

MANDATORY PRACTICES AND THE TRANSFORMATION OF DUE PROCESS

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ABSTRACT

This article examines the conceptual interconnectedness of the federal mandatory immigration detention regime and mandatory minimum sentencing in Western Australia, two procedural and political responses to populist concerns regarding ‘waves of boat people’ and ‘waves of crime’. Through a comparative analysis, the ‘mandatory’ character of these ostensibly separate and distinct practices is shown to limit judicial discretion and oversight of government action. Mandatory practices privilege goals of deterrence, incapacitation and retribution and depict these as promoting the best interests of national safety and security. These practices are also markedly similar in the sense that they are at odds with the principle of due process, unfairly tipping the balance away from individual freedoms and towards the interests of the state, offending aspirational notions of judicial function, the rule of law and natural justice.

KEYWORDS

Mandatory, detention, sentencing, asylum seekers, due process, oversight, government action

I INTRODUCTION

Over the past three decades, Australian state and federal governments have instituted various forms of mandatory practices. This trend commenced in 1992, when Western Australia introduced harsh sentences for juvenile and adult offenders who committed repeat motor vehicle thefts.¹ This was followed

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1 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA); *Criminal Law Amendment Act 1992* (WA). These measures were repealed in 1994. There are examples of this trend in other Australian jurisdictions in the 1990s, notably the ‘three strikes’ property offender laws in the Northern Territory which have also since been repealed — see *Sentencing Act 1995* (NT) pt 3 div 6, as repealed by *Sentencing Amendment Act 2001* (NT) s 6; *Juvenile Justice Act 1983* (NT) pt IV div 3, as repealed by *Youth Justice Act 2005* (NT).

in 1994 by a ‘three strikes policy’ targeting home burglary offences,² and then by mandatory minimum sentences for assaulting police or prison officers.³ Most recently, Western Australia imposed mandatory minimum sentences for serious offences committed in the course of home invasions.⁴ These laws have led to disproportionate sentences of imprisonment for what could objectively be considered as minor crimes or as subjectively deserving of a less severe sentencing outcome in all the circumstances of the case.⁵

Mandatory immigration detention was also introduced in the early 1990s in response to an increase in asylum seekers arriving by boat. While justifications for mandatory immigration detention have changed over time,⁶ the policy remains reflective of the enduring ‘hegemonic’ role of the White Australia Policy in legitimising the exclusion of non-white immigrants.⁷ The defeat of regimes in South Vietnam, Cambodia and Laos between 1976 and 1981 prompted the

2 *Criminal Code Act Compilation Act 1913* (WA) s 401, as amended by *Criminal Code Amendment Act 1996* (WA) s 5.

3 *Criminal Code Amendment Act 2009* (WA) ss 5(2), (5).

4 *Criminal Code Act Compilation Act 1913* (WA), as amended by *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) s 5. Examples of recent implementation of mandatory sentencing in other Australian jurisdictions include: mandatory sentences of imprisonment for assaults causing death while intoxicated introduced in NSW in January 2014 — see *Crimes Act 1900* (NSW) ss 25A, 25B, as inserted by *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* sch 1 cl 2; and mandatory sentences of imprisonment for single punch manslaughter introduced in Victoria later in 2014 — see *Sentencing Act 1991* (Vic) s 9C, as inserted by *Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6. The Tasmanian Parliament recently considered the introduction of new laws for mandatory minimum sentences of imprisonment for those who seriously assault ‘frontline workers’ — the Sentencing Amendment (Assaults on Frontline Workers) Bill 2016 (Tas) was passed by the House of Assembly on 17 November 2016 but was finally negated after vigorous debate in the Legislative Council on 25 May 2017.

5 See examples listed in Law Council of Australia, ‘Policy Discussion Paper on Mandatory Sentencing’ (Discussion Paper, May 2014) 11 [20]. See also *Boddington v Western Australia* [2013] WASC 179 (14 August 2013); *Johnson v Staskos* (2015) 48 WAR 249.

6 A significant and enduring justification for mandatory immigration detention is the right of the Australian government to control and select those who may enter Australia. The earliest guiding principles of immigration policy following the first arrival of people seeking asylum by boat encapsulated this principle. See Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1983, 662 (Stewart West). See also former Prime Minister John Howard’s 2001 election speech which emphasised this principle: John Howard, ‘Address at the Federal Liberal Party Campaign Launch’ (Speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001) <https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1178395/upload_binary/1178395.pdf;fileType=application%2Fpdf#search=%22library/partypol/1178395%22>. Security arguments have also been evident, particularly following the September 11 attacks and concerns of terrorism. See comments by the former Minister for Defence, Peter Reith, alluding to the link between people seeking asylum with ‘strange identities’ and terrorism: ABC TV, ‘Defence Minister Outlines Australian Role in War on Terror’, *Insiders*, 23 September 2001 (Peter Reith) <<https://web.archive.org/web/20060512043649/http://www.abc.net.au/insiders/content/2001/s373271.htm>>. Saving lives at sea and the need for ‘fairness’ have also framed policy decisions, particularly following the 2012 report that recommended offshore processing and the ‘no advantage’ principle. See Angus Houston, Paris Aristotle and Michael L’Estrange, ‘Report of the Expert Panel on Asylum Seekers’ (Report, Australian Government, August 2012) <<https://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf>> (‘2012 Houston Report’).

7 Michael Grewoock, *Border Crimes: Australia’s War on Illicit Migrants* (Institute of Criminology Press, 2009), 112–3. Note that the ‘White Australia Policy’ was the popular name by which the policy intentions of the *Immigration Restriction Act 1901* (Cth) came to be known. This was the first Act of the new Australian federal Parliament and one that was unanimously supported by all members of the Parliament. See James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2nd ed, 2007); Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe Publications, 2005).

Australian government to move towards the systematic processing of asylum applications.⁸ The second phase of boat arrivals from 1989 prompted a more ‘exclusionist and abusive’ response by the government, and the process of ‘crimmigration’: the criminalisation of what might be described as dangerous and unfair or ‘deviant’ immigration practices.⁹ From 1993, the detention of all non-citizens, including people seeking asylum, was mandated and there were no time limits placed on the length of detention.¹⁰

While asylum seekers arriving by plane and overstaying visas received little media attention,¹¹ people travelling by boat to seek asylum in Australia¹² were scrutinised in the media, generating populist fears regarding public safety and security.¹³ Alarmism, as evident in the 2001 MV Tampa crisis¹⁴ and the SIEV4 ‘children overboard’ affair¹⁵ spurred a toughening of border protection relating particularly to people seeking asylum by boat.¹⁶ In direct response, offshore

- 8 Grewcock, above n 7, 94. Notably, immigration detention was applied to all non-citizens, however, those arriving by boat were less likely to be granted residence in Australia following successful applications for refugee status: at 96.
- 9 Ibid 94. The term ‘crimmigration’ was coined by Juliet Stumpf in 2006. See Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56 *American University Law Review* 367. Crimmigration refers to the criminalisation of immigration practices, which was traditionally an administrative process: at 376, 381. This is particularly apparent in the United States of America (‘United States’) where criminal law has expanded and encroached on immigration law to the point that the government is seeking to deport large numbers of non-citizens, with those entering the United States for a second time facing criminal sanction: at 384; Juliet P Stumpf, ‘Doing Time: Crimmigration Law and the Perils of Haste’ (2011) 58 *University of California, Los Angeles Law Review* 1705; Jennifer M Chacón, ‘Immigration and the Bully Pulpit’ (2017) 130 *Harvard Law Review Forum* 243; Annie Lai and Christopher N Lasch, ‘Crimmigration Resistance and the Case of Sanctuary City Defunding’ (2017) 57 *Santa Clara Law Review* 539. Australia, unlike the United States, has not criminalised the practice of seeking asylum, however, the lengthy detention of people seeking asylum in prison-like conditions resembles a criminalising shift in immigration practices: Alison Gerard and Sharon Pickering, ‘Crimmigration: Criminal Justice, Refugee Protection and the Securitisation of Migration’ in Bruce A Arrigo and Heather Y Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 2014) 587.
- 10 *Migration Act 1958* (Cth) s 189(1), as inserted by *Migration Reform Act 1992* (Cth) s 13. Currently, where ‘an officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen, the officer must detain the person’: *Migration Act 1958* (Cth) s 189(1). Detention must continue until the detainee is removed from Australia, taken to a regional processing country, deported or granted a visa: *Migration Act 1958* (Cth) s 196. Special provisions apply to people seeking asylum by boat who are labelled unauthorised maritime arrivals and are generally required to be taken to a regional processing country: *Migration Act 1958* (Cth) s 198AD.
- 11 Janet Phillips, ‘Asylum Seekers and Refugees: What Are the Facts?’ (Research Paper, Parliamentary Library, Parliament of Australia, 2015). People ‘overstaying’ in Australia after the expiry of their visa period significantly outnumber those arriving by boat to seek asylum. For example, in 2013 the federal government estimated that 62 700 people were in Australia after the expiration of their visa: Department of Immigration and Border Protection, ‘Australia’s Migration Trends 2012–13’ (Report, 2014) 77.
- 12 People seeking asylum by boat are classified under the *Migration Act 1958* (Cth) as ‘unauthorised maritime arrivals’ (‘UMAs’). See *Migration Act 1958* (Cth) s 5AA. Provisions applying particularly to people seeking asylum by boat include ss 46A(1), 198AD, 198AE, 198AJ, 494AA.
- 13 Frank Mols, ‘What Makes a Frame Persuasive? Lessons from Social Identity Theory’ (2012) 8 *Evidence & Policy* 329, 336. It was the second ‘wave’ of arrivals that received heightened media scrutiny. Earlier arrivals received little media attention. See Grewcock, above n 7, 94–8.
- 14 National Museum of Australia, *Tampa Affair* <http://www.nma.gov.au/online_features/defining_moments/featured/tampa_affair>.
- 15 S J Odgers, Submission to Select Senate Committee, Parliament of Australia, *Report of Independent Assessor to the Senate Select Committee on a Certain Maritime Incident*, 21 August 2002.
- 16 Mols, above n 13.

processing of people seeking asylum by boat was established under former Prime Minister John Howard's 'Pacific Solution'.¹⁷ That strategy was abandoned in 2008,¹⁸ but revived by the Gillard Government in 2012.¹⁹ Presently, people seeking asylum by boat are transported to an offshore processing centre on Nauru,²⁰ with the Australian government taking the stance that none of these people will ever have access to resettlement in Australia.²¹ While Nauru has been an 'open centre' since October 2015,²² it has all the hallmarks of a detention facility including the lack of control over daily life for people seeking asylum.²³ The facility is principally controlled and funded by the Australian government.²⁴

Governments offer these mandatory practices as evidence that they have taken seriously fears about public safety and national security. The high profile 'border protection' and 'tough on crime' debates reflect both the nature of political responses and the bolstering of public support for a tough-minded approach to

- 17 Robert Manne, 'From Tampa to 9/11: Seventeen Days that Changed Australia' in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History* (UNSW Press, 2009) 239, 242. Note that Australia had regional arrangements before this time, in particular with Indonesia and Malaysia. See Grewcock, above n 7, 99, citing Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia* (Melbourne University Press, 1984) 83–5.
- 18 Ariane Rummery, *Australia's 'Pacific Solution' Draws to a Close* (11 February 2008) United Nations High Commissioner for Refugees <<https://www.unhcr.org/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html>>.
- 19 Chris Aulich (ed), *The Gillard Governments: Australian Commonwealth Administration 2010–2013* (Melbourne University Press, 2014) 135.
- 20 *Migration Act 1958* (Cth) s 198AD; Elibritt Karlsen, 'Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources?' (Research Paper, Parliamentary Library, Parliament of Australia, 2016).
- 21 ABC Radio National, "'They Will Never Come to Australia": Turnbull Maintains Tough Stance on Asylum Seekers', *RN Drive*, 23 September 2015 (Jeremy Story Carter) <<http://www.abc.net.au/radionational/programs/drive/prime-minister-malcolm-turnbull-tough-stance-on-asylum-seekers/6799610>>. We note that Australia is no longer transferring asylum seekers to Manus Island, following the announcement that the centre there will be closed. Around 742 men remain on Manus Island and their futures are uncertain: Amy Maguire and Georgia Monaghan, 'Manus Detention Centre Closure Sparks Safety Fears for Refugees', *The Conversation* (online), 30 October 2017 <<https://theconversation.com/manus-detention-centre-closure-sparks-safety-fears-for-refugees-84460>>. People seeking asylum by boat generally cannot make a valid visa application: *Migration Act 1958* (Cth) s 46A(1).
- 22 Republic of Nauru, 'No More Detention, Greater Assistance for Nauru Asylum Seekers' (Media Release, 5 October 2015) <<http://www.abc.net.au/news/2015-10-05/asylum-seekers-on-nauru-to-be-processed-within-the-next-week/6828130>>.
- 23 Helen Davidson, 'Nauru Self-Immolation Led to "Up to 50" Similar Threats and Attempts', *The Guardian* (online), 3 May 2017 <<https://www.theguardian.com/australia-news/2017/may/03/nauru-self-immolation-led-to-up-to-50-similar-threats-and-attempts>>.
- 24 The Senate Legal and Constitutional Affairs References Committee has found that the Australian government has a duty of care over the centres and '[t]o suggest otherwise is fiction'. See Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre* (2017) vi.

these perceived crises.²⁵ The policy context of crisis management has also been characterised by arguably ill-considered knee jerk responses. Both types of mandatory practices have unfairly affected certain minority groups. Mandatory minimum sentencing disproportionately impacts Indigenous Australians due to long-term socio-economic inequalities affecting crime rates and discrimination in arrest and conviction.²⁶ People seeking asylum by boat are often of Tamil or Middle Eastern descent so mandatory immigration detention disproportionately affects these groups.²⁷ The economic costs of detention and imprisonment are of particular concern,²⁸ as are the human rights violations experienced by those subject to these mandatory practices.²⁹

There are key differences between these mandatory practices. Mandatory minimum sentencing is a state-based criminal process applying to those convicted of certain crimes. In contrast, mandatory immigration detention is a federal

- 25 Patrick van Berlo, 'Australia's Operation Sovereign Borders: Discourse, Power, and Policy from a Crimmigration Perspective' (2015) 34(4) *Refugee Survey Quarterly* 75; David Baker, 'Tough on Crime: The Rhetoric and Reality of Property Crime and Feeling Safe in Australia' (Policy Brief No 56, The Australia Institute, August 2013) 1–2; Julian V Roberts, 'Sentencing Policy and Practice: The Evolving Role of Public Opinion' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008) 15, 23; Michael Tonry, 'Mandatory Penalties' in Michael Tonry (ed), *Thinking About Punishment: Penal Policy Across Space, Time and Discipline* (Ashgate, 2009) 204; Arie Freiberg, 'Sentencing: Trends and Issues' (2005) 86 *Reform* 7, 8; Andrew von Hirsch and Andrew Ashworth, "'Law and Order'" in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 410, 417–20; Kate Warner, 'Gang Rape in Sydney: Crime, the Media, Politics, Race and Sentencing' (2004) 37 *Australian and New Zealand Journal of Criminology* 344, 345–51.
- 26 Tammy Solonec, "'Tough on Crime": Discrimination by Another Name — The Legacy of Mandatory Sentencing in Western Australia' (2015) 8(18) *Indigenous Law Bulletin* 7; Berit Winge, 'Mandatory Sentencing Laws and Their Effect on Australia's Indigenous Population' (2002) 33 *Columbia Human Rights Law Review* 693; William Jones, 'Indigenous People and Racism in Australia: Issues and International Commentary' in Suhaz Chakma and Marianne Jensen (eds), *Racism Against Indigenous Peoples* (International Work Group for Indigenous Affairs, 2001) 34. Hidden discretion, such as a police officer's decision to arrest also factors into this overrepresentation: Anna Corbo Crehan, "'Appropriate" Police Discretion and Indigenous Over-Representation in the Criminal Justice System' (2009) 11 *Australian Journal of Professional and Applied Ethics* 68, 68.
- 27 Danielle Every and Martha Augoustinos, 'Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers' (2007) 18 *Discourse & Society* 411, 416; Paul Hodge, 'A Grievable Life? The Criminalisation and Securing of Asylum Seeker Bodies in the "Violent Frames" of Australia's Operation Sovereign Borders' (2015) 58 *Geoforum* 122; Martha Augoustinos and Danielle Every, 'The Language of "Race" and Prejudice: A Discourse of Denial, Reason, and Liberal-Practical Politics' (2007) 26 *Journal of Language and Social Psychology* 123.
- 28 National Commission of Audit, *10.14 Illegal Maritime Arrival Costs* (2014) <<http://www.ncoa.gov.au/report/appendix-vol-2/10-14-illegal-maritime-arrival-costs>>; Konrad de Kerloy, 'A Letter to the Premier Colin Barnett on Mandatory Sentencing' (2014) 41(4) *Brief* 32 <<https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/2014-Mandatory-Sentencing-Letter-to-Colin-Barnett.pdf>>.
- 29 Frank Brennan, 'Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection' (2016) 39 *Boston College International & Comparative Law Review* 47; Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685; Ben Saul, 'Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions' (2013) 20 *Australian International Law Journal* 55; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); Chris Cunneen, 'Mandatory Sentencing and Human Rights' (2002) 13 *Current Issues in Criminal Justice* 322; Australian Human Rights Commission, *Indigenous Deaths in Custody: Report Summary* (October 1996) <<https://www.humanrights.gov.au/publications/indigenous-deaths-custody-report-summary>>.

administrative process applying to all people who seek asylum in Australia without a valid visa. People seeking asylum by boat are subject to offshore processing in developing Pacific Island countries, with successful judicial review or ministerial discretion being the only means by which their asylum claims will be processed in Australia.³⁰ Mandatory immigration detention can also apply indefinitely under current law,³¹ whereas indefinite mandatory minimum sentencing has not applied in Western Australia since the repeal of the *Crimes (Serious and Repeat Offenders) Sentencing Act 1992* in 1994.³² One might assume that such differences make these practices vastly different and consequently incomparable. At the same time, it is apparent that substantial similarities exist between these mandatory practices, which require deeper evaluation.

Despite extensive research into mandatory immigration detention and mandatory minimum sentencing as distinct areas of study,³³ there has been minimal consideration of how these mandatory practices might relate or overlap.³⁴ ‘Crimmigration’ literature has examined how the immigration process has become increasingly criminalised.³⁵ However, this body of work is yet to assess

30 *Migration Act 1958* (Cth) ss 198AD, 198AE. Ministerial discretion has meant that some asylum seekers arriving by boat have been sent offshore to regional processing centres while others have been detained in community detention or granted temporary protection in Australia. The reasoning for these decisions has remained unexplained. See Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing, 2016). For those on temporary visas, there is no prospect of permanent resettlement and a risk of being detained and deported upon the expiry of a visa: Department of Home Affairs, *Temporary Protection Visa* <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-protection-785>>. Those in community detention are not imprisoned in facilities but are prescribed an address to live and have conditions such as curfews placed upon them: Refugee Council of Australia, *Recent Changes in Australian Refugee Policy: Immigration Detention* (8 June 2017) <<https://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>>.

31 See *Al-Kateb v Godwin* (2004) 219 CLR 562 where the Court ruled that detention could legally continue even where there was no prospect of resettlement in a third country. The High Court has also confirmed that the Commonwealth has both constitutional and statutory power to make offshore immigration detention arrangements with other countries, even where the circumstances of detention under those arrangements are illegal under the law of the relevant country. See *Plaintiff S195/2016 v Minister for Immigration and Border Protection (Cth)* (2017) 261 CLR 622; *Namah v Minister for Foreign Affairs & Immigrations* [2016] SC1497 (26 April 2016) (Supreme Court of Papua New Guinea); Amy Maguire, ‘High Court Challenge to Offshore Immigration Detention Power Fails’, *The Conversation* (online), 17 August 2017 <<https://theconversation.com/high-court-challenge-to-offshore-immigration-detention-power-fails-82424>>.

32 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) s 8(2). Pursuant to this provision, offenders could be detained following a mandatory sentence ‘at the Governor’s pleasure’.

33 Major contributors to the debate on mandatory immigration detention include Jane McAdam, Ben Saul, Mary Crock, Sharon Pickering, Joyce Chia and Frank Brennan. Major contributors in the field of mandatory minimum sentencing include Andrew von Hirsch, Julian Roberts, Andrew Ashworth, Neil Morgan, George Zdenkowski, Hal Jackson and Mirko Bagaric.

34 Note, however, that Crock and Miller briefly discussed the public disgust at the unjust effects of mandatory minimum sentencing laws and the strange silence surrounding mandatory immigration detention laws, which ‘are as unsatisfactory and as unjust’. See Mary Crock and Daniel Miller, ‘Mandatory Detention of Asylum Seekers in Australia’ (2013) 22(1) *Human Rights Defender* 17, 17.

35 Stumpf, ‘The Crimmigration Crisis’, above n 9; Stumpf, ‘Doing Time’, above n 9; Christopher N Lasch et al, ‘Understanding “Sanctuary Cities”’ (2018) 59 *Boston College Law Review* 1703; Gerard and Pickering, above n 9; Michael Welch, ‘The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring’ (2012) 52 *British Journal of Criminology* 324; Maartje A H van der Woude and Patrick van Berlo, ‘Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package’ (2015) 11(1) *Utrecht Law Review* 61; van Berlo, above n 25.

how mandatory practices across criminal and administrative settings commonly expand government power and limit due process. In this article, we explore the similarities of mandatory practices by examining the following questions: Is there a common underlying thread uniting mandatory policies and practices? What are the particular aims of mandatory practices, as distinct from discretionary decision-making in relation to criminal offenders and asylum seekers arriving by boat?³⁶ Is mandatory immigration detention effectively an administrative form of incarceration, absent safeguards to protect the rights of people detained without committing any crime?³⁷ We take an interdisciplinary approach to explore these questions through the lens of the principle of due process,³⁸ with focus on the

- 36 Australia's mandatory immigration detention policy relates specifically to people who seek to travel to Australia by boat and claim asylum as refugees. The majority of boat arrivals are genuine refugees: Phillips, above n 11, 9–10. In order to ensure clarity here, we term these people 'asylum seekers arriving by boat' or 'asylum seekers'. We note, however, that discourse in this context is highly politicised and value-laden. We deliberately avoid use of the terms frequently applied to people seeking asylum by boat in Australian law and public discourse, for example, 'illegal immigrants', 'queue jumpers', 'unauthorised maritime arrivals', etc. See, eg, *Migration Act 1958* (Cth) s 5AA; Department of Home Affairs, *Illegal Maritime Arrivals* (2017) <<https://web.archive.org/web/20170315070436/http://www.ima.border.gov.au/>>. See also remarks by former Prime Minister Tony Abbott in Julian Burnside, 'Boat People Un-Christian? Wrong, Mr Abbott', *ABC News* (online), 11 July 2012 <<http://www.abc.net.au/news/2012-07-11/burnside-an-unchristian-view-of-asylum-seekers/4123872>>.
- 37 Pursuant to international law it is not a crime to seek asylum: *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 ('*Refugee Convention*'). In Australia, those seeking asylum are not prosecuted through the criminal justice system but are subject to administrative detention in accordance with the *Migration Act 1958* (Cth) ss 189, 196.
- 38 Due process was first expressed in the *Magna Carta* cl 39. See J C Holt, *Magna Carta* (Cambridge University Press, 3rd edition, 2015) 389: 'No free man is to be taken or imprisoned ... except by the lawful judgement of his peers or by the law of the land'. Due process is not a part of modern British law and the extent to which it is implied within the *Australian Constitution* is highly contested: Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31 *Sydney Law Review* 411. Cf American law where due process is expressly included within the Constitution: *United States Constitution* amends V, XIV. However, the concepts of exclusive judicial power, the rule of law, natural justice and substantive fairness have been long held as ideals within the common law system: Chief Justice R S French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009) <<http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>>. Further, modern expectations of citizens in Australia far exceed those values encapsulated by John Stuart Mill in his formulation of a representative democracy, meaning these principles that enforce a balance between state power and individual freedoms are increasingly relevant: Murray Gleeson, 'Courts and the Rule of Law' (Paper presented at The Rule of Law Series, Melbourne University, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>. In this article, we use the term 'due process' as an umbrella that covers several fundamental principles that are both founding and aspirational to Australia's liberal democratic system of governance.

retention of exclusive judicial power,³⁹ the rule of law,⁴⁰ natural justice⁴¹ and substantive fairness.⁴²

In investigating these questions, we analyse the development of mandatory minimum sentencing in Western Australia⁴³ and mandatory immigration detention of asylum seekers arriving by boat. In Part II, we explore the definition of ‘mandatory’. In Part III, we examine the origins of mandatory practices. In Part IV, we critically evaluate mandatory practices to understand better the nature and effects of limiting decision-maker discretion. In Part V, we explore what are purported to be the primary goals of mandatory practices: retribution, deterrence and incapacitation. In revealing the common base elements of these distinct and separate mandatory practices, we conclude that mandatory immigration detention and mandatory minimum sentencing practices both lead to the suppression of due process through increased governmental control.

II DEFINING MANDATORY

An exploration of the term ‘mandatory’ reveals distinctions between how the concept is understood and applied by lawyers and by the general public. In legal terminology, mandatory detention is defined as ‘[t]he compulsory confinement of

39 *Australian Constitution* ch III. This principle is sometimes referred to as the implied ‘separation of powers’ doctrine. In Australia there is not a strict separation of legislative, executive and judicial functions as there is in the United States: *United States Constitution* arts I § 1, II § 1, III § 1. For United States cases upholding the separation of powers, see *Immigration and Naturalization Service v Chadha*, 462 US 919 (1983); *Dames & Moore v Regan*, 453 US 654 (1981); *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952). However, Australian Federal Courts have maintained exclusive jurisdiction to adjudicate criminal guilt and there appears to be constitutional limits on executive and legislative power: *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*‘Lim’*); *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

40 The rule of law requires that ‘all authority is subject to, and constrained by, law’: Gleeson, above n 38. Gleeson pointed to the continuing relevance of the rule of law, stating that it will continue to evolve.

41 Natural justice is a broad concept encompassing the right to a fair hearing and the rule against bias. Procedural fairness pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is more narrowly defined: *Kioa v West* (1985) 159 CLR 550, 583–4; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. For a consideration of differences between natural justice and procedural fairness see Justice Alan Robertson, ‘Natural Justice or Procedural Fairness’ (Paper presented at the Judges and the Academy Series, University of Melbourne Law School, 4 September 2015) <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-robertson/robertson-j-20150904>>. In this article, we take natural justice in its broadest and most aspirational sense.

42 Substantive fairness, meaning the achievement of a fair result or outcome, is an aspirational notion, rather than a legal principle of Australian constitutional law. Cf the United Kingdom and New Zealand: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 399 n 8. As the Australian liberal democratic system values fair outcomes, we include an assessment of substantive fairness within our conception of due process.

43 We have restricted our analysis to Western Australia as there has been a series of mandatory minimum sentencing schemes in this jurisdiction over the past three decades, which provide the best comparative example of the policies and practices associated with mandatory sentencing. We acknowledge that mandatory minimum sentencing has and does exist in other Australian jurisdictions — see above nn 1, 4, 5.

an individual in custody, compelled by law'.⁴⁴ Mandatory sentencing is defined as '[s]entencing prescribed by legislation with no discretion granted to the court to individualise punishment'.⁴⁵ Generally, a provision that uses the words 'may' or 'if he or she thinks fit' is discretionary and a provision that uses the words 'shall' or 'must' is obligatory.⁴⁶ Nonetheless, the courts have treated the mandatory/discretionary divide as 'having to be dealt with by reference to the ordinary [legal] principles of interpretation'.⁴⁷ Courts will principally have regard to the meaning of the text, the purpose of the provision and the intention of Parliament.⁴⁸ If the words were designed by the legislators to have a particular purpose, this will be relevant.⁴⁹

Beyond this strict legal sense, the term 'mandatory' is often used by politicians to reflect a strong and unrelenting stance even where relevant laws do not have an absolute mandatory application. For example, 'mandatory detention' was proposed in Canada as part of its response to the interception of the MV Sun Sea, a cargo ship carrying Sri Lankan asylum seekers that had entered Canadian waters.⁵⁰ However, in Canada 'mandatory immigration detention' is only applied in an obligatory sense to those who are designated as an 'irregular arrival' by the Minister, encapsulating a discretionary element.⁵¹ In contrast, Australian 'mandatory immigration detention' refers to an obligation to detain *all* asylum seekers arriving by boat and therefore has an absolute mandatory application.⁵²

'Mandatory sentencing' has similarly been used to describe legal regimes that retain a discretionary element. For example, minimum sentences may be mandated alongside a 'loophole' which permits judges to exercise discretion and bypass mandatory sentences in special circumstances.⁵³ Also, there have been examples of forbearance from a strictly mandatory application through

44 Ray Finkelstein et al (eds), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 393.

45 *Ibid* 394.

46 *Acts Interpretation Act 1901* (Cth) s 33(2A); *Interpretation Act 1984* (WA) s 56. For a summary of case law favouring this construction see Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 428, citing *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, 690 (Diplock LJ), 698 (Salmon LJ); *DPP (ACT) v Hiep Huu Le* (1998) 86 FCR 33, 40; *Newmarch v Atkinson* (1918) 25 CLR 381, 387–8; *Lamb v Moss* (1983) 76 FLR 296, 312.

47 Pearce and Geddes, above n 46, 425. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

48 Pearce and Geddes, above n 46, 425; Kath Hall and Claire Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 4th ed, 2015) 108.

49 See, eg, *Re Sarina; Ex parte Wollondilly Shire Council* (1980) 43 FLR 163; Pearce and Geddes, above n 46, 433.

50 Kim Rygiel, 'Governing Mobility and Rights to Movement Post 9/11: Managing Irregular and Refugee Migration through Detention' (2012) 16 *Review of Constitutional Studies* 211, 222.

51 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 20.1(1).

52 *Migration Act 1958* (Cth) ss 5AA, 189.

53 See, eg, *Sentencing Act 1995* (NT) ss 78A(6B)–(6C), (6E), as repealed by *Sentencing Amendment Act 2001* (NT) s 6, which provided that offences may not amount to 'strikes' under the Northern Territory three strikes laws where particular criteria are fulfilled. These include the offence being of a trivial nature, that the sentence was non-custodial, that there were mitigating circumstances and that the behaviour was unusual for the offender.

judicial interpretation of particular provisions in light of fundamental sentencing principles. Under the Western Australian mandatory sentencing laws, Fenbury J ruled that conditional release orders were to be granted instead of terms of imprisonment in two cases, taking into account the juvenile justice principle that imprisonment must only be a last resort.⁵⁴ However, other mandatory sentencing statutes — for example those based on fixed sentences or an inflexible grid system — do not permit any discretion.⁵⁵ In the following section, we briefly explore the origins of mandatory practices in contemporary Australia to contextualise the nature of mandatory.

III MANDATORY LAWS: POPULIST RESPONSES TO CONSTRUCTED CRISES

Mandatory minimum sentencing and mandatory immigration detention laws were enacted as a response to perceived community fears of ‘waves’ of crime and ‘waves’ of ‘boat people’.⁵⁶ Through the construction of these seemingly unrelenting ‘waves’ by successive governments and the media, images of destructive forces were conjured in populist sentiment, with an apparent need for a swift punitive response — ‘mandatory’ treatment. The metaphoric ‘wave’ absorbed individuals into an indistinguishable mass, effectively denying individual personhood to those subject to mandatory practices and positioning them as causes of social problems.⁵⁷ With political elites and the media in a position to provide the primary source of information to the public, these bodies ‘lead, not follow’,⁵⁸ public opinion, and present claims that affect people’s understanding of social problems.

54 See Aboriginal and Torres Strait Islander Commission, Submission No 24 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Senate Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, March 2000, 24 [7.2], [7.4].

55 For example, mandatory sentencing in Western Australia is in the form of mandatory minimum sentencing. See Neil Morgan, ‘Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?’ (1999) 28 *Western Australian Law Review* 259; Library of Congress, *Sentencing Guidelines: Australia* (24 August 2016) <https://www.loc.gov/law/help/sentencing-guidelines/australia.php#_ftnref15>.

56 The term ‘boat people’ has been in use in Australian political discourse since the arrival of the first asylum seekers in the ‘aftermath of the Vietnam War’: Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia since 1976* (Research Paper, Parliamentary Library, Parliament of Australia, 2013) 1. The term ‘boat people’ has been used in a pejorative way, conflating the human being with the experience of seeking asylum by boat. This labelling has led to ‘Othering’ and the exclusion of asylum seekers: Bridget Holtom, ‘“Boat People” in Australia: Press, Policy and Public Opinion’ (2013) *GEOview* 1 <<http://geoview.iag.org.au/index.php/GEOView/article/view/29/28>>. Negative connotations stem from perceptions of illegitimacy of asylum seekers arriving by boat. This group is popularly misrepresented as jumping the ‘queue’ to unfairly access Australia’s immigration system and less in need of protection because of their ability to pay to travel to Australia: Elizabeth Rowe and Erin O’Brien, ‘“Genuine” Refugees or Illegitimate “Boat People”: Political Constructions of Asylum Seekers and Refugees in the Malaysia Deal Debate’ (2014) 49 *Australian Journal of Social Issues (Australian Social Policy Association)* 171.

57 Lyn Hinds, ‘Three Strikes and You’re Out in the West: A Study of Media Coverage of Crime Control in Western Australia’ (2005) 17 *Current Issues in Criminal Justice* 239, 240–1.

58 Ibid 240. See also Carol Bacchi, *Analysing Policy: What’s the Problem Represented to Be?* (Pearson, 2009) x–xi.

A Waves of Crime

In the 1990s, Western Australian criminal policy followed a ‘tough on crime’ rhetoric with politicians taking a retributive stance in a bid to respond to perceived community concerns about increased criminal activity. Saturation media coverage meant that Western Australian citizens were ‘led to believe that they [were] a community under siege from young black men driving stolen cars’.⁵⁹ The first mandatory minimum sentencing laws were introduced after a ‘spate’ of motor vehicle thefts and high-speed police chases, blamed largely on Aboriginal young people.⁶⁰ Howard Sattler, a talkback radio host and writer for the *Sunday Times*, presented the Western Australian Parliament as ‘soft’⁶¹ and failing to respond to community fears, culminating in the largest rally ‘ever seen in Perth’.⁶² Following the rally, there was intense media focus on motor vehicle related crime committed by Aboriginal youth.⁶³

This shift to reflect a ‘tough on crime’ approach was described by Bottoms as ‘populist punitiveness’.⁶⁴ This phrase refers to ‘the notion of politicians tapping into, and using for their own purposes, what they believe to be the public’s generally punitive stance’.⁶⁵ The approach was designed to curb ‘media hysteria [and] attract voter support’.⁶⁶ All Western Australian mandatory minimum sentencing laws reflect this approach. The policies aim principally to increase sentence severity rather than prioritising the consequentialist sentencing goals of rehabilitation or crime prevention. The notorious three strikes laws, for example, were introduced as a ‘highly politicised weapon’ with ‘crime control’ central to both major parties’ campaigns ‘in the lead-up to the 1996 ... election’.⁶⁷

This approach gained favour despite the relative infrequency of motor vehicle theft by Aboriginal young people when compared to other crimes such as motor vehicle incidents involving alcohol consumption.⁶⁸ This generated an amplified concern with a small minority of crimes and thus a small minority of specific offenders. In grouping distinct offences together as part of a crime ‘wave’, the

59 Charlotte Stockwell, ‘The Role of the Media in the Juvenile Justice Debate in Western Australia’ (Paper presented at the National Conference on Juvenile Justice, Adelaide, 22–24 September 1992) 279.

60 Hal Jackson, ‘Juvenile Justice — The Western Australian Experience’ (Paper presented at the National Conference on Juvenile Justice, Adelaide, 22–24 September 1992) 87–8.

61 Stockwell, above n 59, 282.

62 Ibid 283. The rally was attended by over 20 000 people: Jackson, above n 60, 88.

63 Stockwell notes the lack of media coverage of a deliberate hit-and-run, where Louis Johnson was bashed and run over, with the driver targeting him ‘because he was black’: Stockwell, above n 59, 284–5 (emphasis altered).

64 Anthony Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Oxford University Press, 1995) 17.

65 Ibid 40.

66 Solonec, above n 26, 7.

67 Hinds, above n 57, 247, quoting C Fitzpatrick, ‘Three Strikes — You Pay’, *The West Australian* (Perth), 15 February 1997, 14.

68 Stockwell, above n 59, 284.

specific circumstances surrounding each crime and the personal features of each offender are lost in the perceived overriding concern for community safety.

B Waves of ‘Boat People’

Like the construction of ‘waves of crime’ in Western Australia, the intense focus on the relatively small number of people travelling to Australia by boat to seek asylum has led to perceptions of ‘waves of boat people’. Despite a generally welcoming response to the first ‘wave’ of Vietnamese war refugees in the late 1970s, there were growing anxieties around deaths at sea in the late 1980s.⁶⁹ Influxes of ‘boat people’ predominantly arriving from Cambodia sparked fears of an inundation of asylum seekers.⁷⁰ Fears of waves ‘hit[ting]’ Australian shores were reflected in media reports.⁷¹ Asylum seekers were described as an ‘armada’ which, coupled with predictions of ‘masses’ of ‘boat people’, shifted focus from the personal vulnerabilities of asylum seekers to the ways in which their arrival in Australia might impose burdens on housing and administration.⁷² This discourse generated a perception of ‘crisis’ and consequently a shift away from hospitality and towards keeping asylum seekers out of Australia. Further, terms such as ‘illegal’ and ‘queue jump[ing]’⁷³ have been used to describe asylum seekers arriving by boat in a way that stigmatises, if not criminalises, the conduct of asylum seekers despite the right of those people to seek asylum under international law.⁷⁴

Successive governments have both fed and responded to fears of being overrun with asylum seekers,⁷⁵ who are portrayed as using dangerous and unfair methods of immigration. This has driven convergence with criminal procedures as expressed by the concept of ‘cimmigration’. Mandatory immigration detention has been a high profile political issue that has been used to harness votes. This was particularly the case in the re-election of former Prime Minister John Howard following the Tampa incident and the ‘Children Overboard’ Affair in 2001,⁷⁶ when he famously declared ‘we will decide who comes to this country and the circumstances in which they come’.⁷⁷ Similarly, former Prime Minister, Tony

69 ‘No Place But the Grave’, *The Canberra Times* (Canberra), 24 May 1980.

70 Janet Phillips and Harriet Spinks, ‘Immigration Detention in Australia’ (Background Note, Parliamentary Library, Parliament of Australia, 2013) 4, quoting Adrienne Millbank, ‘The Detention of Boat People’ (Current Issues Brief No 8, Parliamentary Library, Parliament of Australia, 2001) 2.

71 ‘Another Wave of Boat People Possible’, *Canberra Times* (Canberra), 2 September 1980.

72 Paul Chamberlain, ‘Plans for 5000 Boat People’, *Canberra Times* (Canberra), 6 January 1995, 1.

73 Rowe and O’Brien, above n 56, 175.

74 Tom Clark, ‘Calling a Boat Person a Spade: Australia’s Asylum Seeker Rhetoric’, *The Conversation* (online), 22 October 2013 <<https://theconversation.com/calling-a-boat-person-a-spade-australias-asylum-seeker-rhetoric-19367>>.

75 Sharon Pickering and Leanne Weber, ‘New Deterrence Scripts in Australia’s Rejuvenated Offshore Detention Regime for Asylum Seekers’ (2014) 39 *Law & Social Inquiry* 1006, 1007–8; Grewcock, above n 7, 147–9.

76 See Manne, above n 17, 239; 2012 Houston Report, above n 6.

77 Howard, above n 6.

Abbott, won an election in 2013 via a ‘Stop the Boats Campaign’, which favoured turning asylum seeker boats back to Indonesia.⁷⁸

Elements of the media have continued in recent years to reinforce the portrayal of asylum seekers in a negative light.⁷⁹ The fears of mass numbers of asylum seekers with criminal proclivities arriving in Australia are not grounded in fact yet they have reinforced negative attitudes in the Australian community.⁸⁰ The most common false beliefs include that “‘boat people are queue jumpers”, “asylum seekers are illegal” and “people who arrive unauthorised are not genuine refugees”.⁸¹ Fear-mongering by government and media has deflected attention from the personal circumstances of vulnerable individuals, shifting instead to the ‘problem’ of asylum seekers as a ‘faceless, undifferentiated mass’.⁸² Elements of the Australian media have wilfully conveyed prejudicial representations of asylum seekers, constituting instances of what Cohen has called ‘moral panic’.⁸³ Cohen contends that metaphors have been used to describe asylum seekers. He identified an earlier study that highlighted instances where asylum seekers were represented as ‘water (“tidal waves”), as criminals or as an invading army’.⁸⁴

While Cohen’s example draws on European media, his key point that asylum seekers and refugees can be portrayed as ‘folk devils’ through being framed as ‘deviant’,⁸⁵ and that framing is also evident within media and political discourse in Australia.⁸⁶ The construction of asylum seekers as ‘folk devils’ has led to what McNamara and Quilter describe as ‘hyper-criminalisation’ — the extension of the sphere of ‘criminal responsibility ... beyond its traditional limits’.⁸⁷ The perceived need for ‘harsh’ and ‘tough’ approaches aimed at ‘controlling’ asylum seekers has led to a merging of administrative immigration procedures with

78 Brian Loughnane, *It’s Time to Take a Stand and Stop the Boats* (2013) Liberal Party of Australia <<https://web.archive.org/web/20160412132848/https://www.liberal.org.au/its-time-take-stand-and-stop-boats>>.

79 Pickering and Weber, above n 75, 1007–8.

80 Anne Pedersen, Susan Watt and Susan Hansen, ‘The Role of False Beliefs in the Community’s and Federal Government’s Attitudes towards Australian Asylum Seekers’ (2006) 41 *Australian Journal of Social Issues* 105, 105.

81 Ibid.

82 *Woodson v North Carolina*, 428 US 280, 304 (Stewart J) (1976).

83 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Routledge, 3rd ed, 2002) at pages xxii–xxiv.

84 Ibid xxiii (emphasis altered), citing Elisabeth E Refaie, ‘Metaphors We Discriminate by: Naturalized Themes in Austrian Newspaper Articles about Asylum Seekers’ (2001) 5 *Journal of Sociolinguistics* 352.

85 Cohen, above n 83, xxii–xxix.

86 Sharon Pickering, ‘Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia’ (2001) 14 *Journal of Refugee Studies* 169; Natascha Klocker and Kevin M Dunn, ‘Who’s Driving the Asylum Debate: Newspaper and Government Representations of Asylum Seekers’ [2003] 109 *Media International Australia Incorporating Culture and Policy: Quarterly Journal of Media Research and Resources*, 71.

87 Luke McNamara and Julia Quilter, ‘The “Bikie Effect” and Other Forms of Demonisation: The Origins and Effects of Hyper-Criminalisation’ (2016) 34(2) *Contemporary Issues in Criminal Law* 5, 5. ‘Crimmigration’ has also been used to describe the trend towards the divergence of immigration and criminal law. See above n 9 and accompanying text.

criminal sentencing, namely, ‘crimmigration’ — laws and policies that aim to discipline asylum seekers.

This construction of asylum seekers as ‘illegal’ does not reflect the fact that many people have a right to seek asylum pursuant to international law.⁸⁸ The common origin of mandatory practices, as responses to populist discourse, provides the first clue to the nature of ‘mandatory’.

IV THE REALITY OF MANDATORY PRACTICES: LIMITING JUDICIAL DISCRETION AND OVERSIGHT OF GOVERNMENT ACTION

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.⁸⁹

Stewart J of the US Supreme Court eloquently captures the stark reality of mandatory sentencing in the specific context of the death penalty, but at the same time illustrates the broader application of the idea of ‘a faceless, undifferentiated mass’ being a feature of all mandatory practices.⁹⁰ Mandatory minimum sentencing and mandatory immigration detention both necessitate a limiting of decision-maker discretion, and consequently fail to acknowledge the lived experiences of those people subject to mandatory practices. In this section, we explore the limiting of decision-maker discretion in detail. We examine the effects of restricting discretion on due process accorded to those subject to mandatory practices.

A Limiting Discretion: Mandatory Minimum Sentencing

The 1992 Western Australian legislation mandated terms of imprisonment so that the minimum would apply even where a judge had determined that mitigating factors warranted a more lenient sentence.⁹¹ The three strikes laws also limited judicial consideration of mitigating factors in mandating minimum

88 *Refugee Convention* art 33.

89 *Woodson v North Carolina*, 428 US 280, 304 (Stewart J) (1976).

90 *Ibid.*

91 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) s 6(2). ‘Violent offences’ are listed in sch 1, including murder, manslaughter, acts intending to cause grievous bodily harm, grievous bodily harm, causing explosion likely or intended to endanger life, wounding, assault occasioning actual bodily harm, serious assaults, indecent assaults, sexual assault, kidnapping, deprivation of liberty, robbery and assault with intent to commit robbery: at sch 1 pt 2.

terms of at least twelve months imprisonment.⁹² Comparatively recent legislative amendments have further restricted the exercise of judicial discretion, removing options for conditional release and classifying multiple infringements on a single occasion as multiple ‘strikes’, allowing the mandatory provisions to apply in a broader range of circumstances.⁹³ This expansion in legislative control over the nature and duration of sentences has meant that judges cannot take into account mitigating factors in terms of the objective seriousness of the offence and the subjective circumstances of the offender that would likely reduce the sentence below the mandatory minimum. The consequence of these statute-imposed practices is the dehumanisation, the rendering faceless, of those convicted of specified criminal offences.

Such restrictions on the exercise of judicial discretion are troubling since a lack of knowledge of the facts of a case can lead to misconceptions of excessive leniency in sentencing.⁹⁴ The Law Council of Australia has cited instances of anomalies including a jail term of one year imprisonment for an eleven-year-old who broke into houses in a remote community to steal food, a jail term of 14 days for a person who stole a cigarette lighter valued at \$2.50 and a jail term of 90 days for a person who stole 90 cents from a motor vehicle.⁹⁵ Removing objective and personal circumstances from the equation inevitably groups offences into a single category regardless of the broad spectrum of conduct that can constitute such offences, and forces offenders into a single subclass regardless of their personal circumstances and background. In failing to account for the particularities of each case, it is impossible to achieve substantive fairness in mandatory minimum sentencing.

The mandatory minimum sentencing regimes in Western Australia evidence a shift towards legislators determining what they perceive to be appropriate

- 92 *Criminal Code Act Compilation Act 1913* (WA) s 401(4); *Young Offenders Act 1994* (WA) s 126. For useful examples of critical academic commentary about mandatory sentencing and these specific laws, see Russell Hogg, ‘Mandatory Sentencing Laws and the Symbolic Politics of Law and Order’ (1999) 22 *University of New South Wales Law Journal* 262; Neil Morgan, ‘Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories’ (1999) 22 *University of New South Wales Law Journal* 267; Martin Flynn, ‘Fixing a Sentence: Are there Any Constitutional Limits?’ (1999) 22 *University of New South Wales Law Journal* 280; Helen Bayes, ‘Punishment Is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory’ (1999) 22 *University of New South Wales Law Journal* 286; George Zdenkowski, ‘Mandatory Imprisonment of Property Offenders in the Northern Territory’ (1999) 22 *University of New South Wales Law Journal* 302; David Brown, ‘Mandatory Sentencing: A Criminological Perspective’ (2001) 7(2) *Australian Journal of Human Rights* 31; Dianne Johnson and George Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (Australian Centre for Independent Journalism, 2000).
- 93 *Criminal Code Act Compilation Act 1913* (WA) ss 400, 401, 401A, 401B, as amended by *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) ss 19–21.
- 94 Kate Warner et al, ‘Public Judgement on Sentencing: Final Results of the Tasmanian Jury Study’ (Report No 407, Australian Institute of Criminology, February 2011) 3; Kate Warner et al, ‘Are Judges Out of Touch?’ (2014) 25 *Current Issues in Criminal Justice* 729; Chief Justice Wayne Martin, ‘The Art of Sentencing — An Appellate Court Perspective’ (Paper presented at the Singapore Academy of Law & State Courts of Singapore Sentencing Conference, Singapore, 9 October 2014) <<http://www.supremecourt.wa.gov.au/files/The%20Art%20of%20Sentencing%20-%20an%20Appellate%20Court%20Perspective%20Martin%20CJ%2014%20Oct%202014.pdf>> 34; David Indermaur et al, ‘A Matter of Judgement: The Effect of Information and Deliberation on Public Attitudes to Punishment’ (2012) 14 *Punishment & Society* 142, 159–60.
- 95 Law Council of Australia, ‘The Mandatory Sentencing Debate’ (Paper, Law Council of Australia, September 2001) 7.

sentences for particular crimes, in circumstances where such crimes appear prevalent and/or where they are generating high levels of apprehension in the community. A particularly extreme claim to executive, rather than judicial, power in this area was evident in the 1992 legislation, which allowed for adult repeat offenders to be detained indefinitely ‘at the Governor’s pleasure’ after serving a mandatory minimum custodial sentence.⁹⁶ This law, which has since been repealed, represented a serious deviation from the doctrine of separation of powers in a democracy governed by the rule of law. The law offended the rule of law because it empowered the executive to encroach on the court’s role to adjudge and sentence criminal guilt.

B Limiting Discretion: Mandatory Immigration Detention

Mandatory immigration detention laws demonstrate a similar trend in limiting the discretion of decision-makers and the judicial oversight of government action. Early 1990s reform of the *Migration Act* by the Keating Government inserted the requirement that ‘[i]f an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.’⁹⁷ The word ‘must’ obliges an officer to detain all asylum seekers arriving by boat (and, potentially, other persons who may not be seeking asylum but may be ‘reasonably suspected’ of doing so). The mandatory policy removes the discretion to take into account the individual circumstances of an asylum seeker and effectively prohibits initial individual assessments, grouping all asylum seekers arriving by boat into a ‘faceless’⁹⁸ subclass. Consideration of the rights and needs of individuals is no longer permissible at the time of initial apprehension, and all asylum seekers arriving by boat, regardless of their varying ages, abilities, mental states and political situations, are subject to detention.

Over time, the restrictions upon judicial oversight of government action have become more apparent in mandatory immigration detention policy. The removal of time limits on detention, effective from September 1994, have legalised prolonged and potentially indefinite detention.⁹⁹ Review by the courts is now basically closed due to the enactment of privative clauses.¹⁰⁰ These factors evidence a grab for control by the executive and legislative arms of government, ousting the role of the courts and closing avenues that would more readily allow for ensuring natural justice and procedural fairness. The negative effects of a lack of review were highlighted in the 2005 Palmer Inquiry into the case of

96 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) s 8(2).

97 *Migration Reform Act 1992* (Cth) s 13, inserting *Migration Act 1958* (Cth) s 54W. Section 7 expressly states that those termed ‘illegal entrants’ under the previous reform become ‘unlawful non-citizens’ on the 1 November 1993. ‘[U]nlawful non-citizens’ also include those who had their visa cancelled whilst in the migration zone: at s 7.

98 *Woodson v North Carolina*, 428 US 280, 304 (Stewart J) (1976).

99 Australian Human Rights Commission, ‘Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood’ (Report, Australian Human Rights Commission, 2011) 6–7 <<http://www.humanrights.gov.au/publications/2011-immigration-detention-villawood#s4>>; Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004) 141 [6.2].

100 *Migration Act 1958* (Cth) ss 5E, 47A(2); *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 (da), (db).

Cornelia Rau, an Australian permanent resident who was incorrectly detained as a suspected ‘unlawful non-citizen’.¹⁰¹ Over a decade since that inquiry, the government has failed to establish any systematic review process for persons detained due to uncertainty regarding their citizenship or residency status.¹⁰²

C The Upshot of Convergent Limiting of Discretion

The use of mandatory practices to limit judicial oversight in this way is deeply concerning due to the increased potential for unjust and unfair decisions to be made without effective monitoring. There are very limited circumstances in which the government will be found to be overstepping its powers under the *Australian Constitution*.¹⁰³ Privative clauses that oust judicial oversight of government actions have been ruled to be constitutional on the basis that these clauses are construed not as limiting the role of the court but rather as extending the power of the decision-maker.¹⁰⁴ This finding has diminished the role of the courts and hampered the achievement of procedural fairness.

In limiting decision-maker discretion and oversight of government action, mandatory sentencing and immigration detention are effectively extreme practices which capitalise on moral panic regarding criminal offenders and asylum seekers. The shift towards mandatory practices has seen the marginalisation of natural justice, procedural fairness, substantive fairness and human rights concerns, in favour of promoting goals of deterrence, incapacitation and retribution. In the following section, we examine these goals of punishment in detail and assess whether they are effectively reflected in — or justified by — mandatory sentencing and detention practices.

V PURPORTED AIMS OF MANDATORY PRACTICES: UPHOLDING THE PERCEIVED NATIONAL INTEREST IN COMMUNITY SAFETY AND NATIONAL SECURITY

Populist debate has centralised the national interest agenda of deterrence, incapacitation and retribution in both asylum seeker law and criminal law. It is noted that these three aims are not mutually exclusive, nor do they necessarily complement one another. These goals are usually associated with sentencing, including mandatory minimum forms, particularly since the mid-1970s when rehabilitative goals were cast aside in favour of a more punitive

101 Mick Palmer, ‘Inquiry in the Circumstances of the Immigration Detention of Cornelia Rau’ (Report, Department of Immigration and Multicultural and Indigenous Affairs, July 2005).

102 Shaun McCarthy, Amy Maguire and Amy Elton, ‘Executive Detention: Still No Effective Review for Detainees’ (2016) 41 *Alternative Law Journal* 249, 249.

103 Helen Irving, *Five Things to Know About the Australian Constitution* (Cambridge University Press, 2004) 74.

104 Administrative Review Council, ‘The Scope of Judicial Review’ (Discussion Paper, Attorney-General’s Department, 2003) 149 [7.8].

approach.¹⁰⁵ With the strong focus on border protection and the evolution of ‘cimmigration’, however, the aims of deterrence, incapacitation and retribution have also come to apply in varying degrees to the treatment of asylum seekers arriving by boat.

The primary objective of mandatory immigration detention is to enable asylum claims to be assessed and to facilitate removal from Australia.¹⁰⁶ The Australian government has a strong desire to deal speedily with asylum claims and facilitate removal of people seeking asylum. This is evidenced through highly controversial fast track asylum claims processing,¹⁰⁷ granting of temporary protection visas for those who successfully claimed refugee status,¹⁰⁸ removal of those with negative claims for refugee status¹⁰⁹ and strong encouragement and even incentives for those with pending claims to return to their home countries.¹¹⁰ However, we

105 The penal treatment methods utilised into the 1970s were associated with the decline of rehabilitation as a primary aim in the sentencing of offenders. The use of indeterminate sentences in the name of ‘treatment’ was criticised, in particular, by desert theorists on the basis that there was no discernible proportion between the crime committed by the offender and the sentence imposed. See Andrew von Hirsch and Lisa Maher, ‘Should Penal Rehabilitationism Be Revived?’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 33; Andrew von Hirsch, *Doing Justice: The Choice of Punishments — Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976); Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993). Another criticism was based on the research by Robert Martinson into the rehabilitative effects of various sanctions and treatment programs, leading to the general conclusion that ‘nothing works’ — see Robert Martinson, ‘What Works? Questions and Answers about Prison Reform’ 35 (Spring) *The Public Interest* 22.

106 ‘The object of [the Migration] Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’: *Migration Act 1958* (Cth) s 4(1). Deportation, removal and the taking of ‘UMAs’ to regional processing countries are listed as means by which to advance this purpose: at ss 4(2)–(5). According to the High Court, mandatory immigration detention is a valid means to meet these objectives: *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (Cth) (2017) 261 CLR 622. These aims are put forward on the Department of Home Affairs website: Department of Home Affairs, *Immigration Detention in Australia: Role of the Department of Home Affairs* <<https://web.archive.org/web/20180504211547/https://www.homeaffairs.gov.au/about/immigration-detention-in-australia/departement-role>>.

107 *Migration Act 1958* (Cth) s 473BA; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 4. This form of processing required the completion of complex legal documents and has ‘a very limited appeal mechanism’: Graham Thom, *Government Sets Impossible Deadline for Asylum Applications* (13 March 2017) Amnesty International <<https://www.amnesty.org.au/unrealistic-deadlines-imposed-on-people-seeking-asylum/>>.

108 Department of Home Affairs, *Temporary Protection Visa*, above n 30.

109 Department of Home Affairs, *Status Resolution Service* <<https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service>>; Australian Border Force, ‘Immigration Detention and Community Statistics Summary’ (Report, 30 June 2017) 6. Under the ‘screening’ processes and ‘on-water matters’ many people have been returned to their home countries without their asylum claims being heard, raising concerns of non-refoulement: Australian Human Rights Commission, ‘Asylum Seekers, Refugees and Human Rights’ (Snapshot Report No 2, 2017) 26–31.

110 The government has offered payment to people seeking asylum on Manus Island to return home: Matt Watson, ‘Manus Island Detention: Asylum Seekers Offered “Huge Amounts of Money” to Go Home, Activist Says’, *ABC News* (online), 30 July 2016 <<http://www.abc.net.au/news/2016-07-30/manus-island-asylum-seekers-offered-double-to-return-home/7674606>>. The government has also been accused of enabling harsh conditions in order to coerce people seeking asylum to return home: Ben Doherty, ‘“It’s Simply Coercion”: Manus Island, Immigration Policy and the Men with No Future’, *The Guardian* (online), 29 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/29/its-simply-coercion-manus-island-immigration-policy-and-the-men-with-no-future>>. This potentially breaches non-refoulement obligations under international law: Ben Doherty, ‘UN Condemns Australia’s Forced Return of Asylum Seeker to Sri Lanka’, *The Guardian* (online), 22 December 2017 <<https://www.theguardian.com/world/2017/dec/22/un-condemns-australias-forced-return-of-asylum-seeker-to-sri-lanka>>.

contend that there are other goals in this form of administrative detention. Why is the process applied particularly to people seeking asylum by boat and not to those seeking asylum by other means?¹¹¹ Why are the elements of detention so harsh?¹¹² Why does the government invest so much in regional processing, where onshore processing is a much cheaper option?¹¹³ Why detain those who do not pose any risk to the community, are likely to meet the criteria for refugee status and are unlikely to flee?¹¹⁴ Why has the Australian government refused to allow other governments to re-home asylum seekers?¹¹⁵ We contend that the answers to these questions lie in the criminalisation of immigration practices leading to a severe form of administrative detention.

In the following section, we explore deterrence, incapacitation and retribution as primary aims of mandatory minimum sentencing and which we argue are also heavily infiltrating mandatory immigration detention as a result of the ‘criminalisation’ of asylum seekers. The effectiveness of mandatory practices in achieving these purported aims will be evaluated.

A Deterrence

Deterrence objectives are apparent across mandatory policies. Both mandatory minimum sentencing and mandatory immigration detention practices aim to deter particular behaviour, including both general and specific deterrence of particular crimes, and general deterrence of asylum seekers who may seek to reach Australia by boat. Deterrence as an aim of punishment refers to ‘where the penalty will discourage the offender, and others of like disposition in the community, from engaging in further criminal behaviour’.¹¹⁶ Deterrence is concerned with fear of punishment and its magnitude, that is, it makes examples of individuals in an attempt to affect the conduct of others by engendering fear

111 Australian Human Rights Commission, ‘Asylum Seekers, Refugees and Human Rights’, above n 109, 41–6.

112 Ibid 15.

113 In a 2014 audit, it was reported that it cost ‘\$400 000 per year to hold an asylum seeker in offshore detention’ compared to \$239 000 to hold onshore. The cost of an asylum seeker living in the community was estimated at \$40 000 per year: Claire Higgins and Zoe Tishler, ‘The Cost of Australia’s Asylum Policy: A Guide to Sources’ (Factsheet, Andrew & Renata Kaldor Centre for International Refugee Law, 15 May 2017) 1 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_The_Cost%20_of_Australia%27s_Asylum_Seeker_Policy%2016.05.17%20.pdf>.

114 Statistics in 2015 showed ‘asylum seekers are 45 times less likely to be charged with a crime than an average member of the Australian public’: Andrew & Renata Kaldor Centre for International Refugee Law, ‘Debunking Myths on Refugees and Asylum Seekers’ (Factsheet, 24 September 2015) 3 <http://web.archive.org/web/20180324063744/http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Debunking_myths.pdf>. See also Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum is Legal and Australia’s Policies Are Not* (UNSW Press, 2014).

115 Katharine Murphy, ‘Turnbull Government Scrambles after Temporarily Losing Vote on New Zealand Refugee Offer’, *The Guardian* (online), 4 December 2017 <<https://www.theguardian.com/australia-news/2017/dec/04/turnbull-government-scrumbles-after-losing-vote-on-new-zealand-refugee-offer>>; Sonja Heydeman, ‘Vic, Qld and ACT Offer Sanctuary to Asylum Seekers’, *SBS News* (online), 8 February 2016 <<https://www.sbs.com.au/news/vic-qld-and-act-offer-sanctuary-to-asylum-seekers>>.

116 Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 5th ed, 2014) 210.

of the consequences of committing similar actions.¹¹⁷ In the case of criminal offending, deterrence is undoubtedly an important element in the mix of theories of punishment. It is a consequentialist purpose of sentencing as it aims to reduce offending through fear that criminal activity will be detected and the individuals involved punished, usually by imprisonment. Deterrence is also a disclosed aim of mandatory immigration detention and forms a strong element of Australia's border protection policy.

1 **Mandatory Minimum Sentencing and Deterrence**

A justifying expectation associated with mandatory minimum sentencing is that those intending to perpetrate a crime might choose not to do so due to their awareness of the costs associated with apprehension and conviction. In mandating particular sentences for certain crimes, lawmakers seek to send a strong message that offenders will be treated severely and thus create a climate of fear of the threatened punishment. Setting in place mandatory minimum sentences of imprisonment purportedly reflects the aim of 'marginal deterrence': the deterrent effect of changing the law to increase the penalty or risk of detention.¹¹⁸

It is apparent that 'the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system',¹¹⁹ and it has long been regarded as a legitimate sentencing objective 'because it may work in some cases, either through sentencing itself or in conjunction with other components of the criminal justice system'.¹²⁰ At least to some extent, it is justifiable to seek to deter others from offending by penalising those who are convicted of doing so, because blameworthiness attaches to the actions of the convicted offenders and the penalties have an overall restraining effect.¹²¹

On the other hand, marginal general deterrence, 'which assumes that an increase in the penalties imposed for an offence will result in a corresponding decrease in offending behaviour', has ultimately not been realised as a result of

117 Julian Roberts and Andrew Ashworth, 'Deterrence' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2014) 39, 39–40.

118 Kate Warner, 'Theories of Sentencing: Punishment and the Deterrent Value of Sentencing' (Paper presented at Sentencing — From Theory to Practice, The Australian National University, 8–9 February 2014) <<https://web.archive.org/web/20170227014448/https://njca.com.au/wp-content/uploads/2013/05/Warner-paper.pdf>>. See also Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 3rd ed, 2016) 185–93, 197–8.

119 *R v Miria* [2009] NSWCCA 68 (13 February 2009) [11]–[12], quoting *R v Wong* (1999) 48 NSWLR 340, 363 (Spigelman CJ).

120 New South Wales Law Reform Commission, *Sentencing*, Report No 139 (2013) 34 [2.103]; *R v Radich* [1954] NZLR 86, 87, quoted in *R v Rushby* [1977] 1 NSWLR 594, 597–8; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377–8.

121 Roberts and Ashworth, above n 117, 46. See also Bagaric and Edney, *Sentencing in Australia*, above n 118, 196–7, 200 in relation to 'absolute general deterrence' as 'a justification for imposing punishment' to 'discourag[e] potential offenders from committing crime'.

mandatory sentencing schemes.¹²² There has, in fact, been a robust questioning of the effectiveness of mandatory minimum sentencing in achieving marginal deterrence. There is evidence that increasing the duration of imprisonment through harsher sentences ‘exerts no measurable effect at all’.¹²³ Hoel and Gelb found that mandating a particular penalty is unlikely to increase its deterrent value.¹²⁴ A 2011 review of studies on the deterrence effect by Ritchie found that there might be a small deterrent effect in mandating a sentence of imprisonment, however in relation to marginal deterrence, increasing the term of imprisonment had no effect.¹²⁵ Morgan found that the three strikes legislation was ineffective in deterring potential offenders.¹²⁶ The New South Wales Law Reform Commission reported that increasing the severity of a penalty imposed for an offence was unlikely to have a marginal deterrent effect.¹²⁷ There is no empirical evidence as to the effectiveness of deterrent strategies and implementing policies on the basis of perceived marginal deterrent effect ‘can be no more than a shot in the dark, or a political decision to pacify “public sentiment”’.¹²⁸

General deterrence also violates the principle of proportionality. It punishes one person in order to influence the choices of others by putting them in fear of future offending because of the potential punishment, which stands at odds with proportionality.¹²⁹ This exemplary sentence approach unfairly targets

- 122 New South Wales Law Reform Commission, above n 120, 31 [2.93]. See also Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work — And What it Means for Sentencing’ (2011) 35 *Criminal Law Journal* 269, 273–80 where various research studies and empirical research are analysed leading to the conclusion that ‘marginal general deterrence is an illusory concept — a mirage — which does little, if anything, to influence crime rates and trends’: at 280; A N Doob and C M Webster, ‘Studies of the Impact of New Harsh Sentencing Regimes’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 49, 49–51; Andrew von Hirsch et al, ‘Deterrent Sentencing as a Crime Prevention Strategy’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 57, 60–3; Deryck Beyleveld, ‘Deterrence Research and Deterrence Policies’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 66; Mirko Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 32–41.
- 123 New South Wales Law Reform Commission, above n 120, 31 [2.94], quoting Wai-Yin Wan et al, ‘The Effect of Arrest and Imprisonment on Crime’ (Crime and Justice Bulletin No 158, NSW Bureau of Crime Statistics and Research, February 2012) 16. Some studies have shown that specific deterrence is not achieved through imprisonment, and that imprisonment may increase the likelihood of recidivism. See Don Weatherburn, ‘The Effect of Prison on Adult Re-Offending’ (Crime and Justice Bulletin No 143, NSW Bureau of Crime Statistics and Research, August 2010). See also the various sources set out at above n 122.
- 124 Adrian Hoel and Karen Gelb, ‘Mandatory Sentencing’ (Research Paper, Sentencing Advisory Council, August 2008) 14.
- 125 Donald Ritchie, ‘Does Imprisonment Deter? A Review of the Evidence’ (Research Paper, Sentencing Advisory Council, April 2011) 12–17. The studies reviewed in this report included six aggregate studies.
- 126 Neil Morgan, ‘Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?’ (2000) 24 *Criminal Law Journal* 164, 172.
- 127 New South Wales Law Reform Commission, above n 120, 31–3. See also Ritchie, above n 125, 2. This paper found that increasing the length of imprisonment did not produce a corresponding increase in deterrence.
- 128 Beyleveld, above n 122, 67.
- 129 Roberts and Ashworth, above n 117, 43–4.

an individual for excessive punishment in the interests of the social good or wider anticipated social benefits. The clear difficulty with this ‘reciprocity of perspectives’ is that ‘it is impossible to know with any certainty that what would deter me, would deter anyone else’.¹³⁰ The unfair and disproportionate impacts of general deterrence mirror the dehumanising effects of mandatory policies, as the offender’s personal circumstances and culpability are effectively removed from the sentencing calculus.

Overall, the specific or general deterrent effect has not been proven to be enhanced as the sentence (or margin) has been increased through mandatory penalties. Deterrence, as an overarching aim, is not effectively pursued through mandatory policies and practices.

2 Mandatory Immigration Detention and Deterrence

Deterrence is also purported to be an aim of mandatory immigration detention, despite United Nations calls to ensure that detention is not used for this purpose.¹³¹ The prolonged detention of boat arrivals who will ‘never be settled in Australia’¹³² amounts to an attempt to hold these people out as examples to deter others from seeking to make a similar journey. Asylum seekers have effectively been criminalised and represented as culpable and threatening to community safety or wellbeing, which in turn serves to justify the imposition of deterrence strategies in response to their circumstances.¹³³ Mandatory immigration detention is designed to deter asylum seekers themselves from pursuing claims and also to deter others from making the same journey.¹³⁴

Successive governments argue that they have communicated a ‘strong message’¹³⁵ to people smugglers and asylum seekers through harsh laws aimed at preventing asylum seekers from entering Australia if they travel by boat. Both major parties appear to share the view that harsh policy change will ‘directly shape the behaviour’ of asylum seekers overseas,¹³⁶ causing fewer people to risk travelling to Australia by boat out of fear of what awaits them upon arrival. Former Prime Minister John Howard began to use terms such as “border protection” and

130 Barbara A Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Open University Press, 1996) 21.

131 United Nations High Commissioner for Refugees, ‘Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 7 [3].

132 Department of Immigration and Border Protection, *You Won’t Be Settled* (29 August 2013) YouTube <<https://www.youtube.com/watch?v=bvz3U-JOvOU>>.

133 Paresh Kathrani, ‘Asylum Law or Criminal Law: Blame, Deterrence and the Criminalisation of the Asylum Seeker’ (2011) 18 *Jurisprudence* 1543, 1550.

134 Sharon Pickering and Caroline Lambert, ‘Deterrence: Australia’s Refugee Policy’ (2002) 14 *Current Issues in Criminal Justice* 65, 78.

135 Roslyn Richardson, ‘Sending a Message? Refugees and Australia’s Deterrence Campaign’ (2010) 135 (May) *Media International Australia* 7, 12, 17.

136 *Ibid* 16.

labelled asylum seekers as “illegal” as part of an attempt to dissuade asylum seekers from coming to Australia by boat.¹³⁷

The deterrence element was still strong during Kevin Rudd’s humanitarian push in his second term as Prime Minister, particularly with the institution of offshore processing, but became subtle due to growing concerns regarding human rights abuses.¹³⁸ The 2012 Houston Report¹³⁹ which was compiled in response to concerns about preventing deaths at sea¹⁴⁰ stated, amongst other recommendations, that there was a need for a ‘no advantage’ principle.¹⁴¹ This principle required ‘that those who choose irregular and dangerous maritime voyages to Australia in order to seek asylum are not advantaged over those who seek asylum through regular migration pathways and established international arrangements’.¹⁴² The legislative reform that followed ignored other recommendations from the 2012 Houston Report but incorporated the more punitive measure of the ‘no advantage principle’,¹⁴³ transforming a principle aimed at fairness into a deterrent measure that held asylum seekers out as examples to dissuade others from seeking asylum in Australia by boat. The aim of this policy was to send a message to people smugglers that making the journey to Australia by boat would be futile.

Deterrence has remained a principle objective of the Abbott and Turnbull-led Liberal National Coalition governments, framed in the need to stop the people smuggling trade, but targeted towards deterrence of asylum seekers themselves. The video ‘You Won’t Be Settled’ by former Immigration Minister, Scott Morrison, was directed at asylum seekers abroad and emphasised that there was no possibility of resettlement in Australia for anyone seeking asylum by boat.¹⁴⁴

Yet mandatory immigration detention cannot be said to have achieved the aim of deterrence. Richardson has demonstrated that those arriving by boat typically have extremely limited knowledge of Australian immigration policies, giving the example of an Iranian respondent who only knew that Australia’s capital was Canberra and ‘that Australia had kangaroos’.¹⁴⁵ Some respondents to her research knew that they would initially be detained in immigration centres, however, for some, ‘the prospect of being detained in a Western country seemed preferable to remaining in their situations in Iraq, Afghanistan or Iran — situations that made them refugees’.¹⁴⁶ Others were undeterred ‘because they had an inherent faith that Western countries would deal with them in a humane manner’.¹⁴⁷ The

137 Michael Kenny, ‘The Changing Language of Asylum-Seeker Policy’, *SBS News* (online), 30 November 2013 <<https://www.sbs.com.au/news/the-changing-language-of-asylum-seeker-policy>>.

138 Richardson, above n 135, 8.

139 2012 Houston Report, above n 6.

140 *Ibid* 9.

141 *Ibid* 14.

142 *Ibid* 20.

143 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

144 Department of Immigration and Border Protection, *You Won’t Be Settled* (29 August 2013) YouTube <<https://www.youtube.com/watch?v=bvz3U-JOvOU>>.

145 Richardson, above n 135, 9.

146 *Ibid* 12.

147 *Ibid* 13.

deterrence message is often countered by ‘positive messages about Australia that the respondents passed on’ to others in their home countries.¹⁴⁸

Further, deterrence is an unethical goal by which to justify mandatory immigration detention. The detention of asylum seekers in offshore processing centres, under the refrain ‘you will never be settled in Australia’, dehumanises refugees and prohibits acknowledgement of their lived experiences. People who have committed no crime by seeking asylum are used as human examples to try to prevent other people who face persecution (and are consequently entitled to protection as refugees)¹⁴⁹ from fleeing intolerable situations. Australia’s mandatory immigration detention policy subjects genuine refugees in offshore processing centres to the same harsh treatment as those who have no legitimate claim for asylum. Likewise, children and vulnerable individuals are treated in the same harsh manner as adults.

B Incapacitation Theory

We turn to consider the aim of incapacitation, which its advocates present as an important objective of both mandatory immigration detention and mandatory minimum sentencing. Incapacitation refers to the deprivation of liberty of an individual in order to protect the community by ‘rendering an offender incapable of committing further offences’¹⁵⁰ in the community. It is another consequentialist purpose of punishment with the aim of decreasing offending in the community by incarcerating individuals who have committed offences, thus protecting the community from further harm from these individuals. Whilst effectively incapacitating certain repeat offenders and asylum seekers, the costly nature of mandatory minimum sentencing and the human rights implications of mandatory immigration detention undermine incapacitation as a legitimate goal of mandatory practices.

1 Mandatory Minimum Sentencing and Incapacitation

In setting mandatory minimum sentences, legislators aim to remove individuals from the community by imprisoning them for set periods of time, thereby effecting a form of physical restraint on the ability to engage in criminal behaviour. For the time an offender is imprisoned, they cannot reoffend in the community. Thus, the risk of recidivism in the community is theoretically reduced under a mandatory minimum sentencing regime.¹⁵¹ Across Australia, there seems to be consensus for the need ‘to protect the community [from offenders] by limiting the capacity

148 Ibid 15.

149 *Refugee Convention* art 1.

150 Bagaric and Edney, *Sentencing in Australia*, above n 118, 205. See also Andrew von Hirsch, ‘Incapacitation’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 75.

151 Lawrence W Sherman et al, ‘Preventing Crime: What Works, What Doesn’t, What’s Promising’ (Research in Brief, National Institute of Justice, July 1998) 8.

of' such offenders to commit further criminal offences in the community, that is, through incapacitation by imprisonment.¹⁵²

There has been extensive research into 'selective' incapacitation, whereby offenders who are likely to reoffend and commit serious crimes are sentenced more severely, in order to achieve the utilitarian purpose of reducing crime rates. Peter W Greenwood, for example, believed that through selective incapacitation, crime could be reduced by 15–20 per cent without increasing the prison population through determining by a set of criteria those more likely to regularly reoffend or commit grave offences.¹⁵³ Most criminals are only active for a certain time, with certain criteria indicative of the likelihood of reoffending. In predicting a criminal's 'life course' it might be possible for sentencers to select and incarcerate individuals that are likely to reoffend seriously or have a continuing and extensive criminal career.¹⁵⁴

Government rhetoric¹⁵⁵ seems to make it clear that incapacitating offenders by mandatory minimum terms of imprisonment will increase the safety of the community through keeping repeat and serious offenders in prison for longer periods of time. In selecting home burglary,¹⁵⁶ for example, the Western Australian government is attempting to reduce the frequency of this specific offence, which is perceived to be particularly feared in the community. This could be portrayed as a form of 'selective incapacitation' in that the mandatory sentences apply only to home burglaries, not robberies or burglaries of commercial or professional premises. Despite evidence that those committing burglary are at a higher risk of reoffending, and that robbery offenders are often at an equal or higher risk of recidivism, neither of these offences have been included as part of the mandatory minimum sentencing regime in Western Australia.¹⁵⁷

Without an effective 'selective incapacitation' strategy using mandatory minimum sentences to lower the number of prisoners or keep numbers stable, there is the clear danger of extreme cost increases resulting from higher incarceration rates. The cost of imprisonment is a known negative consequence of mandatory minimum sentencing regimes. Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, has stated that '[t]here is a substantial body of evidence that higher imprisonment rates produce lower crime rates but

152 New South Wales Law Reform Commission, above n 120, 30, quoting Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 29 (recommendation 4–1(d)).

153 Andrew von Hirsch and Lila Kazemian, 'Predictive Sentencing and Selective Incapacitation' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 95, 95–6.

154 Criminal offending usually 'peaks in the mid to late teenage years, before diminishing in adulthood'. See Jason Payne, 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007) 87.

155 Michael Mischin, 'Mandatory Sentencing' (2014) 41(9) *Brief 8*; Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 March 2014, 1055–8 (Liza Harvey).

156 *Criminal Code Act Compilation Act 1913* (WA) ss 401A–401.

157 Payne, above n 154, 93.

the size of the effect and the cost-effectiveness of prison is much debated.¹⁵⁸ Mandatory minimum terms of imprisonment have triggered increases in prison populations throughout the world. Terblanche and Mackenzie compared South African mandatory minimum sentencing regimes to those in Australia and noted a distinct escalation in prison populations.¹⁵⁹ The national daily average cost of imprisonment in Australia in 2015–16 was \$283.00 per prisoner and with increasing prison populations a total annual amount of \$2.9 billion was spent on prisons across the nation.¹⁶⁰ Thus, incapacitation through mandatory minimum sentencing is proving to be expensive for the government and community.

The extent to which instituting mandatory minimum sentences for particular offences is effective in reducing crime rates is questionable. Commentators have found some proof for the incapacitation argument.¹⁶¹ However, even where selective incapacitation permeates to the individual offender, it is unlikely to be accurate or effective in predicting future offending. When sentencing in a court setting, accurate personal accounts are unlikely, and the courts are not able to take significant account of past behaviour including early violence and drug use in order to determine sentence.¹⁶² Von Hirsch and Kazemian raise some clear doubts about the utility of selective incapacitation, particularly in relation to the efficacy of prediction techniques.¹⁶³ Hoel and Gelb found that '[w]hile there is some proof that incapacitation can prevent further offending by persistent offenders, this does not necessarily establish ... that mandatory sentencing increases the effectiveness of incapacitation'.¹⁶⁴

Further, there are concerns associated with the conflict between the goal of incapacitation and the 'just deserts' model of sentencing based on proportionality. Roche argues that incapacitation as a means of reducing crime rates presents serious moral challenges.¹⁶⁵ The aim of incapacitation being consequentialist departs from the seriousness of the relevant offence to measure unrelated crime prevention factors, potentially infringing proportionality requirements 'to a very substantial degree'.¹⁶⁶ Hence, there is the potential for someone committing a home burglary to receive a disproportionately harsh sentence compared to someone committing a burglary in a commercial setting, under current Western Australia law. The case of *Boddington v Western Australia*¹⁶⁷ demonstrates the disproportionate nature of incapacitation in mandatory sentencing, in that a mandatory sentence for repeat home burglary offending ignored the objective circumstances of the

158 'Mandatory Sentencing: Does It Reduce Crime?', *ABC News* (online), 5 February 2014 <<http://www.abc.net.au/news/2014-02-05/does-mandatory-sentencing-reduce-crime/5225986>>.

159 Stephan Terblanche and Geraldine Mackenzie, 'Mandatory Sentences in South Africa: Lessons for Australia?' (2008) 41 *Australian and New Zealand Journal of Criminology* 402.

160 Productivity Commission, 'Report on Government Services 2017' (Report, January 2017) 8.19.

161 Hoel and Gelb, above n 124, 14–15.

162 von Hirsch and Kazemian, above n 153, 96.

163 Ibid 99–100.

164 Hoel and Gelb, above n 124, 14.

165 Declan Roche, 'Mandatory Sentencing' (Trends and Issues in Crime and Criminal Justice No 138, Australian Institute of Criminology, December 1999) 2–3.

166 von Hirsch and Kazemian, above n 153, 99.

167 [2013] WASCA 179 (14 August 2013).

actual offence and subjective features of an offender — namely his long period without offending, other compelling personal circumstances and his minor role in the offence.¹⁶⁸

2 Mandatory Immigration Detention and Incapacitation

Incapacitation also appears to be a goal of mandatory immigration detention policy, in the sense that asylum seekers subject to mandatory detention are not only removed from the general community but prevented from having a voice in public discourse. Imprisonment in the administrative sense is distinct from mandatory minimum sentencing in that no crime has been committed by asylum seekers. However, the incapacitation of asylum seekers prevents them from garnering support and warehouses them outside of the discernment of the Australian community, denying them the ability to claim protection in Australia.¹⁶⁹ Furthermore, the ‘cimmigration’ of immigration law through the rhetoric of ‘deviance’ in the manner of seeking asylum has meant that these asylum seekers are often wrongly viewed as criminals or as a dangerous class of persons and treated as such.¹⁷⁰

This is evidenced in the increasing securitisation of immigration detention arrangements, both in Australia and offshore, over recent years. Immigration detention centres have become more prison-like¹⁷¹ with high fences¹⁷² and the contracting of private security firms to manage offshore detention centres.¹⁷³ Asylum seekers travelling by boat are mandatorily detained offshore where they cannot access either Australian courts or the Australian community to contribute to discussion over their circumstances. Recent legislation censors both asylum seekers detained offshore and those who provide services in detention centres, thus further limiting transparency and discouraging community understanding or empathy with the plight of people indefinitely and mandatorily detained despite having committed no crime.¹⁷⁴ Apparent incapacitation for lengthy periods, with no review, prevents close scrutiny of the treatment of asylum seekers and hides the human experience of those seeking asylum from the Australian community. The remote location of detention means few people observe detention practices

168 Ibid [26]–[27], [29].

169 Julian Burnside, ‘Australia’s Ugly Secret: We Still Warehouse Asylum Seekers’, *The Sydney Morning Herald* (online), 16 September 2009 <<https://www.smh.com.au/politics/federal/australias-ugly-secret-we-still-warehouse-asylum-seekers-20090916-fqqe.html>>.

170 Andrew & Renata Kaldor Centre for International Refugee Law, above n 114.

171 Australian Human Rights Commission, *The Forgotten Children*, above n 29, 51, 68, 129.

172 See Australian Human Rights Commission, *Photos of Immigration Detention Facilities* <<https://www.humanrights.gov.au/publications/photos-immigration-detention-facilities>>.

173 Azadeh Dastyari, ‘Detention of Australia’s Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?’ (2015) 38 *University of New South Wales Law Journal* 669, 676–7.

174 *Australian Border Force Act 2015* (Cth) s 42. Those who divulge information about asylum seekers in immigration detention face up to two years’ imprisonment.

directly and the experiences of people seeking asylum by boat remain hidden from the public eye.¹⁷⁵

As a result of these secrecy laws, the abuse of asylum seekers goes unchecked and is concealed from the Australian community. Incapacitation through offshore processing and the restriction of free speech distances the experiences of asylum seekers from the Australian public and stifles an empathetic public response to the situation. Despite censorship attempts, the leaking of material from inside immigration detention centres and whistleblower accounts reveal insights into the concerning treatment of asylum seekers. Behrouz Boochani's appearance on *Q&A* provided Australians with a small glimpse of one of the faces behind the arbitrary and incapacitating mandatory immigration detention regime on Manus Island.¹⁷⁶ The Kurdish journalist questioned Prime Minister Malcolm Turnbull asking '[w]hat is my crime? ... Why am I still in this illegal prison after three years?' to which no direct response was elicited.¹⁷⁷

Wrongly held fears of asylum seekers as criminals or as likely to perpetrate crimes in Australian society¹⁷⁸ have also strengthened arguments to remove these people from mainstream society. In particular, the indefinite immigration detention of those with Australian Security Intelligence Organisation ('ASIO') adverse security assessments appear designed to have an incapacitating effect. Incapacitation in this case is thought to prevent potential future crime or terror acts by those suspected of posing a threat to national security or community safety. This extends well beyond the controversial preventative detention in criminal law, as the detainees are not imprisoned for the commission of a crime nor at risk of specific recidivism that threatens community safety. ASIO has been granted extensive powers to safeguard Australia's security by declaring adverse security assessments, preventing asylum seekers proven to be refugees from being released from detention even where there is no prospect of relocation to a third country.¹⁷⁹ Thus, those with adverse security assessments are subject to indefinite detention.

The effective criminalisation of people seeking asylum by boat supports the incapacitating objective of mandatory immigration detention. Discourse is dominated by 'walls' of 'loud panic'.¹⁸⁰ In particular, van Berlo points to the Pacific Solution, and its reformation as Operation Sovereign Borders, as an example of 'loud panicking' whereby 'boat people' were deemed 'illegal, deviant, non-genuine, threatening and, ultimately, to be excluded'.¹⁸¹ Such exclusion, through 'quiet manoeuvring',¹⁸² took the form of mandatory offshore processing

175 Caroline Fleay and Linda Briskman, 'Hidden Men: Bearing Witness to Mandatory Detention in Australia' (2013) 32(3) *Refugee Survey Quarterly* 112, 112.

176 ABC TV, 'Prime Minister Malcolm Turnbull', *Q&A*, 20 June 2016 <<http://www.abc.net.au/tv/qanda/txt/s4463065.htm>>.

177 Ibid.

178 Andrew & Renata Kaldor Centre for International Refugee Law, above n 114, 3.

179 Saul, 'Dark Justice', above n 29, 729.

180 Welch, above n 35, 328–31.

181 van Berlo, above n 25, 98.

182 Welch, above n 35, 324, 331.

— a practice that ‘erects [both] physical and legal barriers’ to judicial review and public scrutiny from the Australian community.¹⁸³ There is a high degree of control and surveillance exercised in offshore detention including the denial of access to communication technologies, and constant monitoring and surveillance in some settings.¹⁸⁴ These circumstances aim not only to restrict access to permanent protection in Australia but also to limit contact with the outside world.

It is also noted that targeting people seeking asylum by boat in mandatory immigration detention policy has effectively led to selective incapacitation. People seeking asylum by boat are disproportionately of Middle Eastern or Tamil descent.¹⁸⁵ This group is thus disproportionately affected by subjection to continuing detention, offshore detention and a lack of prospect of resettlement in Australia.¹⁸⁶ At the same time, those who have overstayed their visa in Australia who are predominantly from Asia, United States and the United Kingdom are not subject to the same provisions.¹⁸⁷ In this way, the application of mandatory detention selectively incapacitates people from particular cultures or backgrounds. Selective incapacitation in the context of mandatory immigration detention provides a means for the Australian government to remove individuals of certain ethnicity or country of origin from Australian society.

Like deterrence, incapacitation appears to be an inappropriate objective in the context of asylum seeker policy. Detention for prolonged or indefinite periods in poor conditions seems unnecessary when compared with detention systems operating in other countries. For example, detention of asylum seekers in Sweden is generally limited to two weeks for adults and 72 hours for children.¹⁸⁸ Hiding asylum seekers from the public eye is also unnecessary, with most asylum seekers arriving by boat generally being found to be refugees and therefore unlikely to flee or present a threat to the community.¹⁸⁹ Further, the censorship laws running parallel to the incapacitation objective in mandatory immigration detention policy essentially criminalise those who speak out against human rights abuses and are particularly ill-adapted to the health care setting.¹⁹⁰

183 Ibid 335–6.

184 Linda Briskman, ‘Technology, Control, and Surveillance in Australia’s Immigration Detention Centres’ (2013) 29(1) *Refuge* 9, 10–12.

185 See above n 27 and accompanying text.

186 See above n 30 and accompanying text.

187 Department of Immigration and Border Protection, ‘Australia’s Migration Trends 2013–14’ (Report, 2014) 70 <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/migration-trends13-14.pdf>>.

188 Global Detention Project, *Sweden Immigration Detention* (July 2018) <<https://www.globaldetentionproject.org/countries/europe/sweden/>>; *Aliens Act* (Sweden) No 2005:716, ch 10 ss 4–5 [Ministry for Foreign Affairs (Sweden) trans, *Aliens Act (2005:716)* (2006) https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf].

189 Clarke Jones, ‘FactCheck Q&A: Have Any Refugees Who Came to Australia Gone on to Be Terrorists?’, *The Conversation* (online), 23 January 2018 <<https://theconversation.com/factcheck-qanda-have-any-refugees-who-came-to-australia-gone-on-to-be-terrorists-51192>>; McAdam and Chong, above n 114.

190 Amnesty International, *Border Force Act: Blatant Censorship of Staff Working in Immigration Detention* (23 July 2015) <<https://web.archive.org/web/20160406023534/http://www.amnesty.org.au/news/comments/37640/>>.

C Retribution

Retribution is a key principle of punishment that is often cited as a reason for the institution of mandatory minimum sentencing. In sentencing criminal offenders, retribution involves the punishment fitting the gravity of the crime and individual culpability of the offender to reflect community blame and censure for the crime. It is a non-consequentialist aim of punishment in advancing only the imposition of a just punishment on the individual for his or her conduct rather than seeking to influence the future conduct of the individual and general community. The central tenet of contemporary retribution or ‘just deserts’ model is that punishment should be commensurate with wrongdoing, otherwise known as the ‘principle of proportionality’.¹⁹¹ The arrival of asylum seekers in Australia, particularly those who travel by boat, has arguably led to a similar censuring by those in the community who seek to hold asylum seekers responsible for so-called ‘queue-jumping’.

1 Mandatory Minimum Sentencing and Retribution

The aim of ‘retribution’ is expressed in statute in Western Australia whereby the sentence must be ‘commensurate with the seriousness of the offence’.¹⁹² Retribution has become particularly prominent since the perceived failing of rehabilitation as a fundamental aim of sentencing policy.¹⁹³ In accordance with the modern variant of retributive theory, the ‘just deserts’ model,¹⁹⁴ ‘[t]he state can restore the victim and the community to a previous balance if the offender is punished in proportion to what his [sic] culpability deserves’,¹⁹⁵ this presenting the principle of proportionality as a touchstone. The ‘do the crime, do the time’ rhetoric reflects the aim of retribution. Such rhetoric tends to focus closely on the need for the sentence to meet the gravity of the seriousness of offences and ensure that criminals receive the punishment they deserve, considering the relative blameworthiness of their crimes.¹⁹⁶

The proportionality principle, though theoretically sound, has difficulties in practical application, which some commentators consider to be so extensive that

191 See, eg, Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 93–6, 112–13; Andrew von Hirsch, ‘Proportionate Sentences: A Desert Perspective’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 115, 115–19.

192 *Sentencing Act 1995* (WA) s 6(1).

193 See Findlay, Odgers and Yeo, above n 116, 216; see above n 191.

194 See, eg, Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale’ (1983) 74 *Journal of Criminal Law & Criminology* 209; Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 204–6.

195 Findlay, Odgers and Yeo, above n 116, 212.

196 For an example of a retributive focus in the context of the most recent home burglary bill in Western Australia, see, eg, Colin Barnett and Liza Harvey, ‘Tough Home Burglary Laws Come into Force’ (Media Release, 1 November 2015) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/11/Tough-home-burglary-laws-come-into-force.aspx>>.

they have argued the concept may be an ‘illusion’.¹⁹⁷ Findlay, Odgers and Yeo observe that ‘divisions arise over how particular penalties are to be justified, and most fairly and effectively imposed’.¹⁹⁸ This is evidenced by a lack of consistency in penalties for similar offences both within and across jurisdictions,¹⁹⁹ and a lack of consistency in fixing penalties for certain types of crimes.²⁰⁰ Bagaric and Edney contend that the principle is ‘poorly defined and understood’ and ‘so nebulous that it would be misleading to assert that it provides a meaningful guide to sentencers’.²⁰¹ Bagaric suggests that

[t]he vagaries are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years’ imprisonment is equivalent to the pain felt by an assault victim, or whether a burglar should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker.²⁰²

Despite such criticisms, proportionality is a paramount principle in sentencing and a limiting factor on punishment, which is invariably referred to and applied by the courts.²⁰³ In countering the nebulous nature of proportionality and perceptions of judicial bias that follow from the intuitive approach taken to sentencing,²⁰⁴ there has been a push by some commentators in favour of setting minimum mandatory sentences for particular offences. Bagaric and Pathinayake suggest the need for sentencing regimes to establish a calculus to fetter discretion.²⁰⁵ Similarly, Grunwald states that the positive ‘variance effect’ in increasing parity

- 197 Mirko Bagaric, ‘Injecting Content into the Mirage That Is Proportionality in Sentencing’ (2013) 25(3) *New Zealand Universities Law Review* 411, 411.
- 198 Findlay, Odgers and Yeo, above n 116, 202.
- 199 Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, 2001) 164.
- 200 Mirko Bagaric and Richard Edney, ‘The Proportionality Thesis in Australia: Application and Analysis’ (2008) 4 *International Journal of Punishment and Sentencing* 38, 38.
- 201 *Ibid.*
- 202 Bagaric, ‘Injecting Content into the Mirage that is Proportionality in Sentencing’, above n 197, 413.
- 203 See, eg, *Veen v The Queen* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348.
- 204 Weatherburn has noted marked differences in judicial leniency in sentencing to terms of imprisonment. See Don Weatherburn, ‘Sentence Disparity and Its Impact on the District Court’ (Report, NSW Bureau of Crime Statistics and Research, 1994) 4. See also Karen Gelb, ‘Gender Differences in Sentencing Outcomes’ (Report, Sentencing Advisory Council, July 2010); Samantha Jeffries and Christine Bond, ‘Sex and Sentencing Disparity in South Australia’s Higher Courts’ (2010) 22 *Current Issues in Criminal Justice* 81, for consideration of sex discrimination in sentencing. In relation to the intuitive or instinctive synthesis approach to sentencing, see *Markarian v The Queen* (2005) 228 CLR 357; *Muldrock v The Queen* (2011) 244 CLR 120.
- 205 Mirko Bagaric and Athula Pathinayake, ‘The Paradox of Parity in Sentencing in Australia: The Pursuit of Equal Justice that Highlights the Futility of Consistency in Sentencing’ (2013) 77 *Journal of Criminal Law* 399. Further critique of a purely discretionary judicial sentencing system includes such contentions as the system leads to inconsistency in sentencing outcomes and fosters subconscious bias in sentencing particular types of offenders — see, eg, Andrew Ashworth, ‘Techniques for Reducing Sentence Disparity’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 243; George Zdenkowski, ‘Limiting Sentencing Discretion: Has There Been a Paradigm Shift?’ (2000) 12 *Current Issues in Criminal Justice* 58.

and uniformity in sentencing outweighs the potential negative ‘bias effect’ in mandatory minimum sentencing regimes, thus increasing fairness.²⁰⁶

Whether ‘just deserts’ retributivism and proportionality in sentencing are actually achieved through mandatory minimum sentencing regimes remains dubious. Mandatory minimum sentencing is argued to be an unnecessary interference with judicial discretion that completely disrupts the proportionality principle.²⁰⁷ Proportionality requires that ‘a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances’.²⁰⁸ As Mildren J astutely observed:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.²⁰⁹

Similarly, Hoel and Gelb argue that mandatory minimum sentencing does not necessarily fit with the retributive justice model, as it only applies to select crimes and this may ‘interfere with the hierarchy of sanctions’,²¹⁰ that is, it will be difficult to achieve ordinal proportionality across the spectrum of criminal offences.²¹¹ Further, Morgan argues that mandatory minimum sentencing regimes fail to take into account the peculiarities of each case, and particularly the culpability of offenders, a factor that cannot be measured in grid-like form but requires the experience and intuition of judges.²¹² Anderson argues that ‘parsimony’, the allied principle that the punishment should be no more severe than is necessary to achieve the purposes of the sentence, cannot be achieved because the mandatory punishment in itself cannot rightly be categorised as a ‘moderate’ punishment; it is in and of itself ‘severe’, and is therefore not within the ‘just deserts’ model of sentencing.²¹³ Therefore proportionality cannot be achieved in a system where mandatory minimum sentences are applied on a selective basis, which has little or no regard for the principles of fairness and equal treatment.²¹⁴

206 Ben Grunwald, ‘Questioning Blackmun’s Thesis: Does Uniformity in Sentencing Entail Unfairness?’ (2015) 49 *Law & Society Review* 499.

207 See Lenny Roth, ‘Mandatory Sentencing Laws’ (E-Brief No 1, Parliamentary Library, Parliament of NSW, 2014).

208 *Hoare v The Queen* (1989) 167 CLR 348, 354, citing *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472, 485–6, 490–1, 496; *Veen v The Queen* (1979) 143 CLR 458, 468.

209 *Trenerry v Bradley* (1997) 6 NTLR 175, 187.

210 Hoel and Gelb, above n 124, 12.

211 Ashworth, *Sentencing and Criminal Justice*, above n 191, 113–24; von Hirsch, ‘Proportionate Sentences: A Desert Perspective’, above n 191, 120.

212 Neil Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (2002) 23 *Adelaide Law Review* 141, 148.

213 John L. Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence’ (2012) 35 *University of New South Wales Law Journal* 747, 755.

214 *Ibid.*

Thus, despite a rhetorical push by government and media to match the seriousness of the offence with the punishment, mandatory minimum sentencing does not appear to effectively meet this aim. Rather, the government is presenting a ‘tough on crime’ and objectively ‘fair’ stance while failing to respect the proportionality principle that is a central tenet in the contemporary sentencing goal of retribution. A lack of proportionality in mandatory minimum sentencing interferes with the achievement of substantive fairness and equal treatment crucial to ensuring due process.

2 Mandatory Immigration Detention and Retribution

Despite the fact that retribution is largely associated with the sentencing of criminal offenders to imprisonment for punishment, an aim which does not logically link to the administrative processing of asylum seekers in immigration detention, it is certainly arguable that it can be linked to people seeking asylum by boat who, while committing no crime, are viewed in populist discourse as illegal and as ‘queue-jumpers’. Deterrence and incapacitation have a demonstrated alignment as aims of the mandatory immigration detention scheme. Such aims do not, however, readily explain why conditions in mandatory immigration detention appear to be so much harsher, particularly for those offshore, than those incarcerated in the correctional facilities of the criminal justice system.²¹⁵ We contend that the Australian government has taken ‘cimmigration’ one step further: to seek retribution for the act of entering Australia without a valid visa.

There is no generally available empirical evidence reflecting a public retributive stance towards asylum seekers arriving by boat. Considering, however, the way in which politicians and elements of the media have framed asylum seekers arriving by boat as ‘illegal’ and the disproportionate length of detention imposed on members of this group, which may be indefinite, there appears to be a significant retributive element to the policy: a blameworthiness in their ‘illegal’ status. As Kathrani states:

[There is a] growing perception that the asylum seeker is somehow at fault, or to blame, for some of the negative consequences of globalisation that contracting states encounter. As mentioned, the sine qua non of criminal law is that it is enforced by the state on the basis that the perpetrator is seen as an agent, or culpable or morally to blame for something. If there is no moral fault then a person should not be convicted, (unless it is a strict liability offence) and there has been a growing tendency in some countries to assume that the asylum seeker is somehow responsible or to blame for, amongst other things, overcrowding and unemployment.²¹⁶

215 A study in the Netherlands, which has a far higher standard of services than in Australia, found that there is an elevated deprivation in immigration detention as a result of no access to work or educational opportunities, a lack of medical facilities, reduced legal aid and fewer well-qualified staff. These factors mean those in administrative detention were less satisfied with being detained than those in correctional facilities: Arjen Leerkes and Dennis Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’ (2010) 50 *British Journal of Criminology* 830, 838.

216 Kathrani, above n 133, 1549.

Whereas less extreme forms are available to monitor asylum seekers,²¹⁷ Australia's system of mandatory immigration detention with no prospect of settlement in Australia is designed to cause hopeless despair which reflects a retributive objective.²¹⁸ Mandatory detention is intentionally harsh, with prison-like conditions including high fencing, security staff, poor housing, regimented routine and lack of privacy.²¹⁹ The leaking of over 2000 files ('the Nauru Files') in August 2016 uncovered countless instances of serious abuse, including that of children, within the Nauru immigration detention centre.²²⁰ These files provided insight into a small fraction of the inner workings of the immigration detention regime which is designed to cause systematic hopelessness, in symbolism of 'society's collective determination of the proper stigmatizing response to ... [the commission of] a social wrong'.²²¹

The indefinite nature of mandatory immigration detention could also be seen as having a retributive aim. Whereas mandatory minimum sentencing provides a definite, finite sentence, those subject to mandatory immigration detention have no time limits.²²² Dr Liddell, from the University of New South Wales School of Psychology has stated that this uncertainty is cruel and contributes greatly to 'uncertainty, fear and disempowerment' that contributes to the deteriorating mental health of detainees.²²³ With broad-ranging evidence of the harmful and long-term effects of indefinite detention, the practice could be considered nothing other than a means to inflict punitive, retributive treatment.

217 Robin Rothfield (ed), *Alternatives to Offshore Processing* (Labor for Refugees, 2013).

218 See comments by Paul Stevenson, a trauma expert who worked in offshore processing: Ben Doherty and David Marr, 'The Worst I've Seen — Trauma Expert Lifts Lid on "Atrocity" of Australia's Detention Regime', *The Guardian* (online), 20 June 2016 <<https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocity-of-australias-detention-regime>>.

219 See, eg, Australian Human Rights Commission, 'Immigration Detention at Villawood', above n 99, 16.

220 Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention', *The Guardian* (online), 10 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>>. Further, such revelations led Amnesty International to accuse the Australian government of deliberate torture of refugee children on Nauru: Amnesty International, 'Island of Despair: Australia's "Processing" of Refugees on Nauru' (Report, Amnesty International, 2016) <<https://www.amnesty.org.au/wp-content/uploads/2016/10/ISLAND-OF-DESPAIR-FINAL.pdf>>. Teachers formerly employed at a now-closed Save the Children school on Nauru risked prosecution under anti-whistleblower legislation to reinforce claims of government-sanctioned abuse of refugee children: ABC TV, 'The Forgotten Children', *Four Corners*, 17 October 2016 <<http://www.abc.net.au/4corners/stories/2016/10/17/4556062.htm>>. These most recent allegations reinforce the long-standing international perception that Australia is violating its obligations under human rights law, particularly in relation to the rights of the child: Amy Maguire, 'Accusations of Deliberate, Cruel Abuse of Refugee Children Must Prompt a More Humane Approach', *The Conversation* (online), 18 October 2016 <<https://theconversation.com/accusations-of-deliberate-cruel-abuse-of-refugee-children-must-prompt-a-more-humane-approach-67154>>.

221 César Cuauhtémoc García Hernández, 'Immigration Detention as Punishment' (2014) 61 *University of California, Los Angeles Law Review* 1346, 1402.

222 Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) 9.

223 Belinda Liddell, 'One Step Forward, Two Steps Back for Asylum Seeker Mental Health', *The Conversation* (online), 24 November 2012 <<https://theconversation.com/one-step-forward-two-steps-back-for-asylum-seeker-mental-health-10943>>.

It has become easier to justify the indefinite and mandatory detention of asylum seekers arriving by boat via their depiction as ‘queue jumpers’. This representation creates an artificial distinction between ‘good’ or ‘acceptable’ refugees — namely those who wait in ‘queues’ in refugee camps until such time as Australia’s humanitarian program accepts them for resettlement — and ‘illegal’ asylum seekers. This dichotomy is fundamentally false because it assumes an equal capacity amongst all refugees, wherever they are, to access an orderly queue which will eventually deliver them to the desirable outcome of protection from further persecution. Yet it persists in Australian political discourse and permits the imposition of retributive motives in asylum seeker policy, because — to some — it would be unjust to support people who seek asylum via the ‘wrong’ means.

The ‘no advantage principle’, as proposed in the 2012 Houston Report,²²⁴ further demonstrates the application of a retributive approach towards people seeking asylum by boat. While aimed at deterrence, the principle has also had a retributive effect, essentially punishing those arriving by boat with very lengthy and indefinite detention. Through this principle, the government aims to send a strong message that people seeking asylum by boat will not be welcomed in Australia and will be excluded from a society that, openly or otherwise, denounces arrivals without a valid visa.²²⁵

However, as in the case of mandatory sentencing, mandatory immigration detention fails to convince that retribution can effectively be achieved. There is no crime committed by seeking asylum,²²⁶ and therefore it is unwarranted to suggest that mandatory detention is the just desert of asylum seekers travelling to Australia by boat.

VI CONCLUSION

Mandatory immigration detention and mandatory minimum sentencing, though originating from different areas of law and policy, have more in common than might initially be expected. To investigate this proposition, we explored three key questions: Is there a common underlying thread to these policies? What aims are encompassed by the mandatory element of these policies? Should mandatory immigration detention more properly be understood as a form of mandatory sentencing, albeit in an administrative setting? Mandatory practices in sentencing and immigration detention exhibit clear and disturbing parallels. The rhetoric surrounding these mandatory practices, the removal of decision-maker discretion in individual cases and the limiting of judicial oversight of government action demonstrate that mandatory immigration detention exhibits strong common features with mandatory sentencing. The Commonwealth has effectively enabled the ‘cimmigration’ of immigration law, transforming an

224 2012 Houston Report, above n 6.

225 See discussions in Leerkes and Broeders, above n 215, 843.

226 *Refugee Convention* art 31.

administrative process into administrative detention that not only reflects the aims of criminal sentencing but surpasses criminal law through its indefinite detention in harsh conditions. The detention of asylum seekers is without adequate judicial oversight. This is despite the fact that asylum seekers have committed no wrong under international law and have a right to seek asylum and be treated humanely. While the Commonwealth insists that mandatory immigration detention is not designed to punish,²²⁷ the use of detention as a disciplinary measure for illegal entry, the use of detention for the extraneous purpose of deterrence and the lack of proportionality in the length of detention point towards mandatory immigration being a penalty under international law.²²⁸ Mandatory immigration detention practices have led to a decline in due process and shifted the balance of power further away from individual rights-bearers and towards the state.

The demonstrated common reliance on aims of deterrence, incapacitation and retribution highlights the connections between mandatory criminal sentencing and mandatory immigration detention. These aims are at best questionable and at worst unjust and unethical in relation to criminal sentencing and the treatment of refugees. Instead, these practices are driven by populist sentiment and punitive impulses which dehumanise the people subject to mandatory practices.

Importantly, mandatory minimum sentencing and mandatory immigration detention practices violate the principle of proportionality. They generally fail to align impugned conduct and culpability with just or proportionate punishment (in saying this, we categorise mandatory immigration detention as punishment). By removing the consideration of mitigating factors and detaining people for excessively long periods, these mandatory practices fail to reflect a ‘just deserts’ model. This reality has emerged in response to constructed crises. Successive governments, often aided by elements of the media, have played upon perceived threats of ‘crime waves’ and ‘waves of boat people’ to generate harsh, unfair and hasty responses in the form of mandatory practices. By grouping individuals into a ‘faceless, undifferentiated mass’,²²⁹ human experiences and frailties have become irrelevant.²³⁰

Given these findings, it is our firm contention that mandatory immigration detention is a consequence of ‘cimmigration’, whereby the government has sought to infuse features of criminal procedure and sentencing into an administrative practice. This is despite the reality that asylum seekers arriving by boat have committed no crime. Herein lies the crux of mandatory practices. Detainees who have committed no crime are transformed from asylum seekers into criminals. The very process of incarceration subjects them to criminalising dynamics, not just in terms of the relationship between guard and prisoner, but also because the

227 Graham Thom, ‘Australia’s Obligations under Article 31(1) of the *Refugees Convention*: What Are Penalties?’ (2006) 31 *Alternative Law Journal* 142, 146.

228 United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (26 February 1999).

229 *Woodson v North Carolina*, 428 US 280, 304 (Stewart J) (1976).

230 It is beyond the scope of this paper to assess the impacts of the dehumanisation effect on individual rights. Future research into this phenomenon could explore the impact of this dehumanisation on Australia’s international human rights law obligations.

rules of detention leave them vulnerable to penalties that render them criminals in substance as well as name. A process that should ordinarily fall within the remit of administrative law is now reshaped and trumped by criminal law considerations.

It is timely to consider whether the 'mandatory' element of these practices should be entirely removed. The detention of asylum seekers is indefinite, censored and takes place in conditions below UN standards. Indeed, it is extraordinary that asylum seekers arriving in Australia by boat are subject to non-discretionary mandatory detention with fewer procedural safeguards than the practices associated with the Western Australian mandatory minimum sentencing scheme. Less extreme mechanisms could provide adequate responses to these social issues and could afford due process to the individuals concerned. In a democratic civilised society such mechanisms would be more likely to meet the recognition of individual human rights and be compatible with judicial process, natural justice and the rule of law. To better accord with due process, policy-makers should have effective regard to the de-humanising effects of mandatory practices and carefully consider the need to retain judicial discretion and oversight in these important areas of government administration and practice.