

Objections to Mandatory Sentencing

1) The Separation of Powers

The legislature (Parliament) which makes the law could be seen to be interfering with the work of the Judiciary (Courts) who decide on legal disputes and impose punishments.

2) Judicial Discretion

Mandatory sentences either exclude or restrict the operation of judicial discretion and prevent the court from being able to give proper consideration to the individual circumstances of the case.

3) Increased Role of Prosecutor

Sentencing discretion is transferred from the judge to the police and the prosecutor, whose decisions are not reviewable.

4) Principles of Sentencing

Mandatory sentences are a blunt instrument. Sentencing principles, are better designed to be able to take individual circumstances into account and may result in more appropriate outcomes as compared to a 'one size fits all' approach.

5) Rehabilitation

Mandatory sentences do not account for the circumstances of the offender. Consequently, they may either prohibit or make it difficult to target more therapeutic approaches to sentencing.

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 too harsh or 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. Moreover, the underlying causes of criminal behaviour and rehabilitation are better off being addressed early, to prevent reoffending and return to prison.

4) Less Cooperation with Police

Mandatory sentences deter cooperation with police as no discount can be given for cooperation. This results in fewer guilty pleas and offenders may take any chance to avoid a harsh sentence.

5) Increase in Sentencing Across the Board

The introduction of mandatory sentences in other common law jurisdictions has led to an increase in sentences across the board, as courts seek to ensure proportionality and consistency in sentencing.

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 for which a court may impose a sentence on an offender are:

- to ensure 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 or her 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 the checks and balances 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.



The Rule of Law and Mandatory Sentencing

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 the political objectives of a parliament.

The independence of the judiciary is visible 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 any victim/s. The decision of the judge should not be influenced by personal perspectives but should be given according to the law as passed by Parliament.

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 or Minimum Mandatory Non-Parole Period?

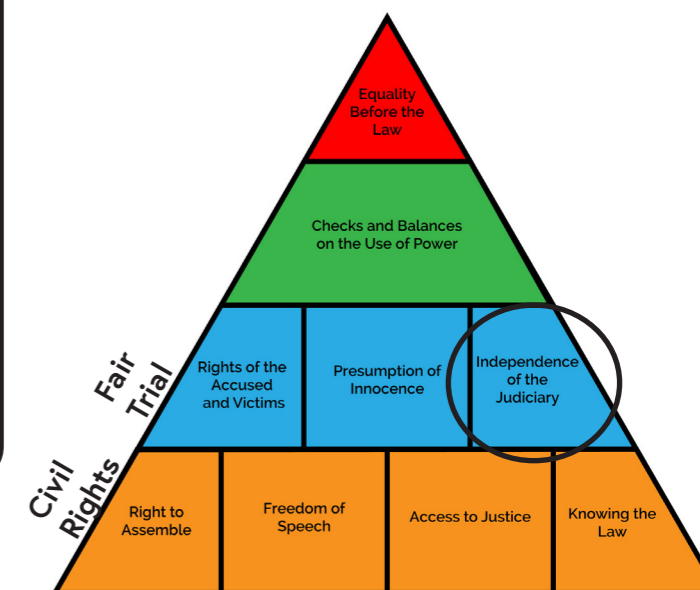
A minimum mandatory sentence or minimum mandatory non-parole period is when parliament removes the judge's discretion and legislates a minimum period of imprisonment as a punishment for an offence.

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 the legislation.

Mandatory Sentencing and the Rule of Law

The independence of the judiciary is a key principle of the rule of law. The separation of powers is critical between the legislature, which makes the law, the executive and the judiciary which decides legal disputes and for criminal law, imposes punishments. Parliament should not seek to do the work that belongs to the judiciary or to remove or fetter the discretion of the courts.

Read more: <https://www.ruleoflaw.org.au/wp-content/uploads/2014/05/Dist.-speakers-15-May-2014-Mandatory-Sentencing-paper.pdf>



The Rule of Law Pyramid highlights key Rule of Law Principles

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

Judges' discretion in sentencing is an essential part of a fair trial and should not be restricted.



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)*.

Crimes Act 1900 (NSW):

Section 25A of the Crimes Act states that a person is guilty of assault causing death if:

- 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*
- the assault is not authorised or excused by law, and*
- 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 states if a person is found guilty of Assault Causing Death under Section 25A and they are also over the age of 18 and intoxicated, they will be subject to a maximum sentence of 25 years, and a minimum mandatory sentence of no less than 8 years imprisonment.

To find someone guilty of Assault Causing Death while intoxicated the prosecution must prove the offence beyond a reasonable doubt which involves four essential 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 element is not satisfied.

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.

Glossary

mens rea - Latin term meaning "guilty mind" which is an element to be proven in most criminal offences.
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

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.

Case Note: R v Garth (No 2) [2017] NSWDC 471

The Facts

On the 2nd of May 2014 in the outer suburbs of Sydney there was a 21st birthday party hosted by Mr Ong.

A number of people attended this party including the offender, Mr Garth - who was the boyfriend of host's cousin and the deceased Mr Ray Manalad - who was a close friend of the host Mr Ong. Many of the people at the party consumed alcohol, including the offender and the deceased. Soon after midnight, there was a disagreement between the host and the offender that escalated into yelling and the offender pushing the host of the party in the middle of the chest. Mr Ong tripped over a gutter and fractured his ankle.

Mr Manalad intervened and approached the offender with his hands upon and his palms flat - he tried to calm the offender down. The offender punched Mr Manalad on the side of his face, he fell over and never regained consciousness. He died the following day from his injuries.

The police conducted a breath analysis of the offender when they arrived which showed a reading of 0.174 and a later blood test found 0.185g of alcohol per 100 ml of blood. In a police interview he stated that he was unable to remember punching Mr Manalad. He was charged with a number of offences including affray and common assault in addition to Assault Causing Death with Intoxication.

The Court Case

The case was before His Honour Judge Townsden and a jury in the District Court of NSW. His Honour found the offender guilty beyond reasonable doubt of the offences of common assault and affray.

The jury found him guilty beyond reasonable doubt of the offence assault occasioning death whilst intoxicated.

The Sentencing

Ms Teresit Manalad, the deceased's mother, provided a Victim Impact Statement to the court. She pointed out that her son was a nurse and was passionate about helping people.

"It was a needless death of an innocent young man" [33]

The Mandatory Minimum Penalty

In his judgment His Honour states:

"The offence of assault occasioning death is objectively serious. Both the minimum and maximum penalties provide a sentencing yardstick. I refer to my earlier decision ...where I held that s 25B of the Crimes Act, which sets out the mandatory minimum penalty, is both constitutionally valid and acts as a yardstick: Garth v R [2017] NSWDC 469." [42]

"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," [48]

The judge found that the offender intentionally hit Mr Manalad with his closed fist and that although the assault was objectively serious it was spontaneous.

"the assault is not authorised or excused by law, and the assault causes the death of the other person. The offender's act was not done in self-defence." [48]

It led to the death of Mr Manalad.

"A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated."

The offender was over the age of 18 yrs and intoxicated when he committed the offence

"There can be no doubt that it is all too common in our community for young men to commit serious acts of violence after having consumed excessive amounts of alcohol. Such conduct must be properly denounced by the Courts, which should impose sentences that would act as a deterrent to others." [55]

Hugh Garth was sentenced by Judge Townsden to 10 years and 3 months imprisonment with a non parole period of 8 years and 3 months- to reflect the mandatory minimum required by the Crimes Act 1900.