

## Objections to Mandatory Sentencing

### 1) The Separation of Powers

The legislature (Parliament) which makes the law seeks to do the work of the Judiciary (Courts) who decide on legal disputes and impose punishments.

### 2) Judicial Discretion

Mandatory sentences exclude the operation of judicial discretion and prevent the court from being able to give proper consideration to the circumstances of the offence and the offender.

### 3) Increased Role of Prosecutor

Sentencing discretion is transferred from the judge to the police and the prosecutor as the sentence now depends on the charges laid.

### 4) Principles of Sentencing

Judges are unable to apply the principles of imprisonment as a last resort and proportionality.

### 5) Rehabilitation

Mandatory sentences do not account for the circumstances of the offender and prohibit therapeutic approaches to sentencing.

## Mandatory Sentencing and the Rule of Law

The independence of the judiciary is a key principle of the rule of law. For a criminal trial to be fair the judge must be independent and not be swayed by public opinion or political objectives of the parliament. Mandatory sentencing undermines the rule of law as the independence of the judiciary is removed. By removing the discretion of the judge mandatory sentencing can lead to sentences that are not proportionate to the offence.

The legal system is based on protecting the interests of the victim, offender and society, and must consider the rule of law implications for law reform.

## General problems created by Mandatory Sentencing Include -

### 1) Reluctance of Juries to Convict Accused

Juries may be reluctant to convict the accused in circumstances where they think the mandatory minimum sentence is unjust. This occurred when the mandatory sentence for murder was the death penalty. Juries would convict the accused on manslaughter instead.

### 2) Higher rates of refusal of bail

The inevitable prison sentence, determined by the mandatory sentence, increases the incentive to run away. As a result more bail applications are refused.

### 3) Expansion of prison populations

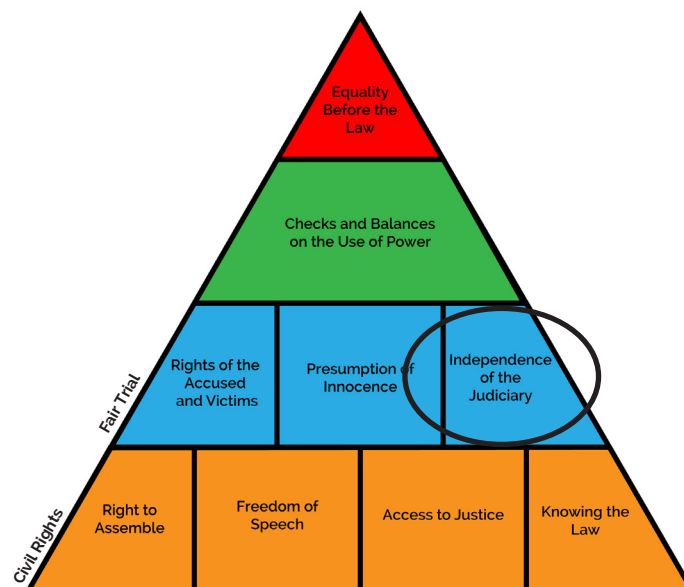
Higher rates of refusal of bail leads to a higher prison population. More offenders will also spend longer in prison due to the mandatory sentence. This has a significant financial cost.

### 4) Less Cooperation with Police

Mandatory sentences deter cooperation with police as no discount can be given for cooperation. They also result in fewer guilty pleas as often no discount can be given for a guilty plea.

### 5) Increase in Sentencing Across the Board

The introduction of mandatory sentences in Canada led to an increase in sentences across the board as the courts sought to ensure proportionality and consistency in sentencing.



The Rule of Law Pyramid highlights key Rule of Law Principles



# Mandatory Sentencing & the Independence of the Judiciary

## The Independence of the Judiciary

The independence of the judiciary is a key principle of the rule of law. For a trial to be fair the judge must be independent and not be swayed by public opinion or political objectives of the parliament.

The independence of the judiciary is seen in the sentencing process. Parliament legislates the maximum sentence for each crime but the judge decides on the appropriate sentence for each offender according to the law and the facts of the case.

A judge must decide on the appropriate sentence by considering the individual circumstances of the offender, the crime, and the victim. The decision of the judge should not be influenced by moral perspectives but should be given according to the law.

## What is a Sentence?

A sentence is a decision made by a judge to punish a person who has been found guilty of a criminal offence.

A sentence can often involve the offender being held in a prison. This is known as a 'custodial sentence' or a 'sentence of imprisonment'.

## What is a Minimum Mandatory Sentence?

A minimum mandatory sentence is when parliament removes the judge's discretion and legislates a minimum period of imprisonment.

Instead of a judge deciding on a punishment which fits the crime a judge must sentence the offender to at least the minimum mandatory sentence dictated in legislation.



**"The independence of the judiciary is a key principle of the rule of law"**

## Guidelines for Sentencing

When sentencing an offender judges must take into account both the purposes and principles of sentencing.

## Purposes of Sentencing

The *Crimes (Sentencing Procedure) Act 1999 (NSW)* states the purposes of sentencing which a judge must consider:

- that the offender is adequately **punished** for the offence,
- to prevent crime **by deterring** the offender and other persons from committing similar offences,
- to **protect** the community from the offender
- to promote the **rehabilitation** of the offender
- to make the offender **accountable** for his actions
- to **denounce** the conduct of the offender
- to **recognise the harm** done to the victim of the crime and the community.

Judges provide reasons for sentencing decisions which must be based on the law. Reasons for a sentencing decision are an important part of checks on the power of judges because reasons allow an appeal court to check the law has been applied correctly.

## Principles of Sentencing

In addition to the purposes of sentencing there are principles of sentencing established by common law and legislation that must be applied in every case. Some of these are:

- imprisonment only when no other punishment is appropriate
- the punishment must fit the crime (proportionality)
- similar crimes should receive similar sentences (consistency)

It is the role of the judiciary to determine the appropriate sentence by taking both the purposes of sentencing, the principles of sentencing, and the individual facts of the case into account.



# Assault Causing Death

In January 2014 the the **Crimes Act 1900 (NSW)** was amended to create a new criminal offence called Assault Causing Death.

Assault Causing Death, is defined in ss25A 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)** were also amended to provide for alcohol and drug testing in relation to the offence.

Self-induced intoxication was removed as a mitigating factor that judges can consider when sentencing for criminal offences in NSW.

## What is the offence?

### Crimes Act 1900 (NSW):

#### Section 25A - Assault Causing Death

"(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 Assault Causing Death is subject to a maximum sentence of 20 years imprisonment

Section 25B of the Crimes Act 1900 NSW states that a person who is:

- over 18,
  - intoxicated,
  - found guilty of Assault Causing Death
- is subject to a maximum sentence of 25 years, and a **minimum mandatory sentence of 8 years imprisonment.**

To find someone guilty of Assault Causing Death while intoxicated the prosecution must prove beyond a reasonable doubt four elements:

- 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)**

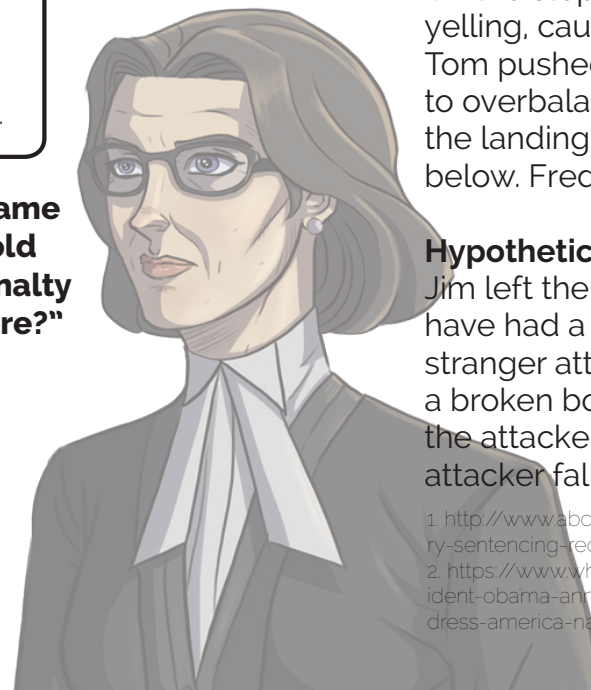
Causation, which is the link between the hit and the death can be established by medical evidence, a finding by a court or the NSW Coroner.
- 4 Proof of Intoxication**

If the accused has a blood alcohol concentration of 0.15 (0.05 is the legal limit for driving a vehicle under the influence in NSW) or has other drugs in their body they can be charged under Section 25B.

The accused's drug/alcohol concentration must be tested at a hospital within six hours of the offence.

**"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?"**

Nicholas Cowdery AM QC,  
Former NSW Director of Public Prosecutions.



## Support for Mandatory Sentencing

Support for mandatory sentences for many offences are often supported by the following claims:

### 1) Consistency in Sentencing

Mandatory sentencing provides a consistent sentence for an offence not the person charged with the offence. It prevents consistency of punishment of similar offenders for similar crimes.

Consider the hypotheticals below in terms of the mandatory minimum sentences for assault causing death:

#### Hypothetical 1:

Geoff was intoxicated and socialising with friends at a bar when Sam, a complete stranger, hurled insults at Geoff and his friends.

Sam continued making insulting comments and after 20 minutes of this pushed Geoff aggressively. Geoff punched Sam in the face who then fell and hit his head on ground. Sam died later in hospital due to injuries sustained by the fall to the ground.

#### Hypothetical 2:

Tom was having a few drinks with mates at a nightclub. After a few hours he became involved in an argument with his friend Fred. Tom tried to break off the argument and headed for the door of the club. Fred followed, continuing to yell and argue with Tom.

On the steps of the night club, Fred, still yelling, caught up with Tom. In frustration Tom pushed Fred's shoulder, causing him to overbalance, fall down the steps from the landing and hit his head on the path below. Fred later died in hospital.

#### Hypothetical 3:

Jim left the pub with his girlfriend. Both have had a number of alcoholic drinks. A stranger attacks Jim and his girlfriend with a broken bottle. Jim's girlfriend punches the attacker in the head repeatedly. The attacker falls to the ground and dies.

<sup>1</sup> <http://www.abc.net.au/news/2014-02-05/does-mandatory-sentencing-reduce-crime/5225986>  
<sup>2</sup> <https://www.whitehouse.gov/blog/2015/07/13/president-obama-announces-46-commutations-video-address-america-nation-second-chance>

### 2) Crime Reduction by Imprisonment

Supporters of mandatory sentences claim that imprisonment reduces crime because the offenders are incapacitated in a correctional institution and therefore not a threat to the community.

Evidence about whether mandatory sentencing effectively reduces crime is contradictory<sup>1</sup>.

### 3) Deterrence

That mandatory sentences provide for harsher sentences is said to deter people from committing a crime.

Research shows that the greatest deterrent is the expectation of being caught and dealt with, not the punishment at the end of the process.<sup>1</sup>

In the case of Assault Causing Death, it is questionable whether a person who is intoxicated and unable consider the consequences of their actions clearly, or someone who commits a 'crime of passion' will think of the mandatory sentence they may face and be deterred.

### 4) International Perspective

Mandatory sentences have been used widely for Federal drug offences in the United States. In 2015, President Barack Obama commuted the sentences of 46 mainly non-violent offenders who had been convicted under mandatory sentencing laws<sup>2</sup>:

**"Over the last few years a lot of people have become aware of the inequities in the criminal justice system...I am commuting the sentences of 46 prisoners who were convicted many years or in some cases decades ago. These men and women were not hardened criminals but the overwhelming majority have been sentenced to at least 20 years, 14 of them had been sentenced to life for non-violent drug offences...so their punishments didn't fit the crime."**

**- President Barack Obama<sup>2</sup>**