

Smart Justice

“Smart action for a safer community”

Mandatory sentencing

Mandatory sentencing leads to harsh and unfair sentences and does not reduce crime

Forms of mandatory sentencing reappear frequently on the political agenda in Victoria, despite evidence from Australia and overseas demonstrating that it has no demonstrable effect on the crime rate, leads to harsh and unfair sentences and disproportionately affects indigenous and other marginalized groups.

Most jurisdictions in Australia already have some form of mandatory sentencing¹, including Victoria. In Victoria, there is now mandatory sentencing for a number of newly created offences, including:

- ‘Gross violence’: intentionally or recklessly causing serious harm in certain circumstances.²
- ‘Punch/strike manslaughter’: punching or striking a person in the head without warning, resulting in their death (even where a person who is punched or struck then falls and hits their head on the road and dies from the second injury).³
- Specified ‘violent offences’ against emergency workers.⁴

While mandatory sentencing may appear a superficially attractive option for those who want to reduce crime and provide consistency and certainty in sentencing, evidence-based research shows that it simply doesn't work.

Mandatory sentencing fails to consider an offender's circumstances

Mandatory sentencing means a one size fits all approach which doesn't properly consider the circumstances of the offender. Giving judges and magistrates discretion maximises the chances of finding a sentence which will address the causes of the offending and reduce the chance of reoffending. Evidence shows that therapeutic approaches to sentencing, such as community and treatment-based orders, can substantially reduce reoffending rates compared with prison.⁵

Mandatory sentencing leads to harsh and unfair sentences

Mandatory sentencing means a one size fits all approach to the culpability of the offender, instead of matching the sentence to the actual level of seriousness of the offending. This leads inevitably to harsh and unfair sentences.

Kevin Cook, a homeless man, was sentenced to 12 months in prison under the Northern Territory's three strike laws in 1999. His crime? Stealing a towel from a clothes line.⁶

Mandatory sentencing shifts discretion from the courts to police and prosecutors

Instead of judges having discretion to impose the appropriate sentence, mandatory sentencing shifts discretion to police and prosecutors who decide – behind closed doors – whether or not a charge that carries a mandatory sentence should be brought against an offender.⁷

Mandatory sentencing disproportionately affects marginalised communities

In Western Australia and the Northern Territory, mandatory sentencing laws disproportionately affected Aboriginal and Torres Strait Islander peoples, particularly young people from remote areas.⁸ The United Nations committee against torture recently expressed concern that mandatory sentencing continues to disproportionately affect Aboriginal and Torres Strait Islander peoples. It recommended that governments review these laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances in the sentencing process.⁹

In the United States, far from leading to more consistent sentencing, mandatory minimum sentences for drug cases widened the gap between sentences imposed

for black and Hispanic offenders and white offenders charged with similar crimes.¹⁰

Mandatory sentencing has no demonstrable effect on crime rate

In the Northern Territory, property crime increased during the mandatory sentencing regime, and decreased once it was repealed.¹¹ Advisory Commissions and Committees in the United States, UK and Canada have all rejected the notion that mandatory sentencing acts as a deterrent to crime.¹² This is hardly surprising, since research demonstrates that the perceived risk of being caught is a much greater deterrent than the fear of punishment when caught.¹³

Mandatory sentencing violates human rights

Mandatory sentencing laws in the Northern Territory and Western Australia have been examined by three of the United Nations committees – on civil and political rights, the rights of the child and against racial discrimination. Each concluded that the laws violated Australia's international human rights obligations.¹⁴

Previous trial of mandatory sentencing in Victoria

Few people realise that previously Victoria had mandatory sentencing for certain offences. Until 2011, anyone found guilty for a second time of driving while disqualified or suspended faced a mandatory minimum of one month's

imprisonment.¹⁵ In 2008, the Victorian Sentencing Advisory Council conducted a review of the mandatory minimum sentence, and recommended that it be removed.¹⁶

The report found that the mandatory sentencing scheme:

- Is NOT effective in protecting the community
- Does NOT lead to sentences that rehabilitate offenders or prevent them from reoffending
- Can result in penalties which are disproportionately high
- Is causing strain on the criminal justice system.¹⁷

Based on this evidence, the Victorian Government abolished the mandatory prison sentence for this offence in 2010.¹⁸ Others remain or, indeed, have been introduced since, as outlined above.

Smart Justice solutions

The Smart Justice solution is to take mandatory sentencing off the agenda. Sentencing reform should focus on promoting the court discretion so that judges can tailor the punishment to fit the crime and make orders (such as drug and alcohol treatment) or participation in rehabilitation programs that maximise the chances of preventing reoffending.

This factsheet is based on the law of Victoria, Australia and was last updated on 23 July 2015.

1. See Law Council of Australia (2014) *Current Mandatory Sentencing Laws*. Available at http://www.lawcouncil.asn.au/lawcouncil/images/CURRENT_MANDATORY_SENTENCES_LAWS.pdf
2. S 15A-B *Crimes Act 1958* (Vic). Commenced 30 January 2014.
3. S 4A *Crimes Act 1958* (Vic). Commenced 1 November 2014.
4. Ss 3(2), 15A, 15B, 16, 17, 31(b), (ba) *Crimes Act 1958* (Vic). Commenced 2 November 2014.
5. In Victoria, people released from prison are nearly twice as likely to return to corrective services within two years of ending their sentence as those with a sentence involving community correction: Victorian Budget 15/16 *Budget Paper 3*, based on actual rate of return for 2013/14, 284, 286. See also Lulham, Weatherburn and Bartels, 'The Recidivism of offenders given suspended sentences: a comparison with full-time imprisonment' *Contemporary Issues in Crime and Justice* no 136, NSW Bureau of Crime Statistic and Research, 4.
6. Barlow, 'Back to the Future in the Northern Territory: the Return of Mandatory Imprisonment for First Offenders' (2009) 33 *Criminal Law Journal* 231, 234.
7. See e.g. Morgan, 'Why we should not have mandatory penalties', (2001) 23 *Adelaide Law Review* 141, 144.
8. Sallmann, 'Mandatory sentencing: a bird's eye view' (2005) 14(4) *Journal of Judicial Administration* 177, 189-90; Sheldon & Gowans, *Dollars Without Sense: A Review of the NT's Mandatory Sentencing Laws*, (1999) North Australian Aboriginal Legal Aid Service.
9. UN Committee against torture, CAT/CAUS/CO/4-5, 3-28 November 2014, 2.
10. United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), xv.
11. NT Crime Prevention, *Mandatory sentencing for adult property offenders*; (2003), 10: The report notes that while there is insufficient data to draw conclusions it does indicate that sentencing policy is not a dominant factor influencing the level of crime.
12. Sallman, above n8, 187.
13. Morgan, above n7, 149; Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (April 2009), viii.
14. Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51.
15. Under s 30, *Road Safety Act 1986* (Vic).
16. Sentencing Advisory Council, above n 14, viii.
17. Sentencing Advisory Council, above n 14, viii.
18. s 28, *Sentencing Amendment Act* (2010).