The Hon Justice M J Beazley AO
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Discretion and the rule of law in the criminal justice system♠

1 The breadth of discourse on the meaning of the rule of law makes identifying its central content difficult, often context specific and always contentious. It is contentious because the phrase '*rule of law'* can too readily be used as a convenient mantra to clothe the institutional law as we know and practice it with high respect and to distinguish ourselves from those countries whose systems of law do not protect the rights of the individual in the way we do.

2 But is the cloth woven with gold or do we fool ourselves, as did the emperor in his new clothes in Hans Christian Andersen's fairy tale? Those who espouse the rule of law as the underpinning of a just society will insist that the cloth is indeed golden. It is after all an underlying assumption of the Australian constitution.[1] Accepting that is so, the question becomes how well, as a society, do we wear the golden cloth?

3 One way to test this is to consider the extent to which a society permits itself to be governed by unaccountable executive action. That is a huge topic. For that reason, I propose to confine my attention in this paper to the conferral and allocation of discretion in the criminal justice system, and to do so be reference to two matters only. The first is the offence of consorting.[2] The second is the coupling of mandatory minimum sentences with forms of aggravated offences.

♠ I express my thanks to my Researcher, Myles Pulsford, for his extensive research and invaluable assistance in the preparation of this paper.
[1] *Australian Communist Party v The Commonwealth* [1951] HCA 5; 83 CLR 1, 193 (Dixon J).
[2] The NSW consorting laws are presently subject of High Court challenge: Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales.

Discretion and the rule of law

4 Discretion plays a central but complex role in the rule of law. When describing the rule of law,[3] AV Dicey stated that the rule of law meant:

> "… the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."[4]

5 In this aspect of Dicey's definition of the rule of law, discretion is associated with the potential for arbitrariness, which is "*the antithesis of the rule of law*".[5] Lord Bingham considers that for the purposes of the rule of law, "*questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion*".[6] Gleeson CJ has explained that:

> "All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice".[7]

6 But discretion in fashioning outcomes is not of itself offensive to the rule of law provided it satisfies the essential aspects of the rule of law. "*It is impossible, and probably would be in any event unwise, to imagine a legal system consisting entirely of fixed, precise, mechanical rules. Every legal system will have some resort to discretion*".[8]

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[3] See AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 187 ff.
[4] Ibid 202.
[5] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72.
[6] Bingham, above n 5, 73.
[7] *Wong v R* [2001] HCA 64; 207 CLR 584, 591.
[8] John Calvin Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 189, 213.

7 Equality before the law is an essential attribute. Lord Bingham has stated that the rule of law requires that "*the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation*".[9]

8 That principle has been articulated in Australian jurisprudence as follows:

> "Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect."[10]

9 However, the difficulty of crafting rules to take into account all potential relevant exceptions is immediately apparent.[11] The rule of law test will be passed if the exercise of the discretion is not arbitrary. Lord Bingham explains that the rule of law requires that there is "*no such thing as an unfettered discretion, judicial or official*".[12] His Honour observed that "[*t*]*he broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness* …".[13]

10 The requirement for constraint on governmental discretion, whether judicial or administrative, serves another aspect of the rule of law: certainty. Lord Bingham has explained that in the rule of law, "*the law must be accessible and so far as possible intelligible, clear and predictable*".[14] Similarly, Raz states that one principle of the rule of law is that "[*a*]*ll laws should be prospective, open and clear*."[15] This aids the function of the law in *"guiding the behaviour of its subjects*."[16] Hayek, for example, defined the rule of law as meaning:

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[9] Bingham, above n 5, 73.
[10] *Wong v R* [2001] HCA 64; 207 CLR 584, [65] (Gaudron, Gummow, Hayne JJ) (emphasis in original).
[11] David Bennett 'Rules that ought not be applied – the ultimate iconoclasm' (2010) Winter *Bar News* 102, 104.
[12] Bingham, above n 5, 73.
[13] Ibid.
[14] Ibid 69.
[15] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198.

> "… that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[17]

11 The law cannot be clear and predictable, and its operation certain, if the executive and the judiciary have a discretion at large to do as they please.

12 Clarity and predictability are served by another aspect of the rule of law: accountability for the exercise of public functions. Lord Bingham states that under the rule of law, "*ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers*".[18] Justice Brennan has explained that:

> "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly."[19]

13 The requirement for accountability applies equally to the judiciary and is attended to through mechanisms such as the requirement to provide reasons and availability of appeal. Interestingly, the absence in some definitions of the rule of law to include this requirement of accountability of the judiciary may reflect the fact that many commentators on the rule of law identify the independence of the judiciary as one of its central elements.[20] However, the misuse of the discretion vested in the judiciary may be equally as harmful for the rule of law as executive action.[21]

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[16] Ibid.
[17] FA Hayek, *The Road to Serfdom* (1944), 54 quoted in Raz, above n 15, 195.
[18] Bingham, above n 5, 78.
[19] *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, 70-71 (Brennan J) (citations omitted).
[20] See eg Raz, above n 15, 200-201.
[21] See Dyson Heydon "Judicial activism and the death of the rule of law" (2003) 47(1) *Quadrant* 9. See also Raz, above n 15, 201.

14 I have put forward three requirements of the rule of law: lack of arbitrariness, certainty and predictability, and accountability. Let me move to examine how well these three aspects of the rule of law function in the two areas I have identified for consideration.

Discretion in the criminal justice system

15 The criminal law, like most areas of law, has undergone significant expansion throughout the twentieth and twenty first century. Stuntz has described the phenomenon by reference to a growth in the breadth and depth of the criminal law; "[*c*]*riminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over*".[22]

16 The extent of the conduct that is proscribed as criminal calls attention to the implementation of the criminal law. Prosecutorial discretion is embedded in the criminal justice system, it being well established that it is for the prosecuting authorities and not the courts to decide who should be prosecuted and for what.[23] The consequences in allocating discretion to prosecuting authorities, including the police, can have stunning consequences.

17 Stuntz states that the broad scope of conduct that has been criminalised means that "*the law as enforced will differ from the law on the books*".[24] Stuntz emphasises that the enforcement of the law will be "*defined by law enforcers, by prosecutors' decisions to prosecute and police decisions to arrest*".[25] In respect of the depth of the criminal law, Stuntz argues that there is a "*transfer of adjudication from courts to prosecutors*".[26]

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[22] William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 505, 512.
[23] *Maxwell v The Queen* [1996] HCA 46; 184 CLR 501. See also *Likiardopoulos v The Queen* [2012] HCA 37; 86 ALJR 1168, [2]-[4]; *Elias v The Queen* [2013] HCA 31; 87 ALJR 895, [34]-[35].
[24] Stuntz, above n 22, 519.
[25] Ibid.
[26] Ibid.

18 A simple example demonstrates the point.[27] A 12 year old indigenous boy broke into a fire station and stole several rulers, balloons and a couple of cans of soft drink. He also stole a laptop computer. He was charged with the offence of aggravated breaking and entering. The issue before the court was whether the 12 year old boy had the capacity to know that his actions were wrong, there being a rebuttable presumption in the law in New South Wales that a young person between 10 and 14 years of age does not have the necessary knowledge to have a criminal intention. The prosecution must therefore prove, not only the elements of the offence, but also that the young person knew that the conduct was seriously wrong as opposed to merely naughty.

19 The 'aggravating' feature of the offence was being 'in company'. It slipped out ("*slipped out*" because it was not relevant to the question of doli incapax) that the person with whom the 12 year old was in company was his four year old female cousin. If that information was correct, there was a serious question whether the offence had been committed at all. The four year old, by law, was incapable of committing an offence. [28] Even if the offence could be committed in these circumstances, this case could be viewed as an inappropriate and unaccountable exercise of prosecutorial discretion.

20 The developments in the extent and allocation of discretion in the criminal justice system have significant ramifications for the rule of law, the relevant aspects of which have been sketched earlier. Indeed, Raz identified the discretion of the police and prosecutors as one of eight important principles of the rule of law:

> "*The discretion of the crime preventing agencies should not be allowed to pervert the law.* Not only the courts but also the actions of the police and the prosecuting authorities can subvert the law.

[27] See *RH v Director of Public Prosecutions* [2014] NSWCA 305.
[28] *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

> The prosecution should not be allowed, *e.g.* to decide not to prosecute for commission of certain crimes, or for crimes committed by certain classes of offenders. The police should not be allowed to allocate its resources so as to avoid all effort to prevent and detect certain crimes or prosecute certain classes of criminals."[29]

Consorting

21 Andrew McLeod[30] tells us that whilst the crime of consorting has its statutory foundation in early twentieth century antipodean vagrancy laws, the offence first being introduced in New Zealand in 1901,[31] it is "*part of a long, knotted strand of legal history that stretches from the 14th century to the present*".[32] As he points out, "*the concept of conditioning criminal liability on the company a person keeps*" is not modern.[33] Rather, "*Parliaments have for centuries experimented with legislation to reform or suppress those classes of people considered in their time to be detestable, disreputable and dangerous*".[34]

22 The offence of consorting has found newfound prominence in Australia in the fight against organised crime. Section 93X of the *Crimes Act 1900* was introduced in 2012[35] in a suite of amendments that were said to "*ensure that the provisions of the Act remain effective at combating criminal groups in NSW*".[36] The purpose of the Bill, which was introduced on behalf of the Police Minister, was explained as being to modernise the offence of consorting as the former consorting provision[37] according to the

[29] Raz, above n 15, 201-202 (emphasis in original).
[30] Andrew McLeod, 'On the origins of consorting laws' (2013) 37 *Melbourne University Law Review* 103.
[31] Ibid 126.
[32] Ibid 141.
[33] Ibid 105.
[34] Ibid 105.
[35] *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW).
[36] New South Wales, Parliamentary Debates, Legislative Council, 7 March 2012, 65 (David Clarke).
[37] *Crimes Act 1900* (NSW), s 546A (repealed).

police was difficult to use because of the difficulty in ascertaining the meaning of "*habitual consorting*".[38]

23 The provision[39] has a tripartite structure. First, the offence is created and the penalty is prescribed by subs (1) (3 years or 150 penalty units, giving rise to a fine of up to $16,500). An element of the offence is that a person consorts after an official warning is given. Secondly, the meaning of habitually consorting is defined negatively in subs (2): a person does not habitually consort unless a person consorts with at least two convicted offenders on at least two occasions. Thirdly, the meaning of an official warning is prescribed in subs (3) as a warning that is given orally or in writing by a police officer that a person is a convicted offender and that consorting with a convicted offender is an offence.

24 The section gives rise to a number of concerns. First, there are obvious problems associated with the warning that needs to be given before an offence can be committed. The warning need not be in writing; it assumes that a person knows what it means to 'consort' within the meaning of the section; once a warning is giving, the potential to commit an offence is ongoing, that is, it constitutes a prohibition on associating with that person again.

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[38] New South Wales, Parliamentary Debates, Legislative Council, 7 March 2012, 65 (David Clarke).

[39] *Crimes Act 1900* (NSW), s 93X. The provision is as follows:

"**93X Consorting**

(1) A person who:
  (a) habitually consorts with convicted offenders, and
  (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,
  is guilty of an offence.

Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) A person does not habitually consort with convicted offenders unless:
  (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
  (b) the person consorts with each convicted offender on at least 2 occasions.

(3) An official warning is a warning given by a police officer (orally or in writing) that:
  (a) a convicted offender is a convicted offender, and
  (b) consorting with a convicted offender is an offence."

25 Secondly, a person need not be a convicted offender to commit the offence; and the offence under the section is itself an indictable offence. Sixteen per cent of all people "*directly affected by the provisions*" in their first year of operation had "*either no criminal record at all, a conviction for a minor (summary) offence, or who had only received an infringement notice in the past 15 years*."[40] The consequence is that a whole new class of 'criminals' will potentially be created. The legislature, in enacting the provision, clearly did not remember the words of Premier Lang in 1929 when, in the parliamentary debate about the introduction of the offence of consorting, he offered "*a word of caution against going too rapidly and making criminals of persons who, though they mix with these particular people, are with them not for a bad purpose but probably for a very good one*".[41]

26 Thirdly, liability is conditioned on association with "*convicted offenders*", which is defined in s 93W as meaning a person who has been convicted of *an* indictable offence other than the offence of consorting. In New South Wales, an indictable offence is an offence that is not required to be dealt with summarily or one that is permitted to be dealt with summarily or on indictment.[42] In New South Wales, 5.86 per cent of the male population and 1.29 per cent of the female population have been convicted of an indictable offence between July 2002 and June 2012.[43] The percentage is higher for those under the age of 30.[44]

27 The criminality of the people convicted of indictable offences varies greatly and bears no necessary relationship with serious or organised crime.[45]

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[40] Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013) [5.1.1].
[41] New South Wales, Parliamentary Debates, Legislative Assembly, 22 October 1929, 683–4 (John Lang) cited in Alex Steel, 'Consorting in New South Wales: Substantive offence or police power' (2003) 26(3) *University of New South Wales Law Journal* 567, 585.
[42] See *Criminal Procedure Act 1986* (NSW), s 5.
[43] Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013) [5.1.3].
[44] Ibid.
[45] Cf to the *Summary Offences Act 1966* (Vic), s 49F. Section 49F conditions liability on association with "a person who has been found guilty of, or who is reasonably suspected of

Indeed, a person who intentionally or recklessly damages the Opera House commits an indictable offence if the value of the damage exceeds $5,000 or if the prosecutor elects to deal with the offence on indictment.[46] Persons who take the trouble to paint a sign on the sails of the Opera House are usually protesters who are not members of criminal organisations or a danger to the community.

28 Fourth, the type of association captured under s 93X is very wide. The act of consorting itself is defined as meaning to "*consort in person or by any other means, including by electronic or other form of communication*".[47] The net is intentionally wide. The Second Reading Speech stated that this "*will ensure that networks established via Facebook, Twitter and SMS will not be immune from these provisions*."[48]

29 Fifthly, there is no requirement in s 93X of any unlawful or criminal purpose to the association, let alone one connected to organised crime. The Second Reading Speech explicitly invoked a High Court judgment[49] in support of the notion that "*consorting need not have a particular purpose but denotes some seeking or acceptance of the association on the part of the defendant*".[50] The Second Reading Speech went on to state that it "*was not the intention of the section to criminalise meetings where the*

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having committed, *an organised crime offence*" (emphasis added). An "organised crime offence" is defined in s 49F(3) as meaning an "indictable offence against the law of Victoria, irrespective of when the offence was or is suspected to have been committed, that is punishable by level 5 imprisonment (10 years maximum) or more and that—
(a) involves 2 or more offenders; and
(b) involves substantial planning and organisation; and
(c) forms part of systemic and continuing criminal activity; and
(d) has a purpose of obtaining profit, gain, power or influence."

[46] See *Sydney Opera House Trust Act 1961* (NSW), s 28C and *Criminal Procedure Act 1986* (NSW), Sch 1, Table 2, Part 3.

[47] *Crimes Act 1900* (NSW), s 93W.

[48] New South Wales, Parliamentary Debates, Legislative Council, 7 March 2012, 65 (David Clarke).

[49] *Johanson v Dixon* [1979] HCA 23; 143 CLR 376, 383. Mason J observed "[i]In its context "consorts" means "associates" or "keeps company" and it denotes some seeking or acceptance of the association on the part of the defendant (Brown v. Bryan (1963) Tas SR 1, at p 2) … It is not for the Crown to prove that the defendant has consorted for an unlawful or criminal purpose".

[50] New South Wales, Parliamentary Debates, Legislative Council, 7 March 2012, 65 (David Clarke).

defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks".[51] The offence is not, however, drafted with such a restriction.

30 Finally, the defence provided by s 93Y is narrow. It only excludes certain types of association and places an onus on the defendant to establish that the association was "*reasonable*".[52] The 'associating' that falls within the defence is: (a) consorting with family members; (b) consorting that occurs in the course of lawful employment or the lawful operation of a business; (c) consorting that occurs in the course of training or education; consorting that occurs in the course of the provision of a health service; (e) consorting that occurs in the course of the provision of legal advice; (f) consorting that occurs in lawful custody or in the course of complying with a court order. There are potentially significant questions as to what is reasonable in the circumstances and the extent of the categories of association identified in s 93X.[53] For example, does the category relating to associating with family members extends to Indigenous kinship relationships.[54]

Rule of law concerns with the offence of consorting

31 I have already intimated certain 'practical' concerns relating to s 93X. In terms of the 'rule of law', the concern is the extent of discretion invested in the police. As Steel observed in relation to the narrower repealed provision that "[*i*]*t is an extraordinarily broad offence that relies almost entirely on police discretion to control its scope*".[55] Under s 93X, the police can shape the target group; they can determine the conduct that is caught;

[51] Ibid.
[52] Cf *Summary Offences Act 1966* (Vic), s 49F(2). Section 49F(2) provides:
"The accused bears the burden of proving reasonable excuse for habitual consorting to which a charge of an offence against subsection (1) relates."
[53] See The Law Society of New South Wales, Submission to New South Wales Ombudsman, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, 4-5.
[54] See Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013) [6.1.1].

who is charged; whether a person is charged; and when a person is charged. The Second Reading Speech unashamedly recognised this:

> "This bill puts police in a position to do what they do best every day and make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties."[56]

32 Every society, including those based on the rule of law as we understand it, needs a police force, and policing does involve judgment. Section 93X has, however, the potential to authorise subjectivity and arbitrariness as to who will be affected by the law. There is evidence that this has happened.

33 In its review of the first twelve months of operation, the NSW Ombudsman concluded that "*the consorting provisions were being used to target people suspected of involvement in different types of crime and in crime of differing level of seriousness*".[57] Only 11 per cent of the consorting "*events*" recorded in the COPS system were created by officers in specialist and organised crimes squads.[58] The vast majority of events arose from Local Area Commands.[59]

34 Although the specialist squads advised the Ombudsman that s 93X was used "*as an additional tool to interrupt the activities of criminal gangs involved in organised criminal activity*", other Local Area Commands advised that the provisions were used variously to target: people congregating in public places; involved in drug supply and property offences; and people suspected of involvement in robberies, aggravated break and enter offences and home invasions.[60]

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[55] Steel, above n 41, 567.
[56] New South Wales, Parliamentary Debates, Legislative Council, 7 March 2012, 65 (David Clarke).
[57] Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013) [5.4].
[58] Ibid [3.2.1].
[59] Ibid.
[60] Ibid [5.4].

35 The scope for arbitrariness increases the risk of a discriminatory application of the law. The Ombudsman reported that the provisions were predominantly used against men (91 per cent), with the greatest proportion of individuals having been warned or having committed the offence of consorting being males aged between 18 and 34 years of age.[61] Forty per cent of the people subject to the consorting provisions were Aboriginal and this proportion was higher for Aboriginal people aged between 13 and 17 years old and women.[62] This is a hugely disproportionate application of the law compared to the proportion of indigenous persons in the population. The indigenous population in New South Wales comprises only 2.5 per cent of the state's total population.[63] I do not have any statistics on the involvement of the indigenous population in organised crime, but I would venture to suggest that it is not 40 per cent of those who engage in organised crime.

36 The breadth of the offence and both the risk and the reality of its arbitrary application impacts upon society in a real way. It has the potential to create feelings of unfairness and injustice. A society that feels it is treated unfairly or unjustly, somewhere along the way, will rebel. Until the police decide to issue a warning, it would be very difficult for a person to speculate whether their association with a convicted offender, which would otherwise be lawful, may lead to criminal liability. The police could, under the wide powers conferred by s 93X, issue a warning, not for the purposes of controlling crime, but for the purpose of controlling the individual. That purpose may be a corrupt one or it may simply be one throw of the dice in a power play. Should that occur, it would obviously be an affront to the

[61] Ibid [3.3.1].
[62] Ibid.
[63] Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians*, 2011, cat.
no. 2075.0, ABS, Canberra, 2012, viewed 27 June 2013,
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/2076.0Main%20Features1102011?opendocument&tabname=Summary&prodno=2076.0&issue=2011&num=&view=> cited in Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013), [3.3.1].

rule of law. But the uncertainty itself may well be offensive to the rule of law.

37 The High Court has emphasised the need for certainty in the application of law. In *Taikato v The Queen* Brennan CJ, Toohey, McHugh and Gummow JJ commented that "[*i*]*f the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different*".[64] In that matter, their Honours observed that "*a person should not be guilty or not guilty of a crime depending on a value judgment … The operation of the criminal law should be as certain as possible*".[65]

38 Police are guided in their use of the consorting offence by the *Consorting Standard Operating Procedures*.[66] And there is some accountability given the overview functions performed by the Ombudsman. However, there is no direct accountability, no consequences which flow from the manner in which the discretion is exercised (subject to the detection of corruption). This lack of accountability has led to one commentator characterising the consorting laws "*as a police power rather than as a substantive offence*".[67] Put another way, the "*corollary*" of legislation prohibiting an activity may be actually be involve an extension of police powers.[68]

39 This is a serious development. It is to be contrasted, for example with the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Although under that Act police have discretionary powers, there are inbuilt rule of law safeguards.[69] For example, "*a move on direction*" given to an intoxicated person in a public place must be reasonable in the

[64] [1996] HCA 28; (1996) 186 CLR 454, 465.
[65] Ibid 465-66.
[66] State Crime Command, *Consorting Standard Operating Procedures,* NSW Police Force, April 2012 cited in Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013).
[67] Steel, above n 41, 599,
[68] David Dixon, *Law In Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997) 68.
[69] Steel, above n 41, 600.

circumstances for the purpose of preventing injury or damage or reducing or eliminating a risk to public safety or preventing the continuance of disorderly behaviour in a public place.[70]

40 The unconstrained nature of the discretion in s 93X can also be illustrated by comparing it with the constraints within which a court of law operates when limiting a person's right to associate, such as in the imposition of bail[71] or parole conditions[72] or when imposing an non-association order in sentencing.[73] By way of example, when sentencing an accused for an

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[70] See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 198(2)

[71] *Bail Act 2013* (NSW), s 24. Section 24 provides:

"**24 General rules for bail conditions**

(1) A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.

(2) Bail conditions must be reasonable, proportionate to the offence for which bail is granted, and appropriate to the unacceptable risk in relation to which they are imposed.

(3) A bail condition is not to be more onerous than necessary to mitigate the unacceptable risk in relation to which the condition is imposed.

(4) Compliance with a bail condition must be reasonably practicable.

(5) This section does not apply to enforcement conditions."

[72] *Crimes (Sentencing Procedure) Act 1999*, s 51A. Section 51A provides:

"**51A Conditions of parole as to non-association and place restriction**

(1) The conditions to which a parole order is subject may include either or both of the following:
  (a) provisions prohibiting or restricting the offender from associating with a specified person,
  (b) provisions prohibiting or restricting the offender from frequenting or visiting a specified place or district.

(2) A condition referred to in subsection (1) (a) or (b) is suspended:
  (a) while the offender is in lawful custody (otherwise than while unescorted as referred to in section 38 (2) (a) of the Crimes (Administration of Sentences) Act 1999), and
  (b) while the offender is under the immediate supervision of a public servant employed within the Department of Juvenile Justice pursuant to a condition of leave imposed under section 24 of the Children (Detention Centres) Act 1987.

(3) An offender does not contravene a prohibition or restriction as to his or her association with a specified person:
  (a) if the offender does so in compliance with an order of a court, or
  (b) if, having associated with the person unintentionally, the offender immediately terminates the association.

(4) An offender does not contravene a requirement not to frequent or visit a specified place or district if the offender does so in compliance with an order of a court."

[73] *Crimes (Sentencing Procedure) Act 1999*, s17A. Section 17A provides:

"**17A Non-association and place restriction orders**

(1) This section applies to any offence that is punishable by imprisonment for 6 months or more, whether or not the offence is also punishable by fine or to an aggregate sentence of imprisonment in respect of 2 or more offences any one of which is an offence to which this section applies.

(2) When sentencing an offender for an offence to which this section applies, a court may make either or both of the following orders in respect of the offender:

offence that is punishable by imprisonment of 6 months or more, the Court may impose a non-association order that must not exceed 12 months[74] and "*only if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences to which this section applies*."[75] It should also be noted that *Crimes (Criminal Organisations Control) Act 2012*,[76] creates a consorting offences but there greater safeguards against its misuse.[77]

41 In summary, the functions of the police in a modern society governed by the rule of law are as important as they were when walking around Sir Robert Peel's London 185 years ago. Today, those functions are enshrined in statute. The statutory "*mission*" of the New South Wales Police Force is "*to work with the community to reduce violence, crime and*

(a) a non-association order, being an order prohibiting the offender from associating with a specified person for a specified term, or
(b) a place restriction order, being an order prohibiting the offender from frequenting or visiting a specified place or district for a specified term,

if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences to which this section applies.

(3) An order under subsection (2) (a) is to be one of the following:
(a) a limited non-association order, being an order prohibiting the offender from being in company with a specified person except at the times or in such circumstances (if any) as are specified,
(b) an unlimited non-association order, being an order prohibiting the offender:
(i) from being in company with a specified person, and
(ii) from communicating with that person by any means.

(3A) An order under subsection (2) (b) is to be one of the following:
(a) a limited place restriction order, being an order prohibiting the offender from frequenting or visiting a specified place or district except at the times or in such circumstances (if any) as are specified,
(b) an unlimited place restriction order, being an order prohibiting the offender from frequenting or visiting a specified place or district at any time or in any circumstance.

(4) An order under this section is to be made in addition to, and not instead of, any other penalty for the offence, but may not be made if the only other penalty for the offence is an order under section 10 or 11.

(5) The term of an order under this section is not limited by any term of imprisonment imposed for the offence, but must not exceed 12 months.

(6) This section does not limit the kinds of prohibition or restriction that may be imposed on an offender by means of any other order or direction under this or any other Act, so that such an order or direction may include prohibitions of the kind referred to in subsections (2) and (3).

(7) This section is subject to the provisions of Part 8A."

[74] Ibid s17A(5).
[75] Ibid s 17A(2)(a).
[76] *Crimes (Criminal Organisations Control) Act 2012*, s 26.
[77] See Ibid s 7(1).

fear".[78] The functions of the Police Force include "*services by way of the prevention and detection of crime*"[79] and "*the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way*".[80] So much is to be welcomed. However, when legislation is crafted in a way that places an unaccountable discretion in individual police officers, the potential for the rule of law to be undermined must not be underestimated.

Aggravated offences and mandatory minimum sentences

42 The introduction of aggravated offences and mandatory minimums present different issues for the rule of law. It cannot be doubted that "[*t*]*here are now, and long have been, many statutory offences where one form of offence can be seen as an aggravated form of another*."[81] I have already given an example of how the location of discretion in a prosecuting authority can impact upon an outcome for an individual in the criminal justice system. However, my primary focus is to examine the impact on the rule of law when an aggravated offence is coupled with a mandatory minimum sentence.

43 Although mandatory minimum sentences are not new in New South Wales,[82] the issue became topical earlier this year with the introduction of mandatory minimum sentences for convictions for alcohol-fuelled 'one-punch' assaults. Following the sentencing of an accused person for manslaughter and a number of assault charges,[83] in circumstances where the community viewed the sentence as inadequate,[84] the NSW

[78] *Police Act 1990* (NSW), s 6(1).
[79] Ibid s 6(3)(a).
[80] Ibid s 6(3)(b).
[81] *Magaming v R* [2013] HCA 40; 302 ALR 461, [15] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[82] See eg *Crimes Act 1900* (NSW), s 19B; *Crimes (Sentencing Procedure) Act,* s 61.
[83] See *R v Loveridge* [2013] NSWSC 1638.
[84] Although the sentence imposed by the sentencing judge was the subject of virulent media comment, there was sufficient reporting of community reaction to the sentence to make this comment.

Government introduced two new offences. Section 25A(1) of the *Crimes Act 1900* (NSW) established an offence for assault causing death.[85] Section 25A(2) established an aggravated form of that offence where the accused is over 18 years of age and commits an offence under subs (1) when intoxicated.[86] Section 25B(1) provides that a court is required to impose a non-parole period and sentence of imprisonment of "*not less than 8 years*" in respect of a person convicted of the aggravated form of the offence.

44 Before examining the impact of mandatory minimums on the rule of law, it is necessary to understand how discretion is ordinarily allocated in the criminal justice system. First, "*it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences*".[87] Secondly, "*it is for the sentencing judge, alone, to decide what sentence will be imposed*".[88]

45 In Australia, the second of these factors has a constitutional dimension. Section 71 of the Constitution vests Federal judicial power in the judiciary. The "*adjudgment and punishment of criminal guilt under a law of the Commonwealth*" has been recognised as an "*essentially and exclusively*" judicial function.[89] In *Chu Kheng Lim v Minister for Immigration,* Brennan, Deane and Dawson JJ observed that:

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[85] Section 25A(1) provides:
"A person is guilty of an offence under this subsection if:
(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
(b) the assault is not authorised or excused by law, and
(c) the assault causes the death of the other person.
Maximum penalty: Imprisonment for 20 years."

[86] NB: Section 25A(7)-(8) prescribes when the jury may acquit an accused of murder or manslaughter and find the person guilty under subsection (1) or (2) and when the jury may acquit an accused tried for an offence under subsection (2) and find the person guilty under subsection (1).

[87] *Magaming v R* [2013] HCA 40; 302 ALR 461, [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 305 ALR 323, [47] (French CJ, Hayne, Kiefel and Bell JJ).

[88] *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 305 ALR 323, [47] (French CJ, Hayne, Kiefel and Bell JJ).

[89] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (citations omitted).

> "In exclusively entrusting to the courts designated by Ch.III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."[90]

Judicial discretion

46 In the ordinary course, where the offence with which the accused is charged does not carry a mandatory minimum sentence, sentencing is an inherently discretionary function that is subject to internal and external constraints. In Australia, sentencing judges are required to determine the sentence to be imposed by an approach described as "*instinctive synthesis*".[91] Despite the jitters that might send through an accused's spine, McHugh J has explained why that approach is a manifestation of the rule of law and not the antithesis of it:

> "The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for **predictability and consistency in sentencing that underpins the rule of law** and public confidence in the administration of criminal justice. The synthesising task is conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case. The instinctive synthesis approach does not prevent the use of adjectives or adverbs or indications that this or these factors makes or make the case more or less serious than other cases or are the critical features of the case. And judicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle and community values all confine the scope in which instinct may operate. The judicial wisdom involved in the instinctive synthesis approach is therefore likely to lead to better outcomes than the pseudo-science of two-tier sentencing."[92]

[90] Ibid.
[91] *Markarian v R* [2007] HCA 25; 228 CLR 357 (McHugh J).
[92] Ibid [84].

47 The scope of the sentencing discretion is itself an aspect of the "*administration of the criminal law [which] involves individualised justice*".[93] Spigelman CJ has stated the proposition as follows: "[*t*]*he maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account*".[94]

48 Judicial discretion in the sentencing process is not at large. In *Magaming*, the plurality (French CJ, Hayne, Crennan, Kiefel and Bell JJ) emphasised the legal underpinning of the sentencing process:

> "In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles. Sentencing an offender must always be undertaken according to law."[95]

49 Similarly, in *Barbaro v The Queen; Zirilli v The Queen*, the High Court observed "[*t*]*he exercise of* [the *sentencing*] *discretion is subject to applicable statutory provisions and judge-made law*".[96]

50 The legal underpinning of the sentencing process has become increasingly complex. In New South Wales, a sentencing judge, depending on the charge, may variously be required to take into account a guideline judgment,[97] the standard non-parole period,[98] the maximum sentence for the relevant offence, and over 30 aggravating and mitigating factors

[93] *Elias v R; Issa v R* [2013] HCA 31; 248 CLR 483, [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[94] R v Whyte [2002] NSWCCA 343; 55 NSWLR 252, [147] (Spigelman CJ).
[95] *Magaming v R* [2013] HCA 40; 302 ALR 461, [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[96] *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 305 ALR 323, [25] (French CJ, Hayne, Kiefel and Bell JJ).
[97] See *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3, Div 4.
[98] Ibid Part 4, Div 1A.

(including that the actions of the offender were a risk to national security) as may be relevant to the circumstances of the individual.[99]

51 Such internal constraints are complemented by the external 'control' of an appeal where the discretion has been wrongly exercised discretion.[100] These constraints on the exercise of judicial discretion, although seemingly burdensome on the sentencing judge, who must give reasons, are not unwelcome. As the High Court has repeatedly emphasised, "[*j*]*udges need sentencing yardsticks*".[101]

Prosecutorial discretion

52 In the ordinary course, a prosecutor determines whether an accused is prosecuted and on what charges. Discretion is essential to this exercise. As the High Court in *Magaming* the Court explained:

> "Framing the charge or charges to be laid against an accused often requires a prosecutor to choose between available charges. The very notion of prosecutorial discretion about what charges will be laid depends upon the existence of a choice between charges."[102]

53 The prosecutorial discretion is wide and a variety of factors "*may legitimately inform the exercise of those discretions*", such as policy and public interest considerations.[103]

54 Importantly, the exercise of the prosecutor's discretion "*is capable of having a bearing on the sentence*".[104] The appropriate sentence for an accused will, for example, be affected by the prosecutor's decision

[99] Ibid s 21A.
[100] See eg *Criminal Appeal Act 1912* (NSW), s 5(1)(c).
[101] *Markarian v R* [2007] HCA 25; 228 CLR 357, [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Magaming v R* [2013] HCA 40; 302 ALR 461, [103] (Keane J).
[102] *Magaming v R* [2013] HCA 40; 302 ALR 461, [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[103] *Likiardopoulos v The Queen* [2012] HCA 37; 247 CLR 265, [2] (French CJ).
[104] *Elias v R; Issa v R* [2013] HCA 31; 248 CLR 483, [34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

whether to proceed summarily or on indictment and the prosecutor's decision whether a more or less serious charge is appropriate.[105]

55 These decisions will invariably impact upon the legislative guideposts in the sentencing exercise such as the standard non-parole period[106] and the maximum sentence. The Court cannot sidestep this impact. In *Elias v The Queen* the High Court unanimously rejected the proposition that a sentencing judge should take into account that there is a less punitive offence for which the prosecution could have proceeded and which is appropriate or even more appropriate to the facts than the charge for which the offender is sentenced.[107]

56 Prosecutors within the offices of the various Directors of Public Prosecutions around Australia are subject to internal restraints in the form of prosecutorial policies and guidelines.[108] And, although a prosecutor is "*subject to a duty of fairness in the exercise of their important public functions*"[109] there is limited accountability for the exercise of the prosecutorial discretion. The exercise of the prosecutor's discretion in charging is not susceptible to judicial review and clearly there is no available appeal from the determination of which charge is laid. This quarantining from review rests on the consideration that "*the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what*".[110] In *Likiardopoulos v The Queen*, a majority of the High Court stated that:

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[105] Ibid.
[106] NB: In New South Wales, under the *Crimes (Sentencing Procedure) Act 1999* (NSW), the standard non-parole period for an offence is the non-parole period prescribed by the legislature in the Table in Part 4, Division 1A. The manner in which standard non-parole periods are required to be taken into account in the sentencing exercise was recently considered by the High Court in *Muldrock v R* [2011] HCA 39; 244 CLR 120.
[107] *Elias v R; Issa v R* [2013] HCA 31; 248 CLR 483.
[108] See eg *Director of Public Prosecutions Act 1986* (NSW), ss 13-15 and Part 4.
[109] *Elias v R; Issa v R* [2013] HCA 31; 248 CLR 483, [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[110] *Likiardopoulos v The Queen* [2012] HCA 37; 247 CLR 265, [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also [2]-[3] (French CJ).

> "… sanctions available to enforce well established standards of prosecutorial fairness are to be found mainly in the powers of a trial judge and are not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or an action for damages."[111]

57 The scope for external review is limited in that:

> "[i]n the unlikely event that the discretion to prosecute a particular charge (or at all) was exercised for some improper purpose, the court has the power to relieve against the resulting abuse of its process. The time for debate as to any claimed abuse arising out of the selection of the charge is before the entry of a plea."[112]

Mandatory minimum sentences

58 Where criminal cases involve an offence which carries a mandatory minimum sentence, there is a reallocation of discretion away from the sentencing judge to the prosecutor. Again, there are minimal safeguards against the misuse or abuse of that discretion.

59 The issues surrounding this reallocation of discretion were recently explored by the High Court in *Magaming v The Queen*.[113] The Court was concerned with two offences under the *Migration Act 1958* (Cth). The first offence, under s 233A, was to organise or facilitate the bringing or coming to Australia of an unlawful non-citizen. The second offence, under s 233C, established an aggravated offence of people smuggling where at least five such persons were smuggled. Even though either provision could conceivably be used to found an indictment for the smuggling of five or more people, s 236B provided for a mandatory minimum term of

[111] Ibid [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). French CJ, at [4], reserved his position on whether there may be limited scope for review under the Commonwealth Constitution, s 75(v).
[112] *Elias v R; Issa v R* [2013] HCA 31; 248 CLR 483, [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (citations omitted).
[113] [2013] HCA 40; 87 ALJR 1060.

imprisonment of five years with a non-parole period of least three years only for an offence against s 233C.[114]

60 Magaming was convicted and sentenced for committing an offence under s 233C. The trial judge, Blanch J, Chief Judge of the District Court, observed that it was "*perfectly clear that [Magaming] was a simple Indonesian fisherman who was recruited by the people organising the smuggling activity to help steer the boat towards Australian waters*".[115] In light of his minimal role, his Honour observed that absent the mandatory minimum sentence prescribed by s 236B, "*normal sentencing principles would not require* [*as heavy a sentence*] *to be imposed*".[116] Although the Commonwealth Attorney General has directed that the Director of Public Prosecutions "*not institute, carry on or continue to carry on a prosecution*" under the aggravated offence unless the accused was a repeat offender, their role in the venture extended beyond that of crew member or a death occurred, Magaming was convicted and sentenced prior to its introduction.[117]

61 In the High Court, Magaming argued that where the smuggling involved five unlawful non-citizens, the two offences were co-extensive so that the mandatory minimum for the aggravated offence was incompatible with the separation of judicial and prosecutorial functions and the institutional integrity of the courts.[118] Six members of the Court (French CJ, Hayne, Crennan, Kiefel and Bell JJ with whom Keane J agreed) dismissed the appeal. Gageler J dissented.

62 Magaming was confronted with long standing authority in both the New South Wales Supreme Court and the High Court on mandatory minimum

[114] See *Migration Act 1958* (Cth), ss 236B(3)(c) and 236B(4)(b).
[115] Quoted in *Magaming v R* [2013] HCA 40; 302 ALR 461, [7] (French CJ, Hayne, Crennan, Kiefel and Bell JJ)
[116] Ibid.
[117] *Magaming* [2013] HCA 40; 302 ALR 461, [22].

sentences contained in the *Black Marketing Act 1942* (Cth).[119] The *Black Marketing Act* was an act that, subject to a few matters, did "*not create new offences*".[120] The statute took a number of acts that were already offences under the *National Security Act 1939* and the National Security Regulations and "*stigmatize[d] them as black marketing*".[121] There were two important differences. First, offences under the *Black Marketing Act* attracted mandatory minimum sentences. Second, pursuant to s 4 of the Act, a black marketing offence was not to be prosecuted without the written consent of the Attorney General after advice from the relevant Minister and a committee of departmental representatives appointed by the Attorney.[122]

63 In *Ex Parte Coorey* the Full Court of the New South Wales Supreme Court upheld the validity of the *Black Marketing Act 1942* (Cth) notwithstanding that the effect of the Act was that:

> "… a member of the Executive has been furnished with the power to say with regard to offences, the punishment of which has already been provided for and vested in the Judiciary, that the latter shall no longer exercise their discretion in that respect, but in some instances, if there is a conviction, shall award not less than the minimum penalty although that penalty may be considered, having regard to the facts, to be oppressive."[123]

The majority of the Court held that this did not constitute an exercise of judicial power because the constraint on the sentencing discretion that resides in the judiciary "*only* [*operated*] *in the future upon a contingency of a conviction by the Court*".[124]

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[118] *Magaming v R* [2013] HCA 40; 302 ALR 461, [11] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[119] See *Ex parte Coorey* [1944] NSW StRp 60; 45 SR (NSW) 287 and *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; 70 CLR 100.
[120] *Ex parte Coorey* [1944] NSW StRp 60; 45 SR (NSW) 287, 299 (Jordan CJ).
[121] Ibid.
[122] *Magaming v R* [2013] HCA 40; 302 ALR 461, [30].
[123] *Ex Parte Coorey* [1944] NSW StRp 60; 45 SR (NSW) 287, 314 (Davidson J).
[124] Ibid 314. See also 319-320 (Nicholas CJ in Eq).

64 Jordan CJ dissented. To the extent that the offences under the *Black Marketing Act* were co-extensive with offences under the National Security Act and Regulations, his Honour considered the Act was invalid because the "*Act purports to invest a person who is not a competent Court with part of the judicial power of the Commonwealth, in that it purports to enable him at his discretion to dictate the penalty in particular* cases".[125] Jordan CJ considered that the encroachment on the judicial power of the Commonwealth was not "*any the less real*" because the penalty was dictated in advance of trial.[126]

65 The validity of the *Black Marketing Act* fell for consideration by the High Court in *Fraser Henleins Pty Ltd v Cody*[127] and was once again held to be valid. Although significant reliance was placed on the reasoning in *Ex Parte Coorey,*[128] a number of observations were made about the operation of the Act. Latham CJ, for example, recognised that prosecution under the Act exposed the accused to a greater penalty than otherwise would be the case. His Honour considered, however, that "*in all cases of public prosecutions, there must first be a decision by some public authority whether to prosecute or not to prosecute*" and the risk of penalty always depends on that decision.[129] The conferral of a discretion on prosecutors to determine the charge was not an exercise of judicial power: there was "*no adjudication upon rights or duties or liabilities, or, indeed, upon anything. It imposes no penalties, though it does expose a person to the possibility of a particular penalty*".[130] It was a purely administrative function of the same quality as other decisions made by a prosecutor such as the determination to proceed on indictment.[131] Significant emphasis was also placed on the notion that this was just another manifestation of the

[125] Ibid 300 (Jordan CJ).
[126] Ibid 300.
[127] [1945] HCA 49; 70 CLR 100.
[128] See ibid 120 (Latham CJ), 122 (Starke J), 124-125 (Dixon J), 132 (McTiernan J).
[129] Ibid 119 (Latham CJ).
[130] Ibid 120 (Latham CJ).
[131] Ibid 120 (Latham CJ). See also ibid 139 (Williams J).

proposition that the prescription of penalties for particular offences is an exercise of legislative power involving policy choices.[132]

66 In *Magaming* the majority observed that the simple and aggravated form of the offence were not "*coextensive*"[133] because the aggravated offence required proof that a group of five, as opposed to only one, unlawful non-citizen was brought to Australia.[134] The majority rejected Magaming's contention that the two offences gave prosecuting authorities a choice about the sentence an accused would suffer upon conviction.

67 Importantly for the rule of law as it is understood in Australian Chapter III jurisprudence, their Honours held that the provisions of the *Migration Act* were "*neither incompatible with the separation of judicial and prosecutorial functions nor incompatible with the institutional integrity of the courts*".[135] Notwithstanding that a mandatory minimum sentence must be imposed if the more serious form of the offence was charged, the court nonetheless maintained its sentencing discretion, provided it sentenced according to law.[136]

68 The majority also observed that the "*essential premise*" of Jordan CJ's dissent in *Ex parte Coorey*[137] was not established in this case because the two offences were not identical.[138] Their Honours also observed that there was "*no reason to doubt the correctness of Fraser Henleins*".[139] That decision had been applied in *Palling v Corfield*[140] and the majority in *Magaming* observed that "[*n*]*othing said or decided in Palling, or in subsequent cases, casts doubt upon the general proposition that it is for*

[132] Ibid 121-122 (Starke J). See also ibid 139 (Williams J) .
[133] *Magaming v R* [2013] HCA 40; 302 ALR 461, [16] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[134] Ibid [17].
[135] Ibid [40].
[136] Ibid [26].
[137] *Ex Parte Coorey* [1944] NSW StRp 60; 45 SR (NSW) 287.
[138] *Magaming v R* [2013] HCA 40; 302 ALR 461, [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[139] Ibid [38].
[140] [1970] HCA 53; 123 CLR 52.

the prosecuting authorities (not the courts) to decide who will be prosecuted and for what offences."[141] In short, prosecutorial choice as to the charge laid was not an exercise of judicial power."[142] The existence of a mandatory minimum penalty on one available charge was analogous to a prosecutor's discretion to proceed summarily or on indictment.[143]

69 Their Honours did, however, state that:

> "It may be that, as Barwick CJ said in *Palling v Corfield*:
>
> > 'It is both unusual and in general ... undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.'
>
> Whether or not that is so, as Barwick CJ also said, '[i]f Parliament chooses to deny the court such a discretion, and to impose ... a duty [to impose specific punishment] ... the court must obey the statute in this respect assuming its validity in other respects'."[144]

70 Justice Gageler dissented. He considered that "*the reasoning in Fraser Henleins elevates form over substance*" and was accordingly "*out of step with the modern purposive understanding of Ch III of the Constitution*".[145] His Honour commented that:

> "It is to accept that the length of deprivation of liberty to be imposed as a punishment for criminal conduct can in practice be the result of an executive determination made on information which can remain hidden not only from the individual and the public but from the court whose formal duty it is to impose the minimum penalty in the event of conviction."[146]

71 Gageler J considered that the conferral of such a power on the executive was an encroachment on and usurpation of judicial power.[147] The

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[141] *Magaming v R* [2013] HCA 40; 302 ALR 461, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[142] Ibid [40].
[143] Ibid [39].
[144] Ibid [27] citing *Palling v Corfield* [1970] HCA 53; 123 CLR 52, 58 (Barwick CJ).
[145] Ibid [81] (Gageler J).
[146] Ibid [82].
[147] Ibid [89].

constitutional vice in the *Migration Act*, according to Gageler J, was that the prosecutor is empowered "*in effect to determine the minimum penalty to be imposed on the conviction of any individual within the class*" of persons who may either be subject to charge under the people smuggling offence or the aggravated people smuggling offence.[148] And, in exercising this discretion, the prosecutor is not subject to the same accountability as the sentencing judge. As his Honour explained:

> "The circumstances specified in the Direction [referred to at [60**] above] are not found in s 233C of the Act, or elsewhere in statute. Their consideration requires the CDPP to form and act on his own assessment about the seriousness of the offender's conduct. Whether or not the CDPP's satisfaction might be susceptible of judicial review, the decision-making processes able to be adopted by the CDPP do not attract the constitutionally entrenched requirements of fairness and transparency applicable to decision-making by a court. The satisfaction of the CDPP need not be based on admissible evidence available to be placed before a court. Once satisfied of a specified circumstance, the CDPP need not prove that circumstance in the ensuing prosecution, either to obtain a conviction or to obtain the mandatory minimum penalty on conviction.
>
> The CDPP might, for example, decide to prosecute a crew member for the aggravated offence created by s 233C instead of the offence created by s 233A on being satisfied that his or her role in what the CDPP considered amounted to a "people smuggling venture" extended beyond that of a crew member. But conviction for the aggravated offence created by s 233C would result whether or not the CDPP proved to the court that the crew member had that extended role and imposition of the mandatory minimum penalty required by s 236B(3)(c) and (4)(b) would necessarily follow."[149]

Rule of law concerns with aggravated offences and mandatory minimums

72 On an abstract level mandatory minimum sentences might be seen as promoting that aspect of the rule of law that calls for certainty in the sentencing outcome. Their vice is that they constrain the dispensation of individualised justice. As Chief Justice Gibbs observed in *Sillery v R*:

[148] Ibid [92].

> "… there may exist wide differences in the degree of culpability of particular offenders, so that in principle there is every reason for allowing a discretion to the judge of trial to impose an appropriate sentence not exceeding the statutory maximum."[150]

73 His Honour's example was a good one. The *Crimes (Hijacking of Aircraft) Act* 1972 (Cth), s 893) provided that the punishment for hijacking a plane "*is imprisonment for life*". The High Court held that, as a matter of construction, this was a maximum punishment and not a mandatory punishment. Gibbs CJ commented that to read the section as "*providing for a mandatory punishment would lead to results that would be plainly unreasonable and unjust*" and compared "*the case of an unarmed drunken man who seeks to take control of an aircraft by the use of his fists with that of a terrorist armed with a bomb*".[151]

74 The imposition of a mandatory minimum removes the discretion from the judiciary and places it in the hands of the prosecutor. This is not a like for like swap. There are very real and important differences between the transparency and accountability involved in the exercise of discretion by courts as compared to prosecutors. Justice Gageler made the point well: there is a risk that when the prosecutor is making an assessment of what charges to lay and prefers a charge with a mandatory minimum sentence, it may be on the basis of facts that are found not be correct at trial. There is no residual discretion for the trial judge to enter anything other than the mandatory minimum sentences upon conviction.

75 The comparison with a prosecutorial decision to proceed on indictment, is not entirely apt. Regardless of whether the matter proceeds summarily or on indictment, the Court maintains the full panoply of sentencing discretions, including not proceeding to a conviction, bonds, suspended sentences, fines and imprisonment.

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[149] Ibid [97]-[98].
[150] [1981] HCA 34; 180 CLR 353, 357 (Gibbs CJ).
[151] Ibid.

76 The essential rule of law issue however is the lack of accountability in the police and prosecuting function. To say that is not to undermine the fine role that is played by police and prosecuting units such as the offices of the Director of Prosecutions. It is however to state the fact. There is no means of review of that part of the policing function or the prosecuting function discussed in this paper.

77 Although the High Court keenly emphasises the requirement of fairness in the prosecution function, it jealously guards the distinction between the judicial function and the prosecutorial role. This was never so apparent as it its decision in *Barbaro v The Queen; Zirilli v The Queen*.[152] There has been a long standing practice for the prosecution to 'assist' the court in the sentencing function by providing it with cases suggesting the 'range' of sentence that might apply, or making a statement as to the appropriate range. This practice was described by the High Court as the prosecution playing the role of "'*a surrogate judge*'".[153] The High Court added the curt remark, "*that is not the role of the prosecution*".[154] As a matter of substance and not form, it is difficult to reconcile why, on the one hand, it is unacceptable for a prosecutor to provide a submission as to the appropriate sentence which may be rejected by the trial judge, yet on the other, it is acceptable for the prosecutor to decide that an applicant should be charged with an offence carrying a mandatory minimum which, upon conviction, will determine their sentence.

Conclusion

78 Lord Bingham commented in the preface of his book, *The Rule of Law*, that when he was asked in 2006 to give the sixth Sir David Williams Lecture at the University of Cambridge, he chose as his topic 'the Rule of

[152] [2014] HCA 2; 305 ALR 323.
[153] Ibid [29] (French CJ, Hayne, Kiefel and Bell JJ) quoting *R v MacNeil-Brown* [2008] VSCA 190; 20 VR 677, [128] (Buchanan JA).
[154] Ibid [29].

Law' because "*the expression was constantly on people's lips*".[155] He added, "I *was not quite sure what it meant*", a typical gem of honesty from a truly great jurist.[156] I have not, and could not, have attempted to provide the answer. The point I have attempted to make is that an assumption that the rule of law governs our society must not be permitted to become, in our time, a truism without content.

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[155] Tom Bingham, *The Rule of Law* (Penguin, 2011) vii.
[156] Ibid.