

BRIEFING PAPER

MANDATORY SENTENCING

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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MANDATORY SENTENCING

Issue

Increasingly, Australian parliaments are intervening in sentencing practices. In WA, this includes the recent expansion of the “three strikes” home burglary laws.

Politicians enacting mandatory sentencing laws claim to be responding to the public calling for harsher sentences, with the courts perceived as too lenient on crime. Unfortunately, the public is largely misinformed about crime and justice matters.

Mandatory sentencing regimes are the most concerning manifestation of these parliamentary interferences. Such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles.

Background

In 1992, the WA Government passed the first mandatory sentencing legislation for car theft, followed by the “three strikes” laws in 1996 for home burglaries. Since then, it has also passed the *Criminal Organisations Control Act 2012*, and mandatory sentences for people who assault custodial officers.

Mandatory sentencing laws have particularly failed WA's Indigenous community, members of which have been incarcerated in even greater numbers as a result of these laws. In the June quarter of 2019, Indigenous children in Western Australia were 49 times more likely than non-Indigenous children to be in detention.¹

The Northern Territory also has mandatory sentencing legislation, resulting in Mr Zak Grieve being sentenced to life imprisonment with a 20 year non-parole period for his role in a murder, despite a judge finding he did not commit the murder. The judge recommended that the Northern Territory Administrator consider releasing Mr Grieve after 12 years, which was the sentence that the judge had wished to give Mr Grieve but could not due to the mandatory sentencing laws.

In 2018, Mr Grieve's sentence was reduced to a 12 year non-parole period by the NT Administrator, giving him a release date of 2023.²

Policy Position

Law Council of Australia

The Law Council has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences.³ Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles. The rule of law underpins Australia's legal system and ensures that everyone, including governments, is subject to the law and that citizens are protected from arbitrary abuses of power. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.

In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, and the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.

In particular, the Law Council considers that mandatory sentencing:

- potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. There are already numerous examples where mandatory sentencing has applied with anomalous or unjust results, including a disproportionate effect on vulnerable groups including Indigenous Australians, juveniles and people with intellectual disabilities;
- when adopted, fails to produce convincing

evidence that increases in penalties for offences deter crime;

- potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- provides short- to medium-term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
- inappropriately undermines the community's confidence in the judiciary and the criminal justice system as a whole. However, this lack of confidence is not warranted by in-depth studies which demonstrate that when members of the public are fully informed about the particular circumstances of the case and the offender, 90% view judges' sentences as appropriate;
- displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
- results in significant economic costs to the community, both in terms of increasing incarceration rates and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- is inconsistent with Australia's international human rights obligations.

Law Society of Western Australia

The Law Society of Western Australia is opposed to mandatory sentencing in any form.

The Law Society's opposition to mandatory sentencing is consistent with the view of the legal profession across Australia as set out in the [policy position from Law Council of Australia](#) (above).

Law Society Past President, Hayley Cormann wrote 'there is limited convincing evidence demonstrating that mandatory sentencing has a positive effect on

crime rates and crime severity in our society.'³

Mandatory sentencing:

- results in harsh and disproportionate sentences where the punishment may not fit the crime;
- increases the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole;
- removes discretion from the judiciary and dangerously displaces it to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors; and
- results in significant economic costs to the community, both in terms of increasing imprisonment rates, and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime

The Law Society wrote to various members of parliament expressing its serious concern with the proposed new mandatory sentencing under the *Criminal Law Amendment (Home Burglary and other Offences) Bill 2014 (WA)* and urged that the Bill be opposed.

Notwithstanding the Society's opposition, the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015 (WA)* was passed.

This Act imposes the following mandatory sentences for serious offences of physical or sexual violence committed in the course of an aggravated home burglary:

- minimum sentence of 75% of the statutory maximum term of imprisonment for adults;
- where the maximum is life imprisonment, a minimum of 15 years applies; and
- a minimum sentence of 3 years' imprisonment for juvenile offenders.

Funding implications

Clearly there will be a cost attached to implementing alternatives to mandatory sentencing. However, the Productivity Commission found that the average cost of keeping a person in prison in WA is around \$301 per day.⁴ Placing greater numbers of people into prison for longer periods of time will be expensive for taxpayers.

In 2018-19, the cost per day for juvenile detention was \$1,114.20 per person.⁵ The cost of detaining one young person was therefore \$ \$416,903 per annum. This is a significant amount of money that instead could be spent on addressing the underlying causes of offending.

Policy implications

The government has for decades made strong commitments to be “tough on crime” and part of the 2013 election platform was a commitment to introduce the expanded home burglary laws. It is unlikely that without clear community dissatisfaction with mandatory sentencing laws the government will be motivated to repeal this legislation. Education of the community should therefore be a focus.

NOTES

1. Australian Institute of Health and Welfare, ‘Youth Detention Population in Australia 2019’ (Bulletin No. 148, JUV 131, 2020) 17 <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2019/contents/summary>>.
2. Steven Schubert, ‘Zak Grieve’s lawyer to push for immediate release despite rare eight year reprieve’ ABC News (News article, 20 December 2018) <<https://www.abc.net.au/news/2018-12-20/zak-grieves-prison-sentence-reduced-after-mercy-plea/10637998>>.
3. Hayley Cormann, ‘Mandatory Sentencing Big Cost to Community’, The West Australian (30 April 2018).
4. Productivity Commission, Report on Government Services – Corrective Services (2020) table 8A.18 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services>>.
5. Productivity Commission, Report on Government Services - Youth Justice Services (2020) table 17A.21 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>>.

Policy Position

The Law Society of Western Australia endorses the Law Council of Australia 2016 Federal election Policy Platform and thereby seeks the support of all parties to:

- Adopt policies which reject mandatory sentencing and repeal laws that impose minimum terms of imprisonment;
- Refrain from the creation of new mandatory sentencing regimes;
- Provide flexible sentencing options for offenders; and
- Repeal mandatory sentencing laws and implement alternatives to mandatory sentencing, such as justice reinvestment strategies and diversionary non-custodial options, which may be more effective for reducing crime while remaining compatible with the rule of law and Australia’s human rights obligations.



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