

SEXUAL OFFENCES AGAINST CHILDREN: SENTENCING PRINCIPLES AND TRENDS IN EIGHT JURISDICTIONS

June 2016

A joint initiative between Macquarie University & HAQ: Centre for Child Rights



This report is part of a larger research on understanding sentencing principles and policies relating to sexual offences against children in different jurisdictions and their impact on crime reduction, deterrence or crime control and restorative justice. It is a joint initiative between Macquarie University, Sydney, Australia and HAQ: Centre for Child Rights, a non-profit organization based in New Delhi, India.

Written & Compiled By:

Anita Burkart, Ellie Chapman, Michael Kendall, Amanda Thorpe, Alexander Tieu, Calli Tsipidis, Shelley Xu and Lucy Wu

Supervised by:

Bharti Ali (Co-Director at HAQ) & Debra Ronan (Director of PACE at Macquarie University)

CONTENTS

INTRODUCTION	3 - 4
PART 1: PRINCIPLES AND PURPOSES OF SENTENCING	5 - 31
A Principles	6 - 20
1. Reasonableness	
2. Proportionality	
3. Equal Application/Parity	
4. Parsimony	
5. Dignity	
6. Human Rights	
B Purposes	21 - 31
1. Retribution	
2. Incapacitation	
3. Deterrence	
4. Rehabilitation	
5. Denunciation	
PART 2: PRINCIPLES OF SENTENCING IN VARIOUS JURISDICTIONS	32 - 164
CHAPTER 1: Australia	33 - 53
CHAPTER 2: Canada	54 - 73
CHAPTER 3: England and Wales	74 - 88
CHAPTER 4: Germany	89 - 103
CHAPTER 5: Malaysia	104 - 122
CHAPTER 6: New Zealand	123 - 137
CHAPTER 7: South Africa	138 - 150
CHAPTER 8: United States of America (California & Florida)	151 - 164

INTRODUCTION

The aim of this report is to explore and contextualise the critical debates and discussions around the issue of sentencing in the context of sexual violence in the following jurisdictions:

1. Australia
2. Canada
3. England and Wales
4. Germany
5. Malaysia
6. New Zealand
7. South Africa
8. 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, which are summarised in the tables below.

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

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

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)	✓	✓	

PART 1: PRINCIPLES AND PURPOSES OF SENTENCING

A PRINCIPLES OF SENTENCING

1 REASONABLENESS

1.1 Definition

The concept of reasonableness in sentencing is the determination of whether a sentence that is mandated on an offender is just and proportional to the crime that was committed. The concept is often intertwined with the principle of proportionality in sentencing, and is therefore not commonly discussed as a separate concept. However, a couple of times when the concept of reasonable has been discussed separately from proportionality in regards to sentencing was in the United States. In the case of *United States v Booker*, the Supreme Court determined that the imposition of mandatory sentences through statute and judicial guidelines that were to be followed by the judiciary in sentencing was unconstitutional as it blurred the distinction between the branches of the separation of powers.¹ However, the standards that were set in these guidelines were kept by the judiciary as a means of advising them on reasonable sentencing considerations and procedures, as the judiciary felt that without reasonable guidelines for sentencing, the discretionary powers of judges to sentence offenders may result in inconsistencies in sentencing offenders who committed similar offences, and the possibility of an abuse of power by judges who arbitrarily use their discretion to produce unreasonable sentences.²

1.2 Standard

The standard of reasonableness that was set in the United States for the purposes of sentencing offenders was set in *Kimbrough v United States* and *Gall v United States*. These precedents states that reasonable sentences are created through the scope of determining the facts and circumstances of every case.³ This does not necessarily mean that the advisory guidelines of sentencing needs to be strictly followed. The sentencing guidelines is a way for judges to be able to ensure that their sentences are not disproportionate and unreasonable, however judges also need to consider the circumstances of the offence, and whether sentences that abide by the advisory nature of the sentencing guidelines fulfil one of the purposes of sentencing.⁴ A reasonable sentence does not only consider the guidelines, but also the aggravating and mitigating circumstances of the crime, and is a reflection of court's determination as to the purpose of sentencing the offender.

¹ Craig D. Rust, "When 'reasonableness' is not so reasonable: The need to restore clarity to the appellate review of federal sentencing decisions after *Rita*, *Gall* and *Kimbrough*" [2010] 26(75) *Touro Law Journal* 75-76.

² Ibid 78-79.

³ Ibid 101.

⁴ Nancy Gertner, 'Thoughts on reasonableness' [2007] 19(3) *Federal Sentencing Reporter* 165.

2 PROPORTIONALITY

2.1 Definition and Purpose

The principle of proportionality in sentencing dictates that punishment should be commensurate with the relative seriousness of the offence and the offender's degree of responsibility.⁵ In other words, the severity of the punishment should not be more or less than the seriousness of the offence,⁶ which looks at both i) the offender's culpability, and ii) the harm resulting from the offence.⁷ 'Seriousness' is therefore a 'limiting principle' that sets the range in penalty for any offence,⁸ and ensures that unduly harsh or lenient sentences will not be imposed.⁹

The Australian courts have recognised the proportionality principle as a 'fundamental and immutable principle in sentencing',¹⁰ and the High Court of Australia has upheld its primacy such that even the goal of community protection cannot override it.¹¹

2.2 Justifications

There are a number of justifications for the proportionality principle including:

- *Lex talionis* or the law of retaliation which requires that punishment correspond with the kind and degree of injury inflicted upon the victim. However, such a mentality (equivalent to the Biblical remedy of 'an eye for an eye') raises problems when it comes to sentencing certain offenders- for instance, what punishment could the state impose on a child rapist or murderer?¹² Furthermore, *lex talionis* only provides a formula for how much to punish, and fails to provide a rationale for why we should punish;¹³ and

⁵ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 144.

⁶ *Purposes of Sentencing* (27 May 2014) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>, citing *R v McNaughton* (2006) 66 NSWLR 566 [15]; *R v Dodd* (1991) 57 A Crim R 349, 354.

⁷ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 147, quoting A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 1(1) *Oxford Journal of Legal Studies* 1, 1.

⁸ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 153.

⁹ *Purposes of Sentencing* (27 May 2014) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>.

¹⁰ *R v Scott* [2005] NSWCCA 152 [15] (Howie, Grove and Barr JJ), cited in *Purposes of Sentencing* (27 May 2014) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>.

¹¹ *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), cited in *Purposes of Sentencing* (27 May 2014) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>.

¹² Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 155.

¹³ *Ibid.*

- Retribution and the desire to retaliate for wrongs committed by the offender.¹⁴ Where retribution is the central aim of punishment, the criminal justice system may be seen as no more than state-organised revenge.¹⁵

According to some academics, it is perhaps utilitarianism that provides the strongest justification of the proportionality principle.¹⁶ Generally speaking, utilitarianism aims to maximise community good,¹⁷ and distributes privileges and obligations according to the level of merit or blame of an individual.¹⁸ When applied to the context of sentencing, a proportionate punishment would be:

- One that causes the same level of pain and unhappiness to the offender as suffered by the victim/s of the offender's crime;¹⁹ yet also,
- Forward-looking, so that matters such as deterrence or likelihood of rehabilitation is relevant to determining how much to punish.²⁰

Consequently, utilitarians tend to disagree with the imposition of severe punishments on minor offenders with good chances of rehabilitation.²¹

The father of utilitarianism, Jeremy Bentham had argued in favour of proportionality in sentencing, based on the idea that if punishments are gradated to reflect the gravity of different offences, offenders would then be more likely to choose to commit less serious crimes over more serious ones, with an overall benefit to society.²² While there is no evidence to suggest that offenders make such comparisons,²³ it is nevertheless possible for disproportionate sentences to bring about, in another way, a diminution in community welfare:²⁴ unduly harsh or lenient sentences are likely to be unpopular and would lose the support of communities, leading to less reporting of crimes, less cooperation with law enforcement authorities and less crimes being solved.²⁵

In light of these justifications of the proportionality principle, it can be seen that it is often equated with justice.²⁶

¹⁴ Ibid.

¹⁵ Ibid 156.

¹⁶ Ibid 159.

¹⁷ See, eg, Julia Driver, *The History of Utilitarianism* (22 September 2014) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/utilitarianism-history/#Con>>.

¹⁸ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 156.

¹⁹ Ibid 159.

²⁰ Ibid 156.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid 156-7.

²⁶ Ibid 156.

2.3 Debate Surrounding the Proportionality Principle

There is much debate as to whether or not, in sentencing, the proportionality principle should take into account the offender's unique circumstances and mitigating factors surrounding the offence, including:²⁷

- The offender's socio-economic status;
- Level of education;
- Rehabilitation prospects;
- Remorse;
- Employment history; and
- Level of intention and planning when committing a crime.

Some academics have argued that the courts should not take into account these factors as they are often unconnected to the offence,²⁸ and tend to 'pull in a diametrically opposite direction to the objective factors' that the proportionality principle requires.²⁹ This has compromised fairness in the criminal justice system, undermined the seriousness of some offences such as rape,³⁰ and resulted in inconsistent sentencing due to too much discretion left to judges in taking into account any of a wide range of factors.³¹ On this view, the only factor that should be taken into account is the severity of the offence and its consequences, with the offender's culpability only of 'derivative significance' when determining a proportionate sentence.³²

Other academics contend that the criminal justice system should allow for some accommodation of mitigating factors and the offender's circumstances for more proportionate sentencing,³³ however, there is disagreement as to how significant or substantial these mitigating factors must be before there can be a reduction in the maximum sentence for a certain offence.³⁴ Indeed, the seriousness of the offence should always be of paramount consideration, and may sometimes override relevance of the offender's personal mitigating factors.³⁵ The crux of the problem is therefore in determining the appropriate balance between proportionality and the offender's unique circumstances.³⁶

Some academics contend that personal mitigation factors may be taken into account even where they are not directly or immediately connected to the offence, such that the offender's circumstances are considered as a

²⁷ Neil Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 149; Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321, 328-9.

²⁸ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 153.

²⁹ *Ibid* 153.

³⁰ Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321, 346.

³¹ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 144, 153.

³² *Ibid* 160-2.

³³ Neil Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 142.

³⁴ See Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321.

³⁵ *Ibid* 330.

³⁶ *Ibid*.

whole in determining their overall culpability and level of responsibility for an offence.³⁷ Others argue that mitigating factors should be taken into account only when they are substantially and/or directly connected to the offence,³⁸ or where there is evidence suggesting that the offender committed the offence with less than full intent.³⁹ Where this strict and narrow application of personal mitigation is applied, factors such as the offender's employment history and social disenfranchisement are not relevant because they are remotely connected to the offence;⁴⁰ nor would the offender's rehabilitation prospects be taken into account unless they are substantial.⁴¹ To do otherwise would be contrary to the proportionality principle, and would be unfair to those offenders who have received the maximum penalty for committing a similar offence.⁴²

Despite these often polarising arguments, it would appear that the public's sense of justice requires more than mere consideration of the seriousness of the offence and the offender's culpability;⁴³ rather, public conceptions of 'fairness' and 'justice' require that factors including:⁴⁴

- The offender's rehabilitation prospects;
- The impact of an unduly harsh sentence of an offender;
- The offender's blameworthiness in light of their personal circumstances; and
- Effects on the offender's family

be taken into account when sentencing. Not only would this allow for more proportionate sentencing and promote confidence in the criminal justice system, but it would also respect the human rights of individual offenders, where 'offenders are thought of as fellow human beings whose humanity needs to be understood and to be seen as mattering'.⁴⁵

³⁷ Ibid, citing N Morris N and M Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, 1990).

³⁸ Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321, 330, citing A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

³⁹ Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321, 326.

⁴⁰ Ibid, citing A von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993).

⁴¹ Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321, 326-7.

⁴² Ibid.

⁴³ Ibid 344.

⁴⁴ Ibid.

⁴⁵ Ibid 345.

3 EQUAL APPLICATION/PARITY

3.1 Definition

Equal application or parity refers to the notion that there is consistency and equality in the application of sentences between offenders, that like cases are treated alike.⁴⁶ That is not to say that everyone who commits the same offence should receive the same penalty, any mitigating or aggravating factors should still be taken into account.⁴⁷ Generally, the criminal justice system only accounts for parity between the offenders, but Etienne has argued that parity is also required for the procedural aspects of sentencing.⁴⁸

Etienne noted that disparity in the quality of legal representation in the United States resulted in defendants receiving sentences close to the statutory maximum which were usually not intended to be the actual sentence.⁴⁹

3.2 Justifications

Equal application or parity is justified by the underlying principle of the rule of law, in that everyone is to be treated equally before the law.⁵⁰

3.3 Concerns Surrounding Equal Application or Parity

There is considerable difficulty in achieving parity in sentencing between offenders when there is insufficient information. As noted by Weisbery and Miller it is difficult to hand down similar judgments when there is insufficient information available to both the legal representatives and the judge regarding prior sentences for like offenders.⁵¹ Therefore it is necessary to collect and collate sentencing statistics and ensure that everyone involved in the sentencing process has this information readily available to them to ensure that parity is achieved.⁵² This is especially the case where the judge has a broad discretion in sentencing under the indeterminate model.⁵³

⁴⁶ Margareth Etienne, 'Parity, Disparity, and Adversariality: First Principles of Sentencing' (2005) 58(1) *Stanford Law Review* 309, 312; *Green v R* (2011) 244 CLR 462, [28].

⁴⁷ *Green v R* (2011) 244 CLR 462, [31] – [32].

⁴⁸ Margareth Etienne, 'Parity, Disparity, and Adversariality: First Principles of Sentencing' (2005) 58(1) *Stanford Law Review* 309, 311 – 2.

⁴⁹ *Ibid* 321.

⁵⁰ Paul Gowder, 'The Rule of Law and Equality' (2013) 32(5) *Law and Philosophy* 565, 565.

⁵¹ Robert Weisbery and Marc L. Miller, 'Introduction: Sentencing Lessons' (2005) 58(1) *Stanford Law Review* 1, 9.

⁵² Richard S. Frase, 'Sentencing Principles in Theory and Practice' (1997) 22(1) *Crime and Justice* 363, 366.

⁵³ *Ibid* 365.

4 PARSIMONY

4.1 Definition

Parsimony largely operates as a ‘limiting principle’ in guiding sentencing decisions.⁵⁴ Parsimony is founded upon utilitarian ideals, so that sentences imposed should not be ‘more costly or burdensome than other available means’ which would achieve the same objectives.⁵⁵ Accordingly, parsimony is affiliated with the concept of efficiency and expediency in dealing with offenders.

Parsimony promotes the use of ‘non-custodial punishments’ as an alternative to imprisonment, which should be saved as a last resort, largely based on a belief the same results can be achieved through the imposition of less intrusive sentences.⁵⁶ Therefore, the underlying premise of parsimony is that those sentences that are ‘more severe than that [which is] necessary to achieve the purpose of the sentence’ should be avoided.⁵⁷

4.2 Justifications

The parsimony principle is dynamic in nature, as it both challenges and parallels other principles of sentencing.

Human Rights

Proponents of a parsimonious approach to sentencing have identified that, whilst public protection ideals underlying sentencing procedures should be maintained as the ‘first concern’ for decision-makers, a concurrent consideration should be ‘mercy.’⁵⁸ One of the key justifications in applying the parsimony principle is founded in human rights, that the ‘inherent dignity and worth’ of an offender should mandate concern for their welfare in sentencing. The parsimony principle, therefore, is commonly aligned with the ‘principle of humaneness.’⁵⁹

Based on the principle of parsimony, sentences imposed should not be ‘unnecessarily burdensome’ on offenders.⁶⁰ Rather, the severity of a parsimonious sentence would ideally ‘minimise gratuitous suffering’ of an offender in order to reflect ‘society’s respect for the liberty and physical integrity’ of the offender as a member of the public.⁶¹

⁵⁴ Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press, 2012) 11.

⁵⁵ Ibid 195.

⁵⁶ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 75.

⁵⁷ Australian Law Reform Commission, ‘Sentencing of Federal Offenders’ (Discussion Paper no 70, Australian Law Reform Commission, 2005) at 5.8.

⁵⁸ *Webb v O’Sullivan* [1952] SASR 65, 66.

⁵⁹ Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press, 2012) 11.

⁶⁰ Ibid 195.

⁶¹ Ibid 32; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 64.

Public Interest

Whilst the efficiency argument seemingly seeks to minimise sentences, which some would regard as lacking the necessary substance to deter and adequately punish offenders, the operation of parsimony is actually intended to be ‘consistent with a due regard for public interest.’⁶² Parsimony recognises the ‘devastating consequences’ that are inherent in certain sentencing decisions, for the ‘individual offender’ together with ‘the wider community.’⁶³ Accordingly, parsimony beckons ‘restraint’ in the judicial ‘wielding’ of sentences, instead compelling judges to employ more restrained sentences that still fit the crime.⁶⁴

In this context, the public interest is the implementation of ‘public policy’ that utilises ‘limited public resources’ to achieve sentencing purposes in a more expedient way.⁶⁵ This is largely based on the ‘truism’ that sentences, particularly prison sentences, should be ‘no longer than [they] need to be’ given that longer imprisonment terms are not necessarily ‘more effective than shorter terms.’⁶⁶

Imposition of the ‘maximum’ sentence warranted by the offence would violate the parsimony principle.⁶⁷ Similarly, mandatory minimum sentences are often cited as a legal mechanism that ‘violates the parsimony principle.’⁶⁸ Instead, parsimony encourages sentences that are able to achieve the same ‘crime-control and other practical benefits’ as a harsher penalty would have achieved, however pose less of a burden on ‘public and private costs.’⁶⁹ In this context, parsimony promotes reduced imprisonment terms, based on their ‘extraordinarily costly’ nature, in both ‘economic’ and ‘personal’ terms.⁷⁰

Tension with Proportionality

There is an inherent tension between parsimony and proportionality. On the one hand, proportionality justifies the imposition of a sentence that is comparable to the circumstances surrounding an offence, taking into account what punishment ‘like situated offenders’ would be conferred.⁷¹ In this sense, proportionality favours ‘equality.’⁷² Conversely, parsimony would favour the ‘minimisation of suffering’ through imposition of the ‘least restrictive alternative,’ which may not necessarily be justified in the circumstances.⁷³ However, this dissonance can be resolved if sentences are imposed ‘within the authorised bounds’ having consistent regard to the ‘governing purposes’ of sentencing.⁷⁴

⁶² *Webb v O’Sullivan* [1952] SASR 65, 66.

⁶³ Australian Law Reform Commission, ‘Same Crime, Same Time: Sentencing of Federal Offenders’ (Australian Law Reform Commission Report no 103, 2006) 152.

⁶⁴ *Ibid.*

⁶⁵ Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press, 2012) 195.

⁶⁶ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 222.

⁶⁷ *Webb v O’Sullivan* [1952] SASR 65, 66

⁶⁸ Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press, 2012) 32.

⁶⁹ *Ibid* 13, 88.

⁷⁰ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 22.

⁷¹ Michael Tonry ‘Proportionality, Parsimony and Interchangeability of Punishments’ in R.A. Duff et al (ed) *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press, 1994) 217 at 220.

⁷² *Ibid* 232.

⁷³ *Ibid* 232, 235.

⁷⁴ *Ibid* 235.

5 DIGNITY

5.1 Definition

The concept of Human dignity is the widely accepted moral backbone of universal human rights theory. Human dignity is a difficult concept to define, it can be thought of as the binding together of concepts such as equality, respect and autonomy. This difficulty of defining dignity largely stems from the fact that it has many different ideas channelling into it. There are many different philosophical, religious and metaphysical components that inform our perception of dignity.⁷⁵

According to McCrudden, these different ideas overlap, and when they are pared back to their root, have a three essential elements that make up the common core of dignity which the basis of universal human rights.⁷⁶

Of these three elements the first is an ontological claim that every human being is intrinsically valuable, by virtue of the fact that they are human, and that humankind are special.⁷⁷ The second element is a relational claim that recognises this intrinsic worth in all humans, and that this worth must be respected and upheld by acknowledging that our shared value requires us to treat each other as valuable, and prohibit conduct that does not respect that intrinsic value.⁷⁸ The third element is a limited-state claim that extends this mutual respect of each person's value to the relationship between individuals and government.⁷⁹ It posits that government exists for the benefit of the individual, and not the other way around.

5.2 Justifications

This conceptual core is descriptive in nature, and necessarily so because the philosophies and politics that underlie each claim are heavily contested.⁸⁰ What makes every individual intrinsically valuable? Why should this value be respected? Why should the government respect the value of the individual over the value of the whole? These questions are all legitimate. Kant's deontology is used as a foundation for a non-religious philosophy on the importance of dignity.⁸¹ It holds that due to a human's rationality and autonomy, the combination of which some believe are exclusively the realm of humans, this is what creates this intrinsic value. Others hold that humans are creations of deities, and have a special importance due to this relationship. The answers to these questions however are beyond the scope of this report. The importance of the conceptual core is that it describes what dignity is, without getting lost in the varied philosophical and metaphysical histories of the concept, while also illuminating how the concept of dignity will guide sentencing law.

⁷⁵ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655, 675.

⁷⁶ Ibid 675.

⁷⁷ Ibid 679.

⁷⁸ Ibid 679.

⁷⁹ Ibid 679.

⁸⁰ Ibid 679.

⁸¹ Gauthier de Beco, 'Life Sentences and Human Dignity' (2005) 9(3) *The International Journal of Human Rights* 411, 412.

As alluded to above, the term ‘dignity’ is a shorthand for the primacy and value of human life. Dignity is seen as what distinguishes humans from all other living things on earth, and why human life is special and deserves to be protected and respected.⁸² Having dignity as a consideration in sentencing law requires the law to approach sentencing in a humane way, ensuring that the offender is recognised to be a person of equal moral value to any other, and as such, must be treated in such a way as to reflect that. Dignity is the recognition that people should not be used as a means to an end, but as an end in themselves.⁸³

Dignity humanises the people subject to incarceration, and forces us to consider sentencing from an individual perspective, with the understanding that the offender is a person, who will (more likely than not) eventually become a part of society again. This principle requires the justice system to consider the rights of the offender, and challenges the conventional wisdom that as soon as a person is convicted of a crime, they lose almost all the benefits of being a human.⁸⁴

Dignity is a large factor in sentencing in some countries such as Germany, but has very little influence in others such as the United States.⁸⁵ This is largely due to the ideological divide between the German and US systems. Germany’s law was built with the atrocities of the Second World War strongly in mind, and strongly implemented principles that put people first, and recognised humans as inherently valuable and equal in worth. The US system of criminal justice is more based on inputs and outputs, and designed around punishment of the individual.⁸⁶

5.3 Assessment of Dignity

When determining the impact of a process on a person’s dignity and whether it is being respected, the ‘instrumentalisation test’ is used.⁸⁷ It 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.⁸⁸

Dignity is especially important when considering the role of sentencing in the criminal justice system. This invokes the third arm of the dignity core that aims to limit state intrusion on the relational claim. When it is recognised that prisoners are still humans who deserve to have their value respected, rehabilitation becomes a service that ‘prisoners should receive because of their innate ability to act morally and rationally’.⁸⁹

⁸² Alison Shames and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections* (2014) 27(1) *Federal Sentencing Reporter* 9, 12.

⁸³ Gauthier de Beco, ‘Life Sentences and Human Dignity’ (2005) 9(3) *The International Journal of Human Rights* 411, 413.

⁸⁴ Tatjana Hornle and Mordechai Kremnitzer ‘Human Dignity as a Protected Interest in Criminal Law’ [2011] 44 *Israel Law Review* 143, 146-147.

⁸⁵ Alison Shames and Ram Subramanian, ‘Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections’ (2014) 27(1) *Federal Sentencing Reporter* 9.

⁸⁶ *Ibid.*

⁸⁷ Tatjana Hornle and Mordechai Kremnitzer ‘Human Dignity as a Protected Interest in Criminal Law’ [2011] 44 *Israel Law Review* 143, 147.

⁸⁸ *Ibid.* 147.

⁸⁹ Amanda Ploch, ‘Why Dignity Matters: Dignity and the Right (Or Not) to Rehabilitation from International and National Perspectives’ (2012) 44 *NYU Journal of International Law and Politics* 887, 900.

Mandatory life sentences do not respect the dignity of the offender because they do not allow for the rehabilitation and eventual freedom once rehabilitated.⁹⁰ In the case of *BVerfGE*, the Verden District Court in Germany ‘regarded life imprisonment as an infringement of the right to human dignity, since the psychological effects of such a sentence were too detrimental for the individual’.⁹¹ The death penalty was considered by the Canadian Supreme Court to be the ‘ultimate desecration of dignity’ in the case of *Kindler v. Canada*.⁹²

It must be said that the principle of dignity is used as a bulwark against the perceived harshness of retributive sentencing. The principle of dignity will always be used to argue for a less punitive, more humane approach to criminal justice. While it is incredibly important to ensure the law does not slip into the depth of immorality, and while dignity should certainly be a more prominent consideration in most legal systems than it currently is, it is still just one of many considerations that need to be taken into account when sentencing an offender.

⁹⁰ Gauthier de Beco, ‘Life Sentences and Human Dignity’ (2005) 9(3) *The International Journal of Human Rights* 411, 414.

⁹¹ Ibid 413.

⁹² *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779. See also Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *The European Journal of International Law* 655, 687.

6 HUMAN RIGHTS

6.1 Introduction

The concept of human rights influences global sentencing practices in many ways. This is achieved with various international instruments including the United Nations Standards Minimum Rule, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, explanatory statements by Amnesty International, and constitutional documents. Information given will focus on human rights violations of long custodial sentences, the death penalty, juvenile justice, and chemical castration.

6.2 Non-Custodial Sentencing

In accordance with the universal right to liberty, the United Nations Standard Minimum Rules for Treatment of Prisoners provide basic principles promoting the use of non-custodial measures and minimum safeguards for persons subject to alternatives to imprisonment.⁹³ There must be a broad range of sentencing options because the prison system itself is not successful for rehabilitating offenders. These principles aim to promote greater community involvement in the treatment of offenders, allowing them to have a sense of responsibility towards society.⁹⁴ At the sentencing stage, non-custodial measures must consider the rehabilitative needs of the offender, the protection of society, and the interests of victims.⁹⁵ Common types of non-custodial sentences include probation orders, community service orders, conditional or absolute discharge, drug treatments, and mental treatments.⁹⁶

6.3 Long Custodial Sentencing

According to the International Covenant on Civil and Political Rights ('ICCPR'), the essential aim of penitentiary systems is the rehabilitation and reformation of prisoners.⁹⁷ Despite its ratification by 168 countries,⁹⁸ deterrence and retribution are still prominent features in most criminal justice systems and rehabilitation is often neglected.

Life Without Parole

Although international human rights law is silent about specific terms of life without parole ('LWOP'), it is clear that focus of sentencing should be on rehabilitation and reformation. A LWOP sentence removes any possibility of this as prisoners are condemned to die in prison. On an international level, several criminal

⁹³ *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, UN GAOR, A/RES/70/175 (17 December 2015).

⁹⁴ Hon. Justice Ashraf Caunhye, Supreme Court of Mauritius, *Sentencing: Human Rights Standards and Non-Custodial Measures* (2008) 1.

⁹⁵ *Ibid* 2-3.

⁹⁶ *Ibid*.

⁹⁷ International Covenant on Civil and Political Rights, Dec. 16 1966, S. Treaty Doc. No. 95-20 (1992), 999 U.N.T.S. 171, art 10(3) ('International Covenant on Civil and Political Rights').

⁹⁸ Including Australia, Canada, Germany, India, New Zealand, South Africa, United Kingdom, and United States.

tribunals do not allow for LWOP sentences. This includes the International Criminal Court, which tries grave crimes including genocide and crimes against humanity. Despite this, 38 countries (1/5 of all countries) currently utilise LWOP sentences.⁹⁹ In New Zealand and the United Kingdom, LWOP is allowed only for murder.¹⁰⁰ In contrast, Australia and the United States allow for LWOP sentences in non-homicide offenses. This includes kidnapping, armed robbery, and drug crimes.¹⁰¹

Consecutive Sentences

Uncapped consecutive sentences are problematic because they also violate the focus on rehabilitation for prison systems. These sentences can last beyond a defendant's expected lifetime, thus removing the possibility for parole. The guiding principle in international criminal law is that final penalties for convicts should reflect their overall culpability. This is known as the 'totality principle.'¹⁰² Australia, Canada, New Zealand, South Africa, United Kingdom, and the United States allow judges to issue concurrent or consecutive sentencing without caps. Germany, India, and Malaysia do not utilise this type of sentencing.¹⁰³

Mandatory Minimum Sentences

Although mandatory minimum sentences have not been specifically addressed under international law, the Human Rights Committee has expressed concern over legislation in Australia. They indicated that mandatory laws lead to the 'imposition of punishments that are disproportionate to the seriousness of crimes committed' and violate certain articles in the ICCPR.¹⁰⁴ Like consecutive sentences, mandatory sentences circumvent the goal of rehabilitation and fail to take individual circumstances into account.

6.4 Death Penalty

Amnesty International describes the death penalty as 'the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state. It violates the right to life as proclaimed in the Universal Declaration of Human Rights.'¹⁰⁵ Throughout the 20th century, worldwide abolition of the death penalty rose significantly and legal instruments doing so also gained prominence in international law.¹⁰⁶ The latest death penalty report by Amnesty International shows that 98 countries have abolished the death penalty for all crimes, 7 countries have abolished the death penalty for ordinary crimes, 35 countries have abolished the death penalty in practice (retain the death penalty but have not executed

⁹⁹ Including Australia, New Zealand, United Kingdom, and United States; De La Vega Et Al, University of San Francisco School of Law, *Cruel and Unusual: U.S Sentencing Practices in a Global Context* (2012) 25.

¹⁰⁰ *Sentencing Act 2002* (NZ) s 86E; *Criminal Justice Act 2003* (UK) s 269(4).

¹⁰¹ De La Vega Et Al, University of San Francisco School of Law, *Cruel and Unusual: U.S Sentencing Practices in a Global Context* (2012) 22.

¹⁰² Ibid 40.

¹⁰³ Ibid 42.

¹⁰⁴ UN Human Rights Committee, *Report of the Human Rights Committee*, U.N. Doc. A/55/40 (2000) 74.

¹⁰⁵ Amnesty International USA, *The Death Penalty: Questions and Answers* <http://www.amnestyusa.org/pdfs/dp_qa.pdf>; Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹⁰⁶ Matthew Mathias, 'The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty' (2013) 118(5) *American Journal of Sociology* 1246, 1247.

anyone in the last 10 years and are believed to have a policy of not carrying out executions), and 58 countries continue to retain the death penalty.¹⁰⁷

6.5 Juvenile Justice

Minimum Age of Criminal Responsibility ('MACR')

The Convention on the Rights of the Child ('CRC') states that all countries must establish a minimum age for when children have the capacity to infringe laws.¹⁰⁸ The Committee has further elaborated that countries should 'bear in mind the facts of emotional, mental and intellectual maturity' when determining the age of criminal liability.¹⁰⁹ Overall, it is recommended that 12 should be the minimum age for criminal liability.¹¹⁰ According to worldwide statistics, 64% of countries have a MACR of 12 or above. 76% of countries have a MACR of 10 or above. The average age of criminal responsibility is 12.¹¹¹

Juveniles Tried as Adults

The ICCPR requires that an offender's juvenile status is to be considered in criminal proceedings. Here, there is an emphasis on the promotion of rehabilitation.¹¹² In addition to this, section 10(3) states that 'juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.' The Committee on Rights of the Child have also emphasised the differences between juveniles and adults and encouraged the use of distinct juvenile justice systems and penal codes for rehabilitative goals.¹¹³ Thus, transferring a juvenile to an adult court in order to receive an adult sentence violates ICCPR requirements to have the offender's status considered.¹¹⁴ The CRC also specifies that the imprisonment of children should only be used as a last resort and for the shortest appropriate period of time.¹¹⁵

6.6 Chemical Castration

It is possible that chemical castration violates various rights of offenders.¹¹⁶ It reduces or eliminates deviant sexual thoughts, thus infringing the offender's right to entertain sexual fantasies as contained in the First

¹⁰⁷ Amnesty International, *Death Sentences and Executions 2014* (April 2015) 65.

¹⁰⁸ U.N. Convention on Rights of the Child, GA Res 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) art 40(3)(a) ('Convention on the Rights of the Child'); All countries except the United States, Somalia, and South Sudan are a party.

¹⁰⁹ Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, UN Doc. CRC/C/GC/10 (April 25, 2007) para 32.

¹¹⁰ Ibid para 33.

¹¹¹ De La Vega Et Al, University of San Francisco School of Law, *Cruel and Unusual: U.S Sentencing Practices in a Global Context* (2012) 51.

¹¹² International Covenant on Civil and Political Rights, Dec. 16 1966, S. Treaty Doc. No. 95-20 (1992), 999 U.N.T.S. 171, art 10(3) art 14(4).

¹¹³ Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, UN Doc. CRC/C/GC/10 (April 25, 2007) para 10.

¹¹⁴ De La Vega Et Al, University of San Francisco School of Law, *Cruel and Unusual: U.S Sentencing Practices in a Global Context* (2012) 55.

¹¹⁵ U.N. Convention on Rights of the Child, GA Res 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) art 37(b).

¹¹⁶ First, Eighth and Fourteenth Amendments of the American Constitution and also Articles 3, 8, and 12 of the European Convention of Human Rights (ECHR).

Amendment of the American Constitution.¹¹⁷ However, one counterargument is that offenders who commit sex crimes have demonstrated a ‘lack of mastery over their fantasies.’¹¹⁸

The second argument involves whether forced castration violates both the Eighth Amendment of the American Constitution or Article 3 of the European Convention on Human Rights (ECHR), which bans cruel and unusual punishment. Supporters of chemical castration propose that the use of anti-androgen drugs do not satisfy the test for cruel and unusual punishment because it stops the offender from partaking in criminal behaviour.¹¹⁹

The third argument involves the Fourteenth Amendment of the American Constitution and the ECHR Article 8 guarantee of due process and equal protection. This right prohibits states from depriving citizens of life, liberty, or property. Another aspect is the fundamental right to procreation observed in Article 12. In opposition to this, supporters of chemical castration argue that the compelling state interest involves public protection against sexual victimisation.¹²⁰

¹¹⁷ *Stanley v Georgia* (1969) 394 U.S. 565, 557.

¹¹⁸ Charles Scott and Trent Holmberg, ‘Castration of Sex Offenders: Prisoners’ Rights Versus Public Safety’ (2003) 31 *Journal of the American Academy of Psychiatry* 502, 507.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

B PURPOSES OF SENTENCING

1 RETRIBUTION

1.1 Definition

Retributive justice was propounded first and most passionately by Andrew von Hirsch, in the United States, influenced by famous theorists Immanuel Kant and Hart.¹²¹ The theory, developed further by Thomas Aquinas, is premised by the notion that those who do harm to society or harm to others should be penalised.¹²² Retributivism is synonymous with ‘just deserts’, which means that people should receive what they deserve.¹²³

1.2 Justification

Central to the theory of ‘just deserts’ is that people should be rewarded for the fruits of their labour, while those who break the rules should be punished.¹²⁴ Zedner adequately describes desert theory as one, which “reifies corresponding notions of censure and sanction as the ‘just’ response to offending behaviour. Within this framework, it claims to grade the gravity of crimes in order that sanctions of comparable severity may be applied.”¹²⁵

Kant used a debt metaphor to describe the just desert theory that “citizens in a society enjoy the benefits of a rule of law. According to the principle of fair play, the loyal citizen must do their part in this system of reciprocal restraint. An individual who seeks the benefits of living under the rule of law without being willing to make the necessary sacrifices of self-restraint is a free rider. He or she has helped themselves to unfair advantages, and the state needs to prevent this to preserve the rule of law.”¹²⁶

Retributive justice is backward looking. It is a response to a past injustice or wrongdoing and acts to try to reinforce the rules broken, and balance the scales.¹²⁷ Emphasis is ascribed to proportionality, which is the key feature within this notion and its sentencing objective.¹²⁸ Hence, the punishment generally should be no more or less than is merited by the severity and seriousness of the offence.¹²⁹

¹²¹ Lucia Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ *The Modern Law Review Limited* (1994) 57, 229; Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55, 61; Hugo Adam Bedau, ‘Retribution and the Theory of Punishment’ *The Journal of Philosophy* (1978) 75(11) 601, 602.

¹²² Peter Koritansky, ‘Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas’ (2005) 22(4) 319, 325.

¹²³ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ 62 *Buffalo Law Review* (2014) 1159, 1164.

¹²⁴ Rachel James, ‘Punishment and Desert.’ In *Ethics in Practice* (Malden Massachusetts, Blackwell Publishers, 1997) 466.

¹²⁵ Lucia Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ *The Modern Law Review Limited* (1994) 57, 229.

¹²⁶ Jeffrie Murphy, *Retribution Reconsidered* (Norwell, Massachusetts, Kluwer Academic Publishers, 1992) 23.

¹²⁷ Jeffrey Jenkins, *The American Courts: A Procedural Approach* (Jones & Bartlett Publishers, Massachusetts, 2011) 10.

¹²⁸ Lucia Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ *The Modern Law Review Limited* (1994) 57, 230.

¹²⁹ Ibid.

2 INCAPACITATION

2.1 Definition

Incapacitation is a process by which an offender is physically isolated from the community, to prevent them from re-offending.¹³⁰ Other than the death penalty, no punishment can permanently prevent future re-offending.¹³¹ Incapacitation is most frequently observed through sentencing an offender to a period of imprisonment, wherein their physical ability to commit a criminal offence is severely restricted due to constant supervision and their physical isolation.¹³² There are two types of incapacitation: collective and selective incapacitation.¹³³

Collective incapacitation refers to sentencing policies that captures offenders all offenders who commit a particular offence, such as through, mandatory minimum sentences.¹³⁴ Legislation will determine the minimum and usually the maximum amount of time that the offender will be sentenced to prison. The duration of the mandatory sentences has usually been designed with the degree of the seriousness of the offence in mind so that more serious crimes have harsher penalties.¹³⁵

Selective incapacitation refers to sentencing policies that tailor the sentence to individual offenders.¹³⁶ The aim of selective incapacitation is to reduce crime rates through identifying offenders who are likely to commit serious crimes in the future.¹³⁷ Support for selective incapacitation arises from a study of Philadelphia offenders in which a small group of offenders accounted for 52% of arrests and another study that found that 10% of offenders committing 80 robberies per year as compared to 50% committing less than 5 per year.¹³⁸ It was therefore believed that if the small group of active offenders could be incapacitated for longer periods then crime rates could be reduced without a disproportionate increase in prison populations.¹³⁹

¹³⁰ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24; Christy A. Visser, 'Incapacitation and crime control: Does a "Lock 'em up" strategy reduce crime?' (1987) *Justice Quarterly* 4(4) 513, 514.

¹³¹ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24.

¹³² Ibid.

¹³³ Christy A. Visser, 'Incapacitation and crime control: Does a "Lock 'em up" strategy reduce crime?' (1987) *Justice Quarterly* 4(4) 513, 514.

¹³⁴ Ibid 514 – 5.

¹³⁵ Ibid 515.

¹³⁶ Ibid 515.

¹³⁷ Ibid 515.

¹³⁸ Ibid 523.

¹³⁹ Ibid 523.

2.2 Justifications

Incapacitation is often reflected as a purpose of sentencing in the criminal law of many jurisdictions by virtue of referring to protecting the community through separating the offender from society.¹⁴⁰

Incapacitation, for example, is identified as a purpose of sentencing (in the above terms) in the following jurisdictions: Australia,¹⁴¹ Canada,¹⁴² England,¹⁴³ New Zealand,¹⁴⁴ and the United States.¹⁴⁵ The public is generally reassured that the threat to their safety has been reduced when offenders are removed from society, as a result, the public continues to support incapacitation offenders through incarceration policies.¹⁴⁶

Incapacitation is often justified on the basis that it operates to deter offenders and would-be offenders from committing crimes.¹⁴⁷ Incarceration is expected to result in falling crime rates and decreasing rates of recidivism.¹⁴⁸ Though, as noted in the discussion of the purpose of deterrence, the success of deterrence in reducing rates of recidivism is in doubt, and therefore is not an adequate justification for incapacitating offenders.

2.3 Debate Surrounding the Theory of Incapacitation

Arguments for Incapacitation

Incapacitating known offenders increases the communities sense of safety and security as they can seek comfort in the knowledge that it is largely impossible for the offender to reoffend against the general public whilst they are incarcerated.¹⁴⁹

Arguments against Incapacitation

The introduction of mandatory prison sentences has resulted in dramatic increases in the population of prisons.¹⁵⁰ The prison population in the United States has increased dramatically, from a rate of 110 persons per 100,000 in the 1970s to over 600 per 100,000 in the 1990s, which represents an increase in over 500%.¹⁵¹ A less substantial, but still significant increase in the prison population was also reflected in

¹⁴⁰ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24, 26.

¹⁴¹ *Sentencing Act 1991* (Vic) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Criminal Law (Sentencing) Act* (SA) s 10(2)(a); *Sentencing Act 1995* (NT) s 5(1)(e); *Sentencing Act 1997* (Tas) s 3(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act 1995* (WA) s 6(4); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c).

¹⁴² *Criminal Code*, RSC 1985, c C-46 s 718(c).

¹⁴³ *Criminal Justice Act 2003* (UK) s 142(1)(d).

¹⁴⁴ *Sentencing Act 2002* (NZ) s 7(1)(g).

¹⁴⁵ 18 USC § 3553(a)(2)(C).

¹⁴⁶ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 31.

¹⁴⁷ Keven L. Nunes et al, 'Incarceration and Recidivism among Sexual Offenders' (2007) 31(3) *Law and Human Behaviour* 305, 306.

¹⁴⁸ *Ibid.*

¹⁴⁹ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 31.

¹⁵⁰ *Ibid* 25.

¹⁵¹ *Ibid.*

Australia, with a 48% increase between 1983-1997.¹⁵² Visher examined the results of studies on collective incapacitation policies and their success and found that although crime rates fell, the drop was not substantial and even a small drop in crime rates resulted in a large increase in prison populations.¹⁵³ Thus, one of the problems with incapacitation policies is that they substantially increase prison populations without necessarily resulting in a substantial drop in crime rates.

Objections are frequently raised that there is no evidence that the offender would have re-offended if they were released into the community, and therefore no evidence that incapacitating the offender protected the community.¹⁵⁴ Bagaric raises the concern that there is empirical studies are often unable to predict recidivism rates amongst serious offenders.¹⁵⁵ Bagaric refers to a New Zealand study that found that individuals who were designated as serious offenders were no more likely to re-offender in a two and a half year period after their release than ordinary offenders.¹⁵⁶ Another study sought to determine if there was a correlation between increasing prison populations (following the implementation of more severe sentencing laws) and crimes rates in the American state of California in the 1990s, but no positive correlation was found, indicating that incapacitating offenders generally may also be unsuccessful.¹⁵⁷ Visher notes that attempts to predict future offending rates under a selective incapacitation model may result in some offenders being incorrectly assessed as likely to reoffend or a 'false positive' error which would result offenders losing their liberty as a result of a faulty prediction.¹⁵⁸

The cost of incapacitating an offender through incarceration is very expensive, but its success at reducing recidivism rates is limited. A study into the annual cost of incarceration in Canada in 2002-2003 was found to be \$80, 000 as compared to a cost of \$20, 000 for supervising an offender in the community.¹⁵⁹ Studies into recidivism rates amongst sexual offenders have found that the length of the prison sentence was unrelated to recidivism rates, though Nunes et al have noted that the study did not take into account the risk level of the offender.¹⁶⁰ A Canadian study of sexual offenders between 1983-1995 found that there was no significant correlation between sexual offences and rates of recidivism.¹⁶¹ Nunes et al found that accounting for risk did not alter the results, there was still no significant association between incarceration and recidivism rates.¹⁶² In turn this raises the question of whether incapacitating sexual offenders, in particular, through incarceration is the appropriate sentencing option.

¹⁵² Ibid.

¹⁵³ Christy A. Visher, 'Incapacitation and crime control: Does a "Lock 'em up" strategy reduce crime?' (1987) *Justice Quarterly* 4(4) 513, 522.

¹⁵⁴ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 25 – 6.

¹⁵⁵ Ibid 27.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Christy A. Visher, 'Incapacitation and crime control: Does a "Lock 'em up" strategy reduce crime?' (1987) *Justice Quarterly* 4(4) 513, 525.

¹⁵⁹ Keven L. Nunes et al, 'Incarceration and Recidivism among Sexual Offenders' (2007) 31(3) *Law and Human Behaviour* 305, 306.

¹⁶⁰ Ibid 307.

¹⁶¹ Ibid 307, 310.

¹⁶² Ibid 310 – 3.

2.4 Summary

Hence, it can be seen that incapacitating offenders is a primary purpose of sentencing legislation in a number of jurisdictions. Incarceration is employed as the primary means of incapacitating offenders. There is a presumption that incapacitation and deterrence are interrelated and interdependent purposes of sentencing that will result in reduced crime rates. Studies into the rates of crime, incarceration and deterrence appear to suggest that there is no positive correlation which results in falling crime rates. In turn, this would seem to suggest, that sentencing policies which include mandatory sentencing may only increase prison populations and not reduce crime rates. Additionally, there is currently little evidence to suggest that incapacitating sexual offenders specifically will result in a reduction in rates of recidivism. Thus, incapacitation only serves the purpose of making the public feel safe, it does not reduce the occurrence of crime, nor recidivism rates for offenders upon release.

3 DETERRENCE

3.1 Definition

Deterrence is defined as the notion of imposing a more severe sentence for an offence to emphasise the consequences of the offence and thereby reduce the likelihood of recidivism both for the particular person being sentenced (specific deterrence) and other potential offenders (general deterrence) by functioning as a general warning.¹⁶³

The theory of deterrence and its application as a rational choice originally developed with Jeremy Bentham in a paper published in 1789.¹⁶⁴ Bentham considered that a would-be offender would weigh the pleasure (benefits) of committing the crime with the pain (costs) and that this would guide their behaviour.¹⁶⁵ The conception of crime being a rational choice was not accepted within the academic community, as criminal behaviour was considered to be a result of pathological condition that affected the minds of only a minority of people.¹⁶⁶ As a result, the rational choice theory of deterrence was generally ignored until the 1950s when it was again academically considered, but it was not until the 1970s that it came to be considered a valid purpose of sentencing.¹⁶⁷

3.2 Justifications

Deterrence theory is based upon the presumption that a sufficiently severe penalty can prevent future offending and reduce crime rates.¹⁶⁸ The modern conception of deterrence theory is based upon the conception of crime being a rational choice, that potential offenders will rationally weigh the cost and benefits of committing the crime against the potential penalties.¹⁶⁹ The 3 properties of the cost of legal punishment that are considered in deterrence theory are (1) certainty, (2) severity, and (3) celerity (or swiftness).¹⁷⁰ The deterrence theory holds that when legal punishment for these properties are more costly there are lower crime rates (certainty: higher chance for legal punishment for commission of a crime, severity: increasing magnitude of punishment, and swift: haste punishment after commission of the offence).¹⁷¹

¹⁶³ Carla Cesaroni and Nicholas Bala, 'Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges' (2008) 34(1) *Queen's Law Journal* 447, 452.

¹⁶⁴ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 767.

¹⁶⁵ Ibid 770.

¹⁶⁶ Ibid 772.

¹⁶⁷ Ibid 773, 776, 779 – 80.

¹⁶⁸ Carla Cesaroni and Nicholas Bala, 'Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges' (2008) 34(1) *Queen's Law Journal* 447, 468.

¹⁶⁹ Ibid.

¹⁷⁰ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 783.

¹⁷¹ Ibid 783 – 4.

3.3 Debate Surrounding the Theory of Deterrence

There is considerable support for the theory of deterrence. A study in 1990s considered if would-be sexual offenders adhered to the rational choice notion of the deterrence theory.¹⁷² The results of their study were consistent with the deterrence theory in that if there was a perceived risk of formal sanction then it decreased the likelihood of a theoretical sexual assault.¹⁷³ The rhetoric of the effectiveness is often utilised by judges in considering the sentence to be handed down in cases, such as in the Canadian case of *R v Morrissey* [2000] 2 SCR 90, [120] – [121] when they said the sentence ‘serves a general deterrent function to prevent others from acting so recklessly in the future’.

There is a substantial body of literature that suggests that general deterrence is not effective at preventing would-be offenders from committing crimes. One study has suggested that severe legal penalties may increase offending amongst particular social deviants who respond with defiance.¹⁷⁴ Whilst, Paternoster has suggested that the delay of the imposing a punishment for committing an offence reduces the effectiveness of harsh penalties deterring would-be offenders.¹⁷⁵ But perhaps the biggest problem with the theory underlying general deterrence is that it is underpinned by a fundamental presumption that would-be offenders know the penalty for committing a particular offence.¹⁷⁶ If a would-be offender is unaware of the particular penalty for committing an offence, then the severity of the punishment cannot deter them from committing the crime. A study in 2000 found that convicted felons were unaware of the potential penalties they could face, with 18% reporting that they were unaware of the penalty for the criminal act, whilst 35% stated that it was not a factor they considered before committing the offence.¹⁷⁷

Certain empirical findings cannot be explained by the current deterrence theory. The below is an extract from Chapter 2 Canada ‘2.2.4 Arguments Against Mandatory Sentences’. For example, the rate of rape crimes decreased in Canada between 1990 – 2000 despite the number of police officers declining by 10% per 100,000 residents during the same period.¹⁷⁸ Deterrence theory cannot explain this result, as a decreased police presence also results in a decrease in certainty of punishment but crime rates are falling, not increasing. Increasing the severity of the punishment also does not have a significant impact due to the effect of subjective discount rates, whereby the mind subconsciously reduces the cost of things distant in time.¹⁷⁹ A 1985 survey found that a 5-year prison sentence was only judged as twice as severe as a 1-year sentence.¹⁸⁰

¹⁷² Ronet Bachman, Raymond Paternoster and Sally Ward, ‘The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault’ (1992) 26(2) *Law & Society Review* 343.

¹⁷³ Ibid 357.

¹⁷⁴ Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 472.

¹⁷⁵ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 765.

¹⁷⁶ Ibid 804.

¹⁷⁷ Ibid 805 citing David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 305.

¹⁷⁸ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 797, 799.

¹⁷⁹ Ibid 805.

¹⁸⁰ Ibid.

A 1993 survey similarly reported that a 10-year sentence was only considered to be four times more severe than a 1-year sentence and a 20-year sentence was only 6 times more severe.¹⁸¹ These findings are contrary to the deterrence theory, as crime rates can fall even when certainty of punishment decreases and people's perception of increasing the severity of the punishment for an offence does not proportionally correlate the actual increase in the penalty. This would seem to suggest that deterrence is not necessarily an effective mechanism of reducing crime rates.

¹⁸¹ Ibid 806.

4 REHABILITATION

4.1 Definition

Rehabilitation forms one of the purposes of sentencing, aiming to treat the defendant in such a way that he or she is able to be reintegrated into society, as a functioning and law-abiding citizen.¹⁸² This is achieved through treatment and education.¹⁸³ There are many ways in which rehabilitation can be implemented:¹⁸⁴

- As a sentence: Undertaking rehabilitative measures can be ordered by the court without any other sentence being applied. This would be the justification of directing an offender to enroll in a drug treatment program, or to undertake certain education measures. Sentencing an offender to a certain number of community service hours would also be considered a rehabilitative practice. This method is usually only taken in cases where the crime and the damage caused is less severe.
- Concurrently with incarceration: This is perhaps the most common way in which rehabilitation is manifested. In conjunction with incarceration, an offender will undergo treatment and education programs. In some legal systems this forms part of general prison practice, whilst in others it is an option to offenders. It is common that successfully completing a rehabilitation program can reduce a prison sentence.
- Parole: Parole is justified under the purpose of rehabilitation. When an offender is paroled, it is believed that they have been rehabilitated enough to be released into society. Furthermore, most legal systems ensure that further education and treatment occurs whilst an offender is released on parole.

As stated above, in general rehabilitation will reduce a prison sentence.¹⁸⁵ However, it is important to remember that rehabilitation is usually only effective if the defendant admits his or her guilt and is determined to undergo rehabilitation.¹⁸⁶ It is unlikely that an unrepentant and unwilling defendant would be successfully rehabilitated.

There are studies that suggest that the recidivism rate of sexual offenders who have undergone rehabilitation is half of that in comparison to sexual offenders who have merely been incarcerated.¹⁸⁷ The most effective measure has shown to be education.¹⁸⁸

¹⁸² Encyclopaedia Britannica Inc, *Punishment* (14 March 2016) *Encyclopaedia Britannica Online* <<http://www.britannica.com/topic/punishment>>.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Mirko Bagaric, 'A rational theory of mitigation and aggravation in sentencing: Why less is more when it comes to punishing criminals' (2014) 62 *Buffalo Law Review* 1159, 1205.

¹⁸⁶ Encyclopaedia Britannica Inc, *Punishment* (14 March 2016) *Encyclopaedia Britannica Online* <<http://www.britannica.com/topic/punishment>>.

¹⁸⁷ Mirko Bagaric, 'A rational theory of mitigation and aggravation in sentencing: Why less is more when it comes to punishing criminals' (2014) 62 *Buffalo Law Review* 1159, 1206.

¹⁸⁸ Ibid, 1208.

4.2 Restorative Justice

Restorative justice is a particular form of rehabilitation. There are several different ways in which restorative justice is undertaken: for example through mediation, conferencing, sentencing circles and community panels.¹⁸⁹ Within these methods, there are a number of different practices, including: apologies, restitution, acknowledgement of harm, reintegration into community.¹⁹⁰ Restorative justice can be undertaken in conjunction to formal sentencing or additional sentencing, or alone.¹⁹¹

Typically, restorative justice is characterised by its direct and open communication which occurs in a less formal setting than a court proceeding.¹⁹² Restorative justice has recognised that crime affects a number of different groups within the society, and thus it aims to repair the broken relationships.¹⁹³ Thus, a restorative justice practice will generally include the victim and the offender; however it is also open to interested bystanders, family, and the wider community.¹⁹⁴ In short, restorative justice aims to include all stakeholders for a particular crime.¹⁹⁵

Usually, restorative justice involves direct communication between the victim and the offender, and allows both parties to make their motivations and feelings be heard and understood.¹⁹⁶ It aims to rehabilitate the offender,¹⁹⁷ whilst at the same time giving a voice to the victim. It can be undertaken separately or in conjunction with more formal sentencing procedures such as incarceration, and can occur pre-trial, during the trial or as a sentencing option.¹⁹⁸

There is some research to suggest that restorative justice results in a lower recidivism rate.¹⁹⁹ However, it must be remembered that restorative justice is only effective in a situation where all parties are willing participants, meaning, for example, that the offender must be prepared to admit his or her guilt and to recognise the impact of his or her actions.²⁰⁰ Furthermore, restorative justice is not effect for all offences: in the case of sexual assault it is particularly noted to be less effective, since the victim is often too traumatized to face his or her attacker.

¹⁸⁹ Joanna Shapland, Anne Atkinson, Helen Atkinson, Emily Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, 'Situating restorative justice within criminal justice' (2006) 10(4) *Theoretical Criminology* 505, 506.

¹⁹⁰ Carrie Menkel-Meadow, 'Restorative justice: What is it and does it work?' (2007) 3 *Annual Review of Law and Social Science* 161, 162.

¹⁹¹ Ibid.

¹⁹² Carrie Menkel-Meadow, 'Restorative justice: What is it and does it work?' (2007) 3 *Annual Review of Law and Social Science* 161, 162.

¹⁹³ Howard Zehr and Harry Mika, 'Fundamental concepts of restorative justice' in Eugene McLaughlin, Ross Ferguson, Gordon Hughes and Louise Westmarland (eds), *Restorative Justice: Critical Issues* (The Open University, 2003) 40, 41.

¹⁹⁴ Carrie Menkel-Meadow, 'Restorative justice: What is it and does it work?' (2007) 3 *Annual Review of Law and Social Science* 161, 162.

¹⁹⁵ Howard Zehr and Harry Mika, 'Fundamental concepts of restorative justice' in Eugene McLaughlin, Ross Ferguson, Gordon Hughes and Louise Westmarland (eds), *Restorative Justice: Critical Issues* (The Open University, 2003) 40, 41.

¹⁹⁶ Carrie Menkel-Meadow, 'Restorative justice: What is it and does it work?' (2007) 3 *Annual Review of Law and Social Science* 161, 162.

¹⁹⁷ Ibid.

¹⁹⁸ Daniel Van Ness, 'An overview of restorative justice around the world' (2005) 2 *Workshop* 1, 10.

¹⁹⁹ Carrie Menkel-Meadow, 'Restorative justice: What is it and does it work?' (2007) 3 *Annual Review of Law and Social Science* 161, 176.

²⁰⁰ Ibid, 175.

5 DENUNCIATION

5.1 Definition

One purpose of sentencing is the concept of denunciation. Denunciation punishes offenders based on the theory that their punishment serves as a message to the community in condemning the actions of the offender as a violation of the values and morals of society.²⁰¹ The punishment of an offender through the purpose of denunciation reaffirms the community's values and declares that the wrongdoings of the offender would not be tolerated.²⁰²

5.2 Justification

Denunciation is often paired together with retribution for the purpose of sentencing offenders. However, unlike retribution, denunciation does not only look at the moral culpability of the offender, and sentencing for the purpose of revenge. Rather, denunciation tends to look more into the utilitarian aims or benefits for society from inflicting punishment on the offender.²⁰³ This may compliment other purposes of punishment, such as general and specific deterrence, as a harsh punishment for the purposes of denouncing the act of the offender can also benefit the community by deterring others from committing similar crimes, which in turn may reduce the offence rates for that particular crime.²⁰⁴

5.3 Purpose

The utilitarian principle that underpins the concept of denunciation could lead to a safer society by discouraging crime. It aims to satisfy the community's desire to know that the morals and values that are instilled in the law is upheld, and offenders are justly punished for violating those enshrined principles.²⁰⁵ The purpose of denunciation in sentencing seeks to reassure the community that law enforcement mechanisms are in place to ensure that violators of these values are punished, and that the current sentencing framework in place is succeeding in denouncing the acts of the offender in order to discourage others from committing similar crimes.²⁰⁶ Denunciation does not focus on individual offenders or potential lawbreakers, but to the wider society, and the impact that an effective criminal law framework has in the general community.²⁰⁷

²⁰¹ Ronald Rychlak, 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment' [1990] 65(2) *Tulane Law Review* 331.

²⁰² Ibid 331.

²⁰³ Ibid 331-332.

²⁰⁴ Mirko Bagaric, 'The Negation of Venting in Australian Sentencing: Denouncing Denunciation and Retribution' [2014] 88 *Australian Law Journal* 507.

²⁰⁵ Ronald Rychlak, 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment' [1990] 65(2) *Tulane Law Review* 332.

²⁰⁶ Ibid 332.

²⁰⁷ Ibid 333.

PART 2: PRINCIPLES OF SENTENCING IN VARIOUS JURISDICTIONS

CHAPTER 1: AUSTRALIA

Discussion of sentencing principles and policies will be discussed here in relation to Australia and punishment of the offence of sexual assault, in general, and sexual assault against children, specifically.

‘Sexual assault’ in Australia is defined by the Australian Bureau of Statistics as ‘physical assault of a sexual nature directed towards another person who does not give consent or gives consent as a result of intimidation or fraud, or is legally incapable of giving consent because of youth or incapacity.’²⁰⁸

CHAPTER 1.1: SEXUAL OFFENCES IN AUSTRALIA

Overview

- **Mandatory Minimum Sentences** have been enacted in each of the Commonwealth Government of Australia (Cth), and in Western Australia (WA), the Northern Territory (NT), Queensland (Qld), New South Wales (NSW), South Australia (SA) and Victoria (Vic).²⁰⁹ However, only NSW, NT, SA and Qld have introduced mandatory minimum sentences for sexual assault offences and sexual assault offences against a child.
- **Death Penalty** has been abolished at the federal level since 1973, and all Australian States have abolished capital punishment since 1984, with the last execution in 1967.
- **Chemical Castration** is not a sentencing option in any Australian State, but can be used by the courts as a condition for release from prison in courts in the States of Qld, NSW and WA in matters involving offenders classified as ‘dangerous sex offenders’.

Australia has inherited the common law tradition from Great Britain, and as such operates under a common law legal system. Australia is a federation of six states (Western Australia (WA), Queensland (Qld), New South Wales (NSW), South Australia (SA), Victoria (Vic), Tasmania (Tas)) and two mainland territories (the Northern Territory (NT) and the Australian Capital Territory (ACT)). Each Australian jurisdiction that comprises the Commonwealth of Australia has their own set of criminal laws which govern the offence of sexual assault in general,²¹⁰ and specifically, the offence of sexual assault against children.²¹¹

A review of the relevant criminal laws suggest that these offences are governed by principles including proportionality and reasonableness, parsimony, equal application and parity, and human rights. It would also appear that the laws seek to meet the sentencing purposes of retribution, incapacitation and protection of the community, deterrence, rehabilitation and denunciation. These principles and sentencing purposes will be discussed in relation to mandatory sentencing, the death penalty and chemical castration in Australia.

²⁰⁸ *Trends in Sexual Assault* (24 June 2015) Australian Institute of Criminology
<<http://www.aic.gov.au/statistics/violent%20crime/sexual%20assault.html>>.

²⁰⁹ Mirko Bagaric and Athula Pathinayake, ‘Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation’ (2014) 40 *Australian Bar Review* 64, 64.

²¹⁰ ‘*Sexual Offences*’ Australian Law Reform Commission 1130 [25.6]

<<https://www.alrc.gov.au/sites/default/files/pdfs/publications/25.%20Sexual%20Offences.pdf>>.

²¹¹ Australian Law Reform Commission, *Family Violence- A National Legal Response*, Report No 114 (2010) [25.32].

1.1.1 Sexual Offences (General)

Over the past two decades, there have been significant reforms in each jurisdiction to the offence of sexual assault, including changing the language of ‘rape’ to ‘sexual assault’ to emphasise the violence involved in sexual offences.²¹² Furthermore, a gradation of sexual offences have also been introduced to encompass the different levels of the seriousness of the offence in different situations and in light of aggravating factors.²¹³ Reforms have therefore taken into account changing conceptualisations of the offence of sexual assault.²¹⁴

Despite the comprehensiveness of each jurisdiction’s criminal laws on sexual assault, it remains one of the most difficult offences to successfully prosecute due to the significantly low reporting of sexual assaults.²¹⁵

1.1.2 Sexual Offences Against Children

Under Australian law, a ‘child’ is a person under the age of 10 and a ‘juvenile’ is a person under the age of 18.²¹⁶ The age of consent to sexual interactions for both males and females ranges generally from 16 to 18 years old.²¹⁷

In relation to sexual offences against children, each Australian jurisdiction have provided for a range of offences, including actual and attempted sexual intercourse with a child,²¹⁸ incest offences,²¹⁹ and offences where the accused is in a position of trust or authority with the child.²²⁰

The seriousness of sexual assault offences against children are expressed through each Australian jurisdiction in terms of the age of the child victim.²²¹ Generally, an offence against very young children (ranging from under the age of 10 to 13 years old) are more serious than offences against older children (ranging from under 16 to 18 years of age), and this is reflected in the imposition of higher sentences.²²² Aggravating factors are also taken into account in determining the culpability of the offender and the severity of the sentence.²²³

²¹² ‘Sexual Offences’ Australian Law Reform Commission 1130 [25.5]

<<https://www.alrc.gov.au/sites/default/files/pdfs/publications/25.%20Sexual%20Offences.pdf>>.

²¹³ Ibid.

²¹⁴ Bianca Fileborn, *Sexual Assault Laws in Australia* (February 2011) Australian Institute of Family Studies

<<https://aifs.gov.au/publications/sexual-assault-laws-australia>>.

²¹⁵ Ibid.

²¹⁶ *Legal Definition of a Juvenile* (10 August 2009) Australian Institute of Criminology

<http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/definition.html>.

²¹⁷ Adam Dean, *Age of Consent Laws* (February 2016) Australian Institute of Family Studies

<<https://aifs.gov.au/cfca/publications/age-consent-laws>>.

²¹⁸ Australian Law Reform Commission, *Family Violence- A National Legal Response*, Report No 114 (2010) [25.32].

²¹⁹ Ibid [25.36].

²²⁰ Ibid [25.39].

²²¹ Ibid [25.33].

²²² Ibid.

²²³ Ibid.

CHAPTER 1.2: MANDATORY SENTENCES

1.2.1 Nature of Offences with Mandatory Minimum Sentences in Australia

In response to calls for more stringent and consistent sentencing for certain serious offences, seven Australian jurisdictions have enacted mandatory minimum penalties for both first-time and repeat offenders.²²⁴ The introduction of mandatory minimum sentencing can therefore be seen as a ‘tough on crime’ approach taken by many of Australian States’ jurisdictions.²²⁵ However, since imprisonment is considered the severest form of punishment in the Australian criminal justice system, imposing significant hardship on prisoners, imprisonment should only be increased if there is evidence to suggest its effectiveness or benefit to the community.²²⁶

The common purposes and aims of sentencing across all Australian jurisdictions include deterrence, community protection, rehabilitation and denunciation.²²⁷

There is widespread debate as to the effectiveness of mandatory minimum sentences in achieving these aims. Sentencing councils and guidelines judgements have also been introduced in some Australian jurisdictions in an effort to provide more consistency in sentencing offenders.

This has had the effect of reducing judicial discretion in determining appropriate sentences for offenders.²²⁸ The introduction has also increased the number of incarcerated individuals in Australia, thereby imposing significant financial costs on the community.²²⁹

1.2.2 Jurisdictions with Mandatory Minimum Sentences in Australia

Mandatory minimum sentences have been enacted by the Commonwealth Government (Cth), and in Western Australia (WA), the Northern Territory (NT), Queensland (Qld), New South Wales (NSW), South Australia (SA) and Victoria (Vic)²³⁰ for a range of different offences. However, only NSW, NT, SA and Qld have introduced mandatory minimum sentences for sexual assault offences and sexual assault offences against a child.

²²⁴ Kelly Buchanan, ‘Sentencing Guidelines: Australia’ (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>.

²²⁵ Mirko Bagaric and Athula Pathinayake, ‘Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation’ (2014) 40 *Australian Bar Review* 64, 64.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ ‘The Mandatory Sentencing Debate’ *Law Council of Australia* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>>.

²²⁹ Mirko Bagaric and Athula Pathinayake, ‘Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation’ (2014) 40 *Australian Bar Review* 64, 64.

²³⁰ Ibid.

State	Offence	Mandatory Minimum Sentence	Other Sentencing Options
New South Wales	Sexual intercourse with a child under 10 years of age	No mandatory minimum sentences for sexual offences	Standard non-parole sentence of 15 years imprisonment up to a maximum sentence of 25 years imprisonment
Northern Territory	Sexual intercourse with a person under 16 years of age without consent	Maximum penalty of up to 14 years imprisonment	
	Repeat sexual intercourse with a person under 16 years of age without consent	Mandatory minimum term of 12 months imprisonment with a maximum penalty of up to 14 years imprisonment	-
	Sexual intercourse with a person under 16 years of age without consent with actual or threatened use of an offensive weapon and the victim suffers physical harm	Mandatory minimum term of 3 months imprisonment with a maximum penalty of up to 14 years imprisonment	
Queensland	Repeat serious child sex offence	Life imprisonment (25 years)	Indefinite detention may also be imposed where the offender poses a serious danger to the community

New South Wales

In NSW, standard non-parole periods have been introduced in the *Crimes (Sentencing Procedure) Act 1999* (NSW) in addition to mandatory minimum sentences.²³¹ While there are no mandatory minimum sentences for sexual offences in general under NSW law, there are standard non-parole periods for types of sexual assault offences, including a standard non-parole period of 15 years for the offence of sexual intercourse

²³¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A.

with a child under 10²³² up to a maximum penalty of 25 years imprisonment.²³³ Standard non-parole periods are to be taken into account by a judge when determining the appropriate sentence of an offender- however, following a High Court of Australia case,²³⁴ this should be done along with other matters that might otherwise be required or permitted to be taken into account to determine an appropriate sentence for the offender.²³⁵

Northern Territory

The Northern Territory adopted mandatory minimum sentences with the enactment of the *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT), which introduced five levels of violent offences with corresponding minimum sentences:

- Level 5 offence:²³⁶ applies to offences that unlawfully causes serious harm to another person,²³⁷ and to assault involving the actual or threatened use of an offensive weapon and the victim suffers physical harm as a result.²³⁸ Where the offence is the offender's first level 5 offence, a minimum sentence of 3 months' imprisonment is imposed.²³⁹ Where the offence is the offender's repeat level 5 offence, a minimum sentence of 12 months' imprisonment is imposed;²⁴⁰
- Level 4 offence: for assault offences that are not a level 5 offence and the victim suffers physical harm as a result of the offence.²⁴¹ A level 4 offence imposes a minimum sentence of 3 months' imprisonment;²⁴²
- Level 3 offence: the offence is of common assault (excluding indecent assault) and the offence is not a level 5 offence.²⁴³ Where the offence is the offender's first level 3 offence, the court must impose a term of imprisonment.²⁴⁴ Where the offence is the offender's repeat level 3 offence, a minimum of 3 months' imprisonment is imposed;²⁴⁵
- Level 2 offence: where the offender harms another person and the victim suffers physical harm as a result, but the offence is not a level 5 offence.²⁴⁶ A level 2 offence requires that a court impose a term of imprisonment;²⁴⁷ and
- Level 1 offence: includes any other violent offence.²⁴⁸ A level 1 offence requires that the court impose a term of imprisonment.²⁴⁹

²³² *Crimes Act 1900* (NSW) s 66A.

²³³ *Ibid* s 66A(1).

²³⁴ *Muldock v The Queen* (2011) 244 CLR 120.

²³⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

²³⁶ *Sentencing Act 1995* (NT) s 78CA(1).

²³⁷ *Criminal Code of the Northern Territory of Australia 1983* (NT) s 181.

²³⁸ *Ibid* ss 155A, 186, 188, 188A, 189A, 190, 191, 193, 212.

²³⁹ *Sentencing Act 1995* (NT) s 78D.

²⁴⁰ *Ibid* s 78DA.

²⁴¹ *Ibid* s 78CA(2).

²⁴² *Ibid* s 78DB.

²⁴³ *Ibid* s 78CA(3).

²⁴⁴ *Ibid* s 78DC.

²⁴⁵ *Ibid* s 78DD.

²⁴⁶ *Ibid* s 78CA(4).

²⁴⁷ *Ibid* s 78DE.

²⁴⁸ *Ibid* s 78CA(5).

²⁴⁹ *Ibid* s 78DF.

Thus, for instance, the offence of committing sexual intercourse with a person under 16 years of age without that person's consent is punishable by a maximum term of imprisonment for 14 years.²⁵⁰ Where this offence is committed with actual or threatened use of an offensive weapon, and the victim suffers physical harm as a result of the offence, the offence is a level 5 offence²⁵¹ and punishable by a mandatory minimum sentence of 3 months imprisonment.²⁵² If the offence was not the offender's first level 5 offence, the mandatory minimum sentence increases to 12 months imprisonment.²⁵³

However, where the offender is a youth (that is, under the age of 18 years),²⁵⁴ a court is not required to impose a mandatory minimum sentence of a specified period in relation to the above levels 1 to 5 offences.²⁵⁵

South Australia

In 2012, the Parliament of South Australia attempted to enact the Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill 2012 (SA), but it appears that this Bill was not passed. The Bill had attempted to amend the current *Criminal Law (Sentencing) Act 1988* (SA) to include a new s 20E for the mandatory imprisonment of child sex offenders, where:

- 'If the maximum period of imprisonment prescribed in relation to the offence is life imprisonment, there is a mandatory minimum sentence of 10 years imprisonment;'²⁵⁶ or
- 'If any other case, a mandatory minimum sentence of not less than one-third of the maximum period of imprisonment prescribed in relation to the offence.'²⁵⁷

Queensland

In Queensland, a mandatory sentence of life imprisonment (25 years) with a 20 year minimum non-parole period is imposed on repeat serious child sex offenders, which cannot be mitigated or varied.²⁵⁸ The repeat serious child sex offender may also be liable to indefinite detention if the court is satisfied that the offender poses a serious danger to the community because of the exceptional severity of the nature of the repeat offender's offence, their character, etc.²⁵⁹ The indefinite sentence may be discharged upon review if the court is satisfied that the offender no longer poses a serious danger to the community.²⁶⁰ Upon discharge of the indefinite sentence, the offender will be given the corresponding sentence for the offence for which the indefinite sentence had been imposed,²⁶¹ this sentence must not be less than the nominal sentence²⁶² - thus, for the offence of repeat child sex crime, the sentence imposed cannot be less than life imprisonment.

²⁵⁰ *Criminal Code of the Northern Territory of Australia 1983* (NT) s 192(6).

²⁵¹ *Sentencing Act 1995* (NT) s 78CA(1)(b).

²⁵² *Ibid* s 78D(2).

²⁵³ *Ibid* s 78DA.

²⁵⁴ *Youth Justice Act 2005* (NT) s 6.

²⁵⁵ *Sentencing Act 1995* (NT) s 78DH(2).

²⁵⁶ Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill 2012 (SA) s 20E(2)(a)(i).

²⁵⁷ *Ibid* s 20E(2)(a)(ii).

²⁵⁸ *Criminal Law (Two Strike Child Sex Offender) Amendment Act 2010* (Qld) s 161E(2).

²⁵⁹ *Penalties and Sentences Act 1992* (Qld) s 163.

²⁶⁰ *Ibid* s 173(1).

²⁶¹ *Ibid* s 173(1)(b).

²⁶² *Ibid* s 173(3)(c).

Victoria

Although there are no mandatory minimum sentences for sexual offences against children under the Victorian *Crimes Act 1958* (Vic), there are baseline sentences- for example, the baseline sentence for the offence of sexual penetration of a child under the age of 12 is 10 years imprisonment,²⁶³ with a maximum penalty of life imprisonment (25 years).²⁶⁴ Baseline sentences are intended by the Victorian Parliament to be the median prison sentences for certain nominated offences.²⁶⁵

It is unsure whether the mandatory minimum sentences under ss 15A and 15B under the *Crimes Act 1958* (Vic)- introduced under the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic)- for offences involving gross violence apply either to sexual offences generally, or to sexual offences against children specifically. ‘Gross violence’ includes ‘premeditated, in-company, or continuing [an] act of violence once a person is incapacitate.’²⁶⁶

Section 15A provides that where a person intentionally causes unlawful serious injury to another person in circumstances of gross violence, there is a mandatory minimum sentence of 4 years imprisonment²⁶⁷ with a maximum of 20 years.²⁶⁸ Where a person recklessly causes unlawful serious injury to another person in circumstances of gross violence, there is a mandatory minimum sentence of 4 years imprisonment to a maximum of 15 years.²⁶⁹

1.2.3 Arguments For Mandatory Sentences

The imposition of mandatory minimum sentences has been argued to serve the sentencing aims of:²⁷⁰

- retribution;
- specific and general deterrence;
- incapacitation;
- denunciation; and
- consistency in sentencing.

1.2.4 Arguments Against Mandatory Sentences

On the other hand, the implementation of mandatory minimum sentences has raised concerns regarding proportionality in sentencing, the economic and social costs on the community, its lack of deterrent effect, and negative impact on the rights of offenders who, although having committed the same offence, may have

²⁶³ *Crimes Act 1958* (Vic) s 45(2A).

²⁶⁴ *Ibid* s 45(2)(a).

²⁶⁵ State of Victoria, *Baseline Sentencing* (3 December 2015) Sentencing Advisory Council <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/baseline-sentencing>>.

²⁶⁶ See *Crimes Act 1958* (Vic) ss 15A, 15AB; Jackie Charles, *Mash-Up: Mandatory Sentencing in Australia* (23 January 2013) Rule of Law Institute of Australia <<http://www.ruleoflaw.org.au/mandatory-sentencing-in-australia/#vic>>.

²⁶⁷ ‘Mandatory Sentencing’ (Policy Discussion Paper, Law Council of Australia, May 2014) 54.

²⁶⁸ *Crimes Act 1958* (Vic) s 15A(1).

²⁶⁹ *Ibid* s 15B(1).

²⁷⁰ ‘The Mandatory Sentencing Debate’ *Law Council of Australia* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>>.

unique circumstances which aggravate or mitigate his/her culpability. Mandatory minimum sentencing also displaces public trust and confidence in the continued independence of the judiciary.

Proportionality and Reasonableness

One of the primary consequences of mandatory minimum sentencing is that it diminishes judges' discretion in determining appropriate sentences that are commensurate with the circumstances of the offender and offence.²⁷¹ This has at times led to serious miscarriage of justice, especially since mandatory sentences are not reviewable on appeal.²⁷² Mandatory minimum sentences also appears contrary to what the High Court of Australia has stated regarding the primacy of the proportionality principle in sentencing, which cannot be trumped even by the aim of community protection.²⁷³ As Sir Gerard Brennan (former Chief Justice of Australia) has stated:²⁷⁴

A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral. Sentencing is the most exacting of judicial duties because the interest of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty.

It may also be argued that mandatory minimum sentencing does not lead to proportionate sentences since juries are likely to refuse convicting offenders who face unjust mandatory penalties.²⁷⁵ As such, prosecutors deliberately charge offenders with lesser offences, and offenders are able to 'get away with' less severe punishments.²⁷⁶ Prosecutorial discretion is, unlike judicial discretion, unregulated, more liable to be exercised arbitrarily, and less transparent than judicial decision-making.²⁷⁷

Human Rights

The imposition of mandatory minimum sentences breaches Australia's obligations under articles 9(1) and 14 of the *International Covenant on Civil and Political Rights*,²⁷⁸ which prohibits arbitrary imprisonment and entitles individuals to fair hearings by independent courts, respectively.

With regards to article 9(1), mandatory minimum sentencing leads to arbitrary imprisonment because judges do not have the discretion to determine appropriate sentences that take into account the offender's circumstances.²⁷⁹

²⁷¹ Ibid.

²⁷² 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1.

²⁷³ Mirko Bagaric and Athula Pathinayake, 'Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation' (2014) 40 *Australian Bar Review* 64, 71, citing *Veen v Queen (No 1)* (1979) CLR 458, 467.

²⁷⁴ Dato' Param Kumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7, citing G Hughes, *The Mandatory Sentencing Debate* (Law Council of Australia, Canberra, 2000).

²⁷⁵ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 2.

²⁷⁶ Ibid.

²⁷⁷ Dato' Param Kumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁷⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

²⁷⁹ Letter from Ros Everett to Barry O'Farrell, 24 January 2014

<<http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/818469.pdf>>.

Mandatory minimum sentencing also diminishes judicial discretion and independence, such that an offender's right to a fair hearing before competent and independent judges is breached under article 14 of the *ICCPR*.²⁸⁰ Sentencing is an exercise of judicial power, and any law restricting judicial sentencing discretion violates the independence of the judiciary.²⁸¹ The offender's right to appeal to higher tribunals is also violated in breach of article 14(5) of the *ICCPR* since mandatory minimum sentences prevent 'substantial review of the penalty'.²⁸² In other words, an offender is unable to challenge the sentence because there would be no merit in an appeal that challenges the prescribed mandatory minimum sentence as set down by law.

Thus, the imposition of mandatory minimum sentences has significant implications in the actual and perceived independence of the courts, and may impact public trust and confidence in the judiciary. It is paramount that the courts have formal mechanisms of independence in place for all stages in sentencing, and to be perceived by the public as being independent.²⁸³

Parsimony

Mandatory minimum sentencing is not a cost-efficient mechanism in dealing with criminal offenders as some argue that it imposes immense economic and social costs on the community.²⁸⁴

Firstly, mandatory minimum sentencing reduces the number of guilty pleas, which in turn artificially increases the number of individuals proceeding to trial and thus results in higher prosecution and defence costs, and a burden on police resources.²⁸⁵ Victims and witnesses are also subjected to court delays and the stress of criminal trials.²⁸⁶ Secondly, mandatory minimum sentencing inevitably leads to increased prison populations with associated higher incarceration costs for the state.²⁸⁷ This money could be used to fund better alternatives such as crime prevention, education and rehabilitation programs. Lastly, studies have shown that the longer an offender is institutionalised, the more difficult it will be to successfully rehabilitate and reintegrate them into the community once they have served their sentence.²⁸⁸

Deterrence

Proponents of mandatory minimum sentences have argued that potential offenders would be deterred from committing crimes due to the severity of the relevant punishments, and public disapproval.²⁸⁹ This argument requires only that a reasonable number of offenders would be deterred.²⁹⁰

²⁸⁰ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 2.

²⁸¹ Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁸² Ibid; 'Mandatory Sentencing' (Policy Discussion Paper, Law Council of Australia, May 2014) 54.

²⁸³ Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁸⁴ 'The Mandatory Sentencing Debate' *Law Council of Australia* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>>.

²⁸⁵ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 2; Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁸⁶ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 2.

²⁸⁷ Kerry O'Shea, 'Baseline Sentencing a Mistake' (Media Release, 3 April 2014); Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁸⁸ Kerry O'Shea, 'Baseline Sentencing a Mistake' (Media Release, 3 April 2014).

²⁸⁹ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 13 [30].

²⁹⁰ Ibid.

However, it is often argued by Australian law societies and academics that mandatory minimum sentencing has no increased deterrent effect on potential offenders because deterrence arises out of a fear of being caught, rather than from the length of sentence.²⁹¹ Indeed, there is lack of empirical evidence in Australian statistical data that displays the deterrent effect of mandatory sentencing policies.²⁹²

Equal Application

Mandatory minimum sentencing is often introduced in an attempt to bring about more consistency in the sentencing of offenders for similar crimes. It does not look to the individual offender but to the particular criminal offence committed; or, if it does look to the offender, it does so only in relation to the offender's criminal history.²⁹³

Despite these aims, mandatory minimum sentencing has resulted in a phenomenon known as the 'cliff effect' where, due to the arbitrary nature of the offences that attract mandatory minimum sentencing, judges have imposed substantially different prison terms on similar offenders who are not significantly different.²⁹⁴

Indeed, the stated aim of consistency (as a rationale for mandatory sentencing laws) has negatively impacted the most vulnerable groups in society because mandatory sentencing does not take into account an individual's disadvantaged backgrounds.²⁹⁵ This has led to an overrepresentation of homeless people, minorities, youth, substance-addicted individuals, Aboriginals and Torres Strait Islanders, and people with mental illness in the criminal justice system.²⁹⁶ States need to consult with Indigenous people in order to ensure that laws enacted will not result in discriminatory treatment.²⁹⁷

Conclusion

There is insufficient evidence to suggest that mandatory minimum sentencing serves any of its stated aims and goals, nor that it benefits the community or offender. Sentencing guidelines (discussed in Chapter 1.5 below) may be a more effective alternative to mandatory minimum sentencing because it does not restrict judicial discretion in sentencing, and may still allow for consistency, proportionality²⁹⁸ and individualised justice.²⁹⁹

²⁹¹ Letter from Ros Everett to Barry O'Farrell, 24 January 2014

<<http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/818469.pdf>>.

²⁹² 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, [31].

²⁹³ Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁹⁴ Ibid.

²⁹⁵ 'The Mandatory Sentencing Debate' *Law Council of Australia* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>>.

²⁹⁶ 'Mandatory Sentencing Laws Policy Position' (Policy Paper, Queensland Law Society, 2014) 1, 2.

²⁹⁷ Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

²⁹⁸ Ibid.

²⁹⁹ Kelly Buchanan, 'Sentencing Guidelines: Australia' (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>.

CHAPTER 1.3: DEATH PENALTY

1.3.1 History of the Death Penalty under Australian Law

The death penalty- otherwise known as capital punishment- is ‘the state-sanctioned termination of a criminal offender’s life’,³⁰⁰ and has been used as a way for crime control.³⁰¹ It arrived on the shores of Australia with the creation of the British penal colony of NSW in 1788, which brought with it English criminal law and a list of crimes punishable by capital punishment,³⁰² including murder and manslaughter, burglary, sheep stealing, forgery, and sexual assaults.³⁰³ There has been a total prohibition of the death penalty in Australia since 1973.³⁰⁴

Historical Colonial Laws at Federation

- There was no common position among the Australian States and there was significant variation on the use of capital punishment in the Australian colonies at the time of Federation in 1901.³⁰⁵
- Only in the States of NSW³⁰⁶ and Vic³⁰⁷ was the crime of rape punishable by the death penalty.
- Colonial laws providing for capital punishment became a part of the law of each new Australian State at Federation; however, the death penalty was generally only imposed for the offence of murder, despite the vast range of offences to which the penalty was applicable.³⁰⁸
- Queensland was the first Australian State to abolish the death penalty in 1922. During parliamentary debates to abolish the penalty, it was argued that public opinion no longer supported capital punishment, that juries were often reluctant to convict murderers facing the death penalty, and that evidence showed harsh punishment did not deter crime.³⁰⁹
- During parliamentary debates in the Northern Territory on the issue of whether or not to abolish the death penalty, opposition to the abolition of capital punishment was often grounded on the aim of general deterrence.³¹⁰ Advocates of abolishing the death penalty rejected the deterrence argument and cited moral reasons for the abolition of the death penalty.³¹¹

1.3.2 Australia’s Current Stance and Challenges

The death penalty has been abolished at the federal level since 1973, and all Australian States have abolished capital punishment since 1984, with the last execution in 1967. In 2010, the Federal Australian

³⁰⁰ Janet Chan and Deborah Oxley, ‘The Deterrent Effect of Capital Punishment: A Review of the Research Evidence’ (NSW Bureau of Crime Statistics and Research Bulletin, No 84, October 2004) 1.

³⁰¹ Ibid 2.

³⁰² Jo Lennan and George Williams, ‘The Death Penalty in Australian Law’ (2012) 34 *Sydney Law Review* 659, 659, 663.

³⁰³ Ibid.

³⁰⁴ *Commonwealth Death Penalty Abolition Act 1973* (Cth).

³⁰⁵ Jo Lennan and George Williams, ‘The Death Penalty in Australian Law’ (2012) 34 *Sydney Law Review* 659, 659, 667.

³⁰⁶ Ibid 659, 668, citing *Criminal Law Amendment Act 1883* (NSW) s 39.

³⁰⁷ Jo Lennan and George Williams, ‘The Death Penalty in Australian Law’ (2012) 34 *Sydney Law Review* 659, 659, 667, citing *Crimes Act 1890* (Vic) s 42.

³⁰⁸ Jo Lennan and George Williams, ‘The Death Penalty in Australian Law’ (2012) 34 *Sydney Law Review* 659, 659, 669.

³⁰⁹ Ibid.

³¹⁰ Ibid 672.

³¹¹ Ibid.

Government amended the *Death Penalty Abolition Act 1973* (Cth) to prevent any Australian State or Territory from reintroducing the death penalty for any offence.³¹²

Currently, the sentence of life imprisonment (25 years in Australia) has replaced the death penalty as the most severe punishment under Australian law.³¹³ However, the debate as to whether capital punishment should be re-instated in Australia is often raised in the context of serious cases such as sex-murder offences.³¹⁴ Polls have shown that, in general, people's opposition to the death penalty is not based in principle, but rather depends on factors such as the crime committed and the level of public sympathy for the convicted.³¹⁵ Furthermore, while the laws abolish the practice of capital punishment under domestic law, it does not prevent Australian authorities from participating in processes that may lead to the imposition of the death penalty in foreign jurisdictions through extradition or mutual assistance in criminal proceedings³¹⁶ - although the *Extradition Act 1988* (Cth) does prevent the extradition of persons who may face the death penalty abroad.³¹⁷

1.3.3 Arguments For the Death Penalty

Although the death penalty has been abolished in Australia, there are still arguments supporting the death penalty for the following perceived advantages.

Deterrence

Capital punishment is seen as a method of deterrence when the death penalty is imposed for certain offences, particularly if the offender had the intention to commit the crime.³¹⁸

Deterrence in the form of punishment can act as:³¹⁹

- Simple deterrence where the threat of punishment causes a person to reconsider the intention of committing a crime because the threat of punishment outweighs the 'pleasure' or benefits of committing an offence; or,
- As a moralising force where the threat of punishment conveys society's disapproval of a certain offence or act. This disapproval may affect the moral attitudes of potential offenders and their behaviour. The threat of punishment may also induce a potential offender to conform to society's expectations.

³¹² Ibid 659, 682-3, quoting Explanatory Memorandum, Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009 (Cth).

³¹³ Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 1.

³¹⁴ Ibid 2; Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 660.

³¹⁵ John von Doussa, 'The Death Penalty- A Matter of Principle' (Speech delivered at the United Nations Association of Australia, Adelaide, 22 October 2006) <<https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle>>.

³¹⁶ Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 684.

³¹⁷ Ibid 694.

³¹⁸ Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 4.

³¹⁹ Janet Chan and Deborah Oxley, 'The Deterrent Effect of Capital Punishment: A Review of the Research Evidence' (NSW Bureau of Crime Statistics and Research Bulletin, No 84, October 2004) 1, 2, citing F Zimring and G Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973).

Incapacitation and Recidivism

The death penalty is an obvious method of preventing offenders from re-offending³²⁰ by obviating the risk of escape from prison or release after the offender's imprisonment term has ended.³²¹

Retribution

The death penalty is considered by some to be a just and proportionate punishment for certain offences such as murder, and corresponds with the concept of 'an eye for an eye'.³²²

1.3.4 Arguments Against the Death Penalty

There are a variety of arguments which oppose the re-introduction of the death penalty in Australia.

Proportionality and Reasonableness

One of the justifications of the proportionality principle is *lex talionis* (an eye for an eye).³²³ However, there is no way of measuring whether imposition of the death penalty on a rapist would be commensurate with his or her crime.³²⁴ There is also the possible risk that the convicted person is innocent. The law is capable of making mistakes, in which case any punishment would not at all be proportionate. As former Prime Minister of Australia, John Howard said in 2001, 'from time to time the law makes mistakes and you can't bring somebody back after you've executed them.'³²⁵

Human Rights

Regardless of how heinous the crime,³²⁶ the state should respect the sanctity of life.³²⁷ Indeed, respect for the inherent dignity and value of human life is a fundamental tenet in human rights law, and 'reflects a deeply held moral vision of the type of world we want to live in'.³²⁸ Imposition of the death penalty for any crime would be a clear breach of the state's duty to respect the right to life.

Deterrence

The death penalty has been proven to have very little to no deterrent effect on offenders,³²⁹ and there is little evidence to suggest that it has any real deterrent value over and above imprisonment.³³⁰

³²⁰ Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 4.

³²¹ Ibid.

³²² Ibid 5.

³²³ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 145, 155.

³²⁴ Ibid.

³²⁵ Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 659, 661, quoting *Australia's Policy on the Death Penalty*, New South Wales Council for Civil Liberties <http://www.nswcccl.org.au/issues/death_penalty/aust_policy.php#fn5>.

³²⁶ Michael Gannon, 'Why Saying No to the Death Penalty is the Ethical Thing To Do' (2015) 27(4A) *Australian Medicine* 23, 23.

³²⁷ John von Doussa, 'The Death Penalty- A Matter of Principle' (Speech delivered at the United Nations Association of Australia, Adelaide, 22 October 2006) <<https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle>>.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 5.

Furthermore, the threat of the death penalty only acts as a deterrence if the crime had been premeditated. As such, the death penalty has no deterrent effect on those offenders who had, for example, committed murder in the heat of passion.³³¹

Rehabilitation

Capital punishment does not allow for the rehabilitation of offenders,³³² particularly for those offenders who have committed offences in the heat of passion and who are unlikely to re-offend.³³³

Conclusion

Given that capital punishment breaches a number of sentencing principles and purposes, there appears to be no compelling reason for either the retention or re-introduction of the death penalty as punishment for any crime.

CHAPTER 1.4: CASTRATION

1.4.1 Current Stance in Australia on Chemical Castration

Anti-libidinal treatment, otherwise known as chemical castration, is a ‘treatment’ under the criminal law that is used to prevent further reoffending of sex crimes, in particular for convicted pedophiles and child sex offenders although it is not recognised as a ‘cure-all’ or panacea.³³⁴ It is a form of non-custodial treatment order, and is usually offered to convicted offenders as an alternative to incarceration,³³⁵ or while they are still in prison as a condition of early release.³³⁶

In August 2015, the New South Wales Government established a taskforce to examine whether judges could order child sex offenders to undergo chemical castration,³³⁷ and for what type of child sex offences it may apply.³³⁸ According to statistics, 17% of child sex offenders are likely to reoffend within two years.³³⁹

However, there is strong debate in the Australian community as to whether or not anti-androgenic medication used in the process of chemical castration of convicted child sex offenders is ethical or even effective.³⁴⁰

³³¹ Ibid 4.

³³² Ibid 5.

³³³ Ibid 4.

³³⁴ ‘Taskforce on Anti-Libido Treatment for Child Sex Offenders’ (Media Release, 26 August 2015)

<<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Taskforce-on-anti-libido-treatment-of-child-sex-offenders.aspx>>.

³³⁵ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 40.

³³⁶ Ibid 39.

³³⁷ Ibid.

³³⁸ ABC News, ‘NSW Government May Introduce Chemical Castration for Child Sex Offenders as a Sentencing Option’ *The World Today*, 26 August 2015 (Mandie Sami) <<http://www.abc.net.au/worldtoday/content/2015/s4300319.htm>>.

³³⁹ ‘NSW Government Taskforce to Examine Chemical Castration of Child Sex Offenders’, *ABC News* (online), 26 August 2015 <<http://www.abc.net.au/news/2015-08-26/nsw-govt-considers-chemical-castration-of-sex-offenders/6725220>>.

³⁴⁰ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>.

In Australia, chemical castration is currently an option to prisoners convicted of sexual offences as a condition to early release from prison, rather than as a sentencing option.

At the time of writing, courts in the States of Queensland (QLD), New South Wales (NSW) and Western Australia (WA) can order people classified as ‘dangerous sex offenders’ to undergo chemical castration as a condition for release from prison.³⁴¹ In NSW, sex offenders can voluntarily undergo chemical castration while in prison.³⁴² However, chemical castration is not a sentencing option in any Australian State.³⁴³

1.4.2 Arguments For Chemical Castration

The main argument in support of chemical castration has been to prevent the risk of dangerous sex offenders from re-offending after release from prison. Chemical castration may arguably even promote the rehabilitation of sex offenders since there are no permanent effects after treatment has ceased.³⁴⁴

1.4.3 Arguments Against Chemical Castration

Ethical and Medical Concerns

The Royal Australian and New Zealand College of Psychiatrists (RANSCP) does not support mandatory chemical castration for convicted child sex offenders for the following reasons:³⁴⁵

- chemical castration violates medical practitioners’ Code of Ethics because a patient’s consent should be given before undergoing any such procedure;
- chemical castration leads to no sex drive at all, which is contrary to the goal of merely reducing deviant sexual arousal and behaviour;
- chemical castration has significant potential side effects; and
- prescription of anti-androgenic medication (used in chemical castration) is a clinical decision that requires specific medical knowledge of the individual being, or likely to be, subjected to it.

Proportionality

Once the option of chemical castration is accepted by the offender, the nature and duration of the ‘treatment’ is often ill-defined and may violate limits in sentencing that would otherwise accord with the principle of proportionality in sentencing.³⁴⁶

³⁴¹ ABC News, ‘NSW Government May Introduce Chemical Castration for Child Sex Offenders as a Sentencing Option’ *The World Today*, 26 August 2015 (Mandie Sami) <<http://www.abc.net.au/worldtoday/content/2015/s4300319.htm>>.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Uger Nedim, *Chemical Castration of Child Sex Offenders: Is It Effective?* (2 September 2015) Sydney Criminal Lawyers <<http://www.sydneycriminallawyers.com.au/blog/chemical-castration-of-child-sex-offenders-is-it-effective/>>.

³⁴⁵ ‘NSW Considers Compulsory Castration’, *SBS News* (online), 26 August 2015 <<http://www.sbs.com.au/news/article/2015/08/26/nsw-considers-compulsory-castration>>.

³⁴⁶ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 39.

Human Rights

Mandatory chemical castration represents punishing an offender twice for the same crime because chemical castration is not treatment but rather, punishment.³⁴⁷

Furthermore, offenders have merely an appearance of freedom of choice when agreeing to be subjected to chemical castration. Indeed, the ‘choice’ to go through with chemical castration is often used as a bargaining chip for a sentencing discount in the face of graver sentencing options (eg imprisonment) or for not having a conviction recorded.³⁴⁸ In other words, offenders’ ‘informed consent’ as to whether or not to submit to chemical castration takes place in an ‘inherently coercive environment [where] his/her freedom of choice is substantially eroded, if not totally precluded.’³⁴⁹

Parsimony

For anti-androgenic medication to work as part of the chemical castration process, the individual would need to continually take the medication. This means that there are practical issues involved in monitoring an individual’s use of the medication to ensure that they won’t reoffend.³⁵⁰ Monitoring of treatment passes from the court to the doctor with the risk of no external scrutiny.³⁵¹

Recidivism

One of the main purposes of chemical castration is to prevent reoffending amongst sex offenders. However, it is doubted whether chemical castration actually works in preventing reoffending:

- Of all categories of violent crimes, convicted child sex offenders have the lowest recidivism rates (apart from murder).³⁵²
- It is estimated that 17% of child sex offenders reoffend within two years.³⁵³ However, this number has been disputed, with some arguing that the numbers vary from 6-30% depending on the category of child sex offender and what constitutes sexual offending;³⁵⁴ and
- 90% of child sexual assault victims are known to the offender or take place in the family. Chemical castration- which seeks only in reducing the offender’s sexual libido- therefore does not address the power dynamics behind sexual assault offences against children.³⁵⁵

³⁴⁷ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>.

³⁴⁸ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 39.

³⁴⁹ Ibid 48.

³⁵⁰ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>.

³⁵¹ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 51, quoting J Bancroft, ‘Ethical Aspects of Sexuality and Sex Therapy’ in S Bloch and P Chodoff (eds), *Psychiatric Ethics* (Oxford University Press, 2nd ed, 1991) 233.

³⁵² Mike O’Connor, ‘Our Father Who Art in Prison: Conviction and Rehabilitation for Australian Catholic Clergy Who Are Child Sexual Offenders’ (2015) *Journal of Law and Medicine* 471, 480, 479.

³⁵³ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>; ‘NSW Government Taskforce to Examine Chemical Castration of Child Sex Offenders’, *ABC News* (online), 26 August 2015 <<http://www.abc.net.au/news/2015-08-26/nsw-govt-considers-chemical-castration-of-sex-offenders/6725220>>.

³⁵⁴ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>.

³⁵⁵ Uger Nedim, *Chemical Castration of Child Sex Offenders: Is It Effective?* (2 September 2015) Sydney Criminal Lawyers <<http://www.sydneycriminallawyers.com.au/blog/chemical-castration-of-child-sex-offenders-is-it-effective/>>.

1.4.4 Concerns Regarding Chemical Castration

In light of the arguments for and against chemical castration, there are a number of concerns in Australia regarding the use of chemical castration as a method of punishment for sexual assault offences. First, some argue that chemical castration is, and should be seen as, punishment rather than ‘treatment’. The imposition of chemical castration should therefore be governed by principles such as proportionality,³⁵⁶ and considered in light of human rights implications.

Secondly, the current voluntary nature of chemical castration programmes means that it is seen as a ‘privilege’ rather than a burden on the offender.³⁵⁷ However, faced with alternatives, the offender is the judge of their own best interests and this acts as a safeguard against state abuse.³⁵⁸ To ensure that human rights principles are adhered to, consent must persist and be free of coercion throughout the entire duration of a chemical castration programme.³⁵⁹

With regards to the argument that chemical castration lowers rates of recidivism, one should bear in mind that statistics relating to the risk of reoffending by convicted child sexual offenders are likely to be skewed because:³⁶⁰

- Budgetary and time constraints on recidivism studies have limited most studies to an average of 2-3 years. It is likely that longer studies are needed to reveal true rates of recidivism among child sex offenders;³⁶¹ and
- The category of ‘child sex offenders’ include a diverse range of offenders with different motivations. Therefore, the recidivism rate of intra-familial offenders may be lower than extra-familial offenders because the former category have access to a smaller number of children, thereby limiting the likelihood of reoffending.³⁶²

CHAPTER 1.5: ALTERNATIVE SENTENCING METHODS

1.5.1 Guideline Judgements as an Alternative to Mandatory Minimum Sentencing in Australia

- Guideline judgements are ‘court decisions that give judges guidance as to how offenders should be sentenced. One purpose of guideline judgements is to improve sentencing consistency’.³⁶³

³⁵⁶ ‘Treatment or Punishment? Chemical Castration of Child Sex Offenders’, *The Conversation* (22 April 2014) <<https://theconversation.com/treatment-or-punishment-chemical-castration-of-child-sex-offenders-25495>>.

³⁵⁷ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 39.

³⁵⁸ Ibid.

³⁵⁹ Ibid 49-50.

³⁶⁰ Kelly Richards, ‘Misperceptions About Child Sex Offenders’ (Publication No 429) *Australian Institute of Criminology*, September 2011) 5.

³⁶¹ Kelly Richards, ‘Misperceptions About Child Sex Offenders’ (Publication No 429) *Australian Institute of Criminology*, September 2011) 5, citing J Tressider, P Homel and J Payne, *Measuring Youth Justice Outcomes* (2009) Australian Institute of Criminology.

³⁶² Kelly Richards, ‘Misperceptions About Child Sex Offenders’ (Publication No 429) *Australian Institute of Criminology*, September 2011) 5.

³⁶³ ‘Guideline Judgements’, *NSW Sentencing Council* <<http://www.sentencingcouncil.justice.nsw.gov.au/nsw-sentencing-council/sentencing-in-nsw/guideline-judgments>>.

- There has been a movement towards the development of guideline judgements in Australian jurisdictions, beginning in the 1990s and early 2000s.
- The first formal guideline judgement was issued by the New South Wales Court of Criminal Appeal in 1998 by Chief Justice Spigelman in *R v Jurisic*.³⁶⁴
- Currently, courts in NSW, Qld, Vic, SA and WA are authorised to issue guideline judgements.³⁶⁵ However, courts have been reluctant to issue guideline judgements in some instances.

New South Wales

- Under s 36 of the governing legislation, *Crimes (Sentencing Procedure) Act 1999* (NSW) guideline judgements may be general (ie apply generally) or specific (ie applying to particular courts or classes of courts, particular offences or classes of offences, to particular penalties or classes of penalties, or to classes of offenders).
- Guideline judgements may be issued in proceedings which the Court considers appropriate or which is necessary for the purpose of determining the proceedings.³⁶⁶
- Guideline judgements may be reviewed, varied, or revoked in subsequent guideline judgements by the Court.³⁶⁷
- Guideline judgements are to be taken into account *in addition to* any other matter that courts must take into account as required by legislation. The guideline judgement must not 'limit or derogate from any such [legislative] requirement'³⁶⁸ - for instance, aggravating and mitigating factors, guilty pleas, penalty reductions for facilitating the administration of justice or for assisting law enforcement authorities.³⁶⁹
- However, NSW currently only allows for the issue of guideline judgements in 6 subject areas which does not include sexual assault generally, or child sexual offences more specifically, although in response to a past gang-rape case the NSW Attorney-General had attempted to submit an application for guideline judgement in relation to sexual assault and aggravated sexual assault in 2001.³⁷⁰ No guideline judgement was issued by the Criminal Court of Appeal regarding the matter.
 - o Currently, NSW guideline judgements cover:
 - i) Dangerous driving causing death or grievous bodily harm;
 - ii) Armed robbery;
 - iii) Break, enter and steal;
 - iv) Discounts for pleading guilty;
 - v) Taking further offences into account; and
 - vi) High-range drink driving.

No new guideline judgements have been issued in NSW since 2004.³⁷¹

³⁶⁴ (1998) 45 NSWLR 209.

³⁶⁵ Kelly Buchanan, 'Sentencing Guidelines: Australia' (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>.

³⁶⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37A(1).

³⁶⁷ *Ibid* s 37B.

³⁶⁸ *Ibid* s 42A.

³⁶⁹ *Ibid* Pt 3 Div 1.

³⁷⁰ Kelly Buchanan, 'Sentencing Guidelines: Australia' (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 September 2001, 16511.

³⁷¹ *Ibid*.

Western Australia

- Section 6 of the *Sentencing Act 1995* (WA) requires that the Court consider any relevant guidelines when sentencing an offender as a principle of sentencing.
- Furthermore, the Court of Appeal in WA has the authority to give a guideline judgement in any proceeding that the Court considers appropriate, regardless of whether or not it is necessary for the purpose of determining the proceeding.³⁷²

Victoria

- The Victorian Court of Appeal must consider the need to promote consistency in sentencing offenders and the need to promote public confidence in the criminal justice system when giving or reviewing a guideline judgement.³⁷³

South Australia

- Guideline judgements may include appropriate ranges of penalties for particular offences, and indications as to how particular aggravating or mitigating factors should be reflected in a sentence.³⁷⁴
- A Court must consider relevant guideline judgements but are not bound by them if, in the circumstances of the case, there is good reason for not doing so.³⁷⁵

Queensland

- The Queensland Court of Appeal must consider the need to promote consistency in sentencing offenders and the need to promote public confidence in the criminal justice system when giving or reviewing a guideline judgement.³⁷⁶

The benefit of guideline judgements is that they allow courts to retain judicial independence and discretion in the sentencing process, and most Australian jurisdictions do not require courts to be bound to guideline judgements; instead, guideline judgements should be applied only if the court believes it is appropriate in determining a particular case. This gives courts the ability to individually assess the circumstances of each case without being bound to benchmark sentences and allows for more proportionate, consistent and reasonable sentencing of offenders.

CHAPTER 1.6: OVERALL CONCLUSION AND RECOMMENDATIONS

1.6.1 Mandatory Sentences

There is insufficient evidence to suggest that mandatory minimum sentencing serves any of its stated aims and goals, nor that it benefits the community or offender. Sentencing guidelines may be a better alternative

³⁷² Ibid.

³⁷³ *Sentencing Act 1991* (Vic) s 6AE(a), (b).

³⁷⁴ Kelly Buchanan, 'Sentencing Guidelines: Australia' (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>.

³⁷⁵ Ibid.

³⁷⁶ Ibid, citing *Penalties and Sentencing Act 1992* (Qld) s 15AH.

to mandatory minimum sentencing because it does not restrict judicial discretion in sentencing, and may still allow for consistency, proportionality³⁷⁷ and individualised justice.³⁷⁸

1.6.2 Death Penalty

Australia has totally prohibited the imposition of the death penalty for all criminal offences since 1973.³⁷⁹ This is in line with commitments to respect and protect the sanctity of life,³⁸⁰ regardless of what heinous crimes a person may have committed.³⁸¹ Instead, life imprisonment of 25 years has replaced the death penalty as the most severe punishment under Australian law.³⁸²

The risk of condemning an innocent person to death for a crime that he or she did not commit,³⁸³ and the little evidence that suggests any real deterrent effect on offenders,³⁸⁴ have also proven strong arguments in support of Australia's abolition of the death penalty.

1.6.3 Castration

Chemical castration is not currently a sentencing option in Australia.³⁸⁵ Rather, it is offered as an option to prisoners convicted of sexual offences, or to those who the Courts classify as 'dangerous sex offenders', as a condition to early release from prison.³⁸⁶ Chemical castration programmes in Australia are therefore 'voluntarily' entered into by convicted sex offenders.³⁸⁷ While some may argue that an offender's consent to chemical castration does not actually represent a real 'choice',³⁸⁸ the offender is usually the judge of their own best interests;³⁸⁹ therefore, so long as the offender's choice is informed, this should safeguard against state abuse.³⁹⁰ The offender's consent must also persist and be free from coercion throughout the entire programme of chemical castration.³⁹¹

³⁷⁷ Dato' Param Kumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

³⁷⁸ Kelly Buchanan, 'Sentencing Guidelines: Australia' (April 2014) *Library of Congress* <<http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Mandatory>>.

³⁷⁹ *Commonwealth Death Penalty Abolition Act 1973* (Cth).

³⁸⁰ John von Doussa, 'The Death Penalty- A Matter of Principle' (Speech delivered at the United Nations Association of Australia, Adelaide, 22 October 2006) <<https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle>>.

³⁸¹ Michael Gannon, 'Why Saying No to the Death Penalty is the Ethical Thing To Do' (2015) 27(4A) *Australian Medicine* 23, 23.

³⁸² Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 1.

³⁸³ Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 659, 661, quoting *Australia's Policy on the Death Penalty*, New South Wales Council for Civil Liberties <http://www.nswccl.org.au/issues/death_penalty/aust_policy.php#fn5>.

³⁸⁴ John von Doussa, 'The Death Penalty- A Matter of Principle' (Speech delivered at the United Nations Association of Australia, Adelaide, 22 October 2006) <<https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle>>; Ivan Potas and John Walker, 'Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment' (February 1987) 1, 1.

³⁸⁵ ABC News, 'NSW Government May Introduce Chemical Castration for Child Sex Offenders as a Sentencing Option' *The World Today*, 26 August 2015 (Mandie Sami) <<http://www.abc.net.au/worldtoday/content/2015/s4300319.htm>>.

³⁸⁶ Ibid.

³⁸⁷ Richard G Fox, 'The Compulsion of Voluntary Treatment in Sentencing' (1992) 16 *Criminal Law Journal* 37, 39.

³⁸⁸ Ibid 39, 48.

³⁸⁹ Ibid 39.

³⁹⁰ Ibid.

³⁹¹ Ibid 49-50.

Evidence of the low recidivism rates among convicted child sex offenders have cast doubt on the necessity and effectiveness of chemical castration.³⁹² To address this concern, it is recommended that the treatment only be imposed on repeat child sex offenders who have shown a likelihood of reoffending through their conduct, or ordered against ‘dangerous’ or ‘serious’ child sex offenders.

Other measures to ensure the ethics and effectiveness of chemical castration may include:

- in accordance with the principle of proportionality, defining the nature and duration of treatment for each offender so as to avoid the risk of imposing an indefinite punishment on the offender;³⁹³
- governing the laws and procedure surrounding chemical castration in line with human rights;³⁹⁴ and
- requiring sufficient judicial or other monitoring to ensure that:
 - i) there are no significant side-effects on the offender’s health;³⁹⁵
 - ii) the offender is continually using, and consenting to use, anti-libidinal drugs as part of his or her chemical castration treatment;³⁹⁶ and
 - iii) the offender is not reoffending as a result of his or her use of the anti-libidinal drugs.³⁹⁷

It should be borne in mind, however, that chemical castration is not a ‘cure-all’, nor a panacea for sexual deviancies or sexual offences against children.³⁹⁸

³⁹² Mike O’Connor, ‘Our Father Who Art in Prison: Conviction and Rehabilitation for Australian Catholic Clergy Who Are Child Sexual Offenders’ (2015) *Journal of Law and Medicine* 471, 480, 479.

³⁹³ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 39.

³⁹⁴ ‘Treatment or Punishment? Chemical Castration of Child Sex Offenders’, *The Conversation* (22 April 2014) <<https://theconversation.com/treatment-or-punishment-chemical-castration-of-child-sex-offenders-25495>>.

³⁹⁵ ‘NSW Considers Compulsory Castration’, *SBS News* (online), 26 August 2015 <<http://www.sbs.com.au/news/article/2015/08/26/nsw-considers-compulsory-castration>>.

³⁹⁶ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 49-50.

³⁹⁷ Jessica Tapp, ‘Maggie Hall: “Chemical Castration Plan Might Miss the Mark”’, *The Drum* (online), 28 August 2015 <<http://www.abc.net.au/news/2015-08-28/tapp-chemical-castration-plan-might-miss-the-mark/6730612>>.

³⁹⁸ ‘Taskforce on Anti-Libido Treatment for Child Sex Offenders’ (Media Release, 26 August 2015) <<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Taskforce-on-anti-libido-treatment-of-child-sex-offenders.aspx>>.

CHAPTER 2: CANADA

CHAPTER 2.1: SEXUAL OFFENCES IN CANADA

Overview

- **Mandatory Sentences** - Have existed since the first Criminal Code was enacted in 1892, but it is only since 1995 that mandatory minimum sentences have been used for offences against the person. Currently, there are both minimum and maximum sentences for offences against people under the age 16 years.³⁹⁹
- **Death Penalty** – Has been abolished since 1976 for all offences but particular offences under the *National Defence Act*, RSC 1985, c. N-5 but this exception was removed in 1998.
- **Chemical Castration** – Is not a sentencing option for a judge under the *Criminal Code*, but if the prosecution has sought (and succeeded) to have an offender classified as either a dangerous or long-term offenders by the court, then the National Parole Board can make it a condition of release from prison.

Canada is a former British colony, and thus follows the common law model. Like most common law countries, Canada's criminal offences are codified in legislation. Criminal offences in Canada are contained within a single federal (national) statute the *Criminal Code*, RSC 1985, c C-46 ('*Criminal Code*') which is administered by the provinces and can be located online.⁴⁰⁰ The *Criminal Code* contains offences that specifically refer to sexual assault, but there is no separate offences for sexual offences against children, rather a separate punishment is specified if the victim is a child.

A review of the *Criminal Code* and the academic literature would seem to suggest that there is considerable conflict in achieving a balance between the principles and the purposes of sentencing. The *Criminal Code* specifically extolls the fundamental principle of sentencing to be proportionality,⁴⁰¹ whilst simultaneously identifying that the purposes of denunciation and deterrence should be given greater consideration for offences against children.⁴⁰² These principles and purposes are diametrically opposed to one another, and is the subject of considerable debate amongst the literature. These principles and purposes of sentencing will be discussed in relation to mandatory sentencing, the death penalty and chemical castration in Canada.

2.1.1 Sexual Offences (General)

The discourse surrounding sexual offences has altered the landscape both of the nomenclature and substance of what constitutes an offence. Prior to 1983, the *Criminal Code* defined rape as an assault specifically with

³⁹⁹ *Criminal Code*, RSC 1985, c C-46, ss 151 – 3, 155, 271 – 3.

⁴⁰⁰ The *Criminal Code*, RSC 1985, c C-46 can be read online on the Justice Laws website: Department of Justice, Government of Canada, *Criminal Code*, RSC 1985, c C-46 (19 May 2016) <<http://laws-lois.justice.gc.ca/eng/acts/c-46/index.html>>.

⁴⁰¹ *Criminal Code*, s 718.1.

⁴⁰² *Ibid* s 718.01.

vaginal and/or anal penetration.⁴⁰³ In 1983, the *Criminal Code* was altered to repeal rape and replace it with sexual assault, which is characterised as an assault offence of a sexual nature. As a result, sexual assault is a much broader offence as constitutes applying force to another person, either directly or indirectly without their consent.⁴⁰⁴

Sexual assault is underreported as most victims are unwilling to disclose their experience to any formal source, which results in inaccurate statistics of the occurrence of the offence.⁴⁰⁵ A 2004 report estimated that only 8% of sexual assaults were reported to police as compared to 40% of physical assaults, which suggests that sexual assaults, in particular, are severely underreported.⁴⁰⁶ Physical force was used against the victim in 95% of sexual assault cases.⁴⁰⁷

2.1.2 Sexual Offences Against Children

The age of consent for sexual acts is not contained within a single section of criminal legislation. If the victim is under a particular age, usually 16 years, then the standard penalty for the offence will *not* apply. Rather a specifically designated punishment will apply to offenders who are found guilty of committing an offence against that individual. As per, Figure 1, the judge has discretion in sentencing people found guilty of committing a sexual assault⁴⁰⁸ within the prescribed limits of the legislation. If the offence is of an indictable nature and the victim is over 16 years old the judge has discretion in selecting a sentence up to a maximum sentence of 10 years' imprisonment. But if the victim is under 16 years old, then the judges' discretion is constrained to issuing a minimum sentence of 1-year imprisonment and a maximum sentence of 14 years' imprisonment. Thus, the age of consent will be specified in the offence, but generally the age of consent is 16 years; this was raised from 14 years in 2008 under the *Tackling Violence Crime Act*, SC 2008, c.6, s 54 which amended the *Criminal Code*.

The sexual offences that specify an alternative punishment for when the victim is under the age of 16 years are: sexual assault,⁴⁰⁹ sexual assault with a weapon,⁴¹⁰ aggravated sexual assault,⁴¹¹ sexual interference,⁴¹² invitation to sexual touching,⁴¹³ sexual exploitation,⁴¹⁴ and incest.⁴¹⁵ When the victim of the offence is under the age of 16 years old then the maximum sentence that the judge can order is increased and their discretion

⁴⁰³ Sexual Assault Services of Saskatchewan, *Sexual Assault in Canada* <<http://sassk.ca/about-sexual-assault/sexual-assault-in-canada>>; Jane Doe, 'Who Benefits From the Sexual Assault Evidence Kit?' in eds. Elizabeth A. Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 355, 364

⁴⁰⁴ *Criminal Code*, ss 265(1)(a), (2).

⁴⁰⁵ Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada 2004 and 2007*, Canadian Centre for Justice Statistics <<http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.htm>>.

⁴⁰⁶ Roxan Vaillancourt, *Gender Differences in Police-Reported Violence Crime in Canada, 2008*, Canadian Centre for Justice Statistics (27 November 2015) <<http://www.statcan.gc.ca/pub/85f0033m/85f0033m2010024-eng.htm?contentType=application%2Fpdf>>.

⁴⁰⁷ Ibid.

⁴⁰⁸ *Criminal Code*, s 271.

⁴⁰⁹ Ibid s 271.

⁴¹⁰ Ibid s 272(2).

⁴¹¹ Ibid s 273(2).

⁴¹² Ibid s 151.

⁴¹³ Ibid s 152.

⁴¹⁴ Ibid s 153(1).

⁴¹⁵ Ibid s 155(2).

is constrained by the application of a mandatory minimum sentence. As noted above, the judge is required to give greater weight to two purposes of sentencing, denunciation and deterrence when exercising their discretion to sentence the offender.⁴¹⁶

CHAPTER 2.2: MANDATORY SENTENCES

2.2.1 Nature of Offences with Mandatory Minimum Sentences in Canada

Mandatory minimum sentencing have existed in Canada since the first Criminal Code was enacted in 1892, at that point in time, there were only six offences which contained a mandatory minimum term of imprisonment and none of them were for offences against the person.⁴¹⁷ Mandatory minimum sentences were not introduced for offences against the person until the *Firearms Act*, SC 1995, c 39 in the form of legislation that was designed to target persons committing offences utilising a firearm.⁴¹⁸ Since 1995 it has become more common to implement mandatory minimum sentences for crimes against the person. Currently, mandatory minimum sentences are only implemented for offences of a sexual nature if the victim is under 16 years old.⁴¹⁹ Thus, if the victim is over the age of 16 years, there is no mandatory minimum sentence that a judge is required to apply. The mandatory minimum penalties listed in the table below for sexual offences were largely introduced by the *Safe Streets and Communities Act*, SC 2012, c 1, due to a growing concern about the rates of sexual offences against children. The introduction of mandatory minimum penalties were viewed as a means to be tough on crime to deter individuals from committing these offences.⁴²⁰ Parliament has proposed introducing mandatory minimum sentences in numerous unsuccessful bills, which has led Doob to suggest that these sentences are popular amongst the legislature as a means to be tough on crime.⁴²¹ Parliament's preference for mandatory minimum sentences is at odds with every Canadian sentencing commission that has recommended that they be abolished.⁴²² Presumably, the Canadian sentencing commissions have recommended that mandatory minimum sentences be abolished because they are unsuccessful at deterring crime, this theory will be discussed below at '2.2.4 Arguments Against Mandatory Sentences'.

⁴¹⁶ Ibid s 718.01.

⁴¹⁷ Nicole Crutcher, 'The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 273, 273.

⁴¹⁸ Ibid 278 – 9.

⁴¹⁹ With the exception of *Criminal Code*, s 153(1) for sexual exploitation which applies to a child between the ages of 14 years and 18 years.

⁴²⁰ Elizabeth Sheehy, 'Mandatory Minimum Sentences: Law and Policy' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 261, 263; Nicole Crutcher, 'The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 273, 280; Anthony N. Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 287, 288; Anthony N. Doob, 'Principled sentencing, politics, and restraint in the use of imprisonment: Canada's break with its history' (2012) IX *Champ Pénal*, 48 < <https://champpenal.revues.org/8335>>.

⁴²¹ Nicole Crutcher, 'The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 273, 273, 280.

⁴²² Anthony N. Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 287, 288.

Figure 1 – Selection of Sexual Offences with Mandatory Sentences

Section	Offence	Description	Sentence
271	Sexual Assault	<p>Everyone who commits a sexual assault is guilty of.</p> <p>There is no definition of a sexual assault, it is merely an assault that is of a sexual nature. Thus, it is necessary to refer to s 265(1) which defines an assault as when</p> <p>(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;</p> <p>(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or</p> <p>(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs</p>	<p>Standard penalty for an adult</p> <p>(a) indictable offence</p> <p>No minimum sentence</p> <p>Maximum sentence is 10 years imprisonment</p> <p>(b) summary conviction</p> <p>No minimum sentence</p> <p>Maximum sentence = 18 months imprisonment</p> <p>Standard penalty for a victim under 16 years</p> <p>(a) indictable offence</p> <p>minimum sentence = 1 year imprisonment</p> <p>maximum sentence = 14 years imprisonment</p> <p>(b) summary conviction</p> <p>Minimum sentence = 6 months imprisonment</p> <p>Maximum sentence = 2 years imprisonment</p>
272(1)	Sexual assault with a weapon, threats to a third party or causing bodily harm	<p>(1) Every person commits an offence who, in committing a sexual assault,</p> <ul style="list-style-type: none"> (a) carries, uses or threatens to use a weapon or an imitation of a weapon; (b) threatens to cause bodily 	<p>Standard penalty for an adult</p> <p>(2)(a.1) If a firearm was used</p> <p>Minimum sentence = 4 years imprisonment</p>

- harm to a person other than the complainant;
- (c) causes bodily harm to the complainant; or
- (d) is a party to the offence with any other person

Maximum sentence = life imprisonment

Standard penalty for a victim under 16 years

(2)(a.2) If a firearm was used

Minimum sentence = 5 years imprisonment

Maximum sentence = life imprisonment

273(1)	Aggravated Sexual Assault	Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.	<p>Standard penalty for an adult</p> <p>(2)(a.1) If a firearm was used</p> <p>Minimum sentence = 4 years imprisonment</p> <p>Maximum sentence = life imprisonment</p> <p>Standard penalty for a victim under 16 years</p> <p>(2)(a.2) If a firearm was used</p> <p>Minimum sentence = 5 years imprisonment</p> <p>Maximum sentence = life imprisonment</p>
--------	---------------------------	---	--

151	Sexual Interference	Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years is guilty of an offence	<p>No adult provision – only an offence for victims under 16 years</p> <p>(a) indictable offence</p> <p>minimum sentence = 1 year imprisonment</p> <p>maximum sentence = 14 years</p>
-----	---------------------	--	--

imprisonment

(b) summary conviction

Minimum sentence = 90 days' imprisonment

Maximum sentence = 2 years imprisonment

152	Invitation to sexual touching	Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years, is guilty of an offence	No adult provision – only an offence for victims under 16 years (a) indictable offence minimum sentence = 1 year imprisonment, maximum sentence = 14 years imprisonment (b) summary conviction Minimum sentence is 90 days imprisonment Maximum sentence is 2 years imprisonment
153(1)	Sexual Exploitation	(1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who <ul style="list-style-type: none">• (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or	No adult provision – only an offence for victims between 14 years – under 18 years (1.1) (a) indictable offence minimum sentence = 1 year imprisonment, maximum sentence = 14 years imprisonment (b) summary conviction

- (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

Minimum sentence = 90 days' imprisonment

Maximum sentence = 2 years imprisonment

Is guilty of an offence

S 153(2) A young person is 14 yrs or more but under the age of 18 yrs

155	Incest	(1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person	<p>(2) guilty of an indictable offence</p> <p>Standard penalty for an adult</p> <p>No minimum sentence</p> <p>Maximum sentence = 14 years imprisonment</p> <p>Standard penalty for a victim under 16 years</p> <p>Minimum sentence = 5 years imprisonment</p> <p>Maximum sentence = 14 years imprisonment</p>
-----	--------	--	---

Thus, as evidenced by the mandatory sentences above, the judges' discretion has been limited by legislation. Though, judges still have discretion in determining the sentence that will apply to offenders between the minimum and maximum sentences identified in legislation. Yet, the *Criminal Code* also limits how judges can exercise their discretion in determining sentences by introducing general sentencing principles. The purposes of sentencing that are listed in the *Criminal Code* are extensive, but there is no statutory guidance for the judiciary regarding the weight that any particular purpose is supposed to have when making a sentence. Doob has raised concerns that the lack of sentencing guidance for prioritising particular principles results in sentences that lack consistence due to the complex nature of factors that need to be simultaneously

considered.⁴²³ Yet, it should be noted that this concern could potentially be ameliorated by the *Criminal Code*, s 718.01 (as contained in Figure 2) which was introduced in 2005 and identifies that the purposes of denunciation and deterrence are to have priority when sentencing individuals convicted of crimes against children. Yet, conflicting principles still apply even in this instance as it must still conform to the principle of proportionality.⁴²⁴ Thus, judges are bound by conflicting principles when sentencing offenders who are guilty of committing an offence against a person under the age of 16 years. As the principles of proportionality and deterrence, in particular, are often difficult to reconcile. The conflict between proportionality and deterrence will be discussed below.

Figure 2 – Relevant Sentencing Considerations in the *Criminal Code*

Section	Heading	Description
718	Purpose	<p>The fundamental purpose of sentencing is to protect society and 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:</p> <ul style="list-style-type: none"> • (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by 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 to the community; and • (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
718.01	Objectives – offences against children	When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
718.1	Fundamental Principle	A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

⁴²³ Anthony N. Doob, 'Principled sentencing, politics, and restraint in the use of imprisonment: Canada's break with its history' (2012) IX *Champ Pénal*, 43, 45 < <https://champpenal.revues.org/8335>>.

⁴²⁴ *Criminal Code*, s 718.1.

2.2.2 Arguments For Mandatory Sentences

Deterrence and Denouncing

It is commonly argued that mandatory minimum sentences send a message to offenders or would-be offenders that commissions of these specific crimes will not be tolerated and thereby reduces the likelihood of recidivism (specific or general deterrence).⁴²⁵

Politicians often justify the introduction of mandatory minimum sentences legislation with commentary about how a large proportion of the general public support these measures.⁴²⁶

2.2.3 Arguments Against Mandatory Sentences

Deterrence and Denouncing

A key presumption underlying the principle of deterrence is that the public or would-be offenders are aware of the actual applicable punishments they are being deterred from.⁴²⁷ But this presumption does not appear to be well supported. The Canadian Sentencing Commission has acknowledged in 1984 that mandatory sentences will not deter people from committing crimes because most people, not only offenders, are unaware of the existence of mandatory minimum sentences.⁴²⁸ If both the public and would-be offenders are unaware of the existence of mandatory sentences then their election not to commit criminal offences is not a by-product of deterrence.

Deterrence is premised upon 3 properties certainty, severity, and celerity (swiftness).⁴²⁹ The theory holds that when legal punishment for these properties are more costly there are lower crime rates (certainty: higher chance for legal punishment for commission of a crime, severity: increasing magnitude of punishment, and swift: hast punishment after commission of the offence).⁴³⁰ Recently Paternoster has criticised the body of empirical evidence that suggests that offenders are deterred through the imposition of criminal sanctions.⁴³¹

Certain empirical findings cannot be explained by the current deterrence theory. For example, the rate of rape crimes decreased in Canada between 1990 – 2000 despite the number of police officers declining by 10% per 100,000 residents during the same period.⁴³² Deterrence theory cannot explain this result. When the number of police officers decrease the rate of rape crimes has also decreased, but according to the theory of deterrence the number of crimes should be increasing, not decreasing. Additionally, increasing the severity of the punishment by increasing the maximum sentence for crimes has not resulted in a decrease in crime rates. Empirical research has instead found that people subconsciously apply a discount rate, whereby the

⁴²⁵ Carla Cesaroni and Nicholas Bala, 'Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges' (2008) 34(1) *Queen's Law Journal* 447, 452.

⁴²⁶ Elizabeth Sheehy, 'Mandatory Minimum Sentences: Law and Policy' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 261, 263

⁴²⁷ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 804.

⁴²⁸ Elizabeth Sheehy, 'Mandatory Minimum Sentences: Law and Policy' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 261, 263

⁴²⁹ *Ibid* 783.

⁴³⁰ *Ibid* 783 – 4.

⁴³¹ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) (Summer) 100(3) *Journal of Criminal Law & Criminology* 765, 766.

⁴³² *Ibid* 797, 799.

cost of crimes that are distant in time are reduced.⁴³³ A 1985 survey found that a 5-year prison sentence was only judged as twice as severe as a 1-year sentence.⁴³⁴ A 1993 survey similarly reported that a 10-year sentence was only considered to be four times more severe than a 1-year sentence and a 20-year sentence was only 6 times more severe.⁴³⁵

Figure 3 – Culmination of Studies on Perceived Severity of Sentences

Years of Imprisonment	Perceived Severity	Ratio
5	2	2:1
10	4	4:1
20	6	6:1

These findings are contrary to the deterrence theory. Thus, when the severity of the punishment for an offence increases it does not proportionally translate in people's perception of the crime. As a result, the net impact of increasing the severity of the sentence only results in a small marginal increase in the would-be-offenders or offenders mind. Doubling the sentence from 5 years to 10 years results in the same proportional increase as from 1 year to 5 years. Additionally, the impact of the perceived severity of the sentence does not proportionally increase when the sentence increases to 20 years. This would seem to suggest that there is a saturation level, whereupon increasing the sentence does not proportionally increase the perceived severity of the sentence in the minds of the public. This would seem to suggest that deterrence is not necessarily an effective mechanism of reducing crime rates, hence, mandatory sentencing cannot be adequately justified on the basis of deterrence theory.

The notion of the public support for the introduction of mandatory sentences exists only in theory, not in practice. It has consistently been held as a finding across Western nations, that sentencing is too lenient with 94% of people in a United States survey holding that offenders were not sufficiently punished.⁴³⁶ Few studies have addressed the status of public knowledge of mandatory sentences, but generally, the public does not have an accurate idea of either the offences attracting mandatory sentences or the severity of the penalties.⁴³⁷ Less than 1/3 of respondents in a nationwide Canadian survey could identify an offence with a mandatory sentence in the 1990s.⁴³⁸ Another survey also found that only 6% of respondents could identify the correct mandatory minimum sentence of 7 years for importing narcotics, with 2/3 of the respondents failing to provide any answer.⁴³⁹ Thus, although the general public may support the notion of mandatory sentencing, they have little knowledge of either the offences that specifically contain them nor the severity of the mandatory sentence that is imposed. Nearly all Canadians in a general questionnaire supported imposing a mandatory life sentence for offenders convicted of murder but ¾ voted against this sentence when they read a description of a case involving a father murdering his severely disabled daughter.⁴⁴⁰ Thus,

⁴³³ Ibid 805.

⁴³⁴ Ibid.

⁴³⁵ Ibid 806.

⁴³⁶ Julian V. Roberts, 'Public Opinion and Mandatory Sentencing: A Review of International Findings' (2003) 30(4) *Criminal Justice and Behavior* 483, 486.

⁴³⁷ Ibid 489.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid 501.

the public appears to support the abstract notion of mandatory sentencing, but they have little knowledge and awareness of the application of mandatory sentencing. It can therefore be seen that the public may only support the notion of mandatory sentencing in the abstract, as support drops considerably once the sentence is actually applied.⁴⁴¹

Proportionality

The Canadian Sentencing Commission has acknowledged in 1984 additionally that mandatory sentences are unjust because a judge is prevented from exercising their discretion in a manner that fairly reflects the circumstances of the offence and the offender.⁴⁴² The introduction of mandatory minimum sentences in regards to offences against the person has reignited this debate.

There is a concern that an emphasis on proportionality will require the sentences to be increased in order to differentiate between the best and worst offender which will increase the average penalty for the crime, thus creating an inflation effect.⁴⁴³ Mandatory sentencing is contrary to the notion of proportionality as it prevents the seriousness of the offence and the culpability of the offender being factored into the sentence.⁴⁴⁴ The concern that mandatory minimum sentences will have an inflationary effect upon the average sentence imposed for crimes originates from statements made by Justice Arbour. In *R v Wust*⁴⁴⁵ Justice Arbour stated that legislation for mandatory minimum sentences needs to be interpreted in a manner consistent with the general principles of sentencing.⁴⁴⁶ Justice Arbour notes that mandatory minimum sentences departs from the principles of sentencing expressed in the *Criminal Code* and makes particular reference to the principle of proportionality.⁴⁴⁷ Additionally in *R v Morrissey*⁴⁴⁸ she noted that in doing so it is necessary to take account of the fact that proportionality has not been repudiated by Parliament and therefore the mandatory minimum is the new inflationary floor for the best offender which will increase all penalties for the offence.⁴⁴⁹ Thus, members of the judiciary appear to be concerned that mandatory minimum sentences are incompatible with existing principles of sentencing.

Robert raises the concern that raising the inflationary floor for certain offences may affect the sentencing patterns for other offences.⁴⁵⁰ This concern can be emphasized by noting that the mandatory minimum sentence for using a firearm for committing manslaughter is a 4 year prison term, but it is a 5 year prison term for sexually assaulting a person under the age of 16 years with a weapon or alternatively committing incest.⁴⁵¹ Now it could be argued that these sentences reflect society's values which Parliament has reflected in the legislation by identifying that sexually assaulting a minor with a weapon or incest is a more serious

⁴⁴¹ Ibid, 505.

⁴⁴² Elizabeth Sheehy, 'Mandatory Minimum Sentences: Law and Policy' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 261, 263 – 4.

⁴⁴³ Julian V. Robert, 'Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 305, 311.

⁴⁴⁴ Ibid, 315.

⁴⁴⁵ [2000] 1 SCR 455.

⁴⁴⁶ *R v Wust* [2000] 1 SCR 455, [22] (Arbour J).

⁴⁴⁷ Ibid 466.

⁴⁴⁸ [2000] 2 SCR 90.

⁴⁴⁹ *R v Morrissey* [2000] 2 SCR 90, [75], [82] (Arbour J).

⁴⁵⁰ Julian V. Robert, 'Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 305, 313.

⁴⁵¹ *Criminal Code*, ss 236(a), 272(2)(a.2), 155(1).

offence than manslaughter. As Robert notes, murder is a more serious crime than sexual assault which may increase the sentences in order to preserve proportionality between offences.⁴⁵² The concern that proportionality will play a role in increasing the average sentence for an offence is justified as the *Criminal Code*, s 718.1 emphasises proportionality as its first principle (as noted by the designation s 718.1).⁴⁵³ Theorists are concerned that over time the general sentence handed down for sexual assault or manslaughter without the use of a firearm will correspondingly increase to be able to conform to the principle of proportionality. Potentially, this could result in an unofficial increase in the mandatory minimum sentences being applied and/or applying an unofficial mandatory minimum sentence when it is not required by statute.

Human Rights

Mandatory sentences could be identified as a cruel and unusual punishment that is against the *Canadian Charter of Rights and Freedoms* s 12 which forms part of the Constitution.⁴⁵⁴ This occurred in *R v Smith* [1987] 1 SCR 1045 where a 7 year mandatory minimum sentence was struck down for importing narcotics as it was believed that it would capture a young person with a single joint of marijuana returning from spring break.⁴⁵⁵ Roach notes that the Court examines whether the ‘gravity and the blameworthiness of the offence justified the mandatory penalty of imprisonment’.⁴⁵⁶ Though, Roach notes that few Canadian cases have followed the precedent established in *R v Smith*, rather the mandatory sentence is held to be justified as a valid exercise of legislative power.⁴⁵⁷

Rehabilitating the Offender & Restorative Justice

Introducing mandatory minimum sentences results in a focus on the punitive rather than the restorative purposes of sentencing.⁴⁵⁸ The justice system focuses on punishing the offender rather than attempting to restore the victim. It is impossible to restore the victim to the state they were in prior to the sexual offence occurring, but it is possible to implement measures to rehabilitate the offender (to a degree) and hence, reduce rates of recidivism.

The offender is sentenced to imprisonment rather than seeking to ‘treat’ the offender in an attempt to prevent re-offending upon being released from prison. As a result, it is merely hoped that offenders will have ‘learnt their lesson’ and will not re-offend when they are released from prison. Circles of support are an optional program that sex offenders can seek out upon being released from prison to help them re-integrate back into society.⁴⁵⁹ Studies into the impact of circles of support on recidivism rates have found that 16.7% of sex offenders will re-offend when they are released from prison, as compared to 5% of sex offenders who participated in the program.⁴⁶⁰ Sex offenders who participate in circles of support have subjectively

⁴⁵² Julian V. Robert, ‘Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process’ (2001) 39(2 – 3) *Osgoode Hall Law Journal* 305, 322.

⁴⁵³ Kent Roach, ‘Searching for *Smith*: The Constitutionality of Mandatory Sentence’ Process’ (2001) 39(2 – 3) *Osgoode Hall Law Journal* 367, 395, 399.

⁴⁵⁴ *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’); Ibid 368.

⁴⁵⁵ Kent Roach, ‘Searching for *Smith*: The Constitutionality of Mandatory Sentence’ Process’ (2001) 39(2 – 3) *Osgoode Hall Law Journal* 367, 369.

⁴⁵⁶ Ibid 377.

⁴⁵⁷ Ibid 375 – 86.

⁴⁵⁸ Ibid 406.

⁴⁵⁹ Mechtild Höing, Stefan Bogaerts and Bas Vogelvang ‘Circles of Support and Accountability: How and Why They Work for Sex Offenders’ (2013) 13(4) *Journal of Forensic Psychology Practice* 267, 267 – 8.

⁴⁶⁰ Ibid 269.

indicated that they believe the circle prevents them from re-offending, with 50% indicating in one sample that they would have re-offended if the circle did not exist.⁴⁶¹ Hence, it appears as though restorative measures should still play some role in rehabilitating sex offenders to reduce rates of recidivism. Though it should be noted that circles of support are optional support groups available to sex offenders upon release from prison they are not mandatory and are currently not utilised as a condition of release from parole. It is essential to introduce any measures to reduce rates of recidivism amongst sex offenders as studies have noted that 48.9% of the Canadian federal prison population have committed a sex offence.⁴⁶² Hence, mandatory sentences are focused on punishing the offender not rehabilitating the offender or restoring the victim.

2.2.4 Conclusion

Thus, there is little evidence to suggest that mandatory sentences will actually result in a decrease in crime rates or rates of recidivism. The theories of incapacitation and deterrence are the primary basis of mandatory sentences. Yet, the underlying assumptions that form the basis of these sentencing principles appear to be ill-founded. Offenders and would-be-offenders are generally unaware of the penalties that apply to any specific offence, thus increasing the severity of the penalty results in no apparent deterrent effect. Increasing the severity of the offence results in subjective mental discounting, thus reducing the impact of the increase in the penalties. The public is only supportive of mandatory sentences in theory, but generally consider the sentences to be unfair in practice. Mandatory sentencing does not comply with the general principles of sentencing, but its interaction with proportionality is particularly concerning. Hence, the potential benefits from mandatory sentencing appear to be outweighed by its numerous deficits.

CHAPTER 2.3: DEATH PENALTY

2.3.1 History of the Death Penalty under Canadian Law

The last executions took place in December of 1962, but the death penalty was not officially abolished in Canada until 1976 for all offences but particular offences under the *National Defence Act*, RSC 1985, c. N-5 but this exception was removed in 1998.⁴⁶³ The death penalty has never been utilised against an offender convicted of rape.⁴⁶⁴

⁴⁶¹ Carla Cesaroni, 'Releasing Sex Offenders into the Community Through "Circle of Support"—A Means of Reintegrating the "Worst of the Worst"' (2001) 34(2) *Journal of Offender Rehabilitation* 85, 95.

⁴⁶² Ibid 87.

⁴⁶³ Andrew S. Thompson, 'Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005' (2008) 42(3) *Journal of Canadian Studies* 172, 174 – 5; Mark Davidson, 'The ritual of capital punishment' (2011) 24(3) *Criminal Justice Studies* 227, 227.

⁴⁶⁴ Tristin Hopper, *Sidestepping the lash: Punishment of Canadian sex offenders lags, has always lagged* (12 October 2012) National Post <<http://news.nationalpost.com/news/canada/sidestepping-the-lash-punishment-of-rape-and-child-sex-offenders-lagging-in-canada-critics>>.

The death penalty was effectively removed as a punishment in 1963, when the federal cabinet intervened in all capital cases and commuted every death sentence to life imprisonment.⁴⁶⁵ In 1967 a 5 year moratorium on the imposition of the death penalty in all cases bar those involving the murder of police officers, prison staff or other individuals employed for the maintenance of public peace was ordered.⁴⁶⁶

Polls conducted in May 1987 revealed that 60% of Canadians still favoured the death penalty on the ground that it served as a deterrent against violent crime.⁴⁶⁷ Other studies found that the rate was higher at 65-75% of the Canadian public supported the reintroduction of the death penalty.⁴⁶⁸ In 1987 there was a motion to reintroduce the punishment in Parliament but it was defeated by a vote of 148 to 127.⁴⁶⁹ In 1999 Bill C-335 was introduced which sought to reintroduce the death penalty for people convicted of aggravated first degree murder.⁴⁷⁰

2.3.2 Canada's Current Stance and Challenges

There has been a renewed support for the reinstitution of capital punishment in Canada, with Davidson noting in a paper in 2011 that most of the members of federal government are pro-death penalty.⁴⁷¹ In 2009 the then current Minister of Justice, Rob Nicholson, openly called for the death penalty to be reinstated.⁴⁷²

Though there would be numerous legal obstacles to re-introducing the death penalty in Canada. Canada has signed and ratified the 1989 *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* whose principle aim is to prohibit states from using the death penalty.⁴⁷³ Additionally, the Supreme Court of Canada has speculated that the death penalty is incompatible with the *Canadian Charter of Rights and Freedoms* (s 7 'everyone has a right to life'), which is a constitutional law document in Canada.⁴⁷⁴ Hence, a law re-introducing the death penalty could be struck down as unconstitutional.

At present, there have been no further legislative attempts to reintroduce the death penalty in Canada, and if legislation was passed it is likely that it would face a constitutional challenge.

⁴⁶⁵ Andrew S. Thompson, 'Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005' (2008) 42(3) *Journal of Canadian Studies* 172, 174.

⁴⁶⁶ Ibid 174 – 5.

⁴⁶⁷ Ibid 178.

⁴⁶⁸ Ibid 172; Jennifer C. Honeyman and James R.P. Ogloff, 'Capital Punishment: Arguments For Life And Death' (1996) 28(1) *Canadian Journal of Behavioural Science* 27, 27.

⁴⁶⁹ Andrew S. Thompson, 'Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005' (2008) 42(3) *Journal of Canadian Studies* 172, 179.

⁴⁷⁰ Mark Davidson, 'The ritual of capital punishment' (2011) 24(3) *Criminal Justice Studies* 227, 230.

⁴⁷¹ Ibid 227.

⁴⁷² Ibid. Rob Nicholson was the Minister of Justice from 2007 – 2013 as per: *Rob Nicholson* (12 February 2016) Wikipedia <https://en.wikipedia.org/wiki/Rob_Nicholson>.

⁴⁷³ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

⁴⁷⁴ *Canadian Charter of Rights and Freedoms* s 7; Andrew S. Thompson, 'Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005' (2008) 42(3) *Journal of Canadian Studies* 172, 173, 180.

2.3.3 Arguments For the Death Penalty

The most common arguments for the reintroduction of the death penalty are deterrence, cost, retribution and incapacitation.⁴⁷⁵

Deterrence

The death penalty is commonly justified through the medium of general deterrence, in that other potential murders for example will not commit murder for fear of being sentenced to death themselves.⁴⁷⁶ Surveys in the 1980s in the United States indicate that 68% of the respondents believe that the death penalty deters crime.⁴⁷⁷

Incapacitation

It goes without stating that the offender is incapacitated, as due to their death, they are incapable of committing any further crimes.

Retribution

The principle of retribution is commonly used as justification for the use of the death penalty, that being, that the offender ‘deserves’ or has ‘earned’ the punishment.⁴⁷⁸ The appeal for the death penalty is typically noted to be the power of its symbolic significance within the normative values of society.⁴⁷⁹

It has been suggested that arguments regarding the issue of the death penalty are not the result of a rational evaluation, but rather are emotionally based on a moral opinion and perhaps a desire for vengeance.⁴⁸⁰ The purpose of retribution could therefore be seen as the primary underlying motivation for sentencing a person to the death penalty. A Canadian study in 1974 found a positive correlation between support for the death penalty and retribution for crimes in general.⁴⁸¹

2.3.4 Arguments Against the Death Penalty

Ineffective Deterrence Mechanism

The effectiveness of deterrence as a means of reducing crime rates has been questioned. Researchers in the United States have noted that the death penalty may actually increase the number of homicides occurring rather than decreasing them, a phenomenon called the ‘brutalisation hypothesis’ as it legitimises killing people.⁴⁸²

⁴⁷⁵ Jennifer C. Honeyman and James R.P. Ogloff, ‘Capital Punishment: Arguments For Life And Death’ (1996) 28(1) *Canadian Journal of Behavioural Science* 27, 27.

⁴⁷⁶ Ibid 28.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Mark Davidson, ‘The ritual of capital punishment’ (2011) 24(3) *Criminal Justice Studies* 227, 228.

⁴⁸⁰ Jennifer C. Honeyman and James R.P. Ogloff, ‘Capital Punishment: Arguments For Life And Death’ (1996) 28(1) *Canadian Journal of Behavioural Science* 27, 27, 29.

⁴⁸¹ Ibid 29 – 30.

⁴⁸² Ibid 28.

Others such as Brudner, have noted that there is no statistical evidence to either confirm or deny, that the death penalty deters people from committing crimes any more effectively than life imprisonment.⁴⁸³

Davidson notes that death penalty is a sentence which relates to symbolism as the performance of a ritual rather than as a result of rule breaking per se.⁴⁸⁴ If the death penalty is about the performance of symbolism rather than enforcing a punishment against rule breaking, then the deterrent effect of the death penalty must be questioned.

Human Rights

The death penalty is commonly opposed on the basis that life is sacred, and that everyone has a right to life.⁴⁸⁵

Rehabilitation

There is evidence that murders have one of the lowest recidivism rates of all offenders, which would seem to suggest that they can be successfully rehabilitated and prevented from committing the same offence.⁴⁸⁶

Economic Factors

It has been argued in some studies in the United States in the 1980s that the death penalty may be more expensive than life imprisonment because of the cost of the appeals.⁴⁸⁷

2.3.5 Conclusion

Honeyman and Ogloff completed a study in Canada (Vancouver) in the 1990s to investigate which arguments were most persuasive to make people commend either life imprisonment or the death penalty.⁴⁸⁸ If a participant received arguments in favour of death penalty 75% of them elected the death penalty as the appropriate sentence (25% life sentence), whereas, only 53% who received arguments against the death penalty elected to choose the death penalty.⁴⁸⁹ Arguments for the death penalty using either a moral or economic argument appeared to be persuasive for the participants with 82% recommending the death penalty.⁴⁹⁰ Similar results were found when it was argued that it was impossible to rehabilitate these offenders.⁴⁹¹ Thus, it appears that support for the death penalty increases when the argument is constructed as a rational choice. Additionally, their study found that arguments against the death penalty were not successful in persuading the participants to elect a life sentence over the death penalty, especially if they believed in retribution and vengeance.⁴⁹²

⁴⁸³ Alan Brudner, 'Retributivism and the Death Penalty' (1980) (Autumn) 30(4) *University of Toronto Press* 337, 338.

⁴⁸⁴ Mark Davidson, 'The ritual of capital punishment' (2011) 24(3) *Criminal Justice Studies* 227, 228.

⁴⁸⁵ Jennifer C. Honeyman and James R.P. Ogloff, 'Capital Punishment: Arguments For Life And Death' (1996) 28(1) *Canadian Journal of Behavioural Science* 27, 28.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid 29.

⁴⁸⁸ Ibid 27.

⁴⁸⁹ Ibid 31.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid 31, 33.

Therefore, it appears as though the general public can be persuaded to support the re-introduction of the death penalty by couching the argument in as a rational choice. Additionally, individuals who believe that the primary purpose of sentencing is retribution will be more inclined to acquiesce to the re-introducing the death penalty and more resistive to the persuasion of arguments against the death penalty.

CHAPTER 2.4: CASTRATION

The topic of castration has not been widely discussed in the academic literature in Canada, with the article explicitly on castration being written by Matthew Kutcher in 2010.

2.4.1 Current Stance in Canada on Chemical Castration

Chemical castration is a potential condition of release if it is designated by the National Parole Board, but it can only apply to offenders who are designated as either dangerous or long-term offenders by the court. The designation of dangerous or long-term offenders was only introduced into the *Criminal Code* in 1997 and until 2010 there have only been 15 reported cases of dangerous or long-term offender hearings in which the possibility of chemical castration has been considered.⁴⁹³ The small quantity of reported cases would appear to suggest that chemical castration has not been widely applied as a condition of release for dangerous or long-term offenders in Canada. The aim of the regime is to protect the public from offenders who continue to pose a threat to society.⁴⁹⁴ Statistics demonstrate that in 80% of dangerous offender hearings the underlying criminal offence committed was of a sexual nature, demonstrating that the regime is primarily targeting sexual offenders.⁴⁹⁵

If a person is found guilty of a serious personal injury offence or a sexual offence designated under the *Criminal Code*, RSC 1985, c C-46, s 753.1(2)(a) which includes all of the criminal offences listed in Chapter 2 (except incest), then the prosecutor can apply for the Court to designate that the person is a dangerous offender. The *Tackling Violence Crime Act*, SC 2008, c.6, s 42 replicated the ‘three strikes law’ in the US by introducing a presumption that the person is a ‘dangerous offender’ if they have committed 3 violent offences.⁴⁹⁶ The judge then has to determine whether the offender is a dangerous or long-term offender. The Crown must prove beyond a reasonable doubt that the offender represents a danger to society because of the likelihood of causing significant harm by reoffending.⁴⁹⁷ The judge has considerable discretion when they determine if an offender is designated as either a dangerous or a long-term offender.⁴⁹⁸ Ultimately, the judge

⁴⁹³ Matthew R. Kutcher, ‘The Chemical Castration of Recidivist Sex Offenders in Canada: A Matter of Faith’ (2010) 33(2) *Dalhousie Law Journal* 193, 212.

⁴⁹⁴ *Criminal Code*, s 753(1)(a).

⁴⁹⁵ Matthew R. Kutcher, ‘The Chemical Castration of Recidivist Sex Offenders in Canada: A Matter of Faith’ (2010) 33(2) *Dalhousie Law Journal* 193, 201.

⁴⁹⁶ *Criminal Code*, s 753(1.1).

⁴⁹⁷ Matthew R. Kutcher, ‘The Chemical Castration of Recidivist Sex Offenders in Canada: A Matter of Faith’ (2010) 33(2) *Dalhousie Law Journal* 193, 202.

⁴⁹⁸ *Ibid* 203.

makes the decision based on their assessment of the expert evidence, that there is a reasonable possibility of eventual risk in the community.⁴⁹⁹

Chemical castration is not a sentencing option available to the judge, rather it is a potential condition of release for offenders that the National Parole Board can elect to utilise. The power of the National Parole Board to require a dangerous or long-term offender to be chemically castrated as a condition for release under a long-term supervision order was held to be constitutionally valid in *Deacon v Canada (Attorney General)* [2007] 2 FCR 607. In the case, the power was challenged based on Deacon's constitutional rights under the *Canadian Charter of Rights and Freedoms* s 7 for his right to life, liberty or security of the person not to be violated except in accordance with the principles of fundamental justice. It was held in the Federal Court of Appeal that Deacon was at liberty to refuse to take the medication, but that there would be consequences for his refusal to comply, that being breach of his supervision order.⁵⁰⁰

2.4.2 Arguments For Chemical Castration

Incapacitation

It is commonly argued that chemical castration ensures that the offender is incapacitated and largely incapable of committing further sexual offences because they have a reduction in sexual interest and arousability within 3-4 weeks of testosterone withdrawal. The fact that chemical castration is not a permanent sentence is also favourable, with normal levels of sexual interest being restored with the administration of testosterone. Some studies have demonstrated that treated participants have recidivism rates that are 6.5%-8% lower than untreated participants which would seem to suggest that it may have some positive results.⁵⁰¹

2.4.3 Arguments Against Chemical Castration

Incapacitation

Kutcher has noted that there are some design concerns regarding the studies that found that recidivism rates have fallen if the offender has participated in chemical castration.⁵⁰² Additionally, it is noted that both the British Columbia Court of Appeal and the Ontario Court of Appeal have criticised chemical castration due to a concern about the lack of evidence of the effectiveness of the treatment in reducing rates of recidivism.⁵⁰³

Additionally, Kutcher notes that chemical castration does not fix the underlying reason why in particular, paedophile's commit sexual offences.⁵⁰⁴ It is the target of their sexual urges that is problematic and chemical castration does not target the underlying reason why paedophiles commit sexual offences.⁵⁰⁵

⁴⁹⁹ Ibid 203.

⁵⁰⁰ *Deacon v Canada (Attorney General)* [2007] 2 FCR 607, [40].

⁵⁰¹ Matthew R. Kutcher, 'The Chemical Castration of Recidivist Sex Offenders in Canada: A Matter of Faith' (2010) 33(2) *Dalhousie Law Journal* 193, 210.

⁵⁰² Ibid 211.

⁵⁰³ Ibid 212.

⁵⁰⁴ Ibid 214.

⁵⁰⁵ Ibid.

Human Rights

The implementation of chemical castration as a condition of release on parole could be considered to be a violation of fundamental human rights. Kutcher notes that it is precisely this concern that has led to Canada strictly controlling the practice of chemical castration.⁵⁰⁶ Kutcher ultimately argues that chemical castration should not be used in Canada as the evidence of its effectiveness is not proven and therefore cannot ethically justify breaching the offenders human rights.⁵⁰⁷ There is also the potential that the drugs being administered for chemical castration could cause serious side effects including: depression, osteoporosis, thromboembolism and stroke.⁵⁰⁸

2.4.4 Conclusion

It can be seen that there are a number of arguments both for and against the implementation of chemical castration as a condition for release from parole in Canada. The most central concern is surrounding the current evidence about the effectiveness of chemical castration in reducing the rates of recidivism for sexual offenders. There appears to be some evidence that it is successful, although the design of the studies has been scrutinised which may invalidate their results. Hence, it is clear that further studies will be necessary to determine whether the use of chemical castration on sexual offenders can successfully reduce rates of recidivism. Yet currently, chemical castration has not been widely used as a condition of release from parole.

CHAPTER 2.5: OVERALL CONCLUSION AND RECOMMENDATIONS

2.5.1 Mandatory Sentences

The Canadian Sentencing Commission in 1987 has noted in all of its reports that mandatory minimum sentencing is ineffective in deterring would-be offenders from committing an offence and thus, should be abolished.⁵⁰⁹ Additionally, the discussion above would seem to suggest that mandatory sentences are not particularly effective at deterring offenders or would-be-offenders from committing crimes. Most offenders or would-be-offenders are not even aware of the specific penalty applicable for committing the crime they are convicted of thus; it could not deter them from committing the offence. Hence, it may be worth considering abolishing mandatory sentences and allowing judges to exercise their discretion as they see fit.

Alternatively, if it is still considered desirable to keep mandatory minimum sentences then other changes could be adopted to amend the current system. Tonry has suggested that the harm caused by mandatory minimum sentences could be reduced by making the penalties presumptive rather than mandatory and adding in sunset provisions so that they will be automatically repealed unless re-enacted by the

⁵⁰⁶ Ibid 194.

⁵⁰⁷ Ibid 212, 215 – 6.

⁵⁰⁸ Ibid 214.

⁵⁰⁹ Anthony N. Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 287, 288; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services, Canada, 1987) (Chair: J.R. Omer Archambault) 179 – 180.

legislature.⁵¹⁰ If the penalty is merely presumptive rather than mandatory it re-establishes judicial discretion as the key factor in sentencing (by determining if the presumption has been rebutted) but it would also address the public's concern that mandatory minimum sentences can be unfair. The inclusion of sun-set clauses would also force the legislature to routinely re-examine the continuing applicability of the penalty and the success of the sentences in actually reducing both the rates of the crimes and rates of recidivism.

Thus, mandatory minimum sentencing in particular should either be abolished, or alternatively transformed into a presumption that should be regularly reviewed by parliament to ensure its continued effectiveness.

2.5.2 Death Penalty

The death penalty has been abolished in Canada since 1976, and despite some public support for the reintroduction of the death penalty it appears unlikely that this will occur. The primary impediments to the reintroduction of the death penalty are concerns regarding breaches of human rights, ineffective deterrent strategy and illegality concerns.

The death penalty clearly violates the notion of the sanctity of human life and the notion of a right to life which is clearly espoused in international law. The effectiveness of general deterrence has been undermined by repeated evidence that would-be offenders are unaware of the penalties for the offences they commit and thus, it cannot deter individuals from committing a crime. Additionally, re-introducing the death penalty would result in Canada breaching international law as they are a signatory of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* and it would likely be deemed by the Supreme Court of Canada to be unconstitutional as it would breach the *Canadian Charter of Rights and Freedoms*. Thus, the death penalty should not be re-introduced.

2.5.3 Castration

There is currently insufficient evidence to suggest whether chemical castration is an effective means of reducing recidivism rates amongst sexual offenders. However, perhaps despite the concerns of Kutcher, it could continue to be implemented as a condition of release on parole amongst offenders designed at dangerous or long-term offenders. As the National Parole Board has not abused the process, this can be demonstrated that only a small number of offenders have ever been subject to chemical castration as a condition of parole which would seem to suggest that it has only been employed in the most extreme cases.

⁵¹⁰ Anthony N. Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 – 3) *Osgoode Hall Law Journal* 287, 298.

CHAPTER 3: ENGLAND AND WALES

In England,⁵¹¹ criminal sentencing is guided by the principle of proportionality. Here, the seriousness of the offence should determine the type of sentence that is imposed.⁵¹² This was adopted in the early 1990s after a decisive step away from deterrence-based sentencing, influenced by the overcrowding of prisons and the view that custodial sentences should not be imposed unless the offence was ‘so serious that only such a sentence can be justified.’⁵¹³ After 1991, there was increased awareness amongst scholars that community sentences, such as probation orders, supervision, and community service orders, were more appropriate in dealing with persistent re-offending.⁵¹⁴ The *Criminal Justice Act* was passed in 1993, imposing custodial sentences when the offence is so serious that only such a sentence can be justified, or when the offence is of a violent or sexual nature and such a sentence would protect the public from serious harm. This Act also required courts to consider the seriousness of the offence when determining the length of the custodial sentence. This aligned with the government’s policy of dealing with less serious offences within the community, while imposing custodial sentences to offenders of more serious crimes.

English courts have a great deal of discretion in choosing when to impose a custodial sentence and how long the sentence should be. This is because they must have regard to the following purposes of sentencing: the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences.⁵¹⁵ They can consider a variety of sentencing alternatives including fines, compensation orders, community punishments, or probation orders. This is achieved through a system of sentencing guidelines, created and maintained by the Sentencing Council, which aims to create a uniform approach to sentencing.⁵¹⁶ The Sentencing Council itself is an independent non-departmental body of the Ministry of Justice. It was established in 2009 by the *Coroners and Justice Act* and its role includes:

- Developing sentencing guidelines and monitoring their use
- Assessing the impact of guidelines on sentencing practice
- Promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice

The sentencing guidelines themselves are accessible to the public as required by the *Coroners and Justice Act 2009*. They 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. These main guidelines only apply to offenders aged 18 or older because there are also other specific guidelines that apply for youth sentencing.

⁵¹¹ In this report, ‘England’ will refer to the jurisdiction of England and Wales.

⁵¹² Ashley Gilpin, ‘The Impact of Mandatory Minimum and Truth-In-Sentencing Laws and Their Relation to English Sentencing Policies’ (2012) 29 *Arizona Journal of International and Comparative Law* 91, 96.

⁵¹³ Ibid 97.

⁵¹⁴ Ibid.

⁵¹⁵ *Criminal Justice Act 2003* (UK) s 142.

⁵¹⁶ Claire Feikert-Ahalt, *Sentencing Guidelines: England and Wales* (April 2014) Library of Congress, Law Library <<http://www.loc.gov/law/help/sentencing-guidelines/englandandwales.php>>.

These guidelines aim to promote uniformity by prescribing a sequence of steps for courts to follow when sentencing an offender:⁵¹⁷

- Step One: There is an exhaustive list of factors used to determine which of the three categories is most appropriate e.g. Category 3 seriousness carries a non-custodial sentence range from a fine to a community order. Category 1 seriousness carries sentences of imprisonment from one to three years
 - These factors include statutory aggravating factors (e.g. hate motivation) and other important circumstances affecting harm (e.g. deliberate targeting of a vulnerable victim)
 - Factors indicating lower culpability include: a subordinate role of the offender, a greater degree of provocation, and a lack of premeditation
- Step Two: Courts use a corresponding starting point to shape a sentence which will then be modified by the remaining steps. This essentially means to move up or down from the starting point to reflect mitigating and aggravating factors. Examples provided below are non-exhaustive:
 - Aggravating factors can include committing the offence while on bail, while a child was at home, under the influence of alcohol or drugs etc.
 - Mitigating factors include if the offender was a subordinate member of a gang, remorse, 'good character and/or exemplary conduct' etc.

Overall, the two-step format can be described as employing primary and secondary factors in order to determine crime seriousness and culpability. Step One examines elements that have the most important influence on sentence severity e.g. presence of a knife or weapon. Step Two, in contrast, identifies circumstances which are relevant to seriousness or culpability.

- Step Three: Consider any factors which indicate a reduction, such as assistance to the prosecution. The court should take into account s 73 and 74 of the *Serious Organised Crime and Police Act 2005* (assistance by defendants) or any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given or offered to the prosecutor or investigator
- Step Four: Take into account any potential reduction for a guilty plea in accordance with s 144 of the *Criminal Justice Act 2003* and the *Guilty Plea* guideline
- Step Five: Consider whether having regard to the criteria contained in Part 12 of the *Criminal Justice Act 2003*, if it would be appropriate to award a life sentence or an extended sentence
- Step Six: If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour
- Step Seven: The court must consider whether to make any ancillary orders. The court must also consider what other requirements or provisions may automatically apply
- Step Eight: The court must give reasons for, and explain the effect of the sentence (s 174 of the *Criminal Justice Act 2003*)
- Step Nine: The court must consider whether to give credit for time spent on bail in accordance with s 240A of the *Criminal Justice Act 2003*

⁵¹⁷ Julian Roberts, 'Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues' (Paper presented at the Haifa Law School Seminar, Faculty of Law, University of Haifa, March 2012) 5-9.

CHAPTER 3.1: SEXUAL OFFENCES IN ENGLAND

Overview

- **Mandatory Sentences** are only imposed for murder offences.
- The **Death Penalty** was abolished in 1998, with the last execution carried out in 1964.
- **Chemical Castration** is not used as a sentencing option in England. However, offenders can voluntarily undergo treatment under a pilot program.

3.1.1 Sexual Offences (General)

In recent years, there has been considerable legal and policy debate about the extent to which sentencing guidelines are sensitive enough to the specific circumstances and facts of each case. This is particularly the case with sentences relating to sexual offenders. A key landmark relating to sexual offenders was the implementation of the *Sexual Offences Act 2003*. This Act outlines a range of offences including rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity. Definitions are as follows:⁵¹⁸

- Rape:
 - (A) intentionally penetrates the vagina, anus or mouth of another
 - (B) does not consent to the penetration
 - (A) does not reasonably believe that (B) consents
- Assault by penetration:
 - (A) intentionally penetrates the vagina or anus of another person (B) with a part of their body or anything else
 - The penetration is sexual
 - (B) does not consent to the penetration
 - (A) does not reasonably believe that (B) consents
- Sexual assault:
 - (A) intentionally touches another person (B)
 - The touching is sexual
 - (B) does not consent to the touching
 - (A) does not reasonably believe that (B) consents
- Causing sexual activity without consent
 - (A) intentionally causes (B) to engage in activity

⁵¹⁸ The Crown Prosecution Service, *Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 – Principal Offences, and Sexual Offences Act 1956 – Most Commonly Charged Offences*
<http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/>.

- o The activity is sexual
- o (B) does not consent to engaging in the activity
- o (A) does not reasonably believe that (B) consents

This Act was followed by the definitive guidelines issued by the Sentencing Council in 2007 known as the *Sexual Offences Definitive Guideline*.⁵¹⁹ Under these guidelines, courts must first examine suggested starting points and sentencing ranges. They must then examine any aggravating and mitigating factors that are present. Here, the guidelines for sentencing for serious sexual offences are based on the guideline judgment on rape (*Milberry and others*), where the Court of Appeal stated that there were three dimensions to consider: harm to the victim, culpability of the offender, and risk posed by the offender to society. There is a wide range of sexual offences, including non-consensual offences (including rape, assault by penetration, sexual assault), offences involving ostensible consent (including sexual activity with a child, abuse of trust, arranging or facilitating the commission of a child sexual offence), and preparatory offences (including sexual grooming, trespass with intent).

There are a broad range of sentencing options with the aim to prevent re-offending. Non-custodial sentences include community orders (e.g. carrying out unpaid work, attending treatment or rehabilitation programs and adhering to curfews or supervision requirements etc.), and ancillary orders. Courts can also give disqualification orders (preventing sexual offenders from working with children), deprivation orders (including depriving offenders of equipment used to commit an offence such as computers) and sexual offender prevention orders (which prevent the offender from doing anything described for a period of not less than five years or until further notice).⁵²⁰ The current treatment of sex offenders is managed by the National Offender Management Service in England and Wales, and it is achieved through containment, supervision sessions, monitoring and possibly restriction of movement, restrictions on residence, surveillance and control of movement through curfews and electronic monitoring.⁵²¹

3.1.2 Sexual Offences Against Children

Currently, there is a section in the *Sexual Offences Definitive Guideline* dealing with crimes where the victim is a child.⁵²²

Offence	Starting Point Range	Maximum
Rape of a child under 13	6-19 years custody	Life imprisonment
Assault of a child under 13 by penetration	2-19 years custody	Life imprisonment

⁵¹⁹ Carol Nicholls Et Al, Center for Gender and Violence Research, University of Bristol, *Attitudes to Sentencing Sexual Offences* (2012) 2; Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2007).

⁵²⁰ Carol Nicholls Et Al, Center for Gender and Violence Research, University of Bristol, *Attitudes to Sentencing Sexual Offences* (2012) 5.

⁵²¹ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16.

⁵²² Ibid 27-99; These do not apply where the offender is under 18. The maximum sentence is generally lower and sentencing guidelines will be covered by the *Overarching Principles: Sentencing Youths Definitive Guideline*.

Sexual assault of a child under 13	Community order – 9 years custody	14 years custody
Causing or inciting a child under 13 to engage in sexual activity	1-17 years custody	Life imprisonment (if penetration involved), otherwise 14 years custody
Sexual activity with a child	Community order – 10 years custody	14 years custody
Causing or inciting a child to engage in sexual activity	Community order – 10 years custody	14 years custody
Sexual activity with a child family member	Community order – 10 years custody	14 years custody
Inciting a child family member to engage in sexual activity	Community order – 10 years custody	14 years custody
Abuse of position of trust: Sexual activity with a child	Community order – 2 years custody	5 years custody
Abuse of position of trust: Causing or inciting a child to engage in sexual activity	Community order – 2 years custody	5 years custody

- The United Nations Convention on the Rights of the Child was also ratified by the United Kingdom in 1990.⁵²³ Because of this, anyone under the age of 18 in England is considered a child
- The current age of consent is 16⁵²⁴

CHAPTER 3.2: MANDATORY SENTENCES

3.2.1 Nature of Offences with Mandatory Minimum Sentences in England

In England, the only specific offence which carries a mandatory sentence of life imprisonment is murder.⁵²⁵ Although this sentence is given, it is rare for the offender to spend the rest of their natural life in prison because courts only need to fix a minimum term to be served before consideration for parole.⁵²⁶

‘Mandatory minimum sentences’ can also be given in other circumstances, including a life sentence after a second conviction for a ‘very serious violent or sexual offence,’⁵²⁷ a 7-year sentence after a third conviction for dealing Class A drugs,⁵²⁸ a 3-year sentence after a third conviction on domestic burglary,⁵²⁹ and a 3-year

⁵²³ Department of Education, ‘United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England’ (Policy Paper, UK Government, 2010).

⁵²⁴ The Crown Prosecution Service, *Rape and Sexual Offences: Chapter 3: Consent* <http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/>.

⁵²⁵ *Criminal Justice Act 2003* (UK) s 277; If under 18, then detained during Her Majesty’s Pleasure, and if under 21, then sentenced to custody for life (*Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 90, 93).

⁵²⁶ The Crown Prosecution Service, *Sentencing – Mandatory Life Sentences in Murder Cases* <http://www.cps.gov.uk/legal/s_to_u/sentencing_-_mandatory_life_sentences_in_murder_cases/>.

⁵²⁷ *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 122; *Criminal Justice Act 2003* (UK) s 224A.

⁵²⁸ *Power of Criminal Courts (Sentencing) Act 2000* (UK) s 110.

sentence for certain prohibited weapons offences.⁵³⁰ However, the word ‘mandatory’ is misleading here because courts can still avoid passing these sentences if there are particular circumstances relating to the offences or to the offender which ‘would make it unjust to do so in all circumstances.’⁵³¹

3.2.2 Nature of Sexual Offences with ‘Mandatory Sentences’

Offence	Sentence
Conviction for second ‘very serious violent or sexual offence’ offence (two strikes)	<p><u>Life sentence</u>, available where:</p> <ul style="list-style-type: none"> • A person aged 18 or over is convicted of an offence listed in part 1 of schedule 15B of the <i>Criminal Justice Act 2003</i> (offences of a very serious violent or sexual nature) • The offence is such that the court would have imposed a determinate sentence of 10 years or more • The offender has a previous conviction for an offence listed in schedule 15B for which he received as life sentence (with a minimum term of 5 years) or a determinate sentence of 10 years or more <p>Even if all conditions apply, the court may still avoid passing this ‘mandatory life sentence.’</p>

3.2.3 Arguments For Mandatory Sentences

Proportionality and Reasonableness

The mandatory sentence of life imprisonment was supported by the Labour Government in 2006 due to the seriousness of the offence. It was described as a ‘unique crime of particular moral and social significance.’ Thus, it should warrant a harsh punishment. Mandatory life sentences are imposed as a symbolic contract to the public that murders would be taken seriously by the justice system and would routinely receive the most serious form of punishment that is available.⁵³² Regarding the ‘two strike’ and ‘three strike’ laws, former Prime Minister Tony Blair’s spokesman has stated that it is important that people should be kept in prison if they are judged to be a danger to society.⁵³³ Justice Secretary Chris Grayling has stated that those who commit the most serious offences must receive the most severe sentences.⁵³⁴

⁵²⁹ *Power of Criminal Courts (Sentencing) Act 2000* (UK) s 111.

⁵³⁰ *Firearms Act 1968* (UK) s 51A.

⁵³¹ The Crown Prosecution Service, *Sentencing Dangerous Offenders* <http://www.cps.gov.uk/legal/s_to_u/sentencing_and_dangerous_offenders/>.

⁵³² Kate Fitz-Gibbon, ‘The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England’ (2012) 13(5) *Criminology & Criminal Justice* 506.

⁵³³ ‘Some Murderers in Jail Too Long,’ BBC News (online) 9 March 2007 <http://news.bbc.co.uk/2/hi/uk_news/6433195.stm>.

⁵³⁴ UK Government, ‘New Sentences and Criminal Offences Come Into Effect’ (Media Release, 2 December 2012).

3.2.4 Arguments Against Mandatory Sentences

Proportionality and Reasonableness

English judges have condemned the use of mandatory minimum sentences as they are ‘incompatible with the modern civilised penal system.’⁵³⁵ These new guidelines and the introduction of indeterminate terms mean that prison sentences are now more ‘tougher and far harsher’ than 10 years ago. For example, repeat burglars can range from professional offenders to inadequate young people. For these young people, their amateurish attempts to commit crime could be best tackled by intensive probation programs instead of mandatory sentences. Courts should be able to choose sentences which fit the varying circumstances of each case.⁵³⁶

Human Rights

Mandatory minimum laws lead to the ‘imposition of punishments that are disproportionate to the seriousness of crimes committed’ and violate certain articles in the ICCPR.⁵³⁷ England violates this principle with its life imprisonment without parole for murder, as well as its other ‘two strike’ and ‘three strike’ principles.

Parsimony

One English judge has opposed mandatory minimum sentences due to concerns about the overpopulation of prisons and the need to make greater use of community sentences.⁵³⁸ It is estimated that the average cost to house one prisoner in England exceeds \$62,400⁵³⁹ per year.⁵⁴⁰ With a prison population of more than 88,000 inmates as of 2012, the cost equates to \$5.1 billion per year.⁵⁴¹ As a result, English scholars have started to explore alternatives to custodial sentences, including drug treatment programs and individual monitoring through surveillance systems. Each alternative has been calculated to save from \$193,000 to \$310,000 over the lifetime of an offender.⁵⁴²

Deterrence

The usual justifications offered for mandatory minimum sentences is that they are transparent, even-handed, and can deter people through the certainty of punishment. However, there is no evidence to support the claim of deterrence. Research into California’s ‘three strikes’ laws has proven this.⁵⁴³ English officials have also noticed that the overcrowding of prisons due to mandatory minimum sentencing has led to an increase in recidivism.⁵⁴⁴ Although recorded gun crime had fallen by more than 40% since 2004, mandatory sentences had very little to do with it. Because gun possession attracted a tough new penalty, older gang

⁵³⁵ Ibid.

⁵³⁶ Ros Taylor, ‘Three Strikes Anti-Burglary Policy Comes Into Force’ The Guardian (online) 2 December 1999 <<http://www.theguardian.com/uk/1999/dec/01/rostaylor>>.

⁵³⁷ U.N. Human Rights Comm., *Report of the Human Rights Committee*, U.N. Doc. A/55/40 (2000) 74.

⁵³⁸ ‘Some Murderers in Jail Too Long,’ BBC News (online) 9 March 2007 <http://news.bbc.co.uk/2/hi/uk_news/6433195.stm>.

⁵³⁹ US dollars.

⁵⁴⁰ Kevin Marsh and Chris Fox, ‘The Benefit and Cost of Prison in the UK: The Results of a Model of Lifetime Re-Offending’ (2008) 4 *Journal of Experimental Criminology* 403.

⁵⁴¹ Ashley Gilpin, ‘The Impact of Mandatory Minimum and Truth-In-Sentencing Laws and Their Relation to English Sentencing Policies’ (2012) 29 *Arizona Journal of International and Comparative Law* 91, 101.

⁵⁴² Kevin Marsh and Chris Fox, ‘The Benefit and Cost of Prison in the UK: The Results of a Model of Lifetime Re-Offending’ (2008) 4 *Journal of Experimental Criminology* 403, 417.

⁵⁴³ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 107.

⁵⁴⁴ Ashley Gilpin, ‘The Impact of Mandatory Minimum and Truth-In-Sentencing Laws and Their Relation to English Sentencing Policies’ (2012) 29 *Arizona Journal of International and Comparative Law* 91, 106.

members simply gave their guns to younger gang members or girlfriends. The immediate result here was a spread of shootings involving young teenagers, both as perpetrators and victims.⁵⁴⁵

Equal Application

The director of the Prison Reform Trust has stated that the imposition of mandatory sentences does not give judges discretion to consider each case on an independent basis.⁵⁴⁶ One example is with the imprisonment of elderly offenders. Between 1990 and 2000, the number of prisoners aged sixty and over have doubled.⁵⁴⁷ These inmates have increased health care costs and are more likely to show symptoms of mental or physical illness than their younger counterparts. Here, the same sentence will impact an older offender differently in comparison to a younger one. For example, a two-year prison sentence may be perceived to be a 'rite of passage' for a young gang member, whereas the same sentence could result in the death of a unhealthy seventy-five-year old.⁵⁴⁸

CHAPTER 3.3: DEATH PENALTY

3.3.1 History of the Death Penalty under English Law

Capital punishment was used in the United Kingdom throughout all of its history until 1964.⁵⁴⁹ During 1688, there were already 50 offences punishable by death in statute, and this number almost quadrupled by 1776. Capital offences during this time ranged from serious to trivial, including forgery, poaching, stealing, association with gypsies, and cutting down trees. This system of law began to be known as the 'Bloody Code.'⁵⁵⁰ During this time, many hangings were held in public and they were generally carried out expeditiously after the sentence. Offenders who were convicted of murder, for example, were executed immediately.

In 1770, attempts were made by Sir William Meredith to implement more proportionate punishments. Although his attempts failed, it started a debate about the severity of capital punishment.⁵⁵¹ The cause of reform became pursued by Sir Samuel Romilly in 1807, when he gave serious attention to the Bloody Code in Parliament. Throughout his tenure, he succeeded in abolishing capital punishment in cases of private stealing from the person, stealing from bleaching grounds, and treason.⁵⁵² A significant breakthrough was observed in 1823 with the enactment of the *Judgement of Death Act*. This abolished the mandatory death

⁵⁴⁵ Peter Squires, 'Missing the Target – Mandatory Gun Sentences Don't Work' The Conversation (online) 21 August 2013 <<http://theconversation.com/missing-the-target-mandatory-gun-sentences-dont-work-17246>>.

⁵⁴⁶ 'Some Murderers in Jail Too Long,' BBC News (online) 9 March 2007 <http://news.bbc.co.uk/2/hi/uk_news/6433195.stm>.

⁵⁴⁷ Kevin Howse, Centre for Policy on Ageing and Prison Reform Trust, *Growing Old in Prison: A Scoping Study on Older Prisoners* (2003).

⁵⁴⁸ Ashley Gilpin, 'The Impact of Mandatory Minimum and Truth-In-Sentencing Laws and Their Relation to English Sentencing Policies' (2012) 29 *Arizona Journal of International and Comparative Law* 91, 115.

⁵⁴⁹ Julian Knowles, The Death Penalty Project, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why It Still Matters* (2015) 6.

⁵⁵⁰ Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge University Press, 2010) 139.

⁵⁵¹ Vic Gatrell, *The Hanging Tree: Execution and the English People* (Oxford University Press, 1996) 326.

⁵⁵² Julian Knowles, The Death Penalty Project, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why It Still Matters* (2015) 11.

penalty and gave judges the discretion to reduce this sentence for crimes other than treason and murder. For the next few decades, the death penalty became gradually abolished for a large number of offences. In particular, the *Punishment of Death, Etc. Act 1832* reduced the number of capital crimes to approximately 60. By 1861, there were only four capital offences in the Criminal Consolidation Acts for that year.⁵⁵³ These included murder, high treason, piracy with violence, and arson in the Royal Docklands.

The move to abolish capital punishment altogether started with a resolution in the House of Commons in 1929. The Parliamentary Select Committee recommended that capital punishment should be abolished for a trial period of five years, but this had failed. The *Criminal Justice Act 1948* reopened the debate about capital punishment and became the first serious attempt at abolition. The opinion among Cabinet Ministers was divided and the bill was defeated in the House of Lords. In 1955, Sydney Silverman introduced the *Death Penalty (Abolition) Act*. This was passed by the House of Commons in 1956 but failed in the House of Lords. Although the bill was not successful, the breakdown of votes showed that many conservative MPs were becoming abolitionists.⁵⁵⁴

The abolition of the death penalty for murder was finally achieved in 1965 following the deaths of Timothy Evans, Dereck Bentley, and Ruth Ellis. Evans was convicted of murdering his family and was sentenced to death by hanging. Three years after his death, police discovered that his neighbour had committed the murders.⁵⁵⁵ The hanging of Derek Bentley in 1953 was also controversial due to his limited intelligence and the fact that his accomplice who fired the fatal shot was too young to hang.⁵⁵⁶ Two years later, Ruth Ellis was executed for the murder of her boyfriend. Her calm and eloquent demeanor in court, combined with the violence she had suffered at the hands of her boyfriend, attracted a significant amount of public sympathy.⁵⁵⁷ When the Labour Party came into power in 1964, the incoming Prime Minister, Harold Wilson, was already a lifelong abolitionist. The *Murder (Abolition of the Death Penalty) Bill* was introduced in this year. It abolished the death penalty for murder, but not for high treason, piracy with violence, arson in the Royal Dockyards, and capital offences under military law. The death penalty was completely abolished in 1998 with the *Crime and Disorder Act*⁵⁵⁸ and the *Human Rights Act*⁵⁵⁹ after the United Kingdom ratified international instruments that prohibited it.

3.3.2 Challenges to the Ban on Death Penalty

There have been subsequent attempts to reintroduce capital punishment after its abolition, especially after terrorist incidents and notorious murders. Between 1965 and 1994, there were 13 attempts to reintroduce it in Parliament, including for the murder of a police officer. Each attempt was rejected by ever-increasing

⁵⁵³ Ibid 13.

⁵⁵⁴ Lizzie Seal, *Capital Punishment in the Twentieth Century Britain: Audience, Justice, Memory* (Routledge, 2014).

⁵⁵⁵ Jonathan Oates, *John Christie of Rillington Place: Biography of a Serial Killer* (Wharncliffe Books, 2013).

⁵⁵⁶ *R v Bentley (Deceased)* [1998] EWCA 2516.

⁵⁵⁷ Julian Knowles, The Death Penalty Project, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why It Still Matters* (2015) 46.

⁵⁵⁸ S 36.

⁵⁵⁹ S 21(5).

majorities.⁵⁶⁰ The many miscarriages of justice played a significant role in changing the minds of those who previously supported the restoration of the death penalty. For example, Home Secretary Michael Howard explained during a debate in 1994 that he had changed his mind because the system he previously regarded as infallible could make mistakes.⁵⁶¹ The support for abolition was demonstrated again with the quashing of Mahmoud Mattan's conviction in 1998. Mattan was a Somali who was executed in 1952 for murder, but new evidence uncovered by the Criminal Cases Review Commission revealed that another suspect may have committed the crime.

3.3.3 Arguments For the Death Penalty

Proportionality and Reasonableness

Capital punishment removes the worst criminals from society permanently. It proves to be much safer than long term or permanent incarceration. Dead criminals cannot commit any more crimes, either in prison or after escaping, or after being released. Execution is also a very serious punishment, and can be proportionate to the offence. Retribution is seen by many people as an acceptable reason for the death penalty.⁵⁶²

Parsimony

The government should be spending their resources on the young and the sick etc. rather than the long term imprisonment of criminals. Abolitionists in the U.S cite the higher cost of executing criminals over life in prison. Whilst this is true in the U.S, it is only because of the many appeals and delays in carrying out the death sentence. This would be different in Britain, where the average time from conviction to sentence was 3-8 weeks and only one appeal was allowed.⁵⁶³

3.3.4 Arguments Against the Death Penalty

Deterrence

During the 1920s, there was a development of sophisticated and statistically backed arguments for the abolition of the death penalty. The deterrent effects of the death penalty were questioned in cases where murder was impulsive or where the murderer was mentally ill. Statistics have shown that ending capital punishment in other countries had not resulted in higher murder rates.⁵⁶⁴

Human Rights and Dignity

The United Kingdom cannot reintroduce the death penalty because of its membership in the European Union. The EU is implacably opposed to the death penalty and requires complete abolition for any country wishing to join. Article 2 of the EU Charter of Fundamental Rights states that no one shall be condemned to the death penalty, or executed. The European Convention on Human Rights also requires the abolition of the

⁵⁶⁰ Julian Knowles, The Death Penalty Project, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why It Still Matters* (2015) 57.

⁵⁶¹ Ibid.

⁵⁶² *Arguments for and against capital punishment in the UK*, Capital Punishment UK <<http://www.capitalpunishmentuk.org/thoughts.html>>.

⁵⁶³ Ibid.

⁵⁶⁴ 'Some Murderers in Jail Too Long,' BBC News (online) 9 March 2007 <http://news.bbc.co.uk/2/hi/uk_news/6433195.stm>.

death penalty. This is due to the acceptance that state-sanctioned taking of life is wrong, undermines human dignity, and can lead to grave miscarriages of justice. Any miscarriage of justice leading to its imposition is irreversible and irreparable.

Equal Application

Often, it may come down to the skill of the prosecution and the defence lawyers as to whether there will be a conviction for either murder or manslaughter.⁵⁶⁵ The cases involving James McNicol and Edith Thompson demonstrate this. Both individuals were executed even though they did not intend to kill the victims.

CHAPTER 3.4: CASTRATION

3.4.1 History of Chemical Castration

Chemical castration has existed as a treatment option for sex offenders in England for the past few decades. In 1973, a drug known as Meprobamate became available for the treatment of sex offenders. 28 offenders tried this and noticed a reduction in sexual desire. Between 1975 and 1978, 138 sex offenders in prisons also tried one or more types of chemical treatment for sexual urges. However, these trials ended because 12% of these men required surgery to remove breasts. In 1983, an offender was released from prison on probation on the condition that he is treated with hormones.⁵⁶⁶ In the following year, however, a judge in the Central Criminal Court denied a request by a man convicted of indecent assault to be chemically castrated. During this time, chemical castration was not used as a sentencing option. Despite this lack of support from the judiciary, the use of hormones continued to be used as a treatment in the 1980s in London.⁵⁶⁷

Politician John Reid raised the idea of chemical castration in Parliament during 2007 and began a pilot in 2008.⁵⁶⁸ A few offenders took part in this trial, which was coordinated by criminal psychiatrist Professor Don Grubin between 2008 and 2012. After offenders were referred by prison and probation officers, Grubin decided whether the trial was appropriate for them. In 2012, the Ministry of Justice announced a trial for 100 prisoners.⁵⁶⁹ This was conducted at Whatton Prison, a specialist prison for sex offenders in Nottinghamshire. The scheme itself was entirely voluntary.⁵⁷⁰ Although the results are not yet available, the option for chemical castration as a treatment is still in the process of being extended across the country.

⁵⁶⁵ *Arguments for and against capital punishment in the UK*, Capital Punishment UK
<<http://www.capitalpunishmentuk.org/thoughts.html>>.

⁵⁶⁶ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16, 21.

⁵⁶⁷ *Ibid* 22.

⁵⁶⁸ 'Wanted: Pedophiles for chemical castration trial' RT News (online) 7 April 2016 <<https://www.rt.com/uk/338774-chemical-castration-trial-pedophilia/>>.

⁵⁶⁹ Ewan Palmer, 'Paedophiles Chemically Castrated in British Prison' International Business Times (online) 13 March 2012 <<http://www.ibtimes.co.uk/paedophiles-chemically-castrated-british-prison-jails-100-313257>>.

⁵⁷⁰ 'Wanted: Pedophiles for chemical castration trial' RT News (online) 7 April 2016 <<https://www.rt.com/uk/338774-chemical-castration-trial-pedophilia/>>.

3.4.2 Arguments For Chemical Castration

Purposes of Sentencing

England does not currently have an effective intervention to reduce the threat posed by high-risk sex offenders. Chemical castration would be effective here as it is not invasive as surgical castration and it is also reversible. After sentencing, treatment would occur through a combination of psychotherapy and the administration of antiandrogens drugs. This will serve the purposes of sentencing, with the initial punishment, deterrence and incapacitation, and also the treatment, rehabilitation, and public safety.⁵⁷¹ Offenders usually experience a reduction in sex drive and urges, and may also aid the offender's concentration on other therapeutic activities that are aimed at controlling deviant behaviour.

Recidivism

Numerous studies have shown that chemical castration reduces recidivism rates.⁵⁷²

Parsimony

The cost of treatment is 'startlingly low.' Whatton Prison spends around £2.5m each year on sex offender treatment programs. A drug program would cost only £20, 000.⁵⁷³

3.4.3 Arguments Against Chemical Castration

Reasonableness and Proportionality

Although chemical castration lowers libido, sex offending is not often about sex. It is about violence and domination. Chemical castration will not affect these attitudes and some men may inflict other types of deviant behaviour on victims if they cannot perform sexually.⁵⁷⁴

Parsimony

Chemical castration requires a high degree of supervision, which can lead to high costs. They require treatment regularly in order to lower their libido. Offenders must take the correct dosage, and must not be trying to reverse the effects with testosterone supplements or other methods. Although this can probably be achieved with the National Offender Management Service, it may still be difficult to all of the offender's actions. In addition to monitoring behaviour and relapse signs, they must also work with medical personnel in order to monitor the administration of treatment and blood tests to determine compliance.⁵⁷⁵ However, it can be argued that keeping sex offenders in prison incurs a higher cost.

⁵⁷¹ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16, 27.

⁵⁷² Ibid 24.

⁵⁷³ Decca Aitkenhead, 'Chemical castration: The soft option?' *The Guardian* (online) 19 January 2013 <<http://www.theguardian.com/society/2013/jan/18/chemical-castration-soft-option-sex-offenders>>.

⁵⁷⁴ Polly Curtis, 'Should sex offenders be chemically castrated?' *The Guardian* (online) 14 March 2012 <<http://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/mar/13/prisons-and-probation-criminal-justice>>.

⁵⁷⁵ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16, 25.

Human Rights

It can be argued that giving sex offenders treatment to limit their ability to have intercourse provokes objections on the grounds of civil liberties. It also in contravention of Articles 3, 8 and 12 of the European Convention of Human Rights,⁵⁷⁶ and/or Amendment 8 of the United States Constitution.⁵⁷⁷ It is also difficult to find medical practitioners who are willing to carry out the operation, especially if the surgery does not have the offender's willing consent. Generally, doctors are unwilling to be involved in the punishment of offenders and have concerns about removing non-diseased tissue as it is against their ethics.⁵⁷⁸ However, the opposing view is that it is more morally important to protect children than it is to protect the freedoms of pedophiles. Another opposing view is that offenders can voluntarily undergo chemical castration.

Purposes of Sentencing

'Feminising' sex offenders can make it difficult for them to reintegrate into society, which makes their likelihood to reoffend increase.⁵⁷⁹ Many people also believe that medicating sex offenders implies that they are suffering from a disease, thus relieving them from responsibility for their actions and treating them as victims of their biology.⁵⁸⁰

CHAPTER 3.5: OVERALL CONCLUSION AND RECOMMENDATIONS

3.5.1 Mandatory Sentences

The complaints about mandatory sentencing often concern the strict sentencing framework that is imposed. This often ties the hands of the police when filing charges or the courts when passing sentences.⁵⁸¹ The most compelling evidence against mandatory sentences comes from the USA, where the 'three strikes' law is also used. Here, leading US criminologist Michael Tonry made an extensive study about mandatory sentences and concluded that 'mandatory penalties, in all their forms, are a bad idea.' Among the many problems are the following:⁵⁸² They can be counter-productive during criminal investigation by deterring offender co-operation or guilty pleas, they can result in patterns and sentencing disparities that correlate with race, age, or other attribute, they restrict judicial discretion in relation to mitigation and culpability, and they produce sharp 'cliffs' at sentencing thresholds where punishments are dramatically increased. Finally, they can add substantially to over-incarceration.

⁵⁷⁶ No-one shall be subjected to torture or to inhuman or degrading treatment or punishment; Everyone has the right to respect for his private and family life, his home and his correspondence; Men and women of marriageable age have the right to marry and to found a family.

⁵⁷⁷ Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

⁵⁷⁸ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16, 18.

⁵⁷⁹ Polly Curtis, 'Should sex offenders be chemically castrated?' *The Guardian* (online) 14 March 2012 <<http://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/mar/13/prisons-and-probation-criminal-justice>>.

⁵⁸⁰ Gabriel Gavin, 'Should we be castrating sex offenders?' *Psychology Today* (online) 6 October 2014 <<https://www.psychologytoday.com/blog/wiring-the-mind/201410/should-we-be-castrating-sex-offenders>>.

⁵⁸¹ Peter Squires, 'Missing the Target – Mandatory Gun Sentences Don't Work' *The Conversation* (online) 21 August 2013 <<http://theconversation.com/missing-the-target-mandatory-gun-sentences-dont-work-17246>>.

⁵⁸² Ibid.

Beyond the opposing arguments of public opinion and confidence in sentencing, there have been many views that the mandatory sentence of life imprisonment of murder should be abolished due to the need for greater judicial discretion. This has been shown with a study involving interviews with various individuals who oppose this sentence. One respondent has stated that ‘all serious judges over the last 20 years have been calling for this change because it binds the hands of judges unnecessarily.’⁵⁸³ There needs to be a sentencing structure that better reflects the variances in culpability of offenders. A discretionary sentencing regime would be suited for this as it would respond to the vast range of circumstances within the crime. The mandatory sentence of life imprisonment does not adequately represent the many different contexts within which defendants use lethal violence.⁵⁸⁴ Respondents believe that the government’s unwillingness to abolish this sentence is due to a political desire to implement laws that carry public favour by promoting a punitive, tough-on-crime approach to justice. It has become a symbol that governments are taking crime seriously. If a political party attempts to abolish this sentence, they would be seen as taking a weak approach.

Respondents have suggested for the mandatory life sentence for murder to be replaced with a discretionary sentencing model similar to what is currently implemented in comparable jurisdictions, such as the Victorian system in Australia.⁵⁸⁵ The abolition of this sentence can be achieved in two ways: The government can adopt recommendations made by the Law Reform Commission after its review of the law of homicide in England and Wales, or the government can implement a system allowing for greater judicial discretion in sentencing through increased use of the Sentencing Council’s guideline judgements.⁵⁸⁶ Respondents were able to refer to their experiences of higher levels of discretion currently afforded to English judges in sentencing for manslaughter. Even if the mandatory life sentence was abolished, judges will still possess the ability to impose a maximum life sentence if it is warranted based on the circumstances.⁵⁸⁷

3.5.2 Death Penalty

As of 2015, the UK Government has stated that ‘it is opposed to the death penalty in all circumstances.’ It has called on all states to adopt ‘a moratorium on the use of the death penalty’ in accordance with the UN General Assembly resolution 186 as part of a process towards complete abolition.⁵⁸⁸ This principled stance is achieved through outreach work by the Foreign and Commonwealth Office and through NGOs including the Death Penalty Project and Reprieve. Their experience with the tragic outcomes of capital punishment, the acceptance that state-sanctioned taking of life is wrong, combined with evidence that abolition has no adverse consequences in terms of crime rates, allows the United Kingdom to lead the way in the movement for abolition internationally.⁵⁸⁹ The government’s objectives are to increase the number of abolitionist

⁵⁸³ Kate Fitz-Gibbon, ‘The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England’ (2012) 13(5) *Criminology & Criminal Justice* 514.

⁵⁸⁴ Ibid 516.

⁵⁸⁵ Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed).

⁵⁸⁶ Kate Fitz-Gibbon, ‘The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England’ (2012) 13(5) *Criminology & Criminal Justice* 518.

⁵⁸⁷ Ibid.

⁵⁸⁸ House of Lords, ‘Murder (Abolition of Death Penalty) Act 1965’ (Research Brief, UK Government, 2015) 2.

⁵⁸⁹ Foreign & Commonwealth Office, ‘Human Rights and Democracy Report 2014’ (Corporate Report, UK Government, 2014).

countries and seek further restrictions in countries where it is used. As a result, significant progress has been made in restricting its use in countries like in Africa and Asia, especially in relation to China.

3.5.3 Castration

Research on the effectiveness of chemical castration has been largely optimistic, especially if it is used in conjunction with cognitive behavioural treatment programs and if the offenders are motivated to change. Dr Fred Berlin, a Professor at the John Hopkins University School of Maryland, has found in one study that recidivism was reduced to 15% for all sexual offences in the U.S. Only 8% of 629 who had been receiving chemical therapy reoffended after a five-year follow-up period.⁵⁹⁰ Offender comments concerning chemical castration have also been encouraging. Robert Oliver, a convicted paedophile, advocates for this type of treatment. He has acknowledged that no amount of sentence can stop the way he feels and that the streets can only be safe if he is treated with a course of injections.⁵⁹¹

It is important that offenders can be adequately monitored when they are undergoing treatment. It is also likely that chemical castration would only work with certain classes of sex offenders. Most research shows effectiveness for those offenders who are classed as paedophiles. There must also be a combination of psychotherapy or some other form of counselling in order to address perceptions, denial or minimisation of the offending, and attitudes towards children. Ultimately, it can be said that chemical castration is only effective when offenders really want to change. Hence, participation should be voluntary. The offender must be informed of all possible side effects and should be able to withdraw consent at any time. It should not be either a condition of release or form part of a punishment agenda.⁵⁹² The selection of suitable offenders also need to be a medical decision. It cannot necessarily be based on the nature or seriousness of the crime, but on the offender's suitability and motivation. Most of these factors are already addressed in England's pilot of chemical castration, although it is unknown whether participants also participate in psychotherapy.

⁵⁹⁰ Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46 *The Howard Journal* 16, 24.

⁵⁹¹ Ibid.

⁵⁹² Ibid 28.

CHAPTER 4: GERMANY

The Federal Republic of Germany is a civil law system. The legal system is founded on the constitutional document: the *Basic Law for the Federal Republic of Germany* (“the *Basic Law*”), which was enacted in West Germany on 23 May 1949.⁵⁹³ With the adoption of the *German Reunification Treaty*,⁵⁹⁴ East Germany became part of the Federal Republic of Germany, accepted under the *Basic Law* as per article 23,⁵⁹⁵ effective from 3 October 1990.

The German penal code is known as the *Strafgesetzbuch* (“the *Penal Code*”), and was accepted in 1871.⁵⁹⁶ The *Penal Code* is divided into two main parts. The General Part covers general points of law such as statutes of limitations, criminal capacity and necessary defence. On the other hand, the Special Part outlines the various criminal offences, and their definitions and mandatory sentences. The German *Penal Code* falls under federal jurisdiction, applying to all crimes committed on German territory.⁵⁹⁷

As a civil law system, there are several points of difference in the German legal system that must be understood prior to focusing on sexual offences:

- No jury: Germany has abolished the use of a jury, and instead cases are heard before several judges and lay judges. The rationale behind this practice is that without a jury, judges need not spend time on many formal procedures, such as the rules surrounding the legality of evidence.⁵⁹⁸ Thus, trials are based on procedural rules, and the substantive rules of the relevant criminal law.⁵⁹⁹
- Lack of prosecutorial discretion: The prosecutor in a criminal case does not hold any discretion to decline to prosecute.⁶⁰⁰ Prosecutors are bound by the legality principle, under which they have a duty to prosecute any reasonable case.⁶⁰¹ Furthermore, a prosecutor can be legally compelled to file charges by the plaintiff.⁶⁰²
- Role of the Federal Constitutional Court: The Federal Constitutional Court’s primary role is to safeguard the German people against a violation of human rights.⁶⁰³ The Court has the ability to overturn any judicial decision or legislation passed by government which is believed to have violated basic human rights, or a *Basic Law* principle, without requiring a plaintiff with the relevant standing.⁶⁰⁴

⁵⁹³ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 145.

⁵⁹⁴ *Treaty on the Final Settlement with Respect to Germany (The Two Plus Four Agreement)*, East Germany-West Germany plus France-Soviet Union-United Kingdom-United States, signed 12 September 1990, American Foreign Policy Current Documents 1990 (entered into force 3 October 1990), retrieved from: <<http://www.usa.eseembassy.de/etexts/2plus48994e.htm>>.

⁵⁹⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 23.

⁵⁹⁶ *Strafgesetzbuch* [German Criminal Code] (Germany) preamble (‘*StGB*’).

⁵⁹⁷ *StGB* § 3.

⁵⁹⁸ Hans-Heinrich Jescheck, ‘Principles of German criminal procedure in comparison with American law’ (1970) 56(2) *Virginia Law Review* 239, 244.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*, 245.

⁶⁰¹ *Ibid.*

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*, 241.

⁶⁰⁴ *Ibid.*

CHAPTER 4.1: SEXUAL OFFENCES IN GERMANY

Overview

- **Mandatory Minimum and Maximum Sentences:** Mandatory sentences are strictly enforced in Germany. The overarching principle of proportionality has meant that judges (and prosecutors) have limited discretion, and thus mandatory minimum and maximum sentences exist in order to ensure that the fundamental sentencing principles – in particular, proportionality, equal application and the protection of human rights and human dignity – are upheld to the highest extent possible.
- **Death Penalty:** Although Germany has historically used capital punishment, the death penalty was explicitly forbidden by article 102 of the *Basic Law* in 1949. While article 102 could theoretically be amended or even abolished, it has been suggested that capital punishment would continue to be prohibited under article 1, which guarantees the inalienable right of human dignity.
- **Castration:** Germany practices surgical castration instead of chemical castration. Surgical castration is undergone voluntarily, and is considered a treatment option, rather than a sentencing procedure. However, due to a recent European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment report, the German Government is currently reviewing its practice of surgical castration.

4.1.1 Sexual Offences (General)

Sexual assault (also referred to as ‘rape’) is defined in § 177 of the German *Penal Code*.⁶⁰⁵ Sexual assault occurs when a victim is coerced either through physical force, with threats or by the exploitation of a person in a vulnerable situation, to suffer sexual acts by another person (the offender) or a third person.⁶⁰⁶ Forcing a person to engage actively against their will in sexual acts with the offender or a third person is also considered to be sexual assault.⁶⁰⁷ “Serious sexual assault” occurs if the sexual assault includes sexual intercourse, or is committed by more than one offender.⁶⁰⁸

4.1.2 Sexual Offences Against Children

The age of consent in Germany is ordinarily 14 years of age.⁶⁰⁹ However, if a person is over 21 years of age,⁶¹⁰ or in a position of trust, then the age of consent rises to 16 years of age.⁶¹¹ Child sexual assault is found in § 176 of the German *Penal Code*.⁶¹² It is defined in the same way as the ordinary crime of sexual assault, but pertaining to children.⁶¹³ Aggravated child abuse, covered in § 176a, is where “serious sexual

⁶⁰⁵ *Strafgesetzbuch* [German Criminal Code] (Germany) (‘*StBG*’).

⁶⁰⁶ *StGB* § 177(1).

⁶⁰⁷ *StGB* § 177(1).

⁶⁰⁸ *StGB* § 177(2).

⁶⁰⁹ *StGB* § 176(1).

⁶¹⁰ *StGB* § 182(2).

⁶¹¹ *StGB* § 174.

⁶¹² *Strafgesetzbuch* [German Criminal Code] (Germany) (‘*StBG*’).

⁶¹³ *StGB* § 176(1) and (2).

assault” occurs against a child, the offence is committed jointly by more than one person, or the child is placed in serious danger as a result of the abuse.⁶¹⁴

4.1.3 Juvenile and Adolescent Defendants

Juvenile and adolescent offenders are treated considerably differently to their adult counterparts in Germany. A juvenile defendant is an offender aged between 14 and 18 years.⁶¹⁵ An offender aged 18 to 21 years old is classified as an adolescent.⁶¹⁶ There are several distinctions in the way juvenile and adolescent offenders are handled by the German criminal law system.

Firstly, prosecutors are not bound by the legality principle in cases where the offender is classified as a juvenile.⁶¹⁷ Instead, the prosecutor exercises extremely broad discretionary power, and can refuse to commence proceedings entirely.⁶¹⁸ While juvenile defendants face both prosecutors and judges to discuss remedies,⁶¹⁹ a criminal trial will only occur if it is in the public interest.

Secondly, the judges and prosecutors hearing a case with a juvenile defendant generally belong to a special juvenile court.⁶²⁰ Furthermore, both the judge and the prosecutor have been trained specifically to deal with juvenile offenders, and have often been involved in the education system in the past.⁶²¹

Thirdly, the attitude of the criminal law is significantly different towards juvenile defendants. If the offender is a juvenile, the outcome of a court proceeding must focus mainly on educating or rehabilitating the offender first, and only consider incarceration if no other option is viable.⁶²² The process is individualised and pertains to the facts of that particular case.⁶²³ In most cases, the prosecutor will request that the judge issue a directive to the juvenile, which must be followed.⁶²⁴ These draw mostly on the criminal justice purpose of rehabilitation, and often include restorative measures.⁶²⁵ Under the *Juvenile Court Support Service* § 38, juvenile offenders are to receive punishments that prioritise education and possibly psychological support, and in the rare case that incarceration is necessary, the juvenile will receive specialist probation services.⁶²⁶ Thus, a juvenile is only punished if the educational measures are insufficient in that particular case.⁶²⁷

⁶¹⁴ StGB § 176a(2).

⁶¹⁵ Joachim Hermann, ‘The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany’ (1973) 41 *University of Chicago Law Review* 468, 498.

⁶¹⁶ Ibid, 500.

⁶¹⁷ Ibid, 498.

⁶¹⁸ Ibid.

⁶¹⁹ Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing Ltd, 2012) 13.

⁶²⁰ Ibid, 11.

⁶²¹ Ibid.

⁶²² Ibid, 13.

⁶²³ Joachim Hermann, ‘The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany’ (1973) 41 *University of Chicago Law Review* 468, 498.

⁶²⁴ Ibid, 499.

⁶²⁵ Ibid.

⁶²⁶ *Jugendgerichtsgesetz* (German) 6 December 2011, BGBl I, 2011, 2554, § 38.

⁶²⁷ Joachim Hermann, ‘The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany’ (1973) 41 *University of Chicago Law Review* 468, 498.

Similarly, adolescents are also heard before prosecutors and judges trained in handling juvenile defendants.⁶²⁸ However, the prosecutors are once more bound by the legality principle and do not have discretion to decline to prosecute, like they do for juveniles.⁶²⁹ In practice, however, there is evidence that many adolescents are treated more similarly to juveniles than to adult offenders.⁶³⁰ Judges tend to grant prosecutors discretion to discontinue proceedings against an adolescent offender, in the understanding that this has a greater educational benefit to the adolescent than incarceration.⁶³¹ The focus is also on education, as with juvenile offenders, however it is the judges that hold the discretion, not the prosecutors.

CHAPTER 4.2: MANDATORY SENTENCES

4.2.1 Nature of Mandatory Sentences in Germany

In Germany, as a substantive element of criminal law, most crimes have a minimum and maximum sentence attached.⁶³² However, despite the existence of maximum and minimum sentences, two factors must be taken into consideration. Firstly, personal guilt remains a crucial factor in determining the length of the sentence.⁶³³ Secondly, the impact of the sentence on the offender is considered.⁶³⁴ Furthermore, the German *Penal Code* takes any victim-offender mediation that has already occurred into account, and will only permit a sentence that does not undo any progress to be enforced.⁶³⁵ In the case of multiple crimes, separate or consecutive sentences are prohibited, and thus, in effect the mandatory sentence is reduced.⁶³⁶ Previously, there was a higher maximum sentence of repeat offenders, however, this was abolished in 1986.⁶³⁷ However, in 2003, the *Penal Code* was amended to include recidivism as an aggravating factor in sexual assault cases.⁶³⁸

It must be remembered that while the *Penal Code* has prescribed mandatory sentences for most crimes, the difference between the minimum and maximum sentence is relatively broad. Thus, in practice, judges hold some discretion as to the length of incarceration they set.

⁶²⁸ Ibid, 500.

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ Ibid.

⁶³² Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing' (2013) 76(1) *Law of Contemporary Problems* 211, 214.

⁶³³ Ibid.

⁶³⁴ *StGB* § 46.

⁶³⁵ *StGB* § 46a.

⁶³⁶ *StGB* § 54.

⁶³⁷ Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing' (2013) 76(1) *Law of Contemporary Problems* 211, 215.

⁶³⁸ Ibid.

4.2.2 Sexual Offences and Mandatory Sentences

Section	Offence	Minimum Sentence	Maximum Sentence
174	Abuse of a position of trust <ul style="list-style-type: none"> • Person under 14 or 16, who is entrusted to him for upbringing education or care • Position of trust includes prisoners, patients, students etc. • Engages in sexual intercourse in presence of person in trust • Harm is minor 	3 months Fine Discharge	5 years 3 months
176	Child abuse <ul style="list-style-type: none"> • Child under 14 years • Serious cases • Presents child with pornographic material 	3 months 1 year 3 months	10 years 5 years
176a	Aggravated child abuse <ul style="list-style-type: none"> • If convicted of similar offence within previous five years • Rape of child, serious injury, production of child pornography • Serious physical abuse, danger of death 	3 months 1 year 2 years 5 years	10 years 10 years
176b	Child abuse causing death	10 years	Life Imprisonment
177	Sexual assault by use of force of threats; rape <ul style="list-style-type: none"> • If offender carries weapon; places victim in danger of serious injury • If offender uses weapon during offence; seriously abuses victim; places victim in danger of death • Less serious cases 	1 year 2 years 5 years 6 months	10 years
178	Sexual assault by use of force of threats of death and rape causing death	10 years	Life imprisonment
180	Causing minors to engage in sexual activity <ul style="list-style-type: none"> • Causing person under 16 years to engage in sexual activity with or in presence of third person 	Fine	5 years
182	Abuse of juveniles <ul style="list-style-type: none"> • Abuse of person under 18 years by taking advantage of exploitative situation 	May only be prosecuted on request or in special public interest	5 years

4.2.3 Arguments For Mandatory Sentences

The arguments for (and against) mandatory sentencing in Germany are based in the principles and purposes underpinning the criminal law system.

Proportionality

Proportionality is the one of the most important principles of the German criminal law,⁶³⁹ and is codified in the *Basic Law*.⁶⁴⁰ Furthermore, the German Constitutional Court has explicitly recognised the overarching importance of the principles of proportionality.⁶⁴¹ Proportionality has, and continues to, inform all other sentencing principles within the criminal law. There are three distinct ways in which proportionality is manifested.⁶⁴²

- (1) The principle of suitability: Public authorities are restricted to using measures which are proportionate. This means that they must be no more severe, or be considered appropriate, in regards to furthering the goals that they hope to achieve;
- (2) The principle of necessity: The least harmful or restrictive measures must be taken in achieving these public policy or criminal law goals;
- (3) Strict proportionality: The benefits of any measure undertaken must outweigh any negative aspects, such as any resulting injuries or costs.

In order to ensure that sentencing serves a legitimate and beneficial goal, German criminal law uses mandatory sentences,⁶⁴³ ensuring that the principles of proportionality are upheld in a uniform manner. As discussed above, however, judges hold some discretion in setting a sentence between the prescribed minimum and maximum sentences. The judge will balance the seriousness of the offence, the supporting evidence and the seriousness of the consequences of the crime.⁶⁴⁴ This discretion is necessary, since each crime has an individual and different impact, however, any sentence set can be challenged on the grounds of proportionality.⁶⁴⁵ Thus, the German definition of proportionality encompasses the principle of suitability.⁶⁴⁶

It is evident that the principles of parsimony and reasonableness are encompassed by the broad German principle of proportionality.

⁶³⁹ Richard Frase, 'Excessive prison sentence, punishment goals, and the Eighth Amendment: "Proportionality" relative to what?' (2005) 89(3) *Minnesota Law Review* 571, 623.

⁶⁴⁰ Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing Ltd, 2012) 21.

⁶⁴¹ Christopher Slobogin, 'Prevention as the primary goal of sentencing: The modern case for indeterminate dispositions in criminal cases' (2011) 48 *San Diego Law Review* 1127, 1135.

⁶⁴² Richard Frase, 'Excessive prison sentence, punishment goals, and the Eighth Amendment: "Proportionality" relative to what?' (2005) 89(3) *Minnesota Law Review* 571, 626.

⁶⁴³ Vicki Jackson, 'Constitutional law in an age of proportionality' (2015) 124 *Yale Law Journal* 3094, 3099.

⁶⁴⁴ Richard Frase, 'Excessive prison sentence, punishment goals, and the Eighth Amendment: "Proportionality" relative to what?' (2005) 89(3) *Minnesota Law Review* 571, 627.

⁶⁴⁵ Richard Singer, 'Proportionate thoughts about proportionality' (2011) 8(1) *Ohio State Journal of Criminal Law* 217, 246.

⁶⁴⁶ *Ibid*, 249.

Equal Application

As discussed above, both judges and prosecutors have limited discretion within the German criminal system.⁶⁴⁷ For example, a prosecutor, bound by the legality principle, has no discretion as to whether or not they prosecute a case.⁶⁴⁸ Furthermore, judges' discretion is restricted in terms of sentencing by the imposition of minimum and mandatory sentences. The combined effect of the lack of prosecutorial discretion and the limited discretion exercised by judges is designed to ensure that the principle of equal application, considered a human right in Germany, is upheld.⁶⁴⁹

Human Rights and Human Dignity

Human rights and human dignity are arguably the most important aspects of the German legal system. Human rights are considered to be fundamental and must be protected; however, the government may limit these rights within the principles of proportionality.⁶⁵⁰ Human dignity, on the other hand, is considered to be the fundamental value of the *Basic Law*, or the rule of law, in the German legal system.⁶⁵¹ In fact, human dignity has been shown to take precedence over the principles of proportionality.⁶⁵² For example, in the *Aviation Security Case*, legislation which allowed the government to shoot down a hijacked aircraft to prevent loss of life on the ground was overturned by the Federal Constitutional Court.⁶⁵³ Despite the fact that this legislation upheld the proportionality principles, since it would most likely minimise the potential loss of life, it was considered to violate the basic principles of human dignity and was therefore found to be unconstitutional.⁶⁵⁴ Thus, while the government may limit an individual's human rights to maximise public benefit, for example, an offender may lose his freedom through incarceration, human dignity will, in turn, limit the government's power.⁶⁵⁵ In this way, human dignity will aim to control the government's actions and ensure other principles, such as equal application and proportionality.

4.2.4 Arguments Against Mandatory Sentences

There are very few arguments against mandatory sentencing in Germany.

Parsimony and Proportionality

This argument is based on the fact that codifying sentencing procedures has limited judicial discretion. German judges have limited discretion in comparison to their common law counterparts, partly due to the fact that German courts do not rely on past precedence.⁶⁵⁶ This issue is exacerbated by the fact that prosecutors have very narrow discretion in deciding whether to prosecute a crime, and, furthermore, which

⁶⁴⁷ Joachim Hermann, 'The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany' (1973) 41 *University of Chicago Law Review* 468, 470.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ibid.

⁶⁵⁰ Vicki Jackson, 'Constitutional law in an age of proportionality' (2015) 124 *Yale Law Journal* 3094, 3125.

⁶⁵¹ Richard Singer, 'Proportionate thoughts about proportionality' (2011) 8(1) *Ohio State Journal of Criminal Law* 217, 231.

⁶⁵² Vicki Jackson, 'Constitutional law in an age of proportionality' (2015) 124 *Yale Law Journal* 3094, 3158.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Eleanor Hadley, *Antitrust in Germany and Japan* (Princeton University Press, 2015) 158.

sentence to pursue.⁶⁵⁷ It can be argued that this will result in sentencing having more negative impacts than positive benefits.

Rehabilitation

It could be argued that mandatory sentencing in Germany has led to a greater number of prison sentences being ordered. It has also limited the criminal law's ability to develop alternative methods, such as restorative justice. However, while this is a valid point, it must be remembered that all mandatory sentences are believed to be proportionate to the crime to which they apply.

CHAPTER 4.3: DEATH PENALTY

4.3.1 History of the Death Penalty

The first body of German criminal law, the *Constitutio Criminalis Carolina*, recognised the death penalty in 1499.⁶⁵⁸ While this document first codified capital punishment, it had been used extensively prior to this.⁶⁵⁹ A constitution was drafted in 1849, however it was never adopted.⁶⁶⁰ This constitution was written by the Frankfurt Parliament, the first freely elected federal government.⁶⁶¹ The draft codified several basic rights, and would have abolished the death penalty in all situations except where prescribed by martial law, or for crimes committed on the high seas, such as mutiny.⁶⁶² However, with the fall of the Frankfurt Parliament, the German Empire (1871-1918) continued to use the death penalty for numerous crimes, including high treason, murder and as part of military law.⁶⁶³ The Weimar Republic (1919-1933) retained the death penalty for murder.⁶⁶⁴

The death penalty was used extensively by the National Socialist German Worker's Party ("Nazi Party") (1933-1945).⁶⁶⁵ The death penalty was mandatory for several crimes, including treason, arson, betraying a secret, sabotage, kidnapping, espionage, desertion, looting, publishing foreign radio broadcasts, murder and rape.⁶⁶⁶ Adolf Hitler, the German Führer, made it clear that the main purpose of the death penalty was deterrence. Furthermore, Hitler stated that the death penalty was in the interest of the public, stating that the alternative long incarceration period would mean that the offender was of no value to the community, but a drain on public resources.⁶⁶⁷ Thus, for such offences, the options were to place the offender in a

⁶⁵⁷ Ibid.

⁶⁵⁸ Werner Frotscher and Bodo Pieroth, *Verfassungsgeschichte* (Beck, 5th ed, 2005) 306.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid, 317.

⁶⁶¹ Ibid, 306.

⁶⁶² Ibid, 317.

⁶⁶³ Manfred Messerschmidt, *Die Wehrmachtjustiz 1933-1945*, (Verlag Ferdinand Schöningh GmbH & Co KG, 2005) 21.

⁶⁶⁴ Ibid, 43.

⁶⁶⁵ Wolfgang Curilla, *Die deutsche Ordnungspolizei und der Holocaust im Baltikum und Weissrussland 1941-1944* (Verlag Ferdinand Schöningh GmbH & Co KG, 2006) 742.

⁶⁶⁶ Ibid.

⁶⁶⁷ Richard Evans, 'Rituale der Vergeltung' in Richard Evans (ed), *Die Todesstrafe in der Deutschen Geschichte* (Verlag Ferdinand Schöningh GmbH & Co KG, 2001) 1532, 1828.

concentration camp or execute him, with the latter being the better option in terms of furthering the purpose of deterrence.⁶⁶⁸

In the aftermath of World War II, executions were carried out in West Germany, mainly by the International War Crimes Tribunal against Nazi war criminals.⁶⁶⁹ The death penalty was abolished by the new German constitution in West Germany in 1949,⁶⁷⁰ and later in East Germany. However, despite the protests from the newly founded Federal Republic of West Germany, the occupying Allied Powers continued to use the death penalty in their separate jurisdictions.⁶⁷¹ Thus, it is believed that the final execution on West German soil occurred in 1951, when a war criminal was executed by the occupying American forces.⁶⁷²

4.3.2 Current Stance on the Death Penalty

The death penalty is constitutionally forbidden in Germany by article 102,⁶⁷³ effective from 23 May 1949. Although a couple of states have not explicitly forbidding capital punishment in their respective constitutions,⁶⁷⁴ the Federal ban is absolute, and overrules these sections. Articles 1-20 of the *Basic Law* cannot be repealed or amended, meaning that the ban on the death penalty could, in theory, be overturned in the future.⁶⁷⁵ However, in 1995 the Federal Court ruled that capital punishment is absolutely and irrevocably forbidden as a consequence of article of the *Basic Law*, which guarantees a right to human dignity.⁶⁷⁶ The *Penal Code* was amended in 1951 to incorporate the abolition of the death penalty, and capital punishment was replaced with life imprisonment.⁶⁷⁷ Life imprisonment remains the mandatory sentence for murder.⁶⁷⁸

On occasion, it has been argued that the abolition of the death penalty under article 102 of the *Basic Law* is so broad and absolute that it, in effect, also prevents the German Government from assassinating or targeting any civilians, such as in a hostage situation.⁶⁷⁹

4.3.3 Arguments For the Death Penalty

Article 102 of the *Basic Law* offers no explanation as to the benefits or disadvantages of the abolition of the death penalty. The combination of Germany's wish to disassociate with the Holocaust,⁶⁸⁰ and the European

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 102.

⁶⁷¹ Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (Columbia University Press, 2002) 173.

⁶⁷² Ibid.

⁶⁷³ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 102.

⁶⁷⁴ *Bayerische Verfassung* [Constitution of the Free State of Bavaria] (Germany) art 47.

⁶⁷⁵ Roman Herzog, 'Todesstrafe in Rechtlich Verfassungsrechtlich' in Werner Heun (ed) *Evangelisches Staatslexikon* (W. Kohlhammer Verlag, 2006) 3615.

⁶⁷⁶ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 1.

⁶⁷⁷ Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing' (2013) 76(1) *Law of Contemporary Problems* 211, 216.

⁶⁷⁸ *StGB* § 211.

⁶⁷⁹ Roman Herzog, 'Todesstrafe in Rechtlich Verfassungsrechtlich' in Werner Heun (ed) *Evangelisches Staatslexikon* (W. Kohlhammer Verlag, 2006) 3614.

Union's strong and total position against capital punishment,⁶⁸¹ has meant that there is no real argument advocating the death penalty. It must be remembered that entry into the European Union requires, amongst others, the abolition of the death penalty.⁶⁸²

4.3.4 Arguments Against the Death Penalty

While there is not much debate surrounding the death penalty, there are a couple of justifications of the abolition of the death penalty.

Proportionality and Reasonableness

Under the principles of proportionality, as discussed above (see 4.2), capital punishment would be considered both disproportionate and unreasonable in terms of furthering the ultimate aims of the criminal law. Under the proportionality principle of necessity,⁶⁸³ it would be difficult to justify capital punishment. Life imprisonment has replaced the death penalty, and this sentence is effective in fulfilling several sentencing purposes, such as deterrence and incapacitation, while taking less harmful and restrictive measures. The Federal Court has previously argued that even life imprisonment is too harsh, and does not comply with the need to take personal guilt into consideration.⁶⁸⁴ In light of this statement, it is clear that the death penalty could not be considered proportionate.

Human Dignity

Article 1 of the *Basic Law* has ensured that human dignity is an inalienable right, and cannot be violated at any cost.⁶⁸⁵ The Federal Court has argued that the death penalty is incompatible with this guarantee for human dignity.⁶⁸⁶

⁶⁸⁰ Emma Anderson, 'German state to finally get rid of death penalty', *The Local Deutschland* (online), 17 March 2016 <<http://www.thelocal.de/20160317/german-state-to-finally-get-rid-of-death-penalty>>.

⁶⁸¹ External Action, *EU Policy on Death Penalty* (12 April 2013) European Union <http://eeas.europa.eu/human_rights/adp/index_en.htm>.

⁶⁸² Ibid.

⁶⁸³ Richard Frase, 'Excessive prison sentence, punishment goals, and the Eighth Amendment: "Proportionality" relative to what?' (2005) 89(3) *Minnesota Law Review* 571, 626.

⁶⁸⁴ Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing' (2013) 76(1) *Law of Contemporary Problems* 211, 227.

⁶⁸⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 1.

⁶⁸⁶ Roman Herzog, 'Todesstrafe in Rechtlich Verfassungsrechtlich' in Werner Heun (ed) *Evangelisches Staatslexikon* (W. Kohlhammer Verlag, 2006) 3615.

CHAPTER 4.4: CASTRATION

4.4.1 Castration in Germany: Surgical Castration

Chemical castration was used in Germany during the 1960s;⁶⁸⁷ however, Germany no longer continues this practice. Today, Germany practices surgical castration.

It is important to note that surgical castration is not a sentencing option, but a part of treatment.⁶⁸⁸ Offenders can volunteer to undergo surgical castration as a treatment option. If they choose to have the procedure, they are more likely to be paroled, since they are believed to no longer pose a threat to society.⁶⁸⁹ In fact, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”) has found that surgical castration has ‘drastically’ reduced the recidivism rate of sex offenders.⁶⁹⁰

The practice of surgical castration is becoming increasingly rare, with fewer than five surgical castrations occurring each year since 2000.⁶⁹¹ Furthermore, the procedure is only available to criminals over the age of 25 years; applications must be cleared by an expert; and the procedure can only be undertaken with the consent of the individual.⁶⁹² It is only available to those offenders who are considered to have an “abnormal sex drive”, and who are therefore more susceptible to re-offence.⁶⁹³

While recognising the benefits, the CPT has nevertheless urged the German Government to cease its practice of surgical castration entirely.⁶⁹⁴ It stated that the practice was inhumane and degrading, and amounted to degrading treatment,⁶⁹⁵ which is a form of torture. The CPT expressed particular concern over the fact that surgical castration, unlike its equivalent chemical castration, was irreversible.⁶⁹⁶ In its response to the CPT Report, the German Government commenced an inquiry into the use of surgical castration in 2013,⁶⁹⁷ and is yet to make a decision as to whether to continue the practice.

⁶⁸⁷ Charles Scott and Trent Holmberg, ‘Castration of sex offenders: Prisoner’s rights versus public safety’ (2003) 31(4) *Journal of the American Academy of Psychiatry* 502, 505.

⁶⁸⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (‘CPT’), *Response of the German Government to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany*, (22 February 2012), CPT/Inf(2012)7, at [49]; retrieved from: <<http://www.cpt.coe.int/documents/deu/2012-07-inf-eng.pdf>>.

⁶⁸⁹ *Ibid.*, at [51].

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² Jessica Phelan, ‘Germany must stop castrating sex offenders, says European Rights watchdog’, *Global Post* (online), 23 February 2012 <<http://www.globalpost.com/dispatch/news/regions/europe/germany/120222/germany-surgical-castration-sex-offenders-council-of-europe-cpt>>.

⁶⁹³ *Ibid.*

⁶⁹⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (‘CPT’), *Response of the German Government to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany*, (22 February 2012), CPT/Inf(2012)7, at [51]; retrieved from: <<http://www.cpt.coe.int/documents/deu/2012-07-inf-eng.pdf>>.

⁶⁹⁵ *Ibid.*, at [49]

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*, at [50].

4.4.2 Arguments For Surgical Castration

There are several arguments in favour of surgical castration.

Human Rights

There is no doubt that surgical castration would amount to torture if it was done without the consent of the individual.⁶⁹⁸ Thus, the question here is whether voluntary or consensual, surgical castration could be considered a violation of human rights. While offered as a treatment option, an individual should have the right to choose what happens to their own body. If the individual has free choice, then surgical castration can be compatible with human rights.

Proportionality

It can be argued that surgical castration fulfils the overarching principle of proportionality to a greater extent than incarceration. An offender who has committed a sexual offence but no other crime can undergo surgical castration and be released in the knowledge that they are highly unlikely to commit a sexually based crime again. Surgical castration affects only the offender's sexual activities. However, if the same offender were to receive a long prison sentence, they experience a complete loss of freedom while incarcerated, and is not able to participate in society at all. The argument here is that surgical castration, since it targets the specific illegal activity, is a more proportional option.

Purposes of Sentencing

Surgical castration has the purpose of ensuring that an offender who is likely to reoffend is prevented from doing so. Obviously, the proportionality principles are only fulfilled if surgical castration is only applied to sexual offences. This fulfils several of the sentencing purposes:

- Incapacitation: The offender is permanently prevented from committing further crimes of a sexual nature.
- Rehabilitation: Since surgical castration is offered as a treatment option, and not a punishment, it could be considered a form of rehabilitation of an offender. Specifically, surgical castration is available to offenders who are considered to have an "abnormal sex drive",⁶⁹⁹ and thus surgical castration forms the basis of their treatment.

4.4.3 Arguments Against Surgical Castration

Due to the CPT Report, the single, and powerful, argument against surgical castration is based on the belief that it violates human rights.

Human Rights

As stated above, if a rational individual freely and willingly consents to surgical castration, then it is compatible with human rights. However, there is concern that an offender is placed in a position where they

⁶⁹⁸ Ibid, at [49].

⁶⁹⁹ Jessica Phelan, 'Germany must stop castrating sex offenders, says European Rights watchdog', *Global Post* (online), 23 February 2012 <<http://www.globalpost.com/dispatch/news/regions/europe/germany/120222/germany-surgical-castration-sex-offenders-council-of-europe-cpt>>.

do not have the ability to make such a choice freely. Although surgical castration is offered as a treatment option, and not as a sentencing option, once surgical castration has been performed, it is no longer necessary to imprison the offender and they can be released. Thus, many offenders are placed in a position where they are choosing between surgical castration and continued incarceration. There is a valid argument to state that this significantly limits the offender's ability to make a free and rational decision.

In order to counteract this, the German Government has put several measures in place, such as ensuring the offender is over a certain age, and they have discussed the option with an expert, who will ultimately be required to approve the application for surgical castration.⁷⁰⁰ The CPT, however, would argue that the procedure is degrading treatment of an individual, and is irreversible, thus amounting to torture,⁷⁰¹ which is a recognised violation of human rights standards.⁷⁰²

CHAPTER 4.5: OVERALL CONCLUSION AND RECOMMENDATIONS

4.5.1 Mandatory Sentences

There is no doubt that within a system of limited judicial discretion and no reliance on precedence, mandatory sentencing is necessary to ensure that the principles of proportionality and equal application are upheld. Without mandatory sentencing, judges would have unfettered discretion to apply any sentence to a crime. Furthermore, arbitrarily applied sentences would be incredibly difficult to overturn. Thus, mandatory sentencing is a necessity in the German criminal law system.

It could be argued that the existence of precedence within a common law system could take the place of mandatory sentencing. Judicial discretion is exercised within the limits of precedence. However, precedence can be overruled much more easily than overruling a statutory mandatory sentence. Thus, mandatory sentencing necessarily provides a better protection of sentencing principles such as equal application, proportionality, parsimony and reasonableness. Judicial discretion will continue to exist within the confines of mandatory sentencing.

However, it is important that judicial decisions can be reviewed. Since proportionality and human rights are such important aspects of the criminal law system, or indeed the *Basic Law*, there must be a method in which judicial decision can be reviewed. In the German civil law system, judicial review can occur at any time by the Federal Constitutional Court, and does not require special leave to appeal, which is often found in common law jurisdictions. In the interest of ensuring that the criminal law principles are upheld, making it simpler to appeal a case is beneficial. The existence of mandatory sentences will ensure that the only substantive points of law can be contested.

⁷⁰⁰ Ibid.

⁷⁰¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'), *Response of the German Government to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany*, (22 February 2012), CPT/Inf(2012)7, at [49]; retrieved from: <<http://www.cpt.coe.int/documents/deu/2012-07-inf-eng.pdf>>.

⁷⁰² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 26 June 1987, 1465 UNTS 85 (entered into force 26 June 1987), art 1.

Juvenile Defendants

The treatment of juvenile and adolescent defendants is perhaps the greatest recommendation. Juvenile defendants, ranging between 14 to 18 years of age, are treated entirely differently to adult defendants, since it is believed that they do not hold complete criminal liability, and that they are able to be rehabilitated. Furthermore, judges and prosecutors dealing with juvenile cases have received special training in this area.

There is no doubt that this practice is extremely beneficial for the entire society. While it does not necessarily fulfil the sentencing purpose of retribution, it is able to further all other principles and purposes of the criminal law. Firstly, this practice has meant that a juvenile defendant is not a drain on public resources, since he or she is not incarcerated at the state's expense. Furthermore, by focusing on education, there is a chance that a juvenile defendant, who, based on his or her age, clearly does not hold full criminal responsibility, is subjected to education in the hope of achieving rehabilitation. This practice has meant that the juvenile is less likely to reoffend, and is able to receive the support that he or she requires in order to be reintegrated into society. The German system has recognised that it seems ludicrous to hold a person under 18 to full criminal responsibility, when the same legal system does not consider them mature enough to participate in other activities, such as electing members of parliament. This measure should be adopted globally.

In Germany, the limited liability of juvenile defendants has been somewhat extended to adolescent defendants, ranging from 18 to 21 years of age. Adolescent defendants are considered to hold more criminal responsibility than their juvenile equivalents; however, there remains a focus on education and rehabilitation. While not as important as the juvenile treatment, the attitude towards adolescent defendants is also recommended.

4.5.2 Death Penalty

Following the German practice, it is clear that the existence of the death penalty is redundant and incompatible with human rights. In terms of fulfilling the purposes of sentencing, life imprisonment is just as effective. Equally, life imprisonment is reversible, meaning that the sentence can be reversed if it is found to have been wrongly decided. Germany would not be able to adopt the death penalty due to its absolute ban by the European Union.

4.5.3 Castration

The practice of surgical castration is currently (stand: 2016) under review in Germany, and thus it is difficult to form any conclusions or recommendations based on the German stance. However, it must be remembered that, while surgical castration is a voluntary and consensual treatment option, it is irreversible. It could be argued that surgical castration can fulfil the principle of proportionality and various sentencing purposes, and, due to its consensual nature, is compatible with human rights.

However, the existence of chemical castration, which is practiced in several other countries around the world, has meant that surgical castration is likely to be considered inhumane, and a form of torture. Chemical castration is reversible, yet reaches the same desired outcome as surgical castration – the offender is unlikely to reoffend again. Surgical castration has a greater success rate; however, chemical castration is also effective.

The single benefit of surgical castration over chemical castration is that it is permanent, meaning that an offender cannot purposely circumvent his or her obligation to continue treatment. This means that an offender undergoing chemical castration must be monitored, lest they discontinue treatment and reoffend. However, it is also this point that makes surgical castration likely to be considered incompatible with human rights. It is fair to state that chemical castration is the better alternative of the two options.

CHAPTER 5: MALAYSIA

The British colonisation of the Malay Peninsula in the late 1800s provided a significant influence to the inception of the Malaysian legal system, which remains largely framed upon the British common law model. As enshrined in article 160 of the *Federal Constitution* (Malaysia), three tiers of law operate in the Malaysian legal system:

1. Written law;
2. Common law; and
3. 'Any custom or usage having the force of law.'

The Malaysian courts have recognised the inherent complexity in sentencing criminal offenders. Rather than merely providing a 'common mathematical yardstick' through the legislation, the courts have stressed the importance of 'facts and circumstances relating to the offence, the offender and public interest.'⁷⁰³

Moreover, sections 173(b) and 173(m)(ii) of the *Criminal Procedure Code 1998* (Malaysia) provide that sentences must be handed down in accordance with the law and 'established judicial principles.'⁷⁰⁴

Accordingly, this chapter will focus on the operation of the *Penal Code 2015* (Malaysia) and the *Child Act 2001* (Malaysia), as well as the influence of case law, in governing sexual offences committed against children.

Two unique features of the Malaysian court system should be highlighted. Firstly, the Syariah Court operates as a distinct subordinate court, applicable only to those who follow Islam.⁷⁰⁵ Whilst Parliament is unable to make laws in relation to the constitution and organisation of the Syariah Courts, there is no dual system of law. Rather, the Syariah Courts govern only 'Islamic personal law' including marriage, divorce, family law and succession.⁷⁰⁶ Secondly, jury trials were abolished in Malaysia in 1995, so that judges, being the 'experts' of law, are now the sole administrators and decision-makers in trials.⁷⁰⁷

CHAPTER 5.1: SEXUAL OFFENCES IN MALAYSIA

Overview

- **Mandatory Sentences:** Malaysian criminal statutes provide for a range of mandatory sentences. As frequently stipulated in legislation, sex offenders are required to serve a minimum imprisonment

⁷⁰³ *Public Prosecutor v Safian bin Abdullah & Anor* [1983] 1 CLJ 324 Wan Yahya J.

⁷⁰⁴ Office of the Chief Registrar – Federal Court of Malaysia, *Bench Book - Sentencing*, (27 January 2014) Office of the Chief Registrar – Federal Court of Malaysia
<<http://www.kehakiman.gov.my/sites/default/files/document3/Buku%20Panduan/bench%20book%20-%20Undang2/23.pdf>> at 148.

⁷⁰⁵ *Federal Constitution* (Malaysia) Ninth Schedule, List I, art 4(e)(ii); Lee Hishammuddin Allen & Gledhill Advocates and Solicitors, *Legal Herald: The Syariah Court: Its Position Under the Malaysian Legal System* (May 2015) Lee Hishammuddin Allen & Gledhill
<http://static1.1.sqspcdn.com/static/f/419448/26225606/1431598025387/Legal+Herald+2015_All+Article+32+pages_v9.pdf?token=cXkt9x52pxoqQo9CbdaFGGI2tp8%3D>.

⁷⁰⁶ *Federal Constitution* (Malaysia) Ninth Schedule, List I.

⁷⁰⁷ Zedeck Siew, *Censoring with sub judice* (14 April 2009) Malaysian Bar Association
<http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=22647>.

period, however this period is statutorily prescribed not to exceed a certain time frame. It has been customarily adopted that sentences at the maximum end of the threshold level should be reserved for the ‘worst cases.’⁷⁰⁸

- **Death Penalty:** The death penalty remains an active sentencing option in Malaysia, both as a discretionary and a mandatory punishment. Under the *Penal Code*, the rape, or attempted rape of a woman, resulting in her death is punishable by death.⁷⁰⁹
- **Castration:** Chemical castration is not a current sentencing option available in the Malaysian jurisdiction. However, it has been reported that members of the Malaysian legal profession are providing momentum for the introduction of castration as an alternative sentencing procedure in dealing with repeat sexual offenders.
- **Alternative Penalties:** Currently, legislative provisions stipulate the discretionary, and sometimes mandatory, ‘judicial whipping’ of sexual offenders. Whilst statutory guidelines somewhat limit the ambit of such provisions, judicial whipping remains a common sentencing procedure in Malaysia.

The laws governing sexual offences in Malaysia provide a variety of sentencing options and most provisions allow judicial discretion in deciding on a sentence. This discretion allows the presiding court to decide what is the ‘appropriate sentence’ in consideration of the ‘particular circumstances of each case.’⁷¹⁰

Whilst the welfare of the victim ‘appears to be the paramount factor’ there are a range of factors that the court will consider in determining whether the offence justifies an aggravated or mitigated sentence.⁷¹¹ The common considerations that dictate sentencing decisions include pleas of guilt, the age of the victim and perpetrator, use of violence, previous convictions and the impact of the offence on the victim.⁷¹²

Whilst balancing these considerations is a key objective in sentencing an offender, the ‘first and foremost consideration’ is public interest.⁷¹³ The Malaysian courts have stipulated guidelines to ensure sentences adhere to this public interest. Firstly, the sentence should accurately reflect ‘society’s disapproval or even revulsion of the crime committed’ and consequently promote deterrence of such behaviours.⁷¹⁴ Secondly, the offender should be induced to turn to ‘honest living.’⁷¹⁵ Thirdly, the circumstances of the case should impact upon what is in the public interest in the context of the case, including the ‘time, place and

⁷⁰⁸ Office of the Chief Registrar – Federal Court of Malaysia, *Bench Book - Sentencing*, (27 January 2014) Office of the Chief Registrar – Federal Court of Malaysia
<<http://www.kehakiman.gov.my/sites/default/files/document3/Buku%20Panduan/bench%20book%20-%20Undang2/23.pdf>> at 153.

⁷⁰⁹ *Penal Code 2015* (Malaysia) s 376(4).

⁷¹⁰ Office of the Chief Registrar – Federal Court of Malaysia, *Bench Book - Sentencing*, (27 January 2014) Office of the Chief Registrar – Federal Court of Malaysia
<<http://www.kehakiman.gov.my/sites/default/files/document3/Buku%20Panduan/bench%20book%20-%20Undang2/23.pdf>> at 148.

⁷¹¹ Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, ‘Developments in the Law Relating to Rape and Incest in Malaysia’ (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 201.

⁷¹² Office of the Chief Registrar – Federal Court of Malaysia, *Bench Book - Sentencing*, (27 January 2014) Office of the Chief Registrar – Federal Court of Malaysia
<<http://www.kehakiman.gov.my/sites/default/files/document3/Buku%20Panduan/bench%20book%20-%20Undang2/23.pdf>> at 149-152.

⁷¹³ *Ibid* 148.

⁷¹⁴ *Ibid*.

⁷¹⁵ *Ibid*.

circumstances...its nature and prevalence.⁷¹⁶ Finally, it is essential that the public interest is kept in balance with ‘the interests of the accused’ and the overriding purpose of such a balance is consideration of the overall ‘interests of justice.’⁷¹⁷

5.1.1 Sexual Offences (General)

The *Penal Code 2015* (Malaysia) operates as an effective starting point in understanding the Malaysian legislative regime governing sexual crimes. Section 375 stipulates that ‘rape’ is committed when a *man* engages in sexual intercourse (defined as ‘penetration’) with a *woman*, against her will or without her proper consent. The *Penal Code* additionally provides for the offences of gang rape and marital rape, as well as infringements on an individual’s ‘decency and modesty’, which are expanded in Figure 1, below. Interestingly, the *Penal Code* specifically provides that rape is an offence committed by a man against a woman.

Additionally, the *Penal Code* provides that the existence of any of the prescribed aggravating circumstances, per section 376(2), mandates the imposition of a more severe sentence than that stipulated under section 375. Consequently, the occurrence of rape in any of the following circumstances will result in an accordingly adjusted sentence:

- Where harm is caused, or a fear of death or harm is invoked in the victim or another person;⁷¹⁸
- Where the offence is committed ‘in the company or presence of any other person’;⁷¹⁹
- If the victim is under sixteen and consent has not been obtained;⁷²⁰
- Where the victim is under twelve years of age, regardless of whether consent has been obtained;⁷²¹
- Where consent is obtained through a position of authority, professional relationship or relationship of trust;⁷²²
- If the woman was pregnant at the time;⁷²³
- If the woman becomes insane or commits suicide by reason or on occasion of the rape;⁷²⁴
- If the offender is aware that he is infected with a sexually transmittable disease, including HIV;⁷²⁵ or
- If the offender was aware of the victim’s ‘mental disability, emotional disorder or physical handicap.’⁷²⁶

⁷¹⁶ Ibid citing *New Tuck Shen v PP* (1982) 1 MLJ 27.

⁷¹⁷ *Loo Choon Fatt v PP* [1976] 2 MLJ 276 per Hashim Yeop A Sani J.

⁷¹⁸ *Penal Code 2015* (Malaysia) ss 376(2)(a), (b).

⁷¹⁹ Ibid (b).

⁷²⁰ Ibid (d).

⁷²¹ Ibid (e).

⁷²² Ibid (f).

⁷²³ Ibid (g).

⁷²⁴ Ibid ss (h), (j).

⁷²⁵ Ibid (i).

⁷²⁶ Ibid (k).

5.1.2 Sexual Offences Against Children

The *Child Act 2001* (Malaysia) was introduced to provide a system of law to ensure the ‘care, protection and rehabilitation of children.’⁷²⁷ Furthermore, the *Child Act* recognises the vitality of the ‘moral, ethical and spiritual development’ of children, framing them as they ‘key’ to the ‘survival, development and prosperity’ of society.⁷²⁸ Accordingly, the statute recognises that children, ‘by reason of their mental and emotional immaturity’, are in need of ‘special safeguards’ and are ‘entitled to protection and assistance in all circumstances.’⁷²⁹

Sections 17 and 18 of the *Child Act* provides that children who are ‘in need of care and protection’ can be taken into temporary custody, so long as it is in the best interests of the child to do so.⁷³⁰ This includes children who have been sexually abused by their carers, children who are not likely to be protected against such abuse, children who have been ‘induced to perform any sexual act’ or are in an ‘environment which may lead to the performance of such an act.’⁷³¹

An act of sexual abuse against a child is provided in section 17 of the *Child Act* to include any instance of a child taking part, as either a participant or an observer, in ‘any activity which is sexual in nature’ for any of the following purposes:

- Pornographic, obscene or indecent material, photograph, recording, film, videotape; or
- Sexual exploitation by any person for that person’s or another person’s sexual gratification.⁷³²

Correspondingly, both the *Penal Code* and the *Child Act* provide a range of indictable sexual offences against children as well as stipulating a range of protections.

Age of Consent

Section 376B of the *Penal Code* provides that females under 16 years of age and males under 13 years of age cannot provide legal consent to engage in sexual relations. Notably, if a victim is under the age of 16 and consent is not provided, *or* if a victim is under the age of 12, regardless of whether consent has been provided, this will mandate the imposition of a more severe penalty.⁷³³ Section 376B(2) of the *Penal Code* clearly highlights that if the age of a victim falls far beyond the age of consent, it will be constituted an aggravating factor.

Age of Criminal Responsibility

The *Child Act 2001* (Malaysia) defines children as those who are under the age of 18.⁷³⁴ Conversely the age of criminal responsibility is stipulated in the *Penal Code* as 10 years of age, however an exception applies for children over the age of 10 but under 12 who ‘have not attained sufficient maturity of understanding.’⁷³⁵

⁷²⁷ *Child Act 2001* (Malaysia) (preface to Pt 1).

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid* ss 17, 18.

⁷³¹ *Ibid* ss 17(a), (b), 38.

⁷³² *Ibid* 17(2)(c).

⁷³³ *Penal Code 2015* (Malaysia) s 376B(2)(d).

⁷³⁴ *Child Act 2001* (Malaysia) s 2 (definition “child”).

⁷³⁵ *Penal Code 2015* (Malaysia) ss 82, 83.

5.1.3 Protection Mechanisms in the *Child Act*

Mandatory Reporting

Any medical officers, members of a child's family or child care providers who 'believe on reasonable grounds' that a child is or has been physically or emotionally injured 'as a result of being...sexually abused' must immediately report this to a 'protector' or they will be liable to a fine or imprisonment.⁷³⁶ Protectors include the Director General, Directors of Social Welfare and any specifically appointed Social Welfare Officers.⁷³⁷

Court for Children

The Court for Children, a specialist court dealing with matters relating to juvenile offenders as well as offences against juveniles, provides a range of powers to assist in protecting children who are determined to be 'in need of care and protection.'⁷³⁸ In such circumstances, the Court may either order the parent or guardian of a child to enter into a 'bond to exercise proper care and guardianship',⁷³⁹ or make an order for the child be placed into custody of a 'fit and proper person,' which can be extended.⁷⁴⁰ The Court must hold the 'best interests of the child' as the 'paramount consideration' in making any orders specified under the *Child Act*.⁷⁴¹

Child Protection Teams

Section 7 of the *Child Act* stipulates the formation of 'Child Protection Teams' throughout Malaysia, whose role is to 'coordinate locally based services' in order to assist the families of children who 'are or are suspected of being in need of protection.'⁷⁴²

Child Sex Offender Register

Although not currently stipulated in the *Child Act*, the announcement of the *Child Act (Amendment Bill) 2015* (Malaysia) included a proposal to implement the introduction of a child sex offender registry in Malaysia. Early reports indicate that this registry will be private and only accessible upon official permission provided by the Ministry of Families and Communities.⁷⁴³

CHAPTER 5.2: MANDATORY SENTENCES

5.2.1 Nature of Mandatory Sentences in Malaysia

Mandatory sentences are a common theme in legislative provisions regarding sexual offences, including offences against children, and are stipulated in both the *Penal Code* and the *Child Act*. It has been argued

⁷³⁶ *Child Act 2001* (Malaysia) ss 27, 28.

⁷³⁷ *Ibid* s 2 (definition of 'Protectors').

⁷³⁸ *Ibid* s 30(1).

⁷³⁹ *Ibid* s 30(1)(a).

⁷⁴⁰ *Ibid* ss 30(1)(b), (d).

⁷⁴¹ *Ibid* s 30(5).

⁷⁴² *Ibid* s 7(1).

⁷⁴³ Janelle Tai, 'The Malaysian Child Sex Offenders Registry Is Finally Approved. What Does This Mean?', *SAYS Malaysia* (online), 21 January 2016 <<http://says.com/my/news/malaysian-child-sex-offenders-registry>>.

that mandatory sentences are an effective means of facilitating a ‘more coherent and exacting approach’ in determining the appropriate sentence for an offence.⁷⁴⁴ The Malaysian system modifies the traditional use of mandatory minimum penalties by imposing maximum thresholds for certain offences, as stipulated in Figures 1 and 2 below.

Figure 1 – Mandatory Penalties for Sexual Offences under the *Penal Code 2015* (Malaysia)

Offence	Description	Punishment
s 375	<p>“Rape” where sexual intercourse with a woman is:</p> <ul style="list-style-type: none"> a) Against her will; b) Without her consent; c) With consent, but consent obtained through: <ul style="list-style-type: none"> • fear of harm (to herself or another) • knowing misconception d) Knowingly adulterous e) Woman is unable to understand the nature and consequences of consent f) Abuse of a position of authority/professional relationship/trust g) With or without consent when she is under 16 years of age 	<ul style="list-style-type: none"> • Max. 20 years; AND • Whipping.⁷⁴⁵
s 376(2)	If any aggravating factors as mentioned in 5.1.2 (above) are present.	<ul style="list-style-type: none"> • Min. 10 years; • Max. 30 years; AND • Whipping.
s 376(3)	Rape committed on a woman ‘whose relationship to him is not permitted under the law, religion, custom or usage’	<ul style="list-style-type: none"> • Min. 8 years; • Max. 30 years; AND • Whipping - minimum 10 strokes.
s 376(4)	Rape resulting in death	<ul style="list-style-type: none"> • Death; <p>OR</p> <ul style="list-style-type: none"> • Min. 15 years; • Max. thirty years; AND • Whipping - minimum 10 strokes.
s 375B	“Gang rape” – where a woman is raped by one or more in a group ‘acting in furtherance of their common intention.’	<ul style="list-style-type: none"> • Min. 10 years; • Max. 30 years.
s 376A	<p>“Incest”</p> <p>If he or she has sexual intercourse with another person whose relationship is “not permitted under the law, religion, custom or usage” to marry that person.</p>	<ul style="list-style-type: none"> • Min. 6 years; • Max. 20 years; AND • Whipping.⁷⁴⁶

⁷⁴⁴ Mirko Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23(1) *Adelaide Law Review* 113, 115.

⁷⁴⁵ *Penal Code 2015* (Malaysia) s 376(1).

⁷⁴⁶ *Ibid* s 376B.

Defences s 376B(2):

1. The offender did not know they were committing incest;
or
2. The act was done without the consent of the offender.

s 377A	<p>“Carnal intercourse against the order of nature”</p> <p>The ‘introduction of the penis into the anus or mouth of the other person.’</p>	<ul style="list-style-type: none"> • Max. 20 years imprisonment; AND • Whipping.⁷⁴⁷
s 377C	<p>“Carnal intercourse against the order of nature without consent”</p> <ul style="list-style-type: none"> • Without consent, or • Against the will, or • Through fear of death/hurt. 	<ul style="list-style-type: none"> • Min. 5 years; • Max. 20 years; AND • Whipping.
s 377CA	<p>“Sexual connection by object”</p> <p>The ‘introduction of any object into the vagina or anus of the other person without the other person’s consent.’</p> <p><i>Exception:</i> where object introduced for ‘medical or law enforcement purposes’</p>	<ul style="list-style-type: none"> • Min. 5 years; • Max. thirty years; AND • Whipping.
s 377D	<p>“Outrages on decency”</p> <p>Any person in public or in private who commits, or abets, or procures/attempts to procure the commission of any act of indecency with another person.</p>	<ul style="list-style-type: none"> • Max. 2 years
s 377E	<p>“Inciting a child to an act of gross indecency”</p> <p>Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person.</p>	<ul style="list-style-type: none"> • Min. 3 years; • Max. 15 years; AND • Whipping.
s 354	<p>“Assault or use of criminal force to a person with intent to outrage modesty”</p> <p>Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will outrage the modesty of that person.</p>	<ul style="list-style-type: none"> • Max. 10 years; • OR fine; • OR whipping; • OR any of the two.

Figure 2 – Mandatory Penalties for Sexual Offences under the *Child Act 2001* (Malaysia)

Offence	Description	Punishment
s 31	<p>“Treatment, neglect, abandonment or exposure of children”</p> <p>Any person who has care of a child and ‘sexually abuses</p>	<ul style="list-style-type: none"> • Fine; OR • Max. 10 years; OR • Both.

⁷⁴⁷ Ibid s 377B.

	the child or causes or permits him to be so abused.’	N.B. A good behaviour bond may be permissible in addition to the above. ⁷⁴⁸ If breached, additional fines and sentences will apply.
s 43	<p>“Offences”</p> <ul style="list-style-type: none"> • selling/hiring children with the intent to employ them in prostitution;⁷⁴⁹ • procures a child for the purpose of prostitution/having sexual intercourse;⁷⁵⁰ • detains a child in a brothel/place for the purposes of prostitution against their will;⁷⁵¹ 	<ul style="list-style-type: none"> • Fine; <i>OR</i> • Max. 15 years; <i>OR</i> • Both. <p>N.B. subsequent offences mandate additional penalties.⁷⁵²</p>
ss 43(i), (j)	<p>“Prostitution”</p> <p>Acting as an intermediary or controlling the prostitution of a child <i>OR</i> engages or hires a child to provide services for sexual gratification.</p>	<ul style="list-style-type: none"> • Fine; <i>AND</i> • Min. 3 years; • Max. 15 years; <i>AND</i> • Whipping - 6 strokes <p>N.B. subsequent offences mandate additional punishments.⁷⁵³</p>

5.2.2 Arguments For Mandatory Sentences

Deterrence

The imposition of strict mandatory sentences is a method by which governments can ‘send a strong message to society that the act is condemned.’⁷⁵⁴ Mandatory imprisonment terms, for instance, aim to work as a ‘sufficiently strong and effective signal’ so that potential offenders are aware that the law will not ‘hesitate to come down hard on them.’⁷⁵⁵ Specifically, the statutory capping of the age of consent at 16 serves as a deterrent to ‘curb the frequency of sexual exploitation of young girls’ who are in relationships with older

⁷⁴⁸ *Child Act 2001* (Malaysia) s 31(2).

⁷⁴⁹ *Ibid* s 43(1)(a).

⁷⁵⁰ *Ibid* s 43(1)(b).

⁷⁵¹ *Ibid* ss 43(1)(f), (g).

⁷⁵² *Ibid* s 43(2).

⁷⁵³ *Ibid* s 43(2).

⁷⁵⁴ Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, ‘Developments in the Law Relating to Rape and Incest in Malaysia’ (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 189.

⁷⁵⁵ *Ismail Rasid v Public Prosecutor* [1999] 3 CLJ 402, 403 cited in Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, ‘Developments in the Law Relating to Rape and Incest in Malaysia’ (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 196.

men.⁷⁵⁶ Such sentences in concurrent operation with aggravating factors make it clear to offenders that a plea of guilty will not 'enable them to escape the consequences of a severe penalty.'⁷⁵⁷

Ancillary to deterrence is reducing recidivism, particularly to those currently serving a sentence for sexual offences. Subsequent infringements will be punishable taking into consideration previous offences and will necessitate additional penalties, as provided by s 43 of the *Child Act*.

Protection

The application of mandatory sentences epitomises the vulnerability of children, who can 'easily be manipulated.'⁷⁵⁸ There is strong opinion suggestive that children are 'naïve, helpless and innocent' and they must be protected from those who betray their 'unquestioning trust, faith, loyalty and confidence.'⁷⁵⁹ Such a need is heightened when it is a person in a position of trust who has committed an offence, provided that such individuals are intended to be 'role models' to children, particularly family members who are expected to act as a 'pillar of strength and protection at all times.'⁷⁶⁰ This susceptibility of children to harm stemming from such relationships is clearly epitomised in the legislation, further clarifying the importance of stringent punishments to protect children from exploitation.

Recognition of the Rights of the Victim

Imposing strict sentences is a method of reflecting the impact of sexual offences against the victim as well as 'the victim's family and society.'⁷⁶¹ Consideration of the impact on the family members of victims demonstrates the potential extent of harm flowing from sexual offences. Stricter sentences provide a sense of justice for the victim and their family members. Moreover, the range of factors that are taken into consideration indicate that the circumstances of the victim as well as the circumstances surrounding the offence will play a significant role in sentencing, ultimately to promote the welfare of the victim as a paramount factor.⁷⁶²

To Reflect the Severity of the Offence

Potential exposure to imprisonment, a fine and judicial caning (or all three) demonstrates a strict 'punishment' purpose underlying the award, reflecting the 'abhorrence of society to such heinous and despicable acts.'⁷⁶³ Moreover, the potential imposition of the death penalty demonstrates the inherently punitive nature deemed necessary to combat sexual crimes. It has been judicially stipulated that 'rape is always a serious crime...which calls for an immediate custodial sentence.'⁷⁶⁴ In direct response to this perception, Malaysia has imposed strict mandatory sentences in cases and stipulated for the severity of a

⁷⁵⁶ Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, 'Developments in the Law Relating to Rape and Incest in Malaysia' (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 180.

⁷⁵⁷ *Ismail Rasid v Public Prosecutor* [1999] 3 CLJ 402, 403 cited in Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, 'Developments in the Law Relating to Rape and Incest in Malaysia' (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 196.

⁷⁵⁸ *Ibid* 189.

⁷⁵⁹ *Ibid*, 196

⁷⁶⁰ *Ibid*.

⁷⁶¹ *Ibid* 189.

⁷⁶² *Ibid* 201.

⁷⁶³ *Ibid* 196.

⁷⁶⁴ *Ibid*, 185 quoting *R v Roberts* [1982] 1 All ER 610, 610.

sentence to reflect any aggravating factors. For example, in the case of *Mohamed Senik v Public Prosecutor* [2005] 1 LNS 74, where the victim was 13 and became pregnant as a result of the rape, the accused was sentenced to 18 years and ten strokes.⁷⁶⁵ Mandatory sentences are intended to signify the severity of the offence in the eyes of lawmakers and, more widely, in the eyes of society. Rape poses a 'threat to social wellbeing.'⁷⁶⁶ Accordingly, the imposition of severe punishments substantially reflects the public disapproval of such offences.

5.2.3 Arguments Against Mandatory Sentences

There is a distinct lack of proof to demonstrate that mandatory incarceration sentences actually have any effect on the commission of offences, particularly provided there is 'an increasing trend in these offences.'⁷⁶⁷ Despite the wide range of laws and penalties operating to protect children from sexually violent crimes, sexual assault and abuse has ensued at a high rate. The Malaysian Women's Aid Organisation reported that approximately 3,000 instances of rape occurred in Malaysia in 2007.⁷⁶⁸ Of these, more than 1,600 of the victims were under the age of 16.⁷⁶⁹ Scholars have placed the blame on judicial discretion in applying *mitigating* factors to reduce sentences, as well as reluctance to adhere to a maximum imprisonment sentence.⁷⁷⁰

For instance, in the case of *Sarkawi bin Dahlan v Public Prosecutor* [2004] 8 CLJ 611, a father was found guilty of raping his daughter. The High Court reduced the punishment from 15 years imprisonment to 10 years after taking into consideration that the appellant was already 65 years old, his age serving as a 'mitigating factor.'⁷⁷¹ The High Court clarified that it was necessary to consider that the 15 year sentence was 'unduly long...even though deserving [which] could mean that the appellant would remain in prison for the rest of his natural life.'⁷⁷² It was clarified that it would be excessively harsh to allow the offender to remain in prison for the rest of his life and not be able to return to society.

The Malaysian Courts have defended such reasoning, claiming that judgements are not intended to portray 'that the instant crime should be condoned',⁷⁷³ rather, that there is a moral argument that the perpetrator should not 'be literally left in prison for the rest of his natural life.'⁷⁷⁴ Moreover, in *Chan Wan Chuan v Public Prosecutor*, the courts held that 'justice will be served' even if a reduced sentence is imposed. This is

⁷⁶⁵ Ibid 185.

⁷⁶⁶ Ibid 184.

⁷⁶⁷ 'Prison not the answer for minor offenders of rape' *The Sun Daily Malaysia* (online) 9 August 2010 <<http://www.thesundaily.my/node/139742>>.

⁷⁶⁸ Women's Aid Organisation Malaysia, *Rape* (2011) <http://www.wao.org.my/Rape_40_5_1.htm>.

⁷⁶⁹ Ibid.

⁷⁷⁰ Jal Zabdi Mohd Yusoff, Zulazhar Tahir & Norbani Mohamed Nazeri, 'Developments in the Law Relating to Rape and Incest in Malaysia' (2008) *Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya* 177, 182.

⁷⁷¹ Ibid at 182, quoting *Sarkawi bin Dahlan v Public Prosecutor* [2004] 8 CLJ 611.

⁷⁷² Ibid.

⁷⁷³ Ibid.

⁷⁷⁴ Ibid.

on the basis that the imposition of the full charges ‘are [perceptually] quite excessive’ if perpetrator is a first time offender.⁷⁷⁵

Although ‘public clamour’ is a significant impetus in applying strict and harsh sentences, the Malaysian Courts have, instead, focused on ensuring they are not ‘carried away by forgetting the importance of weighing’ the penalty imposed against the circumstances of the offence, including the need to treat offenders in a morally sensitive fashion.⁷⁷⁶

CHAPTER 5.3: DEATH PENALTY

5.3.1 The Death Penalty in Malaysia

Article 5(1) of the Constitution of Malaysia provides that ‘no person shall be deprived of his life...save in accordance with law.’ Malaysian statute law currently provides for a range of crimes punishable by death, on a mandatory and a discretionary level, however the only provision extending the application of such a sentence to a sexual offence is rape, causing death.⁷⁷⁷

There has been a marked decline in executions, despite continued sentences of death, with less than 10 executions in the last decade as compared to over 100 sentences handed down.⁷⁷⁸ This decline has been associated with increased public debate regarding whether the death penalty should continue to mandatorily operate for certain offences, specifically drug trafficking.

In the last five years, there have been signs of imminent change in Malaysia’s stance on capital punishment. For instance, in 2008, Malaysia’s representative at the United Nations reported that Malaysian Parliament was considering ‘replacing the death penalty with life imprisonment.’⁷⁷⁹ Moreover in 2011, a media report indicated that the government was ‘rethinking the death penalty’, as quoted by the then ‘Law Minister.’⁷⁸⁰ Further to this, the Attorney General’s Chambers publicly proclaimed it would no longer consider the enactment of laws that carry the death penalty and were considering whether the current mandatory nature of the death penalty for certain offences be altered to a discretionary death penalty.⁷⁸¹ There have since been calls for a ‘moratorium’ to be imposed on the death penalty, which has yet to transpire.⁷⁸²

It has become apparent, however, that Malaysia’s reconsideration of their own application of the death penalty is in response to Malaysian citizens facing a death penalty in other nations, so as to lead by example.

⁷⁷⁵ *Chang Wan Chuan v Public Prosecutor* [2003] 4 CLJ 647, 666.

⁷⁷⁶ *Mohd Salleh MK Mohd Yusof v Pendakwaraya* [2005] 2 CLJ 655, 656.

⁷⁷⁷ *Penal Code 2015* (Malaysia) s 376(4).

⁷⁷⁸ Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>> at vii.

⁷⁷⁹ *Ibid* at 3.

⁷⁸⁰ Vivian Ho, ‘Malaysia rethinks gallows; woman has hope’ *The Japan Times* (online) 23 November 2011 <<http://www.japantimes.co.jp/news/2011/11/23/national/malaysia-rethinks-gallows-woman-has-hope/>>.

⁷⁸¹ *Ibid*.

⁷⁸² *Ibid*; Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>> at 4.

5.3.2 Arguments For the Death Penalty

Proportionality

Proponents of the proportionality principle may argue that, in certain circumstances, a punishment of death could be ‘commensurate with the gravity of the crime.’⁷⁸³ This would strictly be a ‘just deserts’ mentality, whereby capital punishment is perceived to effectively obtain retribution for the victims, or the family of victims, of violent crimes resulting in death ‘if they believe that justice has prevailed.’⁷⁸⁴

Deterrence

The possibility of facing the death penalty provides an impetus to potential offenders to reconsider the commission of an offence in the interest of self-preservation. Thus, an appropriate basis for the imposition of the death penalty is therefore its ability to ‘function as a mode of deterrence.’⁷⁸⁵ A common perception of capital punishment is its necessary drive to ‘prevent crime by deterring potential offenders’ from risking their own lives.⁷⁸⁶ Essentially, it is perceived that if the ‘expected costs’ associated with the offence ‘are large enough, potential criminals will not commit the crime.’⁷⁸⁷

Protection of Society

Unlike imprisonment terms, capital punishment is extremely protectionist in that the offender is permanently removed from society. Unlike the current provisions for sexual offences, the commission of offences resulting in a sentence of death further provide a sense of justice and closure for the victim, or the victim’s family in case of death.

Economic Considerations

The cost of maintenance of offenders poses a financial strain on parliamentary budgeting, which is further strained by overcrowded prison systems. Accordingly, the death penalty is a method by which offenders, and only those offenders who are liable to a sentence of death as stipulated in the written law, will no longer have to be supported by the government and which will allow ‘correctional facilities to be less crowded.’⁷⁸⁸

⁷⁸³ Mirko Bagaric, ‘The negation of venting in Australian sentencing: Denouncing denunciation and retribution’ (2014) 88 *Australian Law Journal* 502, 507.

⁷⁸⁴ Martin Kasten, ‘An Economic Analysis of the Death Penalty’ (1996) 1(1) *University Avenue Undergraduate Journal of Economics* 1, 5.

⁷⁸⁵ Paul Marcus, ‘Capital Punishment in the United States and Beyond’ (2007) 31(3) *Melbourne University Law Review* 837, 840.

⁷⁸⁶ David Indermaur, ‘Changing Attitudes to the Death Penalty: An Australian Perspective’ (2006) 17(3) *Current Issues in Criminal Justice* 444, 447.

⁷⁸⁷ Martin Kasten, ‘An Economic Analysis of the Death Penalty’ (1996) 1(1) *University Avenue Undergraduate Journal of Economics* 1, 3.

⁷⁸⁸ *Ibid* 4.

5.3.3 Arguments Against the Death Penalty

Human Rights

Those in opposition of the imposition of the death penalty are largely concerned that it is ‘akin to cold-blooded murder’ in that it is a ‘cruel and heartless’ punishment.⁷⁸⁹ There is serious concern from representatives of the European Union that a mistake or a ‘miscarriage of justice could lead to the loss of an innocent life.’⁷⁹⁰ There is no guarantee that any legal system will produce faultless results, however the imposition of the death penalty presents an irreversible punishment that propagates the fear of ‘false positives’ in potentially executing an innocent individual.⁷⁹¹ Effectively, it is argued that capital punishment reduces the value of human life and reinforces the value of ‘just deserts.’ Particularly evident in cases of murder where capital punishment is imposed, it is apparent that this penalty only ‘further brutalises society’ and perpetuates the ‘cycle of violence.’⁷⁹²

Not a Proven General Deterrent

Perhaps the strongest argument against the use of capital punishment is that which was argued by Shamini Darshni, Executive Director of Amnesty International, who stated, ‘*crime has existed for lifetimes, and so has the death penalty. Yet, there is still crime and there is still state-sanctioned killing. One does not solve the other.*’⁷⁹³ It is exceedingly obvious that, despite the operation of the death penalty, it has not completely deterred the commission of offences, which is the desired effect.

Need for Judicial Discretion

In 2015, an independent analysis of the application of the death penalty in Malaysia found, from a survey of over 1,500 individuals, that there was a low level of support for a mandatory imposition of the death penalty when aggravating or mitigating factors affected a sample case.⁷⁹⁴ The ‘Death Penalty Project’ demonstrated that judicial discretion is valued and that members of the sample study stipulated that a mandatory penalty of death should only be imposed if all the appropriate circumstances have been taken into consideration.⁷⁹⁵ Therefore, highlighting the value of judicial discretion in determining whether a penalty of death is legally justifiable in any case.

⁷⁸⁹ Tei Wei Soon, ‘An Inconvenient Moral Argument: Are You For Or Against The Death Penalty?’ *Malaysian Digest* (online) 25 May 2015 <<http://malaysiandigest.com/features/554904-an-inconvenient-moral-argument-are-you-for-or-against-the-death-penalty.html>>.

⁷⁹⁰ Ibid.

⁷⁹¹ Martin Kasten, ‘An Economic Analysis of the Death Penalty’ (1996) 1(1) *University Avenue Undergraduate Journal of Economics* 1, 10.

⁷⁹² Prema Devaraj, *Is Capital Punishment Justified? Mistakes can and have been made and, in maintaining the death sentence, innocent people will be killed* (2003) Aliran for Unity Monthly <<http://aliran.com/archives/monthly/2003/6k.html>>.

⁷⁹³ Tei Wei Soon, ‘An Inconvenient Moral Argument: Are You For Or Against The Death Penalty?’ *Malaysian Digest* (online) 25 May 2015 <<http://malaysiandigest.com/features/554904-an-inconvenient-moral-argument-are-you-for-or-against-the-death-penalty.html>>.

⁷⁹⁴ Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>> at xi.

⁷⁹⁵ Ibid.

CHAPTER 5.4: CASTRATION

5.4.1 The Role of Castration in Malaysia

The Malaysian legal system currently does not have any provisions to allow the castration, whether chemical or surgical, of child sex offenders. However, it has recently been reported that the Malaysian Bar Council is actively encouraging Parliament to introduce chemical castration ‘for repeat sex offenders as an *alternative form of sentencing*.’⁷⁹⁶ Whilst little detail has emerged regarding the Malaysian Bar Council’s perception on how this could be implemented, it is apparent that chemical castration has been suggested as a possible method to *rehabilitate* rapists.⁷⁹⁷

5.4.2 Arguments For Castration

Concurrent Protection and Rehabilitation

Under the *Child Act*, sex offenders are liable to face a maximum of 10 years imprisonment. This period of imprisonment clearly ‘fulfills [a] dual purpose’ in incapacitating the offender, as well as protecting the community.⁷⁹⁸ However some have perceived this as a transient solution, arguing that whilst prison sentences ‘keep paedophiles away from children’ offenders who are ‘released back into the community often end up *re-offending*.’⁷⁹⁹ Accordingly, in the case of *chemical* castration, the administration of anti-androgens to such offenders, and the effect of these drugs on their sexual desires, demonstrates a medical method by which reoffending can be minimised or even eliminated.⁸⁰⁰ This clearly demonstrates the same ‘dual purposes’ (of incapacitation and protection) as referred to above, however in a context where the offender can become re-integrated into society. A collateral benefit is that the offender is ‘calmer and more responsive to psycho-behavioural treatment’ thus allowing contemporaneous ‘behavioural therapy’ so as to holistically treat the problem.⁸⁰¹

Therefore, whether used in addition to imprisonment, as an alternative to imprisonment, or even as a factor to mitigate an imprisonment sentence, it is clear that chemical castration can fulfil multiple sentencing purposes. Firstly, chemical castration can physically restrict offenders from ‘sexually victimising children’ through its medicinal implements, thus *protecting the community*.⁸⁰² Secondly, it provides the opportunity to rehabilitate offenders through improved ability to ‘concentrate on therapy’ in an attempt to ‘prevent relapse’ thus targeting the cognitive element of sexual abuse.⁸⁰³ Moreover, if chemical castration were used in

⁷⁹⁶ ‘Malaysia Bar pushes for chemical castration for rapists’, *The Times of India* (online) 8 January 2013 <<http://timesofindia.indiatimes.com/world/rest-of-world/Malaysia-Bar-pushes-for-chemical-castration-for-rapists/articleshow/17934196.cms>>.

⁷⁹⁷ Chi Mui Yoon, ‘She was ripe for the picking’ *Malaysian Bar Association* (online) 3 August 2008 <http://www.malaysianbar.org.my/news_features/she_was_ripe_for_the_plucking.html>.

⁷⁹⁸ ‘Consider chemical castration or rapists: Malaysian Bar Council’ *Business Standard* (online) 7 January 2013 <http://www.business-standard.com/article/pti-stories/consider-chemical-castration-for-rapists-malaysia-bar-council-113010700418_1.html>.

⁷⁹⁹ Elizabeth M. Tullio, ‘Chemical Castration for Child Predators: Practical, Effective, and Constitutional’ (2009) 13 *Chapman Law Review* 191, 199.

⁸⁰⁰ Ibid 205.

⁸⁰¹ Ibid 206.

⁸⁰² Ibid 206.

⁸⁰³ Ibid 205.

conjunction with additional sentences, specifically for repeat offenders, it provides judicial authorities with an opportunity to be less punitive in their administration of sentences. That is, it will treat the *person* rather than ‘just trying to get rid of the offending behaviour.’⁸⁰⁴ This is perceived as holistically targeting recidivism and fostering the ‘reintegration of the offender into the community.’⁸⁰⁵

Deterrence

Currently, offenders are liable to imprisonment, a fine or judicial whipping. The addition of castration to this already long list of potential sentences would send a strong message to offenders, and potential offenders, of the severity of the offence in the eyes of the law and the severe consequences that flow from the offence. The prospects of facing chemical castration could, therefore, deter individuals from partaking in the offending conduct.

Proportionality

Given that chemical castration is intended to only ‘take from the offender...this overwhelming desire that causes the offender to sexually attack innocent children,’ it has been deemed a proportionate method.⁸⁰⁶ As an alternative, allowing offenders to be chemically castrated, as suggested by the Malaysian Bar Council would signal the abhorrence of child sex offences, reflecting the widespread social perception that it is a ‘heinous crime’ that ‘deserves the harshest penalty,’ especially in situations where there has been an exploitation of a position of trust.⁸⁰⁷ Accordingly, advocates of castration claim that chemically reducing sexual drive in an offender ‘pales in comparison’ to the ‘monstrous act of violation’ involved in rape cases.⁸⁰⁸ However, such a form of punishment is morally justified given that the death penalty has been deemed an ‘excessive’ penalty to be imposed even in sexual offences.⁸⁰⁹

International Consistency

Castration is internationally used as a measure for deterring and punishing sex offenders. Specifically, South Korea currently utilizes castration and Indonesia is proclaimed to follow suit in due course.⁸¹⁰ This has put pressure on Malaysia to take a similar stance against sexual offences against children by reflecting the criminal procedures of its neighbouring nations.

Reversible

As compared to surgical castration, the administration of anti-androgenic drugs is the mechanism by which sexual desire is reduced. If judicial authorities decide that treatment should cease, then ‘testosterone levels will return and the physical effects will reverse.’⁸¹¹ It cannot be argued that chemical castration is punitive in this sense, as it allows the sexual ability of an offender to be restored, if administration of the drug is

⁸⁰⁴ Ibid.

⁸⁰⁵ Ibid 209.

⁸⁰⁶ Ibid 213.

⁸⁰⁷ M Rajah, ‘No other way except chemical castration’ *The Star* (online), 7 June 2014

<<http://www.thestar.com.my/news/community/2014/06/07/no-other-way-except-chemical-castration/>>.

⁸⁰⁸ Ibid.

⁸⁰⁹ Elizabeth M. Tullio, ‘Chemical Castration for Child Predators: Practical, Effective, and Constitutional’ (2009) 13 *Chapman Law Review* 191, 213.

⁸¹⁰ Randy Fabi, ‘Indonesia considers chemical castration to punish pedophiles’ *Reuters* (online), 16 May 2014

<<http://www.foxnews.com/world/2014/05/16/indonesia-considers-chemical-castration-to-punish-pedophiles.html>>.

⁸¹¹ Elizabeth M. Tullio, ‘Chemical Castration for Child Predators: Practical, Effective, and Constitutional’ (2009) 13 *Chapman Law Review* 191, 218.

stopped. Studies have demonstrated that offenders who are administered with these drugs are able to ‘avoid total impotence’ as well as reduce the side effects of the drugs, through dosage adjustments.⁸¹² This serves a dual benefit. Firstly, if an offender has been wrongly accused, the courts are able to cease treatment and allow the offender to get back to normality. Secondly, it allows those offenders who are rehabilitated to re-integrate into society as ordinary citizens, with their bodily functions restored.

Cost Efficiency

A potential benefit of chemical castration as an alternative to incarceration is the ‘exponential’ economic savings it would provide.⁸¹³ Reports show that the cost of incarceration is approximately \$20,000USD per annum as compared to the approximate cost of administration of anti-androgens of \$160USD per month.⁸¹⁴ In the United States, chemical castration has been judicially praised for its ability to ‘minimise the hidden costs that imprisonment places on the family of the offender.’⁸¹⁵ On a direct cost comparison to incarceration, it is ostensible that chemical castration could be ‘the most economic form of correctional supervision’ for repeat sex offenders.⁸¹⁶

5.4.3 Arguments Against Castration

Human Rights

Proponents of human rights are strongly against the introduction of medically invasive methods to reduce sexual desire in offenders. Their reasons are twofold. Firstly, the ‘health interest of the guilty’ should be considered.⁸¹⁷ Some evidence is suggestive that chemical castration will result in a range of side effects, despite the fact that its effects are reversible. Secondly, the prospect of surgical castration, as an alternative, has been branded as a ‘cruel’ and ‘dangerous form of punishment’ given its irreversible nature.⁸¹⁸

CHAPTER 5.5: ALTERNATIVE SENTENCING METHODS AND PROCESSES

5.5.1 Use of Judicial Caning/Whipping in Malaysia

There are currently over sixty offences in Malaysia that provide for punishment by caning, including a range of sexual offences, as stipulated in Figures 1 and 2, above.

A statutory maximum punishment of 24 strokes for adults and 10 strokes for ‘youthful offenders’ is stipulated in section 288(i) of the *Criminal Procedure Code 1998* (Malaysia). Section 289 provides that certain persons are prohibited from being punishable by ‘whipping’, including all females, all males

⁸¹² Ibid.

⁸¹³ Ibid 207.

⁸¹⁴ Ibid 207-208.

⁸¹⁵ Ibid 209.

⁸¹⁶ Ibid.

⁸¹⁷ ‘Consider chemical castration for rapists: Malaysia Bar Council’ *Zee News* (online), 7 January 2013

<http://zeenews.india.com/news/world/consider-chemical-castration-for-rapists-malaysia-bar-council_821364.html>.

⁸¹⁸ Ibid.

sentenced to death and all males over the age of 50. However, section 289(c) provides an **exception** to the upper age limit for males who have been sentenced whipping for the following offences:

- Rape under section 376 of the *Penal Code*;
- Carnal intercourse ‘against the order of nature, without consent’ under section 377C of the *Penal Code*; and
- Individuals who have incited a child to an act of gross indecency under section 377E of the *Penal Code*.

Moreover, it is stipulated in section 290 that such a punishment cannot be carried out unless a Medical Officer has certified that the offender ‘is in a fit state of health to undergo such punishment.’⁸¹⁹

5.5.2 Arguments For ‘Judicial Whipping’

Deterrence and Retribution

As stipulated by the deputy public prosecutor, the purpose of caning is to ‘touch [the offender’s] conscience. The pain is to remind [them] to not offend again.’⁸²⁰ Thus, quite similar to the abovementioned proponents for castration and capital punishment, the use of corporal punishment is seemingly analogous in that, firstly, its severity is considered sufficient enough to deter individuals from committing offences and, secondly, given the severity of the offences committed it is considered to be a fair outcome for offenders.

5.5.3 Arguments Against ‘Judicial Whipping’

International Obligations

Article 1(1) of the *United Nations Convention Against Torture* stipulates that intentionally inflicting severe pain and suffering is prohibited, which is an adoptive principle in international customary law. Moreover, a 2007 United Nations Report provided that the exception of the infliction of pain and suffering in imposing legal sanctions would only apply if the principle was ‘widely accepted as legitimate by the international community.’⁸²¹ However, it has been argued by Amnesty International that judicial whipping does not have the requisite global legislative enforcement to operate as an exception to the customary law. Accordingly, it could be argued that judicial whipping is at odds with international conventions against torture.

Human Rights

The 2010 Amnesty International Report entitled ‘A Blow To Humanity: Torture by Judicial Caning in Malaysia’ raised several key arguments strongly against the permissibility of judicial caning as a sentencing option on the grounds of its clearly inhumane character. Firstly, despite the mandatory medical examination prior to the whipping, past recipients of the Malaysian judicial whip have proclaimed that ‘doctors do not routinely provide medical treatment afterwards,’⁸²² nor do they provide advice or painkillers, only an

⁸¹⁹ *Criminal Procedure Code 1998* (Malaysia) s 290(1).

⁸²⁰ Amnesty International, ‘Humanity: Torture by Judicial Caning in Malaysia’ (International Publication, 2010) 42.

⁸²¹ Ibid 51.

⁸²² Ibid 36.

‘iodine solution’ is administered immediately after the whipping.⁸²³ Secondly, individuals subjected to the judicial caning often find themselves unable to walk, sit or even stand in some cases, as well as having unable to carry out ordinary bodily functions. Concomitant to this is the implicit mental trauma individuals’ face, particularly ‘anguish...caused by caning and also its possible consequences.’⁸²⁴ This physical and psychological trauma is said to last far beyond the actual caning, which forms the basis for the argument questioning the humanity of judicial caning.

*The ‘False Rationale of Deterrence’*⁸²⁵

There is evidence to suggest that a significant number of individuals who have been subjected to caning have actually returned and recommitted a similar offence. For instance, surveys have demonstrated that over 4,000 illegal immigrants have returned to Malaysia, even after they were caned and deported.⁸²⁶ This questions the effectiveness of judicial caning as a deterrent and somewhat rationalises the perception that judicial caning is merely a tool for political use, to invoke confidence in the public that offenders are being physically punished and are theoretically deterred, due to the severity of the physical infliction of the caning process.

CHAPTER 5.6: OVERALL CONCLUSION AND RECOMMENDATIONS

The Malaysian case study provides some significant lessons for similar jurisdictions, particularly in understanding Malaysia’s unique sentencing regime for child sexual offences.

Mandatory minimum sentences are considered to be an effective tool in demonstrating a stringent approach to sex offences. Particularly, the imposition of mandatory *minimum* imprisonment periods for sexual offences against children clearly demonstrates the general community aversion of such offences as well as promoting the protection of vulnerable members of society from exposure to offenders. As discussed above, mandatory *minimum* sentences have the capability to benefit the community through incapacitation and deterrence. However, the Malaysian system’s allowance for *maximum* sentencing periods, in conjunction with discretionary mitigation factors can be seen as somewhat downplaying the potential effectiveness of mandatory sentences to potentially deter such criminal behaviour. This is especially prevalent given the rate of sexual crimes have not diminished in Malaysia.⁸²⁷

Moreover, given that capital punishment is currently not a sentencing option for sexual offences, or child sex offences, in Malaysia, its effectiveness as a sentencing option can only be determined in its currently applicable context. It is apparent that despite the imposition of death penalty, it has not deterred individuals from committing offences punishable by death, indicative in the 924 individuals who are now on ‘death

⁸²³ Ibid 36-37.

⁸²⁴ Ibid 38.

⁸²⁵ Ibid.

⁸²⁶ Ibid.

⁸²⁷ ‘Prison not the answer for minor offenders of rape’ *The Sun Daily Malaysia* (online) 9 August 2010 <<http://www.thesundaily.my/node/139742>>.

row.⁸²⁸ Similarly, the use of judicial whipping has not curbed the commission of such offences, with over sixteen thousand reported rape cases between 2006 and 2010.⁸²⁹

Given the continued high prevalence of rape and child molestation, there is a push for sentencing regimes in Malaysia to focus less on retribution and incapacitation, and more on reducing recidivism, rehabilitation and ongoing protection of the community.

For instance, the introduction of chemical castration may be seen as a possible measure that provides a cost-effective and therapeutic means where offenders may be temporarily incapacitated, allowed the chance to rehabilitate and possibly reintegrated into society and given “a second chance at life”, if the circumstances permit it.⁸³⁰ As it stands, there is a distinct ‘lack of resources’ for rehabilitation programs to be carried out in Malaysia.⁸³¹ This has nullified the ability of rehabilitation programmes to be able to operate as an additional element of prison sentences, or as a compulsory post-sentencing consideration. If castration were introduced, its effectiveness may depend on the ability of the Malaysian legal system to concurrently provide rehabilitation mechanisms, such as psychiatric treatment, to move sentencing towards a more therapeutic mechanism.

Additionally, a possible solution is inciting social change. It has been suggested that women have been ‘taught from young not to become victims’ and that such ‘blame for provoking rape’ is a cultural norm that needs to be altered before stricter punishments are implemented.⁸³² Consequently, promoting gender equality and women’s rights could combat sexual victimisation of women (and young girls) at its ‘roots.’⁸³³ The strong impetus for the promotion of such social issues can potentially target sexual offences at their core.

⁸²⁸ Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>> at vii.

⁸²⁹ Ibid.

⁸³⁰ Elizabeth M. Tullio, ‘Chemical Castration for Child Predators: Practical, Effective, and Constitutional’ (2009) 13 *Chapman Law Review* 191, 220.

⁸³¹ Lokman Mustafa ‘Should Malaysia consider chemical castration to treat violent rapists?’ *The Ant Daily* (online) 2 December 2013 <<http://www.theantdaily.com/Main/Should-Malaysia-consider-chemical-castration-to-treat-violent-rapists>>.

⁸³² M Rajah, ‘No other way except chemical castration’ *The Star* (online), 7 June 2014 <<http://www.thestar.com.my/news/community/2014/06/07/no-other-way-except-chemical-castration/>>.

⁸³³ ‘Consider chemical castration for rapists: Malaysia Bar Council’ *Zee News* (online), 7 January 2013 <http://zeenews.india.com/news/world/consider-chemical-castration-for-rapists-malaysia-bar-council_821364.html>.

CHAPTER 6: NEW ZEALAND

New Zealand has a common law system, established in 1840 after separating from the influence of New South Wales and becoming its own colony.⁸³⁴ The court structure is modelled from the English Westminster system.⁸³⁵ However, whilst principles and purposes of sentencing reflect similarities of English and Australian legal systems, the structure of its courts and legal processes has since evolved and adapted to the Maori culture and people of New Zealand. The country operates under federal laws, three of which will be the focus of this chapter: the *Sentencing Act 2002*, *Crimes Act 1961* and *Parole Act 2002*.⁸³⁶

The *Sentencing Act 2002* was introduced in June 2002 and reprinted in April 2016. It provides a list of various purposes for which a court can sentence an offender.⁸³⁷ These purposes range across accountability and responsibility for the offender, reparation, denunciation, deterrence, community protection and rehabilitation.⁸³⁸ The judges also take into account certain principles, such as the gravity of the offence, culpability of the offender, maximum penalty for the offence, the desirability of consistency of sentences for similar offending, the personal circumstances of the offender and whether any restorative agreements or terms have been reached.⁸³⁹ It is clear from the range of purposes that New Zealand's approach no longer reflects a focus exclusively on retribution and punishment.⁸⁴⁰ Accordingly, the judges must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in s 10A.⁸⁴¹

New Zealand is an international leader in the area of restorative justice, which is also attributed to by the country's therapeutic approach to justice.⁸⁴² This approach has begun to permeate into the wider body of criminal law and policy. The premise of therapeutic jurisprudence is that its process and actors have an impact on the wellbeing of whoever interacts with the system.⁸⁴³ In the context of sex offences, the emphasis on the main focus is 'the potential beneficial and harmful impacts of justice intervention itself'.⁸⁴⁴ A review of government policy has illustrated therapeutic goals influenced by therapeutic ideologies exist within the aims of the government bodies. Such examples lie within policy statements. For example, the Department of Corrections tasked with the oversight of sentencing regimes, indicated in their statement of intent to reduce

⁸³⁴ Courts of New Zealand, *The History of the Court System* <<https://www.courtsofnz.govt.nz/about/system/history/overview>>.

⁸³⁵ Ibid.

⁸³⁶ Parliamentary Counsel Office, *Kia Ora. The Authoritative Source of Acts, Bills & Legislative Instruments* <<http://www.legislation.govt.nz/>>.

⁸³⁷ *Sentencing Act 2002* s 7(1)-(2).

⁸³⁸ Ibid s 7(1).

⁸³⁹ Courts of New Zealand, *Sentencing* <https://www.courtsofnz.govt.nz/about/system/role/sentencing/#_ftn2>.

⁸⁴⁰ Warren Brookbanks and Richard Ekins, 'The Case Against the "Three Strikes" Sentencing Regime' (2010) *New Zealand Law Review* 689, 699.

⁸⁴¹ *Sentencing Act 2002* s 10A. The sentences are ordered from least to most restrictive starting with a discharge or order to come up for sentence, fine or reparation, community work and supervision, intensive supervision and community detention, home detention and lastly, imprisonment.

⁸⁴² Courts of New Zealand, *Sentencing* <https://www.courtsofnz.govt.nz/about/system/role/sentencing/#_ftn2>.

⁸⁴³ Astrid Birgden, 'Therapeutic Jurisprudence and Sex Offenders' [2004] 16(4) *Sexual Abuse: A Journal of Research and Treatment* 351, 354.

⁸⁴⁴ Brian McKenna, Claire Meehan, Alice Mills and Katey Thom, 'Evaluating Problem-Solving Courts in New Zealand: A Synopsis Report' (Centre for Medical Health Research, University of Auckland, 2013) 9.

rates of recidivism by 25% in 2017.⁸⁴⁵ This goal is echoed by the Ministry of Justice whose is also to reduce crime.⁸⁴⁶

Generally, the sentencing policy and laws exhibit therapeutic policy goals, as the presumption against imprisonment and the community-based sentences at the top of the sentencing hierarchy, enables offenders to remain as part of the community, whilst still undergoing rehabilitative and reparatory measures.⁸⁴⁷ The statutory sentencing purposes also closely align with a successfully therapeutic outcome for offenders whereby the offender's wellbeing and capacity for reformation is increased when rehabilitative measures are chosen,⁸⁴⁸ whilst acceptance of responsibility, accountability, and redress for harm done can be perceived as preconditions to therapeutic outcomes for offenders.⁸⁴⁹ The inclusion of a restorative justice approach within the Sentencing Act, and the interest of the victim as a purpose of sentencing, exemplifies a shift towards the premise of therapeutic jurisprudence, as the sentences are coherent with the wellbeing of those who interact with the criminal justice system.⁸⁵⁰

CHAPTER 6.1: SEXUAL OFFENCES IN NEW ZEALAND

Overview

- **Minimum and Maximum Sentences:** NZ does not have mandatory minimum sentences. Instead, the court has discretion to impose these along with other regimes including MPIs, ESOs and preventative detention. The maximum sentences of imprisonment available for child sex offences against a child is 14 years, a young person, 10 years, and a finite period of 20 years imprisonment for rape against any person.
- **Death Penalty** has been 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.

This section of the chapter aims to assess the sentencing laws in New Zealand in relation to sexual offences against a child. The assessment will broaden its scope to include the nature of sexual offences broadly, yet narrow the focus of sentencing for offenders only in relation to child related sexual offences. This report will also address additional sentencing regimes (aside from the presumption of imprisonment for sex offenders) and capital punishment, whilst canvassing the concerns and views in favour and against the implementation and operations of these components of the criminal justice system.

⁸⁴⁵ Department of Corrections, 'Statement of Intent 1 July 2014-30 June 2018' (Department of Corrections, May 21 2014) 2 <http://www.corrections.govt.nz/_data/assets/pdf_file/0010/743671/Statement_of_Intent_2014-2018.pdf>.

⁸⁴⁶ Ministry of Justice, 'Statement of Intent 2012-2015' (Minsitry of Justice, 2012) 6 <<http://www.justice.govt.nz/publications/global-publications/s/statement-of-intent-2012-2015/Publication>>.

⁸⁴⁷ *Sentencing Act* 2002 ss 44-80.

⁸⁴⁸ *Ibid* s 7(1)(h).

⁸⁴⁹ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 23; *Sentencing Act* 2002 s 7(1)(a),(b),(d).

⁸⁵⁰ *Ibid*; *Sentencing Act* 2002 ss 7(1)(c), 8(j), s 25(1)(b)-(c).

6.1.1 Sexual Offences (General)

A 'sex offender' under the *Crimes Act* 1961 is defined as someone who commits an act of sexual violation.⁸⁵¹ Sexual violation under s 128B defines an act where someone:

- a) rapes another person (non-consensual penetration of another person's genitalia by the perpetrator's penis); or
- b) has unlawful sexual connection with another person (typically, including oral sex or digital penetration).⁸⁵²

New Zealand's crimes involving sexual violation have been the subject of public outcry from some community members.⁸⁵³ A small portion of alleged offenders make it to the sentencing stage although it is clear from the purposes and principles of these laws that they express and reflect the community's attitudes and perceptions that they hold toward offences of this nature.⁸⁵⁴ Despite a strong sense of revulsion for this kind of offending, the victim's voice is not always heard, with as few as 7% of victim's likely to report the incident to the police.⁸⁵⁵

6.1.2 Sexual Offences Against Children

In relation to sexual offences against children, New Zealand have provided for an offence of having sexual conduct with a child,⁸⁵⁶ and sexual conduct with a young person.⁸⁵⁷ Under New Zealand law, a 'child' is defined as a person under the age of 12, and a young person describes a person under the age of 16.⁸⁵⁸

Generally, these offences account for sexual connection and indecent assault and an attempt to have a sexual connection with the child or young person.⁸⁵⁹ However, rape does not fall within a definition of a child sexual offence. The crime of rape is only account for as a general offence, against any person under the *Crimes Act* 1961 (Crimes Act).⁸⁶⁰

The seriousness of sexual assault offences against children is expressed in terms of the age of the child victim.⁸⁶¹ Generally, an offence against a child under the age of 12 carries a higher penalty than an offence against a young person.⁸⁶²

⁸⁵¹ *Crimes Act* 1961 ss 128B.

⁸⁵² Ibid ss 128(2)(b), 128(3)(b).

⁸⁵³ Bryce Edwards, 'Does New Zealand have a 'rape culture'?', *The New Zealand Herald* (online) 11 July 2014 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11292050>.

⁸⁵⁴ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 4.

⁸⁵⁵ Ministry of Justice, 'The New Zealand Crime & Safety Survey 2009: Main Findings Report' (Ministry of Justice, 2010) 4, 45 <<http://www.justice.govt.nz/publications/global-publications/n/new-zealand-crime-and-safety-survey-2014/documents/nzcass-main-findings-report>>.

⁸⁵⁶ *Crimes Act* 1961 s 132.

⁸⁵⁷ Ibid s 134.

⁸⁵⁸ Ibid ss 132, 134.

⁸⁵⁹ Ibid ss 132(2), 134(2).

⁸⁶⁰ Ibid s 128B.

⁸⁶¹ Ibid ss 132, 134.

⁸⁶² Ibid ss 132(1), 134(1).

CHAPTER 6.2: NATURE OF SENTENCING CONSIDERATIONS IN NEW ZEALAND

The Ministry of Women's Affairs affirmed that 'sexual violation is regarded by criminal justice agencies as second only in seriousness to murder.'⁸⁶³ Case law has also reflected society's 'horror and repugnance' of the crime of rape.⁸⁶⁴ These attitudes have been reflected in the law, with the maximum sentence for sexual violation, being 20 years imprisonment, as the longest maximum finite term under New Zealand law. The penalty for sexual violation is only superseded by life imprisonment for murder⁸⁶⁵ or preventative detention, available for sex offenders.⁸⁶⁶ However, penalties, and the range of sentencing options available must still aim to uphold the principle of proportionality at the policy level.⁸⁶⁷ There are currently no specific mandatory minimum periods in legislation.⁸⁶⁸ Indeed, whilst minimum sentences are not mandated by statute, the court still has discretion to impose one. For example, even in the case of 'less serious' sexual violations, a term of 6 years imprisonment was determined as the starting point.⁸⁶⁹ Indeed, case law also defines the expression of ongoing social attitudes, also evident in how the judges appear to not derogate from imprisonment for crimes like rape, unless in exceptional circumstances. In *Bayne v Police HC Timaru* AP102/89 1 February 1990, Holland J stated that "Parliament has intervened in the case of sexual violation charges to provide that a person convicted of those offences must be sent to prison unless there are special circumstances." This was also supported by *R v Edwards* (1994) 12 CRNZ 167 where, in considering a conviction for rape, the judge stated that "in exceptional cases (...) a non-custodial approach is justified." Furthermore, there are a range of mechanisms and regimes, which a judge has the discretionary power to impose beyond the statutory maximum, presumption of imprisonment or guideline judgments. The following considerations can increase the likelihood of a longer period of imprisonment, and will be discussed below, such as preventative detention, Minimum Period of Imprisonment (MPIs) and Extended Supervision Orders (ESOs).

6.2.1 Minimum Periods of Imprisonment (MPIs)

Following the judge providing a term of imprisonment for the offender, the judge also has discretion to impose an MPI justified by punitive and protective rationales.⁸⁷⁰ This form of sentencing can be used for other offences, not specifically for sex offenders. It has the effect of altering the ordinary non-parole period for long-term determinate sentences, per 84(1) of the *Parole Act* 2002. The court may impose a minimum period of imprisonment that is longer than the period provided by the aforementioned section, if it is

⁸⁶³ Ministry of Women's Affairs, 'Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence' (Ministry of Women's Affairs, October 2009) 1, 2 <http://women.govt.nz/sites/public_files/restoring-soul-pdf-1.pdf>.

⁸⁶⁴ *D v Police* (2000) 17 CRNZ 454, Nicholson J at 16.

⁸⁶⁵ *Crimes Act* 1961 s 172.

⁸⁶⁶ Ministry of Justice, 2. *Legislative Framework for Use of Imprisonment* (June 1998)

<<http://www.justice.govt.nz/publications/publications-archived/1998/the-use-of-imprisonment-in-new-zealand>>.

⁸⁶⁷ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 26.

⁸⁶⁸ Ministry of Justice, 2. *Legislative Framework for Use of Imprisonment* (June 1998)

<<http://www.justice.govt.nz/publications/publications-archived/1998/the-use-of-imprisonment-in-new-zealand>>.

⁸⁶⁹ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 26; *R v AM* (2010) 24 CRNZ 540.

⁸⁷⁰ *Sentencing Act* 2002 s 86(2).

satisfied that the sentence already being served is insufficient for all or any of the purposes, including: accountability, denunciation, deterrence and community protection.⁸⁷¹ A minimum period imposed must not exceed the lesser of two-third of the full term of the sentence or 10 years.⁸⁷²

6.2.2 Preventative Detention

Preventative detention is a sentencing option available to allow the Department of Corrections to hold an offender within prison for an unspecified duration of time.⁸⁷³ The purpose of preventative detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.⁸⁷⁴ The imposition of preventative detention applies if the person has committed a sexual or violent offence and over 18 years of age at the time, and the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date.⁸⁷⁵ Preventative detention can only be issued by the High Court through an application by the prosecution or on its own motion,⁸⁷⁶ upon taking into account a number of considerations such as the seriousness of harm to the community, and the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.⁸⁷⁷ An offender who is subject to preventative detention is also given 5 years MPI and if released on parole, the offender can be recalled to prison if the Parole Board believe he or she still poses an undue risk to society.⁸⁷⁸ The form of preventative detention has subsisted under various guises since the early 20th century which demonstrates the legislature's primary intention for ongoing proactive community protection.⁸⁷⁹ Despite these intentions, only 10 offenders convicted for "sexual assault and related offences" were sentenced to preventative detention in 2013.⁸⁸⁰

6.2.3 Statutory Maximums

Crimes Act 1961	Offence	Maximum Sentence (Imprisonment)
128B	Committing an act of sexual violation (sexual connection or rape)	20 years
131	Sexual connection or attempt to have a sexual connection with a dependent family member under the age of 18 years	7 years

⁸⁷¹ Ibid s 86(2).

⁸⁷² Ibid s 86(4).

⁸⁷³ Ibid s 87.

⁸⁷⁴ Ibid s 87(1).

⁸⁷⁵ Ibid s 87(2).

⁸⁷⁶ Ibid s 87(3).

⁸⁷⁷ Ibid s 87(4).

⁸⁷⁸ Ibid s 89(1); *Parole Act* 2002 s 6(4)(d).

⁸⁷⁹ John Meek, 'The Revival of Preventive Detention in New Zealand 1986 – 93' (1995) 28 *Australian & New Zealand Journal of Criminology* 225, 229.

⁸⁸⁰ Statistics New Zealand, Adults convicted in court by sentence type – most serious offence (1 October 2014) <stats.govt.nz>.

	An indecent act on a dependent family member under the age of 18 years	3 years
132 – Sexual conduct with child under 12 years of age	Sexual connection with a child	14 years
	Attempt to have sexual connection with a child	10 years
	An indecent act on a child	10 years
134 – Sexual conduct with young person under 16	Sexual connection with a young person	10 years
	Attempt to have sexual connection with a young person	10 years
	An indecent act on a young person	7 years

Regarding the table above, the maximum period of sentences are imposed for child sexual offences determined in severity by the age of the child. Typically, rape is considered the ‘worst’ of the offences and is given the longest finite period of imprisonment for the offender, regardless of the age of the victim. The most serious crime, in relation to children, is that against the youngest of children (anyone under 12 years old). Having a sexual connection with a child is subject to a period of 14 years imprisonment and similarly, quite high terms of imprisonment for an attempt to and performing an indecent act on the child. The next most serious sexual crime is against a young person, above the age of 12 but below 16 years of age. The maximum penalty for having a sexual connection with the young person is 10 years in prison, and even attempting to have a sexual connection offers the same period of imprisonment, with the shorter prison sentence of 7 years for performing an indecent act on the young person. Alongside sexual offences relating to specifically children and young persons, defined by the act, there is also a provision relating to incest. It is an offence to commit a sexual connection or indecent assault against a dependent family member under the age of 18 years old. The maximum penalty is 7 years for performing a sexual connection, and attempting to do so, whilst performing an indecent assault on the dependent family member under 18 years of age carries a 3 year term of imprisonment. Unlike the UK and Australia, New Zealand has a broad categorisation of sexual offences against children or young persons, exhibited by these four provisions.

6.2.4 Standard Non-Parole Period – ‘Three Strikes’ Regime

The standard non-parole period encompasses the three strikes regime. The extent of an ordinary sentence is generally determined by the Parole Board, and is ordinarily eligible for parole after having served one-third of his or her sentence.⁸⁸¹ In doing so, the Board must take into account a number of factors, including the safety of the community.⁸⁸² It has already been made apparent that an MPI or preventative detention can

⁸⁸¹ *Sentencing Act 2002* s 86(4).

⁸⁸² *Parole Act 2002* s 7(1).

affect the parole eligibility of an offender, and the ‘three strikes’ regime is no exception.⁸⁸³ The ‘three strikes’ regime works like this:

Strike 1: If an offender is convicted of 1 or more Stage 1 offences (found in s 86A of the Act), he or she has a warning recorded.⁸⁸⁴ Qualifying sexual offences include all of those mentioned in the table above, therefore, the ‘three strikes’ regime is applicable to sex offenders, and more specifically, child sex offenders.

Strike 2: If an offender is convicted of a second qualifying offence, anything under the prescribed list in s 86A, and sentenced to imprisonment the offender will have to serve the sentence in full and parole is not an option.⁸⁸⁵

Strike 3: If the offender commits a third qualifying offence, this will result in a sentence of the maximum penalty length, without parole unless the court finds this manifestly unjust.⁸⁸⁶

6.2.5 Extended Supervision Orders (ESOs)

An Extended Supervision Order, is not imposed until the latter stages of the offender’s sentence, before the expiry date of the sentence or when the offender ceases to be subject to any release conditions.⁸⁸⁷ It is imposed by the Chief Executive of the Department of Corrections.⁸⁸⁸ The ESO enables the Department of Corrections to further monitor a child sex offender for up to ten years after their release from prison. They are also placed under conditions similar to those made when on parole.⁸⁸⁹ The rationale for granting an ESO is laid out in s 107I, in light of the health assessor’s report, whereby the offender is considered to be likely to commit a relevant offence upon release from prison.⁸⁹⁰ The term of the order is based on considerations such as the safety of the community in light of the level of risk posed by the offender, seriousness of the harm and duration of the risk.⁸⁹¹ The Department of Corrections is seeking to have monitoring beyond the current ten year time frame for sex offenders who pose a high risk, and very high risk violent offenders.⁸⁹² In addition, public protection orders are available if an offender is already subject to the most intensive ESO, whereby the Department of Corrections can apply which would mean the offender moves to a separate residence of the prison, with a stringent management plan to abide by before their potential release. Public protection orders can be re-evaluated annually and reviewed by the court at any time. If an offender no longer needs to be monitored under the Public Protection Order, the offender is released and placed on a protective supervision order, and managed in the community with intensive monitoring. The rationale behind a public

⁸⁸³ *Sentencing Act* 2002 s 86A-I.

⁸⁸⁴ *Ibid* s 86B.

⁸⁸⁵ *Ibid* s 86C(4)(a).

⁸⁸⁶ *Ibid* s 86D(3).

⁸⁸⁷ *Parole Act* 2002 s 107F(1).

⁸⁸⁸ *Ibid* s 107F.

⁸⁸⁹ *Ibid* ss 107B and 107C.

⁸⁹⁰ *Ibid* ss 107I, 107F.

⁸⁹¹ *Ibid* ss 107I(5).

⁸⁹² Department of Corrections, ‘Statement of Intent 1 July 2014-30 June 2018’ (Department of Corrections, May 21 2014) 2 <http://www.corrections.govt.nz/_data/assets/pdf_file/0010/743671/Statement_of_Intent_2014-2018.pdf>.

protection order is meant to follow and ESO as a protective, not punitive purpose.⁸⁹³ The Orders are expected to apply to 5-12 offenders over a 10 year period, those being specifically child sex offenders.⁸⁹⁴

6.2.6 Arguments For and Against Sentencing Considerations

The implementation of these sentencing options is to ultimately uphold the sentencing aims of accountability and responsibility for the offender, denunciation and community protection. However, these methods raise concerns in relation to these aims and proportionality and reasonableness in sentencing, economic costs on the community, equal application of the law and the negative impact on the rights of offenders.

Arguments For Sentencing Considerations

Proportionality and Reasonableness

The imposition of these sentencing options in New Zealand has been argued to serve the purpose of proportionality and reasonableness. The courts believe these options uphold this notion as it has been stressed and reiterated by the New Zealand Court of Appeal in *R v Puru* [1984] 1 NZLR 248, 250 where Woodhouse P stated, “[The] judicial obligation is to ensure that the punishment [the courts] impose in the name of the community is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberations.”

These sentencing options are also argued to serve the purpose of denunciation as these options highlight the society’s attitude toward the conduct, and by doing so, make the offender aware of how his or her conduct is viewed by the members of the public.⁸⁹⁵ As Geoffrey Hall, a New Zealand legal academic emphasises, “...the criminal law is an educative and a cohesive force in the community, and, through the public nature of punishment of crime, an important symbolic statement as to the extent of society's indignation and condemnation of certain conduct is thereby expressed.”⁸⁹⁶

Community Protection and Parsimony

One of the most important and prioritised aims of these sentencing options is community protection. Indeed, this is the primary focus of the Parole Act.⁸⁹⁷ On a general basis, by achieving this aim the principle of parsimony is also upheld. That is, because the cost of imprisoning someone is a significant economic burden on the state, it is reserved for those whom the cheaper options are not appropriate given the risk they would

⁸⁹³ Department of Corrections, *Public Protection Orders* <http://www.corrections.govt.nz/working_with_offenders/prison_sentences/release/public_protection_orders.html>.

⁸⁹⁴ Department of Corrections, ‘Statement of Intent 1 July 2014-30 June 2018’ (Department of Corrections, May 21 2014) 2 <http://www.corrections.govt.nz/_data/assets/pdf_file/0010/743671/Statement_of_Intent_2014-2018.pdf>.

⁸⁹⁵ Ministry of Justice New Zealand, *The Rationales and Goals of Sentencing (1/2)* (October 1997) <<http://www.justice.govt.nz/publications/-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/3.-the-rationales-and-goals-of-sentencing#3.1>>.

⁸⁹⁶ Ibid 3.1.1.

⁸⁹⁷ *Parole Act* 2002.

pose to the community.⁸⁹⁸ If courts impose shorter sentences, the prison population is more likely to be reduced which in turn can increase savings.⁸⁹⁹ The restraint principle also promotes the least severe sanction in regards to the offence and circumstances.⁹⁰⁰ In the case of ESOs, these have been argued to be more effective than a sentence of preventative detention in ascertaining and preventing the ongoing and future risk posed to the community. In the context of sexual offences, it is clear that community protection is paramount, demonstrated by the range of sentencing options.

Rehabilitation

Closely linked to the notion of community protection is the purpose of rehabilitation. Judges have the power to defer sentencing in order for rehabilitation programmes to be undertaken.⁹⁰¹ However, the reality for sex offender's means these programs are run within prison, controlled by the Department of Corrections. As such, there is a nexus between a multiplicity of purposes such as rehabilitation, community protection, denouncement and deterrence. Furthermore, this nexus contributes to the offender achieving accountability and responsibility for the offence.

Equality

The principle of equality of impact under the law suggests the need to adjust sentencing towards the particular circumstances of the offender, albeit at the furthest end of the spectrum would lead to positive discrimination towards the social disadvantaged.⁹⁰² It however, is argued to justify the increasing terms of imprisonment for repeat offenders.

Human Rights and Dignity

The human rights notion is balanced by two justifications. Firstly, the statutory maximum sets a bar to ensure a reasonable amount of time is spent in prison, whilst 'not exceeding' the imposed maximum.⁹⁰³ And secondly, whilst the offender might serve a term of imprisonment, the judges ensure the punishment is appropriate, taking into account the relevant considerations and so 'like' cases are treated similarly.⁹⁰⁴ This justification also feeds into proportionality and reasonableness, whilst fostering confidence in the justice system.

⁸⁹⁸ Ministry of Justice, *Other Sentencing Principles* (October 1997) <<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/4.-other-sentencing-principles>>.

⁸⁹⁹ Ministry of Justice New Zealand, *The Current Sentencing Structure* (October 1997) <<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/2.the-current-sentencing-structure#2.4.1>>.

⁹⁰⁰ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 14.

⁹⁰¹ *Sentencing Act* 2002 s 25(1)(d).

⁹⁰² Ministry of Justice, *Other Sentencing Principles* (October 1997) <<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/4.-other-sentencing-principles>>.

⁹⁰³ *Sentencing Act* 2002 s 132(1).

⁹⁰⁴ Ministry of Justice New Zealand, 'Sentencing Policy and Guidance' (Discussion Paper, 1997) 33.

Arguments Against Sentencing Considerations

Proportionality and Reasonableness

An argument has been raised in relation to proportionality and reasonableness regarding the statutory maximums. It has been argued that the general penalty structure in the *Crimes Act 1961* and the *ad hoc* manner of which it has changed over time has seen a disparity emerge.⁹⁰⁵ It now reflects the worst possible instance of each offence and many of these offences remain broadly defined. Hall pointed out that the cause of the disparity could be due to the change in the criminal codes once being specific and limited definitions each with a maximum penalty, to now broadly defined offences with one relatively high maximum penalty.⁹⁰⁶ The addition of several categories of conduct within one broadly defined offence means that each offence has a wide variation in the degree of seriousness of the conduct. In an effort to confine the range, the maxima has been set far in excess of what is appropriate to apply to the conduct of the least severity, and more frequent.⁹⁰⁷ The maxima are claimed to not reflect consistent rationale and make it more difficult to distinguish the seriousness of particular offences compared to others.⁹⁰⁸ The introduction of mitigating and aggravating factors has also contributed to the broader definition, as these factors used to be the defining characteristics of the more narrowly defined offences. However, the broadening of offences with a high maximum penalty is a recent trend, following reforms in English law in an effort to reduce the amount of “technical argument” in courts about the boundaries between offences.⁹⁰⁹

Accountability and Responsibility

Another argument is raised in relation to the efficacy of offender accountability and responsibility in relation to these sentencing options. Whilst the essence of restorative justice process hinges on these principles being realised, lengthy terms of imprisonment and ‘high stakes’ has said to discourage offenders from admitting guilt.⁹¹⁰ Furthermore, an emphasis on punishment, retribution and incapacitation is argued to discourage offenders to accept responsibility as well as impacting their ability to effectively benefit from treatment.⁹¹¹

Punitive Purpose and Human Rights

In relation to preventative detention and MPIs, an argument has been raised that these options serve a predominantly punitive purpose rather than protective purpose as they lengthen the time spent in prison based on accountability, deterrence and denouncement.⁹¹² Indeed, a human rights considerations is apparent when taking into consideration that a lengthy determinate sentence is preferable due to the aim of

⁹⁰⁵ Ministry of Justice New Zealand, *The Rationales and Goals of Sentencing (1/2)* (October 1997) <<http://www.justice.govt.nz/publications/-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/3.-the-rationales-and-goals-of-sentencing#3.1>>.

⁹⁰⁶ Geoffrey Hall, ‘Reducing disparity by judicial self-regulation: sentencing factors and guideline judgments’ [1991] 14 *New Zealand Universities Law Review*, 208, 228.

⁹⁰⁷ Ministry of Justice New Zealand, *The Current Sentencing Structure* (October 1997) <<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/2.the-current-sentencing-structure#2.4.1>>.

⁹⁰⁸ Ibid.

⁹⁰⁹ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, first published 1992, 5th ed) 39.

⁹¹⁰ Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014) 3, 14.

⁹¹¹ Ibid 27; Karl Hanson, Guy Bourgon, Leslie Helmus, Shannon Hodgson, ‘The Principles of Effective Correctional Treatment Also Apply To Sexual Offenders’ (2009) 36(9) 865-891.

⁹¹² *Parole Act 2002* s 7(1); Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014) 3, 15.

preventative detention as protecting the community, not as a punitive measure.⁹¹³ In *R v Pairama* CA 216/97 the court stated that imposing preventative detention to achieve a punitive result than what can be provided by a finite sentence would be an error of principle.

Proportionality and Deterrence

The arguments raised against the three strikes regime are based on proportionality and deterrence. The regime is purported to create unfair outcomes for victims and offenders, as well as undermining public confidence in the system.⁹¹⁴ Brookbanks and Ekins argue that the ‘fundamental failure’ of the regime is the lack of attention to the specific wrong caused by the offender.⁹¹⁵ As not all crimes committed will be in the same circumstances nor by the same people, the offender’s should not be deserving of the same treatment. Imposing a maximum penalty as the third strike does not support the proportionality principle as it is not necessarily proportionate to the harm caused. The scholars continue to argue that this regime is therefore undermining a foundational aim of sentencing, that is, retribution.⁹¹⁶ Furthermore, Hall suggests research is equivocal as to how effective the regime is at upholding the deterrence principle and the regime provides ‘little or no incentive to plead guilty’.⁹¹⁷

Human Rights

Lastly, a human rights consideration is relevant to ESOs. An argument against ESOs is propounded by the Attorney-General and the rule against ‘double jeopardy’. It is claimed this sentencing option violates the New Zealand Bill of Rights Act 1990 with its use of retroactive penalties based on the fact the orders are not imposed until after the offender has been sentenced.⁹¹⁸ Therefore, it is seen as an extension or addition to an already existing punishment.

CHAPTER 6.3: DEATH PENALTY

6.3.1 History of the Death Penalty under New Zealand Law

The first execution in New Zealand was in Auckland, 1842, of a Maori named Maketu. Maketu has hanged, as this method was always used for execution.⁹¹⁹ Punishment for murder, as culpable homicide, treason and piracy became punishable by death in 1893 with the introduction of the *Criminal Code Act* 1893.⁹²⁰ Despite other crimes being punishable by death, as far as is known, murder was the only crime whereby executions

⁹¹³ Ibid 13; *R v Bailey* CA 102/03, 22 July 2003 the Court of Appeal at 19 stated that an indeterminate sentence of preventive detention ought not be imposed ‘without first allowing a lengthy finite sentence to serve as a final warning and opportunity to address underlying drivers of offending.’

⁹¹⁴ Warren Brookbanks and Richard Ekins, ‘The Case Against the “Three Strikes” Sentencing Regime’ (2010) *New Zealand Law Review* 1, 689.

⁹¹⁵ Ibid.

⁹¹⁶ Ibid 690.

⁹¹⁷ Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014) 3, 16.

⁹¹⁸ *New Zealand Bill of Rights Act* 1990 s 26; Christopher Finlayson, ‘Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill 2009’ (2nd April 2009) 2.

⁹¹⁹ Bruce James Cameron, *Capital Punishment*, (1966) Ministry for Culture and Heritage <<http://www.teara.govt.nz/en/1966/capital-punishment>>.

⁹²⁰ Greg Newbold, ‘Capital Punishment in New Zealand: An experiment that failed’ (1990) 11 *Deviant Behavior* 155, 157.

occurred.⁹²¹ The abolition and reinstatement of capital punishment was a result of political parties in power at various times. The abolition of capital punishment was the Labour Party's policy, so after taking office in 1935 all death sentences were abolished, confirmed by the abolition of the death penalty for murder in 1941 through an amendment to the Crimes Act.⁹²²

The National Party reintroduced the death penalty in 1950, as it was in power at this time. The death penalty existed between 1951-1957 with 18 convictions of murder and 8 executions being performed during this time. In 1958-1960 the Labour Party abolished the death penalty again, although this time using the justification of the royal prerogative of mercy.⁹²³ It was not until 1961, whereby a free vote of Parliament, including 10 members of the National Party voted for its abolition and removed capital punishment for crimes, except for treason.⁹²⁴ This was the case until 1989 when capital punishment was removed from the statute book entirely.⁹²⁵

The arguments for and against the death penalty arose typically based on proportionality and reasonableness, and deterrence. The arguments in favour rely on the death penalty being an effective deterrent and the proportionality principle as it may be a fitting punishment for some murders, like the notion of 'just deserts'. On the other hand, abolitionists believe capital punishment is never justifiable, and uphold the sanctity of life over death as a means of punishment. Moreover, opponents do not strongly believe in 'community protection' as a priority to outweigh the taking of someone else's life. The human rights principle is equally stressed, as there can always be the risk of potentially taking the life of an innocent person.⁹²⁶

6.3.2 Law on Death Penalty for Sex Offenders

The death penalty has been abolished since 1989. In 1990, NZ became the first country in the world to ratify the United Nations' Second Optional Protocol to the International Covenant on Civil and Political Rights, relating to total abolition of the death penalty.⁹²⁷

⁹²¹ Bruce James Cameron, *Capital Punishment*, (1966) Ministry for Culture and Heritage <<http://www.teara.govt.nz/en/1966/capital-punishment>>.

⁹²² New Zealand Parliament, *50 years since abolition of capital punishment for murder* <<http://www.parliament.nz/en-nz/features/00NZPHomeNews201210301/50-years-since-abolition-of-capital-punishment-for-murder>>.

⁹²³ Bruce James Cameron, *Capital Punishment*, (1966) Ministry for Culture and Heritage <<http://www.teara.govt.nz/en/1966/capital-punishment>>.

⁹²⁴ Ibid.

⁹²⁵ New Zealand Parliament, *50 years since abolition of capital punishment for murder* <<http://www.parliament.nz/en-nz/features/00NZPHomeNews201210301/50-years-since-abolition-of-capital-punishment-for-murder>>.

⁹²⁶ Bruce James Cameron, *Capital Punishment*, (1966) Ministry for Culture and Heritage <<http://www.teara.govt.nz/en/1966/capital-punishment>>.

⁹²⁷ Greg Newbold, 'Capital Punishment in New Zealand: An experiment that failed' (1990) 11 *Deviant Behavior* 155, 156-159.

CHAPTER 6.4: ALTERNATIVE SENTENCING METHODS

6.4.1 Guideline Judgments as an Alternative Sentencing Option in New Zealand

The New Zealand judiciary has shifted away from the ‘instinctive synthesis’ approach to sentencing, to predominantly using their discretion in guideline judgments from *R v Taueki* [2005] 3 NZLR 372 (*Taueki*), *Hessell v R* [2011] 1 NZLR 607 (*Hessell*) and *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114 (*R v AM*).⁹²⁸ These ‘guideline judgments’ help to create a guide for ‘like’ cases. That is, they create a guide to assess the range of appropriate sentences in any given circumstance, including an examination of the circumstances and characteristics of the offender, which may warrant the consideration of any aggravating or mitigating factors when determining the appropriate sentence.⁹²⁹

The Court of Appeal, in *Taueki* outlined the three-stage approach for judges to use when determining the quantum of a sentence.⁹³⁰ The first and second stage involves assessing the circumstances and characteristics of the offender, alongside any aggravating or mitigating factors, which may raise or lower the starting point. The factors are outlined within the *Sentencing Act* 2002, although do not act as an exhaustive list.⁹³¹ A further consideration in stage three is whether or not the offender makes a guilty plea. If so, the judge is entitled to reduce the sentence given in stage two by 25% although, this will depend upon when the plea was given, as an earlier plea will likely attract a greater discount. The percentage of the 25% discount available to an offender who pleads guilty is within the judge’s discretion.⁹³²

As another mechanism of guidance, resulting from the decision in *R v AM*, is a number of ‘rape bands’ and ‘unlawful sexual connection bands’ that a judge can use as a starting point for those found guilty of sexual offences under s 128B.⁹³³ To determine which band the starting point should fall into, the judge must take into account how many ‘culpability assessment factors’ were present in the offence which can help to assess the overall gravity of the offending.⁹³⁴ These factors cannot be equated to aggravating or mitigating factors, as they are more specific.⁹³⁵

The benefits and arguments in favour of these judgments is that they imply greater consistency in sentencing practice and provide to some extent a specific direction in relation to the type sentence imposed in similar situations.⁹³⁶ The ‘banding’ process promotes consistency as the maximum penalty can provide for significant variation in decisions as to where the appropriate starting point lies. For example, the lowest rape

⁹²⁸ Grant Hammond, ‘Sentencing: Intuitive Synthesis or Structured Discretion?’ [2007] *New Zealand Law Review* 1, 211.

⁹²⁹ Ministry of Justice New Zealand, *The Current Sentencing Structure* (October 1997) <

<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/2.the-current-sentencing-structure>>.

⁹³⁰ *R v Taueki* [2005] 3 NZLR 372; *R v Clifford* at [2011] NZCA 360, 34.

⁹³¹ *Sentencing Act* 2002 s 9.

⁹³² *Hessell v R* [2011] 1 NZLR 607, 72-77.

⁹³³ *Crimes Act* 1961 s 128B; *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114, 65-124.

⁹³⁴ *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114 [37]-[64].

⁹³⁵ Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014) 3, 10.

⁹³⁶ Ministry of Justice New Zealand, *The Current Sentencing Structure* (October 1997)

<<http://www.justice.govt.nz/publications/publications-archived/1997/sentencing-policy-and-guidance-a-discussion-paper/2.the-current-sentencing-structure>>.

band directs the starting point of between 6-8 years, compared with the lowest unlawful sexual connection band between 2-5 years.⁹³⁷ The use of a formulaic approach with a pattern to follow is to circumscribe the judge's discretion in making his or her own decision about whether the starting point should lie, as the 'checklist' promotes consistency and 'reasonableness regularity' for sentencing sex offenders.⁹³⁸

Indeed, the need for circumscribing discretion contributes to adequate human rights protections, consistency with sentencing and social equality.⁹³⁹ However, to ensure such consistency exists means some sentencing purposes are sacrificed because the policy and outcomes are predetermined.

CHAPTER 6.5: OVERALL CONCLUSION AND RECOMMENDATIONS

6.5.1 Sentencing Considerations

Sex offenders are subjected to a host of additional and potential sentencing considerations which, to determine the suitability of the regime, the primary considerations are based on community protection and the seriousness of the harm caused. The various elements in each of these regimes have been designed to circumscribe judicial discretion when determining the purpose, type and quantum of the sentence. In turn, the aim is to achieve consistency with sentencing and instil public confidence in the justice system. Community protection is the predominant consideration when sentencing sexual offenders, and forms the basis when a judge is deciding whether to impose an ESO or preventative detention. The only way, with the current sentencing framework, to achieve community protection and this is demonstrated through the sentencing considerations, is to impose a lengthy term of imprisonment or extensive restriction on the sex offender's liberty, through either an ESO or public protection order. It is clear that although the hierarchy of sentencing options that is used in general sentencing, falls away when the paramount consideration is for protecting the community. This is evident in the treatment options, only available within the prison, and the opportunity to technically 'sentence' the offender twice under the current ESO regime.

A possible solution for the future is the implementation of problem-solving courts, already growing in a number of jurisdictions, including the UK.⁹⁴⁰ The Law Commission has recommended the use of a specialist sentencing court for sexual violence. Entry into the specialist court would depend on the 'suitability' of the offender, informed victim agreement and guilty plea.⁹⁴¹ This plan provides a softer approach, whereby education, rehabilitation and restorative justice processes alongside special supervision would provide the offender with the opportunity for a 'softer' sentence, at least indicative of the progress and success of the 'intervention plan'.⁹⁴² This recommendation is premised on therapeutic considerations and takes into

⁹³⁷ *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114, 90-112, 113-124.

⁹³⁸ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 10; Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (W.S. Hein, 1960) 217.

⁹³⁹ Grant Hammond, 'Sentencing: Intuitive Synthesis or Structured Discretion?' [2007] *New Zealand Law Review* 1, 222.

⁹⁴⁰ Jenni Ward, 'What is Justice? Re-imagining penal policy Work Papers' (2/2014) 2.

⁹⁴¹ New Zealand Law Commission, *Alternative Pre-Trial and Trial Processes: Possible Reforms* (2012) <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP30.pdf>>.

⁹⁴² *Ibid* 45.

consideration the treatment of offenders and interests of the victim.⁹⁴³ However, issues may arise with the implementation of such a court and disparity between convictions for offenders who are not eligible for the specialist court. Moreover, the sentencing discounts for offenders may challenge the public's conception of justice. The main issue with this model is the inconsistency with the presumption of imprisonment and precedent already before the courts. Understandably, the general principles of justice should not be overlooked, if incorporate a therapeutic agenda.⁹⁴⁴

The benefits to this specialist court is that it acts as a vehicle to shape the future behaviour of litigants and society's outlook on offenders, in a way that the current rigid framework is unable to accommodate. If implemented correctly, taking into account all of these considerations and appropriate framework, the specialist court could enhance victim reporting, motivate offenders to plead guilty and incentivise the engagement with restorative justice processes.⁹⁴⁵ In turn, the overarching aims could be achieved if community protection is maximised, victims' interests are well looked after and communities can rely on and trust the justice system in responding adequately to sexually motivated crimes.⁹⁴⁶

6.5.2 Death Penalty

New Zealand has totally prohibited the imposition of the death penalty for any crime, since 1989. Instead, a period of life imprisonment has replaced the death penalty as the most severe punishment, for murder, under New Zealand law.⁹⁴⁷

Past history has shown that there is still a chance an innocent person could go to prison, and that there is a limited effect on deterrence from crimes of which are punishable by death. For these reasons, the abolition of the death penalty since the late 1980s prevails today.⁹⁴⁸

⁹⁴³ Ibid 14.

⁹⁴⁴ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3, 58.

⁹⁴⁵ New Zealand Law Commission, *Alternative Pre-Trial and Trial Processes: Possible Reforms*(2012) <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP30.pdf>> 46.

⁹⁴⁶ Ibid.

⁹⁴⁷ *Sentencing Act* 2002 s 102.

⁹⁴⁸ Greg Newbold, 'Capital Punishment in New Zealand: An experiment that failed' (1990) 11 *Deviant Behavior* 155, 171-172.

CHAPTER 7: SOUTH AFRICA

The legal system in South Africa is based off a combination of Roman-Dutch law and English common law. South Africa has a combination of these two legal systems due to its history of colonisation, first being the Dutch, and later, the British.⁹⁴⁹ Both common law and Roman-Dutch law is applicable in South Africa. However, it is apparent that common law has influenced the development of public law in South Africa, particularly on civil procedure and criminal law.⁹⁵⁰

The development of South Africa's judiciary since it became a separate jurisdiction from English law in the 20th century, and the judiciary's reliance on common law for criminal cases, has led to the entrenchment of the use of unfettered judicial discretion in sentencing offenders for serious crimes. This has often led to inconsistent sentencing patterns and the perceived ineffectiveness of the judicial system by the public in dealing with crime. The ineffectiveness of the judiciary in dealing in crime in South Africa exacerbated the crime rate after South Africa's transition to democracy, which can be demonstrated from the increasing rate of sexual offences against women and children during this period.⁹⁵¹

In order to curb the increasing crime rate, and the use of unfettered judicial discretion by judges when sentencing, the South African parliament enacted legislation in order to create a more consistent sentencing framework and limit the use of discretion by judges in sentencing, by introducing mandatory minimum sentences. However, since the legislation has been in force, it is unclear whether the codification of sentencing in South Africa, and the introduction of mandatory minimum sentences has been effective in reducing the crime rate. Statistics demonstrate that the rate of sexual offences against women and children had, at best, been stable since the introduction of this legislation.⁹⁵² This has led to calls for the reintroduction of the death penalty as a sanction that can be used against serious offenders. However, the effectiveness of the death penalty is questionable, and there is no proven research to suggest a correlation between the use of the death penalty, and a reduction in crime rates.

This research aims to discuss the effectiveness of the mandatory minimum sentencing regime in South Africa in relation to sexual offences against children, as well as the effectiveness of reinstating the death penalty in combating crime.

⁹⁴⁹ John Andrew Faris, 'African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems' [2015] 10(2) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinary* 171-174.

⁹⁵⁰ Eduard Fagan, 'Roman-Dutch Law in its South African Historical Context' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press: 1996) 56-57.

⁹⁵¹ Kristina Scurry Baehr, 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' [2008] 20(8) *Yale Journal of Law and Feminism* 223-225.

⁹⁵² Ibid 229.

CHAPTER 7.1: SEXUAL OFFENCES IN SOUTH AFRICA

Overview

- **Mandatory Minimum Sentencing** was instituted in South Africa in 1997 in an attempt to curb the rising crime rate.
- The **Death Penalty** was abolished in South Africa in 1997 as it was found to be unconstitutional and in breach of basic human rights.

7.1.1 Sexual Offences (General)

Sexual offences in South Africa, such as rape and sexual assault, have often been dealt with by the courts, as under English law, it was governed by common law and not statute. However with the increasing rate of rape against women and children in the late 20th century, the post-apartheid government decided to codify these offences. Codification of rape and sexual assault can be connected with the enactment of South Africa's Bill of Rights, which guaranteed the freedom from all forms of violence and the right to bodily integrity and security.⁹⁵³

However it was not until 2007 in which the South African parliament formally codified the offences of rape and sexual assault into statute. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* abolished the common law offences of rape and sexual assault, and sought to move these offences under the umbrella of statute. The list of related rape and sexual assault offences are detailed in the table in Chapter 2. Despite this transition from common law to statute, the rate of sexual assaults and rape has remained constant in South Africa.⁹⁵⁴

7.1.2 Sexual Offences Against Children

In relation to sexual assault and rape against children, South Africa employs the same regime for adult and child victims. The only specific crimes relating to sexual assault and rape of children relates to the statutory rape or sexual assault of a child. These crimes are listed in the table in Chapter 2.

According to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*, the definition of a child is a person under the age of 18, or, for the purposes of section 15 (statutory rape) and 16 (statutory sexual assault), a person 12 years or older, but under the age of 16.⁹⁵⁵ South Africa considers the age of consent to be 16, meaning that sexual conduct between an adult, and a child over the age of 12 but under the age of 16 is illegal, even if the child consents to the sexual activity. This is due to the fact that South African law deems a child under the age of 16 to be immature, and unable to make a consensual decision on sexual conduct.

⁹⁵³ *Constitution of South Africa 1996* (South Africa) s 12.

⁹⁵⁴ Kristina Scurry Baehr, 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' [2008] 20(8) *Yale Journal of Law and Feminism* 229.

⁹⁵⁵ *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (South Africa) s 1.

CHAPTER 7.2: MANDATORY SENTENCES

7.2.1 General Overview

Mandatory minimum sentencing was introduced in South Africa under the *Criminal Law Amendment Act 1997* after a fierce public debate over the leniency of the judiciary's treatment of serious crimes after South Africa's transition into democracy in the 1990s.⁹⁵⁶ This legislation contains the mandatory minimum sentences for the most serious crimes, including the common law offence of rape. The various offences, along with their mandated minimum sentences are contained in section 51 of the act.⁹⁵⁷ South Africa has a number of sexual offences, both general and specific to minors under the age of 18, which is addressed in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*. This is a table which lists the various rape and sexual assault offences against children under the age of 18.

Section	Offence	Description
3	Rape	Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape
4	Compelled Rape	Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape
5	Sexual Assault	Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape
6	Compelled Sexual Assault	(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault. (2) A person ("A") who unlawfully and intentionally inspires the belief in a complainant ("B") that B will be sexually violated, is guilty of the offence of sexual assault
15	Acts of consensual sexual penetration with certain children (statutory rape)	(1) A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child

⁹⁵⁶ Julia Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa' (ISS Paper No. 111, Institute for Security Studies, 2005) 1.

⁹⁵⁷ *Criminal Law Amendment Act 1997* (South Africa) s 51.

16	Acts of consensual sexual violation with certain children (statutory sexual assault)	(1) A person (“A”) who commits an act of sexual violation with a child (“B”) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.
----	--	---

7.2.2 Nature of Sexual Offences with Mandatory Sentences

Though the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* addresses a number of crimes where children are involved, namely statutory rape and sexual assault, in most cases, the rape or sexual assault of a child will continue to be governed by the general provisions governing rape. Therefore, the crime of rape and sexual assault against children would be governed by the general sentencing regime that is followed by the judiciary for cases of rape and sexual assault between adults. The mandatory minimum sentencing framework stipulated in s51 of the *Criminal Law Amendment Act 1997* states that for the crime of rape and sexual assault, the mandatory minimum sentence for a first offender would be no less than 10 years imprisonment, a second offender for no less than 15 years, and a third or subsequent offender to no less than 20 years.⁹⁵⁸

There is also a separate minimum sentencing regime for the offences of rape (and compelled rape) that possess aggravating factors. The table below outlines these aggravating factors, and the sentencing framework that applies:

Aggravating Factors	Sentencing Framework
Rape Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007- (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 or compelled 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	2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in- (a) Part II of Schedule 2, in the case of- (i) a first offender, to imprisonment for a period not less than 15 years; (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years; ⁹⁶¹

⁹⁵⁸ *Criminal Law Amendment Act 1997* (South Africa) s 51(2)(b).

⁹⁶¹ *Ibid* s 51(2)(a).

immunodeficiency virus;

(b) where the victim-

(i) is a person under the age of 16 years;

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters)

Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

⁹⁵⁹

Compelled Rape

Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) when committed-

(i) in circumstances where the victim was raped more than once by one or more than one person;

(ii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iii) under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) same as rape (see above)⁹⁶⁰

7.2.3 Substantial and Compelling Circumstances

Despite having this mandatory minimum sentencing regime for the offences of rape, compelled rape and sexual assault, there are loopholes in the legislation which allows for judges and magistrates to be able to use their discretion in sentencing. The notion of ‘substantial and compelling circumstances’ stipulated in the legislation, allows for the courts to be able to justify a lesser sentence than the sentence that is prescribed to each crime in the legislation, including rape and sexual assault.⁹⁶² This had led to a number of disparaging cases, where the court has used its unfettered discretion in identifying factors that they believe were

⁹⁵⁹ Ibid Sch 2 Pt 1.

⁹⁶⁰ Ibid Sch 2 Pt 3.

⁹⁶² Ibid s 51(3)(a).

‘substantial and compelling’ in nature to lessen a sentence. These factors can often be trivial, and undermines the mandatory sentencing regime implemented in the legislation.

For example, in *S v Mahomotsa*,⁹⁶³ the court ruled that the fact that two school girls that were raped were not virgins could constitute a substantial and compelling factor to lessen the defendant’s sentence.⁹⁶⁴ Though on appeal, the Supreme Court of Appeal deemed that the court had made an error in judgement, the court nonetheless found that the fact that the victims suffered no serious physical injuries in their ordeal is a substantial and compelling factor in lessening the defendant’s sentence.⁹⁶⁵

In *Rammoko v Director of Public Prosecutions*,⁹⁶⁶ the Supreme Court of Appeals had overturned a life sentence against the defendant for raping a thirteen year old girl due to the fact that there was a lack of evidence to suggest that there was any psychological trauma from the victim’s ordeal, and that the victim’s lack of severe emotional harm can be a substantial and compelling factor to lessen the sentence.⁹⁶⁷ The case was returned to the Supreme Court to determine the sentence after the appeal was quashed.

There are many more cases where the courts have been able to use their unfettered discretion allowed in the legislation to be able to lessen the sentences handed to offenders and bypass the mandatory sentencing framework stipulated in the legislation. This has created an ineffective sentencing regime in South Africa. Despite the fact that the introduction of mandatory minimum sentencing was meant to curb the rising crime rate, especially in regard to rape and sexual assaults, the number of rape and sexual assault cases have remained constant,⁹⁶⁸ and overall, the mandatory sentencing regime enacted by the South African government has done little to curb the high crime rate in the country.⁹⁶⁹

7.2.4 Arguments For Mandatory Sentences

Purposes of Sentencing

There is support for the retention of the mandatory minimum sentencing regime in South Africa as it argued that this sanction against offenders fulfils some of the purposes of sentencing. One argument is that the mandatory minimum sentencing regime in South Africa fulfils the purpose of retribution in the eyes of the population. This is due to the fact that aspects of society may have felt that at the time of the introduction of the mandatory sentencing regime, the authorities were beginning to be tough and crack down on crime. This is due partly from the high crime rates that South Africa was experiencing after their transition to democracy in the 1990s.

⁹⁶³ [2002] 3 SA 534 (Supreme Court Appellate Division).

⁹⁶⁴ Ibid [10].

⁹⁶⁵ Ibid [17].

⁹⁶⁶ [2002] 4 SA 731 (Supreme Court Appellate Division).

⁹⁶⁷ Ibid.

⁹⁶⁸ Kristina Scurry Baehr, ‘Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa’ [2008] 20(8) *Yale Journal of Law and Feminism* 224-225.

⁹⁶⁹ Julia Sloth-Nielsen and Louise Ehlers, ‘Assessing the Impact: Mandatory and Minimum Sentences in South Africa’ [2005] 14 *SA Crime Quarterly* 15.

Another argument that is raised in support for mandatory minimum sentencing in South Africa is that the regime allows for society to denounce the crimes committed by the offender. Mandatory minimum sentencing assists in demonstrating to the community that certain crimes are wrong, and punishes offenders as a form of denouncing their conduct to the community.

Incapacitation

Mandatory minimum sentences incapacitates the offender by imprisonment, ensuring that they do not pose an adverse risk to the community or re-offend without punishment. This has been one of the main rationales behind the implementation of mandatory minimum sentencing in South Africa, as it often works alongside general and specific deterrence of a crime when sentencing. South Africa exercises sentences in a punitive manner, and by removing the offender from being able to inflict further harm on the community, it both punishes the offender of the crime, and sends a message to the community that the offender has been dealt with and the community is safe.

7.2.5 Arguments Against Mandatory Sentences

Purposes of Sentencing

The mandatory minimum sentencing regime in South African has shown to be ineffective in fulfilling some of the purposes of sentencing. One purpose of sentencing that has not been fulfilled by the mandatory minimum sentencing regime in South Africa is the purpose of deterrence. The South African mandatory sentencing regime has not resulted in a decrease in the crime rate. At best, the crime rate for both child sexual offences and general crime has remained steady since the introduction of mandatory minimum sentencing.⁹⁷⁰ This is in spite of the introduction of the mandatory minimum sentencing regime in South Africa, as its implementation by the government was in response to the increasing crime rate in the 1990s. These statistics demonstrating that at best, the crime rate, and rate of sexual offences in South Africa have remained stable since the introduction of the regime, and that it is ineffective in reducing crime.⁹⁷¹

Another purpose of sentencing that has been argued to be unfulfilled with the introduction and implementation of mandatory minimum sentencing in South Africa is the purpose of rehabilitation. There is little evidence to suggest that imprisonment assists in rehabilitating offenders. Rather, evidence suggests that prisoners who are imprisoned with long term sentences, such as those who are prescribed with mandatory minimum sentences are less likely to rehabilitate.⁹⁷² This is due to the fact that long sentences lessens the prospect for release, which results in reduced hope from the prisoner to reform.

In the South African context, the mandatory minimum sentencing regime has not resulted in consistency in sentencing. Though one of the aims of mandatory minimum sentencing in South Africa was to limit the discretion that judges are able to make decisions, and make sentences more consistent, it has not achieved the desired result. Loopholes in the mandatory sentencing regime has allowed the judiciary to continue

⁹⁷⁰ Kristina Scurry Baehr, 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' [2008] 20(8) *Yale Journal of Law and Feminism* 229.

⁹⁷¹ Ibid 229-230.

⁹⁷² Julia Sloth-Nielsen and Louise Ehlers, 'Assessing the Impact: Mandatory and Minimum Sentences in South Africa' [2005] 14 *SA Crime Quarterly* 17.

sentencing with near unfettered discretion, leading to sentences that can be argued to be unjust, and that it does not serve as a general deterrence to the community.

Parsimony

In an economic perspective, mandatory minimum sentencing in South Africa is not effective as its implementation has resulted in an increase in the number of people incarcerated in prison. This is not only a reflection of the effectiveness of the South African regime in sentencing child sexual offenders, but a general reflection of the effectiveness of the sentencing regime overall. The growing number of people serving terms of imprisonment in South Africa after the introduction of mandatory minimum sentencing has increased, as more people are incarcerated with longer sentences, which places an economic burden on the state and society who needs to cater for the prisoners.

Furthermore, the inconsistent sentencing practices by the South African judiciary in an attempt to bypass the mandatory sentencing regime is a violation of the principle of parsimony, as it aims to ensure that an adequate sentence is given to suit the crime. South African judges have often employed ‘substantive and compelling circumstances’ allowed for in legislation to afford lesser sentences to offenders. Some cases have been listed in the previous chapter.

Equal Application

The near unfettered discretion from judges as a result of a loophole that had been taken advantage of by the judiciary has resulted in different applications of the sentencing regime in South Africa. The use of ‘substantial and compelling circumstances’ in South Africa by the judiciary has resulted in many sentences being lessened due to trivial matters, thus bypassing the mandatory minimum sentences stipulated in the legislation.

Proportionality and Reasonableness

Unfettered judicial discretion that is allowed by judges in the legislation from the use of ‘substantial and compelling circumstances’ have resulted in lessened sentences which are not proportional to the crime that was committed. See some of the case examples above to demonstrate the impact that ‘substantial and compelling circumstances’ have had in sentencing offenders in South Africa.

CHAPTER 7.3: DEATH PENALTY

7.3.1 Historical Development of the Death Penalty in South Africa

South Africa had historically used the death penalty as a method of punishment for various crimes. Since the creation of the Union of South Africa in 1910 until a moratorium calling for the ban of the death penalty in 1990, South Africa had executed approximately 4,200 people for various crimes, including murder, rape, treason, robbery and terrorism.⁹⁷³

⁹⁷³ Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia and the Caribbean* (Ashgate Publishing: 2014) 128.

Successive governments in South Africa had kept capital punishment as a criminal sanction throughout the 20th century, and used it extensively during the apartheid period. The white dominated government has often used discriminatory justifications in keeping the sanction, with one commission of enquiry into penal and prison reform stating that the lives of ‘undeveloped natives’ who have recently been introduced to western civilisation are of lesser value than that of the western civilised man, and that the racial and social differences between South Africa and other western abolitionist countries were different that retaining the death penalty was justified.⁹⁷⁴

Throughout the middle of the 20th century, the death penalty was extensively used as a tool for repression as successive South African governments implemented the policies of apartheid. The government had widened the scope of crimes in which the death penalty was an available sanction, such as robbery and housebreaking.⁹⁷⁵ The government had also began to classify both violent and non-violent political acts as capital crimes due to the rise in support, and increasing political action by anti-apartheid organisations such as the African National Congress and the Pan-Africanist Congress.⁹⁷⁶ Capital punishment became the central sanction for any political crimes that occurred in South Africa from the 1960s up until the end of the apartheid regime in the 1990s. The increasing repression by the apartheid regime in the mid to late 20th century had impacted on the number of executions that occurred in later periods. The last decade of the apartheid regime saw a rapid increase in the number of executions occurring. From 1980-1989, approximately 1,100 people were executed for various crimes, in contrast to 841 people in the previous decade.⁹⁷⁷ This made South Africa one of the highest ranking countries for number of executions at the time.

However, with the end of the apartheid regime in the early 1990s, the new South African government wanted a way to deal with the increasing rate of crime in a humane fashion. The last president of South Africa’s apartheid regime, Frederik de Klerk, had limited the extent in which capital punishment could be sanctioned, and placed a moratorium on executions.⁹⁷⁸

Jurisprudence in South Africa also led the way in the abolitionist movement. In *S v Makwanyane and Another*, the Constitutional Court was assessing whether capital punishment contravened provisions in the Constitution that states that all individuals are not to be subjected to crime, inhumane and degrading punishment.⁹⁷⁹ The court found that the death penalty did not address the causes of crime and that it was a punishment which contravene the constitution.⁹⁸⁰ This decision ultimately led to South Africa abolishing capital punishment in 1997, as the Constitutional Court deemed the imposition of the death penalty to be in contravention to the constitutional right that all citizens in South Africa have to life.⁹⁸¹

⁹⁷⁴ Peter N Bouckaert, ‘Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa’ [1996] 32 *Stanford Journal of International Law* 290-291.

⁹⁷⁵ Ibid 291.

⁹⁷⁶ Ibid 291.

⁹⁷⁷ Ibid 293-294.

⁹⁷⁸ Ibid 1997.

⁹⁷⁹ Chris Derby Magobotiti, ‘An analysis of judicial sentencing approaches to persons convicted of serious crimes’ (PhD Thesis, University of South Africa, 2009) 94.

⁹⁸⁰ Ibid.

⁹⁸¹ Roger Hood and Carolyn Hoyle, ‘Abolishing the Death Penalty Worldwide: the Impact of a “New Dynamic”’ [2009] 38(1) *Crime and Justice* 11.

7.3.2 Arguments For the Death Penalty

Purposes of Sentencing

There are a couple of arguments in South Africa in favour of the reintroduction of the death penalty as it fulfils some of the purposes of sentencing. One such argument is the purpose of incapacitation. The imposition of the death penalty will send a message to the community that the offender is incapacitated, and would not commit similar offences against the community again. It is argued that by committing egregious crimes, the offender has forfeited their right to life, and would thus be incapacitated from committing more crimes.

Two other purposes which have been raised to argue for the reintroduction of the death penalty is retribution and denunciation. The imposition of the death penalty by the state will demonstrate to the community that the crimes that the offender committed was in contrast to the values of society, thus denouncing the actions of the offender. Furthermore, the death penalty would be the ultimate retribution by the state who represents the victims of the crimes committed by the offender, allowing the victims their vengeance and a peace of mind that the offender would not be able to harm another person again.

Parsimony

In contrast to allowing offenders to be imprisoned for a long period of time, the death penalty imposed on serious criminals would save the public the burden of funding for the long term imprisonment of serious offenders. It can be argued that the use of the death penalty against serious offenders would achieve the same result of incapacitation and retribution against the offender without the burdensome economic cost of a long term imprisonment sentence.

Proportionality

Some may argue that the death penalty is a proportionate sanction against an offender whose crime was the murder of another person ('an eye for an eye').

7.3.3 Arguments Against the Death Penalty

Human Rights

The imposition of the death penalty violates basic human rights that are afforded by international law, as well as the constitution of South Africa, namely, the right of all people in the world, and all citizens of South Africa to life. The South African Constitution guarantees the right to life, along with the freedom from violence, violation of bodily integrity and human dignity, and that it can be argued that the imposition of the death penalty would violate these rights. The South African Constitutional Court has already ruled in *S v Makwanyane and Another* that the imposition of the death penalty as a sanction is a violation of the constitution, which led to its abolition in 1997. The proposed reintroduction of the death penalty would only lead to violations in the constitution.

Purposes of Sentencing

The death penalty has been proven in numerous studies to be ineffective in deterring offenders from committing serious crimes. Even before the abolition of the death penalty in South Africa, crime was a common occurrence in South Africa, and the ultimate criminal sanction did not deter offenders from committing those acts of crime. Rape and murder had been a common occurrence in apartheid South Africa, despite the possibility of the death penalty being imposed on offenders. The apartheid regime had also increasingly used the death penalty against political offences, however its use did not deter offenders of political crimes from these activities. Therefore, the imposition of the death penalty does not deter others from committing crimes, despite arguments on the contrary.

The imposition of the death penalty on an offender would not allow sufficient time for the offender to be able to reflect on the true nature of their crimes and rehabilitate, and the possibility of rehabilitated offenders to use their experience to help deter others from society. As the death penalty does not allow offenders the chance to rehabilitate, the offender would not get the chance to be able to reintegrate into society and contribute to the societal and economic life of the community, and society may lose the economic benefits that the rehabilitated offender may offer in the future.

Proportionality and Reasonableness

Depriving the offender of their right to life and sentencing them to death is unreasonable due to the fact that it does not allow for the offender to reflect and possibly rehabilitate in the future. The sentence of death against an offender for crimes other than murder would also not be proportionate for crimes that did not result in the death of a person (it is not an application of ‘an eye for an eye’).

CHAPTER 7.4: OVERALL CONCLUSION AND RECOMMENDATIONS

7.4.1 Mandatory Sentences

The introduction of mandatory minimum sentencing in South Africa can be considered to be a knee-jerk reaction to the community due to the high levels of crime that was being experienced in South Africa after its transition to democracy.⁹⁸² The rushed implementation of the mandatory minimum sentencing regime has resulted in many deficiencies in the sentencing framework that must be addressed to increase its effectiveness in reducing crime.

The main loophole that needs to be addressed is the liberal use of ‘substantial and compelling circumstances’ by the judiciary in order to afford offenders a lesser sentence for serious crimes such as child sexual offences. The South African judiciary has had a history of resisting interference by the legislature and executive in what they perceive to be their legal domain.⁹⁸³ However, without the judiciary working alongside the legislature and executive in creating reforms to the mandatory sentencing regime, there will continue to be loopholes in the law which would allow offenders to get off lightly with lesser sentences. The

⁹⁸² Kristina Scurry Baehr, ‘Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa’ [2008] 20(8) *Yale Journal of Law and Feminism* 224-225.

⁹⁸³ Julia Sloth-Nielsen and Louise Ehlers, ‘A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa’ (ISS Paper No. 111, Institute for Security Studies, 2005)1.

law must be clear and free of discretionary loopholes to ensure that the sentencing regime promotes consistency in sentencing offenders of similar crimes. Though the notion of ‘substantial and compelling circumstances’, or any similar approach should be kept in order to ensure that some aggravating or mitigating circumstances are considered in the sentencing process, there must be a strict and clear legal definition in the legislation to ensure that the judiciary is unable to use their unfettered discretion to lessen the sentences of offenders.

Despite the fact that the introduction of mandatory minimum sentencing in South Africa has the aim of reducing the high crime rate, especially in regards to instances of rape against women and children, the statistics tend to show that in its current form, the sentencing regime has not succeeded in reducing the crime rate. Statistics have shown that though there are some targeted crimes in which the rate of occurrence had decreased, most other offences have increased.⁹⁸⁴ At best, the rate of sexual assaults and rape in South Africa had remained constant since the introduction of mandatory minimum sentencing.⁹⁸⁵ The fact that crime rates for sexual assaults, rape and general offences have remained steady or increased after the introduction of mandatory minimum sentencing demonstrates the ineffectiveness of the South African sentencing framework to enforce the punishments stipulated in the legislation, creating uncertainty, inconsistency and mistrust of the justice system in getting a proportional sentence for the crime that was committed by the offender.⁹⁸⁶

The mandatory minimum sentencing regime in South Africa has also had an unintended consequence in increasing the prison population, which has led to overcrowded prisons in South Africa.⁹⁸⁷ The growing prison population in South Africa had been attributed to longer sentences, the decreasing chance of parole, and the promotion of incarceration in policies such as mandatory minimum sentencing.⁹⁸⁸ The mandating of longer prison sentences for general crimes, especially for first time offenders has not helped in rehabilitating offenders in reintegrating them into society, and an increasing prison population would increase the public expenditure on prison maintenance. In the case of first time offenders for sexual offences such as child sexual abuse, implementation of alternative sanctions such as chemical castration may be able to relieve the stress that the prison system in South Africa is currently experiencing.

7.4.2 Death Penalty

There had also been calls from sections within the South African community to reintroduce the death penalty as an available sanction in serious crimes such as murder and rape, in an attempt to curb the high crime rate in the country. However, the death penalty cannot be reinstituted in South Africa as the imposition of the death penalty in South Africa would contravene South Africa’s obligations to international law, such as its obligations under the International Covenant on Civil and Political Rights, as well as infringe

⁹⁸⁴ S Terblanche, ‘Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997’ in J Burchell & A Erasmus (eds), *Criminal justice in a new society* (Juta and Co, 2003) 219.

⁹⁸⁵ Kristina Scurry Baehr, ‘Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa’ [2008] 20(8) *Yale Journal of Law and Feminism* 229.

⁹⁸⁶ Ibid 229-231.

⁹⁸⁷ Julia Sloth-Nielsen and Louise Ehlers, ‘A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa’ (ISS Paper No. 111, Institute for Security Studies, 2005) 18.

⁹⁸⁸ Ibid.

on the South African Constitution, which not only provides fundamental rules for which the government of South Africa must abide by, but also outlines fundamental rights that citizens in South Africa have, including the right to life. Furthermore, numerous studies have shown that the death penalty is ineffective in serving as a deterrent and reducing the crime rate in various jurisdictions around the world, including South Africa. Finally, the death penalty is a symbol of South Africa's bloody history during the apartheid era, and the reintroduction of the death penalty would only serve to hinder South Africa's transition into a stable democratic country.

7.4.3 Reform in Sentencing: Sentencing Guidelines

In 2000, the South African Law Reform Commission had commissioned a report into sentencing procedures in South Africa, and recommended the creation of a Sentencing Council, in which one of its primary functions was to create sentencing guidelines for judicial officers to follow when determining the sentence of an offender.⁹⁸⁹ The creation of a sentencing council would help promote consistency in the judiciary, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives, and, at the same time, produce sentencing outcomes that are within the capacity of the state to enforce in the long term.⁹⁹⁰

7.4.4 Concluding Remarks

South Africa's current mandatory minimum sentencing regime is in need of reform in order for it to become a more effective tool in reducing the rate of crime for sexual offences and general criminal activity in South Africa. However, in order for the South African criminal justice system to have a more effective sentencing regime and reduce the number of sexual offences against women and children, there needs to be a societal, institutional and cultural change in the country, as years of violence and political struggle during the apartheid era has fostered a warrior culture emphasising hyper-masculinity.⁹⁹¹ The judicial sentencing regime cannot completely change in providing consistency and proportional sentencing for sexual offences when there is no societal or institutional change to encourage a cultural shift away from the legacies of the apartheid era. South Africa is a promising jurisdiction and has demonstrated success in its transition to democracy, but there must be societal and institutional change for their judiciary to become a beacon of justice.

⁹⁸⁹ S Terblanche, 'Sentencing Guidelines for South Africa: Lessons from Elsewhere' [2003] 120 *South African Law Journal* 858.

⁹⁹⁰ Ibid 858-861.

⁹⁹¹ Kristina Scurry Baehr, 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' [2008] 20(8) *Yale Journal of Law and Feminism* 218-219.

CHAPTER 8: THE UNITED STATES OF AMERICA (CALIFORNIA & FLORIDA)

The United States of America is a common law country, with a Federated system of government, made up of one Federal jurisdiction and multiple State jurisdictions.⁹⁹² Each State has a large amount of autonomy over its own criminal law. Due to the large amount of jurisdictions, this chapter will focus only on two representative jurisdictions, namely California and Florida. Both California and Florida have a codified criminal law and criminal sentencing law. As both are still common law jurisdictions, they are subject to case law precedent (*stare decisis*).

California defines the crime of ‘rape’ as is “an act of sexual intercourse accomplished with a person where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another, *or* where a person is at the time unconscious of the nature of the act, and this is known to the accused”.⁹⁹³

In Florida, the crime of sexual battery is defined as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, does not include an act done for a bona fide medical purpose.”.⁹⁹⁴

CHAPTER 8.1: SEXUAL OFFENCES IN UNITED STATES OF AMERICA

Overview

- **Mandatory Minimum Sentences** have been enacted in many US jurisdictions, including California and Florida. They have the effect of removing sentencing discretion from judges and enforcing a minimum sentencing floor for individuals convicted of specific offences.⁹⁹⁵
- **Death Penalty** is currently in force in 31 US States, including California and Florida.⁹⁹⁶ It is not however available where the commission of a crime does not result in the death of a person.⁹⁹⁷
- **Chemical Castration** is not a part of sentencing in California or Florida, however it can be imposed by the courts as a condition of release from prison in both jurisdictions under certain circumstances.

⁹⁹² Federal Judicial Centre, *The U.S. Legal System: A Short Description* (20 May 2016) Federal Judicial Centre < [http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/\\$file/U.S._Legal_System_English07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/$file/U.S._Legal_System_English07.pdf)>.

⁹⁹³ Cal Penal Code §261(1),(4).

⁹⁹⁴ Fla Stat Ann §794.011.

⁹⁹⁵ Gary Lowenthal, ‘Mandatory Sentencing Laws: Undermining the effectiveness of Determinate Sentencing Reform’ 81(1) *California Law Review* (1993) 61, 64.

⁹⁹⁶ National Coalition to Abolish the Death Penalty, *State by State* (20 May 2016) < <http://www.ncadp.org/map>>.

⁹⁹⁷ The case of *Coker v Georgia*, 433 US. 584 (1977) made it unconstitutional to impose the death penalty in cases of rape of an adult. *Kennedy v Louisiana*, 554 US. 407 (2008) furthered this prohibition to include all rape, including the rape of children. More broadly, the Court also held that the death penalty could not be imposed for crimes that did not result in the death of the victim.

8.1.1 Sexual Offences (General)

California

Recent legislative changes to California's criminal code have greatly expanded the conduct that is captured by the crime of rape, in addition to increasing the severity of the penalties involved.⁹⁹⁸ In 2010 there was a significant increase in the mandatory minimum sentences associated with rape and sexual battery offences.⁹⁹⁹ In 2002 and 2013, legislation broadened the definition of the conduct captured by the rape and sexual battery provisions to better reflect the changing community standards on how certain conduct should be treated.¹⁰⁰⁰

California has 2 core general offences in rape and sexual battery.¹⁰⁰¹ Rape is where the offender engages in sexual intercourse with another person against their will or without their consent. Sexual battery is where the offender touches a person in an intimate area, who is unlawfully restrained for sexual pleasure or gratification.

Florida

Florida law has followed a similar path recently however focused more on increasing the severity of the punishments for offences, such as reinstating capital offences for serious child abuse (this is however unconstitutional so would be read down to life with no parole), increasing the mandatory minimum sentence for repeat sex offenders.

Florida has one core general sexual offence of sexual battery.¹⁰⁰² This then includes many different sub-offences with differing penalties. The unifying factor is that the offender engages in sexual activity with another person against their will, or without their consent.

8.1.2 Sexual Offences Against Children

The age of consent in California and Florida is 18 years of age. A 'minor' is any person who has not attained the age of 18, while a 'child' is any person that has not attained the age of 14.¹⁰⁰³ Both states have laws with tougher sentences for people who commit sexual crimes against minors and children.

⁹⁹⁸ 2010 Cal. Legis. Serv. Ch. 219 (A.B. 1844) (WEST) – Increased severity of punishment.

2013 Cal. Legis. Serv. Ch. 259 (A.B. 65) (WEST) – Expanded definition

2002 Cal. Legis. Serv. Ch. 302 (S.B. 1421) (WEST) – Expands definition of rape and sexual battery

⁹⁹⁹ 2010 Cal. Legis. Serv. Ch. 219 (A.B. 1844) (WEST) – Increased severity of punishment.

¹⁰⁰⁰ 2013 Cal. Legis. Serv. Ch. 259 (A.B. 65) (WEST) – Expanded definition; 2002 Cal. Legis. Serv. Ch. 302 (S.B. 1421) (WEST) – Expands definition of rape and sexual battery

¹⁰⁰¹ Cal. Penal Code § 243.4, 261.

¹⁰⁰² Fla. Stat. Ann. § 794.011.

¹⁰⁰³ Cal. Penal Code § 261, Fla. Stat. Ann. § 794.011.

California

Rape committed upon a minor or child has stronger mandatory minimum sentences than if the crime were committed upon an adult.¹⁰⁰⁴ An adult that has sexual intercourse with a child 10 or under, whether under duress or otherwise will be punished with a minimum 25 year prison sentence.¹⁰⁰⁵

Florida

The crime of sexual battery covers most forms of sexual assault against minors and children through its subsections. The other crime that covers a wide range of sexual abuse behavior towards children is that of lewd or lascivious battery and lewd or lascivious molestation. These cover the touching of a child's genitals by an adult, and also engaging in sexual activity with a minor aged between 12 and 16.

CHAPTER 8.2: MANDATORY SENTENCES

Mandatory sentencing imposes limits on the discretion of a judge or jury in sentencing an offender.¹⁰⁰⁶ Mandatory minimums ensure that an offender is sentenced to a minimum prison sentence for the commission of a particular crime or aggravating factor.¹⁰⁰⁷

8.2.1 History of Mandatory Minimum Sentences in the United States

There has been some form of mandatory minimum sentences in the United States since the establishment of the British colonies that eventually came together to form the United States of America.¹⁰⁰⁸

Mandatory minimum sentencing only began to become widespread in the late 1980's.¹⁰⁰⁹ Before the mid-1980's, sentencing law in the US was largely unstructured, and while certain minimum sentences existed, they were fairly uncommon. Judges had a wide discretion to formulate and impose whatever sentence she/he thought was appropriate.¹⁰¹⁰ The 1970's and 1980's saw the rise of the 'war-on-drugs' in the United States and with it, a stricter approach to dealing with crime.¹⁰¹¹ One of the mechanisms used to enforce this 'tough-on-crime' approach was the abolition of indeterminate sentencing and implementation of the mandatory minimum sentences.¹⁰¹² This change away from indeterminate sentencing was lead country-wide by California, followed close behind by Florida. By 1994, all 50 US States had mandatory minimum sentences on their legislation books.¹⁰¹³ The main justifications for mandatory minimum sentencing is that it is thought

¹⁰⁰⁴ Cal. Penal Code § 264.

¹⁰⁰⁵ Cal. Penal Code § 288.7.

¹⁰⁰⁶ David Bjerk, 'Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing' (2005) 48(2) *The Journal of Law & Economics* 591, 592.

¹⁰⁰⁷ Gary Lowenthal, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform' (1993) *California Law Review* 81(1) 61, 63.

¹⁰⁰⁸ *Ibid*, 68.

¹⁰⁰⁹ Herbert Hoelter, 'Sentencing Alternatives – Back to the Future' (2009) *Federal Sentencing Reporter* 22(1) 53, 53.

¹⁰¹⁰ *Ibid*, 53.

¹⁰¹¹ *Ibid*, 53.

¹⁰¹² Joan Petersilia, 'California's Correctional Paradox of Excess and Deprivation' (2008) *Crime and Justice* 37(1) 207, 210.

¹⁰¹³ David Bjerk, 'Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing' (2005) 48(2) *The Journal of Law & Economics* 591, 591.

to act as a strong deterrent to people considering committing crimes, as well as ensuring that people that *do* commit certain crimes go to prison for a set minimum time.¹⁰¹⁴

There is a large amount of pushback on mandatory sentencing in the academic world. There are countless reports disputing the perceived benefits of mandatory sentencing, and many that show the detrimental effects they have on society, the economy and the country overall.¹⁰¹⁵

Unfortunately, it has been difficult to make changes to the system, however the tide is starting to turn in California. The state that began the country-wide rush to mandatory minimums, is now hoping to abandon them completely for non-violent offenders in the state.¹⁰¹⁶ The new ballot initiative which will be voted on on the 8th November 2016 would relax mandatory minimum sentencing across the State. The initiative has the full backing of the incumbent Governor, Jerry Brown and has a good opportunity to pass.¹⁰¹⁷ If so, it would be the biggest roll-back of mandatory sentencing the United States has ever seen.¹⁰¹⁸

It should be noted that there is little support for substantially removing mandatory minimum sentences for repeat violent and sexual offenders. This is largely due to the high level of risk and danger these violent offenders pose to society if diverted to alternative sentencing measures.

8.2.2 Jurisdictions with Mandatory Minimum Sentences in the United States

Both California and Florida enforce mandatory minimum sentences for sexual assault, and sexual assault on a child along with a wealth of other crimes.

State	Offence	Mandatory Minimum Sentence	Other Sentencing Options
California	California Penal Code		
	Rape of a child under 14 years of age [Section 261(2), 264(c)(1)]	Minimum penalty of 9 years in prison (first offence)	
	Rape of minor 14 years of age or older	Minimum sentence of 7 years in	

¹⁰¹⁴ Gary Lowenthal, ‘Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform’ (1993) *California Law Review* 81(1) 61, 64.

¹⁰¹⁵ Joan Petersilia, ‘California’s Correctional Paradox of Excess and Deprivation’ (2008) *Crime and Justice* 37(1) 207. See also Gary Lowenthal, ‘Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform’ (1993) *California Law Review* 81(1) 61. See also Michael Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings (2009) 38(1) *Crime and Justice* 65. See also Alison Shames and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections* (2014) 27(1) *Federal Sentencing Reporter* 9.

¹⁰¹⁶ Brian Hawkins, *California’s Golden Opportunity on Sentencing Reform* (23 February 2016) American Legislative Exchange Council <<https://www.alec.org/article/california-sentencing-reform/>>.

¹⁰¹⁷ John Myers, *Gov. Brown to seek November ballot initiative to relax mandatory prison sentences* (27 January 2016) Los Angeles Times <<http://www.latimes.com/politics/la-pol-sac-jerry-brown-sentencing-reform-ballot-20160127-story.html>>.

¹⁰¹⁸ Ibid.

[Section 261(2), 264(2)]	prison (first offence)	
Commits an act of sexual penetration upon a child who is under 14 years of age, when the act is accomplished against the victim's will [Section 289(B)]	Minimum sentence of 8 years in prison (first offence)	
Commits an act of sexual penetration upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will [Section 289(C)]	Minimum sentence of 6 years in prison (first offence)	
Adult who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger [Section 288.7(a)]	Minimum sentence of 25 years in prison (first offence)	Life imprisonment
Adult who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger [Section 288.7(b)]	Minimum sentence of 15 years in prison (first offence)	Life imprisonment

Florida

Florida Crimes Statute

A person 18 years of age or older who commits sexual battery a person less than 12 years of age [§794.011(2)(a)]	Minimum sentence of life in prison, without parole (This crime is a capital felony however due to <i>Kennedy v. Louisiana</i> 554 U.S. 407 (2008), the death penalty is unconstitutional in cases where the victim is not killed)	
A person 18 years of age or older who commits sexual battery upon a person 12 years of age or older but younger than 18 years of	Minimum sentence depends on complex points system, but as it is a first degree felony, the minimum sentence will be at least 15 years.	Maximum sentence is for an undetermined number of years (must be less than life imprisonment)

age without that person's
consent
[§794.011(4)(a)]

Life imprisonment

Where person is a repeat sexual offender, or threatened the use of a deadly weapon, or caused serious personal injury to the victim is guilty of being a dangerous sexual felony offender
[§794.0115(e)]

California

California has made widespread use of mandatory minimum sentencing since the introduction of the *Uniform Determinate Sentencing Law* in 1977. The purpose of which at the time was to swap the main of the criminal justice system from rehabilitation to retribution. The California Penal code now contains a very large amount of mandatory minimum sentences. There are mandatory minimum sentences for all permutations of rape committed on a person under the age of 18, with varying degrees of severity based on the age of the victim and the circumstances the crime was committed under. IN addition to these mandatory minimum sentences for individual crimes, California also has a 'three strikes policy' on repeat violent crime. The first crime is charged at the minimum face-value of the crime. The second offence is charged at double the mandatory minimum for the crime, and any third offence is sentenced to life imprisonment.¹⁰¹⁹

Florida

Florida also liberally uses mandatory minimum sentences. All felony crimes have mandatory prison sentences, however due to the complex points system involved in Florida's sentencing code, it is difficult to outline the exact minimum sentence for each crime, without knowing the exact circumstances of that crime. Florida treats sexual offences against minors very harshly, with minimum sentence of life imprisonment for offenders whose victims are aged under 12 years, as well as a 15-year minimum sentence for offenders whose victim is 12 or older but younger than 18.

8.2.3 Arguments For Mandatory Sentences

Deterrence, Incapacitation and Equal Application

One of the main justifications for mandatory minimum sentencing is that it is thought to act as a strong deterrent by ensuring the penalty for the commission of a crime is severe and well known.¹⁰²⁰ Mandatory minimums are also thought to protect society from offenders because they ensure the offender is

¹⁰¹⁹ Cal. Penal Code §1170.18.

¹⁰²⁰ Robert Mueller, 'Mandatory Minimum Sentencing' (1992) 2(2) *Federal Sentencing Reporter* 230, 230.

incarcerated for a certain time that recognises the severity of their crime.¹⁰²¹ Long prison sentences isolate the offender from the community, which prevents the offender from being able to reoffend in the general community.¹⁰²²

It is also seen to standardise sentencing to ensure there is better consistency between sentences for similar crimes. Better consistency ensures there is less discrimination due to race (or any other factor) in sentencing. The US has history of white offenders getting lesser sentences for comparable crimes to other ethnicities.¹⁰²³

8.2.4 Arguments Against Mandatory Sentences

Parsimony

California was the first US state to introduce the widespread use of mandatory minimum sentences, and after doing so, has seen its prison populations skyrocket.¹⁰²⁴ Incarceration is a very expensive way of dealing with crime, and having an exploding prison population will only exacerbate the issue of cost.¹⁰²⁵

The principle of parsimony is not just concerned with cost, but rather using the least harsh method to gain the outcome sought. Mandatory minimum sentences ensure an offender will receive a prison sentence regardless of whether there may be a more appropriate method of punishing an offender, while reducing the risk of recidivism such as chemical castration.

A recent study by Shames and Subramanian shows that mandatory minimum sentences are expensive for a range of reasons. The major factor is that imprisonment has a criminogenic effect on offenders.¹⁰²⁶ Extended time in prison increases an offender's rate of recidivism, or sentencing a person to prison for a borderline offence only increases their likelihood of reoffending compared to another non-custodial sentence.¹⁰²⁷ This is a costly side-effect not only in monetary terms, but in societal terms as well. Since it is known that mandatory minimum sentences are likely to increase the rate of recidivism overall, it would be wise to consider this effect when deciding the appropriateness of these type of sentences in certain crimes.¹⁰²⁸

Additionally, the Shames and Subramanian study also found that there is good evidence to support that mandatory sentences are too harsh for certain crimes, especially when it comes to substance abuse crimes. Their study found that non-violent offenders 'can be safely and effectively supervised in the community', and these alternatives have a large effect on recidivism rates when compared to those that are sent to

¹⁰²¹ Ibid 230.

¹⁰²² Gary Lowenthal, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform' (1993) *California Law Review* 81(1) 61, 64.

¹⁰²³ American Civil Liberties Union, 'Racial Disparities in Sentencing' (Report, American Civil Liberties Union 27 October 2014) 1-5.

¹⁰²⁴ Joan Petersilia, 'California's Correctional Paradox of Excess and Deprivation' (2008) *Crime and Justice* 37(1) 207, 221.

¹⁰²⁵ Harold Miller, 'Projecting the Impact of New Sentencing Laws on Prison Populations' *Policy Sciences* (1981) 13(1) 51, 69-71.

¹⁰²⁶ Alison Shames and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections* (2014) 27(1) *Federal Sentencing Reporter* 9, 12.

¹⁰²⁷ Ibid, 12.

¹⁰²⁸ Francis T. Cullen et al., 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 91(3) *The Prison Journal* 48S, 60S.

prison.¹⁰²⁹

Proportionality and Reasonableness

While mandatory minimum sentences can help to ensure consistency in sentencing, because they only focus on one factor and do not take into account the entire circumstance of the crime, offender and situation. Mandatory minimum sentences can lead to extremely severe punishments for relatively minor crimes.¹⁰³⁰ This is especially the case where the crime is non-violent, and the person is a first time offender.

The proportionality of minimum sentences varies, but ultimately, taking away a judge's discretion and ensuring that an offender will serve a minimum amount of time in prison does not lead to sentences that are proportional to the crime committed. The three strikes rules in California adds to this lack of proportionality by doubling and tripling the sentences of repeat offenders. This can lead to outcomes such as a person with a non-violent criminal history being sentenced to 50 years prison without parole for stealing 9 video tapes (*Lockyer v Andrade*).¹⁰³¹

In addition to the lack of proportionality between crime and sentence, sentences such as these are also plainly unreasonable. It would be unthinkable for any judge with the discretion to choose a sentence to impose one as severe as what was required by the law in the case of *Lockyer v Andrade*.¹⁰³²

A study by Tonry shows that prosecutors in the US use mandatory minimums tactically to induce guilty pleas from accused offenders¹⁰³³. Prosecutors threaten to press charges with mandatory minimums, or if the accused cooperates and pleads guilty, they will charge them with something with no mandatory sentence. Because defendants are worried about having to face the sometimes quite extreme mandatory minimum sentences for many crimes, they plead guilty to lesser crimes.¹⁰³⁴ This gives the prosecutor an unreasonable amount of leverage over a defendant, and speaks to the vastly disproportionate sentences that accompany certain crimes.

Additionally, a report written by the US Sentencing Commission after investigating the practice at a Federal level found that in over 22% of mandatory minimum cases, the judge had used statutory special provisions to downwardly depart from the legislative mandatory sentencing requirements. The commission reflected that 'the increased departure rate may reflect a greater tendency to exercise prosecutorial or judicial discretion as the severity of the penalties increases'.¹⁰³⁵ The fact that judges are resorting to using provisions that were designed to be used in only the most exceptional of cases, for almost a quarter of cases before them is a testament to how far out of line current Federal mandatory minimum sentences are set.

¹⁰²⁹ Alison Shames and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections* (2014) 27(1) *Federal Sentencing Reporter* 9, 12.

¹⁰³⁰ Gary Lowenthal, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform' (1993) *California Law Review* 81(1) 61, 64.

¹⁰³¹ *Lockyer v Andrade* 538 US 63 (2003).

¹⁰³² *Ibid*.

¹⁰³³ Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65, 82.

¹⁰³⁴ *Ibid*, 82.

¹⁰³⁵ Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65, 83. See also William Wilkins, et. al., 'Mandatory Minimum Penalties in the Federal Criminal Justice System' (Report, US Sentencing Commission, August 1991) 53.

Deterrence

Another finding of Shames and Subramanian, along with Tonry is that the crime deterrent effect of mandatory minimum sentencing in the US is virtually non-existent. There is no credible evidence to support the deterrent effect of mandatory minimum sentences when looking at the means of deterrence by way of certainty of punishment, nor via increases to previously applicable penalties.¹⁰³⁶

CHAPTER 8.3: DEATH PENALTY

8.3.1 History and Future Directions of the Death Penalty in the United States

The death penalty is a long enduring practice that has always been a part of US law. The practice, depending on the state, is still a fairly regular occurrence. The death penalty is a punishment available at the federal level, and in a large proportion of states. Most US States have at some time had a death penalty on their legislation books.

Historically, it has been enforced only for the most serious of crimes, such as murder, rape and high treason. It is important to note that due to multiple Supreme Court decisions, the death penalty is not available for charges of sexual assault only, or any other kind of abuse of adults or children that does not result in the death of the victim.¹⁰³⁷ The death penalty is of course available in situations where the crime of murder coincides with other crimes such as sexual assault.

The 8th Amendment of the United States Constitution ensures a person's right to be free of cruel and unusual punishment. In 1972, the US Supreme Court ruled that a very large proportion of the nation's death penalty legislation was in contravention of the 8th amendment, and therefore illegal and unenforceable.¹⁰³⁸ In this decision, Thurgood Marshall and William J Brennan jointly held that all death penalty legislation was unconstitutional.¹⁰³⁹ While this argument did not catch on among Supreme Court judges at the time (The Supreme Court affirmed new death penalty legislation in 1974) it is certainly the direction that the law is heading in moving forward.

While California does still have the death penalty in law, it has not carried out an execution since 2006 due to litigation over the method California uses to execute death row prisoners. As this is the only procedure in place, California effectively cannot execute any death row prisoners until this litigation is resolved. While California has the largest amount of people on death row in the country, there seems to be little political will to find a way around the current legal impasse, and continue executions in the state. There is a growing anti-death penalty sentiment in California, with a State ballot initiative that would have banned the death penalty in California being narrowly defeated in 2012, 52% voting against the proposition and 48% voting for

¹⁰³⁶ Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings (2009) 38(1) *Crime and Justice* 65, 68.

¹⁰³⁷ *Coker v Georgia*, 433 US 584 (1977), *Kennedy v Louisiana* 554 US 407 (2008).

¹⁰³⁸ Michael Radelet and Marian Borg 'The Changing Nature of Death Penalty Debates' (2000) *Annual Review of Sociology* 26, 43, 43.

¹⁰³⁹ *Furman v. Georgia* 408 US 238 (1972).

getting rid of the death penalty.¹⁰⁴⁰ Additionally, more recent polls show that support for the death penalty continues to wane in the state.¹⁰⁴¹

Florida was the first state to reintroduce a death penalty after the *Ferman* decision. The state had its fresh legislation upheld in the Supreme Court as constitutional in the case of *Gregg v Georgia* in 1976, essentially green-lighting executions across the country.¹⁰⁴² Florida continues to carry out executions to this day, with the method of execution being lethal injection.¹⁰⁴³ Recently, there have been cases that have resulted in the restriction of the circumstances in which the death penalty can be applied in sentencing, and a restriction the the procedure that allows for the sentencing of the death penalty.¹⁰⁴⁴ While incremental in approach, these steps all trend toward the eventual abolition of the death penalty in Florida.

Overall, there is a definite trend towards the abolition of the death penalty in these two states. While California is further along the road than Florida, the direction that Court decisions are heading, and the legislative changes that are being made certain trend in the direction of abolition.

8.3.2 Arguments For the Death Penalty

Incapacitation

Incapacitation is an obvious argument for the death penalty. Where someone is executed, they can no longer pose a threat to society by committing any further crimes. In this sense however, it is difficult to see any practical difference between execution and a life sentence without parole. If the person truly is a danger to society that they must never be able to be allowed back into the community, then life imprisonment without parole has the same effect as an execution, without the worry about the moral issue of taking a life.

Retribution

The debate around the death penalty in the United States is increasingly around the purpose of retribution.¹⁰⁴⁵ The argument is that for justice to be done, the offenders that perpetrate the worst, most despicable crimes should be executed because they deserve it, and that life imprisonment just isn't severe enough to be just.¹⁰⁴⁶

¹⁰⁴⁰ Howard Mintz and Matt O'Brien, *Proposition 35: Death Penalty Repeal Fails* (6 Nov 2012) Mercury News <http://www.mercurynews.com/ci_21943752/california-proposition-34-voters-decide-whether-keep-states>.

¹⁰⁴¹ Bob Egelko, *Fewer in state support capital punishment in latest Field Poll* (15 Jan 2016) San Francisco Chronicle <<http://www.sfgate.com/news/article/Fewer-in-state-support-capital-punishment-in-6760158.php>>.

¹⁰⁴² *Gregg v Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana* 428 US 153 (1976)

¹⁰⁴³ Department of Corrections (Fla), *Death Row* Florida Department of Corrections <<http://www.dc.state.fl.us/oth/deathrow/#General>>.

¹⁰⁴⁴ Mark Berman, *Florida has nearly 400 death row inmates. Will the state overturn all of their death sentences?* (4 May 2016) The Washington Post <<http://wapo.st/1pYQfmt?tid>>. See also, Lizette Alvarez, *Florida Revamps Death Penalty, Making It Harder to Sentence Someone to Die* (3 Mar 2016) The New York Times <<http://nyti.ms/1LCKSUG>>.

¹⁰⁴⁵ Michael Radelet and Marian Borg, 'The Changing Nature of Death Penalty Debates' [2000] *Annual Review of Sociology* 26, 43, 52.

¹⁰⁴⁶ *Ibid*, 52.

8.3.3 Arguments Against the Death Penalty

Deterrence

Deterrence is one of the major principles used to justify the death penalty in the US. According to Radelet and Borg, ‘the deterrent effect of punishment is thought to be a function of three main elements: certainty, celerity and severity’.¹⁰⁴⁷ Certainty in terms of the idea that people are unlikely to commit a crime if they know they will be caught. Celerity is a temporal idea, where the closer the punishment comes after the commission of the crime, the higher the deterrent effect. Finally, severity, where the more severe the punishment, the less likely a person is to commit the crime.¹⁰⁴⁸ These three factors all work together to grade the deterrence level that a criminal justice system has upon a certain crime.

While the severity aspect of the deterrence effect is present, the celerity aspect is almost completely absent in comparison to a life sentence without parole crime. The practical reality is that people once sentenced to death sit on death row for decades and decades, many of whom will die in prison from other causes before the state get to execute them. This extended interval is necessary due to the finality of the death penalty, and the need for all appeals processes to be allowed to come to completion before the execution can take place. Due to this extreme delay between the commission of the crime and the end punishment, the deterrence benefit over a life sentence without parole is extremely small, if it exists at all.¹⁰⁴⁹

Parsimony

Somewhat counterintuitively, executing a person in the United States costs a significant amount more than it does to imprison them for the rest of their lives.¹⁰⁵⁰ Studies in some US States have found the cost of an execution to be roughly \$3.2 million USD, while the cost of imprisoning a person for life is on average \$600,000 USD.¹⁰⁵¹ From a purely monetary perspective, it does not make sense to have a death penalty.

Human Rights

The death penalty is seen as an archaic and barbaric practice in most parts of the world. There are significant human right impacts to considering this situation. The primacy and importance of the right to life is fundamental to the entire human rights structure, and State-sanctioned execution is seen to be a major and egregious violation of the entire body of philosophy and jurisprudence.

The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), however has not transferred many of its principles into domestic law. The 8th Amendment of the US Constitution which prevents cruel and unusual punishment is commonly referenced as a source of a right against the death penalty, however the Supreme Court has not yet ruled in that way.

¹⁰⁴⁷ Ibid, 44-45.

¹⁰⁴⁸ Ibid, 44-45.

¹⁰⁴⁹ Ibid, 45-56.

¹⁰⁵⁰ Michael Radelet and Marian Borg, ‘The Changing Nature of Death Penalty Debates’ [2000] *Annual Review of Sociology* 26, 43, 50. See also Dean Murphy, *San Quentin Debate: Death Row vs. Bay Views* (18 Dec 2004) The New York Times <<http://nyti.ms/1QbxB2s>>.

¹⁰⁵¹ Michael Radelet and Marian Borg, ‘The Changing Nature of Death Penalty Debates’ [2000] *Annual Review of Sociology* 26, 43, 50.

CHAPTER 8.4: CASTRATION

8.4.1 History and Future directions of the Chemical Castration in the United States

Chemical castration is the administration of a drug to a sex offender to diminish or eliminate their sex drive so they do not feel compelled to reoffend. Anti-androgens are administered (such as progesterone-like drugs) to reduce testosterone levels and in turn reduce the person's sex drive.¹⁰⁵² While the US has historically been reluctant to use surgical castration due to its permanency, the first states to introduce legislation for chemical castration were California in 1996 and Florida in 1997.¹⁰⁵³ Since the mid-90's, chemical castration legislation has passed in at least 3 other states.¹⁰⁵⁴ As such, the procedure is not very widely practiced in the US.

California

In California, repeat child sex offenders that were convicted after the beginning of 1997 are required to undergo mandatory chemical castration as a condition of their parole.¹⁰⁵⁵ Additionally, the judge has the discretion to order chemical castration as a condition of parole for any other sex offender. The treatment begins before the offender is released and continued until the Department of Corrections believes it is not necessary to continue treatment.¹⁰⁵⁶ This is quite a significant power.

Florida

Florida has similar legislation to California in this regard. One major difference however is that failure to continue treatment in Florida can result not only in re-incarceration for the remainder of the original sentence, but also to an additional sentence of 15 years in prison.¹⁰⁵⁷

8.4.2 Arguments For Chemical Castration

Proportionality

Depending on how the policy of chemical castration is implemented, it can certainly be a reasonable solution and proportional to the risks the person would otherwise pose to society. This all depends on where the parameters of the policy are set. In the policy's iterations in California and Florida, there is certainly an argument to be made on either side.

Parsimony

Chemical castration is likely to cost significantly less to implement than keeping the offender in prison. Almost all non-prison alternatives cost less than incarceration.¹⁰⁵⁸ In this sense it is certainly a parsimonious

¹⁰⁵² Michael Petrunik, Lisa Murphy and J. Paul Fedoroff, 'American and Canadian Approaches to Sex Offenders a Study of the Politics of Dangerousness' (2008) 21(2) *Federal Sentencing Reporter* 111, 115.

¹⁰⁵³ Ibid, 115.

¹⁰⁵⁴ Ibid, 115.

¹⁰⁵⁵ Ibid, 115.

¹⁰⁵⁶ Ibid, 115.

¹⁰⁵⁷ Ibid, 115.

¹⁰⁵⁸ Ibid, 115.

policy. The loss of sex drive for the offender under the policy is also less harsh a method of incapacitation than keeping the person locked up in prison and is therefore preferable in that sense as well.

Incapacitation

Chemical castration serves as an extension of the incapacitation purpose of sentencing. Its purpose is to take away the offenders compulsion towards their deviant sexual behaviour and will therefore stop them from re-offending in the future.

8.4.3 Arguments Against Chemical Castration

Human Rights and Dignity

Chemical castration is seen by many as a violation of human rights. This is because the offenders that are eligible for chemical castration have the choice of getting the injections and being released on parole, or staying in prison.¹⁰⁵⁹ This is in effect a double sentence of unlimited length, which violates a person's right to dignity.

Having dignity as a consideration in sentencing law requires the law to approach sentencing in a humane way, ensuring that the offender is recognised to be a person of equal moral value to any other, and as such, must be treated in such a way as to reflect that. This value is not reflected in by this legislative action.¹⁰⁶⁰

At the same time, this policy allows the offender to be integrated back into society, rather than staying confined in prison. While still an infringement of the person's rights, it seems to be a fair trade-off considering the kind of crime the person committed and may commit again. The person must take the medication and have their sex-drive effectively extinguished, but they are allowed to have their freedom back.¹⁰⁶¹

CHAPTER 8.5: OVERALL CONCLUSION AND RECOMMENDATIONS

8.5.1 Mandatory Sentences

Mandatory sentencing reduces the discretion of the sentencing decision-maker so that a certain minimum jail sentence is imposed for certain crimes. In the context of sexual assault perpetrated against children, it is unclear that mandatory sentencing does anything to deter potential offenders, however it does ensure that people who do commit these crimes are prevented from reoffending for at least the minimum time that they must be sentenced to in prison.¹⁰⁶² The counter to this benefit is that when a judge has their discretion limited in jurisdictions that are over-zealous with their mandatory minimum sentencing laws can lead to a

¹⁰⁵⁹ Ibid, 115.

¹⁰⁶⁰ Alison Shames and Ram Subramanian, 'Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections' (2014) 27(1) *Federal Sentencing Reporter* 9, 15.

¹⁰⁶¹ Michael Petrunik, Lisa Murphy and J. Paul Fedoroff, 'American and Canadian Approaches to Sex Offenders a Study of the Politics of Dangerousness' (2008) 21(2) *Federal Sentencing Reporter* 111, 115.

¹⁰⁶² Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65, 68.

disproportionate sentence for the crime committed. Care must be given when drafting mandatory minimum sentence law so that this situation does not occur.

8.5.2 Death Penalty

Administering the death penalty in the US is quite costly, and generally more expensive than incarcerating a person for life.¹⁰⁶³ It is an ethically dubious practice, and one which most states are trending away from. There is also little evidence to support any it has any greater deterrence effect over life imprisonment.¹⁰⁶⁴ Retribution is one of the major arguments used in support of the death penalty, because taking a person's life is the ultimate form of punishment, although any benefit gained in terms of retribution should be balanced against the factors that weigh against the use of the death penalty.

8.5.3 Castration

While chemical castration is largely reversible, it is only effective in certain types of offender, which limits its usefulness. There are also issues surrounding the ethical nature of getting 'informed consent' from a person who is coerced into the chemical castration program.¹⁰⁶⁵ The usage of chemical castration for high-risk sex offenders is quite low in the United States, and is only used in a handful of states. It is certainly less expensive to administer than keeping the offender in prison, and is less harsh of a punishment than life imprisonment.

¹⁰⁶³ Michael Radelet and Marian Borg, 'The Changing Nature of Death Penalty Debates' [2000] *Annual Review of Sociology* 26, 43, 50.

¹⁰⁶⁴ Ibid, 45-56.

¹⁰⁶⁵ Michael Petrunik, Lisa Murphy and J. Paul Fedoroff, 'American and Canadian Approaches to Sex Offenders a Study of the Politics of Dangerousness' (2008) 21(2) *Federal Sentencing Reporter* 111, 115.