S E R V I N G C A N A D I A N S

RESEARCH AND STATISTICS DIVISION

MANDATORY SENTENCES OF IMPRISONMENT IN COMMON LAW JURISDICTIONS: SOME REPRESENTATIVE MODELS

Department of Justice Canada
Ministère de la Justice Canada

Canada

Table of Contents

Acknowledgements

The author would like to gratefully acknowledge the input of Suzanne Wallace-Capretta, Nicole Crutcher and David Daubney from the Department of Justice Canada; Tom Finlay from the Library of the Centre of Criminology at the University of Toronto and Sherri Matta from the University of Ottawa. In addition, I thank the following individuals for information on their specific jurisdictions: Stephan Terreblanche; Estella Baker; Tappio Lappi-Seppala; Arie Freiberg; Lirette Louw; Mike Hough; Cyrus Tata; Arie Freiberg; Neil Hutton.

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Highlights

- This report summarizes findings from a review of sentencing arrangements in a number of common law jurisdictions around the world.

- In 1995, the Canadian Parliament created a number of mandatory sentences of imprisonment. These apply to a number of serious offences when the crime was committed using a firearm. Courts do not have the discretion to impose a sentence below the mandatory minimum four-year term of custody. In contrast, most other jurisdictions that have created mandatory sentences of imprisonment permit some judicial discretion. This is accomplished by means of a "judicial discretion" clause that permits judges to impose a lesser sentence where exceptional circumstances exist.

- A common feature of the mandatory sentence legislation in common law countries is the emphasis on repeat offenders. Thus, a mandatory sentence must be imposed if the offender has previously been convicted of a related offence.

- Where mandatory sentences do exist, they have been the object of considerable (and growing) opposition from a variety of parties, including advocacy groups, judges, academics and criminal justice professionals. This opposition has led to a number of Bills to amend or repeal the mandatory sentences legislation. While a number of countries have passed mandatory sentencing legislation within the last decade, there is evidence that jurisdictions with the most severe mandatory sentencing laws are beginning to repeal, or consider repealing, the most punitive sentences of imprisonment.

- When surveys pose a general question about mandatory sentences of imprisonment, polls reveal strong public support for the concept. However, when asked about specific cases, there is far less support among members of the public for restricting judicial discretion at sentencing. The most recent polls conducted in Australia and the United States demonstrate that public support for mandatory sentencing has declined in recent years.

Executive Summary

This report summarizes findings from a review of sentencing arrangements in a number of western nations. The purpose was to identify and discuss current trends regarding the use of mandatory sentences of imprisonment. Since most jurisdictions employ a mandatory sentence for the offence of murder, this offence will not be discussed at length in this report.

The document summarizes recent trends from the following jurisdictions: Canada; England and Wales; Scotland; Ireland; Australia (including Western Australia; Victoria; Northern Territories; Queensland; New South Wales), New Zealand and South Africa. Particular attention is paid to Australia in light of the diversity of approaches to sentencing reform that has been adopted in that jurisdiction.

The aim of the research was to provide the reader with a sense of current developments in a representative collection of common law nations, in order to reflect the diversity of mandatory sentencing regimes.

Very few countries have created mandatory sentences of imprisonment such as the minimum four-year term of custody created in 1995 in Canada. This penalty applies to offenders convicted of any one of ten offences when the offence was committed with a firearm. Courts in Canada have no discretion to impose a lesser sentence following conviction for one of the enumerated offences; the Canadian model of a mandatory sentence does not permit any judicial discretion.

Almost all mandatory sentencing legislation in other jurisdictions allows for judicial discretion in that the courts are permitted to depart from the legislated mandatory sentence *where exceptional circumstances exist*. Moreover, in most jurisdictions (South Africa for example), judges often depart from the mandatory sentence by invoking a "judicial discretion" clause that permits courts, where exceptional circumstances exist, to impose a lesser sentence than the prescribed mandatory sentence. In some jurisdictions, judges are required to provide written reasons when using their discretion to go below the mandatory minimum sentence.

Categories of Mandatory Sentence

Generally speaking the mandatory sentences of imprisonment in western nations can be classified into three categories:

(i) mandatory sentences of imprisonment that allow no discretion below or above a specific sentence. These are usually reserved for murder;

(ii) mandatory minimum sentences of imprisonment that require courts to impose a sentence of at least "x" years. Courts may impose a harsher sentence up to the statutory maximum but are not allowed to impose a sentence below the minimum prescribed (the Canadian firearms

mandatory sentences as well as a few other offences, fall into this category);

(iii) mandatory sentences of custody that permit the court to impose a lesser, or even non-custodial sentence in the event that exceptional circumstances exist (the mandatory sentences in England, Wales and South Africa are examples of this kind of mandatory sentence).

In several countries, mandatory sentences have been the object of considerable (and growing) opposition from a variety of parties, including advocacy groups, judges, academics and criminal justice professionals. This opposition has led to the introduction of a number of Bills to amend or repeal the mandatory sentences. The most pointed example of the impact of the opposition to mandatory sentencing occurred in the Australian Northern Territories. Opposition to the mandatory sentences of imprisonment in that jurisdiction led to the subsequent repeal of critical elements of the mandatory sentencing regime. Evidence indicates that jurisdictions with the most severe mandatory sentencing laws are beginning to repeal, or consider repealing, the most punitive sentences of imprisonment.

Although mandatory sentences of imprisonment have been introduced in a number of western nations, few jurisdictions have evaluated the impact of these laws on prison populations or crime rates. The studies that have examined the impact of these laws reported variable effects on prison populations, and no discernible effect on crime rates.

Public Attitudes to Mandatory Sentencing

Proponents of mandatory sentencing have long argued that such penalties are consistent with public attitudes toward sentencing. In reality, the public supports mandatory sentencing only when asked to consider the most serious crimes of violence, and when the poll question prevents respondents from considering the potential deficiencies associated with mandatory sentences of imprisonment (such as a loss of proportionality in sentencing). Recent polls conducted in Australia and in the United States demonstrate that public support for mandatory sentencing has declined in recent years. This, in turn, explains in part the decline in support for mandatory sentencing among politicians.

1.0 Introduction

Mandatory sentences of imprisonment exist in most western nations as well as many non-western countries.[1] During the 1990s, the number of mandatory penalties in these countries increased significantly. Since then, initiatives have been launched in a number of jurisdictions to repeal or amend the more punitive mandatory sentencing laws. The purpose of this report is to describe the principal mandatory sentence laws[2] in a number of representative western jurisdictions. The report is divided into sections, with each section devoted to a specific jurisdiction.

The report reviews the principal mandatory sentences of imprisonment applicable to adult offenders. A number of jurisdictions such as the Northern Territories in Australia have created mandatory sentences for juveniles. In light of the different sentencing purposes and principles applicable to juvenile offenders, these laws are not covered in this report. In addition, since a mandatory sentence for murder exists in all jurisdictions, this offence will not be examined in depth in the review. The review also excludes mandatory sentences in which imprisonment is one of two possible sentencing options. Provisions pertaining to breaches of orders are also omitted from this survey. (For example, a number of jurisdictions create a mandatory obligation on courts to imprison offenders found to have breached the conditions of a home confinement order.)

The following information is provided for each jurisdiction:

- an overview of the statutory sentencing framework;
- a description of the principal mandatory sentences of imprisonment;
- a commentary on recent developments regarding mandatory sentencing (wherever possible). This material reflects discussions with key informants in a number of jurisdictions; and
- a bibliography for further reading.

The following jurisdictions are included in the review: Canada; England and Wales; Scotland; Ireland; Australia (Victoria; Northern Territories; Queensland; New South Wales; Northern Territories); New Zealand and South Africa. Particular attention is paid to Australia in light of the diversity of approaches to sentencing that has been adopted in that jurisdiction.

The focus of the report is on the number and nature of mandatory sentences; however, wherever possible, information is included on the effect of the mandatory sentence legislation. Regrettably,

[1] For discussion of mandatory minimum sentences in a non-western country, see Sharma (1996).
[2] As is the case in Canada, most jurisdictions employ mandatory fines and other sanctions (such as prohibitions); these are not reviewed in this report. The purpose of this report to examine custodial mandatory minimum sentences.

few jurisdictions have undertaken empirical research on the impact of mandatory sentencing on crime rates or prison populations. This absence of empirical research is unfortunate. The principal justification for the creation of mandatory sentences of imprisonment is that by increasing the likelihood of custody, they will provide a greater deterrent to criminal behaviour. For example, mandatory sentences have been introduced in a number of countries for offences committed with a firearm. The justification for this sentencing policy is that it will result in fewer gun-related crimes.

Generally speaking, mandatory sentences of imprisonment in western nations can be classified into three[3] categories:

(i) mandatory sentences of imprisonment that do not allow discretion below or above a specific sentence. This form of mandatory sentence is usually reserved for murder. For example, in Canada, first degree murder carries a mandatory sentence of life imprisonment with no possibility of parole until the offender has served at least 25 years in prison. Courts have no discretion to impose a lesser sentence, or a no-parole period in excess of 25 years.

(ii) mandatory minimum sentences of imprisonment that require courts to impose a sentence of at least "x" years. Courts may impose a harsher sentence (up to the statutory maximum) but are not allowed to impose a sentence below the minimum prescribed. The Canadian firearm mandatory minima represent an example of this form of mandatory sentence. When an offender is convicted of an enumerated offence using a firearm, courts must impose a term of at least four years in custody.

(iii) mandatory sentences of custody that permit the court to impose a lesser, or even a non-custodial sentence in the event that exceptional circumstances exist (the mandatory sentences for repeat serious offenders in England, Wales and South Africa are examples of this kind of mandatory sentence).

Clearly, these categories of sentences represent different degrees limiting judicial discretion at sentencing. Although the current research encompasses only a limited number of jurisdictions, it is apparent that most mandatory sentences fall into the third category that permits some discretion for the courts to impose a lesser sentence. This form of mandatory sentence characterizes legislation found in countries such as South Africa.

[3] This review does not encompass sentencing legislation that pertains to dangerous offenders. For example, England and Wales' *Criminal Justice Act 2003* requires a court to impose a sentence of life imprisonment on offenders considered by the court to represent a significant risk involving serious harm to members of the public.

1.1 Mandatory Sentencing and Public Opinion

Although this report deals only with the statutory regimes with respect to mandatory sentences of imprisonment, it is worth noting that there is evidence from a number of jurisdictions that public support for mandatory sentencing has declined over the past decade. Mandatory sentences of imprisonment represent the most punitive sentencing reforms of recent years and are found in many western nations. Often justified by reference to public opinion, they have proved highly controversial in practice. Where do members of the public stand with respect to the issue?

Few studies have addressed public knowledge of statutory minimum penalties; fortunately, the surveys that exist on this issue have generated the same findings: the general public has little knowledge of the offences that carry a mandatory minimum penalty, or of the magnitude of the statutory minima. For example, in 1998, members of the public responding to the British Crime Survey (BCS) were asked if they were aware of the mandatory minimum prison term of three years for offenders convicted of burglary (see Roberts, 2003). Even though this mandatory sentence had been the object of considerable media attention, less than one quarter of the sample responded affirmatively. This finding is consistent with earlier research in Canada that found that very few members of the public had any idea which offences carried a mandatory sentence (Roberts, 1988).[4]

1.2 Attitudes to mandatory sentencing in the U.S., Australia and Britain

The limitations of opinion polls as a tool to understanding public opinion are apparent in the area of mandatory sentencing. A clear split can be seen with respect to the portrait of public opinion that emerges from standard polls, and other research approaches in which the public is provided with more than a simple question to answer. When simple questions are put to the public, they tend to tap into a vein of punitiveness as the respondents tend to think of the worst case scenarios. For example, when a poll asked people in Britain whether they supported or opposed a "three-strikes" mandatory sentencing scheme whereby offenders automatically receive a prison sentence if they have been convicted of any three crimes, exactly four out of five respondents expressed their support (Observer, 2003). Similarly, when Americans were asked their reaction to a "three-strikes" law for offenders convicted of a third violent felony, almost 90% were in favour (Roberts and Stalans, 1997). When questions are phrased in such a way, respondents are not given a chance to think through the consequences (or costs) of such a sentencing policy; nor are they encouraged to think of the kinds of cases for whom a three-strike sentence of custody may be appropriate.[5]

[4] It should not be surprising that public knowledge of mandatory sentences is poor. Opinion surveys conducted in several jurisdictions have shown that the public knows little about maximum sentences, sentencing options, alternatives to imprisonment, sentencing patterns, recidivism rates, or many other elements of the sentencing process (see Roberts and Hough, 2005, for a review).

[5] For example, respondents may overlook the fact that mandatory sentences of imprisonment violate important sentencing principles such as proportionality in sentencing. In addition, mandatory sentences of imprisonment may prove expensive by increasing the costs of the correctional system as more offenders are admitted to custody (and for longer periods of time).

Applegate, Cullen, Turner and Sundt (1996) explored attitudes towards "three- Strikes" mandatory sentencing laws using a random sample of Ohio residents. Respondents were first asked whether they supported or opposed implementing a "three-strikes" law in their state. Most (88%) expressed their support for the proposal. These same respondents were then given a series of cases to consider that met the three strikes criteria, and were asked to select an appropriate sentence. Support for the Three Strikes law declined significantly once respondents had to consider individual cases. In fact, on average, only 17% of the sample elected to impose the mandatory sentence. Additional analyses demonstrated that the public supported making a number of exceptions to the "three-strikes" law. In other words, they were clearly uncomfortable with the *mandatory* nature of the legislation. Applegate et al. (1996) concluded that: "these findings suggest that citizens would endorse three-strikes policies that focus on only the most serious offenders and *that allow for flexible application*" (p. 517 (emphasis added)). The true level support for mandatory sentencing (or any other complex issue in the area of criminal justice) can only be determined by providing more information and specific examples, in a manner such as the one employed by Applegate et al. (1997).

There is clear evidence that even in the United States, where support is stronger for mandatory sentences, public support for the concept is declining. For example, in 1995 over half of the sampled public in the US held the view that mandatory sentences were a good idea (Roberts, 2003). In 2001, this percentage had declined to slightly more than one-third of respondents (Peter D. Hart Research Associates, 2002; Roberts, 2003). In fact, over half the polled public in the US now favour the elimination of "three-strikes" mandatory sentences (Peter D. Hart Research Associates, 2002). The most recent polling on the issue of mandatory sentencing comes from the state of New Jersey. When asked whether mandatory jail or mandatory drug treatment was the more effective approach to non-violent offenders, respondents chose treatment over imprisonment by a three to one ratio (Eagleton Institute of Politics Center for Public Interest Polling, 2004). Three-quarters of the sample favoured allowing judges to set aside mandatory sentences "if another sentence would be more appropriate" (Eagleton Institute of Politics Center for Public Interest Polling, 2004). Taken together, these results suggest that the impact and realities of mandatory minimum sentences are starting to be understood by the general public.

1.3 Trends in Mandatory Sentencing Legislation

After a decade in which a number of common law countries enacted mandatory sentencing legislation, there is clear evidence that several jurisdictions are now either repealing or amending these punitive laws. For example, in 2002 the Michigan mandatory sentencing laws were significantly amended. The effects of these amendments include the following:

- elimination of mandatory minimum sentencing for certain controlled substance violations;
- creation of provisions that permit courts to consider important mitigating factors; and
- revision of the quantities of drug that trigger certain sentences.

This movement towards a more flexible, judge-determined sentencing scheme is a result of several factors with international repercussions including:

- a shift in public opinion away from supporting strict mandatory minimum sentencing (see above);
- the impact of Advocacy groups such as Families Against Mandatory Minimums Foundation (FAMM)[6];
- growing public disenchantment with the "War on Drugs" that initially triggered many of the most punitive mandatory sentencing laws (see Eagleton Institute of Politics Center for Public Interest Polling, 2004);
- news media coverage of "three-strikes" cases in which offenders whose "third strike" consisted of a less serious felony and stories of offenders receiving lengthy prison terms for offences such as stealing a bicycle from a garage have undermined public support for this kind of sentencing; and
- growing concern among criminal justice professionals that mandatory sentences have played an important role in keeping prison populations from declining, even in an era of falling crime rates.

1.4 The Future of Mandatory Sentencing

It would be overstating the case to say that the pendulum has swung away from mandatory sentencing to a model of sentencing that privileges judicial discretion. However, it is clear that public and legislative interest in mandatory sentencing laws has declined, and is likely to continue to decline in the near future. Although the public supports tough sentencing measures for violent offenders, the experience with mandatory sentencing legislation in a number of countries has shown that these laws do little to promote public confidence in the sentencing process.

1.5 References and Further Reading

Applegate, B., Cullen, F., Turner, M. and Sundt, J. (1996). Assessing public support for 3-strikes and you're out laws: global versus specific attitudes. *Crime and Delinquency*, 42: 517-534.

Bottoms, A. (1995). The Philosophy and Politics of Punishment and Sentencing. In: C. Clarkson and R. Morgan (eds.) *The Politics of Sentencing Reform*. Oxford: the Clarendon Press.

Clarkson, C. and R. Morgan, eds. (1993). *The Politics of Sentencing Reform*. Oxford: The Clarendon Press.

[6] See www.famm.org for further information.

Eagleton Institute of Politics Center for Public Interest Polling (2004). *New Jersey's Opinions on Alternatives to Mandatory Minimum Sentencing*. Newark: Eagleton Institute of Politics Center for Public Interest Polling.

Observer (2003). Crime Uncovered. A Nation under the Cosh? The truth about crime in Britain in 2003. The Observer Magazine, April 27.

Peter D. Hart Research Associates (2002). *Changing Public Attitudes toward the Criminal Justice System*. Washington: The Open Society Institute.

Roberts, J.V. (1988). Public Opinion and Sentencing: the surveys of the Canadian Sentencing Commission. Ottawa: Department of Justice Canada.

Roberts, J.V. (2003). Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings. *Criminal Justice and Behavior*, 20: 1-26.

Roberts, J.V. and Hough, M. (2005). *Understanding Public Attitudes to Criminal Justice.* Maidenhead: Open University Press.

Roberts, J.V. and Stalans, L. (1997). *Public Opinion, Crime, and Criminal Justice*. Boulder: Westview Press.

Sharma, M. (1996). *Minimum Sentencing for Offences in India*. New Delhi: Deep and Deep Publications.

2.0 Canada

2.1 Summary

Twenty-nine offences in the Canadian *Criminal Code* carry a mandatory minimum sentence of imprisonment[7]. The majority (19) of these mandatory minimum sentences were introduced with the enactment of Bill C-68, a package of firearms-related legislation in 1995. In addition, there are also mandatory minimum sentences for other offences, such as child prostitution, betting, pool-making, and impaired driving. Every year in the Canadian Parliament, private member's bills are introduced to add new minimum sentences such as joy riding and repeat violent offenders. In light of this, it is surprising that it has been almost ten years since any amendments have been made to the *Criminal Code* that would add, repeal or modify the current statutory minimum sentences. With respect to the firearms offences, courts must impose a sentence of at least four years imprisonment if the offender has been convicted of one of the enumerated offences (see Appendix A). Currently, there is no discretion for judges to reduce the sentence for anyone convicted of an offence carrying a mandatory minimum sentence in Canada.

2.2 Overview of Sentencing Framework

In 1995, an amendment to the *Criminal Code* regarding sentencing was enacted. The new legislation codified the purpose and principles of sentencing. Section 718, of the *Criminal Code of Canada* states:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> *(a) to denounce unlawful conduct;*
> *(b) to deter the offender and other persons from committing offences;*
> *(c) to separate offenders from society, where necessary;*
> *(d) to assist in rehabilitating offenders;*
> *(e) to provide reparations for harm done to victims or the community; and*
> *(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. (1995, c. 22, s.6).*

In addition, according to s. 718.1 sentences should be proportionate to the offence and reflect the degree of responsibility of the offender. Section 718.2 of the *Criminal Code* outlines other sentencing principles and specifies a number of aggravating factors which the courts may also take into consideration. The aggravating factors include offences motivated by prejudice or hate; if the victim was a spouse or child; if the offender abused a position of authority in committing the offence; if the offence was committed for the benefit of organized crime or if the offence was a terrorism offence.

[7] This was the total number at the time of writing.

2.3 Mandatory Sentences of Imprisonment

Minimum sentences in Canada can be broken down into four principal categories (See Appendix A). The first type is a mandatory life sentence imposed upon conviction for three offences: treason, first degree murder and second degree murder. The second type, the largest category with 16 offences, consists primarily of firearms offences. For some offences within this category, the use of a firearm is embedded within the individual offence section as opposed to being a separate, sentence enhancement. The third category of mandatory minimum sentences pertains to repeat offenders. These sentences apply only to an offender with at least one previous conviction for the same offence. There are seven offences in total in this category and are directed at driving while impaired, betting, and possession of unauthorized weapons.

The last category of minimum sentences is for hybrid offences. In the case of a hybrid offence, Crown prosecutors have the option of electing to proceed by way of a summary or indictable offence. For summary offences, the punishments are less severe and none carry a mandatory minimum sentence. However, for the three firearms offences within this category, if the Crown elects to proceed by way of indictment, a conviction will result in the imposition of a minimum sentence.

2.4 Impact of the Mandatory Sentencing Legislation

While there has been no research into the impact of the 1995 firearms legislation, Meredith, Steinke, & Palmer (1994) examined the mandatory minimum one-year sentence for offenders convicted of using a firearm during the commission of an offence found in s. 85 of the *Criminal Code of Canada*. The researchers found that charges under this section were often used in plea negotiations and about two-thirds of the charges laid were stayed, withdrawn or dismissed. In addition, the study showed that when Crown attorneys proceeded with charges under s. 85, there was a lower probability of conviction.

The judiciary in Canada and elsewhere are opposed to mandatory sentences of imprisonment. The Canadian Sentencing Commission (1987) found in their survey of judges that slightly over half felt that minimum sentences impinged on their ability to impose a just sentence and that inappropriate agreement between defence and Crown counsel may result.

2.5 The Future of Mandatory Sentences of Imprisonment

The future of mandatory minimum sentences in Canada remains unclear. There is some indication that minimum sentences are not an effective sentencing tool: that is, they constrain judicial discretion without offering any increased crime prevention benefits. Nevertheless, mandatory sentences remain popular with some Canadian politicians. Every year in Parliament, bills continue to be introduced that, if passed, would increase the number of mandatory minimum sentences of imprisonment.

2.6 References and Further Reading[8]

Canadian Sentencing Commission (1987). *Sentencing Reform: A Canadian Approach*. Ottawa: Supply and Services Canada.

Crutcher, N. (2001). Mandatory minimum penalties of imprisonment: An Historical Analysis. *Criminal Law Quarterly*, 44(3), 279-308.

Gabor, T. (2001). Mandatory minimum sentences: A utilitarian perspective. *Canadian Journal of Criminology*, 43: 385-405.

Gabor, T., & Crutcher, N. (2002). *Mandatory minimum penalties: Their effects on crime, sentencing disparities, and judicial system expenditures*. Ottawa: Department of Justice Canada.

Meredith, C., Steinke, B., Palmer, S. (1994). *Research on the Application of Section 85of the Criminal Code of Canada*. Working Document WD1994-20e. Ottawa: Department of Justice Canada.

Roberts, J.V. (2003). Public opinion and mandatory sentencing. *Criminal Justice and Behaviour*, 20: 1-26.

Roberts, J.V., & Cole, D.P. (1999). *Making sense of sentencing*. Toronto: University of Toronto Press.

[8] See also the special issue of the Osgoode Hall Law Journal (Volume 39, Numbers 2 and 3) published in 2001 that was devoted to the issue of mandatory minimum sentences.

3.0 England and Wales

3.1 Summary

There are few mandatory sentences of imprisonment in England and Wales. A small number have been introduced in recent years in response to populist pressures and growing public concern about some specific offences such as domestic burglary. Sentencing in England and Wales has traditionally followed a just dessert-based orientation[9], with enhanced penalties for specific categories of offenders.

3.2 Overview of Sentencing Framework

The sentencing of adult offenders in England and Wales will change significantly over the next few years as a result of the reforms introduced by the *Criminal Justice Act 2003*, which received Royal Assent in November 2003 (see Taylor, Wasik and Leng, 2004). As well as re-enacting some existing provisions, this legislation places the purposes and certain principles of sentencing on a statutory footing. It also establishes a mechanism for generating sentencing guidelines to be issued by the newly created Sentencing Guidelines Council for the first time in England and Wales. These provisions in the *Act* reflect, in part, the contents of the Home Office Sentencing Review, chaired by John Halliday, which resulted in a report in 2001 (Home Office, 2001) and a government White Paper published in 2002 (Home Office, 2002).

The *Criminal Justice Act* (2003)[10] prescribes a number of sentencing goals that courts must consider when sentencing offenders:

s. 147 Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing –

> *(a) the punishment of offenders;*
> *(b) the reduction of crime (including its reduction by deterrence);*
> *(c) the reform and rehabilitation of offenders;*
> *(d) the protection of the public; and*
> *(e) the making of reparation by offenders to persons affected by their offences*.

The other important change in sentencing philosophy introduced by the *Criminal Justice Act* concerns the role of previous convictions. If the offender's priors are considered recent enough and relevant for the current sentencing by the court, each previous conviction must be treated as an aggravating circumstance.

[9] Under a just desserts sentencing rationale, the severity of punishments should increase to reflect the seriousness of crimes for which the sentences are imposed. This is known as the principle of proportionality in sentencing (see von Hirsch and Ashworth, 2005).
[10] This legislation can be found at: http://www.opsi.gov.uk/acts/acts2003/20030044.htm

The relevant section provides the following:

> *s. 143 In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular to -*
>
> *(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and*
>
> *(b) the time that has elapsed since the conviction.*

By requiring courts to take into account multiple (and potentially conflicting) sentencing aims, and by giving a progressively larger role to an offender's prior convictions, the *Criminal Justice Act* (2003) could, to a significant degree, move sentencing in England and Wales away from a model based on the principle of proportionality. The *Act* attempts in one provision to preserve proportionate sentencing, while in another seemingly giving an enhanced role to a variety of other sentencing aims, and calling for progressively increasing punishments for recidivist offending. This may be creating some confusion regarding the purpose and principle of sentencing.

3.3 Mandatory Sentences of Imprisonment[11]

Mandatory sentences for serious offences were created by the *Crime (Sentences) Act* of 1997. Three offence categories are included: offenders convicted of repeat serious offences; repeat drug traffickers; and repeat domestic burglars (see Appendix B). The mandatory life sentence for a second conviction of a serious offence was repealed by the *Criminal Justice Act* (2003) but the minima for repeat drug and domestic burglars as well as firearms remain in force. These mandatory sentences of imprisonment reflect the attention paid to recidivist offenders in 1990s, which resulted in "three-strikes" statutes in the United States.

The important point to bear in mind about the mandatory sentences of imprisonment in England and Wales is that they permit some limited judicial discretion in the event that the court is of the opinion that there are particular circumstances which relate to any of the offences or to the offender and would make it unjust to so impose the mandatory sentence. The judge must provide the reasons for not imposing the mandatory sentence. Thus, these mandatory sentences fall into the more flexible category of mandatory minima, namely those sentences that permit judges some flexibility.

[11] According to section 225 of the *Criminal Justice Act (2003)*, a court must impose a sentence of imprisonment for life if certain criteria are met. These pertain to offenders convicted of serious offences that represent a significant risk to members of the public. Since the imposition of this sentence is contingent upon the court considering such an offence justified, it is not included in this review of mandatory sentences despite the language of the *Act* ("the court must impose a sentence of imprisonment for life").

3.4 Mandatory Minimum Sentences for Firearms Offences

Section 287 of the *Criminal Justice Act (2003)* contains a mandatory term of imprisonment for a number of offences found in the *Firearms Act (1968)*. The *Criminal Justice Act (2003)* thus amends the *Firearms Act (1968)* (c. 27) and creates mandatory sentences of imprisonment for a number of firearms offences.[12] Section 287 of the *Criminal Justice Act (2003)* prescribes a minimum sentence of five years custody in the case of an adult offender (aged 18 or older) or a minimum sentence of three years imprisonment for an offender aged 16 years. As with the aforementioned mandatory sentences limited judicial discretion is permitted. Thus:

> *s. 287 (2) The court shall impose an appropriate custodial sentence (or order of detention[13]) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.*

3.5 Impact of the Mandatory Sentencing Legislation

No impact analysis of the mandatory sentencing legislation has been conducted by the Home Office. In light of the relatively small number of offences affected, it seems unlikely that the mandatory sentences have had a significant impact on the prison population in England and Wales.

3.6 Future of Mandatory Sentences of Imprisonment

As noted earlier, there are no plans to increase the number of mandatory sentences of imprisonment in England and Wales. On the other hand, there is no equivalent in Britain to the grassroots movement found in the United States to repeal or amend the existing mandatory sentences.[14] Again, this is likely due to the relative rarity of mandatory minimum sentences within the sentencing framework. The only opposition to the mandatory sentences comes from academics active in the area. There have been some calls to increase the number or scope of mandatory sentences of imprisonment in Britain for terrorist offences. Mandatory minima have become an attractive reform for politicians to propose prior to an election. However, no political party included additional mandatory sentences in its electoral platform during the campaign of 2005. In short, the status quo is likely to remain for some time to come.

[12] The offences include possessing or distributing certain prohibited weapons or ammunition and possessing or distributing a firearm disguised as another object.
[13] This applies to juvenile offenders.
[14] For example, the organization "Families Against Mandatory Minima" has an extensive website devoted to advocacy in this area and has had a clear impact on legislators in a number of states.

3.7 References and Further Reading

Ashworth, A. (2000). *Sentencing and Criminal Justice*. (Third Edition) Butterworths.

Ashworth, A. (2001). The Decline of English Sentencing and Other Stories. In: M. Tonry and R. Frase (eds.) *Sentencing and Sanctions in Western Countries*. New York: Oxford.

Baker, E. & Clarkson, C. (2002). Making Punishments Work: An Evaluation of the Halliday Report on Sentencing in England and Wales, *Criminal Law Review*, 81.

Home Office (2001). *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* . London: Home Office. The report is also available at: <www.homeoffice.gov.uk/cpg/halliday.htm>.

Home Office (2002). *Justice for All.* CM 5563. London: Home Office.

Roberts, J.V. (2002). Alchemy in sentencing: An analysis of sentencing reform proposals in England and Wales, *Punishment and Society,* 4: 25.

Taylor, R., Wasik, M., and Leng, R. (2004). *Blackstone's Guide to the Criminal Justice Act 2003*. Oxford: Oxford University Press.

von Hirsch, A. (2002). Record-enhanced sentencing in England and Wales (2002) 4 *Punishment and Society* 4*:* 443.

von Hirsch, A. & Roberts, J.V. (2004). Legislating Sentencing Principles:
The Provisions of the Criminal Justice Act 2003 relating to Sentencing Purposes
and the Role of Previous Convictions. *Criminal Law Review*, August, 639-652.

von Hirsch, A. and Ashworth, A. (2005). *Proportionate Sentencing. Exploring the Principles*. Oxford: Oxford University Press.

4.0 Scotland

4.1 Summary

Scotland uses the term "automatic sentence" or "required custodial sentence" in addition to "mandatory sentence" in its legislation. Scottish law provides mandatory sentences for a variety of serious repeat offences as well as other offences, some of which mirror those found in England and Wales. In addition to a life sentence for murder, the legislation provides a minimum of 7 years for repeat drug traffickers. Mandatory sentencing in Scotland is somewhat complicated by the fact that there are mandatory sentence provisions in the 1997 *Crime and Punishment (Scotland) Act* which has yet to become law. As is the case in most other jurisdictions, Scottish courts may impose a less severe sanction where it would be unjust to impose the mandatory sentence. In situations where judges impose a sentence below the minimum, they must provide reasons in open court. The drug offence legislation is enumerated below. (See Appendix C.)

4.2 Overview of Sentencing Framework

Although part of the United Kingdom, Scotland has its own criminal justice system. Many of the statutes in England and Wales have equivalents in Scotland, and with the exception of the juvenile justice system, there are important parallels between the two jurisdictions. As with most other common law jurisdictions, Scottish courts have considerable discretion at the sentencing stage of the criminal process. No formal sentencing guidelines currently exist[15] and at present, Scotland does not have any codified sentencing purposes or principles.

4.3 The Future of Mandatory Sentencing in Scotland

There is no discussion at present to create any new mandatory sentences of imprisonment, nor is there any movement to repeal current penalties. No impact analysis research has been conducted to date.

[15] Scottish judges do have a computerized sentencing information system that may well promote uniformity in sentencing.

5.0 Republic of Ireland

5.1 Summary

Irish law provides mandatory sentences for three offences: murder, attempted murder and high treason. The legislation provides a life sentence for murder and treason. It also provides a minimum 40 years imprisonment for the murder and/or a minimum of 20 years imprisonment for the attempted murder of a member of the Garda Síochána, a prison officer, or a political murder. The mandatory sentences were created by the *Criminal Justice Act* (1990). (See Appendix D.)

5.2 Overview of Sentencing Framework

As with most other common law jurisdictions, Ireland courts have considerable discretion at the sentencing stage of the criminal process. No formal sentencing guidelines exist at present nor does Ireland have any codified sentencing purposes or principles. Furthermore, there does not appear to be any plans to place sentencing principles on a statutory footing in the near future.

5.3 Impact and Future of Mandatory Sentencing in Ireland

No impact analysis has been published with respect to sentencing in Ireland and there appears to be no likelihood that additional mandatory sentences will be adopted in the near future.

5.4 References and Further Reading

O'Donnell, I. (2001) Sentencing and Punishment in Ireland. In: M. Tonry (ed.) *Penal Reform in Overcrowded Times*. New York: Oxford University Press.

6.0 South Africa

6.1 Summary

South African law provides minimum sentences of imprisonment for a relatively small range of serious offences, including murder, rape, robbery and serious economic crimes. The least severe mandatory sentence is 15 years imprisonment, rising to 20 and 25 years for offenders with previous convictions for the same offence. The legislation thus provides for progressively harsher penalties for repeat offenders. The mandatory sentencing provisions also contain a clause that allows for judicial discretion: courts may impose a lesser sentence in cases in which "substantial and compelling circumstances exist that justify the imposition of a lesser sentence." Judges must provide their reasons for imposing a sentence below the minimum. The mandatory sentences were created by the 1998 *Criminal Law Amendment Act*, initially for a period of two years, but remain in effect. Commentary on the mandatory sentencing legislation suggests that these penalties were introduced in large measure to placate public opinion as crime rates are high in South Africa (see discussion in Van Zyl Smit, 2000).

6.2 Overview of Sentencing Framework

As with most other common law jurisdictions, South African courts have considerable discretion at the sentencing stage of the criminal process. The mandatory sentences introduced for a limited number of offences therefore run counter to the general ethos of sentencing in that country (see Van Zyl Smit, 2000). At present, South Africa does not have any codified sentencing purposes or principles or sentencing guidelines. However, that is likely to change within the next few years. In 2000, the South African Law Commission released a report containing an integrated package of proposals (South African Law Commission, 2000). Reviewing the entire report is beyond the scope of this summary; however, it may be useful to review the key proposals advanced by the Commission.

The Law Commission proposes an integrated approach to structuring judicial discretion, one comprised of three primary components: (i) statutory principles of sentencing; (ii) creation of an independent Sentencing Council, and (iii) development of comprehensive sentencing guidelines. The proposed statute carries a preamble that articulates its objective as "establishing a comprehensive framework to deter criminal conduct and make society safer by providing for the consistent and just punishment of offenders with sentences that recognize the human dignity of offenders and victims of crime" (p. 49). The proposals articulate a single sentencing purpose, namely "to punish convicted offenders for the offences of which they have been convicted by limiting their rights or imposing obligations on them in accordance with the requirements of this *Act*" (p. 50). While this provision thus omits other potential purposes of sentencing – such as restoration – it nevertheless has the advantage of clarity. The Commission's proposals assign an important role to proportionality in sentencing (South African Law Commission, 2000). The government has yet to respond officially to the Law Reform Commission's report and there is no indication that a response is forthcoming.

6.3 Mandatory Minimum Sentences of Imprisonment

Mandatory sentences have been part of the South African penal landscape for many years. For example, mandatory sentences were prescribed for drug offences in 1971 (*Act 41*), and mandatory corporal punishment was prescribed in limited circumstances in 1952 (Neser, 2001). These have been repealed. The only significant mandatory minimum sentences of imprisonment in this jurisdiction were created within the last few years in response to rising crime rates.

In 1998, the *Criminal Law Amendment Act* was passed. The *Criminal Law Amendment Act* enacted minimum sentences for a wide range of the more serious offences. The *Act* originally applied for a period of only two years, but it has subsequently been extended[16] and there is no indication of it being terminated in the near future, although a number of academics have been critical of the legislation (e.g., Terreblanche, 2003; Van Zyl Smit, 2000). In March 2005, consultations were underway with various agencies and the judiciary, with the purpose of determining whether the mandatory minimum legislation should be renewed. The best indication appears to be that it will be renewed.

Although the mandatory minimum sentences of imprisonment are harsher than those found in other jurisdictions, the *Act* specifically provides discretion for the sentencing judge. Thus, if "substantial and compelling circumstances" are present to justify a lesser sentence, the court is permitted to deviate from the prescribed sentence as long as the judge provides reasons for the deviation on the record.[17] In *S v Malgas,*[18] the Supreme Court of Appeal decided that, if the prescribed sentence would result in an injustice, this would amount to a substantial and compelling circumstance, and the sentencing court would then impose an appropriate sentence. This feature of the South African provisions – combined with the fact that the penalties are mandatory minimum sentences rather than mandatory sentences – provides courts with more discretion than might otherwise be the case. Systematic statistics are not yet available (they will be later in 2005), but anecdotal reports indicate that judges exercise their discretion to circumvent the mandatory sentence in a relatively high proportion of cases. Informal discussions with some members of the judiciary in South Africa suggest that judges are strongly opposed to the mandatory minima.

6.4 Impact of Mandatory Minimum Sentences

The state of sentencing and prison admission statistics in South Africa does not permit reliable inferences to be drawn about the impact of the mandatory sentences on crime rates or prison populations. A number of criminal justice professionals in the country have expressed apprehension that the mandatory sentences have contributed to the country's high (and rising) prison population.[19] However, two reasons argue against the position that the mandatory sentences have played a role in this regard. First, as noted, most commentators agree (and the judiciary acknowledge) that courts frequently use their discretion to circumvent the prescribed

[16] The President of South Africa is authorised, through s 53(2), to extend its operation in consultation with Parliament.
[17] Sec 51(3)(a).
[18] 2001 (1) SACR 469 (SCA).
[19] This comment reflects discussions with key informants in this jurisdiction.

sentence, and second, that the small number of offences included in the legislation (see Appendix E) could not account for the much larger number of admissions to custody. The Ministry responsible for prisons in South Africa is currently investigating the impact of the legislation, and a report, or at least more systematic statistics, should be available later in 2005. Research reveals that the introduction of these mandatory sentences does not appear to have promoted consistency in sentencing across regions of the country (see Paschke and Sherwin, 2000). Moreover, interviews with judges and counsel demonstrate that these professionals "generally preferred the situation before the *Act* came into effect." (Schonteich, Mistry, and Struwig, 2000, p. 6). Judges have continued to criticize the *Act* for limiting their discretion (South African Law Commission, 2000).

6.5 The Future of Mandatory Sentencing

It seems unlikely that the mandatory sentences of imprisonment created for serious crimes will be abandoned in the near future. Although no evidence has been adduced to suggest these penalties reduce crime rates, a number of politicians continue to support the sentences. In addition, anecdotal evidence suggests that the sentences are popular with the general public who are apprehensive about high crime rates. Finally, with the exception of the judiciary, and a small number of academics, no organization has taken a stand against the mandatory sentences in South Africa; as such, the status quo is likely to remain for some time. On the other hand, there is no evidence to suggest that additional mandatory sentences are being contemplated.

6.6 References and Further Reading

Neser, J.J. (2001). *Mandatory minimum sentences in the South African context*. Capetown: Department of Criminology, University of South Africa.

Paschke, R. and Sherwin, H. (2000). *Quantitative Research Report on Sentencing. An empirical quantitative study on sentencing practices in South African courts and an assessment of the impact of the Criminal Law Amendment Act No. 105 of 1997 on behalf of the South African Law Commission*. Capetown: South African Law Commission. Available at: www.wits.ac.za/salc/salc.html.

Schonteich, M., Mistry, D. and Struwig, J. (2000). *Qualitative Research on Sentencing. An empirical qualitative study on the sentencing practices of the South African criminal courts, with particular emphasis on the Criminal Law Amendment Act no. 105 of 1997*. Pretoria: Institute for Security Studies. Available at: www.wits.ac.za/salc/salc.html.

South African Law Commission (2000). *Sentencing (A New Sentencing Framework)*. Report of Project 82. Capetown: South African Law Commission.

Terreblanche, S.S. (1997). Sentencing in South Africa. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

Terreblanche, S. S. (1999). *The Law of Sentencing in South Africa*. Capetown: Butterworths.

Terreblanche, S. S. (2003). Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act, 1997. *Acta Juridica,* 248-283.

Van Zyl Smit, D. (2000). Mandatory Sentences. A conundrum for the new South Africa? *Punishment and Society*, 2(2): 197-212.

7.0 Australia

7.1 Overview

Jurisdiction for sentencing in Australia is shared among six state governments, two autonomous territories and the federal government who share responsibility for criminal law. Few changes have been introduced to federal sentencing legislation since the landmark report of the Australian Law Reform Commission (in 1988). For this reason this report concentrates on mandatory sentencing developments at the state and territorial level.

7.2 References and Further reading

Morgan, N. (2002) Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002. *Criminal Law Journal*, 26: 293-311.

7.3 Northern Territory

The Northern Territory stands out in the Australian federation for having passed the most punitive mandatory sentencing legislation. In 1997, mandatory sentences of imprisonment were created for property crimes committed by adults and juveniles. The mandatory sentences affected a broad range of property offences including: unlawful entry with intent; unlawful use of motor vehicles; property damage; and stealing (including receiving stolen goods). Offenders found guilty of certain property offences were subject to a mandatory minimum sentence of 14 days for the first offence, 90 days for the second conviction and one year for the third offence.

When these sentences were associated with the tragic deaths of a number of offenders in custody, a widespread grassroots campaign led to their amendment. First, in 1999, courts were allowed to depart from imposing the mandatory sentence when exceptional circumstances justified such a departure.[20] In 2000, legislation was passed to mitigate the impact of the mandatory penalty regime, and in 2001, the mandatory minimum sentencing regime for property offenders was replaced by a new scheme that is more flexible.

There are currently three categories of offences for which a minimum term of imprisonment is mandatory: Murder, which carries a mandatory life sentence of imprisonment; "Violent offences" (such as assault) which carry a mandatory prison sentence; and, "Sex offences" (such as rape) which also carry a mandatory prison sentence (see Appendix F).

[20] For example, if the court appearance was related to a single property offence, if the offence was trivial in nature or if the defendant was otherwise of good character and had co-operated with law enforcement agencies. These only apply to juvenile offenders.

7.3.1 Impact of the Mandatory Sentencing Legislation in Northern Territories

As is the case in some other jurisdictions, the mandatory sentencing legislation in the Northern Territory affected Aboriginal offenders to a disproportionate degree. As of 2001, Aboriginal offenders were represented in the population of mandatory sentencing offenders at a rate of 3,728 per 100,000 adult population compared to 432 for non-Aboriginal peoples (Northern Territories Office of Crime Prevention, 2003). This disproportionate impact on Aboriginal communities is one of the factors giving rise to the repeal of some of the provisions.

With respect to the issue of deterrence, the Northern Territories experience suggests that mandatory sentences of imprisonment do not act as an effective deterrent reference. A report on the mandatory sentencing laws published by the Office of Crime Prevention in that jurisdiction concluded that: "The data…..do not support the idea that the threat, or experience of a longer sentence reduced the likelihood of a person being reconvicted for a mandatory sentencing related offence" (Northern Territories Office of Crime Prevention, 2003, p. 6).

Regarding the size of the prison population, this same report concluded that the mandatory sentence laws had "undoubtedly increased the flow of individuals through the prison system" (Northern Territory Office of Crime Prevention, 2003, p. 9). The Australian Bureau of Statistics reported that the Northern Territory prison population had increased by 42% since the inception of mandatory sentencing (Australian Bureau of Statistics, 1998). The Report was unable to draw firm conclusions about the effects of the legislation on crime rates, although the researchers concluded that: "Available data suggests that sentencing policy does not measurably influence levels of recorded crime" (Northern Territory Office of Crime Prevention, 2003, p. 13).

7.3.2 References and Further Reading

Australian Bureau of Statistics (1998). *Year Book Australia, 1998*. National Figures on Crime and Punishment.

Australian Law Reform Commission (1988). *Sentencing*. Report No. 44. Canberra: Australian Law Reform Commission.

Freiberg, A. (1997). Sentencing and Punishment in Australia in the 1990s. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

Freiberg, A. (2001). Three Strikes and You're Out – It's not Cricket: Colonization and Resistance in Australian Sentencing. In: M. Tonry and R. Frase (eds.) *Sentencing and Sanctions in Western Nations*. Oxford: Oxford University Press.

Northern Territory Office of Crime Prevention (2003). *Mandatory Sentencing for Adult Property Offenders. The Northern Territory Experience*. Available at: http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf.

Zdenkowski, G. and D. Johnson (2000). *Mandatory Injustice: compulsory imprisonment in the Northern Territory*. Broadway, NSW: Australian Centre for Independent Journalism.

7.4 Western Australia[21]

The statutory framework of sentencing in Western Australia is provided by the *Sentencing Act* 1995 (W.A.). Western Australia has mandatory minimum sentences comparable to those found in the Northern Territories. Mandatory sentences were enacted in 1996 as a result of amendments to the Western Australia *Criminal Code*. The amendments required the imposition of a minimum twelve-month prison term for repeat adult and juvenile offenders convicted of residential burglary. This provision follows earlier provisions which had the same purpose, and which are described by Freiberg as "a failure on almost every criminological criterion on which they were measured" (2001, p. 42). As with the mandatory sentences in the Northern Territory, the Western Australian provisions have been criticized by many groups such as the Aboriginal Justice Council in Western Australia.

7.4.1 Impact of Mandatory Sentences in Western Australia

The Aboriginal Justice Council is one of the organizations that have documented the effect of the mandatory sentencing legislation. The Council notes that the mandatory sentences have had no impact on burglary rates in the state, and have had a disproportionate impact on Aboriginal offenders appearing before the courts due to the lack of proper diversionary programs for Aboriginal youth (Aboriginal Justice Council, 2001). In light of this, it is not surprising that Aboriginal peoples regard these laws as, in the words of the Aboriginal Council, "racist and discriminatory" (Aboriginal Justice Council, 2001).

7.4.2 References and Further Reading

Aboriginal Justice Council (2001). *Call for Repeal of Western Australian Mandatory Sentencing.* The Guardian, November 28, 2001.

Australian Human Rights and Equal Opportunity Commission (2005). *Mandatory Sentencing Laws in Australia*. Available at: www.hreoc.gov.au/human_rights/children/mandatory_briefing.html.

Freiberg, A. (2001). Three Strikes and You're Out – It's not Cricket: Colonization and Resistance in Australian Sentencing. In: M. Tonry and R. Frase (eds.) *Sentencing and Sanctions in Western Nations*. Oxford: Oxford University Press.

Morgan, N. (1996). Non-custodial Sentences under WA's New Sentencing Laws: Business as usual or a new Utopia? *University of Western Australia Law Review*, 26: 364-388.

Morgan, N. (1999). Accountability, Transparency and Justice: Western Australia's Proposed Sentencing Matrix. *University of Western Australia Law Review*, July, 1999.

[21] A more determinate form of sentencing has been proposed, and draft guidelines introduced. This scheme takes the form of a sentencing matrix similar to that which is found in many American states and at the federal level in the United States. The latest development however, is that the matrix will not be introduced in the near future.

7.5 Victoria

The state of Victoria has no mandatory minimum sentences of imprisonment for offences less serious than murder such as those that exist in Canada, England and Wales and the United States. There is no suggestion that the government has any intention of introducing such minima in the near future.

7.5.1 References and Further Reading

Freiberg, A. (1995) Sentencing Reform in Victoria: A Case Study. In: C. Clarkson and R. Morgan (eds.) *The Politics of Sentencing Reform*. Oxford: the Clarendon Press.

Freiberg, A. (1997) Sentencing Reform in Victoria. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

Freiberg, A. (2001) Three Strikes and You're Out – It's not Cricket: Colonization and Resistance in Australian Sentencing. In: M. Tonry and R. Frase (eds.) *Sentencing and Sanctions in Western Nations*. Oxford: Oxford University Press.

Freiberg, A. and Ross, S. (1999) *Sentencing Reform and Penal Change. The Victorian Experience*. Leichardt: The Federation Press.

7.6 Queensland

Courts in Queensland are guided by the principle of proportionality that was placed on a statutory footing in the 1990s. This principle applies to the sentencing of both adult and juvenile offenders. Sentencing in Queensland is regulated by the *Penalties and Sentences Act*, 1992. This statute contains the purposes of sentencing[22], as well as a limited number of sentencing principles. This statute contains no mandatory minimum sentences of imprisonment. However, the creation of such mandatory sentences has been advocated by a number of individuals and political parties in the state. For example, opposition leader Lawrence Springborg recently[23] (2004) promised to overhaul the sentencing process if elected to office. The proposals advocated a number of "get tough" measures, including "flat time" or "truth in sentencing" legislation that would eliminate early release for serious violent offenders. In addition, mandatory sentences were proposed for habitual home invaders. At the time of writing, no such legislation has been passed.

[22] These include punishment, rehabilitation, deterrence, denunciation and community protection.
[23] View the candidates platform at: http://www.springborg.com/policies/policy_crime.htm

7.6.1 References and Further Reading

Colvin, E. (2003). Sentencing Principles in the High Court and the Penalties and Sentences Act. Queensland *University of Technology Law and Justice Journal,* 3: 1-18. Available at: www.law.qut.edu.au.

Freiberg, A. (1997). Sentencing and Punishment in Australia in the 1990s. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

Office of the Government Statistician (1999). *Sentencing in Queensland Criminal Courts, 1997-98*. Brisbane: Queensland Government.

7.7 New South Wales

Sentencing in New South Wales is regulated by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 which amended the *Crimes (Sentencing Procedure) Act* 1999. This *Act* specifies the purposes of sentencing which include punishment, deterrence, community protection, rehabilitation, offender accountability and recognition of the harm done to individual victims and the community. No mandatory minimum sentences of imprisonment have recently been introduced in New South Wales. One reason for the absence of such sentences may well be the fact that the 1999 legislation introduced the concept of "truth in sentencing" to the state, in order to ensure that a significant proportion of a custodial sentence would be served in prison. These provisions had the effect of increasing the average time served in custody, and reducing the proportion of prisoners whose sentences included a conditional release to community supervision (Gorta, 1997).

Although there are no mandatory sentences of imprisonment, the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 did create what are referred to as standard non-parole sentences for a number of offences. When sentencing an offender for one of a number of enumerated offences, the court must, if it decides that imprisonment is appropriate, be guided by the minimum term of custody.[24] This arrangement restricts a court's discretion with respect to the duration of custody, while leaving a court free to impose a non-custodial sanction. As such, the New South Wales reforms represent an interesting variation on structuring judicial discretion at sentencing. Thus, judges have the discretion to choose between imprisonment or a non-custodial sanction. If the court were to impose a custodial term, it must be for a statutorily specified length.

In 1999, the New South Wales Sentencing Council was established as a result of the *Crimes (Sentencing Procedure) Act*. It is the first council of its kind created in any Australian jurisdiction and has a number of statutory functions. These include providing advice to the Attorney General and preparing research reports on a variety of subjects in connection with sentencing (see www.lawlink.nsw.gov.au/sentencingcouncil.)

[24] For example, if a court decides to impose a sentence of imprisonment on an offender convicted of sexual assault, it must be guided by the standard non-parole period of seven years.

7.7.1 References and Further Reading

Chan, J. (1992). Dangers and Opportunities in the Sentencing Crisis. *Current Issues in Criminal Justice*, 3: 249-250.

Freiberg, A. (1997). Sentencing and Punishment in Australia in the 1990s. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

Johnson, P. (2003). *Reforms to NSW Sentencing Law – The Crimes (Sentencing Procedure) Amendments (Standard Minimum Sentencing) Act 2002*. Paper for the Criminal Law Section and Continuing Professional Development Programme of the New South Wales Bar Association. Available at: www.lawlink.nsw.gov.au/lawlink.

Marin, M. (2003). *Standard Non-Parole Sentencing and Guideline Judgments: Where to from here?* Criminal Law Review Division, New South Wales. Available at: www.lawlink.nsw.gov.au/lawlink.

Gorta, A. (1997). Truth in Sentencing in New South Wales. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

8.0 New Zealand

8.1 Summary

New Zealand is a good example of a jurisdiction that has declined to introduce mandatory minimum sentences of imprisonment for serious crimes, despite populist pressure. In 1999, a referendum was conducted in which residents were asked the following question: "Should there be a reform of our justice system placing greater emphasis on the needs of victims and *imposing minimum sentences* and hard labor for all serious offenders" (emphasis added). In light of the wording of the question it is not surprising that 92% of the sample responded affirmatively. In the 2002 electoral campaign, several parties advocated minimum sentences for violent offenders. For example, the New Zealand First party promised, if elected, to implement mandatory minima for violent offenders. However, the government did not pursue this course of action, electing to pass a Victims' Rights Law in 2002, and then to introduce a sentencing reform Bill (*The Sentencing Act* 2002).

8.2 Overview of Sentencing Framework

In 2002, the statutory framework of sentencing in New Zealand was revamped as a result of passage of the *Sentencing Act*. The purpose and principles of sentencing were put on a statutory footing, with the principle of proportionality assuming a central role in determining sentence severity. As well, there is a clear statutory enunciation of the principle of restraint in sentencing. The language used in the New Zealand statute is particularly directive. Courts are instructed that:

> *s. 16(1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.*

And further:

> *The court must not impose a sentence of imprisonment unless it is satisfied that:*
>
> *(a) a sentence is being imposed for all or any of the [statutory] purposes [of sentencing] and*
>
> *(b) those purposes cannot be achieved by a sentence other than imprisonment; and*
>
> *(c) no other sentence would be consistent with the application of the principles [of sentencing].*

8.3 The Future of Sentencing in New Zealand

It appears unlikely that New Zealand will adopt any mandatory sentences in the near future. New Zealand represents an interesting example of a country that has resisted the temptation to introduce mandatory sentences of imprisonment, despite the presence of some of the pressures that have elsewhere resulted in such legislation.

8.4 References and Further Reading

Brown, M. and Young, W. (2000). Recent Trends in Sentencing and Penal Policy in New Zealand. *International Criminal Justice Review*, 65: 45-52.

Hall, G. (2002). *Sentencing*. Wellington: Butterworths.

Roberts, J.V. (2003). An Analysis of the Statutory Statement of the Purposes and Principles of Sentencing in New Zealand. *Australia and New Zealand Journal of Criminology*, 36(3): 249-271.

Thorp, T. M. (1997). Sentencing and Punishment in New Zealand. In: M. Tonry and K. Hatlestad (eds.) *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

9.0 Sentencing in Other Nations

This report on mandatory sentencing concludes by noting mandatory sentencing laws in other western nations. A comprehensive survey of even a number of representative countries is beyond a single report.[25] However, two observations can be made. First, there is no evidence that other western nations have adopted mandatory sentences of imprisonment as a response to rising crime rates. The mandatory sentences of custody that exist have been part of the sentencing framework for many years, and generally focus on exceptional crimes such as murder.

Second, when minimum sentences of imprisonment exist, courts are provided with discretion to sentence below the minimum when mitigating circumstances exist. For example, Swedish criminal law allows courts to sentence below the statutory minimum and to impose less severe punishment than imprisonment when mitigating circumstances are present. The current sentencing principles were introduced into the Swedish *Penal Code* in 1989 with the aim of increasing the predictability and consistency of penal decision-making. The law sets forth "penalty scales" with maximum and minimum sentences specified individually in relation to each crime. A number of aggravating and mitigating circumstances are provided. These arrangements are comparable to the "judicial discretion" clauses that have been identified in several common law countries such as South Africa.

[25] Additional information about sentencing in several countries (including Poland, France, Romania, and Sweden) is available from the author.

10.0 Conclusion

This report has demonstrated that while mandatory sentences of imprisonment proved popular in the 1990s across a number of common law jurisdictions, closer examination of the laws reveals that many countries allow courts the discretion to sentence below the minimum when exceptional circumstances exist. This usually means that courts are permitted to consider mitigating factors relating to the offence or the offender, in some cases, as long as the judge provides written reasons for doing so. In addition, while the general public appears to favour the use of mandatory sentences for offenders convicted of the most serious offences and repeat offenders, there are important limits on public support for strict mandatory sentencing laws. When the public is provided with more information regarding the law and the circumstances surrounding the offence and the offender, the tendency is not to favour punitive sanctions such as mandatory minimum sentences.

Appendix A

Canada

1. Mandatory Life Sentences

Section	Offence	MMS	Enacted
s. 47(1)	High Treason	Life (25)	1976
s. 231(1) – (6.1)	1st degree murder	Life (25)	1976
s. 231(7)	2nd degree murder	Life (10-25)	1976

2. Mandatory Minimum Sentences

Section	Offence	MMS	Enacted
s. 236(a)	Manslaughter with firearm	4 yrs	1995
s. 239(a)	Attempted murder with firearm	4 yrs	1995
s. 244	Causing bodily with intent with firearm	4 yrs	1995
s. 272(2)(a)	Sexual assault with firearm	4 yrs	1995
s. 273(2)(a)	Aggravated sexual assault with firearm	4 yrs	1995
s. 279(1.1)(a)	Kidnapping with firearm	4 yrs	1995
s. 279.1 (1)(a)	Hostage taking with firearm	4 yrs	1995
s. 344(a)	Robbery with firearm	4 yrs	1995
s. 346(1.1)(a)	Extortion with firearm	4 yrs	1995
s. 220 (a)	Criminal negligence causing death with firearm	4 yrs	1995
s. 85(1)	Using a firearm during the commission of an offence	1 yr	1976
s. 85(2)	Using imitation firearm during commission of offence	1 yr	1995
s. 99	Weapons trafficking	1 yr	1995
s. 100	Possession for purpose of weapons trafficking	1 yr	1995
s. 103	Import/export firearm knowing it is unauthorized	1 yr	1995
s. 212 (2.1)	Living off the avails of child prostitution	5 yrs	1996

3. Repeat Offenders

Section	Offence	MMS	Enacted
s. 92(1)	Possession of firearm knowing it is unauthorized	2nd conviction – 1 yr, 3rd & sub – 2 yrs less a day	1995
s. 92(2)	Possession of weapon/device /ammunition know its possession is unauthorized	2nd conviction – 1 yr, 3rd & sub – 2 yrs less a day	1995
s. 202(b)	Betting, pool-selling, book-making, etc.	2nd conviction – 14 days 3rd & sub – 90 days	1976
s. 203(e)	Placing bets on behalf of others	2nd conviction – 14 days 3rd & sub – 90 days	1976
s. 253(a)	Operating while impaired	2nd conviction – 14 days 3rd & sub – 90 days	1954
s. 253(b)	Blood alcohol over .08	2nd conviction – 14 days 3rd & sub – 90 days	1976
s. 254	Fail/refuse to provide breath sample	2nd conviction – 14 days 3rd & sub – 90 days	1976

4. Hybrid offences - A hybrid offence is an offence where the Crown has the option to proceed summarily or by way of indictment. Crown election in each case will be the deciding factor as to whether the offender will receive a minimum sentence. If the Crown proceeds summarily, there is no mandatory minimum in place. However, if the Crown elects to proceed by way of indictment, the offender, if convicted, will face a minimum sentence.

Section	Offence	MMS	Enacted
s. 95	Possession of prohibited or restricted firearm with ammunition	Indictment – 1 yr Summary – no MMS	1995
s. 96(2)(a)	Possession of weapon obtained by commission of an offence	Indictment – 1 yr Summary – no MMS	1995
s. 102(a)	Making automatic firearm	Indictment – 1 yr Summary – no MMS	1995

Appendix B

England and Wales

Mandatory Minimum Seven Year Sentence for Third Drug Offence
110[26]—
(1) This section applies where –
(a) a person is convicted of a class A drug trafficking offence committed after 30th September 1997;
(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of two other class A drug trafficking offences; and one of those other offences was committed after he had been convicted of the other.
(2) The court shall impose an appropriate custodial sentence for a term of at least seven years except where the court is of the opinion that there are particular circumstances which –
(a) relate to any of the offences or to the offender; and
(b) would make it unjust to do so in all the circumstances.
(3) Where the court does not impose such a sentence, it shall state in open court that it is of that opinion and what the particular circumstances are.

Mandatory sentence of three years or more for third conviction for residential burglary
111[27] –
(1) This section applies where –
(a) a person is convicted of a domestic burglary committed after 30th November 1999;
(b) at the time when that burglary was committed, he was 18 or over and had been convicted in England and Wales of two other domestic burglaries; and
(c) one of those other burglaries was committed after he had been convicted of the other, and both of them were committed after 30th November 1999.
(2) The court shall impose an appropriate custodial sentence for a term of at least three years except where the court is of the opinion that there are particular circumstances which –
(a) relate to any of the offences or to the offender; and
(b) would make it unjust to do so in all the circumstances.
(3) Where the court does not impose such a sentence it shall state in open court that it is of that opinion and what the particular circumstances are.

[26] S. 110 of the *Powers of Criminal Courts (Sentencing) Act 2000*.
[27] S. 111 of the *Powers of Criminal Courts (Sentencing) Act* 2000.

Appendix C

Scotland

s.110 Minimum of seven years for third class A drug trafficking offence:
(1) This section applies where—
(a) a person is convicted of a class A drug trafficking offence committed after 30th September 1997;
(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of two other class A drug trafficking offences; and
(c) one of those other offences was committed after he had been convicted of the other.
(2) The court shall impose an appropriate custodial sentence for a term of at least seven years except where the court is of the opinion that there are particular circumstances which—
(a) relate to any of the offences or to the offender; and
(b) would make it unjust to do so in all the circumstances.
(3) Where the court does not impose such a sentence, it shall state in open court that it is of that opinion and what the particular circumstances are.
(4) Where—
(a) a person is charged with a class A drug trafficking offence (which, apart from this subsection, would be triable either way), and
(b) the circumstances are such that, if he were convicted of the offence, he could be sentenced for it under subsection (2) above, the offence shall be triable only on indictment.
(5) In this section "class A drug trafficking offence" means a drug trafficking offence committed in respect of a class A drug; and for this purpose--
"class A drug" has the same meaning as in the *Misuse of Drugs Act* 1971;
"drug trafficking offence" means an offence which is specified in—
(a) paragraph 1 of Schedule 2 to the *Proceeds of Crime Act* 2002 (drug trafficking offences), or
(b) so far as it relates to that paragraph, paragraph 10 of that Schedule.
(6) In this section "an appropriate custodial sentence" means—
(a) in relation to a person who is 21 or over when convicted of the offence mentioned in subsection (1)(a) above, a sentence of imprisonment;
(b) in relation to a person who is under 21 at that time, a sentence of detention in a young offender institution.

Appendix D

Republic of Ireland

Sentence for treason and murder.
2.—A person convicted of treason or murder shall be sentenced to imprisonment for life.

Special provision in relation to certain murders and attempts.
3.—(1) This section applies to—

(a) murder of a member of the Garda Síochána acting in the course of his duty,

(b) murder of a prison officer acting in the course of his duty,

(c) murder done in the course or furtherance of an offence under section 6 of the *Offences against the State Act, 1939*, or in the course or furtherance of the activities of an unlawful organisation within the meaning of section 18 (other than paragraph (f)) of that *Act*, and

(d) murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State, and to an attempt to commit any such murder.

(2)(a) Subject to paragraph (b), murder to which this section applies, and an attempt to commit such a murder, shall be a distinct offence from murder and from an attempt to commit murder and a person shall not be convicted of murder to which this section applies or of an attempt to commit such a murder unless it is proved that he knew of the existence of each ingredient of the offence specified in the relevant paragraph of subsection (1) or was reckless as to whether or not that ingredient existed.

(b) Save as otherwise provided by this *Act*, the law and procedure relating to murder and an attempt to commit murder shall apply to the offence.

(3) In this section "diplomatic officer" means a member of the staff of a diplomatic mission of a foreign State having diplomatic rank; "prison" means any place for which rules or regulations may be made under the *Prisons Acts, 1826 to 1980*, section 7 of the *Offences against the State (Amendment) Act, 1940*, section 233 of the *Defence Act, 1954*, section 2 of the *Prisoners of War and Enemy Aliens Act, 1956*, or section 13 of the *Criminal Justice Act, 1960*; "prison officer" includes any member of the staff of a prison and any person having the custody of, or having duties in relation to the custody of, a person detained in a prison.

4.—Where a person (other than a child or young person) is convicted of treason or of a murder or attempt to commit a murder to which section 3 applies, the court—

(a) in the case of treason or murder, shall in passing sentence specify as the minimum period of imprisonment to be served by that person a period of not less than forty years,

(b) in the case of an attempt to commit murder, shall pass a sentence of imprisonment of not less than twenty years and specify a period of not less than twenty years as the minimum period of imprisonment to be served by that person.

Appendix E

South Africa

First Level: Imprisonment for Life
Offence (Part I of Schedule 2):
Rape (a) when committed

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or
(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim –

(i) is a girl under the age of 16 years;
(ii) is a physically disabled woman who due to her physical disability, is rendered particularly vulnerable; or
(iii) is a mentally ill woman as contemplated in section 1 of the *Mental Health Act*, 1973 (*Act* No. 18 of 1973); or

(c) involving the infliction of grievous bodily harm.

Second Level: Lesser terms of custody
First offender: imprisonment for not less than 15 years:
Second offender of any such offence, to imprisonment for a period of not less than 20 years;
Third or subsequent offender of any such offence, to imprisonment for not less than 25 years

Offences (from Part II of Schedule 2):
Robbery—

(a) when there are aggravating circumstances; or
(b) involving the taking of a motor vehicle

Any offence referred to in section 13(f) of the *Drugs and Trafficking Act*, 1992 if it is proved that –

(a) the value of the dependence producing substance in question is more than R50,000
(b) the value of the dependence producing substance in question is more than R10,000 and the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
(c) the offence was committed by any law enforcement officer.

Any offence relating to-

(a) the dealing or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft –

(a) involving amounts of more than R500,000;

(b) involving amounts of more than R100,000 if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy by any law enforcement officer –

(i) involving amounts of more than R10,000; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Limited Judicial Discretion

As noted, courts have some discretion to impose a more lenient sentence:

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

Appendix F

Northern Territory

Division 6A – Imprisonment for violent offences
78BA. Imprisonment for violent offences

(1) Where a court finds an offender guilty of a violent offence and the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence, the court must record a conviction and must order that the offender serve –

(a) a term of actual imprisonment; or
(b) a term of imprisonment that is suspended by it partly but not wholly.

(2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other *Act* in addition to an order under subsection (1).

Division 6B – Imprisonment for sexual offences
78BB. Imprisonment for sexual offences

(1) Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve –

(a) a term of actual imprisonment; or
(b) a term of imprisonment that is suspended by it partly but not wholly.

(2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other *Act* in addition to an order under subsection (1).