

MANDATORY SENTENCING

FACTSHEET

WHAT IS MANDATORY SENTENCING?

Australian federal, state and territory criminal laws generally only set a maximum penalty for an offence, thereby allowing courts (i.e the judge or magistrate) to exercise discretion when determining appropriate sentences. Laws that specify a mandatory minimum sentence generally set a minimum or fixed penalty for an offence. Some laws may allow judges to make exceptions from the mandatory sentence, while others are more limited in their application.

In recent years, Australian parliaments have increasingly intervened in the sentencing process with prescribed mandatory sentences becoming more common. The growth of mandatory sentencing laws reflects a desire in some quarters for tougher sentences and dissatisfaction with the traditional sentencing system where courts have a broad discretion to deal with offenders.

DOES MANDATORY SENTENCING MEAN BETTER JUSTICE?

The Law Council is concerned that mandatory sentencing results in harsh and unjust punishments because it tries to apply a theoretical blanket standard to the real life, complex circumstances that surround each criminal act. There are numerous examples of anomalous or unjust cases where mandatory sentencing has been applied in Australia, such as:

- a 16-year-old with one prior conviction received a 28-day prison sentence for stealing 1 bottle of spring water;
- a 17-year-old first time offender received a 14-day prison sentence for stealing orange juice and "Minties";
- a 15-year-old boy received a 20-day mandatory sentence for stealing pencils and stationery worth less than \$100. He died while in custody; and
- a woman and first-time offender received a 14-day prison sentence for stealing a can of beer.

Such cases highlight how mandatory sentencing inhibits judges from handing down 'punishments that fit the crime'.

It also shows that it is the courts, rather than the Parliament, that deal with the reality rather than the idea of crime. Only the courts have access to the full facts of any particular case. Because of this, the Law Council supports an approach where the courts are given the ultimate say over the appropriate penalty for an offence.



DOES MANDATORY SENTENCING REDUCE CRIME?

The short answer is: no one really knows, however, some studies suggest it can make things worse.

In the United States (US), some evidence does suggest that mandatory sentencing may reduce crime, although it is unclear whether several other variables known to influence crime reduction are also contributing factors. Further, faced with unacceptable high levels of prison incarceration rates, 29 states in the US have moved to cut back on mandatory sentences since 2000. A 2011 report by the United States Sentencing Commission found that certain mandatory minimum provisions apply too broadly and are: set too high; lead to arbitrary, unduly harsh, and disproportionate sentences; can bring about unwarranted sentencing disparities between similarly situated offenders; have a discriminatory impact on racial minorities; and are one of the leading drivers of prison population and costs.

In Australia, there is conflicting evidence as to the deterrent effectiveness of mandatory sentencing. For example, the experience in the Northern Territory during the initial mandatory sentencing regime for property offences showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal.

Evidence suggests that a person may be deterred from committing a crime if he or she feels certain that they will be caught and punished. However, a 2011 review by the Victorian Sentencing Advisory Council found that increasing the length of imprisonment resulted in no corresponding increase in a deterrent effect.

In fact, the Victorian Sentencing Advisory Council found that mandatory sentencing increased the likelihood of recidivism because it placed prisoners in a learning environment for crime, reinforced criminal identity and failed to address the underlying causes of crime.

WHAT ARE THE ALTERNATIVES TO MANDATORY SENTENCING?

There are a number of other ways to prevent and punish crime that can deliver real outcomes for the community without relying on mandatory sentencing.

'Justice reinvestment' is an alternative to imprisonment which diverts funds from incarceration to community-based programs and services that address the underlying causes of crime, such as lack of housing or substance abuse. The idea is to try and invest in initiatives that prevent people from offending or re-offending rather than using mandatory sentencing, which only leads to more prison costs.

For some criminal offending, options such as community service orders or rehabilitation programs can be cost-effective ways to address the underlying problems causing a person to commit crime. These alternatives should be available to courts to consider when determining an appropriate punishment.

A further legal tool would be to increase maximum penalties for particular offences to reflect community concern regarding the seriousness of an offence. While the increase of a maximum penalty may not achieve a deterrent effect, it may provide guidance to judges regarding community perceptions as to the gravity of an offence while maintaining judicial discretion in determining a just and appropriate punishment.