



RULE OF LAW
INSTITUTE OF AUSTRALIA

Mandatory Sentencing in NSW

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The Rule of Law Institute of Australia is an independent not-for-profit organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

Have a question about this resource or a rule of law issue?

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What is the Rule of Law?

The rule of law in Australia is a set of principles which require that there is equality before the law.

Equality before the law means that the law applies equally to all regardless of their status in society.

The rule of law is not a simple concept and it is the central motivation in the existence of the following principles in Australia:

- the separation of powers in ensuring checks and balances on government

- the presumption of innocence in criminal trials to ensure someone is only punished by the law

- fairness in legal proceedings

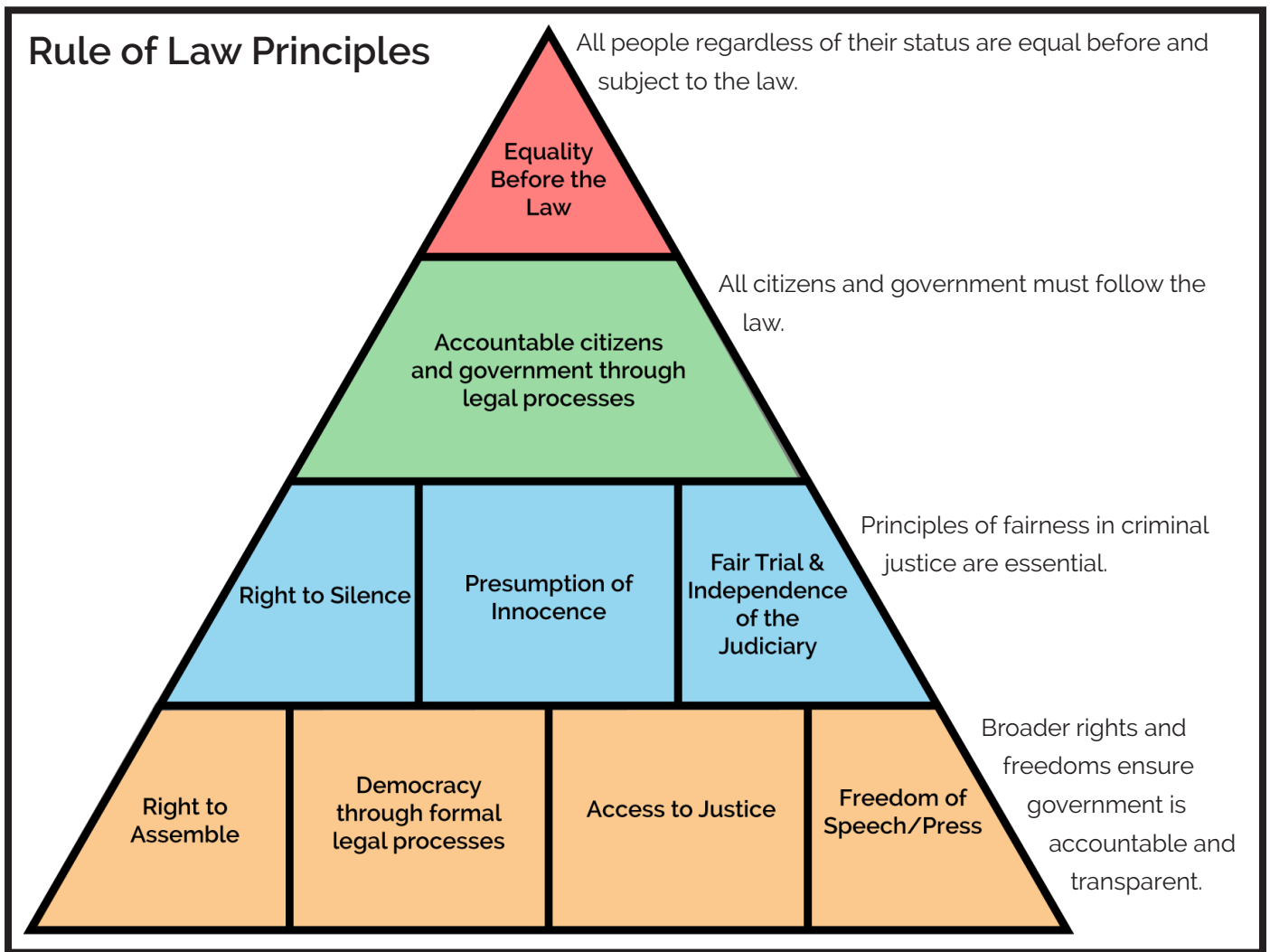
- courts are open and accessible to the public

- that people can be critical of the government and assemble without fear

- that the law is changed through formal democratic processes so the law remains responsive to the needs of society

What is status?

What problems occur when you do not have the rule of law?



Rules - guidelines or expected standards of behaviour.

Laws - rules passed with the authority of parliament which apply to all people in society.

Law reform - changes to the law made by Parliament. There are many reasons why Parliament may change the law.

Formal Legal Processes - processes which follow rules that are set out in laws.

Democracy - government officials (politicians) use power according to formal legal processes with the consent of the people.

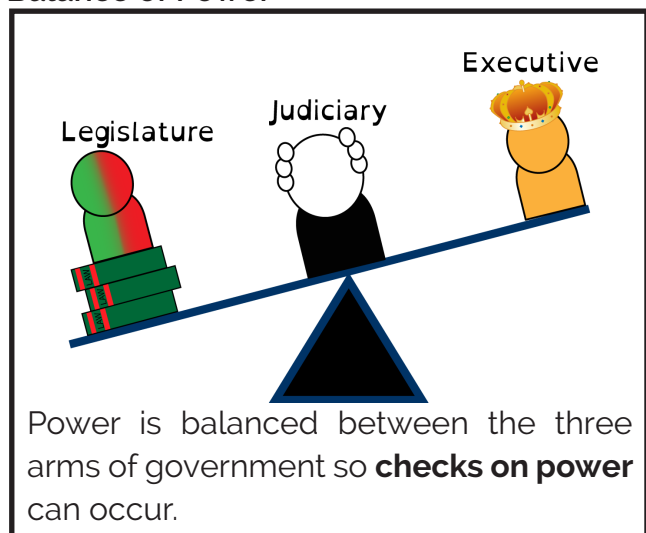
Checks on power - when power is used or a decision is made by Government there should be an independent check on whether that decision is legal.

Legislature - the politicians in Parliament who pass laws

Judiciary - the judges in courts who hear cases and apply the law

Executive - members of the Legislature with positions like Prime Minister or Attorney-General who run the country.

Balance of Power



Why Reform the Law?

The tragic deaths of a number of young men in Sydney's King's Cross have led to calls from grieving families and the media to reform the law to provide harsher penalties for offenders, and other measures to prevent and deter alcohol and drug fueled violence.

The NSW Government has announced plans to increase penalties for violent offences, and to introduce mandatory minimum sentences for certain offences where the offender is intoxicated.

The central question about the mandatory sentencing reforms is:

*If someone under the influence of alcohol or drugs commits a violent offence, does a mandatory sentence of imprisonment lead to a **just outcome** for all involved?*

Background to the Reforms

In January 2014, NSW Premier Barry O'Farrell announced changes to the *Crimes Act 1900 (NSW)* and other laws to provide mandatory minimum sentences for committing violent offences while intoxicated in New South Wales.

An new offence 'assault causing death' which carries a minimum mandatory sentence was passed in late January 2014 along with changes to the opening hours of some venues in the Sydney CBD and increases to on the spot fines for other offences. The NSW Government is still considering a range of proposals. There has been strong criticism from the legal community about the proposed an introduced laws.

What has been proposed?

On 21 January 2014 a Media Release from the NSW Premier listed the following proposals:

- Eight-year minimum sentence for alcohol or drug-fueled assaults ending in death.
- 1.30am lockout and 3am last drinks in the Sydney CBD, Kings Cross, Darling Harbour, the Rocks, Haymarket and Darlinghurst.
- State-wide 10pm closing time for all bottle shops
- Increase in the maximum sentence for the illegal supply of steroids from 2 years imprisonment to 25 years imprisonment
- Increased fines for various offences such as offensive language, offensive behaviour and continuation of intoxicated disorderly behaviour following a move on direction (see table on opposite page).
- A community awareness campaign to address the culture of binge drinking, and drug and alcohol related violence.
- Removing self-induced intoxication by drugs and alcohol as a mitigating factor in determining sentencing for offences
- Free buses from Kings Cross to the CBD on Friday and Saturday nights
- Allowing police to ban trouble-makers from the CBD for up to 48 hours
- Changes to and freezes on certain liquor licences.

Please note: Not all of the proposals above have yet become law.

Source: NSW Government Media Release and Materials 21/01/2014

"For serious assaults where drug and alcohol are involved, existing mandatory sentences will be increased by two years, and mandatory minimum sentences will be introduced."

	Current Maximum Sentence	New Maximum Sentence	New Mandatory Minimum
Assault occasioning actual bodily harm	5	7	2
Assault causing actual bodily harm in company	7	9	3
Reckless grievous bodily harm	10	12	4
Reckless wounding	7	9	3
Reckless grievous bodily harm - in company	14	16	5
Reckless wounding - in company	10	12	4
Assault against police officers in the execution of duty (not during a public disorder)	5	7	2
Affray	10	12	4
Sexual assault	14	16	5

"on the spot fines issued by police for anti-social behaviour will be increased.

Criminal Infringement Notice Type	Current Penalty	Proposed Penalty
Offensive language	\$150	\$500
Offensive behaviour	\$200	\$500
Continuation of intoxicated and disorderly behaviour following a move on direction	\$200	\$1100

These changes have not been brought before Parliament and are still under discussion as of 13/02/14

Passed on 30/01/14

Questions

1. Calculate what percentage the minimum mandatory is of the maximum sentence.*
2. What needs to be involved in the offence to attract the use of a mandatory sentence?
3. Why would the Government propose to increase the penalties for offences relating to anti-social behaviour?

* (Minimum mandatory sentence / New maximum sentence) x 100 = percentage of maximum sentence

Assault Causing Death

The *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)* was passed on 30/01/2014. It amends the *Crimes Act 1900 (NSW)* to include a new offence.

The new offence can be found in s25A and 25B of the *Crimes Act 1900 (NSW)*.

The *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and the *Crimes (Sentencing Procedure) Act 1999 (NSW)* have been amended to provide for alcohol and drug testing in relation to the offence. Self-induced intoxication has been removed as a mitigating factor that judges can consider in sentencing for any offence in NSW.

What is the offence?

s25A(1)(a)-(c) Crimes Act 1900 (NSW):

"(1) A person is guilty of an offence under this subsection if:

- a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and*
- b) the assault is not authorised or excused by law, and*
- c) the assault causes the death of the other person."*

A person who is found guilty of the offence is subject to a maximum sentence of 20 years imprisonment.

A person who is over 18, intoxicated, and is found guilty of the offence is subject to a maximum sentence of 25 years, and a minimum mandatory sentence of 8 years imprisonment.

To successfully prove the offence the prosecution is required to prove beyond a reasonable doubt the following four elements in a case where the accused was intoxicated:

1 Intent to Hit (mens rea)

Intent to hit is all that is required for this element of the offence, not intent to kill or injure. It is much easier to establish intent to hit than it is to show intent to kill or injure. Where the 'hit' was accidental the mens rea will not exist.

For example: *it would be very hard to argue that a person who punches someone in the face with a closed fist did not intend to hit them.*

2 The Accused Hit the Victim (actus reus)

It must be shown the accused actually hit the other person

What does hitting mean?

Hitting the other person with their own body or with an object held by the person is considered hitting.

3 The Hit led to the Death (Causation)

Causation, which is the link between the hit and the death can be established by medical evidence, a finding by a court or the NSW Coroner.

4 Proof of Intoxication?

To receive the mandatory minimum sentence for this offence, the accused must be found to have been intoxicated when hitting the victim. If intoxicated with alcohol this means a breath or blood alcohol concentration of 0.15 (0.05 is the legal limit for driving a vehicle under the influence in NSW, 0.15 or above the amount for a high range drink driving offence).

This element is optional and does not need to be proven to secure a conviction.

Defences Against the Mandatory Sentence for Intoxication

There is a defence to the mandatory sentence if someone can prove they were cognitively impaired which includes someone with an intellectual disability, a developmental disorder (including an autism spectrum disorder), a neurological disorder, dementia, a mental illness or brain injury.

Self-Induced Intoxication

This offence is concerned with "self-induced intoxication" which is being intoxicated as a result of taking drugs or consuming alcohol voluntarily. It is a defence to this aspect of the charge that the person became intoxicated involuntarily.

Identify which of the following situations show **INTENT** to hit, and which do not:

- punching another person in the face;
- being pushed from behind by another person into someone else;
- slapping a person across the face;
- tackling a person to the ground;
- tripping on a shoelace and head-butting another person.
- tripping while carrying a heavy object and hitting someone with it.

How do you prove hitting?

In a public place this is likely to be very easy to prove. Discuss the following questions:

- Did a witness see the hit occur?
- Are there injuries on the victim which shows they were hit?
- Is there forensic evidence on the accused which suggests they hit the victim?
- Was there CCTV footage of the hit?

Glossary

mens rea - Latin term meaning "guilty mind" which is an element to be proven in most criminal offences. It deals in different ways with the question: to what extent did the accused intend to commit a criminal act?

actus reus - Latin term meaning "guilty act" which is an element to be proven in all criminal offences. It involves establishing with evidence that a criminal act has occurred.

intoxicating substance - s4 of the *Crimes Act 1900 (NSW)* defines this as a substance, including alcohol or a narcotic drug or any other substance, that affects a person's senses or understanding.

murder - causing death where the offender intends to kill or shows reckless indifference to human life.

manslaughter - in NSW any act of killing that is not murder is manslaughter. There are two types of manslaughter, involuntary and voluntary. Each is different in its requirements, but both require proof of a certain *mens rea* (see table on page 8).

intent - what a person thought or wanted the result of an action to be.

assault - the act of contact with a person with the intent of harming or recklessly committing unlawful violence.

mitigating factor - a circumstance in a particular case which would cause the judge to consider a lighter sentence.

maximum sentence - the highest sentence a judge can give for a criminal offence

minimum mandatory sentence - a minimum sentence the judge must give if a person is convicted.

Specific Issues with the Assault Causing Death Offence

This law reform creates the new offence of Assault Causing Death. The offence carries a mandatory sentence of 8 years for someone who is intoxicated and found guilty.

The first element of the offence, proving intention to hit is a comparatively low standard of proof compared to manslaughter considering the severity of the mandatory sentence AND the potential maximum sentence of 20 years.

Same as Manslaughter and Easier to Prove

This offence is essentially the same as manslaughter but effectively makes the *mens rea* of the offence much easier to prove.

So Easy to Prove it's like Strict Liability?

A strict liability offence is one that does not require *mens rea* to be proven, only that a guilty act was committed.

The offence is like a strict liability offence for hitting and killing someone unless, it was an accident without any intention to come in contact with the victim.

Mandatory Sentence Too Harsh Considering Removal of Mitigating Circumstance?

When sentencing an offender convicted of the offence, the judge can no longer take intoxication into consideration as a mitigating circumstance. This can have harsh results where the person was not aware of their actions or cannot recall them.

Do Mandatory Sentences Provide Just Outcomes?

Mandatory sentencing is a 'one size fits all' approach to sentencing, where the mandatory punishment may in some cases fit the crime, but in others may be excessive or inappropriate.

An offence with a mandatory sentence will require a judge to give a specific sentence for an offence.

A number of legal experts have pointed out the injustices which may arise as a result of this.

An article in the *Sydney Morning Herald* discusses some situations where a mandatory sentence would be unjust, and limiting a judge's discretion would not allow important facts about a case to affect sentencing. Consider the following:

"An 18-year-old with no criminal record is drinking in a bar when a drunken stranger hurls an insult at his girlfriend. After further taunts, the young man hits the stranger, who trips, hits his head on the edge of the bar and dies.

...

But a bikie gang member with a history of violence who lies in wait for a rival gang member and punches him in the face, causing him to crack his head on the pavement and die, would not receive a minimum eight-year sentence unless he was affected by alcohol or drugs at the time."

Michaela Whitborn, 'Legal Eagles punch holes in mandatory sentence plan', *Sydney Morning Herald*, 23/1/2014

Questions and Activities

1. **Identify** one measure proposed by the NSW Government to deal with alcohol/ drug fueled violence and explain how it would prevent crime (see dot points on page 4).
2. Does imposing mandatory minimum sentences reflect the **moral and ethical standards** of the community in NSW? Give reasons for your answer.
3. What are the two main **types of homicide** in NSW?
4. What is the difference between **murder** and **manslaughter**?
5. What is the difference between **assault causing death** and **voluntary manslaughter**?

Differences between the mens rea in Homicide Offences

The assault causing death offence is a homicide offence, but it is different to other homicide offences such as murder and manslaughter.

Offence	Example of the Intent required (Mens rea)	Max Penalty
Murder	intent to kill or reckless indifference to life	life imprisonment
Voluntary Manslaughter	intent to kill, but mitigating circumstances such as substantial impairment, excessive self-defence, or provocation,	25 years imprisonment
Involuntary Manslaughter		
Manslaughter by an unlawful and dangerous act	intent to expose another person to risk of serious injury	25 years imprisonment
Manslaughter by Criminal Negligence	the conduct of the accused was well below the standard a reasonable person would expect so as to probably cause death or grievous bodily harm	25 years imprisonment
Other		
Assault Causing Death	intent to hit a person with your own body or an object	20 years imprisonment (8 years minimum if intoxicated)
Dangerous Driving Occasioning Death	that the person was aware that the way in which they were driving was dangerous	10 years imprisonment

Rule of Law and Mandatory Sentences

The rule of law requires that the justice system provides equality before the law. A key aspect of equality before the law in criminal law is ensuring that punishments (sentences) are proportionate to the crime. This means that the punishment should fit the crime.

Consistency is also essential to this so sentences are comparable for like cases - something which mandatory sentences can prevent.

Example: A person who plots to kill another person should not be treated the same as a person who accidentally kills a pedestrian. This is the difference between murder and manslaughter and it is the reason for having a different sentence.

Fast Laws Brings Uncertain Results

- laws which limit the discretion of judges should not be rushed through Parliament and consultation with experts should occur to ensure the possible effects of such changes are fully understood by the Parliament

Example: the law containing the new Assault Causing Death offence was proposed on 21/01/2014 and passed on the 30/01/2014, a period of 9 days. This did not leave adequate time for consultation with experts and stakeholders, and raises the concern that there may be unintended effects of the law not considered by the NSW Parliament because of the speed at which the law was passed.

Day 1

Day 2

Day 3

Day 4

Day 5

Day 6

Day 7

Day 8

Day 9

Day 10

Media Release from NSW Premier's Department
21/02/14

New assault causing death offence passed by Parliament
30/01/2014

Granted assent by the Governor of NSW
31/01/2014

Bills of Attainder and the Separation of Powers

In times past, before the establishment of the separation of powers as an essential aspect of Government in the Westminster system, Parliaments passed bills of attainder which named people, and imposed a criminal penalty without a person being found guilty by a court.

Historical Example: a well known bill of attainder was issued by King Charles II of England for the posthumous execution of Oliver Cromwell (after his death). Cromwell's body was exhumed, hanged and then his head fitted on a spike atop Westminster Hall!

Attainder in Australia

In Australia the Separation of Powers is an essential aspect of the Australian Constitution. While the concept is not as strictly defined in the Constitutions of the States and Territories. While the concept is not as strictly defined in the Constitutions of the States, it has been recognised by the High Court (especially in *Kable v Director of Public Prosecutions for NSW [1996] HCA 24*). The fundamental principle of equality before the law means that Parliaments cannot name an individual in legislation and penalise them.

Mandatory sentences are closely linked to the concept of bills of attainder because they make a certain class of person subject to a different punishment regardless of their personal circumstances.

Generally speaking it is accepted that criminal laws in Australia will involve a criminal offence which is defined by Parliament, where a maximum sentence is set. Judges are free to use their discretion based on the specifics of the case to give a lesser sentence.

Limiting the Independence & Discretion of the Judiciary

- Minimum mandatory sentences reduce the discretion of judges to issue a sentence which fits the crime.
- Judges' discretion in sentencing is an essential part of the judicial function and should not be restricted if it is likely to lead to injustices.

Example: a case where mitigating circumstances suggest a sentence that is much lower than the mandatory minimum.

Criticism of Judges

Supporters of tougher sentences for offenders have criticised members of the judiciary for what they see as lenient sentences for offenders convicted of violent offences.

It is fundamental to the rule of law that judges be independent and undertake their role according to the law at the time, not media or public opinion.

"For somebody who commits the same offence with a clear mind, stone-cold sober, the mandatory minimum penalty does not apply. What's going on here?"

Former NSW Director of Public Prosecutions, Nicholas Cowdery AM QC on ABC's 7.30.

Matt Peacock, 'Critics slam mandatory sentencing for drunken crimes', ABC 7.30, 06/02/2014, Australian Broadcasting Corporation

<<http://www.abc.net.au/7.30/content/2013/s3939751.htm>>.

Purposes of Sentencing

The *Crimes (Sentencing Procedure) Act 1999 (NSW)* states the purposes of sentencing which judges must consider such as:

- punishment,
- recognising the harm done to the victim and society,
- making the offender accountable for their actions and
- deterrence.

Promoting the rehabilitation of the offender is also a lawful consideration. This can contradict the other purposes of sentencing - according to the law judges must balance these and take into consideration the facts of the case.

Judges provide reasons for their decision, and must be based on the law. Reasons are an essential aspect of the principle of open justice: those who make decisions must be accountable for their decisions.

Personal Attacks on Judges for Light Sentences

Personal attacks on judges in the media when members of the community think a particular sentence is too lenient often fail to acknowledge that judges are applying the law, not making a decision based on their own personal views or opinion about a case.

If a sentence issued by a judge is regarded as too lenient by the Attorney General or the Director of Public Prosecutions they can authorise an appeal to be made to a higher court. If an offender believes the sentence is too harsh they can also appeal.

The appeal system is an essential aspect of the legal system that acts as a check on the decisions of the judiciary.

Are judges in NSW going easy on Manslaughter?

Chief Justice Bathurst of the NSW Supreme Court in a speech given at the n February 2014 discussed the use of statistics in media reports which suggested that judges were not doing their job in sentencing offenders for manslaughter.

The claim in the media was that the average sentence for manslaughter from 2008 to 2012 was less than 4 years imprisonment. The Chief Justice stated that this figure was based on information which incorrectly included incidents of driving causing death, and that for the 176 persons sentenced for manslaughter in that period the average term of imprisonment was seven years and one month.

Freedom of the press is an essential

Research Tip:

The Judicial Commission of NSW has website to assist judges in explaining what is required to prove criminal offences to a jury.

The link below has a list of guidelines for criminal offences in NSW:

<http://www.judcom.nsw.gov.au/publications/benchbks/criminal/ch05-offences.html>

Some of the explanations are very technical and may be hard to understand unless you are a lawyer or a judge, however, many give very clear explanations of criminal offences, and often have links to cases that have set important precedents for a certain offence.

Honourable T.F. Bathurst CJ NSW, 'Community Confidence in the Justice System: The Role of Public Opinion', Opening of Law Term Address, 3/2/2014.

http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m670001l771019/bathurst_20140203.pdf

aspect of the rule of law because it assists the public to be informed about issues in the community and the actions of those in power such as judges and politicians. However, the media has a responsibility to make sure that the information they provide to the public is factually correct.

Public Opinion on Sentencing

Freedom to criticise laws and government is essential to the rule of law and a healthy democracy. This freedom also comes with the responsibility to ensure that opinions are well informed and based on correct information about an issue.

Judges should not be immune from criticism, but criticism must be based on an understanding of how the law works. The purpose of an independent and impartial judiciary is to come to decisions based on the law which is passed by Parliament.

An Australian Institute of Criminology study which examined the responses of 698 jurors from 138 criminal trials in Tasmania found that 90% of jurors who had read the reasons given by the judge, and an information booklet about sentencing, thought that the sentence was appropriate.

Another part of the study also found that 52% of the jurors surveyed would have given a more lenient sentence than the judge.

These figures challenge the assumption that judges are especially lenient in sentencing compared with the general public.

Families of victims and the community have the right to call for changes in

sentencing, and should be free to do so.

However, Parliament bears the responsibility for enacting laws which do not create injustices. Balancing the rights of the victim and the offender is a very difficult task, one which requires careful consideration and consultation.

Question to consider:

How responsive should Parliamentarians be to criticism from the media and the public about how judges should apply the law?

Kate Warner; Julia Davis; Maggie Walter; Rebecca Bradfield and Rachel Vermey, 'Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study', *Australian Institute of Criminology*, February 2011.

<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html>



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