

Mandatory Sentencing Laws The case against

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[This paper was prepared in response to statements made by the Opposition Shadow Attorney-General in Queensland (Mr Lawrence Springborg) seeking to gather support for the introduction of mandatory gaol directives in sentencing laws. Mr Springborg's paper can be obtained from the [Brisbane Institute](#).]

Sending someone to gaol would, I expect, be a very difficult thing to do, particularly if one is aware of the conditions in gaol or has had contact with someone who has spent even a short period in a gaol. Imprisonment is intended to be, and usually is, a severe form of punishment. There is in gaol a real risk of forced sex, bullying and serious assault. Most drugs are readily available in gaol. If the offender is youthful, happens to have some impairment like a mental disease (depression, schizophrenia etc), a physical disability, a drug addiction or the usual manifestations of poverty then it must cause grave concern to order that he or she enter the general prison population. Such a decision is particularly perplexing one when, for example, an offender has repeatedly committed minor property offences. The community, however, understandably expects a serious response to this conduct.

Under our current system, the government appoints lawyers as judges to undertake this difficult task of sentencing. It also enacts legislation to provide guidelines and principles for these judges. The criminal justice system is however administered by human agency and is capable at times of individual errors of under and over sentencing. The shadow Attorney-General, Lawrence Springborg, in his recent speech to the Brisbane Institute points to some of these examples and has indicated an intention to change this system if his party is elected. He advocates that mandatory sentencing be introduced in Queensland. He proposes replacing the sentencing discretion that is currently reposed in judges and magistrates, with compulsory gaol for certain offences and repeat offenders. An election is looming and his views will be popular. It would be wrong for Queenslanders to embrace his approach:

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- ?? Sentencing necessarily involves an exercise of discretion, because no two cases are the same and many subjective factors must be considered. The variables include the offender's age, gender, character, background, any drug addiction, the causes for that addiction, attempts at and prospects of rehabilitation, the motivation for the offence, and the history of prior offending behaviour, alcohol abuse and many others. Two offenders who commit the exact same offences may warrant considerably different penalties. To replace judicial/expert opinion and discretion with compulsory gaoling will routinely unjustly send people to gaol.
- ?? Any system of sentencing will reveal instances of injustice either through under-sentencing, over-sentencing or otherwise inappropriate sentencing. The use of isolated instances to justify wholesale change is not convincing. (Some of Mr Springborg's examples require proof - the only amphetamine supplier to school children who was not gaoled that I am aware of was a school child himself). There is in place an appellate process to correct sentencing error by individual judges. Any failure to appeal should attract criticism of those advising the Attorney-General (who holds the power to appeal) rather than the individual judge, let alone the whole sentencing system. Indeed, if there are to be errors then as a community, we should probably prefer isolated under-sentencing to automatic over-sentencing which is also likely to be routine if there is compulsory gaoling.
- ?? Mr Springborg should analyse the considerable research that has been undertaken by experienced criminologists about the causes of crime in Australia instead of resorting to a simplistic comparison with the 'successful' measures taken in totalitarian States such as Singapore. (Singapore is a poor example about property offences as the rich usually live in secure apartment blocks rather than exposed houses). He will discover that there are more complex reasons associated with increases in crime than under-sentencing by the courts. Some obvious ones are:
- the increasing disparity between the rich and the poor;
 - the disillusionment of youth and a greater use of drugs by them;
 - the side effects of economic downturns in communities particularly rural centres;
 - the social disillusionment attending the Aboriginal community;
 - the poverty, dislocation and isolation within migrant communities; and
 - unsuccessful social policy experiments in town planning.
- ?? The most direct causes of crime are drug (including alcohol) addiction and abuse, under-education and poverty. Those that descend into crime come from a wide pool but are usually poor. Improving the economic and social circumstances of these people is likely to have a greater impact on reducing their resort to crime than sending more of them into gaol.

- ?? Any increase in the certainty of gaol can, of course, act as significant short term deterrence. However, simply wielding a bigger stick is never likely to be enough. The resources spent on increasing penalties and the number of people in gaols is surely better spent on educational, prevention and rehabilitation programmes which address the root causes of the offending behaviour. It must be obvious that the community gains much more from rehabilitated offenders than institutionalised ones.
- ?? Zero tolerance for crime will of course reduce offending. The Singaporean system lauded by Mr Springborg obviously works in a mathematical graph analysis. But is that what a mature and sophisticated community wishes to achieve at the expense of social and cultural development? Could a zero tolerance policy ever accommodate the many complex factors that pervade youth crimes and those committed by the poor, the mentally impaired and the marginalised all of whom are already over represented in the criminal justice system? Thankfully, even Mr Springborg can see that the 'political' resistance to flogging makes it unpalatable for him to advocate some Singaporean principles as plausible in Queensland.
- ?? Mr Springborg places substantial reliance on the Crime (Sentences) Act 1997 in the United Kingdom to support the call for mandatory sentencing. That legislation, although using terms like "Mandatory and Minimum Custodial Sentences", in fact has a provision that states "the court shall impose a custodial sentence [etc] ... unless there are specific circumstances (...) which would make the prescribed custodial sentence unjust in all the circumstances". Therefore, even in that jurisdiction, it is not compulsory to gaol. Mr Springborg is either mistaken or just talking tough while recognising the unjustness of mandatory gaol.

It is clear that elected governments are responsible for protecting the community from crime and that responsibility has never been easy. It continues to gain both legal and social complexity. It is also true that many in the community have a dim regard for the plight of 'criminals' and are unlikely to be concerned with stricter measures against them. The general public are unlikely to appreciate that these criminals are usually ordinary people caught in exceptional circumstances or are themselves the victims of past criminal conduct. There is no short and easy answer to crime prevention and reduction.

There is also of course a direct relationship between the type of lawyers appointed as judges and magistrates and how the task of implementing government policy on sentences is achieved. In the Northern Territory, the Chief Minister has suggested that any judicial officer unhappy enough

with compulsory gaoling to speak out should resign. In that jurisdiction lawyers with consciences are not valued. It is perhaps trite to observe that the first attribute that should be held by appointees to judicial office is a capacity to understand and implement the law with compassion and sense. It is generally accepted that it is not necessary that a lawyer who becomes a judge have any prior experience in criminal law, even though most State judges spend most of their time in the criminal jurisdiction.

Mr Springborg's attempt to relate the quality of recent judicial appointments to that of the sentencing process is misdirected. There have only been two appointments to the Court of Appeal in the current term. One is generally regarded in the profession as the pre-eminent authority on criminal law in the State and the other has decades of criminal law experience as a trial lawyer and as a District Court judge. The Court of Appeal hitherto had judges with almost no experience in the criminal law jurisdiction as practitioners prior to appointment and only one had any significant experience as a trial judge in that jurisdiction. Since the Court of Appeal generally sets the tariffs for sentencing in Queensland, it is difficult to see the nexus that Springborg contends for. If governments want longer gaol terms to be imposed they should have the honesty to amend statutes to increase penalties rather than blame judges who are applying the law with an appropriate measure of compassion and sense.

It is however true that the current Attorney-General, Matt Foley, over the last term, has actively set about attempting to correct the gender imbalance on the bench. This has attracted support as well as criticism. Most agree that correcting gender imbalance in judicial positions is important, but that merit is the essential criterion. Mr Foley has routinely responded by suggesting that the pool from which judges and magistrates are being appointed from should be widened. It remains to be seen, as in other areas of affirmative action, whether Mr Foley's approach diminishes the quality of sentencing. If one thinks about it that seems rather unlikely.

This cocktail of competing issues allows both sides of politics to seek popular support for their respective agendas, and unfortunately political expediency will always be the foremost

consideration. Perhaps that is in fact the primary cause of injustice in the reform of the criminal justice system - the politicisation of a process which allows public sentiment to be ventilated, discussed and courted in a manner devoid of detail, and encourages argument by example rather than a careful and balanced deconstruction of its inherent complexities. This approach raises consideration of the pool from which that political parties attract aspiring politicians. What criteria of education, experience or learning is assessed before members of parliament are elected to office and selected by other politicians to determine policy as difficult as criminal justice? A lawyer is qualified to become a politician without doing a single thing other than foster popularity, whereas judges take many years before they even reach the pool from which judges are selected. Both sides of politics possess popular politicians who have recently demonstrated appalling shortcomings in judgement. It is useful to compare and contrast the 'qualifications', experience and capacity for considered judgment possessed by judges, both men and women, to that held by politicians who criticise them. It is incumbent on all lawyers to resist the introduction of mandatory sentencing and inform the community of why these measures should not be seen as the only options in the fight against crime. If mandatory sentencing is introduced, we will all regret not having done enough.

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