
CONTEMPORARY ISSUE CENTERING ON JUSTICE, JUDICIAL PROCESS AND LEGAL POWER: MANDATORY SENTENCING

STUDENT POST-VISIT RESOURCE

In your Politics and Law course you are expected to study one contemporary issue. 'Contemporary' in School Curriculum and Standards Authority's (SCSA) interpretation is within the last 3 years. This topic aligns with SCSA's interpretation due to the 2015 amendment of the Criminal Law Amendment (Home Burglary and Other Offences) Act 2015 assented to on 24 September 2015 amendment.

A brief outline of the amendments is as follows:

Criminal Law Amendment (Home Burglary and Other Offences) Act 2015

- Minimum term of two years for repeat offenders aged 16 years and above;
- Minimum term of fifteen years imprisonment for offenders who commit murder, manslaughter or unlawful assault causing the death of a person this include during the course of a home invasion with aggravated circumstances;
- Minimum term of three years imprisonment for offenders aged 16 years and above who commit murder, manslaughter or serious physical or sexual assaults in the course of a home invasion with aggravated circumstances;
- Minimum term of imprisonment to be 75 per cent of the maximum penalty for offenders who are adults and commit unlawful assault causing death, grievous bodily harm or sexual offences against an incapable person.

In assessments, when asked to identify or discuss a contemporary issue, you are required to establish the contemporary nature of the issue. For example, if you were to talk about mandatory sentencing, you would need to identify the year in which the relevant Act of Parliament was implemented, or assented to, and it must be within the last three years.

Arguments for Mandatory Sentencing

Understanding the arguments in favour of mandatory sentencing is necessary in considering the effectiveness and appropriateness of such regimes. Many of the arguments in favour can be understood by reference to the key purposes of sentencing as identified by the Australian Law Reform Commission (ALRC), which include:

- *Retribution;*
- *Deterrence;*
- *Rehabilitation;*
- *Incapacitation;*
- *Denunciation; and*
- *Restoration.*

The rationale behind mandatory sentencing is based firmly on retribution, deterrence, incapacitation and denunciation as a means of crime prevention and reducing the crime rate.

Advocates of mandatory sentencing also claim that it delivers consistent, and thus fairer, punishment outcomes.¹

- Mandatory sentencing ensures adequate retribution for offending conduct. Retribution is based on the principle that those who engage in criminal activity and harm others deserve to suffer.²
- Mandatory sentencing deters offenders from engaging in criminal conduct, and as a consequence, reduces crime and promotes social stability... such penalties deter potential offenders from committing a criminal offence, through fear of the perceived severity of punishment, and public disapproval.³
- Mandatory sentencing reduces crime by incapacitating offenders from re-offending through removal from society and imprisonment... The logic is that while in prison, an offender cannot continue to cause harm in the community.⁴
- Mandatory sentencing for certain crimes reflects that such conduct is sufficiently serious to be a complete violation of society's values. Denunciation is based on the theory that a sentence can send a strong message to the community and the offender of society's disapproval of the criminal conduct and that the law must be obeyed.⁵
- Mandatory sentencing eliminates inconsistency in sentencing and ensures fairness by treating like offenders alike. Judges and magistrates are often guided by the relevant sentencing legislation and the common law, but mandatory sentencing advocates claim that the sentencing discretion is too broad and leads to inconsistent, disproportionate and disparate sentences.⁶

Arguments against Mandatory Sentencing

The Law Council has consistently opposed the use of mandatory sentencing regimes. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermines fundamental rule of law principles. The rule of law underpins Australia's legal system and ensures that everyone, including governments, are subject to the law and that citizens are protected from arbitrary abuses of power. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.

In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the

¹ Law Council of Australia. *Policy Discussion Paper on Mandatory Sentencing*. (May 2014)

>http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/2014_06_18_Final_Law_Council_Mandatory_Sentencing_Discussion_Paper.pdf< 8.

² Ibid.

³ Ibid. 12.

⁴ Ibid. 15.

⁵ Ibid. 16.

⁶ Ibid.

*impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their direct ability to reduce crime.*⁷

- Mandatory sentencing undermines fundamental principles underpinning the independence of the judiciary and the rule of law. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. This extends to ensuring that the discretion of judges in sentencing matters is not restricted to the point where the judiciary effectively acts as a rubber stamp for the Executive⁸
- Mandatory sentencing gives rise to significant human rights concerns under Australia's international human rights obligations, which it has voluntarily assumed, including in particular:
 - the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR);
 - the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - in the case of juveniles, children's rights, as contained in Articles 3, 37 and 40 of the Convention on the Rights of the Child (CROC).

The ICCPR entered into force for Australia on 13 August 1980. The CROC was ratified by Australia on 17 December 1990 and came into force on 16 January 1991. Australia is therefore legally bound by the obligations of both instruments.⁹

- Mandatory sentencing may result in a significant economic cost to the community. "Imprisonment is very expensive. It costs more than \$300 a day to keep a person in jail, and more than \$600 a day to keep a juvenile in detention. ...Mandatory sentencing contributes to a higher rate of imprisonment which often unnecessarily increases the costs in the administration of justice."¹⁰
- Mandatory sentencing can have a disproportionate effect on vulnerable groups within the community including Indigenous Australians; Juveniles; and Persons with a mental illness or an intellectual disability... Mandatory sentencing legislation can have ongoing adverse impacts on such groups of society especially when the laws focus on offences commonly committed by these groups (for example property offences). The people smuggling mandatory sentencing regime can also impact most severely on individuals who are impoverished crew members, not organisers."¹¹
- Mandatory sentencing may have unintended consequences such as
 - Reducing the number of people convicted of domestic assault because witnesses may be reluctant to provide evidence. Partners in a relationship may be unwilling to give evidence for a range of reasons including economic and emotional factors such as the fear of the breadwinner being imprisoned.¹²
 - Legislation singles out occupational groups that may be seen as discriminatory, for example, assaulting a public officer. Those associated with the victims of assaults

⁷ Ibid. 19.

⁸ Ibid. 19.

⁹ Ibid. 21.

¹⁰ Ibid. 27.

¹¹ Ibid.

¹² Ibid. 37

- may ask why their loss is not viewed as serious enough for a mandatory sentence when the assault of a public officer attracts a mandatory sentence.
- Offenders are charged with lesser offences that do not adequately reflect the nature of the criminal conduct. Given that mandatory sentencing offences may result in more contested cases, prosecutors and police may feel additional pressures to negotiate with the offender and/or the defence and agree to pursue lesser charges to prevent court delay and a backlog of cases.¹³

Additional Resources

In December 2013, a new Bill was introduced in the WA Parliament to strengthen the mandatory sentencing laws. The following articles give reasons for the Bill.

[WA mandatory sentencing laws to be tightened](#)

[Mandatory sentencing laws strengthened](#)

2015 News Articles

[WA Bill will lock up hundreds of people – but won't reduce home burglary](#) – Amnesty International

[Crime looms as a political battleground as Western Australia heads down long road to next election](#) – ABC News

[New burglary laws will jail more Aboriginal people in WA, experts fear](#) - Guardian

Further Reading

[Does mandatory sentencing work?](#)

[Magistrate laments mandatory sentencing laws](#)

[The mandatory sentencing debate](#)

[Plans to toughen mandatory sentencing in WA a step in the wrong direction](#)

Optional Activities

- a) Using the link [Mandatory Sentencing Debate](#) explain in your own words at least three arguments for and three arguments against mandatory sentencing. (Though this resource is American based, many of the arguments still apply in the Australian context.)

“Arguments FOR

¹³ Ibid. 38.

Arguments AGAINST

- b) Conduct a class debate on mandatory sentencing.
- c) Write a letter to your local minister that details reasons why you would support or oppose mandatory sentencing. As a guide, you may wish to use the *Law Society of Western Australia's Letter to the Premier* or the *Attorney General's response on Mandatory Sentencing* discussed in the pre-visit resource.



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