

# *Before the High Court*

## Planting the Yardstick: The Approach to Mandatory Minimum Sentences and the High Court Appeals in *Delzotto* and *Hurt*

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### *Abstract*

In *Delzotto v The King* and *Hurt v The King*, the High Court of Australia must decide a fundamental question which will shape the approach to mandatory minimum sentences in the future, both in terms of their consideration in sentencing and their use generally by Parliament. The appeals offer the High Court an opportunity to clarify whether a sentencing judge must use a mandatory minimum penalty as a yardstick in the sentencing exercise or whether a mandatory minimum penalty is only relevant where the sentence arrived at after the usual exercise of the sentencing discretion is below the mandated minimum. In doing so, the High Court will necessarily consider the core principles underlying criminal sentencing in Australia as well as the need for consistency in sentencing in the future. This column considers the appeals and suggests that the approach adopted should involve the use of a minimum penalty as a yardstick as this approach is the only one which is consistent with established principles of criminal sentencing.

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## I Introduction

The appeals to the High Court in *Delzotto v The King*<sup>1</sup> and *Hurt v The King*<sup>2</sup> come from the New South Wales Court of Criminal Appeal ('NSWCCA') in *R v Delzotto*,<sup>3</sup> and the Australian Capital Territory Court of Appeal ('ACTCA') in *Hurt v The Queen*,<sup>4</sup> respectively. The appeals raise a fundamental question about the approach to the sentencing of offences that prescribe, through legislation, mandatory minimum penalties, where such legislation is not clear about the approach to be followed. While both *Delzotto* and *Hurt* relate to offences of possession of, access to and transmission of child abuse material under the *Criminal Code*,<sup>5</sup> the High Court's decision promises to have far-reaching impacts on both the interpretation and legislative use of mandatory minimum penalties in the future. And although uncharacteristically zealous arguments against mandatory minimum sentences have been made by courts,<sup>6</sup> mandatory minimum sentences are often provided for in legislation.<sup>7</sup> As such, the guidance of the High Court will be critical.

## II Background Facts, Legislative Framework and Procedural History

### A *Delzotto*

On 25 June 2021, Mr Delzotto, before Grant DCJ in the District Court of New South Wales at Albury, was convicted of and sentenced for two offences contrary to the *Criminal Code*: namely, possessing or controlling child abuse material obtained or accessed using a carriage service, contrary to s 474.22A(1) (the 'possession offence'); and using a carriage service to access child abuse material, contrary to s 474.22(1)(a)(i) (the 'access offence').<sup>8</sup> Critically, Mr Delzotto was sentenced on the basis that s 16AAB of the *Crimes Act 1914* (Cth) ('*Crimes Act*') applied to the sentencing of the possession offence because of his prior convictions in Queensland

<sup>1</sup> *Delzotto v The King* (High Court of Australia, Case No S44/2023) ('*Delzotto*').

<sup>2</sup> *Hurt v The King* (High Court of Australia, Case No C7/2023) ('*Hurt*').

<sup>3</sup> *R v Delzotto* [2022] NSWCCA 117 ('*Delzotto Appeal*').

<sup>4</sup> *Hurt v The Queen* (2022) 18 ACTLR 272 ('*Hurt Appeal*').

<sup>5</sup> *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

<sup>6</sup> Recently, by the Victorian Court of Appeal in *Buckley v The Queen* [2022] VSCA 138, [5], where mandatory minimum sentences were described by Maxwell P and T Forrest JA as 'wrong in principle' and 'requir[ing] judges to be instruments of injustice'. Criticisms have also been made by judges in other jurisdictions: see eg, Justice David M Paciocco, 'The Law of Minimum Sentences: Judicial Responses and Responsibility' (2015) 19(2) *Canadian Criminal Law Review* 173.

<sup>7</sup> Despite, for example, legislative prescription of mandatory minimum penalties being described by the former Chief Justice of the Supreme Court of Western Australia as not showing mutual respect between Parliament and the courts: Wayne Martin, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' (2015) 30(2) *Australasian Parliamentary Review* 80, 97–8.

<sup>8</sup> *R v Delzotto* [2021] NSWDC 325 ('*Delzotto Sentencing*'). The facts underlying the offence can be found in *Delzotto Appeal* (n 3) [18]–[22] but are not required to be recounted for the purposes of this column.

in 2001.<sup>9</sup> Section 16AAB of the *Crimes Act* provides that, if the person has been convicted of a ‘Commonwealth child sexual abuse offence’ then,<sup>10</sup> subject to the operation of s 16AAC, ‘the court must impose for the current offence a sentence of imprisonment of *at least* the period specified in column 2’ of the table in s 16AAB.<sup>11</sup> Relevantly, for an offence against s 474.22A(1) of the *Criminal Code*, the period specified is four years. Section 16AAC permits a judge to reduce the sentence from four years to take account of a guilty plea and assistance to authorities, as occurred in this case, with Grant DCJ allowing a combined reduction of 30%.<sup>12</sup> The sentencing judge fixed an indicative sentence of two years and nine months’ imprisonment for the possession offence.<sup>13</sup>

In sentencing, Grant DCJ rejected the Crown’s argument that the four-year period specified in s 16AAB should be used as a yardstick and reserved for the least serious types of offending. In doing so, his Honour did not follow the approach set out by the Western Australia Court of Appeal in *Bahar v The Queen*,<sup>14</sup> reasoning that the relevant provisions of the statute in *Bahar* — the *Migration Act 1958* (Cth) (*‘Migration Act’*) — were distinguishable from those of the *Crimes Act*.<sup>15</sup> The *Bahar* approach requires the sentencing judge to have regard to the minimum penalty from the outset as prescribing the bottom of the range of appropriate sentences, akin to the manner in which the maximum penalty is considered as prescribing the upper limit of the range of appropriate sentences. The necessary corollary of that approach — in line with the principle that the sentence should be proportionate to the objective gravity of the offence<sup>16</sup> — is that the mandatory minimum sentence applies as a pre-determined baseline for cases involving the least serious offending.<sup>17</sup> Instead, Grant DCJ adopted the approach set out by the Northern Territory Supreme Court in *R v Pot*.<sup>18</sup> The *Pot* approach requires the sentencing judge to first apply all relevant sentencing principles and, if the sentence arrived at falls below the minimum penalty, only then to have regard to it by increasing the sentence imposed to the minimum penalty prescribed by the statute.<sup>19</sup>

The Crown appealed against the sentence imposed by Grant DCJ, arguing, relevantly, that his Honour erred in failing to follow the principles set out in *Bahar*. In the *Delzotto Appeal*, the NSWCCA, constituted by Beech-Jones CJ at CL and RA Hulme and Adamson JJ, unanimously upheld the Crown’s appeal on this ground,

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<sup>9</sup> *Delzotto Sentencing* (n 8) [10] (Grant DCJ).

<sup>10</sup> Defined in s 3 of the *Crimes Act 1914* (Cth) (*‘Crimes Act’*) as including offences contrary to various provisions of the *Criminal Code* (n 5).

<sup>11</sup> *Crimes Act* (n 10) s 16AAB (emphasis added).

<sup>12</sup> *Delzotto Sentencing* (n 8) [72].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Bahar v The Queen* (2011) 45 WAR 100 (*‘Bahar’*).

<sup>15</sup> *Delzotto Sentencing* (n 8) [30]–[31].

<sup>16</sup> See *R v McNaughton* (2006) 66 NSWLR 566, 572.

<sup>17</sup> *Delzotto Appeal* (n 3) [24].

<sup>18</sup> *R v Pot* (Supreme Court of the Northern Territory, Riley CJ, 18 January 2011) (*‘Pot’*).

<sup>19</sup> *Delzotto Appeal* (n 3) [26].

determining that the *Bahar* approach, and not the *Pot* approach, was to be applied in sentencing under the relevant provisions of the *Crimes Act*.<sup>20</sup>

## B *Hurt*

The background of *Hurt* is very similar to that of *Delzotto*. In 2020, Mr Hurt pleaded guilty to three offences: the possession offence; the access offence; and using a carriage service to transmit child abuse material contrary to s 474.22(1)(a)(ii) of the *Criminal Code* (the ‘transmission offence’).<sup>21</sup> These offences were committed after convictions in 2019 for similar offences, all falling within the definition of ‘Commonwealth child sexual abuse offence’, as that term is used in s 16AAB of the *Crimes Act*. It was common ground that s 16AAB only applied to the possession offence,<sup>22</sup> the other two offences having been committed prior to the commenced operation of s 16AAB.<sup>23</sup> The sentencing judge, Mossop J, sentenced Mr Hurt to four years’ imprisonment for the possession offence.<sup>24</sup> In his Honour’s remarks on sentence, Mossop J criticised the *Bahar* approach, concluding that, were it not for that decision, he would have favoured the *Pot* approach.<sup>25</sup> However, Mossop J determined that he was bound by the decision in *Bahar* and proceeded to sentence accordingly.<sup>26</sup>

Mr Hurt appealed to the ACTCA primarily on the basis that Mossop J erred in his approach to sentencing in light of the prescribed mandatory minimum sentence by following the *Bahar* approach. The ACTCA, by majority (Kennett and Rangiah JJ), held that the *Bahar* approach was to be preferred, therefore dismissing this ground of appeal.<sup>27</sup> However, in dissent, Loukas-Karlsson J endorsed the criticisms of Mossop J and held that the decision in *Bahar* was plainly wrong and ought not be followed, and instead that the *Pot* approach should be preferred.<sup>28</sup>

## III Overview of the Issues

While a number of grounds of appeal are raised, they remain tangential to the fundamental question to be answered by the High Court in *Delzotto* and *Hurt*. That question can be expressed quite simply: what is the correct approach to sentencing

<sup>20</sup> Ibid [91] (Adamson J, Beech-Jones CJ at CL and RA Hulme J agreeing). Other grounds were raised by the Crown and by the appellant, none of which go to the fundamental question to be answered by the High Court, and therefore warrant no material discussion here: *Delzotto Appeal* (n 3) [8]; Crown, ‘Submissions of the Respondent’, Submissions in *Delzotto v The King*, Case No S44/2023, 7 July 2023, [23] (‘*Delzotto Respondent’s Submissions*’).

<sup>21</sup> Again, the details are not required here but can be found in the judgment of the sentencing judge: *R v Hurt [No 2]* (2021) 294 A Crim R 473, 476–8 (Mossop J) (‘*Hurt Sentencing*’).

<sup>22</sup> Ibid 498.

<sup>23</sup> Added to the *Crimes Act* (n 10) on 22 June 2020 by *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) sch 6 pt 1 (‘*Amending Act*’).

<sup>24</sup> *Hurt Sentencing* (n 21) 498.

<sup>25</sup> Ibid 490–4.

<sup>26</sup> Ibid 494–5.

<sup>27</sup> *Hurt Appeal* (n 4) 307–8.

<sup>28</sup> Ibid 295.

where there is a mandatory minimum sentencing provision like that contained in s 16AAB of the *Crimes Act*? More narrowly, the High Court is to decide whether the better approach is the one set out in *Bahar* or the one set out in *Pot*. And critically, in answering the question, the High Court can consider it, on principle, not bound by considerations of comity as were the appellate courts below.<sup>29</sup> For completeness, it should be noted that the fundamental question to be answered only arises if the High Court agrees with the unanimous decisions of the courts below that s 16AAB of the *Crimes Act* applies to each of the appellants.<sup>30</sup> The remainder of this column proceeds on the basis that it does.<sup>31</sup>

At the outset, it is important to note that *Bahar* and *Pot* were both decided in the context of s 233C of the *Migration Act*, not s 16AAB of the *Crimes Act*, the relevant legislation in these appeals. An attempt to distinguish the provisions was made in the *Delzotto Appeal*, but was ultimately rejected, with Adamson J stating that ‘the differences between [the *Migration Act* and *Crimes Act* provisions] are, in my view, formal and reflect different drafting styles but are nonetheless substantially the same’.<sup>32</sup> In the *Hurt Appeal*, no submission on this point was advanced, and all three judges agreed that the provisions were not relevantly distinguishable on the basis that both provisions use the phrase ‘impose a sentence of imprisonment of at least’ — which is the operative phrase implementing the minimum penalty.<sup>33</sup> The appellants do not seek to re-open this issue in the High Court and there is a passive acceptance of the positions arrived at by the courts below.

#### IV A Simple Problem of Statutory Interpretation?

The appellants in *Delzotto* and *Hurt* argue that a straightforward application of established principles of statutory interpretation will necessarily result in a sentencing judge adopting the approach set out in *Pot*. Both focus on the language in the provision which requires that the sentencing judge ‘impose a sentence of imprisonment of at least’<sup>34</sup> the specified mandatory minimum period to argue that the construction of the provision leads to a preference for the two-stage *Pot*

<sup>29</sup> *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Totaan v The Queen* (2022) 108 NSWLR 17, 34–6 (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing); Transcript of Proceedings, *Hurt v The King; Delzotto v The King* [2023] HCATrans 52, 19–22 (S Callan SC).

<sup>30</sup> *Delzotto Respondent’s Submissions* (n 20) [4]; *Hurt Appeal* (n 4) 311–18 (Kennett and Rangiah JJ, Loukas-Karlsson J agreeing at 278).

<sup>31</sup> This issue turns on the construction of the transitional provision introduced in the Amending Act (n 23) — that is, on whether ‘the relevant conduct’ in that provision refers to the use of the carriage service to access the material or the act of possession itself. It appears quite clear that the use of the carriage service is a circumstance, but the relevant conduct is the possession, which occurred after the relevant time specified in the transitional provision: *Delzotto Respondent’s Submissions* (n 20) [19].

<sup>32</sup> *Delzotto Appeal* (n 3) [74]. Although note that the *Migration Act* provisions did specify a minimum non-parole period which does not exist in the *Crimes Act* provisions.

<sup>33</sup> *Hurt Appeal* (n 4) 279–80 (Loukas-Karlsson J), 302–3 (Kennett and Rangiah JJ).

<sup>34</sup> *Crimes Act* (n 10) s 16AAB (emphasis added).

approach.<sup>35</sup> While it is accepted that the *Pot* approach achieves a result consistent with the statutory language, this argument does not go so far as to cast doubt on the correctness of the *Bahar* approach, which also results in a sentence ‘of at least’ the mandatory minimum. And as set out below, an appeal to the principle of legality to support this argument does not change the result.

The appellants then argue that there is an absence of language in the provisions of the *Crimes Act* which would evince an intention for the minimum penalty to operate as a yardstick; nor is there any material which would suggest that Parliament intended for this operation or for a general increase in sentences for the identified offences,<sup>36</sup> a criticism which has been noted by Stephen Odgers SC in commentary on mandatory minimum provisions.<sup>37</sup> The first portion of this argument can be dispensed with quite easily. It has long been accepted, and confirmed by the High Court in *Markarian v The Queen*, that the maximum penalty represents the legislature’s view of the seriousness of an offence and provides a yardstick to be used in sentencing for that offence.<sup>38</sup> It has never seriously been argued that the High Court’s approach is wrong in the absence of Parliament’s failure to specifically identify the maximum penalty as a yardstick to be used in the sentencing exercise.<sup>39</sup> Given the High Court has accepted the use of maximum penalty provisions as yardsticks in the absence of specific language, Loukas-Karlsson J’s dissenting view in the *Hurt Appeal* — that ‘[t]he equivalence between maximum and minimum penalties which underlies the Court’s reasoning in *Bahar* cannot be justified by the statutory language used’<sup>40</sup> — cannot be maintained. There is, therefore, no reason in principle that such an argument can be sustained in the case of minimum penalties. In fact, a plurality of the High Court in *Magaming v The Queen* (albeit in obiter) — a decision involving a constitutional challenge to mandatory minimum penalties — has already suggested that such a parallel should be drawn:

In *Markarian v The Queen*, the plurality observed that ‘[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks’. The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.<sup>41</sup>

In the absence of explicit parliamentary intention to draw a distinction between minimum and maximum penalties, there is no reason to doubt the logic of

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<sup>35</sup> Enrico Robert Charles Delzotto, ‘Appellant’s Submissions’, Submissions in *Delzotto v The King*, Case No S44/2023, 9 June 2023, [18] (‘Delzotto Appellant’s Submissions’); Raymond James Choi Hurt, ‘Appellant’s Submissions’, Submissions in *Hurt v The King*, Case No C7/2023, 9 June 2023, [45] (‘Hurt Appellant’s Submissions’).

<sup>36</sup> Delzotto Appellant’s Submissions (n 35) [55]; Hurt Appellant’s Submissions (n 35) [34].

<sup>37</sup> Stephen Odgers SC, ‘Minimum Imprisonment for Federal Offences’ (2023) 46(5) *Criminal Law Journal* 275, 276.

<sup>38</sup> *Markarian v The Queen* (2005) 228 CLR 357, 372 (Gleeson CJ, Gummow, Hayne and Callinan JJ) (‘*Markarian*’).

<sup>39</sup> Delzotto Respondent’s Submissions (n 20) [44].

<sup>40</sup> *Hurt Appeal* (n 4) 290.

<sup>41</sup> *Magaming v The Queen* (2013) 252 CLR 381, 396 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted) (‘*Magaming*’). Justice Keane, writing separately, made comments to a similar effect at 414.

considering the minimum penalty as fixing one end of the yardstick.<sup>42</sup> Once it is accepted that the maximum penalty reflects what Parliament considers to be the appropriate punishment for the most egregious offending,<sup>43</sup> the same rationale can be applied to a minimum penalty, reflecting Parliament's view of the appropriate penalty for the least egregious offending. Therefore, having already established that the maximum penalty acts as a yardstick, it would create an inconsistency for the minimum penalty to not act in the same manner. And while it is accepted that the term 'yardstick' need not necessarily denote a guidepost at one end of the spectrum,<sup>44</sup> the language of the High Court in *Magaming* is clear in that the 'yardstick' tied to a mandatory minimum is described as fixing 'one end'.

There is a further flaw with the appellants' suggestion that the relevant extrinsic material does not point to an intention to increase sentences generally, which is what would occur under the *Bahar* approach. The Explanatory Memorandum to the Amending Bill contains multiple references which make clear Parliament's intention to increase sentences generally and specifically. The introduction of mandatory minimums was said to address the 'disparity between the seriousness of child sex offending and the sentences currently handed down by the courts'<sup>45</sup> and 'ensur[e] that the courts are handing down sentences for Commonwealth child sex offenders that reflect the gravity of these offences and ensure that the community is protected from child sex offenders'.<sup>46</sup> Nowhere in these statements is an indication that these comments applied only to sentences below the newly prescribed mandatory minimum, or even sentences on the lower end of the scale generally — in fact, the opposite appears to be the case. In that way, the NSWCCA in the *Delzotto Appeal* was right to conclude that the legislative history evinces Parliament's intention that sentences be increased generally (the effect of the *Bahar* approach), rather than increasing only sentences at the lower end of the scale (the effect of the *Pot* approach).<sup>47</sup>

Mr Delzotto also draws a false equivalence between mandatory minimums in the *Crimes Act* and the approach to be taken to jurisdictional limits, such as the two-year limit for terms of imprisonment in the NSW Local Court.<sup>48</sup> That limit has been held as not operating like a maximum penalty, and therefore its imposition is not reserved for the worst objective case.<sup>49</sup> However, the equivalence can be dispensed

<sup>42</sup> As the Delzotto Respondent's Submissions (n 20) note, even early authority does not draw such a distinction: at [38], citing *Reynold v Wilkinson* (1948) 51 WALR 17, 18 (Dwyer CJ).

<sup>43</sup> As has been accepted since *Markarian* (n 38), affirmed in *Muldrock v The Queen* (2011) 244 CLR 120, 132 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Elias v The Queen* (2013) 248 CLR 483, 494–5 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>44</sup> For example, a plurality of the High Court has said that the history of previous sentences for an offence 'stands as a yardstick against which to examine a proposed sentence': *Barbaro v The Queen* (2014) 253 CLR 58, 74 (French CJ, Hayne, Kiefel and Bell JJ).

<sup>45</sup> Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2019 (Cth) [24] ('Explanatory Memorandum').

<sup>46</sup> *Ibid* [40].

<sup>47</sup> *Delzotto Appeal* (n 3) [82].

<sup>48</sup> Delzotto Appellant's Submissions (n 35) [36], [56].

<sup>49</sup> *Park v The Queen* (2021) 273 CLR 303, 311–13 (Kiefel CJ, Gageler, Keane, Edelman and Gleeson JJ); *R v Doan* (2000) 50 NSWLR 115, 123 (Grove J, Spigelman CJ agreeing at 117, Kirby J agreeing at 126).

with quickly when it is remembered that a jurisdictional limit applies regardless of the specific facts of offending and is stipulated as a function of ‘the court’s jurisdiction divorced from the offence for which the offender is to be sentenced’.<sup>50</sup> That is, Parliament’s legislation of a jurisdictional limit says nothing about its view of a specific offence or particular circumstances of offending — it is simply a decision as to the powers granted to a particular court. As such, a simple analogy cannot be drawn between mandatory minimum penalties and jurisdictional limits.

Lastly, the appellants turn to the principle of legality, arguing that the canon of construction would prefer an interpretation which protects personal liberty, which they argue (and it is accepted) would be achieved under the *Pot* approach, given that the *Bahar* approach increases sentences generally.<sup>51</sup> While the very function of this legislation is to interfere with liberty, it is accepted, based on a plurality of the High Court’s statements regarding the principle’s application to such statutes, that if a constructional choice is available, the choice involving the least interference with personal liberty should be preferred.<sup>52</sup> The appellants thus argue that the *Pot* approach should be preferred, adopting the language of Adams J in *Dui Kol v The Queen* that the *Pot* approach ‘does least violence to fundamental principles of criminal justice’.<sup>53</sup> But what is clear from the explanatory material is that Parliament *did* intend to interfere with the liberty of all offenders, not just those involved in the least serious offending who would otherwise fall below the minimum penalty, and not just at the margins.<sup>54</sup> As such, it is questionable the extent to which a constructional choice is open such that the principle of legality has scope to operate, where the evident purpose of the legislation is a targeted interference with personal liberty.<sup>55</sup> There is an open question, noted by Brendan Lim, as to whether the underlying motivation of the principle would allow much weight to be placed on explanatory materials.<sup>56</sup> Nonetheless, given that the text specifically provides for a mandatory minimum — clearly interfering with the fundamental right to liberty, albeit only explicitly for those who would have otherwise fallen below that minimum — it is difficult to argue that there is no indication in the text of the provision itself to suggest this intended interference.<sup>57</sup> This, coupled with the explanatory materials

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<sup>50</sup> Delzotto Respondent’s Submissions (n 20) [33].

<sup>51</sup> Delzotto Appellant’s Submissions (n 35) [38]–[43]; Hurt Appellant’s Submissions (n 35) [55]–[58].

<sup>52</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 582 (French CJ, Kiefel and Bell JJ).

<sup>53</sup> *Dui Kol v The Queen* [2015] NSWCCA 150, [14] (Adams J, McCallum J agreeing at [27]) (‘*Dui Kol*’).

<sup>54</sup> See the extracts from the Explanatory Memorandum in the text accompanying nn 45, 46.

<sup>55</sup> *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310–11 (Gageler and Keane JJ) (‘*Lee*’). Also note the Court’s hesitance to apply the principle to sentencing legislation, as to which see generally Mirko Bagaric and Theo Alexander, ‘Addressing the Curious Blackspot that is the Separation between the Principle of Legality and Sentencing’ (2015) 41(3) *Monash University Law Review* 515.

<sup>56</sup> Which Lim argues would be permissible on the analysis in *Coco v The Queen* (1994) 179 CLR 427 but perhaps not so on that in *R v Secretary of State for the Home Department; Ex parte Simms* [1999] UKHL 33; Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* 372, 393–4.

<sup>57</sup> As occurred in *Lee* (n 55), with the plurality considering general words sufficient to evince an intention to alter fundamental criminal law principles.



makes clear that the intention of Parliament was to increase sentences generally as occurs under the *Bahar* approach.<sup>58</sup> Further, unlike at a state or territory level,<sup>59</sup> there is no legislated ratio between the non-parole period to be imposed and the head sentence, leaving the judge who is sentencing for a Commonwealth offence with sufficient scope to alter the non-parole period so as to ensure only the appropriate interference with liberty required to achieve an individualised and just sentence. And in any case, as the NSWCCA has held in *R v Taylor*, nothing in the *Bahar* approach limits the imposition of the minimum penalty *only* for offences which fall within the least serious category of offending.<sup>60</sup> There is therefore a difficulty in maintaining an argument that the principle of legality requires the *Pot* approach to be favoured when the minimum penalty can, even under the *Bahar* approach, be imposed on sentences involving more serious categories of offending if the sentencing judge determines such a course should be taken, thereby remaining an approach which protects, to some degree, personal liberty. And while a Canadian Judge, in commentary, has set out means by which the impact of minimum sentences can be ameliorated and an approach similar to *Pot* adopted,<sup>61</sup> such methods do not find a basis in light of the contextual interpretation of provisions such as those in the *Crimes Act*.

## V The ‘Independent Reason’ of Equal Justice

The Courts below, in arriving at the conclusion that the *Bahar* approach was to be preferred, considered an ‘independent reason’, beyond the application of statutory interpretation principles, which they argued further justified preferring the *Bahar* approach over the approach in *Pot*.<sup>62</sup> That ‘independent reason’ is found in the judgment of Allsop P in *Karim v The Queen*, where his Honour stated:

There is an independent reason that leads me to favour the construction in *Bahar*. Equal justice inheres in judicial power, the fabric of the law and the basal notion of justice that underpins, informs and binds the legal system. ... *To approach the matter as in Pot would see cases of perceived different seriousness by force of statute given the same penalty.* ... The statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice.<sup>63</sup>

Justice Loukas-Karlsson only briefly addressed the ‘independent reason’, suggesting that to the extent equal justice is offended by the adoption of the *Pot* approach, it

<sup>58</sup> As Bruce Chen has noted, this aligns with the contextual approach taken by some members of the High Court when legislation clearly abrogates rights but the extent of that abrogation or curtailment is unclear: Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329, 356–8.

<sup>59</sup> See, eg. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

<sup>60</sup> *R v Taylor* [2022] NSWCCA 256, [71]–[73] (Simpson AJA, Davies and Wilson JJ agreeing) (*‘Taylor’*).

<sup>61</sup> Paciocco (n 6) 207–29.

<sup>62</sup> *Delzotto Appeal* (n 3) [82] (Adamson J, Beech-Jones CJ at CL and RA Hulme J agreeing); *Hurt Appeal* (n 4) [144(d)] (Kennett and Rangiah JJ).

<sup>63</sup> *Karim v The Queen* (2013) 83 NSWLR 268, 282–3 (Allsop P, Bathurst CJ, Hall and Bellew JJ agreeing) (emphasis added) (citations omitted) (*‘Karim’*).

remains a consideration for Parliament and the maintenance of parity or equality is for it and not the responsibility of the courts.<sup>64</sup>

The appellants cavil with Allsop P's 'independent reason' as a basis to prefer the *Bahar* approach, both relying on the criticisms of Adams J in *Dui Kol*. There, Adams J reasoned that the principle of parity has never justified an increase of comparative sentences, only a decrease, and that to increase sentences on the reasoning of Allsop P would involve 'disguis[ing] [the approach's] arbitrary character by emollient jurisprudence'.<sup>65</sup> The appellants also appeal to a counter-vailing consideration — the principle of legality — to argue that the elegance of the *Bahar* approach, based on the 'independent reason' of equal justice, is, in the words of Mossop J, 'achieved at a very high cost'.<sup>66</sup> On that basis, the appellants suggest that Allsop P's 'argument is flawed because it ignores another, competing, aspect of the principle of legality: the protection of personal liberty'.<sup>67</sup> The limits of an appeal to that canon of construction have already been noted above.

Mr Delzotto goes further in his criticism of Allsop P's reasoning, targeting his Honour's statement that an adoption of the *Pot* approach would mean the 'statute and through it the order of the Court, would be an instrument of unequal justice and, so, injustice'.<sup>68</sup> He suggests this begs the question: injustice to whom? Mr Delzotto argues that if that question is to be answered as those who would have received the minimum sentence but for the mandatory minimum penalty, the remedy is 'antithetical to justice for them' as it would be 'adopt[ing] a construction which would result in them being given a longer sentence'.<sup>69</sup>

The fundamental flaws in this argument can be explained through a simplified example. Consider an offence which mandates a statutory minimum period of imprisonment of five years and a maximum of 20 years. Offender X and Offender Y commit the offence, and, in remarks on sentence, it is assessed that Offender X's offending is of a higher objective seriousness than Offender Y's and all relevant subjective factors are the same. Assume that but for the statutory minimum, the sentencing judge would have imposed on Offender X a sentence of five years' imprisonment, and on Offender Y a sentence of two years' imprisonment. However, because of the operation of a mandatory minimum penalty, Offender Y is also sentenced to five years' imprisonment. On the *Pot* approach, Offender X's sentence does not change. On the *Bahar* approach, however, Offender X's sentence would be increased to say, 10 years, since the five-year minimum operates as a yardstick for the least serious offending.<sup>70</sup> Mr Delzotto argues essentially that, but for the mandatory minimum, Offender X would have received a sentence of five years' imprisonment but under the *Bahar* approach, to ensure equal justice, they have their

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<sup>64</sup> *Hurt Appeal* (n 4) 293.

<sup>65</sup> *Dui Kol* (n 53) [16] (Adams J, McCallum J agreeing at [27]).

<sup>66</sup> *Hurt Sentencing* (n 21) 492.

<sup>67</sup> Delzotto Appellant's Submissions (n 35) [38].

<sup>68</sup> *Karim* (n 63) 283.

<sup>69</sup> Delzotto Appellant's Submissions (n 35) [41].

<sup>70</sup> Noting that it is not an automatic movement upwards as explained in *R v Taylor* (n 60) [71]–[73] (Simpson AJA, Davies and Wilson JJ agreeing).

sentence increased, and this increase is the ‘remedy’ to the perceived injustice of Offender X. That, however, inaccurately characterises the increase as a ‘remedy’. Adopting the *Bahar* approach does not ‘remedy’ the injustice by increasing sentences. Instead, it *removes* the scope for any individualised perception of injustice in its entirety — Offender X cannot logically complain of a higher sentence by comparison to Offender Y if their sentence is proportionate to the objective seriousness of their offending compared with Offender Y.<sup>71</sup> In fact, it is the *Pot* approach which could create room for perceived injustice where an offender, in this case Offender Y, is sentenced to the same period of imprisonment as an offender whose offending is more serious than theirs (here, Offender X).

Lastly, in intervening submissions by the North Australia Aboriginal Justice Agency (‘NAAJA’), two additional reasons for rejecting Allsop P’s ‘independent reason’ are suggested. First, NAAJA submits that ‘[w]hen Parliament passes a mandatory sentencing prescription it necessarily renders *irrelevant* those matters that would otherwise have taken a sentence below the mandatory minimum, at least to that extent’.<sup>72</sup> However, NAAJA fails to cite authority for this proposition. It could equally be said that Parliament’s intention is to force a re-evaluation of such factors by sentencing judges whereby those matters are assessed in light of a new yardstick, being the statutory minimum penalty. Second, NAAJA relies on the decision in *R v Deacon*<sup>73</sup> to argue that ‘Parliament ought to be taken to have been willing to pay the price of some unequal justice when imposing mandatory minimums’.<sup>74</sup> This analysis, however, suffers from the criticism that Mossop J sought to raise against the analysis in *Bahar*, with which Loukas-Karlssoon J agreed — it is circular in that it accepts, as its starting point, the correctness of the assertion that is sought to be proved. The argument fails to appreciate the reality that equal justice is embedded within the core principles of the criminal sentencing system in Australia,<sup>75</sup> and it would be doubtful that Parliament would not legislate with an intention to maintain such a fundamental tenet of sentencing.<sup>76</sup> It is the departure from *this* fundamental principle which would require explicit words to that effect.<sup>77</sup> Such words do not appear in the legislation.

## VI Conclusion

The appeals in *Delzotto* and *Hurt* can resolve a fundamental, and increasingly impactful, point of contention in Australian sentencing law. Concepts of justice and

<sup>71</sup> See generally, Dina Yehia SC, ‘Boat People as Victims of the System: Mandatory Sentencing of “People Smugglers” — Politics or Justice?’ (2016) 3(1) *Northern Territory Law Journal* 18, 33–4.

<sup>72</sup> North Australia Aboriginal Justice Agency, ‘NAAJA’s Submissions Seeking Leave to Be Heard Amicus Curiae’, Submissions in *Delzotto v The King*, Case No S44/2023, 21 June 2023, [21] (emphasis in original) (‘NAAJA’s Submissions’).

<sup>73</sup> *R v Deacon* (2019) 282 A Crim R 329, 346 (Grant CJ, Southwood J and Riley AJ).

<sup>74</sup> NAAJA’s Submissions (n 72) [23].

<sup>75</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 107 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J).

<sup>76</sup> *Karim* (n 63) 299.

<sup>77</sup> See the comments in *R v Dang* [2018] QCA 331, [38] (McMurdo JA, Gotterson and Morrison JJA agreeing) specifically in the context of equal justice.

the means by which it is achieved must be settled in a society governed by the rule of law. These appeals offer the High Court an opportunity to provide clear guidance on the use of legislatively prescribed mandatory minimum sentences for sentencing judges.<sup>78</sup> The analysis set out above makes clear that the approach endorsed by the NSWCCA in the *Delzotto Appeal* and the majority of the ACTCA in the *Hurt Appeal* — that is, the *Bahar* approach — best aligns with the intention of Parliament and the fundamental criminal law principle of equal justice. It is also the approach which maintains consistency in the law by drawing parallels with the well-established principles to be applied when Parliament has legislated a maximum penalty for an offence. It would be a bold decision of the High Court to depart from such an approach, thereby creating an inconsistency in the law while chipping away at equal justice in the process.

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<sup>78</sup> Which has been sought for some time: see Andreas Schloenhardt and Colin Craig, 'Penalties and Punishment: People Smugglers before Australian Courts' (2016) 40(2) *Criminal Law Journal* 92, 98–9.