

Sentencing Matters: Mandatory Sentencing

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Introduction

Sentencing Matters is a new series of incidental research papers prepared by members of the secretariat of the Sentencing Advisory Council as part of the Council's statutory function of conducting research and disseminating information on sentencing matters. Mandatory Sentencing is the first in the series and has been authored by Dr Adrian Hoel, Legal Policy Officer, and Dr Karen Gelb, Senior Criminologist. The views expressed in this paper are those of the authors and do not necessarily reflect the views of the Council or its individual members.

Mandatory sentencing is a controversial issue that creates significant debate and divisions both in the community and in government. It has been implemented, in Australia and around the world, in various forms including 'three strikes' legislation and, in an attenuated form, as presumptive minimum sentences and standard non-parole periods. The goal of these legislative initiatives has been to increase consistency in sentencing and to improve public confidence in the courts by ensuring that sentences properly reflect community views.

Periodically calls arise for the introduction of mandatory sentences in Victoria. This research paper examines what mandatory sentencing is and considers how mandatory sentencing fits within a spectrum of sentencing schemes, ranging from wholly discretionary systems and structured discretionary systems through systems with standard minimum non-parole periods to systems with greater degrees of prescription.

The purpose of the paper is to consider the aims of mandatory sentencing, and to assess whether various schemes that have been adopted elsewhere have been successful in achieving those aims. The paper also examines the economic and social costs of mandatory sentencing.

The paper concludes, on the basis of existing research, that mandatory and other prescriptive schemes are unlikely to achieve their aims. To the extent that such schemes achieve some of their aims, the research indicates that they are achieved at a high economic and social cost.

What is mandatory sentencing?

A mandatory sentence is a fixed penalty prescribed by parliament for committing a criminal offence (Roche, 1999; Australian Law Reform Commission, 2006, pp. 538–9). While a mandatory sentence can theoretically involve any type of sentence, typically it refers to a mandatory sentence of imprisonment.

There are very few offences in Victoria which carry a mandatory prison sentence. They are all offences of intermediate rather than serious gravity.¹ This has not always been the case in common law countries. Historically, in the United Kingdom, all serious offences drew a mandatory capital sentence and courts exercised very little discretion in sentencing offenders. In the eighteenth and nineteenth centuries, courts were bestowed with a progressively broader sentencing discretion, in terms of both the nature and the severity of the sanction (Fox and Freiberg, 1999, pp. 2–3).

Victorian law also provides for a system of infringement notices that have been introduced for offences ranging from parking illegally to drink driving. These notices prescribe notionally ‘fixed’ amounts of money and/or other sanctions such as licence suspension. Despite this, the sanctions prescribed for infringement notices are not mandatory sanctions as a person retains the right to have the matter determined before a court, which may impose some other sanction than that detailed in the infringement notice (see Fox, 2005, pp. 341–2; Fox, 1995, p. 287).

The term ‘mandatory sentencing’ is often thought to refer to the *severity* or *quantity* of the sanction. However, the term ‘mandatory sentence’ describes a prescribed *type* of sanction—it does not necessarily stipulate a specific minimum sentence level. For example, a mandatory sentence of imprisonment does not, of itself, specify the minimum period of imprisonment. However, the concept of mandatory sentencing is often used interchangeably with the idea of mandatory *minimum* sentences. Mandatory sentences generally prescribe both the type of sanction and the minimum level of the sanction. Sometimes they

will provide for more severe sanctions for repeat offenders, such as the ‘three strikes and you’re out’ legislation in many United States jurisdictions (Morgan, 1999).

Mandatory sentencing regimes are often the product of ‘tough on crime’ initiatives, prescribing severe mandatory minimum sanctions for the offences (Bagaric, 2002, p. 119). While many, perhaps even most, do this, severe sanctions are not, by definition, synonymous with mandatory sentencing. At least one Australian advocate of mandatory sentencing has attempted to distance the concept of mandatory sentencing from the harshness that it is often assumed to engender (Bagaric, 2002). Nevertheless, many supporters of mandatory sentencing, expressly or otherwise, also advocate more severe penalties. It is, however, unclear how well a mandatory sentencing scheme could provide for appropriately proportionate sanctions. It is precisely this issue of degree, of where to set the bar for a mandatory sanction and how to link it to an offence/offender’s particulars, for which mandatory sentencing, lenient or severe, is most criticised. An avowedly parsimonious approach would probably alienate most core supporters of mandatory sentencing. While noting that mandatory sentencing does not necessarily entail more severe sanctions, this paper will largely address mandatory sentencing in the context of regimes where harsher penalties are one of the objectives sought as part of the legislative program.

A concept related to mandatory sentencing is that of presumptive sentencing. A presumptive sentencing system is one in which parliament prescribes both a sanction type and a minimum level of severity for a given offence which the court *must* impose *unless* there is a demonstrable reason—which may be broadly or narrowly defined—justifying a departure from this (Freiberg, 2005). Presumptive minimum sentencing schemes can differ in terms of their level of prescription, ranging from wholly voluntary guidelines to what effectively amount to mandatory sentencing regimes. A presumptive minimum sentence scheme has been adopted in New South Wales for the imposition of non-parole periods.² Many of the justifications for and criticisms of mandatory sentencing similarly apply to presumptive minimums.

¹ For example, mandatory sentences of imprisonment are prescribed under the *Country Fire Authority Act 1958* (Vic) s 39C (causing fire with intent to cause damage) and the *Road Safety Act 1986* (Vic) s 30 (recidivist disqualified/suspended driving). Graver offences, such as murder (see *Crimes Act 1958* (Vic) s 3), do not have mandatory penalties attached to them. As part of the *Suspended Sentences and Intermediate Sentencing Orders Final Report—Part 2* (Sentencing Advisory Council, 2008), the Sentencing Advisory Council has recommended a review of the mandatory sentence prescribed for driving while disqualified/suspended under the *Road Safety Act 1986* (Vic) s 30.

² See the *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A.

Sentencing under a structured discretionary regime

This section provides a brief overview of the current discretionary sentencing system in Victoria.³ The section also presents some of the criticisms of discretionary sentencing systems that are typically used to justify the introduction of mandatory sentencing.

Who sentences in Victoria?

In Victoria, as in all Australian jurisdictions, parliament and the courts both have functions that shape sentencing and its processes. Parliament legislates in respect of specific aspects of sentencing (for example the *Sentencing Act 1991* (Vic)) and also prescribes maximum, and more rarely minimum, sanctions for offences. In its role as the people's representative body, parliament has the ability to amend existing legislation as well as to modify or abrogate judge-made law relevant to sentencing. The judiciary alone has the power to sentence offenders and, in doing so, interprets and applies the written law of Victoria as well as any relevant judge-made principles of law. Judges are appointed by the Governor on the advice of the senior members of the incumbent government.

There can be a degree of tension between parliament and courts in the area of sentencing. In sentencing offenders, courts have a measure of discretion as to how to apply the relevant law. Parliament, on the other hand, has no power to sentence offenders but is empowered to enact the legislation that guides the courts' sentencing discretion. Though each is independent of the other, parliament has the capacity to circumscribe the role of the judiciary in the sentencing process, while the judiciary is ultimately responsible for determining how the law applies to the cases that come before it.

The principal piece of legislative guidance on sentencing in Victoria is the *Sentencing Act 1991* (Vic), which sets out the purposes of sentencing, a basic process of sentencing and the factors that the court must consider in sentencing an offender. The *Sentencing Act 1991* (Vic) is supplemented by other Acts that set out the maximum penalties for specific offences. Courts are also guided by established common law sentencing principles (Fox and Freiberg, 1999, pp. 28–34). Under section 6AB of the

Sentencing Act 1991 (Vic), the Victorian Court of Appeal can also promulgate guideline judgments that set out principles relevant to sentencing that lower courts are bound to consider when imposing a sentence (though, to date, no such guidelines have been promulgated).

The Victorian sentencing process

The sentencing process commences only after a finding of guilt has been made against an offender. Sentencing is thus a separate phase of the trial process. The process used in Victoria is discretionary in the sense that the judge or magistrate can decide both the type and the severity of the sanction. This discretion is not unfettered: the sentencing discretion is a structured one, guided by legislation and common law principles. The exercise of the discretion is also subject to rehearing or review by higher courts.

The judge or magistrate is the sole decision-maker on the issue of sentence—the jury plays no role at all in sentencing. As part of the sentencing process, the judge or magistrate will hear submissions from the prosecution and defence on evidence that relates to either the circumstances of the offence itself or the circumstances of the offender. Where any such circumstances are found to be proven, they will act to aggravate (increase) or mitigate (decrease) the severity of the sentence imposed. Evidence in aggravation must be proven beyond reasonable doubt while evidence in mitigation must only be proven on the balance of probabilities.

The process can be illustrated by an example.

Bob works in a convenience store. He is 26 years old and is a trusted employee. He is found stealing money from the store. He has no criminal history. He is very remorseful and pleads guilty to the offence at an early stage in the proceedings.

The fact that Bob abused a position of trust is an aggravating factor. However, the fact that Bob has no relevant prior convictions, his remorse and his guilty plea would all be mitigating factors. Even in the absence of evidence of remorse, a guilty plea will generally act to mitigate a penalty because it reduces the time and cost of prosecution. It is also said to reduce negative impact on victims. The vast majority of criminal prosecutions are disposed of by way of a guilty plea.

The judge will weigh up this evidence in sentencing an offender and must consider what purpose or purposes ought to be advanced in sentencing. Section 5(1) of the *Sentencing Act 1991*

³ For a detailed analysis of sentencing law and practice in Victoria, see Fox and Freiberg, 1999, and also Fox, 2005. For a short, uncomplicated discussion of the sentencing process, see Judicial Conference of Australia, 2007.

(Vic) sets out the purposes for which sanctions may be imposed in Victoria. They are:

- punishment;
- deterrence;
- rehabilitation;
- denunciation; and
- protection of the community (or a combination of two or more of them).⁴

The extent to which each purpose is appropriate to a particular case, and the relative weight to be given to each purpose, will depend on the circumstances of the case and of the offender.

Assuming Bob has no prior convictions and a steady job, a court may be persuaded that Bob has some chance of rehabilitation and may impose a sentence to reflect this. A sentence favouring rehabilitation would generally be less harsh in terms of the nature and severity of the sanction, though it may involve some kind of education or supervision. Courts will often favour rehabilitative sanctions when sentencing young offenders, particularly where they have not previously offended, and subject, of course, to the gravity of the offence for which they are being sentenced. Bob is not particularly young. If he had previous convictions, the court may take the view that there is little or no chance of rehabilitation and may instead place more weight on other sentencing purposes such as deterrence and denunciation. Most sanctions encompass a number of sentencing purposes.

Victorian courts are also guided by section 6 of the *Sentencing Act 1991* (Vic), which incorporates the principle of parsimony—no sanction can be more severe than is needed to achieve the purpose or purposes for which it is imposed. The Act stipulates that the court must refrain from imposing a sanction within the sentencing hierarchy where the sentencing purpose or purposes could be achieved by a sanction that is lower in the hierarchy. The other broad principle that guides sentencing in the Act is that the court must impose proportionate sanctions—the severity of the sentence must fit the seriousness of the offence in all its circumstances. The court will determine what the proportionate sanction is by evaluating the facts of the case and by considering both the maximum penalty and current sentencing patterns for the offence.

When considering the sentencing facts, appropriate sentencing purposes and relevant sentencing principles, the court may also need to consider whether to record a conviction—which itself

amounts to a sanction in its own right, beyond a finding of guilt. A conviction must be recorded where a custodial or intensive correction order is imposed.

In addition, the court will need to consider common law sentencing principles. There are a large number of these common law principles. An example of such a principle is parity: a court must not impose disparate sentences on co-offenders in the same or subsequent criminal proceedings in the absence of clear differences in the degree of culpability or of other aggravating or mitigating factors between the offenders (Fox and Freiberg, 1999, pp. 725–6). This principle helps ensure consistency from case to case or offender to offender, and in doing so helps preserve public confidence in the judicial system.

Imagine that Bob has a co-offender, Andrew.

Andrew has a similar criminal history, a similar level of remorse, a similar level of cooperation with the investigating authorities and a similar level of culpability in the offence itself. Let us also assume that the court sentences Andrew with similar sentencing purposes in mind to those that the court considers in sentencing Bob. Under these circumstances, a court may not impose a disproportionately higher sentence on Bob.

But assume that Andrew had a much greater role in the offence. He was the instigator of the offence, did not demonstrate any remorse, did not assist the police investigations and was a repeat offender. Although their offences are notionally the same, there can be a legitimate disparity between the sentences. In other words, numerically inconsistent sentences *can* properly be imposed by a court in order to ensure there is consistency with regard to the overall culpability of the offender in the relevant offence.

A judge or magistrate is required to give reasons for sentencing an offender. These reasons do not have a prescribed format and need not deal with every particular factor relevant to sentencing, but must give an indication of the factors that have influenced the court in sentencing the offender. These reasons allow the parties to assess the extent to which their submissions have influenced the court and also allow third parties to ascertain how a court will sentence in a like matter in the future. In addition to this, reasons enhance judicial accountability and transparency and, themselves, assist appellate courts to determine whether a court has imposed an appropriate sentence (Fox and Freiberg, 1999, pp. 175–6).

The court will also normally need to consider whether it is appropriate to impose a non-parole period (this is the minimum period that the offender must serve in prison). If the court sets a non-parole period and at the end of that period the Parole Board approves parole, the offender will serve the remainder of the sentence in the community. Parole will normally be subject to conditions and/or supervision. There are no presumptive or fixed minimum parole periods in Victoria, nor are there any statutory

⁴ Most sentencing literature lists the five principal purposes of sentencing as: retribution, deterrence, rehabilitation, incapacitation and denunciation. See, for example, Fox and Freiberg, 1999, pp. 184–212. For consistency, this research paper will adopt the terminology generally used in sentencing literature, though it is noted that the purposes identified under the *Sentencing Act 1991* (Vic) incorporate a broader range of considerations than retribution, deterrence, rehabilitation, incapacitation and denunciation.

formulae for determining parole.⁵ Parole offers the corrections authorities a chance to closely monitor the reintegration of an offender into society. The decision to release an offender on parole is not automatic; the parole authorities will consider a range of factors including an offender's behaviour in gaol, an offender's criminal history and psychiatric reports concerning the offender.

Offenders may appeal against sentences, including the decision to record a conviction and decisions regarding the fixing of non-parole periods. Appeals depend upon an error being found or inferred in the trial judge's exercise of the sentencing discretion so as to persuade an appellate court to hear an appeal on the matter.⁶ The prosecution may also appeal against sentences. Appeals by the prosecution must be in the public interest (see generally, Fox, 2005, Chapters 10–11).⁷ The normal grounds argued by the prosecution and the defence are, respectively, that a sentence is manifestly inadequate or that it is manifestly excessive). These rights of appeal act as a check and balance ensuring that courts are sentencing in accordance with the relevant legislative and common law principles and substantially constrain the sentencing discretion of judges and magistrates in Victoria. Appeals help prevent arbitrary or incorrect sentences from being imposed. A defendant cannot appeal a sentence on the grounds of excessive severity where a court simply applies a prescribed mandatory sentence, though very few such sentences exist in Victoria.

Criticisms of discretionary sentencing systems

A number of criticisms have been levelled at discretionary sentencing systems. The criticisms generally involve one or more of the following concerns:

- **inconsistency**—discretionary sentencing leads to unjustified disparity. Calls for mandatory sentencing reflect a lack of confidence that the courts can impose consistent sentences.
- **leniency**—discretionary sentencing results in sentences that are too lenient and that do not accord with contemporary community values.
- **relationship between courts and parliament**—it is sometimes suggested that courts are simply failing to sentence in accordance with the will of parliament (and its constituents, the community).

Inconsistency, leniency of sentencing and the role of the courts and parliament in this area are contentious issues in most legal systems. Sentencing is a highly divisive issue. Different people can have very different perceptions as to what a consistent sanction is, what community values are in relation to sanctions, who/what body is ultimately responsible for sentencing and who that body is ultimately answerable to.

The Victorian sentencing process offers significant guidance to judges and magistrates in sentencing. In addition to this, aberrant sentences will be subject to appellate review. These measures would appear, based on the statistics of organisations such as the Sentencing Advisory Council, to promote a substantial level of consistency. Courts take note of such statistics in assessing the general tariffs for offences. Even with the fairly prescriptive guidance under the *Sentencing Act 1991* (Vic) and contained within the common law, the sentencing discretion of judges and magistrates is considered to be too broad (Bagaric, 2002). This breadth of the sentencing discretion is said to lead to inconsistent, disproportionate and disparate sentences which affront important broader principles such as equality before the law and broader societal notions of fairness (Bagaric, 2002).

To some, consistency simply means setting a standard penalty or penalty range for each offence. This view underpins mandatory sentencing. The approach to consistency in Victoria is not so one-dimensional. While like cases will be treated alike and different cases differently, the offence itself is only one determinant, albeit a major one, of the sentence. The other determinants are the circumstances of the offence and offender. This approach, though more complicated, allows a sentence to be tailored more closely to all of the relevant factors. This can result in more variability in the sentences imposed.

It is argued that the current system is unduly lenient and thus does not effectively exact on the offender the degree of retribution commensurate to the offence itself and to contemporary community values. It is also argued that sentences imposed are not harsh enough to deter offenders or to incapacitate offenders effectively. It is difficult to ascertain whether current sentences are too lenient. While there is some less vocal and less trenchant criticism of discrete aspects of sentencing (such as the maximum penalties for specific offences), these criticisms do not necessarily amount to a call for mandatory sentencing. Judges and magistrates have, on occasion, publicly encouraged parliamentary review of the maximum penalties prescribed for given offences, in line with community concerns.

It is suggested that because judges are appointed, not elected, it is appropriate that the democratic will of the people, through the parliament, be given greater prominence in the sentencing process in terms of harsher and more numerically consistent sanctions being imposed (Garland, 2001, pp. 171–3; Roche, 1999). Sentences that are substantially lower than the maximum penalties prescribed by parliament are seen by some to suggest that the courts are failing to comply with the will of parliament. However, in Victoria, such criticisms fail to recognise that in the *Sentencing Act 1991* (Vic) parliament has stated that the maximum penalty is just one factor that the courts must take into account and that parliament has provided the courts with a discretion as to how those factors are to be applied in each case.

⁵ For a succinct discussion of parole in Victoria see Fox, 2005, pp. 309–28.

⁶ *Crimes Act 1958* (Vic) s 567.

⁷ *Crimes Act 1958* (Vic) s 567A.

Mandatory sentencing and presumptive sentencing: a continuum

Jurisdictions around the world that have introduced mandatory sentencing regimes generally only implement them for specific offences or classes of offence, rather than for all crimes. These jurisdictions may or may not also make use of presumptive sentencing for other criminal offences or classes of offence. This section provides an overview of some of the presumptive sentencing regimes that have been implemented in Australia and the United States.

Presumptive minimum sentences

Presumptive minimum sentences can take a number of forms and entail varying levels of prescription. In essence, a presumptive minimum sentencing regime is one where prescribed legislative minimum sentences dictate the sentence that must be imposed by a court in sentencing offenders. The legislation will also stipulate grounds upon which the court may find the presumption to be rebutted and proceed to exercise its full sentencing discretion.

Presumptive minimums can be used to regulate various aspects of sentencing. They can theoretically be used for regulating financial and community service penalties as well as imprisonment. When used in respect of imprisonment, they will normally prescribe both the head sentence (the maximum period of imprisonment to be served by the offender) as well as the non-parole period (the minimum period to be spent in prison before an offender can apply for parole). Perhaps the most important factor in defining the operation of a regime of presumptive minimum sentences is the breadth of the grounds upon which the presumptive sentences can be rebutted or departed from. If a wide range of grounds is stipulated and/or if the grounds themselves are not construed narrowly, courts will retain a large discretion as to the type of sentence imposed. If the legislation makes provision for only a very narrow range of grounds upon which a presumptive minimum sentence may be rebutted or departed from then the regime's operation will closely resemble mandatory sentencing. Some presumptive minimum sentencing legislation, as well as stipulating the factors that can rebut the presumption, may also limit the effect that the rebuttal can have on the sentence. Some will allow for rebuttal only in order to *increase* the severity of the sanction while other legislation will allow for rebuttal either to *increase or decrease* the sentence from the presumptive minimum, as the sentencer sees fit.

Where presumptive minimums cover some but not all aspects of sentencing, even a strict regime may still allow courts some flexibility in the overall sentence imposed. For example, strict presumptive minimum sentence legislation that stipulates head

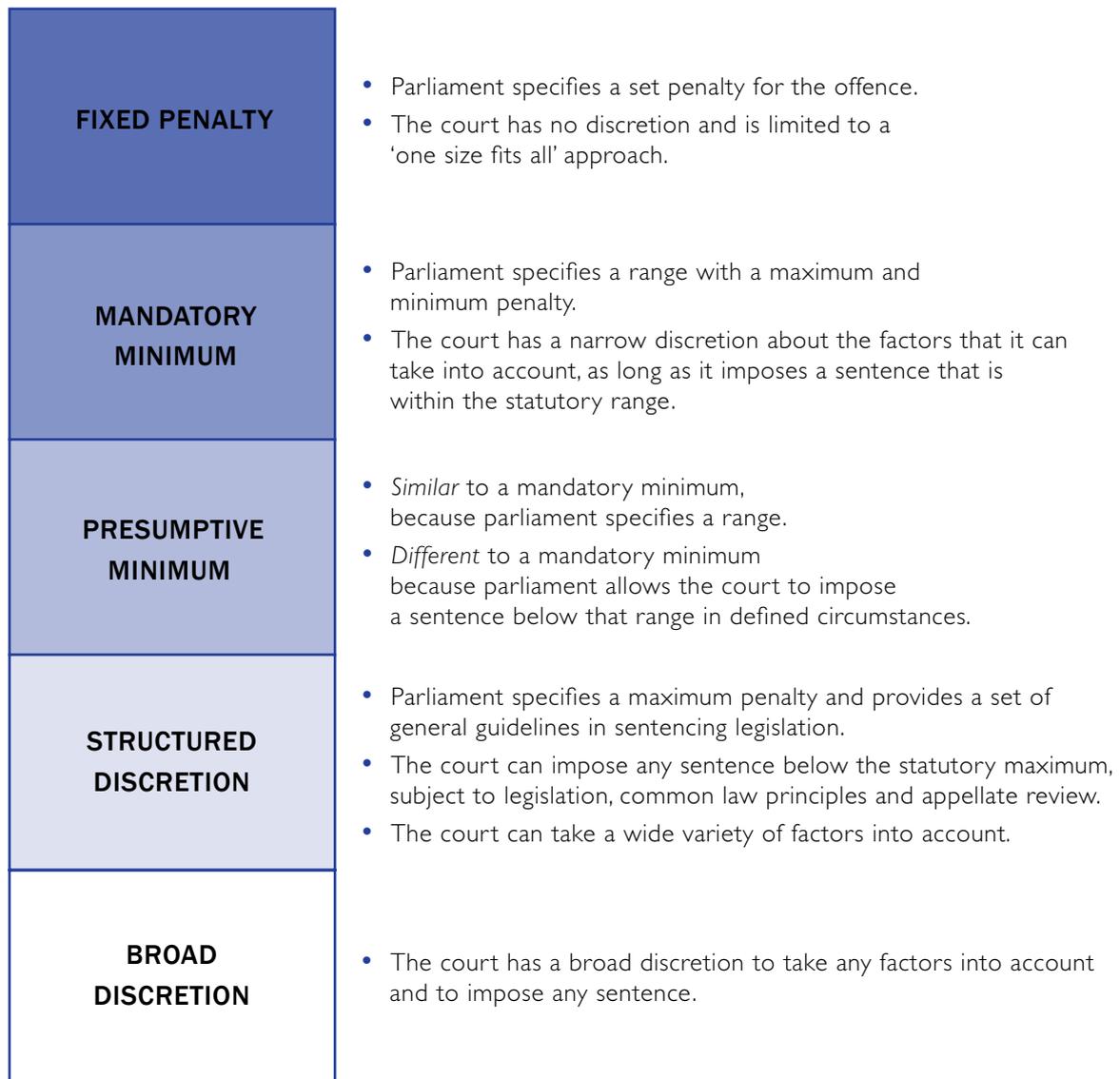
sentences but not non-parole periods would, theoretically, allow a court to temper an offender's sanction by setting a shorter non-parole period.

Figure 1 sets out a continuum of sentencing and the level of discretion given to the judge or magistrate. The bottom cell denotes unfettered sentencing discretion. An unfettered discretion is one that has no limitations in terms of maximums or minimums, has no transparency requirements (such as giving reasons), and has no guidance for judges and magistrates. The absence of these important facets of principled sentencing will render appeal mechanisms (if any exist) ineffective at worst and problematic at best. Second from the bottom is the current discretionary model used in Victoria that prescribes maximum penalties and regulates the sentencing discretion of Victorian courts through legislation and common law rules. The Victorian sentencing system thus does not confer an unfettered discretion upon judges or magistrates. The next narrowing of the sentencing discretion comes with presumptive minimums that allow for rebuttals to increase or decrease the sentence. Figure 1 also shows the variability in judicial sentencing discretion according to the grounds for ignoring the presumption and maintaining discretion:

- whether the presumptive minimum legislation provides for a wide or narrow range of factors that may rebut the presumption;
- whether the legislation broadly or narrowly defines the grounds for rebuttal;
- whether legislation does or does not regulate the imposition of non-parole periods; and
- whether rebuttals are permitted only for increasing the severity of the sentence.

Still stricter are regimes that provide for mandatory minimum penalties but that otherwise allow the sentencer to increase the sanction. Finally, at the top of the continuum in terms of the sentencing discretion are mandatory sentencing regimes that prescribe fixed penalties and that give the sentencer no discretion whatsoever in determining the sentence.

A number of Australian and overseas jurisdictions make use of presumptive minimum sanctions. The following briefly considers the presumptive minimum sentencing legislation currently in force in New South Wales, and provides a summary of both the Minnesota Sentencing Guidelines and the United States Federal Sentencing Guidelines. The presumptive minimum sanction regimes in these jurisdictions can be ranked in terms of the extent to which the sentencing discretion is regulated, with the most discretionary version of the regime operating in New South Wales and the strictest version represented by the United States Federal Sentencing Guidelines.

Figure 1: The spectrum of approaches to discretion in sentencing

New South Wales standard non-parole periods

New South Wales introduced presumptive minimum penalties in respect of non-parole periods under the *Crimes (Sentencing Procedure) Act 1999* (NSW) Division IA. The provisions (referred to in the Act as 'standard non-parole periods') relate only to parole and do not directly affect the determination of head sentences.⁸ The provisions also relate only to serious drug offences, offences against the person, sexual offences, serious property offences and homicide offences committed on or after

1 February 2003.⁹ Other serious offences such as fraud do not feature, nor do less serious indictable offences. This regime of presumptive minimums would fall in the lower end of the lower category of presumptive minimums in Figure 1.

Section 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that when imposing a sentence of imprisonment, the court must set the non-parole period provided in Division IA which represents the penalty for a middle-range instance of the relevant offence unless there are circumstances that justify setting a shorter or longer period. The reasons for doing so must fall under those set out under section 21A of the Act, which provides

⁸ It may be that setting presumptive minimum non-parole periods will tend to raise head sentences indirectly by pushing out the maximum penalties so as to keep the head sentences and non-parole periods roughly in the same proportions as they were prior to the introduction of the legislation.

⁹ The relevant offences and prescribed non-parole periods are set out in Div. IA.

an exhaustive (albeit very loosely worded) list of aggravating and mitigating factors under subsections 2 and 3. Section 21A(1) also outlines a residual class of factors that may be taken into account by courts—‘any other matters that are required or permitted to be taken into account by the court under any Act or rule of law’. Section 21A(2) includes such factors in aggravation as abuse of a position of trust and gratuitous cruelty. Section 21A(3) includes mitigating factors such as a guilty plea and display of remorse. Division 1A requires that the court give reasons for imposing a non-custodial period for an offence with a prescribed minimum, or for otherwise deviating from the minimum non-parole periods in imposing a sentence of imprisonment. Under section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the court must first determine the non-parole period and then impose the head sentence. Under that section, the balance of the sentence must not exceed one third of the non-parole period unless there are ‘special circumstances’—this is intended to ensure that only a limited portion of a sentence may be served on parole (Marien, 2003). Where the court imposes a sentence inconsistent with the ratio prescribed in section 44(2) it must give reasons for doing so, though the failure to do so will not invalidate the sentence. The term ‘special circumstances’ has been held to fall under the residual category of factors in section 21A(1) (Marien, 2003).

The standard minimum non-parole periods do not apply when courts impose a head sentence of life imprisonment or an indeterminate sentence, nor do they apply to offences dealt with summarily or to custodial sentences imposed on mentally ill offenders under mental health legislation. The exclusion of offences heard summarily is worthy of additional comment as there are some offences that have standard minimum periods which can be dealt with summarily (Marien, 2003). Not only does this mean that the courts that process the bulk of criminal cases will not be bound by this regime, it also means that the decision to try a matter summarily (or not) will have an effect on both the applicable statutory maximum *and* minimum sentence prescribed.

The NSW approach to setting non-parole periods does not appear to fetter the sentencing discretion significantly. Courts remain free to diverge from the prescribed non-parole periods as long as there are one or more relevant aggravating or mitigating factors and the court gives reasons for diverging from the prescribed period. The range of aggravating or mitigating factors listed in the Act is fairly broad and the factors themselves are expressed in quite expansive terms (Roser et al., 2003, see generally [03-016]; see also Anderson, 2006). From the cases to date, it appears that:

[T]he actual constraints imposed on sentencers by the standard non-parole period...are no more or less onerous than the maximum penalty as a ‘reference point’ but the range of cases

that may be encompassed by the middle range of objective seriousness are such that this new guidepost will be utilised more often in structuring judicial sentencing (Anderson, 2006, p. 216).

The current NSW Director of Public Prosecutions strongly opposed the introduction of standard minimum periods (Cowdery, 2007). Despite this, he has stated (2007, p. 8):

I find consolation now in the fact that, like the mandatory life sentencing legislation [used in other Australian jurisdictions] in 1996, so many let-outs have been provided for the courts by the [standard minimum] legislation as interpreted by the Court of Criminal Appeal that the exercise of judicial discretion has remained largely intact.

It may well be that the flexibility that was built into the legislation will in fact render the legislation ineffective. Because the standard minimum non-parole regime commenced in respect of offences committed on or after 1 February 2003, there are only limited data available on the sentences imposed under it.¹⁰ These data indicate that there has been an increase in the terms of non-parole periods imposed for some regime offences. The data also indicate that there has been an increase in the rate of offenders incarcerated for some of the offences falling under the regime (NSW Sentencing Council, 2006, pp. 13–16). However, while these figures suggest some similarity in the types of sanctions being imposed, this does not necessarily imply a consistency in sentence severity.

In the absence of more detailed statistics on sentences under the standard minimum non-parole period regimes, it may be worth considering how the previous legislative attempt in NSW to guide the courts’ sentencing discretion fared.

Prior to the implementation of the standard minimum non-parole periods in NSW, there was a statutory formula prescribed under section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (note that this section has now been amended). This legislation basically provided that a non-parole period needed to be 75% of the head sentence period unless special circumstances existed. The goal of the legislation was to ensure that judges, when imprisoning offenders, would impose sentences that prescribed that a greater portion of the sentence actually be served in proportion to the head sentence. The legislation allowed judges to impose sentences outside the formula where special circumstances existed and that is exactly what they did. Describing this previous system, Keane, Poletti and Donnelly (2004) noted that it was ‘something of a rarity for a sentence to reflect the statutory norm’ and that up to 87.1% of cases where imprisonment was imposed departed from the prescribed statutory formula.

¹⁰ Some data can be found in NSW Sentencing Council (2006), annexures A and B.

These high departure rates and the non-conformity of the judges to the stipulated statutory norms indicate that this previous attempt to ensure more consistent and severe sentencing did not achieve its aims. Indeed, discussing standard minimum non-parole periods, Cowdery (2007, p. 10) has said:

It is fair to say that judges have been quite ingenious in finding ways to avoid being unnecessarily constrained by the legislation, so (in my view, at least) the legislation has failed to contribute much to either consistency or transparency in sentencing.

This failure of the legislation itself does not necessarily equate to a failure by the courts to deliver justice, nor is the judges' use of the 'let-outs' necessarily contrary to the will of parliament (which included them in the legislation in the first place). Cowdery (2007, p. 17) observed:

The modern historical objective of sentencing in our system is to make the punishment fit the crime and the criminal. It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice.

Minnesota Sentencing Guidelines

Minnesota has had a regime of presumptive minimum sentences for felony offences for more than 25 years in the form of the Minnesota Sentencing Guidelines. Many jurisdictions in the United States (US) make use of sentencing guidelines (including Washington State, Wisconsin, Utah, Pennsylvania, Oregon, Maryland and Delaware).¹¹

The sentencing discretion historically bestowed upon judges in US jurisdictions is much broader than that in Australian jurisdictions. In most US jurisdictions, elements of the offence, together with any attendant conduct, need to be put to the jury. After a finding of guilt is made, the judge makes findings on sentencing facts based on the 'preponderance of evidence' or balance of probabilities, and the decisions are, absent constitutional concerns, normally unreviewable (Frase, 2007). In the past, this has sometimes led to unjust and/or disparate outcomes. Guidelines were instituted in Minnesota, in part as a means of more closely guiding the sentencing discretion, and in part to re-assert retribution as a central (though not overbearing) sentencing purpose (Frase 2008, pp. 88–9).

The Minnesota Sentencing Guidelines Commission was established by the Minnesota legislature in 1978 to determine

presumptive sentencing guidelines for various serious offences, represented in summary form in the grid. As shown in the extract in Figure 2 (page 10), the grid sets out penalties for the offences covered and is presumptive both as to the *severity* of the sanction and *whether* the sanction is actually executed. The guidelines exist independently of the statutory mandatory minimum sanctions that are also prescribed for certain offences.

The Commission is composed of judicial officers, corrections officials, members of the public and lawyers. It meets periodically to consider the operation of the guidelines, which may be amended by it to address issues in the guidelines and sentence levels.

Felony offences other than sexual offences are organised into 11 categories by reference to their severity, I being low severity and XI being very serious. Sexual offences are arrayed on a separate eight-level grid that operates in a similar fashion. There are some felony offences, such as incest, that are not typically prosecuted and/or that encompass a wide range of underlying behaviours and so are not specifically ranked within the grid. A sentencing judge would need nominally to rank any such offence prior to sentencing. First-degree murder also does not feature on the grid because it carries a mandatory sanction of life imprisonment.

The horizontal axis of the grid is determined by the offender's criminal history, which relates to four factors: prior felony record; the offender's custody status at the time of the offence; the prior misdemeanour and gross misdemeanour record of the offender; and the prior juvenile record for young adult felons. The original intention of the guidelines was to give primary weight to the current offence in sentences and accord only secondary significance to offenders' criminal histories. As well as reducing the impact of criminal history on sentences, the Minnesota guidelines also attempt to 'provide uniform standards for the inclusion and weighting of criminal history information' (Minnesota Sentencing Guidelines Commission, 2007, p. 5). There is a formula for determining the 'score' of the offender by reference to the four criminal history factors; this score is then plotted on the grid along with the ranked severity of the current offence. Criminal history scores can be amended in line with community values and other factors on a year-to-year basis.

When sentencing, a judge must plot the offence type on the vertical axis and the offender history on the horizontal axis. The judge is then taken to the appropriate cell in the grid that stipulates the range (in months) of the imprisonment period that may be imposed. A judge may depart from the guidelines only where substantial and compelling circumstances render the departure more appropriate than the presumptive sanction, but must provide detailed reasons for doing so. These circumstances broadly correlate to aggravating and mitigating factors and are

¹¹ See the National Association of State Sentencing Commissions website: <www.ussc.gov/states.htm>.

Figure 2: Extract of Minnesota Sentencing Guidelines 2007

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder (2nd Degree)</i> (intentional murder; drive-by- shootings)	XI_μ	306* 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480	426 363-480
<i>Murder (3rd Degree)</i> <i>Murder (2nd Degree)</i> (unintentional murder)	X	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Assault (1st Degree)</i> <i>Controlled Substance Crime</i> (1st Degree)	IX	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Aggravated Robbery</i> (1st Degree) <i>Controlled Substance Crime</i> (2nd Degree)	VIII	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i>	VII	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84
<i>Controlled Substance Crime</i> (3rd Degree)	VI	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68

* The figure on the top line represents the midpoint for the range while the bottom line gives the penalty range for months of imprisonment (the greyed out section in the bottom left corner denotes offences that presumptively should have a term of imprisonment stayed unless some other legislation requires that the sentence be executed).

μ The grid classifies offences into 11 severity levels; only levels VI-XI are extracted here.

not defined exhaustively; nonetheless, the intention is clearly that such departures be exceptional and unusual. Where the judge attempts to impose a more severe sanction than the presumptive sentence due to an aggravating factor, the grounds upon which the aggravating factor is based need to be found as proven by a jury (Minnesota Sentencing Guidelines Commission, 2007). In extreme circumstances, judges may impose a sentence up to the statutory maximum available for an offence. The defence and the prosecution have the right to appeal both improper departures and improper failures to depart from the guidelines (Frase, 2008). Under the Minnesota guidelines, courts do not exercise any role in relation to parole. The Minnesota guidelines set out some minimum terms that need to be served in respect of certain lengths of sentences and/or sentences in respect of specific crimes. Parole cannot exceed one third of the total sentence and is only awarded for good behaviour whilst in prison. Some life sentences specifically exclude the possibility of parole, whilst others may allow parole after a minimum

period of 30 years. Subject to these limitations, the Minnesota Department of Corrections exercises sole discretion to grant or refuse parole (Frase, 2008).

In the past decade, there has been increasingly greater appellate scrutiny of sentencing decisions and the principles that surround sentencing in the US. A number of appellate cases in the US have ruled that the sentencing guidelines cannot be absolutely binding on trial courts. These decisions have arisen out of constitutional appeals regarding sentences imposed under the United States Federal Sentencing Guidelines and the guidelines in other US states. A trio of important cases—*Apprendi v New Jersey* (2000), *Blakely v Washington* (2004) and *United States v Booker* (2005)¹²—has ruled that aggravating evidence is subject

¹² *Apprendi v. New Jersey* (99-478) 530 U.S. 466 (2000); *Blakely v. Washington* (02-1632) 542 U.S. 296 (2004); *United States v. Booker* (04-104) 543 U.S. 220 (2005).

to jury trial rights and proof beyond reasonable doubt and that the guidelines themselves are only advisory. This undermines central operational facets of such guidelines and also has wider implications as these cases also require judges to take account of a broad range of other general sentencing factors (Frase, 2007). These latter factors are likely to affect the operation of non-binding guidelines as well as binding guidelines though the precise effect of these cases is still being ascertained in US jurisdictions (Hofer, 2006). Because the Minnesota guidelines are not strictly binding, it may be that the effect of these cases will be less pronounced. Thus far, the trial courts in Minnesota have tended to adhere to the Minnesota guidelines in sentencing offenders (Frase, 2006).

United States Federal Sentencing Guidelines

The United States Federal Sentencing Guidelines operate in a similar fashion to the Minnesota guidelines by tabulating the appropriate severity of sentence by reference to both the seriousness of the offence and the offender's criminal history. Offences are ranked into 43 categories in ascending order of seriousness; criminal history is ranked into six levels. Like the Minnesota guidelines, the Federal Sentencing Guidelines are presumptive not only as to the severity of the sanction but also as to the nature of the sanction imposed. Offences are divided into four zones, A–D, in ascending order of seriousness. These zones determine whether prison or other sanctions either *can* or *must* be imposed. The Federal Sentencing Guidelines set out the factors that determine the criminal history score of the offender. They also purport to set out exhaustively the grounds for departure from the presumptive ranges (United States Sentencing Commission, 2007). The Federal Sentencing Guidelines are more inflexible and more severe than many other sentencing guidelines in the US, including the Minnesota guidelines. The Federal Sentencing Guidelines have been criticised for their complexity, rigidity, severity, inappropriate uniformity and general disproportionality (Freed, 1992; Gertner, 2008).

As noted above, the trio of cases concluding with *United States v Booker* (2005) has rejected key aspects of sentencing guidelines in the US. As a result of this, the Federal Sentencing Guidelines, though initially intended to be mandatory, are now only presumptive in nature and may require significant reform in the future to comply with these cases. Evidence indicates that since *Booker* there has been a higher departure rate from the Federal Sentencing Guidelines than prior to *Booker*, though more than 60% of the sentences imposed since *Booker* have remained within the range prescribed in the Federal Sentencing Guidelines (Hofer, 2006, pp. 433–4).

Summary

This section has discussed three types of presumptive minimum sentencing regimes. They are all very different in the way they operate and in their levels of punitiveness. In New South Wales, for example, the judge is still left with a discretion to diverge from the presumptive minimum non-parole period, while under the United States Federal Sentencing Guidelines a judge has, at least on the face of them, less discretion to diverge from the prescribed presumptive sanction (although *United States v Booker* (2005) has lessened the rigidity of the guidelines).¹³ However, recent studies and appellate decisions suggest that they are not as rigid as originally intended.

While much of the discussion in the following sections regarding mandatory sentencing is relevant to presumptive minimum sentences it is worth noting the findings of Bushway and Piehl (2007) on presumptive minimum sentencing regimes in the US and their ability to control judicial discretion and prevent disparity. The Bushway and Piehl study analysed the effectiveness of presumptive as well as voluntary sentencing regimes in the US. They concluded that presumptive minimum sentencing regimes might not be as successful in controlling judicial discretion and limiting disparity as previous studies have found them to be. Bushway and Piehl (2007) suggested these studies, which have tended to focus on numerical sentencing outcomes alone, have not paid due regard to the multiple actors apart from judges who share some element of the sentencing discretion—such as prosecutors, who, in exercising prosecutorial discretion to proceed with charges, may exercise a de facto sentencing discretion where presumptive minimums are in force. Further to this, Bushway and Piehl noted that, while presumptive minimum sentencing creates a nominally objective process of sentencing, judges still retain a potentially powerful sentencing discretion in applying the relevant sentencing guidelines (such as determining the 'score' of the offender). Because of this, Bushway and Piehl concluded that even in jurisdictions with very rigid guidelines, judges and other actors exercise a substantial sentencing discretion, directly or indirectly, despite the veneer of consistency and non-disparity.

The rationales for presumptive minimum sentences are similar to those for mandatory sentences and, accordingly, the criticisms made of mandatory sentencing apply equally to presumptive minimum sentences (see, for example, Australian Law Reform Commission, 2006, pp. 537–8, 540–2). The following two sections present, first, a discussion of the rationales for mandatory sentencing regimes and secondly, a discussion of the costs associated with these regimes.

¹³ Western Australia introduced sentencing guidelines, similar to the US grids described above, under the *Sentencing Legislation Amendment and Repeal Bill 1998* (WA). This legislation was passed by parliament but was never actually proclaimed and never entered into force.

Rationales for mandatory sentencing

Of the various rationales of sentencing, mandatory sentencing tends to emphasise deterrence and incapacitation. It also aims to provide for greater consistency in sentencing and to reflect community expectations of punishment more closely.

In critically assessing mandatory sentencing, this section presents a brief discussion of the underlying principles upon which such regimes have been founded.

Retribution and consistency

One of the central aims of sentencing is retribution; that is, to express society's disapproval of an offender's conduct. Retribution has long been a pre-eminent sentencing purpose in Western legal systems. Retribution can be traced back to the concept of *lex talionis* in the Old Testament.¹⁴ While some writers may characterise retribution simply as vengeance (Bagaric and Amarasekara, 2000), even this early formulation of retribution plainly prescribed 'a high degree of equivalence between the offence and the sanction: "eye for eye, tooth for tooth, hand for hand, foot for foot"' (Fox, 1994, p. 490). The primacy of retribution in Western legal systems was re-asserted in the 1970s partly as a result of a general move away from rehabilitation following research that suggested that rehabilitation did not work (see Martinson, 1974).

Most modern retributive theorists believe that there is a need for some level of parity between the sanction imposed and the crime committed. For this reason, modern retributive theory has adopted the concept of 'just deserts' (Fox and Freiberg, 1999; von Hirsch, 1981).

In the context of retributive theory, proportionality acts as both a determining and a limiting factor in establishing a sentence; a proportionate sanction is formulated by a sentencer principally by reference to the gravity of the offence in its objective circumstances. Proportionality, in this context, is known as 'cardinal proportionality', which dictates that a sanction may not be disproportionate (either too harsh, or too lax) to the objective gravity of the offence itself. Some retributive theories also make use of the concept of 'ordinal proportionality', which directs that a sanction for an offence may not be disproportionate in relation to those imposed for other offences. Ordinal proportionality necessitates the formulation of some kind of schedule or scale of offences in terms of seriousness, with a corresponding scale of punishments in order of seriousness.

The use of such a scale helps to promote equality and consistency: offenders are sanctioned in similar ways for offences of similar gravity and differently for ones that are different. This ensures that sanctions will be proportionate to the offence within the framework of other offences in a given legal system.

In sanctioning offenders, retribution can achieve some very important outcomes. Retributive sentences satisfy the disapprobation of the public and serve as a public denunciation of the offender and the offender's conduct. The moral outrage of the community is expressed and public confidence in the administration of justice is thereby reinforced. In addition, Bagaric and Amarasekara (2000) write that retribution promotes a consistent approach to the sanctioning of offenders, being firmly based on the nature of the offence rather than other factors, like community protection and deterrence, seen by retributivists to be wholly extraneous to the process of sentencing.

How well do the underlying justifications and principles of mandatory sentencing fit with retributive theory?

One of the primary aims of mandatory sentencing is to ensure that there is greater consistency in sentencing, both between a given offence and its sanction (such that the punishment fits the crime), and between the punishments imposed on different offenders (such that similar sanctions are applied for similar offences). It is argued that by mandating specific penalties to be applied by the courts, there will be a greater level of ordinal and cardinal proportionality. Additionally, it is argued that the sanctions imposed, which will generally be strict, will better convey the indignation of the public. Parliament is a better judge of this and judges are either not able or not willing to impose sufficiently severe sanctions on a consistent basis. Discretion is seen as the enemy of consistency—inconsistency equals injustice.

Mandatory sentencing pays only a superficial regard to the principles that underpin retributive theory. Particularly where mandatory sentencing is applied only to select offences (as is generally the case), it may actually interfere with the hierarchy of sanctions (Australian Law Reform Commission, 2006, p. 540). It may artificially increase the severity of sanctions for some types of conduct while not doing so for conduct of similar blameworthiness that is not targeted by the regime. It may also interfere with the concept of cardinal proportionality to the extent that a single criminal offence can incorporate a range of different levels of culpability: a mandatory sentence may set an artificially high minimum sanction that becomes disproportionate to the specific circumstances of a given offence. Warner (2007b,

¹⁴ Exodus 21:24.

p. 344; see also Johnson and Zdenkowski, 2000) provides some particularly stark examples of this disproportionality brought about under the now-repealed Northern Territory mandatory sentencing legislation:

- An Indigenous woman who was employed and was a first offender was sentenced to 14 days' imprisonment for stealing a can of beer.
- A 16-year-old with one prior conviction received a 28 day prison sentence for stealing a bottle of spring 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 28 days' imprisonment for stealing less than \$100 worth of stationery and died in custody whilst serving his sentence.

It is worth recognising that the examples listed above are instances of some of the worst excesses of mandatory sentencing legislation. It may well be possible to find cases where discretionary sentencing regimes have also produced wholly disproportionate sentences. No sentencing system can guarantee this will not occur. Despite this fact, it should be borne in mind that in a discretionary sentencing regime, no judge or magistrate would ever be *required* to impose a wholly disproportionate sanction and any such sanction would be subject to appeal. In a mandatory sentencing regime, the judge or magistrate would be required to impose such a sentence and the sentencing would *not* be subject to review for being manifestly excessive.

Modern retributivists see a need for some type of moral equivalence between the offence and its sanction—it is artificial simply to look at the act alone and try to divorce it from its surrounding circumstances. The focus of mandatory sentencing, in seeking consistency, is on sanctioning offenders found guilty of the same offence in the same way with little or no regard to the differing circumstances of each. Rather than achieving consistency, however, mandatory sentencing actually runs the risk of punishing materially *different* levels of culpability with a single arbitrary sanction—the same penalty for materially different criminal conduct. Though the sanction imposed may be nominally consistent, it may, in fact, be substantively inconsistent in terms of the offenders' overall culpability. In addition to this, mandatory sentencing tends to escalate sentencing severity (Australian Law Reform Commission, 2006, p. 540). A judge may be better able to arrive at consistent sanctions from case to case, by reference to the individual circumstances of the cases, than parliament, which is unable to prescribe the myriad circumstances surrounding offences.

Deterrence

One of the central aims of mandatory sentencing is deterrence (Roche, 1999). Deterrence encapsulates two distinct concepts: 'specific deterrence', which attempts to deter the particular offender from re-offending; and 'general deterrence', which aims to deter other would-be offenders in society from offending.

The notion of deterrence assumes a rational link between human behaviour and punishment. It also presupposes that an individual can rationally weigh up the advantages and disadvantages of a given behaviour and choose a course of action based on this deliberation. Deterrence assumes that rational individuals, in seeking to advance their own self-interest, will only engage in illegal conduct where the expected benefits outweigh the expected costs after allowing for the risks of detection and the costs of prosecution (Posner, 1985; Bagaric and Amarasekara, 2000; Fox and Freiberg, 1999, p. 209). Deterrence-based sanctions are thus consequentialist: they are a means of achieving an outcome and not *per se* a punishment.

Mandatory sentencing is said to provide an extra level of deterrence by ensuring that the cost of illegal conduct outweighs the benefits, in terms of both the *severity* of the sanction and the *certainty* that the sanction will be imposed consistently where there is a successful prosecution.

There are two other ideas related to the concept of general deterrence: 'marginal deterrence' and 'absolute general deterrence'. Marginal deterrence refers to the extent to which the severity of a sanction will better deter an offender (that is, whether a *more severe* sanction will achieve a greater level of deterrence). Absolute general deterrence deals with the extent to which the *threat* of sanctions *per se*, whatever their nature or severity, has any effect on the incidence of criminal conduct (that is, whether the threat of some type of sanction deters offenders at all). Tonry (2005, p. 53) writes that '[m]andatory minimum penalties are no more than a specific instance of an attempt to deter crime through penalty increases'. By prescribing the type of sanction to apply to a given offence and stipulating its severity, mandatory sentencing schemes are attempting to achieve a greater level of marginal deterrence. Those that prescribe incrementally more severe sanctions, such as the 'three strikes and you're out' legislation used in many parts of the United States, are particularly clear examples of these attempts at marginal deterrence. Schemes that provide for non-ascending sanctions can still generally be regarded as being aimed at marginal deterrence because of their relative severity and the specificity of their application to certain offences (Tonry, 2005).

Despite the intuitive appeal of deterrence as a concept, it has been criticised on empirical grounds as well as for broader theoretical reasons.

The empirical basis for marginal deterrence is disputed. A large number of studies have found no clear correlation between sanction severity and levels of offending (Hogg, 1999; Zimring and Hawkins, 1973; Blumstein, Cohen and Nagin, 1978). Tonry (2005, pp. 52–3) observed:

Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels all appointed by republican presidents, reached that conclusion, as has every other major survey of the evidence. [citations omitted]

There is little evidence to suggest that a more severe penalty is a better deterrent than a less severe penalty.

Absolute general deterrence has been found to have a stronger empirical basis, but it does not provide much substantive guidance to sentencers and policy-makers in assessing both the choice and the level of sanction (Bagaric and Amarasekara, 2000); it requires that there be a sanction but does not mandate that it be of a particular character or severity (Tonry, 2005). Thus, it would appear from research to date that making a penalty mandatory rather than discretionary will be unlikely to increase its deterrent value.

It is difficult for empirical research in general to identify the factors that bring about behaviour change in an offender, in any case. Lower rates of offending may be due to a range of factors apart from deterrence—such as old age, lack of opportunity, change in life circumstances or increased risk of detection due to changed criminal justice policy. Such studies would be 'counterfactuals', requiring a researcher to gauge whether a person would have offended but for a sanction imposed or the threat of one in the future (Duff and Garland, 1994).

There are some broader theoretical criticisms that can be made of deterrence theory that are pertinent to mandatory sentencing. Deterrence presupposes that would-be offenders are rational actors who are capable of weighing up, and actually do weigh up, the costs and benefits of a particular course of conduct. Crime, however, is often impulsive and lacking such judicious forethought. In any case, the circumstances of would-be offenders may be such as to make a cost-benefit analysis of little application—to some people the threat of punishment may be less of a disincentive and the possibility of a small gain to satisfy a short-term need a greater incentive than a cost-benefit analysis would actually suggest (Roche, 1999; Tonry, 1996; Tonry, 2005). While some of the above discussion on deterrence would be equally relevant to the notion of deterrence in discretionary sentencing regimes, these regimes do not mandate widespread use of more severe sanctions (with their attendant high demands on the public coffers) as a panacea for deterring crime.

Incapacitation

The aim of mandatory sentencing is not solely to deter offenders. The imprisoning of offenders pursuant to a mandatory sentence also serves to prevent offenders from re-offending while in custody (Roche, 1999). This is known as 'incapacitation' or 'community protection'. Like deterrence, incapacitation is a consequentialist sentencing purpose: its aim is to incapacitate would-be offenders and thereby protect society by eliminating opportunities to offend.

The rationale for this aim is that the past behaviour of an offender is the best indicator of the offender's future behaviour (Roche, 1999, citing Sherman et al., 1998). Imprisonment is said to prevent crime by removing all opportunity to offend against the broader community (although opportunities will remain to offend within the confines of prison).

Incapacitation, especially of repeat offenders, has been justified by writers on a number of grounds. There is some evidence that incapacitation may be effective where it is employed carefully and sparingly (Tonry, 2005). Assuming that the offenders targeted were actually going to or were likely to re-offend, they are precluded from committing these offences against the wider community.

While there is some proof that incapacitation can prevent further offending by persistent offenders, this does not necessarily establish either that mandatory sentencing increases the effectiveness of incapacitation or that it is the best means of selecting which offenders should be incapacitated (Roche, 1999).

Indeed, broader moral questions can be posed about incapacitation: is it morally appropriate to punish an offender for possible future conduct rather than for proven past behaviour? How accurate are mandatory sentencing schemes in the mechanisms they employ for predicting future offending and thereby selecting particular offenders for incapacitation? Moreover, if a court imposes a sanction in response to a proven offence but with a view to future offending, is it imposing a sentence that is disproportionate to the crime?

It has been argued that persistent offending should properly be seen to raise an offender's culpability; an increased sentence aimed at incapacitation is thus not disproportionate according to this rationale (Vitiello, 1997). While this argument is logically appealing when applied to repeat offenders, it is less convincing when we consider first-time offenders, particularly those convicted of less serious offences. Many, if not most, mandatory sentencing schemes apply to both first-time and recidivist offenders (Roche, 1999), calling into question both the logic and the morality of such mandatory sentencing regimes.

Predicting future behaviour and the level of risk posed by a given offender is a notoriously difficult task. A vast body of research literature has shown that the prediction of individual

risk of offending is an inexact science, and mandatory sentencing schemes have been criticised as being particularly poor at predicting future offending (Roche, 1999, p. 3). The majority of studies in the risk prediction field have shown that attempts to predict future offending will successfully select some offenders who will continue to offend, but they will also select a significant number of false positives—offenders who would not have gone on to offend.¹⁵ Despite mandatory sentencing schemes being particularly susceptible to this error, it is argued that the risk of potential harm to the community should outweigh the risk to offenders of false positives. Conversely, others argue that judges, rather than parliament, are best equipped to determine levels of risk and thus to decide who should be incapacitated, based on the individual circumstances of each case.

Mandatory sentencing has also been criticised on the grounds that such schemes are not cost effective. Discussing the mandatory sentencing frameworks used in the United States, Tonry (2005, p. 54) noted that the 'principal difficulty is that current incapacitation policies often, and expensively, target the wrong people'. Tonry indicated that these policies are ineffective for a number of reasons. Those that focus on recidivism for serious offences often lead to older inmates being sentenced to long periods of imprisonment despite the established fact that the statistical likelihood of prisoners re-offending significantly diminishes as they age: criminal careers tend to taper off in offenders' middle years. While there may be other justifications for imprisoning such offenders, incapacitation will often lead to the same outcomes that the offender's age alone would most likely have led to. Extended incapacitation of these people is thus an expensive form of crime prevention for little return over and above what progression through the lifecycle would have, in due course, delivered.

Mandatory sentencing legislation aimed at preventing high-volume but relatively minor offences, such as property offences, tends to cost significantly more than the damage arising from such offences as the number of offenders imprisoned under such laws continues to increase. Such laws are also problematic in that they often unintentionally result in systemic bias against the marginalised members of society, who are more likely to be convicted of the offences subject to mandatory sentencing.

Incapacitation strategies aimed at addressing certain types of crime, particularly those that are highly prevalent (such as drug trafficking or dealing), may fail because there are other willing 'competitors' ready to 'replace' incapacitated offenders, as well as a continuing market for the criminal conduct. Mandatory sentencing schemes for these kinds of offences cannot stem the tide of offenders in the community willing to take on the incapacitated offenders' roles (Tonry, 2005).

¹⁵ For an overview of the literature on the prediction of risk, see Sentencing Advisory Council, 2007a, pp. 11–16.

A democratic approach

Punishment is a collective ritual that is dependant on the public's participation for its meaning and authority. Simply ignoring the public in matters of crime control and punishment, can damage basic moral principles of moral states (Barker, 2006, p. 42).

As has been alluded to above, a large measure of the impetus for mandatory sentencing has been public perceptions of crime and justice, including perceptions of:

- the prevalence of crime, in particular violent crime;
- the effectiveness of various strategies for controlling and preventing crime;
- the role of the courts in preventing crime; and
- the severity of sanctions typically imposed by the courts.

International and Australian studies on public opinion indicate that, at least in the abstract, the public thinks that sentences are too lenient (see, for example, Gelb, 2006; Roberts and Hough, 2005; Indermauer, 1987; Doob and Roberts, 1983). This research also indicates that when people think about crime and sentencing, they tend to think about violent and repeat offenders. At the same time, people have very little accurate knowledge of crime and criminal justice and rely almost solely on the mass media for information on these matters. The mass media have a vested interest in dramatising and sensationalising the news in order to engage with their audience, while at the same time conveying very limited factual information due to their own time and space constraints. Not surprisingly, public opinion about crime tends to reflect the picture of crime that is conveyed in the media, overestimating rates of offending (particularly of violent crime) and underestimating the nature and severity of the sanctions imposed by the courts (Gelb, 2006). Gelb (2006, p. 14) said: 'It is evident from the research that this lack of knowledge about crime and the criminal justice system is a significant factor in perpetuating public misconceptions and misunderstanding.' When people are given more information on the realities of crime and the criminal justice system, their levels of punitiveness drop substantially.

Mandatory sentencing is seen as a symbolically and intuitively appealing means of addressing perceived problems in the criminal justice system. It is one of the pre-eminent manifestations of penal populism (Gelb, 2006, p. 21). The public tends to have a limited understanding of what mandatory sentencing really entails, in terms of:

- how mandatory sentencing works;
- how the system that it is replacing/supplementing works;
- the goals and assumptions of mandatory sentencing; and
- the possible problems and costs associated with implementing mandatory sentencing regimes.

Despite the widespread use of mandatory sentencing regimes throughout the world, recent research suggests the public has become deeply divided on this issue (Gelb, 2006, citing Roberts, 2003).

In the 1995 National Opinion Survey on Crime and Justice conducted in the United States, respondents were asked whether mandatory sentencing was a good idea or whether judges should retain the discretion to determine sentences. The survey found that 55% of respondents favoured mandatory sentencing while 38% favoured discretionary sentencing. The survey was conducted again in 2001. This time the results were reversed, showing a swing in public opinion against mandatory sentencing: 38% favoured mandatory sentencing while 45% preferred discretionary sentencing (Gelb, 2006, p. 21, citing Hart, 2002, p. 5). Another national survey in the United States found that 61% of respondents were opposed to mandatory sentencing while 35% supported it (Gelb, 2006, pp. 21–2, citing Belden, Russonello and Stewart, 2001, p. 5).

Where respondents have been asked to impose sentences in hypothetical cases involving mandatory sentences, or have otherwise been informed as to how mandatory sentencing operates, surveys have found even lower levels of support for proposed mandatory sentencing. In a study conducted in Ohio on three strikes legislation, respondents were asked whether they supported the law without been given any context to the question (Applegate, Cullen, Turner and Sundt, 1996). Eighty-eight percent of respondents supported the proposal. When asked to impose sentences in a number of detailed case scenarios, the proportion of respondents supporting the proposal dropped to 17% (Gelb, 2006, p. 21, citing Roberts, 2003, p. 493). A more recent survey evidenced similar changes in public opinion when the effects of mandatory sentencing legislation were explained (Belden, Russonello and Stewart, 2001). Respondents were given some of the arguments for and against mandatory sentencing and were asked whether they thought such a scheme was fair. In response to this initial question, 61% of respondents indicated that they thought mandatory sentences were not fair. Respondents were then provided with a detailed case scenario involving the application of mandatory sentencing and were again asked whether they supported mandatory sentencing. This time, 72% indicated that they opposed mandatory sentencing (Gelb, 2006, p. 22, citing Belden, Russonello and Stewart, 2001).

Australian surveys on mandatory sentencing have yielded conflicting results. A survey conducted by the Northern Territory government in 2000 indicated that 58% of Australians supported mandatory sentencing. A second survey that same year delved further into these results and suggested that while a slim majority of participants supported mandatory sentencing

for adult offenders, a full two-thirds opposed mandatory sentencing for juvenile offenders (Warner, 2007b, p. 346). Thus, in accordance with the international literature on public opinion on sentencing more generally, Australian attitudes to mandatory sentencing may be more nuanced than they first appear, with public opinion varying according to characteristics of the offender. Despite these nuances, the above studies clearly suggest that greater community involvement in and understanding of the courts will lead to a higher level of confidence in the legal system.

Consistency, or concealed inconsistency?

While the decision to introduce mandatory sanctions is, on the surface, simply a question of sanctioning certain classes of offender more consistently and severely, serious questions arise as to how the system itself will accommodate such a change (Tonry, 2006). Rather than removing co-called impermissible and arbitrary judicial discretion, mandatory sentencing schemes instead simply displace this discretion to other less transparent parts of the legal system. The objective of consistency in sentencing may in fact be undermined by a hidden substantive inconsistency, resulting in disparate sanctions being imposed from case to case (Australian Law Reform Commission, 2006, p. 540; Roche, 1999).

There are a several matters that can affect the implementation of mandatory sentencing schemes and their ability to deliver consistent, proportionate sanctions. Some of these matters are simply systemic pressures that exist both with and without mandatory sentencing regimes, while others relate directly to the introduction of such regimes.

One systemic pressure that has been found to interfere directly with mandatory sentencing outcomes is plea bargaining. Common law systems generally recognise that a plea of guilty, preferably early in the proceedings, is worthy of the reward of some kind of discount in the sentence imposed. In discretionary and mandatory sentencing regimes alike, it is common for offenders to plead guilty to some charges in return for the prosecution withdrawing other charges and tempering its sentencing submissions at the sentencing stage. Plea bargaining is a formal, wholly legitimate and, at least in common law countries, institutionalised means of quickly resolving criminal proceedings.

One of the potential side-effects of plea bargaining is that the threat of a more serious charge, with the attendant risk of a severer sanction, may be used as leverage for a guilty plea to a less serious charge. This will result in the accused person avoiding having a mandatory sentence imposed and, at the same time, will ensure that the prosecution successfully secures

a conviction and the offender receives some measure of punishment (Centre of Criminology, 2008). While this can occur under a discretionary sentencing regime, under a mandatory regime it takes on an extra dimension. A conviction for one offence may draw a mandatory sanction while a conviction for another may not. Even if *all* the relevant offences have mandatory sanctions attached to them, this situation is no better: it is the prosecutor who decides whether to bring or to withdraw charges. The latent effect of this is to give the *prosecutor rather than the judge* the power to choose the penalty—'the primary responsibility for sentencing decisions now rests with the prosecutor, an advocate for the state, rather than the judge' (Merritt, Fain and Turner, 2006, p. 31; Australian Law Reform Commission, 2006, p. 540). In other words, 'mandatory minimums... simply substitute prosecutorial discretion for judicial discretion' (Ulmer, Kurlychek and Kramer, 2007, p. 451, citing Tonry, 1992). This phenomenon has been dubbed 'the hydraulic displacement of discretion' (Merritt, Fain and Turner, 2006, pp. 10–11, citing Casper and Brereton, 1984).

A number of studies on public attitudes to plea bargaining have indicated that the public is somewhat disapproving of the practice, the perception being that offenders receive a lower punishment than they deserve by dint of the bargain (Cohen and Doob, 1990; Gelb, 2006). According to Cohen and Doob, plea bargaining is more acceptable to the general public where the court is either involved in the process and/or an explanation of the bargaining is made in open court. In Victoria, at present the court does not play any role in the plea bargain process though it may mitigate a sentence to reflect a guilty plea. Plea bargaining is a matter for the prosecution and defence.¹⁶ Though prosecutorial discretion is guided by policies and guidelines in most jurisdictions, by definition, it is neither transparent nor consistent, nor are there any formal mechanisms for reviewing it. In contrast, judicial decisions are publicly accountable through their visibility and via appeal mechanisms, providing safeguards against inconsistent or unreasonable decisions.

It has similarly been argued that judges, prosecutors and juries may simply circumvent mandatory sentences that they consider to be unjust (Roche, 1999, p. 5; see also Ulmer, Kurlychek and Kramer, 2007). If a mandatory sanction is seen as being too harsh and if a conviction will inevitably lead to the imposition of that sanction, then the mandatory law may be circumvented: judges may substitute other penalties for imprisonment, such as wholly suspended sentences, if warranted by the individual circumstances of the case, while juries may simply refuse to convict. This process has been labelled 'jury nullification' or 'de-mandatorizing' (Ulmer, Kurlychek and Kramer 2007, p. 433). One US study indicated that of those offenders convicted of offences which made them eligible for mandatory sentences only about half actually received a mandatory sentence; another study indicated that the figure was closer to one fifth (see Centre of Criminology, 2008; Ulmer, Kurlychek and Kramer, 2007).

Formal mechanisms for dealing with systemic pressures in legal systems, such as plea bargaining, are likely to have a disproportionate effect where mandatory sentences are used. This has significant human rights implications for defendants, as those who are offered plea deals will fare much better than those who are not. It is difficult to assess the effect that informal circumvention mechanisms will have on consistency and proportionality, but certainly there is the potential for them to have a serious impact. Formal and informal circumvention mechanisms may, ironically, lead to fewer reported incidents of mandatory offences; thereby validating the same provisions which the mechanisms are avoiding.

In conclusion, rather than mandatory sentencing ensuring proportionate and consistent sentences, instead '[t]he resulting hypocrisy and lack of transparency compound the problem of unjust sentences and stark disparities' (Tonry, 2006, p. 46).

¹⁶ In 2007, the Sentencing Advisory Council released the *Sentence Indication and Specified Sentence Discount – Final Report*, which recommended greater involvement of the courts in some aspects of plea bargaining (2007b, pp. 133–6). The Council recommended that legislation be enacted allowing courts to give an indication to defendants of the likelihood of a custodial sentence where a defendant pleads guilty. The Council recommended that the legislation be adopted as part of a pilot scheme that should be formally evaluated after a period of operation. In late 2007 the Victorian Government introduced into Parliament the *Criminal Procedure Legislation Amendment Bill 2007* (Vic), which adopted

these recommendations; the legislation was assented to on 18 March 2008. In the absence of an earlier commencement date being made by proclamation, the operative provisions of the *Criminal Procedure Legislation Amendment Act 2008* (Vic) came into force on 1 July 2008. It should be noted that this legislation will not in any way interfere with or curtail prosecutorial discretion; prosecutors remain free to withdraw charges and make other undertakings with defendants. The Act simply provides a mechanism for the court to give a sentence indication based on the charge(s) brought before it, the circumstances of the offence(s) and a guilty plea.

The costs of mandatory sentencing

A crucial element of any rational assessment of the effectiveness of mandatory sentencing is an evaluation of its costs balanced against its ability to achieve its stated aims (Roche, 1999).

Two types of costs will be considered in this section:

- the disproportionate social cost to certain types of offender in terms of access to justice; and
- the economic cost to society in terms of financial resources.

A number of Bills to amend mandatory sentencing regimes (and related provisions dealing with parole eligibility) were voted on by legislatures in a number of US jurisdictions in 2007. These Bills were largely aimed at addressing the high costs of mandatory sentencing, both economically and upon offenders of certain racial backgrounds. Ultimately, most of these Bills, despite being supported by a majority of representatives in the relevant legislature, either did not pass through the senate or were vetoed by the Governor of the relevant State (King, 2008). The debate of, and the increasing legislative support for, such Bills nevertheless indicates that legislatures in the US are becoming increasingly conscious of the problems that arise under mandatory sentencing regimes.

Disproportionate social cost

Although it is argued that mandatory sentencing promotes consistency in sentencing, this approach can have a disproportionate effect on some sections of society. The effect of many mandatory sentencing regimes is often felt more by first-time and/or minor offenders, as well as by offenders of particular vulnerability such as young people, Indigenous people and women (Ulmer, Kurlychek and Kramer, 2007).

Under a discretionary sentencing system, first-time and minor offenders would be likely to receive less severe sanctions except where the particulars of the offence led the sentencer to view the offence in a more serious light. It is precisely this discretion that a mandatory sentencing regime removes from the sentencer. Cases are arbitrarily grouped together even where compelling sentencing factors exist that differentiate them in terms of culpability and thus appropriate sentencing outcome. This may lead to unjust sentencing outcomes, such as that which occurred in Western Australia where a charge of aggravated burglary could cover conduct ranging from a violent home invasion to the opportunistic theft of a can of soft drink by reaching into an open window, leading to all offenders convicted of this offence being

liable to the same mandatory minimum penalty of 12 months' imprisonment (Morgan, Blagg and Williams, 2001; Law Council of Australia, 2001). Several United Nations treaty committees have voiced concerns on these grounds about mandatory sentencing *per se* and about the mandatory sentencing regimes formerly in force in the Northern Territory and West Australia (see Australian Law Reform Commission, 2006, p. 540; United Nations Human Rights Committee, 2000, paras 498–528; United Nations Committee Against Torture, 2000, paras 52–3; United Nations Committee on the Rights of the Child, 2005, paras 73–4; United Nations Committee on the Elimination of Racial Discrimination, 2005, para. 20).

Conversely, repeat offenders tend often to receive relatively severe sentences, irrespective of whether there is a mandatory minimum sanction. This effectively means that regardless of the type of offence for which a mandatory sentence is prescribed, the offences (and offenders) at the lower end of the scale in terms of seriousness (such as first-time offenders) will be the most affected by the mandatory penalty.

Studies on the implementation of mandatory sentencing in the Northern Territory and in Western Australia indicate that it disproportionately affected young people, Indigenous people and women (particularly Indigenous women). Often these offenders, like first-time and minor offenders, would have been found under a discretionary regime of sentencing to have mitigating factors that would have lessened the severity or duration of the sentence. Under a mandatory sentencing regime, mitigating factors cannot be taken into account or given any weight, at least so as to bring the sentence below the mandatory minimum sanction (Morgan, Blagg and Williams, 2001; Law Council of Australia, 2001; for a general discussion of the mandatory sentencing schemes in the Northern Territory and Western Australian see Warner, 2007b, pp. 332–7).

The extent to which mandatory sentencing laws focus on offences commonly committed by given parts of society will necessarily play a large part in determining how these groups interact with the law; this will have ongoing and far-reaching effects on them, both legal and economic. Because mandatory sentencing regimes are often fuelled by public opinion, it is likely that it is the more common and particularly visible offences that will be regulated under these schemes. Studies in the United States suggest that offenders, particularly young offenders from some minority groups, who are charged with offences subject to mandatory penalties are less likely to be offered a plea bargain and therefore are more likely to suffer the full effect of mandatory sentencing laws (Ulmer, Kurlychek and Kramer, 2007).

The economic costs to society

Mandatory sentencing can result in some potentially significant economic costs. Imprisonment is a very expensive sanction. The real recurrent cost of imprisoning an offender in Victoria in 2005–06 was \$204.50 per day (Productivity Commission, 2007, Part C, attachment table 7A.7). The cost of imprisoning an offender for 365 days would yield a total figure of \$74 642.50.

It is difficult to identify accurately the extent to which mandatory sentencing is responsible for increasing the rate of incarceration, though there is certainly evidence that it does have such an effect. Diverse factors may act to increase or decrease imprisonment rates including:

- enhanced/decreased detection or policing from one period to the next;
- general fluctuations in offending and in sentences over time; and
- the impact of systemic pressures and circumvention on mandatory sentencing initiatives.

Enhanced or reduced detection measures or changes in policing from one period to the next will have a direct effect on the number of offences detected. They may also affect the rate of offending by deterring or encouraging offenders by reference to the perceived likelihood of being apprehended. Any attempt to measure the effectiveness of mandatory sentencing would thus need to assess and compensate for variations in police policy and practice. Costs incurred or saved in increasing or decreasing detection and policing would also need to be factored into any assessment of the effectiveness of mandatory sentencing. For example, if a mandatory sentencing regime were implemented alongside heightened detection and policing mechanisms and lower levels of offending were recorded, it would be inaccurate to ascribe the lower rates of offending to the mandatory sentencing scheme alone. The global cost would need to be assessed and the effect of the heightened detection and its economic costs evaluated.

Levels of offending and changes in sentencing practices over time would need to be reflected in data in order to ascertain properly the cost of mandatory sentencing. Offence levels and sentence levels can reflect general trends that operate independently of mandatory sentencing. For example, the ageing of the population that has been seen around the world in recent decades has been identified as one possible cause of the significant decrease in crime rates in many major cities, independent of policing and sentencing practices. Systemic pressures and circumvention also need to be assessed in costing mandatory sentencing. A lower rate of convictions for a given offence may reflect plea bargains or circumvention of the mandatory sentencing provisions rather than lower levels of offending.

Despite the difficulty in assessing the extent to which mandatory sentencing affects levels of incarceration, most jurisdictions in which mandatory sentencing has been introduced have seen a rise in both the number and the proportion of offenders sentenced to terms of imprisonment and a correlative general rise in the prison population. Jurisdictions that have mandatory sanctions tend to have much larger prison populations than those without such regimes (Wooldredge, 1996; Bales and Dees, 1992; Australian Law Reform Commission, 2006, p. 537). Some of these jurisdictions, most notoriously California, have also experienced serious prison overcrowding as a direct result of mandatory policies such as 'three strikes and you're out' (Bogan and Factor, 1995). It should be noted that cost projections may themselves understate the financial effect of such regimes as the costs can accrue long after the legislation has been passed (Gabor and Crutcher, 2002, p. 26, citing Schultz, 2000). One such potential hidden cost is that of ageing prisoners who are more expensive to imprison (Donham, 2005).

There is a strong likelihood that older offenders will be sentenced more severely in mandatory sentencing regimes on account of their prior criminal conduct, even though they are statistically less likely to re-offend as they age. This may mean society will, paradoxically, be spending more and more money warehousing people who are statistically less and less likely to re-offend (Gabor and Crutcher, 2002; Vitiello, 1997; see also McCoy and Krone, 2002).

According to a report prepared for the Public Safety Performance Project (a project of the Pew Charitable Trusts), the US prison population has risen 700% between 1975 and 2005, the current number of prisoners sitting at around 1.5 million people (Public Safety Performance Project, 2007, p. ii). The report, entitled *Public Safety, Public Spending: Forecasting America's prison population 2007–2011* was prepared by prison population forecasting consultants and reviewed by independent specialists in the same field. The report painted a startling picture. It projected that if the same sentencing practices are maintained there will be a further 13% rise in the prison population over the next five years (translating to approximately 192 000 more prisoners), meaning that over 1.7 million people will be inmates in state and federal prisons in the US by 2011—one in every 182 US citizens will be a prison inmate (Public Safety Performance Project, 2007, pp. ii, 9). Leaving aside costs of imprisoning the existing prisoners, the cost of the 13% increase *alone* would amount to approximately US\$27.5 billion by 2011, including both cumulative operating and infrastructure costs (Public Safety Performance Project, 2007, p. ii). The report also considered the driving forces behind the growth in prison populations to date and the projected growth

in the future. The report (2007, p. iv) observed: 'The size of a state's prison system is determined by two simple factors: how many people come in and how long they stay.' The report noted that these seemingly simple factors are of course determined by myriad complex issues such as policy decisions and the dynamics of society itself. The report made the following observation about the causes of the increases in the prison population (2007, p. iv):

During the past three decades, a number of changes in states' sentencing and corrections policies have been particularly significant. These include movement from indeterminate to determinate sentencing; abolition of parole and adoption of truth-in-sentencing requirements; lower parole grant rates; passage of 'three-strikes' laws; and establishment of sentencing guidelines. While the impact of reforms varies in each state, the states report that these policy decisions are among the major drivers of their prison populations.

The limited data available on the standard minimum non-parole period regime in NSW would seem to support this observation. Despite the flexible nature of the regime, as noted above, the available data indicate that lengths of non-parole periods and incarceration rates for some regime offences have already increased (NSW Sentencing Council, 2006, pp. 13–16).

Costs versus aims

If mandatory sentencing is seen to demonstrate the indignation of society more effectively than discretionary sentencing, it must be recognised that this demonstration itself will come at a significant cost. The only requirement that retribution makes is that a sanction be proportionate to the crime; retribution does not pretend to pursue any consequential purpose. As the discussion in the proceeding sections suggests, this goal is unlikely to be achieved consistently in a mandatory sentencing regime, particularly in view of the likelihood of systemic pressures and circumvention.

If mandatory sentencing does act as a deterrent, the rate of imprisonment may drop in line with rates of offending. Nevertheless, the actual prison population itself may remain constant or perhaps increase, even if there are fewer convictions for given offences, because the sentences will be more severe than under a discretionary sentencing regime. In other words, even if mandatory sentencing successfully deters, it is unlikely to lower government expenditure on imprisoning offenders. As has been noted above, there is significant doubt, in any case, that mandatory sentencing does deter any better than discretionary sentencing.

The goal of incapacitation is also difficult to assess vis-a-vis its costs. As has been noted above, it is unclear how accurate a mandatory sentencing regime is in targeting potential recidivists. At the same time, there is much evidence that suggests that imprisonment itself increases the likelihood of recidivism. Significant cost implications flow from this, as well as the cost to society of the harm caused by recidivist offenders.

If the research on public attitudes to sentencing is correct, even satisfying the anger of the public alone may prove to be a misallocation of money. In satisfying this sentiment, mandatory sentencing may indirectly *further* instil fear and may also give rise to an incorrect view of the prevalence of crime and success of crime control measures. Paradoxically, these are precisely the issues that mandatory sentencing is meant to address. Engaging with the public to inform and educate will cost less and will bring a greater level of understanding of, and satisfaction with, the criminal justice system, not to mention lower levels of fear. The research certainly indicates that the majority of the informed public does *not* approve of the outcomes of mandatory sentencing. An even dimmer view of mandatory sentencing might be taken by the public at large when the economic costs to the community itself are considered.

If we accept that at least one of the major aims of the criminal justice system is to bring about some kind of normative and/or behavioural change in society and thereby create a safer community, it may well be that a consideration of the costs will lead people to query whether this can be better achieved by allocating state money outside the criminal justice system. There is some evidence that crime prevention may be better achieved by directing money towards other community programs such as education and health care. Citing Greenwood et al. (1996), Roche (1999, p. 4) wrote:

Cost-benefit analyses done by the RAND Corporation in the United States estimate that every million dollars spent on California's three strike laws would prevent 60 serious crimes, whereas providing parent training and assistance for families with young children at risk would prevent 160 serious crimes, and giving cash incentives to induce disadvantaged high school students to graduate would prevent 258 serious crimes.

Conclusion

This paper has discussed mandatory sentencing, the assumptions and objectives that underpin it and its ability to deliver on its intended results. It has also discussed the concept of presumptive minimum mandatory sentencing regimes and has noted that they have many of the same theoretical problems as mandatory sentencing.

The paper has also discussed some of the other factors that bear upon the effectiveness of mandatory sentencing regimes including systemic pressures, circumvention, public opinion and the economic effects of mandatory sentencing.

Ultimately, current research in this area indicates that there is a very low likelihood that a mandatory sentencing regime will deliver on its aims. In part, this is a result of these regimes being based on assumptions about the nature of human decision-making that are simply not reflected in studies to date: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate. In part, it also is because public perceptions of crime and sentencing are not always accurate or informed.

There is, in any case, ample evidence that suggests that mandatory sentencing can and will be circumvented by lawyers, judges and juries both by accepted mechanisms (such as plea bargaining) and by less visible means. The outcome of this avoidance is to jeopardise seriously another central aim of mandatory sentencing; that is, to ensure that proportionate and consistent sentences are imposed. Even if this circumvention, both formal and informal, could be addressed, imposing a prescribed sanction or range of sanctions for offences (which invariably encompass a broad range of behaviours) guarantees only a very superficial, artificial consistency and one that trades its subtlety for simplicity.

Finally, this paper has discussed the costs of mandatory sentencing. The costs of implementing a mandatory sentencing regime alone weigh strongly against the establishment of such a system *even if* it actually manages to deliver on some of its central aims. If we bear in mind that mandatory sentencing is likely to be unsuccessful, or at best imprecise, in achieving its aims, the costs are still less acceptable to informed policy-makers and citizens alike.

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