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**CRIMINAL LAW (SENTENCING) AMENDMENT BILL [B15-2007]: MINIMUM SENTENCING
LEGISLATION**

1. Introduction

The purpose of this brief is to provide information on some of the benefits of the minimum sentencing legislation, in the light of the fact that much of the negative implications of the legislation are widely accessible. The paper provides:

- An overview of the lack of appropriate statistics in the criminal justice cluster, in terms of the information requested.
- Statistics on the number of convictions between 2000 and 2006 stemming from the Act.
- Statistics on the number of murder and rape offenders in South Africa's prisons.
- Statistics on the percentage of inmates incarcerated for murder and rape who were sentenced using the minimum sentencing legislation.
- A short summary of the key conclusions emanating from a recent study on the impact of minimum sentencing in South Africa
- Analysis of the benefits of minimum sentencing legislation in the United States and Canada.

2. Lack of availability of statistics from the Justice Cluster departments

The following statistics were requested for this paper:

- The number of convictions between 2000 and 2006 stemming from the minimum sentencing legislation for the more serious cases involving murder and rape - requested from the National Prosecuting Authority (NPA).
- The number of convictions between 2000 and 2006 for murder and rape - requested from the South African Police Service (SAPS).
- The number of murder and rape offenders in prison - requested from the Department of Correctional Services (DCS)
- The percentage of murder and rape offenders who were sentenced using the minimum sentencing legislation - requested from the NPA

The following problems were identified:

2.1. Statistics collected by the NPA

The NPA has only kept statistics on the implementation of the minimum sentencing legislation since April 2004. In addition, these statistics are limited to those offences that are heard in the regional courts and which merit life sentences, and are thus referred to the high courts for sentencing (section 52s). No records are thus kept of:



- Minimum sentence cases heard and sentenced in the regional court (or the district courts) where sentences below life imprisonment are given.
- Minimum sentence cases which are dealt with from inception in the high courts.

In addition, no record is kept of 'type of offences' cases referred to the high court e.g. for murder or rape. Thus the statistics only capture:

- Convictions confirmed by the high court
- Convictions set aside by the high court
- Sentences imposed

Sentences are divided into:

- 15 years
- More than 15 years
- Life imprisonment

It should also be noted that it is only after April 2005, that the figures were broken down into the abovementioned categories. Prior to this, only the total number of referrals from the regional to the high courts was specified.

2.2. Statistics collected by the DCS

The DCS keeps information regarding admissions, release and current population, as well as data on prison population by sentence length. Sentence length categories include:

- 0-6 months
- 6-12 months
- 12-24 months
- 2-3 years
- 3-5 years
- 5-7 years
- 7-10 years
- 10-15 years
- 15-20 years
- More than 20 years
- Life sentence
- Other sentences

Since 1995, the DCS Management Information System provides for four general categories of offence, and an additional 'other' category. These are:

- Aggressive crimes (includes murder, assault, armed robbery etc)
- Sexual offences



- Economic offences
- Narcotics

The DCS has made statistics available on the number of offenders in the crime categories of murder and rape serving sentences in prison. The DCS does not keep any information on whether an offender was sentenced using the minimum sentence legislation.

2.3. Statistics collected by the SAPS

The SAPS keeps information on the number of cases registered by crime category (i.e. rape or murder), the number of charges to court per crime category, and the number of charges found guilty per crime category. However, they do not collect information on sentences given, nor on whether the accused were sentenced using the minimum sentencing legislation.

From the above, it is clear that it is possible to collect statistics from the various criminal justice cluster departments which provide information on the status of violent crime in this country and its impact on prisons. However, it is not possible to determine the role that the minimum sentencing legislation plays in this regard.

3. Number of convictions stemming from the Act

As mentioned earlier, it is not possible to ascertain from the available statistics, what the number of convictions stemming from the Act (particularly for category 1 offences for murder and rape) have been between 2000 and 2006. The following information is available:

As background, Table 1 illustrates that the number of murders and rapes reported in 2006 has decreased in comparison with 2000. Of some concern is the fact that the number of charges referred to court has decreased in the case of murder. An increase in charges referred to court is noted in the case of rape. The actual number of convictions outlined in Table 2 is thus very small in comparison to the number of cases registered.

Table 1: Crime cases registered and charges referred to court 2000-2006

	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07
Cases registered:	21 683	21 180	21 738	20 456	18 828	18 811	19 043
Murder							
Charges referred to court:	12 518	11 940	12 091	11 630	11 325	11 641	11 597
Murder							
Cases registered:	53 383	54 493	52 107	52 536	54 732	55 451	52 887
Rape							
Charges referred to	25 248	29 403	29 957	30 091	31 774	32 225	31 179



court: Rape							
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SAPS Crime Administration System (2007)

The SAPS has provided statistics on the number of convictions for murder and rape for the period 2000 to 2006. As Table 2 illustrates the number of convictions for both murder and rape, have in fact decreased over this period.

Table 2: Convictions for murder and rape (2000-2006)

Crime category	2000	2001	2002	2003	2004	2005	2006
Murder	4 807	5 532	5 207	4 775	5 196	4 341	4 137
Rape	5 014	6 088	6 057	5 564	6 242	5 575	4 778

SAPS Crime Administration System (2007)

The following table illustrates the number of referrals from the regional to the high courts (s52s) where life imprisonment was presumed by the regional courts to be the applicable sentence, in terms of the Act. As mentioned earlier, this is the only type of data kept by the criminal justice cluster, which specifically relates to the minimum sentencing legislation.

Table 3: Referrals to the high courts (April 2004-March 2007)

Period	Total cases referred by the regional to the high courts	Sentenced by the high courts	Acquitted by the high court	Referred back to the regional courts	Sentences of less than 15 years imposed	Sentences of more than 15 years imposed	Life sentences imposed
April 2004-March 2005	1 295						
April 2005-March 2006	1 267	1 083	125	59	351	387	205
% in terms of the three sentence categories					37%	41%	22%
April 2006-March 2007	1 151	988	109	54	277	411	150
% in terms of the three sentence categories					33%	49%	18%

National Prosecuting Authority (2007)



This table illustrates that in only 22% of cases in the 2005 financial year and 18% of cases in the 2006 financial year that were referred by the regional courts to the high courts as requiring a sentence of life imprisonment in terms of the minimum sentencing law, was the required sentence of life imprisonment actually imposed. Thus in the majority of instances (78% in 2005/06 and 82% in 2006/07) the high courts imposed a lesser sentence than that of life imprisonment as stipulated by the law.

It may be possible to make some kind of conclusion if one looks at the number of convictions for rape and murder (4 137 for murder and 4 778 for rape) for 2006 and compares this figure of 8 914 with the figures provided by the NPA. Thus for example, only 150 life sentences were applied by the high court (in relation to regional court referrals), yet 8 914 persons were convicted during that period for murder and rape.

4. Number of murder and rape offenders in prison

The following information is available on the number of offenders in prison serving sentences for murder and rape:

Table 4: Sentenced offenders serving sentences for murder and rape (2007)

Crime Category	Number of offenders
Murder	22 749
Rape	15 586

Department of Correctional Services (2007)

Table 4 illustrates that a total of 22 749 offenders are currently serving sentences for murder and 15 586 offenders are serving sentences for rape. Unfortunately, the DCS did not provide figures for the preceding years.

However, the DCS did provide information on the breakdown of offenders in terms of the crime categories for aggressive and sexual offences for the period 2000 to 2007. Table 5 illustrates that the percentage of offenders in terms of the total sentenced and unsentenced prison population incarcerated for aggressive and sexual offences has increased from 56% in 2000 to 70% in 2007.

Table 5: Sentenced and unsentenced offenders in prison by crime category (2000-2007)

Crime Category	2000	2001	2002	2003	2004	2005	2006	2007
Aggressive	73 556	77 421	83 323	88 720	92 654	89 900	86 529	87 202
Sexual	21 667	22 303	23 795	25 349	26 284	26 455	25 602	25 649
% of all offenders in prison for sexual and aggressive offences	56.83%	58.34%	59.45%	61.40%	63.79%	68.66%	70.59%	69.96%
Total sentenced and unsentenced offenders in prison	167 567	170 928	180 173	185 783	186 467	169 459	158 859	161 319

Department of Correctional Services (2007)



5. Percentage of offenders incarcerated for murder and rape who were sentenced using the minimum sentencing legislation

As mentioned earlier, it is not possible from the available statistics to ascertain the percentage of offenders incarcerated for murder and rape who were sentenced using the minimum sentencing legislation. However, the following information is available from DCS:

The DCS provided information on the number of offenders who are serving life sentences for sexual offences and for aggressive offences from 2000 to 2006.

Table 6: Offenders serving life sentences in prisons for sexual and aggressive offences (2000-2006)

	2000	2001	2002	2003	2004	2005	2006
Sexual offences	103	276	527	803	1 084	1 343	1 528
Aggressive offences	1 331	2 031	2 760	3 438	4 157	4 842	5 450

Department of Correctional Services (2007).

It is clear that the number of offenders serving life sentences in prison for sexual and aggressive offences has increased substantially from 2000 to 2006. If one compares these figures in Table 6 with the figures in Table 7, it illustrates that the vast majority of persons serving life sentences have committed sexual and aggressive crimes (such as rape and murder). For example, in 2006, 6 185 of the total of 6 998 offenders serving life sentences were incarcerated for sexual and aggressive offences.

Table 7: Offenders serving life sentences in prisons (2000-2007)

Year	2000	2001	2002	2003	2004	2005	2006	2007
Offenders sentenced to life imprisonment	1 436	2 313	3 296	4 249	5 284	6 214	6 998	7 490

Department of Correctional Services (2007).

Table 8 provides a breakdown of all sentenced offenders in prison according to sentence length.

Table 8: Offenders in prison by sentence length 2000-2007

Sentence category	2000	2001	2002	2003	2004	2005	2006	2007
0-6 months	6 102	6 034	6 453	6 514	5 862	5 098	4 640	4 445
6-12 months	6 808	6 676	6 665	6 826	6 330	3 971	4 163	3 975
12-24 months	6 211	6 279	6 335	6 375	6 254	3 876	4 004	4 147
2-3 years	15 188	16 526	17 283	17 470	18 021	13 144	11 402	12 958



3-5 years	16 068	16 198	17 064	16 836	16 804	13 777	10 392	10 460
5-7 years	13 688	12 994	12 854	12 509	12 240	10 762	8 576	7 777
7-10 years	19 044	20 209	21 174	21 411	21 403	20 010	17 526	15 961
10-15 years	11 734	14 516	17 519	20 131	22 161	23 539	23 956	23 571
15-20 years	5 137	6 316	7 669	8 948	10 120	10 920	11 375	11 629
More than 20 years	5 395	6 437	7 452	8 312	8 934	9 332	9 583	9 693
Life sentence	1 436	2 313	3 296	4 249	5 284	6 214	6 998	7 409
Total sentenced	109 764	117 182	126 174	131 717	135 254	122 157	113 781	113 061

Department of Correctional Services (2007)

6. South African Research

Two comprehensive studies on the impact of minimum sentencing were completed as recently as October 2006. These are:

- O' Donovan, M and Redpath, J (2006). The Impact of Minimum Sentencing in South Africa: Research Report for the Open Society Foundation South Africa
- Giffard, C and Muntingh, L (2006). The Effect of Sentencing on the Size of the South African Prison Population: Report commissioned by the Open Society Foundation for South Africa.

The study by O' Donovan and Redpath, in particular offers an extremely objective analysis of the impact of the minimum sentencing legislation in South Africa. Its conclusions are in line with an analysis that recognises that the minimum sentencing legislation has not in itself resulted in overcrowding in prisons. In addition, in recognition of the fact that insufficient statistics are kept in the criminal justice cluster around the minimum sentencing legislation, the authors have supplemented their analysis of the available statistics with a review of selective court records at a sample of three regional courts, as well as with interviews with court officials.

Main conclusions of the study:

- The scrapping of the minimum sentencing legislation is 'unlikely to result in significant reduction in the sentences passed for violent and sexual offences'.
- Minimum sentencing has lifted the bar in terms of penalties for the relevant offences.
- The abolition of the minima is unlikely to result in increased judicial discretion or a marked reduction in sentence length.
- Arguments that changing minimum sentencing will alleviate prison overcrowding are for the moment, facile as the impact of minimum sentencing is yet to be felt.
- The current congestion in prison (in relation to sentenced offenders) is primarily the product of increasing the sentencing jurisdiction of regional courts and of the general increase in the tariff for violent crime.



- Ultimately solutions rest on a reduction in violent and sexual offences that prompted the legislation in the first place. This however falls well beyond the scope of the Criminal Justice System and lies more firmly in the realm of social and economic policy and in the strengthening of families.

7. Comparative analysis of the advantages of minimum sentencing, with special reference to the United States and Canada

7.1. Introduction

In 1997, the South African *Criminal Law Amendment Act* 105 of 1997 introduced minimum sentences of 5, 7, 10, 15, 20, 25 years and life for a variety of offences including robbery with aggravating circumstances, corruption, drug dealing, assault, rape and murder. The Act obliges presiding officers to impose not less than the prescribed minimum sentence, unless substantial and compelling circumstances justify a lesser sentence. Suspension of any part of such sentence is prohibited. The sentence prescribed varies depending upon the severity of the crime and the number of previous convictions of the convicted person. (Some examples of minimum sentences are life imprisonment for murdering a police officer, for the rape of a woman under the age of 16 years, and for gang rape. The prescribed sentence for vehicle hijacking is 15 years imprisonment).

Mandatory minimum sentencing is nothing new, having been in use since time immemorial. Commentators point to the *lex talionis* – an eye for an eye, a tooth for a tooth – as one example of mandatory punishment that dates to biblical times. Today, despite attendant controversy, mandatory minimum sentencing is used in other countries, such as the United States, Canada and England.¹

Mandatory sentencing legislation require judges to sentence convicted offenders to specific prison terms for a fixed number of years. Typically this will mean that when convicted of certain crimes, the offender must serve at least some absolute minimum prison term before becoming eligible for parole. In some cases, parole is precluded.

Generally speaking, mandatory sentences of imprisonment can be classified as follows:

- Mandatory sentences of imprisonment that allow no discretion in the imposition of the sentence. These are usually reserved for murder.
- Mandatory minimum sentences of imprisonment that require courts to impose a sentence of at least 'X' years. Courts may impose a harsher sentence up to a statutory maximum but are not allowed to impose a sentence below the prescribed minimum (for example, in Canada, firearm mandatory minima require that the courts impose a term of at least four years in custody on conviction of enumerated offences in which a firearm was used).
- Mandatory sentences of custody that permit a court to impose a lesser or even non-custodial sentence in the event that exceptional circumstances exist (As is the case in South Africa, the United Kingdom (England and Wales)).

It should be noted that after enjoying considerable popularity in the 1990s, mandatory sentences have seen growing opposition from a variety of parties. In some instances, such opposition has seen movement towards a

¹ Mandatory minimum sentencing occurs in both western and non-western nations.



more flexible, judge-determined sentencing scheme resulting in the amendment or even repeal of mandatory sentencing, as occurred in the Australian Northern Territories.

This paper sets out the findings of international research on the impact of mandatory minimum sentencing. As much of the research been conducted in the United States, the paper concentrates on findings in relation to that country. While there is some discussion of mandatory minimum sentencing in Canada, it is noteworthy that research on its impact in that country is lacking, making analysis difficult.

7.2. Arguments for and against mandatory minimum sentencing

Proponents of mandatory minimum sentencing believe that these penalties act as a general or specific deterrent; prevent crime by incapacitating or removing the offender from society; have a denunciatory or educational purpose; and reduce sentence disparity.

Opponents of mandatory minimum sentencing argue that it has little or no deterrent value; the rigid penalty structure limits judicial discretion not only preventing the imposition of just sentences, but also resulting in the imposition of grossly disproportionate sentences; it creates difficulties in convicting offenders where the penalty is believed to be unduly harsh; its is costly, and may increase the prosecutorial burden and produce substantial increases in the prison population; and it may exacerbate racial/ethnic/gender bias in the justice system if applied disproportionately to minority groups.

7.3. Mandatory minimum sentencing as a deterrent

There is extensive research on whether or not punishment in general acts as a deterrent. Criminal sanctions have been found to carry some deterrent and incapacitative effect. This, however, varies according to a number of factors:²

- The nature of the crime. Deterrent effects may be crime specific.
- The target group. More persistent or repeat offenders are less likely to be deterred by the threat of punishment.
- Moral prohibitions associated with the behaviour. Those who will experience shame or embarrassment as a result of their involvement in crime are less likely to commit that crime.
- Knowledge of the pertinent sanction. Public awareness of the nature and severity of criminal sanctions is a prerequisite for deterrence.
- The certainty of punishment. Some studies have shown that crime rates decline in the face of probability of arrest.
- The swiftness with which the punishment follows the crime.
- The severity of the sanction. Evidence in this regard is mixed at best.
- Perceptions of the risk of incurring the sanction. Generally those who believe that they are likely to be caught and punished will be less likely to commit a criminal act.

Thus, the many factors that shape the potential deterrent effect of criminal sanctions preclude simplistic, sweeping generalisations that either affirm or deny the presence of a deterrent effect.

² Gabor, T. & Crutcher, N. Mandatory minimum penalties: Their effects on crime, sentencing disparities and justice system expenditures. January 2002.



In the case of mandatory minimum sentences, the research on both certainty and severity are particularly relevant. The evidence suggests that severity of sanction may be less critical to deterrence than initiatives aimed at boosting the certainty of being punished. In short, it is a high rate of detection (the certainty of being caught) and not severity of punishment that acts to deter crime.

In fact, these factors (namely, severity and certainty) may operate at cross-purposes, as actors within the criminal justice system have been known to circumvent laws that they believe to be draconian by failing to charge or by refusing to convict guilty defendants. Therefore, excessively harsh penalties may undermine the certainty of imprisonment.

A further factor is that as a consequence of the finite capacity of prisons, certainty of imprisonment may be accompanied by a reduction in the length of sentences imposed or lead to early releases.

Research has shown that the incapacitating effect of mandatory minimum sentences may have some impact on crime. However, internationally research has found that removing offenders from society through incarceration has only a small impact on crime. Furthermore, the costs of incarceration are many when weighed up against the small amount of crime it prevents.

7.4. Research on the deterrent effect of minimum mandatory sentencing in the United States

4.4.1. Crime and incarceration rates

In general, crime rates in the United States have declined. Comparative studies of data results from a series of victimisation surveys conducted among industrialised nations, including the United States, indicate that rates of victimisation for Americans are generally in the mid-range. In fact, for a variety of offences, American citizens are at less risk than their counterparts in other nations. For violent crime, however, Americans are considerably less safe than citizens of other countries. While this has declined in the past decade (for example, the murder rate has declined from 9.8 per 100 000 inhabitants in 1991 to 5.6 per 100 000 in 2005),³ the homicide rate in the United States is still four times that of most nations in Western Europe.⁴

7.4.2. California 'three strikes' law

Among the best known and probably most thoroughly evaluated laws prescribing mandatory minimum sentencing has been the California 'three strikes' law enacted in March 1994. This law calls for a mandatory sentence of 25 years to life for offenders convicted of any felony, following two prior convictions for serious crimes. The law also increases the prison sentence for second strike offenders, requires consecutive prison sentences for multiple-count convictions and limits good time credits to 20% following the first strike. The policy implication for such a law is that incapacitation of chronic offenders should occasion major reductions in crime. Researchers projected that a fully implemented three strikes law would reduce serious felonies by between 22% and 34%.⁵

³ United States crime rates 1960 – 2005.

⁴ Mauer, M. Comparative international rates of incarceration: An examination of causes and trends. 20 June 2003.

⁵ Gabor & Crutcher. January 2002.



Stolzenberg and D'Alessio evaluated the impact of the law on the rates of serious crime in California's ten largest cities, finding that the rate of serious crime dropped by 15% from the 9-year pre-implementation period to the 20-month post-implementation period.⁶ However, analysis suggested that the drop in index crimes was due to a declining trend in the occurrence of these offences that was already underway before the law was enacted. Nevertheless, the authors did find a significant drop in crime in one city. Furthermore, the margin in the drop in serious crime in the post-implementation phase was significantly greater than for petty crime.

Another analysis of the impact of California's three strikes law indicated that major crime dropped more sharply in the state than it did nationwide. In the first year of the law, crime dropped by 4.9% as opposed to 2% in the United States as a whole.⁷

While these findings provide mixed support for the deterrent effect of such legislation, there has been no systematic attempt to explore the role that the enactment of the three strikes law has played in crime reduction, as opposed to other economic and demographic factors.⁸

A further confounding factor is that mandatory minimum sentencing applies only to a fraction of those who enter the justice system in the United States. Accordingly, they are likely to only marginally affect crime rates. As of August 1998, of the 22 states that had adopted 'three strikes' laws, six or less individuals had been sentenced under these laws. Only in California have these laws been applied to a sizable group of offenders. In addition, 85% of those convicted under California's mandatory minimum sentencing laws were non-violent or drug offenders, thereby limiting its limiting impact on violent crime.⁹

Other factors that have been advanced as possibly playing a role in the absence of a more pronounced effect include the inconsistent application of mandatory sentencing legislation, the small number of individuals to whom these laws apply, and the possibility that the most serious and persistent offenders already tend to be serving long sentences under existing legislation.¹⁰

7.4.3. Mandatory minimum sentencing in the United States and increased prison populations

In the past thirty years, incarceration rates in the United States have increased six-fold since 1972. There are presently approximately two million people in the United State's prisons and jails.¹¹ However, the nature of the relationship between crime rates and incarceration is unclear.

During the national decline in crime during the 1990's, states with the greatest increases in incarceration tended to experience modest declines in crime.¹² Nationally, however, in the 1990s, crime decreased with increasing incarceration rates. This finding is contradicted by the fact that in the 1980's, increased incarceration rates were

⁶ Referred to in Gabor & Crutcher. January 2002.

⁷ Gabor & Crutcher. January 2002.

⁸ Gabor & Crutcher. January 2002.

⁹ Gabor & Crutcher. January 2002.

¹⁰ Gabor & Crutcher. January 2002.

¹¹ Mauer, M. 20 June 2003.

¹² Gabor & Crutcher. January 2002.



accompanied by an increase in crime rates. Therefore, rising incarceration rates (attributable in part to the introduction of mandatory sentencing minima) has only an inconsistent relationship with crime.¹³

Some commentators argue that countries choose the rates at which their citizens are imprisoned. A study of rising prison populations from 1977 to 1988 found that this was strongly influenced by explicit changes in imprisonment policies, including the introduction of mandatory minimum sentencing.¹⁴ This argument holds that the United States has chosen at a policy level to increase its prison population.

In the United States, the high rate of imprisonment is explained by several factors:¹⁵

- A higher rate of violent crime than other industrialised nations.
- Harsher sentencing practices than in other nations, particularly for property and drug offences.
- Sentencing policy changes over a period of three decades, particularly the shift toward mandatory sentencing, restrictions on judicial discretion and a greater emphasis on imprisonment as a preferred sanction.
- Policy changes adopted as part of the war on drugs, leading to increased use of the criminal justice system as a means of responding to drug problems.

It is argued that mandatory minimums enhance public safety by removing dangerous offenders for substantial amounts of time. While two leading studies have concluded that during the 1990s about 25% of the decline in violent crime during this period resulted from the rise in imprisonment, there has been no study of other possible contributing factors. Nevertheless, these are thought to include the fact that during the 1990s the United States enjoyed a relatively healthy economy with higher rates of employment, changes in policing policy toward community policing, the waning of the crack epidemic, and behavioural changes among young people in high crime neighbourhoods toward safe conduct.

Therefore, while mandatory minimum sentencing forms part of policy decision-making, the relationship between it and the increased prison population is far from clear, making it difficult to draw any conclusions as to the deterrent or incapacitating effect of mandatory minimum sentencing.

7.4.4. Mandatory minimum sentencing in the United States and its effect on sentencing disparity

There is no evidence that minimum mandatory sentencing reduces discretion or disparities in sentencing. While judicial discretion in the sentencing process is reduced, prosecutors play a more pivotal role as their charging decisions become more crucial. The shift also represents a loss of transparency in decision-making, as prosecutorial decisions are less open to scrutiny than those made by judges. In California, under the three strikes law, prosecutors have been inconsistent in their application of the law; particularly where they believe that to apply the law would be unduly harsh.

¹³ Mauer, M. Testimony of Marc Mauer (Executive Director of the Sentencing Project) before the House Judiciary subcommittee on crime, terrorism and homeland security. 26 June 2007.

¹⁴ Mauer, M. 20 June 2003; Redpath, J & O'Donovan, M. Reaching a verdict. The impact of minimum sentencing. SA Crime Quarterly no. 19, March 2007.

¹⁵ Mauer, M. 20 June 2003.



The 1991 report on mandatory sentencing commissioned by the United States Sentencing Commission documented that in a sample of cases involving circumstances where a mandatory could have been charged, the dynamics of plea negotiations resulted in 35% of defendants pleading guilty to non-mandatory or reduced mandatory minimum offences.¹⁶ However, more recently, the Sentencing Commission reported that in 2006, 20 737 of 69 627 federal cases (or 29.8%) were convicted of a statute carrying mandatory minima. Of these offenders, 93% pled guilty and 6.8% were convicted after a trial. By comparison, 95.7% of the 69 403 offenders pled guilty and 4.3% were convicted after a trial.¹⁷

It has been shown that offenders are less likely to plead guilty when the probable sentence is likely to be the harshest possible, creating additional work for the courts.

Another significant impact of mandatory minima on plea bargaining is the inducement of defendant co-operation. A prosecutor who wishes to obtain incriminating evidence will often turn to the most accurate source, the criminals themselves in return for sentencing concessions. This practice is widespread and occurs in the federal system especially, where in exchange for their co-operation (or substantial assistance), defendants are given the promise that they will not be charged with crimes that carry the mandatory sentence.

7.5. Minimum mandatory sentencing in Canada

In Canada, the Criminal Code contains 29 offences that carry mandatory minimum sentences of imprisonment. By far the majority of these were introduced with the enactment of a package of firearms related legislation in 1995. In addition, there are also mandatory minimum sentences for other offences such as child prostitution, betting, pool-making, and impaired driving. With respect to firearms offences, courts must impose a sentence of at least four years imprisonment if the offender is being convicted of a listed offence. Currently, there is no discretion for judges to reduce the sentence for anyone convicted of an offence carrying a mandatory minimum sentence in Canada.

Minimum sentences in Canada fall into four principal categories:

- The first is a mandatory life sentence on conviction for treason, first degree murder and second degree murder.
- The second consists primarily of firearms offences.
- The third category pertains to repeat offenders (for the same offence). There are seven offences in this category, including driving while impaired, betting and the possession of unauthorised weapons.
- The fourth category is that of hybrid offences. In the case of hybrid offences, prosecutors have the option of proceeding by way of summary or indictable offence. For the three firearms offences in this category, if the Crown decides to proceed by way of indictment, a conviction will result in the imposition of a mandatory minimum sentence.

There has been very little research on the impact of mandatory sentencing legislation in Canada and no research whatsoever on the impact of the 1995 firearms legislation. However, one study conducted in 1994 on the mandatory minimum one-year sentence for offenders convicted of using a firearm during the commission of

¹⁶ Mauer, M. 26 June 2007.

¹⁷ Hinojosa, R. Statement of Chair United States Sentencing Commission before the House Judiciary subcommittee on crime, terrorism and homeland security. 26 June 2007.



an offence under the criminal code found that about 2/3 of charges brought under this section were stayed, withdrawn or dismissed. Where prosecutors proceeded with charges under the relevant section, there was a lower possibility of conviction.¹⁸ Furthermore, the judiciary in Canada is generally opposed to mandatory minimum sentencing as they believed they impinged on their ability to impose just sentences and that an inappropriate agreement between defence and Crown counsel might result.¹⁹ However, it should be noted that Canadian law contains no 'exceptional circumstances' clause, as is the case in South Africa.

7.6. Conclusion

Proponents of mandatory minimum sentencing argue that it has a deterrent effect on crime. Unfortunately, the research in support of this is inconclusive. While, in the United States, crime has decreased, the deterrent effect on crime of mandatory minimum sentencing has not been proved. It is difficult to know whether the observed drop in crime rates is caused by strict laws, strong economies, or some other factor. What is known is that it is the certainty of being caught rather than the severity of punishment associated with mandatory minimum sentencing that has a greater deterrent effect on crime.

The incapacitating effect of mandatory minimum sentencing is thought to have a greater deterrent effect on crime by placing offenders behind bars for long periods of time. Research has shown that there is a modest reduction in crime associated with incarceration. However, over time the incapacitating effects diminish, as older offenders serving life terms would be less likely to be involved crime at that point of their lives. The very high costs of incarceration coupled with ancillary social costs must be weighed up against the small reduction of crime.

Mandatory minima are also argued to ensure that there is less sentencing disparity. Unfortunately, this has not been shown to be the case as in the United States discretion in decision-making is shifted elsewhere. The role that prosecutors play is key in this regard.

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United States crime rates 1960 – 2005.

¹⁸ Department of Justice Canada. Mandatory sentences of imprisonment in common law jurisdictions: some representative models.

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