



# The History & Trends of Sentencing in Relation to Child Sexual Offences

**A Collaborative Project with HAQ Centre for Child Rights**

**Supervised by:**

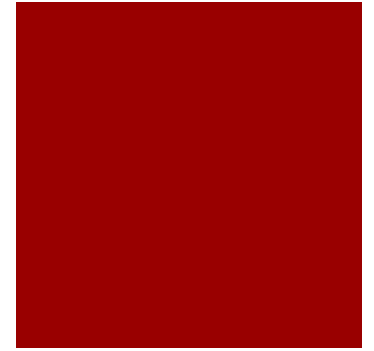
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**Aims**

# Overview

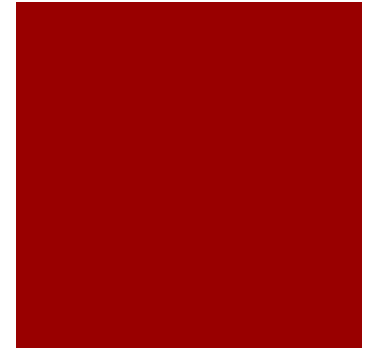


- The report explores and contextualises the critical debates and discussions around the issue of sentencing in the context of sexual violence in:
  - Australia
  - Canada
  - England and Wales
  - Germany
  - Malaysia
  - New Zealand
  - South Africa
  - United States of America
- The report addresses the basic principles of sentencing in each jurisdiction and how these principles have evolved with time. This includes debates around the use of mandatory sentencing, castration and the death penalty,

# **Part 1: Principles and Purposes of Sentencing**

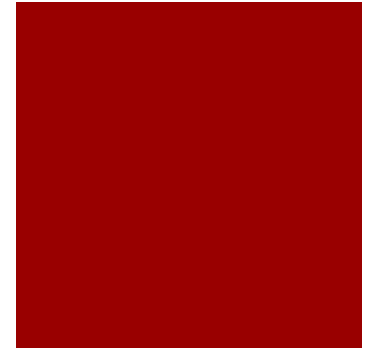
## **A Principles**

# Reasonableness



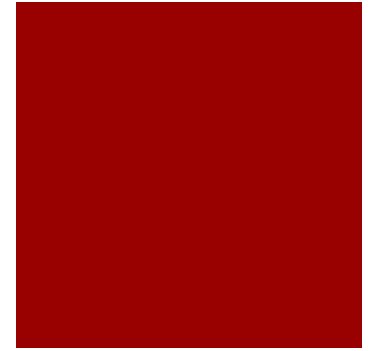
- Determination of whether a sentence that is mandated on an offender is just and proportional to the crime that was committed
- Often used in describing the notion of proportionality in sentencing
- However, reasonableness as a separate principle in sentencing has been discussed in the United States. This is in regards to mandatory sentencing, and the principle of reasonableness ensures that the judiciary in the United States cannot use their unfettered discretion in order to sentencing an offender disproportionately. This is through the use of guidelines as a tool to advise judges on considerations when sentencing offenders

# Proportionality



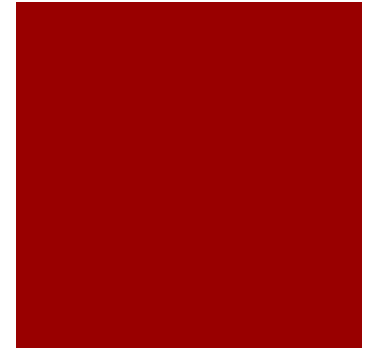
- Punishment should be proportionate to:
  - *The seriousness of the offence, and*
  - *The offender's degree of responsibility*
- Fundamental principle in sentencing
- Proportionate Sentencing > Community Protection
- Utilitarianism argument supporting proportionate sentencing
- Debate surrounding proportionality:  
*Should the proportionality principle take into account the offender's unique circumstances and mitigating factors in sentencing?*

# Equal Application/Parity



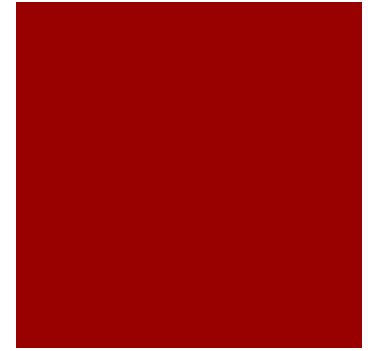
- Refers to the notion that sentences are consistent and equal between offenders
- Equal application is a principle that is based on the rule of law
- There are often practical difficulties in satisfying this principle
  - insufficient sentencing information available to both judges and legal representatives
    - Unaware of the average sentence for that particular offence
    - Difficult to present arguments about whether the sentence is too light or too harsh

# Parsimony



- Sentences which more severe than necessary to achieve the purpose of the sentence should be avoided.
- **Human rights** - sentences should not be 'unnecessarily burdensome' and should 'minimise gratuitous suffering'
- **Economic/Policy** - favours processes that utilise minimum resources to achieve sentencing purposes more expediently
- At odds with **proportionality** - parsimony would favour imposition of the 'least restrictive alternative,' which may not necessarily be justified in the circumstances.

# Dignity



- The dignity of the offender should be a consideration in their sentencing
- The concept of dignity has many overlapping philosophical and metaphysical bases, but the common core of these can be thought of as a mutual respect for the value of human life
- Instrumentalisation test' - requires the observer to look at whether the offender is used as an instrument to achieve an external goal, or if the rights and needs of the person are being considered, with an emphasis on autonomy of the offender.
- Dignity is currently not a large consideration in the United States, but a significant factor in sentencing in Germany

# Human Rights



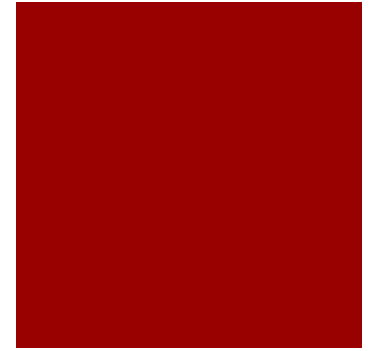
Human Rights influences global sentencing practices by focusing on the following issues:

- Non-Custodial Sentencing
  - There must be a broad range of sentencing options because the prison system itself is not successful for rehabilitating offenders
- Violations with Long Custodial Sentencing
  - Life Without Parole - Removes any possibility of rehabilitation and reformation
  - Consecutive Sentences - Final penalties should reflect overall culpability
  - Mandatory Minimum Sentences - May lead to disproportionate punishment
- Violation with Death Penalty - The 'ultimate denial of human rights'
  - Latest death penalty report shows that 98 countries have abolished the death penalty for all crimes
  - 35 have abolished the death penalty in practice (retain but have not executed anyone in the past 10 years and are believed to have a policy of not carrying out executions)
  - 58 countries continue to retain the death penalty
- Juvenile Justice
  - Minimum Age of Criminal Responsibility - CRC has recommended the age of 12
  - Violation with Juveniles Tried as Adults - Juvenile status must be considered in criminal proceedings
- Chemical Castration
  - Right to entertain sexual fantasies
  - Ban on 'cruel and unusual punishment'
  - Right to due process and equal protection, thus prohibiting states from depriving citizens of life, liberty, or property

# **Part 1: Principles and Purposes of Sentencing**

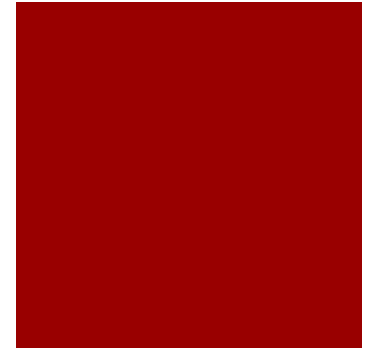
## **B Purposes**

# Retribution



- Notion:
  - Those who do harm to society or harm to others should be penalised.
  - Synonymous with “just deserts” → people should receive what they deserve.
- Retributive justice is backward looking.
  - A response to past injustice or wrongdoing and acts to try to reinforce the rules broken, and balance the scales.
  - Proportionality is a key feature:
    - Punishment generally, should be no more or less than is merited by the severity and seriousness of the offence.

# Incapacitation

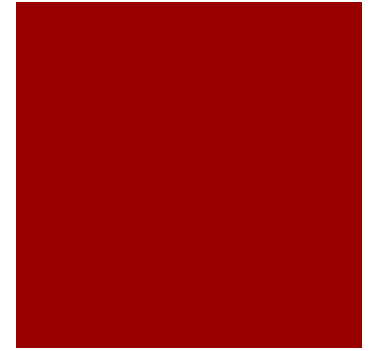


- Process of physically isolating the offender to prevent re-offending, usually through imprisonment
- Collective incapacitation – sentences that capture all offenders who commit a particular offence – ie: mandatory sentences
- Selective incapacitation – sentences tailored to the individual offender. Aims to identify and incapacitate small group of repeat offenders.
- Is strongly linked with the purpose of deterrence
- Studies = either no correlation or a small correlation between incapacitation practices and crime rates
- Concerns about selective incapacitation

# Deterrence

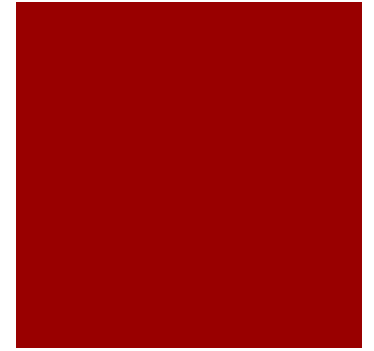
- Imposing a more severe sentence to attempt to reduce rates of recidivism for both the particular offender (specific) and potential offenders (general)
- Rational choice theory – cost v benefit model
- Presumption – potential offenders are aware of penalty for committing the crime
- 3 factors – certainty, severity and swiftness
- Increasing likelihood of being caught does not decrease crime rates – Canada
- Increasing severity of penalty - encounters subjective discount rates
- Difficult to increase swiftness

# Rehabilitation



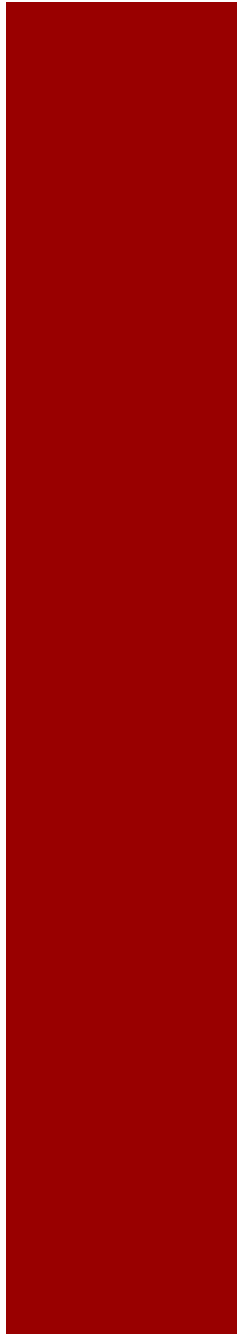
- Aim: treat defendant in such a way that he/she is able to reintegrate into society, as functioning and law-abiding citizen
- Implemented in several stages:
  - As sentence
  - Concurrently with incarceration
  - Parole
- Only effective if defendant admits guilt and is willing participant
- Restorative justice: aims to include all stakeholders in a crime
  - Informal
  - Open communication

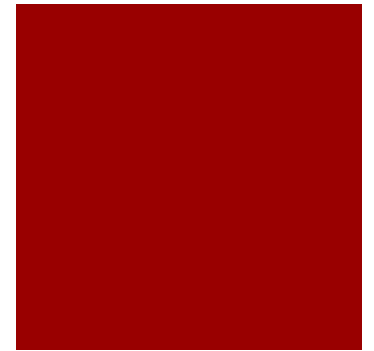
# Denunciation



- The theory of punishing offenders as their sentence would send a message to society that that actions are a violation to the morals and values of the community
- Sentencing to denounce the conduct of an offender is often paired together with retribution and deterrence
- Denunciation takes a utilitarian approach to sentencing, taking aim at the offender for the benefit of society
- Denunciation looks to the effect that a punishment would have on the wider community, rather than the impact it would have on the offender.

# **Part 2: Principles of Sentencing in Various Jurisdictions**



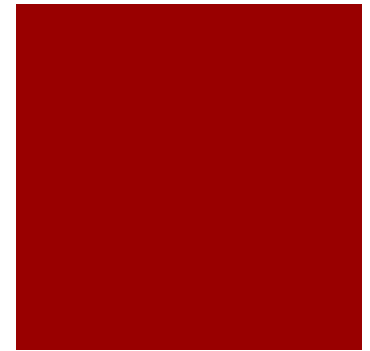


# Australia

- 6 States and 2 Territories = 9 jurisdictions overall (including the Commonwealth of Australia- Federal)
- 'child' = under the age of 10 years
- 'juvenile' = under the age of 18 years

## Mandatory Minimum Sentences

- Introduced in response to calls for more stringent and consistent sentencing for certain offences → 'tough on crime' approach
- Introduced only in States of New South Wales, Northern Territory and Queensland for sexual assault offences and sexual assault against children
- Insufficient evidence to suggest that mandatory minimum sentencing achieves its aims
- Alternative: **Guideline Judgements:**
  - Court decisions that give judges guidance on sentencing offenders
  - Main purpose: improve sentencing consistency



# Australia (cont.)

## Death Penalty

- Abolished at federal level: 1973
- Abolished in all States and Territories: 1984
- However, debate persists as to whether the death penalty should be re-instated
- Life imprisonment (25 years) is now the most severe punishment under Australian law
- Strong arguments against re-implementation

## Chemical Castration

- Offered as alternative to imprisonment or as a condition for early release
- Used in the States of Queensland, New South Wales and Western Australia
- Strong debate as to whether chemical castration should be imposed on convicted sex offenders
- Measures may be introduced to ensure the ethics and effectiveness of chemical castration as treatment



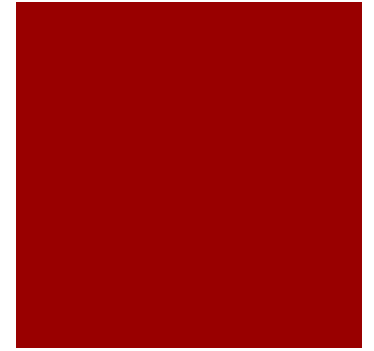
# Canada

- **Mandatory minimum sentences (MMS)** have only been introduced for sexual offences against children, only since 1995 (originally – firearms)
  - Canadian Sentencing Commissions have continuously recommended abolishing MMS generally
  - Confusion over operation of sentencing principles – conflict between proportionality, deterrence and MMS
    - Judiciary = focus on deterrence, ignore proportionality
    - Academics = concerned increase all penalties for the offence if proportionality followed
  - Justified – support of public
    - Only support in theory – think unfair in practice
  - Recommendation - either remove or change to a presumption and add sunset clause



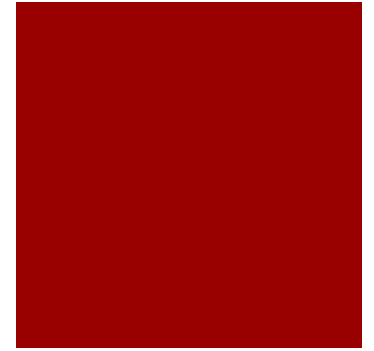
## Canada (cont.)

- **Death penalty** was effectively abolished in 1976.
  - Polls reveal that general population still supports – based on deterrence
  - Academics – noted federal parliamentary support exists
  - BUT – constitutional limits
    - Judiciary -incompatible with Constitutional Canadian Charter of Rights and Freedoms
    - Canada signatory of optional protocol ICCPR – abolish death penalty
  - Unlikely to be able to re-implement
- **Chemical castration** limited discussion in Canada. Optional condition for release from parole – determined by National Parole Board for dangerous or long-term offenders. Limited use, few studies on success.
  - Further research is needed



# England and Wales

- Utilisation of 'Sentencing Guidelines' that specify a range of sentences with starting points, and list any factors or mitigating circumstances that can affect the sentence
  - Such factors include the offender's culpability, the degree of harm, and any aggravating or mitigating circumstances
- Sexual Offences are dealt with under the *Sexual Offences Act 2003* and the *Sexual Offences Definitive Guideline*
  - There is a broad range of sentencing options with the aim to prevent re-offending, including community orders, disqualification orders, and deprivation orders
- **Mandatory Sentences**
  - Murder carries a mandatory sentence of life imprisonment. Courts fix a 'minimum term' to be served
  - Can also be given in other circumstances, but courts can still avoid using this if it is 'unjust to do so in all circumstances'
- **Death Penalty**
  - Abolished in 1998, with the last execution carried out in 1964
- **Castration**
  - Chemical castration is available as a voluntary treatment plan under a pilot program



# England and Wales (cont.)

## **Mandatory Sentences**

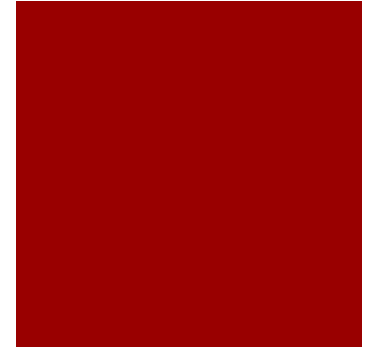
- Many complaints about mandatory sentencing concerns the strict sentencing framework that is imposed
  - Can result in patterns and sentencing disparities that correlate with race, age, or other attribute
  - Restricts judicial discretion in relation to mitigation and culpability

## **Death Penalty**

- As of 2015, the UK Government has stated that they are opposed to the death penalty in all circumstances
- They lead the way in the movement for abolition internationally due to their experience with the tragic outcomes of capital punishment, and the acceptance that state-sanctioned taking of life is wrong

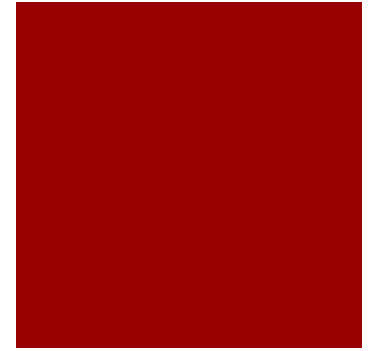
## **Castration**

- Research on the effectiveness of chemical castration has been largely optimistic
- It should be done with a combination of psychotherapy or other form of counselling in order to address perceptions, denial or attitudes towards children
- Participation should be voluntary. Selection should be based on the offender's suitability and motivation, not the seriousness of the crime
- Most factors are already addressed in England's pilot of chemical castration



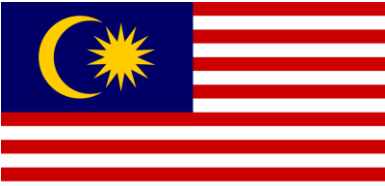
# Germany

- **Constitutional, Civil Law System**
  - Criminal law is federal jurisdiction
    - No jury trials
    - Lack of prosecutorial discretion
    - Role of Federal Constitutional Court
- **Mandatory Sentencing**
  - Strictly enforced
  - Maximum and minimum mandatory sentences
  - Separate or consecutive sentences prohibited
  - Justification: proportionality principle, equal application and human rights/dignity
- **Juvenile and Adolescent Defendants**
  - Not bound by legality principle
  - Special juvenile courts
  - Prioritise education



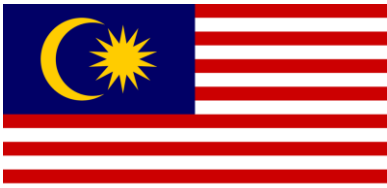
# Germany (cont.)

- **Death Penalty**
  - Historical use
  - Now: explicitly forbidden (*Basic Law* art 102) since 1949 (West Germany) and 1990 (East Germany)
  - Cannot be justified under proportionality principle and human rights principles
- **Castration**
  - Surgical castration
  - Voluntary, considered treatment option
  - European Committee for Prevention of Torture and Inhumane or Degrading Treatment or Punishment Report: claims practice is form of torture
    - German Government currently reviewing practice



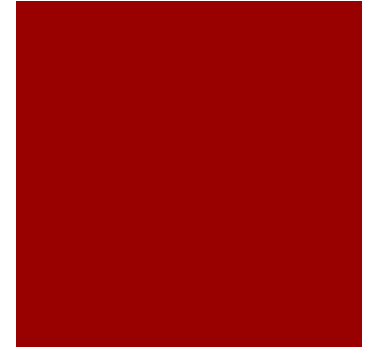
# Malaysia

- *Child Act 2001* recognises children need 'special safeguards'
  - Protections - mandatory reporting, child protection teams, court for children, possible introduction of child sex offender registry
  - Age of consent: 16 for females, 13 for males
- **Mandatory Sentences**
  - Minimum mandatory, subject to maximum threshold
  - Provision for aggravating factors
  - Justified by deterrence and protection
  - Consistent operability affected by judicial discretion
- **Death Penalty**
  - Still in force - justified by proportionality and protection
  - If rape/attempted rape results in the death of the victim
  - Movement to imposing a moratorium - human rights considerations, only used 10 times in last decade



# Malaysia (cont.)

- **Castration**
  - Not used
  - Movement to introduce as alternative sentencing procedure
  - Desirable for proportionate, protectionist, rehabilitative and reversible nature
- **Judicial Caning**
  - Mandatory and discretionary penalty for sexual offences
  - Justified in deterrent capabilities
- **Effective?** In 2007 - 3,000 instances of rape, approximately 1,600 females under 16
- **Recommendations**
  - Concurrent chemical castration and rehabilitation programmes
  - Promoting social change and recognition of women's rights and equality to minimise the 'sexual victimisation of women'



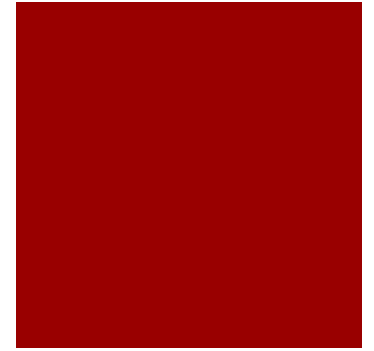
# New Zealand

- There is a presumption of imprisonment for sexual offences against children, or any person regardless of age.
- Against a child = 14 years. Young person = 10 years. Rape = 20 years.
- New Zealand's justice system is based on the notion of restorative justice, no longer exclusively retribution or punishment.
  - Judges must impose the least restrictive outcome that is appropriate in the circumstances.
- Instead of mandatory sentencing, there are other regimes in place once the offender is in prison, which aims to serve the purposes of therapeutic justice the focus of which is, "the potential beneficial and harmful impacts of justice intervention itself".
  - **Minimum Period Imprisonment (MPI)**
  - **ESOs (Extended Supervision Orders)**
  - **Preventative detention**
  - **Three Strikes Regime**



# New Zealand (cont.)

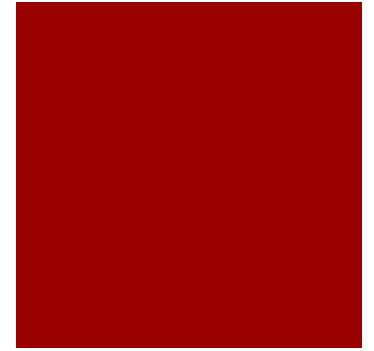
- **Guideline judgments:** Restorative justice → alternative sentencing method.
  - court takes into account more specific circumstances, including aggravating and mitigating factors → proportionate sentence for the offender.
- **Death Penalty** abolished since 1989, with the last execution in 1957.
- **Chemical castration** is not a sentencing option in New Zealand, with an absence of recent debate as a condition for release or sentencing alternative.
- **Recommendations:** Specialist Courts
  - Entry into the specialist court would depend on the 'suitability' of the offender, informed victim agreement and guilty plea.
  - Softer approach à education, rehabilitation and restorative justice processes + special supervision would provide the offender with the opportunity for a 'softer' sentence.
  - **Benefits:** vehicle to shape the future behaviour of litigants and society's outlook on offenders.
    - enhance victim reporting, motivate offenders to plead guilty and incentivise the engagement with restorative justice processes.



# South Africa

## Mandatory Minimum Sentencing

- Introduced in 1997 after the abolition of the death penalty and the rising crime rate in South Africa.
- Mandatory minimum sentencing for rape against both adults and children are under a uniform sentencing framework. There is no difference between adult and child victims.
- Minimum sentences for rape for the first offence is 10 years, for the second offence of 15 years, and the third and subsequent offence for 20 years
- However, history of unfettered judicial discretion in South Africa prior to the introduction of mandatory minimum sentencing has resulted in the judiciary finding loopholes to circumvent mandatory sentencing. This includes the use of 'substantial and compelling circumstances' in order to ignore statutory sentences in favour of judicial sentencing.



# South Africa (cont.)

## Death Penalty

- South Africa abolished the death penalty in 1997, after the Constitutional Court found that the sentence of death violated both international human rights law, as well as the South African Constitution guaranteeing citizens freedom from inhuman treatment
- The perceived ineffectiveness of the current sentencing framework to combat crime, especially sexual crimes against women and children has led to calls for the reintroduction of the death penalty. However, as studied in the past, the death penalty did not have the desired effect of deterring crime during South Africa's apartheid years.



# United States of America

## **Federated State with Common Law Legal System**

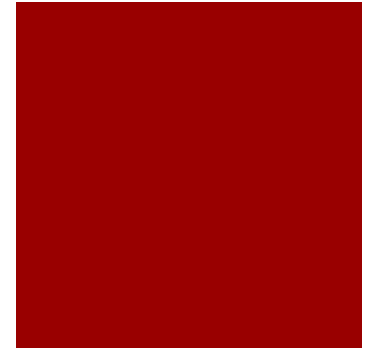
- Each of the 50 states has control over their own criminal law
- Crimes against the person are almost all regulated at the state level.
- California and Florida have a codified criminal law and procedure.

## **Mandatory Sentencing**

- Long running practice which became widespread in the late 1970's-early 1980's.
- Emphasise punishment over rehabilitation
- Widely used and known for harsh and rigid mandatory sentencing laws
- Recent studies have shown they are ineffective in reducing crime rates and recidivism rates in the country



# United States of America (cont.)



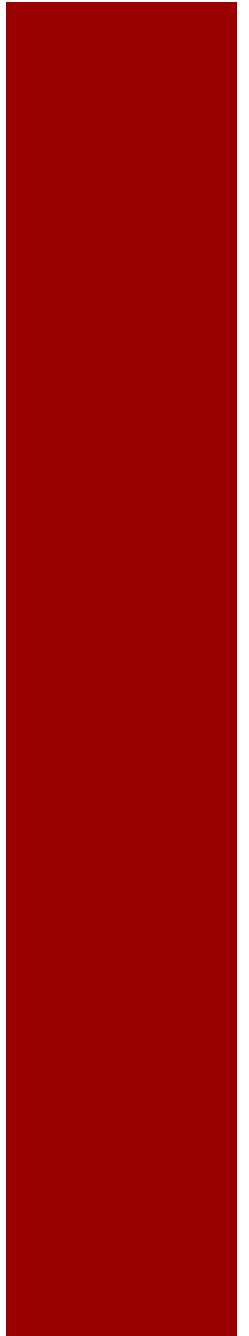
## Death Penalty

- Longtime historical use of the death penalty
- Still prevalently used across the country.
  - California has not executed a death row inmate since 2006 due to legal challenges to the execution process.
  - Florida are active in enforcing their death penalty

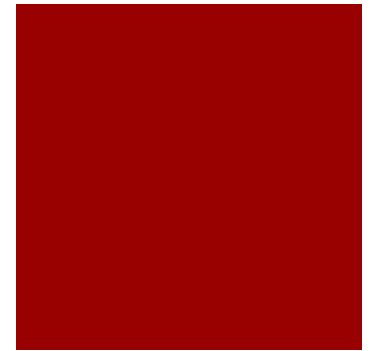
## Chemical Castration

- More recent development. Reticent to use surgical castration due to ethical considerations.
- Quite limited use across the country, however in California and Florida is enforced more regularly.
- Significant issue of informed consent when used on prisoners where they have the choice of chemical castration or serving their entire sentence.

# **Concluding Remarks**



# Mandatory Sentencing



Mandatory Sentences (For: Sexual Offences)	Yes	No
Australia	✓	
Canada	✓	
England and Wales		✓
Germany	✓	
Malaysia	✓	
New Zealand		✓
South Africa	✓	
USA (California and Florida)	✓	

# Death Penalty



Death Penalty	Prohibition	No Prohibition
Australia	✓	
Canada	✓	
England & Wales	✓	
Germany	✓	
Malaysia		✓
New Zealand	✓	
South Africa	✓	
USA (California & Florida)		✓

# Chemical Castration



Castration	As a Sentencing Option	As a Condition for Release from Prison	Other
Australia		✓	
Canada		✓	
England & Wales			✓
Germany			✓
Malaysia			
New Zealand			
South Africa			
USA (California & Florida)	✓	✓	

# Concluding Remarks



- **Mandatory Sentencing:** The table reveals that mandatory sentencing for sexual offences does not apply to England and Wales. In New Zealand, mandatory sentencing does not apply for any offence. For the countries that it applies to, each has its own method of applying these based on the prioritisation of certain sentencing principles.
- **Death Penalty:** The table shows that the death penalty has been abolished in 6 of the 8 jurisdictions. In Malaysia, the death penalty can be applied in the case of rape resulting in death. In the United States of America, it applies only where the victim dies in the commission of any crime, including a sexual offence.
- **Castration:** The table shows castration does not apply to South Africa, New Zealand and Malaysia. Germany uses surgical castration as a treatment option. England and Wales uses castration as a treatment option. Australia uses castration as a condition for early release or alternative to imprisonment. Canada uses castration as a condition of release for a limited scope of offenders. Finally, the United States of America uses chemical castration as a sentencing option and condition for release from prison.