Mandatory Sentencing

Introduction

This paper looks at the topical issue of mandatory sentencing.

When we hear or read about a serious crime, it can be easy to empathise with the victim. Such crimes can affect us all, because they can undermine our sense of security and because they involve a serious breach of the community values that our laws embody.

The sentence imposed on the offender can seem puzzling and disappointing, particularly if it is much lower than the maximum penalty that applies to the offence.

In such cases, it can seem that some judges or magistrates are out of touch with community views and with the views of parliament when it set the maximum penalty.

Laws that restrict what courts can do when they decide on a sentence can seem an attractive way to address these concerns.

Various parliaments in Australia and overseas have adopted such laws. They can take many different forms. For example, the laws can specify that a court must impose a particular sentence for a particular offence, or they can specify a range, with a maximum and minimum penalty that a court can impose for a particular offence. Alternatively, they can involve an elaborate numerical grid, specifying the weight that a court must give to various factors when sentencing. Sometimes they leave some discretion to a court, for example by permitting the court to depart from the mandatory penalty (or range) in exceptional circumstances.

The Council is publishing a separate research paper on mandatory sentencing that examines these different schemes in more detail. The research paper can be accessed on the Council’s website <www.sentencingcouncil.vic.gov.au>.
How sentencing currently works in Victoria

Before looking at the differences between the various types of mandatory sentencing, it is important to consider the basic reasons for adopting such schemes. Typically, the central aim of these schemes is to increase both the severity and the consistency of sentences.

Are sentences in Victoria too lenient? Are there major inconsistencies between the sentences that individual judges or magistrates impose in similar cases?

Victorian courts sentence around 90,000 people each year for hundreds of types of offence. The Sentencing Advisory Council publishes detailed statistics on a range of those offences. However, as the case studies in this paper will show, it is difficult to make a meaningful assessment of leniency and inconsistency in relation to offences in general.

The case studies in this paper will demonstrate how current Victorian law deals with the issues of leniency and inconsistency and how they could be dealt with differently under various mandatory sentencing schemes. The case studies are based on real cases, although the names have been changed.

### Case study 1: Joe

Joe is 37 years old. He was born overseas but his family moved to Australia when he was six. His father and two of his brothers were involved in trafficking drugs and spent time in jail. He had to move from school to school and grew up in a home where crime and drugs were a normal way of life.

In his early twenties, Joe was convicted of cultivating cannabis. Five years later, he was again convicted of cultivating cannabis. This was followed by a conviction for importing cannabis into Australia. A few years later, he was convicted of trafficking cocaine and amphetamines.

After he was released from prison for that offence, he began to manufacture ecstasy. The police became aware of his activities. They arrested him after a complex investigation involving surveillance and listening devices. When the police arrested him, they found equipment for making ecstasy pills and over 14 kilograms of ecstasy pills and powder.

The police charged Joe with trafficking in a large commercial quantity of drugs (trafficking includes manufacturing a drug).

Joe pleaded guilty to the offence during preliminary court proceedings.

### The sentence

The court sentenced Joe to 14 years in prison for the offence of trafficking in a large commercial quantity of ecstasy. The court imposed a total sentence of 17 years with a non-parole period of 13 years for the offence of trafficking and for other offences that he had committed at the same time. This means that, after 13 years, Joe can apply to the parole board to be released from prison. The parole board does not have to release him.

If Joe has behaved well in prison, the parole board may release him with certain conditions. These involve reporting to a parole officer. The conditions can also require him to do unpaid community work or to attend an educational program.

Parole enables a person who has been in prison for a long period to re-acclimatise to society. It also enables the authorities to keep an eye on the person. While Joe is on parole, he is still serving a sentence. If he breaches a parole condition, he risks being sent back to prison to serve the remainder of his sentence.
The **Sentencing Act 1991** sets out the principles that courts in Victoria must follow when they decide on the sentence to impose in a particular case.

The Act lists several factors that the court must consider. The factors that are relevant in Joe’s case are:

1. **The maximum penalty for the offence**
   The maximum penalty for trafficking in a large commercial quantity of drugs is life imprisonment.

2. **Current sentencing practices**
   This ensures a degree of consistency between cases. The court must consider the range of sentences that have been imposed in other cases involving the same offence. If the court imposes a sentence that is too high compared to other cases of trafficking in a large commercial quantity of drugs, Joe can appeal against the sentence. If the court imposes a sentence that is too low in comparison to other cases, the prosecution can appeal against the sentence.

3. **The nature and gravity of the offence**
   This was a serious example of trafficking in a large commercial quantity of drugs. It involved a high degree of planning. If it had been carried out, it would have distributed a very large amount of illicit drugs into the community.

4. **The offender’s culpability and degree of responsibility for the offence**
   Joe was one of the instigators of the offence. He set out to commit the offence and played a key role in it.

5. **Whether the offender pleaded guilty**
   Joe pleaded guilty. This can demonstrate a degree of remorse about what he had done. It saved witnesses from the uncertainty and pressure of having to give evidence in court and being cross-examined about the offence. It also saved the police, the courts and the community the significant costs of a trial.

6. **The offender’s previous character**
   Joe has committed many drug-related offences. The first time he was found guilty of cultivating cannabis, he received a good behaviour bond. The penalties became more severe for his later offences, resulting in two periods in jail. The first was for two and a half years, the second was for four years. None of these penalties deterred him from committing further offences.

7. **The presence of any aggravating or mitigating factor or any other relevant circumstance**
   Joe was a drug addict at the time of the offences. However, this is not a case where he committed the offence simply to fund his own drug habit.

   The court has to weigh up all of these factors in deciding on the sentence to impose. It also has to consider the purposes that the sentence has to achieve.

   The Act identifies five purposes of sentencing. They are:
   - To **denounce** the offender’s conduct.
   - To **punish** the offender.
   - To **deter** the offender or other people from committing the same or similar offences.
   - To **protect the community** from the offender.
   - To facilitate the offender’s **rehabilitation**.

   In Joe’s case, he has committed a very serious offence. The sentence needs to be sufficiently severe to denounce what he has done and to punish him for it. Although he is a drug user, the offence was not committed on the spur of the moment or to pay for his own drug habit. It was carefully planned and committed out of greed. In such cases, deterrence is a significant purpose. Protection of the community is also a factor. The court considered that Joe is a ‘manipulative, dangerous and experienced criminal’. He has committed serious offences in the past, and his prospects for rehabilitation are not strong. His troubled upbringing and his plea of guilty are mitigating factors, but they are less significant than the other factors in this case.
Case study 2: Chris

Chris is 26 years old. She was sexually assaulted when she was younger. She has suffered from mental illness and is addicted to heroin.

When Chris was 19 she started to go out with Joe. She became emotionally dependent on him. He supplied her with drugs. In exchange, she helped Joe by doing things like minding houses where he manufactured ecstasy tablets, cleaning up the houses to avoid the manufacturing from being detected and collecting and sorting drugs for him.

When the police arrested Joe, they also arrested Chris and charged her with trafficking in a large commercial quantity of drugs (on the basis that she had aided and abetted Joe).

Chris pleaded guilty to the offence at a very early stage and agreed to give evidence against Joe and another co-offender. Giving evidence against these people involved a significant and ongoing risk to her life.

By the time the court came to sentence her, Chris had successfully quit drugs and had found a full-time job. She showed good prospects for rehabilitation.

The sentence

The court sentenced Chris to imprisonment for 2 years and 9 months, but suspended it for a period of 3 years. This means that she only has to go to prison if she commits another offence during that 3-year period.

Chris and Joe each had a miserable past and were drug addicts. They were both charged with the same offence involving the same quantity of drugs. They both pleaded guilty. However, there were vast differences between their cases. In particular, Chris had a much lower degree of culpability and responsibility for the offence. Her significant assistance to the police, her different motivations for offending and her strong prospects for rehabilitation were also important differences. Purposes such as denunciation, deterrence and community protection are less significant in her case than in Joe’s.

Although these two case studies are very simplified examples of how sentencing currently works in Victoria, they show that sentencing is a complex process (you can find more detailed information about sentencing from the websites listed at the end of this paper). Victorian courts have to take into account a wide variety of factors. They have to tailor each sentence they impose to the particular facts of the case, and they must consider a range of different sentencing purposes.
What is mandatory sentencing?

There are many different approaches to sentencing. The table below places them in a spectrum, ranging from a strict ‘one size fits all’ approach at the top to a very broad discretionary approach at the bottom.

The approach used in Victoria and many other jurisdictions is a structured discretionary system. As we saw in the case studies, the courts must take into account a wide range of factors and purposes. They can tailor the sentence to suit the particular facts of the case before them. However, they are limited by the principles set out in the Sentencing Act 1991 and other laws, and by the sentencing practices established over many years and in many other cases. This system seeks to balance the needs of justice, consistency, fairness, efficiency and effectiveness.

The spectrum of approaches to discretion in sentencing

<table>
<thead>
<tr>
<th>Approach</th>
<th>Description</th>
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<tbody>
<tr>
<td>FIXED PENALTY</td>
<td>• Parliament specifies a set penalty for the offence.</td>
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<td></td>
<td>• The court has no discretion and is limited to a ‘one size fits all’ approach.</td>
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<tr>
<td>MANDATORY MINIMUM</td>
<td>• Parliament specifies a range with a maximum and minimum penalty.</td>
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<td></td>
<td>• The court has a narrow discretion about the factors that it can take into account, as long as it imposes a sentence that is within the statutory range.</td>
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<tr>
<td>PRESUMPTIVE MINIMUM</td>
<td>• Similar to a mandatory minimum, because parliament specifies a range.</td>
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<td></td>
<td>• Different to a mandatory minimum because parliament allows the court to impose a sentence below that range in defined circumstances.</td>
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<tr>
<td>STRUCTURED DISCRETION</td>
<td>• Parliament specifies a maximum penalty and provides a set of general guidelines in sentencing legislation.</td>
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<td>• The court can impose any sentence below the statutory maximum, subject to legislation, common law principles and appellate review.</td>
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<td></td>
<td>• The court can take a wide variety of factors into account.</td>
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<tr>
<td>BROAD DISCRETION</td>
<td>• The court has a broad discretion to take any factors into account and to impose any sentence.</td>
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How would a more prescriptive approach to sentencing be different for Joe and Chris?

**Fixed penalty**

The fixed penalty approach (the top row in the table above) would not make any distinctions between a person such as Joe and someone like Chris. If the fixed penalty were life imprisonment, the judge would have no choice but to impose that penalty on both Joe and Chris.

This approach to sentencing can have significant social costs. This is because a key aspect of justice is to treat like cases alike. Importantly, this also means that if cases are different in any significant way, they should be treated differently. Treating an offender such as Chris in the same way as an offender such as Joe would be unjust.

It can also have significant economic costs. The direct cost of keeping a person in prison for a year is approximately $75,000. To imprison Chris for even just the same length of time as Joe received (a minimum of 13 years) would cost almost $1 million in today’s money. It is necessary for the community to spend some of its resources on imprisoning offenders for long periods, especially in cases such as Joe’s where community protection and deterrence are important considerations, but in cases such as Chris’s it is possible to satisfy the relevant sentencing purposes in other ways and at a much lower social and economic cost.

**Mandatory minimum and presumptive minimum approaches**

The approaches that sit between the structured discretionary approach and the fixed penalty approach recognise the problems of the ‘one size fits all’ approach of a fixed penalty and provide more scope for the court to take into account differences between individual cases.

Nevertheless, they tend to limit the number and range of factors that the court can look at and to play down the significant differences between a case such as Joe’s and a case such as Chris’s.

One of the dangers with a fixed penalty or a mandatory or presumptive approach to sentencing is that it can lead to a greater role for plea-bargaining.

In many cases, the facts surrounding an alleged crime are not entirely clear. The police and the prosecutors need to make choices about which offence or offences to charge the defendant with. The general view is that it is in the public interest to avoid a trial if the defendant will plead guilty to an appropriate charge. There are often discussions between the prosecutors and the defendant’s lawyers about the strength of the evidence, about whether the defendant will plead guilty and about what an appropriate charge is in the circumstances.

Such negotiations occur under the current Victorian system, but they are more significant under a mandatory or prescriptive sentencing scheme. This is because under those schemes a person like Chris is unlikely to plead guilty to an offence such as trafficking in a large commercial quantity of drugs because she knows that she will inevitably receive a high penalty. The prosecutors may consider that her conduct does not warrant such a high penalty when compared with another offender such as Joe. They could negotiate with her lawyers over charging her with a less serious offence so that she will plead guilty to that offence to achieve the public interest in avoiding a trial while obtaining a sentence that is fair in the circumstances of the case.

The effect is that, although those schemes aim to restrict the scope of judges and magistrates in choosing a sentence, the choice of sentence simply shifts away from judges to the prosecutors and lawyers. It is much better for a judge or magistrate to decide on the sentence in open court and to give reasons for his or her decision than for the prosecutors and defence lawyers effectively to decide on the sentence in negotiations behind closed doors.
Structured discretionary approach

As we can see from the cases of Joe and Chris, under a structured discretionary approach, which currently exists in Victoria, there is a wide variety of factors that the court must take into account when it is deciding on the sentence to impose.

The process of sentencing is not simply a mathematical or mechanical process. The judge or magistrate must exercise considerable judgment when looking at each factor.

Take the issue of a plea of guilty. Both Joe and Chris pleaded guilty. But in each case the significance of the plea was different. Did Joe’s plea show that he had truly accepted responsibility and was sorry for what he did? Or was it a case where the evidence against him was very strong and he was simply accepting the inevitable? By contrast, Chris pleaded guilty at a much earlier stage and helped the authorities by agreeing to give evidence against Joe and another co-accused, placing herself at a significant personal risk.

Another example is each offender’s prospects for rehabilitation. Both Joe and Chris were addicted to drugs. Each of them has been through drug treatment programs in the past and has eventually relapsed. Chris argues that she has managed to get off the drugs and to turn her life around. Some people do eventually manage to beat their drug addiction; other people do not. How likely is Chris to keep off drugs this time?

Each of these things is relevant to the sentence that a particular offender should get. Each is also very difficult to assess, and to balance them against all of the other relevant factors (the circumstances of the offence itself and so on). Some factors will make denunciation relevant; others will pull in a different direction.

The structured discretionary approach accepts that, by dealing with many cases over time, judges and magistrates gain experience in making these difficult assessments.

While parliament provides general guidance in the Sentencing Act and by setting the maximum penalties for particular offences, judges and magistrates are in the position to assess all of the facts and circumstances in individual cases. In doing so, they must also consider the principles and practices developed by the courts. Judges and magistrates make their decisions openly and are required to give reasons for them. Their decisions can be reviewed by a higher court. These safeguards ensure an appropriate degree of consistency between similar cases.

Broad discretionary approach

A broad discretionary approach is one where judges and magistrates are not guided by statutory principles and sentencing practices in other courts. Each case is decided in greater isolation.

Outcomes can vary more widely depending on factors including the personal views of the judge or magistrate about particular factors. For example, if the judge considered that ecstasy is an extremely serious drug and that anyone involved in any way with it should be dealt with harshly, the judge might exercise his or her discretion by imposing a particularly severe sentence on Chris. Another judge who thought that ecstasy is not such a serious drug might impose a less severe penalty.
Summary

The sentencing system used in Victoria is based on the notion of structured discretion.

This means that the courts can tailor a sentence to suit the particular facts and circumstances of each individual case.

Although each court can exercise its own discretion about the sentence that is appropriate for the case before it, there are safeguards to ensure an appropriate degree of consistency between courts. Each court must consider the practices used in other cases as well as principles that are set out in the Sentencing Act and other laws. Over the years, the courts have developed a sentencing range for each offence. The range does not bind a court, because each case is different and the court must decide on the appropriate sentence in the case before it, but it provides guidance to the court. The court must give reasons for the sentence it imposes, and the sentence can be reviewed by a higher court.

The case studies in this paper demonstrate that the issues of leniency and inconsistency are complex. There can be very significant differences between cases involving the same offence, even when the cases involve some similar factors.

In seeking to increase the severity and consistency of sentences, mandatory and presumptive sentencing schemes tend to downplay or ignore these important differences. This can lead to injustice.

In addition to this social cost, mandatory and presumptive sentencing schemes can also have very significant economic costs. It is appropriate for some offenders to serve long prison sentences. But imprisonment is expensive, and it is important for the community to consider whether a long term of imprisonment is effective and appropriate in relation to some offenders.

Finally, mandatory and presumptive sentencing schemes can lead to a much greater use of plea-bargaining. This can make the criminal justice process less transparent and less accountable and therefore less just.