminished, as more and more supposedly rare circumstances are discovered.¹⁸

According to Dr Bagaric, ‘a compromise is the best solution to this dilemma’: the fixed penalty should be mandatory where it does not involve a term of imprisonment (because such penalties are ‘not inherently harsh’), but only presumptive where it involves a period of incarceration.

This compromise is based on an over-simplistic demarcation between custodial and non-custodial options. Over the past 15 years or so, legislatures have introduced new and ‘tougher’ alternatives to imprisonment. These sentences can include conditions which require the person to undertake community work or treatment programs, to undergo drug testing or even to be subject to a curfew or ‘home detention’ through electronic monitoring. Such penalties cannot simply be dismissed as ‘not inherently harsh’. Indeed, one can argue that community-based sentences with tough conditions may sometimes pose more challenges for some offenders than a short sentence of imprisonment, and may therefore be just as punitive in impact. There is no doubt that such penalties will continue to be developed and the focus on electronic monitoring is likely to increase, thereby blurring the ‘in/out line’. Furthermore, breach of such orders can lead to imprisonment.

The crude dichotomy between custodial and non-custodial sentences is therefore an insufficient foundation to support two radically different sentencing regimes. The fact that ‘human foresight has its limits’ and that ‘a mandatory system, no matter how well designed, will at times lead to unfairness’ are matters which should affect our approach to non-custodial as well as custodial sentencing. Nor are the costs of ‘unfitting sanctions ... outweighed by the advantages stemming from a more efficient sentencing process.’¹⁹

¹⁸ At 132–3.

¹⁹ At 133; see below 149–50.

CUSTODIAL SENTENCING

Presumptive sentencing regimes take many forms. Dr Bagaric favours a system which is

structured along the lines of the Federal Sentencing Guidelines in the United States to the extent that offences are compartmentalized into more and less serious instances of each type of offence.²⁰

The only suggested differences are that penalty levels should be lower and that the personal circumstances of offenders should be ignored.

Leaving aside, for now, the thorny issue of who would be responsible for devising such a scheme,²¹ let us consider the practicalities of the task. The first point to note is that it is likely to prove monumentally difficult to fragment and compartmentalize offences to the anticipated degree.²² Drug offences provide a useful example. One matter at least would appear to be readily ‘quantifiable’: the quantity of drugs. However, in reality, even this has proved difficult. The US Federal Guidelines contain ‘drug equivalency tables’ which try to equate the quantities of different drugs. These involve highly detailed breakdowns and dubious judgments about ‘seriousness’: one gram of marijuana is equated to one mg of heroin; and one gram of crack cocaine to 20 grams of heroin and 100 grams of powder cocaine.²³ And are we talking about pure weights or mixed weights? The Federal Guidelines use mixed weights with the bizarre result that 220 grams of sugar mixed with five grams of heroin is treated the same as 220 grams of heroin mixed with five grams of sugar. Consideration would also have to be given to less ‘measurable’ issues related to the offender’s activities and level of culpability. The variables include importation, sale, possession with intent to sell or supply, attempts, conspiracies and general level of involvement. Finally, one would have to consider the relevance, if any, of the purchaser’s characteristics and the weight to be attached to such factors. In the Federal Guidelines, for example, the fact that the purchaser is young or pregnant is an aggravating factor. Sexual assault, manslaughter, robbery and fraud are other areas where the range of circumstances is almost infinite.

These difficulties are particularly acute if, like the present writer, one subscribes to the view that culpability is a crucial factor;²⁴ to some degree, levels of harm can be quantified in advance but it is hard to see how levels of culpability can properly be

²⁰ At 135.

²¹ Below 152.

²² For a fascinating example of the difficulties of the Federal Guidelines, see Doob, above n 9, 218–26.

²³ Below 153.

²⁴ Below 149–50.

predetermined. The second point flows from the first — it will be apparent that schemes such as the Federal Guidelines end up being extraordinarily complex in both theory and practice.

Another unresolved problem concerns the extent to which, and the grounds upon which, it would be permissible to depart from the presumptive sentence. This is a particularly important issue given the limits of human ability to predict future events. One of the reasons behind the comparative success of the Minnesota guidelines is that there is ample room for sentencers to depart from the starting point (which itself involves a range rather than a fixed penalty). By comparison, according to Doob, the Federal Guidelines are not ‘guidelines’ at all, but mandatory prescriptions. Under Dr Bagaric’s proposal, which leaves the personal characteristics of the offender out of the equation, there is a similar inflexible prescription of sentencing outcomes.

Again, it is not enough for proponents to proclaim the splendour of presumptive sentences; they must tell us how they would work.

FIXED PENALTIES AND RATIONALES OF SENTENCING

Drawing strongly on his previous writings, Dr Bagaric expresses strong views on the balance between utilitarian and retributive theories of punishment. He argues that utilitarianism is the only proper justification for punishment and that

...the seriousness of the offence and the severity of the sanction should both be determined by reference to the one common variable: happiness — the level of pain caused by the sanction, should, as closely as possible, match the unhappiness occasioned by the offence.²⁵

Elsewhere, he stresses the importance of proportionality. In contrast to pure ‘just deserts’ writers, he believes that proportionality does not, in itself, provide a justification for punishment, but that it is underpinned by a particular utilitarian assumption: namely, that punishment ‘deters a great many people from committing crime’.²⁶ I do not wish to engage in a debate about theories of punishment, not least because Dr Bagaric contends that his proposals can reflect either a utilitarian or a retributive position.²⁷ However, four points must be made. First, the bald statement that punishment deters a great many people cannot pass unchallenged; the evidence

²⁵ At 134.

²⁶ At 129.

²⁷ At 139–40.

suggests that the fear of being caught is a more powerful deterrent than fear of punishment.²⁸

Secondly, I am far from convinced that general concepts of happiness, and ‘promising research’ into ‘the things that make us happy’ provide a suitable basis for analysing offence seriousness, either in terms of general offence rankings or in terms of relativities within a particular offence category. It is certainly difficult to see the value of some of these arguments or where they lead. For example, ‘one of the main guarantees of happiness (especially for men) is marriage.’²⁹ Does this mean that adultery should again be criminalised? And, given its propensity to cause great human misery (especially to men), should it be seen as a particularly serious offence (especially when committed by women)? Or suppose that there are two offences involving the theft of portable computers. Should it make any difference that victim X is angry and unhappy at the loss, but that victim Y is not unduly fazed (or even rather happy to be able to obtain a new computer through insurance)?

The third issue concerns the role of culpability. Dr Bagaric identifies two facets to ‘proportionality’; the harm caused by the offence and the offender’s culpability. However, he states that ‘personal culpability is not intrinsically relevant to offence seriousness’. His utilitarian starting point leads him to conclude that consequences are the ‘ultimate consideration’ and that culpability only has a ‘derivative importance’ which arises because ‘deliberate harmful behaviour’ causes greater fear than an ‘unintentional wrong’.³⁰ Reflecting the view that consequences are the ultimate consideration, he also contends that ‘few (if any) property offences should result in imprisonment.’³¹ However, in my view, culpability has inherent and ineluctable importance in assessing offence seriousness and is not merely of derivative significance. This means that penalties should not simply reflect consequences, but should reflect the level of culpability (including planning and calculation) which is involved.³² The specific conclusion that property offences should rarely attract imprisonment therefore appears too crude.

²⁸ See, for example, F Zimring & G Hawkins, *Deterrence: The Legal Threat in Crime Control* (1973); D Beylveled, *A Bibliography on General Deterrence* (1980); A Von Hirsch, A E Bottoms, E Burney & P-O Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999).

²⁹ At 135.

³⁰ At 132.

³¹ At 135. He also states (*ibid*) that ‘the opposition to the three strikes laws in the Northern Territory and Western Australia does not stem from their mandatory nature, but, rather because they violate this important prescription.’ As this essay shows, the repugnant character of the WA and NT laws is far more deeply rooted than this.

³² For debate on this general issue, see A Ashworth, ‘Taking the Consequences’ in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (Oxford;

Finally, the tension between proportionality and utilitarianism also spills over into Dr Bagaric's proposal to adopt a mandatory penalty regime for non-custodial penalties:

No doubt this will at times mean that offenders will be dealt with too severely, but this is not too high a price, given the nature of the sanction involved (for example, a fine or loss of licence) is not inherently harsh. The costs in the form of unfitting sanctions are likely to be outweighed by the advantages stemming from a more efficient sentencing process; one which will avoid the time consuming and expensive exercise of uncovering minutiae relating to the offender and the offence.³³

I can only record my fundamental disagreement with the proposition that proportionality should be sacrificed in this manner. 'Unfitting sanctions' may take the form, as Dr Bagaric indicates, of penalties which are too severe. They may also take the form of penalties that are too lenient. The ironing out of significant differences between offences and offenders cannot be justified by cost benefits or managerial efficiencies.

THE REDISTRIBUTION OF DISCRETION

Almost without exception, commentators agree that fixed penalty schemes result in a redistribution of discretion.³⁴ In other words, as a result of judicial discretion being removed or restricted, pre-trial decisions by the police and prosecuting authorities become increasingly important. Western Australia's three strikes home burglary laws provide a graphic illustration. The question of whether a person is a third striker is based on previous *court appearances*. Consequently, police cautions and referrals to juvenile justice teams do not constitute a 'strike'. The police, not the courts, are the main gatekeepers of diversionary schemes and different groups of offenders have differential access. In particular, Indigenous youth are less likely to be diverted and more likely to be processed through the courts.³⁵ They are therefore

Clarendon Press, 1993) 107-124; and R A Duff, 'Acting, Trying and Criminal Liability', *ibid* 88-90.

³³

At 133.

³⁴

See for example, A W Alschuler, 'Sentencing Reform and Prosecutorial Power' (1978) 126 *University of Pennsylvania Law Review* 550; R Hogg, 'Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order' (1999) 22 *University of New South Wales Law Journal* 262; K Knapp, '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.

³⁵

Morgan, Blagg and Williams, above n 2.

likely to acquire ‘third striker’ status more quickly than their non-Indigenous counterparts. Once this happens, the courts’ hands are largely tied.

Dr Bagaric accepts that a redistribution occurs, but concludes that:

[T]hese problems amount to a rehash of the more fundamental objection that some fixed penalties are too tough. If the legislature does not prescribe excessive penalties, prosecutors could not use the threat of mandatory penalties as a weapon to coerce guilty pleas. It is unlikely that criminal justice officials would seek to circumvent the operation of such laws – there would simply be no reason to do so.³⁶

However, concerns about the redistribution of discretion are not simply a ‘rehash’ of concerns about sentences being too tough. They involve other fundamental issues of accountability, transparency and consistency in the criminal process. Pre-trial decisions include the decision to prosecute rather than to use alternatives (such as cautioning or diversionary programs) and the choice of charge. Although general prosecutorial guidelines do exist, they leave a great deal of discretion with respect to the decision to prosecute and usually say nothing about the choice of charge. Subject to these broad parameters, prosecutorial decisions in individual cases are taken behind closed doors and without public reasons, and are not open to appeal, judicial review or media scrutiny. In this sense, they are far less transparent and accountable than judicial decisions.

Thus, even if legislators do ‘get it about right’ in terms of penalty levels (and this would mean that, for the first time in recent history, they have resisted pressure to ‘get tough’),³⁷ the problem will remain. Dr Bagaric is concerned that, under the present regime, the ‘rule of law virtues of consistency and fairness are trumped by ... the idiosyncratic intuition’ of judges. The prospect of pre-trial players holding the trump cards in private is far more daunting.

STRUCTURAL AND CONSTITUTIONAL ISSUES

Dr Bagaric dismisses concerns that fixed penalties violate judicial independence. As far as they go, his comments on the legal position are both accurate and uncontroversial: sentencing is clearly not a matter for judges alone and mandatory penalties are not, of themselves, unconstitutional.³⁸ However, there is more to the

³⁶ At 121.

³⁷ Below 153–4.

³⁸ See *Palling v Corfield* (1970) 123 CLR 52; *Sillery* (1981) 180 CLR 353 and *Wynbyne v Marshall*, High Court, Transcript of Hearings, 21 May 1998; G Santow, ‘Mandatory Sentencing: A Matter for the High Court?’ (2000) 74 *Australian Law Journal* 298; N Manderson and N Sharp, ‘Mandatory Sentences and the

problem than this. Presumptive grid systems offer greater flexibility than mandatory penalties, because they permit some level of departure. At first glance, it might be thought that, if mandatory penalties are constitutionally valid, a grid system would survive constitutional challenge because of its greater flexibility. This was certainly the view of the Western Australian government with regard to the proposed matrix.

Constitutionally, however, the *structure* which is adopted is more important than the degree of restriction. The Western Australian matrix involved a system in which the judiciary would initially ‘report’ on their sentencing practices to the executive. On the basis of such reports, the executive would draw up a sentencing grid. The matrix would be imposed through regulations rather than primary legislation. I have argued elsewhere that, following the decision in *Kable v The Director of Public Prosecutions for the State of New South Wales*:³⁹

There are strong grounds for arguing that the proposed matrix is different from those mandatory sentencing schemes which have been upheld. Although it must be accepted that Parliament has the right to fix mandatory sentences or minimum sentences for *specific offences* by legislation, the matrix scheme is based squarely upon general regulations made by the Executive and also on the previously unknown notion that the courts must report to the Executive. The scheme as a whole therefore involves a structure in which the courts are, in a sense, made answerable to the Executive. Viewed in this way, the matrix involves a systemic attack on the structure and independence of the courts; it can well be argued that this attack is so fundamental that it undermines the ability of the courts to act or to appear to act independently of the Executive.⁴⁰

It is not clear how Dr Bagaric would propose to develop and construct a regime of mandatory non-custodial sentences and presumptive custodial penalties; and the precise constitutional ramifications are therefore unclear. However, it is an issue that needs to be addressed. Nor is this just a matter of constitutional nicety: the processes for the development of a fixed penalty regime, and for its future modification, lie at the heart of whether the scheme will be more transparent, accountable and rational. Those processes will also determine whether the model can ever be immune from the ravages of law and order politics.

Constitution: Discretion, Responsibility and the Judicial Process’ (2000) 22 *Sydney Law Review* 322.

³⁹ (1996) 189 CLR 51.

⁴⁰ N Morgan, above n 14, 289–90.

DISCRIMINATORY IMPACT AND SCAPEGOATING:
THE *REALPOLITIK* OF MANDATORY SENTENCING

In the 1960s, Stan Cohen traced the way in which ‘moral panics’ can develop around certain forms of behaviour; and the dynamics of societal reactions to the ‘folk devils’ who are held to be responsible.⁴¹ At the time he was writing, direct legislative reactions were not on the cards; the issue was how the media and the judiciary would react. Times have changed and legislatures have become far more interventionist and far more prepared to react to ‘public pressure.’

In both Australia and the US, these factors have resulted in mandatory and presumptive sentencing laws which have had a profoundly discriminatory impact on minority groups. For example, under the US Federal Sentencing Guidelines, a transaction involving 5 grams of ‘crack’ cocaine can attract the same mandatory penalty (5 years imprisonment) as 500 grams of powder cocaine.⁴² Despite the ‘moral panic’ about ‘crack’, it has been held in some US courts that the two substances are pharmacologically indistinguishable. But the young and the poor - especially African Americans - are disproportionately high consumers of ‘crack’ cocaine. Powder cocaine is favoured by the higher echelons. In Western Australia, the three strikes laws of 1992 impacted almost exclusively on Aboriginal men from remote parts of the State. The State’s three strikes home burglary laws of 1996 have had a grossly disproportionate impact on Indigenous youth, especially on the youngest and those from remote areas.⁴³ In the Northern Territory, Indigenous people again appear to have borne much of the brunt of the laws.⁴⁴

If further evidence was needed, it came in November 2001. In the run up to an election, and in a reaction to the arrival of a number of ‘boat people’ – especially from Afghanistan — the federal Parliament enacted tough new border control laws. These 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 incoming applicants for refugee status who provide misleading information to immigration officials.⁴⁵ ‘Repeat offenders’ face a

⁴¹ S Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972).

⁴² M Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford: Oxford University Press, 1995) 188-90.

⁴³ Above n 2.

⁴⁴ See Northern Territory Aboriginal Legal Aid Service (NAALS), *Dollars without Sense: A Review of the NT’s Mandatory Sentencing Laws* (Darwin: NAALS, 2000)

⁴⁵ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) Schedule 2, amending the *Migration Act 1958* (Cth) ss 232A and 233A.

mandatory minimum of eight years, with a minimum non-parole period of five years.

Dr Bagaric does not discuss these problems. He would no doubt respond that they do not undermine his proposals, but are merely criticisms of how mandatory sentencing has been (badly) developed and implemented so far.⁴⁶ Even if he was right in theory, the *realpolitik* cannot be ignored or underestimated. Sentencing has become the most politicised area of law in Australia and mandatory and matrix schemes represent the most overt attempts to impose political control over sentencers.⁴⁷ Consequently, advocates of fixed penalties cannot simply propose abstract structures: they must first explain how we can develop a regime which is above excessive political pressures. Then, a second issue would arise: once the legislature has control over sentencing levels, how can the grid or other model be protected from future political pressure and tinkering? It should be noted, in this regard, that even the better examples of grid sentencing in the US, such as Minnesota and Oregon, have proved susceptible to political pressures, despite the existence of independent sentencing commissions.

CONCLUSION

Dr Bagaric is highly critical of existing sentencing practices and enthusiastically proclaims the ‘splendour’ of mandatory penalties. He also promises to tell us the type of mandatory penalties we should have. However, he does not establish the case for a new regime and, other than in very general terms, does not tell us the type of mandatory sentences we should have. Drawing on the experience in a number of jurisdictions, this analysis has shown that the detail of proposed schemes is important and that advocates of mandatory schemes must explain how their proposals will avoid the abject failures of recent history. In this, more than any other area, one cannot avoid the political dimensions and the symbolism. As Richard Harding wrote, in a different criminal justice context, we cannot allow ‘a debate which *par excellence* possesses profound human connotations [to be] reduced simply to moral or ideological abstractions’.⁴⁸

⁴⁶ See his comments at 116.

⁴⁷ For recent discussion, A Freiberg, ‘The Politics of Sentencing’ (2000) 4 *The Judicial Review* 357.

⁴⁸ R Harding, *Private Prisons and Public Accountability* (1997) 24.