

Smart Justice

“Smart action for a safer community”

Mandatory sentencing

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

Mandatory sentencing remains on the political agenda in Victoria, despite overwhelming evidence from Australia and overseas demonstrating that it fails to reduce 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 sentencing. In the Northern Territory, assaults causing harm carry mandatory prison sentences,¹ and in Western Australia, “third strike” burglars face a minimum of 12 months’ imprisonment. In NSW, there are presumptive minimum sentences for certain offences,² while Queensland and the Commonwealth also have mandatory sentences in some circumstances.

While mandatory sentencing may appear a superficially attractive option 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.³

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.⁴

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.⁵

Mandatory sentencing disproportionately affects marginalised communities

In Western Australia and the Northern Territory, mandatory sentencing laws disproportionately affected Aboriginal offenders, particularly young offenders from remote areas.⁶ 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.⁷

Mandatory sentencing does not reduce crime

In the Northern Territory, property crime increased during the mandatory sentencing regime, and decreased once it was repealed. 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.⁸ 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.⁹

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.¹³

Ending mandatory sentencing in Victoria

Few people realize that Victoria used to have 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.¹⁰ In 2008, the Sentencing Advisory Council, an independent statutory body, conducted a review of the mandatory minimum sentence, and recommended that it be removed.¹¹ 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.¹²

The Victorian Government abolished the mandatory prison sentence for this offence in 2010.¹⁴

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) that maximise the chances of preventing reoffending.

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- 1 s 78BA, *Sentencing Act 2008* (NT). A similar scheme was proposed by the Liberal Party in the recent Tasmanian State Election: <http://tasliberal.com.au/news/mandatory-sentencing-for-assaults-against-police-and-emergency-service-workers>.
- 2 The presumptive minimum sentences relate only to the non-parole period for certain offences.
- 3 In Victoria, people released from prison are twice as likely to return to corrective services within two years of ending their sentence as those with a sentence involving community correction: Productivity Commission Report on Government Services 2010, C.11-C.12. 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.
- 4 Barlow, 'Back to the Future in the Northern Territory: the Return of Mandatory Imprisonment for First Offenders' (2009) 33 *Criminal Law Journal* 231, 234.
- 5 See eg Morgan, 'Why we should not have mandatory penalties', (2001) 23 *Adelaide Law Review* 141, 144.
- 6 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.
- 7 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.
- 8 Sallman, above n 6, 187.
- 9 Morgan, above n 5, 149; Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (April 2009), viii.
- 10 Under s 30, *Road Safety Act 1986* (Vic).
- 11 Sentencing Advisory Council, above n 9, viii.
- 12 Sentencing Advisory Council, above n 9, viii.
- 13 Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51.
- 14 s 28, *Sentencing Amendment Act* (2010).