



# L&RS

## Note

### Mandatory Sentences: *Wayne Ellis v Minister for Justice and Equality*

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#### Abstract

This L&RS Note on mandatory sentences follows the decision of the Supreme Court in *Wayne Ellis v Minister for Justice and Equality*, decided on 15 May 2019, which has raised important issues in relation to the roles of the Oireachtas and the courts in respect of sentencing. This L&RS Note sets out background information in relation to mandatory sentences, analyses the decisions of the High Court, Court of Appeal and the Supreme Court in *Ellis* and examines the implications of the Supreme Court decision in *Ellis* on the future of legislation providing for mandatory sentences.



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## Executive Summary

In *Ellis v Minister for Justice*,<sup>1</sup> in a judgment delivered on 15<sup>th</sup> May 2019, the Supreme Court struck down section 27A(8) of the [Firearms Act 1964](#) as unconstitutional. Section 27A(8) provided for a mandatory minimum sentence of 5 years to be imposed on a person convicted of the offence of ‘possession of a firearm or ammunition in suspicious circumstances’. The mandatory minimum sentence applied in cases in which the convicted person was before the court for a second such offence, or had previously been convicted of another similar firearms offence. Mr Ellis was convicted of a second firearms offence and brought a challenge to the constitutionality of the provision. The Supreme Court held that section 27A(8) impermissibly encroached on the judiciary’s role to administer justice in individual cases under Article 34.1 of the Constitution, and breached the constitutional principle of the separation of powers.

The decision raises important and interesting questions about the respective roles of the Oireachtas and the courts in sentencing, and about the separation of powers more generally. The decision also creates some doubt as to the constitutionality of a number of similar sentencing provisions on the statute book, most notably the mandatory minimum sentence of 10 years imprisonment for an offence under section 15A of the [Misuse of Drugs Act 1977](#), which provides for an offence of possession with intent to supply an amount of drugs valued at more than €13,000.

This Note examines the legal background in relation to the use of mandatory sentences, including certain challenges and criticism of their use. It then discusses the background to the Ellis case, and sets out the judgments of the High Court and Court of Appeal, before analysing the decision of the Supreme Court, and setting out some possible implications of its decision.

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<sup>1</sup> *Ellis v Minister for Justice and Equality & ors* [\[2019\] IESC 30](#).

## Background

In Ireland, laws that create a criminal offence will usually specify a maximum penalty that a court may impose.<sup>2</sup> For example, the maximum penalty for assault causing harm is 5 years imprisonment.<sup>3</sup> This operates to communicate to the courts the relative gravity of the offence, whilst leaving them a wide measure of discretion to account for mitigating factors, either with respect to the circumstances of the commission of the offence, or to the personal circumstances of the convicted person. For example, only the most serious category of assault causing harm, committed by someone with little or no mitigating circumstances, would attract a sentence of 5 years imprisonment.

Mandatory sentences operate to remove such discretion from the courts, and direct that a particular sentence be imposed, no matter the particular circumstances of the offence, or of the offender. There are two forms of mandatory sentence; an entirely mandatory sentence and a mandatory minimum sentence. Mandatory minimum sentences can be further subdivided into presumptive mandatory minimum sentences and truly mandatory minimum sentences.

### Entirely mandatory sentences

An entirely mandatory sentence is the most absolute form of mandatory sentence; it permits for no movement of the penalty, upwards or downwards, by the judge. There are only three entirely mandatory sentences in Irish law: an entirely mandatory life sentence is prescribed for the offences of: (a) murder;<sup>4</sup> (b) capital murder;<sup>5</sup> and (c) treason.<sup>6</sup>

### Mandatory minimum sentences

A more common form of mandatory sentence is the mandatory minimum sentence. The mandatory minimum sentence can be further subdivided into presumptive mandatory minimum sentence, and a truly mandatory minimum sentence.

A *presumptive* mandatory minimum sentence directs a court to impose, at a minimum, a specified term of imprisonment, unless the court is of the view that exceptional circumstances require a lower sentence. For example, the [Misuse of Drugs Act 1977](#), as amended, provides for a minimum sentence of 10 years imprisonment on conviction of possession with intent to supply an amount of drugs valued at over €13,000. However, this minimum does not apply where the judge “determines that by reason of exceptional and specific circumstances relating to the offence, or the person

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<sup>2</sup> Where no statute provides for a specified penalty, [section 10\(1\) of the Criminal Law Act 1997](#) provides for a maximum of 2 years imprisonment for any offence tried on indictment.

<sup>3</sup> When charged on indictment. [Section 3 of the Non-Fatal Offences Against the Person Act 1997](#). A more serious offence of causing serious harm is provided for in [section 4 of the 1997 Act](#), which attracts a maximum sentence of life imprisonment.

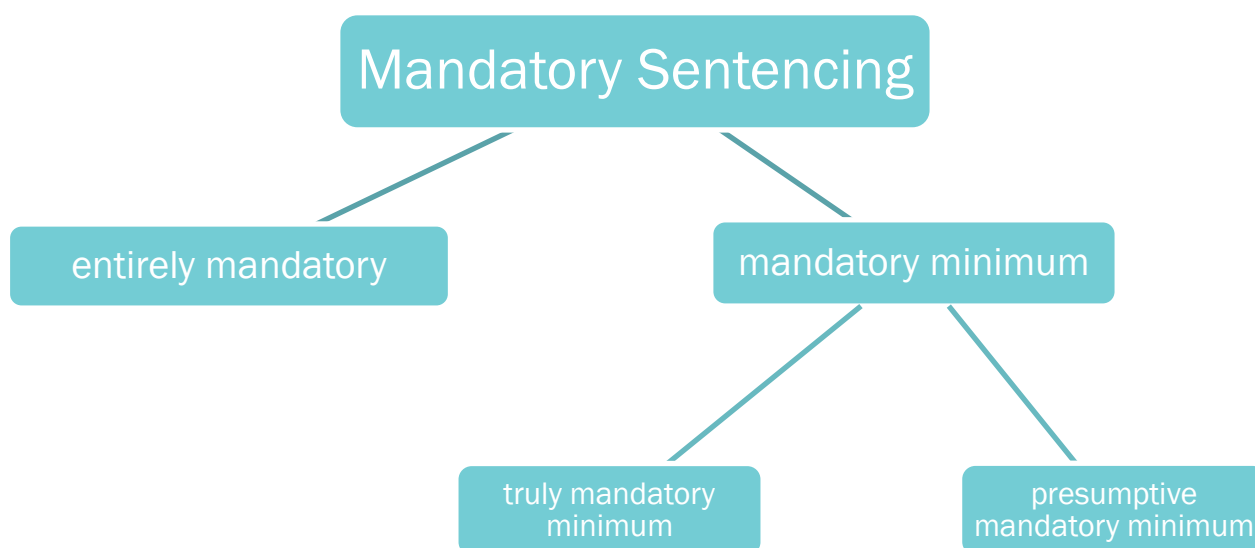
<sup>4</sup> [Section 2 of the Criminal Justice Act 1990](#).

<sup>5</sup> [Section 3 of the Criminal Justice Act 1990](#).

<sup>6</sup> [Section 1 of the Treason Act 1939](#), as amended. There have been no successful prosecutions for this offence in the history of the State.

convicted of the offence, it would be unjust in all the circumstances to do so.”<sup>7</sup> Similar provision is made in respect of a number of serious firearms offences under the [Firearms Act 1964](#).

In the case of both categories of offence, the presumptive mandatory minimum applies only in respect of a first offence, and is converted to a *truly* mandatory minimum sentence where a person is before the court for a second such offence. That is, on a second offence, a judge has no residual discretion to impose a term of imprisonment less than the statutory minimum. It is in effect a “two strikes and you’re out” provision.<sup>8</sup>



### Challenges to mandatory sentences

Mandatory sentences have been challenged in the courts on the ground that they interfere with the judiciary’s function to administer justice, and hence breach the separation of powers, which the Supreme Court has described as “a high constitutional value.”<sup>9</sup>

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<sup>7</sup> [Section 27\(3D\)\(a\) of the Misuse of Drugs Act 1977](#). There are figures to suggest that the presumptive minimum is more honoured in the breach than in the observance. The Irish Independent reported in 2012 that: “since 2007, 889 people have been convicted of the sale or supply of more than €13,000 worth of drugs, but only 155 -- or 17pc -- received a 10-year term.” It is not made clear how many of this 17 per cent were repeat offenders. Irish Independent, [‘Just one in five drug dealers gets “mandatory” term’](#) (February 2, 2012).

<sup>8</sup> In the 1990s a number of US states introduced what are often referred to as “three strikes” laws. These provide that where an offender has committed a third offence, the punishment received by the offender for the third offence is significantly higher than it would be for a first-time offence, in many cases being a mandatory life sentence. This contrasts with the considerably less harsh position under the *Firearms Act 1964*, which provides for mandatory minimum sentences of 5 years for a repeat offender for certain offences.

<sup>9</sup> *T.D. and Others v Minister for Education* [2001] IESC 101, [2001] 4 IR 259 per Denham J (as she then was).

### The separation of powers

The separation of powers is a constitutional doctrine that provides for the division of the organs of government; between the executive, the judiciary, and the legislature. The doctrine requires each organ to carry out its functions independently, and free from the interference of the others. The separation of powers has been a fundamental value of liberal government since the time of the French Revolution. It ensures that there is a system of checks and balances maintaining the stability and good governance of the State.

The mandatory life sentence for murder was challenged on these grounds in *Lynch & Whelan v Minister for Justice*,<sup>10</sup> but the Supreme Court ruled in favour of the State. The Supreme Court held that mandatory sentences are not unconstitutional provided the sentence bears a “rational relationship” to the nature of the offence (i.e. it is proportionate) and applies equally to all persons.<sup>11</sup> In discussing the proportionality argument, the Supreme Court noted that while murder can be committed in a “myriad of circumstances” with varying degrees of culpability and blameworthiness, the commission of the offence under any circumstances is so grave and repugnant that a life sentence will always be proportionate:

“In committing the crime of murder the perpetrator deprives the victim, finally and irrevocably, of that most fundamental of rights, the right ‘to be’, and at the same time extinguishes the enjoyment of all other rights inherent in that person as a human being. By its very nature it has been regarded as the ultimate crime against society as a whole. It is also a crime which may have exceptional irrevocable consequences of a devastating nature for the family of the victim.”<sup>12</sup>

While the authors are not aware of any previous constitutional challenge to mandatory minimum sentencing, as opposed to entirely mandatory sentences, it is worth noting that their constitutionality has been questioned by leading commentators. O’Malley, a prominent academic in the field, discusses the mandatory minimum sentence under the *Misuse of Drugs Act 1977*, as amended, in the following terms:

“The constitutionality of the mandatory minimum 10-year sentence for repeat offenders remains an open question. Due deference must obviously be paid to the legislative assessment of the gravity of repeat drug-dealing offences. Yet a mandatory 10-year term under this “two-strikes” law is remarkably severe for a non-violent offence. It means, for example, that a person who was once convicted of possessing for sale or supply drugs with a street value only marginally in excess of €13,000 and is again convicted several years later of a s. 15A offence involving drugs with a similar street value must, in respect of that second offence, be given a prison term of at least 10 years...Even assuming that a

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<sup>10</sup> [2012] 1 IR 1.

<sup>11</sup> *Lynch & Whelan v Minister for Justice Equality and Law Reform* [2010] IESC 34, [2012] 1 IR 1.

<sup>12</sup> *Ibid.*

mandatory penalty is constitutionally vulnerable where there is “no rational relationship between the penalty and the requirements of justice” in the particular case, that test could possibly be satisfied in a constitutional challenge to the mandatory minimum sentences for drug and firearms offences...”<sup>13</sup>

The Law Reform Commission (“the Commission”) has recommended that the mandatory minimum sentencing regimes applicable to both drugs and firearms be repealed in their entirety.<sup>14</sup> In relation to drugs offences, the Commission noted that the offenders most likely to be the subject of the mandatory minimum are so-called “drug mules”, whose involvement in the drugs trade is secured through exploitation and coercion, and for whom the sentencing regime is unlikely to have any real deterrent effect.<sup>15</sup> The Commission also suggested that it is unjust for drugs offenders to be subject to the same punishment irrespective of their level of moral culpability.<sup>16</sup> The Commission similarly took the view that the mandatory sentencing regime under the *Firearms Act 1964* is unjust having regard to relative culpability of offenders, and does not meet the aim of deterrence.<sup>17</sup> In place of this regime of sentencing, the Commission recommends that a structured, guidance-based sentencing system, operated by a Judicial Council, be enacted.<sup>18</sup>

It is against this background that the Supreme Court gave judgment in *Ellis v Minister for Justice* in May 2019.

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<sup>13</sup> O’Malley, *Sentencing Law and Practice* (3<sup>rd</sup> ed. Round Hall, 2016) p. 467.

<sup>14</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108 – 2013) p. 183.

<sup>15</sup> *Ibid.*, p. 175.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, p. 177.

<sup>18</sup> *Ibid.*, p. 183. The [Judicial Council Bill 2017](#), currently before Seanad Éireann, proposes to give effect to this recommendation.



## *Ellis v Minister for Justice*

In *Ellis*, the Supreme Court considered the constitutionality of [section 27A\(8\) of the Firearms Act 1964](#), which provides for a “two strikes and you’re out” mandatory minimum sentence of the kind discussed above. The Court considered the respective roles of the Oireachtas and the courts in determining appropriate sentence for repeat offenders, and its implications for the separation of powers. The main judgment was delivered by Ms Justice Finlay Geoghegan,<sup>19</sup> and a concurring opinion was delivered by Mr Justice Charleton.<sup>20</sup>

The background to the case is set out in detail in the judgment of Ms Justice Finlay Geoghegan.<sup>21</sup> Mr Ellis was charged with numerous offences arising out of an incident at Knocklyon Shopping Centre, including an offence of possession of a sawn off shotgun contrary to section 27A(1) of the 1964 Act. Mr Ellis had a previous conviction for carrying a firearm with criminal intent, under [section 27B of the 1964 Act](#).

Having pleaded guilty to this offence, Mr Ellis was sentenced in the Circuit Court to a five year sentence, which was fully suspended. However, the Circuit Court judge acted in error in so doing, as she was not aware that the mandatory nature of the sentence to be imposed on a repeat offender under section 27A(8) precluded her from suspending the sentence.

While the Circuit Court judge was of the view that the appellant was undertaking credible measures to reform himself, and was entitled to a degree of leniency, this was not an avenue open to her. The Director of Public Prosecutions appealed the sentence for undue leniency, noting the error of trial judge.

The appellant commenced separate proceedings to challenge the constitutionality of section 27A(8). He argued that the effect of the provisions was to fetter the discretion of the sentencing judge in a manner inconsistent with the Constitution, and in breach of the doctrine of separation of powers. The constitutionality of section 27A(8) of the 1964 Act was upheld in the High Court by Mr Justice Twomey<sup>22</sup> and in the Court of Appeal by Mr Justice Birmingham.<sup>23</sup>

### **The High Court**

The decision of the High Court was delivered on the 9<sup>th</sup> May 2016. In analysing the constitutionality of section 27A(8), the Court set out the following three principles derived from earlier case law:

- i. It is permissible as a matter of principle for the Oireachtas to impose a fixed or mandatory penalty for a particular offence.
- ii. The mandatory penalty must apply to all citizens.
- iii. There must be a rational relationship between the fixed penalty and the requirements.

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<sup>19</sup> Available [here](#).

<sup>20</sup> Available [here](#).

<sup>21</sup> *Ellis v Minister for Justice and Equality & ors* [2019] IESC 30, at paras 3 to 17.

<sup>22</sup> *Ellis v Minister for Justice and Equality & ors*. [2016] IEHC 234.

<sup>23</sup> *Ellis v Minister for Justice and Equality & ors*. [2017] IECA 237.



Relying on the decision of the Supreme Court in *Lynch & Whelan v Minister for Justice*,<sup>24</sup> the Court held that it was settled law that the Oireachtas was permitted to provide for mandatory sentences in legislation.

In relation to the principle that a mandatory penalty must apply to all persons, the Court rejected the contention that, as section 27A(8) only applies to persons who have previous firearms convictions, it therefore cannot be said to apply to all citizens, and was unconstitutional. In analysing the second principle and what is meant by a penalty applying to all persons, the Court held that were a penalty to be applied irrationally to a specific sub-set of citizens then it would be in breach of the second principle. However, in the present case the Court suggested that the public policy arguments in favour of a mandatory minimum sentence for a repeat offender meant that it could not be said to be an irrational application to a sub-set of citizens.

He suggested that the reference in section 27A(8) to a person having a previous conviction for a firearms offence was merely a pre-condition for the offence under section 27A(8) to be committed, and could not be viewed as specifying a characteristic or category of person in a manner to render the section unconstitutional. He drew a comparison with a fixed penalty offence for dog owners and noted that such an offence could not be considered unconstitutional because the offence only applies to dog-owning citizens as opposed to all citizens.

Discussing the rational relationship between the fixed penalty and the requirements of justice, the High Court focused on the public policy behind penalties for gun-related crime in a country where the police force is unarmed, stating:

“[T]his Court does not believe that a sentence length of five years, for a person who has been guilty of possessing a firearm in suspicious circumstances, where he has a previous offence of carrying a firearm with intent, is so irrational as to be unconstitutional. In this Court’s view there exists an obvious rational relationship between the length of that sentence and the requirements of justice and, in particular, the desire of the Oireachtas to seek to address gun-crime in a country where the Gardaí are unarmed.”<sup>25</sup>

## The Court of Appeal

The decision of the Court of Appeal was delivered by Mr Justice Birmingham on the 31<sup>st</sup> July 2017. He rejected arguments that the regime under section 27A(8) was unconstitutional on the basis that it applies only to persons with relevant previous convictions. In this regard he held that “[t]here is nothing unusual about the fact that a different sentencing regime is to apply in the case of second or subsequent offences.”<sup>26</sup>

In relation to the rational relationship between the punishment and the offence he agreed with the view expressed by the High Court that “in a country where even the police do not routinely carry arms that the possession of firearms unlawfully is a particularly serious matter and that the legislature is quite entitled to so treat it.”<sup>27</sup> The Court of Appeal went on to quote with approval the

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<sup>24</sup> [2012] IR 1.

<sup>25</sup> [2016] IEHC 234, at para 45.

<sup>26</sup> [2017] IECA 237, at para 11.

<sup>27</sup> [2017] IECA 237, at para 12.

following passage from O'Malley, *Sentencing Law and Practice* (3<sup>rd</sup> Ed.) as highlighting the threat posed by firearms:

“One constant theme running through the jurisprudence on sentencing for firearm offences across all common law jurisdictions is that courts must be aware of the intense and, apparently growing danger posed by the misuse of firearms. The same concern is reflected in the legislative introduction of minimum sentences which have become increasingly common.”<sup>28</sup>

The Court of Appeal was ultimately of the view that the Oireachtas was entitled to a wide margin of appreciation in relation to sentencing policy and that in circumstances where the threat posed by gun crime was so serious, it could not be said that the approach adopted in relation to section 27A(8) was either irrational or disproportionate.

## The Supreme Court

The Supreme Court considered the fundamental issue before the court to be whether:

“... it is consistent with the Constitution for the Oireachtas to legislate for a fixed or minimum mandatory sentence or penalty which does not apply to all persons convicted of the offence, but only to a limited class of such offenders, determined by reference to a fact which is either one characteristic of the offender, namely that he has one or more prior relevant conviction, or is one of the circumstances in which the offence of conviction is considered to have been committed, namely that it is the second time or more that the offender has committed this offence or a similar relevant offence.”<sup>29</sup>

The Supreme Court examined the relevant case law and identified two principles to guide the court in considering the issue of the separation of powers in the area of sentencing:

- The first principle is that both the Courts (pursuant to Article 34 and Article 38 of the Constitution)<sup>30</sup> and the Oireachtas (pursuant to Article 15 of the Constitution)<sup>31</sup> may have a role in the determination of the sentence to be imposed on a convicted person.<sup>32</sup>
- The second principle is that the Oireachtas may prescribe legislation which provides for all persons convicted of a particular offence to be subject to a specific prescribed penalty, subject to the constitutional constraint of the penalty bearing a rational relationship to the requirements of justice in relation to the punishment of the offence.<sup>33</sup>

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<sup>28</sup> [2017] IECA 237, at para 12.

<sup>29</sup> [2019] IESC 30, at para 52.

<sup>30</sup> Article 34.1 of the Constitution provides that “Justice shall be administered in courts established by law”. Article 38.1 provides that “No person shall be tried on any criminal charge save in due course of law”.

<sup>31</sup> Article 15.2.1 of the Constitution provides that “The sole and exclusive power for making laws for the State is hereby invested in the Oireachtas...”.

<sup>32</sup> [2019] IESC 30, at para 45.

<sup>33</sup> [2019] IESC 30, at paras 46 and 47.

The Supreme Court also noted that the case law indicates that:

“... the selection of the punishment to be imposed on a particular person convicted of a particular offence forms part of the administration of justice which, pursuant to Articles 34.1 and 38, is exclusively a matter for judges sitting in courts.”<sup>34</sup>

In discussing the principles of sentencing to be applied in order to reach a just and fair sentence, the Supreme Court noted that these involve a consideration of the following factors:

1. The gravity of the offence;
2. The circumstances in which it was committed;
3. The personal situation of the accused; and
4. Mitigating factors.

The Supreme Court also highlighted the importance of evaluating previous convictions in sentencing and noted that:

“Prior convictions, or the absence thereof, always form part of the consideration of the above factors by a sentencing judge in reaching an appropriate sentence for the offence of conviction and the person convicted.”<sup>35</sup>

In applying the principles set out above, the Supreme Court held that section 27A(8) of the 1964 Act breached the separation of powers, holding that:

“... it is not constitutionally permissible for the Oireachtas to determine or prescribe, by Statute a penalty to which only a limited class of persons who commit a specified offence are subject, by reason either of the circumstances in which the offence was committed, or the personal circumstances of the convicted person. This is because the law no longer simply determines the applicable penalty for all who are convicted of the crime and the selection of the appropriate sentence in accordance with law for the particular offence committed by the individual offender forms part of the administration of justice and is pursuant to Article 34.1 exclusively the domain of judges sitting in courts. That is what the Oireachtas purported to do by enacting s. 27A(8) of the 1964 Act, as amended.”<sup>36</sup>

In effect, the Supreme Court held that while the Oireachtas can provide for a mandatory penalty for an offence, it can only do so where that penalty applies equally to all offenders. In directing a court as to how to assess the weight of previous convictions in determining sentence (i.e. that a previous conviction for the same or similar offence should automatically bring it into a higher category of sentence), the Oireachtas had overstepped into the judicial function of administering justice in individual cases. For the Supreme Court, it is a function of the judiciary, and not the Oireachtas, to determine the relative weight to be attached to previous convictions in determining sentence.

Thus, the Supreme Court does not view the differing application of the mandatory minimum as constitutionally deficient on equality grounds, but rather on the basis of how that differing application interferes with a court’s function in determining sentences in an individual case,

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<sup>34</sup> [2019] IESC 30, at para 48.

<sup>35</sup> [2019] IESC 30, at para 55.

<sup>36</sup> [2019] IESC 30, at para 60.

something which the Court sees as integral to the judicial function under Article 34.1 of the Constitution.

This is perhaps the key difference between the approach of the High Court and Court of Appeal, and of the Supreme Court. The lower courts considered the “differing application” argument through the lens of the constitutional guarantee of equality in Article 40.1, and rejected it on the basis that it was not an arbitrary or unreasonable distinction for the Oireachtas to draw. However, the Supreme Court considered the “differing application” argument under a different standard, namely Article 34.1. The Supreme Court was persuaded that the differing application of the mandatory sentence interfered with a court’s function of administering justice in individual cases, as required by Article 34.1.

## Implications

The decision does not automatically render invalid the detention of persons who have previously been sentenced under section 27A(8), unless they raised the question of its unconstitutionality at their own trial.<sup>37</sup> The decision does, however, raise questions about the constitutionality of a number of other offences, and may prompt the Oireachtas to revisit legislation in the area of mandatory minimum sentencing.

As discussed above, the “two strikes and you’re out” sentencing framework in the *Firearms Act 1964* is very similar to that provided for in respect of an offence under [section 15A of the Misuse of Drugs Act 1977](#), as amended. [Part 3 of the Criminal Justice Act 2007](#) also provides for certain mandatory sentencing arrangements in respect of a second offence, where the offence is one set out in Schedule 2 of that Act.<sup>38</sup>

Within the *Firearms Act 1964* there are a number of other offences that carry mandatory minimum sentences for a second relevant offence, and are set out in similar terms to the section struck down in *Ellis* (section 27A(8)). These include:

- An offence under section 26(8) – possession of a firearm while taking vehicle without authority (5 years);
- An offence under section 27(8) – prohibition of use of firearms to assist or aid escape (10 years); and
- An offence under section 27B(8) – carrying firearm with criminal intent (5 years).

The judgment in *Ellis* raises serious questions about the constitutionality of these provisions, and they may also be subject to challenge in the courts.

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<sup>37</sup> *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88. See discussion of the retrospective effect of declarations of unconstitutionality in Hogan, Whyte, Kenny & Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> ed. Bloomsbury, 2018) pp. 1053 – 1078.

<sup>38</sup> The scheduled offences include, *inter alia*: murder; causing serious harm; blackmail; threats to kill; aggravated burglary; and various offences related to organised crime. Where a person who has previously been convicted of a scheduled offence comes before a court charged with the same offence or another scheduled offence, within a 7 year period, the court must impose a sentence equivalent to at least three-quarters of the maximum penalty available under the relevant statute. However, this section is a presumptive mandatory minimum, as section 25(3) provides that the mandatory “three-quarters” penalty will not apply where it would be “disproportionate in all the circumstances of the case”. O’Malley suggests that this section has had a limited effect on day-to-day practice, save to the extent that courts routinely consider previous convictions in making a determination on sentence. See O’Malley, *Sentencing Law and Practice* (3<sup>rd</sup> ed. Round Hall, 2016) p. 238.



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