Executive Summary & Recommendations

INTRODUCTION

Mandatory sentences evoke vastly different, but deeply felt responses. Some view mandatory sentences as vital law enforcement tools that yield deterrence, rein in overly lenient Judges, and promote uniformity of punishment. Others view mandatory sentences as counterproductive, if not pernicious, devices that not only fail to deter, but actively promote disparity and injustice. Many of these competing views stem from anecdotes and other small slices of reality. It may be that mandatory sentences fit all of these varied descriptions depending on the circumstances. While much remains to be learned, this report sheds important light on the frequency, effectiveness, and wisdom of mandatory sentences in Pennsylvania.

House Resolution 12, adopted October 16, 2007, directed the Pennsylvania Commission on Sentencing to study the use and impact of mandatory minimum sentences on the criminal justice system in Pennsylvania. In an effort to gather a broad spectrum of input, the Commission established an advisory committee, comprised of legislators, judges, district attorneys, and public defenders. This advisory committee met ten times and offered important guidance to the Commission. In addition, Commission staff conducted interviews, surveys, extensive data analyses and several studies, working in collaboration with faculty and students of The Pennsylvania State University.

After considerable study and consultation, the Commission on Sentencing has made numerous findings and issued multiple recommendations, which are discussed in the following pages. For example, the Commission found that: (1) fewer than half of all convictions for mandatory-eligible offenses resulted in the mandatory sentence; (2) only 34% of Pennsylvanians surveyed could correctly name a mandatory-eligible offense; and (3) neither the length of sentence, nor the imposition of the mandatory sentence per se, was a predictor of recidivism.

The Commission’s recommendations include specific suggestions for the General Assembly, the Criminal Procedural Rules Committee, and its own future research and actions. Most notably, the Commission recommends that the General Assembly: (1) allow sentencing courts to use existing authorized sentencing options, including State Intermediate Punishment and County Intermediate Punishment, to satisfy lower-level drug trafficking mandatory minimum sentences; (2) amend the drug trafficking statute to increase the threshold for cocaine, eliminate the stacking of previous convictions, link penalties to the aggregate weight of compounds and mixtures in the judicial proceeding, and reduce mandatory fines; and (3) repeal the Drug-Free School Zone mandatory legislation, which is irregularly applied and overbroad geographically, in favor of the existing guidelines-based youth and school sentencing enhancement.

The Commission’s work, mandated by HR 12, is consistent with its statutory mission to “(m)ake recommendations to the General Assembly concerning modification or enactment of sentencing, parole and correctional statutes which the commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.” 42 Pa.C.S. § 2152(a)(12). The Commission stands ready to work with the General Assembly and the Governor to implement these recommendations.
**Purposes of Sentencing**

Pennsylvania’s Sentencing Code requires criminal courts to consider the following principles when determining the sentence to be imposed: confinement that is consistent with the protection of the public; the gravity of the offense as it relates to the impact on the life of the victim and on the community; and the rehabilitative needs of the defendant (42 Pa.C.S. §9721(b)). As such, each sentence is individualized, with the court taking into account the nature of the offense and risks and needs of the offender.

Among the purposes identified in HR 12 for mandatory minimum sentences are the following:

- Certainty of punishment (defining a minimum term the court is required to impose on a defendant);
- Incapacitation (interrupt the life cycle of violent and other serious crimes);
- Deterrence (deter certain types of crimes);
- Retribution (sentence should bear a rational relationship to the type of crime committed).

Through this study, the Commission found many current practices that undermine the principles of sentencing generally and compromise the stated purposes for mandatory minimum sentences specifically, especially the certainty of punishment and deterrence. This suggests the need for more targeted and consistent application of mandatory sentencing provisions if these purposes are to be achieved.

In Pennsylvania, the majority of mandatory sentencing statutes require the prosecutor to give notice prior to sentencing of his/her intent to seek the mandatory; absent this notice, the mandatory does not apply. For mandatory-eligible offenses, charge reductions and the waiver of the mandatory sentencing provision result in the imposition of the mandatory minimum sentence in a minority of cases; only 34% of charges for mandatory-eligible offenses resulted in convictions for mandatory-eligible offenses, and only 45% of mandatory-eligible convictions resulted in sentences greater than or equal to the mandatory minimum sentence.

In general, offenders with prior convictions and those who were convicted following trial (as opposed to a guilty plea) were more likely to receive a mandatory minimum sentence. Even in cases where the mandatory minimum sentence was applied, there are circumstances, such as with DUI, where alternative programs and sanctions may be used to satisfy the term of imprisonment. It is not surprising then that in a poll of Pennsylvania citizens, no more than 34% could identify at least one offense for which there is a mandatory minimum sentence.

HR 12 notes that “criminal recidivism accounts for a substantial percentage of all violent and other serious crimes in this Commonwealth” and that “mandatory minimum sentences may be particularly effective for repeat offenders to interrupt the life cycle of violent and other serious crime.” However, in 2008, only 8.8% of offenders sentenced for a crime of violence had been previously convicted of a violent offense, and only 3% had more than one prior conviction for a violent crime; those convicted of robbery had the highest rate of re-offending.

There is some support in the research for the use of incapacitation to address chronic or career criminals, focusing on both the age-crime curve (aging-out of offenders) and offenders with multiple...
serious offenses (repeat violent offenders). But failure to appropriately target offenders at high risk of violent or serious re-offense may result in an over-broad application of incapacitation, especially since the Commission’s research indicates that those who are incarcerated are at a higher risk of recidivism upon release from incarceration. The use of incapacitation is not supported in circumstances where an offender is quickly replaced by another, such as with a drug dealer.

Consideration of other factors, beyond current and previous convictions, contributes to a more focused and effective use of incapacitation. Although the approach to place the burden on the defendant to rebut a presumption of being a ‘high risk dangerous offender’ was found to be unconstitutional, such targeting was attempted during the 1995 Special Session on Crime amendment to 42 Pa.C.S. §9714, which included the following factors for consideration:

(i) Age of the offender.
(ii) Age of the victim.
(iii) Use of illegal drugs or alcohol by the offender.
(iv) Offender’s prior criminal record.
(v) Whether the offense involved multiple victims.
(vi) Offender’s failure to complete a prior sentence.
(vii) Any mental illness or mental disability of the offender.
(viii) If the offense included attempted or actual sexual contact with the victim and was part of a demonstrated pattern of abuse.
(ix) If the offense included a display of unusual cruelty by the offender during the commission of the crime.
(x) The nature and circumstances of the current offense.
(xi) The use of a deadly weapon as defined in 18 Pa.C.S. § 2301 (relating to definitions) during the commission of the current offense.
(xii) The impact of the current offense on the victim and the extent of injury caused to the victim as a result of the current offense.

The consideration of these risk factors by the prosecution may better target the use of the repeat violent offender provision to those requiring incapacitation, and consideration of the same factors by the sentencing court may support the imposition of sentences beyond the minimum term required.

**Public Safety**

The study by the Commission found that neither length of sentence nor the imposition of a mandatory minimum sentence alone was related to recidivism. In the four recidivism studies conducted as part of this project, the recidivism rates (i.e., arrest for a new crime or technical violation resulting in reincarceration) three years after release were as follows: drug delivery offenders (54%), school zone offenders (57%), repeat violent offenders (54%) and firearms offenders (50%). Younger offenders, those with a greater number of prior arrests and/or convictions, and those sentenced to prison were more likely to recidivate; those sentenced for a drug mandatory were more likely to be re-arrested for a drug offense and those sentenced for a repeat violent offense or firearms mandatory were more likely to be re-arrested for an offense against a person. Consistent with finding of other research on deterrence and recidivism, the certainty of incarceration may be more important than the duration of the confinement.
Law Enforcement & Prosecution

Mandatory sentencing statutes serve as valuable tools for law enforcement and prosecution, in that they provide leverage to encourage cooperation (e.g., pressure lower level drug dealers to provide information about higher-level dealers) and to achieve negotiated pleas and sentences in cases that would otherwise require a substantial commitment of time and resources for a trial. Through surveys and discussions, district attorneys also acknowledged the important role of mandatories, and of their discretion to withhold or withdraw mandatories, in negotiating pleas, particularly in difficult cases such as those involving a vulnerable victim or weak evidence. The consensus among prosecutors was that a plea to a lesser offense or agreement to a sentence shorter than that required by the mandatory is better than an acquittal. Consistent with this, the Commission found an increase in the average minimum sentence imposed in cases where the mandatory minimum sentence was available but not invoked. So, while the uneven application or selective use of mandatories may undermine the purposes of certainty and deterrence, the successful prosecution and subsequent incarceration may help to achieve the purposes of retribution and incapacitation. Defense attorneys and judges, however, viewed this additional prosecutorial power far more negatively, with many of them complaining that it resulted in unfairness in certain cases and provided district attorneys with too much power over the criminal justice process.

One finding that was of concern was the failure by courts and prosecutors to apply the sentencing guidelines’ enhancements as required. These enhancements, which provide longer guideline sentence recommendations that mirror several mandatory sentence provisions, were only applied in half of the cases in which a firearm was possessed or used, and less often in cases involving drug trafficking to minors or in a school zone. The sentencing guidelines require the court to make a determination at the time of sentencing whether one or more of the four sentencing enhancements (i.e., deadly weapon/possessed, deadly weapon/used, distribution of a controlled substance to a minor, distribution of a controlled substance in a school zone) apply based on the criteria contained in the guidelines, and if so, to adjust the sentencing guideline ranges accordingly. The Appellate Courts have been clear: the application of an enhancement is not negotiable or discretionary; if the factor is present, the guideline ranges must be adjusted.

Like mandatories, these enhancements promote longer sentences for serious and violent offenders when applied as required; however, unlike mandatories, the court retains the discretion to depart from the recommendation, provided an adequate explanation of the reason for doing so is given. Failure to apply the enhancements as required not only reduces sentences for serious and violent offenders, but also increases the gap between sentences imposed under the guidelines and sentences for comparable offenders when the mandatory is invoked.

Unintended Consequences of Mandatory Minimum Sentences

HR 12 also identified concerns about unintended consequences of mandatory minimum sentences, including:

- Significant increases in the costs of corrections due to longer prison terms and an increasing prison population;
- Removal from consideration of other sentencing options that may prove to be less costly and/or more effective than mandatory incarceration;
- Impact on all aspects of the criminal justice system, including pleas or verdicts and offender eligibility for rehabilitation programs and early release;
- Limiting the discretion of the sentencing judge.

The sustained growth in the state prison population is well documented. In 1997, the PA Department of Corrections reported an inmate population of 33,553 (1997 Annual Report); a decade later, the population had increased to 46,028 (2007 Annual Report); as of April 2009, the total population under the supervision of the Department exceeded 50,000, and as of August 31, 2009 had reached 50,948. In 1997, a narcotic drug conviction was the primary offense for 13.9% of the DOC population (4,846 inmates); by 2007, this increased to 17.2% (7,917 inmates).

Many factors have contributed to this correctional population increase, not the least of which is enhanced law enforcement and prosecution. Pennsylvania’s civilian population remained fairly stable during the ten-year period discussed above (1997 = 12,020,000; 2007 = 12,432,792), while the crime rate during the same period dropped for both violent crimes (1997 = 442.1 per 100,000; 2007 = 416.5 per 100,000) and property offenses (1997 = 2,989.4 per 100,000; 2007 = 2,361.3 per 100,000). However, the number of criminal incidents reported to the Commission between 1997 and 2007 increased by 40% (1997 = 69,618; 2007 = 97,483), with drug violations representing a greater portion of all sentences reported, from 17.3% in 1997 (12,094 criminal incidents) to 21.9% in 2007 (21,435 criminal incidents). The reported use of mandatory minimum sentences also increased, from 784 mandatory sentences in 1997 (364 for drug mandatories) to 1,676 in 2007 (1,016 for drug mandatories).

Mandatory minimum sentences alone are not the reason for the increase in the correctional population, but they are a driver of other criminal justice policies and practices, including sentencing guidelines. Aside from the prosecutorial leverage and guideline enhancements discussed earlier, mandatory sentencing provisions also contribute to increased severity in the sentencing guidelines out of concerns for proportionality, and to the reduced use of sentencing programs due to ineligibility. In 2008, 13.6% of all sentences reported to the Commission resulted in total confinement in a state correctional facility. Of these:
- Drug offenses represented 31.8% of all sentences to the PA Department of Corrections (4,399 sentences); about half of these (15.4% of all sentences to DOC or 2,135 sentences) were mandatory-eligible offenses, with about one third (10% of all sentences to DOC or 1,383 sentences) receiving sentences equal to or greater than the mandatory minimum provided in statute.
- Mandatory-eligible firearms offenses represented 3.1% of all sentences to the PA Department of Corrections (425 sentences), with 2.5% (344 sentences) receiving sentences equal to or greater than the mandatory minimum provided in statute.
- Mandatory-eligible repeat violent offenses represented 1.8% of all sentences to the PA Department of Corrections (246 sentences), with 0.5% (70 sentences) receiving sentences equal to or greater than the mandatory minimum provided in statute.

Addressing the growth in the state prison population, particularly involving drug-related offenders, requires systemic change, beginning with adjustments to both the sentencing guidelines and the mandatory sentencing provisions, and including expanded eligibility and use of sentencing programs.
Expanded Use of Sentencing Programs

Many of the sentencing alternatives created by the General Assembly to serve as rehabilitative alternatives to traditional incarceration (e.g., county intermediate punishment, state motivational boot camp, and state intermediate punishment) are presently under-utilized. Contributing factors include: prohibitions to use certain programs to satisfy mandatory minimum sentencing provisions; extensive ineligibility criteria, particularly as related to present or past offenses; and/or other restrictions of a sentencing judge’s ability to consider the program, such as approval by the prosecutor. Many of these programs specifically target drug-related offenders, such as user/dealers of smaller quantities of controlled substances, and have been found to produce lower recidivism rates and substantial cost savings as compared to incarceration.

Based on data provided by the Department of Corrections, a sentence to state intermediate punishment (SIP) in lieu of total confinement in a state facility for a comparable offender results in a savings of $6,101 per offender, due primarily to a reduction of seven months in the time served. At the county level, based on data provided by the Pennsylvania Commission on Crime and Delinquency, a sentence to a treatment-based county intermediate punishment program (RIP/D&A) in lieu of total confinement in a county facility results in a savings of $9,194 per offender, as determined by the reported incarceration days saved, the average cost of county incarceration, and the state funding of the RIP/D&A program. Previous research by the Commission on Sentencing found significantly lower recidivism rates for offenders who successfully completed comprehensive drug treatment (RIP/D&A) as compared to similar offenders sentenced to probation or total confinement in a county jail.

Developments in recent years have improved the quality and availability of comprehensive, clinically appropriate treatment services for drug related offenders. This includes the establishments of numerous county-based problem-solving courts: drug treatment courts (21 in operation, 16 under consideration), DUI courts (11 in operation, 2 under consideration), and mental health courts (11 in operation, 7 under consideration). However, access to these courts and to treatment available through state and county intermediate punishment would be expanded if judges were provided with greater discretion in selecting and using these options. Barriers to broader utilization of these programs include restrictive ineligibility criteria and SIP procedures which empower prosecutors to withhold referrals and veto participation.

Balanced and Targeted Use of Mandatory Sentences

Many recognize the need for mandatory sentencing statutes that balance certainty of punishment with discretion. In those areas where public safety is most at risk, or where deterrence is the primary purpose, certainty may be more important than discretion. In those areas where rehabilitation may play an important role, such as with treatment of drug related offenders, broader court discretion may be warranted.

In order to promote the stated purposes of mandatory minimum sentences while reducing the unintended consequences, it is important to first confirm the need for the mandatory provision, and if the need exists, then to identify the primary purpose for the provision, to target the population of offenders subject to the mandatory, and to implement the use of the mandatory consistent with the purpose. While retribution (i.e., punishment, accountability) is an underlying purpose of sentencing in
Pennsylvania, and efforts should continue to promote uniformity and proportionality in sentencing, factors specific to the offense or the offender may influence the consideration of other purposes.

- **Rehabilitation (target: drug trafficking/1st tier, DUI mandatories).** Drug involved offenders with low risk of violent re-offense may benefit from clinically prescribed treatment in licensed programs in lieu of incarceration (CIP) or in conjunction with reduced incarceration (SIP, RRRI). Studies of CIP and SIP (preliminary) provide support for the successful diversion of low level drug involved offenders from jail and prison.

- **Incapacitation (target: repeat violent/sex offender mandatories).** Offenders with a high risk of violent re-offense should be the target for incapacitation. The current two/three strikes mandatory relies only on retributive factors (current and prior convictions). Other factors that should be considered to target those at high risk of violent re-offense include: age of offender, number of prior arrests, type of sentence/prior incarceration, violent history, psychopathy, use of a gun, and age at first offense.

- **Deterrence (target: firearm mandatory).** If deterrence is a primary purpose for a mandatory minimum sentencing statute, it is important that the public be aware of the mandatory penalties and that there be consistency and certainty in the application of the mandatory. The low level of public awareness of mandatory sentencing provisions, the specifics of the mandatory sentencing provisions (e.g., ‘visibly possessed’ requirement in the firearms mandatory), and the substantial negotiation involving mandatory-eligible offenses undermine the utility of deterrence.

Specific findings and recommendations, based on an intensive study of four mandatory minimum sentencing provisions, follow in the subsequent pages. A listing of all mandatory sentencing statutes is found in Appendix B; Case Law relating to mandatory sentencing provisions is found in Appendix D; Draft Legislation relating to the recommendations to the General Assembly is found in Appendix F.

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**FINDINGS AND RECOMMENDATIONS**

(1) **General Provisions**

- **Findings**
  - Overall, about 34% of mandatory-eligible charges did not result in conviction for a mandatory-eligible offense; this reduction may be attributed to many factors, including lack of evidence to support the mandatory sentencing provision, failure to obtain a conviction for a mandatory-eligible offense, and/or a plea negotiation. Firearms offenders (63%) were more likely than repeat violent offenders (39%) or drug delivery offenders (26%) to have a charge reduction. Consistent with the survey findings, most charge reductions involved the dropping of charges (30%) rather than a reduction in the severity of the charge (4%) for all three offender types.
  - Since charging of offenders (see: Pa.R.Crim.P. Rule 507, Approval of Police Complaints and Arrest Warrant Affidavits by Attorney for the Commonwealth – Local Option) and prosecution of cases may differ substantially from county to county, and factors considered
in plea negotiations are not generally made public, it is difficult to document the reasons for charge reductions and/or the impact of this on the application of a mandatory sentencing provision. The varying practices and lack of transparency in decision-making undermines public understanding of mandatory sentencing provisions and compromises the study of the effectiveness of such statutes. However, the current rule is useful in addressing two important factors noted by prosecutors: the county-to-county variations in resources and workload.

- Two types of mandatory sentencing statutes exist in Pennsylvania: ‘notice’ (i.e., prosecutor required to give ‘reasonable notice of the Commonwealth’s intention to proceed’ in order to apply the mandatory) and ‘no-notice’ (i.e., mandatory sentence applies automatically based on conviction).

- The mandatory statutes studied in detail during this project were ‘notice’ mandatories. Based on a review of court files, surveys, and discussions with judges, prosecutors and defense attorneys, the ‘notice’ given may be formal or informal, written or verbal, given prior to trial or immediately before sentencing or sometime in between, and may be initially given but then withdrawn as part of a negotiated plea. For these reasons, it is sometimes difficult to determine by the record the application of a specific mandatory; therefore, a sentence equal to or greater than the mandatory minimum served as a default in determining the application of the mandatory.

- Using the term ‘mandatory’ to address both ‘notice’ and ‘no-notice’ mandatories creates confusion and undermines confidence in the criminal justice system and efforts at public education. The term ‘mandatory’ raises an expectation of certainty of punishment upon conviction, particularly with crime victims, which is not consistently found with ‘notice’ mandatories.

- A number of evidence-based programs targeting certain drug-related and mandatory-eligible offenders have been established in Pennsylvania, including: county intermediate punishment; state motivational boot camp; state intermediate punishment; and recidivism risk reduction incentive program. However, these programs are being under-utilized (as of October 2008, fewer than 20% of DOC-eligible offenders were referred for SIP) or are under-funded (estimate of RIP/D&A funding need based on 1994 sentencing guidelines was $26 million; current funding less than peak of $18 million). Concerns were raised about the restrictions of the ineligibility criteria for these programs and the ability of the prosecutor to restrict sentences to state intermediate punishment (SIP).

- Overall, about 45% of the mandatory-eligible offenses received a mandatory minimum sentence, with firearms being the highest at 77%, followed by drug trafficking at 43% and repeat violent offenses at 26%. Offense seriousness, prior convictions, and type of disposition (i.e., trial vs. plea) were found to be the strongest and most consistent predictors of the imposition of the mandatory sentence. In general, offenders who had prior convictions and/or were convicted via a trial were more likely to receive the mandatory sentence.

- Of those receiving a mandatory minimum sentence, about 54% were reported as such to the Sentencing Commission as required by statute. The Commission’s Annual Report and all related data disseminated to the public are based on sentences reported to the Commission through the JNET-based SGS Web application. Failure by the Court to document the application of a mandatory sentencing provision undermines the accuracy and reliability of this mandatory sentencing information. As a result, for purposes of this study, sentence length was used to determine the application of a mandatory sentencing provision.
Recommendations to the General Assembly:

- Amend 18 Pa.C.S. §6314 (relating to sentencing and penalties for trafficking drugs to minors), 18 Pa.C.S. §6317 (relating to drug-free school zones), 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties), 18 Pa.C.S. §9712 (relating to sentences for offenses committed with firearms), 18 Pa.C.S. §9712.1 (relating to sentences for certain drug offenses committed with firearms), 18 Pa.C.S. §9713 (relating to sentences for offenses committed on public transportation) and 18 Pa.C.S. §9714 (relating to sentences for second and subsequent offenses) to distinguish between those mandatory sentencing provisions that apply automatically based on conviction and those that require ‘prosecutorial notice,’ by referring to the latter as ‘sentencing enhancement upon prosecutorial notice,’ and to enhance public education efforts to increase knowledge, recognition and confidence in mandatory sentencing provisions, particularly those for which the primary purpose is deterrence.

- Amend 42 Pa.C.S. §9714 (relating to sentences for second and subsequent offenses) to expand the definition of ‘crime of violence’ to include the following recently-enacted statutes:
  - Manslaughter of law enforcement officer (18 Pa.C.S. §2507 (c), (d));
  - Murder of the third degree, unborn child (18 Pa.C.S. §2604(c));
  - Voluntary manslaughter, unborn child (18 Pa.C.S. §2605);
  - Aggravated assault of unborn child (attempt or cause SBI) (18 Pa.C.S. §2606);
  - Assault of a law enforcement officer (18 Pa.C.S. §2702.1);
  - Weapons of mass destruction (18 Pa.C.S. §2716(b));
  - Terrorism, violent offense is F1 (18 Pa.C.S. §2717(b)(2));
  - Eco-Terrorism, specified offense against property is F1 (18 Pa.C.S. §3311(b)(2));
  - Trafficking of persons (SBI) (18 Pa.C.S. §3002(a));

- Amend 18 Pa.C.S. §3502 (relating to burglary), as found in SB 436 (PN 440), to codify ‘burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present,’ consistent with the definition of ‘crime of violence’ used in 42 Pa.C.S. §9714 (relating to sentences for second and subsequent offenses).

- Review the eligibility criteria for county intermediate punishment (42 Pa.C.S. §9802), state motivational boot camp (61 Pa.C.S. §3903), state intermediate punishment (42 Pa.C.S. §9903) and recidivism risk reduction incentive (42 Pa.C.S. §5303); consider removing certain ineligible offenses and/or providing the sentencing court with greater discretion in ordering participation in these sentencing programs.

- Amend 42 Pa.C.S. §9903 (relating to definitions) and §9904 (relating to referral to state intermediate punishment program) to remove the requirement for a motion of the Commonwealth and agreement of the defendant during the referral process, and to remove the agreement of the attorney for the Commonwealth and the defendant as a prerequisite for commitment of an eligible offender to state intermediate punishment; but to restrict eligibility for those sentenced under 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) for subsections (a)(1)(i), (2)(i), (3)(i), (4)(i) or (7)(i).
Amend 42 Pa.C.S. §9721 (relating to sentencing generally) to require imposition of recidivism risk reduction incentive minimum sentence, even if a mandatory minimum sentence would otherwise be provided by law, except if the defendant is otherwise ineligible.

Recommendations to the Criminal Procedural Rules Committee:

- Study the benefits of developing statewide standards to improve consistency in the charging and prosecution of mandatory-eligible offenses, while promoting greater transparency and improving the quality of information.
- Adopt a standard document and require use of the same for formal written notice by the Commonwealth of the application of ‘prosecutorial notice’ mandatory sentencing provisions (‘sentencing enhancement upon prosecutorial notice’); require the Court to pronounce at sentencing and report to the Commission the application of any such ‘prosecutorial notice’ sentencing enhancement or the withdrawal of notice of any ‘prosecutorial notice’ sentencing enhancement.

Issues for future consideration by the Commission:

- Increase educational efforts and/or enhance the SGS Web application (i.e., add required fields, error checks) to address the failure of prosecutors and courts to apply the sentencing guidelines’ enhancements in required cases.

FINDINGS AND RECOMMENDATIONS

Specific Provisions

A. **Trafficking Drugs to Minors (18 Pa.C.S. §6314); Drug-Free School Zone (18 Pa.C.S. §6317); and Solicitation of Minors to Traffic Drugs (18 Pa.C.S. §6319)**

Findings

- In a survey, district attorneys indicated that they were more likely to invoke the mandatory when children were present than if children were not present, although they did not appear to make distinctions with respect to distance involved (1,000 feet of school) or whether it was a school building versus school property.
- A major difference between those receiving the school zone and drug trafficking mandatory was related to race and county. About 41% of the school zone offenders were Hispanic, compared to 6% of the drug delivery offenders. However, almost 50% of the cases came from Berks County, which has the second highest percentage of Hispanic population in the state.
- Offenders who had prior convictions were more likely than those without prior convictions to recidivate. Offenders sentenced to prison were more likely to recidivate than those not sentenced to prison. Neither length of sentence nor the imposition of the mandatory sentence alone was a predictor of recidivism in any of the studies.
The recidivism rate for school zone offenders was 58%; those who recidivated were most likely to be re-arrested for a drug offense.

Mapping of schools zones in the major municipality for each county indicated that the percentage of the municipality that was within 1,000 feet of a school building ranged from .5% in Elk County to 39.4% in Wyoming County, with a statewide average of 19%. For the two most populous counties, Philadelphia and Allegheny Counties, the percentages were 29.5% and 22.8% respectively. This coverage presents a conservative estimate as it does not include the actual property owned by the schools, nor recreation centers, playgrounds, or school buses. The impact of a school zone may differ substantially when comparing urban and rural jurisdictions.

As an example of the extent to which drug delivery offenses occurred within school zones, in 2002 there were 4,701 drug delivery arrests within Philadelphia County, with 3,365 (72%) of these within 1,000 feet of school property. A total of 34 offenses was reported to the Commission under the school zone mandatory. While it is clear that the school zone mandatory is used rarely, it is not at all clear why and under what circumstances the district attorney chooses to invoke this penalty.

There was general support for enhanced penalties to discourage delivery of drugs in an area where minors may often be present and to discourage delivery of drugs to minors (see: 18 Pa.C.S. §6314, Trafficking drugs to minors); this included the benefit of targeting the mandatory to safeguard children walking to and from school, school-related activities and recreation, often outside of traditional school hours. However, there was general agreement that the statute as written is overbroad, does not provide a nexus with risk to minors, and has the least utility of the mandatory statutes studied.

The term ‘school zone’ is used for purposes of two mandatory sentencing provisions (18 Pa.C.S. §6314, §6317), a non-mandatory provision (18 Pa.C.S. §6319) and the sentencing guidelines Youth and School Enhancement (204 Pa.Code §303.10(b)), but the definitions differ across these applications. Lack of consistency undermines the purposes of certainty and deterrence.

Concerns were raised about the uneven application of the school zone mandatory from county to county, the lack of nexus with a child being present in the school zone (evenings and summer, school administration and service buildings, residences within school zone), the size of the school zone (1,000 feet from the real property of the school), and the definition of school (including college or university).

Concerns also included the inconsistency in the size of the zone between school athletic field (1000 feet) and playground (250 feet) and the application of the mandatory to unmarked bus stops, particularly outside of school hours.

**Recommendations to the General Assembly:**

- Amend 18 Pa.C.S. §6314 (relating to sentencing and penalties for trafficking drugs to minors) and 18 Pa.C.S. §6319 (relating to solicitation of minors to traffic drugs) to reduce a school zone to 250 feet of the real property of public, private or parochial school, a recreation center, a playground or a school bus stop, as well as on a school bus; and to remove colleges and universities from the definition of a school.

- Encourage efforts to post ‘drug-free zone’ signs at boundaries of school zones and school bus stops.
Amend 42 Pa.C.S. §9721 (relating to sentencing generally), 42 Pa.C.S. §9763 (relating to sentence of county intermediate punishment) and 42 Pa.C.S. §9804 (relating to county intermediate punishment programs) to authorize the sentencing court to sentence an offender subject to 18 Pa.C.S. §6314 (relating to drug trafficking to minors) to county intermediate punishment or state motivational boot camp to satisfy the mandatory minimum sentence if not otherwise ineligible.


Absent a repeal of 18 Pa.C.S. §6317 (relating to drug-free school zones):

- Amend 18 Pa.C.S. §6317 (relating to drug-free school zones) to reduce a school zone to 250 feet of the real property of public, private or parochial school, a recreation center, a playground or a school bus stop, as well as on a school bus; and to remove colleges and universities from the definition of a school.
- Amend 42 Pa.C.S. §9763 (relating to sentence of county intermediate punishment) and 42 Pa.C.S. §9804 (relating to county intermediate punishment programs) to authorize the sentencing court to sentence an offender subject to 18 Pa.C.S. §6317 (relating to drug-free school zones) to county intermediate punishment to satisfy the mandatory minimum sentence if not otherwise ineligible.

Issues for future consideration by the Commission:

- Reduce Youth & School Enhancement school zone to 250 feet of the real property of public, private or parochial school, a recreation center, a playground or a school bus stop, or on a school bus.

- Increase educational efforts and/or enhance the SGS Web application (i.e., add required fields, error checks) to address the failure of prosecutors and courts to apply the sentencing guidelines’ Youth & School Enhancements in required cases.

FINDINGS AND RECOMMENDATIONS

B. Drug Trafficking (18 Pa.C.S. §7508)

- Findings
  - Drug delivery offenses have generally accounted for approximately 21% of all offenses reported to the Commission (1990-2007), with sentences to county jail decreasing (from 48% to 29%) due to replacement by county intermediate punishment, and sentences to state prison fluctuating but starting and ending at about 42% (average minimum sentences: jail = 8 months; prison = 26 months) (PCS Data).
  - 26% of offenders charged with a mandatory-eligible offense were convicted of an offense for which the offender became ineligible for the mandatory; most cases involved the dismissal of charges rather than a reduction in the seriousness of the offense charged (AOPC 2007/2008 data).
In 2008, 43% of offenders convicted of a mandatory-eligible offense received a sentence equal to or greater than the drug trafficking mandatory; of those receiving a mandatory sentence, fewer than half (41%) were reported as such to the Commission as required by statute (PCS 2008 data).

Offenders were more likely to receive a mandatory sentence when the following were present: no prior drug offense, prior offense against a person, more than one current conviction offense, or convicted by trial; those convicted of dealing in smaller quantities were more likely than those dealing in larger quantities to receive the mandatory minimum sentence.

The recidivism rate for those receiving a mandatory sentence was 58%; those who recidivated were sentenced for delivering smaller quantities and were most likely to be re-arrested for a drug offense (46.9%).

Analysis of assessment scores found that offenders dealing in smaller quantities were at higher risk of recidivism and in greater need of treatment than those dealing in larger quantities.

There was a recognition that many low-level dealers are users (i.e., sell to support habit); in order to provide broader opportunities for rehabilitation and reduced reliance on incarceration, there is a need to recalibrate the weights used for drug trafficking thresholds, particularly as related to cocaine. However, concerns were raised about increasing the threshold for other Schedule I & II narcotics.

Research suggests a limited impact of incapacitation due to replacement of dealers and a limited impact of deterrence due to market forces. However, a positive impact has been found with rehabilitation due to reduction in demand (see: RIP/D&A Evaluation).

In order to effectively address individuals early on in their criminal careers, there is a need for better assessment/evaluation of offenders required prior to sentencing (i.e., pretrial and/or via referral to DOC Diagnostic Center) in order to determine both treatment needs and risk.

Interviews with law enforcement suggest the sophistication of drug dealers in terms of knowing mandatory thresholds (taken into account in terms of sales, packaging and age of sellers); the mandatory sentencing statutes provide a valuable tool for law enforcement and prosecution, especially when using lower-level dealers to obtain information/convictions for higher-level dealers.

Concerns were expressed about the ‘stacking’ provision, peculiar to the drug trafficking mandatory, which permits imposition of enhanced penalty for what would otherwise be considered two first-time offenses. Many recommended reliance on the ‘previous conviction’ definition provided in statute and used in the sentencing guidelines; discussions also addressed consideration of aggregate drug quantities for purposes of applying the drug trafficking mandatory.

The PA Department of Corrections has experienced a substantial increase in the number of admissions and the percentage of its population classified as non-violent (Part II) drug-related offenders. Since 1997, the Department experienced a 61.0% increase in the number of offenders admitted for Part II offenses, while the number of Part I offenders admitted increased less rapidly (7.4% increase).

Based on sentences reported to the Commission in 2008, an increase in the threshold for application of the mandatory related to cocaine (from 2 grams to 5 grams) combined with replacement of the stacking provision with an aggregation provision would remove 911 offenders annually from mandatory eligibility (1,027 offenders removed and 116 offenders.
added), and would expand eligibility for treatment alternatives to 510 offenders annually subject to the mandatory.

- The drug trafficking statute contains maximum penalties for MDA, MDMA and MMDA, but does not include mandatory minimum penalties; as such, it should be transferred to the penalties section of the Drug Act.

- Concerns were raised about the mandatory fines associated with drug trafficking mandates, recognizing the availability of forfeiture to exhaust all drug-related resources. The statute also provides that the mandatory fine may be increased “as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.” One limitation of the forfeiture provision is the burden on the prosecution of establishing a nexus between the illegal activity and the assets.

- In 2008, only 28% of sentences reported to the Commission for possession with intent to deliver (35 Pa.C.S. §780-113(a)(30)) included the imposition of a fine; 78% of all fines imposed were in the amount of $500 or less; the mandatory fine was imposed in only 12% of cases for which a fine was imposed.

- The maximum fine permitted for most violations of subsection (a)(30) range from $100,000 to $250,000; the maximum fine for murder is $50,000; the maximum fine for most felonies of the first degree is $25,000.

• Recommendations to the General Assembly:

  - Amend 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) to increase the threshold for application of the drug trafficking provisions as follows:
    - (a)(3)(i) – Cocaine (first tier) (increase from 2 grams to 5 grams)

  - Amend 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) to replace the definition of ‘previous conviction’ found at 18 Pa.C.S. §7508(a.1) with a definition consistent with that found at subsection (b) of 35 P.S. §780-115 (relating to second or subsequent offense).

  - Amend 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) to apply the sentences and penalties to the aggregate sentence imposed during the judicial proceeding based on the aggregate weight of all compounds or mixtures contained in all convictions in a judicial proceeding.

  - Amend 42 Pa.C.S. §9721 (relating to sentencing generally), 42 Pa.C.S. §9763 (relating to sentence of county intermediate punishment) and 42 Pa.C.S. §9804 (relating to county intermediate punishment programs) to authorize the sentencing court to sentence an offender subject to 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) where the sentence is imposed pursuant to subsection (a)(1)(i), (2)(i), (3)(i), (4)(i) or (7)(i) to county intermediate punishment or state motivational boot camp to satisfy the mandatory minimum sentence if not otherwise ineligible.

  - Amend 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) and 35 P.S. §780-113 (relating to prohibited acts; penalties) to remove the maximum penalty provisions contained in 18 Pa.C.S. §7508(a)(8) (relating to MDA, MDMA and MMDA) and
adding those maximum penalty provisions to 35 P.S. §780-113(o) (relating to MDA, MDMA and MMDA).

- Amend 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties) to reduce the mandatory fines as follows:
  - First tier of the drug trafficking mandatory:
    - First offenses (reduce from $5,000 to $500)
    - Second/Subsequent offenses (reduce from $10,000 to $1,000)
  - Second tier of the drug trafficking mandatory:
    - First offenses (reduce from $15,000 to $5,000)
    - Second/Subsequent offenses (reduce from $30,000 to $10,000)
  - Third tier of the drug trafficking mandatory:
    - First offenses (reduce from $25,000 to $15,000)
    - Second/Subsequent offenses (reduce from $50,000 to $30,000)

- Issues for future consideration by the Commission:
  - Review drug thresholds; consider greater consistency with drug mandatory thresholds (e.g., increase cocaine from 2.5 grams to 5 grams). Review offense gravity score (OGS) assignments for two lowest categories (< 2.5 grams; 2.5 - < 10 grams).
  - Modify the sentencing guidelines to promote consideration of county intermediate punishment, state motivational boot camp or state intermediate punishment categories to satisfy the mandatory minimum sentence for offenders not otherwise ineligible.
  - Review maximum and mandatory fines for controlled substances and other economic sanctions, including forfeitures, as part of the Commission’s ongoing Act 37 study.

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**FINDINGS AND RECOMMENDATIONS**

**C. Offenses Committed with Firearms (42 Pa.C.S. §9712)**

- **Findings**
  - Violent offenses have consistently accounted for 3% of all offenses reported to the Commission (1990-2007), with mandatory-eligible firearms offenses representing 13% of all violent offenses. While admissions to state prison have remained stable, the average minimum sentence imposed for mandatory-eligible firearms offenses has increased from 66 months to 86 months.
  - 63% of offenders charged with a mandatory-eligible offense were convicted of an offense for which the offender became ineligible for the mandatory; most cases involved the dismissal of charges rather than a reduction in the seriousness of the offense charged (AOPC 2007/2008 data).
  - The substantial reduction in mandatory-eligible charges is consistent with earlier research by the Commission in which Violations of the Uniform Firearms Act (VUFA) were withdrawn or dismissed or did not otherwise end in convictions.
Prosecutors, particularly from Philadelphia, have suggested in the past that application of the firearms mandatory was limited due to courts finding that the offender did not ‘visibly possess’ the firearm (as required by 42 Pa.C.S.§9712(a)) or that the offender caused or threatened bodily injury (rather than serious bodily injury) and thus convicted on a F2 robbery and ineligible for the firearms mandatory (see: 42 Pa.C.S.§9714(g))(also see: Appendix D, Case Law (Firearms)).

In 2008, 77% of offenders convicted of a mandatory-eligible offense received a sentence equal to or greater than the firearms mandatory; of those receiving a mandatory sentence, 63% were reported as such to the Commission as required by statute (PCS 2008 data).

Offenders were more likely to receive a mandatory sentence when the following were present: prior conviction, convicted via trial rather than plea, and greater number of prior arrests; those with more serious offenses were more likely to receive the mandatory minimum sentence.

The recidivism rate for firearms offenders was 50%; those who recidivated were most likely to be re-arrested for an offense against a person (41.3%).

28% of respondents in the public poll who could correctly identify a mandatory offense identified firearms as one of the mandatory sentencing provisions.

**Recommendations to the General Assembly:**

- Promote greater transparency and consistency in the application of the mandatory sentence for eligible offenders in order to better address the purpose of deterrence.

- Authorize a study of the processing of mandatory-eligible firearms cases from arrest through sentencing in order to determine and document reasons for attrition, particularly relating to charge reductions and to the ‘visibly possessed’ requirement; such a study will necessarily require the cooperation of law enforcement, prosecution and defense.

**Issues for future consideration by the Commission:**

- Increase educational efforts and/or enhance the SGS Web application (i.e., add required fields, error checks) to address the failure of prosecutors and courts to apply the sentencing guidelines’ Deadly Weapon Enhancements in required cases.

**FINDINGS AND RECOMMENDATIONS**

**D. Second and Subsequent (Repeat Violent) Offenses (42 Pa.C.S. §9714)**

**Findings**

- Violent offenses have consistently accounted for 3% of all offenses reported to the Commission (1990-2007), with mandatory-eligible repeat violent offenders representing 9% of all violent offenses. While admissions to state prison have remained stable, the average minimum sentence imposed for mandatory-eligible repeat violent offenders has increased from 74 months to 95 months.
39% of offenders charged with a mandatory-eligible offense were convicted of an offense for which the offender became ineligible for the mandatory; most cases involved the dismissal of charges rather than a reduction in the seriousness of the offense charged (AOPC 2007/2008 data).

In 2008, 26% of offenders convicted of a mandatory-eligible offense received a sentence equal to or greater than the repeat violent offender mandatory; of those receiving a mandatory sentence, 50% were reported as such to the Commission as required by statute (PCS 2008 data).

Offenders were more likely to receive a mandatory sentence when the following were present: prior conviction offense or convicted via trial rather than plea; those with more serious offenses were more likely to receive the mandatory minimum sentence.

The recidivism rate for those receiving a mandatory sentence was 54%; those who recidivated were most likely to be re-arrested for an offense against a person (43.4%) or a property offense (42.6%).

Legislation has been introduced (HB1457, PN2244) and the House Judiciary Committee has conducted a hearing as a result of a number of murders of police officers in Philadelphia by previously-convicted offenders. Sentencing concerns raised during the drafting of the bill include the duration of the sentences imposed; the low use of the repeat violent offender mandatory; the substantial number of previous charges dismissed; withdrawn or nolle processed; and the lack of consideration of risk factors at sentencing. The bill in present form would substantially increase the mandatory penalties, introduce a determinate sentencing structure, mandate a post-release supervision period, and promote greater application of the mandatory sentencing provision and transparency of the process.

Under the existing statute, the court is required to impose a 25-year minimum sentence for a third strike, but may impose a sentence of life imprisonment without parole if the court ‘determines that 25 years of total confinement is insufficient to protect the public safety.’ Concerns were raised about the basis for the determination of a life sentence.

**Recommendations to the General Assembly:**

- Refine the targeting of offenders subject to repeat violent offender mandatory to those with the greatest risk of violent re-offending in order to better address the purpose of incapacitation; expand the offender information available to the prosecution and to the sentencing court.

- Authorize a study of the processing of mandatory-eligible repeat violent offender cases from arrest through sentencing in order to determine and document reasons for attrition, particularly relating to the use of the enhanced sentencing provisions; such a study will necessarily require the cooperation of law enforcement, prosecution and defense.
FINDINGS AND RECOMMENDATIONS

(3) Additional Study Required

A. Driving Under the Influence (75 Pa.C.S.§3802)

- Findings
  - Substantial changes to the DUI statute took effect February 1, 2004, modifying the grading and penalties for convictions as well as mandating treatment. However, the legislation delayed implementation of a number of provisions, with several provisions only taking effect June 30, 2009.
  - In 2008, 22,996 DUI sentences were reported to the Commission (22.6% of all offenses), on par with the number of drug offenses reported. In addition, perhaps as many offenders received ARD during the same period for DUI.

- Recommendations to the General Assembly:
  - Authorize a separate and comprehensive evaluation of dispositions and sentences for DUI, including a systematic evaluation of mandated treatment and outcomes.
  - Amend 42 Pa.C.S. §2153 (relating to powers and duties) to empower the Commission to systematically collect information on acceptance into and successful completion of or termination from Accelerated Rehabilitative Disposition (ARD).

B. Sentences for Offenses Against Elderly and Infant Persons (42 Pa.C.S.§9717) (42 Pa.C.S.§9718)

- Findings
  - 42 Pa.C.S. §9717, provides mandatory sentences for certain offenses (e.g., aggravated assault, rape, IDSI, theft by deception) against the elderly (e.g., over 60 years of age and not a police officer). In 2008, 17 mandatory sentences were reported to the Commission.
  - 42 Pa.C.S. §9718, provides mandatory sentences for certain offenses (e.g., aggravated assault, rape, IDSI, aggravated indecent assault) against minors (e.g., under 13 years of age; under 16 years of age). The most recent amendments to this statute took effect January 1, 2007. In 2008, 141 mandatory sentences were reported to the Commission: 101 for offenses against victims under 16 years of age, 40 for offenses against victims under 13 years of age.
  - Other mandatory provisions not relating to the age of the victim may apply to individuals convicted of applicable offenses, which complicates a specific analysis.

- Recommendations to the General Assembly:
  - Authorize a separate and comprehensive evaluation of sentences and outcomes for offenses committed against elderly and infant persons.
C. **Sentences for Sexually Violent Offenses (42 Pa.C.S.§9718.2) (42 Pa.C.S.§9718.3)**

- **Findings**
  - Under Pennsylvania’s Registration of Sexual Offenders (Megan’s Law) statute, an offender convicted of a ‘sexually violent offense’ (42 Pa.C.S. §9795.1) is subject to assessment and registration. Legislation in Pennsylvania to comply with provisions of the Sexual Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006, is presently under development.
  - 42 Pa.C.S. §9718.2, effective January 1, 2008, provides mandatory sentences for offenders convicted of a second (25 years) or subsequent (Life) ‘sexually violent offense.’ No sentences were imposed in 2008 under this provision.
  - 42 Pa.C.S. §9718.3, provides mandatory sentences for offenders who fail to register. In 2008, 23 sentences under this provision were reported to the Commission.

- **Recommendations to the General Assembly:**
  
  - Authorize a separate and comprehensive evaluation of sentences and outcomes for sexually violent offenses. The application of the containment model and consideration of risk and role of incapacitation should be considered as part of this evaluation.