



Mandatory sentencing

What is Mandatory Sentencing?

Mandatory sentencing limits a judge's or magistrate's discretion to sentence an offender with regard to the particular circumstances of the case. Instead a minimum or standard sentence must be imposed, usually derived from a set formula. Rather than "making the punishment fit the crime", it often leads to unjust and disproportionate outcomes. There are several varieties of mandatory sentencing, including grid sentencing and standard minimum sentencing.

The idea of Mandatory Sentencing originated with the "3 Strikes" law in the US state of Washington in 1993. In Australia, the approach was adopted in Western Australia and the Northern Territory in 1996 and 1997 respectively, although the Northern Territory subsequently repealed most of its mandatory sentencing laws in 2001. There is still some form of mandatory sentencing for violent offences and sexual offences in the Northern Territory and in the case of aggravated property damage courts may impose sentences of imprisonment or community service only.¹

The New South Wales government has recently introduced a "Standard Minimum Sentencing" Bill which sets a "standard non-parole period" for various offences. The judge may impose a greater or lesser sentence if there are aggravating or mitigating factors, but has no choice about what the starting point will be.²

Does Mandatory Sentencing Deter People From Committing Crime?

Mandatory sentencing is based on the idea that tougher, more certain sentences will deter people from committing crimes. This approach is flawed. Firstly, studies have shown that it is the certainty of being apprehended, rather than the harshness of the potential penalty, that deters people from offending.³ Secondly, for penalties to have a deterrent effect, people must actually be able to make informed choices. Many offenders are affected by a mental illness, an intellectual disability, drug dependency, poverty or social disadvantage.

The most effective anti-crime programs are those that address issues of poverty, homelessness, discrimination, child abuse and neglect, exclusion from education and drug abuse.⁴

The implementation of mandatory sentencing has had no significant effect on crime levels in the United States. Instead, it has resulted in grossly disproportionate sentencing and an expensive aging prison population. The lengthy and inappropriate mandatory sentences have doubled what was already an enormous prison population to that of 2 million inmates.⁵

Does Mandatory Detention Reduce Crime?

The mandatory sentencing approach in Australia has been similarly ineffective. The effect of mandatory detention is temporary incapacitation through incarceration. The experience of



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detention limits the development of necessary social skills- especially for young people. This, combined with the fact that detainees learn more about crime whilst in custody, results in a higher rate of recidivism.

Recidivists generally are involved in more serious offences resulting in ultimately higher crime rates.⁶ The Northern Territory Department of Corrective Services admits as much when it states that "The evidence is clear that the more access juveniles have to the criminal justice system the more frequently and deeper they will penetrate it. What happens in many cases is that the detainees learn from their fellow inmates how to become more effective in committing crime."⁷

As mandatory sentencing is said to deter and thus reduce criminal activity, higher rates of imprisonment should produce lower crime rates. But rates of re-offending are higher for those imprisoned than for those directed to alternative sentencing programs.⁸ There is also no consistent correlation between imprisonment rates and crime rates. If sending more people to prison reduced crime, then the United States would have the lowest crime rate in the world. Instead it has the highest rate for some crimes.

In Australia, Victoria for example has the lowest crime rates for many crimes and has by far, the lowest rates of juvenile detention and adult imprisonment. This can be contrasted to crime rates in the Northern Territory, where incarceration levels are highest as are the levels of violent criminal activity.⁹

Mandatory Sentencing, Discrimination and Judicial Discretion

Mandatory sentencing has the potential to operate in a discriminatory way. For example, in the Northern Territory, mandatory sentencing impacted dramatically and disproportionately on

young indigenous people. The social and economic circumstances of many Aboriginal offenders explains why they remain over-represented in the criminal justice system.¹⁰ Reducing over-representation is a pre-requisite for the achievement of social justice for Indigenous Australians.¹¹

Mandatory sentencing undermines judicial independence and neglects to recognise established sentencing principles. It favours the principles of deterrence and punishment over other important factors such as rehabilitation. In particular, it ignores rehabilitation as a paramount consideration in sentencing juvenile offenders.

Under some forms of mandatory sentencing, judicial officers are not allowed to take into account any mitigating circumstances of the crime and whether and when the offender made an admission of guilt. No longer could an early plea of guilty lead to a reduced sentence therefore, giving offenders no incentive to plead guilty. This is likely to lead to increased delays in the courts and increased costs in the administration of justice including legal aid.

Mandatory sentences are frequently imposed for trivial non-violent offences such as stealing a can of beer or a pack of batteries. It is clear that the laws are being misdirected and are not proportional to the crimes.

Some examples include the sentencing of an 18 year old man to 90 days in prison for stealing 90 cents from a motor vehicle and a 24 year old woman to 14 days in prison for receiving a stolen \$2.50 can of beer. A 17 year old school student convicted of theft of yo-yos and computer games from a Darwin toy shop and criminal damage was sentenced to 14 days detention. This young person had no previous convictions, had handed himself into the police and had pleaded guilty.¹²



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email: beyond_bars@yahoo.com

web: www.ncoss.org.au/beyond_bars

media enquiries: c/- Alan Kirkland, 0418 620094

Even when imposed for violent offences mandatory sentences have the potential for injustice and the worsening of levels of crime. If mitigating circumstances such as intellectual disability and sustained prior abuse, are no longer allowed to be taken into account due to the imposition of a mandatory sentence it is quite possible that unjust punishment may occur.

Is Mandatory Sentencing about being 'Tough on Crime'?

One of the reasons that mandatory sentencing appeals to people is because it is seen to be 'tough' on crime. The problem is, that even though mandatory sentencing can involve sending lots of people to prison, and this can give the impression of toughness, it doesn't actually do anything to reduce crime. In fact it can make crime worse. Harsh sentencing for petty crime, and the subsequently damaging impact of a period of incarceration are not good crime prevention strategies.

Crime is a complex social problem, and cannot be resolved by appealing to policies based on vague, unsubstantiated notions of 'deterrence'. The implementation of mandatory sentencing both in Australia and internationally, has been characterised by the troubling discrimination of already disadvantaged minority groups, and massive and expensive increases in prisoner populations.

In order to be serious about crime prevention, it is necessary to ask questions about the social factors that influence why some people commit offences. This is not achieved by taking away the ability of the judiciary to decide on the suitability or otherwise of a prison sentence. Mandatory sentencing certainly can be 'tough' on certain groups of people who commit certain types of crime. It is not however, in any broad

sense, an effective or useful strategy for crime prevention.

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