



Mandatory Minimum Sentencing

To: Attorney-General, Robert Clark

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Executive summary

1. The Law Institute of Victoria opposes the introduction of mandatory minimum sentences, which are a form of mandatory sentencing.
2. Advocates of mandatory sentencing claim that it prevents crime, provides consistency in sentencing, and that it constitutes a democratic response to widespread public concern about crime.
3. The overwhelming evidence from Australia and overseas, however, demonstrates that mandatory sentencing does not reduce crime through deterrence nor incapacitation, and may lead to increased crime rates in the long run, as imprisonment has been shown to have a criminogenic effect.
4. Mandatory minimum sentencing leads to inconsistent sentencing results through the imposition of sentences that may be disproportionate to the gravity of the offending.
5. The introduction of mandatory minimum sentencing would undermine the guideline principles in the *Sentencing Act 1991*, and well-understood common law principles relating to sentencing discounts and proportionality.
6. Mandatory sentencing regimes do not remove discretion from the criminal justice system, but shift that discretion away from judicial officers, and on to police and prosecutors.
7. Mandatory sentencing regimes are not supported by the public, when the public is informed about what they actually mean.
8. In jury studies, where jurors are asked which sentence they would impose on a convicted offender, more than half of the jurors suggested a more lenient sentence than the trial judge imposed. Further, when informed of the actual sentence imposed, 90% of jurors said that the judge's sentence was (very or fairly) appropriate.
9. Mandatory sentencing regimes exacerbate court delay, especially in the County Court, as offenders contest charges in order to avoid the mandatory minimum sentence.
10. The motivation for an offender to assist the authorities with their investigations is also removed.
11. "Closure" for victims of crime will be delayed under the government's proposal, as more matters will be contested. Victims of crime will also be subjected to the rigours of cross examination as offenders seek to avoid the mandatory minimum penalty.
12. The proposal will have a significant impact on the costs of judicial administration, policing and legal aid funding, as more matters are contested.
13. The proposal will result in burgeoning costs in relation to housing more prisoners, for longer.
14. Juveniles are most likely to be impacted by this proposal, as they are the most likely to engage in the type of criminal offending to which the mandatory minimum sentences will attach.
15. The proposal undermines the philosophy of sentencing children, set out in the *Children, Youth and Families Act 2005*.
16. The proposal violates rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *UN International Covenant on Civil and Political Rights* and the *UN Convention on the Rights of the Child*.

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17. The LIV recommends that the government abandon the proposal to introduce mandatory minimum sentences for offences of gross violence, and instead create an independent crime statistics bureau, recruit more police officers, expand the specialist courts currently operating, replicate the Tasmanian Jury Study and introduce Justice Impact Tests to Victoria.

Introduction

On 10 May 2011, the Law Institute of Victoria (LIV) received a letter from the Sentencing Advisory Council (SAC), advising that the Attorney-General had requested the SAC provide advice on the introduction of a statutory minimum penalty (mandatory minimum sentencing) for the offences of intentionally causing serious injury and recklessly causing serious injury, when either offence is committed with gross violence. That statutory minimum penalty will apply to both adult offenders and juvenile offenders aged 16 or 17 (the proposal).

We are now writing to you to urge you not to introduce this proposal.

While the LIV recognises that there is a legitimate concern about violent crime in the community, the wealth of International and Australian empirical evidence in relation to mandatory sentencing regimes shows that such regimes fail to fulfil their aims, and in many cases lead to serious injustice.

Further, the proposed mandatory minimum sentencing regime violates rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and human rights under international law.

This submission will briefly examine the empirical evidence behind each justification for mandatory sentencing in turn, and address the unintended consequences of mandatory sentencing regimes.

We will then suggest alternative, empirically supported methods the government might consider to address the issue of violent crime in the community, and public perceptions of crime.

This submission uses the terms “mandatory sentencing” and “mandatory minimum sentencing” interchangeably, as both are variations on the same concept of “mandatory sentencing”. We note that, even when accompanied by an “exceptional circumstances” provision, the proposal amounts to a mandatory sentencing regime.

Background

Advocates of mandatory sentencing claim that it prevents crime, provides consistency in sentencing, and that it constitutes a democratic response to widespread public concern about crime.

The overwhelming evidence from Australia and overseas, however, demonstrates that the “one size fits all” approach to sentencing fails to reduce the crime rate or deter would-be offenders, and leads to harsh and unjust sentences which disproportionately affect youth, indigenous offenders, those with mental illness or intellectual disabilities, and other marginalised groups.

Further, mandatory sentencing exacerbates court delay, as the motivation for an offender to plead guilty disappears under a mandatory sentencing regime, and more matters are taken to trial. Likewise, the motivation for an offender to assist the police disappears where the potential sentence discount for such assistance disappears.

The legal maxim that “justice delayed is justice denied” applies to victims of crime where mandatory sentencing regimes are in place. As cases are taken to trial, “closure” for victims is delayed. Victims of crime will not only have to wait longer for trials to be completed under mandatory sentencing, but will also have to endure the rigours of cross-examination as offenders contest charges to avoid the mandatory minimum penalty.

Mandatory sentencing regimes remove judicial discretion in sentencing; they are designed specifically to address public perceptions of judicial lenience in sentencing. However, the evidence shows that mandatory sentencing merely displaces the discretion in the criminal justice system away from publicly accountable judicial officers and onto the police and prosecutors, who have the discretion to decide which charges will proceed.

Mandatory Sentencing in Australia

Both Western Australia and the Northern Territory have recent experience with mandatory sentencing regimes, and both jurisdictions provide the majority of the empirical evidence in Australia in relation to the faults of mandatory sentencing.

The Western Australian government introduced a “three strikes and you’re in” law in respect of home burglaries in 1996. Under those amendments to the *Criminal Code (WA)*, a person with at least two previous convictions for burglary is required to serve at least 12 months in custody if convicted again¹.

Then in 2009 the Western Australian government introduced amendments to the *Criminal Code*, prescribing a mandatory sentence of imprisonment (or detention, if the offender is a juvenile) for an offender guilty of grievous bodily harm, where the victim is a police officer or other prescribed public official².

The now notorious mandatory minimum sentences for property crime were introduced into Northern Territory law in 1997 and were repealed in 2001. Under that regime, offenders were imprisoned for 14 days for a “first strike” property offence, 90 days for a “second strike” and 12 months for a “third strike” property offence.

Despite the failure of that mandatory sentencing regime, mandatory sentencing was re-introduced to the Northern Territory with an amendment to the *Sentencing Act (NT)*, which came into force on 10 December 2008. The amended s7BA *Sentencing Act (NT)* provides that a mandatory sentence of imprisonment must be served where an offender is found guilty of serious harm, harm, assault causing harm and assaults on police resulting in harm³.

New South Wales has “life means life” provisions in relation to the penalty of life imprisonment for murder, but this is ameliorated by the general power to reduce penalties, conferred by s21 *Crimes (Sentencing Procedure) Act 1999*. Section 61 of the same Act provides judicial officers with a sentencing discretion by prescribing that the mandatory life sentence will apply where a person is convicted of murder, and:

“if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence”

Section 61(2) provides a further discretion to the courts to not impose a life sentence on those convicted of a serious heroin or cocaine trafficking offence.

Despite their name, the NSW mandatory sentencing provisions do not, therefore, constitute a mandatory sentencing regime; judicial discretion is preserved through s21 and s61 *Crimes (Sentencing Procedure) Act 1999*.

In May 2011, the New South Wales government introduced legislation into Parliament making life sentences mandatory for offenders convicted of murdering police officers⁴. The provisions of the Bill do not apply if the person was under the age of 18 years at the time the murder was committed, or if the person had a significant cognitive impairment at the time (not being a self-induced impairment)⁵.

The Commonwealth Parliament introduced mandatory sentencing into Commonwealth legislation in 2001, with amendments to the *Migration Act 1958* (Cth). Section 236B prescribes mandatory

¹ This was Western Australia’s second attempt at introducing mandatory sentencing. In 1992 the Western Australian government introduced the short-lived *Crime (Serious and Repeat Offenders) Act 1992*. This Act targeted young offenders involved in high-speed pursuits in stolen vehicles, and proscribed a mandatory sentence of 18 months in custody for a repeat offender with three previous convictions for prescribed offences of violence.

² s297(5) *Criminal Code (WA)*

³ See s181, s186, s188 and s189A *Criminal Code Act (NT)*

⁴ *Crimes Amendment (Murder of Police Officers) Bill 2011*

⁵ s3(3) *Crimes Amendment (Murder Of Police Officers) Bill 2011*

minimum penalties for certain aggravated offences involving people smuggling. The mandatory sentences include eight years imprisonment for a repeat offence of aggravated people smuggling (at least 5 people)⁶, regardless of the motivation of the offender or the circumstances of the offending.

The popularity of mandatory sentencing regimes in Australia would suggest that they are very cost effective in achieving their aims, namely, crime reduction through deterrence and incapacitation. The next section of this submission will examine each of the justifications for mandatory sentencing and dispute that mandatory sentencing fulfils those aims.

Mandatory sentencing does not reduce crime

A major aim of mandatory sentencing regimes is to reduce and prevent crime, through deterrence of would-be offenders, and the incapacitation of an offender who would otherwise commit crimes in the community.

However, the experience in the Northern Territory during the mandatory sentencing regime for property offences showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal.⁷

The following section of this submission will examine the evidence behind the justifications of deterrence and incapacitation and analyse why crime rates actually increase under mandatory sentencing regimes.

Deterrence

Deterrence theory in criminology is based on the classical economic theory of “rational choice”, which assumes that would-be offenders are rational actors who weigh up the costs and benefits of committing a crime, before deciding to commit that crime.

Thus, deterrence works by introducing a penalty for a crime, which would “deter” would be offenders from committing that crime, through fear of the perceived consequences.

However, deterrence theory fails to take account of the large number of offenders who may be considered “irrational”; those suffering from mental impairment, those who are drug affected or intoxicated, those with behavioural problems, or those with poor or anger management.

The reality is that many crimes are committed impulsively, and without a great deal of forethought. The LIV submits that the types of offending contemplated by the government in relation to gross violence are likely to fall into this category.

Further, it is generally recognised that to some people, the satisfaction of a short-term need may outweigh the disincentive of punishment⁸; drug use offending is a good example of this, where the need to satisfy a craving may outweigh the threat of punishment. Further, the deterrent value of the proposed penalty is highly subjective; imprisonment (or detention), and the provision of three meals a day, shelter and company might actually constitute a better day-to-day experience for some offenders than life “outside”⁹.

While deterrence is an appealing concept, the empirical basis to support the theory is shaky at best. There is evidence that *a sanction* provides some deterrent effect, but little to no evidence to suggest that a more severe penalty is a greater deterrent than a less severe penalty¹⁰.

⁶ s233C *Migration Act 1958*

⁷ Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience* (2003) p 10.

⁸ M Tonry (1996) *Sentencing Matters* Oxford University Press, New York

⁹ D Ritchie *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council April 2011, p18.

¹⁰ A Hoel & K Gelb *Sentencing Matters: Mandatory Sentencing*, Sentencing Advisory Council August 2008, p 14.

The maximum penalties for offences of Causing Serious Injury Intentionally and Causing Serious Injury Recklessly are already severe, at 20 years and 15 years imprisonment, respectively¹¹. There is, therefore, no empirical justification to impose a mandatory sentence of imprisonment (or detention) for these offences, as the greater severity will have little or no effect on the level of deterrence, and therefore little effect on the crime rate.

A recent study undertaken by the Australian Institute of Criminology shows that, in relation to juveniles, prison exerts no specific deterrent effect. The report concludes that:

“These adverse effects of imprisonment on employment outcomes and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders”¹²

While there is a lack of empirical data to support an increase in the *severity* of a sentence, there is a wealth of studies to support the contention that *certainty of punishment* produces a great deterrent effect. A 2010 aggregate study of police presence and crime found that:

“Aggregate studies of police presence conducted since the mid-1990s consistently find that putting more police officers on the street—either by hiring new officers or by allocating existing officers in ways that put them on the street in larger numbers or for longer periods of time—is associated with reductions in crime”¹³

The LIV is therefore very supportive of the Government’s proposal to recruit 1,600 additional police officers¹⁴, but urges that the increase in frontline police numbers must be accompanied by a requisite increase in court resourcing and legal aid funding, to avoid excessive court delay.

Incapacitation

Along with deterrence, mandatory sentencing regimes also aim to reduce crime by the incapacitation of an offender.

Incapacitation seeks to prevent offenders from reoffending through the fact of their imprisonment; they are incapable of committing offences in the community due to the fact that they are not *in* the community. “Community protection” is another way of expressing this concept.

There is some evidence that incapacitation works as a strategy to reduce crime, but only where the most prolific offenders are imprisoned¹⁵.

Effective incapacitation requires the identification and imprisonment of those offenders who will continue to offend. However, predicting the risk level posed by an individual offender is a notoriously difficult task¹⁶. Previous offending can be an indicator of future offending, but is still very unreliable. Attempts to predict future offending can result in “false positives”, that is, the incapacitation of offenders who would not have reoffended for whatever reason.

Mandatory sentencing regimes are particularly poor at fulfilling the purpose of incapacitation; instead of capturing only those most likely to reoffend, they capture everyone convicted of a type of offence.

There is a fundamental moral objection to punishing an offender for something they have not yet, and might not do, especially when the science of prediction of risk is so inexact. Incapacitation presupposes that the end (potentially incarcerating a person who would not have reoffended) justifies the means – community safety.

¹¹ s16 and s17 Crimes Act 1958

¹² D Weatherburn, S Vignaendra & A McGrath ‘*The specific deterrent effect of custodial penalties on juvenile reoffending*’ Australian Institute of Criminology, AIC Technical and Background Paper 33, 2009, p 10.

¹³ SN Durlauf & DS Nagin (2010) ‘*The Deterrent Effects of Imprisonment*’ http://economics.uchicago.edu/pdf/durlauf_060710.pdf, at p 25

¹⁴ Victorian Liberal Nationals Coalition Media Release: *Coalition announces 1,600 additional police to make our streets safe again* 6 April 2010 <http://www.vic.liberal.org.au/LinkClick.aspx?fileticket=DpXJLchAhvs=&tabid=189>

¹⁵ Tonry M, ‘*The functions of sentencing and sentencing reform*’ Stanford Law Review, vol 5, Oct 2005, pp 37-66.

¹⁶ D Roche *Mandatory Sentencing*, Trends & Issues in Crime and Criminal Justice No.138, Australian Institute of Criminology, Canberra, December 1999, p 3

The significant moral objections can be ameliorated by only applying mandatory sentencing regimes to the most serious and tightly defined class of offences, designed to capture the most culpable and blameworthy offenders who are at a high risk of reoffending. The definition would have to preclude first time offenders; it is generally accepted that repeat offenders are more morally blameworthy than first time offenders who may not offend again¹⁷.

If incapacitation is to be pursued as a purpose of sentencing, it can be forcefully argued that judicial officers are best placed to make a prediction of the risk of future offending of a particular individual, taking into account that persons past record, the nature of the current offence, and any other mitigating or aggravating material presented in evidence. In other words, judicial discretion ameliorates against some of the risks of incapacitation as a method of reducing crime.

The criminogenic effect of imprisonment / detention

While there is no evidence to support the proposition that mandatory sentencing reduces crime through deterrence, and little evidence to suggest that mandatory sentencing reduces crime through incapacitation (while also capturing “false positives”) there is a wealth of evidence that imprisonment (or detention) may have a criminogenic effect upon reoffending when compared to non-custodial or community based sentences¹⁸.

This criminogenic effect is strongest with lower risk offenders who are sentenced to imprisonment¹⁹.

In other words, mandatory imprisonment can lead to increased crime rates.

There are several reasons for this criminogenic effect.

First, prisons and juvenile detention centres can act as a criminal learning environment or “school of crime”, whereby prison sub-cultures which reinforce and encourage anti-social or criminal behaviour, flourish, despite the pro-social and rehabilitative intentions of the state²⁰.

Secondly, imprisonment exerts a stigmatising or “labelling” effect, which reinforces the criminal identity, and the subsequent negative reaction from society to that identity. The “labelling” effect has several long-term consequences; future employment prospects are diminished and pro-social community relationships and family ties may be severed. This may lead to prolonged association with other offenders and a reduced incentive to engage in law-abiding behaviour²¹.

Thirdly, imprisonment is not the best place to address the underlying causes of offending, and unless these underlying causes are addressed, crime rates will not fall. A 2003 Corrections Victoria report on substance abuse, for example, found that two-thirds of all first-time offenders entering the Victorian Criminal Justice system had a “history of substance abuse that is directly related to their criminal behaviour”²². Furthermore, a 2007 Victorian study found that 53% of people detained in police cells were registered in the Victorian public mental health database, and 25% reported a psychiatric history. Seventy per-cent of that group had some form of substance use or dependency²³.

Furthermore, under mandatory sentencing regimes, the motivation for an offender to address the underlying causes of offending is removed. There is no penalty discount available for pleading guilty, genuine remorse, or attempts to rehabilitate.

¹⁷ M Vitiello ‘Three strikes: can we return to rationality?’ *Journal of Criminal Law and Criminology*, vol. 7, pp 395 – 481.

¹⁸ D Ritchie *Does Imprisonment Deter? A review of the evidence* Sentencing Advisory Council April 2011, p19

¹⁹ P Gendreau, C Goggin, FT Cullin ‘The Effects of Prison Sentences on Recidivism’, *Solicitor General Canada, User Report 1999-3*
<http://www.prisonpolicy.org/scans/e199912.htm>

²⁰ DS Nagin, FT Cullen & CL Johnson ‘Imprisonment and Reoffending’ *Crime and Justice*, 3: p126

²¹ C Spohn ‘The Deterrent Effect of imprisonment on Offenders’ stakes in Conformity’ *Criminal Justice Review* (2007) 18(1): 31-50

²² Forensic Psychology Research Group (2003) *Substance Use Treatment in Victorian Corrections: Service Mix and Standards: Stage 1 Report*. University of South Australia, p3

²³ Corrections Victoria (2007) *Prisoner Health Services: Health Service Requirements Overview Document*. Melbourne, Department of Justice

Instead of mandatory sentencing, which may increase the crime rate in the long term, the LIV supports the extension of specialist courts which address the underlying causes of offending and have been shown to reduce recidivism²⁴.

Mandatory sentencing leads to inconsistent sentencing results

Mandatory sentencing regimes are intuitively appealing on the basis that they provide consistency in sentencing, by removing the discretion of the judicial officers to decide on the most appropriate sentence. The aim of mandatory sentencing is to provide consistency both between the offence and its sanction (so that the punishment fits the crime) and between punishments imposed on different offenders.

Discretion is seen as the enemy of consistency, and inconsistency is seen as equalling injustice²⁵.

Indeed, consistency in sentencing is the first purpose of the Sentencing Act 1991²⁶.

However, this principle belies the reality that human behaviour is invariably complex and diverse and can involve an almost limitless variation of blameworthiness or culpability in relation to any particular offence.

Mandatory sentencing does not lead to consistency in sentencing. It results in harsh and unjust sentences, where offenders of unequal blameworthiness and culpability are sentenced to the same result.

Further, where mandatory sentencing regimes succeed in removing the discretion from judicial officers in sentencing, empirical evidence shows that that discretion is not removed from the criminal justice system, but merely displaced on to prosecutors²⁷.

The following sections will show how mandatory sentencing regimes fail to achieve the aim of consistency in sentencing.

Disproportionate sentences

That sentences should be proportionate to the gravity of the offence is a long established and well-understood sentencing principle.

In *Veen [No. 2]*²⁸ it was held that:

“The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen (No.1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.”

In *Banmer v The Queen*²⁹ the High Court confirmed the principle when it said:

“the sole criterion relevant to the determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence”.

Mandatory minimum sentencing works against the principle of proportionality and undermines the guideline principles set out very clearly in the *Sentencing Act 1991* (the Sentencing Act).

²⁴ The Victorian Drug Court, in Dandenong, has been shown to reduce recidivism by 23% *The Drug Court: An Evaluation of the Victorian Pilot Program*, Department of Justice, 2006

²⁵ A Hoel & K Gelb *Sentencing Matters: Mandatory Sentencing*, Sentencing Advisory Council August 2008, p 12

²⁶ s1(a) *Sentencing Act 1991*

²⁷ M Tonry, (1996) *Sentencing Matters*, Oxford University Press, New York

²⁸ (1988) 164 CLR 465 at 476,

²⁹ (1988) 166 CLR 51, at 58.

Section 5(2AB) of the Sentencing Act allows a court to impose a less severe sentence than it would have otherwise imposed, due to an undertaking given by the offender to assist, after sentencing, law enforcement authorities. This section is made redundant under mandatory minimum sentencing regimes, where no discount can be given for assistance. Not only could this result in a disproportionate sentence, but it would also reduce or eradicate an offender's motivation to assist authorities, thus making the investigation of offences more difficult.

Likewise, s6AAA of the Sentencing Act is rendered redundant under a mandatory minimum sentence regime. That section mandates that the court must state the sentence and non-parole period it would have imposed, but for the plea of guilty.

The common law is quite clear that pleas of guilty motivated by genuine remorse carry more weight than pleas motivated by self-interest, though both must be taken into account and attract a sentencing discount. In *R v Morton*³⁰ it was stated as follows:

“a court must always take a plea of guilty into account in mitigation of sentence, even though it is solely motivated by self-interest and even though it is a plea to lesser offences than those originally charged or intended to be charged. Doubtless, however, a plea of guilty which is indicative of remorse or of some other mitigating quality will ordinarily carry more weight than a plea dictated solely by self-interest.”

This necessary sentencing discount for a plea of guilty is impossible to reconcile with a mandatory minimum sentence and the principle of proportionality. If a mandatory minimum sentence is to apply to the “least serious” type of offence in its category, that is, one where the offender has demonstrated remorse, has pleaded guilty at the earliest opportunity, has made attempts to rehabilitate and has assisted the authorities, then all other cases must attract a higher sentence. But this conflicts with the principle of proportionality where all other cases must attract a sentence above and beyond the mandatory minimum, regardless of other mitigating circumstances.

Subsections 5(3) and (4) are also undermined by the introduction of mandatory minimum sentences. Those sections relate directly to the principle of proportionality. Subsection (4) states:

(4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

This consideration cannot be taken into account at all by the sentencing judicial officer, under a mandatory minimum sentencing regime.

The government's proposal also raises considerable issues in relation to the sentencing of young offenders under Victoria's 'dual track' sentencing system. The *Sentencing Act 1991* provides for the adult courts to sentence a young person aged 18 but not yet 21 years to serve their custodial sentence in a youth justice centre, as a direct alternative to a sentence of imprisonment³¹. The maximum period to which a court may direct that a young offender be detained is two years for the Magistrates' Court³², and three years for the County and Supreme Courts³³.

The government's proposal relating to juvenile offenders, however, only relates to 16 or 17 year olds. Under this proposal, eighteen, nineteen and twenty year olds fall outside of the jurisdictional power of the court to sentence a young offender to a period of detention in a Youth Justice Centre. The proposal would therefore require them to be sent to an adult prison for the mandatory minimum sentence of four years. This would be in direct contravention to international treaty obligations³⁴, and well understood principles of common law³⁵. Given that the focus of detention in a Youth Justice Centre is to rehabilitate young offenders before criminality becomes entrenched, the proposal would be contrary to the community's best interests.

³⁰ [1986] VR 863, at 867

³¹ s32(1) *Sentencing Act 1991*

³² s32(3)(a) *Sentencing Act 1991*

³³ s32(3)(b) *Sentencing Act 1991*

³⁴ Article 37c *UN Convention on the Rights of the Child*,

³⁵ *R v Mills* [1998] 4 VR 235 at 241.

The experience of mandatory sentencing for property offences in the Northern Territory provided some stark examples of disproportionality:

- A 16 year old with one prior conviction received a 2 day prison sentence for stealing a bottle of water;
- A 17 year old first offender received a 14 day prison sentence for stealing orange juice and lollies;
- A 15 year old Indigenous boy was sentenced to 2 days' imprisonment for stealing less than \$100 worth of stationary and died in custody while serving his sentence.

The injustice of mandatory sentencing was addressed recently in the Supreme Court of the Northern Territory in the case of *The Queen v Nafi*³⁶. Mr Nafi pleaded guilty to a charge under s233C Migration Act (Aggravated offence of people smuggling, at least 5 people). The circumstances of the offending were that Mr Nafi captained a vessel containing 33 asylum seekers from Iraq and Iran. Food, water and lifejackets were available to the passengers on the ten-day voyage.

Her Honour Justice Kelly accepted that Mr Nafi was motivated by extreme poverty and his need to provide for his family; he had been approached by a man in Roti, Indonesia, and offered \$1200 to take the job – an extremely large amount of money to a man in Mr Nafi's financial circumstances, but a very modest sum compared to the sums paid by the people for passage on board the boat.

Mr Nafi pleaded guilty at a very earliest opportunity. Her Honour was also convinced that Mr Nafi did not play a high level or principle role, that the lengthy sentence of imprisonment would have an extreme effect on his wife and daughter for whom he would not be able to provide, and that his level of moral culpability was low.

Nevertheless, Her Honour, under the mandatory sentencing provisions of the Migration Act, was forced to impose a sentence of imprisonment of eight years, with a non-parole period of five years on Mr Nafi. In doing so, Her Honour said:

“Taking into account all of those matters which are set out in s16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in the Court for offences of the same or higher maximum sentences involving far greater moral culpability, including violence causing serious harm to victims.

As his Honour, Mildren J, said in *Trenerry v Bradley* (1997) 6 NTLR 175 at 17:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.”³⁷

The government's proposal relates specifically to offences of Recklessly Causing Serious Injury and Intentionally Causing Serious Injury. These offences, on the face of it, are serious offences, which might normally attract a sentence of detention or imprisonment - but not *always*. There are many examples of where a mandatory sentence of two years detention (juvenile) and four years imprisonment (adult) would be disproportionate to the gravity of the offence or the culpability of the offender; offences committed in excessive self-defence, in a situation of domestic violence or school yard fights involving extreme provocation.

Furthermore, injustice results where mandatory sentences of imprisonment are attached to some offences and not others. It is illogical that a plea of guilty to a lower level offence of Recklessly Causing Serious Injury attracts a mandatory sentence of imprisonment or detention, when murder, manslaughter and terrorism do not, especially when the evidence shows that mandatory sentencing has no deterrent effect.

³⁶ *The Queen v Edward Nafi* Unreported Judgement, 19 May 2011, SCC 21102367

³⁷ *The Queen v Edward Nafi* Unreported Judgement, 19 May 2011, SCC 21102367 at 6.

Mandatory sentencing shifts the discretion from the judicial officer to the prosecutor

Mandatory sentencing regimes are designed to promote consistency in sentencing by removing judicial discretion.

However, there is a wealth of empirical evidence to show that mandatory sentencing does not remove discretion from the criminal justice system; it merely displaces that discretion from visible and publicly accountable judicial officers, onto police and prosecutors.³⁸

Under mandatory sentencing regimes, prosecutors hold the discretion, as to which charges should proceed, and pre-trial decisions and plea-bargaining become increasingly important.

This effect has been seen in Western Australia, where the “three strikes” home burglary laws provide a graphic illustration.

Police cautions and referrals to juvenile justice teams do not constitute a “strike” in Western Australia. Thus, police and not the courts become the main gatekeepers of discretionary schemes, and whether a person is referred to these schemes depends upon the individual personality and idiosyncrasies of the police officer. In Western Australia, this has resulted in Indigenous youth less likely to be diverted, and more likely to be processed through the courts³⁹.

Apart from the obvious and fundamental issues of transparency, accountability and consistency, mandatory sentencing can also encourage an unfair and unjust result. Offenders, who believe they may have a complete defence, may be discouraged from contesting the matter if they are advised that the charge carrying the mandatory minimum sentence would be withdrawn in the event they plead guilty to a lesser alternative charge.

Prosecutors are therefore given more power in the plea-bargaining process under mandatory sentencing regimes. By agreeing to withdraw a charge that attracts a mandatory sentence, prosecutors could secure a plea to a lesser charge, despite any gaps in evidence or the possibility of a defence.

There is evidence that the possibility of a harsh or unjust sentence can lead to mandatory laws being circumvented in other ways, for example, victims of crime refusing to report an offence, or juries refusing to convict. This process has been labelled “de-mandatorising”⁴⁰.

The LIV submits that highly qualified, professional, experienced, and independent judicial officers are best placed to impose the appropriate sentence, taking into account all of the individual circumstances of the case. Judicial officers are publicly accountable and their decisions are appealable.

A democratic response to crime?

Mandatory sentencing regimes are often justified as a democratic response to public perceptions of crime, including perceptions of the fear of crime, the role of the courts in preventing crime, the severity of sentences imposed by the courts, and the effectiveness of strategies for controlling and preventing crime⁴¹.

International and Australian studies on public opinion and sentencing indicate that, in the abstract, the public thinks that sentences imposed by courts are too lenient⁴².

³⁸ M Tonry, (1996) *Sentencing Matters*, Oxford University Press, New York

³⁹ N Morgan, H Blagg & V Williams ‘*Mandatory Sentencing in Western Australia and the Impact on Indigenous Youth*’ (Perth: Aboriginal Justice Council of Western Australia, 2001)

⁴⁰ A Hoel & K Gelb *Sentencing Matters: Mandatory Sentencing*, Sentencing Advisory Council August 2008, p 17

⁴¹ *ibid*, p 15

⁴² K Gelb *Myths and Misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, Melbourne, 2006, p 11

At the same time, however, studies indicate that the public has very little understanding of crime and sentencing, and rely almost exclusively on the mass media (who have a vested interest in sensationalising the news, in order to sell more of it) for information in relation to these complex matters⁴³.

While the introduction of mandatory sentencing schemes may make a fearful public feel they are being listened to and responded to, studies show that the public has a very limited understanding of what mandatory sentencing actually entails⁴⁴.

Empirical studies show, however, that when the public is educated about mandatory sentencing, support for mandatory sentencing drops. For example, a US study conducted in Ohio in relation to three strikes legislation initially asked respondents whether they supported such a law. Without a given context, support for the law amongst respondents was 88%. However, when asked to impose sentences in a number of detailed case scenarios, the proportion of the respondents who supported the law dropped to 17%⁴⁵.

In response to international research suggesting that judges might be out of touch with public opinion, Chief Justice Gleeson of the High Court of Australia suggested that it might be useful to survey jurors, as opposed to uninformed members of the public, in relation to the appropriateness of sentences in particular cases.

The results of that study showed that more than half of the jurors, who were as informed as the judge about the facts of the case, and the circumstances of the offender, suggested a more lenient sentence than the trial judge imposed, when asked to do so.⁴⁶

Further, when informed of the sentence, 90% of the jurors said that the judge's sentence was (very or fairly) appropriate.

The results of this study showed that the criticism that judges are "too lenient" is inaccurate and misinformed, and that the public is far less punitive than otherwise thought.

Furthermore, a recently published study of community views in Victoria to alternatives to imprisonment found that the Victorian public are far less punitive than commonly thought; support for alternatives to imprisonment was very strong, especially for certain groups of offender, namely the mentally ill, youth, or drug addicted offenders⁴⁷.

The LIV therefore urges the government to avoid introducing mandatory sentencing and instead, educate the public on the current sentencing regime, as studies show that perceptions of justice change as the public becomes more informed.

Mandatory sentencing is a costly response to crime

Mandatory sentencing imposes a significant economic cost on the criminal justice system, without a corresponding reduction in the crime rate.

Such regimes also impose a significant long-term social cost on offenders sentenced to lengthy mandatory terms, and victims of crime who must give evidence in contested trials.

⁴³ *ibid*, p15

⁴⁴ *ibid*, p21

⁴⁵ J Roberts 'Public Opinion and mandatory sentencing: a review of international findings' *Criminal Justice and Behaviour* (2003) vol. 30 no. 4pp 483-508

⁴⁶ K Warner, J Davis, M Walter, R Bradfield & R Vermey *Public Judgement on Sentencing: Final results of the Tasmanian Jury Study* Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, Feb 2011, p3

⁴⁷ K Gelb *Sentencing Matters: Alternatives to Imprisonment: Community Views in Victoria* Sentencing Advisory Council, March 2001

Economic cost

In Australia and many other jurisdictions, offenders are entitled to a sentencing discount for pleading guilty. The rationale for such a discount was explained in *Siganto v The Queen*⁴⁸:

“A plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and secondly, on the pragmatic ground that the community is spared the expense of a contested trial...It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence”

Under a mandatory sentencing regime, the motivation for an offender to plead guilty disappears. There is no discount for pleading guilty because the mandatory minimum penalty is set (see Disproportionate Sentences, above). The discount for pleading guilty is completely diminished by requiring the imposition of a mandatory term of imprisonment.

Mandatory sentencing therefore leads to more matters being contested; with nothing to lose, it makes sense for an offender to “roll the dice” and defend a matter in the hope that they are acquitted of the charges.

Contested matters cost significantly more than matters that resolve by way of a plea of guilty. County Court or Supreme Court trials cost the most of all, and are tremendously expensive compared to pleas.

Costs include wages for judicial officers and court staff, jury costs and lost productivity, courtroom and capital costs, Office of Public Prosecution costs for both counsel and instructing solicitor, police costs for the Informant to prepare a brief of evidence and organise witnesses to attend court for both a contested committal hearing and the trial itself, witness lost productivity, and the costs of counsel and instructing solicitor for the defence – in many cases publicly funded through Victoria Legal Aid.

Contested matters also take a lot longer (weeks instead of a day or two), exacerbating the issue of court delay.

In 2008/09 the Magistrates’ Court heard 442 pleas for charges of Recklessly Causing Serious Injury⁴⁹. Under the governments’ proposal, these charges could not be heard in the Magistrates’ Court, due to the jurisdictional limits of the Magistrates’ Court⁵⁰.

Therefore, the County Court, currently the court in Victoria suffering the most from court delay, would be unduly affected by the introduction of the government’s proposal, and require further courtrooms, further judges and further staff to cope with the ensuing case load.

The government’s proposal would also have a significant impact on legal aid funding, as more matters go to trial.

Policing cases of “gross violence” will also become more difficult, when such offences attract a mandatory sentence. Co-operation with authorities will no longer be a strong mitigating factor, thereby attracting a sentencing discount; therefore, such assistance is likely to disappear.

Mandatory sentencing regimes also extract a significant economic cost in terms of housing extra prisoners. Prison populations depend on two primary variables – the number of offenders going into prison, and the duration of their stay.

Under the government’s proposal, depending on the strictness of the definition of ‘gross violence’ and the nature of the ‘exceptional circumstances’ provision, prison populations could be expected to rise (especially in combination with the abolition of suspended sentences), as more offenders are sentenced to imprisonment for lengthy terms.

⁴⁸ (1998) 194 CLR 656 at 664.

⁴⁹ Sentencing for ‘Gross Violence’, Adult Offenders, Sentencing Advisory Council, May 2011, http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/sentencing_for_gross_violence_-_adult_notes_revised_10june2011.pdf

⁵⁰ s113 Sentencing Act 1991

The costs of imprisonment are very significant. The total net operating expenditure and capital cost of housing an individual prisoner, per day in 2009-10 was \$293.93⁵¹, or \$107,284.45 per year.

These costs much come from somewhere else in the economy; health, education or infrastructure spending may need to be cut to fund the government's proposal.

To justify these costs, the benefits of mandatory sentencing must be proven to be significant. That evidence does not exist at the current time, and the LIV therefore submits that for this reason and others, the governments' proposal should not proceed.

Social cost

Mandatory sentencing regimes do not only extract a significant economic cost; they also extract a significant social cost.

The experience of mandatory sentencing in Western Australia and the Northern Territory indicates that mandatory sentencing provisions disproportionately target Indigenous offenders, youth, and other marginalised groups.⁵² The Western Australia example shows that Indigenous offenders are less likely to be offered a police caution or diversionary scheme, and are more likely to be processed through the courts⁵³.

Further, mandatory sentencing regimes, which require an offender serve a lengthy mandatory term of imprisonment, extract a significant long-term cost in terms of stigmatisation and lost employment opportunities⁵⁴.

Victims of crime also suffer under a mandatory sentencing regime. Due to the court delays caused by more matters going to trial, victim "closure" is also delayed. Further, victims are more likely to be subjected to the rigours of cross-examination when more cases go to trial.

The LIV is particularly concerned at the government's proposal to introduce mandatory sentences of detention for juvenile offenders aged 16 or 17.

Juvenile offenders are most likely to be captured by the government's proposal, as they are most likely to engage in the type of offending to which the mandatory penalties will attach. Juveniles are most likely to commit offences in groups, and in public, and by comparison with adult offending, juveniles tend to commit offences that are unplanned and opportunistic⁵⁵.

Juvenile offending differs in nature to adult offending. Firstly, young people commit crime disproportionately⁵⁶. Persons aged between 15 and 19 years are more likely to be processed by police for the commission of a criminal offence, than are members of any other population group. Secondly, most juveniles "grow out" of offending behaviour and mature into law-abiding citizens if provided with the opportunity⁵⁷. This is of vital significance to the debate about the mandatory sentencing of juvenile offenders, as the mandatory detention of juveniles may "interrupt" the normal juvenile offending trajectory and redirect juvenile offenders back into crime, through the criminogenic effects of juvenile detention.

Thirdly, juveniles are not only more likely to be the perpetrators of crime, but also the victims of crime. This is significant because it is widely recognised that victimisation is a pathway into offending behaviour for some young people⁵⁸.

⁵¹ Productivity Commission *Report on Government Services 2011*, Table 8A.35.

⁵² P Sallman 'Mandatory Sentencing: A Birds Eye View' (2005) 14 *Journal of Judicial Administration*, 177, 189

⁵³ N Morgan, H Blagg & V Williams 'Mandatory Sentencing in Western Australia and the Impact on Indigenous Youth' (Perth: Aboriginal Justice Council of Western Australia, 2001)

⁵⁴ C Spohn 'The Deterrent Effect of imprisonment on Offenders' stakes in Conformity' *Criminal Justice Review* (2007) 18(1): 31-50

⁵⁵ C Cunneen & R White *Juvenile Justice: Youth and crime in Australia*, 3rd ed South Melbourne: Oxford University Press.

⁵⁶ K Richards 'What makes juvenile offenders different from adult offenders?' *Trends & Issues in crime and criminal justice* Australian Institute of Criminology, Feb 2011

⁵⁷ *Ibid*, p 2

⁵⁸ *Ibid*, p 4

Fourthly, juveniles are uniquely capable of being rehabilitated, and this is reflected in the matters to be taken into account in sentencing, set out in s362 *Children, Youth and Families Act 2005*. General deterrence and punishment are not matters that can be taken into account, although protection of the community is⁵⁹.

Mandatory sentencing therefore completely undermines the philosophy of sentencing, set out in the *Children, Youth and Families Act 2005*.

Mandatory minimum sentencing regimes also contravene the rights protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), including s17(2) and s23. These sections of the Charter reflect the relevant human rights relating to children in the UN *International Covenant on Civil and Political Rights* (ICCPR) (Articles 10 and 24) to which Australia is a party. In our view, the proposal also violates the human rights set out in the UN *Convention on the Rights of the Child* (CROC), to which Australia is also a party.

The CROC requires that in all actions concerning children (every person under the age of 18, Article 1), courts should have the best interest of the child as a primary consideration (Article 3). Moreover, dispositions imposed on children must be proportionate to the circumstances of the offence, and be subject to appeal (Article 40(4)), and be subject to appeal (Article 40(2)(v)). By their very nature, mandatory penalties are not appealable on the grounds of being manifestly excessive; therefore, mandatory sentences of juvenile detention or imprisonment contravene the CROC by way of disproportionality and inability to be appealed.

Article 37(b) states:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort for the shortest appropriate period of time”

In our view, this article is contravened if a juvenile is detained after a first conviction, unless such detention is necessary for reasons of public safety. This view is consistent with the views of the UN Committee on the Rights of the Child⁶⁰.

The LIV very strongly submits that, despite the seriousness of the offending in question, judicial officers are best placed to impose the appropriate sentence on youthful offenders. Such sentences can be tailored to focus on the rehabilitation of the offender by addressing any particular criminogenic needs, and encourage successful integration back into the community.

Alternatives to mandatory sentencing – LIV Recommendations

Despite the LIV’s strongest objection to mandatory sentencing, we are not opposed to imprisonment *per se*. We accept that imprisonment constitutes condign punishment in many cases, and also serves to protect the community from particularly prolific or dangerous offenders through the purpose of incapacitation.

We also accept that there is a legitimate fear of crime in the community, and that the government’s role is to increase public safety and the perception of safety to the best of its ability.

However, the wealth of empirical evidence surrounding mandatory sentencing, including recent studies from Western Australia and the Northern Territory, illustrate that mandatory sentencing not only fails to fulfil its aims, but has serious costly and long term consequences.

⁵⁹ s362(1)(g) *Children, Youth and Families Act 2005*

⁶⁰ Para 71, General Comment No 10 (2007) *Children’s Rights in Juvenile Justice*, CRC/C/GC/10, 25 April 2007

The LIV submits that there are a number of other strategies that the government could adopt, to address the issue of crime rates, the public perception and fear of crime and the public perception of sentence leniency.

Recommendation 1: Independent crime statistics bureau

Accurate crime statistics play an important role in increasing public confidence in the criminal justice system. They go towards painting an accurate picture of the incidence of crime, and can therefore balance against sensationalist mass media reporting, which focuses on the dramatic, unusual, or violent as a means to entertaining, and therefore selling more newspapers⁶¹.

Crime statistics are not only used by the public, but are also used to inform operational decisions by police, such as the allocation of police resources.

Crime statistics in Victoria are currently managed and disseminated by the Victorian Police, and in February 2011, a complaint was made to the Victorian Ombudsman in relation to the manipulation and misreporting of crime figures for political purposes.

In June 2011, the Ombudsman released the report *Investigation into an allegation about Victoria Police crime statistics* pursuant to the *Whistleblowers Protection Act 2001*.

That report held that the matter of the independence of crime statistics is crucial, and recommended that an independent crime statistics bureau be created to manage and disseminate the release of crime statistics.

The LIV wholeheartedly agrees with this recommendation.

Recommendation 2: Increase the certainty of apprehension effect

The overwhelming evidence in relation to mandatory sentencing, imprisonment and deterrence, indicates that the threat of imprisonment generates a small general deterrent effect at best, and mandatory sentencing does not increase that deterrent effect at all.

However, the research demonstrates that increases in the *certainty* of apprehension show a significant positive deterrent effect.

The LIV is therefore very supportive of the government's proposal to recruit 1,600 additional police officers.

This increase in police numbers must be accompanied by an increase in legal aid funding, to ameliorate the effects of more cases on court delay.

Recommendation 3: Expand the specialist courts to address causes of offending and avoid "postcode" justice

Studies show that a significant number of offenders in Victoria's criminal justice system have a history of substance abuse that directly relates to their offending behaviour, or suffer from mental illness or intellectual disability, or have multiple conditions or "co-morbidities"⁶².

The specialist courts in Victoria (Drug Court, Koori Court, Assessment and Referral Court List, Neighbourhood Justice Centre) are specifically designed to address the underlying causes of offending, and have positive effects on crime rates of recidivism⁶³.

⁶¹ K Gelb *Myths and Misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, Melbourne, 2006, p15

⁶² See para above, The criminogenic effect of imprisonment / detention

However, the specialist courts in Victoria are all limited in their jurisdictional reach.

The LIV supports the expansion of specialist court programmes that have been proven to work to address the underlying causes of crime, and reduce crime rates and recidivism.

Recommendation 4: Replicate the Tasmanian Jury Study in Victoria

The results of the Tasmania Jury Study, published in February 2011 are significant, and illustrate that an informed public is less punitive than otherwise thought. Furthermore, and most importantly, the study illustrates that sentences imposed by judges are not considered “lenient” when provided with context.

The LIV submits that the government should consider authorising a replication of this study in Victoria, as similar results would increase public confidence in the criminal justice system.

Recommendation 5: Introduce a Justice Impact Test to Victoria

The LIV recommends the introduction of the British Justice Impact Test (JIT).

The JIT considers the impact of a proposal on the justice system - including impacts on the courts, and tribunals, prisons, the legal aid budget, or the prosecuting bodies and judiciary.

It provides guidance aimed at policy makers in government departments to help them assess the impact of their proposals on the justice system.

The JIT would be, pursuant to the British model, a mandatory specific impact test, as part of the impact assessment process, which considers the impact of government policy and legislative proposals on the justice system.

The guidance notes set out specific steps which policy officials need to take when developing proposals to assess and quantify the ‘justice impacts’, so that these impacts can be anticipated and planned for at an early stage.

In the UK, the Ministry of Justice is responsible for the administering the tests and processes involved in Justice Impact Assessments and Tests.

Such a test would allow the government to assess the costs of any proposal, including the proposal to introduce mandatory sentencing, as part of a cost/benefit analysis to assist in policy decision-making.

⁶³ *Evaluating the Neighbourhood Justice Centre in Yarra 2007-09, The Drug Court: An Evaluation of the Victorian pilot program*, Department of Justice, 2006, M Harris *A Sentencing Conversation*” *Evaluation of the Koori Courts Pilot Program* , October 2002 – October 2004, Department of Justice, 2006