MONASH University

# Caught in the crossfire in the war on drugs: international drug trafficking, sentencing and human rights

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**Abstract**

One need only look to international concern about use of the death penalty or irreducible life sentences to appreciate the scope for domestic sentencing practices to violate international human rights norms. Yet, outside of these extremes, penal severity has traditionally been regarded as a question of penal theory rather than as a human rights issue. Consequently, it has typically been considered a matter of domestic rather than international concern. However, recent developments in international drug control policy have confirmed that that domestic drug offences created pursuant to the international drug conventions ('drug treaty offences') must be implemented in conformity with international human rights norms, and that violations of these norms will be the subject of legitimate international scrutiny. Presently, however, there is no established legal test by which to evaluate whether a particular domestic sentence is consistent with international human rights norms. This thesis attempts to answer the question of whether sentences imposed by Australian courts on international drug traffickers are consistent with international human rights norms.

The thesis contends that the international human rights doctrine of constitutional proportionality ('constitutional proportionality') is the appropriate test for this purpose, based on its widespread use in constitutional and human rights adjudication. Both the European Court of Human Rights, which supervises enforcement of the European Convention on Human Rights, and the United Nations Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights ('ICCPR'), have deployed constitutional proportionality when adjudicating the very small number of applications or complaints concerning disproportionately severe sentences falling short of the death penalty or irreducible life sentences and analogous applications or complaints concerning arrest, immigration detention, extradition detention and/or preventative detention. This jurisprudence is still underdeveloped, in part because so few cases have sought to challenge allegedly disproportionate sentences, and in part because the full reach of the related margin of appreciation doctrine ('margin of appreciation') has not yet been clearly articulated in relation to such cases. But despite these limitations, the jurisprudence provides good evidence that constitutional proportionality is an accepted and workable quasi-constitutional constraint on the sentencing.

Drawing on a sample of 94 Australian cases in which persons were sentenced for international drug trafficking offences, the thesis deploys constitutional proportionality to evaluate whether the sentences are consistent with international human rights norms. To provide a sound factual basis for that evaluation, the thesis uses a grounded theory analysis of the sentencing judge's official 'remarks on sentence'[1] in each case to generate a reliable a picture of who trafficks drugs into Australia and why. A content analysis of the remarks on sentence is used to generate a reliable picture of how sentences are formulated. The picture that emerges from these analyses is of a drug trafficking market that is predominantly non-violent, competitive and populated by profit-motivated actors who rely on minimally culpable individuals to do the high-risk of work of trafficking, tracking, collecting or delivering the drugs; in short, a market that does not conform to stereotypes about the international drug trade. The thesis concludes that the evidential and normative basis for sentence formulation is so systematically flawed that resulting sentences are often disproportionate and therefore arbitrary, contrary to international human rights norms.

[1] The sentencing judge's official published reasons for sentence.

## Declaration

This thesis is an original work of my research and contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature: ……………………

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Date: 20 August 2019

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# Introduction

*'The story of sentencing reform was (and is) partly about 'doing justice' better and partly about re-legitimating the state's power to punish in a society rife with 'background conditions of inequality and injustice.'*[1]

## I Rationale

Sentencing, the final stage in the criminal justice process, is the symbolic and pragmatic test of whether the criminal law strikes the correct balance between the several competing and incommensurable objectives of punishment, deterrence and rehabilitation. If the correct balance is not struck the community will view the sentence as either too harsh, too lenient or unfair, and legislative or judicial processes may be invoked to restore balance. Each legal system strikes a unique balance, which is a product of the country's political and legal history.[2] Historically, national governments have accepted that different penalties may be imposed for similar offences in different countries and rarely comment upon matters of domestic sentencing on other countries, except where it concerns their own citizens abroad.[3] Since the turn of the millennium, however, the United Nations drug control bodies,[4] and more recently the United Nations General Assembly,[5] have signalled that while the sentencing of persons for domestic drug offences created pursuant to the three international drug conventions ('the drug

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[1] Kathleen Daly and Michael Tonry, 'Gender, Race and Sentencing' (1997) 22 *Crime and Justice* 201, 204 citing Nicola Lacey, 'Introduction: Making Sense of Criminal Justice' in Nicola Lacey (ed) *Criminal Justice* (Oxford University Press, 1994) 33.

[2] Lacey, Nicola, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008); Tonry, Michael, 'Remodelling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration' (2014) 13(4) *Criminology & Public Policy* 503, 505; Snacken, Sonja, 'Resisting Punitiveness in Europe?' (2010) 14(3) *Theoretical Criminology* 273.

[3] Amy Macguire and Shelby Houghton, 'The Bali Nine, Capital punishment and Australia's Obligation to seek Abolition' (2016) 28(1) *Current Issues in Criminal Justice* 67, 83; Natalie Klein, 'Australians Sentenced to Death Overseas: Promoting Bilateral Dialogues to Avoid International Law Disputes' (2011) 37(2) *Monash University Law Review* 89.

[4] The Commission on Narcotics Drugs ('CND'), the International Narcotics Control Board ('INCB') and the United Nations Office on Drugs and Crime ('UNODC'). See Chapter 3 'International Drug Trafficking: Policy Context' for an explanation of the role and functions of each body.

[5] At the United Nations General Assembly's Special Session on the World Drug Problem 2016 ('UNGASS 2016').

conventions')[6] remains a matter of domestic responsibility, sentencing is no longer exclusively a matter of domestic concern. The domestic balance must be struck in a way that is consistent with international human rights norms.[7]

International interest in domestic sentencing for drug-treaty offences arises from concern that implementation of the requirements of the drug conventions – to criminalise the production, distribution and use of illicit drugs[8] – has produced numerous 'unintended consequences' which have gone unaddressed in many countries.[9] For example, the impoverishment of thousands of peasant farmers in drug-producing regions was an unintended consequence of the criminalisation of drug production and implementation of crop eradication programmes.[10] Crop eradication programs are now carried out in conjunction with alternative development programs.[11] Along similar lines, the creation of an underclass of recidivist criminals from addicts was an unintended consequence of the criminalisation of drug use. Users are now routinely diverted from the criminal justice system and into treatment and rehabilitation programmes in most countries.[12] The concern with respect to sentencing has not yet been clearly articulated much beyond the observation that imposition of the death penalty, irreducible life sentences or 'grossly disproportionate' sentences are unacceptable in the context of drug control policy.[13]

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[6] Single Convention on Narcotics Drugs 1961 ('Single Convention'), opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964); Convention on Psychotropic Substances ('1971 Convention'), opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('1988 Convention'), opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990).

[7] Political Declaration, GA Res S-20/2, UN GAOR, 20th special sess, UN Doc A/S-20/14 (10 June 1998), Annex.

[8] 1988 Convention, art 3.

[9] The term 'unintended consequences' was used by the Secretary-General of the UNODC in a 2008 position paper, and has been criticised as 'euphemistic' by Daniel Heilmann, 'The International Control of Illegal Drugs and the UN Treaty Regime: Preventing or Causing Human Rights Violations?' 19 *Cardozo Journal of International and Comparative Law* 237, 268.

[10] Heilmann (n 9) 268.

[11] United Nations Office on Drugs and Crime, Alternative Development (Last viewed 11 July 2018) <https://www.unodc.org/unodc/en/alternative-development/index.html?ref=menuside>; United Nations Office on Drugs and Crime, Alternative Development: A Global Thematic Evaluation: Final Synthesis Report, UN Doc No E.05.XI.13.

[12] Heilmann (n 9) 268.

[13] Dirk Van Zyl Smit, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019), 13; Sonja Snacken, 'Resisting Punitiveness in Europe?' (2010) 14(3) *Theoretical Criminology* 273; Sonja Snacken,

There is now near universal agreement that the drug conventions must be read and understood subject to human rights norms.[14] At the United Nations General Assembly Special Session on the World Drug Problem 2016 ('UNGASS 2016'), Werner Sipp, then President of the International Narcotics Control Board ('INCB'), emphasised that the drug conventions 'never called for a war on drugs,' that 'there is no treaty obligation to incarcerate for minor offences' and that 'inhumane punishment and treatment of [users] is not in line with the conventions.'[15] In preparatory sessions for UNGASS 2016, a proposal to abolish the death penalty for drug-treaty offences was only narrowly defeated in the face of protests from a small number of countries which asserted their sovereign right to do so.[16] However, in its stead, the General Assembly passed a less controversial but arguably more significant resolution not confined to the death penalty; its significance lies in its potential to impact domestic sentencing practices for all drug-treaty offences. The resolution reiterates the General Assembly's 'commitment to respecting, protecting and promoting all human rights, fundamental freedoms and the inherent dignity of all individuals and the rule of law in the development and implementation of drug policies' and recommends that parties:

> '[p]romote proportionate national sentencing policies, practices and guidelines for drug related offences whereby the severity of penalties are proportionate to the gravity of offences and whereby both mitigating and aggravating factors are taken into account, including the circumstances enumerated in article 3 of the *1998 Convention* [which enumerate the factors that make an offence 'particularly serious'] and other applicable international law, and in accordance with national legislation.'[17]

The General Assembly further resolved that convention parties consider, on a voluntary basis, including information on 'the promotion of human rights' and 'information, lessons learned,

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'A Reductionist Penal Policy and European Human Rights Standards' (2006) 12(2) *European Journal on Criminal Policy and Research* 143.

[14] Heilmann (n 9) 286.

[15] Jamie Bridge, 'The United Nations General Assembly Special Session (UNGASS) on the World Drug Problem' (Report, International Drug Policy Consortium, 2016), 2.

[16] Namely, China, Singapore, Yemen, Malaysia, Pakistan, Egypt, Saudi-Arabia, Oman, the UAE, Qatar, Kuwait, Bahrain, Iran, Indonesia and Sudan; Bridge (n 15) 4.

[17] Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem GA Res S-30/1, UN GAOR, 30th special session, Agenda Item 8, para 4(1) UN Doc No A/RES/S-30/1 (19 April 2016).

experiences and best practices on…domestic practices on proportional sentencing' when furnishing annual returns to the United Nations drug control bodies pursuant to the drug conventions.[18]

This thesis seeks to discover whether sentences imposed on international drug traffickers sentenced in Australia comport with these requirements and are therefore consistent with international human rights norms. The same question could be asked in every other country that has ratified the drug conventions, but the question has not been asked to date.

In Australia, international drug traffickers are charged under Div 307 of the *Criminal Code* (Cth), which prohibits the importation of 'border controlled drugs,' including cocaine, heroin, methamphetamine as well as drug analogues and precursor chemicals. Offenders are liable to a maximum penalty of 25 years' imprisonment for importing a 'marketable quantity' of drugs or life imprisonment for importing a 'commercial quantity.'[19] The median custodial term for drug importers sentenced in Australia, at 72 months,[20] lies between the notorious leniency of the Netherlands, which is a key transit point for drugs in Europe, and the notorious brutality of the Philippines, which imposes the death penalty on some drug importers, and which is a similarly significant transit point for drugs in South-East Asia.[21] These statistics may provide some superficial reassurance that Australian sentences are not outliers in comparison with other countries,[22] but they do not answer the question of whether domestic sentences are consistent

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[18] This includes information on drug seizures, arrests etc provided to the CND for inclusion in the World Drug Report; Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem GA Res S-30/1, UN GAOR, 30th special session, Agenda Item 8, para 4(h) and 4(k) UN Doc No A/RES/S-30/1 (19 April 2016).

[19] Section 301.4(a) *Criminal Code* (Cth) read with s 5D, sch 4 *Criminal Code Regulations 2002* (Cth) provide: a 'commercial quantity' of cocaine is 2 kg, heroin 1.5 kg, methamphetamine 0.75 kg; a 'marketable quantity' of cocaine is 2 g, heroin 2 g, methamphetamine 2 g.

[20] Pierrette Mizzi, 'Sentencing of Commonwealth Drug Offenders' (Research Monograph Series, No 38, Judicial Commission of New South Wales, June 2014) 95 <https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/research-monograph-38.pdf>.

[21] United Nations Office on Drugs and Crime, 'World Drug Report 2016' (Report, United Nations Office on Drugs and Crime, 2016) 39 <https://www.unodc.org/wdr2016/>

[22] There is an extensive literature on why cross-national comparison of sentencing outcomes is presently problematic. For example, Klimer, Beau, Peter Reuter and Luca Giommoni, 'What Can Be Learned from Cross-National Comparisons of Data on Illegal Drugs?' (2015) 44 *Crime and Justice* 227; Frase, Richard S, 'Comparative Perspectives on Sentencing Policy and Research' in *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001); Young, Warren and Mark Brown, 'Cross-National Comparisons of Imprisonment' (1993)

with international human rights norms. And several matters suggest that Australian sentences are unlikely to be compliant.

Australia is the only democracy without a national charter of rights.[23] While Australia has ratified all but two of the seven core international human rights treaties,[24] none of these treaties is enforceable domestically.[25] Moreover, only some obligations under some treaties have been incorporated into domestic law in what has been described as a 'somewhat threadbare' 'patchwork' of domestic constitutional, statutory and common law protections.[26] Australia's failure to systematically recognise international human rights goes hand-in-hand with its failure to provide systematic means for redress of international human rights violations. The Australian Constitution makes no reference to international human rights and contains no Bill of Rights. Additionally, despite being a signatory to the major international human rights treaties, Australia has no domestic mechanism for review of a sentence for non-compliance with the substantive protections of the ICCPR, contrary to art 9(4) of the ICCPR.[27] For example, a prisoner cannot make an application to a court for a declaration or other remedy on the basis that the sentence violates his rights or freedoms under the ICCPR. Additionally, although Australia has ratified the First Optional Protocol to the ICCPR – which permits individuals who have exhausted all domestic remedies to make complaints about the State's violation of their human rights to the UN Human Rights Committee ('UNHRC') – Australia has been widely criticised for ignoring the determinations of the UNHRC, including in relation

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17 *Crime and Justice* 1; Tata, Cyrus and Neil Hutton, *Sentencing and Society: International Perspectives* (Routledge, 2002).

[23] George Williams and Daniel Reynolds *A Charter of Rights for Australia* (UNSW Press, 4th ed 2017) 14.

[24] Comprising the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), the International Covenant on Civil and Political Right ('ICCPR'), the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), the Convention on the Rights of the Child ('CRC'); Australia has not signed up to the International Covenant on Economic, Social and Cultural Rights or the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families ('ICMRW').

[25] *Kioa v West* (1985) 159 CLR 550 [21] (Gibbs CJ).

[26] Williams and Reynolds (n 3) 13, 15.

[27] Australia has not implemented domestically the provisions of the ICCPR or the UDHR. ICCPR Art 9(4) provides for the right to review of detention, and has been interpreted by the UN HRC to include the right to review of whether a sentence is compliant with the substantive provisions of the ICCPR, including 'arbitrariness' which in turn incorporates the proportionality requirement. The absence of such a domestic review mechanism is itself a violation of art 9(4).

to mandatory immigration detention,[28] irreducible life sentences,[29] preventative detention,[30] and mandatory extradition detention.[31] Nevertheless, Australia presents itself internationally as a nation committed to the promotion and protection of human rights, including in its campaign for election as a member of the UN Human Rights Council for 2018-2020.[32] There is an inconsistency between the extent of domestic safeguards for international human rights and how Australia presents itself and its domestic human rights record internationally.[33]

Australia's common law – which derives from English common law –never embraced human rights.[34] Rather, it adopted a broadly utilitarian philosophy, incorporating unswerving faith in parliamentary supremacy, historically influenced by Jeremy Bentham, John Austin and Albert Venn Dicey.[35] Not surprisingly, relevant case authorities pertaining to drug importers betray a utilitarian logic: the 'common sense' presumption that 'a person who is importing drugs is

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[28] For instance, *A v Australia* (No 560/1993), CCPR/C/59/D/560/1993 (30 April 1997) [3.3] (where a Cambodian national was detained for four years while his refugee application was processed); *C v Australia* (No 90/1999), UN Doc CCPR/C/76/D/900/1999 (28 October 2002) [8.2] (where the applicant overstayed a tourist visa and was detained for over 2 years); *Baban v Australia* (No 1014/2001), UN Doc CCPR/C/78/D/1014/2001 (18 September 2003); *Shafiq v Australia* (No 1324/2004), UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); *Shams et al v Australia* (1255, 1256, 1259, 1260, 1268, 1270, 1288/2004), UN Doc Nos CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (11 September 2007); cf *Bakhtiyari v Australia* (No 1069/02), UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) (where the applicant was only detained for 2 months and that was found not to violate art 9), and *Nystrom v Australia* (No 155720/07), UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) (where the applicant was placed in mandatory immigration detention pending deportation on character grounds, and that was found not to violate art 9).

[29] In *Blessington and Elliott* (1968/2010), UN Doc CCPR/C/112/D/1968/2010 (17 November 2014) the UNHRC upheld a complaint that irreducible life sentences imposed on the complainants for a murder they committed while they were minors violated their rights under art 9 of the ICCPR.

[30] *Fardon v Australia* (No. 1629/2007), UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) the UNHRC found that that a Queensland legislative scheme for the preventative detention of dangerous offenders who had completed their prison sentence violated the offender's rights under arts 9(1) and 9(4). The UNHRC reached the same conclusion in relation to similar NSW legislation in *Tillman v Australia* (No 1635/2007), UN Doc CCPR/C/98/D/1635/2007 (10 May 2010).

[31] In *Griffiths v Australia* (No 1973/2010), UN Doc CCPR/C/112/D/1973/2010 (26 January 2015) the UNHRC held in that Australia's common law requirement that an extraditable person must be remanded in custody absent 'exceptional circumstances' justifying release on bail violated the claimant's art 9(1) and 9(4) rights.

[32] Williams and Reynolds (n 23) 4.

[33] Ibid.

[34] J Spigelman, 'Keynote Address' (Paper presented at Current Issues in Federal Crime and Sentencing, National Judicial College of Australia and Australian National University, Canberra, 11-12 February 2012) 4.

[35] Ibid.

doing so for profit,'[36] the requirement that sentences 'neutralise' the 'potential financial rewards' of drug trafficking;[37] the rule that '[o]rdinarily, the amount of drug involved in an importation is a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type,'[38] the requirement that involvement of the offender 'at any level' must attract a significant sentence;[39] and the constraint that little weight ought to be attributed to the offender's prior good character or the hardship of foreign detention, lest the objective of general deterrence be eroded.[40]

In addition to its lack of systematic protection of human rights, the Australian legal system provides no domestic constitutional protection against penal severity. There is no right of appeal on the basis that a sentence is a numerical outlier in relation to sentencing patterns for the applicable category of offences, much less a right of appeal on the basis that sentencing patterns for an applicable category of offences is unduly harsh. The applicant must be able to demonstrate that the court has a made an error – whether 'specific'[41] or 'non-specific'[42] – such as failing to take into account a relevant consideration, which provides a basis for judicial review.[43] The common law protects the sentencing court's very wide sentencing discretion, so

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[36] *Nguyen v The Queen; Phommalysack v The Queen* ('*Nguyen & Phommalysack v The Queen*') (2011) 31 VR 673 [34]. See also David Brown, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605, 615.

[37] *Nguyen & Phommalysack v The Queen* (n 36).

[38] *Nguyen & Phommalysack v The Queen* (n 36).

[39] *Nguyen & Phommalysack v The Queen* (n 36).

[40] *Nguyen & Phommalysack v The Queen* (n 36); *R v Ferrer-Esis* (1991) 55 A Crim R 231 Hunt J (with whom Gleeson CJ and Lee CJ at CL said) at 239 citing *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 [265] where McClellan CJ at CL found these matters to be of "strictly limited" significance.

[41] Specific error occurs where the sentencing judge makes the kind of error that would ordinarily enliven the grounds for review of an exercise of discretion more generally, such as failure to take into account a relevant consideration. Other examples are where the sentencing judge makes a mistake as to the law or the facts, fails to disregard an irrelevant consideration, gives excessive or insufficient weight to a particular sentencing factor, or otherwise fails to observe the requirements of procedural fairness, including the rule against bias: see Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 3rd ed, 2014) [17.80] for a detailed discussion of the types of specific error.

[42] Non-specific error occurs where the sentence patently betrays some sort of specific error, though no such error can be identified from the written reasons of the sentencing judge; it is sometimes called 'manifest inadequacy' or 'manifest excess' of sentence.

[43] Other examples are where the sentencing judge makes a mistake as to the law or the facts, fails to disregard an irrelevant consideration, gives excessive or insufficient weight to a particular sentencing factor, or otherwise fails

that the High Court will intervene only where necessary to ensure 'consistency in the application of relevant legal principles.'[44] There is no constitutional protection against the death penalty, an irreducible life sentence, or an indeterminate sentence. Moreover, the writ of *habeas corpus*, which is the primary constitutional safeguard for the liberty of all persons against the unlawful actions of ministers, officials and judges, affords no protection against penal severity; it merely ensures that the actions of government are in accordance with domestic law, which is in practical terms constrained only by the will of the Commonwealth and State parliaments.[45]

Concern about the potential for human rights violations in relation to the sentencing of drug importers (also variously called 'drug traffickers,' 'drug smugglers,' 'drug couriers,' or 'drug mules' throughout the scholarly literature)[46] stems from legal and criminological literature from the early 1990s, which identified 'drug mules' as persons who were coerced, duped or had limited alternatives to small-scale trafficking on behalf of others for grossly inadequate compensation relative to the risk of detection.[47] Many drug mules were thought to be impoverished widows, mothers and pregnant women from developing countries who had been exploited by drug trafficking networks. If caught, drug mules faced lengthy terms of imprisonment in a foreign gaol or, in some countries, death. Drug mules were characterised as victims rather than perpetrators of the world drug trade or, at worst, reluctant participants caught in the cross-fire in the war on drugs. Theirs was a story of acute social-, racial- and gender-based inequality. It was argued that the criminal justice system had failed these persons; curiously, not by convicting them,[48] but because the severity of the sentences compounded the

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to observe the requirements of procedural fairness, including the rule against bias: see Fox and Freiberg (n 41) [17.80] for a detailed discussion of the types of specific error.

[44] *Hili v The Queen* (2010) 242 CLR 520 [18].

[45] See *Magaming v The Queen* (2013) 252 CLR 381. For a discussion of Australia's constitutional arrangements as they apply to sentencing see Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' 36 *Criminal Law Journal* 335.

[46] European Monitoring Centre for Drugs and Drug Addiction, 'A Definition of 'Drug Mules' for use in a European Context' (Thematic paper, European Monitoring Centre for Drugs and Drug Addiction, 2012).

[47] P Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press, 1998); Williams, Stephen, 'Black Women Drug Mules in Foreign Prisons' (New African Woman, October 2008) 24; Huling, Tracy, 'Women Drug Couriers - Sentencing Reform Needed for Prisoners of War' (1994) 9 *Criminal Justice* 15.

[48] This appears to have been accepted as a fait accompli for persons caught concealing the drugs internally or strapped to their bodies. In Australia, the defences of 'duress' under div 10.2 and 'sudden or extraordinary

social inequalities that produced the offending by removing the offenders from their communities. Various explanations were offered for the apparently harsh sentences imposed on drug mules: from illogical 'straight-weight' sentencing laws or practices, which used drug weight as a proxy for offender culpability,[49] to the conscious scapegoating of foreigners by Westernised governments in their ideological war on drugs.[50]

The counter-intuitive possibility that the criminal justice system may exacerbate social inequalities is not novel. The once fringe critical legal studies movement has had far-reaching influence by exposing a multitude of substantive inequalities in laws and practice since the 1970s. In *Crime, Reason and History*,[51] Alan Norrie not only exposes entrenched structural and social inequalities maintained by the criminal law but explains the development of criminal law doctrine as a response to the structural elements of class conflict in a capitalist society.[52] Norrie's argument is that the conflicts and contradictions that characterised industrialisation – namely the need for the middle classes to safeguard themselves against both the brutal aristocracy and the thieving lower classes – were resolved in legal doctrine that entrenches the socio-economic status quo. That doctrine, Norrie argues, employs 'juridicial abstractions,' such as 'reasonableness,' 'mens rea,' which emphasise only one side of human life – the ability to reason and calculate – 'at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways.'[53] Thus, legal doctrine conveniently obscures the social reality that '*this* citizen was poor, unemployed, brought up in deprivation or the product of a broken family'[54] and thereby avoids 'open and contentious moral and political issues.'[55] The result is a modern criminal law that ensures formal rather than substantive equality between social classes ironically masked by inclusive and general

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emergency' under div 10.3 of the *Criminal Code* (Cth) have not been relied on successfully by drug importers to date.

[49] Steven B Wasserman, 'Toward Sentencing Reform for Drug Couriers' (1995) 61 *Brooklyn Law Review* 643, 644.

[50] Green (n 48).

[51] Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law (Cambridge University Press, 3rd ed, 2014).

[52] Nicola Lacey, 'Abstraction in Context' (1994) 14 *Oxford Journal of Legal Studies* 255.

[53] Norrie (n 51).

[54] Ibid 29.

[55] Ibid 36.

language 'cast in terms of respect of the individual before it.' [56] For this reason, Norrie argues, the subject of criminal law has always been the lower classes.[57] Courtrooms overflow with symptoms of this social inequality in all its guises, from property crime to social security fraud and, it would appear, small-scale international drug trafficking. However, some scholars have predicted that the tension between this juridical abstraction and social reality relaxes somewhat at sentence, and the system becomes 'much more discretionary and less regulated by law.'[58] At this point, the sentencer is supposedly guided toward a just sentence by the set of philosophically irreconcilable utilitarian and retributive goals onto which the late Victorian ideologies of rehabilitation and incapacitation are grafted.[59] The practical question for the sentencer becomes how much context can be air-brushed into sentencing without offending the rule of law; the 'perennial and endemic tension between the principle of consistency and individualised justice' that characterises sentencing.[60] A small and predominantly North American empirical literature on sentencing suggests that the balance is nevertheless often struck in a way that perpetuates social, racial and gender inequalities.[61] There is no corresponding literature in Australia.[62]

It is the abovementioned literature on drug mules, combined with the structural failure of the Australian legal system to recognise or protect international human rights, the proven potential for the criminal justice system to perpetuate social inequalities, and international interest in ensuring that domestic sentences with drug treaty laws comport with international human rights norms, that provides the rationale for the research question.

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[56] Ibid 29.

[57] Lacey (n 52)

[58] Norrie (n 51) 334.

[59] Norrie (n 51) 353.

[60] Arie Freiberg and Sarah Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21 *Journal of Judicial Administration* 73, 73.

[61] For a summary of the literature see Goodall, Wayne and Russil Durrant, 'Regional Variation in Sentencing: The Incarceration of Aggravated Drink Drivers in the New Zealand District Courts' (2013) 46(3) *Australian & New Zealand Journal of Criminology* 422.

[62] There is only a very small but growing literature on indigenous Australians, Goodall (n 61).

## II Research question and methodology

There are three practical obstacles to answering the question of whether sentences imposed on Australian courts for drug importation offences are consistent with international human rights norms. First, there is very little official information or scholarly research on the international drug trade at Australia's border.[63] For example, it is not known whether international drug trafficking at Australia's border is mostly violent or non-violent, mostly profit-motivated or politically subversive, mostly oligopolistic or competitive, mostly directly connected to drug-producers or at arm's length. It is not known whether importation enterprises are run along hierarchical lines or as cooperative coalitions, nor whether they are mostly enduring or short-lived. It is not known whether participants in importation enterprises are mostly profit-motivated or desperate, nor whether they are mostly perpetrators or victims. Second, there is very little official information or scholarly research on how drug importers are sentenced in Australia.[64] For example, it is not known how courts assess offence gravity and offender culpability in practice. It is not known how pre-existing socio-economic inequalities impact sentence formulation in practice. And it is not known whether courts pay lip service to the legal requirement to emphasise general deterrence, or whether sentences are mostly deterrent in practice. Third, there is no established theoretical methodology for evaluating whether sentences comport with international human rights norms. Specifically, there are no internationally agreed sentencing benchmarks; cross-national comparative sentencing is marred by insurmountable difficulties;[65] and sentences other than the death penalty, mandatory

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[63] For example, Vy Kim Thi Le, *Understanding the Operational Structure of Southeast Asian Drug Trafficking Groups in Australia* (PhD, Queensland University of Technology, 2013).

[64] The few available studies include: Pierrette Mizzi, 'Sentencing of Commonwealth Drug Offenders' (Research Monograph Series, No 38, Judicial Commission of New South Wales, June 2014); Isaac Morrison, 'Pin the Tail on the Donkey' (2016) 40 *Criminal Law Journal* 154 (who analysed 213 sentence summaries from the Public Defenders Sentencing Tables for a range of state and Commonwealth drug offences in NSW and concluded that offender role – characterised as 'courier,' 'mid-range manager' or 'principal' – and drug weight – characterised as bottom (0.2-2.5kg) middle (2.5-16.5kg) or top (>16.5kg) - were the two most significant factors in determining sentences in practice); Roslyn Le and Michael Gilding, 'Gambling and Drugs the Role of Gambling Among Vietnamese Women Incarcerated for Drug Crimes in Australia' (2016) 49(1) *Australian and New Zealand Journal of Criminology* 134; Lisa Maher and Susan L Hudson, 'Women in the Drug Economy: A Metasynthesis of the Qualitative Literature' (2007) 37(4) *Journal of Drug Issues* 805.

[65] For example, Klimer (n 22); Frase, (n 22); Young, Warren and Brown (n 22), Tata, Cyrus and Hutton (n 22).

sentences or irreducible life sentences are rarely challenged before domestic constitutional courts or international courts or other bodies, so that there is no established international human rights jurisprudence on penal severity.[66] The thesis addresses the latter question first.

Chapter One ('Theoretical Approach') proposes the doctrine of 'constitutional proportionality' ('constitutional proportionality') as the appropriate 'yardstick' for assessing whether a sentence is consistent with international human rights norms. The doctrine is the standard against which any impugned sentence would be measured in an application by an Australian prisoner before the HRC. Moreover, the doctrine is of near universal application; the European Court of Human Rights ('ECtHR') would deploy the doctrine to adjudicate an application by a drug importer sentenced in any of the 47 states that are members of the Council of Europe, for example. Chapter Two ('Methodology') explains how the researcher overcomes the other two practical obstacles to answering the research question. Grounded theory is deployed to frame a thematic survey of sentencing remarks in a sample of 94 cases. This provides a reliable and generalisable picture of how persons come to be sentenced before Australian courts for importation offences. Content analysis is deployed to frame a thematic review of the same sentencing remarks. This provides a reliable and generalisable account of how sentences are formulated in practice. Chapter Three ('International drug trafficking: policy context') traces the history of international drug control policy and its domestic implementation. This provides essential background information for the content analysis of sentencing remarks, which feeds into the representative proportionality analyses. Chapter Four ('International drug trafficking: factual context') surveys the multi-disciplinary scholarly literature on the international drug trade to understand the factual context within which international drug trafficking takes place at Australia's border. This provides essential background information for the grounded theory analysis of sentencing remarks, which feeds into the proportionality analyses of six cases that are found to be both factually and legally representative of their type, based on the results of the grounded theory and content analyses. Chapter Five ('Results') provides a taxonomy of drug importation enterprises arising out of the grounded theory analysis and a description of sentencing practice arising out of the content analysis. Chapter Six ('Proportionality Analyses') describes the results of the representative proportionality analyses. Chapter Seven ('Discussion of Results') summarises the results of the research and generalises these results beyond the representative cases.

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[66] Smit (n 13); Snacken (n 13).

## III Thesis outcome

The thesis ultimately harnesses the international human rights doctrine of constitutional proportionality to expose domestic sentences imposed for drug importation offences as 'disproportionate' and therefore inconsistent with international human rights norms. In doing so, the thesis makes a significant contribution to knowledge about the phenomenon of international drug trafficking at Australia's border and the process of domestic sentence formulation for federal importation offences. The thesis also makes a significant contribution to knowledge about the unintended human rights consequences of the domestic implementation of drug trafficking offences in Australia, as well as to knowledge about how to identify and address the problem. Additionally, each of these insights is generalisable to the global phenomenon of drug trafficking, to sentence formulation more generally, and to the recognition of international human rights violations arising during post-conviction sentencing. Specifically, the research provides insights applicable to the General Assembly's commitment made at UNGASS 2016 to ensuring that the domestic implementation of international drug control policy comports with international human rights norms,[67] its resolution to promote proportionate national sentencing policies, and its recommendation that parties consider sharing information on best practices on proportionate sentencing.[68] On a more personal level, it is hoped that an outcome of this thesis will be to redress stereotypes about international drug traffickers by re-telling the stories of international drug traffickers stripped of the legal abstractions and euphemisms that mask their humanity and negate their human dignity.

[67] A/RES/S-30/1 2/21 19 April 2016, annex (19 April 2016) para 4(l).

[68] This includes information on drug seizures, arrests etc provided to the CND for inclusion in the World Drug Report; Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem GA Res S-30/1, UN GAOR, 30th special session, Agenda Item 8, UN Doc No A/RES/S-30/1 (19 April 2016) para 4(h), (k).

# Chapter 1:
# Theoretical Approach

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*'The elevation of human rights to the international level after the Second World War has meant that behaviour can be judged, not only against what national law requires, but also against a standard which sits outside a national system. Every nation is now subject to scrutiny from outside.'*[1]

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## I Introduction

Despite the impressive catalogue of criminal law protections outlined in the *Universal Declaration of Human Rights* ('UDHR')[2] – which includes freedom from cruel, inhuman or degrading treatment or punishment,[3] freedom from arbitrary arrest or detention,[4] the right to a fair and public trial,[5] the right to be presumed innocent of criminal charges,[6] and freedom from retrospective criminal laws and penalties –[7] the UDHR lacks any express requirement for penal restraint or any express protection against penal severity. International and regional conventions, including the *International Covenant on Civil and Political Rights* (UN) ('ICCPR'),[8] the *European Convention for the Protection of Human Rights and Fundamental*

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[1] Andrew Clapham*, Human Rights: A Very Short Introduction* (Oxford University Press, 2nd ed, 2015), 5.

[2] *Universal Declaration on Human Rights*, GA Res 217A(iii) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[3] UDHR Art 5.

[4] UDHR Art 9.

[5] UDHR Art 10.

[6] UDHR Art 11(1).

[7] UDHR Art 11(2).

[8] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171, entered into force 23 March 1976.

*Freedoms* (Council of Europe) ('ECHR'),[9] and the *American Convention on Human Rights* (Organisation of American States) ('ACHR'),[10] which incorporate or expand upon these UDHR rights,[11] also lack an express requirement for penal restraint or protection against penal severity, other than in relation to use of the death penalty.[12] This is undoubtedly because theorising limits on penal severity (or 'penal theory') has proved problematic for centuries. On the retributivist side, no philosopher has devised a scale of penalties that has met with universal approval as the 'Goldilocks' standard of being 'not too hard, not too soft,' although many such attempts have been made.[13] On the consequentialist side, overwhelming empirical evidence – including psychosocial evidence that not all criminals are rational or responsible – has largely discredited general deterrence and rehabilitation as achievable sentencing objectives.[14] At the

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[9] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[10] *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

[11] Obligations under these international conventions only apply domestically if implemented by domestic law.

[12] The use of the death penalty is prohibited, other than in times of war, by the Second Optional Protocol to the ICCPR, Protocol No. 6 to the ECHR and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Protocol No. 13 to the ECHR prohibits the use of the death penalty at all times.

[13] Including A von Hirsch and N Jareborg, 'Gauging Criminal Harms: A Living Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1; Andrew Ashworth, 'Prisons, Proportionality and Recent Penal History' (2017) 80(3) *The Modern Law Review* 473; Andrew Ashworth, 'The Decline of English Sentencing and Other Stories' in Michael Tonry and Richard S Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001); Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) 352.

[14] See Francis A Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press, 1981). Reitz explains that 'the general justificatory aim of the sentencing structure, rehabilitation, came crashing down in the 1970s' with an influential empirical survey by Robert Martinson (1974), see Kevin R Reitz *The Disassembly and Reassembly of US Sentencing Practices* at 239 in Michael Tonry and Richard S Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001). Note that Martinson later commented that his findings were limited and it was generally agreed by him and others that some interventions did work. His work was widely cited, but lost ground in subsequent years and with studies that found that some interventions were effective. It therefore comes as no surprise that the Council of Europe's recommendation on 'Consistency in Sentencing' failed to prefer or recommend any particular sentencing rationale: Leena Kurki, 'International Standards for Sentencing and Punishment' in Michael Tonry and Richard S Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 360.

same time, macro-social scientists have described a trend since the 1980s towards 'penal populism' in the United States, the United Kingdom, New Zealand and Australia.[15] 'Penal populism' is exemplified by escalating prison rates and increasingly more severe legislative responses to crime, such as 'three strikes' laws, 'one punch' laws,[16] mandatory sentencing and preventative detention.[17] Criminologists point to three factors that have combined to propel this trend: the lack of domestic constitutional protection against penal severity,[18] the lack of an effective domestic doctrine of penal restraint,[19] and the lack of international scrutiny with

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[15] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001). See also J Pratt and Eriksson, A *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (Routledge, 2013); Tonry and Frase (n 13).

[16] For instance, 'One-Punch Alcohol Laws Passed By NSW Parliament', *ABC News Online*, 31 January 2004 <https://www.abc.net.au/news/2014-01-30/one-punch-alcohol-laws-pass-in-nsw-lower-house/5227078>

[17] The term 'penal populism' was coined by Sir Anthony Bottoms, who used it to describe 'politicians tapping into and using for their own purposes, what they believe to be the public's generally punitive stance' in Anthony Bottoms, 'The Philosophy and Politics of Punishment in Sentencing' in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon, 1995), 15-49; for a discussion of the origin and contemporary use of the term see John Pratt, *Penal Populism* (Routledge, 2007) 3; for the leading analyses of penal populism see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, 2001) 131–7; Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008); Andrew von Hirsch and Ashworth, Andrew *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 86–8.

[18] For historical reasons, punishment that is sanctioned by parliament is constitutionally valid under the common law system; in the United Kingdom there is no written constitution, and in the United States, Australia and New Zealand, the written Constitution provides no protection against penal excess per se. See, for instance, Dirk van Zyl Smit, 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) *European Journal of Crime, Criminal Law and Criminal Justice* 369.

[19] As discussed in Chapter 4 'International Drug Trafficking: Policy Context', the domestic requirement for 'proportionality' in sentencing (hereafter 'common law proportionality') has failed to moderate sentence severity. The doctrine is, in Lacey's words, a 'chimera': '…the notion of [common law proportionality] generates in itself no concrete limits to punishment; hence the question of how much – and indeed how – to punish remains open to the sway of convention, political decision, or expediency.' Lacey and others have appealed for the development of a new understanding of 'common law proportionality' that can adequately support the moderation of penal excess, but to date no scholar has put forward any such proposal: '…ideally, adequate limits to punishment need to be grounded in substantive judgements about fair and appropriate penalties which are meaningful to, and regarded as legitimate by, the populace in whose name

respect to domestic sentencing.[20] In 2001, Frase predicted that substantive protection against penal severity would eventually be imposed externally, via pressure to conform with international human rights principles.[21]

> Domestic and international human rights principles will eventually be extended to protect defendants from substantive as well as procedural unfairness. The recent expansion in the procedural rights of criminal defendants, prompted by the European human rights convention, other international norms, and domestic constitutional laws suggests widespread support for the idea that governmental power must be strictly limited in criminal cases. As these procedural limitations become more and more widespread, it becomes increasingly absurd to suggest that legislatures and courts need not respect any limits whatsoever on the imposition and duration of custodial penalties.

Frase specifically – and perhaps aspirationally – identified 'expanding constitutional and international human rights limitations on sentencing' as one of four key challenges confronting scholars of comparative sentencing in the years ahead.[22] He further argued that '[o]ne way to do this would be to build on … the principles of proportionality recognised in constitutional and human rights norms covering arrest and pre-trial detention.'[23] Nearly two decades on, the aspiration is yet to be realised, owing to uncertainty as to whether sentencing – as opposed to other forms of deprivation of liberty – is an international human rights issue or a question of domestic penal philosophy.

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they are imposed. The challenge, we suggest, is therefore for philosophers and social scientists to work together to understand the ways in which the undoubted appeal of the idea of proportionality … can best be articulated within such a substantive framework under contemporary conditions': Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216, 235.

[20] Other than in relation to the death penalty; but these countries no longer use the death penalty.

[21] Richard S Frase Comparative Perspectives on Sentencing Policy and Research in Michael Tonry and Richard S Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 271.

[22] Frase (n 21) 279. The other three challenges he predicted were: (i) 'developing a stronger international consensus on sentencing principles,' (ii) 'developing a true comparative law of sentencing,' and (iii) 'improving the quality and comparability of data on sentencing and crime in Western countries.'

[23] Ibid.

*A Sentencing as an international human rights issue*

In common law countries without a constitutional bill of rights, few cases have argued for constitutional limits on sentencing and none has succeeded.[24] Even in countries where there are systematic constitutional or quasi-constitutional human rights protections, domestic penal severity has historically been approached as a question of penal philosophy rather than as a constitutional or quasi-constitutional international human rights issue.

In 1991 van Zyl Smit argued that the prohibition against 'cruel and unusual punishments' in the *Bill of Rights 1688*, and the similarly worded prohibitions against 'cruel, inhuman and degrading punishment' in the German and Canadian constitutions, ought to provide constitutional or quasi-constitutional protection against disproportionate sentences. Van Zyl Smit pointed to *Weems v US* (1910),[25] in which the US Supreme Court held that a heavy fine plus 15 years hard labour in chains imposed on a government clerk who had on one occasion incorrectly recorded that he had paid two lighthouse keepers violated the Eighth Amendment protection from 'cruel and unusual punishments.' He also pointed to *Soering v UK* (1989),[26] in which the ECtHR found that the extradition of a German national from the United Kingdom to the United States to face charges of capital murder violated applicant's rights under art 3 ECHR based on the 'death row phenomenon,'[27] and to *R v Smith* (1987),[28] in which the Canadian Supreme Court found that the mandatory minimum 7-year penalty for importing narcotics into Canada was unconstitutional. However, van Zyl Smit also noted that many other cases involving the imposition of mandatory life sentences without parole had 'bitterly' divided

[24] For example, in Australia, the High Court in *Magaming v The Queen* (2013) 252 CLR 381 held that legislation imposing a mandatory minimum sentence for people smuggling offences did not exceed the legislative power of the Commonwealth Parliament, notwithstanding the sentencing judge's view that the sentence was disproportionate in the circumstances. In 2013, the House of Lords famously endorsed the imposition of irreducible life sentences for murder, a decision which was ultimately found by the ECtHR to have violated the applicant's right under art 3 of the ECHR to freedom from 'inhuman or degrading treatment or punishment' in *Soering v UK* (1989) 11 EHRR 439.

[25] *Weems v US* (1910) 217 US 349.

[26] *Soering v UK* (1989) 11 EHRR 439.

[27] The 'very long period of time spent on death row…with the ever present and mounting anguish of awaiting execution of the death penalty' [111].

[28] *R v Smith* (1987) 34 CCC (3d) 97.

the US Supreme Court, such as *Solem v Helm* (1983)[29] (writing a $100 cheque from a fictitious account) and *Harmelin v Michigan* (1991)[30] (possession of 672g of cocaine by a first offender), both of which were found to be constitutional. Additionally, van Zyl Smit called into question the logic of the US Supreme Court in generally permitting disproportionate but not 'grossly disproportionate' sentences in relation to death penalty cases, and in drawing a distinction between capital and non-capital cases, so that the constitutionality of most sentences is assured by 'the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that proportionality review be guided by objective factors.'[31] Van Zyl Smit also called into question the logic of the Canadian Supreme Court in limiting its constitutional protection to punishments that are barbaric in form – such as the death penalty – or 'grossly disproportionate,'[32] thereby implicitly endorsing disproportionate sentences. Ultimately, van Zyl Smit concluded that constitutional courts and other bodies had generally demonstrated a 'disappointing lack of courage' in coherently defining the constitutional limits on sentencing.[33]

In 2006 Snacken made a comprehensive argument that deprivation of liberty raises human rights issues in the context of the European Convention on Human Rights.[34] Since then, Snacken and van Zyl Smit have called for the development of a viable conceptual framework for providing constitutional or quasi-constitutional protection of the post-conviction right to liberty.[35] Van Zyl Smit expressed hope that the international human rights doctrine of constitutional proportionality ('constitutional proportionality')[36] might provide a solution, at

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[29] *Solem v Helm* (1983) 463 US 277.

[30] *Harmelin v Michigan* (1991) 501 US 957.

[31] *Harmelin v Michigan* (Kennedy J).

[32] Van Zyl Smit (n 18) 370.

[33] Dirk van Zyl Smit, 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) 3(4) *European Journal of Crime, Criminal Law and Criminal Justice* 369.

[34] Sonja Snacken, 'A Reductionist Penal Policy and European Human Rights Standards' (2006) 12(2) *European Journal on Criminal Policy and Research* 143.

[35] Van Zyl Smit (n 33) 1995 374-5.

[36] This Chapter uses the term 'constitutional proportionality' to refer to the legal norm of constitutional adjudication as elaborated by international human rights scholars, including Robert Alexy, *A Theory of*

least in countries which constitutionally protected human rights.[37] Snacken subsequently provided a robust theoretical argument that constitutional proportionality ought to constrain sentencing decisions in the same way that it constrains all other government decisions, on the basis that it is illogical to apply a higher standard to less rights-intrusive decisions, imprisonment being amongst the most rights-intrusive of government actions:[38]

> Imprisonment is the most severe interference (since the effective abolition of the death penalty) with rights and freedoms of suspects and convicts by state authorities that is allowed in Europe. …The deprivation of liberty is inherently a severe restriction of the normal life of a citizen, and hampers the enjoyment of other rights and freedoms (private and family life, association, expression, etc). … National authorities may impose restrictions on the individual liberty of its citizens insofar as these are necessary in a democratic society and are in accordance with the principles of legality, legitimacy and proportionality. The case law of the European Court for Human Rights shows that it is not sufficient that imprisonment as a sanction or measure is provided for by national legislation. It must also be in accordance with the rule of law, and it must have a causal relation with the legitimate aim and be proportionate.[39]

Other scholars have since joined the call for constitutional proportionality to provide a quasi-constitutional constraint on sentences.[40] Spano argued that the ECtHR's decision in *Vinter & Others v United Kingdom* marked a renewed understanding of the scope of the doctrine, along the lines suggested by Snacken. The Court had held that the imposition of an irreducible life

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*Constitutional Rights* (Oxford, 2002) (translated into the English by Julian Rievers), Barak Aharon, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, 2012).

[37] Van Zyl Smit (n 33) 1995, 379.

[38] Snacken (n 34) 161.

[39] Ibid.

[40] For example, Robert Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human rights' (2016) 4(2) *Bergen Journal of Criminal Law and Criminal Justice* 150, 166; Rick Lines et al, 'The Case for International Guidelines on Human Rights and Drug Control' (2017) 19(1) *Health and Human Rights Journal* 231; Lai, Gloria, 'Drugs, Crime and Punishment: Proportionality of Sentencing for Drug Offenders' (Series on Legislative Reform of Drug Policies, Number 20, Transnational Institute, 20 June 2012) <https://www.tni.org/en/briefing/drugs-crime-and-punishment>.

sentence without the possibility of parole – previously upheld by the House of Lords – violated the applicants' art 3 right to freedom from 'inhuman or degrading treatment or punishment:'

> …[T]he Court, through *Vinter and Others* and other judgments, simply requires that all persons, deprived of their liberty, including those serving life sentences, be treated in accordance with their intrinsic worth and humanity. They must be granted an opportunity for rehabilitation and to a realistic prospect of release. They must not be made objects of the State or suffer purely the wrath of the populace. The inherent human capacity for self-betterment, so strongly valued by the Convention system, cannot be wilfully ignored, no matter the judgement society makes of their actions, and no matter the temptation.[41]

Nevertheless, both van Zyl Smit and Snacken have expressed reservations about many decisions of constitutional and other courts which purport to impose a threshold requirement of 'gross disproportionality' before a decision will be unconstitutional,[42] and to other decisions which permit patently disproportionate sentences in purported deference to related 'margin of appreciation doctrine'[43] (the 'margin of appreciation').[44] Both scholars point to decisions of the Canadian Supreme Court upholding discretionary minimum non-parole periods of 25 years for murder and indeterminate sentences for dangerous offenders where those sentences were not found to be 'grossly disproportionate.'[45] Along similar lines, they note that the ECtHR in *Vinter & Ors* endorsed the proposition that a 'grossly disproportionate' sentence would violate

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[41] Spano (n 40).

[42] The ECtHR in *Vinter & Ors v United Kingdom* [2013] ECHR 645 (9 July 2013) [73] noted that the 'gross disproportionality' standards was imposed in case law in Canada, Hong Kong, Mauritious, Namibia, New Zealand, South Africa and the United States.

[43] This thesis uses the term 'margin of appreciation' to refer to the legal norm of constitutional adjudication as elaborated by international human rights scholars, including Yukata Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) and Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford, 2012).

[44] Sonja Snacken, 'A Reductionist Penal Policy and European Human Rights Standards' (2006) 12(2) *European Journal on Criminal Policy and Research* 143.

[45] Van Zyl Smit (n 33) 375.

art 3 of the ECHR.'[46] This is problematic to the extent that it suggests that some disproportionate sentences are nevertheless valid.

This thesis answers Frase's call to expand constitutional and human rights constraints on sentencing, and addresses the problems foreseen by van Zyl Smit and Snacken, by proposing that constitutional proportionality, incorporating the margin of appreciation as properly understood, implicitly imposes a coherent theory of penal restraint. Moreover, this thesis points to evidence that the doctrine has been correctly used in this way by the European Court of Human Rights ('ECtHR') and United Nations Human Rights Committee ('HRC'), albeit in a very limited number of cases, even if the doctrine has been misunderstood and misapplied in the past.

### *B Constitutional proportionality distinguished from common law proportionality*

Constitutional proportionality refers to the legal norm of constitutional adjudication as expounded by international human rights scholars, including Alexy (2002) and Aharon (2012), incorporating the subordinate margin of appreciation doctrine as elaborated by Arai-Takahashi (2002) and Legg (2012).[47] The doctrine evaluates the constitutional legitimacy of any action by the legislative, judicial or executive arms of government. The doctrine is to be distinguished from the similarly named but substantively different doctrine of 'common law proportionality' ('common law proportionality'), which comprises the common law requirement that punishment must to fit the crime.[48] The need for some sort of correspondence between crime and punishment has been accepted as axiomatic throughout history. It can be identified in the writings of early Greek philosophers, in the old testament's canon of *lex talionis* – an eye for an eye, a tooth for a tooth – in the pre-Norman system of amercements whereby fixed penalties were prescribed for each crime, in the *Magna Carta* 1215 and in the pre-amble to the *Bill of Rights 1689* (1 Will & Mar Sess 2 c 2).[49] Yet the doctrine of common law proportionality has never been clearly articulated in common law jurisprudence beyond the general requirement

[46] *Vinter & Ors v United Kingdom* (n 42) [102].

[47] Alexy, Ahron, Arai-Takahashi and Legg (n 36).

[48] Lacey and Pickard (n 19).

[49] For a discussion of the history of the doctrine of common law proportionality see Granucci, Anthony F, 'Nor Cruel and Unusual Punishments Inflicted: The Original Meaning' (1969) 57(4) *California Law Review* 839.

that there must be *a relation* between the crime and the penalty imposed for its commission;[50] and the acceptable relation between crime and punishment varies considerably both over time and between countries.[51] For this reason, Lacey describes the doctrine as a 'chimera.'[52] Common law proportionality, which is an implicit principle of sentence formulation in common law countries, therefore has a different origin, purpose and operation to constitutional proportionality, which is external to the sentence formulation process. The doctrine of constitutional proportionality is far more recent in origin and considerably less elusive than common law proportionality.

## II CONSTITUTIONAL PROPORTIONALITY

The doctrine of constitutional proportionality is at work whenever a constitutional court considers whether government action that infringes 'qualified' – as opposed to absolute – constitutional rights is nevertheless justifiable and therefore constitutional or valid;[53] for example, when the German Federal Constitutional Court ('GFCC') considers whether anti-protest laws that infringe the freedom of peaceful assembly for the purpose of maintaining public order are nevertheless constitutional.[54] Constitutional proportionality is also at work when a human rights court or other body considers whether government action that infringes qualified human rights is nevertheless justifiable and therefore valid. For example, when the ECtHR considers whether the art 9(1) right to freedom of religion is infringed by a law requiring a person to remove a turban during an airport security check.[55] Constitutional proportionality is an implicit requirement of all international human rights conventions,

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[50] Fox, Richard G, 'The Meaning of Proportionality in Sentencing' (1993) 19 *Melbourne University Law Review* 489; Fox, Richard G and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 3rd ed, 2014) [3.501].

[51] For example, Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008).

[52] Lacey and Pickard (n 19).

[53] Qualified constitutional rights are rights that are expressed to be subject to some sort of exception, such as 'necessary in a democratic society in the interests of public safety' as in art 9(1) of the ECHR.

[54] For instance, *National Democratic Public of Germany v Westphalia* BVerfG, 1 BvQ 22/01 of 05/01/2001 [1-22].

[55] For instance, in *Phull v France* No 35753/2003 ECHR 2005-I the ECtHR found that there was no violation of the right because the security measures were a necessary measure in the public interest.

including the ICCPR and ECHR. In countries which have ratified the ICCPR or ECHR, punishment – which is conceptually just another form of government action – must therefore comport with the international human rights doctrine of constitutional proportionality. The doctrine of constitutional proportionality is often described as 'balancing' because it does not treat rights as absolute, but rather as interests that must be reconciled with other interests.[56] Once an applicant has established that government action *prima facie* interferes with their constitutional or human rights, proportionality reasoning declares the action to be constitutionally valid or invalid by reference to whether the affected right has been 'sufficiently optimised.'[57]

In *A Theory of Constitutional Rights*,[58] which is arguably the most influential work of constitutional theory written in the last fifty years,[59] Alexy articulated the conceptual foundations for the doctrine of constitutional proportionality based on the jurisprudence of the German Federal Constitutional Court. Sweet and Matthews describe application of the doctrine – called 'proportionality reasoning' – as a four-stage inquiry that addresses whether the objective of the interference is legitimate ('legitimate aims'), whether the interference is suitable for achieving that objective ('suitability'), whether the interference is necessary in the sense that there is no other less rights-intrusive option for achieving the same result ('necessity'), and whether the interference correctly balances the competing interests ('balancing'):[60]

> First, in the 'legitimacy' stage, the judge confirms that the government is constitutionally-authorised to take such a measure. Put differently, if the purpose of the government's measure is not a constitutionally legitimate one, then it violates a higher norm (the right being pleaded). The second phase - 'suitability'' – is devoted

[56] See Ronald Dworkin, 'Rights as Trumps' in Ronald Dworkin and Jeremy Waldon (eds), *Arguing About the Law* (Routledge, 1984).

[57] As described by Grégoire Webber in Grégoire CN Webber, 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, 181; see also Alexy (n 36) 48; see also Alec Stone Sweet and Jud Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 75, 94.

[58] Alexy (n 36).

[59] Sweet and Matthews (n 57) 74.

[60] Ibid 75-76.

to judicial verification that, with respect to the act in question, the means adopted by the government are rationally related to stated policy objectives. The third step - 'necessity' – has more bite. The core of necessity analysis is the deployment of a 'least-restrictive means' (LRM) test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. PA is a balancing framework: if the government's measure fails on suitability or necessity, the act is p*er se* disproportionate; it is outweighed by the pleaded right and therefore unconstitutional. The last stage, 'balancing in the strict sense,' is also known as 'proportionality in the narrow sense.' If the measure under review passes the first three tests, the judge proceeds to balancing s*tricto senso.* In the balancing phase, the judge weighs the benefits of the act-which has already been determined to have been 'narrowly tailored,' in American parlance-against the costs incurred by infringement of the right, in order to determine which 'constitutional value' shall prevail, in light of the respective importance of the values in tension, given the facts.'

The balancing stage is the most conceptually difficult to describe. Klatt and Meister use a mathematical formula to provide a 'common grammar' for this last stage of proportionality reasoning:[61]

$$W_{i,j} = \frac{W_i \text{ x } I_i \text{ x } R_i}{W_j \text{ x } I_j \text{ x } R_j}$$

EQUATION 1: KLATT & MEISTER'S 'COMMON GRAMMAR' FOR BALANCING

The equation simplifies a formula first proposed by Alexy.[62] It conceptualises the 'balancing' process as identification of: (a) the values underpinning the measure and right respectively, (b) the intensity of interference of the measure with the right and vice versa, and (c) the reliability of the evidential and normative premises of each variable; and then comparing the weight attributed to each respective variable based on the assignment of abstract measures (such as 'low', 'medium,' or 'high'). Each abstract weight is then converted into a numerical value,

[61] Matthais Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP Oxford, 2014) 11-12. The authors caution that the formula 'is a formal tool that allows making explicit the inferential structure of balancing principles, just as logical tools allow for making explicit the inferential structure of subsumption according to legal syllogism.'

[62] Klatt and Meister (n 32) 11-12 citing a postscript to Alexy (n 36) 408, known as 'The Weight Formula' 9.

based on the geometrical sequence $2^0$, $2^1$, $2^2$ (or 1, 2, 4).[63] Where the result is >1, the measure is 'proportionate' to the right and therefore takes priority. Where the result is <1 the right takes priority over the measure, which is regarded as 'disproportionate.' Where the result is 1, there is a stalemate. The equation highlights the requirement that the more coercive the government action, the greater the government's burden to establish a reliable evidential and normative basis for the action. Sending a person to prison, which is amongst the most coercive of government actions, is no exception to this general rule. This is a foundational requirement in any legal system that protects international human rights; but it is easily forgotten in an era of penal populism, particularly when so many laws require the imposition of a highly coercive penalty, such as a mandatory sentence, or refusal of bail, absent 'exceptional circumstances.'

In practice, each court or other body that employs proportionality reasoning has its own formulation for proportionality reasoning. The Supreme Court of Canada uses a three-step formulation for adjudicating rights claims under Canada's *Charter of Rights and Freedoms*,[64] which provides an extensive list of rights qualified in s 1 by reference to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society':[65]

> First, the measures adopted must be carefully designed to achieve the object in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'

The South African Constitutional Court has borrowed extensively from Canadian jurisprudence but does not always disaggregate the three inquiries, and tends to emphasise the

[63] Or some other geometric sequence.

[64] *Canada Act 1982* (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms').

[65] *R v Oakes* [1986] 1 SCR 103, 139.

necessity stage of the inquiry.[66] The ECtHR subjects all convention rights, excepting non-derogable rights,[67] to some form of balancing,[68] but the Court does not use any single formulation, because the various Convention rights are qualified in different ways.[69] Petersen contrasts the approaches of the Canadian, German and South African Constitutional Courts as follows:[70]

> But even if the prongs of the [constitutional proportionality] test are the same, there may be differences in their application and in the emphasis that courts put on the different steps. Whereas the German Constitutional Court mainly focuses on the balancing step in its recent jurisprudence, the Canadian Supreme Court and the South African Constitutional Court rely on rational-connection or less-restrictive-means [necessity] considerations.

### *A Universality*

Constitutional proportionality in one form or another is almost 'universal' in constitutional adjudication in Western legal systems, even if the terminology of 'proportionality' or 'balancing' is not used.[71] Constitutional proportionality spread from Germany across Europe,

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[66] Sweet and Matthews (n 57) 129-130 citing Stephen Gardbaum, *Limiting Constitutional Rights* (2007) 54 UCLA Law Review 789, 842. See also Niels Petersen, *Proportionality and Judicial Activism* (Cambridge University Press, 2017).

[67] The right to life, the prohibition against torture and other forms of ill-treatment, the prohibition against slavery and forced labour, and the prohibition against retroactivity in the criminal law.

[68] Sweet and Matthews (n 57) 147 citing Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *The Cambridge Law Journal* 174, 182.

[69] For instance, the right to freedom of 'thought, conscience and religion' in art 9 is qualified in para 2 as follows: '…subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' By contrast, the right to 'liberty and security of person' is qualified in art 1(a) only by the requirement that detention be 'lawful.'

[70] Neils Petersen, (n 66) 115.

[71] David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 162.

to many Commonwealth countries and to the treaty-based regimes, including the ECHR administered by the ECtHR and the ICCPR administered by the HRC:[72]

> From German origins, [constitutional proportionality] has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems - Canada, South Africa, New Zealand, and via European law, the UK - and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [constitutional proportionality]. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered 'constitutional' in some meaningful sense: the European Union, the European Convention on Human Rights, and the World Trade Organization). In our view, proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all.

Sweet and Matthews describe constitutional proportionality as having a 'viral quality,' providing a fascinating account of how the doctrine was transplanted from jurisdiction to jurisdiction through the work of eminent jurists and legal scholars.[73]

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[72] Sweet and Matthews (n 57) 74.

[73] Ibid 161-162: 'First, the emergence and early consolidation of [constitutional proportionality] depended heavily on the influence of legal scholars on judging, in Germany, and then on the influence of Germany on European law. Second, specific identifiable agents (judges and law professors-turned-judges) were instrumental in bringing [constitutional proportionality] to treaty-based regimes, including Hans Kutscher and Pierre Pescatore (to the ECJ), Jochen Frowein (to the ECHR), Pescatore and Claus-Dieter Ehlermann (to the WTO). In principle, one could map the network of individuals, and the connections between institutions, that facilitated the spread of PA. Again, one would find pervasive German influence. Third, in Europe, the EC/EU and the ECHR developed features of hierarchy that made possible what Powell and Dimaggio call a process of 'coercive isomorphism': the diffusion of institutional forms and practices through legal obligation backed up by monitoring and enforcement mechanisms. The Luxembourg and Strasbourg courts commanded other national courts to deploy [constitutional proportionality], and announced that they would supervise how national judges actually do so. The codification of proportionality as positive law, through the EU Charter of Rights, for example, will further stigmatize resistance to the general movement. Fourth, as more and more courts adopted [constitutional proportionality], the dynamics of diffusion became subject to logics of mimesis and increasing-returns (band-wagon effects): courts began copying what they took to be the emerging best-practice standard, thus ensuring the result. This process, one of choice not duty, can also be expressed in terms of what Powell and Dimaggio call 'normative isomorphism,' which

Constitutional proportionality is ubiquitous in international human rights law and scholarship because it is uniquely adapted to the 'new constitutionalism.'[74] Huscroft, Miller and Webber explain:[75]

> To speak of human rights is to speak of proportionality. It is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship. Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication.

The universality of constitutional proportionality even extends to Australia, albeit with limited practical operation, because the *Australian Constitution* does not contain a Bill of Rights.[76] In

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explains the diffusion of forms through the building of normative consensus among an elite group, whose claim to authority and influence is knowledge-based. Judges and law professors are such a group, and those committed to [constitutional proportionality] are relatively coherent and self-regarding.'

[74] The 'new constitutionalism' refers to government by '(a) a written entrenched constitution, (b) a charter of rights, and (c) a review mechanism to protect rights,' based on the premise that 'rights and effective rights protection are basic to the democratic legitimacy of the state': Sweet and Matthews (n 57) 84.

[75] Huscroft, Grant, Bradley W Miller and Grégoire Webber, 'Introduction' in Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 1 citing Kai Möller, The Global Model of Constitutional Rights (2012) (the 'global model'); Grégoire Webber The Negotiable Constitution: On the Limitation of Rights (Cambridge University Press, 2009) (the 'received approach'); and also Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 Emory Law Journal 797, 808; Mattias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2014) 1 ('best practice standard of rights adjudication').

[76] The Australian Constitution protects only five express constitutional rights, all of which are narrower than similar rights granted under international human rights instruments: a right to vote (s 41; *R v Pearson; ex parte Sipka* (1983) 152 CLR 254), protection against acquisition of property on unjust terms (s 51(xxxi), a right to trial by jury (s 80: *R v Archdall and Roskrug; ex parte Carrigan v Brown* (1828) 41 CLR 128); *Al Qudsi v R* (2016) 258 CLR 203), freedom of religion (s 116), and freedom from discrimination based on State residency (s 117; *Street v Queensland Bar Association* (1989) 168 CLR 461); there are also limited implied constitutional rights, including: the right to freedom of political communication (*Australian Capital Television Pty Ltd v*

*McCloy v NSW* (2015),[77] the High Court approved the following proportionality test for evaluating whether legislation infringing the implied 'freedom of political communication'[78] is constitutionally valid:[79]

> There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses: *suitable* – as having a rational connection to the purpose of the provision; *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom. (Emphasis added).

The similarities with European proportionality tests are striking. The High Court expressly acknowledged that this formulation was informed by European proportionality tests,[80] but cautioned that the domestic test must be understood in the context of the Australian

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*Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), and the separation of judicial and executive powers (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1).

[77] *McCloy v NSW* (2015) 257 CLR 178. The impugned legislation imposed restrictions on the private funding of political candidates and parties in State and local government elections in New South Wales to address the risk and perception of corruption and undue influence in politics. The High Court ultimately found that the legislation was a proportionate burden on the implied freedom of political communication in the circumstances because it was 'suitable,' in that there was a 'rational connection' between the legislation and its legitimate purpose [80], the legislation was 'necessary,' in that it there was no 'obvious and compelling' alternative [57], and the legislation was 'adequate in its balance' in that the provisions 'did not affect the ability of any person to communicate with another about matters of politics and government…in ways other than those involving the payment of substantial sums of money' [93].

[78] The 'implied freedom of political communication' is a qualified limitation on legislative power, which operates to ensure that the people of the Commonwealth may exercise informed choice as electors, based on the constitutional principles of representative and responsible government: *Lange v Australian Broadcasting Corporation* (n 76) 560.

[79] *McCloy v NSW* (n 77) [2].

[80] 'Analagous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools to assist in the determination of the limits of legislative powers which, according to the nature of the case, may be applied in the Australian context': *McCloy v NSW* (n 77) [77].

constitutional settlement, so that it would more closely resemble in practice the approach taken by domestic courts in the United Kingdom than, say, the ECHR.[81] The fact that the High Court has had any occasion to consider the doctrine in the Australian constitutional context speaks to the ubiquity of the doctrine and the high regard with which it is held in supporting constitutional adjudication.

While the appeal of the doctrine of constitutional proportionality is almost universal, it does not sit easily within a system in which the protection of human rights is in the last resort political; as is the case in most common law countries, including the United Kingdom, the United States and Australia.[82] The story of the transplantation of the doctrine to the UK is instructive of the extent of this ideological mismatch. The 'notorious clash' between the ECtHR and the British Government in *Hirst v United Kingdom (No. 2)*[83] is an illustrative example.[84] In that case the prisoner/applicant sought a declaration that the *Representation of the People Act 1983* (UK), which disenfranchised prisoners, was inconsistent with the ECHR. The ECHR was incorporated into domestic law via the *Human Rights Act 1998* (UK) and gave UK courts the power to declare legislation to be incompatible with the Act, with ultimate supervision by the ECtHR. In domestic proceedings, the High Court made no real attempt to 'balance' the interests at stake. Consistently with the UK's own constitutional settlement, the Court readily deferred to the will of the Parliament:[85]

> As Parliament has the responsibility for deciding what shall be the consequences of conviction … in deference to the legislature courts should not easily be persuaded to condemn what has been done… Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to

[81] *McCloy v NSW* (n 77) [77]. Cf The dissenting judgment of Gaegler J in *Brown v Tasmania* 349 ALR 398 [160], where his Honour argued that the test was wholly inappropriate to the Australian context.

[82] The supremacy of parliament in common law countries originates from the *Bill of Rights 1688* c 2 (1s Will and Mar Sess 2). Although the *Human Rights Act 1998* (UK) incorporates ECHR rights into domestic law, the UK Parliament remains sovereign and can therefore pass laws that are inconsistent with the provisions of the Act and the ECHR.

[83] *Hirst v HM Attorney General* [2001] EWHC Admin 239 (4th April, 2001).

[84] Andrew Ashworth, 'A Decade of Human Rights in Criminal Justice' (2014) 5 *The Criminal Law Review* 325, 332; see also Sweet and Matthews (n 57) 147-148.

[85] *Hirst v The United Kingdom* [2001] ECHR 481 (24 July 2001 [20], [40].

> have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.

The Grand Chamber, on the other hand, criticised both the legislature and the judiciary for failing to apply proportionality reasoning in relation to the disenfranchisement of prisoners, despite the requirements of the Convention:[86]

> …[T]here is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. … there was [no] substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself.

The Grand Chamber ultimately held that disenfranchisement was disproportionate and therefore invalid:[87]

> … section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as … being incompatible with Article 3 of Protocol No. 1.

The example illustrates that the doctrine of constitutional proportionality has much work to do in realigning both legislative and judicial actions with international human rights norms in a

[86] Ibid [79]-[80].

[87] Ibid [82].

country with no historical protections for international human rights. In Australia, where there is no equivalent to the *Human Rights Act 1998* (UK), the challenge will be all the greater.[88]

### *B Margin of appreciation*

Different countries impose different penalties for similar crimes. For trafficking 1 kg of amphetamine, penalties range from imprisonment for less than 1 year in France to 15 years in Greece,[89] and as high as the death penalty in Indonesia.[90] Recent research by the EMCDDA reveals that expected prison sentences for trafficking 1 kg of heroin, amphetamine, cocaine or cannabis resin within the EU Member States ranges from less than one year (in the Netherlands) to as high as 20 years (in Greece).[91] Punishment theorists explain the relationship between crime and punishment as 'a product of political and social construction, cultural meaning-making, and institution-building.'[92] It follows that each society strikes a unique balance between crime and punishment, because each society has its own means of legitimising punishment.[93] For example, early modern criminal justice systems legitimised and stabilised penal severity by reference to 'the sacred' – including doctrines of damnation, expiation,

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[88] Ashworth discusses the simmering resentment amongst the senior judiciary and government ministers in Britain towards the Strasbourg Court in Andrew Ashworth, 'A Decade of Human Rights in Criminal Justice' (2014) 5 *The Criminal Law Review* 325, 332.

[89] Based on the supply of 1 kg of amphetamine by a first-time offender with no involvement in an organised crime group who was not considered a 'mule' (defined as a 'badly paid international courier'). European Monitoring Centre for Drugs and Drug Addiction, 'Drug Trafficking Penalties Across the European Union: A Survey of Expert Opinion' (Technical Report, 2017) <http://www.emcdda.europa.eu/publications/technical-reports/trafficking-penalties_en>

[90] Cornell Centre on the Death Penalty Worldwide, *Cornell University Death Penalty Database* (10 July 2019) <http://www.deathpenaltyworldwide.org/search.cfm> citing: Indonesia Law on Psychotropic Substances, Law No. 5 of 1997, art 59, Mar 11 1997. Indonesia Narcotics Law, arts 80-82, Law No 22 of 1997, Sep 1, 1997, translation submitted to United Nations Office on Drugs and Crime.

[91] European Monitoring Centre for Drugs and Drug Addiction (n 89) 5, 23. The research methodology involved a survey of opinions of judges, prosecutors and defence lawyers from 26 countries based on a hypothetical fact scenario and is described.

[92] Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216, 219.

[93] Lacey and Pickard (n 19), 219.

atonement and penitence – which appear to be largely absent in contemporary society.[94] Added to this cross-cultural difference, it is well accepted that, even within a country, there is 'no single correct sentence,'[95] because sentence formulation is an inherently discretionary process.

It follows that when evaluating the legitimacy of a domestic sentence from an external perspective one immediately confronts the problem of the extent to which to defer to the findings or reasons of the sentencing court or domestic constitutional or other laws. Is one to accept the sentencing judge's findings that the prisoner is unremorseful or in need of rehabilitation or will find a custodial sentence to be an unbearable hardship? Must one must accept the legitimacy of a sentence that is formulated in accordance with domestic law or constitutional arrangements that are inconsistent with international human rights norms? What if that sentence is a mandatory sentence? Must one accept that an example must be made of this prisoner or that drug trafficking is an evil or that the most severe penalties in the criminal calendar are reserved for drug traffickers? If the doctrine of constitutional proportionality is to provide a workable framework for evaluating the justifiability of sentences, it must have the capacity to accommodate or tolerate the inevitable cross-cultural differences in what amounts to appropriate punishment for a given crime, and it will need a robust framework for deciding when to defer to the findings of a domestic sentencing court or domestic constitutional or other laws. The doctrine of constitutional proportionality delivers on both fronts, in the form of the subordinate 'margin of appreciation' doctrine.

The 'margin of appreciation' doctrine prescribes the extent of deference an international court or tribunal ought to pay to domestic laws and assessments that feed into proportionality reasoning. The margin of appreciation has been described as addressing 'the real problem of balancing [international] supervision and national sovereignty'[96] and '…the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in [the] treaties.'[97] Conceived of in this way, the 'margin of appreciation' is a procedural step in the application of proportionality reasoning or a filter through which information and arguments must pass before it can be used for proportionality reasoning. Writing on the

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[94] Ibid 229.

[95] *Markarian v The Queen* (2005) 228 CLR 357, 371.

[96] Davor Šušnjar, Proportionality, Fundamental Rights and Balance of Powers (Brill, 2010) 114-115.

[97] Arai-Takahashi (n 43) 2.

jurisprudence of the ECtHR, Arai-Takahashi describes the margin of appreciation as an indispensable tool for ensuring cultural diversity within the Convention system:[98]

> The margin of appreciation must be understood as an essential constitutional device designed to preserve the fundamental prerequisite and virtue of a liberal democratic society: value pluralism. The doctrine's only defensible rationale during *and after* the process of integration is to enable the Strasbourg Court to provide endorsement of the maintenance of cultural diversity, ensuring citizens of Europe the means to articulate and practice their preferred values within a multi-cultural democracy.

To understand how the margin of appreciation achieves this delicate balance between scrutiny and deference, and how this would play out in relation to analysis of a sentence, it is necessary to understand how the doctrine evolved.

The margin of appreciation is originally a judicial creation of the ECtHR.[99] It is thought to have been inspired by the concept of judicial deference in French or German administrative law and was first used to identify the freedom of signatory states with respect to the implementation of the ECHR without being subject to review by the Court.[100] The seminal case is *Handyside v UK*,[101] where the Court stated, in respect of an unsuccessful application challenging the validity of legislation prohibiting the publication of an allegedly obscene book, that 'State authorities are in principle in a better position than the international judge to give an opinion' on the 'necessity' of a 'restriction' or penalty.'[102] Surprisingly, the doctrine is almost never explicitly mentioned in the relevant treaty provisions,[103] yet it is widely accepted even

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[98] Ibid 245.

[99] See, for instance, Dean Speilmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011-12) 14 *Cambridge Yearbook of European Legal Studies* 381.

[100] Greece v UK (Cyprus case) No 176/56 (1958-9) 2 Ybk 174; Gruszczynski and Werner, p3 and Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002) 2–3.

[101] *Handyside v United Kingdom* No 5493/72 [1976] ECHR 5 (7 December 1976) [48].

[102] Ibid.

[103] Gruszczynski and Werner note the exception of the World Trade Organization (WTO) Anti-Dumping Agreement: L Gruszczynski and W Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014) 1.

outside the ECHR context that courts and tribunals have a prerogative to regulate their own margin of appreciation.[104] In this way courts and tribunals define their own concept of subsidiarity having regard to their role in regional human rights protection, their jurisdiction and the practical consequences of their decisions for the parties to the dispute.[105] There has been some debate as to whether the HRC employs a 'margin of appreciation,' because it does not explicitly use that terminology. The better view is that the Committee has 'been speaking silently the language of the margin.'[106]

Unfortunately, few cases have comprehensively analysed the margin of appreciation, and fewer scholars have attempted to do so.[107] Legg conceptualises proportionality as a review standard and the margin of appreciation as the standard of judicial deference that ought to be afforded to the reasoning of the original decision-maker during the review.[108] This approach accounts for the considerable margin of appreciation afforded by the ECtHR in relation to, say, euthanasia, where there is no 'common practice' of states, so that the matter is thought best left to national legislatures and courts. It also accounts for the narrower margin in relation to, say, procedural rights, where there is a substantial 'common practice' of states, and in relation to which tribunals possess considerable expertise. It also accounts for the fact that the doctrine is less frequently invoked before courts and tribunals occupied with assessing state compliance with non-derogable rights – the right to life and freedom from slavery, torture and other ill-treatment, and no punishment without law[109] – but more frequently invoked where courts and tribunals address qualified rights, such as the right to freedom of expression. Legg illustrates

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[104] Ibid 1.

[105] The principle of subsidiarity can both support and detract from the human rights agenda by appealing simultaneously to State sovereignty, the maintenance of cultural diversity, and value pluralism.

[106] McGoldrick, Dominic, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 *International Comparative Law Quarterly* 21, 55 citing Arai-Takahashi (n **Error! Bookmark not defined.**) 1. For a contrary view, see S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 30; Feldman, D, 'Freedom of Expression' in Sarah Joseph and Melissa Castan (eds), The International Covenant on Civil and Policitical Rights and United Kingdom Law (Clarendon Press, 1995) 408–9.

[107] Legg (n 43) and Arai-Takashi (n 43) are the seminal works.

[108] Legg (n 43) 7.

[109] ECHR arts 2, 3, 4 and 7.

this point with a colourful quote from Tom Farer, former President of the Inter American Court of Human Rights:[110]

> As long as governments were simply torturing and maiming, interpretation was hardly necessary. But with governments striving with varying degrees of effort to establish the rule of law, the Commission naturally began to receive more cases from the grey borderland where the state's authority to promote the general interest collides with individual rights.

The second major account of the margin of appreciation doctrine, by Arai-Takahashi, describes proportionality as protecting individual autonomy against illegitimate state interference,[111] while the margin of appreciation doctrine protects state sovereignty, cultural diversity and value pluralism.[112] Arai-Takahashi argues convincingly that proportionality does, and should, constrain the 'margin of appreciation,' rather than the other way around; its purpose being 'to ascertain whether national authorities have overstepped their margin of appreciation.'[113] If that were not the case, the convention system would, paradoxically, sanction disproportionate state action.

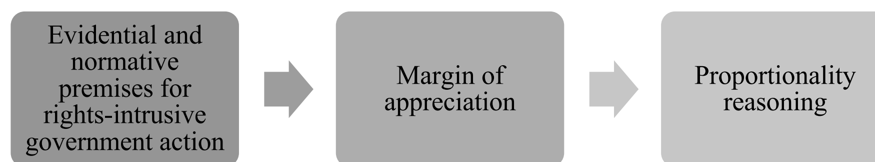


FIGURE 2: CONCEPTUAL DIAGRAM OF PROPORTIONALITY AND THE MARGIN OF APPRECIATION

Arai-Takahashi's detailed review of the case law of the ECtHR identifies a greater level of nuance and therefore unpredictability in the case law than is foreshadowed by Legg's conceptually simpler conceptualisation, but they both come to the same important conclusion: that proportionality is, and must be, the ultimate constraint on government action.[114] The

[110] Legg (n 43) 5 quoting T Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' in DJ Harris and S Livingstone (eds) *The Inter-American System of Human Rights* (Clarendon Press, Oxford 1998) 32.

[111] Arai-Takahashi (n 43) 2.

[112] Arai-Takahashi (n 43) 14-15, 245-247, 249.

[113] Arai-Takahashi (n 43) 14-15.

[114] Legg (n 43) Chapter 7.

margin of appreciation scrutinises and regulates the information that feeds into proportionality reasoning; but ultimately proportionality is determinative of whether state action is consistent with human rights norms, not some presumed level of tolerance for cultural diversity. Presently, the margin of appreciation jurisprudence of the ECtHR and the HRC is best described as developing. Because courts and other bodies frequently dispose of complaints by reference to a step in proportionality reasoning – typically the 'necessity' stage – they often fail to consider in detail the margin of appreciation. This lack of jurisprudence on how the margin of appreciation operates in relation to sentencing may well be a significant disincentive to applications challenging sentence severity and may go some way towards explaining the relative paucity of applications concerning sentences.

If it is to provide a viable model for evaluating penal severity and promoting penal restraint, the doctrine of constitutional proportionality, incorporating the subordinate margin of appreciation doctrine, must be widely accepted as an appropriate standard for measuring compliance with international human rights norms; it must accommodate the considerable scope for legitimate cross-cultural difference in sentencing practices; and it must identify when deference ought to be made to domestic laws and to the discretion of domestic courts. The following section considers how the doctrines have been applied in the very limited case law of the ECtHR and HRC in an effort to answer each of these questions.

## III JURISPRUDENCE CHALLENGING SENTENCES

This section surveys jurisprudence of the HCR and ECtHR to describe how the doctrine of constitutional proportionality – incorporating the margin of appreciation – has been deployed as a quasi-constitutional constraint on excessive sentences.[115] Though very limited in compass, this jurisprudence establishes that constitutional proportionality has been used by both bodies to evaluate whether a small number of relatively short sentences have violated international human rights norms. Taken together with jurisprudence concerning analogous complaints – namely complaints about immigration detention, extradition, preventative detention, arrest, prison conditions and execution of a foreign sentence – the jurisprudence provides a small

[115] The term 'jurisprudence' is used broadly to incorporate HRC 'views,' which are only quasi-jurisprudential because the HRC is not a court but a part-time advisory body, and therefore its 'views' are neither binding nor enforceable.

window on the doctrine's potential to operationalise the requirement that sentences comport with international human rights norms.

### *A The legal context*

The HRC supervises State compliance with the ICCPR, while the ECtHR supervises State compliance with the ECHR. The rights covered, and language used, are 'broadly similar' across both instruments, such that the ICCPR has been described as 'the equivalent of the ECHR only at the global level.'[116] The ECHR applies to 47 States within the European region, and over 820 million people; and 46 of the 47 States parties to the ECHR are also parties to the ICCPR, which applies to 168 States globally, and 'something close' to six billion people.[117] Both instruments are directed at securing compliance with 'minimum fundamental values' rather than establishing 'uniform, harmonised rules.'[118] Both bodies therefore have a subsidiary role, and neither considers itself a 'fourth instance' court of appeal from domestic decisions by State parties.[119] Many States parties to the ECHR have argued that decisions of the ECtHR should be followed by the HRC.[120] Not surprisingly then, the HRC 'follows many of the interpretative approaches of the ECtHR.'[121] The jurisprudence of the HRC and ECtHR reveals that both bodies have heard a small number of complaints concerning allegedly excessive sentences and resolved those complaints by reference to proportionality reasoning. Most complainants contend that their punishment violates the art 5 ECHR right to 'liberty and security' or the art 9 ICCPR right to freedom from 'arbitrary detention' in that it is not in

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[116] McGoldrick (n 106) 57 citing M Schmidt, 'The Complementarity of the Covenant and the ECHR' in Sarah Joseph and Melissa Castan (eds), *The International Covenant on Civil and Policitical Rights and United Kingdom Law* (Clarendon Press, 1995) 629.

[117] McGoldrick (n 106) 58.

[118] Ibid 42, citing P Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech' (1997) EHRLR,364, 369.

[119] McGoldrick (n 106) 43.

[120] Ibid 42, 54.

[121] Ibid 45-52 citing *Al-Dulmi and Montana Management Inc v Switzerland,* A 5809/08, 26 November 2013 [58]-[61] (referred to GC), referring to the HRC's decision in *Sayadi and Vinck v Belgium*, 1472/2006; *Balani v Spain*, Cmn No 1021/2001.

accordance with domestic law and/or the substantive provisions of the Convention or Covenant respectively.[122] The relevant articles are reproduced below:

**ECHR**

**Article 5 Right to Liberty and Security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court…; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

**ICCPR**

**Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Some complaints are framed as violations of the art 2 ECHR 'right to life' or the art 6 ICCPR freedom from 'arbitrary deprivation of life':

**ECHR**

**Article 2 Right to Life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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[122] Regarding the Convention, see *KF v Germany* (No 1144/1996/765/962/97) [63] citing *Lukanov v. Bulgaria* 20 March 1997, Reports 1997-II, 543–44, para 41; and the *Giulia Manzoni v Italy* judgment of 1 July 1997, Reports 1997-IV, 1190, para 21. Regarding the Covenant, see for instance, *A v Australia* (No 560/93) [9.5].

**ICCPR**

**Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Other complaints are framed as violations of the art 3 ECHR or art 7 ICCPR freedom from torture or inhuman or degrading treatment or punishment respectively:

**ECHR**

**Article 3 Prohibition of torture**

1. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

**ICCPR**

**Article 7**

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Less commonly, complaints are brought on the basis that punishment violates the right to freedom of expression (art 10 ECHR, art 19 ICCPR), or the right to respect for private and family life (art 8 ECHR, art 23 ICCPR).[123]

*B Complaints about excessive sentences*

A survey of jurisprudence on complaints about excessive sentences reveals many commonalities in the way that the ECtHR and HRC address such complaints. Both bodies admit complaints about excessive sentences, apply proportionality reasoning to resolve the complaints, emphasise the 'necessity' stage by reference to less rights-intrusive alternatives to the penalty imposed,[124] and readily uphold complaints in the absence of cogent reasons from

[123] See for instance, *Aliev v Ukraine* [2003] ECHR 201 (29 April 2003), discussed further below.

[124] For instance, *Kyprianou v Cyprus* [2005] ECHR 873 (15 December 2005).

the State party.[125] Additionally, neither body views such complaints to be de facto supranational sentence appeals because neither body has such a function.[126]

Complaints to the HRC tend to be framed as violations of the art 9(1) freedom from arbitrary detention. In *Fernando v Sri Lanka* (2003)[127] the Supreme Court of Sri Lanka imposed on an applicant for workers' compensation a sentence of one year in prison with hard labour for contempt of court.[128] The applicant had filed unmeritorious motions, raised his voice in court and refused to apologise to the court.[129] The applicant complained to the HRC that his imprisonment without trial amounted to arbitrary detention in violation of art 9 ICCPR.[130] In upholding the claim the Committee confirmed that the prohibition on arbitrary punishment extends to actions of the judicial arm of government, and summarily concluded that, in the absence of any adequate explanation from the State party, the penalty was arbitrary because of its severity:

> Article 9, paragraph 1, of the Covenant forbids any 'arbitrary' deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. [131]

In *Dissanayke v Sri Lanka* (2005),[132] the Supreme Court of Sri Lanka had imposed on the applicant a sentence of two years in prison with hard labour for contempt of court.[133] The applicant had made a statement at a public meeting that he would not accept any 'disgraceful

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[125] For instance, *Fernando v Sri Lanka (No 1189/2003),* UN Doc CCPR/C/83/D/1189/2003 (31 March 2005); *Dissanayake v Sri Lanka (No 1373/2005),* UN Doc CCPR/C/93/D/1373/2005 (22 July 2008).

[126] For instance, *Dean v New Zealand (No 1512/2006),* UN Doc CCPR/C/95/D/1512/2006 (29 March 2009).

[127] *Fernando v Sri Lanka* (n 125).

[128] Ibid [2.2].

[129] Ibid [2.2].

[130] Ibid [3.3].

[131] Ibid [9.2].

[132] *Dissanayke v Sri Lanka* (n 125).

[133] Ibid [1.1].

decision' of the court.[134] The Committee again found that, in the absence of any adequate explanation from the State party, this sentence was also disproportionate and therefore 'arbitrary' in violation of art 9(1):

> The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court's power to maintain orderly proceedings, if indeed the provision of an advisory opinion can constitute proceedings to which any summary contempt of court ought to be applicable. Thus, it concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1.[135]

In *Dean v New Zealand* (2006),[136] the applicant argued that his sentence of 10 years' preventative detention for an offence of indecency was 'manifestly excessive.' The applicant had entered a cinema, sat next to a young boy, and put his hand across a boy's lap, resting it on his crotch. The State argued that the Committee ought not admit the complaint because 'the Committee is essentially asked to be a further level of appellate review of sentence.'[137] The Committee admitted the complaint, but dismissed it directly based on the applicant's lengthy history of sexual assault and indecency offences.[138]

By contrast, applications to the ECtHR tend to be framed as a disproportionate violation of rights other than liberty. In *Kyprianou v Cyprus* (2001),[139] the complainant, a barrister who was acting as defence counsel during a murder trial, was convicted of an offence of contempt *in facie curiae* after he accused the court of interrupting his cross-examination of a prosecution

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[134] Ibid [8.3].

[135] Ibid [8.3].

[136] *Dean v New Zealand* (n 126).

[137] Ibid [4.8].

[138] Ibid [7.3]: 'As regards the author's claim that the imposition of the sentence of preventive detention was manifestly excessive in his case, the Committee notes that the author has a long history of sexual assault and indecency offences, that he had been warned on several occasions that in case of re-offending he might be sentenced to preventive detention, and that he committed the offense for which he was convicted to preventive detention within three months of his release from prison after having been convicted for a similar offense. The Committee considers that in the circumstances of the present case, the sentence of preventive detention was not so excessive as to amount to a violation of either article 7, 10, paragraph 1, or 14 of the Covenant.'

[139] *Kyprianou v Cyprus*, (n 124).

witness by, among other things, passing each other *ravasakia*, a term which connotes secret love letters or messages with an unpleasant content.[140] He was sentenced to five days' imprisonment, to be served immediately.[141] He successfully argued before the ECtHR that his sentence did not 'strike the right balance' between the interest of the State protecting the authority of the judiciary, and the complainant's art 10 ECtHR right to freedom of expression.[142] In its reasons, the Court emphasised the availability of less rights-intrusive alternatives which would have achieved the State's objective:

> [T]he Court is not persuaded by the Government's argument that the prison sentence imposed on the applicant was commensurate with the seriousness of the offence, especially in view of the fact that the applicant was a lawyer and considering the alternatives available [including censure, referral for disciplinary measures and/or a short adjournment to allow tempers to cool]. Accordingly, it is the Court's assessment that such a penalty was disproportionately severe on the applicant and was capable of having a 'chilling effect' on the performance by lawyers of their duties as defence counsel .... the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression.[143]

In *Otegi Mondragon v Spain* (2007),[144] the applicant, who was a spokesperson for a Basque parliamentary group, was convicted of serious insult against the King, and sentenced to five days' imprisonment, for making the following comments about the King of Spain at a press conference:

> How is it possible [to have one's] picture taken today in Bilbao with the King of Spain, when [he] is the Commander-in-Chief of the Spanish army, in other words

[140] Ibid [17]-[18], [41], [73], [78].

[141] Ibid [18].

[142] Ibid [182]-[183]. Art 10 relevantly provides: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The exercise of these freedoms…may be subject to…such formalities, conditions, restrictions or penalties as are…necessary in a democratic society.'

[143] Ibid [180]-[183].

[144] *Otegi Mondragon v Spain* [2011] ECHR 2426 (15 March 2011).

> the person who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence?[145]

Mondragon successfully argued that his sentence – which not only interfered with his art 10 right to freedom of expression, but also with his eligibility to stand for election – was not 'proportionate':

> Lastly, as regards the penalty imposed, while it is perfectly legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings … The Court observes in that regard that the nature and severity of the penalties imposed are also factors to be taken into consideration in assessing the 'proportionality' of the interference. It notes the particularly harsh nature of the penalty imposed: the applicant was sentenced to one year's imprisonment. His criminal conviction also resulted in his right to stand for election being suspended for the duration of his sentence, even though he was a politician.[146]

In its reasons, the Court emphasised the deleterious consequences of the sentence for the right to freedom of expression more broadly:

> [A] lthough sentencing is in principle a matter for the national courts, the imposition of a prison sentence for an offence in the area of political speech will be compatible with freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence… There is nothing in the circumstances of the present case, in which the impugned remarks were made in the context of a debate on an issue of legitimate public interest, to justify the imposition of such a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, notwithstanding the fact that enforcement of the applicant's sentence was stayed. While that fact may have eased the applicant's situation, it did not erase his conviction or the long-term effects of any criminal record.[147]

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[145] Ibid [10].

[146] Ibid [58].

[147] Ibid [59]-[60].

In *Gatt v Malta* (2008),[148] the applicant, who had been sentenced to more than 2,000 days' imprisonment in default of a fine imposed for breaching a bail condition, argued before the ECtHR that his detention violated his art 5 ECHR right to liberty and security because it was disproportionate to his offence of breaching a curfew and was therefore arbitrary.[149] The Court deployed proportionality reasoning to resolve the matter in the applicant's favour, emphasising that compliance with domestic laws is a necessary but insufficient prerequisite for compliance with art 5 ECHR, and pointing out the need for 'fair balance' between the government's legitimate objective of securing compliance with court orders and the applicant's right to liberty:

> A period of detention will in principle be lawful if it is carried out pursuant to a court order … However, the domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty… The Court considers that in such circumstances issues such as the purpose of the order, the feasibility of compliance with the order, and the duration of the detention are matters to be taken into consideration. The issue of proportionality assumes particular significance in the overall scheme of things… [T]he Court considers that a period of detention of more than five years and six months (two thousand days) for failure to comply with a court order to pay EUR 23,300 as a result of a single breach of curfew imposed as a bail condition cannot be considered to strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court and the importance of the right to liberty.[150]

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[148] *Gatt v Malta* [2010] ECHR 1205 (27 July 2010).

[149] Ibid [40].

[150] Ibid [40]-[43]. The Court did not exclude the possibility that the imposition of a disproportionate sentence may also give rise to a violation of the art 3 ECHR prohibition against inhuman or degrading punishment, but found that, in the circumstances, the complaint did not reach the 'minimum level of severity' needed to establish that the punishment was 'inhuman.' In *Kafkaris v Cyprus* [2008] ECHR 143 (12 February 2008), the applicant had been sentenced to a de jure and de facto reducible mandatory life sentence for three counts of murder. He argued unsuccessfully that a change in domestic legislation which frustrated his expectation of imminent release caused him to suffer anxiety in violation of art 3. The Grand Chamber disagreed: '[107] It is true that a life sentence such as the one imposed on and served by the applicant without a minimum term necessarily entails anxiety and uncertainty related to prison life but these are inherent in the nature of the sentence imposed and, considering the

*C Complaints about the death penalty, irreducible life sentences, indefinite sentences*

The HRC and ECtHR have heard a small number of complaints about excessive sentences comprising the death penalty, irreducible life terms and indefinite custodial terms. These complaints have also been assessed by reference to proportionality reasoning with emphasis on the necessity limb or 'less rights-restrictive alternative' test, although, as discussed below, this is not always easy to discern. Implicit in these decisions is the view that such penalties are inevitably unjustifiable because they involve serious interference with the prisoner's human rights in circumstances where other less rights-intrusive alternatives are patently available. Mandatory penalties of this nature have attracted the opprobrium of the Court or Committee because of the failure of the State legislature or judiciary to make any attempt at balancing.[151] Indefinite terms have been approved only where there is frequent periodic consideration of whether there are legitimate penological grounds for continued detention.[152] The jurisprudence encourages adherence to international human rights norms in sentencing by requiring States to defend punishments via proportionality reasoning.

Prior to 1985, art 2 of the ECHR expressly permitted the lawful imposition of the death penalty.[153] In *Soering v the United Kingdom* (1989),[154] the ECtHR held that, while the imposition of the death penalty could not be regarded as 'inhuman' *per se* due to art 2, the mental suffering of death row prisoners – the so called 'death row phenomenon' – could amount to 'inhuman' treatment in breach of art 3. The facts were that a 20-year-old German citizen challenged his deportation to the United States to be tried on a charge of murder, which

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prospects for release under the current system, do not warrant a conclusion of inhuman and degrading treatment under art 3.'

[151] For instance, *Blessington and Elliott (1968/2010),* UN Doc CCPR/C/112/D/1968/2010 (17 November 2014) [7.8]-[7.9].

[152] For instance, *Hutchinson v United Kingdom* (GC No 57592/2008) [2017] ECHR 65 (17 January 2017) .

[153] Art 2 provided: '[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'; from 1 March 1985 the ECHR was amended by Protocol 6 to prohibit absolutely the imposition of the death penalty: '[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed.'

[154] *Soering v United Kingdom* [1989] ECHR 14 (7 July 1989).

would have exposed him to the 'death row phenomenon.'[155] The Court deployed proportionality reasoning to support its conclusion that the 'death row phenomenon' violated the prisoner's art 3 rights. In doing so, the Court placed considerable weight on the fact that extradition was not necessary, in the sense that the desired outcome (having the applicant tried for murder) could have been achieved by other less rights-intrusive means, namely by extradition to Germany, where he would not have been exposed to the death penalty.[156]

Along similar lines, the HRC has consistently recognised that mandatory death sentences violate art 6,[157] because such sentences impose a penalty 'based solely on the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence.'[158] In *Vinter and Others v United Kingdom* (2013),[159] the three applicants, who were serving mandatory sentences of life imprisonment for murder, were subject to 'whole of life' orders, meaning that the Secretary of State would not consider their release for at least 25 years and, even then, could order release only on 'compassionate grounds.' There was no avenue for constitutional review of the sentences.[160] The Grand Chamber held that the sentences violated art 3 because there was, in substance, no prospect for release of the prisoners or for review of the sentences. In so doing, the court endorsed the reasoning of the German Federal Constitutional Court in the *Life Imprisonment* case, on the concept of human dignity:

> Furthermore, as the German Federal Constitutional Court recognised in the *Life Imprisonment case*… it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without

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[155] The psychological trauma associated with the cumulative effect of being sentenced to death, the protracted process involved in challenging the penalty, and awaiting the execution of the sentence: *Soering v. the United Kingdom* (n 154) [104].

[156] *Soering v. the United Kingdom* (n 154) [110]-[111].

[157] Art 6(1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

[158] For instance, *Thompson v St Vincent and the Grenadines (No 806/1998)*, U.N. Doc. CCPR/C/70/D/806/1998 (18 October 2000) [8.2].

[159] *Vinter v United Kingdom* [2013] ECHR 645 (9 July 2013).

[160] This is because there is no written constitution in Britain. The Australian *Constitution* provides no such mechanism either.

> at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentence prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece… Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity...[161]

The Grand Chamber's decision was criticised in Britain on the basis that it relied too heavily upon unwritten principles, namely the 'emerging consensus' in Europe regarding the abolition of the death penalty and 'human dignity.'[162] Subsequently, in *Hutchinson v the United Kingdom*,[163] the Grand Chamber found that an alleged whole of life sentence did not violate art 3 ECHR because it was in fact reducible *de facto* and *de jure*. This was because, in the circumstances, there was a prospect of release by the Secretary of State pursuant to what the Court of Appeal had, since the decision in *Vinter*, confirmed was an unfettered discretion to periodically review whether there were legitimate penological grounds for continuing detention.

In *Blessington and Elliott v Australia* (2010) Australia was the subject of a complaint to the HRC in respect of irreducible life sentences imposed on the applicants for a murder committed while they were minors. The applicants argued that the possibility of release was remote and – if it ever happened – would be based on 'the impending death or physical incapacitation of the authors rather than on the principles of reformation and social rehabilitation':

> The authors argue that, to their knowledge, no person the subject of a 'non-release recommendation' has ever been released… As to the possibility of release pursuant to the royal prerogative of mercy, the authors state that the power to grant mercy has only been used once in New South Wales in respect of a person convicted of murder. That is the case the State party referred to, which concerned a woman who murdered her husband after suffering protracted domestic violence. Properly understood in the political-legal context of New South Wales and in light of the

[161] *Vinter and Others v United Kingdom* (n 159) [113].

[162] Andrew Ashworth, 'A Decade of Human Rights in Criminal Justice' (2014) (5) *The Criminal Law Review* 325, 330-332.

[163] *Hutchinson v United Kingdom* (GC No 57592/2008) [2017] ECHR 65 (17 January 2017).

> authors' status as children, the mere technical prospect of either author ever receiving the royal prerogative of mercy is not sufficient to convert what would otherwise be cruel, inhuman or degrading treatment into treatment that is compliant with article 7.[164]

Australia argued that an irreducible life sentence would only violate art 7 ICCPR if it were 'grossly disproportionate,'[165] and that this sentence was not 'grossly disproportionate' because the applicants had the possibility of release pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW) under which they could apply for a determination of their non-parole period after serving 30 years in prison and, alternatively, pursuant to the royal prerogative of mercy:[166]

> While age must be taken into account in determining whether a particular sentence is grossly disproportionate or sufficient to give rise to cruel, inhuman or degrading treatment or punishment, the imposition of a life sentence on a juvenile with limited prospects for release will not necessarily breach … the Covenant. The question is whether the high threshold set for release is appropriate, having regard not only to the age of the authors, but also the circumstances of the offence, the need for retribution and deterrence and the need for protection of the community. It is the view of the State party that the sentences imposed on the authors strike an appropriate balance in that regard. [167]

The Committee rejected Australia's arguments. It found that, to avoid characterisation as an 'inhuman' penalty under art 7, a sentence must provide for both review and release.[168] The fact that Australia had failed to put forward any evidence that rehabilitation would not succeed – such as psychological or psychiatric assessments – fortified the Committee's conclusion.[169]

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[164] *Blessington v Elliott* (n 151) [7.7].

[165] This argument appears to have been based on a misunderstanding of the 'margin of appreciation' as it operates in the HRC, as there is no doctrine of 'gross disproportionality' of sentence.

[166] *Blessington v Elliott* (n 151) [4.15], [4.8]-[4.12].

[167] Ibid [4.15].

[168] Ibid [7.7].

[169] Ibid [7.8]-[7.9].

### *D Other similar complaints*

The ECtHR and HRC hear numerous complaints about arrest, prison conditions and administrative detention which have important similarities to complaints about excessive sentences. Such complaints also involve weighing the complainant's private interest in liberty and concomitant rights against the government's broader criminal justice objectives. Many of these cases involve Australia and therefore underscore how Australia's lack of general law or constitutional protection of human rights can permit the systematic violation of the rights of members of vulnerable minorities – namely asylum seekers, sentenced prisoners and suspected criminals and political prisoners – and how proportionality reasoning is deployed to identify the problem and evaluate the justifiability of State action. Several cases show that Australia has been found to have violated the ICCPR in respect of complaints about the mandatory detention of asylum seekers, the detention of extraditable persons and the preventative detention of dangerous offenders notwithstanding that in each case the relevant legislation or common law authorising the detention of the complainants survived appellate or constitutional review.

#### *1 Immigration detention*

Complaints about mandatory immigration detention have similarities with complaints about mandatory sentencing in that the complaint typically concerns the blanket application of a law or policy with respect to a marginalised group to which the complainant belongs. The ECtHR routinely deploys proportionality reasoning to adjudicate claims concerning immigration detention. In such cases the ECtHR emphasises the 'necessity' limb by way of the 'less rights-intrusive means' test:

> The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained … The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the

> right to liberty … The duration of the detention is a relevant factor in striking such a balance.[170]

In *Saadi v the United Kingdom* (2008)*,* the Grand Chamber found that the detention of an Iraqi asylum seeker for 7 days as part of its 'fast track' immigration processing program did not violate the applicant's right to liberty and security.[171] However, the Committee has readily found that Australia has failed to establish that the legitimate purpose of detention – to determine the person's identity and prevent the person from disappearing into the community – could not be mitigated by 'other less intrusive measures', such as reporting obligations or sureties.[172] The following comments from *D and E v Australia* (2002), concerning mandatory detention of a family for 3 years and 2 months, are typical of the Committee's approach and findings in these matters:[173]

> With regard to the claim of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterisation of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. It observes that the authors were detained in immigration detention for three years and two months. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved

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[170] *Saadi v United Kingdom* [2008] ECHR 79 (29 January 2008) [70].

[171] Ibid [80].

[172] For instance, *A v Australia (No 560/1993),* UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [3.3] (where a Cambodian national was detained for four years while his refugee application was processed); *C v Australia (No 90/1999),* UN Doc CCPR/C/76/D/900/1999 (28 October 2002) [8.2] (where the applicant overstayed a tourist visa and was detained for over 2 years); *Baban v Australia (No 1014/2001),* UN Doc CCPR/C/78/D/1014/2001 (18 September 2003); *Shafiq v Australia (No 1324/2004),* UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); *Shams et al v Australia (1255, 1256, 1259, 1260, 1268, 1270, 1288/2004),* UN Doc Nos CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (11 September 2007); compare *Bakhtiyari v Australia (No 1069/02),* UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) (where the applicant was only detained for 2 months and that was found not to violate art 9), and *Nystrom v Australia (No 155720/07),* UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) (where the applicant was placed in mandatory immigration detention pending deportation on character grounds, and that was found not to violate art 9).

[173] *D and E v Australia (No. 1050/2002),* UN Doc CCPR/C/87/D/1050/2002 (9 August 2006).

> the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for the authors, including two children, for the length of time described above, without any appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant. [174]

Along similar lines, in *MGC v Australia* (2009), the Committee found that the automatic detention of an unlawful non-citizen for 3 ½ years pending his deportation on character grounds without consideration on an individual basis of other less rights-intrusive alternatives to detention violated art 9 ICCPR:[175]

> According to the information before the Committee, the author became an 'unlawful non-citizen' as a result of the cancelling of his visa and, pursuant to the *Migration Act 1958*, was automatically placed in immigration detention until his removal, which eventually occurred three and a half years later. During that time, the authorities of the State party made no individual assessment of the need to maintain the author in immigration detention. The Committee considers that the State party has not demonstrated on an individual basis that the author's continuous and protracted detention was justified for such an extended period of time. The State party has also not demonstrated that other, less intrusive, measures could not have achieved the same end, of compliance with the State party's need to ensure that the author would be available for removal (see para. 6.3 above). Furthermore, the author was deprived of the opportunity to challenge his indefinite detention in substantive terms. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant. For all those reasons, the Committee concludes that, in the present circumstances, the detention of the author violated his rights under article 9 (1) of the Covenant. [176]

[174] *D and E v Australia* (n 172) [7.2].

[175] *MGC v Australia (No 1875/2009),* UN Doc CCPR/C/113/D/1875/2009 (7 May 2015).

[176] Ibid [11.6].

*2 Extradition detention*

In *Griffiths v Australia* (2010) the applicant, who had resided in Australia since the age of seven, was to be extradited to the United States on charges relating to his involvement in an online software piracy group.[177] He was held in custody for 2 ½ years pending extradition to the United States despite having no prior criminal record. Australia argued that the applicant's detention was lawful in accordance with the requirements of s 15(6) *Extradition Act 1988*, which requires an extraditable person to be remanded in custody absent 'exceptional circumstances' justifying release on bail. The applicant argued that this statutory presumption against bail was inherently arbitrary:

> The fact that extradition can be a reason for a person's detention under the Covenant does not mean that detention pending extradition is automatically justified and proportionate and, accordingly, not arbitrary. For instance, detention can only be justified on the basis of a risk of absconding or non- cooperation if there are strong grounds to believe such a risk is likely in a particular case. The requirement in the Extradition Act that 'special circumstances' exist before bail can be granted reverses this test. [178]

As with the immigration detention cases, the HRC held that the applicant's detention was arbitrary because Australia had failed to demonstrate the necessity of keeping the applicant in custody pending extradition:

> [T]he State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's extradition policies and international cooperation obligations, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of his individual circumstances. In particular, the State party has failed to show whether due regard was given to the author's arguments in support of his release, such as his compliance with previous bail conditions within the course of the same extradition proceedings, a low flight risk, the absence of a past criminal record or his health condition.[179]

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[177] *Griffiths v Australia (No 1973/2010),* UN Doc CCPR/C/112/D/1973/2010 (26 January 2015) [2.1].

[178] Ibid [5.5].

[179] Ibid [7.2].

The Committee was particularly critical of High Court authority that 'special circumstances' should be 'extraordinary and not factors applicable to all persons facing extradition,' on the basis that domestic law was inconsistent with the substantive requirements of the Convention.[180]

*3 Preventative detention*

Using proportionality reasoning, the Committee found that Australia's legislative scheme for the preventative detention of dangerous offenders violated the art 9(1) prohibition against arbitrary detention in *Fardon v Australia* (2007).[181] As the applicant approached the end of his 14-year prison term for the rape, sodomy and unlawful assault of a female, the Supreme Court of Queensland imposed a further sentence of indefinite preventative detention in civil proceedings initiated under the *Queensland Dangerous Prisoners (Sexual Offenders) Act 2003* ('*DPSOA*') by the Attorney-General (Qld). The High Court of Australia had previously dismissed a constitutional challenge to the *DPSOA*.[182] The applicant successfully argued that the additional period of 'preventative detention' was arbitrary and therefore violated his art 9 rights, because it amounted to a fresh term of imprisonment imposed in the absence of a further conviction. Again, Australia failed to satisfy the Committee that there were no less rights-intrusive means to ensure community safety, noting that the prisoner's rehabilitation ought to have been achieved during the initial 14-year term. Additionally, the Committee was cautious about the judicial finding that the offender might be a danger to the community given that it was based on the opinion of psychiatric experts:

> The 'detention' of the author as a 'prisoner' under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an

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[180] Ibid [7.5].

[181] *Fardon v Australia (No. 1629/2007),* UN Doc CCPR/C/98/D/1629/2007 (10 May 2010).

[182] The High Court held in a 6-1 decision that the legislation did not did not compromise the integrity of the Supreme Court or conflict with federal jurisdiction invested in State courts by the Constitution; there was no substantive challenge to the legislation on the basis that it violated the applicant's human rights: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

> exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison.[183]

The Committee reached the same view in *Tillman v Australia* (2007), in which the applicant challenged orders made under equivalent legislation in New South Wales.[184] By contrast, a preventative detention scheme in New Zealand survived Committee scrutiny in *Rameka et al v New Zealand* (2002). In that case the Committee considered that the sentence of preventative detention was not 'arbitrary' because it was imposed at the same time as the original sentence, justified by compelling reasons, reviewable by judicial authority and subject to annual review of the substantive justification for detention (thereby meeting the review requirements of art 9(4) also).

*4 Arrest and prison conditions*

The ECtHR has used proportionality reasoning to adjudicate complaints concerning arrest.[185] An arrest must appropriately balance the public interest in ensuring the person's attendance at court with the person's private interest in liberty.[186] In *Vasileva v Denmark* (1999) a 60-year old woman was detained for thirteen-and a-half hours after she refused to provide her name and address to a ticket inspector who had accused her of travelling on a public bus without a permit. The Court concluded that the length of detention was disproportionate to the offence,

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[183] *Fardon v Australia* (n 181) [7.4].

[184] *Tillman v Australia (No 1635/2007),* UN Doc CCPR/C/98/D/1635/2007 (10 May 2010) [7.3]-[7.5].

[185] *Khodorkovskiy v Russia* [2011] ECHR 841 (31 May 2011) at [136].

[186] Ibid [136].

considering the applicant's age, the nature of the offence and the purpose of her detention, notwithstanding that there was no statutory maximum period for such detention.[187]

In *Aliev v. Ukraine* (1998), the prisoner, whose sentence had been commuted from capital punishment to life imprisonment, argued that the denial of intimate contact disproportionately violated his art 8 right to respect for private and family life, which is qualified 'in accordance with the law and [as] necessary in a democratic society…for the prevention of disorder or crime.'[188] The ECtHR appears to have dismissed the claim on the basis that the decision fell within the 'margin of appreciation,' in that the Court was unwilling to substitute its own decision on the matter owing to the lack of a common practice of states with respect to conjugal visits:

> Whilst noting with approval the reform movements in several European countries to improve prison conditions by facilitating conjugal visits, the Court considers that the refusal of such visits may for the present time be regarded as justified … the restriction of the applicant's wife's visits was proportionate to the legitimate aim pursued. [189]

*5 Execution of a foreign sentence*

In *Hicks v Australia* (2010) former Guantanamo Bay detainee David Hicks argued that his detention in an Australian gaol for 7 months pursuant to a prisoner transfer agreement negotiated with the United States for terrorism offences violated his rights under art 9(1). The Committee found that by the time Hicks was transferred to Australia 'there was abundant information in the public domain that raised serious concerns about the fairness of the procedures before the United States Military Commission [which convicted him] and that should have been enough to cast doubts among Australian authorities as to the legality and legitimacy of the author's sentence.'[190] This made his detention 'arbitrary' because it didn't satisfy the 'necessity' limb of the proportionality test:

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[187] *Aliev v Ukraine* [2003] ECHR 201 (29 April 2003) [41].

[188] Article 8 relevantly provides 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

[189] *Aliev v. Ukraine* (n 187) [187]-[189].

[190] *Hicks v Australia (No 2005/2010),* UN Doc CCPR/C/115/D/2005/2010 (19 February 2016) [4.8].

> Transfer agreements play an important role for humanitarian and other legitimate purposes, allowing persons who have been convicted abroad and agree to the transfer to come back to their own country to serve their sentence and benefit from, for instance, closer contact with their family. Under the Covenant, however, States parties cannot be bound to execute a sentence when there is ample evidence that it was handed down following proceedings in which the defendant's rights were clearly violated. In the Committee's view, giving effect, under a transfer agreement, to sentences resulting from a flagrant denial of justice constitutes a disproportionate restriction of the right to liberty, in violation of article 9(1) of the Covenant. The fact that, as a condition for his return, the individual in question accepted the conditions of the agreement is not decisive, given that it can be shown, in the present case, that the detention conditions and ill-treatment to which he was subjected left him little choice. In such circumstances, it was for the State party to ensure that the terms of the transfer arrangement did not cause it to violate the Covenant. [191]

Again, the Committee found that Australia had failed to establish the necessity of detention because it made no attempt whatsoever to ensure that the terms of the transfer arrangement were compatible with the provisions of the Covenant:

> The Committee notes the author's claim that the State party not only made no attempt to negotiate the terms of the transfer arrangement in a manner compatible with its obligations under the Covenant but also exercised a significant degree of influence over the formulation of the plea agreement, upon which the author's immediate return to Australia was contingent … The Committee also notes the State party's contention that the author agreed to plead guilty because he perceived prison conditions in Australia to be more favourable … However, the Committee considers that, in order to escape the violations to which he was subjected, the author had no other choice than to accept the terms of the plea agreement that was put to him. It was therefore incumbent on the State party to show that it had done everything possible to ensure that the terms of the transfer arrangement that had been negotiated with the United States did not cause it to violate the Covenant, particularly as the author was one of its nationals. In the absence of such a showing, the Committee considers that, by accepting to give effect to the remainder of the sentence imposed under the plea agreement and deprive the author of his liberty for

[191] Ibid [4.9].

> seven months, the State party violated the author's rights under article 9 (1) of the Covenant. [192]

*6 An aberrant decision on mandatory sentences*

There is one significant and relatively recent decision of the HRC that appears to sit in opposition to the decisions reviewed above: the decision in *Nasir v Australia* (2012). In that case the Committee dismissed a complaint that a mandatory sentence of 5 years' imprisonment with a mandatory 3 ½ year non-parole period imposed on an Indonesian fisherman who had been convicted of aggravated people smuggling was arbitrary in violation of art 9 ICCPR. The complainant had assisted as crew on a vessel carrying 46 Afghanistan asylum seekers and three Indonesian crew members from Indonesia to Australia. The applicant was a cook who had steered the vessel on one night only. The applicant relied on the unusual remarks by the sentencing judge that her Honour considered the mandatory minimum sentence inappropriate in the circumstances:[193]

> You have already been imprisoned for 632 days during which your family has been left destitute. The sentence of imprisonment is not, therefore, necessary to deter you any more than that has already done. ... I regard you as already having been adequately punished. However, I am obliged to impose further imprisonment upon you so as to comply with the obligation I have at law.

And also:[194]

> [I]t is clear that those people who employ men like you will just move to another village because they regard you as completely expendable and people in small villages without newspapers or the means of modern communication are most unlikely to hear of a sentence imposed in an Australian court.

The applicant argued that the mandatory sentence was arbitrary because 'no less invasive means of achieving the same ends, such as reporting obligations, were considered.'[195] Australia argued that the sentence was 'justified' 'to achieve the legitimate objectives of punishing the

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[192] Ibid [4.9].

[193] *Nasir v Australia (No 2229/2012),* UN Doc CCPR/C/116/D/2229/2012 (17 November 2016) [5.8].

[194] Ibid [5.8].

[195] Ibid [5.7].

author, deterring the future commission of such offences, which involve serious risks to the lives of asylum seekers, and to ensure that the courts consistently apply penalties commensurate with the seriousness of the crime.'[196] Based on the complaints jurisprudence of the ECtHR and HRC discussed above, one would have expected the Committee to have reasoned along the lines that the sentence was unjustified because neither the legislature nor the sentencing court had subjected the sentence to the rigours of proportionality reasoning, there were less rights-intrusive alternatives to a mandatory penalty of 5 years' imprisonment, such as deportation or release on conditions, Australia had proffered no evidence that the sentence would have the posited deterrent effect in the circumstances, and in the absence of evidence to the contrary the Committee ought to have deferred to the findings of the sentencing judge that, having regard to the prisoner's circumstances, he had been adequately punished as at the date of sentence. In fact, the Committee dismissed the complaint. The Committee accepted that a sentence that was not 'reasonable and necessary or not proportional to the end that is sought' would contravene art 9,[197] and that the imposition of a 'draconian penalty' for a 'minor offence' without explanation and without independent procedural safeguards is 'arbitrary'.[198] However, the Committee held, without any substantial consideration of the misgivings of the sentencing judge, that it was 'not in a position to conclude that the length of his criminal detention was arbitrary,' so that there was no violation of art 9(1):

> … considering that the author's conviction was the result of a proper legal process in which he was legally represented, the Committee is not in a position to conclude that the length of his criminal detention was arbitrary and therefore concludes that it does not reveal a violation of article 9 (1) of the Covenant. [199]

Whether the Committee intended to acknowledge the margin of appreciation afforded to domestic authorities is unclear. The decision is even more confounding because of the reference to the applicant's 'conviction' being 'the result of a proper legal process' in circumstances where Australian law provided no legal avenue for review of his sentence for conformity with the ICCPR contrary to art 14(5). In a concurring opinion Sir Nigel Rodley

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[196] Ibid [4.10].

[197] Ibid [4.7].

[198] Ibid [7.7] citing *Fernando v Sri Lanka* (n 125) [9.2] *Dissanayake v Sri Lanka* (n 132).

[199] *Nasir v Australia* (n 193) [7.7].

incongruously states that the case 'cried out for the application of executive clemency or mercy:'[200]

> I voted with the majority … with much uncertainty. The sentence was clearly unfair in the case of the author, but respect is due to a State party's aim of discouraging all types of complicity in people smuggling. Under the circumstances of the present case, the sentence cried out for the application of executive clemency or mercy, the non-resort to which did the State party no credit. Having read the persuasive dissents of Mr. de Frouville, Mr. Salvioli and Mr. Rodriguez-Rescia and of Ms. Cleveland, I am not sure that in a similar case, absent the humane exercise of clemency, I would vote the same way.

The dissenting opinions throw some light onto the Committee's reasoning. A joint dissenting opinion by de Frouville, Rodriguez and Salvioli suggests that the Committee was confused about whether a sentence had to be more than just 'disproportionate' before it could be considered 'arbitrary':[201]

> A number of countries have nonetheless chosen to establish mandatory minimum sentences ... This technique is not in itself contrary to article 9 of the Covenant, provided that it does not compel the judge to impose penalties *grossly disproportionate* to the offences with which the accused is charged. That may be the case, however, when the penalty is imposed automatically on the basis of a guilty plea, regardless of the extent of the perpetrator's responsibility for or involvement in the offence, and when the judge cannot make an exception enabling him/her to impose a penalty different from the mandatory minimum. (Emphasis added).

This comment suggests that some members of the Committee misapprehended that the 'margin of appreciation' permitted a tolerance for departure from the requirements of the doctrine of constitutional proportionality. In a separate dissenting opinion Prof Clevland identified that the decision was inconsistent with prior decisions on the death penalty, that the majority had failed to give adequate weight to the remarks of the sentencing judge that the mandatory minimum penalty was disproportionate, and that the majority had overlooked the applicant's lack of

[200] Ibid [4.7].

[201] Ibid [5], Annex I.

domestic review rights in relation to the his sentence.[202] Prof Cleveland also recounted the various domestic inquiries and reports which found that mandatory sentencing leads to excessive sentences and is inconsistent with international human rights norms:

> Indeed, all three branches of the Australian government have recognized that the goals of proportionality and deterrence are not served by application of the mandatory minimum sentence to menial boat crew. The trial court herself expressed scepticism that the sentence would have any general deterrent effect, stating 'it is clear that those people who employ men like you will just move to another village because they regard you as completely expendable and people in small villages without newspapers or the means of modern communication are most unlikely to hear of a sentence imposed in an Australian court.' As the author noted in his communication, numerous other members of the judiciary have criticized the mandatory minimum as requiring them to impose excessive sentences in such cases.
>
> In 2012 the Australian Parliament considered a bill to repeal the mandatory minimum sentences for aggravated people smuggling. After receiving extensive evidence regarding the excessive and disproportionate nature of these sentences as applied to boat crew,[1] the Senate Committee recommended that the State party review the operation of the mandatory minimum penalties and in particular, to consider distinguishing between organizers and boat crew in sentencing and giving judges discretion to impose lesser sentences when warranted, to ensure compliance with Australia's international human rights obligations. [203]

This decision underscores that the Committee's jurisprudence on proportionality and the margin of appreciation is still developing. It is possible that the Committee misapprehended that it was being asked to act as a supranational court of appeal on sentence severity, but that it lacked the language to articulate and resolve this concern; it lacked the language of the 'margin of appreciation.' It is argued that this decision is an aberration, and that this complaint ought to have been resolved in the complainant's favour. However, that is not to say that all similar applications should also be upheld. The remarks of the sentencing judge about the complainant having been adequately punished were highly unusual and would likely distinguish this case from future cases.

[202] Ibid [7-8], Appendix II.

[203] Ibid [10]-[11], Appendix II.

## IV A DEFENCE OF CONSTITUTIONAL PROPORTIONALITY IN EVALUATING SENTENCING

If it is to provide a viable model for evaluating penal severity and promoting penal restraint, the doctrine of constitutional proportionality, incorporating the subordinate margin of appreciation doctrine, must not only be widely accepted, it must be an appropriate standard for measuring compliance with international human rights norms, accommodate the considerable scope for legitimate cross-cultural difference in sentencing practices; and identify when deference ought to be made to domestic laws and assessments that feed into proportionality reasoning. This section defends the doctrine on all accounts, by reference to the abovementioned discussion and review of the jurisprudence of the ECtHR and HRC.

### *A Applicability*

The most compelling reason that the doctrine is the best available conceptual tool for evaluating whether any given punishment is consistent with international human rights norms is that the doctrine is not just a proxy for justifiable punishment, but it *defines* justifiable punishment under the Convention system. And as a party to the ICCPR, Australia is held to this standard. To make an authentic assessment of whether it is complying with the Convention, Australia should measure itself against the standards set in that document; not by some unrelated standard, as in the case of a comparative sentencing analysis, or by reference to a domestic standard such as common law proportionality which, as noted above, has no theoretical basis in the protection of human rights and which would in any case involve the circular use of an endogenous principle of sentence formulation for external scrutiny of sentencing outcomes.[204]

### *B Difference and deference*

The ECtHR and HRC jurisprudence surveyed above demonstrates that the doctrine of constitutional proportionality readily accommodates cross-cultural difference in sentencing practices. It makes no *ex ante* assumptions about the validity of a sentence in comparison with sentences imposed in other countries. It regards compliance with domestic laws as a necessary but insufficient basis for a finding that the sentence is proportionate. It evaluates whether the sentence pursues legitimate aims ('*legitimate aims*'), is capable of achieving those aims ('*suitability*'), impairs the prisoner's human rights as little as possible ('*necessity*'), and

[204] See Chapter 3 for further discussion of why common law proportionality provides little practical protection against penal severity.

comprises a net gain when the reduction on the enjoyment of prisoner's human rights is weighed against the level of realisation of the State's legitimate aims ('*balancing*').[205] HRC jurisprudence on the 'legitimate aims' and 'necessity' components readily demonstrates how the State's 'legitimate aims' are ascertained – by reference to empirical and normative claims, which can be validated or disproved – and how other equally effective but less rights intrusive alternatives are identified. There are obvious parallels with how this might be applied to post-conviction detention. The same jurisprudence suggests answers to questions about how to deal with a sentencing judge's finding that the prisoner has good prospects for rehabilitation, application of precedent requiring that it ignore the prisoner's prior good character, or a determination as to the appropriate punitive component of a sentence. In each case, the margin of appreciation doctrine would scrutinise the evidentiary and/or normative basis for the finding, precedent or determination. Where the evidentiary basis is sound – such as where a finding as to rehabilitative prospects is made based on reliable expert evidence – the doctrine requires deference to the sentencing judge. However, where binding precedent or a determination as to the appropriate penalty is underpinned by principles that are evidentially unsupported or normatively inconsistent with a system that provides constitutional protection against human rights, the margin of appreciation doctrine does not permit tolerance. This conveniently demonstrates how the margin of appreciation doctrine provides a procedural safeguard prior to the application of the substantive doctrine of constitutional proportionality.

### *C Criticisms of constitutional proportionality*

Although the doctrine of constitutional proportionality enjoys widespread support, it is not without its critics.[206] As discussed above, the doctrine sits uncomfortably within a system of parliamentary, rather than constitutional, sovereignty,[207] because it introduces a new and unfamiliar lens through which to scrutinise government action. When the *Human Rights Act 1998* (UK) was introduced, British courts developed what Julian Rivers terms a 'state-limiting' approach to proportionality reasoning, which 'sees proportionality as a set of tests warranting

[205] Klatt and Meister (n 61) 8.

[206] For an overview, see Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, 180.

[207] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000) 139-52, 200-205.

judicial interference to protect rights' in contrast to the European 'state-optimising' approach, which 'sees proportionality as a structured approach to balancing fundamental rights with other interests in the best possible way.'[208] What Rivers observed was the implicit criticism of the doctrine by the judicial arm of government, which was slow to come to terms with what was effectively a new constitutional settlement and new job description that required judicial interference where previously there had been judicial deference in the name of parliamentary sovereignty. On a practical level, use of the doctrine of constitutional proportionality to assess whether sentences for drug importation offences are consistent with international human rights norms is likely to be welcomed by Australian human rights lawyers, but met with suspicion by courts, prosecutors, defence lawyers and others unfamiliar with the doctrine.

There are also well-established criticisms of the doctrine on a theoretical level.[209] Huscroft's critique is that proportionality reasoning undermines the inviolability of rights. His concern is that proportionality reasoning allows rights to be 'balanced away.'[210] For Huscroft, rights have been diluted to 'optimisation requirements;' weaker and less effective. Proportionality reasoning is also criticised for affording unnecessary weight to rights arguments in the face of other moral considerations, such as the utilitarian objective of the 'greatest benefit for the greatest number' or the public good.[211] On a practical level, proportionality reasoning is criticised for purporting to provide an answer to the problem of rights adjudication without overcoming the fundamental epistemic problem of incommensurability. Additionally, on a theoretical level, proportionality reasoning has been criticised an elitist doctrine that undermines popular sovereignty. Nevertheless, even critics of constitutional proportionality concede its value in terms of its capacity to provide transparency to the notoriously opaque area of rights adjudication.[212] Used in this way, constitutional proportionality has such widespread support that it cannot be ignored as the international best practice standard for

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[208] Rivers (n 68) 176.

[209] Barak (n 36) 229, 238.

[210] For instance, Alison L Young, 'Proportionality is Dead: Long Live Proportionality!' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (Cambridge University Press, 2014), 49.

[211] Young (n 210).

[212] Ibid 50.

evaluating whether government action is consistent with human rights norms, in the sense that the action can be adequately justified.

## V Conclusion

Constitutional proportionality protects individuals when government power is used unjustifiably, whether unwisely, corruptly, inefficiently or mistakenly. It makes no judgment as to the motivations for the exercise of government power, rather its focus is the protection of human rights against the inevitability of error. This chapter has established that the doctrine of constitutional proportionality – incorporating the subordinate margin of appreciation doctrine – implicitly imposes a coherent theory of penal restraint within any system that constitutionally protects international human rights. Put differently, to evaluate whether a sentence violates international human rights norms it is necessary to deploy the doctrine of constitutional proportionality. The doctrine defines justifiable punishment under the Convention system, even if this standard is presently relatively unknown and under-appreciated. The very limited ECtHR and HRC jurisprudence concerning excessive sentences read together with jurisprudence in the analogous areas of arrest, immigration detention, extradition detention and execution of foreign sentences, provides some evidence that the doctrine can be used successfully for this purpose. While different jurisdictions deploy different formulations for the doctrine, the appropriate formulation for this research is that applied by the HRC, because the HRC supervises Australia's compliance with the ICCPR. The jurisprudence of the ECtHR is sufficiently similar to that of the HRC that it also provides a useful guidepost for this purpose

# Chapter 2:
# Methodology

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*Judicial opinions are detailed repositories that show what kinds of disputes come before courts, how the parties frame their disputes, and how judges reason to their conclusions. It is the factual and analytical richness of judicial opinions that establish their substantive legal importance.*[1]

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## I Introduction

This thesis proposes to use the international human rights doctrine of constitutional proportionality as the yardstick by which to measure whether domestic sentences imposed for drug importation offences as 'disproportionate' and therefore inconsistent with international human rights norms. The origins, purpose and operation of the doctrine were explained at length in Chapter 2. In short, the fundamental purpose of the doctrine is to scrutinise the evidential and normative bases for coercive government action and the evidential and normative bases for resisting that action, and to evaluate whether the balance between the State's legitimate objectives and individual human rights has been correctly struck. The margin of appreciation doctrine emphasises that assumptions, stereotypes or other unreliable premises, and normative arguments inconsistent with a system that protects international human rights, must be excluded from the analysis. Therefore, to subject a sentencing decision to a proportionality analysis, it is necessary to first establish the factual and normative basis for the sentence, and the factual and normative basis for resisting the type or duration of the sentence. This requires an answer to each of two questions: first, *how do persons come to be sentenced for importation offences* (the 'factual basis' for sentencing), and *how they are sentenced* (the 'legal basis' for sentencing). This chapter describes how a suitable sample of sentencing decisions was selected, and how a reliable empirical foundation was established to answer each of those questions and draw generalisable conclusions.

[1] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63, 89.

## II ESTABLISHING THE FACTUAL BASIS FOR SENTENCING

The only publicly available information on the factual basis for sentencing drug importers is contained within sentencing remarks. Sentencing remarks are published online by courts in each State and Territory and via Austlii.[1] However, establishing the factual basis for sentencing is not as straightforward as isolating the 'agreed facts' tendered by the prosecutor or accepted by the Court, or even the 'findings' of the sentencing court. This is because 'facts' or 'findings' recorded in sentencing remarks are inevitably definitional rather than descriptive. For example, the 'fact' that an offender was a 'low level courier' embeds assumptions about the importation enterprise behind the offending, namely that it was operated along hierarchical lines within a market approximating a licit market. Similarly, a 'finding' that an offender was 'motivated by profit' embeds assumptions about how the sentencer understands the meaning of 'profit.' Likewise, a 'finding' that an offence 'caused great harm to the community' presupposes the existence of criteria by which that harm can be measured, and that the offender's conduct has been measured against those criteria. As explained in the following chapter, surprisingly little is known about the global international drug trade and its participants, and even less is known about the trade at Australia's border. For example, it is not known whether international drug trafficking is mostly violent or non-violent, mostly profit-motivated or politically subversive, mostly oligopolistic or competitive, directly connected to drug-producers or at arm's length, uniform or different between different countries or ports; or whether importation enterprises are run along hierarchical lines or as cooperative coalitions, whether enduring or short-lived; or whether participants are mostly profit-motivated or desperate, whether perpetrators or victims. In short, the international drug trade is vastly under-researched, over-stereotyped and under-theorised. It would be necessary to strip out of 'findings' or 'facts' unsupported stereotypes or assumptions about the international drug trade and its participants, which obfuscate the underlying truth about how these people came to be sentenced. At the same time, it would be necessary to formulate a picture of the international drug trade at Australia's border so as to reliably describe the phenomena as a whole. Therefore, establishing the factual basis for sentencing would require generation of an empirically meaningful framework within the 'agreed facts' and the courts 'findings' – the data – could be understood. Grounded theory,

[1] Austlii is an open source legal information provider facilitated by the University of Technology Sydney and the University of New South Wales Law Faculties, available at http://www.austlii.edu.au/.

which is an approach to qualitative analysis used widely in human sciences research, but also in legal research,[2] provided a suitable framework within which to do that.

### *A Grounded theory*

Grounded theory prescribes a data collection cycle by which descriptive theoretical categories are derived inductively from the data set, and refined, adjusted and tested as the data is progressively analysed.[3] For this reason it is described as a 'constant comparative method.'[4] Grounded theory essentially involves 'developing theory as the research proceeds rather than testing a hypothesis in advance,'[5] which was appropriate for this research because there was no *a priori* theory of the drug trade at Australia's border.[6] Data analysis proceeds in three stages: the 'open coding' stage, during which source material is analysed to discover initial conceptual categories within the data set; the 'axial coding' stage, during which theoretical categories emerge from the initial conceptual categories; and 'theoretical saturation,' where a theory crystallises from the emergent categories.[7]

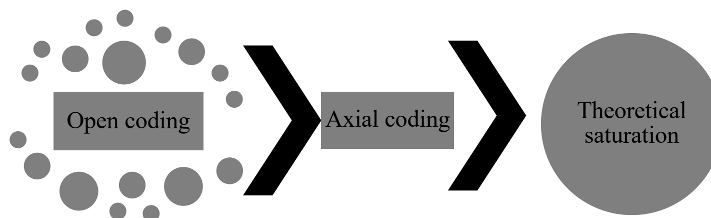


FIGURE 1: THE THREE STAGES OF DATA ANALYSIS USING GROUNDED THEORY

Although grounded theory in its original form requires that data analysis is conducted entirely independently of any theories concerning the dataset, in its more popular form, data analysis is conducted against the background of 'a wide range of cross-cutting and interdisciplinary ideas,'

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[2] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), Oxford Handbook of Empirical Legal Research (OUP, 2010).

[3] Antony Bryant, and Kathy Charmaz, *The SAGE handbook of grounded theory* (Sage Publications, 2007); Kubler V LaBoskey, 'The Methodology of Self-study and its Theoretical Underpinnings' in JJ Loughran et al (eds), *International Handbook of Self-study of Teaching and Teacher Education Practices* (Klewer Academic Publishers, 2004) 817, 817-870.

[4] Bryant and Charmaz (n 3) 5.

[5] Bryant and Charmaz (n 3) 15.

[6] See Chapter 4 'International Drug Trafficking: Factual Context.'

[7] Ian Dey, 'Grounding Categories' in Antony Bryant and Kathy Charmaz (n 3) 115.

so as to counter-balance the predominant assumptions of extant literature.[8] This also allows for the post-hoc 'grounding' of the emergent theory by considering the extent to which it is consistent with well-established multi-disciplinary knowledge.[9]

Some scholars draw a distinction between grounded theory and an 'abbreviated form' of grounded theory.[10] In its unabbreviated form, the researcher triangulates or tests the reliability results by reference to an unrelated dataset. This research deployed grounded theory in its abbreviated form because there was no viable unrelated dataset – such as interviews with convicted traffickers – by which the analysis could be validated. This was a consequence of funding, time and ethical constraints, given that the primary purpose of the research was to conduct a proportionality analysis, rather than to provide a coherent and reliable theory of the international drug trade at Australia's border.

### *B Limitations of grounded theory*

The main limitation of grounded theory is the possibility of confirmation-bias, particularly if the researcher approaches data analysis with background knowledge of an extensive and highly-theorised literature.[11] This limitation is of minimal concern here for the reasons outlined above. Additionally, the researcher purposefully undertook the data analysis after engagement with the available multi-disciplinary literature to counter-balance the predominant assumptions of each literature. This is recognised as an appropriate way to address this limitation.[12] That literature is summarised in Chapter 5.

### *C Application of grounded theory in this research*

Identification of the factual basis for sentencing proceeded as follows. The researcher first undertook a comprehensive review of available official information and multi-disciplinary scholarly literature on international drug trafficking and its participants (Chapter 5). To avoid misrepresenting the sentencers' descriptions of the phenomenon, the researcher recorded

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[8] Dey (n 7) 186.

[9] Ibid 177.

[10] For an explanation of grounded theory in its abbreviated form see KL Henwood and NF Pidgeon, 'Grounded Theory' in G Breakwell et al (eds) *Research Methods in Psychology* (Sage, 3rd ed, 2006)

[11] Dey (n 7) 186.

[12] Ibid 176.

verbatim from the sentencing remarks the court's description of the offender's prior life circumstances, his or her role in the offence, and any other available information about the broader enterprise in which the offender was involved and about the international drug trade more generally. Some cases, such as those in which the prosecution statement of facts referenced evidence from intercepted telecommunications, electronic surveillance devices and the forensic examination of computers or smartphones, provided a rich source of information about importation enterprises and participants beyond the offender. Cases where the offender gave oral evidence provided a rich source of information on how the person came to be involved in the offence.

During the 'open coding' stage, the researcher coded for information about offender demographics (including age, sex and nationality), drug type, drug weight, offender role and offender motivation. During the 'axial coding' stage, emergent themes comprised observed relationships between the logistics stream by which the drugs were imported and drug weight, offender ethnicity, offender role, and concealment method. Other emergent themes concerned offender motivation and remuneration, absence of violence within importation enterprises, absence of hierarchy within importation enterprises, vulnerability of offenders and the recruiting practices of importation enterprises.

| Most visible ethnicity | Logistics stream | Most visible roles | Drug weight | Drug concealment method | Profit of broader importation enterprise | Offender remuneration | Most visible motivation |
|---|---|---|---|---|---|---|---|
| Chinese | Mail | collect, coordinate | low | rudimentary | Low | low | income, debt cancellation |
| Various | Aircraft passenger/crew | carry | low | sophisticated | Low | low | debt cancellation |
| African | Air or sea cargo | coordinate | medium | sophisticated | Medium | low | income, profit |
| Chinese | Dedicated vessel | unpack | high | no concealment | High | low | income, debt cancellation |

Figure 2: Some emergent themes during the axial coding stage

By the time theoretical saturation was reached, the researcher had produced a taxonomy of importation enterprises and participants that comprehensively described the phenomena.

## III Establishing the legal basis for sentencing

Establishing the legal basis for sentencing – namely 'how' the court imposed the sentence – was considerably more straightforward than ascertaining the factual basis for sentencing. This is because the sentence formulation process is highly prescribed by reference to an established

legal and common law framework, so that a meaningful answer need only describe whether sentencing comports with or departs from that established framework. For example, if sentences comprise a component of 'general deterrence,' it is necessary to establish whether this term understood in practice in its retributive or utilitarian sense, and whether this differs from how the term is understood in applicable legislation or case law.

There is only one study of the sentencing of drug importers by Australian courts. That study was produced in 2014 by the Judicial Commission of NSW,[13] and analysed sentencing patterns between 2008 and 2012 to identify the 'factors most likely to influence sentence length'[14] and whether sentencing outcomes are consistent between the various States and Territories.[15] The study found that, across approximately 900 cases, key sentencing factors identified in intermediate appellate authority – such as maximum penalty, drug quantity and offender role – were predictive of sentencing outcomes,[16] as was one extraneous factor, namely the jurisdiction in which the offender was sentenced; sentences were generally harsher in NSW compared with most other States and Territories.[17] However, the study was merely qualitative and did not consider how judges formulated sentences. Such was the paucity of information in relation to the legal basis for sentencing that it was necessary to generate this information for this research. The author of the report found, using a regression analysis, that the statutory threshold drug quantity ( 'marketable' or 'commercial') and the drug quantity range for the drug imported (as low-, mid-, or high-range within each statutory threshold category) were the most significant factors affecting sentencing outcomes for all federal drug offences.[18] However, the author did not consider the statistical relevance of factors that would make an offence 'particularly serious' within the terms of the international drug conventions (such as offender involvements in organised crime, violence and/or corruption) nor matters impacting social, racial or gender inequalities. This was probably not an oversight by the researchers, but

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[13] Pirette Mizzi, 'Sentencing of Commonwealth Drug Offenders' (Research Monograph Series, No 38, Judicial Commission of New South Wales, June 2014) <https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/research-monograph-38.pdf>

[14] Ibid 3.

[15] Ibid 47.

[16] Ibid 24-25.

[17] Ibid 113.

[18] Ibid 93.

rather recognition that those matters are not doctrinally significant in applicable case law. Again, the best available resource for this purpose was 'sentencing remarks.' Sentencing remarks, which usually run from about 10 to 40 pages in length, explain in considerable detail the legal basis for sentence formulation, as well as the sentence outcome. Typical sentencing remarks for a drug importer describe the 'agreed facts' as summarised by the prosecutor, any expert evidence led by the prosecutor, and the submissions of the prosecutor, together with the plea in mitigation, any expert or other evidence led by the offender (including in some cases oral evidence by the prisoner), together with the sentencing judge's findings and reasons for sentence. The 'agreed facts' typically record the type and quantity of drugs imported by the offender, the method of importation and concealment and the offender's role in the importation. The prosecutor typically tenders expert evidence about the type, quantity and value of drugs imported, makes submissions about the seriousness of the offence, the role of the offender and the appropriate sentencing objectives, and identifies relevantly comparable first instance or intermediate appellate cases. Defence counsel makes submissions in reply to the prosecution's submissions and sometimes proffers expert evidence about the offender's mental health and/or evidence from the offender about his prior life circumstances, pathway into crime and remorse. If a prisoner were to seek a review of his or her sentence by an intermediate or ultimate appellate court, the sentencing remarks would form the basis for the review. Similarly, if a prisoner were to make an application to the HRC that his or her sentence violated his human rights under the ICCPR, the sentencing remarks would form the basis for review of the decision.[19] Sentencing remarks are therefore ideally suited to the research question. A preliminary review of a small sample of 15 sentencing remarks confirmed that sentencing remarks provided a rich source of information about legal basis for sentence. A methodology was needed by which to systematically analyse this information to ascertain how sentencing law was operated in practice. Content analysis, which is an approach to qualitative analysis used widely in legal research,[20] provided a suitable framework within which to do that.

### *A Content analysis*

Content analysis prescribes a methodology for qualitative analysis of text-based data to identify patterns and themes in relation to pre-defined reference points. It is a more systematised and

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[19] Based on past cases.

[20] Webley (n 2); Hall and Wright (n 1).

rigorous methodology than a traditional interpretative analysis of judicial decisions, which does not typically consider matters such as number of decisions and replicability of results.[21] Hall and Wright describe content analysis in relation to judicial decisions by way of a musical analogy: content analysis is the chorus, or the 'sound that the cases make together.'[22] By contrast, traditional interpretative analysis critiques the quality of the score. For the purposes of this research, the researcher was seeking to discover whether the chorus (first instance decisions) was faithful to the score. To do this, the researcher needed to 'listen' to a representative example of first instance decisions. A particular strength of content analysis for this purpose is that, unlike traditional interpretative analysis of judicial decisions, content analysis is normatively agnostic. Content analysis seeks to describe what courts do, rather than what they should do. Another advantage of content analysis in this context is that it eliminates 'casual meandering through the cases' in favour of a systemised analysis of each decision, each of which is equally important from the perspective of ascertaining how the law operates in practice.[23]

FIGURE 3: THE PROCESS OF DATA COLLECTION AND ANALYSIS USING CONTENT ANALYSIS

The process of data collection and analysis using content analysis is less iterative and more process-driven than under grounded theory. It merely involves sample selection, coding of data and reporting findings. However, the process of coding data was cumbersome because sentencers did not always specify how each sentencing consideration ultimately impacted sentence formulation. This was a consequence of sentence formulation by 'instinctive synthesis,' by which the court arrives at a particular sentence (such as imprisonment for 4 years 3 months) without explicit numerical attribution of weight to any or each sentencing factor or

[21] Hall and Wright (n 1).

[22] Ibid 63, 76.

[23] Ibid 63, 81.

factors.[24] For this reason, it was necessary for the researcher to infer, based on the sentencing judge's explicit statements, how these matters were ultimately synthesised or resolved in the final sentence. That necessarily involved an element of judgment on the part of the coder, and so introduced an element of subjectivity or imprecision. To reduce the extent of this imprecision, the researcher coded all data herself and recorded verbatim from the sentencing remarks information revealing the court's application of laws and the language used to describe the relative weight to be given to each sentencing consideration. For example, a sentencer may use strong language to discuss the importance of general deterrence but make no comment on the need for specific deterrence or rehabilitation. Rather than trying to ascertain the emphasis put on every sentencing consideration in every case, the researcher focused on the language used by the sentencer and drew inferences based on the sample in its entirety, by identifying patterns observed across multiple decisions; for example, from a pattern of emphasis on general deterrence and omission of references to specific deterrence.

*1 Limitations of content analysis*

Content analysis has been criticised on the basis that it provides a false sense of precision to an inherently subjective process.[25] But despite this flaw, the data set was just too valuable to be disregarded entirely.[26]

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[24] *Markarian v The Queen* (2005) 228 CLR 357 [51] ('*Markarian*'); *Pesa v The Queen* [2012] VSCA 109 [10]. The question of whether a judicial officer ought to formulate sentence by instinctive synthesis versus a 'staged' approach, whereby the judicial officer would explicitly describe the 'distinctive sequential steps or stages that would fully expose the reasoning why the particular sentencing outcome was chosen over all others,' has been a perennial issue in Australian sentencing: Richard Edney, 'Still Plucking Figures Out of the Air? Markarian and the Affirmation of Instinctive Synthesis (2005) 1(2) *High Court Quarterly Reivew* 50, 50-51. The instinctive synthesis methodology been strenuously criticised as opaque by some academic lawyers and some intermediate appellate courts, and the High Court was divided on the issue in *Markarian*. For an overview of the issue see Arie Freiberg, 'Sentencing' in D Chappel and P Wilson (eds) *Issues in Australian Crime and Criminal Justice* (Butterworths, 2005) 159-60; Mirko Bagaric, 'Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that is the Instinctive Synthesis' (2015) 38(1) *University of New South Wales Law Journal* 76; Terry Hewton, 'Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process' (2010) 31(1) *Adelaide Law Review* 79; Ivan Potas, 'Sentencing Methodology: Two-tiered or Instinctive Synthesis? (2002) 25 *Sentencing Trends and Issues* 1.

[25] Mark A Hall and Ronald F Wright (n 1).

[26] Ibid 97.

## IV Sample selection

Based on the abovementioned research by the Judicial Commission of NSW, there are approximately 155 persons sentenced nationally for drug importation offences each year.[27] Sentencing remarks are published at the discretion of each sentencing judge,[28] and are therefore only publicly available in a small proportion of cases. At the outset, the researcher aimed to identify all available sentencing remarks published online since 2014. The sample parameters therefore comprised all available published sentencing remarks for persons prosecuted under Div 307 of the *Criminal Code* (Cth) for importing a 'border controlled drug' or 'border controlled precursor' prosecuted under Div 307 of the *Criminal Code* (Cth)[29] nationally for the 5 years commencing in 2014. Sentencing remarks were ultimately obtained by the researcher for a total of 94 individual offenders between 1 January 2014 and 31 December 2018. This likely represents approximately 12 per cent of the population for the sample period.[30] Almost all decisions were 'first instance' sentences in the District or County courts, but some intermediate appellate decisions were included where the prisoner was re-sentenced and the factual basis for sentence formulation was sufficiently clear.

There were several limitations on the sample selection. First, because publication of sentencing remarks is at the discretion of the individual judge, many judges were likely excluded from the sample. Second, some judges tend to be allocated federal drug importation matters more than others, so that some judges were likely overrepresented in the sample. Third, some decisions would also have been suppressed from publication, for example, to protect the safety of

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[27] Mizzi (n 13) 76; the Judicial Commission of NSW identified 778 federal drug offences under Div 307 *Criminal Code* (Cth) between 1 January 2008 and 31 December 2012, which equates to an average of 155 cases per year.

[28] Based on telephone discussions with court registrars.

[29] 'Border controlled drugs' are defined in s 301.4 as 'a substance other than a growing plant that is (a) listed by a regulation as a border controlled drug; or (b) a drug analogue of a listed border controlled drug; or (c) determined by the AFP Minister as a border controlled drug under s 301.13 (which deals with emergency determinations of serious drugs).' 'Border controlled precursors' are defined in s 301.6(1) as 'a substance (including a growing plant) that is: (a) listed by regulation as a border controlled precursor; or (b) a salt or ester of a precursor that is so listed; or (c) an immediate precursor of a precursor that is so listed; or (d) determined by the AFP Minister as a border controlled precursor under s 301.14 (which deals with emergency determinations of serious drug precursors).' A 'drug analogue' is defined in s 301.9.

[30] Assuming that there was no increase in the number of importers arrested over the 5 years from 2014 to 2018, compared with the 5 years from 2008 to 2012.

informants. Those cases would have been under-represented in the sample too. Despite these limitations, sample selection was ultimately replicable and unbiased because the researcher used the 'universe' comprising all sentencing remarks available online during the three years to 31 December 2018.

## V Ethical considerations and research merit

No ethics approval was sought or required for this research because it involved use of publicly available data in which there is no reasonable expectation of privacy. Open justice and the ability to scrutinise government action – including judicial action – is a fundamental aspect of the Australian criminal justice system, and is protected via the implied constitutional right to freedom of political expression.[31] The merit of the research lies in its contribution to knowledge about and understanding of the sentencing process. The research has potential practical application in identifying and/or preventing systematic human rights violations in relation to the sentencing of a category of prisoners.

## VI Proportionality analyses

It is not practicable to conduct a proportionality analysis in respect of each case in the sample, and so the researcher selected six 'representative' cases to use as case studies, and generalised from those results. The use of grounded theory made it possible to identify cases that were factually representative of different groups within the taxonomy derived from the grounded theory analysis. In this way, the selection of representative cases is dictated by the theoretical model, rather than at the discretion of the researcher. This makes the methodology both rigorous and replicable. Similarly, use of content analysis made it possible to identify whether the law as applied in the factually representative cases was representative of the way in which the law is applied in practice in other cases.

## VII A note on case citations

Medium neutral citations are used for all cases in the sample, whether reported or not, because the citations are used merely to identify each case, rather than as an indicator of precedential value.

[31] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

## VIII CONCLUSION

In summary, the research methodology described above uses proven qualitative research methods to: generate a theoretical account of how offenders come to be sentenced for drug importation offences at the same time as collecting data on these persons, using a *grounded theory* analysis; create a picture of how Australian courts sentence drug importers in practice at the same time as collecting data on how courts formulate sentences, using *content analysis*; provide a systematic framework for selecting a range of cases that are both factually and legally representative of cases within the population; and ensure that that results of the proportionality analyses are generalisable. The research methodology is replicable and generates data that is as reliable as possible given the practical constraints of the research problem, most significantly, the lack of research on the international drug market and sentencing practice generally.

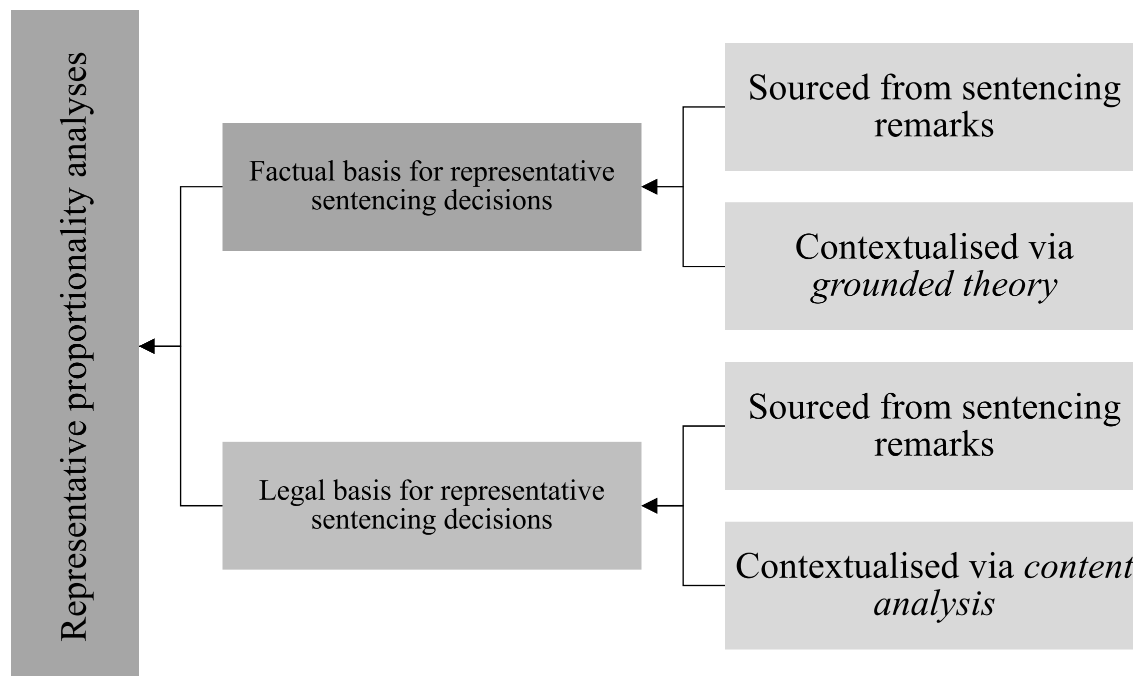


FIGURE 4: THE PROCESS OF DATA COLLECTION IN SUPPORT OF REPRESENTATIVE PROPORTIONALITY ANALYSES

Three anticipated outputs of the research are therefore: first, a theoretical account of how offenders come to be sentenced for drug importation offences at the same time as collecting data on these persons, using the *grounded theory* analysis; second, a description of how Australian courts sentence drug importers in practice; and third, the results of representative proportionality analyses. The ultimate research output comprises generalisation from these results to support a conclusion as to whether sentences imposed by Australian courts on drug importers are consistent with international human rights norms. The following chapter reviews

the history of international drug control policy including the development of the international drug conventions and their domestic implementation in Australian law. This provides context for the content analysis of sentencing remarks. Chapter 5 then reviews available official information and multidisciplinary scholarship on the international drug trade. This provides context for the grounded theory analysis of sentencing remarks. Subsequent chapters present the results of the research and conclusions.

# Chapter 3: International Drug Trafficking Policy Context – the Pivot Towards Human Rights and Implications for Domestic Sentencing

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*More than ever before, the global consensus recognises that the solution to [the world drug problem] lies in a more humane, public-health oriented, human-rights compliant, evidence-based approach that addresses this issue in all its complexity.*[1]

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## I Introduction

Over the past century, the emphasis in international drug control policy has gradually but firmly done an about-face, from attempting to eliminate supply – or blaming producer countries – to attempting to reduce demand – or blaming consumer countries. But the more significant development has occurred only over the past two decades. It is that international drug control bodies have acknowledged that the drug conventions are not an exception to international human rights norms, but are – and were always intended to have been – read and implemented subject to those norms. In March 2016, at the 30th Special Session of the United Nations General Assembly ('UNGASS 2016') the international drug control bodies emphasised the need for international drug control policy to comport with international human rights norms and acknowledged the potential for unintended human rights consequences of domestic drug control laws. Significantly, the General Assembly recommended that all countries promote 'proportionate national sentencing policies, practices and guidelines' for drug treaty offences and consider sharing 'information, lessons learned, experiences and best practices' on

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[1] Mogens Lykketoft, President of United Nations General Assembly speaking at the 70th Session of the United Nations General Assembly, quoted in David R Bewley-Taylor and Martin Jelsma, 'UNGASS 2016- A Broken or B-r-o-a-d Consensus?' (Drug Policy Briefing No 45, Transnational Institute, 2016) 2.

'proportional sentencing' for these offences.[2] This chapter provides a brief history of international drug control policy and its trajectory to this new era of human rights consciousness, followed by a brief history of the domestic implementation of international drug control policy. In so doing, the chapter identifies that Australia it is presently out of step with the international drug control policy consensus, in that it has not fully appreciated this new era of international human rights consciousness, with important implications for sentencing practice.

## II How international drug trafficking is regulated internationally

The origins of modern international drug control policy are comparatively recent. Worldwide concern about the potential dangers from the abuse of psychoactive drugs first emerged in the late 1800s and early 1900s. Prior to that, drugs had been used by almost all ancient and modern civilisations because 'people of every generation have needed chemicals to cope with life.'[3] By the 1800s the drug trade was a profitable international enterprise. Britain waged war with China twice during the late 1800's to secure the right to continue the export opium from the Indian colonies to the lucrative Chinese market.[4] In 1906 the Chinese emperor effectively banned the cultivation and smoking of opium due to concerns that tens of millions of his subjects were addicted to the drug in what amounted to a humanitarian crisis.[5] In that year domestic opium production in China was 35,000 tons,[6] and in 1906 official Chinese figures stated that opium consumption affected 23.3% of adult males and 3.5% adult females.[7] By way of comparison, the United Nations Office on Drugs and Crime ('UNODC') estimates that just under 7,000 tons were produced globally in 2013.[8]

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[2] *Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem* GA Res S-30/1, UN GAOR, 30th special session ('UNGASS 2016'), Agenda Item 8, UN Doc No A/RES/S-30/1 (19 April 2016) paras 4(k), 4(l), A/RES/S-30/1 2/21 19 April 2016.

[3] Richard Davenport-Hines, The Pursuit of Oblivion: *A Global History of Narcotics* (Norton 2002) 300.

[4] United Nations Office on Drugs and Crime, 'World Drug Report 2008' (Report, 2008) 173 <https://www.unodc.org/documents/wdr/WDR_2008/WDR2008_100years_drug_control_origins.pdf>

[5] Ibid 175.

[6] Ibid 24.

[7] Ibid 25.

[8] Ibid 37.

The first international meeting about the need to regulate drugs was the Shanghai Opium Commission held in 1909. The meeting was arranged by the United States and attended by delegates from the US and Austria-Hungary, China, France, Germany, Britain, Italy, Japan, Netherlands, Persia (Iran), Portugal, Russia and Siam (Thailand).[9] Attendees had a common motivation to address drug abuse domestically and/or in their respective colonies or external territories. Significantly though, Britain and the United States had a collateral agenda to stem falling demand for exports to China due to the rising total spend by Chinese consumers on opium. Producer countries had a collateral agenda too. Russia, for instance, sought to maintain a legitimate trade in the drugs. Notwithstanding their common motivation to reduce drug abuse, attendees held divergent views about what drugs to regulate and how. The contentious issues were whether to confine regulation to opium, or extend it to incorporate other drugs; whether to prohibit, licence or nationalise production; and whether to ban drug supply and/or use. The immediate outcome of the Shanghai Opium Commission was an acknowledgement by the parties of the need to regulate or control the consumption of opium in various forms, and an agreement to cease exports to China and work towards an international regulatory framework.[10] A compromise was eventually reached in the form of the *International Opium Convention* ( '*Opium Convention*').[11] The preamble to the *Opium Convention* recorded that the parties were '[d]etermined to bring about the gradual suppression of the abuse of opium, morphine, and cocaine…[and] drugs prepared or derived from these substances, which give rise or might give rise to particular abuses.' Producer countries were permitted to continue producing drugs provided they maintained production records and banned exports to countries that wished to stop imports. There is evidence that the British were proactive in broadening the scope of the agreement beyond opium, over objection from the United States.[12] The *Treaty of Versailles*,[13] which was signed on 28 June 1919, required parties who had 'not yet signed, or who have signed but not yet ratified, the *Opium Convention*…to bring the [treaty] into force,

[9] Ibid 173.

[10] Ibid 44-45.

[11] *International Opium Convention*, opened for signature 23 January 1912, 8 LNTS 187 (entered into force 28 June 1919).

[12] James H Mills, 'Cocaine and the British Empire: The Drug and the Diplomats at the Hague Opium Conference, 1911–12' (2014) 42(3) *The Journal of Imperial and Commonwealth History* 400.

[13] *Treaty of Versailles*, opened for signature 28 June 1919 ATS 1 (entered into force 21 October 1919).

and for this purpose to enact the necessary legislation without delay and in any case within a period of twelve months from the coming into force of the present Treaty.'[14] This ensured that all countries signing the peace treaty also became a party to this Convention and, inevitably, to subsequent conventions, regardless of the scale of their domestic drug problem. This is generally regarded as the beginning of the era of international drug control.[15] By 1949, 67 countries had ratified the convention.[16] Numerous additional international agreements followed.[17]

### *A The three international drug conventions*

Modern international drug control policy is recorded in three multilateral agreements facilitated by the United Nations. Those agreements are known collectively as the 'drug conventions' and comprise the *Single Convention on Narcotic Drugs, 1961* (the '*Single Convention*'),[18] the *Convention on Psychotropic Substances*, 1971 (the '*1971 Convention*'),[19] and the *Convention Against Illicit Traffic in Narcotic Goods and Psychotropic Substances*, 1988 (the '*1988 Convention*').[20] Each convention records the current state of the world drug problem, and sets out domestic measures that parties agree to implement in response. The Economic and Social Council ('ECOSOC')[21] has published an official commentary for each convention ('Official

[14] *Treaty of Versailles* art 295.

[15] World Drug Report 2008 (n 4) 180.

[16] Ibid 51.

[17] The *Opium Convention* restricted opium cultivation to seven states, comprising Bulgaria, Greece, India, Iran, Turkey, USSR and Yugoslavia, which were given monopoly rights to the licit trade in opium and a grace period of 15 years in which to cease production: *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in and use of Opium 1953 ('1953 Opium Protocol')* cited in World Drug Report 2008 (n 4) 59.

[18] *Single Convention on Narcotics Drugs 1961 ('Single Convention'),* opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

[19] *Convention on Psychotropic Substances ('1971 Convention'),* opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976).

[20] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('1988 Convention'), opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990).

[21] ECOSOC is an organ of the United Nations.

Commentary') which explains the intent of each provision of each convention to assist parties to understand and implement their treaty obligations domestically.[22]

### *1 The Single Convention*

The *Single Convention* consolidates all previous international conventions to establish the framework for international drug control and designate the bodies responsible for formulating and supervising compliance with international drug control policy. This framework requires parties to restrict the cultivation/production, distribution and consumption of listed narcotic drugs 'exclusively to medical and scientific purposes.'[23] The *Single Convention* designates the Commission on Narcotic Drugs ('CND')[24] and the 'International Narcotics Control Board ('INCB')[25] as the 'international drug control organs' and requires parties to establish executive agencies to administer convention obligations, and provide statistics and other information to the CND.[26] 'Drugs' are defined in art 1(1)(aj) as any of the substances listed in Schedule I (including cocoa leaf, cocaine, opium, concentrate of poppy straw, heroin, cannabis and cannabis resin) or Schedule II (including codeine). The drugs listed in Schedule II are subject to the same measures of drug control as drugs in Schedule I, subject to an exception regarding retail trade.[27] The term 'narcotic drugs' is used to refer collectively to all scheduled drugs. In terms of its supply-side measures, the *Single Convention* requires that states establish government agencies to supervise the production of drugs to meet domestic medical and scientific needs, and to control via licences, permits and other measures the import, export and wholesale distribution of drug stocks to prevent global oversupply and thereby diversion of

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[22] Adolf Lande, Commentary on the Single Convention on Narcotic Drugs 1961, UN Doc No E.73.XI.1 (1973) 1; Adolf Lande, Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, UN Doc No E/CN.7/588 (1976) 9; United Nations Office on Drugs and Crime, Commentary on the Convention on Psychotropic Substances UN Doc No E/CN.7/589 (1976); United Nations Office on Drugs and Crime, Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1998, UN Doc E/CN.7/590 (1998).

[23] *Single Convention* art 4.

[24] The CND is a functional commission of the ECOSOC.

[25] The INCB is a 13-member expert panel elected by the ECOSOC which provides independent and expert advice to the CND.

[26] *Single Convention* art 5, 18.

[27] *Single Convention* art 2(2).

stock into illicit markets.[28] In terms of its demand-side measures, the *Single Convention* requires that parties criminalise the cultivation, production, distribution and sale of drugs and ensure that 'serious offences' are liable to 'adequate' punishment 'particularly by imprisonment or other penalties of deprivation of liberty.'[29] The term 'serious offence' is not defined. The Official Commentary to the *Single Convention* states that in order to be 'adequate' the penalties must be 'sufficiently severe to have the desired [deterrent] effect under the special conditions of the country in which they are imposed'; and that 'fines alone' would 'in no cases constitute an 'adequate' punishment' for serious offences of the illicit traffic.'[30] In terms of dealing with addiction, the *Single Convention* requires parties to afford drug abusers 'treatment, education, after-care, rehabilitation and social reintegration' 'either as an alternative to conviction or punishment or in addition to conviction or punishment.'[31]

*2 The 1971 Convention*

The *1971 Convention* supplements the *Single Convention* by bringing a lengthy list of 'psychotropic substances'[32] within an identical drug control regime. 'Psychotropic substances' are defined in art 1 as any substances, natural or synthetic, or any natural material, listed in Schedule I, II, III and IV. The schedules include a wide range of psychoactive substances, such as various amphetamines, opiates, benzodiazepines, barbiturates, and hallucinogens. To keep pace with changes in consumption, the *1971 Convention* also empowers the CND, on the advice of the World Health Organisation ('WHO'), to bring new natural or synthetic substances within the regime through notification protocols.[33] In terms of punishment, the *1971 Convention* continues to require parties to ensure that 'serious offences' are liable to 'adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty' but again

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[28] *Single Convention* art 22 (opium poppy),

[29] *Single Convention art* 36(1).

[30] Lande (n 22) 429.

[31] *Single Convention* art 36 (1)(b); the Official Commentary states that parties will normally only adopt this course 'in the case of relatively minor offences such as the illicit sale of comparatively small quantities of narcotic drugs for the purpose of obtaining the financial means required to support the seller's drug dependence, or the supply…to a friend abusing it' Lande (n 22) 77.

[32] Defined in art 1(e) to mean any natural or synthetic substance or material listed in Schedules I, II, III or IV of the *1971 Convention.*

[33] Ibid art 2.

fails to define the term 'serious offences.'[34] The Official Commentary states that whether an offence is 'serious' in terms of art 22 'should be decided principally in the light of its potential for causing, directly or indirectly, damage to the health of people other than the offender, particularly of people residing in other countries than that in which the offence is committed.'[35] The Official Commentary also emphasises that a penalty is 'adequate' in relation to a 'serious offence' 'only if it includes imprisonment or another form of deprivation of liberty.'[36] In terms of dealing with addiction, the *1971 Convention* again permits parties to divert users from the criminal justice system and into treatment.[37]

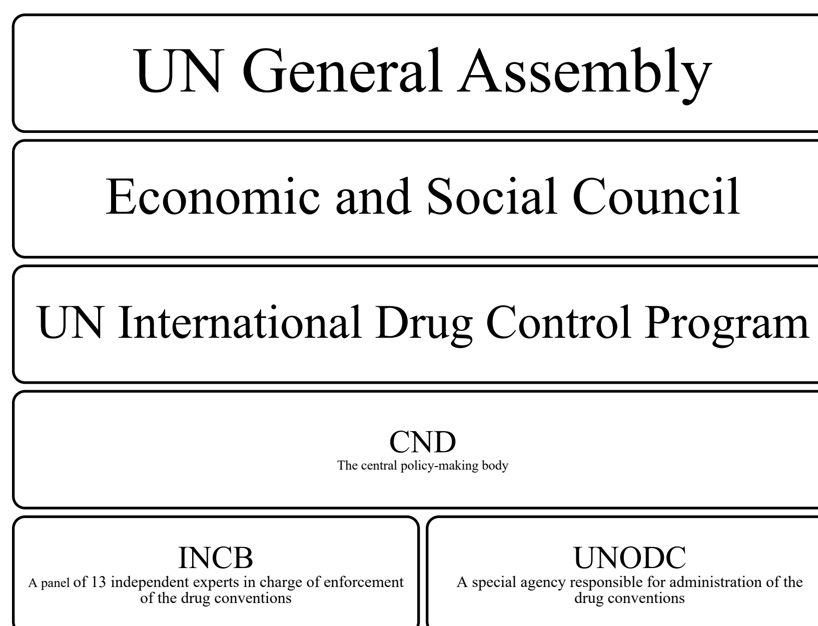


FIGURE 5:THE UN DRUG CONTROL BODIES.

*3 The 1988 Convention*

The *1988 Convention* reaffirms and supplements both the *Single Convention* and the *1971 Convention* 'in order to counter the magnitude and extent of illicit traffic and its grave consequences.'[38] This convention covers both 'narcotic drugs', defined as 'any of the substances, natural or synthetic, in Schedules I and II of the *Single Convention*', and

[34] Ibid art 22 (1)(a).

[35] United Nations Office on Drugs and Crime (n 22) 348.

[36] United Nations Office on Drugs and Crime (n 22) 352.

[37] *1971 Convention* art 22 (1)(b).

[38] *1988 Convention* Preamble.

‘psychotropic substances’, defined as ‘any substance, natural or synthetic, or any natural materials in Schedules I, II, III and IV of the *1971 Convention*.’[39] The *1988 Convention* emphasises the need for each country to have a well-developed criminal justice system so that sophisticated transnational operators cannot evade justice or hide their criminal profits due to a lack of mutual assistance, extradition or criminal assets confiscation arrangements.[40] Article 3 requires parties to establish a modern code of criminal offences concerning all aspects of international drug trafficking from the sourcing of precursor chemicals through to the laundering of proceeds of crime. The Official Commentary describes art 3 as ‘central’ to the promotion of the goals of the convention.[41] In terms of penalties, art 3 requires parties to make the commission of drug treaty offences liable to sanctions that consider the ‘grave nature’ of these offences, ‘such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation,’[42] but the Official Commentary points out that these penalties aren’t intended to be either indicative or cumulative:

> In paragraph 4, subparagraph (a), sanctions are required which adequately reflect the ‘grave nature’ of the offences specified in article 3, paragraph 1. The list of types of sanctions is intended to be neither exclusive nor necessarily cumulative. These sanctions, singly or in combination, are among those that should be deployed.[43]

Rather than requiring that ‘particularly serious’ offences receive ‘adequate’ punishment as in the earlier conventions, the *1988 Convention* requires that parties ensure their courts can ‘take into account’ the factual circumstances which make the offences ‘particularly serious,’ such as:[44]

> (a) The involvement in the offence of an organised criminal group to which the offender belongs; (b) The involvement of the offender in other international organised criminal activities; (c) The involvement of the offender in other illegal

[39] *1988 Convention* art 1.

[40] United Nations Office on Drugs and Crime (n 22) 49.

[41] Ibid 48.

[42] Ibid 85.

[43] United Nations Office on Drugs and Crime (n 22) 85 [3.103].

[44] *1988 Convention* art 3(5).

> activities facilitated by the commission of the offence; (d) The use of violence or arms by the offender; (e) The fact that the offender holds a public office and that the offence is connected with the office in question; (f) The victimisation or use of minors; (g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility…'[45]

Art 3(5) effectively differentiates 'particularly serious' offending from other offending on the based on the policy concerns underpinning the international drug conventions, namely, serious threats to 'the health and welfare of human beings' or to the 'economic, cultural or political foundations of society.' The Official Commentary notes that 'two examples given in the course of the negotiations [for the convention] were arms smuggling and international terrorism.'[46] Paragraph 5 implicitly excludes mandatory sentences for drug trafficking and the making of assumptions about a person's 'involvement in' any of the conduct listed in paragraphs (a) to (h), because a factual inquiry is called for. Sub-para (a) explicitly excludes from the category of 'particularly serious' offences conduct by a person in the offence of an organised criminal group in circumstances where the offender did not 'belong' to that group. Where there is no evidence of the offender's involvement in any of the matters listed in paragraph 5, the offence would not be regarded as 'particularly serious' under the *1988 Convention*. It follows that poverty-induced or opportunistic drug trafficking by persons who do not belong to violent or subversive organised criminal groups would not amount to 'particularly serious' offending under the *1988 Convention.* There is nothing in the earlier international drug conventions that would require a custodial penalty for such offences either. This thesis contends that the imposition of custodial penalties for such offences may also violate international human rights norms.

Read together, the three conventions describe the world drug trade and associated problems as escalating over time. The Preambles to both the *Single Convention* and the *1971 Convention* describe the Parties as 'concerned' for the 'health and welfare of mankind/human beings,' which suggests that these conventions were intended to have a public health focus.[47] By contrast, the *1988 Convention* describes the parties as 'deeply concerned' with the adverse

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[45] Ibid.

[46] United Nations Office on Drugs and Crime (n 22) 91.

[47] Lines et al, 'The Case for International Guidelines on Human Rights and Drug Control' (2017) 19(1) *Health and Human Rights Journal* 231, 232.

effects of the drug trade on 'the economic, cultural and political foundations of society' as well as the 'health and welfare of human beings.'[48] Lines et al argue that the 'centrality of public health and welfare is absent' from the *1988 Convention*.[49] Yet, despite this repositioning of the concern, the *1988 Convention* did not sanction any type or minimum quantum of punishment for drug treaty offences, nor even for 'particularly serious' offences.[50] On the contrary, the Official Commentary to the *1988 Convention* points out that parties adopting 'stricter measures' than those required by the text must ensure that 'such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights.'[51] Nevertheless, Lines et al argues that the overall impression given by the *1988 Convention* and Official Commentary is that punitive measures not only can, but must, be pursued, at the expense of human rights:

> Floors have been established with no ceilings. In many cases this is an invitation to governments to enact abusive laws and policies, especially in a global context where drugs and drug trafficking are defined as an existential threat to society and the stability of nations, and people who use drugs and those involved in the drug trade are stigmatized and vilified.[52]

To this end, Lines et al observe that '[a]t an operational level, the UN exerts little energy toward ensuring that the domestic drug laws mandated by the treaties are drafted and implemented in a way that safeguards human rights,'[53] thereby encouraging the punitive approach adopted by many countries.

### *B The new human rights consciousness*

From the early 1990s there was considerable scholarly concern about the lack of explicit protection mechanisms in international drug control policy for human rights, and question

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[48] *1988 Convention* Preamble, 1.

[49] Lines et al (n 47) 232.

[50] United Nations Office on Drugs and Crime (n 22) 49.

[51] United Nations Office on Drugs and Crime (n 22) 49.

[52] Lines et al (n 47) 232.

[53] Lines et al (n 47) 233.

marks over how the international drug conventions fit with international human rights norms.[54] Lagging about 10 years behind the academic scholarship, international drug control bodies have slowly but progressively clarified that the international drug conventions must be read subject to international human rights norms.[55] At the United Nations General Assembly 20th Special Session ('UNGASS 1998'), the General Assembly adopted a Political Declaration which formalised the need for international drug control policy to be implemented in conformity with the Charter of the United Nations,[56] formalised the shift in policy emphasis from eliminating supply to reducing demand,[57] and committed to addressing the unintended human rights consequence of crop eradication programmes through 'alternative development.'[58] The catalyst for the resolutions was that Mexico was experiencing unprecedented and escalating violence and loss of state control to well-resourced and well-armed drug cartels,[59] and Latin America was struggling to bear the social costs of prohibition-oriented drug control policies. Drug crop eradication programmes had displaced and impoverished thousands of peasant farmers, and prisons were unable to cope with the mass incarceration of users and low-level traffickers. It took a further decade for the international

[54] Lines et al (n 47) 232.

[55] See, for instance, Neil Boister, 'Human Rights Protections in the Suppression Conventions' (2002) 2(2) *Human Rights Law Review* 199.

[56] 'We the States and Members of the United Nations…2. Recognise that action against the world drug problem is a common and shared responsibility requiring an integrated and balanced approach in full conformity with the purposes and principles of the Charter of the United Nations…': *Political Declaration* GA Res, UN GAOR, 20th special sess, Agenda Items 9, 10 and 11A/RES/S-20/2 (21 October 1998) Annexure III, 5.

[57] 'We the States and Members of the United Nations…17. *Recognise* that demand reduction is an indispensable pillar in the global approach to countering the world drug problem, commit ourselves to introducing into our national programmes and strategies the provisions set out in the Declaration on the Guiding Principles of Drug Demand Reduction…': *Political Declaration* GA Res, UN GAOR, 20th special sess, Agenda Items 9, 10 and 11A/RES/S-20/2 (21 October 1998) Annexure III, 6.

[58] 'We the States and Members of the United Nations…18. *Reaffirm* the need for a comprehensive approach to the elimination of illicit narcotic crops in line with the Action Plan on International Cooperation on the Eradication of Illicit Drug Crops and on Alternative Development…': *Political Declaration* GA Res, UN GAOR, 20th special sess, Agenda Items 9, 10 and 11A/RES/S-20/2 (21 October 1998) Annexure III, 6.

[59] Tom Blickman, 'Caught in the Crossfire' (Transnational Institute and Catholic Institute for International Relations, 1998) 2; Pien Metaal, 'Drug policy in the Americas – A New set of Latin American Policy Proposals' (2012) 12(3) *Drugs and Alcohol Today* 3.

drug control bodies to acknowledge the full extent of the unintended consequences of the prohibition-focused international drug control policies of the past 50 years. This what the UNODC Executive Director had to say:

> [T]oo many people in prison; too few people in treatment; too few resources in enforcement; too few resources in prevention, treatment, rehabilitation and harm reduction; too little machinery for international cooperation to reduce the demand for illicit drugs and mitigate their negative consequences;…too much emphasis on illicit crop destruction, and too few resources for development assistance to farmers.[60]

At a High Level Segment of the CND in 2009 ('HLS 2009') member states committed to ensuring that international drug control policy conforms with 'the Charter of the United Nations, international law and the Declaration of Human Rights,'[61] but the associated Plan of Action included few concrete strategies for addressing each of the issues identified above, other than in relation to alternative development programmes.[62] At the time of the High Level Segment of the CND in 2014 ('HLS 2014') the market for stimulants had grown, as had poly-substance abuse, there was an increase in smuggling by sea due to porous maritime borders,[63]

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[60] Costa, Antonio Maria, *Making Drug Control 'Fit for Purpose': Building on the UNGASS Decade,* UN Doc No E/CN.7/2008/CRP.17 (7 May 2008).

[61] The full paragraph in which these words appear is: '*We, the States Members of the United Nations*, …1. *Reaffirm* our unwavering commitment to ensure that all aspects of demand reduction, supply reduction and international cooperation are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights and, in particular with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States, all human rights, fundamental freedoms, the inherent dignity of all individuals and the principles of equal rights and mutual respect among States…' United Nations Office on Drugs and Crime, 'Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, High Level Segment, Commission on Narcotic Drugs, 11-12 March 2009' (2009).

[62] For instance, in relation to demand-reduction strategies, the parties agreed to 'encourage dialogue' with 'human rights bodies' (18); in relation to supply-reduction strategies, the parties agreed to 'ensure that supply-reduction measures are carried out in full conformity with the purposes and the principles of the Charter of the United Nations and…all human rights and fundamental freedoms' (27).

[63] Commission on Narcotic Drugs, *Report on the Fifty-seventh Session (13 December 2013 and 13-21 March 2014),* UN Doc No E/2014/28 E/CN.7/2014/16 (22 April 2014) 81.

and Afghanistan had produced a record opium harvest.[64] There was also a new surge in drug-related violence in Latin America, West Africa and West Asia.[65] But in the spirit of the new era of human-rights aware policy formulation the UNODC Executive Director's report cautioned against a return to harsh, prohibition-focused policies:

> The conventions are not about waging a 'war on drugs' but about protecting the 'health and welfare of mankind.' They cannot be interpreted as a justification – much less a requirement – for a prohibitionist regime…[66]

The 30th Special Session of the United Nations General Assembly ('UNGASS 2016') again confirmed that the General Assembly is committed to addressing the world drug problem in full conformity with human rights. The pre-negotiated outcome document was unambiguous:

> We reaffirm our unwavering commitment to ensuring that all aspects of demand reduction and related measures, supply reduction and related measures, and international cooperation are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights, with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States, all human rights, fundamental freedoms, the inherent dignity of all individual sand the principles of equal rights and mutual respect among States. [67]

The outcome document made specific provision with respect to the need for promoting 'proportionate national sentencing policies, practices and guidelines' for drug treaty offences and, encouraged parties to consider sharing, via the CND, 'information, lessons learned, experiences and best practices on…proportional sentencing' ('Resolutions 4(k) and (l)').[68] Following adoption of the outcome document, more than half of the nations represented, including Australia, made statements expressing disappointment that the outcome document

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[64] Antonio Maria Costa, *Contribution of the Executive Director of the United Nations Office on Drugs and Crime to the High-level Review of the Implementation of the Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, to be Conducted by the Commission on Narcotic Drugs in 2014*, UN Doc No UNODC/ED/2014/1 (6 December 2013) 8.

[65] Costa (n 64) 9.

[66] Ibid 14.

[67] UNGASS 2016 (n 2) Annex 2/21.

[68] UNGASS 2016 (n 2) Annex 13/21 para 4(k), (l).

did not recommend the abolition of the death penalty.[69] Only Indonesia, Oman, Iraq and UAE defended the sovereign right of nations to impose the death penalty. In the round-table conferences leading up to UNGASS 2016 speakers from 73 nations made statements emphasising human rights issues in international drug control,[70] as did many observers, including the WHO, the UNHCHR, the International Drug Policy Consortium ('IDPC')[71] and Penal Reform International ('PRI').[72,73] Several speakers referred to the importance of 'ensuring the proportionality of sentencing and alternatives to conviction or punishment, especially for persons who committed minor, non-violent drug related offences,' such as small-scale international drug trafficking.[74]

### *C From consciousness to action on human rights*

Resolutions 4(k) and (l) confirm that domestic sentencing practices for drug treaty offences are now firmly on the international human rights radar; and that sentencing practices can no longer be ignored on the basis that this is a purely domestic issue. Resolution (k), which encourages sharing information on domestic sentencing practices, will likely provide a catalyst for research into how to identify, measure and address potential human rights violations in sentencing beyond death penalty cases. This thesis contributes to that outcome by proposing the doctrine of constitutional proportionality as the appropriate methodology for resolving the competing objectives of the drug treaty offences and international human rights norms when sentencing an offender. Meanwhile, the gap between discourse and practice remains vast.[75]

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[69] Ban Ki-Moon, *Report of the Commission on Narcotic Drugs on its Preparatory Work for the Special Session of the General Assembly on the World Drug Problem to be Held in 2016*, UN Doc No A/S-30/4 (31 March 2016) 16.

[70] Ibid 7.

[71] According to its website, the IDPC is 'a global network of 154 NGOs that focus on issues related to drug production, trafficking and use' <http://idpc.net/about>.

[72] According to its website, PRI is 'an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide' <https://www.penalreform.org/about-us/>.

[73] Ki-Moon (n 69) 12.

[74] Ibid 13.

[75] Lines et al (n 47) 234.

## III AUSTRALIA'S DOMESTIC IMPLEMENTATION OF DRUG TREATY OFFENCES

The history of Australia's domestic implementation of the drug treaty offences reveals that Australia enacted its importation offences without any regard to international human rights norms and has never updated its laws.

### *A 1800s - WWII*

During the 1800s opium and other substances that would now be considered illicit drugs were freely available from doctors, pharmacists and grocers, and were also used in proprietary medicines such as Bonnington's Irish Moss (which contained opium and morphine), Cherry Pectoral (which contained morphine) and Ayer's Sarsparilla Mixture (which contained opium).[76] Drug dependency was attributable to the therapeutic use of preparations such as these rather than what is presently regarded as deliberate, self-destructive addiction.[77] During this period, the four motivations of the Colonial Parliaments were to raise revenue, to serve the commercial interests of pharmacists (who sought a monopoly in favour of themselves over so-called 'quacks'), to reduce the risk of drugs being used in accidental or intentional poisonings, and – alongside the provisions of the *Immigration Restriction Act 1901* (Cth), which implemented the 'White Australia Policy' – to visit prejudice upon the Chinese diaspora:

> Like legislation enacted in Canada and the United States, the prohibition of opium smoking was a symptom of this racism. Not the pernicious concealment of opiates in patent medicines, nor yet the common habit of laudnam-drinking, were penalised. Only opium in the form used almost exclusively by the Chinese was outlawed. The smoking of opium was hated as a symbol of the Chinese, as an agent of vice, lethargy and filth, and as the tool by which 'innocent white girls' were allegedly seduced by 'lustful and unscrupulous Chinamen.' [78]

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[76] Jennifer Norberry, 'Illicit Drugs, their Use and the Law in Australia' (Background Paper, No 12, Parliamentary Library, Law and Bills Digest Group, 20 May 1997).

[77] Desmond Manderson, 'Trends and Influences in the History of Australian Drug Legislation' (1992) 22(3) *Journal of Drug Issues* 507, 508.

[78] Ibid 509 citing *The Bulletin*, 21 August 1886, 11-15.

Import duties were levied via various *Duties Acts*,[79] various *Poisons Acts* restricted to certified pharmacists the sale of what would now be regarded as illicit drugs,[80] and opium smoking was controlled via various *Opium Acts*.[81] From the 1900s, the newly formed Commonwealth Parliament used drug laws to demonstrate conformity with the international consensus that was emerging around prohibition and robust supply-side regulation, and the federal bureaucracy exerted pressure on the State Parliaments to conform.[82] Initially, the motivation of the Commonwealth Parliament was to avoid embarrassing the Mother Country, and after WWII, to assert Australia's place in the international community.[83] Manderson contends that these motivations eclipsed any desire to assess the scale of the domestic 'drug problem' and tailor appropriate solutions:[84]

> [T]he growing US-led international consensus affected not only the specifics of drug legislation, but the whole climate of bureaucratic opinion in Australia. It was a powerful influence in shaping what was normal and acceptable in terms of drug legislation. Exactly because drug policy was not seen as particularly important, Australian drug policy allowed itself to be influenced by the stronger opinions of others.

The background to the decision to ban the consumption of heroin is instructive. By mid-century, the United Nations had publicly declared that Australia was one of the highest per capita users of heroin in the world, with 5.25 kg consumed per million people compared with

[79] For instance, the *Opium Duties Act 1857* (NSW), which imposed a duty of 'ten shillings upon and for every pound avoirdupois weight thereof;' the *Customs and Excise Duties Act 1890* (Vic).

[80] For instance, the *Poisons Act 1902* (NSW) and the *Poisons Act 1915* (Vic).

[81] For instance, the *Opium Smoking Prohibition Act 1905* (Vic).

[82] Manderson (n 77) 517.

[83] Ibid. Manderson writes that ratification of the *1931 Convention* 'was taken following a telegram from Stanley Bruce, then minister without portfolio in London, to Prime Minister Lyons which pointed out that the 'United Kingdom has taken the necessary legislative action to ratify the Convention within the specified time' and, further, that Canada had of their own accord 'already approved the Convention.' Ratification was not the consequence of independent thought but because otherwise 'the United Kingdom government would be seriously embarrassed,'' citing archival correspondence.

[84] Ibid 515.

2.2 kg per million people in the United Kingdom, and virtually nil for the United States.[85] These statistics likely vastly exaggerated any heroin 'problem' in Australia by counting the large quantities of heroin lawfully used in the wide range of proprietary preparations, including cough mixture.[86] The States and the Federal Council of the British Medical Association in Australia ('BMA') vehemently opposed the ban. They argued that heroin use in Australia was adequately controlled and therefore not problematic, and further that an absolute ban would deprive the medical profession of a drug 'frequently prescribed in childbirth and for the treatment of intractable pain and cancers.'[87] But this opposition was eventually overborne by the Commonwealth bureaucracy:

> [T]he Commonwealth was aware of the 'embarrassment' being caused to its international reputation by Australia's high level of heroin consumption. An enquiry held by the Commonwealth Department of Health, which had emphasised the international ramifications of the problem, reported in 1952 'that serious consideration be given to complete prohibition in medical practice.' With only a sham of consultation with the states and medical profession, the Commonwealth acted to prohibit absolutely the importation of heroin in June 1953, and then began to pressure the states into enacting parallel legislation prohibiting its manufacture, use and possession, these matters being within their exclusive legislative competence. Yet, as we have seen, this decision, which still profoundly affects the structure of drug use and abuse in Australia today, was not made thoughtfully or independently. Like the development of drug policy in general, it reflected an obedience to international opinion and the growing acceptance and use of stereotypes about evil and/or helpless addicts regardless of the actual situation in Australia.[88]

Ultimately, heroin and other illicit drugs became unobtainable in Australia because of the import ban. Once hospital stockpiles of the drugs were exhausted, they could not be prescribed by medical practitioners for either pain relief or the maintenance of addiction.[89]

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[85] Ibid 516 citing United Nations, 1953, 49.

[86] Ibid 516.

[87] Ibid 516-517.

[88] Ibid 517.

[89] Ibid 518.

### *B Post-WWII*

Post-WWII, Australia's military, cultural and economic shift towards the United States reinforced the need to maintain a tough prohibitionist stance.[90] Australia assiduously implemented its obligations pursuant to each of the three international drug conventions, which it understood as requiring a prohibitionist and heavily deterrent regime. The Commonwealth Parliament implemented the *Single Convention* of 1961 via the *Narcotic Drugs Act 1967* (Cth) and amendments to the *Customs Act 1901* (Cth). The *Narcotic Drugs Act 1967* (Cth) provided a licensing, permit and record-keeping system for the manufacture and distribution of drugs covered by the *Single Convention*. The amendments to the *Customs Act 1901* (Cth) increased the penalties for importing narcotic goods, to 'a fine not exceeding four thousand dollars or imprisonment for a period not exceeding ten years, or both.'[91] The Second Reading speech to the Customs Bill 1967 (Cth) reveals the Parliament's firm belief in the deterrent effect of statutory maxima:

> [Mr Howson, Minister for Air] As I mentioned previously in introducing into this House the Narcotic Drugs Bill, obligations which Australia will assume on ratification of the Single Convention on Narcotic Drugs 1961 require that adequate penalties are provided for serious offences involving narcotic drugs… The financial returns which these unscrupulous dealers in human misery stand to gain from their illicit activities are very high and it is certain that financial inducements will increase as the effect of the international campaign against narcotic drugs and drug addiction gradually reduces supplies and distribution avenues. It is essential therefore that salutary penalties, particularly penalties of imprisonment, be provided which will act as positive deterrents to any who might otherwise be tempted by the prospect of rich rewards to engage in the illicit trade in narcotic drugs. [92]

The speech also reveals the Parliament's view that the *Single Convention* required – and these amendments delivered – sufficiently deterrent penalties:

> Substantial penalties are required for narcotics offences in accordance with obligations which Australia will shortly assume on ratification of the United Nations Single Convention on Narcotic Drugs 1961. The penal provisions of the

[90] Ibid 519.

[91] Section 235(1).

[92] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 May 1967 (Peter Howson).

> single Convention require that serious offences involving narcotic drugs shall be liable to adequate punishment. As I mentioned when introducing the Narcotics Drugs Bill, the Standing Committee of Commonwealth and State Attorneys-General has considered the question of what constitutes adequate punishment and has recommended that persons guilty of serious offences involving narcotics be liable to certain penalties. This Bill makes provision for penalties in accordance with the Committee's recommendation. [93]

During the 1960s the States gradually removed prohibitions on the non-medical use of drugs, including hallucinogens, from *Poisons Acts* into criminal justice legislation. Meanwhile, the Commonwealth implemented the *1971 Convention* via the *Psychotropic Substances Act 1976* (Cth) and amendments to the *Customs Act 1901* (Cth). The amendments to the *Customs Act 1901* (Cth) expanded the investigative powers of Customs officers to include the use of listening devices under warrant, increased penalties for drug trafficking, and introduced a civil scheme for confiscation of the proceeds of Commonwealth drug crimes. Penalties for importing 'narcotic substances' (other than cannabis) were increased to life imprisonment for offences involving a commercial quantity of the substance, or a traffickable quantity where the offender had a prior conviction for a similar offence.[94]

By the late 1980s, Australia had become influential in shaping international drug control policy, including by way of its active role in drafting the *1998 Convention*, which Australia ratified in 1990 and implemented via the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) ('the *TINDAPS Act*') and further amendments to the *Customs Act* 1901 (Cth). The then Attorney-General, Michael Duffy, explained Australia's role in drafting the *1998 Convention* in his Second Reading Speech:

> It was because of our commitment to international law enforcement cooperation that Australia played a prominent role in the development of a new United Nations convention whose purpose is to ensure that the international community co-operates in the adoption of a wide range of measures aimed at stemming the illicit drug trade.

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[93] Ibid.

[94] *Customs Amendment Act 1979* (Cth) s 12. The maximum penalty for importing a commercial quantity of cannabis was increased from 10 years' imprisonment and/or a fine of $4,000 to 25 years' imprisonment and/or a fine of $100,000 for an offence involving a traffickable quantity; and to 2 years imprisonment and/or a fine of $2,000 for an offence either not involving a traffickable quantity, or that was not committed for a commercial purpose.

> Australia's ratification of this convention will achieve one of the aims of the national campaign against drug abuse, which has the support of all governments in Australia...[95]

The *TINDAPS Act* defined 'narcotic drugs' and 'psychoactive substances' by reference to lengthy schedules based on the Convention. As Australia already had a modern code of criminal offences concerning all aspects of international drug trafficking, including mutual assistance and extradition, there was no need for further amendments for Australia to comply with Art 3 of the Convention. In his Second Reading Speech, Mr Duffy pointed out that ratification of the *1998 Convention* did not commit Australia to pursuing a particular mix of drug control measures nor prevent courts from affording leniency to users, who were by that time increasingly characterised as victims of, rather than purveyors of, the drug trade, and that courts would only impose imprisonment as a last resort, pursuant to s 17A of the *Crimes Act 1914* (Cth).[96]

### *C Present day*

The international drug trafficking provisions were eventually removed from the *Customs Act 1901* (Cth) and inserted into the *Criminal Code* (Cth) in 2005 as part of the Model Criminal Code Officers' Committee ('MCCOC') project.[97] Section 300.1(1) of the *Criminal Code* (Cth) expressly states that these offence provisions give effect to the *1988 Convention*:

> The purpose of this Part is to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988.

Div 307 of the *Criminal Code* (Cth) replaced the 80-year old illicit drug importation offence in s 233B of the *Customs Act 1901* (Cth). Section 307.1, 307.2 and 307.3 created the offences of importing or exporting a commercial quantity, marketable quantity or other quantity of

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[95] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 May 1967 (Peter Howson).

[96] Ibid.

[97] A project established in 1991 by the Standing Committee of Attorneys General to prepare a model code of criminal laws for the Commonwealth, which could then be adopted by all States and Territories. The project has only been implemented by the Commonwealth in the form of the *Criminal Code* (Cth), which has effect pursuant to s 3 of the *Criminal Code Act 1995* (Cth). For a discussion of the history and work of MCCOC see Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28.

‘border controlled drugs’ or plants respectively. The maximum penalties remained unchanged. ‘Border controlled drugs’ are defined in s 301.4 and 301.5 respectively by reference to regulations, and include ‘drug analogues,’ which are defined in s 301.9 to include a ‘stereoisomer,’ ‘structural isomer having the same constituent groups’ or an alkoloid’ in relation to the listed drug. The new legislation enabled new drugs to be added to the list of ‘border controlled drugs’ or plants by ministerial determination. The Second Reading speech explained that the new offence provisions were moved into Part 9.1 of the *Criminal Code* (Cth) from the *Customs Act 1910* (Cth) as part of the national project to implement ‘model’ drug offences, rather than because of any requirement under the drug conventions.[98] No Australian sentencing case has considered art 3 of the *1998 Convention*, but there is no doubt that a court is entitled to consider this because of the express reference to the *1998 Convention* in s 300.1(1) of the *Criminal Code* (Cth) and because s 16A(2) of the *Crimes Act 1914* (Cth) expressly permits the court to take into account ‘any other matters known to the court’ when sentencing an offender.[99]

Australia’s policy approach to managing illicit drug use is set out in the National Drug Strategy 2017-2026 (‘NDS’), which is a 10-year agreement between the federal, state and territory governments.[100] The stated purpose of the NDS is to identify national priorities, guide government action and reinforce Australia’s commitment to ‘harm minimisation’ ‘through balanced adoption of effective demand, supply and harm reduction strategies.’[101] The document records Australia’s commitment to ‘harm minimisation’ and to ‘evidence-informed responses’ for ‘funding, resource allocation and implementation’ of the NDS.[102] The NDS lists implementing Australia’s obligations under international treaties and the imposition of ‘meaningful’ penalties as examples of evidence-informed approaches to supply reduction.[103]

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[98] Commonwealth, *Parliamentary* Debates, House of Representatives, 26 May 2005 (Philip Ruddock).

[99] Additionally, the *1998 Convention* is annexed to the *TINDAPS Act*, in Schedule 1.

[100] Department of Health, ‘National Drug Strategy 2017-2026’ (Department of Health, 2017) <https://beta.health.gov.au/resources/publications/national-drug-strategy-2017-2026> 1; Cathy Claydon et al, ‘National Drug Strategy Household Survey 2016: Detailed Findings’ (Drug Statistics Series No 31, Australian Institute of Health and Welfare, 2017) 3.

[101] National Drug Strategy 2017-2026 (n 100) 1.

[102] Ibid 15.

[103] Ibid 49.

## IV WHY AUSTRALIAN SENTENCES ARE UNLIKELY TO BE HUMAN RIGHTS COMPLIANT

Although sentencing judges are not required to explicitly consider the human rights of the prisoner and, for historical reasons, the lexicon of 'rights' and 'human rights' does not feature in federal sentencing law,[104] it does not necessarily follow that all human rights concerns are excluded in the process of sentence formulation or that sentences will inevitably produce outcomes that are inconsistent with international human rights norms. It is necessary to consider both sentencing law and sentencing practice. This section reviews Australian sentencing law and concludes that there are nevertheless good reasons for concern.

### *A Domestic sentencing law*

In Australia, a court sentencing a prisoner for a drug importation offence is required to impose a sentence that is 'of a severity appropriate in all the circumstances of the offence'[105] having regard to the non-exhaustive list of matters set out in s 16A(2) of the *Crimes Act 1914* (Cth)[106] and various common law rules. The various common law rules require courts to treat all importation offences seriously and impose 'stern punishment' calculated to have a deterrent effect:

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[104] *Markarian v The Queen* (2006) 228 CLR 357 [76] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

[105] Section 16A(1).

[106] Section 16A(2) relevantly provides: 'In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: (a) the nature and circumstances of the offence; (b) other offences (if any) that are required or permitted to be taken into account; (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character--that course of conduct; (d) the personal circumstances of any victim of the offence; (e) any injury, loss or damage resulting from the offence; (ea) if an individual who is a victim of the offence has suffered harm as a result of the offence--any victim impact statement for the victim; (f) the degree to which the person has shown contrition for the offence…(fa) the extent to which the person has failed to comply with [certain court orders] about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence; (g) if the person has pleaded guilty to the charge in respect of the offence – that fact; (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences; (j) the deterrent effect that any sentence or order under consideration may have on the person; (ja) the deterrent effect that any sentence or order under consideration may have on other persons; (k) the need to ensure that the person is adequately punished for the offence; (m) the character, antecedents, age, means and physical or mental condition of the person; (n) the prospect of rehabilitation of the person; (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.'

> The difficulty of detecting importation offences, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case. The sentence to be imposed for a drug importation offence must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment. Involvement at any level in a drug importation offence must necessarily attract a significant sentence. Otherwise the interests of general deterrence are not served.[107]

Additionally, there are few matters that mitigate sentence. Hardship of custody for foreign offenders will not mitigate sentence, other than in 'exceptional circumstances,'[108] because a foreign national 'has no justifiable cause for complaint when, as the inevitable consequence of the discovery of his crime, he is obliged to remain incarcerated in this country, with its language and culture foreign to him, isolated from outside contact.'[109] It is presumed, absent evidence to the contrary, that drug importers are motivated by profit;[110] and mere indebtedness will not mitigate penalty.[111]A prior drug or gambling addiction will not mitigate sentence because the 'deterrent value' of sentences 'would be undermined if leniency were extended merely on the basis that an unsophisticated and compliant offender came under the sway of more unscrupulous people.[112] Prior good character carries little weight in mitigation of sentence because '[v]ery frequently, those selected to play some part in the chain of drug

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[107] *Nguyen v The Queen; Phommalysack v The Queen* (2011) 31 VR 673 [34].

[108] *R v Wirth* (1976) 14 SASR 291 (Well J); note that this interpretation of s 16(2)(p) has recently been subject to criticism on the basis that it has imposed an unwarranted gloss on the words of the legislation that does not reflect the current approach to statutory interpretation, but any change to this interpretation would need to be effected by the High Court of Australia, see *DPP (Cth) v Pratten* (No 2) (2017) 94 NSWLR 194 [49] and [60] (per Basten JA; S Campbell and N Adams JJ agreeing); *R v Zerafa* 235 A Crim R 265 at [109]-[138] for a careful review of case law on s 16(2)(p); *R v Togias* [2001] NSWCCA 522 (per Spigelman CJ) [16].

[109] *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 239 (per Hunt J, Gleeson CJ and Lee CJ at CL agreeing).

[110] [A]s a matter of common sense, it should be inferred, unless there is evidence to the contrary, that a person who is importing drugs is doing so for profit: *R v Kaldor* (2004) 150 A Crim R 271 297 [104]; *R v Lee* [2007] NSWCCA 234 [32]: *R v Nguyen; R v Pham* (2010) 205 A Crim R 106 [72] (per Johnson J with whom MacFarlan JA and RA Hulme J concurred).

[111] *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 [261] (per McClellan CJ at CL, Simpson J and Barr AJ agreeing).

[112] *Anna Le v R* [2006] NSWCCA 136 [32] (per Latham J).

trafficking…are selected because their records, their past and their lifestyles are not such as to attract suspicion.'[113] Section 16A(2) of the *Crimes Act 1914* (Cth) does not prescribe the purposes of sentencing,[114] so the sentencing judge must form a view as to the appropriate accommodation between the competing objectives of punishment, deterrence and rehabilitation.[115] The High Court acknowledges that the 'factors bearing on the determination of sentence will frequently pull in different directions,' and that it is the duty of the sentencing judge to 'balance often incommensurable factors to arrive at a sentence that is just in all the circumstances.'[116] For this reason, it generally accepted that 'there is no single correct sentence.'[117] The process by which the sentencing judge assimilates these various statutory and common law sentencing factors to arrive at a sentence is known as 'instinctive synthesis.'[118] The requirement that the resulting sentence is 'of a severity appropriate in the circumstances' has been held to embody the requirement of 'common law proportionality,'[119] which the High Court describes as 'the ultimate control on the sentencing discretion.'[120] But what the overriding requirement of common law proportionality means in practice is not straightforward.

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[113] *R v Leroy* (1984) 2 NSWLR 441, 446-447 cited with approval in *R v Gent* [205] NSWCCA 370 [55] (per Johnson J with whom Adams J and McClellan CJ at CL agreed).

[114] This sets federal sentencing apart from sentencing in the states and territories, where there is typically an explicit legislative statement of the purposes of sentencing *Wong v The Queen* (2001) 207 CLR 584 [73] per Gaudron, Gummow, Hayne JJ.

[115] *Wong v The Queen* (2001) 207 CLR 584 [71] (per Gaudron, Gummow and Hayne JJ). The reference in s 16A(1)(k) to ensuring that the offender is 'adequately punished' has also been held to embody the requirement of proportionality: *Van Zwam v The Queen* [2017] NSWCCA 127 [127] per Campbell J.

[116] *Elias v The Queen* (2013) 248 CLR 483 at 494 [27] (per French CJ, Hayne, Kiefel, Bell and Keane JJ) citing *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476; *Pearce v The Queen* (1998) 194 CLR 610, 624; *AB v The Queen* (1999) 198 CLR 111 156 [115]; *Ryan v The Queen* (2001) 206 CLR 267 at 283-84 [49].

[117] *Markarian v The Queen* (n 104) [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[118] Ibid [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[119] The doctrine of 'common law proportionality' is to be distinguished from the unrelated international human rights doctrine of constitutional proportionality or proportionality reasoning.

[120] *Markarian v The Queen* (n 104) [83] (per Gleeson CJ, Gummow, Hayne and Callinan JJ) citing *Veen [No 2] v The Queen* (n 116).

Common law proportionality has been part of English law since at least the *Magna Carta 1215*,[121] but it has never been clearly articulated in common law jurisprudence beyond the axiomatic statement that there must be *a relationship* between a crime and the penalty imposed for its commission. Determination of the correct relationship is, and always has been at discretion of the sentencing judge in each case. But this relation has changed considerably over time. For example, at the dawn of the Middle Ages, punishments were generally pecuniary in nature and mild by comparison with modern standards.[122] But by the end of the Elizabethan period, punishment for what would now be considered trivial or moderate offences included punishment, torture or public shaming. From the late 17th to the early 19th century, the English criminal justice system was known as the 'Bloody Code' because of the vast numbers of crimes for which the death penalty must, or could, be imposed. During this time a statutory system of mandatory penalties meant that almost 'no account' was taken of mitigating circumstances and 'a sentencing structure based on the principle of proportionality between the gravity of crimes and the severity of punishments could hardly be said to exist.'[123] During the Victorian era, the widespread use of imprisonment, and incorporation into legislation of social work ideas, moderated the relation between crime and punishment. The High Court has provided no guidance as to how that relation should be set today.

### *B Absence of protections against penal severity*

There are no general law protections against penal severity. For example, there is no right of appeal on the basis that a sentence is a numerical outlier in relation to sentencing patterns for the applicable category of offences. The only grounds for a severity appeal is that the sentencer

[121] Clause 20 of the *Magna Carta 1215* stated that '[a] free man shall not be amerced [punished] for a trivial offence, except in accordance with the degree of the offence; and for a grave offence, he shall be amerced in accordance with its gravity…'.

[122] For further information on the Dooms of King Alfred, see Calzada, Manuel, 'The Dooms of King Alfred' (1998) 5(4) *Murdoch University Electronic Journal of Law* 28.

[123] L Radzinowicz and R Hood 'Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem' 127(5) *University of Pennsylvania Law Review* 1288, 1291.

has fallen into 'specific error'[124] or 'non-specific error.'[125] Specific error' occurs where the sentencing judge makes the kind of error that would ordinarily enliven the grounds for review of an exercise of discretion more generally, such as by failing to take into account a relevant consideration.[126] Non-specific error occurs where the punishment patently betrays some sort of specific error, though no such error can be identified from the reasoning of the sentencing judge. The High Court has emphasised that the common law protects the sentencing court's very wide discretion to define the appropriate relationship between crime and punishment in each case, so that it will intervene only where necessary to ensure 'consistency in the application of relevant legal principles.'[127] Common law proportionality cannot underpin a claim of either 'specific error' or 'non-specific error' precisely because it does not clearly define the appropriate relationship between a crime and punishment. For this reason, common law proportionality has been described by legal scholars as a 'chimera.'[128]

Under Australian law, which was received from England upon settlement, there is no constitutional protection against penal severity either.[129] That includes no constitutional protection against the death penalty, an irreducible life sentence or an indeterminate sentence.

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[124] Specific error occurs where the sentencing judge makes the kind of error that would ordinarily enliven the grounds for review of an exercise of discretion more generally, such as failure to take into account a relevant consideration. Other examples are where the sentencing judge makes a mistake as to the law or the facts, fails to disregard an irrelevant consideration, gives excessive or insufficient weight to a particular sentencing factor, or otherwise fails to observe the requirements of procedural fairness, including the rule against bias: see Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 3rd ed, 2014) [17.80] for a discussion of the types of specific error.

[125] Non-specific error occurs where the sentence patently betrays some sort of specific error, though no such error can be identified from the reasoning of the sentencing judge; it is sometimes called 'manifest inadequacy' or 'manifest excess' of sentence.

[126] Other examples are where the sentencing judge makes a mistake as to the law or the facts, fails to disregard an irrelevant consideration, gives excessive or insufficient weight to a particular sentencing factor, or otherwise fails to observe the requirements of procedural fairness, including the rule against bias: see Fox and Freiberg (n 124) [17.80] for a detailed discussion of the types of specific error.

[127] *Hili v The Queen* (2010) 242 CLR 520, [18].

[128] Lacey, Nicola and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216.

[129] For some observations on the lack of constitutional protections see Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' (2012) 36 *Criminal Law Journal* 335.

The writ of *habeas corpus* is the primary constitutional safeguard for the liberty of all persons against the unlawful actions of ministers, officials and judges. In its modern form, the writ enforces the rule of law by putting ministers, officials or judges to proof as to the lawful basis upon which any person has been detained. Historically, the writ has been a powerful weapon in maintaining the constitutional settlement under which the parliament, rather than the monarch, is the supreme law maker. However, it affords no protection against penal severity. In *Magaming v The Queen* the High Court rejected the argument that mandatory sentencing is subject to any constitutional limitation.[130] In that case, the appellant, a 19-year old Indonesian fisherman, challenged the imposition of a mandatory five-year term of imprisonment for an offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). The High Court rejected the argument that a mandatory minimum penalty effected an 'arbitrary' deprivation of liberty and thereby collaterally violated a constitutional norm: [131]

> It is enough to say that the appellant demonstrated no basis for applying proportionality reasoning or for forming the factual conclusions on which this aspect of his argument depended. If, as the appellant submitted, the sentence which the Act required the sentencing judge to impose on him was too 'harsh' when measured against some standard found outside the relevantly applicable statutory provisions, that conclusion does not entail invalidity of any of the impugned provisions.

The writ provides no relief against validly enacted legislation requiring the mandatory and indefinite detention of asylum seekers,[132] the preventative detention of persons who have served their sentences for serious sexual and violent offences,[133] or statutory minimum sentences for criminal offences.[134] This underscores that the rule of law in Australia requires

[130] *Magaming v The Queen* (2013) 252 CLR 381; Gaegler J (dissenting) would have allowed the appeal on the basis that the legislation violated the separation of powers doctrine by inadvertently granting the CDPP a collateral power to determine the penalty through its discretion to charge either the ordinary offence (which attracted no mandatory minimum penalty) or the aggravated offence (which attracted the mandatory 5-year minimum penalty) on the same facts.

[131] Ibid 397-98 [52] (French CJ, Hayne, Crennan, Keifel and Bell JJ).

[132] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[133] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[134] *Magaming v The Queen* (n 130).

only that the sentencing an offender is in accordance with applicable legislation and common law principles.

### *C Absence of international human rights protections*

It also follows from Australia's history as a British colony, and its reception of British law, that there is no systematic domestic legal recognition of international human rights. [135] Australia's constitution, which was adopted in 1901, makes no reference to international human rights and unlike the US Constitution, contains no Bill of Rights. Additionally, despite being a signatory to the seven core international human rights treaties, including the ICCPR, Australia has no domestic mechanism for review of a sentence for non-compliance with the substantive protections of the ICCPR or any other international human rights instrument.[136]

### *D Poor human rights record regarding detention*

The catalogue of successful detention-related complaints to the UNHRC concerning Australia – including complaints about mandatory immigration detention, irreducible life sentences, preventative detention, and mandatory extradition detention – betrays the country's failure to implement domestically its obligations under the ICCPR.[137] This is all the more concerning from an international human rights perspective because, in each case, the relevant domestic law authorising the impugned detention survived appellate or constitutional review, and the problem persisted because of the absence of domestic protections for international human

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[135] The United Kingdom only implemented systematic human rights protections late last century, via the *Human Rights Act 1998* (UK), in an effort to incorporate into domestic law the European Convention on Human Rights. For a comprehensive discussion of the limited human rights protections afforded by Australian law see Jeremy Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011); Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 3rd ed, 2014) 75-81; RS French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009); Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (Federation Press, 2014).

[136] Australia has not implemented domestically the provisions of the ICCPR or the UDHR. ICCPR Art 9(4) provides for the right to review of detention, and has been interpreted by the UN HRC to include the right to review of whether a sentence is compliant with the substantive provisions of the ICCPR, including 'arbitrariness' which in turn incorporates the proportionality requirement. The absence of such a domestic review mechanism is itself a violation of art 9(4).

[137] See Chapter 2 'Theoretical Approach' for further discussion.

rights. Moreover, this catalogue of complaints underscores that those who have suffered because of this omission – asylum seekers, convicted criminals and suspected criminals – are the least able to take steps to highlight their own plight. And it is a portent of problems for convicted drug traffickers.

## V Conclusion

International drug control policy has entered a new era of human rights consciousness and, among other things, this will result in increased international scrutiny of domestic sentencing for importation offences. While Australia publicly supports this new policy orientation in international fora – including by making a speech in support of the abolition of the death penalty for drug treaty offences at UNGASS 2016 – the history of Australia's domestic implementation of the international drug conventions suggests that it has not fully appreciated the implications of this new era for domestic sentencing. No Australian court has considered what the policy considerations underpinning the international drug conventions – and therefore also underpinning Pt 9.1 of the *Criminal Code* (Cth) – mean for sentence formulation. And there has been little judicial or scholarly consideration of whether and, if so, how domestic sentence formulation might violate international human rights norms.[138] Australia lacks any institutionalised human rights protections and has no domestic legal or constitutional protection against excessive sentences.[139] The proven potential for the criminal justice system to over-incarcerate socially marginalised groups, combined with Australia's poor human rights record with respect to detention, provides more than enough evidence that the domestic sentencing of

[138] See for example Gans (n 135), Fox and Freiberg (n 135). As discussed in Chapter 1 'Theoretical Approach,' there has been international judicial and scholarly consideration of the issue; for instance, Sonja Snacken, 'A Reductionist Penal Policy and European Human Rights Standards' (2006) 12(2) *European Journal on Criminal Policy and Research* 143; Sonja Snacken, 'Resisting Punitiveness in Europe?' (2010) 14(3) *Theoretical Criminology* 273; Dirk van Zyl Smit, and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *The Modern Law Review* 541; Dirk van Zyl Smit, Life *imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019).

[139] Some states, including Victoria, the Australian Capital Territory and Queensland, have enacted human rights legislation, but none of these Acts is constitutionally entrenched, and no case has yet considered whether and, if so, how, this legislation constrains sentencing. To the extent that the legislation requires a different sentence than that lawfully imposed by a court for a federal offence pursuant to federal legislation it is likely invalid pursuant to s 109 of the *Australian Constitution*, which provides that a Commonwealth law shall prevail to the extent of any inconsistency with any State law.

drug importers is an area in need of human rights scrutiny. The following chapter examines official information and scholarly literature on the international drug trade and its participants, to try to gauge the nature and extent of the 'drug problem' at Australia's border and whether Australia's policy response appears to be commensurate with the gravity of the problem.

# Chapter 4:
# International Drug Trafficking Factual Context – the ‘World Drug Problem’ and the ‘Market’ at Australia’s Border

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*The French blame the Russians; the British blame everyone from ‘the threat in the East’ to the Jamaicans, Chinese, Colombians, Turks and Italians... In Argentina and Germany, heroin trafficking was attributed to Turkish immigrants. In the Philippines (and Southeast Asia), ‘Ethnic Chinese’ are blamed for methamphetamine, and West Africans for cocaine.*[1]

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## I Introduction

Truth is the first casualty in the war on drugs. There is precious little reliable information on the scale of drug-related harms or who participates in the illicit trade and why. In the absence of reliable information, the international drug trade tends to be understood as either a foreign enemy, or as an illicit business enterprise that can be regulated or incentivised like a licit business enterprise, by reference to principles of supply and demand. Both conceptions are problematic because they perpetuate stereotypes and give the impression that the drug trade is well understood. This chapter reviews official and scholarly data and other information on the international drug trade to expose these stereotypes and piece together a rudimentary picture of the international drug trade and its participants. This provides context for the thematic examination of sentencing remarks.

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[1] Jennifer Fleetwood, ‘Mafias, Markets, Mules: Gender Stereotypes in Discourses About Drug Trafficking' (2015) 9(11) *Sociology Compass* 962, 964-65, citations omitted.

## II Data sources and limitations

At the international level, the United Nations Office on Drugs and Crime ('UNODC') annual 'World Drug Report'[2] compiles information provided to the UNODC by each country pursuant to the international drug conventions, in the form of the Annual Report Questionnaire ('ARQ').[3] The ARQ requires statistics – called 'indicators' – on: domestic drug demand (including the prevalence of drug use), associated harms (including drug-related mortality and morbidity), domestic drug supply (including the quantity of drugs produced, manufactured and/or seized) and drug control efforts (including details of prevention and treatment programs). At the European regional level, the European Monitoring Centre for Drugs and Drug Addiction ('EMCDDA') European Drug Report provides similar information for that region. Additionally, the European Sourcebook of Crime and Criminal Justice Statistics ('ESB')[4] provides criminal justice statistics for 41 European countries, based on data from police,[5] prosecution authorities,[6] and probation authorities.[7]

The World Drug Report is the most frequently cited official source of information on the world drug problem, however, there are limitations to the reliability of the data. The most serious limitation is that the UNODC has not specified definitional and data collection protocols for the indicators used in the report. This means that the data cannot be aggregated or compared cross-nationally, though this is frequently – but erroneously – done in both official reports and scholarly research. Other limitations are best understood by way of example. The key demand-side indicator used in the World Drug Report is a 12-month 'prevalence' of drug use, which refers to the proportion of individuals in a country who have used a drug at least once in the

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[2] Published by the United Nations Office of Drugs and Crime at https://wdr.unodc.org/wdr2019/en/previous-reports.html.

[3] United Nations Office on Drugs and Crime, *Annual Report Questionnaire,* UN Doc No UN Doc E/NR/2015/2-4 <http://www.unodc.org/arq/>.

[4] Aebi, Marcelo F, et al, 'European Sourcebook of Crime and Criminal Justice Statistics 2014 (5th ed)' (Publication Series, No 80, European Institute for Crime Prevention and Control, 2014) <http://wp.unil.ch/europeansourcebook/>.

[5] Including offending rates and trends.

[6] Including the number of charges laid or 'dropped,' and conviction rates and sentence lengths.

[7] Including the number of persons under electronic monitoring.

past 12 months.[8] The absence of any data collection standards or protocols means that this indictor may be reported based any available methodology – from official registers of users, to school surveys – and that the figures reported for each country will be subject to the limitations applicable to the methodology used.[9] Additionally, this indicator is of limited use without collateral information about frequency of drug use and quantity consumed per use, none of which is collected pursuant to the ARQ; and most countries – including Australia – do not record it in any case.[10] 'Prevalence' is therefore an over-inclusive statistic because it counts one-off, 'experimental' and infrequent drug use, and it is meaningless except in combination with other indicators that are not readily available.[11] This is significant, because 'prevalence' statistics typically provide the basis for claims about the extent of drug use within a population. For instance, the World Drug Report 2017 states that 'a quarter of a billion people use drugs globally,' based on ARQ surveys for a 12-month prevalence statistic.[12] Klimer et al argue that a meaningful measure of drug consumption would count only 'problem users' rather than 'mere users.'[13] Put differently, the 'world drug problem' is a different phenomenon to the 'prevalence' of drug use. Along similar lines, meaningful cross-national comparisons of the 'drug seizures' and 'drug price' indicators require purity-adjusted figures, as well as supplementary indicators of drug supply, drug demand and exogenous policy and economic influences.[14] This is because the purity and price of drugs varies vastly depending on whether interdiction occurs towards the beginning of the supply chain – where drug volume is high but

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[8] United Nations Office on Drugs and Crime (n 3).

[9] The AIHW conducts the National Drug Strategy Household Survey about every three years, based on a population of approximately 23,000 people. Previous surveys were conducted in 1985, 1988, 1991, 1993, 1995, 1998, 2001, 2004, 2007, 2010, 2013 and 2015. Details of the survey methodology are available at National Drug Strategy Household Survey 2016, 3-4 for details of the survey methodology.

[10] Beau Klimer, Peter Reuter and Luca Giommoni, 'What Can Be Learned from Cross-National Comparisons of Data on Illegal Drugs?' (2015) 44 *Crime and Justice* 227, 283.

[11] Ibid.

[12] UNODC, 'World Drug Report 2017' (Report, United Nations Office on Drugs and Crime, 2017) https://www.unodc.org/wdr2017/. The report somewhat retreats from the sensational implication in the subsequent sentence, but readers are more likely to remember the more sensational claim that 'a quarter of a billion people use drugs globally,' which appears in the heading to the paragraph, and is repeated in the first line.

[13] Klimer, Reuter and Giommoni (n 10) 283.

[14] Ibid 234.

purity is low – or towards the end of the supply chain – where drug volume is low but purity is at its highest.[15] To this end Reuter contends that the universal police practice of valuing seizures at retail prices and based on gross weight 'vastly exaggerates the impact of seizures.'[16] Purity-adjusted figures are available in few countries, because prosecutions usually rely on the gross weight of drugs seized, and in any case the cost of calculating the pure weight of drugs seized is often prohibitive.[17] Likewise, aside from the obvious definitional issues,[18] 'number of arrests' and 'number of prosecutions' indicators vary with the proportion of crime detected in an area, which in turn depends on the resources and priorities of law enforcement and prosecution agencies.[19] This makes cross-national comparison of law enforcement indicators between countries with different economic conditions or political or funding priorities problematic.

By contrast with the World Drug Report, the European Drug Report is generally more amenable to cross-national comparison between EU countries, because the EU uses multiple indicators and prescribes data collection protocols.[20] The EMCDDA also uses wastewater analysis ('WWA') to estimate drug consumption, rather than relying solely on 'prevalence'

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[15] Ibid 231.

[16] Peter Reuter and Mark AR Kleiman, 'Risks and Prices: An Economic Analysis of Drug Enforcement' (1986) 7 *Crime and Justice: An Annual Review of Research* 289317.

[17] In Australia, pure weight analyses are undertaken by the National Measurement Institute for federal drug seizures, but States and Territories do not require pure weight analyses for State/Territory prosecution purposes.

[18] Such as cross-national differences regarding drug quantity thresholds, offence elements (such as knowledge versus recklessness or strict liability), admissibility of evidence, discounts for guilty pleas or cooperation, remissions on sentence, parole eligibility rules; as well as whether statistics are collected post-arrest, post-charge or post-sentence. These definitional issues may be overcome when the UNODC implements its International Classification of Crime for Criminal Purposes ('ICCS'), which will provide a framework for collecting statistics at all stages of the criminal justice process based on statistical rather than legal concepts: see, for instance E Bisogno, J Dawson-Faber and M Jandl, 'The International Classification of Crime for Statistical Purposes: A New Instrument to Improve Comparative Criminological Research' (2015) 12(5) *European Journal of Criminology* 535.

[19] Bisogno, Dawson-Faber and Jandl (n 18) 536.

[20] S Castiglioni, et al, 'Testing Wastewater to Detect Illicit Drugs: State of the Art, Potential and Research Needs' (2014) 487 *Science Total Environment* 613, 614.

measures.[21] WWA measures the loadings of 'parent' drugs and their metabolites excreted into urine and passing into the wastewater system of a designated wastewater catchment area. After adjustments for licit drug use (such as prescription medication), WWA can 'back-calculate' the estimated total consumption of cocaine, heroin, methamphetamine and cannabis in a given population.[22] This provides more accurate information about drug consumption – including unproblematic drug use – because wastewater analysis is not subject to the selection and sampling biases that affect survey data; it is also considerably less resource-intensive, and produces more timely results than large-scale population surveys.[23] WWA also has many potential applications in enhancing drug control. For instance, WWA can yield cross-national comparisons of consumption rates for many drugs,[24] it can also target geographical areas or populations for law enforcement interventions, it can monitor changes in consumption over time, and it can even assess the impact of law enforcement interventions or public health campaigns on total consumption.[25] Wastewater collection in nightclubs is already used in some locations in Europe to identify emerging New Psychoactive Substances.[26] However, because this is a relatively new science, cross-national comparisons are not yet readily available.

There are six official sources of information on the Australian drug trade: the Australian Criminal Intelligence Commission's ('ACIC's') Illicit Drug Data Report ('IDDR'), which provides statistics on arrests and drug seizures, the ACIC's new National Wastewater Drug Monitoring Program ('NWDMP'), which provides estimates of national consumption based on

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[21] For instance, European Monitoring Centre for Drugs & Drug Addiction, 'European Drug Report' (EMCDDA, 2016) <http://www.emcdda.europa.eu/edr2016>.

[22] Cocaine is suitable for 'back-calculation' because 'neither cocaine nor its metabolite (behzoylecgonine ('BE')) is produced by consumption of other drugs or environmental sources' but MDMA estimation can be tricky because 'urine will contain both MDMA and metabolites including MDA (3,4-methylenedioxyamphetamine) which is itself an illicit drug and also a metabolite of MDEA': Prichard, Jeremy, et al, 'Measuring Drug use Patterns in Queensland Through Waste-water Analysis' (2012) *Trends and Issues in Crime and Criminal Justice* 442, 3. There are similar problems with back-calculating methamphetamine consumption.

[23] There are typically considerable time lags between collection and reporting of survey data, particularly for large-scale surveys. Prichard et al (n 22) 6.

[24] Rodney J Irvine et al, 'Population Drug Use in Australia: A Wastewater Analysis' (2010) 210 *Forensic Science International* 73.

[25] Castiglioni et al (n 20) 614.

[26] Ibid.

wastewater collection from five sites nationally,[27] and four survey-based drug monitoring systems:

- The National Drug Strategy Household Survey ('NDSHS') conducted by the Australian Institute of Health and Welfare ('AIHW'), which produces a past-12-month 'prevalence' statistic for each major drug based on a sample size of approximately 23,772 (last reported in 2016);[28]
- The Drug Use Monitoring in Australia ('DUMA') survey conducted by the Australian Institute of Criminology ('AIC'), which provides self-report data and urinalysis results for 4,399 recent police detainees at five sites nationally (last reported in 2017);[29]
- The Illicit Drug Reporting System ('IDRS'), which identifies trends in price, purity and availability of drugs primarily through interviews with a sentinel group of approximately 888 regular injecting drug users supplemented by interviews with key experts (last reported in 2018);[30] and
- The Ecstasy and Related Drugs Reporting System ('EDRS'), which identifies trends in price, purity and availability of ecstasy and other drugs through interviews with a sentinel group of approximately 799 frequent drug users (last reported in 2018).[31]

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[27] Australian Criminal Intelligence Commission, 'National Wastewater Drug Monitoring Program Report' (NWDMP Series, No 5, Australian Criminal Intelligence Commission, August 2018) <https://www.acic.gov.au/sites/g/files/net3726/f/nwdmp5.pdf?v=1538721816>.

[28] Claydon, Cathy et al, 'National Drug Strategy Household Survey 2016: Detailed Findings' (Drug Statistics Series No 31, Australian Institute of Health and Welfare, 2017

[29] Eileen Patterson et al, 'Drug Use Monitoring in Australia: 2015 and 2016 Report on Drug Use Among Police Detainees' (Statistical Reports No 4, Australian Institute of Criminology, 2018).

[30] Antonia Karlsson and Linda Burns, 'Illicit Drug Reporting System (IDRS) National Report 2017' (Australian Drug Trends Series, No 181, National Drug and Alcohol Research Centre, University of New South Wales, 2018)

[31] Amy Peacock, et al, 'Key findings from the National Ecstasy and Related Drugs Reporting System (EDRS) Interviews' (Australian Drug Trends Series, National Drug and Alcohol Research Centre, University of New South Wales, 2018).

The previously discussed limitations to official information apply.[32] The information presented in the IDDR reflects the resources and priorities of law enforcement agencies – such as targeted transport routes and interdiction methods. The limitation of these surveys are that, even in combination, they reach less than 30,000 people, and excepting the urinanalysis component of the DUMA, each survey is heavily reliant on self-reported data. The NWDMP has considerable potential for the reasons previously discussed, and it produced total estimated national consumption figures for amphetamines, cocaine and heroin for the first time this year, but reliable longitudinal and cross-national comparison figures are still several years away.[33]

Given the inherent limitations of official and reports, scholarly research on the international drug trade is of considerable importance. The following sections describe the scholarly research on drug markets and participants before considering official statistics.

## III SCHOLARLY RESEARCH ON DRUG MARKETS AND PARTICIPANTS

Multi-disciplinary research challenges the stereotypical picture of the drug trade as either a ‘market’ or ‘violent cartel,’ by providing a more nuanced picture of where and how drugs are produced or manufactured, how drugs are trafficked across national borders, and who trafficks drugs across national borders. A literature review by Dorn et al (2005), on the drug trade and its participants, covering published and unpublished literature in English, French, Dutch, German, Italian and Spanish, identified significant disciplinary contributions from economists, criminologists and ethnographers and law enforcement personnel.[34] Based on this literature review, the authors proposed a tripartite typology of international drug traffickers, comprising ‘*politico-military’* traffickers, who have ‘aims of restricting the political field, or achieving or maintaining a dominant position in existing political structures/states/failed states, ‘*business criminals’* who are ‘driven by financial consideration, whose political aspirations are limited to their own quiet enjoyment of the proceeds of crime,’ and ‘*adventurers’* ‘for whom a

[32] For a discussion of the limitations of the Australian data collection systems see Robyn Dwyer and David Moore, ‘Understanding Illicit Drug Markets in Australia: Notes Towards a Critical Reconceptualization' (2010) 50(1) *British Journal of Criminology* 82, 89-90.

[33] Australian Criminal Intelligence Commission, ‘National Wastewater Drug Monitoring Program Report’ (NWDMP Series, No 6, Australian Criminal Intelligence Commission, December 2018) 9.

[34] Nicholas Dorn, Michael Levi and Leslie King, ‘Literature Review on Upper Level Drug Trafficking’ (No 22/05, Research Development and Statistics Directorate, Home Office, 2005) iv.

relatively high level of risk-taking is the norm for a variety of reasons – because they may feel they have little alternative (eg due to debt or coercion), or they may experience a sense of excitement yet do not fully understand the risks being run.'[35] Other researchers have proposed different typologies based on tasks undertaken (importers, wholesalers, middle-market brokers, retail level dealers)[36] or the organisational structure of the criminal enterprise (sole traders, small and medium enterprises, collaborative networks).[37] Each typology is appealing in its simplicity, but at present there is an insufficient evidence base from which to make such generalisations.[38] Drug markets and participants are a more complex phenomenon that must be understood at a lower level of abstraction if one is to adequately contextualise the role of a particular smuggler, as is the case in any criminal proceeding. An understanding of extant literature, rather than generalisations from this literature, is therefore essential for this research.

### *A Economic approaches*

Academic economists conceptualise the drug trade as similar to a licit market, and focus on identifying how drug 'markets' are like or unlike licit markets before deploying economic models to make predictions about matters on which we have no available data, namely enduring drug enterprises and their participants.[39] This approach assumes, among other things, that market participants act rationally; and this assumption has proven to have considerable explanatory value.[40] There is a relatively small literature on upper level international drug

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[35] Ibid.

[36] For instance, Geoffrey Pearson and Dick Hobbs, 'King Pin? A Case Study of a Middle Market Drug Broker' (2003) 42(4) *The Howard Journal of Criminal Justice* 335 look at importers, wholesalers, middle market drug brokers and retail level dealers.

[37] For instance, Matrix Knowledge Group, 'The Illicit Drug Trade in the United Kingdom' (Home Office Online Report 20/07, Home Office Research, Development and Statistics Directorate, June 2007) 32, which classifies international smugglers as 'sole traders,' 'small and medium enterprises' or 'collaborative networks.'

[38] F Desroches, 'Research on Upper Level Drug Trafficking: A Review' (2007) 37 *Journal of Drug Issues* 827, 829-30. Pearson and Hobbs (n 36) 336 argue that such typologies are 'barely credible and premature, given the paucity of the evidence base.'

[39] Reuter first proposed an economic analysis of drug markets in 1983: Peter Reuter, *Disorganised Crime* (MIT Press, 1983);

[40] The psychological scholarship challenges this to some extent, providing a basis for modifying economic models in some instances.

markets as opposed to retail level domestic drug markets. The most prominent scholars in this area are Reuter, Desroches, Paoli and Kilmer.[41] There are no discernible schisms in the literature on understanding international drug markets, even if scholars ultimately hold different views on how to regulate or otherwise address the problem.[42]

The most important contribution of this literature is in pointing out how drug markets differ from ordinary licit markets, or, put another way, when the usual assumptions about markets do not hold. This literature theorises that because conditions under which the US Mafia controlled the heroin market in the 1950s no longer apply, the market is presently comprised of large and fluid numbers of small, competitive enterprises:[43]

> The explanation for [the US Mafia monpoly on heroin in the 1950s] monopoly may be found in any or all of three factors. First, the Mafia had considerable influence over the New York Police Department; no other criminal group had access to the corruption of that department. Second, through control of the International Longshoreman's Association, the Mafia had command of the docks, so it was able to protect its own shipments of heroin and increase the hazards faced by all other importers. Third, the heroin refiners were located in southern France and Italy, and there were historic and ethnic ties between them and the American Mafia members. The world drug market comprises large numbers of small, competitive but non-violent enterprises.[44]

In terms of supply, cocaine is grown almost exclusively in Colombia, Peru and Bolivia,[45] and opium poppies are grown almost exclusively in Afghanistan, Myanmar and, to a lesser extent,

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[41] For an overview of the scholarship see L Paoli and P Reuter 'Drug Markets and Organized Crime' in L Paoli (ed), *The Oxford Handbook of Organized Crime* (Oxford University Press, 2014). These authors are cited throughout this chapter.

[42] Ibid.

[43] See, for instance, Peter Reuter, *Report 1 - Assessing the Operation of the Global Drug Market* in Reuter, Peter and Franz Trautmann (eds), 'A Report on Global Illicit Drug Markets 1998-2007' (Trimbos Institute and RAND, 2009) 7.

[44] Reuter and Kleiman (n 16), 300-301; Peter Reuter, 'The Organisation of Illegal Markets: An Economic Analysis' (Report, Department of Justice, National Institute of Justice Washington, DC, 1985).

[45] United Nations Office on Drugs and Crime, 'World Drug Report 2017' (Report, United Nations Office on Drugs and Crime, 2017), Booklet 3, 26.

the Lao People’s Democratic Republic.[46] Non-plant-based illicit drugs can be manufactured anywhere from precursor chemicals, and little is known about the source or origin of most of these drugs, other than that they tend to be trafficked from relatively poor countries to wealthy consumer countries.[47] The economic literature theorises that production of plant-based drugs (excepting cannabis, which can be grown virtually anywhere using hydroponic techniques) is generally concentrated in certain relatively poor countries because of the relatively lower probability of detection in these countries, rather than climate or agricultural conditions, because coca and opium poppies can be grown virtually everywhere using hydroponic techniques.[48] Reuter explains how profit is distributed along the supply chain in the cocaine and heroin sectors as follows:

> [T]he bulk of revenue, though not of consumption, is generated by users in wealthy countries. Earnings have an odd shape; most of the money goes to a very large number of low level retailers in wealthy countries while the fortunes are made by a small number of entrepreneurs, many of whom come from the producing countries. Actual producers and refiners receive one or two percent of the total; almost all the rest is payment for distribution labour. The industry is in general competitive, though some sectors in some countries have small numbers of competing organisations.[49]

Using the example of heroin and cocaine prices in California in 2000, Reuter explains how the price of the drugs increases exponentially between the farm gate and the street, representing the detection risk at each stage:[50]

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[46] Afghanistan accounted for ‘roughly two thirds of the estimated global area under illicit opium poppy cultivation in 2016’ and Myanmar accounted for ’20 per cent of the total area under opium cultivation in 2015’: World Drug Report 2017 (n 45) Booklet 3, 13.

[47] Reuter (n 43) 7.

[48] Ibid.

[49] Ibid.

[50] Ibid.

| Stage | Cocaine | Heroin |
| --- | --- | --- |
| Farm gate | $650 | $550 |
| Export | $1,000 | $2,000-$4,000 |
| Import | $15,000-$20,000 | $35,000 |
| Wholesale (1 kg) | $33,000 | $50,000 |
| Retail (100 mg) | $120,000 | $135,000 |

Table 3:Prices of cocaine and heroin through the distribution system (per pure kilogram equivalent), prices are in US Dollars [51]

The table demonstrates some key general propositions about the way in which prices are set and profits made in the drug trade. First, the cost of production is a 'trivial share of the final price.'[52] Second, the 'vast majority of costs' comprise 'domestic distribution in the consumer country' rather than international trafficking.[53] Third, 'the high cost of distribution represents primarily the need to compensate low level dealers for the risks of arrest or incarceration.'[54] In sum, farmers and smugglers (also called 'traffickers' or 'importers' in this literature) receive less per kilogram than supplier and street-level dealers but deal with the greater bulk of drugs. Interestingly, the relatively trivial cost of production compared with the street price of drugs explains why the large-scale drug hauls celebrated in police media releases have a negligible impact on drug prices: the drugs will be rapidly replaced with more supply at very little cost.[55]

This literature theorises that drug smugglers are remunerated based primarily on the opportunity cost of assuming the risk of transport. This makes smuggling cheaper in countries where wages are relatively low, or where potential recruits have few alternative sources of employment. A recent study of persons smuggling drugs along the US-Mexico border found that the mean reported compensation to have been paid to each 'mule' was $1,604 and the median $1,313.[56] This equated to roughly $16,000 for spending a year in gaol with certainty,

[51] Ibid.

[52] Ibid 7-8.

[53] Ibid.

[54] Ibid.

[55] For instance, Scott H Decker and Margaret Townsend Chapman, *Drug Smugglers on Drug Smuggling: Lessons from the Inside* (Temple University Press, 2008) 54-55.

[56] David Bjerk and Caleb Mason, 'The Market for Mules: Risk and Compensation of Cross-border Drug Couriers' (2014) 39 *International Review of Law and Economics* 58, 59.

assuming a 7.5 per cent detection risk.[57] This was, in turn, roughly in line with the average annual income for Mexican residents residing near to the US/Mexico border.[58]

An important prediction from the economic literature is that the drug market comprises large and fluid numbers of smaller, competitive, non-hierarchical networks, motivated by profit and held together by social and ethnic ties, rather than violence.[59] This literature theorises that an absence of violence tends to indicate a well-functioning market.[60] Dorn et al conclude that while highly permanent insurgent groups and/or paramilitaries, such as FARC in Colombia and the Taliban in Afghanistan, do exist in the traditional coca and opium poppy-growing regions,[61] these groups are vastly outnumbered across all sectors by 'business criminals' who aspire to little more than 'their own quiet enjoyment of the proceeds of crime,'[62] and self-employed risk-takers motivated variously by adventure or misadventure, commonly debt.[63] Natarajan came to the same conclusion in his review of literature concerning the US, the UK and European drug markets:

> All these studies (Alder, 1985; Reuter and Haaga, 1989; Benson and Decker 2010; Zaitch, 2002; Paoli, 2002; Madi, 2004) reinforce the view advanced in various publications (Desroches, 2005, 2007; Pearson and Hobbs, 2001, 2003; Reuter, 2003) that drug trafficking is a highly fragmented business consisting of a large number of independent entrepreneurial networks separately engaged in exploiting the lucrative opportunities presented by the demand for drugs.[64]

Importantly, this literature theorises that, while the insurgent groups and/or paramilitaries pose an existential threat to the existing or fledgling political order in the countries where they

[57] The authors assumed a generous 5 to 10 per cent detection risk, based on official law enforcement data.

[58] Bjerk and Mason (n 56) 70.

[59] For instance, Dorn, Levi and King (n 34); Pearson and Hobbs (n 36); Natarajan, M, M Zanella and C Yu, 'Classifying the Variety of Drug Trafficking Organizations' (2015) 45(4) *Journal of Drug Issues* 409.

[60] Pearson and Hobbs (n 36) 346.

[61] According to the World Drug Report, 'up to 85 per cent of opium poppy cultivation in Afghanistan is in territory under the influence of the Taliban': World Drug Report 2017 (n 45), Booklet 3, 3.

[62] Dorn, Levi and King (n 34) 35.

[63] Ibid.

[64] Natarajan, Zanella and Yu (n 59) 411.

operate, the other groups do not. ‘Business criminals’ seek to exploit opportunities at the border rather than actively cultivate opportunities for corruption or insurgency.

This literature has also produced research on the overrepresentation of particular ethnic groups in world drug markets, such as Colombian groups in cocaine, Turkish and Albanian groups in heroin, and Nigerian groups across all sectors. This research finds that the success of these groups is attributable to ‘the advantages conferred on specific immigrant groups by tighter connections to source and shipment countries as well as by the lesser ability of police to gain cooperation with those immigrants’ communities in the consuming countries.’[65] Paoli and Reuter explain the anomaly of Nigerian involvement in the world drug trade despite its geographic isolation from both producer and consumer countries:

> The explanation is probably to be found in a complex of factors. Nigerians are highly entrepreneurial, have been misruled by corrupt governments for a long time and have large overseas populations, and Nigeria has a weak civil society, very low domestic wages and moderately good commercial links to the rest of the world. Thus it is relatively easy to buy protection for transactions in Nigerian airports (corruption and a weak governmental tradition), to establish connections in both the source and consumption nations (large overseas populations) and to use existing commercial transportation; smuggling labour is cheap (low domestic wages) and the entrepreneurial tradition produces many competent and enthusiastic smuggling organizers. Nigeria is not unique in most of these dimensions (except for its size and its connections with the rest of the world) and there is perhaps an accidental quality to its initiation into the trade, but these other factors plausibly play a major role. [66]

The economic literature theorises that, since the dawn of the post-cartel era in the early 1990s, cumbersome hierarchical organisations, where powerful key senior personnel are informed about all aspects of the business, are out. In its place, is a fragmented supply chain comprising large numbers of independent, non-specialist contractors who coordinate shipping from source country to destination country and into the hands of wholesalers (‘enterprises’). Enterprises are heavily dependent on familial or ethnic ties to obtain ‘contracts,’ and to bring together the

[65] Ibid.

[66] L Paoli and P Reuter, ‘Drug Trafficking and Ethnic Minorities in Western Europe' (2008) 5(1) *European Journal of Criminology* 13, 30.

mostly unskilled persons needed complete each contract, namely persons who can offload, store, transport or carry drugs. The large number of enterprises, and the significance of ethnic ties goes a considerable way to explaining the vast number of international trafficking routes across all sectors.

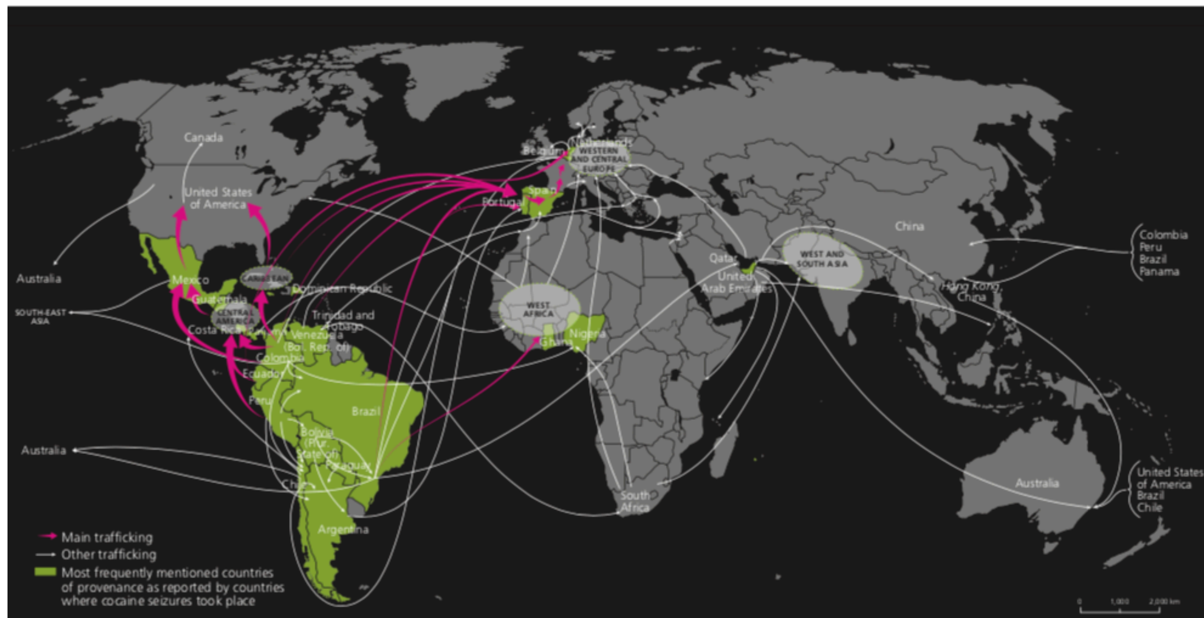


FIGURE 6: MAIN COCAINE TRAFFICKING FLOWS 2011-2015[67]

This literature theorises that the evolution of drug market enterprises from cartels to small enterprises makes economic sense. Compared with cartels, enterprises are considerably better at risk management. They change smuggling methods pre-emptively to avoid law enforcement attention; they compartmentalise operations – including money and drug flows – to minimise the participants' vulnerability to law enforcement surveillance and interrogation; they minimise the quantity of product and money in transit; they limit the time product is in transit; and they even make insurance arrangements for lost or seized product.[68] Columbian brokers are known to minimise interdiction risk by collaborating to fill export ships, rather than arranging their own vessels.[69]

Although trafficking methodologies are not heavily studied in this literature, scholars theorise that most enduring enterprises probably conceal the product within legitimate commerce, such

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[67] World Drug Report 2017 (n 12) Booklet 3, 34.

[68] Sidney Zabludoff, 'Columbian Narcotics Organisations as Business Enterprises' (1997) 3 *Transnational Organised Crime* 20, 30-31 cited in Decker and Chapman (n 55) 45-55, 55, 151-152.

[69] Decker and Chapman (n 55) 44.

as by back-filling into legitimate fruit and vegetable shipments driven by legitimate – and trusted – drivers. Hiding in plain sight.[70]

This literature has considered the vexed question of why people become involved in drug smuggling when the risk of imprisonment – at least as perceived by most educated people – is so high the world over. Within this literature, the answer is obvious: survival. Decker and Chapman put it this way:[71]

> The fact is that poverty makes people vulnerable to involvement in illegal activity. In many cases, such as drug smuggling, this involvement becomes a primary means of survival and an acceptable way of making money.

A prisoner in Decker and Chapman's study provided this personal account:[72]

> In Colombia, the war against drugs has solved big problems for a lot of people that are starving to death right now. Let me tell you what happens. There's a guy that has three children and a wife. He can't send the children to school because there's no money. He can't work because there's no work. He's starving. He's living in a place about this big with three children and - somebody comes to him and says, 'Look, I want you to get in this boat, and this boat is going to have five thousand pounds of marijuana. You might get caught, okay? And you are going to do five years in prison…I'm going to give you $10,000 right now. With $10,000 your family is going to be supported like kings and queens for a year…If you are caught, you will be working in Unicorp [a prison industry]…And then you are going to make - you're going to clear a month at least $300….If you clear you make another $10,000 - that's $20,000. If you don't we will support your family and in five years you come back.' If he is caught, they don't follow through, but this is the situation in Colombia.

While poverty and profit are plausible enough explanations, they are also very broad categories. What of deception, coercion or 'relative' – as opposed to 'abject' – poverty? Ethnographic research (discussed below) provides a more nuanced typology of motivations for drug trade participants within the broad parameters set by this literature.

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[70] Desroches (n 38) 828.

[71] Decker and Chapman (n 55) 98.

[72] Ibid.

The economic literature has made a major, if somewhat pessimistic, contribution to predicting how the market or participants will respond to new drug control measures. Reuter and Kleiman concluded as early as 1989 that intensified law enforcement at any level of the supply chain is unlikely to increase the price or reduce the consumption of drugs, and the prediction appears to have been borne out:

> Part of the problem is that so many of the enforcement resources are focused on a part of the drug distribution system that accounts for very little of the retail price of the drug. Limiting cocoa production in Peru, capturing Colombian crewmen on marijuana smuggling ships, or imprisoning importers of Iranian heroin produces impressive statistics but imposes relatively light costs on the drug distribution system. Even producing a lot more of these enforcement outputs will not much raise the costs of distributing drugs. [73]

Adaptation strategies may be as simple as scaling down the size of shipments,[74] or, as noted above, sharing cargo space with other enterprises. This literature explains the use of human couriers, rather than large-scale shipments as a similar risk-diversification strategy used in response to law enforcement scrutiny of larger shipments. As long as some human couriers succeed, the method continues to be profitable, and traffickers continue to be caught, or not caught, as the case may be. Another adaptation strategy has been the manufacture of methamphetamine from ingredients purchased from retail pharmacies following a crackdown on imports of the precursors ephedrine and pseudoephedrine, and shifting production (laboratories) in response to law enforcement attention.[75]

Finally, there is a small but growing literature on understanding and evaluating the 'unintended consequences' of international drug control policy, which presently prioritises the elimination of supply over the reduction of demand and provision of treatment and rehabilitation notwithstanding the predictions of this literature that supply-reduction strategies are largely futile. The unintended consequences of this prohibition policy are numerous, and include the geographic displacement of rural farmers in coca and opium poppy growing areas, and

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[73] Reuter and Kleiman (n 16) 336.

[74] In relation to marijuana shipments in the US in the mid-1980s, Reuter and Kleiman observed that, in response to law enforcement interdiction, smugglers scaled down the size of transport vessels, but increased their number, so that the quantity seized did not rise with the increase in interdiction pressure: Reuter and Kleiman (n 16) 320.

[75] Peter Reuter, *The Unintended Consequences of Drug Policies*, Report 5, 155 in Reuter and Trautmann (n 43).

environmental degradation as a result of crop eradication programs; increased morbidity and mortality in consumer countries as a result of a lack of regulation of production and sale of drugs; increased morbidity and mortality in consumer countries as a result of the criminalisation of drug use,[76] such as substance displacement into new psychoactive substances with unknown effects; displacement of public money from the public health system and into law enforcement and the criminal justice system; and the increase in corruption opportunities associated with the black market, including as an avenue for financing terrorist activities.[77] The insight that this literature can provide into intractable policy issues here is impressive.[78]

### *B Population and survey-based approaches*

Population and survey-based approaches to understanding the world drug market build on the economic conception of the drug trade as a market by extrapolating from police, health and other survey data to build a more detailed picture. The UNODC's World Drug Report and the ACIC's Illicit Drug Data Report are key examples. The considerable limitations of official data on the drug trade are discussed above, and these limitations flow through to population and survey-based approaches that draw on this data or use similar collection methods. Overall, the picture provided by population and survey-based approaches is highly unreliable without a sophisticated understanding of these limitations. Nevertheless, these are often the only source of information on drug smuggling methodologies, so it cannot be entirely disregarded.

### *C Ethnographic and qualitative research*

Ethnographic and qualitative research with drug market participants has been pivotal in furthering scholarly understanding of the world drug trade. Unlike other approaches,

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[76] Users are less likely to seek treatment if drug use is stigmatised or criminalised; additionally, drug users are more likely to share needles, and thereby spread infectious blood-borne diseases, if needles are hard to obtain and potentially incriminating evidence of drug use.

[77] For example, Peter Reuter, *The Unintended Consequences of Drug Policies*, Report 5, 155 in Reuter and Trautmann (n 43); Fernanda Mena and Dick Hobbs, 'Narcophobia: Drugs Prohibition and the Generation of Human Rights Abuses' (2009) 13(1) *Trends in Organized Crime* 60; Daniel Heilmann, 'The International Control of Illegal Drugs and the UN Treaty Regime: Preventing or Causing Human Rights Violations?' (2011) 19 *Cardozo Journal of International and Comparative Law* 237.

[78] For example Reuter's analysis of the threat to Afghanistan's political stability because of the massive opium growing and heroin smuggling industry there: Peter Reuter, *The Unintended Consequences of Drug Policies*, Report 5, 157 in Peter Reuter and Trautmann (n 43).

ethnographic and qualitative approaches generally do not assume that the drug trade can be conceptualised as a 'market.' There are few ethnographic or qualitative studies concerning producers/manufacturers, wholesalers or smugglers, because of the relative difficulty of accessing smugglers or others further back in the supply chain.[79] Thus, each case study is important in confirming or contesting predictions made by economic models and other approaches.[80] The key studies are described in chronological order below. Considerable detail is provided in relation to each study because of the disproportionate significance that each study has in the overall multi-disciplinary literature on understanding international drug markets.

Adler's (1985) seminal ethnographic study of 65 marijuana dealers and smugglers in California in the mid to late 1970s – most of whom were white, middle class males with no prior records – sensationally challenged the stereotypical image of the hierarchical/organised criminal organisations, which was consistent with the then emerging economic literature. Four years later, following a study of 41 federal prisoners involved in the 'upper levels' of the cocaine and marijuana markets, Reuter and Haaga (1989) also concluded that these criminal organisations did not resemble the mafia model, but consisted of 'temporary and shifting coalitions of dealers.'[81] Reuter and Haaga found that there was much money to be made by [m]en of no obvious skill.'[82] Dorn, Murji and South's (1992) study of 25 drug smugglers in British prisons found 'no cartels, no mafia, no drug barons; and, consequently, relatively little corruption.'[83]

In the early 1990s, there were a number of ethnographic studies of human drug couriers, or 'drug mules.'[84] At this time Penny Green, in her influential book *Drugs, Trafficking and*

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[79] Alison Ritter, 'Studying Illicit Drug Markets: Disciplinary Contributions' (2006) 17(6) *International Journal of Drug Policy* 453, 454.

[80] Ibid.

[81] Peter H Reuter and John Haaga, 'The Organization of High-Level Drug Markets: An Exploratory Study' (No N2830, RAND Corporation, February 1989) v.

[82] Ibid 35.

[83] Nicholas Dorn, Karim Murji and Nigel South, *Traffickers: Drug Markets and Law Enforcement* (Routledge, 1992) x.

[84] For instance, Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press, Winchester, 1998); Tracey Huling, 'Women Drug Couriers - Sentencing Reform Needed for Prisoners of War' (1994) 9 *Criminal Justice* 15.

*Criminal Policy: The Scapegoat Strategy* (1994), identified 'drug mules' as persons who were coerced, duped or had limited alternatives to small-scale trafficking on behalf of others for grossly inadequate compensation relative to the risk of detection.[85] Around this time many scholars also thought drug mules were likely to be impoverished widows, mothers and pregnant women from developing countries who had been exploited by 'drug cartels.'[86] If caught, drug mules faced lengthy terms of imprisonment in a foreign gaol or, in some countries, death, which made them particularly sympathetic subjects. Drug mules were characterised as victims rather than perpetrators of the world drug trade or, at worst, reluctant participants caught in the cross-fire in the war on drugs. Theirs was a story of acute social, racial and gender-based inequality. Scholars argued that the criminal justice system had failed these persons; curiously, not by convicting them,[87] but because the severity of the sentences compounded the social inequalities that produced the offending by removing the offenders from their communities. Green contended that the apparently harsh sentences were a product of the conscious scapegoating of foreigners by Westernised governments in their ideological war on drugs.[88] Later ethnographic research (discussed further below) contends that Green and others were describing a small subset of human couriers. Zaitch's (2002) ground-breaking three-year ethnographic research with active cocaine dealers in Colombia and the Netherlands also reached conclusions consistent with the economic literature: modern business practices in the cocaine industry mirror those of licit trade;[89] transportation costs are 'very small' in comparison to profits;[90] and criminal enterprises are small and fluid, rather than large and hierarchical.[91] Zaitch provides a functional typology of participants in this trade, observing that a diverse range of Colombians are involved in all roles: 'mulas' (small air couriers), 'boleros' (ball swallowing couriers or

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[85] Green (n 84).

[86] Huling (n 84) 9, 15.

[87] This appears to have been accepted as a *fait accompli* for persons caught concealing the drugs internally or strapped to their bodies. In Australia the defence of duress would be unlikely to succeed because poverty is not recognised in the *Criminal Code* (Cth) as a circumstance of necessity.

[88] Green (n 84).

[89] Zaitch, Damian, Trafficking Cocaine: Colombian Drug Entrepreneurs in the Netherlands (Kluwer International, 2002) 103.

[90] Zaitch (n 89) 104.

[91] Ibid.

‘body packers’), ‘niñeras’ (‘baby sitters’ and professional couriers), and ‘tripulantes’ (ship crew members). For instance, ‘mulas’ include persons ‘from desperate young men and women of urban areas to rather well-established migrants in destination countries; from friends and relatives of other drug exporters and couriers to low and middle class adults willing to move upwards; from adventurers to diplomatic personnel to students.’[92] The motivations of ‘mulas’ are equally diverse: ‘debts and other money needs, pressures and threats, lack of job or occupation prospects, the ambition to gain more status and material wealth, the desire to travel, to migrate, or to emulate other couriers – whether neighbours, relatives or friends.’[93]

Pearson and Hobbs (2003) interviewed 50 prisoners who had been convicted of involvement in the importation or distribution of various drugs, which the authors called the ‘middle market.’ This case study also supported predictions in the economic literature about ‘small, flexible networks and partnerships of free-trading entrepreneurs,’ cooperation between networks/participants and the absence of violence.[94] It also suggested the existence of ‘multi-commodity brokers’ dealing in several different drugs, particularly at the importation stage.[95]

Desroches (2005) interviewed 70 persons involved in 62 different drug networks, who had been convicted in Canada of federal offences involving importing, manufacturing or wholesale distribution. The author sought to understand the prisoners’ social characteristics, pathway into crime and the organisation of the criminal enterprises in which they were involved. The study confirmed earlier research about the small, informal and non-violent nature of these enterprises. Of interest, Desroches identified ‘people skills’ – such as treating others with respect, keeping promises and paying debts – as a key attribute of successful smugglers.[96] Most made plans to retire once they had accumulated sufficient wealth.[97] Consistently with the small nature of enterprises, Desroches observed that most dealers had ‘little or no idea what the police

[92] Zaitch (n 89) 145.

[93] Ibid 145.

[94] Pearson and Hobbs (n 36) 344.

[95] Ibid 345-6.

[96] Desroches (n 38) 133.

[97] Ibid 106.

were up to' and got their information about law enforcement by way of 'gossip, hearsay and word of mouth' rather than any systematic counterveilance strategy.[98]

Caulkins et al (2009) explored how and why smugglers bring drugs into Britain based on interviews with 110 prisoners incarcerated for drug smuggling. The authors found that most participants entered as human couriers on commercial plane flights, some were involved in large-scale air or sea cargo shipments and few were involved in secreting drugs within containers of legitimate commerce (using bent truck drivers) or public transport on ferries or the Euro-tunnel. The most numerous of these participants – human couriers on commercial plane flights – were responsible for importing the smallest quantity of drugs overall.[99] The authors describe two types of human couriers, the self-employed (who owned the drugs) and the employed (who carried drugs on behalf of another):

> In the first, individuals were paid on a fee-for-service basis (eg $1,000 per kg), but they were not responsible for drugs lost en route, presumably because loss was usually part and parcel of being arrested…Some were lorry drivers, but most were couriers, who were more like cannon fodder than professional service providers. In the second model, the organisation moving the drugs across the border owned the drugs in the same sense that a mid-level domestic distributor does. Indeed, they almost always broke down the drugs into smaller quantities…[100]

The authors found that 'the allure of easy money was a common motivator, but more than a few couriers reported being coerced and/or tricked into carrying drugs.'[101]

Benson and Decker (2010) interviewed 34 federal prisoners convicted of smuggling large quantities of cocaine to the United States, to understand the organisational structure of drug smuggling enterprises. The authors used as the touchstone for comparison the typical features of licit organisations, namely: hierarchy, established procedures, established communication methods, specialisation/coordination of staff and merit based recruitment/promotion. Consistently with the economic literature, the authors concluded that these enterprises tend to

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[98] Ibid 131.

[99] Jonathan P Caulkins, Honora Burnett and Edward Leslie, 'How Ilegal Drugs Enter an Island Country: Insights from Interviews with Incarcerated Smugglers' (2009) 10(1-2) *Global Crime* 66, 91.

[100] Ibid 90-91.

[101] Ibid 84.

be flat rather than hierarchical/vertical, responsive to events – such as law enforcement technologies, loss of personnel or changes in demand – rather than committed authority or established procedures, reliant on informal associations rather than formal communications channels, manned by generalist rather than specialist personnel, and recruited/promoted based on shared ethnicity, family connections and trust, rather than merit.[102] The personal experiences related by the subject participants are insightful. For example, here a prisoner describes the financing arrangements for a shipment of cocaine:[103]

> RESPONDENT 30: a bunch of people will invest in the load. It's like selling shares of stock. This person will put up this amount of money. Another person will put up another amount of money, and they in effect maybe own 2 or 3 keys. Then the collector, or whoever, whatever you want to call him, puts all this together, and this joint venture goes on a plane.[104]

In 2010 Jennifer Fleetwood produced an influential ethnographic study on international drug smugglers. The study was based on 15-months of field work with prisoners in Quito, Ecuador, which is a significant export point for coca grown or processed in Colombia and Peru. The randomly selected subjects were from a wide range of developing and developed regions, including North America. The sample composition alone immediately ran contrary to the stereotype of the 'third world' drug mules. Fleetwood found that the pathway into crime for

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[102] Jana Benson and Scott Decker, 'The Organizational Structure of International Drug Smuggling' (2010) 38(2) *Journal of Criminal Justice* 130, 136.

[103] Ibid 134-136. Other examples include: a description of the evolution of the market from hierarchical cartels to a flatter organisational structure - 'RESPONDENT 8: Well, it's different – its smaller groups now. Like before, it was all cartels. It was a group of gentlemen, it was like a board. We make decisions together and stuff. Now its all broken up…all of those brokers became chiefs, became bosses…they know all of the connections. They have their own networking, they have clients. [Now they are]…smaller groups, unknown small groups like two, three guys…'; a description of the informality of financing arrangements: 'RESPONDENT 1: I think [payment] would have happened after they took the merchandise, after they sold it. There wasn't any date…we never talked about it…we don't sign no contract. All we do, we shake hands on it because my word is my vow, and I have to keep it'; and a description of the centrality of ethnic ties in recruitment: 'RESPONDENT 6: I arrived [in Colombia]. I used to live there, fishing. I meet a girl. Then she die, and I get so damn crazy. That's when I start using [cocaine]. Then I meet people that I knew – I knew them before. They was lobster fishermen, poor people. I find out they are all rich. Then they give me work smuggling drugs...they were Cubans, all the time Cubans. There is a bond between Cubans...you trust another Cuban more than a Colombian or Haitian.'

[104] Ibid 135.

these persons (whom she calls 'mules') typically involved financial difficulties – such as unmanageable gambling debts or foreclosure on a mortgage – rather than threats or coercion, as was previously thought:

> This research found that both men and women may be threatened or coerced into working as a drugs mule. These were a minority however and many mules found themselves pressured into working by debts and circumstances of deprivation. However, some mules were not pressured, but saw working as a mule as a way to improve their material circumstances in ways which were otherwise attainable.[105]

Based on this research, Fleetwood theorised that 'relative poverty' or 'relative deprivation' – rather than abject poverty – better explained the motivation of persons involved in transporting small quantities of the drug concealed internally or in suitcases (whom she calls 'mules'):

> The mules [studied] were from a diverse set of national and social circumstances. As such, it was not poverty but rather relative deprivation that was important. Mules were not motivated by the first world 'dream' but rather to have what their neighbours, colleagues and friends had.[106]

In a 2011 article, Fleetwood drew on the same study to argue that the use of 'straight weight' sentencing laws – where offenders are subject to a greater penalty the larger the quantity of drugs they import – disproportionately punishes 'mules' as opposed to 'professional traffickers,' because mules often carried greater quantities of drugs than professional traffickers.[107] Fleetwood found that there were two distinct subsets of traffickers within the set of human couriers studied: 'professional traffickers,' who had a financial stake in the drugs they carried, and 'mules,' who carried drugs owned by others. Fleetwood found that not all human couriers were 'mules' and therefore not all human couriers were victims in the way Green and others had described nearly two decades earlier. Moreover, Fleetwood contended that discourses about drug trafficking typically presume that women are victims of, rather than

[105] Jennifer Fleetwood, 'Drug Mules in the International Cocaine Trade: Diversity and Relative Deprivation' (2010) November (192) *Prison Service Journal* 3, 8.

[106] Ibid 6.

[107] Jennifer Fleetwood, 'Five Kilos: Penalties and Practice in the International Cocaine Trade' (2011) 51(2) *British Journal of Criminology* 375, 380.

participants in, the drug trade, which has resulted in a prejudiced or subjective scholarship.[108] As to the differences between 'professional traffickers' and 'mules,' Fleetwood acknowledged that the two appear identical at the time of their arrest or sentence, but there are important differences, based on their control over the type and quantity of drugs carried:

> Because mules work for someone else, they have little control over the choice of drug and the quantity they carry. This is not because of naivety about what they were doing (many here were well informed), but rather because the methods of concealment ensured that they could not know what they are carrying. Interviews with mules and investors found that mules were often misled and were given much larger quantities to carry than agreed. This was especially the case where drugs were concealed in luggage… As a result, mules carried larger quantities than professional traffickers. In contrast, professional traffickers had full control over their work. This, in combination with a number of pragmatic factors (including limited available capital and technologies of concealment) meant that professionals carried smaller quantities.[109]

Additionally, because professionals were aware the five-kilo sentencing threshold in the US and the UK which operated to punish serious offenders more heavily, most carried just under the threshold quantity.[110] Fleetwood's study is the first and only study to examine how traffickers decide 'what drug and what weight to traffic and whether or not this is a meaningful indicator of seriousness.'[111] Here Fleetwood summarises the alternative methods of concealment for cocaine which, at the time, cost between $1,300 and $2,000 wholesale:

> Specialist packaging was typically contracted from a consultant who could command a high price (one respondent paid $5,000). Low-technology methods (e.g. strapping the drugs to the person's body) requiring relatively little specialism were much cheaper. Larger groups employed 'chemical cloaking' whereby cocaine was processed into ceramics, glass or plastic (see also Krebs et al. 2000). This was the most complex and costly form of concealment. Travel and accommodation for the

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[108] Fleetwood, Jennifer, 'Mafias, Markets, Mules: Gender Stereotypes in Discourses About Drug Trafficking' (2015) 9(11) *Sociology Compass* 962, 969.

[109] Fleetwood (n 107) 387-88.

[110] Ibid 388.

[111] Ibid 381.

> mule varied but were, on average, between $2,000 and 5,000.[16] Together, these costs determined how much had to be sent to make a profit. One investor interviewed stated that he had to send at least 2.5 kilos to make it worthwhile.[112]

The chosen method of concealment – whether swallowed, stowed or strapped to the body – dictates the weight of drug that can be carried, and this is decided by the investor, if the courier is a mule, or by the courier if the courier is a professional.[113] Some mules did not even inquire as to how much heroin they were carrying. [114] By contrast, 'professional traffickers' maintained autonomy throughout the smuggling and carried smaller quantities than mules.[115] Fleetwood ultimately concludeed that the weight of drug carried is not just a poor proxy for the financial reward that a mule expects, the degree of involvement of the mule in the broader criminal enterprise or the overall seriousness of the offence; it may indicate just the opposite.[116] These findings raise serious questions about how to distinguish a mule from a professional trafficker at arrest or sentence, and whether that distinction is meaningful in terms of assessing the culpability of an offender.

### *D Behavioural or psychological approaches*

Like ethnographic approaches, behavioural and psychological approaches do not assume that the drug trade is a market or that participants will behave 'rationally,' rather, drawing on the influential research of Kahneman and Tversky, they seek to understand how participants behave.[117] A classic example of the contribution of the behavioural sciences is Caulkins and MacCoun's (2003) paper examining whether assumptions underlying the rational actor models used by economists accurately represent behaviour in international drug markets.[118] The impetus for the paper was the absence of an adequate explanation for why retail prices for

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[112] Ibid 383.

[113] Ibid 383, 385.

[114] Ibid 384.

[115] Ibid 386.

[116] Ibid 388.

[117] Dwyer and Moore (n 32) 95.

[118] Caulkins, Jonathan P and Robert MacCoun, 'Limited Rationality and the Limits of Supply Reduction' (2003) Spring *Journal of Drug Issues* 433; For other examples see Ritter (n 79).

cocaine and heroin in the US fell by 70 to 80 per cent during the 1980s and 1990s despite increases in arrest rates, incarceration rates and law enforcement budgets:

> Falling prices in the face of increasing enforcement are puzzling because most of the burden of drug enforcement falls on sellers, and according to elementary economics, interventions that restrict or suppress supply typically drive prices up rather than down. [119]

The authors found that the fall in retail prices might be explained by several market oddities, including efficiency gains as drug suppliers became more expert in their craft, tough enforcement action in relation to marijuana incentivising consumers to switch to cocaine and heroin, and/or the market being in disequilibrium in the 1980s and 1990s. But these explanations, either alone or in combination, were insufficient to explain the apparent ineffectiveness of law enforcement interventions.[120] The authors drew on human decision-making theory to contend that there are several other factors that may operate separately or in combination to influence participants' perception of risk. These include cognitive biases and heuristics, such as optimism bias,[121] vicissitudes of the moment,[122] intoxication,[123] overgeneralisation from early success,[124] and the 'availability heuristic' – underestimating the probability of arrest by basing the calculation on the fraction of their friends who have been arrested.[125] They concluded that these factors diluted the impact of price signals so that 'other

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[119] Caulkins and MacCoun (n 118) 434.

[120] Ibid 438.

[121] Classically, that the majority of drivers consider themselves to be more skilful than the average driver.

[122] Caulkins and MacCoun (n 118) 449. 'There may be moments in the chaotic and cash-constrained life of a young adult when the desire for quick cash seems particularly urgent, whether the reasons are dramatic (eg owing money to someone who will punish non-payment with physical assault) or pedestrian (wanting to impress a date by spending lavishly'

[123] Ibid 449. The authors point out that 'a high fraction of drug sellers are active users.'

[124] Ibid. The authors point out that 'limited experience should provide limited confidence, but people are notoriously insensitive to sample size and tend to give much greater weight to salient personal experiences than to more abstract base rate statistics.'

[125] Ibid 448. Underestimating risk because of the complexity of the calculation. The authors explain that 'dealers who are incarcerated will be less visible than dealers who are not. Moreover, arrests and incarceration are clustered because police target dealing organisations as well as individuals and they use information from arrestees to locate and arrest other dealers. Thus for most people who have not been arrested, the fraction of drug selling

factors become more prominent than the risks and prices calculations would suggest.'[126] The authors concluded that 'even modest departures from the classical model of decision-making are sufficient to break the link between drug enforcement and drug prices.'[127] Caulkin and MacCoun's findings together with other findings within this literature challenge the applicability of mainstream economic models to the international drug market and have serious implications for law enforcement interventions premised on general deterrence:

> [W]e do not argue that drug enforcement has no value. But the discussion above raises questions, particularly for highly punitive approaches to sellers operating in markets that are large enough and efficient enough to make it relatively easy to identify potential replacements for incarcerated sellers. If deterrence is undermined by the way risks are perceived, then potential replacements may view the disappearance of their predecessors as a stroke of good fortune, not a sobering warning. [128]

### *E Synthesis and conclusion*

No single official source or scholarly discipline can reliably describe international drug markets and participants. To build a coherent account, it is necessary to acknowledge the significant limitations of both official data and the various scholarly approaches, and to be cognisant of the major stereotypes – of the drug trade as a market or as a violent cartel – that pervade both official data and some scholarship.

The true extent of global problematic drug use is unknown, but it is likely to be considerably lower than official estimates, which are based on highly dubious 'prevalence' measures rather than indicators of drug-related harm. In all sectors drugs are smuggled from poorer production countries to relatively richer consumer countries. Loose coalitions of profit-oriented individuals with no involvement in organised crime, violence, drug use, corruption or political subversiveness populate all sectors. In fact, trust is likely a hallmark of a successful drug

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acquaintances who have been arrested will be smaller than the fraction of all sellers who have been arrested. If people estimate the probability of arrest based on the fraction of their friends who have been arrested, they will systematically underestimate their arrest risk.'

[126] Ibid 53.

[127] Ibid 439.

[128] Ibid 455.

enterprise. International drug trafficking is not a particularly complex or skilled task, but requires international contacts. Networks therefore typically comprise individuals with ethnic or familial ties in more than one country because trust is essential to business success in a world where there is no recourse to legal protections; and because international contacts in this line of work are so valuable.[129] Different networks are known to collaborate with respect to large-scale shipments, to minimise interdiction risk. Multi-drug shipments of, say, cocaine and methylamphetamine, are therefore likely to be an indicator of multi-network collaboration rather than cartel dominance.[130] Smugglers receive profits or remuneration in proportion to their sentencing risk and the opportunity cost of their participation. Smuggling is therefore likely to be cheaper and so more prevalent in countries where law enforcement is less effective, wages are low and/or unemployment is high; or where an individual perceives he or she has no acceptable alternatives to smuggling.

The immense value of economic and behavioural or psychological literature on the drug trade is in identifying when and how drug 'markets' differ from licit markets. The answer appears to be: 'considerably;' such that it often takes a professional economist to disentangle the incorrect assumptions from the correct. Ordinarily, licit market participants or enterprises are competitive, but drug market participants or networks tend to be more cooperative. Ordinarily, licit market participants or enterprises act rationally, but drug market participants or networks often act irrationally based on a range of cognitive biases that are sufficient to break the presumed link between risks and prices in many circumstances. The cost of production and the elasticity of demand in relation to drug 'markets' are so different to those in licit markets that ordinary assumptions about the link between increased costs and reduced demand and/or supply do not hold. Arguments about general deterrence therefore do not hold either. The result is that it may be foolish to assume that drug trade participants will act in the same way as participants in licit enterprises. Collectively, this literature exposes the 'market' discourse as grossly inaccurate when applied on a macro-scale to drug control policy formulation, such as general deterrence, and when applied on a micro-scale, to individuals, such as in sentencing proceedings.

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[129] Reuter and Trautmann (n 4343).

[130] For a recent study of 'poly-drug importations' see Caitlin Hughes et al 'Trafficking in Multiple Commodities: Exposing Australia's Poly-drug and Poly-criminal Networks' (Monograph, No 62, National Drug Law Enforcement Research Fund, August 2016).

Ethnographic and other literature provides important insights into the behaviours of drug smugglers. This literature demonstrates, consistently with the economic literature, that assumptions about how individuals will behave in licit 'markets' or settings often do not reflect how individuals behave in the drug trade. Collectively, this literature exposes the 'drug trade as a blame game' discourse by identifying the extent to which foreign nationals are overrepresented within prison populations. (The economic literature explains that this is because human couriers are responsible for the vast majority of importations by number, but only a small percentage by weight).[131] Surprisingly, it appears to be rare that a person is tricked, coerced or forced into smuggling. The literature also identifies how assumptions, such as the 'drug trade as a business/market,' have operated in legislative and judicial settings to disproportionately punish 'drug mules' relative to 'professional traffickers' by using weight of drugs as a proxy for culpability.

In 2012 the EMCDDA undertook a project to determine 'if it is feasible to capture a common European definition of a drug mule and to assess the implications of this for data gathering and future research,' and proposed the following definition: [132]

> 'Drug mule': A drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs.

This definition reflects the identified difference between Fleetwood's (2011) 'professional'/ 'mule' distinction and Caulkins' 'self-employed' / 'employed' distinction. This definition may be useful for achieving consistency of usage, but it reveals nothing about the relative culpability of the two types of human courier; the distinction between the two is merely a question of resources and appetite for risk. Understanding relative culpability is a far more complex task, that requires a more detailed exploration of the person's pathway into crime than is available from extant ethnographic or other research.

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[131] This is because most drugs are smuggled around the world in large-scale air or sea cargo shipments. See Peter Reuter, 'Assessing the Operation of the Global Drug Market; in Reuter and Trautmann (n 43).

[132] European Monitoring Centre for Drugs and Drug Addiction, 'A Definition of 'Drug Mules' for use in a European Context' (Thematic paper, European Monitoring Centre for Drugs and Drug Addiction, 2012) 3.

## IV Drug trafficking at Australia's border

### *A Official statistics*

This section summarises what is known about the international drug trade at Australia's border based on the latest available data from each of the six official data sources, namely the ACIC's IDDR and NWDMP, the NDSHS, DUMA, IDRS and EDRS.

## V Consumption / demand-side statistics

The most recent NWDMP data estimates the total national annual consumption of illicit drugs by weight, based on wastewater analysis, and finds that consumption of amphetamines (comprising mostly methylamphetamine) far exceeds consumption of all other drugs combined:

| Estimated total national annual consumption[133] | |
|---|---|
| Amphetamines[134] | 8,387 kg |
| MDMA | 1,280 kg |
| Heroin | 765 kg |
| Cocaine | 3,075 kg |
| Cannabis | Not recorded |
| TOTAL | 13,507 kg |

Table 4: Summary of NWDMP wastewater analysis data[135]

Using 'price data for 2016-2017'[136] the ACIC estimates that 'Australians spent more than $9.3 billion in methylamphetamine, cocaine, MDMA and heroin' in the year to August 2018, and that more than three quarters of that total (78 per cent) was spent on methylamphetamine.[137] Longitudinal WWA data is not yet available. International comparative analysis indicates that average methylamphetamine use per capita is higher in Australia than in any other country in

[133] Total amount of stimulant consumed (dose per 1,000 people per day) by country as a population weighted average of the number of reported wastewater analysis sites: Australian Criminal Intelligence Commission, 'National Wastewater Drug Monitoring Program Report' (NWDMP Series, No 6, Australian Criminal Intelligence Commission, December 2018).

[134] Mainly methylamphetamine.

[135] Estimated interdiction rate based on estimated consumption and seizure figures reported in Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2016-17' (Report, ACIC, 2018) 13.

[136] The report provides no further information on how the retail price was ascertained.

[137] Australian Criminal Intelligence Commission (n 133) 9.

the world that provides equivalent wastewater analysis statistics excepting the US, while average MDMA, heroin and cocaine use per capita is very low.[138] However, as previously discussed, these comparative figures must be treated with caution, because there is no available comparative data for regions that are believed to be significant consumers of methylamphetamine, including Asia and parts of North America.[139] It is therefore necessary to supplement this information with survey-based demand-side statistics.

The WWA data in combination with DUMA and IDRS/EDRS survey data indicate that amphetamines – mostly comprising methylamphetamine – are not only the most consumed drug, but that they are the most readily available type of drug,[140] and that there is a strong drugs-crime nexus, because nearly half (46.7 per cent) of recent arrestees tested positive for amphetamines. This does not necessarily fit with the NDS survey data, which indicates that cannabis, cocaine and MDMA are the most 'prevalent' drugs. This highlights the limitations of 12-month prevalence measures as a proxy for total demand. Wastewater analysis data is likely more reliable.

| | AIHW HOUSEHOLD SURVEY[141] 12-MONTH PREVALENCE STATISTIC | DUMA SURVEY[142] RECENT ARRESTEES TESTING POSITIVE |
|---|---|---|
| Cannabis | 10.4% | 46.7% |
| Cocaine | 2.5% | 1.8% |
| MDMA | 2.2% | 2% |
| Amphetamines[143] | 1.4% | 52.9% |
| Heroin | 0.2% | 7.3% |

TABLE 5: SUMMARY OF SURVEY-BASED DEMAND-SIDE STATISTICS[144]

[138] Australian Criminal Intelligence Commission (n 27) 5, 2018.

[139] Ibid 63.

[140] Karlsson and Burns (n 30); Peacock et al (n 31).

[141] Claydon et al (n 28).

[142] Patterson (n 29).

[143] Average of speed, base and crystal forms of methamphetamine.

[144] Estimated interdiction rate based on estimated consumption and seizure figures reported in Australian Criminal Intelligence Commission (n 135) 13.

*A Interdiction / supply-side statistics*

On the supply side, by quantity, cannabis was the most seized drug, followed by amphetamines (comprising mostly methylamphetamines), MDMA, heroin and cocaine.[145] Excluding cannabis,[146] a comparison of WWA consumption estimates with IDDR seizures indicates that interdiction rates for cocaine and MDMA are much higher compared with amphetamines and heroin, meaning that law enforcement is more effective at interdicting cocaine and MDMA. This, in turn, confirms that supply-side or interdiction data provides a distorted picture of actual supply and therefore of importation activity also. Nevertheless, this is the only available official source of data concerning importations.

[145] Ibid 12-13.

[146] Cannabis is overwhelmingly produced domestically, and it is not yet detected by wastewater analysis.

| | Estimated total national annual consumption (WWA)[147] | National border Seizures [148] | Estimated total national importations inclusive of seizures[149] | Estimated interdiction rate | Quantity needed to successfully import one kg of the drug[150] |
|---|---|---|---|---|---|
| Amphetamines (mainly methylamphetamine) | 8,387 kg | 3,821 kg | 12,208 kg | 31% | 1.31 kg |
| MDMA | 1,280 kg | 1,426 kg | 2,706 kg | 53% | 1.53 kg |
| Heroin | 765 kg | 224 kg | 989 kg | 23% | 1.23 kg |
| Cocaine | 3,075 kg | 4,623 kg | 7,698 kg | 60% | 1.60 kg |
| Cannabis | Not recorded | 7,547 kg | - | - | - |
| Total | | | 23,601 kg | | |

Table 6: Comparison of the weight of methylamphetamine, MDMA, herion and cocaine seized nationally in 2016-17 and estimated consumption per WWA[151]

Available supply-side data indicates that drugs are smuggled to Australia via international mail, air or sea cargo, or aircraft passenger/crew. Different drugs dominate different logistics streams. By weight, most amphetamines are interdicted in the sea cargo stream (57.7 per cent), most MDMA in the international mail stream (57.3 per cent), most heroin in the air passenger/crew stream (35.8 per cent), most cocaine in the air cargo stream (45.7 per cent) and most cannabis in the international mail stream (41.1 per cent).[152] The different interdiction rates for each drug may reflect the efficacy of border protection methods used in the different importation streams. Over 180 million international mail items comprising letters, express

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[147] Total amount of stimulant consumed (dose per 1,000 people per day) by country as a population weighted average of the number of reported wastewater analysis sites: Australian Criminal Intelligence Commission (n 133).

[148] Ibid.

[149] Assuming a purity rate of 70 per cent. There are no available estimates of purity rates for drugs seized at the border, because drugs are only tested for purity when a matter proceeds to prosecution; but anecdotal evidence based on sentencing remarks is that purity rates tend to be between 70 to 80 per cent, and the larger the quantity imported, the higher the purity rate. Purity rates decline as drugs move through the supply chain towards the consumer, and as detection risk increases.

[150] = (Q1 + 100)/100.

[151] Estimated interdiction rate based on estimated consumption and seizure figures reported in Australian Criminal Intelligence Commission (n 135) 13.

[152] Ibid 11.

mail service, parcels and articles ordinaire entered Australia in 2012-13.[153] The customs authority screened (ie visually inspected, x-rayed and/or screened via detector dogs) about 46 million articles (comprising 25 percent of all mail) and seized more than 67,000 items in 2012-13 posing a risk to biosecurity (eg the introduction of exotic species), public safety (eg firearms) or public health (including illicit drugs).[154] By contrast, in terms of air and sea cargo, there were 15.2 million sea and air cargo imports in 2010-11, the customs authority used 'intelligence led risk management processes' to decide which imports to inspect/examine, and made a total of only 2,305 detections of prohibited and restricted goods in 2009-2010.[155]

Imported cocaine likely originates in Columbia and Peru but is not smuggled directly to Australia.[156] Key embarkation points for seized cocaine are the Americas (by weight), and several Eastern European cities, as well as the US (by number).[157] The five largest seizures (by weight) comprised 100 kg via small craft into Brisbane, 71 kg within a hydraulic press shaft via sea cargo, 24 kg concealed in the luggage of an air passenger/crew, 20 kg also concealed in the luggage of an air passenger/crew and 15 kg in a cardboard box via air cargo. Together these seizures account for only 35 per cent of the total weight of seizures detected at the border. Imported heroin likely originates from Myanmar. Key 'embarkation points' for opiates seized in Australia were Thailand, Vietnam and Malysia (by weight), and the Netherlands, Thailand, Vietnam and France (by number). The five largest seizures accounted for nearly half (45 per cent) of the weight of drugs detected at the border. These seizures comprised 20.5 kg concealed in knee and arm pads via international mail, 18 kg packed in luggage via air passenger/crew, 10.8 kg via air passenger/crew, 10 kg concealed in cardboard boxes via air cargo and 8 kg via air cargo.

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[153] Australian National Audit Office, Screening of International Mail, 18 June 2014 https://www.anao.gov.au/work/performance-audit/screening-international-mail.

[154] Ibid.

[155] Australian National Audit Office, Risk Management in the Processing of Sea and Air Cargo Imports, 30 November 2011 https://www.anao.gov.au/node/2801.

[156] Based on the National Measurement Institute's forensic analysis of AFP and domestic seizures, which can determine country of origin for plant-based drugs.

[157] The Illicit Drug Data Report defines the 'embarkation point' as the 'origin of the transport stage of importations': Australian Criminal Intelligence Commission (n 135) 193.

| Drug type | Proportion of total interdicted importations by weight | |
|---|---|---|
| **Amphetamines**[158] | **Sea cargo** | **57.7%** |
| | Air cargo | 23.4% |
| | International mail | 18.8% |
| | Air passenger/crew | 0.2% |
| **MDMA** | **International mail** | **57.3%** |
| | Air cargo | 42.4% |
| | Air passenger/crew | 0.3% |
| **Heroin** | **Air passenger/crew** | **35.8%** |
| | Sea cargo | 32.0% |
| | International mail | 23.5% |
| | Air cargo | 8.6% |
| **Cocaine** | **Air cargo** | **45.7%** |
| | International mail | 25.0% |
| | Sea cargo | 22.9% |
| | Air passenger/crew | 6.4% |
| **Cannabis** | **International mail** | **49.1%** |
| | Air cargo | 44.4% |
| | Sea cargo | 4.8% |
| | Air passenger/crew | 1.7%% |

Table 7: Proportion of total interdicted importations by weight and importation stream 2016-2017[159]

Imported amphetamines comprise mostly methylamphetamine (including 'ice') which are likely mostly manufactured in China. Key 'embarkation points' for amphetamines are China (1,458.7 kg), Taiwan (289.2 kg) and Nigeria (222 kg). Four of the five largest seizures of amphetamines were over 100 kg imports, and four of these five were sea cargo importations. Imported MDMA likely originates from Europe. Key 'embarkation points' for MDMA are the Netherlands (80.2 kg), Germany (27 kg) and the UK (21.9 kg). Almost all MDMA (83.3 per cent) was imported by international mail, and the five largest seizures were all under 10 kg. The origin of imported cannabis is unknown. According to the World Drug Report 2017, cannabis is the most frequently consumed drug worldwide, and that it is grown, seized and consumed in almost all countries. Almost all cannabis consumed in Australia is produced domestically. Of the total seized at the national border, nearly two-thirds was imported by air cargo (65.5%) and over a third was imported by international mail (33.4%). More than half of imported cannabis came via the US. Without knowing the interdiction rate for each importation method, it is impossible to draw inferences about which smuggling methods account for more

[158] Including amphetamine-type substances but excluding MDMA.

[159] Australian Criminal Intelligence Commission (n 135) 11.

successful imports (by weight), or in which streams law enforcement surveillance is more effective.

### *B Arrests and prosecutions*

There are no official statistics on the number of charges laid with respect to importations in each logistics stream or even with respect to each drug type, and no official statistics on the age, sex, ethnicity or nationality of persons charged with importation offences. The latest statistics provided by the ACIC are that in 2017-18 there were 112,827 drug seizures in relation to a total of 30.6 tonnes of drugs and 148,363 arrests were made, with no distinction between arrests at the national border versus domestic arrests.[160] The Commonwealth Director of Public Prosecutions ('CDPP') reports that in 2017-18 it received 365 referrals to its Illegal Imports and Exports Practice Group, incorporating referrals for money laundering, tobacco importations, firearms importations and non-drug-related importation and exportation offences, and that just over half of all referrals came from the Australian Federal Police.[161] Assuming that all referrals for drug seizures at the national border come from the Australian Federal Police,[162] it is likely that the CDPP receives approximately 180 referrals per year. Assuming at least one charge is laid in relation to each such referral, there are likely about 180 federal drug prosecutions per year.

### *C Academic literature*

There is a very small academic literature on the Australian drug trade, and only one significant study on the importations as opposed to domestic supply.[163] In their 2010 literature review on Australian drug markets, Dwyer and Moore concluded that the Australian drug market is under-

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[160] Commission, Australian Criminal Intelligence, 'Illicit Drug Data Report 2017-18' (Report, ACIC, 2019) 5 <https://www.acic.gov.au/sites/default/files/illicit_drug_data_report_2017-18.pdf?v=1564727746>.

[161] Commonwealth Director of Public Prosecutions, 'CDPP Annual Report 2017-18' (Report, CDPP, 2019) <https://www.cdpp.gov.au/publications/2017-18-annual-report-0#HTML%202017-18>

[162] A small number of such referrals likely also come from Australian Border Force and the various state and territory police forces.

[163] Roslyn Le and Michael Gilding, 'Gambling and drugs the role of gambling among Vietnamese women incarcerated for drug crimes in Australia' (2016) 49(1) *Australian and New Zealand Journal of Criminology* 134.

theorised and stereotyped in both official data and scholarly literature as either a ‘cartel’ or an illicit ‘market’:

> [T]he subjects of drug markets—the persons engaged in the drug transactions through which drug markets are constituted—are represented through undifferentiated categorical descriptions, merely implicit and under-theorized or, in some cases, entirely absent. For example, with regard to surveillance research, in the heroin market section of the 2005–06 IDDR, the subjects of the report are variously described as ‘criminal syndicates’, ‘detections [of drugs]’, ‘air passengers’, ‘Asian and West African criminals’, ‘criminals’, ‘Australian-Vietnamese’, ‘Australian- Cambodians’, ‘arrests’, ‘detainees’, ‘price’ or ‘purity’. These categories reflect either market-like characteristics (e.g. price, purity), events (e.g. arrests, detections) or homogenized, and notably ethnic, categories of people (e.g. criminal syndicates, criminals, air passengers, Australian-Vietnamese) (Australian Crime Commission 2007: 41–50). [164]

In their own ethnographic work on heroin users and sellers of Vietnamese ethnicity in Sydney, Dwyer and Moore found that the drug trade was characterised by trust, loyalty and ethnical business practices rather than stereotypical distrust, violence and turf warfare.[165]

Unfortunately, Australian ethnographic and qualitative research constitutes a very small proportion of drug trade studies, with behavioural/psychological approaches even rarer.[166] The author has identified only one ethnographic study concerning the importation of – as opposed to the domestic trade in – drugs. That study, by Le and Gilding (2016), assumes particular importance in understanding who imports drugs into Australia and why. Le conducted in-depth interviews and observations of 18 women imprisoned in Victoria for drug offences, all of whom were motivated by gambling debt, specifically casino gambling. The median age of the women was 44 years and more than half were divorced or separated and depending on government benefits or informal work. For all participants, this was their first arrest. Le describes the participants as either ‘volunteers’ in or ‘conscripts’ to the drug trade.[167] For both ‘volunteers’ and ‘conscripts’ the pathway into drug smuggling began at the casino, where they

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[164] Dwyer and Moore (n 32) 89-90.

[165] Ibid.

[166] Ibid.

[167] Fleetwood (n 108).

ran up debts to other ethnic Vietnamese patrons (lenders). The participants described a mutual relationship of trust between themselves and the lenders:

> It's like they are sitting next to you, also gambling. But these people [the lenders] are always gambling at the casino. They gambled next to me and we would have pleasant conversations. I would tell them, 'I've lost so much. Today I've lost $1,000' or whatever amount it was. I was so upset so I borrowed money from them. (Thuy)
>
> …
>
> They trusted me so they lent me money. I just borrowed back and forth, back and forth like that. Do you understand? [Why did they trust you?] I was a regular gambler and I often went to the casino and they saw me there constantly. If they see you regularly gambling, they're not scared. And once I borrow from them, I repaid them straightaway. And so the next time, they lent me more. (Nguyet) [168]

The loan amounts were large – ranging from $5,000 to $20,000, and interest rates were exorbitant, at about 10 per cent per week.[169] The 'tipping point' at which participants 'could no longer hope to recover their debts through gambling…varied from $30,000 to more than $1 million.' 'Volunteers' actively sought out opportunities in the drug trade as a solution to their debt via 'friends from the casino' other than their lenders.[170] 'Conscripts' were forced into the drug trade through intimidation – falling short of violence or coercion – by their lenders, as one participant describes:

> If you don't pay off your debt, they force you, they demand it, and they go to your house looking for you. So you have to think about risky matters. . . if you don't repay them, then whenever or wherever you run into them, they will just abuse you then and there. That's why you try everything that you can to repay the debt. I didn't have any other pathway to find the money. (Nguyet) [171]

[168] Le and Gilding (n 163) 143.

[169] Ibid.

[170] Ibid 145.

[171] Ibid 144.

Volunteers 'adopted diverse roles in the heroin distribution chain, including coordination, supervision, recruitment, training, distribution and storage' and rapidly repaid their debt.[172] Most conscripts worked as human couriers on flights between Australia and Vietnam, earning about $20,000 per trip.[173] Two participants described the work as follows:

> I was so scared when I boarded the plane. When I exited the plane in Melbourne, I could've discarded the heroin in the toilet but if I threw it away, I was afraid that they would make me compensate for it. . . $24,000, how was I going to pay that back? (Thuong)
>
> I was praying to Buddha, 'Buddha, Buddha, it's because I didn't know better this time. Please give me the strength to be strong. Let me arrive to Australia and I won't dare do it a second time'. I was praying so much. . . Sitting on the plane for eight hours both my hands and legs were shaking so much. Even when I stepped off the plane I was shaking so much. (Canh) [174]

Interestingly, whether the participant entered the drugs trade as a 'conscript' or 'volunteer' determined their fate: 'conscripts were invariably incarcerated before they had repaid their debts' while 'volunteers were invariably incarcerated after they had repaid their debts.'[175] Le and Gilding contend that their study 'demonstrates a strong association between problem gambling and the drug trade, in that problem gambling provides both the motivation and opportunity for involvement.[176] Beyond this, the scholarly literature offers no answers to the questions of who imports drugs into Australia and why.

## VI ESTIMATING DRUG-RELATED HARMS

There are no complete or reliable estimates of drug-related harms, either globally or domestically, largely due to the difficulties of attributing officially recording causes of death and drug-related harms.[177] Two rudimentary statistics have been developed to provide

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[172] Ibid 146.

[173] Ibid 145.

[174] Ibid.

[175] Ibid 147.

[176] Ibid 148.

[177] Klimer, Reuter and Giommoni (n 10).

rudimentary evidence-based yardsticks for the purposes of this research: the 'single-overdose threshold' and the '5 per cent consumption threshold.'

*A Single-overdose threshold*

The 'single-overdose threshold' combines official statistics for the number of accidental deaths annually for each drug with the ACIC's estimates of total national annual drug consumption, to estimate the quantity of each drug that must be imported to be implicated in a single overdose death.

| Drug type | Number of recorded accidental deaths nationally in 2016[178] | Approximate estimated national annual consumption[179] | Estimated national annual importations inclusive of seizures (kg) | Single Overdose Threshold: Estimated weight of imported drugs implicated in each overdose death |
|---|---|---|---|---|
| Amphetamines, including methylamphetamine[180] | 105 | 8,387kg | 12,208kg | 116kg |
| Cocaine | 20 | 3,075kg | 7,698kg | 385kg |
| Heroin | 357 | 765kg | 989kg | 2.77kg |

Source: Adapted from NDARC, Opioid, amphetamine and cocaine-induced deaths in Australia: August 2018 and ACIC, and National Wastewater Drug Monitoring Program Report 5, 2018.

Although the 'single overdose threshold' statistic does not capture problematic drug use not resulting in overdose death, it provides a useful reference point for understanding the potential adverse health consequences of an importation. The calculations reveal that the importation of 116kg of amphetamines is probabilistically associated with one overdose death, the importation of 385kg of cocaine is probabilistically associated with one overdose death, and the importation of 2.77kg of heroin is associated with one death. Nevertheless, the relationship between importation and death is indirect. Heroin is associated with vastly more overdose deaths than methylamphetamine or cocaine because polydrug use – specifically the use of heroin together with other central nervous system depressants such as alcohol and the benzodiazepines – is

[178] Roxburgh, A, et al., 'Opioid, Amphetamine, and Cocaine-induced Deaths in Australia: August 2018' (National Illicit Drug Indicators Project, National Drug and Alcohol Research Centre, University of New South Wales, August 2018).

[179] Note: statistics for 2016 are unavailable, so figures for 2017 have been used as an approximation.

[180] Note: this figure is for methylamphetamine only, as a figure for all amphetamines is unavailable. It therefore overestimates the overdose deaths per kilogram of drug.

frequently fatal for heroin users.[181] It is a popular myth that heroin overdose is attributable to impurities in imported drugs.[182]

*B The 5 per cent national consumption threshold*

The quantity of drugs imported by an importation enterprise may be so large that it poses a threat by virtue of its market power. The '5 per cent national consumption' threshold represents the weight of 5 per cent of national annual consumption of each drug, based on the ACIC's national wastewater drug monitoring program.[183] This threshold provides a rudimentary yardstick for whether further inquiries ought to be made as to the market power of the enterprise behind an importation. It may be, for instance, that a very large sea cargo importation is in fact the product of a cooperative venture between many smaller enterprises; or it may be that the enterprise has obtained market power through the use of violence or political corruption. The purpose of indicator is to prompt such inquiry not to foreshadow the result.

In combination, these two indicators suggest that, without more, the importation of, say, 5kg of methamphetamine by post, would have a negligible public health impact, and there is no *prima facie* concern that the enterprise behind the importation has acquired market power. Conversely, given the very small total national annual consumption of heroin, the importation of the same quantity of heroin is probabilistically associated with at least one overdose death, and further inquiries ought to be made to ascertain whether there is evidence that the organisation has acquired market power – for instance, whether the importation was facilitated by official corruption or the use of weapons or threats of violence.

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[181] National Drug & Alchohol Research Centre, 'Three persistent myths about heroin use and overdose deaths,' https://ndarc.med.unsw.edu.au/blog/three-persistent-myths-about-heroin-use-and-overdose-deaths.

[182] National Drug & Alchohol Research Centre, 'Three persistent myths about heroin use and overdose deaths,' https://ndarc.med.unsw.edu.au/blog/three-persistent-myths-about-heroin-use-and-overdose-deaths.

[183] ACIC, National Wastewater Drug Monitoring Program – Report 5, 2018.

| DRUG TYPE | SINGLE OVERDOSE THRESHOLD | 5% NATIONAL CONSUMPTION THRESHOLD |
| --- | --- | --- |
| Amphetamines (including methylamphetamine, MDMA) | 122kg | 419kg[184] |
| Cocaine | 770kg | 154kg[185] |
| Heroin | 2.89kg | 38kg[186] |

TABLE 8: EVIDENCE-BASED QUANTITATIVE HEALTH AND COMPETITION IMPACT THRESHOLDS FOR DRUG IMPORTS

## VII CONCLUSION

Official WWA statistics read with available survey data suggest that Australia's 'drug problem' is probably more accurately described as a methylamphetamine and cannabis problem. Whether more cannabis is consumed than methylamphetamine will be known only once WWA data incorporates cannabis consumption. That is expected later in 2019. Until then, the most that can be said is that survey data indicates that a strong drugs-crime nexus for both drugs, with nearly half of recent arrestees testing positive for methylamphetamine (46.7%) and more than half testing positive for cannabis (52.9%). However, this does not mean that there is a strong drugs-*organised crime* nexus in relation to the importation of either of these drugs. International scholarly literature contends that, in the international drug trade, collaboration and trust is the norm, and violence and corruption or insurgency are the exception. Based on this literature, one would expect large numbers of small importation enterprises attached to ethnic diaspora to be involved in smuggling drugs to Australia. Given the high total estimated annual consumption of amphetamines, which are known to be manufactured in China, one would expect a significant Chinese and South-East Asian diaspora to be involved in these importations. Le and Gilding's study provides some evidence that there will be a Vietnamese diaspora in relation to drug smuggling into Victoria. One would also expect some Nigerian involvement, given scholarly evidence of the involvement of Nigerians in international drug smuggling. However, official statistics do not reveal successful trafficking routes, interdiction rates in each importation stream, the nationality or ethnicity of traffickers, the explanation for their offending, nor the extent to which international drug trafficking in Australia is associated

[184] = 0.05 x 8,387kg.

[185] = 0.05 x 3,075kg.

[186] = 0.05 x 765kg.

with insurgent groups, violence or corruption. Thus, it is not possible to infer whether popular discourses about the drug trade as an 'illicit business enterprise' and alternatively as 'violent, subversive and tightly-controlled oligopoly' - which are largely unsupported by the international scholarship – hold up here. And it is not possible to infer whether the scholarly characterisation of international drug control efforts as a largely unjustified 'war' waged on a presumed foreign enemy hold up here either. Finally, there are no available statistics on the number of charges laid in relation to seizures in each importation stream, so it is not possible to say who 'gets caught' – and punished – for importing drugs into Australia, or to test whether, as elsewhere, human couriers account for the mass of offenders, but relatively few imports by weight. Nevertheless, this rich multi-disciplinary literature provides a solid starting point for the grounded theory analysis of the sample sentencing remarks.

# Chapter 5:
# Results

## I Introduction

This chapter describes the results of the thematic analysis of sentencing remarks for 94 individual drug importers who were sentenced for one or more drug importation offences under the *Criminal Code* (Cth).[1] Part I presents the results of the grounded theory analysis. It describes *how persons came to be sentenced for importation offences* (the 'factual basis' for sentencing), namely offender and offence characteristics. Part II presents the results of the content analysis. It describes *how offenders were sentenced* (the 'legal basis' for sentencing), namely the observed patterns of sentencing and sentence formulation.

The results indicate that the sample is representative based on the available statistics and scholarly literature summarised in Chapter 4. Specifically, the number of offenders in each drug category is consistent with the number of national border detections in each drug category (Table 1), and the largest seizures of each type of drug within the sample were representative of the largest seizures of each type of drug nationally, based on the ACIC's Illicit Drug Data Report 2016-17 (Table 2).

| Drug type | Percentage of total national border detections[2] | Percentage of offenders per sample |
|---|---|---|
| Cocaine | 28% | 21% |
| Heroin | 5% | 6% |
| ATS (excluding MDMA)[3] | 45% | 50% |
| MDMA | 22% | 6% |
| Pseudoephedrine | Not known | 11% |

Table 9: Comparison of national border seizures 2016=17 with sample statistics (by detections by drug)

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[1] Namely persons who 'imported' 'border controlled drugs' as defined in s 300.2 read with s 301.4 of the *Criminal Code* (Cth), including heroin, cocaine, methamphetamine, and other amphetamine-type substances.

[2] Based on statistics provided in Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2016-17' (Report, ACIC, 2018) Appendix 1, 11 <https://www.acic.gov.au/publications/intelligence-products/illicit-drug-data-report-0>.

[3] Amphetamine-type substances, mainly methylamphetamine.

The table below underscores that there are typically only one or two comparatively large seizures within each drug category per year and these seizures typically account for a sizeable proportion of total annual seizures. The largest seizure of cocaine in 2016-2017 was 254kg, the largest seizures of heroin 24.8kg and the largest seizure of amphetamine-type substances 500kg. The largest seizures in the sample are surprisingly representative of this distribution despite the identified risk of selective publication of sentencing remarks because publication is at the discretion of individual sentencing judges.[4]

| DRUG TYPE | FOUR LARGEST NATIONAL BORDER SEIZURES NATIONALLY[5] | FOUR LARGEST SEIZURES IN SAMPLE |
| --- | --- | --- |
| Cocaine | 254kg, 153kg, 50kg, 37kg | 283kg, 123kg, 75kg, 59kg |
| Heroin | 24.8kg, 24.4kg, 23kg, 6kg | 13.9kg, 4.99kg, 1.14kg, 0.92kg |
| ATS (excluding MDMA)[6] | 500kg, 135kg, 104kg, 16kg, | 142kg, 59.47kg, 49.07kg, 19.77kg |
| MDMA | 360kg, 5kg, 5kg, 4.5kg | 8.63kg, 1.92kg, 0.22kg, 0.03kg |
| Pseudoephedrine | 194kg[7] | 63kg, 7.3kg, 5.38kg, 6kg |

TABLE 10: COMPARISON OF TOTAL NATIONAL BORDER SEIZURES 2016-17 WITH SAMPLE STATISTICS (LARGEST SEIZURES)

## II TAXONOMY OF IMPORTATION OFFENCES

### *A Offender characteristics*

Almost all offenders (90 per cent) were male, and most offenders were aged between 20 and 30 years (70 per cent). The average age of offenders was 32 years for males and 22 years for females. There were few older offenders, with only 3 per cent of the sample aged over 60. Eighteen nationalities were represented amongst offenders,[8] plus one stateless person.[9] Just over half of all offenders (55 per cent) were foreign nationals. Of the foreign national offenders, Chinese accounted for 37 per cent, Malaysians 12 per cent and Nigerians 10 per cent, with no significant differences in the racial profile for male versus female offenders. Of

[4] As discussed in Chapter 2 'Methodology.'

[5] ACIC (n 2) 160-61.

[6] Amphetamine-type substances, mainly methylamphetamine.

[7] The report does not provide information regarding other large seizures of pseudoephedrine.

[8] Australia, China, Colombia, Congo, Iceland, Indonesia, Iran, Italy, Ivory Coast, Malaysia, Netherlands, Nigeria, Sierra Leone, Taiwan, United Kingdom, United States, Vietnam, 'Western Africa' (no further details).

[9] A stateless Iranian Kurd.

the Australian national offenders, just under half were born overseas (45 per cent), from 10 different countries,[10] including China (12 per cent). Almost a third (31 per cent) of offenders had dependent children (n=80). Just over half of those offenders (52 per cent) were foreign nationals. Of the nine female offenders, only one had a dependent child. The diversity of nationalities, and the small proportion of women is consistent with overseas research.[11] The findings likely reflect both Australia's geographical proximity to Asia and the recognised role of Nigerian nationals in international drug trafficking.[12] Viewed in this context, the findings are consistent with previous findings that most incarcerated importers in Britain came from geographically proximate but less affluent countries such as Colombia and Jamaica, and Nigeria.[13]

Just over three-quarters of all offenders (76 per cent) were on remand at the time of sentence, meaning that bail was either not sought or was refused (n=85).[14] When nationality is considered, a different picture emerges. Only half of all Australian nationals (52 per cent) but nearly all foreign nationals (92 per cent) were on remand at the time of sentence. Foreign nationals who obtained bail were on were on permanent residency, student, spousal or humanitarian visas. These findings are consistent with previous studies which have found that drug mules without a fixed address in the country of apprehension are almost always denied bail.[15]

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[10] China, Vietnam, Philippines, Brazil, Colombia, New Zealand, Fiji, Congo, Germany, Lebanon.

[11] Jennifer Fleetwood, 'Drug Mules in the International Cocaine Trade: Diversity and Relative Deprivation' (2010) November (192) *Prison Service Journal* 3; Jonathan P Caulkins, Honora Burnett and Edward Leslie, 'How Illegal Drugs Enter an Island Country: Insights from Interviews with Incarcerated Smugglers' (2009) 10(1-2) *Global Crime* 66, 70.

[12] L Paoli and P Reuter, 'Drug Trafficking and Ethnic Minorities in Western Europe' (2008) 5(1) *European Journal of Criminology* 13, 30.

[13] Julia Sudbury, Global Lockdown: Race, Gender, and the Prison-Industrial Complex (Routledge, 2005), 323.

[14] Sentencing remarks contained no direct information about bail applications.

[15] Penny Green, Chris Mills and Tim Read, 'Characteristics and Sentencing of Illegal Drug Importers' (1994) 34(4) *British Journal of Criminology* 479, 482 found that Nigerian offenders successfully obtained bail in only 6 per cent of cases.

### *B Offence characteristics*

*1 Drug type and quantity*

The total quantity of drugs imported across the entire sample was just under 2 tonnes, comprising (by weight) mainly pseudoephedrine (64 per cent) and methamphetamine (35 per cent). However, most offences involved the importation of methamphetamine (50 per cent), cocaine (21 per cent), pseudoephedrine (11 per cent), heroin (6 per cent) or MDMA (6 per cent).[16] The largest importations were via maritime vessel, unlike in Britain, where similar sized importations were via truck, because of vehicular access via ferry or tunnel.[17] The average quantity of drugs imported per offender differed by logistics stream. Importations by post averaged 1.70 kg, aircraft passenger 2.13 kg, air or sea cargo importations 8.63 kg and maritime vessel 124 kg. Importation by post was the most prevalent method of importation (48 per cent of offenders) but by quantity almost all drugs were imported via several large-scale air or sea cargo shipments and maritime vessel (92 per cent by quantity). Importations in the aircraft passenger stream (by human couriers) accounted for 22 per cent of offenders but just 2 per cent of total sample imports. Postal imports accounted for 48 per cent of offenders but just 6 per cent of total imports by quantity. These findings are consistent with Reuter's proposition that a Pareto Law applies to international drug trafficking, so that a minority of offenders are responsible for most importations.[18] The average quantity of drugs imported per offender differed by nationality also. Australian nationals imported on average 51.33 kg per offender, while Chinese nationals imported on average 3.97 kg and persons from the African continent 7.65 kg. This appears to be because of a correlation between logistics stream and drug quantity. Australian nationals imported drugs via all logistics streams and were involved in each of the five largest importations. By contrast, most importations by Chinese nationals (79 per cent) and other Asian nationals (57 per cent) were by post, while most importations by persons from the African continent were by air or sea cargo (55 per cent). These findings likely reflect that

[16] Many importations involved more than one drug. Only the type of the largest quantity of drug imported was recorded for statistical purposes.

[17] Caulkins, Burnett and Leslie (n 11) 77.

[18] Ibid 89.

different ethnic groups operate in different logistics streams and that there are different volume constrains in each stream, noting that less than 1 kilogram can be swallowed.[19]

*2 Drug concealment*

Drugs imported via post tended to be rudimentarily concealed, for example, within containers labelled as food, medicine or clothing.[20] Drugs imported via aircraft passenger were usually expertly concealed within the false bottom of a suitcase,[21] or chemically concealed within alcohol carried within that luggage,[22] but sometimes simply labelled as food or vitamins.[23] Only one offender concealed the drugs internally (by swallowing). Drugs imported via air or sea cargo tended to be intermingled with apparently legitimate commercial importations as well as expertly concealed; examples include: within decorative ornaments,[24] within electrical equipment,[25] within the glue adhered to laminated flack-pack furniture,[26] within pails labelled as industrial adhesive,[27] within motor vehicle engines,[28] within rolls of wallpaper,[29] within

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[19] Traub found that a person can successfully swallow 400 grams to one kilogram of a 'body packed' substance: SJ Traub, Robert S Hoffman and Lewis S Nelson, 'Body packing – the internal concealment of illicit drugs' (2003) 349 (26) *New England Journal of Medicine* 2519.

[20] For example, *DPP (Cth) v Cressel* [2017] NSWDC 272 (multivitamins, horse shampoo); *DPP (Cth) v Burtt* [2018] SASCFC 5 (clothing); *DPP (Cth) v Masange* [2016] VCC 739 (books, handbags, diabetic food, shoes); *R v Okosi* [2017] NSWDC 400 (wedding dress, teabags, saris, bangles).

[21] For example, *DPP (Cth) v Arnaout* [2018] NSWDC 110 (within heat-sealed lining of suitcase); *Van Zwam v* R [2017] NSWCCA 127 (within false bottom of suitcase).

[22] *DPP (Cth) v Su Him Ho* [2016] VCC 174 (within a bottle of champagne carried in luggage); *Yip v DPP (Cth)* [2017] VSCA 231 (within a bottle of cognac).

[23] For example, *Garcia v R* [2013] NSWCCA 241 (flour, curry sauce, breadcrumbs);

[24] *DPP (Cth) v Robinson & Kromah* [2017] VCC 2014 (statues of horses); *DPP (Cth) v Schwartz* [2018] NSWDC 118 (glass sculptures).

[25] *DPP (Cth) v Wu* [2016] VCC 141 (aquarium filters); *DPP (Cth) v Nwagbo* [2018] VCC 865 (slimming machines); *R v Udeh* [2017] NSWDC 401 (microwave ovens).

[26] Huang [2018] NSWCCA 70.

[27] *DPP (Cth) v McKell & McGlone* [2016] NSWDC 418.

[28] *DPP (Cth) v Brown* [2016] VCC 511.

[29] *DPP (Cth) v Yang* [2016] VCC 1214.

heat-sealed bags glued to the interior hulls of kayaks,[30] within bicycle seats filled with aluminium lined pouches,[31] and chemically concealed within bottles of wine or coiled hoses.[32] Drugs imported via maritime vessel were not concealed, but rather loaded into duffle bags for offloading.[33]

*3 Broader context in which offending occurred*

Several previous studies have created typologies of drug trafficking networks from surveys of prisoners or examination of legal records in the United Kingdom and United States.[34] These typologies include: 'politico-military' traffickers which operate in failed states versus 'business criminals' versus 'adventurers;'[35] 'importers' versus 'wholesalers' versus 'middle market brokers' versus 'retail dealers;'[36] 'fee-for-service' providers;[37] 'freelance networks' versus 'family businesses' versus 'communal businesses' versus 'corporations' in New York City;[38] and 'self-employed non-plane couriers' versus 'courier organisations' versus 'lorry driver importations' versus 'big importers.'[39] Each of these typologies conflates to some extent logistics stream and/or offender motivation with the underlying business model. The findings of this research clarify and build upon these distinctions as applicable to the international drug market at Australia's border.

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[30] *Shih, Huang & Kuo v R* [2018] NSWCCA 270.

[31] *DPP (Cth) v Schanker* [2016] VCC 1771.

[32] *DPP (Cth) v Chen* [2017] NSWDC 187 (coiled hoses); *DPP (Cth) v McKenzie* [2017] VCC 1029 (wine).

[33] For example, *DPP (Cth) v Golding & Elfar* [2017] QCA 170; *DPP (Cth) v Saputra & Tawfik* [2018] VCC 1665.

[34] As discussed in Chapter 4 'International Drug Trafficking: Factual Context.'

[35] Nicholas Dorn, Michael Levi and Leslie King, 'Literature Review on Upper Level Drug Trafficking' (No 22/05, Research Development and Statistics Directorate, Home Office, 2005).

[36] Geoffrey Pearson and Dick Hobbs, 'King Pin? A Case Study of a Middle Market Drug Broker' (2003) 42(4) *The Howard Journal of Criminal Justice* 335.

[37] Scott H Decker and Margaret Townsend Chapman, *Drug Smugglers on Drug Smuggling: Lessons from the Inside* (Temple University Press, 2008).

[38] M Natarajan and M Belanger, 'Varieties of Drug Trafficking Organisations: A Typology of Cases Prosecuted in New York City' (1998) 28 *Journal of Drug Issues* 1005.

[39] Caulkins, Burnett and Leslie (n 11).

Three distinct enterprise types operate at Australia's border: *consumer enterprises*, *contractor enterprises*, and *corruption-based enterprises*. These enterprise types are consistent with those described in the scholarly literature pertaining to the United Kingdom and are different from the organisational structures observed in the US, where specialised trafficking organisations sell importation services rather than the drugs themselves.[40]

| Enterprise type | Percentage of offenders |
|---|---|
| Consumer enterprise | 5% |
| Contractor enterprise | 85% |
| Corruption-based enterprise | 10% |

TABLE 11: AVERAGE QUANTITY IMPORTED BY ENTERPRISE TYPE (N=93)[41]

(a) Enterprise types

*Consumer enterprises* were operated by drug addicts seeking to feed and fund their own addiction through on-sale to friends ('*online shoppers*'). These offenders either ordered the drugs over the internet or placed orders directly with a supplier, via phone or email. Addicts typically used their own name and address to order and pay for the drugs and paid via overseas money transfer or cryptocurrency. Sometimes the offender obscured his involvement by having the drugs ordered, paid for and collected by other persons, or used a PO Box in a false name. Offenders appeared to have no advance knowledge of the concealment method, which was typically rudimentary. Because of this, offenders were vulnerable to detection. All but one of these offences was detected at the border.[42] Enduring enterprises presumably engaged suppliers who used reliable concealment technology, and/or sourced large numbers of unique and unrelated consignee addresses, for instance via large social networks.

*Contractor enterprises* were operated by unskilled participants who received low fixed fees per package trafficked, tracked, collected or delivered, but who did not share in the profits made by the ultimate investors ('*human couriers*' or '*parcel collectors*').[43] These participants had no knowledge of the broader importation enterprise, and no identifying information about

[40] Decker and Chapman (n 37) 58; Caulkins, Burnett and Leslie (n 11) 90.

[41] For one importation, the enterprise type could not be identified.

[42] *DPP (Cth) v Burtt* [2018] SASCFC 5, which was detected by a foreign law enforcement agency.

[43] These importations occurred in aircraft passenger and crew, mail, air and sea cargo and maritime vessel logistics streams.

other enterprise participants or the ultimate investors. Participants typically established addresses to which parcels could be sent and associated names and contact numbers, informed overseas associates of those details, and then tracked, collected and/or delivered the parcels. They typically had no knowledge of the type or quantity of drugs they trafficked, tracked, collected or delivered.[44] In many importation enterprises there was task specialisation, so that participants routinely performed only one or two of these tasks in relation to multiple parcels and/or coordinated the performance of these tasks by others. For instance, some participants established addresses to which parcels could be sent by renting residential properties, usually paying cash for 2 to 3 weeks' rent in advance. Some tracked the parcels online and liaised with Australia Post as necessary to facilitate delivery. Others physically collected the parcels either at the premises or at the post office. Some informed overseas participants of details of the newly established consignee addresses. Others provided coordination and support to enterprise participants, particularly if a parcel failed to arrive. Investors presumably paid for the drugs following confirmation of receipt from Australian-based participants. Other than in small enterprises where there was little task specialisation, money flows appeared to be handled by separate enterprises, presumably dedicated money laundering enterprises; this is consistent with findings in relation to US trafficking networks.[45] Few contractor enterprises (13 per cent) were vertically integrated, meaning that they also either partially manufactured or trafficked domestically the imported drugs.

The business model for contractor enterprises apparently relied on the repeated importation of large numbers of relatively small quantities of drugs via a particular logistics stream in the expectation that a very small percentage would be interdicted and seized by law enforcement, and a sufficient quantity would 'get through' to make the venture viable. The cost of interdiction was effectively outsourced to the persons who trafficked, tracked, collected or delivered the drugs and who were inevitably caught 'red handed:' the human drug couriers (in the aircraft passenger stream), the parcel collectors and consignees (in the postal stream), the unpackers (in the air or sea cargo stream), and the vessel crew and land party (in the maritime

[44] Whether by plea or jury verdict, all offenders were taken to have been at least 'reckless' as to whether they were importing a 'border controlled drug,' and were deemed to know that the quantity imported was at least a 'marketable quantity' or 'commercial quantity': s 307.1 and s 307.2 read with s 6.2 *Criminal Code* (Cth).

[45] Decker and Chapman (n 37) 60.

vessel stream). These results are consistent with the observations in the economic literature that 'higher-level [operators] hire other people to possess, store and transport the drugs.'[46]

More successful and enduring enterprises presumably had better methods for managing detection risk, but it does not follow that this was limited to more sophisticated concealment methods.[47] Indeed, previous research suggests that specialist concealment can be prohibitively costly,[48] and that organisational strategies are as important as efforts to camouflage the drug.[49] Sophisticated risk management in the postal importation stream appears to have involved regularly securing new backstopped consignee names and addresses and false identities for persons collecting drugs at the post office or via private courier company. False identities presumably provided the collateral benefit of longevity of the workforce, by enabling participants to continue to collect drugs at subsequent addresses and thereby avoid expendability. Sophisticated risk management in the air or sea cargo stream apparently involved establishing a credible import business as a cover for repeated imports,[50] or intermingling the imports within a legitimate consignment from a legitimate business,[51] or even using a legitimate business as the consignee, and providing the freight forwarder with an 'updated' consignee address just prior to delivery. Other than in larger importation enterprises, where there was task specialisation, participants seemed to be aware that if a parcel failed to arrive, interdiction rendered the consignee name, address and contact telephone number unusable, as subsequent parcels addressed to that consignee name, address and/or contact telephone number would be flagged and may be monitored by authorities. Only 5 per cent of cases in the sample involved the importation of drugs via maritime vessel. In all cases the

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[46] Jonathan P Caulkins and Peter Reuter, 'Dealing More Effectively and Humanely with Illegal Drugs' (2017) 46(1) *Crime and Justice* 95, 132.

[47] Such as chemically concealing the drug in wine, which was apparently not detected at the border in *Jaafar v R* [2017] NSWCCA 223.

[48] Jennifer Fleetwood, 'Five Kilos: Penalties and Practice in the International Cocaine Trade' (2011) 51(2) *British Journal of Criminology* 375, 383.

[49] Caulkins, Burnett and Leslie (n 11) 74.

[50] For example, in *Shih v R* [2018] NSWCCA 270, the participants established an outdoor clothing business before importing kayaks containing the concealed within heat-sealed bags glued to the interior hulls.

[51] For example, in *DPP (Cth) v Scott* [2017] SASCFC 96, the offender used his own legitimate paving business as a cover for the import.

drugs were to be on-boarded mid-ocean from a mother ship, and the vessels were detected following receipt of information from foreign law enforcement agencies. The sea and land parties comprised men in their 20s to 40s who coordinated the persons involved, crewed each vessel, on-boarded the drugs, verified receipt, unloaded the drugs and/or handed the drugs to the first purchaser. Police found no evidence of the ultimate investors behind any contractor enterprise.[52]

*Corruption-based enterprises* were operated by corrupt port staff and/or officials seeking to make profits by leveraging knowledge of border protection procedures and access to port facilities. Three such enterprises were identified in the sample: two relied on human couriers, the other on air or sea cargo. In all cases the corrupt port officials or staff advised how the imported drugs could be moved out of the port thereby circumventing usual border detection measures, and carried out that plan with others. Corruption-based enterprises presumably enjoyed lower detection risk relative to other importation enterprises because of access to this information. For this reason, corruption-based enterprises ought to have greater long-term profitability than importation enterprises using the same logistics streams that don't rely on corruption. There were some indications that this was the case.[53] More sophisticated or enduring enterprises likely involve staff who remain in the same trusted roles within the port either as officials or staff for considerable time.[54] In one case, a stevedore at the international sea freight terminal unlawfully accessed a shipping container and removed drugs before the shipping container was formally processed by customs authorities.[55] Another case deployed a similar methodology at the international air freight terminal, involving a freight handling manager and his friend.[56] Police were unable to identify the investors in any of the corruption-based enterprises in the sample, but it is likely that the enterprises were ultimately self-funding from prior profits based on the unexplained wealth of participants.[57] All offenders were

[52] This finding is consistent the findings of Caulkins et al that, in enduring importation enterprises, the arrest of a fee-for-service contractor typically posed no risk to other enterprise participants (Caulkins, 2009, 74).

[53] In one case, *Cranney v R* [2017] NSWCCA 234 ('*Cranney v R*'), police found over $440,000 at the participants' residences, which far exceeded amounts seized in relation to other importations.

[54] In one case, *Cranney v R* [2017] NSWCCA 234, a key participant had been in his role for over 11 years.

[55] *Lee v R* [2018] NSWCCA 75.

[56] *DPP (Cth) v McGlone, McKell* [2016] NSWDC 418.

[57] For example, in *Cranney v R* (n 31).

detected following targeted internal investigations. There were indications that each of the enterprises was long-running.[58]

(b) Hierarchy and violence

The internal management of the importation enterprises behind the offenders in the sample appears to have been both non-hierarchical and non-violent. *Consumer enterprises* operated as either 'sole traders' or partnerships. *Corruption-based enterprises* operated as cooperative ventures between investors (the corrupt port staff or officials), who funded drug purchase, and who engaged on a contract basis human couriers, baggage handlers and others as necessary to facilitate the ventures. *Contractor enterprises* appeared to adopt a similar model, save that the investors were not visible to law enforcement, so their identity remains unknown. The remuneration provided to participants who trafficked, tracked, collected or delivered drugs, or who coordinated others performing these functions, was consistent with these persons having no personal investment in the venture. Moreover, it was consistent with these persons having accepted the work without fully appreciating the detection risk involved, because they did not know the precise type or quantity of drugs which they trafficked, tracked, collected or delivered.

There was no evidence to suggest any inter-enterprise antagonism or violence. Some participants within *contractor enterprises* who had pre-existing black-market debts reported that their creditors had made express or implied threats of violence in connection with either repaying the debt or repaying the debt through participation in drug trafficking,[59] but no offender reported having experienced violence, and there was insufficient information in sentencing remarks to ascertain whether the court accepted that those threats were genuine or, if so, why.[60] Only one offender was charged with the possession or use of a weapon in

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[58] These findings are consistent with previous research suggesting that corruption of port staff and officials is a significant but under-investigated modus operandi for importing drugs (Caulkins *et al*, 2009, 81).

[59] For example, *Lee v R* [2018] NSWCCA 75 [26] ('His Honour found that there were real threats towards the applicant and his family, the existence of which he accepted); *DPP (Cth) v Holmgrimsson* [2015] VCC 704 [10] ('This person threatened he would send people to harm you and your family if you did not pay up'); *DPP (Cth) v Chia* [2018] VCC 150 ('Representatives from the loan company threatened to bring harm to your family because of your outstanding debt'). See also: *DPP (Cth) v Ku* [2015] VCC 634; *DPP (Cth) v Reyes* [2018] VCC 281; *DPP (Cth) v Chan* [2016] VCC 2096; *DPP (Cth) v Brown* [2016] VCC 511; [2017] VSCA 162.

[60] For example, *Lee v R* [2018] NSWCCA 75;

connection with the importation. That offender imported drugs, precursor chemicals and weapons via post to parcel lockers from which the consignments were collected by persons using fake identification; he was also involved in manufacturing and domestic trafficking of the imported drugs.[61] The sentencing court accepted that the firearms 'were part and parcel of the business of drug manufacturing and trafficking and pre-trafficking' rather than to facilitate the importation of drugs.[62] There were no other references to weapons in sentencing remarks. These findings are consistent with the prevailing view in the economics literature that international drug trafficking markets are essentially non-violent,[63] but this contrasts with recent findings of the Victorian Sentencing Advisory Council that 13 per cent of persons charged with a firearms offence were also charged with a domestic drug-related offence.[64]

Sentencing remarks provided sufficient information from which one might infer the overall size of each importation enterprise. Consumer enterprises comprised one to three persons, while contractor enterprises and corruption-based enterprises appeared to comprise 4 to 8 core participants who then recruited up to 20 additional contractors to facilitate importations over the longer term.[65]

(c) Ethnic ties

Although offenders were charged with discrete offences, sentencing remarks frequently referred to other participants within the broader importation enterprise. These references indicate that the broader importation enterprises in which the offenders participated typically involved individuals of the same ethnicity if not nationality. Several offenders reported having

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[61] *Huynh v The Queen* [2017] VSCA 216.

[62] *Huynh v The Queen* [2017] VSCA [37].

[63] Specifically, that violence seen in the Mexican export market between 2006-2008 and in the US retail crack market in the 1980s, is – for a range of structural and historical reasons – the exception and not the rule; Peter Reuter, 'On the Multiple Sources of Violence in Drug Markets' (2016) 15(3) *Criminology and Public Policy* 877.

[64] Sentencing Advisory Council of Victoria, *Firearms Offences: Current Sentencing Practices*, 2000, 21 (Table 5).

[65] This is consistent with economic research which predicts that importation enterprises will be small and numerous (Reuter, 1985).

been recruited by an 'old school friend' or acquaintance. However, in some cases, the victims of deliberate exploitation were of a different ethnicity to their exploiters.[66, 67]

(d) Remuneration

The results reveal that the remuneration of traffickers was trivial by comparison with the wholesale and retail value of the drugs they imported,[68] and had no obvious relation to quantity imported unless the offender was an investor in the importation enterprise. The remuneration for human couriers ranged from $3,000 to $40,000 per trip, the remuneration for parcel or consignment collectors ranged from mere supply for personal use, up to $40,000 per package. The remuneration for participants in importations by boat ranged from $10,000 for a participant whose role was to monitor progress from the mainland, to $500,000 for the captain of a ship carrying drugs valued at $80 million. These results are consistent with the limited research on the remuneration of fee-for-service traffickers, which finds that remuneration varies enormously and likely reflects the person's personal opportunity cost – rather than any meaningful assessment of detection risk and return on investment – and is therefore lower for persons who are unemployed or facing financial hardship.[69]

*4 Explanations for offending*

The explanation for offending in each case was considered independently of the sentencers' characterisation,[70] and against the background of the scholarly literature. Different explanations were associated with the different enterprise types. For a minority of offenders (13 per cent), all of whom were participants in *consumer enterprises*, the explanation for offending was the need to feed and fund their drug addiction. For a larger minority of offenders (25 per cent), the explanation for offending was a tolerance for risk and the prospect of high financial rewards ('profit-motivated risk-taking'). About half of these offenders (48 per cent) were participants in *contractor enterprises* and the other half were participants in *corruption-*

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[66] *DPP (Cth) v Wedi* [2018] VCC 2 (exploiter ethnic Congolese Australian national, victims Australian national); DPP v Ly [2018] VCC 1674 (exploiter Chinese, victim ethnic Vietnamese Australian national).

[67] These findings are consistent with previous research acknowledging and explaining the dominance of ethnic groups within different segments of the international drug market Paoli and Reuter (n 12).

[68] Based on the expert reports as to drug value tendered by the prosecution at the sentence hearing.

[69] Caulkins, Burnett and Leslie (n 11) 86; Fleetwood (n 11).

[70] Sentencers invariably characterised each offender's motivation as 'for profit.'

*based enterprises*. However, for most offenders (65 per cent), all of whom were participants in *contractor enterprises*, the explanation for offending was not a single factor but a combination of circumstances which rendered the offender vulnerable to either seek out or acquiesce in the offending ('intersectional vulnerability').

| Explanation for offending | Total no. of offenders | Percentage of offenders |
|---|---|---|
| Addiction | 12 | 13% |
| Profit-motivated risk-taking | 21 | 22% |
| Intersectional vulnerability | 61 | 65% |

TABLE 12: EXPLANATION FOR OFFENDING (N=94)

*Addiction.* Addicts typically ordered small quantities of drugs by mail or agreed to collect parcels on behalf of their supplier or others in return for payment in cash or in kind. For most of these offenders, addiction was the result of efforts at self-medicating underlying untreated mental illness, such as depression, PTSD or ADHD.

> … [Y]ou have suffered for some years from painful injuries and depression and anxiety. Control of those conditions has proven to be difficult. I accept that it came to your attention that LSD might be effective in the control of such pain and in assisting with your anxiety and depression and that that was the primary reason for your first obtaining and using that drug … [Y]our supplier of LSD apparently located in Switzerland had offered to supply you with LSD for free if you agreed to on send various letters or parcels onto other persons.[71] (***41-yo UK national***).

> … he operated his own landscaping business. The business failed when the respondent broke his hand. [He] then returned to the Gold Coast, where he was introduced to amphetamines. He quite quickly became addicted, which in turn led to his inability to hold down a job. He spiralled out of control and ultimately lived in a caravan park. It was there he met Moore who, the respondent said, asked if the package of drugs could be sent to the respondent's home address.[72] (***24-yo Australian national***).

*Profit-motivated risk-taking.* About half of all members of the second group, profit-motivated risk takers, were corrupt port staff or officials who were otherwise gainfully employed. The other half were students, mainly foreign nationals. Examples of profit-motivated risk-takers

[71] *DPP (Cth) v Giorgio-Yates* [2018] VCC 1123, [52], [61].

[72] *R v Ostrowski* [2018] QCA 62, [6].

are: a 35-yo Customs officer who corrupted a border protection unit at Sydney International Airport to provide cover for baggage handlers who would covertly remove from incoming flights checked baggage containing large quantities of drugs;[73] a 33-yo Australian who abandoned his lucrative $160,000 per annum job in favour of a cooperative venture with Mexican friends, involving the importation of just under 50 kg of methamphetamine;[74] a 45-yo Australian father of two who imported more than 60 kg of methamphetamine and other drugs following news of a terminal diagnosis for a drug-related heart condition;[75] and a 33-yo Australian who arranged to progressively import over 70 kg of various drugs in concert with various other persons, including an aircraft engineer who would board the aircraft and recover the drugs – which were sometimes concealed behind a panel in the business class toilets – and remove the drugs from the airport undetected.[76] By contrast, students were deployed to undertake the risky work associated with receiving, checking and authenticating the drugs, and conducting counter-surveillance.  One case, in which undercover operatives were embedded within the importation enterprise, provides insight into the role played by students – referred to as 'kids' – in relation to a large importation by boat:

> One of the major movers detected in this operation was a person called Van Hu Le. The organisation had a failed importation in 2016, which it had hoped to bring from South America. Subsequently, it arranged this importation whereby the ship called "The Spirit of Shanghai" was loaded on 4 June with 100 kilograms of cocaine. It was Mr Hu Le's intent to use a number of "kids" as he described them to do the mundane work involved in effecting the completion of this particular importation. Mr Le certainly comes under that description.  ... Mr Van Hu Le was there, undercover operatives were there and importantly, the prisoner arrived at such meeting at 11.25AM. … The various steps to be taken to protect the operation and the people involved in the operation, and the identification of such people were also discussed.
>
> The prisoner's role insofar as the operation was concerned was to move the cocaine. Firstly he was to arrive at the cocaine's location, check it, photo it and photocopy it,

[73] *DPP (Cth) v Cranney & Huynh* [2015] NSWDC 276, [101]-[131].

[74] *DPP (Cth) v Brown* [2016] VCC 511; [2017] VSCA 162.

[75] *DPP (Cth) v Scott* [2017] SASCFC 96.

[76] Case name withheld due to non-publication order.

and send the photo on. He was to search people who were in the room, check the room for any bugs and make sure of the weight and the value.[77] (***23-yo Australian national*)**.

*Intersectional vulnerability.* The circumstances that combined to produce vulnerability were: unemployment and poor employment prospects, black-market gambling or drug debt, family dislocation or serious prior trauma resulting in PTSD. Any one of these circumstances might have sufficiently explained the offender's participation in the offence; in combination, the reasons were compelling. Within this group of offenders, there was evidence in just over half of cases (54 per cent) that the offender had been deliberately approached, coerced, manipulated or exploited into participating in the offence.

| VULNERABLE | TOTAL NO. OF OFFENDERS | PERCENTAGE OF OFFENDERS |
|---|---|---|
| Evidence of coercion, manipulation or exploitation | 33 | 54% |
| No evidence of approach, coercion, manipulation or exploitation | 28 | 46% |

TABLE 13: EVIDENCE OF APPROACH, COERCION, MANIPULATION OR EXPLOITATION AMONGST OFFENDERS WITH MULTIPLE VULNERABILITIES (N=61)

These findings are consistent with numerous studies that have found evidence of coercion, manipulation and exploitation of financial hardship in the recruitment of drug mules.[78,79] Caulkins, Burnett and Leslie propose that resort to these tactics is driven by the commercial reality that few persons are willing to take on this work.[80]

Vulnerable offenders who were not approached or otherwise targeted appear to have been motivated by the need for a source of income, as opposed to the desire to profit. Their motivation was therefore qualitatively different to that of profit-motivated risk-takers.

[77] *DPP (Cth) v Le* [2018] VCC 1241, [5]-[7].

[78] Green, Mills and Read (n 15) 18; Sudbury (n 13) 171-172; Caulkins, Burnett and Leslie (n 11) 84; Fleetwood (n 11) 6.

[79] Green uses the term 'relative poverty' to describe 'a sense of desperation and opportunity to rise above the grinding misery of economic hardship in the developing world'; Fleetwood uses the term 'relative deprivation' to describe 'social circumstances in which acquiring better for the family was meaningful: unemployment, or employment in low paid labour made getting something better for one's family particularly appealing.'

[80] Caulkins, Burnett and Leslie (n 11) 73.

Examples of vulnerable offenders who were approached but not coerced are provided below. Both were self-evidently 'easy targets' for whoever recruited them.

> …[T]he applicant is aged 36 years and has no prior convictions. Born in western Africa, the applicant witnessed his father's murder when in his late teens. He came to Australia on a student visa when in his early 20s, and completed a couple of TAFE courses. While performing unskilled work, the applicant was introduced to 'ice' (methamphetamine) and began using the drug daily. Another man from west Africa that the applicant met offered him a few thousand dollars to help with a shipment. The applicant told a psychologist that he accepted the offer in order to pay rent and to send money back home. In a report tendered on the plea, the psychologist expressed the opinion that when the applicant committed the offence, he was experiencing post-trauma symptoms from witnessing his father's murder, and financial stress due to difficulty finding employment. He had commenced using ice in order to self-medicate. The psychologist considered that 'in the light of his circumstances and the lack of judgment associated with his low mood state, he was most likely an easy target for whoever recruited him.[81] (***36-yo refugee, drug user, unemployed, mental illness (PTSD), approached).***
>
> Your parents separated when you were an infant and you were effectively raised by your maternal grandparents with whom you lived prior to departing for Australia in August 2015. You have had minimal contact with your mother and no contact with two half-siblings on your father's side. … You attended school until the completion of Year 10 and then worked in a sushi shop as an assistant before working in telemarketing for three or four months. Subsequently, you secured a job assembling metal structures but that job involved working in a harness at heights and for very long hours. You were poorly paid and returned to sushi making for several months. However, your position was not secure, your hours were reduced, and you eventually found yourself out of work. It was while you were unemployed and looking for work that you met Fernando at a bar. ... You were beginning to appreciate that because you had not finished school or undertaken a university course, your prospects for future employment were poor and that if you were able to find work you would be unlikely to earn more than about AUD $500 per month

[81] *Rosales (a Pseudonym) v The Queen* [2018] VSCA 130, [11].

> as an unskilled worker.[82] (***19-yo Brazilian, unemployed, poor employment prospects, approached***).

These results are consistent with previous findings that, for impecunious offenders, participation is primarily a 'means of survival'[83] and that 'in Britain, both drug trafficking is 'makes sense only in the context of 'high unemployment and a stagnant opportunity structure.'[84] This research found no evidence of Fleetwood's 'professional traffickers,'[85] namely profit-motivated human couriers with an ownership interest in the drugs they trafficked. This may be because such an admission would be against interest in a sentencing proceeding, whereas Fleetwood's data came from ethnographic research with sentenced traffickers.

(a) Coercion, manipulation and exploitation

Several cases illuminate how some offenders were deliberately approached, coerced, manipulated or exploited into participating in importations. In the first example, a 48yo woman (Ly) and 57yo man each became involved an importation through deliberate manipulation by their respective lovers, who were working in concert. One perpetrator exploited Ly's prior gambling problem and manipulated her emotionally:

> You have had a gambling problem since 2007 when you first won some money using a poker machine … you would gamble most days and you incurred debts eventually amounting to between $60,000 and $70,000. You continued to gamble hoping to repay the debts. When assessed by a forensic psychologist, Kathryn Wakeley, in April this year, you were found to be at the highest possible range of gambling involvement indicating in Ms Wakeley's words, "...negative consequences and possible loss of control." You met Mr Dinh Tran through friends who told him of your difficulties. He offered to assist you financially by setting up a small cafe or restaurant for you. By this time you had become romantically involved with him and you did what he told you to do. He told you not to ask questions but to do what he said. You came to Melbourne with him where you

[82] *DPP (Cth) v Dos Santos* [2016] VCC 334 [11]-[14].

[83] Caulkins, Burnett and Leslie (n 11) 98.

[84] Dorn, Nicholas, Karim Murji and Nigel South, *Traffickers: Drug Markets and Law Enforcement* (Routledge, 1992).

[85] Fleetwood, 2011, 387.

> found he had another girlfriend, Thien Tran, and it was apparent he had lied to you. It was some time before you knew that the police were looking for you and you now feel you were taken advantage of by him and that you were too quick to trust him. Of course your pathological gambling had made you vulnerable to exploitation of this type. ...[86] (***48-yo Australian national, gambling debts, manipulation by lover***).

In the second example, a perpetrator manipulated a naïve and cognitively deficient Malaysian national into participating in an importation by telling him that he was travelling to Australia for graphic design work and subsequently confiscating his passport:

> You were educated to the equivalent of Year 10 and exhibited some learning problems, which has been assumed to have been as a result of a head injury when you were very young. After leaving school you worked variously as a waiter and in a factory. You had an aptitude for art and graphics and developed skills in graphic design by taking an internet course. … You came to Australia after a friend encouraged you by telling you that you could get good employment here with your skills in graphic design. The friend arranged a visa but when you arrived you discovered it did not allow you to work. The friend then said he would arrange a student visa for you but that it would cost you more money. There were continual delays and you were becoming increasingly frustrated.
>
> Ultimately the friend told you that you were to deliver something to Melbourne and that he would pay your school fees in return. When you enquired why you specifically needed to do the delivery you were told not to ask any questions. You realised that something was not right but by that stage were scared to refuse. Your passport had been taken by the friend. He and others had your personal details and knew your family's address in Malaysia.[87] (***38-yo Malaysian man, cognitive deficits, duped by friend***).

In the third example, a 40-year old Italian university-educated special education teacher and volunteer paramedic was manipulated into taking a 'free holiday' to Australia by the brother of a friend during a period of vulnerability shortly after escaping a violent marriage:

> You had experienced a violent marriage as a result of which you suffered the symptoms of Post-Traumatic Stress Disorder, including irregular sleep, episodes of

[86] *DPP v Ly* [2018] VCC 1674, [34]-[37].

[87] *DPP (Cth) v Lim* [2017] VCC 1027 [49]-[60].

> moderate depression and anxiety. The relationship with your husband had broken down and you were separated in January 2015. Shortly prior to the breakdown of the marriage, there was an occasion when your husband pushed you down some stairs, as a consequence of which you miscarried. … Following the breakdown of the marriage you were a fragile and vulnerable person.
>
> Eight to nine months prior to your departure you had met a man…He proposed to you that you should "take a break" in Melbourne, that is, take a holiday and that all expenses would be paid. He put that proposal to you two days prior to your expected departure. Initially you said no to his suggestion, because you did not have a current passport, but with his support, he was able to arrange for you, through the local passport office, to have a passport issued in a very expedient manner, so that you were then able to depart. … I accept that you were a vulnerable, emotional, and somewhat naive woman who was exploited by Mr Morea and his associates in order to bring into Australia the border control drug....[88]

The sample included two cases where the perpetrators, rather than the victims, were arrested. In both cases the offenders had deliberately manipulated others into unwittingly participating in an importation. In the first case, two brothers recruited innocent agent couriers under the pretence of needing 'event promoters' to travel to South Africa. They arranged and paid for the event promoters' return travel and accommodation expenses, and had them distribute flyers for a fictitious promotional event while in Johannesburg. One of the brothers directed two event promoters to check in for their return flight to Melbourne suitcases in which just under 3 kg of methamphetamine was concealed.[89] In the second case, a human courier motivated by the need to extinguish drug debts arranged for his unwitting friend to accompany him on the trip. The offender secreted just under one kilogram of drugs within numerous horizontal tunnels hidden inside his friend's toiletry bags. Ultimately the offender admitted that he had exploited his friend, who was released after having spent more than 18 months on remand:

> About a year and a half before the importation, you owed about $20,000 to a person you described as "pretty big in the drug world". This person threatened he would send people to harm you and your family if you did not pay up. Eventually, at his suggestion to discharge the debt, you agreed to commit the crime using the luggage which was provided to you by the dealer. You knew the concealment was well done.

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[88] *DPP (Cth) v Salatino* [2018] VCC 1 [17]-[23].

[89] *DPP (Cth) v Wedi* [2018] VCC 2.

> You were given $7000–8,000 for your travel expenses and told to take someone else with you … Of particular significance is … that you duped your friend. The consequence of this deception was that [your friend] was charged with a very serious offence, he faced a maximum penalty of 25 years' imprisonment and was held in a foreign prison for 576 days before his release. One can imagine the anxiety and distress of such an innocent man, marooned as he was, so far away from his home and his loved ones. … [90] (***25-yo Icelandic national, deliberate exploitation of friend as human courier***).

## III Analysis of sentencing practice

### *A Prisoner characteristics*

#### *Nationality, gender, age, criminal history*

As discussed above, about half of all offenders (55 per cent) were foreign nationals. Almost all offenders were male (90 per cent), aged between 20 and 30 years (70 per cent), and had no prior criminal history (70 per cent). None of the offenders were indigenous Australians.

### *B Sentence length*

The average head sentence was 9.8 years, and approximately 85 per cent of all sentences were over 5 years. Australian nationals received longer sentences (11.25 years) than foreign nationals (8.83 years) on average, but imported considerably more drugs (38.78 kg) than foreign nationals (14.31 kg) on average but noting that Australian nationals were involved in nine of the 10 largest importations in the sample. Similarly, the median head sentence for Australian nationals was higher for Australian nationals (9 years) than for foreign nationals (7.75 years), reflecting the larger median drug quantity imported by Australian nationals (5.38 kg) compared with foreign nationals (3.17 kg). However, on a per kilogram basis, Australian nationals received a lower median sentence per kilogram of drugs imported (20.07 months per kilogram) compared with foreign nationals (24.56 months per kilogram).

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[90] *DPP (Cth) v Holmgrimsson* [2015] VCC 704 [10], [30].

| QUANTITY IMPORTED | AVERAGE SENTENCE PER KILOGRAM |
|---|---|
| < 5kg | 42.09 months |
| 5 kg to < 10 kg | 18.036 months |
| 10 kg to < 100 kg | 5.42 months |
| > 100 kg | 1.40 months |

TABLE 14: AVERAGE SENTENCE PER KILOGRAM OF DRUG IMPORTED (N=93)

Over three quarters of offenders pleaded guilty (76 per cent), but considerably more foreign nationals pleaded guilty (88 per cent) than Australian nationals (65 per cent). The median drug quantity imported and corresponding sentence for offenders who pleaded 'guilty' (3.3 kg, 7.5 years) was correspondingly lower and shorter than for offenders who pleaded 'not guilty' (14.14 kg, 12.5 years).

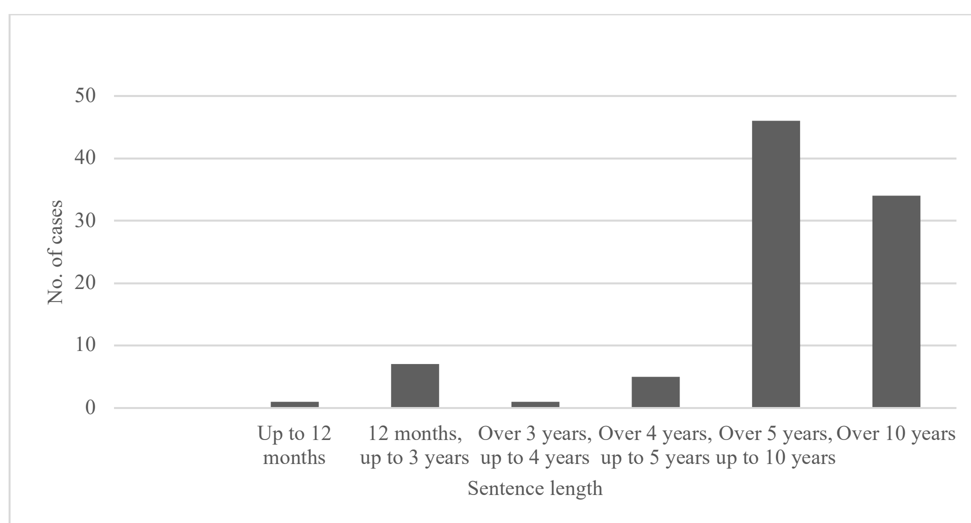


CHART 1: DISTRIBUTION OF CUSTODIAL SENTENCES (N=94)

There was a clear relationship between sentence length and drug weight or value.[91] Importations of less than 5kg resulted in a sentence of more than 5 years in 81 per cent of cases, and an average of 3.51 years per kilogram. All importations over 5kg resulted in a sentence of more than 5 years. Almost all importations over 10kg (92 per cent) resulted in a sentence of 10 years or more, and an average of 5.42 *months* per kilogram. All importations over 100 kg resulted in a sentence of more than 10 years, and an average of 1.40 *months* per kilogram.

[91] Noting that drug values are calculated based on drug weight.

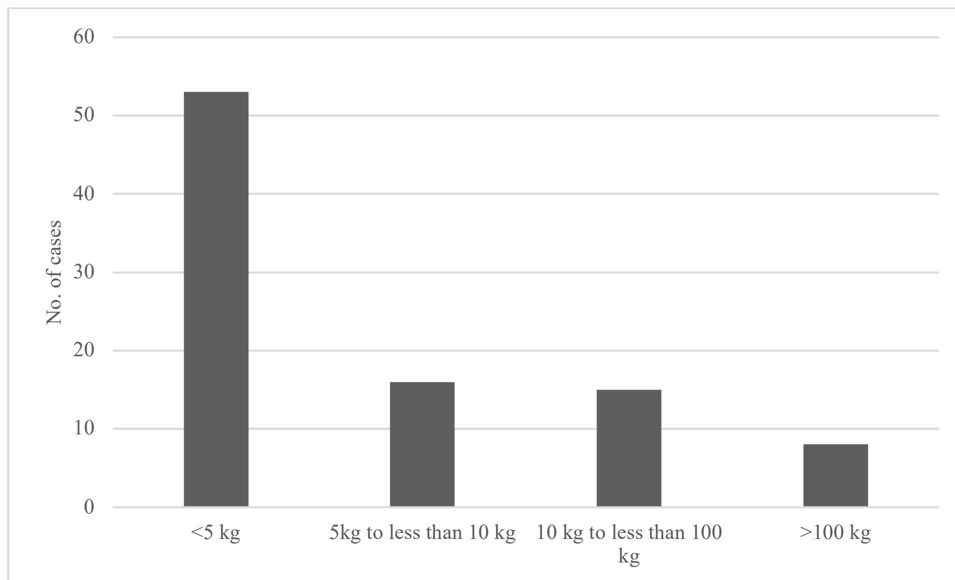


CHART 15: DISTRIBUTION OF DRUG QUANTITY (N=92)

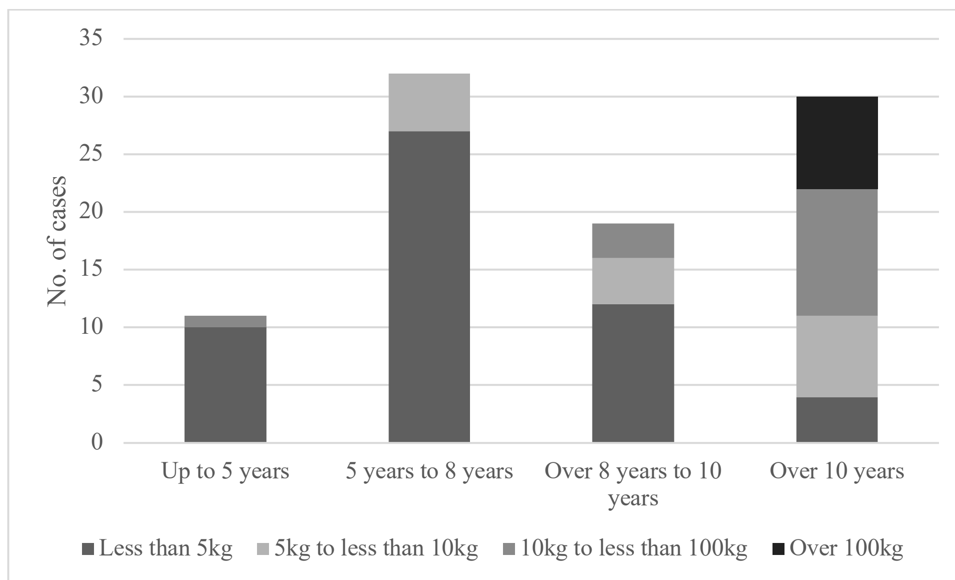


CHART 16: SENTENCE LENGTH BY DRUG QUANTITY CATEGORIES (N=92)

*C Sentence formulation*

Courts are required to impose a sentence that is 'of a severity appropriate in all the circumstances' having regard to a non-exhaustive list of statutory factors, which relevantly includes the 'nature and circumstances of the offence'[92] and the 'character, antecedents, age, means and physical or mental condition' of the prisoner.[93] Courts are required to consider the

[92] s 16A(2)(a).

[93] s16A(2)(m).

objectives of punishment, rehabilitation and deterrence,[94] but the accommodation to be made between these objectives is a matter for the court in each case.[95]

*1 Drug quantity, drug value, resulting harm and offender role*[96]

All sentencing remarks addressed drug weight, and most sentencing remarks cited intermediate appellate authority to the effect that drug weight is ordinarily 'a very significant factor in sentencing.'[97] All sentencers referred explicitly to the precise drug quantity imported. Drug quantity was routinely referenced notwithstanding the absence of any finding that the offender knew the type or quantity of drugs imported.[98] It was common practice for sentencers to gauge the size of the importation by reference to the statutory threshold quantity ('marketable quantity' ('MQ') or 'commercial quantity' ('CQ')), or multiples of the statutory threshold quantity, for example '3 times CQ.'[99] Several sentencers also compared the quantity imported to the next statutory threshold quantity.[100] Alternatively, sentencers relied on their own

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[94] s16A(2)(j), (ja), (n) and (k).

[95] As discussed in Chapter 3 'International Drug Trafficking: Policy Context.'

[96] Sentencers considered drug quantity, value, resulting harm and offender role under the rubric of the 'nature and circumstances of the offence' in s 16A(2)(a). Where an importation is interdicted, there is no 'injury, loss or damage' arising from the offence for the purpose of s 16A(2)(e).

[97] *Nguyen v The Queen*; *Phommalysack v The Queen* ('*Phommalysack*') [2], [34] (Maxwell P) citing *Markarian v The Queen* (2005) 228 CLR 357, 372-373.

[98] For example, in *DPP (Cth) v Salatino* [2018] VCC 1378 [23] the Court stated 'Given your role [as a 'courier or trusted importer'], it is accepted by the prosecution that you may not have been aware of the precise quantity of border controlled drug involved, or the value of the drugs imported. They submitted that it was likely that you would have appreciated that they were of some weight and some value. The weight of the drug is a highly relevant factor to which I must have regard in determining the seriousness of your offending, albeit not the principal factor.'

[99] For example: *DPP (Cth) v Zhao & Chen* [2018] VCC 1348: '34 Ms Chen, you have therefore imported 573 times the minimum marketable quantity of heroin and, Ms Zhao, you have imported 460.8 times the threshold amount.'; *DPP (Cth) v Le* [2018] VCC 1241: '12 The cocaine confiscated weighed 78.49 kilograms, of which 59.206 kilograms was pure. The threshold for commercial quantity, for which Mr Le stands charged, is 2 kilograms, hence the seriousness of the offence is demonstrated by the fact that this pure amount was 29 times the threshold amount.'; *DPP (Cth) v Chu* [2017] VCC 1027: '15 I pause to note that…[t]he total quantity imported therefore is 2.7 times the commercial quantity applicable to methamphetamine.'

[100] For example, *DPP (Cth) v* Teoh [2017] VCC 321: '107 The quantity of drugs imported involved in your charge is 116.8 times a marketable quantity and 15.5 per cent of a commercial quantity; a not insignificant amount of heroin…'; *DPP (Cth) v Reyes* [2018] VCC 281: '5 Insofar as the quantity is concerned, it is 309 times the quantity

experience or that of their colleagues.[101] There was a clear correlation between the weight of drug imported and the head sentence ultimately imposed, with the head sentence increasing sharply for quantities exceeding 10 kg.

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which qualifies for the minimum amount as a marketable quantity under the legislation, being two grams. Insofar as its relationship to the most severe sentence that can be given under the *Crimes Act 1914* (Cth), it is 30 per cent of the qualification of a next level, which is the commercial quantity level, for which Parliament has prescribed a sentence of life imprisonment, that level being 2 kilograms'; *DPP (Cth) v Evers* [2017] VCC 1226: 6 You imported a total of 36.5 grams of MDMA which was 73 times greater than the marketable threshold and 7.3 per cent of the commercial threshold…'; *DPP (Cth) v Garzon* [2018] VCC 484: '7 Hence, the particular amount - and this matter is important, where you have a volume-based regime - the amount for this charge represents, in fact, 43.5 per cent of such upward threshold - that is, the threshold for the higher charge, of which, of course, Mr Garzon is not charged.'

[101] For example: *R v Chiagozie* [2018] NSWDC 298: '16 The commercial quantity of methamphetamine is 750 grams. The amount involved in this importation offence was approximately 2.2 times the commercial quantity. Having said that, it must be pointed out that methamphetamine is often imported in much larger quantities. It is often imported in quantities of tens of kilograms, if not hundreds of kilograms. *Speaking with one of my colleagues at a function today*, he told me that he had just received a verdict of guilty from a jury in which the accused had been found guilty of importing 144 kilograms of methamphetamine. Given the scale at which this drug is imported into Australia, the total amount of pure methamphetamine imported, 1.935 kilograms, was not large; in fact, it was towards the bottom of the range.' (Emphasis added); *R v Yeung* [2018] NSWDC 107: 25 I have sentenced quite a large number of people that have imported drugs into this country in a range of ways and I have sentenced a large number of people within that group who have imported into the country border controlled drugs by bringing those drugs in in suitcases. I acknowledge that the quantity in this particular matter [approx. 6 kg] is above the quantity that one normally sees for such types of importations. There is no fixed amount that is imported, I appreciate. But one can see quantities ranging from a few hundred grams through to three of 4 kilograms. This is *at the upper end of quantities of drug that are imported* into the country by this means. (Emphasis added).'

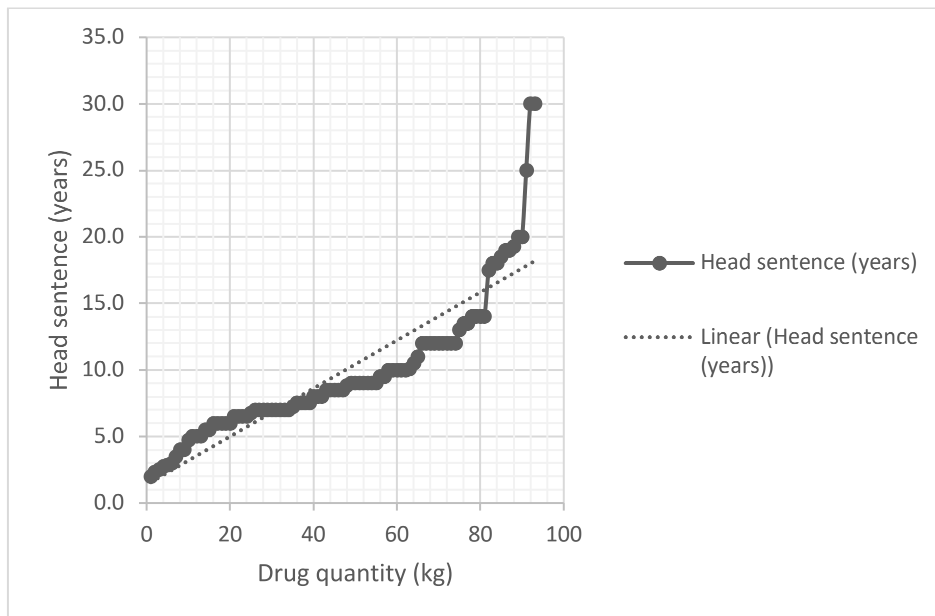


CHART 2: RELATIONSHIP BETWEEN DRUG QUANTITY AND HEAD SENTENCE

Drug value, comprising both the estimated 'wholesale' and 'street' value, was expressly noted in more than half (57 per cent) of cases. As with drug quantity, drug value was routinely noted notwithstanding the absence of any finding that the offender was involved in on-sale of the drugs at the wholesale or retail level.[102] In several cases, sentencers relied on drug value to reject an offender's evidence of their claimed remuneration:

> While I accept that such serious criminality was committed for financial reward, to accept the reward involved in those circumstances, was of such a paltry amount, given the quality and the quantity and the street value, it is, in my view, beggar's belief [sic].[103] ***(Rejecting a claim that a 27-yo parcel collector was to receive $500***

[102] For example: in relation to an importation by a human courier the Court in *DPP (Cth) v Holmgrimsson* [2015] VCC 704 stated: '7 … You have pleaded guilty on the basis that you were in possession and had knowledge of a total of 2.24 kg of pure cocaine found in all the luggage. Hence, you were in possession of 1.1 times the commercial quantity of the drug in question. It was agreed that the [wholesale] value this amount of pure cocaine was between $1.02m to $1.60m wholesale, with a street value of $2.23m to $2.98m.'; in relation to an offence by a 'human collector' and 'collection facilitator' in a DME the Court in *DPP (Cth) v Ku* [2015] VCC 634 stated: '11 I note the large quantity involved in the importations totalling over 7.5 kilograms of methamphetamine. The prosecution submitted that if the drug was sold at street value at current purity, the wholesale price would be between $2.18 million and $2.398 million. If the methamphetamine were cut into street level purity and sold in point form, that is 0.1 grams per point, at 70 per cent purity for $100 per point, the value would be over $11 million.'

[103] *DPP (Cth) v Wang* [2016] VCC 975 [23].

> ***per parcel in relation to each of five parcels containing a total of just under 4kg of methamphetamine)***
>
> I simply do not accept that figure. It would be farcical to take the view that a person would take the risks involved in this enterprise for such a paltry sum.[104] ***(Rejecting a claim that a 23-yo parcel collector was to receive $2,000 for collecting a package that contained 870 g of cocaine)***

In practice, sentencers typically evaluated an offender's role by reference to whether most of the tasks performed by the offender were managerial or subordinate in nature. The implicit assumption was that importation enterprises were structured hierarchically. Persons who trafficked drugs in the aircraft passenger stream performed no task other than physically carrying the drugs and were typically described as 'mere couriers' and assessed as 'low in the overall hierarchy.' By contrast, parcel collectors operating in the mail stream usually tracked drugs, liaised with Australia Post and physically collected the packages; and these offenders were typically described as 'more than mere couriers.' For example, in *DPP (Cth) v Zhao & Chen*,[105] two young women tracked, collected and rerouted to a central address for consolidation and distribution by others several packages containing drugs. The offenders were paid $100 to $200 per package and were unaware of the contents of the packages ignorant of the wider importation enterprise.[106] The Court described the offenders as 'crucial to the successful operation of the syndicate,' 'more than just…a post box' and a 'very important cog' in the importations.[107] Offenders operating in the air or sea cargo streams typically performed multiple tasks of a managerial nature – including tracking consignments online, liaising with customs brokers and freight forwarders, paying import duties and arranging delivery or even establishing 'front' companies as consignees – and were typically described as 'central persons' in the 'importation hierarchy.'[108] Where an offender's role was patently subordinate, but the quantity of drugs imported was assessed as high, the offender's role in the importation

[104] *DPP (Cth) v Garzon* [2018] VCC 484 [34].

[105] DPP (Cth) v *Zhao & Chen* [2018] VCC 1348.

[106] By their plea they acknowledged that they were reckless as to the contents of the packages.

[107] *DPP (Cth) v Zhao & Chen* [2018] VCC 1348 [25], [27], [69].

[108] For example, *Obiekwe v R* [2018] NSWCCA 55.

appeared to assume less importance than drug quantity in sentence formulation, although this was not explicitly stated in any case.[109]

*2 Objective seriousness*

In practice, courts treated intermediate appellate authority as deeming all importation offences to be 'objectively serious,' thereby avoiding the need for empirical assessments. For example, courts routinely purported to use the statutory maximum penalty 'yardstick' for assessing the objective seriousness without any consideration of the 'most serious case' that the tip of the yardstick might represent, nor where the instant case fell. [110] Likewise, courts assumed that the importation of any quantity of drugs caused 'great social harm' based on precedent backed up by anecdotal experience.[111]

*3 Proportionate punishment*

The results revealed that the imposition of stern punishment was in almost all cases commensurate with the anterior finding that the offence was 'objectively serious,' and was consistent with intermediate appellate authority requiring 'stern punishment' 'in almost every

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[109] For example, *DPP (Cth) v Le* [2018] VCC 1241, 9 years NPP 6 years for his role in moving and checking 91.7 kg imported by maritime vessel.

[110] For example: *DPP (Cth) v Nwagbo* [2018] VCC 865: '42 … This offending is of the utmost gravity, as reflected by the maximum penalty of life imprisonment.'; *DPP (Cth) v Yeung* [2018] NSWDC 107: '2 That is of course a very serious offence, it carries a maximum penalty of life imprisonment.'; *Huang v R* [2018] NSWCCA 70: '65 … The seriousness of that offending can be gauged by the fact that the Parliament has seen fit to impose a maximum sentence of life imprisonment.'; *DPP (Cth) v Le* [2018] VCC 1: '2… The seriousness of the charge is best demonstrated by the fact that our Federal Parliament has set as a maximum penalty one of life imprisonment …'. See also *DPP (Cth) v Masange* [2017] VSCA 2014 [139], [142], [158].

[111] For example, *Kuo v R* [2018] NSWCCA 270 [82] citing with approval the sentencing remarks at first instance before Lakatos SC DCJ 23 September 2016, unreported, 40.5-40.19: 'If the importation and the on supply of the methamphetamine in this case had been successful there would have been $147 million worth of amphetamines which would have flooded this country. Those responsible for the offence would most probably have left Australia and enjoyed the financial rewards of a successful drug enterprise, leaving behind a trail of misery, criminality and consequential adverse impacts. When considering the objective seriousness of the offence one is left to surmise how much damage could have been done to how many potential consumers of this quantity of the drugs, 142 kilograms, and the substantial profits which those in charge of this operation, and to a lesser extent these offenders, sought to gain.'

case.’[112] No prisoner in the sample challenged on appeal the anterior finding that the offence was ‘objectively serious.’

*4 Alternatives to imprisonment*

In practice, express consideration of alternatives to imprisonment, and whether those alternatives were appropriate in the circumstances, was almost non-existent. Typically, defence lawyers conceded that a full-time custodial term was the only appropriate disposition, and sentencing remarks mentioned the issue only in passing.

*5 Setting the non-parole period*

The only cases in which the court explained the derivation of the non-parole period (‘NPP’) or recognisance release order (‘RRO’) were where the offender was to be released forthwith.[113] In all other cases, there was no detailed explanation of how the court arrived at the provision for earlier release from custody. There was, however, a consistent relationship between the head sentence and NPP in almost all cases despite the High Court’s rejection of any established norm in *Hili v The Queen; Jones v The Queen* (‘*Hili*’).[114] The non-parole period was approximately 70 per cent of the head sentence in almost all cases, as depicted in the chart below.

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[112] *Nguyen v The Queen; Phommalysack v The Queen* [2011] VSCA 32, [34] item 7; *R v Nguyen; R v Pham* [2010] NSWCCA 238,72 (per Johnson J, with whom Macfarlan JA and R A Hulme J agreed).

[113] For instance, *DPP (Cth) v Evers* [2017] VCC 1226 [22]-[25]; *R v Udeh* [2017] NSWDC 401 [44]-[51];

[114] *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520.

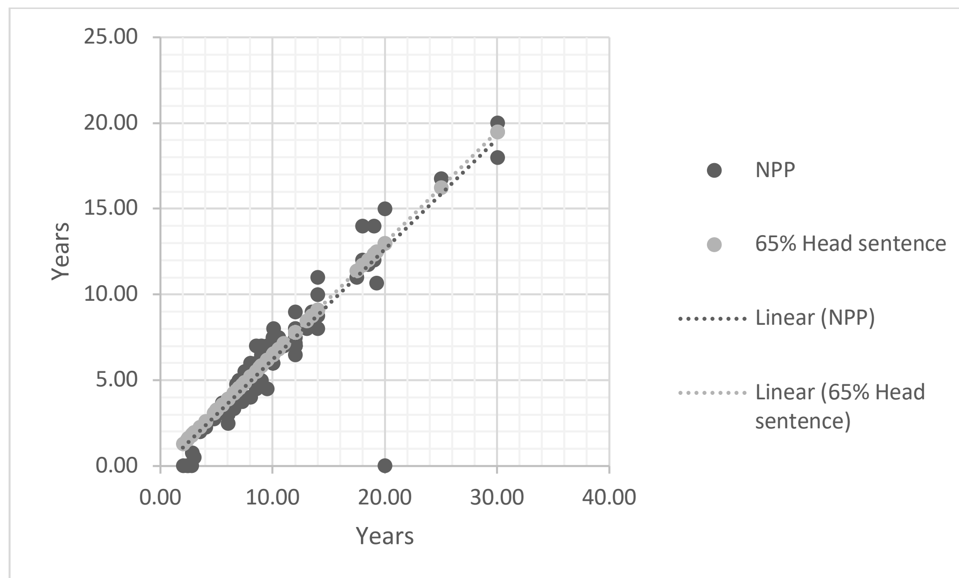


CHART 3: RELATIONSHIP BETWEEN HEAD SENTENCE AND 65% NPP

This suggests that the same matters which informed formulation of the head sentence also guided formulation of the NPP, meaning that general deterrence dominated derivation of the pre-release period in importation cases.

*6 Consideration of comparative sentences*

There is no statutory requirement that a court consider sentences passed in other like cases ('comparative sentences'), but it is a common practice. The results revealed that courts routinely referred to 'comparative sentences' when formulating sentence. It was usual for the prosecutor to tender a 'schedule' of first instance and intermediate appellate comparative sentences in tabular form detailing the drug quantity, the offender's role in the offence and 'very brief' additional information, although these tables were rarely annexed to sentencing remarks. This format and judicial comments underscore that prosecutors were not seeking to identify or ensure consistency with relevant sentencing principles, but with sentencing outcomes based on similar facts, for example:

> We have had regard to the outcomes in: [12 intermediate appellate cases]… It is unnecessary to set out the facts and circumstances of each case. In all save two the offender pleaded guilty. All offenders were couriers or involved in reasonably low level offending. None of them involved a quantity of drugs greater than 100 g.[115]

[115] *Harvey v The* Queen [2018] WASCA 188 [62].

Both first instance and intermediate appellate courts commonly expressed frustration with being unable to identify relevant comparators, which served to reinforce the fact that courts were looking for the elusive 'direct [factual] match' rather than unifying principles.[116] No case recorded an attempt by the prosecutor or the court to identify the 'unifying principles' underlying the comparative cases, as required by *Hili v The Queen*,[117] and only one case pointed out this limitation.[118] Even intermediate appellate courts used comparative sentences inappropriately to define a sentencing 'range':

> It might be accepted that a sentence of 10 years' imprisonment, with a non-parole period of 7 years, for an offender who the sentencing judge described as being still of 'relative young age', with no prior convictions, who pleaded guilty early, and who will serve his imprisonment in isolation from his family who live overseas, is towards the top of the range. A review of the table of comparable cases relied upon by the Crown supports that conclusion. Two sentences are higher (*Riddell* and *Lay*), but one of those (*Lay*) had relevant prior convictions. Four of the sentences are close to that imposed here (*Tiknius*, *Nguyen*, *Legault*, *Agboti*) although in three of those the non-parole periods fixed were notably lower (*Tiknius*, *Nguyen*, *Agboti*). In my view, however, it is not reasonably arguable that this sentence is outside the range.[119]

*7 Sentencing objectives*

Notwithstanding that federal sentencing law does not prescribe the objectives of sentencing, nor rank sentencing objectives in order of importance,[120] intermediate appellate authority

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[116] For example, *DPP (Cth) v Hew* [2016] VSCA 292 [62]: 'I have read all of the cases provided to me. There is no case in the bundle that constitutes a direct match with your offending or your personal circumstances.'

[117] *Hili v The Queen* [2010] HCA 45.

[118] *DPP (Cth) v Burtt* [2018] SASCFC 5 [62]-[64]: 'The High Court has made it very clear that…[w]hat is required is not numerical equivalence but rather consistency in the application of sentencing principles…Unfortunately, the [comparative sentences]…provide only limited assistance… the information goes little beyond numerical equivalence and provides no assistance on matters of principle.'

[119] *DPP (Cth) v Wang* [2016] VSCA 292 [2], [22].

[120] Richard G Fox and Arie Freiberg, *Sentencing State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 193-4, noting that the *Crimes Act 1914* (Cth) s16A requires the court to 'impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence' having regard to an inclusive list of relevant matters.

establishes that general deterrence is 'to be given chief weight on sentence' when sentencing drug importers, and that 'stern punishment will be warranted in almost every case.'[121] The stated rationale for prioritising general deterrence is the 'difficulty detecting importation offences,' the 'great social consequences that follow' and the need to 'signal to would-be traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment.'[122]

(a) General deterrence

In practice, general deterrence was the dominant sentencing consideration in almost every case. Moreover, general deterrence was understood in its utilitarian sense as the imposition of a sentence calculated to deter potential future offending by others.[123] General deterrence was prioritised over all other sentencing considerations, even where the offender was found to be an inappropriate vehicle for general deterrence because their offending could be explained as exploitation of vulnerability.[124] General deterrence routinely trumped rehabilitation,[125] and

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[121] *Nguyen v The Queen; Phommalysack v The Queen* [2011] VSCA 32, [33]-[39].

[122] *R v Nguyen and Pham* [2010] NSWCCA 238, [72].

[123] For example, *DPP (Cth) v Schanker* [2016] VCC 1771 [81]: 'The principal or chief factor in sentencing you is general deterrence - deterring others from engaging in this type of offending.' ***(32-yo Sierra Leone national, mentally ill, unemployed, drug user, 7.785kg methamphetamine, 18 years NPP 14 years)***; *DPP (Cth) v Brown* [2016] VCC 511 [94]: 'We accept the Director's submission that Brown's sentence does not reflect the gravity of this offending or the need to deter others from pursuing substantial profits which drug importation can realise.' ***(33-yo Australian national, 49.07kg, resentenced on appeal from 12 years NPP 7 years to 20 years NPP 15 years).***

[124] For example, *DPP (Cth) v Cheng* [2016] VCC 98 [45]: 'It is necessary therefore for this Court to send a loud and clear message to any person engaged in or thinking of being engaged in this activity, even to those vulnerable or financially pressured as it appears you may well have been.'

[125] For example, *DPP (Cth) v Dos Santos* [2016] VCC 334 [9], [22]-[23]: 'You are a first offender without a criminal history and fall to be sentenced as a young offender. A body of references attest to your previous good character and, on the evidence before this Court, you are a young man capable of rehabilitation… You have spent the last seven months in an adult custodial environment and your isolation is magnified by your lack of English and the absence of other Portuguese-speaking prisoners. Whilst it is true that you have been the author of your own misfortune, your rehabilitation will not be fostered by an extended period of linguistic and cultural isolation during your formative years. In my view, and notwithstanding your youth, a period of imprisonment is the only appropriate sentence that can be imposed. Principles of general deterrence have clear application. Any sentence must discourage other young men and women from the temptation to act as couriers of illicit drugs…'

prior good character.[126] General deterrence was even prioritised in relation to participants in 'consumer enterprises.'[127] By contrast, specific deterrence was rarely mentioned or emphasised.

(b) Punishment

Sentencers routinely rationalised the objective of punishment by reference to general deterrence, rather than as a retributive objective in its own right.[128] There also appears to have been an implicit assumption of personal responsibility underlying justification for punishment, even where the court found that the offender's ability to make rational choices was

[126] For example, *Van Zwam v R* [2017] NSWCCA 127 [104]: 'Whatever subjective circumstances call out for leniency in a particular case, including the present, they are not to be given such weight as to overwhelm the need to deter those, such as the applicant, from deciding, through some misguided assessment of risks and rewards, to commit the crime of importation of this drug. The applicant's clean record, age and circumstances may well have been the reason he was selected for the task of importation. In all the circumstances, I am not persuaded that the sentence imposed on the applicant was manifestly excessive.'; *DPP (Cth) v Valdez, Londono & Poblete* [2017] NSWDC 354 [2]: 'Principles of general deterrence, which I am required to apply, require that significant sentences are imposed upon each of the offenders, despite their otherwise good character and despite the fact that I am satisfied they each have good prospects of rehabilitation. The harm that drugs do to our community is incalculable…That explains the sentences I will ultimately impose upon the offenders.'

[127] *DPP (Cth) v Cooper* [2018] VCC 1226 [56] citing *Matthews & Ors v R* [2014] VSCA 291 [75]: '…If there be a perception amongst some that the online trading of drugs or their purchase or sale by post is somehow less serious than more traditional forms of dealing, those perceptions need to be dispelled by sentences which adequately reflect the need for general deterrence.'

[128] For example, *DPP (Cth) v Cheng* [2016] VCC 98 [41]: ' …stern punishment is to be expected by persons who are involved in these types of crimes. The sentences imposed by our Courts must signal to would be traffickers that the potential financial rewards on offer are neutralised by the risk of severe punishment.'

compromised by drug or gambling addiction or mental illness.[129] No case sought to challenge a sentence on the basis that it infringed the doctrine of common law proportionality.[130]

(c) Rehabilitation

References to rehabilitation were conspicuous by their absence. Sentencers routinely assumed that a term of imprisonment would be 'rehabilitative' for the prisoner absent evidence to the contrary. To this end, sentencers routinely considered the rehabilitative prospects of the offender in the abstract, without any explanation of the condition from which the offender needed to be rehabilitated, except where that condition was obviously a drug addiction. Courts primarily made an inference about rehabilitative prospects based on the extent of an offender's family support either in court or by way of letters or character references.[131] This was even the case where the offender had an established drug or gambling addiction or other mental health

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[129] For example, *R v Le* [2018] NSWDC 86 [14]: 'Were it not for Mr Le's gambling addiction, he would not be where he is today and only a person with a vested interest would say that Mr Le's gambling addiction was unconnected with the ready availability of outlets for his gambling. But ultimately, Mr Le's decision to do what he did, knowing that what he was doing was illegal, was his and his alone. For that reason, he has to be punished in a significant way.'

[130] The High Court has held that the requirement for punishment in s 16A(2)(k) incorporates all common law principles concerning punishment, including 'proportionality' and 'totality': *Hili v The Queen* [2010] HCA 45, [25]. The 'totality' principle also receives statutory recognition in s 16B of the *Crimes Act 1914* (Cth).

[131] For example: *DPP (Cth) v Garzon* [2018] VCC 484: 'I stress again, I take into account his plea of guilty, and of course, his youth. There is no reason why, given the letters from his family and the reference to his prior life, I should not be confident about Mr Garzon having a bright future without crime after he serves his sentence. That, of course, is predicated on the fact that he makes no more stupid decisions.' *DPP (Cth) v Lim* [2017] VCC 321: 'I have taken into account your prior good character as relevant to your prospects for rehabilitation. I have taken into account your mother's reference and accept that you previously were considered to be a young man of integrity and honesty. Overall, I accept you have good prospects for rehabilitation.' *DPP (Cth) v Ragauskas* [2016] VCC 1232 [51]: 'As you well know, your parents have attended court, both the first hearing and again today, demonstrating their continued support of you. And as I have already mentioned, you are already attending counselling. All of those matters, Mr Williamson's support, your parents' support, and the fact that you are attending counselling, point you to be in the right direction in terms of a positive prospect for rehabilitation.' *DPP (Cth) v Masange* [2016] VCC 739 [40]: 'I find that such prospects [for rehabilitation] are high. As stated, you have otherwise behaved as a valuable, admirable member of the community. You have family and community support, and capacity for employment. Your own letter to the court is consistent with my findings on this. You state insightful remorse and determination not to offend again. In your case, the relevance of specific deterrence is not removed; but its importance is reduced.'

issues requiring treatment. Where the offender was suffering from drug addiction at the time of offending, prospects for rehabilitation tended to be assessed by reference to the steps taken by the offender since his arrest to address the drug addiction, rather than on a professional opinion as to the nature and extent of the offender's addiction, and the projected treatment pathway.[132] Other than in relation to the imposition of suspended sentences on addicts operating 'consumer enterprises' or young Australian nationals, sentencing remarks failed to reveal whether or to what extent this factor rehabilitative prospects tended to mitigate or aggravate the sentence ultimately imposed or how this factor was reflected in the non-parole period.[133]

### *8 Mitigating factors*

#### (a) Guilty plea and cooperation

Almost two thirds of offenders who pleaded 'guilty' (61%) received a discount of between 21 and 30 per cent off the nominal head sentence, although the discount was not always quantified

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[132] For example: *DPP (Cth) v Teoh* [2017] VCC 321 [115]: 'Having regard to your expressed insight into your offending, your commitment to rehabilitation and your undertaking of the drug course in prison all combine such that I consider you have good prospects for rehabilitation.' *DPP (Cth) v Su Him Ho* [2016] VCC 174 [41]-[42]: 'I am satisfied having regard to your post arrest conduct, that this has been a salutary lesson for you and that it is unlikely that you will reoffend in the same well like manner in the future. I nonetheless consider there is still a need to emphasise specific deterrence in your sentence. Overall, I consider your rehabilitation prospects are excellent and the likelihood of you reoffending is low.'

[133] For a counter-example, see *DPP (Cth) v De La Cruz-Webb* [2016] VCC 1621, in which the court afforded a long non-parole period to a 23yo Australian offender who accepted a parcel on behalf of a Mexican friend: '23 Given your disrupted education and difficult upbringing, behavioural issues and lack of support and guidance, it is of significance that you have managed to achieve anything by way of a work history. It seems to me that this is a positive factor when considering your prospects of rehabilitation, which, otherwise, may not look optimistic. As I have already stated, the only appropriate sentence is a term of imprisonment and, of necessity, the gravity of offending means that it must be a substantial one. However, according to Mr Candlish, you do have a need for psychological treatment, and I am concerned that there is a real danger that, if you are incarcerated for a very, very lengthy term, any prospect of rehabilitation may well be lost. Although you do not come within the definition of a "young offender" under the *Sentencing Act* (Vic), you were only 23 at the time of committing these offences. It is clear to me that you were immature and the immaturity of youth is acknowledged as a factor bearing upon an offender's transgressions. Yours is a case where I consider that the emphasis to be placed on general deterrence should not completely overshadow the importance of rehabilitation of a 23 year old offender. I deem it appropriate to give you the opportunity to try to rehabilitate yourself during a meaningful parole period.'

in the sentencing remarks (n=41). There was no discernible common feature to the 12 per cent of cases where offenders received a discount to more than 30 percent for the plea of guilty.[134] Only 7 per cent of offenders received any discount for cooperation with law enforcement authorities. Half of the offenders who received a discount for cooperation (57 per cent) were participants in corruption-based enterprises. In practice, there were few other factors that mitigated sentence.

(b) Prior good character

Prior good character was afforded very little weight in accordance with intermediate appellate authority.[135]

(c) Prior drug and gambling addiction

A prior drug addiction was typically regarded as mitigating only in respect of offenders operating consumer enterprises. Intersectional vulnerability, which the researcher found to provide an explanation for offending in more than half (65 per cent) of cases,[136] is not a legally recognised mitigating factor and was not advanced as such. Courts typically considered in isolation each of the circumstances that combined to produce intersectional vulnerability – namely unemployment and poor employment prospects, black-market gambling or drug debt, family dislocation or serious prior trauma resulting in PTSD – and consequently found that none of the factors had a significant mitigating effect either individually or in combination. For example:

> We are very aware of the applicant's sad, indeed shocking, background.[137] It does moderate his sentence but there are limits to its ameliorating influence. There was

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[134] The researcher considered the subjective features of offenders, drug type and quantity; and the state or territory in which the person was sentenced.

[135] *Nguyen v The Queen; Phommalysack v The Queen* [2011] VSCA 32, [33] provides 'the prior good character of a person involved in a drug importation is to be given less weight as a mitigating factor than it might otherwise be given.' The NSWCCA made a similar statement in *R v Nguyen; R v Pham* [2010] NSWCCA 238,72 (per Johnson J, with whom Macfarlan JA and R A Hulme J agreed).

[136] See above.

[137] *DPP (Cth) v Masange* [2016] VCC 739 [17]-[20]: 'You were born in the Democratic Republic of Congo, the middle child of six. Your father was a storekeeper and your mother a teacher. Your childhood became highly dysfunctional and without doubt damaging to you when that country entered a state of war in 1996. Mr Alexander's written and oral submission detail the background of that and the developing circumstances for you.

no specific evidentiary nexus established between this deprivation and the offending in question...[138] ***(28-yo Congolese refugee, untreated PTSD, approached to receive parcels as part of his legitimate business, 2.702 kg methamphetamine, 20 g cocaine, 7 years 6 months NPP 4 years)***

This is a background that is so extreme that I must say I have not encountered the like… [the offender] has suffered from a significant major depressive disorder and a post-traumatic stress disorder following a horrific background that one can only begin to imagine. He is a deeply troubled man who is currently untreated. Unfortunately, [he] has fallen to methamphetamine dependence partly as self-medication… In my view, that addiction does not even come close to explaining even in part your high level of involvement in the criminal conduct that is before me..[139] ... ***(32-yo, refugee from Sierra Leone, unemployed, PTSD, drug addiction,***

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At eight, you and an older brother and sister escaped soldiers, likely paramilitaries, who had come to your home. You got to Tanzania and a refugee camp there. Conditions were very difficult and in addition you were sexually abused by a woman who had taken the three of you in. The bizarre and distressing aspects of that are given in the tendered psychological report. After six months there, you moved through Malawi and Mozambique to Zimbabwe. You were exposed to violence and atrocity. In 1999, the three of you lived for six years in a United Nations refugee camp in Zimbabwe. There was further delay before finally achieving refugee status and you came to Australia in 2006, at 18. In that year, you were told by the Red Cross that your parents were still living as refugees in Zimbabwe. You had until then thought them dead. They have remained there in difficult circumstances. I was told, as I understand, that you have since seen them once. You have given them financial support when able over the last decade. You mother has been diagnosed with cancer. You settled with your brother and sister in the western part of Melbourne. By dint of diligence and hard work you did well. You studied and completed an apprenticeship in plumbing in 2012, at 24. Finding work in that trade was difficult; but you saved, and in early 2013 you were able to purchase, at modest cost, a mixed-business owned by an African man in St Albans. A part of the business was a Western Union transfer agency, which processed money transfers to Africa at low commission. It was legitimate and I presume that you had necessary licence or authority. Mr Alexander's submissions track through the development of this to the offending now before me. In short, he put on your behalf that a group of African people approached you and you began to transfer increasing amounts of money to Africa. This moved to knowing, or being told, that they were proceeds of illegal but not drug-related importations into Australia to agreeing to transfer using false identities (obtained by) you for the larger commission rate of 10 per cent; and finally to realisation that it was a drug importation enterprise. In that context, you agreed not only to fraudulently transfer funds, but (at again higher remuneration) to receive these packages and pass them on.

[138] *DPP (Cth) v Masange* [2016] VCC 739 [27], [229].

[139] *DPP (Cth) v Schanker* [2016] VCC 1771 [56]-[58], [67].

> ***importing and domestic trafficking 7.785 kg methamphetamine, 18 years NPP 14 years)***

> I take into account that Mr Cheng had a difficult and impoverished upbringing. It would be true to say that he was 'ripe' for recruitment. However, the … authorities are very clear that persons who take such big risks with their liberty… must bear the consequences. …[140] ***(21-yo Chinese national, impoverished, mental health issues, 7kg methamphetamine, 10 years NPP 7 years 6 months)***

Courts typically rejected any posited evidentiary nexus between drug or gambling addiction and participation in a contractor enterprise and instead characterised the offender as motivated by profit:

> [The offender] details in [a letter of apology to the court] the financial issues that had beset him, the unfortunate fact that he was involved in gambling, that he was the father of a young family, having financial and personal difficulties with his wife, and that he was wanting to provide for his daughter... in a manner to which he had not as a young boy. As a result, he accepted the offer to, to use his words, 'to take a bag.'[141] ***(21-yo US national, gambling debts, human courier, 0.6193 kg cocaine, 7 years NPP 5 years)***

> Your gambling habit spiralled out of control, such that you had to borrow money initially from friends, and then later from a loan company, at extremely high interest rates. At its most problematic you owed $100,000 Malaysian dollars in respect to your gambling debt. Representatives from the loan company threatened to bring harm to your family because of your outstanding debt. Because of difficulties coping with your situation and your anxiety, you began to lack concentration and eventually you lost your employment. Through personal connections you met some individuals who offered you a way out. They offered you financial security and in exchange you had to agree to travel to Australia to assist with the importation of drugs. The motivation for your offending was so that you would avoid your family members coming to harm, and because you were also wanting to repay the debt as quickly as possible... I am satisfied that you participated in the importation for the purposes of profit, in part related to your need to repay the gambling debts you had

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[140] *DPP (Cth) v Cheng* [2016] VCC 98 [36] - [37].

[141] *DPP (Cth) v Reyes* [2018] VCC 281 [8] - [10].

> accumulated in Malaysia.[142] ***(22-yo Malaysian national, gambling debts, unemployed, parcel collector, 1.612 kg methamphetamine, 8 years NPP 6 years)***

(d) Hardship of custody

Foreign offenders typically raised 'hardship of custody' based on mental or physical health problems, isolation from family and community abroad, or fears of deportation upon completion of sentence, and courts readily recognised that each nominated factor would make the offender's time in custody 'more burdensome' or 'far more difficult' than for the 'ordinary prisoner.' While courts considered the matter as part of the 'general mix' of sentencing considerations, they did not assign or describe any quantifiable discount on sentence, so that it was not possible to ascertain or estimate the impact of this matter on the sentencing calculus.[143]

No case in the sample expressly considered the 'probable effect' of any proposed sentence on the offender's family or dependents as required pursuant to s16A(2)(b), notwithstanding that almost a third of offenders (31 per cent) had dependent children or elderly parents (n=80).[144] For example:

> You are married, have a six month old child and are a permanent resident of Australia. You are not a citizen and are likely to be deported at the conclusion of your prison sentence. … Since you married, you have struggled to have children and your son… was the product of IVF. [Your wife] pleads for a future with you

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[142] *DPP (Cth) v Chia* [2018] VCC 1503 [18] - [33].

[143] For an example of hardship based on mental health issues see *DPP (Cth) v Teoh*: '32 …I do accept that these mental health problems would presently make your prison time more burdensome than for others in better mental health.' For an examples based on isolation from family and community see *DPP (Cth) v Dos Santos* [2016] VCC 334: '22 You have spent the last seven months in an adult custodial environment and your isolation is magnified by your lack of English and the absence of other Portuguese-speaking prisoners. Whilst it is true that you have been the author of your own misfortune, your rehabilitation will not be fostered by an extended period of linguistic and cultural isolation during your formative years.' For an example of hardship based on fear of deportation see *DPP (Cth) v Robinson* [2017] VCC 2014: '27 …you face deportation on completion of your sentence. I accept that this is a circumstance that will weigh heavily upon you during imprisonment.'

[144] For example, in *DPP (Cth) v Ku* [2015] VCC 634, the offender did not raise the impact of the custodial term on his 8yo daughter who was living with her mother in China; in *DPP (Cth) v Lim* [2017] VCC 321 there was no discussion of the impact of the prisoner's sentence of 12 years NPP 9 years on his 3yo daughter.

> and believes you to be innocent.[145] (***31-yo, Indonesian national, 124kg cocaine, 18 years NPP 12 years)***

(e) Aggravating factors

*(i) Profit motive*

Intermediate appellate authorities provide that 'as a matter of common sense, it should be inferred, unless there is evidence to the contrary, that a person who is importing drugs is doing so for profit.'[146] To this end, courts described almost every offender as being motivated by 'profit' or 'greed.' In doing so, courts made no distinction between profit-motivated risk-takers and vulnerable persons seeking an income. While no case specifically stated whether this motivation was regarded as aggravating, mitigating or neutral in the circumstances, the context typically suggested the profit motive was regarded as an aggravating factor.

> You told police that you anticipated being paid the equivalent of approximately AUD $20,000 for bringing the cocaine into Australia. This Court was informed that the average monthly minimum wage in Brazil was in the order of AUD $300 to $400. The magnitude of your anticipated financial reward is self-evident.[147] ***(19-yo, Brazilian national, unemployed, human courier, 2.13 kg cocaine, 6 years NPP 3 years 3 months)***

*(ii) Official corruption*

Although courts denounced the conduct of corrupt port officials as 'seriously aggravating,'[148] in practice, sentences imposed on participants in 'corruption-based enterprises,' inclusive of the significant discounts for cooperation and plea, were vastly shorter per kilogram of drugs imported (4.27 months per kilogram) than for persons who imported less than 5 kilograms of drugs (3.51 *years* per kilogram).

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[145] *DPP (Cth) v Saputra* [2018] VCC 1665 [28]-[30].

[146] *R v Nguyen; R v Pham* [2010] NSWCCA 238 [72] citing *R v Kaldor* [2004] NSWCCA 425 [104].

[147] *DPP (Cth) v Dos Santos* [2016] VCC 334 [20].

[148] For instance, in *DPP (Cth) v Huynh & Cranney* [2015] NSWDC 276 [130].

## IV CONCLUSION

These results describe importation methodologies at the enterprise level and offending at the individual level. In summary, some offenders were merely users, purchasing small quantities drugs of via the internet to feed and fund their addiction owing to the ready accessibility of online shopping for illicit drugs (‘*online shoppers*’). Other offenders were corrupt port staff or officials who are leveraging knowledge of, and the ability to circumvent, border control protocols to facilitate enduring and profitable trafficking routes. However, the overwhelming majority of offenders (85 per cent) are merely engaged *by* profit-motivated importation enterprises on a fee-for-service basis to traffick, track, collect or deliver the drugs (‘*human couriers*’ or ‘*parcel collectors’).* Their offending can be readily explained as a response to coercion, manipulation or exploitation by or, presumably, on behalf of, the investors in those enterprises. Consistently with predictions of academic economists, and contrary to popular stereotypes, these are reluctant participants in the international drug trade who do not share in the spoils.[149] The very low fees paid to fee-for-service traffickers relative to the wholesale drug value, plus the ability to entirely outsource to those persons the risk of imprisonment undoubtedly makes this a lucrative business for investors.[150] There is no evidence of the systematic use of violence or threats in the operation of these importation enterprises, whether to maintain or defend trafficking routes or otherwise; coercion, manipulation and exploitation appear to be more than sufficient in this market. This is consistent with the predictions of academic economists that the market is competitive.[151] Overall, the findings are consistent with the United Kingdom literature, save for differences pertaining to Australia’s geographic proximity to Asia and the absence of cross-border vehicular access. The similarities comprehend the prevalence of fee-for-service contractors,[152] the dominance of particular ethnic groups,[153] the motivation of a ‘means of survival’ for many traffickers,[154] the recruitment of

[149] Reuter, Peter, ‘Ten years After the United Nations General Assembly Special Session (UNGASS): Assessing Drug Problems, Policies and Reform Proposals' (2009) 104(4) *Addiction* 510.

[150] Bjerk, David and Caleb Mason, ‘The Market for Mules: Risk and Compensation of Cross-border Drug Couriers' (2014) 39 *International Review of Law and Economics* 58.

[151] Reuter (n 149).

[152] Caulkins, Burnett and Leslie (n 11) 72.

[153] Paoli and Reuter (n 12).

[154] Ibid 98.

many human couriers by coercion, threat or deception,[155] the use of broadly similar concealment methods,[156] and the involvement of corrupt port staff and officials in some importations.[157] The consistency with the findings of UK-based research suggests that other findings from that literature may be applicable too. For example, findings that: human couriers are sometimes used as 'bait' or cover for other human couriers on the same flight;[158] many importation enterprises are enduring notwithstanding that fee-for-service participants are frequently arrested;[159] that commercial mail couriers are an under-investigated but significant segment of the fee-for-service or *contractor enterprise* market; and that drugs are frequently imported via maritime vessel landing between established border entry ports.[160]

In terms of sentencing practice, the results reveal that each importation offence was found to be 'objectively serious' – by reference to a combination of intermediate appellate authority, a comparison of drug quantity with the statutory threshold quantities, and characterisation of the nature of tasks performed by the offender as either 'managerial' versus 'subordinate' – and courts imposed commensurately high sentences. Offenders importing the smallest quantities of drugs received vastly higher penalties per kilogram of drugs imported than persons who imported more than 10 kg of drugs. The only matter that substantially mitigated sentence length in practice was a plea of guilty. Courts routinely de-emphasised prior good character, prior drug addiction, prior gambling addiction, prior mental illness, and hardship of custody for the offender or his family. Discounts for cooperation were in practice given only to corrupt port staff or officials because human couriers and parcel collectors had no identifying information about other enterprise participants or the broader operation of the importation enterprise. In practice, courts described almost every offender as being motivated by 'profit' or 'greed' and treated this 'fact' as aggravating. General deterrence, in its utilitarian sense of deterring other potential offenders, was the dominant sentencing consideration in almost all

[155] Caulkins, Burnett and Leslie (n 11) 84.

[156] Ibid. This survey of 110 incarcerated drug importers in the United Kingdom found that drugs were concealed in cans of food, bags and hidden in car seats; also most aircraft passengers (50/66) concealed drugs in luggage rather than swallowing them.

[157] Ibid 81.

[158] Ibid 74.

[159] Ibid 92.

[160] Ibid 67.

cases, and the objective of punishment was rationalised by reference to general deterrence also. In practice, courts relied on 'comparative sentences' to define a sentencing 'range' and impose a non-parole period of approximately 70 per cent of the head sentence, contrary to *Hili*.[161] Overall, these findings are broadly consistent with corresponding research in the UK, save that the average sentence of 9.8 years was higher than the comparable average sentence of 7.1 years in England and Wales, where a smaller proportion of sentences were over 5 years (43 per cent compared with the finding of 85 per cent).[162] The similarities comprehended the fact that Australian nationals imported more drugs on average than foreign nationals and received longer sentences on average than foreign nationals;[163] that larger drug weights corresponded with longer sentences;[164] and that persons who 'simply deliver the drug' do not receive discounts for cooperation because they do not possess any useful information.[165] The following chapter considers whether, having regard to this factual context, sentencing practice is consistent with international human rights norms.

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[161] *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520.

[162] Jennifer Fleetwood, Polly Radcliffe and Alex Stevens, 'Shorter Sentences for Drug Mules: The Early Impact of the Sentencing Guidelines in England and Wales' (2015) 22(5) *Drugs: Education, Prevention and Policy* 428, 432. The statistics for England and Wales are for 2013 for a 'Class A' offence involving cocaine or heroin, which is the closest equivalent category to a 'marketable quantity' or 'commercial quantity' offence under s 307 of the *Criminal Code* (Cth). Note that this analysis does not take into account differences in non-parole periods between the jurisdictions.

[163] Rosalyn Harper and Rachel Murphy, 'An Analysis of Drug Trafficking' (2000) 40(4) *British Journal of Criminology* 746, 746-748.

[164] Ibid.

[165] Caulkins, Jonathan P and Peter Reuter, 'Dealing More Effectively and Humanely with Illegal Drugs' (2017) 46(1) *Crime and Justice* 95, 133.

# Chapter 6:
# Proportionality Analysis

## I Introduction

This section describes the results of the evaluation of whether domestic sentencing achieves a just balance between the public interest in implementing international drug control policy and the human rights of individual offenders. Sentencing vignettes are provided for six representative cases chosen from the research sample. Common themes arising out of the proportionality analysis for each case are identified and discussed.

## II Sentencing vignettes

### *A The human courier*[1]

The prisoner, a 21-year old US national and former US Marine, imported 619g of cocaine in his luggage. The Court found that he was motivated by the need to address gambling debts and provide for his young family. He was detected at the border, pleaded 'guilty' and was ultimately sentenced to 7 years non-parole period ('NPP') 5 years. The Court characterised the offender's motive as 'greed' and assessed the 'objective seriousness' of the offence as 'high' by reference to drug quantity and value, the statutory maximum penalty, the prisoner's role in the offence and the prisoner's motivation. The Court accepted that the prisoner was genuinely remorseful, but de-emphasised the prisoner's prior good character because of its perceived inconsistency with the objective of general deterrence. It was not clear what weight, if any, the Court attributed to the prisoner's age. The Court emphasised the need for general deterrence in its utilitarian sense,[2] and rationalised the need for punishment based on the nature

[1] This vignette is based on the case of *DPP (Cth) v Reyes* [2018] VCC 281, who was charged with one count of importing a border controlled drug, carrying a maximum penalty of 25 years imprisonment.

[2] [15]: 'It is a matter of wonderment for the Court, and no doubt for the community, as is how many similar motivated Mr Reyes are coming into Australia every day. The reality is probably many hundreds. [16] The further principal that relates therefore, as detailed in the two cases that I have just referred to, is that any sentence, by being stern, must serve as a signal to would-be traffickers that the consequences will be severe if you are caught being involved in such activity.'

of the offence as involving the importation of drugs.[3] The Court considered 'comparative' sentences proffered by the prosecution but did not regard them as binding. The Court emphasised the presumed rehabilitative effect of the sentence but did not receive or discuss any evidence of the condition from which the prisoner needed to be rehabilitated or consider how a full-time custodial sentence would impact his rehabilitation. Rather, the Court seemed to presume that the prisoner would rehabilitate himself in prison.[4] The Court expressed reluctance at imposing a lengthy full-time custodial sentence on this prisoner:

> It gives the Court no joy to sentence a young man such as you to a significant period of gaol, however there is no option. It remains for me, only to wish you well in that rehabilitation.[5]

The Court did not consider the probable impact of the sentence on the prisoner's wife and daughter.

### *B The online shopper*[6]

The prisoner, a 28yo Australian, purchased drugs via the internet for personal use and for on sale at a profit. He was sentenced to 34 months' imprisonment, to be released after serving 9 months, in relation to the importation of a total of 223.1g of MDMA, and small quantities of other drugs,[7] via nine postal packages. The Court found that the prisoner had ordered the drugs himself and collected them via a PO Box established in a false name. The Court accepted expert psychiatric evidence that the prisoner's crime could be explained by his need to fund his drug addiction, which was in turn a consequence of multiple prior mental illnesses.[8] The prisoner had successfully addressed his drug addiction, and obtained treatment for his mental

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[3] [17] '… The Courts, and in particular this Court, often bemoan the fact that we never get the person or persons at the top of the chain. The principles insofar as couriers are concerned have been detailed on many, many occasions in the Courts, and they are that any person involved in criminal activity of this sort, at any level, must expect condign punishment.'

[4] [39]: 'I am confident that you are a person who will effect rehabilitation.'

[5] [39].

[6] This vignette is based on the case of *DPP (Cth) v Cooper* [2018] VCC 1226, who was charged with three counts of importing a marketable quantity of a border controlled drug, carrying a maximum penalty of 25 years, and one count of attempting to possess a marketable quantity of a border controlled drug, carrying a maximum penalty of 25 years.

[7] 47.9g of cocaine, 100.1g of cannabis resin and 163.8g of GBH.

[8] [26] – [30] and [51].

illnesses through rehabilitation programmes while on bail awaiting sentence. The Court assessed the offence as serious by reference to the number of packages and the total weight of drugs in comparison to the statutory marketable quantity thresholds.[9] The Court determined that 'general deterrence' was the primary sentencing objective:

> However, I do regard general deterrence, that is the deterrent effect that any sentence I impose may have on any other persons, to be of primary importance. As has been said in the Court of Appeal about offending which also involved the ordering of illicit drugs online, the sentence was required to give full effect to the need to deter others and to denounce that conduct. "If there be a perception amongst some that the online trading of drugs or their purchase or sale by post is somehow less serious than more traditional forms of dealing, those perceptions need to be dispelled by sentences which adequately reflect the need for general deterrence."[10]

The Court gave very little weight to the prisoner's prior good character. The Court accepted that the prisoner was genuinely remorseful by reference to his 'guilty' plea, conduct while on bail and positive character references,[11] and had good 'prospects' for rehabilitation having regard to the support of his family and friends, a 'significant number' of whom were in court to support him.[12] The Court also found that a custodial sentence would be counter-productive for this rehabilitative prospects:

> I do take into account his opinion that if you are given a custodial sentence, both your prognosis and your rehabilitation will suffer, as you will be unable to access the treatment you require and this will interfere with the treatment you require, and is likely to compound your already significant psychological difficulties.[13]

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[9] [45]: 'In the present case I regard the first charge as the most serious, both in number of packages and total quantity of illicit drugs. There were seven packages containing MDMA, the early ones being of low amounts although all over the threshold for a marketable quantity. The total net pure weight was almost 450 times the marketable quantity threshold and just short of the midpoint on the spectrum of marketable quantity of this drug. ... 49 Charge 4 relating to GHB involved two packages containing a total of some 80 times the threshold for a marketable quantity but still well under 20 per cent of the range for marketable quantity of that drug.'

[10] [56].

[11] [54].

[12] [38].

[13] [31].

The Court considered that the explanation for the offending was not mitigating because 'it is the drugs that impaired your judgment and influenced your misconduct rather than the underlying depression and anxiety disorders directly.'[14] The prosecution sought a custodial term exceeding 3 years; defence counsel sought a non-custodial alternative.[15] The Court determined that a term of imprisonment was necessary to serve the objectives of general deterrence and punishment, and for consistency with 'comparable sentences,' but that the term should be partially suspended to facilitate the prisoner's continued rehabilitation.[16]

### *C The parcel collectors*[17]

#### *1 The Chinese*

In the first of two cases concerning parcel collectors, the prisoner, a 21yo Chinese male on a tourist visa, was sentenced to 10 years NPP 7 years 6 months for his role in receiving eight separate packages from China containing a total of approximately 7kg of methamphetamine. The prisoner received instructions, obtained delivery addresses, collected parcels, photographed and weighed parcels, changed addresses when parcels did not arrive, arranged delivery of the drugs to purchasers and kept overseas contacts informed of progress.[18] The Court described the prisoner's role as 'a vital cog' and a 'main player,' assessed his culpability as 'higher than a courier,'[19] and the offence as 'objectively serious,' based primarily on the statutory maximum penalty and drug quantity:

> It is obviously, given the type of charge, inherently a serious offence to be part of a conspiracy to bring drugs into this country in any quantity. To do so in a commercial quantity is extremely serious offending. In each of your charges Parliament has provided for the ability of this Court to imprison a person for life. That surely spells

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[14] [30].

[15] [63].

[16] [65].

[17] These vignettes are based on the cases of *DPP (Cth) v Cheng* [2016] VCC 98, who was charged with two offences of conspiracy to import a commercial quantity of border controlled drugs, carrying a maximum penalty of life, and *Rosales (a Pseudonym) v The Queen* [2018] VSCA 130, who was charged with one count of attempting to possess a commercial quantity of border controlled drugs, carrying a maximum penalty of life.

[18] [15].

[19] [27].

> out the seriousness of this offending. Each of your crimes are punishable by the maximum term of life imprisonment.[20]

The Court acknowledged the offender had a difficult and impoverished upbringing and was 'ripe for recruitment.'[21] The Court accepted that his sentence should be mitigated by reference to his plea of guilty and extensive cooperation (noting that the prosecution case was essentially based on the prisoner's own admissions),[22] as well as hardship of custody.[23] However, the Court gave little weight to his youth and prior good character, which was perceived to conflict with the objective of general deterrence.[24] The Court emphasised the need for punishment and general deterrence,[25] and referred in passing to comparative cases and statistics.[26] The Court did not refer to either specific deterrence or rehabilitation.

*2 The African*

In the second case involving a parcel collector, the prisoner, a 36yo temporary migrant from western Africa, with no prior criminal record, was sentenced to 7 years 6 months NPP 4 years in relation to the importation of 4.8kg of methamphetamine concealed within electrical goods. He had entered an early plea of 'guilty' and cooperated extensively with police. The prisoner tracked the package, communicated with the freight forwarder to obtain Customs clearance, coordinated collection and delivery, took possession of the package and gave his co-offender instructions to move and check the drugs. This led the Court to infer that the offender was 'in a position of some authority' over his co-offender and so had a 'greater role.'[27] The Court accepted expert psychological evidence that the prisoner's involvement in the offence could be attributed to poor judgment based on drug use as self-medication for PTSD after having witnessed his father's murder when he was in his late teens, such that he was an 'easy target for whoever recruited him.'[28] The Court assessed the offence as objectively serious, based

[20] [43].

[21] [36].

[22] [35].

[23] [25].

[24] [37].

[25] [41].

[26] [46].

[27] [8] – [18].

[28] [11].

primarily on the maximum penalty, quantity imported and estimated wholesale or street value of the drugs.[29] The Court cited with approval authorities which require heavily deterrent sentences for importation offences.[30] In terms of mitigation, the Court noted that the authorities require that 'less weight' be given to the offender's prior good character,[31] but granted the prisoner the 'fullest discount' for his early plea of 'guilty' and co-operation with police.[32] The Court 'cautiously' accepted that the offender's prospects of rehabilitation were 'good.'[33] The Court also accepted that the prisoner's 'inevitable deportation' meant that imprisonment would 'weigh heavily on him.'[34] On appeal, the Victorian Supreme Court of Appeal ultimately found that, had it not been for the offender's cooperation with authorities, the sentence would have been 'remarkably lenient (if not inadequate).'[35]

*3 The landing party coordinator*[36]

In this case the prisoner, a 31yo Indonesian living in Australia on a permanent resident visa was sentenced together with his co-offender, in relation to the importation of 124kg of cocaine via dedicated maritime vessel. He was sentenced to 18 years NPP 12 years. In this case, co-venturers conspired to import the cocaine via a mid-ocean rendezvous with a Chinese vessel, but the rendezvous never eventuated, because the plan to land the cocaine was beset with problems. The prisoner's role was to monitor the importation on behalf of the unidentified investors. The Court found that he was motivated by 'greed,' noting that the offence seemed to be 'totally out of character' for the young father and restaurant owner.[37] The Court assessed the offence as very serious, based primarily on the maximum penalty and drug quantity, and classified the offence as a *Category 1* offence – the most serious offence of its kind – pursuant

[29] [20].

[30] [21].

[31] [21].

[32] [12]

[33] [14].

[34] [14].

[35] [26].

[36] This vignette is based on the case of *DPP (Cth) v Saputra* [2018] VCC 1665, who was charged with one count of conspiracy to import a commercial quantity of a border controlled drug, carrying a maximum penalty of life.

[37] [29] – [35].

to the taxonomy of sentencing practice described by McClellan CJ at CL in *DPP (Cth) v De La Rosa*:[38]

> Your offence of conspiracy to import a commercial quantity of a border controlled drug was a high level example of that offence. … Parliament has mandated, as I said, a maximum penalty of life imprisonment for this offence and you have conspired to import approximately 61 times a commercial quantity. …[T]here have been larger attempted importations. Neither of you were the principal suppliers or backers of the enterprise. Your roles were significant and important and there comes a times when the quantity of drugs becomes so large that there comes little point in the fact that the quantity could have been greater. ... clearly this was a Group 1 category offence.[39]

The Court emphasised that general deterrence was the 'paramount consideration,'[40] but accepted that hardship of custody should mitigate the sentence, based on the prisoner's likely deportation and separation from his infant child.[41] The Court also referred to comparative sentences, but not in any detail.[42]

*4 The corrupt freight handler*[43]

In this case the prisoner, a 45yo freight handling manager at the international freight terminal at Mascot, was sentenced to 18 years 6 months NPP 11 years 9 months for his role in the importation of over 63kg of pseudoephedrine and 5.7kg of methamphetamine. There was no

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[38] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 per McClellan CJ ad CL which relevantly provides that such an offence is 'high quantity (tens or hundreds of kilograms); high value (tens of millions of dollars); large reward (hundreds of thousands of dollars) although finding of reward not required; not guilty plea in half of cases, no assistance; no remorse; mastermind, principal or part of organising committee; high degree of responsibility' and warrants a head sentence of '25 years to life' with a NPP of '8 years 6 months to 30 years;'cited with approval by Maxwell P in *Nguyen v The Queen; Phommalysack v The Queen*[2011] VSCA 32 ('*Nguyen & Phommalysack v The Queen*'), [33]-[39].

[39] [37] – [41].

[40] [42].

[41] [32].

[42] [44].

[43] This vignette is based on the case of *DPP (Cth) v McKell* [2016] NSWDC 418, who was charged with one count of importing a commercial quantity of a border controlled drug for manufacture, carrying a maximum penalty of 25 years, and one count of conspiracy to import a commercial quantity of a border controlled drug, carrying a maximum penalty of life, and one count of dealing with proceeds of crime under $40,000, carrying a maximum penalty of 10 years imprisonment.

evidence as to who funded the importation venture, but police found over $400,000 in cash at the offender's residence and over $40,000 at a co-offender's residence. The Court accepted that the offender had misused his position as freight handling manager to remove and substitute consignments containing large quantities of drugs prior to customs clearance procedures. The Court assessed the 'objective seriousness' of the offending as very high based on the 'sophisticated' nature of the importation enterprise, which required specialised knowledge of customs clearance procedures, as well as the type and quantity of drugs imported compared with the statutory commercial quantity threshold ('more than seven and a half times the threshold'), the assumed significant up-front investment, and the assumed significant potential damage to public health, observing that the 'harm to the community is legion.'[44] The offender had an unremarkable childhood and employment history.[45] He had a history of gambling but did not suggest that this was at the level of an addiction,[46] and he was in good mental and physical health.[47] In formulating sentence, the Court referred to all of the factors required to be considered pursuant to s 16A(2) of the *Crimes Act 1914* (Cth) but emphasised general deterrence as being of primary importance.[48] The Court also had regard to comparative cases involving similar facts.[49]

### III PROPORTIONALITY ANALYSES

A proportionality analysis for each sentence vignette addresses each of the four limbs of the test for constitutional proportionality, namely whether the sentence imposed pursued legitimate aims ('*legitimate aims*'), whether the sentence was capable of achieving those aims ('*suitability*'), whether the sentence impaired the prisoner's human rights as little as possible ('*necessity*'), and whether the sentence comprised a net gain when the reduction on the enjoyment of prisoner's human rights was weighed against the level of realisation of the legitimate aims ('*balancing*').[50]

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[44] [11].

[45] [32].

[46] [26].

[47] [31] – [39].

[48] [63].

[49] [79].

[50] Matthais Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford, 2014) 8.

*A Legitimate aims and suitability*

Based on the sentencing remarks, in each case, the sentence sought to achieve three objectives, namely: (a) implement the international drug conventions, (b) maintain law and order and (c) uphold the rule of law. The latter two objectives are fundamental obligations of government in any system that protects human rights. Accordingly, there is no doubt that these were legally *legitimate aims* for the State to pursue. Additionally, there is no doubt that the imposition of custodial sentences was *suitable* in the sense that the sentences had the potential to contribute to those aims.

*B Necessity*

The question of whether, in each case, the sentences were *necessary* required consideration of whether the legitimate aims could have been achieved by less rights-intrusive means, such as shorter sentences or non-custodial options, as well as by other options constitutionally available to the government, such as deportation. However, it was necessary to first obtain a baseline measure of the effectiveness of the sentences imposed, because State action only fails the necessity test if a less restrictive measure is both available *and* as suitable as the measure adopted.[51] In terms of implementing the international drug conventions, effectiveness refers to the extent to which the sentences contributed to the policy objectives underlying the conventions, namely protecting 'human health and welfare' and the 'economic, cultural and political foundations of society' from the threat posed by the international drug trade, hereafter called the 'drug control policy objectives.'[52] The baseline measure of effectiveness therefore incorporates an assessment of the extent to which the measures contribute to three matters: (a) the drug control policy objectives, (b) maintenance of law and order, and (c) the rule of law.

*1 Baseline effectiveness*

(a) Contribution to drug control policy objectives

There has been no systematic empirical evaluation of the effect of domestic interdiction efforts by international, supranational or national drug control agencies.[53] Further, there is only a

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[51] Ibid 156, citing Robert Alexy, *A Theory of Constitutional Rights* (Oxford, 2002)68.

[52] Preamble, 1988 Convention.

[53] Peter H Reuter, 'Can Production and Trafficking of Illicit Drugs be Reduced or Merely Shifted?' (Policy Research Working Paper Series, No 4564, World Bank, March 2008) 29.

handful of scholarly studies on the matter. There are 'no more than three empirical studies (using that term generously) of the effects of increased intensity of interdiction,' and 'barely a handful of articles by economists on the peculiar configuration of the global drug market.'[54] Reuter has produced two authoritative reports, one for the World Bank in 2008, and another for the Trimbios Institute and RAND in 2009 sponsored by the European Commission. Those reports together with the empirical studies all find that the interdiction of international drug traffickers has had no identifiable policy impact, with one exception. That exception comprised a short-term targeted program by the Netherlands government during March 2004, which implemented a 100 per cent search policy for airline passengers entering Amsterdam from Curacao, a known trafficking point for cocaine from Colombia. The results were striking:

> Whereas cocaine seizures in the Netherlands Antilles had not exceeded 1.3 tons before 2003, in 2004 they reached 9 tons, a remarkable figure for a jurisdiction with fewer than 200,000 inhabitants.[55]

According to Reuter, this effort 'very probably contributed to the opening of new trafficking routes from South America to West Africa, for instance through Guinea-Bissau and Ghana.'[56] The experiment has not been repeated. Economic theory had predicted that any increase in the interdiction rate or ultimate sentences imposed would raise the costs of smugglers and thereby raise consumer prices, but the prediction has simply not held for drug trafficking markets.[57] Academic economists are yet to understand how drug markets operate and what makes them distinctive from licit markets.[58] The futility of increased enforcement efforts has been observed in relation to the retail segment of the drug market in Western countries also, where there are 'no indications that the drugs have become more difficult to obtain' despite retail prices having

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[54] Ibid, citing Barry Crane, Rex Rivolo and Gary Comfort (1997) *An Empirical Examination of Counterdrug Interdiction Program Effectiveness,* P-3219, Institute for Defense Analyses, January 1997; Reuter, Crawford and Cave (1988) Sealing the Borders: Effects of Increased Military Efforts in Drug Interdiction, Santa Monica, CA: RAND, R-3594-USDP; and Peter Reuter and Victoria Greenfield (2001) 'Measuring Global Drug Markets: How Good are the Numbers and Why Should We Care About Them?' 2(4) *World Economics* 155.

[55] Reuter (n 53).

[56] Ibid 143.

[57] Peter Reuter and Jonathan P Caulkins, 'Purity, Price and Production: Are Drug Markets Different?' (2008) *Illicit Trade and the Global Economy* 8, 24.

[58] Ibid 22.

generally declined.[59] Academic economists have speculated that the long-run interdiction rate is so low that interdiction has no measurable effect, or that importation enterprises readily respond to innovations in interdiction methodologies by changing routes or concealment methods.[60] The present research provides some insight into this question. It would appear to have been easy for importation enterprises operating at Australia's border to change concealment methods and consignee details immediately in response to the non-delivery of a parcel, an unexplained customs delay or the arrest of a human courier or parcel collector; noting that most concealment methods were rudimentary and cheap. Moreover, the adapted concealment method, consignee details or replacement human courier need not have been more sophisticated than the last; it would have been sufficient if things were merely *different* than before and so not readily identifiable as related to earlier importations. Adaptability has also been observed in the production segment of the market, where the bulk of coca production has readily shifted between Bolivia, Colombia and Peru in response to interventions aimed at production, such as crop eradication programmes, so that 'the intensive efforts at control of production by Peru may well have worsened Colombia's problems.'[61] Unfortunately, the available data on risks and prices 'are not nearly precise enough to allow formal empirical modelling' of the effectiveness of domestic interdiction efforts.[62] Nevertheless, Reuter ultimately considers it safe to conclude that stringent enforcement produces none of the intended gains, even if we do not yet fully understand why this is so, because there is sufficient evidence that 'drug prices in high enforcement settings are no higher than those in low enforcement settings.'[63]

There is no official data or research on whether, and if so, to what extent, interdiction efforts have reduced official corruption. In Australia, where official corruption is limited, it is very unlikely that there is any causal relationship between the interdiction and sentencing of international drug traffickers and official corruption levels. If anything, the presumed low

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[59] Peter Reuter and Franz Trautmann (eds), 'A Report on Global Illicit Drug Markets 1998-2007' (Trimbos Institute and RAND, 2009, 16.

[60] Reuter and Caulkins (n 57) 50.

[61] Reuter and Trautmann (n 59) 49; Reuter and Caulkins (n 57) 16.

[62] Reuter and Caulkins (n 57) 24.

[63] Reuter, Peter, 'Ten years After the United Nations General Assembly Special Session (UNGASS): Assessing Drug Problems, Policies and Reform Proposals' (2009) 104(4) *Addiction* 510; Reuter and Trautmann (n 59) 50.

interdiction rate,[64] which would be widely known within law enforcement agencies, would provide both opportunity and incentive for officials to engage in such conduct. In these circumstances, one would expect that robust internal anti-corruption measures, including the inculcation of a culture of compliance, would be essential regardless of the perceived severity of sentencing. All cases of official corruption within the research sample were the result of internal investigations, and in one case the sentencing judge recognised that the effect of a strongly deterrent sentence would be merely symbolic, because the necessary antidote was strong internal anti-corruption mechanisms:

> The evidence in the present case pointed to the existence of a disturbing culture within parts at least of the Customs Service. That evidence suggested that illegal activity among people charged with the responsibility of protecting the integrity of our borders has been far more extensive than merely the matters the subject of the present offending. It is encouraging that there are apparently systems in place which enabled detection of this and some of that other offending. Nonetheless, it is important that the Courts make clear to others tempted to engage in similar criminal conduct that this type of offending will attract penalties appropriately reflecting the community's abhorrence of such a breach of trust.[65]

The only evidence of any observable policy impact of interdiction efforts in this research was in relation to *online shoppers*. Where the traffickers were *online shoppers*, interdiction and subsequent enforcement efforts ultimately resulted in benefits for that person in the form of the opportunity to 'reflect and resolve to reform.'[66] To this end, all *online shoppers* obtained treatment for their addiction and/or underlying mental health issues by the date of sentence.[67] By contrast, offenders with a gambling addiction, almost all of whom were foreign nationals remanded in custody pending sentence, received no treatment for their addiction.

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[64] There are obviously no available statistics on the interdiction rate, as the interdiction rate represents the proportion of total prohibited imports that are in fact detected. As noted above, academic economists have speculated that the interdiction rate is trivial because of the failure of interdiction efforts to have any measurable impact on supply levels or prices.

[65] *DPP (Cth) v Cranney* [2015] NSWDC 276 [131].

[66] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge, 1988) 200. Punishment theorists characterise this as an 'indirect side-effect' rather than a 'central aim' of punishment.

[67] Ibid.

In summary, on the present state of knowledge, interdiction efforts have had no detectable impact on drug supply, availability or price and therefore of consumption. Similarly, while there are many studies of the effectiveness of 'harm reduction' efforts, such as needle-sharing programs, drug substitution therapies or education campaigns, there is no official data or scholarly research on the policy impacts of interdiction and sentencing. Whether publicised large-scale drug seizures have any policy impact has not been the subject of any official reports or scholarly research at the international, supranational or national level. It follows that the baseline measure of the policy impact of the sentences imposed must be assessed as negligible. It is therefore necessary to look for any contribution to law and order and the rule of law.

*2 Contribution to law and order*

The vast modern literature on the philosophy of punishment acknowledges that all but one of the three traditional justifications of punishment – retribution, deterrence and rehabilitation – are, in practical terms, unattainable by means of sentencing.[68] In practice, the objectives of deterrence and rehabilitation are pursued by way of extraneous social policies such as such as the provision of government-funded health education campaigns, government-funded treatment and rehabilitation programmes, adequate social security, and visible and effective systems of border protection. This appears to be the case in relation to sentencing of international drug traffickers.

(a) Retribution

The value of sentencing in maintaining law and order is not readily amenable to quantification, but it can be assumed to be effective by reference to its theorised indispensability to maintaining social cohesion whether from a retributive, utilitarian perspective or hybrid perspective.[69] On any theoretical approach, punishments are normatively essential to the

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[68] D Garland, *Punishment and Modern Society* (Clarendon Press, 1990), 288: 'Punishment, so far as 'control' is concerned, is merely a coercive back-up to these more reliable social mechanisms, a back-up which is often unable to do anything more than manage those who slip through these networks of normal control and integration. Punishment is fated never to 'succeed' to any great degree because the conditions which do most to induce conformity – or to promote crime and deviance – lay outside the jurisdiction of penal institutions.' For a review of the literature see Lacey (n 66).

[69] For an overview of the literature on retribution see, Frase, Richard S, 'Theories of Proportionality and Desert' in J Petersilia, K Reitz and R Frase, *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012).

proper functioning of the criminal justice system. For the retributivist, punishment can be justified by reference to the moral imperative to assign blame.[70] For the utilitarian, punishment can be justified by reference to the collateral benefits of punishment, including by way of general or specific deterrence.[71] For hybrid theorists,[72] the value of punishment may also lie in reaffirming social cohesion in the face of a breach of the social contract:

> It has principally to do with a collective need to underpin, recognise and maintain internalised commitments of many members of society to the content of the standards of the criminal law and to acknowledge the importance of those commitments to the existence and identity of the community.[73]

(b) Deterrence

The extensive literature on general deterrence finds that sentencing makes no measurable contribution to the objective of general deterrence. The impotence of sentencing as a deterrent is reinforced by the abovementioned literature evaluating the effect of interdiction efforts. Additionally, the imposition of a custodial sentence for the purpose of deterring potential future offending by others is widely understood within international human rights scholarship to be contrary to the foundational principle of 'human dignity.'[74] Further, the present research confirms that, excepting consumer enterprises, all importation enterprises operating at Australia's national border outsourced detection risk to vulnerable individuals who either failed to appreciate the risk or were in sufficiently desperate circumstances that acceptance of the risk was rational. Moreover, those persons were readily replaced by other 'contractors' following

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[70] Seminal contributions include Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill & Wang, 1976); Andrew von Hirsch, *Censure and Sanctions* (Oxford, 1993); Richard S Frase, 'Limiting Retributivism' in *The Future of Imprisonment*, Michael Tonry (ed) (OUP, 2004); RA Duff, *Punishment, Communication, and Community* (OUP, 2014).

[71] See Michael Tonry and Richard Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001).

[72] See Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (OUP, 1990), Paul H Robinson, 'Hybrid Principles for the Distribution of Criminal Sanctions' (1987) 82 *Northwestern University Law Review* 19.

[73] Lacey (n 66) 182.

[74] Dirk van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *The Modern Law Review* 541.

interdiction, which underscores that imprisonment served no preventative purpose either. It follows that none of the sentences was effective in achieving the objective of deterrence.

(c) Rehabilitation

'Rehabilitation' refers to 'altering an offender's personality, attitudes, habits, beliefs, outlooks or skills in order to restore him or her as a law-abiding member of society.'[75] The consensus of scholarly research since the 1960s is that custodial sentences are not effective in achieving rehabilitation of offenders.[76] Not surprisingly then, there is presently no research examining the effectiveness of sentencing in the rehabilitation of convicted drug importers,[77] but it can be readily inferred that any contribution is likely to be limited. Consistently with the results for the broader sample, none of the sentences imposed in the vignettes was directed at any rehabilitative aim. No sentencer identified that any offender required rehabilitation of any aspect of his person in order to restore him as a law-abiding member of society. The *human courier* likely had a gambling addiction but the sentencing remarks seemed to presume that the prisoner would rehabilitate himself in prison.[78] The *online shopper* had successfully addressed his drug addiction and obtained treatment for his mental illnesses through private medical care while on bail awaiting sentence, and the court accepted that a custodial sentence would be counter-productive for this rehabilitative prospects.[79] The court made no comment about rehabilitation when sentencing the first *parcel collector*, or the *corrupt freight handler*.[80] The

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[75] Australian Law Reform Commission, 'Sentencing of Federal Offenders' (Discussion Paper No 70, 2005) [4.10].

[76] Ibid [4.11].

[77] Any such research would need to first identify the conditions for which traffickers required the sort of 'reformation and social rehabilitation' that only imprisonment can provide.

[78] [39] 'I am confident that you are a person who will effect rehabilitation.'

[79] [38] 'There were a significant number of people in court to support you, still are - and I accept that you have strong support from your family and friends. You have taken very significant steps towards addressing your substance abuse and the underlying and long term psychological conditions which you had previously addressed only with drugs and alcohol. These circumstances, together with your very clear determination and application to your employment, indicate that despite your longstanding underlying problems, your prospects of continuing with your rehabilitation, and establishing a drug free future for yourself are what I regard as good.

[80] [39] ' Other than to quote the opinion of the offender's psychiatrist who found that he 'would appear to have a good prognosis and prospect for rehabilitation, from his age and current maturity, the absence of any pattern of anti-social behaviour or recurrent substantial use disorder, which are the main predictors of recidivism. There is also a history of continuous employment in a responsible role, which suggests that he would be able to return to full time employment at a similar level.'

court assessed the rehabilitative prospects of the second *parcel collector* as 'good' without providing reasons.[81] There was no evidence that any of these offenders required the sort of reformation that can only be provided within the prison system. For instance, there was no evidence that any of these offenders were conscious participants in a politically subversive or outlaw group that posed any threat to social cohesion. In conclusion, while there is no doubt that the imposition of the sentences on these offenders served an important symbolic function in maintaining law and order,[82] there is no evidence that any sentence contributed to the objectives of deterrence or rehabilitation of the offenders.

(d) Contribution to the rule of law

The rule of law does not countenance consistency with unjustifiable sentences. For example, the practice of sentencing to death all drug traffickers may suggest a high level of consistency in the implementation of a domestic law requiring the death penalty for drug trafficking, but prior sentences would be inconsistent with the rule of law for the purposes of the doctrine of constitutional proportionality because the 'margin of appreciation' does not provide leeway for domestic laws which lack an adequate evidential and normative foundation. Put differently, the 'margin of appreciation' does not permit States choose to ignore empirical facts or violate fundamental norms under the cloak of the rule of law. Therefore, if the rule of law is to be used to justify a penalty by reference to 'comparative sentences,' it is first necessary to establish that the proffered comparatives are themselves evidentially and normatively sound within a system that recognises international human rights.

*(i) Comparatives based on incorrect factual and normative premises*

This research has provided evidence that the evidential and normative basis for domestic sentence formulation in respect of international drug traffickers is highly questionable for two reasons. First, sentence formulation is largely based on factually incorrect but entrenched assumptions about the international drug trade and its participants. Second, Australian courts ignore the policy context in which sentence formulation must take place despite the relevant offence provisions purporting to implement Australia's obligations under the *1988*

[81] [14].

[82] A Ashworth and J Horder, *Principles of Criminal Law* (2013, 7th ed) 22 – 23.

*Convention*.[83] The following summary identifies the common law rules that govern sentence formulation and how each rule is evidentially or normatively unsupportable:[84]

- *All importation offences are objectively serious because of the high statutory maximum penalty*.[85] This rule dispenses with the requirement for ascertaining the gravity of the instant offence by reference to the policy objectives of the international drug conventions, and fails to acknowledge the distinction drawn in art 3(5) of the *1988 Convention*, between 'particularly serious' importation offences and *all other* importation offences.[86]
- *All importation offences cause great harm to the community and are therefore objectively serious*.[87] This rule lacks any empirically-derived reference point for evaluating the harm that might have been caused but for interdiction. Scholarly research and official data reveals that only trafficking on a very large scale poses a non-trivial threat to public health, because only a very small percentage of drug use is problematic. Additionally, this rule assumes – contrary to available evidence – that international drug trafficking threatens the 'economic, cultural and political foundations' of Australian society.[88] Available research indicates that most violence and political corruption associated with the drug trade occurs within the handful of coca and opium-growing regions, so that very few importation offences worldwide pose a non-trivial threat to State security; and there are presently no indications that politically subversive organised crime of this nature has extended its tentacles to Australian shores.
- *The greater the quantity of drug imported, the more serious the offence, and further, any importation which exceeds even a fraction of the applicable statutory and*

[83] The *Criminal Code* (Cth) expressly states, in s 300.1(1) that 'the purpose of [Part 9.1 – Serious Drug Offences] is to create offences relating to drug trafficking and to give effect to the [*1988 Convention*].'

[84] The doctrinal validity of these cases is address in the following chapter.

[85] *Nguyen & Phommalysack v The Queen* (n 38) [2], [34] (Maxwell P) citing *Markarian v The Queen* (2005) 228 CLR 357, 372-373.

[86] This rule is discussed at length in the following chapter, in the context of its doctrinal validity.

[87] *Nguyen & Phommalysack v The Queen* (n 38) [2], [34] (Maxwell P).

[88] *1988 Convention*, Preamble.

*commercial quantity threshold is objectively serious in any case*.[89] This rule is inconsistent with evidence-based reference points for harm developed for this research, namely the 'single overdose threshold'[90] and the '5 per cent national consumption' threshold.[91]

| DRUG TYPE | STATUTORY MARKETABLE AND COMMERCIAL QUANTITY THRESHOLDS | | SINGLE OVERDOSE THRESHOLD | 5% NATIONAL CONSUMPTION THRESHOLD |
|---|---|---|---|---|
| Amphetamines | 0.5g | 0.25 kg | 83 kg | 419 kg[92] |
| Cocaine | 2 g | 2 kg | 307 kg | 154 kg[93] |
| Heroin | 1.5 g | 2 kg | 2 kg | 38 kg[94] |

TABLE 17:EVIDENCE-BASED ESTIMATED MEASURABLE POLICY IMPACT THRESHOLDS FOR DRUG IMPORTS

The arbitrariness of the declaring that the importation of more than 0.5g or 0.25kg of methamphetamine is 'objectively serious' is plain in comparison with the 'single overdose threshold' of 83kg and the '5% national consumption threshold' of 419kg; as is the arbitrariness of using multiples of or fractions of those thresholds as a yardstick. None of the importations in the sentencing vignettes was 'objectively serious' by reference solely to the quantity of drug imported. Moreover, application of these thresholds to the research sample (n=94) reveals that the quantity of drugs imported by almost all offenders was so low from an evidence-based policy perspective that there were only three importations in which the quantity of drugs was probabilistically

[89] *Nguyen & Phommalysack v The Queen* (n 38), [2] (Maxwell P); *R v Nguyen; R v Pham* ('*Pham'*) [2010] NSWCCA 238, [72] (Johnson J, with whom Macfarlan JA and R A Hulme J agreed): '… (e) the statements by the High Court in *Wong v The Queen; Leung v The Queen* do not suggest that, in an appropriate case, the amount of the drug involved in an importation is not a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type; in many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar: *R v Nguyen* [2005] NSWCCA 362 [110]; *Sukkar v The Queen (No. 2)* [2008] WASCA 2 [46].'

[90] Comprising a combination of the National Drug and Alcohol Research Council's ('NDARC') national statistics for the number of accidental deaths annually for each drug and the ACIC's estimates of national annual drug consumption: NDARC, *Opioid, amphetamine and cocaine-induced deaths in Australia: August 2018* and ACIC, *National Wastewater Drug Monitoring Program Report 5*, 2018.

[91] See Chapter 4 'International Drug Trafficking: Factual Context' an explanation of how these indicators were derived.

[92] = 0.05 x 8,387kg.

[93] = 0.05 x 3,075kg.

[94] = 0.05 x 765kg.

associated with one death, based on the 'single overdose threshold,'[95] and no importation was so large as to raise concerns that the enterprise behind the importation had acquired market power, based on the '5 percent national annual consumption threshold.'[96] This likely reflects a widespread practice whereby importers manage detection risk by importing large numbers of relatively small quantities of drugs rather than small numbers of large quantities of drugs. This, in turn, makes it very difficult to identify any significant market player, unless the individuals behind the large-scale use of this methodology are identified; and if the market it competitive, it may be that there are no 'significant players' in the market, rather a large number of small enterprises.

- *The more 'managerial' in nature the tasks performed by the offender in relation to the importation the more serious the offence, and alternatively any role in an importation enterprise is necessarily an 'essential' link in the importation chain*.[97] This rule has no scholarly or other evidential foundation and is inconsistent with the results of this research, which reveals that importation enterprises are not operated along managerial lines. This rule also ignores both the statutory definition of 'import'[98] and the purpose of Part 9.1 of the *Criminal Code* (Cth) in addressing a global, rather than domestic, phenomenon.
- *A substantial term of imprisonment is required in relation to any importation offence absent 'exceptional' circumstances*.'[99] This rule assumes that all importation offences

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[95] Comprising a combination of the National Drug and Alcohol Research Council's ('NDARC') national statistics for the number of accidental deaths annually for each drug and the ACIC's estimates of national annual drug consumption: NDARC, *Opiod, amphetamine and cocaine-induced deaths in Australia: August 2018* and ACIC, *National Wastewater Drug Monitoring Program Report 5*, 2018. Although this statistic does not capture new problematic drug use not resulting in overdose death, it provides a useful reference point for understanding the potential adverse health consequences of an importation.

[96] Comprising five per cent of the estimated weight of national annual consumption of each drug per ACIC's national wastewater drug monitoring program: NDARC, *Opiod, amphetamine and cocaine-induced deaths in Australia: August 2018* and ACIC, *National Wastewater Drug Monitoring Program Report 5*, 2018.

[97] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194, [267].

[98] Section 300.2 *Criminal Code* (Cth) provides: ''import,' in relation to a substance, means import the substance into Australia and includes: (a) bring the substance into Australia; and (b) deal with the substance in connection with its importation.'

[99] *Nguyen & Phommalysack v The Queen* (n 38) [34] item 7.

are assessed as 'objectively serious' – which this research demonstrates to be empirically incorrect – and therefore potentially violates the offender's freedom from arbitrary detention (ICCPR art 9(1)).

- *All importers are motivated by profit (which is treated as aggravating) absent evidence to the contrary*.[100] This rule is inconsistent with scholarly research which finds that drug importers are motivated by 'relative poverty,'[101] and contrary to the findings of this research, that the overwhelming majority of offenders sentenced in Australia (86 per cent, n=70) were reluctant participants in the international drug trade, many were motivated by a lack of alternatives to address black-market debt, and only a minority (14 per cent (n=70)) were profit-seeking risk-takers, which is in turn consistent with international scholarship on explanations for international drug trafficking.
- *Higher penalties must be imposed the greater the value of drugs imported*.[102] This rule assumes – contrary to available scholarly research – that there is a positive correlation between drug quantity and offender remuneration, when it is likely to be inverse.[103] This research reveals that the quantity imported is correlated with importation stream rather than participant reward, and that the importation of relatively larger quantities of drugs is typically outsourced to more vulnerable persons.
- *The offender's prior good character is of little weight when formulating sentence*.[104] This rule is potentially productive of arbitrary sentencing because it fails to acknowledge the value of prior good character in providing additional context for sentence formulation and thereby erodes the court's ability to provide individualised justice.[105]

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[100] Ibid [33] item 6.

[101] J Fleetwood Fleetwood, 'Five Kilos: Penalties and Practice in the International Cocaine Trade' (2011) 51(2) *British Journal of Criminology* 375.

[102] *Nguyen & Phommalysack v The Queen* (n 38) [34] item 8.

[103] See further Chapter 7.

[104] *Nguyen & Phommalysack v The Queen* (n 38) [33]; see similar comments in *Pham* [2010] NSWCCA 238,72 (Johnson J, with whom Macfarlan JA and R A Hulme J agreed).

[105] Australian Law Reform Commission, 'Sentencing of Federal Offenders' (Discussion Paper No 70, 2005) 74 [6.26]. Note, however, that various other statutory provisions erode the court's ability to consider the offender's prior good character. For example, relation to child sex offenders, s 5AA of the *Sentencing Act 1991* (Vic)

- *Consequent hardship of imprisonment for the offender's family, including their children, is mitigating only in 'exceptional circumstances*.' This rule likely works significant hardship because almost a third (31%) of offenders in the sample had dependent children (n=80), but no court received evidence of the impact of the offender's imprisonment on children'; and half (52%) of those offenders were foreign nationals, meaning that the separation from their children would have even more acute.
- *It is necessary when formulating sentence to give 'chief weight' to general deterrence*. This rule entrenches the empirically incorrect assumption that all importation offences are 'objectively serious.' It also entrenches within sentence formulation the normatively unsustainable proposition that general deterrence is a justifiable sentencing objective.
- *Harsher sentences will have a greater deterrent effect*.[106] As previously discussed, this rule exacerbates the empirical and normative errors produced by the previous rule.

In addition to this collection of normatively and evidentially questionable rules, this research has identified several near universal sentencing practices that are premised upon equally dubious assumptions:

- *Imposing a non-parole period that is approximately 70 per cent of the head sentence*. Evidence of a strikingly uniform practice of imposing a common pre-release period common of 70 per cent suggests that courts are in practice failing to administer individualised justice in relation to the setting of non-parole periods. This is another example of a practice that is potentially productive of arbitrary sentencing.
- *Excluding consideration of alternatives to a full-time custodial sentence.* This practice arises directly from the evidentially suspect rule that all importation offences are 'objectively serious.'
- *Looking to prior sentences to provide the upper and lower boundaries of acceptable sentencing*. This practice assumes, in the absence of empirical evidence or other inquiries, that prior sentences have been decided in accordance with both domestic law

provides that a sentencing court is not to have regard to previous good character or a lack of previous findings of guilty or convictions in certain circumstances.

[106] *Nguyen & Phommalysack v The Queen* (n 38) [33] – [39]; *R v Nguyen and Pham* [2010] NSWCCA 238, [72].

and international human rights norms. The results of this research find that both assumptions are unsustainable.

- *Assuming that a custodial term will be rehabilitative and an appropriate way to address any underlying issues bearing upon recidivism*. This practice makes incorrect assumptions about the rehabilitative effect of a custodial sentence without any evidence of the underlying conditions bearing upon recidivism and whether those conditions can be addressed in a non-custodial setting.

*(ii) Comparatives decided inconsistently with international human rights norms*

It follows from the observation that prior sentences are formulated based on a collection of empirically suspect rules and practices, that these sentences are, to a very significant extent, arbitrary, in that they are formulated irrespective of the facts and circumstances of the case at hand. Sentences formulated in this way violate the offender's human right to freedom from arbitrary detention (ICCPR art 9(1)). Accordingly, it cannot be said that sentences decided consistently with prior cases – which have been decided in accordance with these rules and practices – uphold the rule of law.

| LEGITIMATE AIMS | EFFECTIVENESS OF THE SENTENCES |
|---|---|
| (a) protect human health and State security | very low |
| (b) maintenance of law and order | high |
| (c) the rule of law | very low |

TABLE 18: EFFECTIVENESS OF THE MEASURES (SENTENCES)

In summary, this analysis reveals that, despite repeated circumlocutions about the 'seriousness' of offences and the need for 'strongly deterrent' sentences that are consistent with 'comparative sentences,' the sentences actually imposed were only effective in achieving the symbolic aim of maintaining law and order. It follows from this low baseline measure of the effectiveness of the sentences, that alternatives to the lengthy custodial terms imposed need not be particularly effective at protecting human health and State security to be at least as suitable as the measures adopted. Other equally effective measures that impose penalties commensurate with the gravity of the offences properly understood are discussed below. These are for a comprehensive whole-of-government approach to the issue of how to deal with convicted drug

importers in the least rights-intrusive manner, noting that constitutional proportionality does not narrow the 'least restrictive alternative means' inquiry to alternative judicial dispositions.[107]

- *Conviction and conditional liberty for offenders found to be operating a 'consumer enterprise.'* This alternative measure recognises these as the least serious of all importation offences. It also acknowledges that the criminalisation of this conduct amounts to the de facto criminalisation of drug use and consequent criminalisation of drug users, which is a well-recognised unintended consequence of prohibition policy. Conditional liberty may comprise a suspended prison sentence, or an alternative sentencing option such as a community-based order.
- *Conviction and deportation of foreign nationals found to be mere contractors working within importation enterprises whose offending is readily explained otherwise than by profit-motivated risk taking*. This alternative measure would recognise that these offences are not 'particularly serious' within art 3(5) of the *1988 Convention* because they do not threaten public health or State security, and because these offenders are also victims of black market exploitation, which is an inevitable but unintended consequence of prohibition policy.
- *Conviction and conditional release for Australian nationals found to be mere contractors working within importation enterprises whose offending is readily explained otherwise than by profit-motivated risk taking, such as persons with black market (typically gambling) debt*. This alternative measure would recognise that these offences are not 'particularly serious' within art 3(5) of the *1988 Convention* because they do not threaten public health or State security, and because these offenders are victims of black market exploitation but that these persons are usually in less desperate circumstances than most foreign nationals due to Australia's relatively generous social security system.

[107] It should be noted that the risk of deportation is not listed in s 16A(2) of the *Crimes Act 1914* (Cth) as a sentencing factor to which the court must have regard, and there is some uncertainty as to whether it may be taken into account when formulating sentence. In New South Wales, courts are required to exclude consideration of the likelihood of deportation on the basis that 'deportation remains a matter for the Commonwealth Executive Government, subject to review within the Constitutional structure': *Kristensen v The Queen* [2018] NSWCCA 189 [34] (Payne JA, RA Hulme and Button JJ agreeing). In Victoria courts routinely consider the likelihood of deportation when formulating sentence: *Guden v The Queen* [2010] VSCA 196 [25].

- *Conviction and a minimal custodial term for offenders found to be profit-motivated risk-takers.* This alternative measure would recognise that these offences are not 'particularly serious' within art 3(5) of the *1988 Convention* because they do not threaten public health or State security, but would also serve to register disapproval at the deliberate disregard for the established community condemnation of the international drug trade.
- *Conviction and a short custodial term for offenders found to be corrupt port officials or staff.* This alternative measure would recognise that even these offences are not 'particularly serious' within art 3(5) of the *1988 Convention* because they do not threaten public health or State security. Sentences for these offence would be on par with those imposed for other fraud or corruption offences and would not seek to punish these offenders for the existential threats posed by the drug trade in other parts of the world.

Each of these alternative measures recognises that the imposition of a custodial sentence for deterrence or rehabilitation is evidentially and normatively unsupportable and therefore ineffective. Accordingly, each of these alternative measures is at least as effective as the sentences actually imposed, but is significantly less rights intrusive. It follows that the sentence imposed in each vignette fails the necessity test; the sentence of imprisonment imposed on each offender was unnecessary and therefore unjustified.

| LEGITIMATE AIMS | EFFECTIVENESS OF THE SENTENCES IMPOSED | EFFECTIVENESS OF LESS RIGHTS-INTRUSIVE ALTERNATIVE MEASURES |
| --- | --- | --- |
| (a) protect human health and State security | very low | low |
| (b) maintenance of law and order | high | high |
| (c) the rule of law | very low | high |

TABLE 19: EFFECTIVENESS OF LESS RIGHTS-INTRUSIVE ALTERNATIVE MEASURES (SENTENCES)

Because the sentences have failed the necessity test, there is no need to proceed to consider proportionality *stricto sensu*, but some brief comments are made for completeness.

### *C Proportionality stricto sensu*

Klatt and Meister's 'common grammar' proportionality equation provides the framework for the analysis of proportionality *stricto sensu*. The equation is a not an attempt to 'replace

balancing with mere calculation' but rather provides a 'formal tool that allows making explicit the inferential structure of balancing principles, just as logical tools allow for making explicit the inferential structure of subsumption.'[108] This step in the proportionality analysis is only necessary if the State measure is found to be necessary in pursuit of the State's legitimate aims. However, it is instructive to perform the calculation on the hypothetical basis that the State adopts the 'less restrictive means' suggested above. The results reveal that the proposed alternative sentences would be proportionate and therefore justifiable.

$$W_{i,j} = \frac{W_i \text{ x } I_i \text{ x } R_i}{W_j \text{ x } I_j \text{ x } R_j} = \frac{serious \text{ x } serious \text{ x } light}{serious \text{ x } serious \text{ x } serious} = \frac{2^2 \times 2^2 \times 2^0}{2^2 \times 2^2 \times 2^2} = 0.25$$

EQUATION 1: RESULTS OF KLATT AND MEISTER'S PROPORTIONALITY EQUATION INDICATE THAT THE SENTENCES WERE DISPROPORTIONATE (RESULT <1), USING THE GEOMETRIC SEQUENCE $2^0, 2^1, 2^2$

| OFFENDER | PROPOSED ALTERNATIVE SENTENCE |
|---|---|
| The human courier | Conviction, conditional liberty and deportation |
| The online shopper | Conviction and conditional liberty |
| The parcel collectors | Conviction, conditional liberty and deportation |
| The landing party coordinator | Conviction, conditional liberty and deportation |
| The corrupt freight handler | Conviction and a short immediate custodial term |

TABLE 20: PROPORTIONALITY OF LESS RIGHTS-INTRUSIVE ALTERNATIVE MEASURES (SENTENCES)

The variables $W_i$ and $W_j$ 'stand for the abstract weights of the respective principles underpinning the State's measure and the offender's rights respectively 'relative to other principles, but independently of the circumstances of any concrete case.'[109] Often the weights of colliding rights and measures are equal can therefore be disregarded in balancing.[110] In this case, the rights to liberty and concomitant rights are arguably equally 'serious' from an abstract perspective as the rights that the measure seeks to secure, namely the right to health, safety and

[108] Klatt and Meister (n 50) 11.

[109] Ibid.

[110] Ibid.

security for all members of society. Therefore, the abstract weight of the colliding rights cancel each other out. The variables $I_i$ and $I_j$ 'stand for the intensities of interference with the two principles respectively…and are by definition concrete variables, as opposed to the abstract variables $W_i$ and $W_j$.'[111] In each case, the intensity of interference of the proposed penalty is minimally intrusive on the prisoner's exercise of his human rights. Excepting the 'corrupt freight handler,' who will serve a short custodial term, no other offender will serve an immediate custodial term. Therefore, the *online shopper's* mental health will not be compromised; the *human courier* and *landing party coordinator* will not be separated from their respective partners and young children during their children's' formative years; the *human courier*, the *parcel collectors* and the *landing party coordinator* will be imprisoned in a foreign gaol, the *parcel collectors* will not be penalised for having no legitimate opportunities to work, and the *human courier* will not be penalised twice for his gambling addiction and black-market debt. The value assigned to variable $I_j$ is therefore also set as 'light' in each case. Similarly, the intensity of interference of the prisoners' rights with the State's legitimate objectives of seeking to secure right to health, safety and security for all members of society is set as 'light' because the sentencing of these offenders was merely part of a broader strategy for implementing international drug control policy and maintaining law and order. The variables $R_i$ and $R_j$ refer to 'the reliability of the empirical and normative premises concerning what the measure means for the non-realisation of the one principle and the realisation of the other principle.'[112] The consequences for the respective offenders of the recording of a conviction and deportation are presumably readily knowable by reference to evidence about each offender's family situation, as well as by reference to normative arguments about the importance of the human rights in question. The reliability of this assessment is therefore assessed as 'high.' Likewise, as discussed above, there is reliable empirical evidence that the imposition of these 'less restrictive' alternative sentences will have no adverse impact on realisation of the State's objectives.

## IV CONCLUSION

This is the first empirical evaluation of whether the sentencing of international drug importers is proportionate within the meaning of the international human rights doctrine of constitutional

[111] Ibid.

[112] Ibid.

proportionality. The evaluation finds that current sentencing decisions are not proportionate and therefore not justifiable from an international human rights perspective, because the empirical and normative basis for sentencing decisions is inadequate. Sentences are formulated based on a concoction of stereotypes and other false assumptions about the international drug trade and its participants and in a policy vacuum. In the result, average sentences of 9.8 years are imposed on offenders whose offences, properly understood, pose no material threat to human health and welfare, no threat to State security, stability or sovereignty, and whose detention is inconsistent with the rule of law. These sentences are highly rights-intrusive, in that they not only involve deprivation of the offender's liberty for extended periods but, for many offenders, also involve:

- enforced separation from their partners and infant children an extended period, thereby interfering with their right to recognition of the importance of family (UDHR art 16(1), ICCPR art 23(1));[113]
- denial of their only opportunity for emancipation from servitude to black-market creditors whose business model directly benefited from prohibition policy, thereby interfering with their right to freedom from servitude (ICCPR art 8(2));[114] and
- denial of their only opportunity to earn sufficient income to meet their basic human needs in the face of unemployment and an absence of adequate social security, thereby interfering with their right to work (UDHR art 23).[115]

The proportionality analysis reveals that dispensing with custodial sentences for all but corrupt port staff would, on the best available evidence, have no impact on drug availability or price, would not undermine the maintenance of law and order, and would not erode the rule of law. Rather, it would result in fewer vulnerable people being imprisoned, with consequent negative

[113] UDHR art 16(1) and ICCPR art 23(1) provide that: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' The preamble to the, International Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 relevantly provides: 'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…'

[114] ICCPR art 8(2): 'No one shall be held in servitude.'; UDHR art 4.

[115] UDHR art 23(1): '(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'

impacts for their families and communities, with no consequent community benefits. In short, incarcerating fewer people will not result in more drug imports, just fewer people in gaol.

Proportionality reasoning illuminates and safeguards the ultimate constitutional requirement in any system that protects international human rights that the State must not impose highly coercive measures in the absence of reliable empirical evidence and strong normative arguments that it is necessary to do so. Australia has fallen foul of this requirement in respect of its policy of mandatory detention of refugees, which has been successfully challenged numerous times before the HRC on the basis that the policy was far from the least restrictive alternative way of addressing the policy concerns, which included that refugees may abscond into the community. The HRC has consistently held that this concern could be met by reporting requirements, sponsors or even electronic monitoring without the need for mandatory detention. This research has revealed, using similar reasoning, that Australia has an analogous informal policy of imposing mandatory custodial terms – an average of 9.8 years – on drug importers. The policy is less visible because it is implemented via common law rules and practices that mask the mandatory nature of the sanction – but its impact is no less rights-intrusive.

# Chapter 7:
# The Disproportionality of Sentences Imposed by Australian Courts on Drug Importers – Causes and Solutions

## I Introduction

Chapters 5 and 6 have presented generalisable evidence, based on a thematic analysis of a representative sample, that the sentences imposed by Australian courts on typical drug importers are disproportionate within the meaning of the international human rights doctrine of constitutional proportionality and therefore inconsistent with international human rights norms. The results reveal that the identified disproportionality is attributable to the flawed evidential and normative basis for sentence formulation. Specifically, courts make incorrect assumptions about the international drug trade and its participants, and impose heavily deterrent sentences without adequate normative justification for doing so. This Chapter synthesises the picture to emerge from the results, examines the root causes of the problem and considers options for restoring proportionality in sentencing.

## II The international drug trade at Australia's border: the nature extent of the 'problem'

Reuter and Trautmann have long pointed out that, contrary to popular stereotypes, there is no single 'world drug problem,' because the problem differs substantially from country to country, or region to region:

> For example, Colombia is greatly harmed by drug production and trafficking; they generate high levels of violence, corruption and political instability. Consumption of drugs is modest. For Turkey, the problem is largely confined to the corruption surrounding transhipment of heroin. In contrast, European countries such as Sweden, Switzerland and the United Kingdom have large domestic populations of

> dependent users of expensive drugs and minimal problems of violence, corruption or political instability related to production or trafficking.[1]

The present research puts into global perspective the nature and extent of drug trafficking at Australia's border. The results reveal that the international drug trade at Australia's border is relatively unproblematic by world standards, in that there is no evidence that it is productive of violence, corruption or political instability; and there is no evidence that importers are strategically seeking to establish new markets, such as by marketing drugs to children or vulnerable adults. Based on the results of this research, almost all offenders are males in their 20s or 30s. There is a roughly even distribution between Australian nationals and foreign nationals, most of whom are from China, South East Asia or Nigeria, which is consistent with Australia's geographical proximity to Asia and the recognised role of Nigerian nationals in international drug trafficking.[2] Three distinct enterprise types operate at Australia's border: *consumer enterprises*, *contractor enterprises*, and *corruption-based enterprises*. The business model for all enterprise types relies on the repeated importation of large numbers of relatively small quantities of drugs via a particular logistics stream in the expectation that a very small percentage will be interdicted and seized by law enforcement, and a sufficient quantity will 'get through' to make the venture viable. *Consumer enterprises* are operated by drug addicts seeking to feed and fund their own addiction through on-sale to friends ('*online shoppers*'). *Contractor enterprises* are operated by unskilled participants who received low fixed fees per package trafficked, tracked, collected or delivered, but who did not share in the profits made by the ultimate investors ('*human couriers*' or '*parcel collectors*'). *Corruption-based enterprises* are operated by corrupt port staff and/or officials seeking to make profits by leveraging knowledge of border protection procedures and access to port facilities. A tolerance for risk and the prospect of high financial rewards ('profit-motivated risk-taking') is the explanation for offending for only a minority of offenders about half of whom are otherwise gainfully employed at the time of their arrest and most of whom are participants in *corruption-based enterprises*. For the overwhelming majority of offenders, all of whom are participants in *contractor enterprises*, the explanation for offending is not a single factor but a combination of circumstances which rendered the person vulnerable to either seek out or acquiesce in the

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[1] Peter Reuter and Franz Trautmann (eds), *A Report of Global Illicit Drug Markets 1998-2007* (Trimbos Institute and RAND, 2009) 15.

[2] L Paoli and P Reuter, 'Drug Trafficking and Ethnic Minorities in Western Europe' (2008) 5(1) *European Journal of Criminology* 13, 30.

offending ('intersectional vulnerability'). The circumstances that combine to produce intersectional vulnerability are: unemployment and poor employment prospects, black-market gambling or drug debt, family dislocation or serious prior trauma resulting in PTSD. Just over half of offenders in this group are deliberately approached, coerced, manipulated or exploited into trafficking drugs.

This picture is consistent with the economics literature, which predicts that international drug trafficking is, in most places outside the traditional drug-producing regions, a profit-motivated, non-violent black-market that prospers because drugs can be disaggregated and readily concealed within ordinary commerce and because the risk of custodial sanctions can be entirely outsourced to fee-for-service contractors.[3] Working as a fee-for-service contractor is a rational choice for persons with a proclivity towards and tolerance for risk-taking, or for persons facing a combination of unfortunate circumstances which renders them vulnerable to either seek out or acquiesce in this work; and the pool of prospective applicants is sufficiently large that these persons are readily available and expendable. Vulnerable persons, including those from relatively poorer geographically proximate regional areas are effectively exported to Australia as fee-for-service contractors, and ultimately deported home as convicted criminals after serving lengthy sentences averaging 9.8 years. And all at no personal cost to the investors behind these importation enterprises who appear to be beyond the reach of national and international law enforcement efforts, not because they use violent or politically subversive tactics, but because legitimate cross-border trade is so voluminous, and drugs so readily concealed, that drug trafficking of this nature is impossible to prevent or detect.

This picture is consistent popular media coverage. As noted in Chapter 5, official ACIC statistics record that each year the bulk of seized drugs are imported via a very small number of large-scale importations, so that the clear majority of offenders are charged in relation to the importation of very small quantities of drugs.[4] Yet media coverage of national border seizures usually concerns large-scale sea-cargo shipments. This gives the impression that large-scale sea cargo shipments are representative of drug importations generally. The impression is incorrect because news editors do not claim to provide, nor do they provide, representative

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[3] Peter Reuter, 'The Organisation of Illegal Markets: An Economic Analysis' (Report, Department of Justice, National Institute of Justice Washington, DC, 1985; Peter Reuter and Mark AR Kleiman, 'Risks and Prices: An Economic Analysis of Drug Enforcement' (1986) 7 *Crime and Justice: An Annual Review of Research* 289; Reuter and Trautmann (n 1).

[4] As noted in Chapter 5 'Results,' this also confirms the representativeness of the sample.

coverage. Nevertheless, the absence of media coverage of violent cartel-related activity suggests that there is no such violence to report; similarly, the absence of media coverage about the use of, say, young pregnant women from the African continent to traffick drugs, suggests that there are no such stories to report here either. Occasionally news reports concern 'drug mules,' but typically only where there is something particularly gruesome about the story, such as that concerning an unidentified torso found floating off Kyeemagh Beach at Botany Bay,[5] or where the story concerns an Australian national facing the death penalty or a lengthy prison term in a foreign country.[6] The *parcel collector's* story – that of an otherwise unemployed Chinese man in his late 20s seeking out short-term rentals where he can collect mail items concealing methamphetamine within what appears to be bath salts – is insufficiently newsworthy; as are importations by *online shoppers* and *human couriers*. Present media coverage, which is typically limited to seizures exceeding 50kg of drugs, is just the sort of reporting that one would anticipate in relation to the abovementioned picture of the international drug market at Australia's border.

Notwithstanding that popular media coverage is unrepresentative, it provides a significant additional piece in the jigsaw of information on the international drug trade at Australia's border, particularly with respect to recent events that will not make their way into official statistics or research for several years. In terms of large-scale seizures, ABC reported in late 2017 a 'record meth bust' involving the seizure of 1.2 tonnes of methamphetamine near

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[5] Jessica Kidd, ABC News Online, 'Corona finds unknown torso probably drug mule,' 19 May 2016 http://www.abc.net.au/news/2016-05-19/coroner-finds-unknown-torso-probably-drug-mule/7428566. The NSW Coroner found that the deceased died of poisoning from drugs he concealed internally, and which unknown other persons had tried to retrieve post-mortem. See also ABC News Online, 'Japanese man in induced coma after drugs removed from his body in surgery in Tweed Heads' 6 July 2016, 'Japanese man in induced coma after drugs removed from body,' http://www.abc.net.au/news/2016-07-06/japanese-man-in-induced-coma-after-drugs-removed-from-body/7572368?section=nsw.

[6] Recent examples include Shappelle Corby, Cassie Sainsbury, Yoshe Taylor, the Bali 9 and Andrew Chan, see ABC News Online, 'Shapelle Corby return: Australia's most infamous accused drug smugglers,' 26 May 2017 , https://www.abc.net.au/news/2017-05-26/schapelle-corby-return-australias-most-infamous-drug-smugglers/8555684>; ABC News Online, 'AFP admits role in Queensland woman Yoshe Taylor's Cambodian prison hell,' 19 August 2019 <https://www.abc.net.au/news/2019-08-19/afp-admits-role-in-yoshe-taylor-cambodia-drugs-case/11287772>.

Geraldton, on the West Australian Coast.[7] This seizure appears to have been considerably larger than the largest seizures of the drug nationally as reported in the ACIC's Illicit Drug Data Report for 2013-14 (203.2kg, 183kg),[8] 2014-15 (878.9kg, 232.3kg),[9] 2015-16 (200kg, 195kg),[10] and 2016-17 (500kg, 135kg),[11] but the media report contains the gross weight of the drugs, rather than the net weight, which is likely less than 1,000kg,[12] but could be much lower depending on the average purity of the drugs. Nevertheless, the seizure is still significant when measured against the total quantity of amphetamine-type substances (including methamphetamine) detected at the Australian border in 2015-16 (2,621kg)[13] and 2016-17 (1,834kg).[14] According to the news report, police alleged that 182kg of ice seized at a remote beach near Geraldton almost a year earlier was imported by the same importation enterprise, which was apparently undeterred by the earlier seizure. The media report made no mention of the seizure of guns or of violence or connections to drug 'cartels.' This research suggests that the persons involved in the landing of the drugs are likely to have been participants in a profit-motivated *contractor enterprise*. Incarceration of the arrested participants is likely to be an anticipated business risk, and unlikely to have any deterrent effect in relation to this or any other importation enterprises in the market. The participants may not have been aware of the previous failed interdiction and the greater risk that this shipment would be under law enforcement surveillance. Based on the unusually large quantity of drugs seized, the importation was likely the result of collaboration between several profit-motivated importation enterprises rather than the work of a single enterprise with market power procured through natural monopoly, violence or politically subversive means, as all available evidence suggests that the Australian drug market is competitive. Other recent media coverage reported that a successful Australian business man, Rohan Arnold, 43, who had over 20 years' experience in

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[7] Perpitch, Nicholas, 'Australia's Record Meth Bust: Why Do Drug Smugglers Target Geraldton?', *ABC News Online*, 22 December 2017, <http://www.abc.net.au/news/2017-12-22/australia-record-meth-bust-why-do-smugglers-target-geraldton/9283114>

[8] Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2013-14' (Report, ACIC, 2014) 29.

[9] Commission, Australian Criminal Intelligence, 'Illicit Drug Data Report 2014-15' (Report, ACIC, 2015) 27.

[10] Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2015-16' (Report, ACIC, 2016) 29.

[11] Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2016-17' (Report, ACIC, 2018) 160.

[12] Assuming an average purity rate of 70 per cent.

[13] Australian Criminal Intelligence Commission, 'Illicit Drug Data Report 2016-17 (Report, ACIC, 2017) 23.

[14] Ibid.

the steel industry and once headed up Goulburn engineering firm Mass Steel,[15] was charged with conspiring to import 1.28 tons of cocaine concealed within a container of pre-fabricated steel.[16] This story is also unusual because of the large quantity of drugs involved, and it is newsworthy because it involves a known member of the Canberra community; but it is unexceptional in that concealing drugs within ordinary commerce is a very common importation method. It is impossible to conclude whether these media reports represent evidence of an emerging trend towards larger large-scale importations over time, a trend towards improved interdiction rates for large-scale importations, or, in the case of the importation into Geraldton, a trend towards importations that avoid official ports. This research helps to put into context that these importations represent failed business ventures rather than an existential threat to Australian society.

### *A The biggest news story*

Perhaps the most significant 'drugs trade' news story of the past year reported on the enormous seizures of Afghani heroin by the Australian Navy pursuant to 'Combined Maritime Forces' ('CMF') coalition, which is a 33-nation partnership formed to disrupt known ocean smuggling routes for illicit drugs shipped from the Arabian Gulf down to the Indian Ocean off east Africa.[17] According to the official website for the partnership, in 2017 CMF ships – including Australian Navy vessels – seized a total of 22.67 tonnes of narcotics.[18] Surprisingly, the drugs are flushed into the Indian Ocean, and the crews of the dhows from which the drugs are seized are not detained or charged; they are released along with their vessels:

> The Australians search, seize and destroy the drugs from dhows. But they won't seize the dhow, or detain the suspected smugglers — to do so, they would potentially have to bring them back to Australia for prosecution. The smugglers

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[15] Canberra Times, 'Canberra Businessman Arrested in Serbia over $500 million Cocaine Haul,' 18 January 2018 <http://www.canberratimes.com.au/act-news/canberraregion-businessman-arrested-in-serbia-over-500million-cocaine-haul-20180118-h0k5gj.html>

[16] ABC News, 'Australians arrested in Serbia on Drugs Charges,' 23 January 2018 <http://www.abc.net.au/news/2018-01-18/australians-arrested-in-serbia-on-drugs-charges/9338148>

[17] The High Seas, ABC News Online, 3 November 2017 <http://www.abc.net.au/news/2017-11-03/high-seas-war-on-drugs/8966752?pfmredir=sm>; Combined Maritime Forces, About Combined Maritime Forces <https://combinedmaritimeforces.com/> accessed 18 August 2019.

[18] Combined Maritime Forces <https://combinedmaritimeforces.com/2018/01/05/rfa-fort-rosalie-helicopter-leads-hmas-warramunga-to-second-massive-drugs-bust-of-3-5-tonnes/> accessed 18 August 2019.

> aren't known to get paid in full for failed deliveries, but don't face serious consequences from drug lords, like beatings or death. The traffickers need to retain willing drug mules. It means some of those onboard the dhow could smuggle again…Special agent Tamash believes seizing the dhows would [not] deter the drug-runners. 'Typically these guys aren't moving drugs all the time. They may do it once and then they may fish several times before they do it again. So if they have no dhow then they have no livelihood.'[19]

This multi-lateral arrangement openly accepts that the persons responsible for transporting drugs are minimally culpable individuals who rationally undertake this work for minimal wages. Moreover, the arrangement tacitly concedes that there is little to be gained by pursuing the enterprises because the only threat posed by their activities relates to the drugs themselves, which are duly seized and destroyed. The assumptions underlying this supply-side policy measure are strikingly at odds with the current domestic criminal justice approach.

The volume of seizures made pursuant to CMF is unprecedented. Whether this has had any appreciable effect on drug prices, drug availability or drug consumption has not yet been the subject of any research or official reports.[20] Nevertheless, CMF is an example of a humane approach to supply-side drug control, which seeks to disrupt the international drug trade without seeking to scapegoat and disproportionately punish the vulnerable persons who carry out the work of profit-motivated investors. The culpability of the *online shopper*, the *parcel collector* and the *human courier* – who serve an average sentence of 9.8 years – is thrown into sharp relief against the background of 22.67 tonnes of narcotics dumped into the ocean. As is the arbitrariness of the commercial and marketable quantity thresholds for importation offences or any other quantity-based proxy for offender culpability.

## III Reality versus Legal Reality

The law tends to arrogate to itself the right to define reality,[21] and such is the case with respect to international drug trafficking. This research has revealed that Australian law *defines* rather than acknowledges the international drug market at Australia's border. Intermediate appellate

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[19] The High Seas, ABC News Online, 3 November 2017 <http://www.abc.net.au/news/2017-11-03/high-seas-war-on-drugs/8966752?pfmredir=sm>

[20] Though, as discussed in Chapter 4 'International Drug Trafficking: Factual Context,' rates of drug use and problematic drug use are stable.

[21] Carol Smart, *Feminism and the Power of Law*, (Routledge, 1989), 4.

authority defines importation offences as causing 'great social consequences' and therefore 'objectively serious,' all participants as 'profit-motivated,' a profit motive as culpable and, by feat of circular logic, strongly deterrent penalties as 'necessary' to 'neutralise' participants' profits and to combat those great social consequences.[22] The high statutory maximum penalty of life is invoked to lend legitimacy to this dubious reasoning, which appears in the oft-cited statement by Maxwell P in *Nguyen v The Queen; Phommalysack v The Queen* (*'Phommalysack'*):

> Where a commercial quantity of a drug is imported, the maximum penalty for importation…is life imprisonment. Self-evidently therefore, the offence is to be viewed as being of the utmost seriousness … As a matter of common sense, it should be inferred, unless there is evidence to the contrary, that a person who is importing drugs is doing so for profit. (The fact that the offender needs money to pay off a debt does not necessarily affect culpability.) The difficulty of detecting importation offences, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case. The sentence to be imposed for a drug importation offence must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment. Involvement at any level in a drug importation offence must necessarily attract a significant sentence. Otherwise the interests of general deterrence are not served. [23]

The proportionality analysis exposed this and other 'statements of law' as little more than a collection of unsupported and unsupportable evidential and normative premises to which deference could not be given in exercise of the margin of appreciation. This brought unprecedented empirical and normative rigour to bear on the domestic legal framework.

*A Assessment of offence seriousness*

The results reveal that *offence seriousness* was assessed by reference to drug quantity, drug value, resulting harm, and offender role. These matters were in turn assessed by reference to

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[22] *Nguyen v The Queen*; *Phommalysack v The Queen ('Nguyen & Phommalysack v The Queen')* (2011) 31 VR 673 [2], [34]; *R v Nguyen and Pham ('Pham') R v Nguyen and Pham ('Pham')* (2010) 205 A Crim R 106, [72].

[23] *Nguyen & Phommalysack v The Queen* (n 22) [2], [34] citing *Markarian v The Queen* (2005) 228 CLR 357, 372-373.

empirically unsupportable proxies. *Drug quantity* was assessed by reference to the statutory marketable and commercial quantity thresholds; but these thresholds palpably overestimated associated harms. Drug quantity was so influential in the assessment of offence seriousness that even fee-for-service contractors who merely unpacked drugs were assessed as committing the most serious of offences by reference to drug quantity. *Drug value* was assessed by reference to expert evidence as to the wholesale and retail value of the drugs imported; but these values had no relation whatsoever to – and grossly overstated – the anticipated financial rewards for fee-for-service contractors. Additionally, stereotypes about the profitability of international drug trafficking typically caused courts to reject offenders' evidence that they were to be paid comparatively insignificant fixed fees per parcel trafficked, tracked, collected or delivered. *Offender role* was assessed by reference to the nature of the tasks undertaken by the offender in relation to the importation – as 'managerial' versus 'subordinate,' on the incorrect assumption that importation enterprises are operated along hierarchical lines; but these tasks in fact depended on the importation methodology adopted by the importation enterprise for which the offender worked and over which the offender had no control. Offenders working as 'human couriers' performed virtually no tasks of an administrative nature and were therefore typically assessed as a 'subordinate', while 'parcel collectors' often rented premises to provide a consignee address and liaise with Australia Post to arrange delivery and are therefore typically assessed as 'managerial' and therefore more culpable than 'human couriers.' 'Parcel collectors' in the air or sea cargo stream often performed even more tasks of an administrative nature, such as liaising with the customs broker and establishing or operating a business as a 'front' for the importation, and these offenders were typically assessed as being 'managerial' or 'essential' role in the importation enterprise.

### *B Mitigating factors*

Mitigating factors other than a guilty plea and cooperation were de-emphasised in sentence formulation, except for 'online shoppers.' This rule in practice therefore only benefited Australian nationals, because 'online shoppers' and corrupt port staff were exclusively Australian nationals. Online shoppers typically obtained medical evidence to support a nexus between their addition and their offending. Corrupt port staff and officials were typically willing and able to inform on co-venturers. By contrast, this approach to mitigating factors disadvantaged fee-for-service contractors, who were unable to provide cooperation because the business model of importation enterprises ensured that they had no knowledge of the broader

importation enterprise and no identifying information about other enterprise participants. No leniency was afforded to foreign nationals who were refugees, gambling addicts or mentally ill because courts typically ignored an offender's explanation for offending even where this comprised a background of extreme deprivation. Sentencers placed heavy emphasis on the notion that participation was a deliberate choice, even where there was evidence that the ability to make rational choices was compromised. Hardship of custody was typically considered as part of the 'general mix' of sentencing considerations but courts uniformly ignored the 'probable effect' of any proposed sentence on the offender's family or dependents, notwithstanding that almost a third of offenders (31 per cent) had dependent children or elderly parents (n=80).

### *C Aggravating factors*

Courts described almost every offender as being motivated by 'profit' or 'greed' and, in doing so, made no distinction between profit-motivated risk-takers and vulnerable persons seeking an income, thereby effectively treating profit motivation as an aggravating factor. As noted above, although courts denounced the conduct of corrupt port staff and officials as aggravating, in practice sentencing discounts meant that these persons did not receive significantly higher sentences than fee-for-service contractors.

### *D Sentencing objectives*

Courts regarded themselves as bound by precedent to give 'chief weight' to the objective of strongly deterrent sentences, as understood in the utilitarian sense as a sentence calculated to deter potential future offending by others, contrary to the foundational international human rights principle of human dignity. General deterrence was even prioritised in relation to 'online shoppers,' with the dubious policy consequence that addicts are forced to support their local retail supplier rather than 'cut out' the 'middle man.' By contrast, specific deterrence was rarely mentioned or emphasised. Sentencers rationalised the objective of punishment by reference to general deterrence, rather than as a retributive objective in its own right. No case moderated the final penalty based on the common law principle of proportionality. References to rehabilitation were conspicuous by their absence. Sentencers routinely assumed that a term of imprisonment would be 'rehabilitative' for the prisoner absent evidence to the contrary. To this end, sentencers routinely considered the rehabilitative prospects of the offender in the

abstract, without any explanation of the condition from which the offender needed to be rehabilitated, except where that condition was obviously a drug addiction.

### *E Ensuring consistency with the rule of law*

Consistency with the rule of law was apparent rather than real. The imposition of stern punishment was in almost all cases commensurate with the anterior finding that the offence was 'objectively serious.' Prosecutors and courts made obvious efforts to ensure that sentences were consistent with factually similar cases, which had the effect of reinforcing the abovementioned practice of sentence formulation and alleviating the need for sentencers to ensure consistency in the application of sentencing principles. Courts were being consistent; but in the author's view, consistently wrong. In summary, the proportionality analyses exposed Australian sentence formulation in practice as evidentially and normatively unsupported, and resulting sentences as unjustifiable, from an international human rights perspective.

## IV The Gulf Between Sentencing Law and Practice

The results revealed not only a gulf between reality and legal reality, but a gulf between sentencing law and sentencing practice in this area of law. A doctrinal analysis shows that there are good arguments that each of the observed rules of sentence formulation comes from intermediate appellate authority that is invalid or questionable on the basis that it is inconsistent with binding ultimate appellate authority or legislation. The three most significant are the rules that: importation offences are objectively serious because of the high statutory maximum penalty (the 'maximum penalty yardstick' rule),[24] that importation offences cause great social consequences (the 'great social consequences' rule),[25] and that general deterrence is to be given 'chief weight' because harsher sentences will have a greater deterrent effect (the 'general deterrence' rule).[26] This section describes each rule, identifies its origin and explains why it is arguably inconsistent with applicable High Court authority and/or legislation.

[24] Ibid.

[25] Ibid.

[26] *Nguyen & Phommalysack v The Queen* (n 22) [33]-[39]; *Pham* (n 22) [72].

*A The 'maximum penalty yardstick' rule*

The 'maximum penalty yardstick' rule arguably misapplies High Court authority in *Markarian v The Queen* ('*Markarian'*)[27] to the effect that the statutory maximum penalty can be used as a 'yardstick' to compare the instant case with the 'worst possible case' envisaged by the legislature. Rather than comparing the instant case with the 'worst possible case,' the 'maximum penalty yardstick' rule deems all importation offences to be 'worst case' offences. In *Markarian*, the appellant, a heroin addict who acted as a driver for a heroin dealer and was paid in kind, was sentenced for an offence of knowingly taking part in the supply of a commercial quantity of heroin, which carried a maximum penalty of 20 years. He argued that the sentencing judge had failed to make a proper assessment of the objective seriousness of his offence. His Honour had adopted as a starting point a period of 15 years' imprisonment – being the maximum penalty for an offence in the category of seriousness immediately below that with which the appellant had been convicted – and made proportional deductions and increases from that point to reflect matters personal to the appellant. The High Court held that the statutory maximum penalty should have been used as a 'yardstick' to compare the instant case with the 'worst possible case' envisaged by the legislature for that offence, but that the trial judge had failed to make such a comparison.[28] *Markarian* has been misconstrued to mean that the statutory maximum penalty represents the legislature's view of the seriousness of all offences charged pursuant to that statutory provision. The source of the misinterpretation may lie in the Court's failure to elaborate the 'most serious case' that the tip of the yardstick might represent:

> A serious fallacy in [the trial judge's] reasoning is that it assumes that any case involving more than 250g of heroin is likely to be a worse case than any case involving only 250g or less. That cannot be so in the virtually absolute terms in which his Honour puts it. Little imagination is required to envisage a case involving

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[27] *Markarian v The Queen* (2006) 228 CLR 357.

[28] Ibid [30]-[31]: 'Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks … It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick…'

> a relatively small quantity of heroin, as being of very great seriousness, for example, supply to create an addiction in an infant....[29]

Little imagination is required to envisage the tip of the 'maximum penalty yardstick' in relation to an importation offence. The *Criminal Code* (Cth) expressly states, in s 300.1(1) that 'the purpose of [Part 9.1] is to create offences relating to drug trafficking and to give effect to the [*1988 Convention*].' Article 3(5) of the *1988 Convention*, which requires Parties to establish importation offences, draws a distinction between 'particularly serious' drug offences and *all other* drug offences, as follows:

> Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article [requiring Parties to establish drug treaty offences] *particularly serious*, such as: a) The involvement in the offence of an organized criminal group to which the offender belongs; b) The involvement of the offender in other international organized criminal activities; c) The involvement of the offender in other illegal activities facilitated by commission of the offence; d) The use of violence or arms by the offender; e) The fact that the offender holds a public office and that the offence is connected with the office in question; f) The victimization or use of minors; g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities; h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party. (*Emphasis added*).

The enumerated factors are directed at the twin policy concerns underpinning the international drug control conventions, namely the 'serious threat' posed by the traffic in narcotic drugs to the 'health and welfare of human beings' and the 'economic, cultural and political foundations of society.'[30] A faithful implementation of the principle in *Markarian* in the context of Part 9.1 of the *Criminal Code* (Cth) would therefore involve a comparison of the instant case with the examples articulated in art 3(5), having regard to those policy concerns. In this way, the 'tip of the yardstick' might involve large-scale politically subversive action to establish and

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[29] *Markarian v The Queen* (n 27).

[30] Preamble, *1988 Convention*.

entrench drug trafficking routes through systematic violence and corruption of public officials. The relative triviality of small-scale profit-motivated trafficking via established commercial logistics routes, and the minimal culpability of both *online shoppers* and fee-for-service contractors, such as *human couriers* and *parcel collectors*, is clear.

Properly applied, the 'maximum penalty yardstick' rule would therefore produce results more aligned with international drug control policy, but the distinction between 'particularly serious' offences and *all other* offences is not drawn in practice. As noted above, the *Criminal Code* (Cth) does not distinguish between more or less serious offences, other than implicitly by providing a maximum penalty of life imprisonment for offences involving 'commercial quantities' or drugs and 25 years for offences involving 'marketable quantities' of drugs. Moreover the *Criminal Code* (Cth) does not use the term 'particularly serious.' Anomalously, the heading to Part 9.1 is 'Serious Drug Offences' but the legislation does not define 'serious' offences either. Therefore, the distinction between 'particularly serious' and *all other* drug offences in the *1988 Convention* is missing from the *Criminal Code* (Cth), which collects all drug offences under the heading 'Serious Drug Offences.' While this appears to be a merely semantic distinction, it may have contributed towards the misconception that all importation offences are grave.

### *B The 'great social consequences' rule*

The 'great social consequences' rule deems all importation offences to be serious because of the harm consequent upon any successful importation, and assumes the larger the importation the greater the harm. The most frequently cited statement of the rule appears in *Phommalysack*:

> Ordinarily, the amount of the drug involved in an importation is a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type. In many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar. … The difficulty of detecting importation offences, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case.[31]

[31] *Nguyen & Phommalysack v The Queen* (n 22) [34] items 5, 7.

The results reveal that the rule is applied in practice so that any importation which exceeds even a fraction of the applicable statutory and commercial quantity threshold is assumed to be productive of this harm. For example, '[y]ou imported a total of 36.5 grams of MDMA which was 73 times greater than the marketable threshold and 7.3 per cent of the commercial threshold,'[32] or '[t]he quantity of drugs imported involved in your charge is 116.8 times a marketable quantity and 15.5 per cent of a commercial quantity; a not insignificant amount of heroin,'[33] or 'I pause to note that…[t]he total quantity imported therefore is 2.7 times the commercial quantity applicable to methamphetamine.'[34] This quantity-based approach to assessing offence seriousness is demonstrably incompatible with the international drug conventions, which define offence gravity based on the extent to which the offence threatens the 'health and welfare of human beings' and/or the 'economic, cultural and political foundations of society.'[35] The rule's origin may lie in a misunderstanding of the High Court's description, in *Adams v The Queen*,[36] of Part 9.1 of the *Criminal Code* (Cth) as a 'quantity-based penalty regime.' That description was intended to contrast the Australian legislative scheme with that in New Zealand and Canada, both of which 'grade drugs according to a legislative perception of their harmfulness, and prescribe penalties based on harmfulness rather than quantities.'[37] The High Court's description does not suggest that the statutory drug quantity thresholds represent an evidence-based assessment of when an importation threatens public health or State security, nor do any extrinsic materials; but this is the way in which the comment has been understood by intermediate appellate courts.[38] The previous Chapter

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[32] *DPP (Cth) v Evers* [2017] VCC 1226 [6].

[33] *DPP (Cth) v Teoh* [2017] VCC 321 [107].

[34] *DPP (Cth) v Chu* [2017] VCC 1027 [15].

[35] Preamble, *1988 Convention*.

[36] *Pham* (n 22) [70] – [72] opens with the statement that the *Criminal Code* (Cth) adopts 'a quantity-based penalty regime', citing *Adams v The Queen* 234 CLR 143 at 146 [2]: *Pham* [70]-[72]. In *Adams v The Queen*, the applicant, who had been sentenced to 9 years NPP 7 years for the importation of almost 9kg of MDMA, argued that he ought to have been sentenced on the basis that MDMA was 'less harmful' than an equivalent quantity of heroin, notwithstanding that the statutory 'commercial quantity' threshold for MDMA was lower than that for heroin. The majority held that, assuming the applicant could establish this claim, a 'harm-based gradation of penalties' would 'cut across' the quantity-based penalty regime, at [2], [10]. While the phraseology could have been better, the decision does not support the proposition that the 'objective seriousness' of an importation offence increases in proportion to the quantity of drugs imported.

[37] Citing *Adams v The Queen* [2008] HCA 15, [3].

[38] *Nguyen & Phommalysack v The Queen* (n 22); *Pham* (n 22) [72]: '… (e) the statements by the High Court in *Wong v The Queen; Leung v The Queen* do not suggest that, in an appropriate case, the amount of the drug

explained why the statutory drug quantity thresholds are empirically unsupportable by reference to evidence-based indicators created for the purpose of this research. That the 'great social consequences' rule has no doctrinal basis, makes its application even more concerning.

### *C The 'general deterrence' rule*

The 'general deterrence' rule assumes that it is necessary to give 'chief weight' to general deterrence, and that harsher sentences will have a greater deterrent effect, as stated by the NSW Court of Criminal Appeal in *Nguyen*:

> … the sentence to be imposed for a drug importation offence must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment…involvement at any level in a drug importation offence must necessarily attract a significant sentence, otherwise the interests of general deterrence are not served…[39]

This rule is based on a misunderstanding of the obiter by the High Court in *Wong v The Queen*.[40] In that case, the Court had concluded, based on certain hypothesised features of importation offences – namely the presumed 'difficulty of detection' and the 'great social consequences' that follow – that general deterrence ought to be given 'chief weight' in 'almost every case.'[41] However, the Court emphasised, in the same paragraph, that those comments were not intended as a statement of principle.[42]

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involved in an importation is not a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type; in many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar.'

[39] Ibid.

[40] *Wong v The Queen* (2001) 207 CLR 584 [64].

[41] Ibid. This empirical research has confirmed that the hypothesised like features, are not necessarily, in fact, common to offences committed at Australia's border. It is not difficult to detect drugs that are poorly concealed, indeed the business model adopted by importation enterprises operating at Australia's border assumes that a percentage of imports will ordinarily be interdicted and seized. Offences that are 'difficult to detect' in the Australian context are those committed by corrupt port staff and officials, and those involving the use of dedicated maritime vessels, because of the practical difficulties in policing Australia's extensive maritime border. Moreover, as previously discussed, 'great social consequences' do not necessarily follow from every importation offence, particularly in Australia, where there is no evidence of any violence, corruption or political instability related to drug importations.

[42] Ibid: '… Our purpose in mentioning these matters is, however, not now to attempt an exhaustive statement of relevant factors, or to attempt some formulation of applicable principles. What is important for present purposes

On one reading, the legislative history of s16(2) reveals that the Commonwealth Parliament did not intend that general deterrence be prioritised over other sentencing objectives, that general deterrence be pursued separately to the requirement for just punishment, nor that courts adopt a 'utilitarian' concept of general deterrence. Part 1B of the *Crimes Act 1914* (Cth) was introduced in 1990, following the Australian Law Reform Commission's 1988 Report, *Sentencing*, which examined, and formulated proposals to address, the 'considerable variation' across states and territories in the sentencing of federal offenders.[43] This variation was primarily a result of the 'autochthonous expedient' – the Commonwealth's use of established State and Territory criminal justice systems for the arrest, trial, sentence and imprisonment of federal prisoners.[44] Accordingly, prisoners sentenced for the same federal offence in different states would be subject to different substantive and procedural laws. These differences became more pronounced over time as procedural legislation proliferated, parochial differences emerged in the common law of sentencing, and informal mechanisms such as established 'tariffs' developed within each jurisdiction.[45] To address emerging differences in sentencing law and practice, the ALRC's Report recommended the introduction of an open-ended statutory list of matters relevant to sentence,[46] and more extensive requirements for the giving of reasons for sentence, to develop a 'more accountable jurisprudence of sentencing.'[47] The 'sentencing principles' upon which the ALRC's Report was founded reflected the common law

is that it is all of the matters mentioned, and others, including those mentioned in Pt 1B of the Commonwealth Crimes Act, which should be taken into account in formulating applicable principles.'

[43] Pursuant to s 68 of the *Judiciary Act 1901* (Cth).

[44] Australian Law Reform Commission, 'Sentencing' (Law Reform Commission Report, No 44, 25 August 1988) ('ALRC 1988') 2 [3]; citing *R v Kirby; ex parte Boilermakers Society of Australia* (1955-6) 94 CLR 254, 268 (Dixon J).

[45] Ibid 80-83.

[46] Ibid 89 [170]: '*List of facts relevant to sentencing*. A rational and consistent system of law requires the existence of a common standard by which to evaluate individual decision making. … [T]he categories of facts relevant to sentencing should not be closed but should at least include [eg the character, antecedents, age, means and physical or mental condition of the person]. This list is not in any order of priority or importance. … Inclusion of a list of this kind in legislation will promote consistency of approach by sentencers, prosecutors and defence lawyers. The legislation should make it clear that the list is permissive: the court is not obligated to consider all, or any of the matters in the list. It should also state that the list is open ended and that other matters not in the list may be taken into account. The sentencing court should be required by legislation to identify the facts relied upon and the reasons for relying on a particular fact in determining penalty.'

[47] Ibid 85 [165].

at the time,[48] including that all punishments must be 'just,' meaning 'of an appropriate severity, having regard to the circumstances of the offence and the offender,' and that rehabilitation and specific deterrence could be pursued consistently with the goal for 'just' punishment, but that general deterrence and incapacitation (now called preventative detention) could not.[49] The ALRC Report pointed out that pursuing general deterrence as a sentencing objective would violate the fundamental principle that an offender must be punished only for 'his' crime:

> To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed. To single out an offender for increased punishment *pour encourager les autres* also runs counter to the principles of consistency and justice on which this report is based. [50]

The Report also noted the overwhelming lack of empirical evidence for the efficacy of general deterrence,[51] and the fact that general deterrence could be achieved through legislative and other measures that did not impose a burden on an individual offender.[52] Significantly, the ALRC's Report noted that the Commonwealth Director of Public Prosecution's Guidelines were out of step with the common law in this regard, and recommended that those Guidelines

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[48] Ibid 87 – 88 [168]. General deterrence does not feature on the lists of matters commonly or less commonly taking into account in sentencing.

[49] Ibid 24 [48].

[50] Ibid 18 [37].

[51] Ibid 18 [37]: '*General deterrence.* This report has already rejected the notion that general deterrence should be seen as a goal of sentencing. It is unjust to impose a sentence on one person as an example or to deter other from committing crimes. In any event, it is by no means clear that a general increase in imprisonments imposed for a particular offence deters that particular crime, or crime more generally. Nor is it clear that imprisonment is a more effective deterrent than other kinds of punishment. One member of the Commission disagrees with the views expressed in this paragraph.'

[52] Ibid 18 [37]: 'On the other hand, the Commission acknowledges that the operation of the criminal justice system as a whole can be altered to deter those in the community from committing offences. For example, the Parliament may, for some particularly prevalent offence, choose to increase the maximum penalties which are available to sentencers convicting persons of that offence. The purpose of this increase in penalties is clearly to deter the commission of that offence. Increases in penalties actually imposed, in these cases, are a response by sentencers, not to a perception by those sentencers that this particular offence needs to be deterred, but to the statement of the Parliament that this offence is now to be regarded as more serious than it had been in the past. If deterrence occurs, it is not because of individual sentences, but because the system as a whole treats the offence more seriously.

be amended to remove the reference to 'general deterrence as a relevant matter in sentencing.'[53] The Second Reading Speech confirms that s16(2) implements the ALRC's Recommendation to provide a statutory list of mandatory sentencing considerations.[54] Consistently with the totality of the ALRC Report, s16(2) expressly mentioned specific deterrence, punishment, and rehabilitation, but not general deterrence or incapacitation.[55] Also consistently with the ALRC Report, the statutory list was inclusive and did not prescribe any hierarchy of importance to the listed matters.[56] The Second Reading speech confirms that the legislature did not intend that the inclusive format of the list in s 16(2) would give courts an unlimited discretion or otherwise allow sentencers to depart from existing law.[57] The question of whether s 16(2) impliedly excluded general deterrence from the consideration of sentencers, or whether the inclusive nature of the list permitted sentencers to have regard to general deterrence, was considered shortly after s16(2) was introduced, in *DPP (Cth) v El Karhani* ('*El Karhani*').[58] The prisoner, a 62-year old man from Lebanon, had imported 447.6 grams of pure heroin in the false bottom of his suitcase. The sentencing judge found that the express reference to specific deterrence in paragraph (j), which referred to the deterrent effect that any sentence or order under consideration may have on 'the person,' impliedly excluded any consideration of general deterrence:

> I do not know the reasons for that. I assume somebody thought them through.[59]

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[53] Ibid xlv [109]; 105 [193].

[54] Commonwealth, *Parliamentary Debates,* House of Representatives, 30 October 1989 (N A Brown) 2078; Legislative Research Service, Department of the Parliamentary Library (Cth), *Digest of Bill*, No 89/122 of 1989, 17 October 1989 3.

[55] Section 16A(2) relevantly provided: 'In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: … (j) the deterrent effect that any sentence or order under consideration may have on the person; (k) the need to ensure that the person is adequately punished for the offence; (n) the prospect of rehabilitation of the person.

[56] Explanatory Memorandum, Crimes Legislation Amendment Bill (No 2) 1989, 7; ALRC 1988 (n 44), xl (Recommendations 94, 95).

[57] *Parliamentary Debates* (n 54) 2080.

[58] *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 ('*El Karhani*').

[59] Ibid.

On appeal, neither party argued that s 16(2) arose from the ALRC's Report, and the Court was not taken to the ALRC' Report.[60] In fact, the question of whether the introduction of s16(2) was based the ALRC's Report was not the subject of argument.[61] The question of whether s 16(2) impliedly excluded general deterrence was resolved by reference to the text of s16A alone. The NSW Court of Criminal Appeal assumed that the omission was an accidental oversight that could be ignored because the list of relevant considerations in s16A(2) was inclusive.[62] Moreover, the Court stated that general deterrence was one of the 'main purposes'

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[60] Ibid 375. Nevertheless, the Court stated that the Crimes Legislation Amendment Bill (No 2) 1989 was not obviously based on the ALRC's Report, based merely on a 'glance' at the report 'since argument': 'The [ALRC] has for many years been examining the reform of the sentencing of Federal offenders. It has considered some of the fundamental problems referred to above… It was not suggested that the sections of the Act which must now be given meaning arose from the reports of that Commission. The Court was not taken to those reports. A glance at them since argument shows that, whilst some of the provisions in the Act may have been influenced by the recommendations of the Commission, its relevant terms cannot be traced to those recommendations. Looked at realistically, it appears that the impetus for introducing the Act, changing the nomenclature of punishment and providing for adjustment was to respond to the particular discordancy created in New South Wales by the passage of the *Sentencing Act 1989*. It was to do so in ways which extended the range of alternatives to imprisonment (as proposed by the Law Reform Commission) and to set out a number of general principles to be observed in the sentencing of Federal offenders.'

[61] *El Karhani* (n 58) 377 'The [ALRC] has for many years been examining the reform of the sentencing of Federal offenders…It was not suggested that the sections of the Act which must now be given meaning arose from the reports of that Commission. The Court was not taken to those reports. A glance at them since argument shows that, whilst some of the provisions in the Act may have been influenced by the recommendations of the Commission, its relevant terms cannot be traced to those recommendations. Looked at realistically, it appears that the impetus for introducing the Act, changing the nomenclature of punishment and providing for adjustment was to respond to the particular discordancy created in New South Wales by the passage of the *Sentencing Act 1989*. It was to do so in ways which extended the range of alternatives to imprisonment (as proposed by the Law Reform Commission) and to set out a number of general principles to be observed in the sentencing of federal offenders.'

[62] Ibid 378: 'It would have been surprising indeed if such a fundamental principle of sentencing, inherited from the ages, had been repealed by the Act. But legislative slips can occur. It is therefore necessary to look at the language and purpose of the Act. The language of the Act gives no support for the proposition that general deterrence has been removed from the list of criteria to be considered by a court sentencing a person for a federal offence. On the contrary, s16A(1) imposes on the Court the duty, which it is its primary obligation, to ensure that the sentence or order 'is of a severity appropriate in all the circumstances of the offence.' It is by this duty that the general principles of sentencing law are imported into the function of a court imposing a sentence on a federal offender…What will be 'appropriate' will depend, in part, upon a consideration of fundamental notions, such as that of general deterrence….However, the opening words of s 16A(2) must be noticed. They state that the matters there listed are to be taken into account 'in addition to any other matters.' These words make it plain beyond

of sentencing that sentencers were obliged to consider.[63] In reaching this conclusion, the Court relied on an obiter comment by Hunt J in *R v Paul*,[64] in which his Honour stated that he 'hoped' that the reference in s 16(2) to 'any other relevant matters' would be interpreted to include general deterrence because it was 'generally accepted as being the main purpose of punishment, to which all of the usual subjective considerations are necessarily subsidiary,' citing *R v Radich*,[65] a decision of the New Zealand Court of Appeal, in which the Court emphasised that '…fear of severe punishment does, and will, prevent the commission [of potential offences].'[66] Subsequent Commonwealth sentencing decisions treat *El Karhani* as authority for the propositions that general deterrence in its utilitarian sense.

This misinterpretation of s 16A(2) ultimately became a self-fulfilling prophecy. On 26 November 2015, s 16A(2) was amended to expressly require sentencers to consider 'the deterrent effect that any sentence or order under consideration may have on other persons.'[67] The Explanatory Memorandum states that the impetus for the amendment was 'judicial concern' that 'there is no reference in the Act to general deterrence' and notes that 'introducing general deterrence…will remove the need for courts to 'read in' general deterrence as a sentencing factor, thereby aligning the Act with comparable State and Territory sentencing legislation…'.[68] The 'judicial concern' can be traced back to *El Karhani*. While it may appear that the courts, through *El Karhani*, had unwittingly procured a change in legislation that would permit courts to give 'chief weight' to general deterrence in its utilitarian sense, the Explanatory Memorandum suggests otherwise. The Explanatory Memorandum notes that the legislature still understood the reference to 'the deterrent effect that any sentence…may have on other persons' was consistent with the right to liberty under art 9 of the ICCPR. It follows that the legislature intended that the amendment was consistent with the ALRC's

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argument that the legislature was not seeking, by the list, to exclude other relevant matters. One other such relevant matter is clearly the general deterrent effect of the sentence.'

[63] Ibid (n 58) 377-378.

[64] *R v Paull* (1990) NSWLR 427, 434.

[65] *R v Radich* [1954] NZLR 86.

[66] Ibid.

[67] *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth), sch 7, item 1 inserting new s 16A(2)(ja).

[68] Replacement Explanatory Memorandum, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) 71, [413].

Recommendation that 'it is unjust to impose a sentence on one person as an example or to deter others from committing a particular crime.'[69] This is because the Explanatory Memorandum specifically referred to the human rights implications of the Bill, noting that the Bill engages the right to liberty under art 9 of the ICCPR and, in particular, the correlative requirement that 'the detention of the particular individual must be justified as reasonable, necessary and proportionate to the end sought.'[70] The Explanatory Memorandum also states that restrictions on liberty associated with sentencing orders are 'demonstrably necessary, proportionate and the least intrusive method of achieving the desired outcome, as assessed by the sentencing court.'[71] This statement indicates that the legislature understood the concept of 'general deterrence' would be applied in a manner consistent with the requirements of the ICCPR. That is a reasonable assumption given the overriding requirement in s 17A that that a court must not pass a sentence of imprisonment unless satisfied that the sentence is 'appropriate in all the circumstance of the case,' and the High Court's commitment to individualised sentencing. This puts the common law interpretation of 'general deterrence' as a stand-alone sentencing objective to be given 'chief weight' in sentence formulation – as the results of this research show – at odds with the legislature's intention in 1989 and again in 2015. It follows that pursuit of a utilitarian concept of general deterrence, and prioritising general deterrence over other sentencing objectives, including the requirement for 'just' punishment, is inconsistent with the legislative intent behind s 16(2) *Crimes Act 1914* (Cth).[72] That general deterrence is evidentially unsupported and normatively unacceptable within international human rights doctrine has already been discussed. This analysis demonstrates that there is an argument that this interpretation is inconsistent with s 16A(2)(ja). However, no matter how compelling the argument, the requirement for general deterrence is now so entrenched within the federal sentencing framework that it would take a legislative amendment to secure any change to sentencing practice.

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[69] ALRC, *Sentencing*, 1988, 26 [51].

[70] Replacement Explanatory Memorandum, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth), 28, [138], [140].

[71] Ibid [142].

[72] There is no mention of general deterrence in the Second Reading Speech to the amendment: Commonwealth, *Parliamentary Debates,* House of Representatives, 19 March 2015 (Keegan, Stirling – Minister for Justice) 2909.

*D Other doctrinally unsupported rules*

The doctrinal foundation for the myriad of other rules used when sentencing international drug traffickers is also lacking. Those rules are described briefly below.

1) *The rule that the performance by traffickers of 'managerial' tasks is more serious than the performance of 'subordinate' or 'low level' tasks, and alternatively that any role in an importation enterprise as serious because it is an 'essential' link in the importation chain*.[73] In practice, this rule recalibrates the tip of the *Markarian*-yardstick to represent the most serious conduct occurring *within Australia*,[74] thereby ignoring both the statutory definition of 'import'[75] and the purpose of Part 9.1 of the *Criminal Code* (Cth) in addressing a global, rather than domestic, phenomenon.[76]

2) *The rule requiring a substantial term of imprisonment in relation to any importation offence absent 'exceptional' circumstances.'*[77] This rule incorrectly assumes that all importation offences have been properly assessed as 'objectively serious.'

3) *The rule that all importers are motivated by profit (which is treated as aggravating) absent evidence to the contrary*.[78] This rule apparently has its origin in 'common sense' rather than ultimate appellate authority.[79] The rule effectively reverses requirement that a sentencing court not take into account in a way that is adverse to the offender a

[73] *Nguyen & Phommalysack v The Queen* (n **Error! Bookmark not defined.**)[34] item 1.

[74] *R v Lee* [2007] NSWCCA 234, cited in *Phommalysack,* [34] item 7: '(b) [P]roblems may emerge when a sentencing court attempts to categorise the role of the offender in the drug enterprise, as in many cases the full nature and extent of the enterprise is unlikely to be known to the Court: *The Queen v Olbrich* [1999] HCA 54; 199 CLR 270 at 279 [19]; *R v Lee* at [25]; (c) it is the criminality involved in the importation which must be identified - the fact that another person may be characterised as the *"mastermind"* does not mean that a person who was responsible for managing the importation into Australia is properly described as having only a middle level of responsibility.'

[75] Section 300.2 *Criminal Code* (Cth) provides: ''import,' in relation to a substance, means import the substance into Australia and includes: (a) bring the substance into Australia; and (b) deal with the substance in connection with its importation.'

[76] As previously discussed.

[77] *Nguyen & Phommalysack v The Queen* (n 22) [34] item 7.

[78] Ibid item 6.

[79] Ibid citing *De La Rosa* [2010] NSWCCA 194, [261] citing *R v Kaldor* [2004] NSWCCA 425 at [104].

fact that has not been established beyond a reasonable doubt.[80] Additionally, the rule treats circumstances that ought to be regarded as mitigating from a policy perspective – such as the need to earn an income in the absence of alternatives – as aggravating rather than mitigating.

4) *The rule that higher penalties should ordinarily be imposed the greater the value of drugs imported*.[81] This rule does not have any foundation in ultimate appellate authority, and is inconsistent with an evaluation of offence seriousness in its proper policy context.

5) *The rule that the offender's prior good character should be of little weight when formulating sentence*.[82] This rule is inconsistent with High Court authority in *Ryan v The Queen* (*'Ryan'*),[83] which explains that evidence of prior good character is indispensable to a proper exercise of the sentencing discretion, because it provides additional context for sentence formulation.[84] Further, the stated policy rationale for the exception – namely that '[v]ery frequently, those selected to place themselves in the chain of drug trafficking ... are selected because their records, their past and their lifestyles are not such as to attract suspicion'[85] – ignores the possibility that a drug importer may be victim of coercion, manipulation or deception precisely because of his prior good character.

6) *The rule that the consequent hardship of imprisonment for the offender's family, including his children, is mitigating only in 'exceptional circumstances*.'[86] This rule is

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[80] *R v Olbrich* [1999] HCA 54 [27].

[81] *Nguyen & Phommalysack v The Queen* (n 22) [34] item 8.

[82] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 [265]; see similar comments in *Pham* (n 22) 72.

[83] *Ryan v The Queen ('Ryan')* (2001) 206 CLR 267. But note that the High Court was divided on this issu

[84] Ibid. This case has been partially displaced by statute in Victoria so that prior good character cannot be considered in relation to sex offences where the prior good character assisted the offender to commit the offence (s 5AA *Sentencing Act 1991* (Vic)). The policy rationale for s 5AA would only be applicable to drug importers in the face of reliable evidence that drug importers are morally culpable in respect of the use of their prior good character to facilitate the commission of the offence. This research provides good evidence, in many cases, that prior good character may be a hallmark of a vulnerable offender who has been actively recruited by others as a fee-for-service contractor.

[85] *R v Leroy* (1984) 13 A Crim R 469, 474.

[86] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194.

inconsistent with the statutory requirement in s 16A(2)(b) *Crimes Act 1914* (Cth) that the sentencing court must consider, where relevant and known, 'the probable effect that any sentence…under consideration would have on the person's family or dependents.'[87] The rule has also been subject to criticism on the basis that it is inconsistent with the common law principle of mercy.[88]

7) *The rule that it is necessary when formulating sentence to give 'chief weight' to general deterrence because harsher sentences will have a greater 'deterrent effect.'*[89] To the extent that sentencers rely on this rule to justify the imposition of sentences that are strongly deterrent in a utilitarian sense, the rule is inconsistent with the meaning behind s 16A(2)(ja) of the *Crimes Act 1914* (Cth), as discussed above. To the extent that sentencers rely on this rule to justify sentences that are disproportionate to the gravity of the offence as assessed in its proper policy context, the rule is also inconsistent with s 16A(1) which requires the imposition of a sentence that is 'of a severity appropriate in all the circumstances of the offence.'

Several sentencing practices identified in this research also lack an adequate doctrinal foundation. The two most prominent of which are the practice of using comparative sentences to define the sentencing range, and the practice of setting the non-parole period at 70 per cent of the head sentence.

### *E The practice of using 'comparative sentences' to define the sentencing range*

The results found that comparative sentences were widely used in practice to provide the upper and lower boundaries of acceptable sentencing. This provides empirical support for the assertion, formally baulked at by courts, that in practice, courts consider the quantitative 'tariff'

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[87] By its use of the term 'probable,' the provision places the evidential burden on the prisoner, but it does not otherwise restrict the extent to which the extent to which the consideration may impact the sentencing calculus. the NSWCCA in *R v Pratten (No 2)* expressed reservations about the 'gloss' on s16A(2)(b), noting that there 'have been expressions of disquiet that the approach adopted under the common law involves a reading down of the Commonwealth statute in a manner which finds no basis in the statutory language.' *DPP (Cth) v Pratten (No 2)* [2017] NSWCCA 41, [49], refering to: *R v Zerafa* [2012] NSWSC 978 at [87] (per Beech-Jones J), *Elshani v R* [2015] NSWCCA 254 at [3]-[7] (Gleeson JA) and [30]-[35] (Michael Adams J) and [40]-[41] (Beech-Jones J).

[88] Mirko Bagaric 'Redefining the circumstances in which family hardship should mitigate sentence severity' (2019) *University of New South Wales Law Journal 42* (2019)154.

[89] *Nguyen & Phommalysack v The Queen* (n 22) [33]-[39]; *Pham* (n 22) [72].

or ‘going rate’ a useful ‘guide or yardstick as to the limits of judicial discretion’ both at first instance and on appeal.[90] There is no statutory requirement that a court consider sentences passed in other like cases (‘comparative sentences’), and the practice is doctrinally problematic because of the great potential for comparative sentences to be misused for achieving consistency in sentencing outcomes rather than consistency in the application of sentencing principles.[91] To this end, in *Wong v The Queen*,[92] the plurality emphasised the need for the sentencing judge to identify ‘unifying principles’ underlying comparative cases, rather than merely comparing tariffs.[93] Again, in *Hili v The Queen*,[94] the plurality emphasised the need for ‘consistency in the application of sentencing principles,’[95] and cautioned that sentencing statistics do not define the sentencing range.[96] Subsequently, in *The Queen v Kilic*,[97] the plurality applied this principle to conclude that the historical range did not dictate whether a sentence was manifestly excessive.[98] In that case, the offender had intentionally immolated

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[90] (Warner, 2005, 246 citing Fox & Freiberg, 1999, 145; Bagaric 2001, 23)

[91] *DPP v Dalgliesh* (2017) 262 CLR 428.

[92] *Wong v The Queen* (n 40).

[93] *Wong v The Queen* (n 40) [59]: ‘[R]ecording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were.’

[94] *Hili v The Queen* (2010) 242 CLR 520.

[95] Ibid [49].

[96] Ibid [54] ‘In *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: "Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts." But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence." Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence." When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned."’

[97] *The Queen v Kilic* (2016) 259 CLR 256.

[98] Citing *Kilic v The Queen* [2015] VSCA 33 at [48]: ‘22 Their Honours in the Court of Appeal observed, correctly, that examination of cases of causing serious injury by fire may provide a relevant "yardstick" by which a sentencing court can attempt to achieve consistency in sentencing and in the application of relevant sentencing

his pregnant girlfriend. The Victorian Court of Appeal upheld a Crown appeal on the basis that the sentence was unjustifiably disparate, but the High Court held that the Court of Appeal had incorrectly treated comparative sentences as 'defining the sentencing range.'[99] No case within the sample recorded an attempt by the prosecutor or the court to identify the 'unifying principles' underlying the comparative cases, as required by *Hili v The Queen*.[100] The practice of using comparative sentences in this way has discouraged the genuine exercise of sentencing discretion in relation to federal drug importers and perpetuated the use of inappropriately inflated sentences. Had sentencers sought consistency in the application of sentencing principles, rather than consistency in tariffs, courts might have identified the doctrinal problems that have infected the purported comparators.

### *F The practice of setting the non-parole period at 70 per cent of the head sentence*

As discussed in Chapter 6, evidence of the strikingly uniform practice of imposing a pre-release period of 70 per cent suggests that courts in practice fail to recognise that 'sentencing factors in favour of rehabilitation in a particular case can reduce not only the length of the head sentence but also lower the proportion that the non-parole period bears to the head sentence.'[101] This is demonstrably contrary to s16A(2)(ja), for the reasons set out above. It also violates the prohibition against arbitrary detention in art 9(1) of the ICCPR.

### *G Other doctrinally unsupported practices*

The doctrinal foundation for other observed sentencing practices was also lacking. The practice that imprisonment is assumed to be rehabilitative and an appropriate way to address any underlying issues bearing upon recidivism in practice abdicates responsibility to act

principles but that the requirement to have regard to the sentences imposed in those cases does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed; rather the range of sentences imposed in the past may inform a "broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of principle."'

[99] *The Queen* v *Kilic* [2016] HCA 48: '24 As the Crown submitted, despite the Court of Appeal's correct observations of principle earlier referred to, the Court of Appeal's reasoning in effect impermissibly treated the sentences imposed in the few cases mentioned as defining the sentencing range and, on that basis, concluded that, because the sentence imposed in this case exceeded the sentences imposed in all but one of the cases referred to, the sentence imposed in this case was beyond the range of available sentences.'

[100] *Hili v The Queen* (n 94).

[101] *Lam v The Queen* [2014] WASCA 114 (McLure P, Buss and Newnes JJA agreeing), describing the effect of the decision of the High Court in *Hili v The Queen* (2010) 242 CLR 520.

judicially on the basis of evidence that is 'relevant and known to the court' concerning the underlying conditions bearing upon recidivism and whether those conditions can be better addressed in a non-custodial setting.[102] The practice of failing to consider alternatives to a full-time custodial sentence, because importation offences are 'objectively serious' violates s17A(1) of the *Crimes Act 1914* (Cth), which restricts a court from passing a sentence of imprisonment unless, 'after having considered all other available sentences' the court is 'satisfied that no other sentence is appropriate in all the circumstances of the case' and requires that the court 'shall state the reasons for its decision that no other sentence is appropriate.'

The identified doctrinal problems with sentencing law and practice go hand in hand with the evidential problems identified in the proportionality analysis. Sentencing practice is therefore out of step with both empirical evidence about the international drug trade and its participants, with normative arguments about the imposition of deterrent sentences, and with sentencing law properly understood. Both the proportionality analysis and this doctrinal analysis reveal that the root causes of the problem are incorrect assumptions – stereotypes – about the international drug trade and its participants. The next section considers how the problems might be addressed.

## V RESTORING PROPORTION IN SENTENCING

The proportionality analyses described in the previous chapter identified that current sentencing decisions are not proportionate and therefore not justifiable from an international human rights perspective because of the flawed empirical and normative basis for sentencing decisions. The preceding doctrinal analysis reveals that there are good arguments that some of the common law rules used in practice to guide sentence formulation are in turn inconsistent with ultimate appellate authority and/or the original intent behind the legislative provisions that guide sentence formulation. Nevertheless, current interpretations of the law – including the circumlocution that all importation offences are objectively serious and require strongly deterrent penalties – are now so entrenched that an empirically and normatively sentencing framework cannot be resurrected from the current domestic patchwork.

[102] Section 16A(2) requires that the court must take into account certain matters 'as are relevant and known to the court.'

### *A Redefining reality*

Theoretically, the required doctrinal change involves recognition that intermediate appellate authority incorrectly defines importation offences in a manner that perpetuates empirically invalid stereotypes that pre-empt and distort the exercise of sentencing discretion. The impugned definition is an amalgam of stereotypes about the international drug trade –*exporting disease, death and violence to the world* – its participants –*racketeers* – their motivations – *greed* – the harms caused by this trade – *widespread violence, death and disease* – and how best to address the problem – *deterrent sentencing*. Hypothetically, if these stereotypes were addressed, it would follow that because typical offences – such as those described in the sentencing vignettes in the previous chapter – are not 'particularly serious,'[103] and because offenders are not particularly culpable – having regard to the explanations for their offending and the structure of this segment of the international drug trafficking market – proportionate offences should be correspondingly low. It would also follow from the common law doctrine of proportionality, which requires that penalties are commensurate with the gravity of the offence committed, that high tariffs could not be justified. But the gulf between reality and legal reality may be too great to bridge.

Sentencers in practice treat the assessment of offence seriousness as largely a question of law rather than fact. Excision of the impugned stereotypes would require sentencers to approach offence seriousness as a question of fact that must be addressed against the background of the policy and factual context in which each offence was committed. But it is virtually impossible for courts to obtain an adequate understanding of the factual context for these offences. This is because the operation of the international drug trafficking market is beyond the personal experience or general knowledge of sentencers, and is inaccessible to all but academic scholars due to the dearth of official information and empirical research. Moreover, there is such limited reliable publicly available information about this segment of the international drug market that this knowledge is also beyond the reach of other actors in the criminal justice system, including prosecutors, defence lawyers and the offenders themselves. This explains why courts have reached for and embraced – by way of judicial notice – these stereotypes, and why the stereotypes have gone unnoticed and unchallenged for so long.

[103] Within the meaning of art 3(5) of the *1988 Convention.*

Even if it were possible to arm sentencers with reliable information about the international drug market and its participants, and to educate sentencers about the aims of international drug control policy, there are other significant doctrinal and evidentiary matters that would need to be addressed. The most important of which is the issue of general deterrence. Intermediate appellate authority makes it clear that 'chief weight' is to be given to the objective of general deterrence, and the results of this research reveal that the sentences imposed on drug importers are almost exclusively justified by reference to the need for general deterrence in its utilitarian sense. Notwithstanding the history of s 16A(2)(ja) of the *Crimes Act 1914* (Cth) as described above, it is highly unlikely that the High Court would accept that general deterrence in its utilitarian sense has no role in sentence formulation for federal offences given the historic role of general deterrence in sentencing more generally.[104] Additionally, articulation of the inconsistency between general deterrence and the international drug conventions arguably goes beyond expertise of the Court. For instance, this inconsistency is not obvious without an appreciation that the conventions must be read subject to international human rights norms, a matter which is not expressly mentioned in the conventions.[105] Further, the High Court's well-established reluctance to import principles of international human rights law into domestic law makes this outcome unlikely. The High Court would likely require a much clearer statement of legislative intent to abolish the doctrine in its application to importation offences in conformity with Australia's obligations under the ICCPR and international drug conventions. It is highly unlikely that any federal government would be willing to make such a significant legislative change as long as the general public's understanding of the international drug trade is informed by the abovementioned stereotypes. The High Court would likely only act on some of the peripheral doctrinal inconsistencies identified above, where the underlying doctrine is well established, so that departure is plainly erroneous. For example:

- *Ensuring that courts give prior weight to an offender's prior good character*. This merely requires recognition that intermediate appellate authority requiring that limited

[104] For example, Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999, 207 [3.405].

[105] The obligations of the UN Charter must be given primacy over the obligations contained in the international drug conventions (per art 103 of the UN Charter); Boister, Neil, 'Human Rights Protections in the Suppression Conventions' (2002) 2(2) *Human Rights Law Review* 199, 218.

weight be given to an offender's prior good character is arguably inconsistent with High Court authority in *Ryan v The Queen*;[106]

- *Ensuring the courts consider hardship of custody for the offender's family.* This merely requires confirmation that intermediate appellate authority requiring that consequent hardship of custody for the offender's family is mitigating only in 'exceptional circumstances' is inconsistent with the statutory requirement in s 16A(2)(b) *Crimes Act 1914* (Cth).
- *Ensuring that courts do not set the non-parole period at 70 per cent of the head sentence*. This merely requires confirmation that established practice is contrary to High Court authority in *Hili v The Queen; Jones v The Queen*, and possibly also guidance for sentencers on matters that ought to justify a lesser non-parole period, such as prior good character, remorse, the absence of any need for personal deterrence or hardship of custody for the offender or his family members.
- *Ensuring that courts do not inappropriately rely on 'comparative sentences.'* This merely requires acknowledgement that courts have, in practice, inappropriately relied on 'comparative sentences' to define the sentencing range, contrary to *DPP v Dalgliesh*,[107] and possibly also proscription on the use of 'comparative sentencing tables' by prosecutors in favour of submissions confined to matters of sentencing principle.

Another option for bringing the law into line with reality, might be the issue of a 'sentencing guideline' to assist sentencers to navigate the complex factual and policy context in which the sentencing of drug importers takes place. The formal identification and countering of stereotypes with the best available evidence, and the elucidation of potential areas of human rights concern, would go a long way towards repairing the empirical foundation for sentencing. However, there is presently no federal sentencing guidelines council, and therefore no statutory framework for the issue of a federal sentencing guideline. The idea was first proposed by the Australian Law Reform Commission in its 1980 report *Sentencing of Federal Offenders*, with criticisms about the empirical foundation for sentencing which remain apposite today:[108]

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[106] *Ryan* (n 83).

[107] *DPP v Dalgliesh* (n 91).

[108] Australian Law Reform Commission, *Sentencing of Federal Offenders*, No 15 Interim (1980) ('ALRC 1980') [442]-[45]; the report recommended the establishment of a Sentencing Council of Australia comprising nine

> …a system which does nothing to prepare judges for such a serious business as sentencing, which relies very largely on informal, unstructured ways of acquiring knowledge, a methodology which defends untutored personal idiosyncrasy and relies heavily upon the haphazard chance factor of appeals is plainly in need of reform. It is out of step with a more professional and principled approach to determinations about the liberty and punishment of convicted offenders.[109]

This research highlights that the nature of federal criminal law, specifically its emphasis on international or treaty-based crimes, and the complex factual and policy context for these offences, underscores the need for a federal sentencing guidelines council to support sentencers in this difficult task. In 2012 the Sentencing Council for England and Wales issued the *Drug Offences Definitive Guideline* (the 'Guideline') which did just that. The Guideline aimed to reduce the length of custodial sentences imposed on drug 'mules,' which it defined as offenders who 'under the direction of someone else, carries…drugs across the border either in their luggage or on their person.'[110] The Guideline provided 'starting points,' 'sentencing ranges,' and a list of relevant factors for sentence formulation based on the offender's 'role' as 'leading' (including 'using a business as a cover'), 'significant' (including 'operational or management function within a chain') or 'lesser' (including 'performs a limited function under direction'), as well as relevant aggravating and mitigating factors (including 'sophisticated nature of concealment' versus 'lack of sophistication of nature of concealment.')[111] There is some evidence that tariffs for mules decreased following the introduction of the Guideline, based on findings that three quarters of those in 'lesser' roles received sentences of less than four years.[112] However, the Guideline did little more than reinforce entrenched stereotypes about the international drug trade and participants, including that the tasks undertaken by an offender are a reliable proxy for both offender culpability and offence seriousness. In the researcher's opinion, this was a missed opportunity to repair the empirical foundation for the sentencing of drug importers in England and Wales. Nevertheless, it demonstrates the potential for using

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members, five of whom should be judges, with a function to review present sentencing practices and develop non-mandatory sentencing guidelines.

[109] Ibid [455].

[110] *Drug Offences Definitive Guideline* (UK).

[111] Ibid 3-8.

[112] Fleetwood, Jennifer, Polly Radcliffe and Alex Stevens, 'Shorter Sentences for Drug Mules: The Early Impact of the Sentencing Guidelines in England and Wales' (2015) 22(5) *Drugs: Education, Prevention and Policy* 428.

sentencing guidelines to reduce tariffs. The potential for harnessing the power of sentencing guidelines to inform sentencers about the international drug trade and international drug control policy, so that judicial notice is not taken of stereotypes, should not be underestimated. Ultimately, however, in circumstances where there is no federal sentencing council, change is likely to come about slowly, from the incremental re-education of governments and the general public about the realities of the international drug trade and the human rights consequences of strongly deterrent sentences, rather than from any common law or legislative change.

### *B Acknowledging the unintended human rights consequences of sentencing international drug traffickers*

Although the United Nations General Assembly and its organs have long recognised the potential for human rights violations in the implementation of international drug control policy, they have only comparatively recently acknowledged the potential for human rights violations in relation to domestic sentencing laws and practices for drug treaty offences.[113] Lines et al attribute this lag to the fact that international drug control policy preceded the establishment of the Universal Declaration of Human Rights by nearly five decades, by which time an ideological commitment to strict supply-side prohibition had become entrenched, resulting in a highly punitive 'no-holds-barred' ethos that was assumed to trump any human rights concerns.[114] To this end, widely used indicators of drug control 'success' day – such as the number, size and value of interdictions, number of arrests and prosecutions and length of sentences or number of executions – 'are also indicators of human rights risk, and in many cases, are actual evidence of human rights violations committed in the course of enforcing various drug-related laws.'[115] For this reason, many scholars have characterised international drug control policy as a triumph of ideological zeal over effective policy.[116] The fact that

[113] For instance, OHCHR, *Report of the United Nations High Commissioner for Human Rights Implementation of the Joint Commitment to Effectively Addressing and Countering the World Drug Problem with Regard to Human Rights,* UN DOC A/HRC/39/39 (14 September 2018).

[114] Rick Lines et al, 'The Case for International Guidelines on Human Rights and Drug Control' (2017) 19(1) *Health and Human Rights Journal* 231, 231; N Boister, *Penal Aspects of the UN Drug Conventions* ( Kluwer Law International, 2001) 59.

[115] Lines et al (n 114) 232.

[116] Dorn, Nicholas, Karim Murji and Nigel South, *Traffickers: Drug Markets and Law Enforcement* (Routledge, 1992); Franklin E Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973); Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press, Winchester, 1998).

lengthy custodial sentences imposed by Australian courts on international drug traffickers has escaped international criticism while the imposition of comparatively shorter periods of mandatory immigration detention of a comparatively small number of asylum seekers has attracted condemnation from the UNHRC may reflect the extent to which international drug traffickers have been demonised and thereby marginalised not only from mainstream political discourse, but from the attention of human rights guardians and experts.

This underscores the pressing need for human rights lawyers and scholars to identify and articulate the unintended human rights costs of disproportionate sentencing, to provide evidence of the problem and garner support for a solution. Identified human rights violations within the broader sample comprised:

- For all importers, the use of importers as instruments of the State to deter other potential offenders without any sound empirical or normative justification for doing so;
- For many importers (including the *human courier* in the vignette), enforced separation from their partners and infant children for an extended period, thereby interfering with their right to recognition of the importance of family (UDHR art 16(1), ICCPR art 23(1));[117]
- For many importers (including the *human courier* in the vignette), removal of their only opportunity for emancipation from servitude to black-market creditors whose business model directly benefited from prohibition policy, thereby interfering with their right to freedom from servitude (ICCPR art 8(2));[118]
- For many importers, removal of their only opportunity to earn sufficient income to meet their basic human needs in the face of unemployment and an absence of adequate social security, thereby interfering with their right to work (UDHR art 23);[119]

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[117] UDHR art 16(1) and ICCPR art 23(1) provide that: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' The preamble to the ICCPR relevantly provides: 'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…'

[118] ICCPR art 8(2): 'No one shall be held in servitude.'; UDHR art 4.

[119] UDHR art 23(1): '(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'

- For *online shoppers* who imported drugs to feed their own addiction, the imposition of lengthy custodial sentences for what is effectively drug use, contrary to the international drug conventions.[120]

The economics literature, which does not necessarily approach the problem of how to regulate the international drug trade from a human rights perspective, has a significant contribution to make to this conversation. Reuter has described the incarceration of drug traffickers as 'both expensive and inhumane without any of the intended gains.'[121,122] Reuter and Caulkins point out that lengthy custodial sentences do not have any measurable deterrent effect over and above short sentences precisely because the business model of illicit drug enterprises delegates enforcement risk to the low-level functionaries who are inevitably detected and rapidly replaced.[123] Beyond the abovementioned human rights costs, Reuter also points to a range of unintended adverse human rights consequences that are often mistaken as the 'drug problem' itself:

> Most of what currently concerns society as the drug problem is the consequence of prohibition and the policies implementing it; the violence in Mexico, the HIV associated with needle sharing in Russia and the acquisitive crime of addicts in Britain are all proximately the result not of drug consumption, but of the conditions that have been created by prohibition.[124]

The contribution that the economics literature can make to the effort to establish the over-incarceration of international drug traffickers as a human rights issue should not be underestimated.

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[120] Art 3(1) of the *1988 Convention* does not prohibit drug use, just 'production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug.'

[121] Peter Reuter, 'Ten years after the United Nations General Assembly Special Session (UNGASS): Assessing drug problems, policies and reform proposals' (2009) 104(4) *Addiction* 510, 515.

[122] Ibid.

[123] Jonathan P Caulkins and Peter Reuter, 'Dealing More Effectively and Humanely with Illegal Drugs' (2017) 46(1) *Crime and Justice* 95, 133; Mark Kleiman, 'The Problem of Replacement and the Logic of Drug Law Enforcement' (1997) 1(3) *Drug Policy Analysis Bulletin* 8, 9.

[124] Reuter (n 121) 513.

## VI Conclusion

This research confirms the predictions of academic economists that the international drug trade at Australia's border is populated by profit-motivated importation enterprises that exploit vulnerable individuals to do the high-risk work associated with trafficking, tracking, collecting or delivering drugs in return for a low fixed that reflects their desperate circumstances rather than the drug's market value.[125] These traffickers, like the drugs they carry, are fungible, expendable and readily replaceable, so that interdiction and incarceration has no measurable effect on drug supply, drug price or consumption rates.[126] The small quantities of drugs trafficked by these individuals compared with total domestic consumption of illicit drugs, and the very low rates of problematic use, mean that the harm that might have been caused but for interdiction, is trivial. Drug importers who are minimally culpable face average sentences of 9.8 years. Moreover, incarceration rates per kilogram of drug imported is inversely related to the drug quantity: with offenders importing less than 5kg of drugs sentenced to an average of 3.51 years per kilogram imported, compared with offenders who imported more than 100 kg, who were sentenced to 1.40 *months* per kilogram imported; notwithstanding that, viewed in global perspective and considering reliable empirical proxies for offence seriousness, any amount below several hundred kilograms is likely a trivial quantity. Consistently with the predictions of academic economists, a significant problem is that offence seriousness is assessed by reference to 'drug quantity,' 'drug value' and classification of 'offender role' notwithstanding that each is an empirically unsupported proxy for either offence harm or offender culpability.[127] Consistently with the predictions of human rights scholars, another problem is that sentences emphasise the objective of general deterrence beyond what is proportionate to offence seriousness properly assessed, and therefore to an extent unsupportable within a system that protects international human rights.[128] A further insight of this research is that intermediate appellate authority entrenches empirically unsupported assumptions about the international drug trade and its participants, including assumptions about the 'harm caused' by the international drug trade at Australia's border, and the

[125] Reuter and Trautmann (n 1); Reuter (n 121).

[126] Peter Reuter, 'Can Production and Trafficking of Illicit Drugs be Reduced or Merely Shifted?' (Policy Research Working Paper Series, No 4564, World Bank, March 2008).

[127] Reuter and Caulkins (n 123) 138.

[128] van Zyl Smit, Dirk and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *The Modern Law Review* 541, 547.

motivations of participants. As a result, intermediate appellate authority and sentencing practice diverge considerably from general sentencing principles, including relation to the assessment of offence seriousness, the setting of the non-parole period, and the use made of 'comparative sentences;' all of which tend to inflate sentences beyond what is doctrinally acceptable. Untangling each of these problems may be an insurmountable task unless government, sentencers, prosecutors, defence lawyers and the general public alike are persuaded that current sentencing practice ought to be aligned with international human rights norms. The next chapter considers how various actors in the criminal justice system and international drug control policy can be mobilised towards this goal.

# Conclusion and Recommendations

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*'[empirical research on the sentencing process] … can bring greater transparency to this important public function…and …foster a greater public understanding of sentencing and better inform policy makers and the judiciary themselves.'*[1]

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## I Introduction

In 2011 Heilman, in an article reviewing the international drug control regime, concluded that 'implementation of the various UN [drug] conventions into domestic law prompts concerns because some of the most vulnerable groups of society are affected by the drug conventions: drug addicts (who are already vulnerable to discrimination and poverty) and farmers in developing countries (who cultivate illicit crops because they often do not have an economically sound alternative).'[2] This research provides empirical evidence that international drug traffickers ought to be added to that list. By providing a direct window into sentence formulation, this research has uncovered a human rights problem that has hitherto gone unnoticed in Australia, but which likely exists the world over; the scapegoating of minimally culpable international drug traffickers in the global war against drugs. In so doing, this research has confirmed what some academic economists (such as Reuter and Caulkins), some criminologists (such as Fleetwood) and some human rights lawyers (such as Green, Snacken and Van Zyl Smit) have foreshadowed for decades.

There are no easy solutions to the problem. Numerous participants in international policy and domestic law enforcement each have a role to play in re-educating governments and the public about the realities of the international drug trade and the unintended human rights consequences of sentences that do not comport with international human rights norms. This research has significant implications for international human rights law, domestic sentencing law, domestic law enforcement, domestic human rights oversight, international supervision of

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[1] Kate Warner, 'Sentencing Scholarship in Australia' (2006) 18(2) *Current Issues in Criminal Justice* 241, 257.

[2] Daniel Heilmann, 'The International Control of Illegal Drugs and the UN Treaty Regime: Preventing or Causing Human Rights Violations?' (2011) 19 *Cardozo Journal of International and Comparative Law* 237, 266.

the international drug conventions and for broader debates about the use of the death penalty, irreducible life sentences and lengthy custodial sentences for international drug trafficking offences.

## II THE THEORETICAL VALUE OF PROPORTIONALITY ANALYSIS

This research makes a significant theoretical contribution to international human rights jurisprudence by demonstrating, for the first time, that the international human rights doctrine of constitutional proportionality is a theoretically sound and practically workable tool for assessing whether a sentence passed by a domestic court is consistent with international human rights norms. This novel extra-judicial use of the doctrine has significant potential to enhance the international supervision of sentencing not only for domestic cross-border trafficking offences, but for other domestic offences created pursuant to the international drug conventions, including offences relating to drug production, manufacture, domestic trafficking and supply. Moreover, the doctrine could be used in this way in relation to other transnational crimes, such as money laundering, or bribery of foreign officials.[3] The online availability of sentencing remarks in many countries provides the potential for unprecedented insight into domestic sentencing law and practice, which would facilitate these analyses.

## III IMPLICATIONS FOR DOMESTIC SENTENCING

The implications of the findings for the domestic sentencing of drug importers were discussed in the previous chapter. The findings also reveal systemic disparities in respect of the sentencing of drug importers, which may be replicated in relation to other types of offences. First, the systemic disparity between offence gravity as assessed in practice and offence gravity as properly understood, which in turn results in a systemic disparity between offence seriousness and the punishment imposed (or common law 'disproportionality'). This arose from the complex factual and policy environment in which the sentencing of international drug traffickers took place. In the face of this complexity, stereotypes masquerading as common law rules readily infected domestic sentencing practice. For example, rules about 'offence

[3] For an authoritative discussion of the definition of 'transnational crime' 'multinational suppression treaties' see Neil Boister, 'Further reflections on the concept of transnational criminal law' (2012) 6(1) *Transnational Legal Theory* 9; Neil Boister, 'Transnational Criminal Law?' (2003) 14(5) *European Journal of International Law* 953; Neil Boister, *An Introduction to Transnational Criminal Law* (OUP, 2012).

seriousness' (as in the 'great social consequences rule'),[4] 'aggravating factors' (as in 'a profit motive is aggravating' or a 'managerial role is more culpable'), 'mitigating factors' (as in 'prior good character is of limited weight'), or 'exceptional circumstances' requirements that provide an impermissible gloss on legislative requirements (as in 'hardship of custody for the offender's family is not mitigating unless exceptional'). Moreover, the doctrine of common law proportionality was not invoked to realign punishments with offence gravity properly assessed, presumably because of the lack of understanding of the underlying disparity with respect to the assessment of offence seriousness. Similar factual and policy complexity arises in relation to terrorism offences and money laundering offences for example. Second, the systemic disparity between intermediate appellate authority and the general principles of sentencing approved by the High Court. In this research the disparity arose from a misunderstanding of general principles (as in the misunderstanding of the *Markarian*-yardstick or the rule requiring de-emphasis of the offender's prior good character), the misinterpretation of legislation (as in the misinterpretation of s 16(2)(ja) of the *Crimes Act 1914* (Cth) in *El Kharni*),[5] and the development of a practice that purported to comply with authority but which was fact in direct conflict with authority (as in the practice of setting the non-parole period at 70 per cent of the head sentence contrary to *Hili v The Queen*).[6] It even arose due to the incorrect use of comparative sentences to prop up inflated sentencing tariffs that were doctrinally or evidentially unsupportable, contrary to the rule of law, as occurred in *The Queen v Kilic.*[7] Third, the systemic disparity between common law rules and the normative requirements of international human rights law. The rule that 'general deterrence' is a legitimate sentencing objective is the exemplar. The ability of criminal justice actors to recognise these departures – even if courts are bound by the doctrine of precedent to apply the common law – is the first step towards addressing them. Each of these findings should concern all arms of government because of the constitutional responsibility to ensure systemic proportionality and consistency in sentencing. The results lend weight to arguments for the establishment of a federal sentencing council to better monitor sentencing disparity and support

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[4] See Chapter 8 'The Disproportionality of Sentences Imposed by Australian Courts on Drug Importers: Causes and Solutions.'

[5] *DPP (Cth) v El Karhani* (1990) 97 ALR 373.

[6] *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520, [12].

[7] *The Queen v Kilic* (2016) 259 CLR 256.

sentencers in the execution of this vital task which has demonstrable human rights consequences when things go systemically wrong.

## IV IMPLICATIONS FOR DOMESTIC LAW ENFORCEMENT

The research provides a rich source of material for law enforcement agencies ('LEAs'). First and foremost, it puts into perspective the failure of LEAs to identify the ultimate investors in almost any ongoing importation enterprise – noting that none of the offenders within the sample were ultimate investors, even where the investigations were long-running and deployed telecommunications and other electronic surveillance. Viewed in light of the economics literature, this can be understood as reflecting the impossibility of enforcing supply-side prohibition against a fungible commodity that can be so readily hidden within millions of ordinary international commercial transactions undertaken each day. The ubiquitous business model that outsources entirely to fee-for-service contractors the risk of arrest and subsequent incarceration is wickedly effective precisely because the market is competitive. There are likely no 'kingpins' behind importations at Australia's border, because market participants are so numerous. Moreover, there is little that LEAs can achieve in terms of disrupting drug importation enterprises or arresting 'key players,' because market participants are so numerous, and confiscated drugs so readily replaced; indeed, the business model anticipates and accounts for product losses by interdiction.

Nevertheless, LEAs can still play a major role in the implementation of international drug policy by reinforcing the statutory prohibition on drug importations through the publicity given to high-profile drug seizures. In other words, LEAs operationalise general deterrence, even if seizure is a pyrrhic victory. Based on available research, publicity of significant drug seizures has a more important role in general deterrence than the combined effect of all sentences. Along similar lines, the research explains why it would be unproductive for LEAs to invest in trying to arrest and charge the investors behind importation enterprises. To do this, LEAs would need to let drugs 'run' under the cover of controlled operations certificates,[8] to identify and follow money flows, rather than merely arresting the first persons to physically handle the imported drugs or the money. However, the arrest of an 'ultimate investor' would also be a pyrrhic victory if the market is genuinely competitive, because the 'ultimate investor' will be readily replaced by another. Arresting and charging an 'ultimate investor' at the Australian border

[8] Part IAB *Crimes Act 1914* (Cth).

would bear no comparison to the capture of politically subversive figures such as Pablo Escobar or Joaquín Archivaldo Guzmán Loera (known as 'El Chapo'), who have established and maintained monopolistic international drug trafficking routes through systematic violence and corruption of government officials in Colombia and Mexico respectively.

The research therefore underscores the predictions of the economics literature that reducing or even stopping interdiction efforts will have little or no impact on drug supply, price or consumption levels in Australia because this market is competitive. It will undoubtedly take significant efforts to re-educate law enforcement, the government and the community before the logic of this proposition is generally accepted. In the meantime, the results of this research suggest that LEAs should focus on disrupting the large-scale maritime importations, because this will have the greatest impact on general deterrence; but that is not to say that strongly deterrent sentences should be imposed on the persons who are arrested in relation to these importations. This research indicates that those persons will inevitably be fee-for-service contractors whose culpability is minimal. LEAs will need to accept that most fee-for-service contractors are both offenders *and* victims of the black-market drug trade. This will be a difficult adjustment, but it must be done if the unintended human rights consequences of the international drug trade are to be avoided.

## V IMPLICATIONS FOR DOMESTIC HUMAN RIGHTS OVERSIGHT

This research has characterised the sentencing by Australian courts of drug importers as a human rights issue for the first time, and this has significant implications for domestic human rights oversight bodies, such as the Australian Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission. Based on the results of the proportionality analysis, the sentence imposed on a typical drug importer is arbitrary in violation of art 9(1) ICCPR because the sentence is formulated based on empirically incorrect assumptions about the drug trade and its participants, and the normatively unsupportable objective of general deterrence, neither of which can be tolerated in exercise of the 'margin of appreciation.'[9] Additionally, because Australia provides no domestic mechanism by which a prisoner may obtain review of the lawfulness of his detention in accordance with the provisions of the

[9] Chapter 2 'Theoretical Approach' and Chapter 7 'Proportionality Analysis.'

ICCPR, Australia is in breach of art 9(4).[10] The scale of the problem should not be underestimated. Within the sample, 97 per cent of importations posed no measurable threat to public health or State security and yet median sentences exceeded the average sentence for manslaughter.[11] To the extent that these sentences cannot be justified by reference to proportionality reasoning they are arbitrary. The domestic sentencing of drug importers therefore has imposed, and continues to impose, a monstrous human cost on offenders and their families and communities, in respect of what are properly characterised as trivial offences in the context of international drug control policy.

International drug control bodies presently pay 'insufficient attention' to the unintended human rights consequences of the domestic implementation of the international drug conventions, and provide insufficient support to States on how to address the unintended human rights consequences of the domestic implementation of the international drug conventions.[12] It is therefore incumbent on domestic human rights oversight bodies to fill that void. Based on the results of this research, the biggest challenges for domestic oversight bodies will be garnering support for an unsympathetic group of prisoners who have been condemned in public discourse for the past half century.[13] After that, the challenge of articulating the lack of any empirical or normative basis for strongly deterrent sentencing, and dislodging the courts' commitment to deterrent sentencing will be a key strategic priority. Domestic oversight bodies might advocate for the provision of better support for courts when sentencing federal drug importers, possibly by way of the establishment of a federal sentencing council.[14] They might also agitate for the creation of a domestic review mechanism compliant with art 9(4). A domestic review mechanism could, for example, create a right of appeal to the Full Court of the Federal Court by any prisoner for review of his sentence on the grounds that the sentence violates the offender's rights under the ICCPR. Cases could either be remitted back to State courts for re-sentence or re-sentencing could occur before the Federal Court. Longer term strategies would

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[10] Because, as discussed in Chapter 4 'International Drug Trafficking Policy Context,' there is no mechanism for constitutional or other review of sentences for compliance with the ICCPR under domestic law.

[11] NSW Bureau of Crime Statistics and Research, 'Sentencing Snapshot: Homoicide and Related Offences' (Issue Paper, 76, February 2012).

[12] Lines, Rick et al, 'The Case for International Guidelines on Human Rights and Drug Control' (2017) 19(1) *Health and Human Rights Journal* 231, 234.

[13] Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press, Winchester, 1998).

[14] As discussed in Chapter 8 'Discussion of Results.'

include supporting research to better understand the pathways into crime for convicted drug importers, and the consequences for those persons after they have served their sentences and been repatriated.

### VI Implications for domestic human rights charities

This research highlights the potential for international scrutiny to be brought to bear on the unintended human rights consequences of domestic sentence formulation via strategic public interest litigation. A prisoner detained in an Australian prison may make a complaint to the UNHRC that his detention is arbitrary contrary to art 9(1) ICCPR, and further that Australia is in breach of its obligation under art 9(4) to provide a mechanism for each prisoner to seek review of the lawfulness of his detention in accordance with the provisions of the ICCPR, contrary to art 9(4).[15] The purpose of this mechanism is to facilitate the identification of a systematic pattern of human rights violations, to provide guidance to States on how to implement international human rights domestically, and to give concrete meaning to human rights. This research may be of strategic interest to domestic human rights organisations. An application by a prisoner whose involvement in an importation was procured by a manipulative black-market creditor would provide a suitable vehicle for a meaningful exploration of the issues; and this research provides an example of how a persuasive argument may be made by reference to proportionality reasoning.

### VII Implications for international supervision of drug control

There is a vast gap between discourse and practice on the management of the unintended human rights consequences of the domestic implementation of international drug control policy (Lines et al, 2017, 234). This research takes two important steps towards closing that gap. First, it demonstrates that the international doctrine of constitutional proportionality can be operationalised to identify when domestic sentence formulation is inconsistent with international human rights norms. Second, it provides evidence of that gap in relation to the sentencing of drug importers in Australia. This may in turn provide a basis to suspect that there is a similar gap in other countries with a similar common law heritage, such as England and Wales, Canada and the United States.[16] Beyond this, the research has established that the

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[15] Because, as discussed in Chapter 4 'International Drug Trafficking Policy Context,' there is no mechanism for constitutional or other review of sentences for compliance with the ICCPR under domestic law.

[16] Any risk may be ameliorated by the country's domestic or constitutional protections for human rights.

international doctrine of constitutional proportionality has the potential to be deployed to ascertain whether the domestic implementation of other treaties is consistent with international human rights norms too.

### *A International drug control agencies*

Several insights from this research can be readily applied by international drug control agencies to improve supervision of domestic compliance with international human rights norms. The UNODC could develop 'human rights indicators' to be used alongside present law enforcement indicators in the Annual Report Questionnaires submitted by each country.[17] Present indicators, which include 'number of arrests' and 'quantity of drugs seized,' could be expanded to include 'number of arrests with firearms involvements,' 'number of arrests with corruption involvements,' and 'average sentence per kilogram of drugs imported,' for example. The UNODC could also require each country to describe the nature of its 'drug problem' in global perspective, for example by reference to the levels of problematic use, systemic violence, political corruption or political instability attributable to the drug trade. This would assist countries to evaluate whether their broader domestic health, education and law enforcement strategy is proportionate to the domestic 'drug problem,' and help to contextualise the role of sentencing within that framework.

### *B UNHRC*

This research has significance for the United Nations Human Rights Committee ('UNHRC'), because it demonstrates precisely how the international human rights doctrine of constitutional proportionality can be deployed to scrutinise the evidential and normative basis of sentencing, without misapplying the 'margin of appreciation,' as has occurred in some UNHRC decisions.[18] It also highlights areas in which domestic sentence formulation can generate unintended human rights consequences, such as by use of strongly deterrent sentences, or through domestic law that arrogates to itself the right to define reality, as in Australian law that defines importation sentences as 'objectively serious.'[19]

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[17] As discussed in Chapter 4 'International Drug Trafficking Policy Context'.

[18] See Chapter 2 'Theoretical Approach.'

[19] See Chapter 8 'Discussion of Results.'

### *C Lessons from Combined Maritime Forces*

Finally, this research has identified that through Combined Maritime Forces ('CMF')[20] 33 nations are already participating in what is arguably an exemplar human-rights-compliant supply-side prohibition programme. Vast quantities of drugs, which dwarf the quantities seized at the national border, are successfully interdicted and seized each year without unnecessarily scapegoating the minimally culpable crew members of the dhows containing the drugs. It is incumbent upon international drug control bodies to consider whether and, if so how, the comparatively punitive domestic criminal justice response to drug importers can be justified in light of alternatives such as the interdiction-seizure-release/deportation model adopted by CMF. Academic economists undoubtedly have a valuable contribution to make to this discussion.

## VIII IMPLICATIONS FOR BROADER DEBATES ABOUT LENGTHY SENTENCES

This research has broader implications for the sentencing of international drug traffickers in countries which continue to impose the death penalty, irreducible life sentences or lengthy custodial terms on traffickers, as well as for countries such as Australia which by comparison impose moderate sanctions.[21] This research establishes that the doctrine of constitutional proportionality provides a theoretically coherent and practically workable means of identifying whether a particular sentence is incompatible with international human rights norms in relation to any case. First, as a procedural matter, all domestic laws and information feeding into sentence formulation must have a defensible evidential and/or normative basis that is consistent with the protection of international human rights. Second, general deterrence has no acceptable evidential or normative basis consistent with the protection of international human rights and therefore must not be used to formulate or justify a sentence. Third, offence gravity must be assessed relative to the policy considerations underpinning the international drug conventions, namely the threat that the commission of the offence poses to public health or State security. These general principles can easily be applied to evaluate domestic sentences posed on international drug traffickers anywhere in the world. For example, the imposition of the death

[20] 'Combined Maritime Forces <https://combinedmaritimeforces.com/> accessed 18 August 2019, as discussed in Chapter 7 'The Disproportionality of Sentences Imposed by Australian Courts on Drug Importers: Causes and Solutions.'

[21] For an overview of the literature see, Dirk Van Zyl Smit, *Life imprisonment: a global human rights analysis* (Harvard University Press, 2019).

penalty on traffickers readily violates all three principles without the need to invoke the additional violation of the right to life. Similarly, the imposition of irreducible life sentences, or other lengthy sentences, readily violates all three principles without the need to invoke the additional violation of the right to human dignity. Applied to Australia and other countries with similar tariffs for drug importers, the principles highlight that the relative leniency of domestic sentences by comparison with countries such as Indonesia is no answer to the question of whether those sentences are compatible with international human rights norms.

## IX FURTHER RESEARCH

There are numerous areas for further research. Criminological research is needed to provide more information on the pathways into crime for drug importers. This research could be conducted via ethnographic studies of incarcerated drug traffickers in Australian gaols. Criminological research is also needed to identify the human rights cost of imposing lengthy custodial sentences on drug importers, including:

- What happens to importers after they have served their sentence and are deported? Specifically, what happens to black market debts? Are the debts forgiven, or do offenders continue to accumulate interest while in gaol?
- What is the human cost for children of incarcerated importers? Specifically, what happens when the importer is the primary breadwinner? What happens if the offender has a black-market debt? Would it make a difference if foreign importers were repatriated to serve their sentence in their home country via prisoner exchange schemes?

Economics research is needed on the nature of the international drug market at Australia's border, specifically:

- Is the market, as suspected, competitive? If not, why not?
- How many importers are likely operating at any one time?
- What is the impact of the Combined Maritimes Forces interdictions operations on supply, prices and general deterrence?

Criminological and/or law enforcement research is needed on whether and, if so, how, drug importations threaten State security, for instance:

- Do any foreign governments sanction large-scale exports to Australia and, if so, how?

## X Final Remarks

This research contributes to the growing literature on the unintended human rights costs of the over-incarceration of international drug traffickers,[22] to the small literature on how the international human rights doctrine of constitutional proportionality might be harnessed to address this problem,[23] and to the dearth of empirical research on the sentencing process both locally and globally.[24] Rather than inferring that Australian sentences are likely to be compliant with international human rights norms by reference to a comparative sentencing analysis,[25] or because Australia does not impose the death penalty, this research illuminates 'how judges approach the sentencing task, their use of statistics, appellate guidance and the factors influencing sentencing decisions.'[26] The results thereby identify not only a lack of compliance with international human rights norms, but the causes of that disproportion – as the evidentially and normatively problematic common law rules that guide the exercise of the sentencing discretion. And in so doing, the results suggest that the international human rights doctrine of constitutional proportionality can be harnessed to address the third wave of unintended human rights consequences of international supply-side prohibition policy. The first wave was the criminalisation of drug use, which entrenched addicts in a cycle of crime in violation of their human dignity via a proxy war on drug users. This was adequately addressed in some countries through the decriminalisation of drug use and the diversion of drug users into treatment and rehabilitation programmes. The second wave was the displacement of peasant farmers in traditional crop-growing regions via a proxy war on drug producers, which caused widespread impoverishment and rendered them vulnerable to the entreaties of established drug cartels. This was addressed by the international drug control bodies through

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[22] Green (n 13); Dirk van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *The Modern Law Review* 541; Dirk van Zyl Smit, *Life imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019); J Fleetwood, 'Five Kilos: Penalties and Practice in the International Cocaine Trade' (2011) 51(2) *British Journal of Criminology* 375; Jennifer Fleetwood, 'Drug Mules in the International Cocaine Trade: Diversity and Relative Deprivation' (2010) November (192) *Prison Service Journal* 3; Jennifer Fleetwood, 'Mafias, Markets, Mules: Gender Stereotypes in Discourses About Drug Trafficking' (2015) 9(11) *Sociology Compass* 962.

[23] Sonja Snacken, 'Resisting Punitiveness in Europe?' (2010) 14(3) *Theoretical Criminology* 273.

[24] Warner (n 1), 245.

[25] As discussed in Chapter 2 'Theoretical Approach,' this was not possible due to difficulties with both the availability of sentencing data and the difficulties of cross-national comparisons.

[26] Warner (n 1) 259-60).

alternative development programmes, though there is some doubt as to whether these initiatives have been successful. It is over 20 years since Green wrote her ground-breaking book denouncing the over-incarceration of international drug traffickers via a proxy war which rebranded as the enemy persons properly characterised as victims of the lucrative black market trade enabled by prohibition.[27] The results of this research demonstrate that international human rights law gives us a fresh perspective from which to re-examine this the third wave of unintended human rights consequences. This perspective characterises the imposition of severe penalties as a violation of the freedom from arbitrary detention. Multiplied across the number of international drug traffickers the world over, the human cost is significant.

After the first wave of unintended human rights consequences, courts in most countries readily adapted to the re-characterisation of the drug addict as a victim of the in the war on drugs. There is every reason to hope that, in time, LEAs, courts and the public will also accept the re-characterisation of the international drug trafficker as a pawn in a game played usually for profit by black-market profiteers who are effectively immune from law enforcement detection. Faith that not incarcerating the overwhelming majority of drug importers will not result in more drug imports – just fewer minimally culpable people in gaol – is readily accepted by academic economists based on economic theory, but it will take considerable effort to persuade other actors in the criminal justice system and the public. Acknowledgement of this problem via empirical evidence such as is provided in this research is necessary first step towards preventing the intolerable human cost of arbitrary detention. The national and international response to this third wave of unintended human rights consequences of international drug control policy is a test of whether the continued social experiment of supply-side prohibition can be justified, or whether international drug traffickers will continue to be caught in the cross-fire in the war on drugs.

[27] Green (n 13).

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