SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

SUBMISSION ADDRESSING THE CRIMES LEGISLATION AMENDMENT (SEXUAL CRIMES AGAINST CHILDREN AND COMMUNITY PROTECTION MEASURES) BILL 2019

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1. I appreciate the opportunity to make a submission on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 ("the Bill").

2. As a post-graduate researcher and PhD student at the University of Melbourne, School of Law, my research focuses on the relation between legislation and constitutional values, including in the areas of federalism and criminal law.[2]

3. I have recently published a short academic commentary on this topic in the *Public Law Review*[3] and presented on federal criminal law at the Gilbert & Tobin Centre of Public Law, University of New South Wales.[4]

4. In 2017-2018 I explored many of these same issues in the American context while I was a Human Rights Fellow at Columbia University, New York. The results of my American research have been published, and are forthcoming, in the *Harvard Journal on Legislation* and the *Virginia Journal of Criminal Law*.[5]

CONSTITUTIONAL VALIDITY

5. On one view, should the Bill be passed into law, it would be a valid exercise of the Commonwealth Parliament's power to make laws with respect to telecommunications in s 51(v) of the Constitution.[6]

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[2] My postgraduate researcher profile, and links to various publications, can be found here: <https://law.unimelb.edu.au/students/grd/students/julian-murphy>.
[3] Julian R Murphy, "Strawberries, marijuana and hot air balloons: the expressive function of federal criminal law" (2019) 30 *Public Law Review* 94.
[4] Julian R Murphy, "Strictly Federal: A new approach to interpreting federal criminal laws." Paper presented at the 2019 Postgraduate Workshop in Public Law at the Gilbert & Tobin Centre of Public Law, University of New South Wales, Sydney, NSW, Australia. 23 September 2019.
[5] Julian R Murphy, "Lenity and the Constitution: Could Congress Abrogate the Rule of Lenity?" (2019) 56 *Harvard Journal on Legislation* 423; Julian R Murphy, "A Tale of Two Canons – Can lenity succeed where federalism has failed to limit federal criminal laws?" (2019) *Virginia Journal of Criminal Law* (forthcoming).
[6] The Explanatory Memorandum does not rely on the external affairs power in s 51(xxix) and, as such, this potential source of power is not considered in this submission.

6. It is to be recalled that the subject matters within s 51 must "be construed with all the generality which the words used admit"[7] and that each of the subject matter heads of power within s 51 "carries with it ... power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter."[8] This incidental Commonwealth legislative power is confirmed, and potentially extended, by the express incidental power in s 51(xxxix) of the Constitution.

7. Accordingly, should the Bill be passed into law, it is likely that its provisions would be found to be within the subject matter of s 51(v) or the incidental power in s 51(xxxix). However the mandatory sentencing provisions of the Bill warrant closer scrutiny.

Constitutional validity of mandatory sentencing provisions

8. In the 2013 case of *Magaming v The Queen*,[9] the High Court considered the constitutional validity of mandatory sentencing provisions within the *Migration Act 1958* (Cth) for persons found guilty of the offence of "people smuggling". A majority of the Court held that those mandatory sentencing provisions were not invalid by reason of inconsistency with the constitutional separation of powers.

9. Notwithstanding Justice Gageler's powerful dissent in that case, the arguments advanced in *Magaming* are now settled. Mandatory sentencing provisions are consistent with the Constitution's separation of powers. There remains, however, a further potential constitutional concern about federal mandatory sentencing provisions such as those in the Bill. This potential issue is explored in the following two paragraphs.

A limit to incidental legislative power to create mandatory sentences

10. Insofar as the mandatory sentencing provisions in the Bill are not directly within the telecommunications subject matter of s 51(v), they must be shown to be *incidental* to that subject matter. It may be accepted that laws – including criminal offences and criminal penalty provisions – preventing the socially destructive use of telecommunications services are laws incidental those services. By contrast, a law not directed at *prevention*, and instead directed at *punishment*, would arguably lose its incidental character. Such a law could be characterised as directed towards the definition and denunciation of morally reprehensible conduct, which is a purpose quite independent of telecommunications, and has historically been the preserve of the States.

11. The logical foundation for this argument derives from the early cases in which the High Court considered the extent of the Commonwealth Parliament's power to pass legislation prescribing criminal penalties. Those cases are replete with reminders that the Commonwealth Parliament has no general power to pass

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[7] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225.
[8] *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77.
[9] *Magaming v The Queen* (2013) 252 CLR 381. See also *Palling v Corfield* (1970) 123 CLR 52, 58.

criminal laws.[10] In one early case, Chief Justice Griffith explained that such criminal offences were incidental, and thus within Commonwealth legislative power, because they "*secure* the observance of substantive laws with respect to matters within the legislative ... power of the Commonwealth".[11] The obverse of the Chief Justice's reasoning is that criminal penalties that are not directed towards "secur[ing] the observance of substantive laws", and instead are directed towards some other purpose (such as punishment), will not have an incidental character, and will be beyond Commonwealth legislative power.

12. The constitutional concern articulated in the preceding two paragraphs is, admittedly, novel. Furthermore, such a concern would only be engaged if the Bill's mandatory sentencing provisions were characterised as having a primarily punitive purpose.[12] A more charitable reading would be that the provisions have a protective purpose,[13] and thus are directed at securing the observance of substantive laws with respect to telecommunications. If that latter characterisation were accepted then the mandatory sentencing provisions would be within Commonwealth legislative power incidental to s 51(v).

CONSTITUTIONAL VALUES

13. As has just been explained, should the Bill be passed into law it would likely be found to be constitutionally valid. However, the Bill's bare constitutional *validity* should not obscure the fact that it exists in tension with a number of Australia's constitutional *values*, particularly the notion of equal justice and the preference for State criminal lawmaking.

Equal justice

14. Equal justice has long been a cornerstone of Australia's legal system and has been described as a value of constitutional significance.[14] . The High Court has called equal justice "an aspect of the rule of law" and, borrowing from Hans Kelsen, "the starting point of all other liberties".[15]

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[10] See, e.g., *McKelvey v Meagher* (1906) 4 CLR 265, 295; *R v Kidman* (1915) 20 CLR 425, 433. See also *Attorney-General for the Commonwealth v Colonial Sugar Refining Co* (1914) 17 CLR 644, 654.

[11] *R v Kidman* (1915) 20 CLR 425, 434 (emphasis added).

[12] See the Explanatory Memorandum at [1] and [24]. A punitive purpose is suggested by some of the Ministerial media releases prior to the Bill's introduction to Parliament. See, e.g., Hon Peter Dutton MP, Hon Christian Porter MP, "Child sex offenders to face mandatory sentences under Coalition crackdown" (3 September 2019) <hps://minister.homeaffairs.gov.au/peterdutton/Pages/AG-Joint-Media-Release.aspx>.

[13] See the Explanatory Memorandum at [27], [33] and [40].

[14] Cheryl Saunders and Megan Donaldson, "Values in Australian Constitutionalism" in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Oxford: Hart Publishing, 2015) 15, 34-38; Amelia Simpson, "Equal Treatment and Non-Discrimination through the Functionalist Lens" in Rosalind Dixon (ed), *Australian Constitutional Values* (Oxford: Hart Publishing, 2018) 195, 216-217.

[15] *Green v The Queen* (2011) 244 CLR 462, 472 [28].

15. Equal justice requires that like cases are treated alike and different cases are treated differently.[16] The High Court has observed: "Equal justice requires … *different* outcomes in cases that are different in some relevant respect."[17] It is important to be clear that equal justice does not require *leniency*, rather, it requires *accuracy* in the imposition of sentences that take into account differences between offenders, victims and circumstances of offending.

16. All sexual offending against children is serious, however not all such offending is *equally* serious.[18] For example, a premeditated offence committed by a repeat, unrepentant offender will be more serious than a one-off offence committed by a remorseful offender who may themselves have experienced sexual abuse or other contributing factors such as substance addiction or mental health conditions.

17. As has been acknowledged by a previous iteration of this Committee, the apparently unjust or anomalous results produced by mandatory sentencing regimes can erode community trust in the legal system.[19] It is unsurprising, then, that previous federal criminal laws prescribing mandatory sentencing attracted adverse comments from the judges administering them.[20]

The State-by-State expressive function of criminal law

18. In Australia, the proscription of criminal behaviour and the prescription of appropriate penalties have historically been the responsibility of State legislatures. More recently, since the 1980s, there has been an uptick in federal criminal legislation.[21] The reasons for the modern expansion of federal criminal lawmaking are complex, but include increases in transnational crime, cybercrime, and crimes affecting national security; as well as more common use of regulatory offences in all areas of law.[22] Notwithstanding these developments, it has been observed that criminal law is one of the final areas in which the States and Territories "continue to hold the reigns".[23] Justin Gleeson

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[16] *Lowe v The Queen* (1984) 154 CLR 606, 609.
[17] *Wong v The Queen* (2001) 207 CLR 584, 608 [65] (emphasis in original).
[18] See generally Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 *Oxford Journal of Legal Studies* 57.
[19] Parliament of Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (March 2000) [7.46]-[7.47]. See also Walter Sofronoff, *Queensland: Parole System Review, Final Report* (Department of Justice and Attorney-General) (2016) 105.
[20] See, e.g., C Flatley, "Judge Slams mandatory sentence for people smugglers" *Sydney Morning Herald* (11 January 2012). See also *R v Ambo* [2011] NSWDC 182; *R v Mahendra* [2011] NTSC 57.
[21] Justice Peter Johnson, "Consistency in Sentencing for Federal Offenders – The Work of Intermediate Appellate Courts" (2012) 24 *Judicial Officers' Bulletin* 9, 9.
[22] David Weisbrot, Brian Opeskin and Les McCrimmon (Australian Law Reform Commission), *Same Crime, Same Time: Sentencing of Federal Offenders* (Commonwealth of Australia, Canberra 2006) 95 [1.43].
[23] Gabrielle J Appleby and John M Williams, "A New Coat of Paint: Law and Order and the Refurbishment of *Kable*" (2012) 40 *Federal Law Review* 1, 1.

SC has said that "Crime is an area where the states regularly and pervasively exercise their legislative power."[24]

19. There is good reason to preserve the traditional federal balance whereby the States have the primary role in defining criminal conduct and prescribing its punishment. As has been explained of the American federal system:

> "What conduct a state chooses to criminalize and how severely it chooses to punish it are matters critical to the experience of deliberative democracy within that state. Because Federal criminal law dictates uniform, national answers to such questions, expansive readings of federal criminal law threaten to extinguish the opportunity that states have to use criminal law to express and shape local ideals."[25]

This has been described as the "expressive" function of criminal law.[26]

20. The Australian Constitution was intended to ensure democratic expression for the "peoples of the States", so much so that Elisa Arcioni and Adrienne Stone argue that "[t]he 'peoples of the States' are at the core of the Australian constitutional community."[27] In particular, the minimum guarantees of State representation in ss 7 and 24 of the Constitution recognise that the people of individual States will have distinct political preferences that are deserving of respect within the broader national system, this is particularly true with respect to criminal penalties. Justice Gordon has recently explained that "states take often quite different views on the criminality to be ascribed to certain conduct."[28]

21. The mandatory sentencing provisions within the Bill can thus be seen to dictate national answers to questions of criminal punishment that might be answered quite differently by individual states. Indeed, most States have in place criminal offences and penalties that would encompass the conduct subject to the Bill's mandatory sentencing requirements. The homogenisation of Australian criminal law is in tension with the value placed by the Australian Constitution on State-by-State criminal lawmaking.

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[24] Justin Gleeson, "A Federal Human Rights Act – What Implications for the States and Territories?" (2010) 33 *University of New South Wales Law Journal* 110, 121.

[25] Dan M Kahan, "Lenity and Federal Common Law Crimes" (1994) *Supreme Court Review* 345, 421.

[26] See Cass R Sunstein, "On the Expressive Function of Law" (1995) 144 *University of Pennsylvania Law Review* 2021. See also Joel Feinberg, "The Expressive Function of Punishment", in Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, Princeton, 1970) 95–118.

[27] Elisa Arcioni and Adrienne Stone, "The Small Brown Bird: Values and Aspirations in the Australian Constitution" (2016) 14 *International Journal of Constitutional Law* 60, 68

[28] *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1, 40 [199].

INTERNATIONAL LAW

22. It is well known that mandatory sentencing provisions such as those contained in the Bill can operate in certain cases to violate international law's protection of fundamental human rights, freedoms and liberties, particularly:
(i) the right to a fair trial;
(ii) the right to be free from cruel, inhuman or degrading treatment; and
(iii)the right not to be arbitrarily detained.[29]

(i) The right to a fair trial

23. The right to a fair trial in international law encompasses the requirement that prison sentences are subject to the opportunity of appeal.[30] By stipulating at law the minimum sentence that must be imposed, mandatory sentencing provisions prevent meaningful review of sentences by appeal courts. Accordingly, many scholars and institutions, including the Law Council of Australia[31] and the United Nations Special Rapporteur on the Independence of the Judiciary,[32] have opined that mandatory sentencing provisions like those in the Bill infringe the right to a fair trial and an opportunity of appeal.

(ii) Cruel, inhuman or degrading treatment

24. The right to be free from cruel, inhuman or degrading treatment is contained in a number of international instruments.[33] The United Nations Committee Against Torture,[34] the United Nations Human Rights Committee[35] and esteemed commentators[36] have all suggested that grossly disproportionate terms of imprisonment may amount to cruel, inhuman or degrading treatment.[37]

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[29] This section builds upon my previous research in the area of mandatory sentencing while I was undertaking a Post-Graduate Public Interest Fellowship from Columbia Law School. See Felicity Gerry QC, Julian R Murphy, Rebecca Tisdale and Julia Kretzenbacher, "Petition for Mercy in the Matter of Zak Grieve" (20 July 2018) at [55]-[65] <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf>.

[30] See, e.g., *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14(5).

[31] Law Council of Australia, "Mandatory Sentencing" (Policy Discussion Paper, May 2014) [78]-[80].

[32] Dato' Param Cumaraswamy, 'Mandatory sentencing: the individual and social costs' (2001) 7 *Australian Journal of Human Rights* 7, 14.

[33] A *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 7; *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*.

[34] United Nations, *Conclusions and Recommendations of the Committee Against Torture: Australia*, CAT/C/XXH/Concl.3, (21 November 2000) 6(e), 7(h).

[35] United Nations Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (112th session) concerning Communication No. 1968/2010 17.

[36] Jenny Blokland, "International Law Issues and the New Northern Territory Sentencing Regime" (paper presented at conference of the Criminal Lawyers Association of the Northern

25. Canada has the most developed jurisprudence in the common law world on the way that mandatory minimum sentences can impose cruel, inhuman or degrading treatment.[38] As early as 1987, the Supreme Court of Canada struck down a mandatory minimum narcotics sentence on the basis that it infringed the right to be free from cruel and unusual punishment. The Court defined cruel and unusual punishment to encompass a mandatory minimum sentence that is "grossly disproportionate" or "so excessive as to outrage standards of decency".[39]

26. Europe also has a mature jurisprudence describing the link between disproportionate punishments and cruel, inhuman or degrading treatment.[40] The European cases emphasize that a sentence will be amount to inhuman or degrading treatment where it does not allow for a meaningful possibility of a person rehabilitating themselves so as to re-enter the community outside of prison. Another principle deriving from the European decisions is that, for a sentence to avoid characterisation as inhuman or degrading, it must be reasonably related to the risk of reoffending.[41]

27. Should the Bill be passed into law there is no doubt that the majority of persons sentenced to mandatory sentences would still receive proportionate punishments, because their offending would warrant a period of imprisonment in excess of the prescribed minimum independent of the legislative directive. However experience shows that the rigidity of mandatory sentencing provisions, such as those in the Bill, inevitably results in rare occasions of disproportionate sentences, and those sentences will violate the right to be free from cruel, inhuman or degrading treatment.

Territory, 22-26 June 1997) 8-12; Andrew Dyer '(Grossly) disproportionate sentences: can charters of rights make a difference?' (2017) 43 *Monash University Law Review* 195, 219.

[37] In some jurisdictions, the right to be free from disproportionate punishment is considered a free-standing right independent of the torture prohibition. One example is Article 49(3) of the European Union Charter of Fundamental Rights. Article 49(3) of the European Union Charter of Fundamental Rights provides, relevantly that the "severity of penalties must not be disproportionate to the criminal offence." See also *Garage Molenheide v Belgium* [1997] ECR I-7281.

[38] The Canadian jurisprudence stems from section 12 of the Canadian Charter of Rights, which provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." See *Constitution Act 1982* (Can), Pt I, s 12.

[39] *R v Smith* [1987] S.C.J. No. 36, [53]. See also *R v Goltz* [1991] S.C.J. No. 90; *R v Morrisey* [2000] S.C.J. No. 39.

[40] See, e.g., *Vinter v United Kingdom* [2013] III Eur Court HR 317, 344 [102]; *Vinter v United Kingdom* (2012) 55 EHRR 34, [88]-[89], [93]; *Harkins v United Kingdom* (2012) 55 EHRR 19, [133]; *Ahmad v United Kingdom* (2013) 56 EHRR 1, [237]. The European jurisprudence focuses on Article 3 of the European Convention on Human Rights, which provides: "No one shall be subject to torture or to inhuman or degrading treatment or punishment."

[41] *R (on the application of Knights) v Secretary of State for Justice* [2017] EWCA Civ 1053.

(iii) Right not to be arbitrarily detained

28. The right not to be arbitrarily detained[42] has been held to require that State detention of individuals be:
    - Reasonable;
    - Necessary;
    - For a legitimate purpose;
    - Proportionate to the purpose.[43]

29. There are a number of ways in which mandatory sentencing provisions like thos in the Bill will often fail to satisfy these requirements. First, where mandatory sentencing laws require judges to impose a sentence of imprisonment without permitting consideration of all relevant circumstances this may be unreasonable, and thus arbitrary.[44] Mandatory sentencing can also be seen to produce unnecessary, and thus arbitrary, sentences in the way that sentence length is not calibrated according to the risk that a particular offender poses to the community. Finally, where mandatory sentencing requires the imposition of a disproportionate sentence it will inflict arbitrary detention. This has been acknowledged by the United Nations Human Rights Committee,[45] the Inter-American Court[46] and the Joint Standing Committee on Treaties.[47]

Conclusion as to international law

30. As has been explained by United Nations Human Rights Committee and a previous iteration of this Committee, mandatory sentencing provisions such as those in the Bill risk infringing international law.[48] Such international law concerns weigh against the passage of the Bill in its current form.

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[42] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, art 9(1).

[43] *Van Alphen v Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988 (23 July 1990) [5.8]; *Gorji-Dinka v Cameroon*, Communication No. 1134/2002, CCPR/c/83/D/1134/2002 (17 March 2005) [5.1]; *F.K.A.G. et al. v Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011 (20 August 2013) [9.3], [9.6]-[9.7]; *M.M.M. et al. v Australia*, Communication No. 2136/2012, CCPR/C/108/D/2136/2012 (20 August 2013) [10.3]-[10.4], [10.6]; United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement* (1999) [13].

[44] See, e.g., Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, report No 84 (1997), 554; Law Council of Australia, "Policy Discussion Paper on Mandatory Sentencing" (May 2014) [68], [70]-[77].

[45] *A v Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993 (3 April 1997) [9.2].

[46] Gangaram Panday Case 2 IHRR (1995) 360.

[47] Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the United Nations Convention on the Rights of the Child* (1998) 346 [8.26].

[48] Senate Legal and Constitutional References Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (March 2000) [5.91]; United Nations Human Rights Committee: Australia, *Concluding Observations*, CCPR/CO/69/Australia, (28 July 2000) 17.

COMMUNITY PROTECTION

31. Across the developed world there is now near consensus among experts that mandatory sentencing laws have little effect on crime rates and community protection.[49] In North America, where modern mandatory sentencing began, studies have found little evidence that such laws succeed in protecting the community.[50] In fact, a review of two decades of crime data from 188 large cities suggested that cities enacting "three strikes" laws saw *increases* in certain crimes as compared to cities that did not introduce the laws.[51] The Australian research comes to similar conclusions.

32. In 1992 Western Australia introduced extreme mandatory sentencing measures aimed at deterring high-speed pursuits in stolen motor vehicles.[52] Empirical research on the effects of the laws indicated that, far from deterring vehicle-related crime the laws were attended by a significant *increase* in motor vehicle theft and related arrests.[53] Later, in 1996, Western Australia introduced "three strikes" mandatory sentencing for property offences.[54] Again, empirical evidence suggested that reported home burglaries *increased* immediately after the laws passed;[55] robberies also appear to have increased in this time.[56] The Northern Territory's own "three strikes" laws for property offenders were introduced in 1997 (and repealed in 2001) and had similar effect. A review of the laws by the Office of Crime Prevention revealed that the available data did not support the claim that the laws could reduce recidivism or deter potential offenders.[57] The Northern Territory's mandatory sentencing regime was extended to violent offences in 2013[58] and subjected to an internal review in 2015.[59] The authors of that review noted that violent crime rates decreased after the laws were introduced, however this decrease could not be attributed to the

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[49] See, e.g., Michael Tonry "Functions of Sentencing and Sentencing Reform" (2005) 58 *Stanford Law Review* 37, 52-53.

[50] See, e.g., Lisa Stolzenberg and Stewart J D'Alessio, "'Three Strikes and You're Out': The Impact of California's New Mandatory Sentencing Laws on Serious Crime Rates" (1997) 43 *Crime & Delinquency* 457.

[51] Tomislav V Kovandzic, John J Sloan III and Lynne M Vieraitis, "Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effect of 'Three Strikes' in U.S. Cities (1980-1999)" (2002) *Criminology & Public Policy* 399.

[52] *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA). See also Neil Morgan, "Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories" (1999) *University of New South Wales Law Journal* 267, 271-273.

[53] Roderic Broadhurst and Nini Loh, "The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing Act" (1993) 26 *Australian & New Zealand Journal of Criminology* 251.

[54] *Criminal Code Amendment Act (No 2) 1996* (WA).

[55] Mary Ann Yeats, "'Three Strikes' and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia" (1997) 8 *Criminal Law Forum* 369, 377.

[56] Neil Morgan, "Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories" (1999) *University of New South Wales Law Journal* 267, 273-274.

[57] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience*, Discussion Paper (2003) 10.

[58] *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT)

[59] Carolyn White et al, Department of Attorney-General and Justice, *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (2005) 15-16.

mandatory sentencing legislation (and was thought to be the product of other criminal justice initiatives).[60]

CONCLUSION

33. The above analysis has sought to show that while the mandatory sentencing provisions within the Bill might be constitutional valid, they are inconsistent with Australia's constitutional values and with international law. Furthermore, the available research suggests that the Bill's mandatory sentencing provisions are unlikely to advance community protection. Accordingly, it is recommended that consideration be given to amending the Bill to remove the mandatory sentencing provisions.

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30 September 2019

NOTE: This submission is written in a personal capacity and does not reflect the views of any past or present employer or other organisational affiliation.

[60] Carolyn White, Joe Yick, Dee-Ann Vahlberg and Leonique Swart, "Review of the Northern Territory *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*" (2015, Department of Attorney-General and Justice, Darwin) 15-16.