It ain't broke, so for goodness sake, don't fix it

I can accept neither the necessity nor the wisdom of mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.
(Justice Anthony M Kennedy, United States Supreme Court)[1]

At a recent Department of Justice forum for the profession and the public, the Attorney-General took the opportunity to personally answer a question from the floor as to the purpose of the *Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012* (NT). "Deterrence, and retribution", he said. Mr Elferink continued in this vein ("clear message", "genuine gaol time", "tougher sentences") when he introduced the Bill to the Legislative Assembly on 29 November 2012. He also said this: "The purpose of setting the mandatory minimum sentences in this bill is to maintain a consistent standard for sentencing for violent offences."

So, will these laws lead to improved deterrence, retribution or consistency?

Deterrence?

No. After conducting a detailed survey of 30 years of empirical research from North America, Europe and Australasia, Bagaric and Alexander conclude:

> The practice of imposing harsher sentences to discourage other offenders from committing the same or similar offences does not work. The additional pain that is inflicted on offenders to pursue this objective has no positive social effects and is therefore pointless.[2]

Retribution?

No. Retribution is effected by giving an offender their "just deserts".[3] Citing Andrew von Hirsch, a leading exponent of just deserts theory, Southwood J recently reminded us that this approach to punishment (which is essentially retributivist) corresponds to the sentencing principle of proportionality:

> … a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which is justified as proportionate to the gravity of the crime considered in the light of its objective circumstances.[4]

Mandatory minimum sentences prevent courts from applying the principle of proportionality. And that is why, as Mildren J stated in a case dealing with a previous Northern Territory mandatory sentencing regime, "prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences."[5]

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[1] Address to American Bar Association 2003

[2] Mirko Bagaric and Theo Alexander, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35 Crim LJ 269 at 283

[3] "[U]nder the notion of giving the offender his or her 'just deserts', the retributive aspect has re-asserted itself in recent years." (*Ryan v The Queen* (2001) 206 CLR 267 at 283 [46] per McHugh J)

[4] *Hoare v The Queen* (1989) 167 CLR 348 at 354, cited in *Habib Urahman v Semrad* [2012] NTSC 95 at [48]

[5] *Trenerry v Bradley* (1997) 6 NTLR 175 at 187

Consistency?

No. Mandatory sentencing is also the antithesis of individualised sentencing. All offenders are subject to the same minimum sentence, which means some will get more than they justly deserve, while others won't. That produces inconsistency, and infects the judicial process with arbitrariness, as Blokland J, in the course of sentencing a people-smuggler subject to the Commonwealth's mandatory sentencing laws, explained:

> The five year sentence I am obliged to impose has an arbitrary element to it, as does most forms of mandatory imprisonment. Australia is a party to the *International Covenant on Civil and Political Rights*. Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence. The court is deprived of the usual function to assess the gravity and, therefore, be able to pass a proportionate sentence.[6]

It was presumably in response to stern judicial remarks of this nature that on 27 August 2012 the Commonwealth Attorney-General issued a direction under s8(1) of the *Director of Public Prosecutions Act 1983* (Cth) prohibiting the laying of charges which attract mandatory sentencing against most categories of persons suspected of people-smuggling. It is to the credit of Ms Roxon that she did so, albeit belatedly. Far better would have been not to have passed such ineffective, harsh, unfair and costly laws in the first place.

Mandatory minimum sentencing laws do not deter. They do not result in just retribution. They do not produce consistency. And furthermore, as the cases inevitably arise in which the scope, the application, the construction and even perhaps the validity[7] of the complex and controversial provisions to be enacted by the *Sentencing Amendment (Mandatory Minimum Sentences) Bill* are tested in our courts, unnecessary delay, cost and uncertainty will ensue. That is precisely what occurred when the previous generation of radical mandatory minimum sentencing laws commenced on 8 March 1997.[8] One might think that that clear message would have been a lesson well learnt by now. But then again, as the evidence shows, general deterrence just doesn't work.

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[6] *R v Mahendra* SCC 21041400 (Sentence, 1 September 2011)

[7] See Anthony Gray and Gerard Elmore, "The constitutionality of minimum mandatory sentencing regimes" (2012) 22 JJA 37

[8] The Supreme Court of the Northern Territory was required to consider the provisions introduced by the *Sentencing Amendment Act (No. 2) 1996* (and subsequently amended on four separate occasions) in at least 25 different cases, before they were repealed in 2001.