INSTRUMENTS OF INJUSTICE: THE EMERGENCE OF MANDATORY SENTENCING IN VICTORIA

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Over the past decade, sentencing law in the State of Victoria has been transformed. Through legislation enacted by both Coalition and Labor governments, and notwithstanding strong opposition from the legal profession, a mechanism for presumptive sentencing was introduced, expanded, and incrementally hardened. New offences attracting presumptive sentences have been created, exceptions have been made more difficult to satisfy, and for some offences imprisonment is now mandatory. Over this period the courts have wrestled with the correct methodological approach to the new regime and its consequences. This article sets out the pitfalls of presumptive and mandatory sentencing, examines the legislative reforms and emerging jurisprudence, and considers how the sentencing discretion of judicial officers has been systematically eroded and then removed.

I INTRODUCTION

Other jurisdictions have tried similar approaches to sentencing and failed. It is a great pity that we are making the same mistakes.[1]

Justice Michael Croucher

The problems posed in the present debate have arisen time and time again. They occur when Government reacts to disproportionate media treatment of particular, usually atypical, cases. Government usually acts in haste and produces bad laws; rather than considering, consulting and legislating with care. …

We have had mandatory minimum sentences in NSW. In the late 1870s and early 1880s there was public controversy about allegedly light sentences being imposed for serious offences. On 26 April 1883 the Criminal Law Amendment Act was passed, prescribing, for five categories of maximum sentences, corresponding mandatory minimum sentences: life (7 years); 14 years (5 years); 10 years (4

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1 *Esmaili v The Queen* [2020] VSCA 63, [100] ('*Esmaili*').

years); 7 years (3 years); and 5 years (one year). When the law was implemented (as the judges were obliged to do), injustices quickly became apparent and after sustained public reaction, this time against the provisions, they were repealed on 22 May 1884 — after less than one year and one month.

In its editorial on 27 September 1883 (while the legislation was still in force) the Sydney Morning Herald said: 'We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion'.[2]

Nicholas Cowdery AM QC

Former Director of Public Prosecutions, NSW

Since 2013, the State of Victoria has embraced presumptive and mandatory sentencing.[3] Despite strong opposition from organisations such as the Law Council of Australia, the Law Institute of Victoria, the Criminal Bar Association and Liberty Victoria, these reforms have attracted bipartisan support,[4] and the

2 Nicholas Cowdery, 'Mandatory Sentencing' (Speech, Sydney Law School, 15 May 2014) 12, 15 <https://www.ruleoflaw.org.au/wp-content/uploads/2014/05/Dist.-speakers-15-May-2014-Mandatory-Sentencing-paper.pdf>.

3 This article uses the term 'presumptive sentencing' to refer to criminal offences where there is a statutory presumption of a particular type and/or minimum length of sentence, subject to exceptions. This includes presumptive sentences of imprisonment with minimum non-parole periods subject to 'special reasons' exceptions. 'Mandatory sentencing' refers to criminal offences where a particular type of sentence and/or minimum length of sentence must be imposed and there are no exceptions. See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 203 nn 55–6.

4 Although it should be noted that, in theory at least, the federal Australian Labor Party ('ALP') remains opposed to mandatory sentencing, which is against its national platform:

> Labor opposes mandatory sentencing. In substituting the decisions of politicians for those of judges, mandatory sentencing undermines the independence of the judiciary. It leads to unjust outcomes and is often discriminatory in practice. Mandatory sentencing does not reduce crime, and leads to perverse consequences that undermine community safety, such as by making it more difficult to successfully prosecute criminals.

Australian Labor Party, 'ALP National Platform' (Conference Paper, Special Platform Conference, March 2021) 74 [48] <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>. The ALP also opposed mandatory sentencing in its 2018 National Platform: Australian Labor Party, 'A Fair Go for Australia' (Conference Paper, National Conference, 1 February 2019) 184 [259] <https://apo.org.au/sites/default/files/resource-files/2019-02/apo-nid219056.pdf>. However, the federal ALP ultimately did not oppose the *Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Act 2020* (Cth) (after proposed amendments from the Senate were defeated in the House of Representatives), which, amongst other things, inserted s 16AAA into the *Crimes Act 1914* (Cth), introducing mandatory minimum sentences for certain sexual offences committed against children contrary to the *Criminal Code Act 1995* (Cth) (particularly certain offences relating to sexual abuse of children outside Australia and certain domestic child abuse offences): *Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Act 2020* (Cth) sch 6 pt 1 s 2. On the eve of the 2022 federal election, the ALP again failed to oppose mandatory sentencing provisions, with the enactment of the *Criminal Code*

transformation of Victoria's criminal justice system has been profound. At the same time the number of prisoners in Victoria has greatly increased,[5] as too has the cost to the public.[6]

It does not appear that the Victorian reforms have achieved the ends of greater deterrence and improved community protection. As former Chief Magistrate the Hon Ian Gray and former Supreme Court Judge the Hon Kevin Bell have observed, despite Victoria's imprisonment rate having reached its highest levels since 1895, 'jailing is not working as a deterrent: four out of 10 prisoners in Victoria return to prison within two years of their release, with many entrenched in a relentless cycle of unemployment, homelessness and offending'.[7]

The Victorian experience demonstrates how, over a relatively short period of time, a model of presumptive and mandatory sentencing can be introduced, expanded

Amendment (Firearms Trafficking) Act 2022 (Cth) which, amongst other things, introduced mandatory minimum sentences for firearms trafficking offences.

5 'Victoria's Prison Population', *Sentencing Advisory Council* (Web Page, 28 April 2022) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-prison-population> ('*Victoria's Prison Population*'). See the table titled 'Number of People in Victoria's Prisons, 1871 to 2020'. As at 30 June 2019, Victoria's prison population was 8,101, compared to 4,352 in 2009 (an increase of 86.14% over the past decade). It should be noted that since 2019 there has been a reduction in prisoner numbers due in part to the COVID-19 pandemic. As at 31 December 2022, there were 6,610 prisoners in Victorian prisons, with 2,699 unsentenced: 'Monthly Prisoner and Offender Statistics 2022–23', *Corrections, Prisons & Parole* (Web Page, June 2022) <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2022-23>.

6 Royce Millar and Chris Vedelago, 'Prisons Are Booming as Victoria Pays for Its "Tough on Crime" Stance', *The Age* (online, 27 June 2019) <https://www.theage.com.au/national/victoria/prisons-are-booming-as-victoria-pays-for-its-tough-on-crime-stance-20190627-p5220f.html>:

> The annual cost of running the state's prisons is now more than $1.6 billion, triple the outlay in 2009–2010. And to pay for the burgeoning numbers, the government announced a record $1.8 billion in new capital spending on prison infrastructure over four years in the May budget to accommodate 1600 additional prisoners. The surge will stretch the capacity of the corrections system over the next four years despite plans to install hundreds of new beds and cells in existing facilities, and the decision to expand and accelerate plans for a massive new prison near Geelong.

Each prisoner costs over $130,000 AUD per annum: Ian Gray and Kevin Bell, 'Why "Tough on Crime" Attitude Won't Keep Us Safe', *The Herald Sun* (online, 22 November 2020) <https://www.heraldsun.com.au/news/opinion/why-tough-on-crime-attitude-doesnt-make-communities-safer/news-story/c899d9398a40979174cc417b49c8c3fa>.

7 Gray and Bell (n 6). See 'Corrections Statistics: Quick Reference', *Corrections, Prisons & Parole* (Web Page, 22 January 2021) <https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>, citing Productivity Commission, *Report on Government Services 2021* (Annual Report, 22 January 2021) pt C <https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/justice>. Notably, these systemic issues have now been the subject by the findings and recommendations of Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf> ('*Inquiry into Victoria's Criminal Justice System*').

and 'incrementally hardened',[8] with the result that judicial discretion in sentencing is continuously eroded and then removed. There is no reason why such a model, which appears to be particularly susceptible to penal populism and 'law and order auction' election campaigning,[9] could not be adopted in comparable jurisdictions.[10]

Part II of this article considers the dangers of presumptive and mandatory sentencing. Part III outlines the legislative landscape in Victoria before the reforms, and then examines the relevant legislation enacted between 2013 and 2020. Part IV examines the methodological approach taken by the courts in response to the reforms. Part V then sets out critical observations of the new sentencing regime. The erosion of judicial discretion in sentencing has been systematic and is likely to continue as new offences are created, presumptive sentences are increased, exceptions are made more difficult to satisfy or removed, and more offences become subject to mandatory imprisonment.

8 This also occurred with regard to federal people smuggling offences: Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36(2) *Melbourne University Law Review* 553, 555.

9 See Gay Alcorn, 'Law and Order Auction: How Crime Came to Dominate Victoria's Election', *The Guardian* (online, 3 October 2018) <https://www.theguardian.com/australia-news/2018/oct/03/law-and-order-auction-crime-victoria-election>.

10 For an overview of mandatory sentencing in Australia, see Julian R Murphy et al, 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2020) 46(3) *Monash University Law Review* 252, 265–8. Many other Australian jurisdictions already have some form of presumptive or mandatory sentencing provisions. See, eg, *Crimes Act 1914* (Cth) s 16AAA (certain sexual offences against children committed outside Australia and certain domestic child abuse offences); *Migration Act 1958* (Cth) s 236B (aggravated people smuggling); and *Criminal Code Act 1995* (Cth) ss 360.3A, 361.5 (certain firearms trafficking offences). In New South Wales ('NSW') there are standard non-parole periods for certain offences: *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A; and mandatory sentences: *Crimes Act 1900* (NSW) ss 19B (for murder of police officers on duty), 25B (assault causing death when intoxicated). In the Northern Territory ('NT'), see *Criminal Code Act 1983* (NT) s 157(2) (murder); *Domestic and Family Violence Act 2007* (NT) s 121(2) (subsequent breaches of domestic violence orders); *Misuse of Drugs Act 1990* (NT) ss 37(2)–(3) (certain drugs offences); *Sentencing Act 1995* (NT) pt 3 div 6A sub-div 2 (certain violent offences in particular circumstances subject to an exceptional circumstances exemption), s 78F (sexual offences). In Queensland, see *Criminal Code Act 1899* (Qld) ss 305 (murder), 314A (unlawful striking causing death); *Penalties and Sentences Act 1992* (Qld) ss 161E (repeat sexual offences against children), 161R (serious organised crime offences). In South Australia, see *Criminal Law Consolidation Act 1935* (SA) s 11 (murder); *Sentencing Act 2017* (SA) ss 47(5)–(6) (non-parole periods for certain offences), 51 (serious firearms offences). In Western Australia, see *Criminal Code Act Compilation Act 1913* (WA) ss 281(1)–(3), 294(1)–(2), 297(5)–(6), 321(14), 324(3), 326(3), 327(3), 328(2), 330(10) (certain unlawful assault and sexual offences committed in the course of an aggravated burglary), 318(2)–(4) (certain assaults on a public officer), 401(4) (repeat home burglary); *Misuse of Drugs Act 1981* (WA) s 34 (certain drug offences); *Road Traffic Act 1974* (WA) s 60B(5) (certain driving offences committed when escaping pursuit by a police officer); *Sentencing Act 1995* (WA) s 9D (offences involving a declared criminal organisation).

It should be noted that, in the Northern Territory, the *Sentencing and Other Legislation Amendment Act 2022* (NT) has been enacted. Once commenced that will repeal presumptive and mandatory sentencing provisions in the *Domestic and Family Violence Act 2007* (NT), the *Misuse of Drugs Act 1990* (NT) and the *Sentencing Act 1995* (NT).

II THE DANGERS OF PRESUMPTIVE AND MANDATORY SENTENCING

Presumptive and mandatory sentencing statutory provisions restrict or remove the discretion of the judicial officer 'to impose a sentence that is appropriate having regard to the circumstances of the particular instance of the offence'.[11] That is 'contrary to the fundamental sentencing principle that the punishment should be proportionate to the seriousness of the offence having regard to the circumstances of the offender'.[12] The foundational problem caused by presumptive and mandatory sentencing was described by Mildren J in *Trenerry v Bradley*:[13]

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.[14]

That passage was cited with approval by the Victorian Court of Appeal in the 2022 judgment of *Buckley v The Queen* ('*Buckley*'),[15] where Maxwell P and T Forrest JA stated:

> Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted

11 Liberty Victoria, Submission No 10 to the Sentencing Advisory Council, *Sentencing Guidance Reference* (8 February 2016) 11 [38] <https://libertyvictoria.org.au/content/sentencing-guidance-reference>. See *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ) (emphasis added):

> > Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. *It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.* But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. *If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects*. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.
>
> The italicised parts of this passage were quoted in *Magaming v The Queen* (2013) 252 CLR 381, 391 [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Magaming*'). See also *R v Ironside* (2009) 104 SASR 54, 60 [24], 68 [71]–[72] (Doyle CJ, Gray J agreeing at 89–90 [150], Kourakis J agreeing at 94 [168]); *Bahar v The Queen* (2011) 45 WAR 100, 111 [46] (McLure P, Martin CJ agreeing at 102 [1], Mazza J agreeing at 115 [66]) ('*Bahar*').

12 Liberty Victoria, Submission No 10 to the Sentencing Advisory Council, *Sentencing Guidance Reference* (8 February 2016) 11–12 [38].

13 (1997) 6 NTLR 175.

14 Ibid 187.

15 [2022] VSCA 138 ('*Buckley*').

> and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.[16]

Accordingly, and as noted by Murphy et al, the pitfalls of mandatory sentencing regimes are *systemic* in nature; they *necessarily* result in individual instances of injustice.[17] The Law Council of Australia has outlined its concerns that mandatory sentencing regimes:[18]

1. '[U]ndermine fundamental principles underpinning the independence of the judiciary and the rule of law';[19]
2. Are 'inconsistent with Australia's international obligations', particularly Australia's obligations with respect to 'the prohibition against arbitrary detention as contained in Article 9 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')';[20] and 'the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR';[21]
3. Increase economic costs to the community through higher incarceration rates;[22]

16 Ibid [5] (citations omitted).

17 Murphy et al (n 10) 269 (emphasis in original). See also Dyer (n 3) 201 (citations omitted):

> By imposing a disproportionate sentence, the state exercises its coercive powers in a way that is not tailored to the offender's wrongdoing. It thus fails to reason with him/her. In other words, as with punishments that are barbaric in themselves, the offender is treated not as a moral agent, but rather as a thing to be dominated.

18 Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014) 5–7, 20–35 <https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf> ('*Policy Discussion Paper on Mandatory Sentencing*'). See also the list of 22 matters identified by Cowdery (n 2) 12–13. See also Sarah Krasnostein, 'Pursuing Consistency: The Effect of Different Reforms on Unjustified Disparity in Individualised Sentencing Frameworks' (PhD Thesis, Monash University, 15 July 2015) 244 (citations omitted) <https://bridges.monash.edu/articles/Pursuing_consistency_the_effect_of_different_reforms_on_unjustified_disparity_in_individualised_sentencing_frameworks/4706140>:

> Criticised on many bases including failure to deter, redundancy when applied to serious offenders, violation of international law and human rights, encouragement of avoidance behaviours by judges and prosecutors, and displacement of discretion to less visible parts of the criminal justice system, the experience of mandatory and presumptive sentencing in Australia has cast doubt on its ability to reduce disparity and, in fact, has demonstrated that they 'lead to greater inconsistency and had a profound discriminatory impact on certain groups'. As the Victorian Sentencing Advisory Council noted in 2008, '[i]mposing a prescribed sanction or range of sanctions for offences guarantees only a very superficial, artificial consistency'.

19 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 20 [63]. See also the comments of judicial officers in Australia and overseas summarised by Cowdery (n 2) 5–7.

20 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 6. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

21 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 6. To this could be added, amongst other things, the human right against cruel, inhuman or degrading treatment as protected by *ICCPR* (n 20) art 7: Trotter and Garozzo (n 8) 582–9. See also Dyer (n 3) 200–3.

22 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 6.

4. Disproportionately affect vulnerable groups within the community, including First Nations Australians[23] and people with a mental illness or intellectual disability;[24]

5. '[P]otentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime';[25]

23 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 29 [108]. See Chief Justice Robert French, 'The State of the Australian Judicature' (2016) 90(6) *Australian Law Journal* 400, 406:

> The terrible problem of Indigenous incarceration is linked to a complex of factors with no simple answer. Mandatory minimum sentences are not the answer. Nor is it an answer simply to call for their removal. The Law Council and the Australian Bar Association recognise that a nuanced approach, including the concept of justice reinvestment, is required to which they are prepared to contribute in order to address this national tragedy …

See Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 273–8 <https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf >. The report recommended at 277, amongst other things, that

> Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

See also Ryszard Piotrowicz, 'Mandatory Sentencing and International Law: No Logic and Too Many Question Marks' (2000) 74(6) *Australian Law Journal* 363, where he notes the criticisms of mandatory sentencing provisions in Western Australia and the Northern Territory by the United Nations Committee on the Elimination of Racial Discrimination in March 2000. As noted by Australian Law Reform Commission in relation to the Northern Territory 'three strikes' laws: 'In 2001, the laws were repealed following the suicide of a 15 year old Aboriginal boy mistakenly mandatorily detained for his second minor property offence (theft of stationery worth $50 from a council building)': Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper No 84, July 2017) 76–7 [4.18] (citations omitted) <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/4-sentencing-options/mandatory-sentencing>. For completeness, it should be noted that special leave was refused by the High Court of Australia regarding a challenge to the lawfulness of the Northern Territory mandatory sentencing laws: Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998). See also the primary judgment: *Wynbyne v Marshall* (1997) 7 NTLR 97.

24 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 29 [108]. See, eg, *Muldrock v The Queen* (2011) 244 CLR 120 ('*Muldrock*'), concerning a sentence imposed on a person with an intellectual disability. The High Court held *per curiam* (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), amongst other things, that having regard to the standard non-parole period pursuant to s 54B(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the Court was not required or permitted to engage in a 'two-stage approach': at 132 [28]; the Court of Criminal Appeal had not given sufficient weight to the appellant's intellectual disability: at 125 [9]; and had erred in finding that there were no 'special circumstances' within s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW): at 140 [58]; and the offender's intellectual disability and the fact that he had not previously served a sentence of full-time custody, together with the circumstances of the offence, did not warrant the imposition of a term of nine years' imprisonment (after reduction for a plea of guilty): at 140–1 [60].

25 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 5. See, eg, the comments of judicial officers in 'people smuggling cases' considered by Dina Yehia, 'Boat People as Victims of the System: Mandatory Sentencing of "People Smugglers"' (2016) 3(1) *Northern Territory Law Journal* 18, 26–7. See also the examples cited by Margaret McMurdo regarding the impact of the Northern Territory's mandatory sentencing provisions: Margaret McMurdo, 'Why the Sentencing Discretion Must Be Maintained' (Speech, Australian Lawyers Conference, 13 January 2000) 6–7 <https://archive.sclqld.org.au/judgepub/mcmurdo130100.pdf>, discussing Commonwealth, *Parliamentary Debates*, Senate, 25 August 1999, 7737 (Bob Brown) and

6. Fail to deter crime;[26]
7. Increase 'the likelihood of recidivism because prisoners are placed in a learning environment for crime' thereby inhibiting rehabilitation prospects;[27]
8. '[W]rongly undermines the community's confidence in the judiciary and the criminal justice system as a whole';[28] and
9. '[D]isplaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing'.[29]

The Law Institute of Victoria's comprehensive submission on mandatory sentencing from 2011 stated, amongst other things:

> The overwhelming evidence from Australia and overseas … demonstrates that mandatory sentencing does not reduce crime through deterrence nor incapacitation, and may lead to increased crime rates in the long run, as imprisonment has been shown to have a criminogenic effect.[30]

When one has regard to the circumstances of prisoners, it is unsurprising that mandatory sentencing has no practical deterrent effect. In her article 'Why Mandatory Sentencing Fails', Tania Wolff notes:

> The Victorian Ombudsman's report into prisons in 2015 provided the following sobering statistics about our prison population:

'Parliament Asked to Overturn Mandatory Sentencing', *The World Today* (ABC Radio National, 24 August 1999) <https://www.abc.net.au/worldtoday/stories/s46147.htm>. See also the successful petition for mercy in the case of Zak Grieve, who as a 19 year old was sentenced in the NT in 2013 to mandatory life imprisonment with a non-parole period of 20 years for murder where he was not physically present: Petition from Felicity Gerry et al to the Administrator of the Northern Territory, 20 July 2018 <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf>. The use of petitions for mercy in mandatory sentencing cases has been described as an institutional response 'hidden in plain sight': see Murphy et al (n 10) 283.

26 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 5. See Trotter and Garozzo (n 8) 580 n 173, citing Judith Bessant, 'Australia's Mandatory Sentencing Laws, Ethnicity and Human Rights' (2001) 8(4) *International Journal on Minority and Group Rights* 369, 378. See also the various studies to this effect cited by Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22(1) *Journal of Judicial Administration* 37, 38 n 5.

27 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 5. See *Azzopardi v The Queen* (2011) 35 VR 43, 53–4 [34]–[36] (Redlich JA, Coghlan AJA agreeing at 70 [92], Macaulay AJA agreeing at 70 [93]).

28 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 5. See *WCB v The Queen* (2010) 29 VR 483, 490–2 [20]–[29] (Warren CJ and Redlich JA). See also McMurdo (n 25) 1.

29 *Policy Discussion Paper on Mandatory Sentencing* (n 18) 6. See also GFK Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74(5) *Australian Law Journal* 298, 298–9. But see *Magaming* (n 11) 394–5 [40]–[41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Keane J agreeing at 413 [100]).

30 Law Institute of Victoria, Submission to Attorney-General, Robert Clark, *Mandatory Minimum Sentencing* (30 June 2011) 3 [3], archived at <https://perma.cc/56TN-FX3V>.

- 75 per cent of male prisoners and 83 per cent of female prisoners report illicit drug use before going to prison
- 40 per cent of prisoners have a mental health condition
- 42 per cent of male prisoners and 33 per cent of female prisoners had a cognitive disability
- 35 per cent of prisoners were homeless before their arrest
- More than 50 per cent of prisoners were unemployed
- More than 85 per cent of prisoners had not finished high school.

The notion that the unwell, addicted and impaired will stop committing crimes without rehabilitation and therapeutic programs to deal with the underlying causes of offending is fanciful. It is well known that the motivation to satisfy a drug addiction outweighs the threat of punishment and its long-term consequences.

In a growing number of jurisdictions internationally, including Texas, governments are directing resources away from prisons and towards rehabilitation programs for offenders and justice reinvestment initiatives.[31]

Further, the experience in comparative jurisdictions demonstrates that presumptive and mandatory sentencing regimes fail to achieve consistency in sentencing. Dr Sarah Krasnostein has observed:

> These schemes have proven problematic in their level of constraint and in the internal inconsistencies born from their hurried, politically-motivated introduction. They have

31 Tania Wolff, 'Why Mandatory Sentencing Fails' [2018] (2) *Law Institute Journal* 23, 23. Wolff also observes:

> In Victoria, specialist courts and programs are addressing underlying reasons for the offending with treatment and support. The Drug Court, which has had significant success in terms of recidivism, psychosocial improvement and cost effectiveness since starting in 2002, and the Assessment and Referral Court, are a far more effective response to the revolving door nature of crime and punishment.
>
> Mandatory penalties do not deter people from committing crime, address recidivism or provide consistency in sentencing. A 'one size fits all' approach to sentencing leads to unjust outcomes as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment.
>
> Ultimately, mandatory sentencing is a populist, simplistic reaction to complex problems which require a more sophisticated response.

See also Cowdery (n 2) 4: 'The USA is really the "home" of mandatory and grid sentences in the English-speaking world, but even there the disadvantages of such schemes have been recognised and they are starting to be wound back.'; Gray and Bell (n 6):

> Even in the US — the world's biggest incarceration nation — Republicans and Democrats in a growing number of states are working together to act on the evidence that shows mass incarceration does not make communities safer nor prevent repeat offending. Reforms in Texas since 2007 have seen the state close four prisons, saving an estimated $US3bn and reducing reoffending rates.

President Joe Biden has committed to repealing mandatory minimum sentences. 'As president, he will work for the passage of legislation to repeal mandatory minimums at the federal level. And, he will give states incentives to repeal their mandatory minimums': 'The Biden Plan for Strengthening America's Commitment to Justice', *Biden Harris* (Web Page) <https://joebiden.com/justice/>.

> not proven to be appropriate means of operation[a]lising substantive equality in the sentencing of similarly situated offenders.[32]

Notwithstanding the many pitfalls of mandatory sentencing, in *Magaming v The Queen* ('*Magaming*'),[33] a majority of the High Court of Australia upheld the constitutional validity of federal mandatory sentencing provisions regarding the offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). The majority stated:

> [T]he availability or exercise of a [prosecutorial] choice between charging an accused with the aggravated offence created by s 233C [which attracts a mandatory minimum sentence of imprisonment], rather than one or more counts of the simple offence created by s 233A, is neither incompatible with the separation of judicial and prosecutorial functions nor incompatible with the institutional integrity of the courts. Legislative prescription of a mandatory minimum penalty for the offence under s 233C neither permits nor requires any different answer.[34]

The High Court also rejected the appellant's submissions that the prescription of a mandatory minimum penalty for an offence contravened ch III of the *Constitution*, and that the Court should adopt a form of proportionality analysis when considering the lawfulness of mandatory sentencing provisions.[35]

In dissent, Gageler J would have allowed the appeal, having found that the relevant provisions of the *Migration Act 1958* (Cth)[36] were invalid.[37] His Honour agreed with the proposition that:

> [A] purported conferral by the Commonwealth Parliament on an officer of the Commonwealth executive of a discretion to prosecute an individual within a class of offenders for an offence which carries a mandatory minimum penalty, instead of another offence which carries only a discretionary penalty, amounts in substance to a purported legislative conferral of discretion to determine the severity of punishment consequent on a finding of criminal guilt and is for that reason invalid by operation of Ch III of the *Constitution*.[38]

Justice Gageler rejected the proposition that:

32 Krasnostein (n 18) 238 n 100, citing Sentencing Advisory Council (Qld), 'Minimum Standard Non-Parole Periods' (Consultation Paper, June 2011) 128–9 and Sentencing Advisory Council (Qld), *Minimum Standard Non-Parole Periods* (Final Report, September 2011) 8–11.

33 *Magaming* (n 11). See also *Palling v Corfield* (1970) 123 CLR 52.

34 *Magaming* (n 11) 394 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Keane J agreeing at 413 [100]).

35 Ibid 397–8 [52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Keane J agreeing at 413 [100]).

36 *Migration Act 1958* (Cth) ss 236B(3)(c), (4)(b).

37 *Magaming* (n 11) 399 [59]–[60]. This would have reopened and overruled the authority of *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100.

38 *Magaming* (n 11) 399 [59].

> Commonwealth Parliament can use such a legislative model formally to invoke but substantially to by-pass the structural requirement of Ch III that punishment of crime occur only as a result of adjudication by a court. It is to accept that the length of deprivation of liberty to be imposed as a punishment for criminal conduct can in practice be the result of an executive determination made on information which can remain hidden not only from the individual and the public but from the court whose formal duty it is to impose the minimum penalty in the event of conviction.[39]

Beyond issues of constitutional validity and the proper limits of judicial and executive power,[40] it is clear that, when faced with a presumptive or mandatory term of imprisonment (whether with regard to the head sentence or the non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, presumptive and mandatory sentencing reforms are bound to see an increase in contested hearings, committals and trials which places further pressure on a court system that is already strained and suffering from serious delays.[41] Such pitfalls were demonstrated to be systemic in relation to the offences of aggravated people smuggling considered by the High Court in *Magaming*.[42] These delays also result in greater expenditure of publicly funded prosecutorial and defence resources, including those of Victoria Legal Aid.[43] Such delays also impact upon complainants and other witnesses, and their families and friends.

39 Ibid 408 [82].

40 Including the relevance of ch III constitutional jurisprudence to the states and territories: Dyer (n 3) 210–11.

41 Delays that have only increased after the COVID-19 pandemic which resulted in many proceedings being adjourned and the suspension of jury trials: see David Estcourt and Adam Cooper, '"Human Rights Crisis": Plan to Resume Jury Trials Shelved amid Second Surge', *The Age* (online, 8 July 2020) <https://www.theage.com.au/national/victoria/plan-to-resume-jury-trials-shelved-amid-second-covid-19-surge-20200708-p55a6t.html>. See also Tammy Mills, 'COVID and the Courts: Jury Trials on Hold Again, Backlog Still Looms', *The Age* (online, 30 August 2021) <https://www.theage.com.au/national/victoria/covid-and-the-courts-jury-trials-on-hold-again-backlog-still-looms-20210827-p58md5.html>.

42 See Trotter and Garozzo (n 8) 614 (citations omitted) who noted that after significant delays, public cost and an increasing rate of acquittals:

> [T]he Attorney-General issued a direction to the CDPP [on 27 August 2012] not to institute or continue any prosecution for the aggravated offence of smuggling five or more people, unless the person was a repeat offender or more than a crew member, captain or master of a vessel, or if a death occurred. Instead, such offenders are to be charged with the *simpliciter* offence of smuggling a single person, which attracts half the maximum penalty and, notably, no mandatory minimum. This is a commendable move that will go a long way towards restoring justice in these cases, and focusing on high-level organisers rather than low-level crew. It was welcomed from the Bench by the Chief Judge of the District Court of Queensland, 'congratulat[ing] the Director on such a vital response [and] improvement in the administration of justice'. Its consequence has been that a number of defendants have been given a sentence shorter than the time already spent in custody, and deported immediately.

See also *Magaming* (n 11) 390 [21]–[22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

43 See Yehia (n 25) 19 (citations omitted):

> The cost per trial has been estimated at between $450,000 and $750,000. While in the year 2010–2011 the cost of people smuggling prosecutions was $6.2 million, the amount spent in the seven-month period from July 2011 to January 2012 was $7.6 million. These figures do not include the cost of incarcerating those convicted. For the year 2012–2013, the government provided $8.8 million to the Commonwealth Director of Public Prosecutions (DPP) to prosecute crew and organisers.

Further, the enactment of presumptive and mandatory sentencing provisions reflects a failure to utilise and/or support existing mechanisms that are designed to promote consistency and public confidence in sentencing whilst preserving judicial discretion, such as increasing maximum penalties for offences,[44] appeals against sentence by the Director of Public Prosecutions ('DPP'),[45] the Court of Appeal declaring current sentencing practices to be inadequate,[46] and/or the possibility of the Court of Appeal giving a guideline judgment.[47]

44 As a mandatory consideration when sentencing an offender pursuant to *Sentencing Act 1991* (Vic) s 5(2)(a) ('*Sentencing Act*'). As observed by Callaway JA in *DPP (Vic) v Aydin* [2005] VSCA 86, [12]: '[T]here is a difference between steering *by* the maximum and aiming *at* the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid.'

45 *Criminal Procedure Act 2009* (Vic) s 287. Notably, pursuant to s 289(2) of that Act, if an appeal by the DPP is allowed, the Court must not take into account any element of double jeopardy involved in the respondent being sentenced again.

46 See, eg, *Winch v The Queen* (2010) 27 VR 658 (regarding 'glassing' offences); *Hogarth v The Queen* (2012) 37 VR 658 (regarding 'confrontational' aggravated burglary) ('*Hogarth*'); *Harrison v The Queen* (2015) 49 VR 619 (regarding offences of negligently causing serious injury in the 'upper' range of seriousness); *Nguyen v The Queen* (2016) 311 FLR 289 (regarding cultivation of a commercial quantity of a cannabis is the 'mid' category); *DPP (Vic) v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (regarding incest). However, it should be noted that in *DPP (Vic) v Dalgliesh (A Pseudonym)* (2017) 262 CLR 428 ('*Dalgliesh*'), the High Court held that the Court of Appeal erred by treating the range established by current sentencing practices as the determinative factor in the disposition of the appeal and, having concluded that a significantly higher sentence was warranted, should have allowed the appeal and corrected the error of legal principle. Further, pursuant to the *Sentencing Act* (n 44) s 5(2), current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence: *Dalgliesh* (n 46) 444 [48], 448–9 [62]–[63], 450 [68] (Kiefel CJ, Bell and Keane JJ). Following *Dalgliesh*, in *Carter v The Queen* (2018) 272 A Crim R 170, 189 [80] the Court of Appeal (Weinberg, Beach and Hargrave JJA) (citations omitted) held:

> *Dalgliesh* … requires a sentencing court in such circumstances to correct the error of principle underlying inadequate current sentencing practices and impose a just sentence according to law, even where an offender has pleaded guilty in light of current sentencing practices. The incremental increase cases in Victoria should be taken to have been overruled by *Dalgliesh* …

47 As occurred in Victoria's first guideline judgment, *Boulton v The Queen* (2014) 46 VR 308 ('*Boulton*'), which considered Community Correction Orders ('CCOs'). Pursuant to the *Sentencing Act* (n 44), a guideline judgment may be given on the Court's own initiative or on an application by a party to the appeal: at s 6AB; or on application by the Attorney-General: at s 6ABA. Pursuant to s 6AA of the *Sentencing Act* (n 44), such guidelines can apply:

(a) generally; or

(b) to a particular court or class of court; or

(c) to a particular offence or class of offence; or

(d) to a particular penalty or class of penalty; or

(e) to a particular class of offender.

See *Nash v The Queen* (2013) 40 VR 134, 137 [12] where Maxwell P noted that the time had come for the DPP to invite the Court to give a guideline judgment on the offence of intentionally causing serious injury, and that, failing such an invitation, the court itself may need to consider taking that course. It does not appear that such an invitation was extended to the Court by the DPP. For completeness, it should be noted in *Wong v The Queen* (2001) 207 CLR 584, the High Court held, amongst other things, that the particular NSW guideline judgment was beyond jurisdiction because it was directed to the sentences to be passed on others, and was not directed at the quelling of the dispute which constituted the matter before the Court: at 615 [84] (Gaudron,

This article now turns to consider how presumptive and mandatory sentencing became embedded in Victoria, notwithstanding the clear warnings about the pitfalls of constraining the sentencing discretion of judicial officers.

III THE LEGISLATIVE LANDSCAPE IN VICTORIA

While in Victoria the offences of murder, treason, piracy with violence and committing piratical acts once attracted mandatory life imprisonment, this was abolished in 1986.[48] Since that time, and until the reforms began in 2013, mandatory sentencing provisions were very rare.[49] Over the past decade, however, the expansion of presumptive and mandatory sentencing has been unrelenting. Like the fable of the frog being slowly boiled alive, after a decade of legislative changes we now find ourselves in a markedly different environment, and it is important to comprehend how we arrived at this position.

At the outset, Victoria's movement towards presumptive and then mandatory sentencing needs to be placed in the context of other significant reforms to sentencing law. In 2011 there was the commencement of the phased abolition of suspended sentences of imprisonment, which concluded in 2014.[50] Further, in 2011

Gummow and Hayne JJ). Following this judgment, s 37A(1) was inserted into the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that '[t]he Court may give a guideline judgment on its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings'. See the similar provision in the *Sentencing Act* (n 44) s 6AB(3), as inserted by the *Sentencing (Amendment) Act 2003* (Vic) s 4.

48 *Crimes (Amendment) Act 1986* (Vic) pt 3.

49 One example was the now amended *Road Safety Act 1986* (Vic) s 30(1), as at 31 December 2010, which had provided that for a subsequent offence of driving while disqualified a person must be sentenced to 'imprisonment of not less than 1 month and not more than 2 years'. Although it should be noted that this still allowed an offender to be sentenced to a suspended sentence of imprisonment (as a term of imprisonment that could be served in the community). See Brenda Coleman, 'Driving while Disqualified or Suspended under s 30 of the *Road Safety Act 1986* (Vic): Abolition of the Mandatory Sentencing Provision?' (2006) 11(2) *Deakin Law Review* 23. This mandatory sentencing provision was amended by the *Sentencing Amendment Act 2010* (Vic) s 28. Another example is the *Country Fire Authority Act 1958* (Vic) ss 39A, 39C, which mandate imprisonment for offences of causing fire in a country area in extreme conditions (a term not less than three months and not more than two years) and causing fire in a country area with intent to cause damage (a term not less than 1 year and not more than 20 years).

50 Suspended sentences had been restricted since 2006, with the *Sentencing (Suspended Sentences) Act 2006* (Vic) limiting the imposition of wholly suspended sentences for 'serious offence[s]' to where there were 'exceptional circumstances' and it was in the interests of justice: at s 4(2). Then the imposition of suspended sentences was prohibited for 'serious offences' committed on or after 1 May 2011 by the *Sentencing Amendment Act 2010* (Vic) s 12: 'Phasing out of Suspended Sentences Complete from Today', *Sentencing Advisory Council* (Web Page, 1 September 2014) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/suspended-sentences-and-other-abolished-orders> ('Phasing out of Suspended Sentences Complete from Today'). This prohibition was expanded to 'significant offences' by the *Sentencing Further Amendment Act 2011* (Vic) ss 3–4. Then there was the phased abolition of suspended sentences in the higher courts for all offences committed on or after 1 September 2013 by the *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic), and in the Magistrates' Court of Victoria for all offences committed on or after 1 September 2014 by the *Sentencing*

there was the abolition of other sentencing dispositions such as intensive correction orders ('ICOs'), combined custody and treatment orders, home detention orders, community-based orders,[51] and the introduction of community correction orders ('CCOs') as a new, flexible community-based sentencing disposition.[52] A significant purported reason for such reforms was truth in sentencing, whereby the Baillieu and Napthine governments committed to the abolition of sentences of imprisonment that were able to be served in the community (such as suspended sentences and ICOs) under the guiding principle that 'jail will mean jail'.[53]

Following a series of high-profile cases that revealed system failures,[54] there have been other significant criminal justice reforms over the past decade in Victoria, including to the parole system[55] and bail law.[56] In combination, these reforms have also contributed to a significant increase in Victoria's prison population and the

Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013 (Vic): 'Phasing out of Suspended Sentences Complete from Today' (n 50). See 'Abolished Sentencing Orders', *Sentencing Advisory Council* (Web Page, 12 February 2021) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/abolished-sentencing-orders>.

51 *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic); *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).

52 *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

53 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3291–2 (Robert Clark, Attorney-General):

> We have abolished the legal fiction of suspended sentences for a wide range of serious crimes. We also have legislation currently before Parliament that seeks to abolish home detention so that jail will mean jail.
>
> We will be proceeding with the complete abolition of suspended sentences, the introduction of statutory minimum sentences for gross violence offences, and baseline sentencing for serious crimes. These significant reforms will further restore truth and transparency to sentencing. …
>
> Instead of using the legal fictions of imposing a term of imprisonment that is suspended or served at home, the courts will now openly sentence offenders to jail or, where appropriate, use the CCO to openly sentence the offender to a community-based sentence. Unlike the CCTO and ICO, which are technically sentences of imprisonment, the CCO is a community-based sentence. There is no legal fiction involved. The CCO can be combined with a jail sentence, but it will not pretend to be one. The CCO is a transparent sentence that can be understood by everyone in the community.

54 Most notoriously, the cases of Adrian Bayley in *R v Bayley* [2013] VSC 313 and James Gargasoulas in *DPP (Vic) v Gargasoulas* [2019] VSC 87.

55 This was after Ian Callinan's report: Ian Callinan, *Review of the Parole System in Victoria* (Report, July 2013) <https://files.corrections.vic.gov.au/2021-06/ReviewAdultParoleBoard%20v1.pdf> and the resulting *Corrections Amendment (Parole Reform) Act 2013* (Vic). See also the *Corrections Amendment (Parole) Act 2018* (Vic), which, amongst other things, introduced s 74AAA into the *Corrections Act 1986* (Vic) and prohibits the Adult Parole Board from granting parole to offenders who have murdered police officers except in very narrow circumstances (the prisoner is in imminent danger of dying, or is seriously incapacitated and, as a result, no longer has the physical ability to do harm to any person; the prisoner does not pose a risk to the community; and the making of a parole order is justified). This applies retrospectively (in substantive effect) to sentences imposed prior to the reforms.

56 This was after Paul Coghlan's two reports: *Bail Review: First Advice to the Victorian Government* (Report, 3 April 2017) <https://apo.org.au/sites/default/files/resource-files/2017-04/apo-nid76326.pdf>; Paul Coghlan, *Bail Review: Second Advice to the Victorian Government* (Report, 1 May 2017) <https://apo.org.au/sites/default/files/resource-files/2017-04/apo-nid76328.pdf>, and the resulting legislation amending the *Bail Act 1977* (Vic): *Bail Amendment (Stage One) Act 2017* (Vic); *Bail Amendment (Stage Two) Act 2018* (Vic).

corresponding cost to the public.[57] There has been criticism that the reforms have been discriminatory in effect, including against First Nations peoples.[58]

The relevant presumptive and mandatory sentencing reforms over the past ten years include at least 14 pieces of legislation:

1. The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic);
2. The *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic);
3. The *Sentencing Amendment (Emergency Workers) Act 2014* (Vic);
4. The *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic);
5. The *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic);
6. The *Crimes Legislation Amendment Act 2016* (Vic);
7. The *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic);
8. The *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic);
9. The *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic);
10. The *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic);
11. The *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic);
12. The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic);
13. The *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic); and
14. The *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic).

57 See, eg, Adam Carey, 'Jails Bursting with Unsentenced Prisoners as Costs Also Soar', *The Age* (online, 23 April 2018) <https://www.theage.com.au/politics/victoria/jails-bursting-with-unsentenced-prisoners-as-costs-also-soar-20180423-p4zb8p.html>.

58 Liberty Victoria, *Bailing out of Broken Bail System* (Report) <https://static1.squarespace.com/static/6126d454650f333db2d27357/t/62c3cc958ede295f34e1269f/1656999063799/Bailing+Out+A+Broken+Bail+System+-+RAP+June+2021+Report.pdf> 14; Victorian Aboriginal Legal Service, *Fixing Victoria's Broken Bail Laws* (Policy Brief) <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>.

Many of those Acts, amongst other things, amended the *Sentencing Act 1991* (Vic) ('*Sentencing Act*') to require judicial officers when sentencing for certain offences to impose a term of imprisonment and fix a non-parole period of not less than a certain duration, subject to 'special reasons' exceptions.[59] As will be considered below, the special reasons exceptions have been made more difficult to satisfy over time. It is beyond the scope of this article to consider all of the above legislation in detail; however, it will give an overview of the reforms.[60] Further, the appendix to this article provides a summary of the current state of the law.[61]

A *The* Crimes Amendment (Gross Violence Offences) Act 2013 *(Vic)*

Prior to forming government after the Victorian state election on 27 November 2010, the then Coalition opposition made a commitment to introduce statutory minimum sentences for the offences of intentionally causing serious injury ('ICSI') and recklessly causing serious injury ('RCSI') in circumstances of 'gross violence', arguing 'that serious violence in Victoria was increasing', 'the Victorian public believed current sentencing laws to be too lenient, and that a tougher sentencing regime was required which included baseline sentencing and a minimum sentence for gross violence'.[62]

In retrospect, the enactment of the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) was significant, not only because of its introduction of presumptive sentencing in Victoria, but because it created a statutory mechanism that was later expanded to encompass additional offences. The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic), amongst other things, created the offences of ICSI and RCSI in circumstances of 'gross violence'.[63] Whilst those offences

59 *Sentencing Act* (n 44) s 10A.

60 This article will not consider specific reforms with regard to young and child offenders pursuant to amendments to the *Children, Youth and Families Act 2005* (Vic), although for completeness it should be noted that the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) pt 4, amongst other things, introduced 'Category A' and 'Category B' 'serious youth offences' whereby, in certain circumstances, offenders must be sentenced to adult prison rather than a youth detention facility unless 'exceptional circumstances' exist, and certain matters must be uplifted from the Children's Court to be dealt with in the adult jurisdiction unless exceptions apply. See Sentencing Advisory Council (Vic), *Changes to Sentencing Law in Victoria: An Overview of 2018* (Report, 7 February 2019) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Changes_to_Sentencing_Law_in_Victoria_2018.pdf>.

61 Based on a table prepared by Jonathan Barreiro and Michael Stanton**,** barristers at the Victorian Bar: Jonathan Barreiro and Michael D Stanton, 'Mandatory and Presumptive Sentencing: The Current State of the Law' (Criminal Law Zoom Sessions, Foley's List, 11 November 2020) <https://foleys.com.au/ResourceDetails.aspx?rid=453&cid=8>.

62 Bella Lesman et al, 'Crimes Amendment (Gross Violence Offences) Bill 2012' (Research Brief No 1, Parliamentary Library and Information Service, Parliament of Victoria, February 2013) 5 (citations omitted) <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13736-2013-01-crimes-amendment-gross-violence>. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5549 (Robert Clark, Attorney-General).

63 *Crimes Act 1958* (Vic) ss 15A–15B ('*Crimes Act*'), as inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 4. In summary, the circumstances of gross violence are

carried the same maximum penalties as the existing offences of ICSI and RCSI (20 years' and 15 years' imprisonment respectively),[64] the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) provided that a court must impose a sentence of imprisonment and fix a non-parole period of not less than four years' imprisonment unless it finds that a special reason exists.[65]

The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) inserted s 10A into the *Sentencing Act*, with s 10A(2) providing that a court may make a finding that a special reason exists if, in summary:

(a) The offender has assisted or has given an undertaking to assist law enforcement authorities;[66]

(b) The offender is of or over the age of 18 years but under 21 years at the time of the commission of the offence; and has a particular psychosocial immaturity; or

(c) The offender proves on the balance of probabilities that —

  (i) at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability; or

  (ii) he or she has impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment; or

(d) The court proposes to make a hospital security order (due to mental illness, now known as a Court Secure Treatment Order ('CSTO')) or a residential treatment order ('RTO') (due to intellectual disability) in respect of the offender; or

(e) There are substantial and compelling circumstances that justify doing so.[67]

The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) further provided that:

> In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court must have regard to

defined to include: (1) pre-planning; (2) where the offender was in company or in a joint criminal enterprise with two or more other persons; (3) planning and the use of an offensive weapon, firearm or imitation firearm; and/or (4) the offender continued to cause injury after the victim was incapacitated or caused the serious injury when the victim was incapacitated: *Crimes Act* (n 63) ss 15A(2), 15B(2).

64 *Crimes Act* (n 63) ss 15A(1), 15B(1), as inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 4.

65 *Sentencing Act* (n 44) s 10(1), as inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9. Notably, pursuant to *Sentencing Act* (n 44) s 10(2), that provision does not apply to a person who aids, abets, counsels or procures the commission of the offence, or to a person under the age of 18 years at the time of the commission of the offence.

66 See *Farmer v The Queen* [2020] VSCA 140, [69], [79], [84] (Maxwell P, Kaye and Niall JJA) ('*Farmer*'). 'Assistance' does not extend to the making of full admissions.

67 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9.

> (a) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 4 years should ordinarily be fixed for [a gross violence offence]; and
>
> (b) whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and … minimum non-parole period.[68]

Further, the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) provided that the court must state in writing the special reason, and cause that reason to be entered in the records of the court.[69] As will be considered below, over the past decade some of the exceptions have been amended in order to make it more difficult for them to be established (and one category, the young offender with a particular psychosocial immaturity, has been repealed).

It should be noted that those critical of the proposed reforms, such as Liberty Victoria, took issue with the premise that the public was 'calling for harsher sentencing of offenders who have caused serious injuries through violence', or that the reforms would 'result in greater protection of the community'.[70] It was submitted, amongst other things:

1. It was already the case that the offences of ICSI and RCSI, when accompanied by what could be described as 'gross violence', demand condign punishment in almost all cases. Indeed, the Court of Appeal had made that clear in the leading judgment of *Director of Public Prosecutions (Vic) v Terrick*;[71]

2. There was empirical evidence that, when informed of facts relevant to sentencing, most members of the public did not consider sentences imposed upon offenders by judicial officers to be too lenient;[72] and

68 *Sentencing Act* (n 44) s 10A(3), as inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9.

69 *Sentencing Act* (n 44) s 10A(4), as inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9. Although the failure to do so does not invalidate any order: *Sentencing Act* (n 44) s 10A(5).

70 Michael Stanton, 'More Harm than Protection: Reviewing Proposed Sentencing Reforms' (Spring 2011) *Liberty News* 9 <https://libertyvictoria.org.au/sites/default/files/LibertyNews Spring11.pdf>.

71 (2009) 24 VR 457.

72 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] (October) *Criminal Law Review* 769; Karen Gelb, 'More Myths and Misconceptions' (Research Paper, Sentencing Advisory Council, 2 September 2008); Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Research Paper No 407, Australian Institute of Criminology, February 2011) ('*Public Judgement on Sentencing*'). See also Sentencing Advisory Council (Vic), *Sentencing Guidance in Victoria* (Report, 10 June 2016) 252 [10.44]–[10.45] ('*Sentencing Guidance in Victoria*'), citing *Public Judgement on Sentencing* (n 72) and Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 180. See also 'Is Sentencing in Victoria Lenient? Key Findings of the Victorian Jury Sentencing Study', *Sentencing Advisory Council* (Web Page,

3. The reforms undermined the pivotal role of rehabilitation in protecting the community, especially with regard to younger offenders. The government had not cited any empirical evidence that supported the proposition that mandatory sentencing achieves a greater level of community protection. As French CJ had observed in the judgment of *Hogan v Hinch*,[73] '[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest'.[74]

Notwithstanding such concerns, the Victorian government pressed on with its legislative agenda.

B *The* Sentencing Amendment (Baseline Sentences) Act 2014 *(Vic)*

The next step in the reforms introduced by the Coalition government, the ultimately doomed *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic), was passed with bipartisan support and over a unanimous chorus of criticism from the legal profession.[75] The baseline regime required, amongst other things, judicial officers to have regard to an aspirational and increased 'median' sentence for some

23 August 2018) 1–2 (emphasis omitted) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Is_Sentencing_in_Victoria_Lenient.pdf>:

> Overall, 62% of jurors would have imposed a sentence that was more lenient than the judge, while 2% would have imposed a sentence of equal severity. The difference was not minor: overall, jurors imposing a prison sentence were more lenient than the judge by an average of 12 months. Jurors (16%) were also more likely than judges (8%) to suggest a non-custodial sentence. …
>
> After being provided with the judge's sentencing remarks and a booklet of information on sentencing law and practice, the overwhelming majority (87%) of jurors thought the judge's sentence was either "very appropriate" or "fairly appropriate". Only 3% of jurors thought the judge's sentence was "very inappropriate" …

See also *WCB v The Queen* (2010) 29 VR 483, 490–2 [20]–[29] (Warren CJ and Redlich JA), discussing Gelb (n 72); Kate Warner et al, 'Mandatory Sentencing? Use [with] Discretion' (2018) 43(4) *Alternative Law Journal* 289, 289 (citations omitted) ('*Mandatory Sentencing*'):

> [W]hen the public are provided with illustrative cases or are reminded that under mandatory sentencing all offenders guilty of a particular offence will be given the same sentence regardless of the circumstances of the offence or their individual circumstances, the public are largely in favour of sentences being determined on a case-by-case basis. In addition, research has revealed strong public attachment to judicial discretion, even if people feel that sentencing 'in general' is too lenient.

73 (2011) 243 CLR 506.

74 Ibid 537 [32].

75 Cowdery (n 2) 10: 'The 2014 Bill proposes a different scheme from that recommended by the Council and has met with strong opposition from the Chief Justice and Chief Judge, the Victorian Bar and the Law Institute of Victoria — and just about every criminal legal practitioner in the State.'

types of offences,[76] and to give reasons for sentencing above or below that aspirational median.[77]

The criticism from the legal profession towards the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) focussed on the fact that it constituted another limitation of judicial sentencing discretion and appeared to require a form of two-stage sentencing in breach of the judgment of the High Court in *Markarian v The Queen.*[78] Further, it was submitted that the reforms would significantly increase complexity, delay and cost by requiring criminal lawyers and judicial officers to effectively fulfil a role as sentencing statisticians on plea hearings. The reform was characterised by a disregard for the duty of the judicial officer to do justice in an individual case, and statements of fundamental sentencing principle such as in *Hili v The Queen*.[79]

In *Director of Public Prosecutions (Vic) v Walters (A Pseudonym)*,[80] the Court of Appeal observed that the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) was 'without precedent in Australian sentencing law'.[81] By a strong majority (Maxwell P, Redlich, Tate, and Priest JJA, with Whelan JA in dissent), the Court

76 Ibid 11. See the now repealed *Sentencing Act* (n 44) s 5B, as inserted by *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) s 5. The median sentences were as follows: murder (25 years), drug trafficking of a large commercial quantity (14 years), incest with a child (10 years), sexual penetration of a child under 12 years (10 years), persistent sexual abuse of a child under 16 years (10 years) and culpable driving causing death (9 years): *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) ss 12–16, 18.

77 See the now repealed *Sentencing Act* (n 44) s 5A(4), as inserted by *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) s 5.

78 (2005) 228 CLR 357 ('*Markarian*').

79 (2010) 242 CLR 520, 535 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):

> Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.
>
> The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the *Crimes Act*. When it is said that the search is for 'reasonable consistency', what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form.

See, eg, Criminal Bar Association, Submission No 10 to Sentencing Advisory Council, *Baseline Sentencing* (3 November 2011) which was endorsed by Liberty Victoria, Submission No 14 to Sentencing Advisory Council, *Baseline Sentencing* (Report, 7 November 2011). See also Sentencing Advisory Council (Vic), *Baseline Sentencing* (Report, May 2012) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Baseline_Sentencing_Report.pdf>.

80 (2015) 49 VR 356 ('*Walters*').

81 Ibid 360 [10].

held that the legislation was 'incurably defective'.[82] That was because the legislation did not provide any mechanism for the achievement of the intended future median.[83] Further, the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) erroneously conflated the idea of a median sentence with a sentence of mid-range seriousness.

The Court of Appeal observed that the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) was plainly contemplated to create a two-stage sentencing methodology in practice.[84] That was notwithstanding the claim in the Explanatory Memorandum that '[t]he baseline sentence is not a starting point for sentencing judges nor does it require two-stage sentencing'.[85] However, the practical reality was that under the baseline sentencing regime, the sentencing judge would have to consider the median sentence at the outset (which was mistakenly contemplated by the legislature as being an offence of mid-range seriousness), and then, having considered the circumstances of the given case, provide reasons for sentencing above or below the median sentence. As noted by the Court of Appeal, such an approach 'would have "overthrown fundamental principles" of sentencing law'.[86] The Court of Appeal observed:

> It is a tenet of sentencing law that the sentence imposed in a particular case reflects the judge's evaluation of the full range of factors bearing on the nature and circumstances of the offending and the personal circumstances and past history of the offender. The mere fact that two offenders received the same sentence for the same offence provides little or no information as to whether the cases are in any way comparable.[87]

Despite supporting the baseline sentencing regime at the time it was enacted, the Labor government portrayed that legislation as in effect 'botched' by the previous Coalition government and ultimately repealed the baseline sentencing provisions and introduced the 'standard sentence' scheme with the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic). This did not share the same defects as the baseline sentencing regime, although it represented another step in the whittling away of judicial sentencing discretion with the express intention of increasing sentences for certain offences.[88]

82 Ibid.

83 Ibid 360 [11].

84 Ibid 369 [49], 374 [67].

85 Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill 2014 (Vic) 2.

86 *Walters* (n 80) 374 [65].

87 Ibid 375–6 [73].

88 Explanatory Memorandum, Sentencing Amendment (Sentencing Standards) Bill 2017 (Vic) 6: The aim of the standard sentence scheme is to increase sentences for standard sentence offences and ensure that sentencing outcomes are more consistent with community expectations. The standard sentence is calculated at 40% of the maximum penalty for the relevant standard sentence offence. A 'standard sentence' is a mandatory consideration: *Sentencing Act* (n 44) s 5B(2)(a). It is a 'legislative guidepost' when determining a sentence for certain offences, although not

C *The* Sentencing Amendment (Emergency Workers) Act 2014 *(Vic)*

The next legislative reform, the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic), was significant because it represented an expansion of the presumptive sentencing provisions introduced by the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) to encompass offences against emergency workers on duty.[89] 'Emergency workers' was broadly defined to include police officers, protective services officers, ambulance workers, hospital staff, firefighters and State Emergency Service workers amongst others,[90] and was later expanded to include custodial officers[91] and youth justice custodial workers.[92] The *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) also introduced significant reforms to the CCO regime. The *Sentencing Amendment (Emergency Workers) Act 2014* (Vic), amongst other things:

permitting two-stage sentencing or interfering with the instinctive synthesis: *Brown v The Queen* (2019) 59 VR 462, 464–5 [4]–[8] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA) ('*Brown*'), citing *Muldrock* (n 24). See also *DPP (Vic) v Drake* [2019] VSCA 293, [14]–[17] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA); *Lugo (A Pseudonym) v The Queen* [2020] VSCA 75, [24]–[26] (Maxwell P, Kaye, T Forrest and Emerton JJA); *Victorsen v The Queen* (2020) 94 MVR 91, 98–9 [18]–[23] (Priest JA, Niall JA agreeing at 102 [43]); *DPP (Vic) v Beck* [2021] VSCA 88, [55] (Maxwell P, T Forrest and Emerton JJA). The *Sentencing Act* (n 44) s 5B(5) provides that, in giving reasons for sentence, 'a court must refer to the standard sentence for the offence and explain how the sentence imposed by it relates to that standard sentence'. This may involve an element of comparison to the 'legislative guideposts', albeit with limited utility given the narrowness of the definition of 'objective factors' in *Sentencing Act* (n 44) ss 5A(1)(b), 5A(3), and the inevitable imprecision of the notion of a hypothesised mid-range offence: *Brown* (n 88) 479–80 [55]–[57] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA), citing *Markarian* (n 78) 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Carlton v The Queen* (2008) 189 A Crim R 332, 349 [90] (Basten JA). There is an issue as to whether, in light of *Brown* (n 88) and *Muldrock* (n 24), standard sentencing should be regarded as 'presumptive sentencing' at all: see Krasnostein (n 18) 240. It should be noted that this regime also introduced mandatory minimum non-parole periods (as a proportion of the head sentence) for standard sentence offences, subject to an 'interests of justice' exception: *Sentencing Act* (n 44) s 11A. See, eg, *DPP (Vic) v Spottiswood* [2021] VSCA 146, [41], [57] (Priest, Beach and T Forrest JJA). With regard to the relevant transitional provisions, *Sentencing Act* (n 44) s 165A(2) provides that the amendments to the *Sentencing Act* (n 44) made by the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) only apply to the sentencing for offences committed on or after 1 April 2018. However, *Sentencing Act* (n 44) s 165A(3) provides that

> nothing in subsection (2) prevents a court taking into account the effect on current sentencing practices of the amendments made to this Act by Part 3 of the 2017 Act in sentencing an offender on or after the Part 3 commencement day for an offence to which those amendments would have applied had it been committed on or after that day …

The offence of homicide by firearm was added to the 12 original standard sentence offences by the *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) s 5.

89 The prosecution is required to prove beyond reasonable doubt that the victim was an emergency worker on duty, and that 'at the time of carrying out the conduct the offender knew or was reckless as to whether the victim was an emergency worker': *Sentencing Act* (n 44) s 10AA(5), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 4.

90 *Sentencing Act* (n 44) s 10AA(8) (definition of 'emergency worker'), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 4.

91 *Crimes Legislation Amendment Act 2016* (Vic) s 3.

92 *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) s 46.

1. Inserted s 10AA into the *Sentencing Act*, which provided that for certain serious injury offences committed against emergency workers on duty, a court must impose a term of imprisonment and fix a non-parole period of not less than a certain duration (ranging from two years to five years) unless the court finds that a special reason exists;[93]

2. Increased the mandatory minimum non-parole period for gross violence offences committed against emergency workers on duty to five years;[94]

3. Provided that for the offences of intentionally or recklessly causing injury (rather than serious injury) against emergency workers on duty, a court must impose a term of imprisonment of not less than six months (as a head-sentence) unless the court finds that a special reason exists;[95]

4. Reformed the CCO regime, so that:

   (a) The court must have regard to the principle of parsimony (with imprisonment to be the last resort in light of the availability of a CCO with various conditions);[96]

   (b) It was expressly provided that a CCO could be imposed in circumstances that would have previously resulted in a suspended sentence of imprisonment (which had been deemed to be a sentence of imprisonment that could be served in the community);[97] and

93 *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 4.

94 Ibid.

95 *Sentencing Act* (n 44) s 10AA(4), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 4.

96 *Sentencing Act* (n 44) s 5(4C), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 16:

> A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions referred to in sections 48F [non-association condition], 48G [residence restriction or exclusion condition], 48H [place or area exclusion condition], 48I [curfew condition] and 48J [alcohol exclusion condition] are attached.

But see *McGrath v The Queen* [2015] VSCA 176, [31]–[33] (Maxwell P, Redlich and Kyrou JJA), cited in *DPP (Vic) v Borg* (2016) 258 A Crim R 172, 192–3 [108] (Maxwell P, Weinberg and Priest JJA). *Sentencing Act* (n 44) s 5(4C) was amended by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 4(2) and the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(10) in order to make clear that it was qualified by the mandatory sentencing provisions inserted and then amended by those Acts, which will be considered below.

97 *Sentencing Act* (n 44) s 36(2), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 17:

> Without limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment …

(c) It allowed a CCO to be combined with a term of imprisonment (not including pre-sentence detention) of two years or less (increased from three months imprisonment) ('combined sentence').[98]

With respect to the amendments to the CCO regime, it was noted by the then Attorney-General that '[t]he amendments facilitate the use of CCOs and provide greater flexibility to the courts to impose an appropriate combination sentence of CCO and imprisonment'.[99] During the submissions in Victoria's first (and as yet only) guideline judgment case of *Boulton v The Queen* ('*Boulton*'),[100] and prior to the enactment of this legislation, both the DPP and the then Attorney-General had submitted that CCOs were being under-utilised, noting the research of the Sentencing Advisory Council ('SAC') that during the period of January 2012 to December 2013, 'as the rate of imposition of suspended sentences decreased by 16.8 per cent, sentences of imprisonment rose by 11.4 per cent but the use of CCOs rose by only 2.3 per cent'.[101]

When judgment was given in *Boulton*, the Court of Appeal observed that '[t]he availability of the CCO dramatically changes the sentencing landscape',[102] and:

> The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide.

98 *Sentencing Act* (n 44) s 44(1), as amended by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18(1). This is defined as not including a sentence of imprisonment that was suspended: *Sentencing Act* (n 44) s 44(4), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18(3). For certain arson offences, a court may make a CCO in addition to imposing any sentence of imprisonment: *Sentencing Act* (n 44) s 44(1A), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18(1).

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2396 (Robert Clark, Attorney-General).

100 *Boulton* (n 47).

101 Ibid 321 [48] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA). As Karen Gelb observed in Karen Gelb, *The Perfect Storm? The Impacts of Abolishing Suspended Sentences in Victoria* (Research Report, December 2013) 73 <https://researchdirect.westernsydney.edu.au/islandora/object/uws:32115>:

> Based on the evidence, the safety of the Victorian community is not being improved by the abolition of suspended sentences. Quite the contrary: the removal of a viable sentencing option, coupled with the increased workload faced by Victoria Police, the courts, community treatment and support providers, and Corrections Victoria in community corrections — coupled with the worsening conditions within Victorian prisons — all suggest that community safety may be compromised once the full reform process has been completed.

102 *Boulton* (n 47) 335 [113] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

> In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her.[103]

With regard to combined sentences, the Court of Appeal observed:

> The availability of the combination sentence option adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending.[104]

However, quite soon after *Boulton*, and perhaps in response to a perceived over-utilisation of CCOs, the Court of Appeal emphasised that *Boulton* does not offer 'a "Get Out of Jail Free" card in situations where a sentence of imprisonment is necessary in a given case to satisfy the various purposes for which a sentence may be imposed'.[105] Further, there was significant criticism from the Court of Appeal that pre-sentence detention was not being declared by some judicial officers in order to avoid having to set a non-parole period,[106] and that combined sentences were being imposed in circumstances that were inappropriate and where offenders should have been sentenced to head sentences with non-parole periods.[107] As will be seen below, these criticisms were addressed, in part, by the enactment of the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) in 2016.

D *The* Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014 *(Vic)*

The *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic), amongst other things:

1. Introduced the offence of manslaughter caused by a single punch or strike to the head or neck,[108] and deemed such a punch or strike to be a dangerous act for the purposes of the law relating to manslaughter by

103 Ibid 335 [114]–[115] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) (citations omitted).

104 Ibid 340 [141] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

105 *Hutchinson v The Queen* (2015) 71 MVR 8, 13 [17] (Priest JA, Ashley JA agreeing at 14 [26]), cited in *McGrath v The Queen* [2015] VSCA 176, [53] (Maxwell P, Redlich and Kyrou JJA) and *DPP (Vic) v Borg* (2016) 258 A Crim R 172, 193 [109] (Maxwell P, Weinberg and Priest JJA).

106 *DPP (Vic) v Grech* [2016] VSCA 98, [71]–[72] (Ferguson JA, Weinberg AP agreeing at [1], Ashley JA agreeing at [2]). The *Sentencing Act* (n 44) s 11(1)(b) provides that, with regard to a term of imprisonment of two years or more, a court must fix a non-parole period 'unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate'.

107 *DPP (Vic) v Hudgson* [2016] VSCA 254, [31]–[32] (Weinberg, Whelan and Priest JJA) ('*Hudgson*').

108 *Crimes Act* (n 63) s 4A, inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 3.

unlawful and dangerous act.[109] For such an offence, where the prosecution gives notice,[110] the court must impose a term of imprisonment and fix a non-parole period of not less than 10 years unless a special reason exists;[111] and

2. Provided that for an offence of manslaughter in circumstances of gross violence,[112] where the prosecution gives notice,[113] the court must impose a term of imprisonment and fix a non-parole period of not less than 10 years unless a special reason exists.[114]

It should be noted that there have been significant doubts raised about whether such reforms achieve any practical deterrent effect.[115] However, on the eve of the State election on 29 November 2014, the Labor opposition did not oppose the reforms, indeed calling for alternative 'tough' law and order measures.[116] This was despite strong opposition to the reforms from the Law Council of Australia,[117] the

109 *Sentencing Act* (n 44) s 9C(3), inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6.

110 *Sentencing Act* (n 44) s 9A, inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6.

111 *Sentencing Act* (n 44) s 9C(2), inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6.

112 *Sentencing Act* (n 44) s 9B(3), inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6, adopting the definition of gross violence as introduced by the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic), but requiring multiple circumstances to be present.

113 *Sentencing Act* (n 44) s 9A, inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6.

114 *Sentencing Act* (n 44) s 9B(2), inserted by *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) s 6.

115 Kate Fitz-Gibbon, *Legal Responses to One-Punch Homicide in Victoria: Understanding the Impact of Law Reform* (Research Report, December 2018) 50 (citations omitted) <https://research.monash.edu/en/publications/legal-responses-to-one-punch-homicide-in-victoria-understanding-t>:

> Without systematic research and legal analysis any future reforms or reviews of this area of the law will fail to be grounded in the evidence-base required to ensure effective and efficient legal reform.
>
> Given the divergent law reform activity across Australia in recent years and the need to build the evidence base required there would be benefit in a national review of legal responses to alcohol-related lethal violence. This view is supported by the Magistrates' Court of WA which, in its submission to the Senate Inquiry, commented: 'It would seem that each State has developed its legislation in response to particular so called "one punch" deaths without any research as to the effectiveness of the legislation. There has been an emphasis on increasing penalties and creating new offences but historically there is nothing to suggest that increasing penalties alone is an effective way to reduce offending'.

116 See Chris Berg, 'Mandatory Sentencing: A King Hit for Courts', *ABC News* (online, 19 August 2014) <https://www.abc.net.au/news/2014-08-19/berg-mandatory-sentencing-a-king-hit-for-courts/5681594>.

117 Jane Lee, 'Ineffective One-Punch Mandatory Sentences Should Be Scrapped, Says Law Council', *The Sydney Morning Herald* (online, 15 April 2016) <https://www.smh.com.au/politics/federal/ineffective-onepunch-mandatory-sentences-should-be-scrapped-says-law-council-20160414-go6ib4.html>.

Victorian Bar,[118] the Criminal Bar Association,[119] and Liberty Victoria.[120] For example, Liberty Victoria repeated its previous concerns and warned that '[t]he Bill should not be rushed through Parliament as part of the pre-election law and order auction. It should be properly considered and debated given it is (yet another) shift in power between the branches of Government'.[121]

Notwithstanding such concerns and the change of government at the 2014 state election, the Andrews government continued to expand and harden the presumptive sentencing regime.

E *The* Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016 *(Vic)*

The *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic), amongst other things:

1. Introduced a category of 'restrictive conditions' for persons subject to supervision and detention orders pursuant to the then *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (now the *Serious Offenders Act 2018* (Vic)). Breach of 'restrictive conditions', including by committing a sexual offence or a violent offence (defined as including assault, making threats to kill or inflict serious injury, criminal damage, and breach of a family violence protection order or intervention order, and inchoate versions of those offences), requires the imposition of a term of imprisonment of not less than 12 months (as a head sentence) unless a special reason exists.[122] This is in addition to any punishment imposed for the breaching offence;[123] and

118 Victorian Bar, 'Victorian Bar Expresses Concern over Proposed "Coward Punch" Laws' (Media Release, 1 September 2014) <https://www.vicbar.com.au/news-events/victorian-bar-expresses-concern-over-proposed-%E2%80%98coward-punch%E2%80%99-laws>.

119 Richard Willingham, 'Lawyers Condemn Coward Punch Laws', *The Age* (online, 17 August 2014) <https://www.theage.com.au/national/victoria/lawyers-condemn-coward-punch-laws-20140817-10527m.html>.

120 'Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014', *Liberty Victoria* (Web Page, 16 September 2014) <https://libertyvictoria.org.au/SentencingAmendmentCowardsPunchBillSep2014>. Liberty Victoria also warned:

> [T]he Bill is ambiguous. Perhaps the worst example is Cl 6(5) in relation to whether a strike is 'unexpected' (and therefore a Coward's punch attracting the mandatory minimum 10 year non-parole period), where it provides: 'The fact that the offender warned the victim of the punch or strike immediately before delivering it does not mean that the victim was expecting to be punched or struck by the offender'.
>
> Simply put, the meaning of all this will need to be tested in the Superior Courts at great public expense. Such ambiguity provides a further disincentive for accused persons to plead guilty.

121 Ibid.

122 *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic) ss 4, 9, 12, 17. Now *Serious Offenders Act 2018* (Vic) ss 3, 31, 159, sch 3.

123 *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic) ss 4, 9, 12, 17. Now *Serious Offenders Act 2018* (Vic) ss 3, 31, 159, sch 3.

2. Introduced core 'violent conduct' conditions for all persons subject to supervision and detention orders. Those conditions provide:

> [I]f the court requires an offender to reside at a residential facility, [the offender must] not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility.[124]

Further, the offender must 'not engage in conduct that threatens the safety of any person, including the offender'.[125] These are also defined as 'restrictive conditions' subject in circumstances of breach to a term of imprisonment of not less than 12 months unless a special reason exists.[126]

As Liberty Victoria observed,[127] it is extraordinary that the reforms see offenders in such residential facilities exposed to harsher penalties for such conduct than those in prisons.[128] On one view the reforms introduced by the *Serious Offenders Act 2018* (Vic) radically expanded the purpose of presumptive sentences. Initially conceived as a mechanism to promote community confidence and consistency in sentencing for high-level gross violence offending — and then expanded to encompass other high and mid-level offending in relation to emergency workers (as a class of potentially vulnerable victims where general and specific deterrence loomed large in the intuitive synthesis) — the mechanism of presumptive sentencing was then adapted to become a tool of specific deterrence in order to attempt to ensure orderly conduct in post-sentence residential facilities.

F *The* Crimes Amendment (Carjacking and Home Invasion) Act 2016 *(Vic)*

The next reform introduced by the Labor government, the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic), amongst other things:

1. Created new offences of home invasion, aggravated home invasion, carjacking, and aggravated carjacking;[129] and

124 *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic) s 12. Now *Serious Offenders Act 2018* (Vic) s 31.

125 *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic) s 12. Now *Serious Offenders Act 2018* (Vic) s 31.

126 *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic) ss 4, 9, 12, 17. Now *Serious Offenders Act 2018* (Vic) ss 3, 31, 159, sch 3.

127 'Liberty Victoria Comments on the Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016', *Liberty Victoria* (Web Page, 18 April 2016) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoriaComment-Sex-Offenders-Detention-Supervision-Amendment-Bill-2016.pdf>.

128 Ibid [28]. See *Corrections Act 1986* (Vic) s 53; *Corrections Regulations 2009* (Vic) reg 50.

129 *Crimes Act* (n 63) ss 77A–77B, 79–79A, inserted by *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) ss 3–4.

2. Provided that, for the offences of aggravated home invasion and aggravated carjacking, the court must impose a term of imprisonment and fix a non-parole period of not less than three years[130] unless a special reason exists.[131]

It is unclear why the creation of such offences was deemed to be necessary, especially given that they would appear to encompass existing aggravated offences of burglary and robbery.[132] Further, the Court of Appeal had already been active in providing guidance as to appropriate sentencing practices for confrontational aggravated burglaries (which would include 'home invasion' style offending).[133] In *Hogarth v The Queen* ('*Hogarth*'),[134] the Court of Appeal held that current sentencing practices for confrontational aggravated burglary were inadequate, particularly having regard to the increase in 1997 of the maximum penalty from 15 to 25 years' imprisonment. The Court of Appeal held:

> It follows, in our view, that current sentencing for this form of aggravated burglary can no longer be treated as a reliable guide, and sentencing judges should no longer regard themselves as constrained by existing practice. The necessary change in sentencing practice for confrontational aggravated burglary will evolve over the course of decisions in individual cases. The director will play an important role in this process, by assisting judges through the making of submissions on sentencing range.
>
> By way of general guidance, we would add the following. As stated earlier, the director's submission to the sentencing judge was that, if the constraints of current sentencing practice were removed, the applicable range for the sentencing of AH would be a total effective sentence of six to eight years, with a non-parole period of four to six years. Having regard to the circumstances of this offence and this offender, we consider that that was an appropriate identification of the indicative range.[135]

It is notable that the statistics for sentences imposed in cases of aggravated burglary between 2014 and 2015 demonstrate that the courts did, in 83% of cases, give offenders an immediate custodial sentence.[136] The average term of imprisonment

130 *Sentencing Act* (n 44) ss 10AC–10AD, inserted by *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) s 5.

131 *Sentencing Act* (n 44) s 10A.

132 Although it should be noted that, unlike the offence of aggravated burglary, the offence of home invasion (but not aggravated home invasion) imposes strict liability with regard to the element as to whether another person was present in the home: *Crimes Act* (n 63) s 77A(2), inserted by *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) s 3.

133 *Hogarth* (n 46). See also *DPP (Vic) v Meyers* (2014) 44 VR 486, 495–8 [36]–[46] (Maxwell P, Redlich and Osborn JJA).

134 *Hogarth* (n 46) 660 [6] (Maxwell P, Neave JA and Coghlan AJA).

135 Ibid 674 [62]–[63] (Maxwell P, Neave JA and Coghlan AJA) (citations omitted). But see the High Court judgment of *Dalgliesh* (n 46), which, amongst other things, rejected the incremental approach to the adjustment of inadequate sentencing practices.

136 'Sentencing Snapshot 184: Sentencing Trends for Aggravated Burglary in the Higher Courts of Victoria 2010–11 to 2014–15', *Sentencing Advisory Council* (Web Page, 28 June 2016) <https://www.sentencingcouncil.vic.gov.au/snapshots/184-aggravated-burglary>.

handed down for such offences was two years and eight months.[137] The average total effective sentence was three years and three months, and the average non-parole period was two years and five months.[138] These statistics demonstrate that the courts, post *Hogarth*, were already handing down substantial periods of imprisonment for offences of aggravated burglary.[139]

Further, in *Director of Public Prosecutions (Vic) v Salih* the Court of Appeal (Coghlan JA, with whom Ashley and Ferguson JJA agreed) allowed an appeal by the DPP in relation to an aggravated burglary and false imprisonment matter, holding that a five year CCO with 500 hours of community work was outside the range of available sentences.[140] The offender was re-sentenced to a total effective sentence of four years' imprisonment with a non-parole period of two years.[141] This demonstrates that, where inadequate sentences are imposed, appeals against sentences by the DPP provide an important mechanism to ensure public confidence and consistency in sentencing.

However, instead of promoting existing mechanisms which preserve sentencing discretion, the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) demonstrated that the Labor government was committed to expanding the presumptive sentencing regime and to the creation of new, emotively titled offences that in substance already existed on the statute books.[142] In opposing the enactment of the legislation, Liberty Victoria warned that it:

> [F]urther entrenches a model of prescriptive sentencing which will be continually 'ratcheted up' over time with longer standard periods of imprisonment, or (as this Bill demonstrates) broader categories of offences. The kind of model is very susceptible to politicised decision making as part of 'law and order auction' campaigning. It ignores that the Courts can and do provide sentencing guidance and can uplift sentencing practices.

137 Ibid.

138 Ibid.

139 This appears to be consistent with other cases where the Court of Appeal has declared current sentencing practices to be inadequate, such as *Nguyen v The Queen* (2016) 311 FLR 289 (regarding cultivation of a commercial quantity of a cannabis is the 'mid' category). See 'Sentencing Snapshot 247: Sentencing Trends for Cultivating a Commercial Quantity of Narcotic Plants in the Higher Courts of Victoria 2014–15 to 2018–19', *Sentencing Advisory Council* (Web Page, 18 August 2020) <https://www.sentencingcouncil.vic.gov.au/snapshots/247-cultivating-commercial-quantity-narcotic-plants>, which demonstrates that the rate of immediate imprisonment (not including combination with a CCO) increased from 72% (2014–15) to 75.3% (2015–16) to 84.4% (2016–17) to 89% (2017–18) to 95.5% (2018–19). At the same time the rate of combination sentences mostly fell, from 18% (2014–15) to 14.8% (2015–16) to 5.2% (2016–17) to 1.4% (2017–18) to 3.0% (2018–19). This no doubt also reflects the impact of the emerging Court of Appeal jurisprudence: see above nn 100–107.

140 [2016] VSCA 107.

141 Ibid [40]–[41] (Coghlan JA, Ashley JA agreeing at [1], Ferguson JA agreeing at [42]).

142 See 'Submission on the Crimes Amendment (Carjacking and Home Invasion) Bill 2016', *Liberty Victoria* (Web Page, 14 September 2016) [14], [17] <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-CrimesAmendment-Carjacking-and-Home-Invasion-Bill-2016-20160914-web.pdf>.

> While the Government seems to regard the 'special reasons' exception as preserving judicial discretion, this Bill just further entrenches a system where over time exceptions can be whittled away and the test made more difficult to satisfy.[143]

Indeed, as will be seen below, that is precisely what occurred.

G *The* Sentencing (Community Correction Order) and Other Acts Amendment Act 2016 *(Vic)*

The *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) significantly circumscribed the availability of CCOs as a sentencing option. Amongst other things, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) reduced the maximum sentence of imprisonment that can be combined with a CCO from two years to one year (not including pre-sentence detention).[144] The *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) also provided that a CCO cannot be combined with a non-parole period,[145] and limited the maximum duration of a CCO to five years.[146]

Importantly, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) also provided for a category of offences that must receive imprisonment[147] and cannot receive a CCO or a combined sentence ('Category 1'), and a second category of offences that require 'special reasons' to receive a CCO ('Category 2').[148] The practical effect of the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) was to introduce a system of mandatory imprisonment. While that will not have any practical impact for offences in Category 1 such as murder, rape and incest which already invariably result in imprisonment, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) plainly created a framework that will be ratcheted up over time (as has occurred with regard to presumptive minimum sentences). Indeed, as will be noted below, this has already occurred with the enactment of the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) in 2018.

Further, the reforms need to be seen in the context of Court of Appeal jurisprudence that had already made it very difficult to establish 'special reasons'. In *Director of*

143 Ibid [37]–[38].

144 *Sentencing Act* (n 44) s 44(1), as amended by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 12(1).

145 *Sentencing Act* (n 44) s 11(2A), as inserted by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 6.

146 *Sentencing Act* (n 44) s 38(1)(b), as amended by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 10.

147 This includes, under *Sentencing Act* (n 44) pt 3 div 2, Court Secure Treatment Orders (for offenders with a mental illness) and drug treatment orders.

148 *Sentencing Act* (n 44) ss 5(2G), (2H), as inserted by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 4(1).

Public Prosecutions (Vic) v Hudgson ('*Hudgson*'),[149] the Court of Appeal held that with regard to the 'special reasons' exception to mandatory minimum sentences in s 10A of the *Sentencing Act*:

> It was plainly the intention of Parliament that the burden imposed upon an offender who sought to escape the operation of s 10 [providing for mandatory minimum sentences for gross violence offences] should be a heavy one, and not capable of being lightly discharged.
>
> More specifically, we accept the Director's submission that the word 'compelling' connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of this kind.[150]

The Court observed of the matters relied upon by the offender (including delay, issues of parity, and his diagnosis of post-traumatic stress disorder):

> [T[he various matters upon which the respondent relied as giving rise to 'substantial and compelling circumstances', and which her Honour found to meet that description, fall well short, in our view, of doing so. There is nothing 'compelling' about them in the sense required. Nor can it be said that they are 'rare', or 'unforeseen' in cases of this type.[151]

As will be seen below, that test has become even more difficult to satisfy given subsequent legislative amendments and developments in Court of Appeal jurisprudence.

In *Hudgson*, the Court of Appeal allowed the Crown appeal, set aside the combined sentence, and imposed the mandatory minimum non-parole period for the gross violence offence (four years' imprisonment).[152] In combination with the jurisprudence of *Hudgson*, Parliament's creation of Category 1 and Category 2 offences, and its restriction of combination sentences, greatly limited the utility of CCOs. This represented a significant constraint (and indeed in some cases the complete removal) of the sentencing discretion of judicial officers.

Having introduced the mechanism of Category 1 and Category 2 offences, it is unsurprising that Parliament subsequently expanded the offences contained within those categories.

149 *Hudgson* (n 107).

150 Ibid [111]–[112] (Weinberg, Whelan and Priest JJA).

151 Ibid [115].

152 Ibid [130].

H *The* Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017 *(Vic)*

The *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic), amongst other things, created new offences:[153]

1. Intentionally exposing an emergency worker or a custodial officer to risk by driving, punishable by a maximum penalty of 20 years' imprisonment.[154] Notably, in circumstances where the emergency worker on duty or custodial officer on duty is injured, the offence requires a term of imprisonment be imposed and that a non-parole period of not less than two years be fixed, unless a special reason exists;[155]

2. The aggravated offence of intentionally exposing an emergency worker, or a custodial officer to risk by driving, punishable by a maximum penalty of 20 years' imprisonment.[156] Such an offence was defined as a Category 2 offence[157] (it was later made a Category 1 offence where the emergency worker on duty or custodial officer on duty is injured).[158] Further, in circumstances where the victim is injured, the offence requires a term of imprisonment be imposed and that a non-parole period of not less than two years be fixed, unless a special reason exists;[159]

153 *Crimes Act* (n 63) pt 1 div 8A, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3.

154 *Crimes Act* (n 63) s 317AC, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3.

155 *Sentencing Act* (n 44) s 10AE, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 16. The requirement that a term of imprisonment be imposed and that a non-parole period of not less than two years be fixed does not apply if the offender is under the age of 18 years at the time of the offence: *Sentencing Act* (n 44) s 10AE(2)(a), as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 16.

156 *Crimes Act* (n 63) s 317AD, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3. Notably, the circumstances of aggravation are that: (1) 'the motor vehicle driven by the person in the commission of the offence … is stolen and the person knows that, or is reckless' to that fact; or (2) 'the person commits the offence … in connection with an offence against section 317AG [damaging an emergency service vehicle]'; or (3) 'the person commits the offence … in connection with another indictable offence committed by that person, punishable by 10 years imprisonment or more'.

157 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence' para (j)), as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 15.

158 *Sentencing Act* (n 44) s 3(1) (definition of a 'category 1 offence' para (id)), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73(1)(b).

159 *Sentencing Act* (n 44) s 10AE, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 16. The requirement that a term of imprisonment be imposed and that a non-parole period of not less than two years be fixed does not apply if the offender is under the age of 18 years at the time of the offence: *Sentencing Act* (n 44) s 10AE(2)(a), as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 16.

3. Recklessly exposing an emergency worker, or a custodial officer to risk by driving, punishable by a maximum penalty of 10 years' imprisonment;[160]

4. The 'aggravated offence of recklessly exposing an emergency worker, or a custodial officer to risk by driving, punishable by a maximum penalty of 10 years' imprisonment.[161] Such an offence is a Category 2 offence;[162] and

5. Damaging an emergency service vehicle, punishable by a maximum penalty of five years' imprisonment.[163]

I *The* Justice Legislation Miscellaneous Amendment Act 2018 *(Vic)*

The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) expanded the number of Category 1 offences to include injury offences against emergency workers, custodial officers and youth justice custodial workers, aggravated home invasion and aggravated carjacking, and some sexual offences.[164] However, in relation to certain Category 1 offences against emergency workers, custodial officers and/or youth justice custodial workers, in circumstances where it is established on the balance of probabilities that the offender had impaired mental functioning causally linked to the commission of the offence which substantially and materially reduced the offender's culpability, the court may impose a mandatory treatment and monitoring order ('MTMO') (a CCO with specific conditions),[165] a RTO (for offenders with an intellectual disability), or a CSTO (for offenders with a mental illness).[166]

The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) also expanded Category 2 offences to include the aggravated offences of intentionally or recklessly exposing an emergency worker, a custodial officer or a youth justice

160 *Crimes Act* (n 63) s 317AE, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3.

161 *Crimes Act* (n 63) s 317AF, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3.

162 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence' para (k)), as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 15.

163 *Crimes Act* (n 63) s 317AG, as inserted by *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) s 3.

164 *Sentencing Act* (n 44) s 3(1) (definition of 'category 1 offences') as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73.

165 *Sentencing Act* (n 44) s 44A, as inserted by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 80. These conditions must include judicial monitoring, and either a treatment and rehabilitation condition, or a justice plan condition.

166 *Sentencing Act* (n 44) s 5(2GA), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76.

custodial worker to risk by driving, armed robbery in some circumstances,[167] home invasion, carjacking, culpable driving causing death and dangerous driving causing death.[168]

The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) also made 'special reasons' under the *Sentencing Act* even more difficult to satisfy:[169]

1. It repealed the 'youth' exception for those aged 18–21 with particular psychosocial immaturity;[170]

2. It provided that the impaired mental functioning exception 'does not apply to impaired mental functioning caused *solely* by self-induced intoxication';[171]

3. It amended the test for mental impairment and the burden of imprisonment so that it must 'result in the offender being subject to *substantially and materially greater* (as opposed to 'significantly more') than the ordinary burden or risks of imprisonment';[172]

4. It amended the 'substantial and compelling circumstances' test by providing that those circumstances have to be 'exceptional and rare';[173] and

167 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence' para (da)), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 74, where: (i) 'the offender has with him or her a firearm at the time of the offence'; or (ii) 'a victim … has suffered injury as a direct result of the offence'; or (iii) 'the offence was committed by the offender in company with one or more other persons'.

168 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence'), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 74.

169 *Sentencing Act* (n 44) s 5(2H), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76; *Sentencing Act* (n 44) s 10A, as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79.

170 *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(3), repealing *Sentencing Act* (n 44) s 5(2H)(b).

171 *Sentencing Act* (n 44) s 10A(2A), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79(6) (emphasis added).

172 *Sentencing Act* (n 44) s 5(2H)(c)(ii), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(5) (emphasis added). In relation to impaired mental functioning, this sets a higher hurdle than the fifth and sixth limbs from *R v Verdins* (2007) 16 VR 269: see *Peers v The Queen* (2021) 97 MVR 279, 389–90 [52] (Niall and Sifris JJA) ('*Peers*'). However, it should be noted that in *Peers* it was held that the sentencing judge had erred in not finding that the exception was made out: at 391 [59] (Niall and Sifris JJA). In *DPP (Vic) v Lombardo* [2022] VSCA 204 ('*Lombardo*'), the Court of Appeal emphasised that s 5(2H)(c)(ii), whilst looking to the future, requires an extant mental illness: at [46] (McLeish, Niall and Kennedy JJA).

173 *Sentencing Act* (n 44) s 5(2H)(e), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(6); *Sentencing Act* (n 44) s 10A(2)(e), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79(5).

5. It inserted ss 5(2HC) and 10A(2B) into the *Sentencing Act* so that:[174]

> In determining whether there are substantial and compelling circumstances … the court—
>
> (a) must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and
>
> (b) must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and
>
> (c) must not have regard to—
>
> (i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
>
> (ii) an early guilty plea;[175] or
>
> (iii) prospects of rehabilitation; or
>
> (iv) parity with other sentences.[176]

Pursuant to s 167(6) of the *Sentencing Act*, these amendments apply when sentencing for an offence committed after the commencement of that provision, on 28 October 2018.[177]

The *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) has made it incredibly difficult to establish special reasons in new cases, especially under the 'substantial and compelling circumstances' exception. This was emphasised in *Farmer v The Queen*,[178] where the Court of Appeal observed that the specific exception 'is a residual category of limited scope. On any view, it is a very high hurdle that will not often be surmounted'.[179]

174 *Sentencing Act* (n 44) s 5(2HC), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(8); *Sentencing Act* (n 44) s 10A(2B), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79(7).

175 In *Lombardo* (n 172), the Court of Appeal noted that an offender's guilty plea can still be taken into account, without taking into account its early character: at [82] (McLeish, Niall and Kennedy JJA)

176 These provisions have had a particular impact on young and youthful offenders; see *Buckley* (n 15) [44] (Maxwell P and T Forrest JA).

177 Victoria, *Victoria Government Gazette*, No S 480, 16 October 2018, 1 <https://resources.reglii.com/VGG.2018.10.16.S480.pdf>. See also *Barbaro v The Queen* [2021] VSCA 61, [25]–[26] (Kaye JA); *Barbaro v The Queen* [2021] VSCA 277, [27]–[28] (Kaye and T Forrest JJA). An error in relation to the applicable test may still result in the Court of Appeal not being persuaded that a different sentence should be imposed and accordingly dismissing the appeal: see *Roach v The Queen* [2020] VSCA 205, [14], [51]–[52] (Maxwell P and Weinberg JA). Alternatively, the Court of Appeal may find that the error is not material: see *Johns v The Queen* (2020) 92 MVR 160, 172 [69]–[70], 177 [94]–[97] (Ferguson CJ, McLeish and Niall JJA) ('*Johns*').

178 *Farmer* (n 66).

179 Ibid [51] (Maxwell P, Kaye and Niall JJA).

While there are examples of that threshold being reached,[180] in the judgment of *Director of Public Prosecutions (Vic) v Bowen* ('*Bowen*')[181] five judges of the Court of Appeal went a step further, unanimously holding that the 'requirement is — no doubt quite deliberately — almost impossible to satisfy'.[182] That was despite the Court of Appeal in *Bowen* observing that, in all the circumstances, the combination sentence (imprisonment and a CCO) ordered by the sentencing judge was suitable and the best way to advance the offender's prospects of rehabilitation and to reduce the risk of reoffending.[183] The Court of Appeal observed that the case 'highlight[ed] how seriously this legislative barrier [of presumptive sentencing] can work against the public interest'.[184]

In *Buckley*, the Court of Appeal applied *Bowen* and held that there was no alternative but for the offender, who had recently turned 18 at the time he committed an aggravated carjacking, to receive the three-year mandatory minimum sentence (and for that to be required to be served in an adult prison as opposed to a youth justice facility). This resulted in the Court of Appeal having been 'compelled to do the applicant an injustice, and the community a disservice'.[185]

Buckley was followed by the Court of Appeal judgment of *Director of Public Prosecutions (Vic) v Lombardo* ('*Lombardo*'), a Crown appeal against sentence in a dangerous driving causing death case.[186] In *Lombardo* the Court observed that the introduction of the 'exceptional and rare' threshold reflected parliamentary dissatisfaction with the stringency of the existing judicial application of the provision.[187] However, the Court expressly cautioned that the observations in *Bowen* and *Buckley* as to the relevant test being 'almost impossible to satisfy' must not be treated as a substitute for the statutory language.[188]

In *Lombardo* the Court emphasised that the relevant test involved two stages: (1) whether there are 'substantial and compelling' circumstances in the sense of being

180 See, eg, *Farmer* (n 66). See also *Fariah v The Queen* [2021] VSCA 213, [11] (Priest and Beach JJA) ('*Fariah*'), where the Court of Appeal found that the applicant's appalling childhood experiences in Somalia during the civil war, coupled with his youth and other factors, were sufficient to engage the residual category, and observed that 'the mere fact that some individual circumstances may commonly be encountered by sentencing judges in the County Court will not by that fact alone necessarily deprive them of their character as substantial and compelling and exceptional and rare': at [25] (Priest and Beach JJA).

181 [2021] VSCA 355 ('*Bowen*').

182 Ibid [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA). See also *Buckley* (n 15) [3], [43] (Maxwell P and T Forrest JA).

183 *Bowen* (n 181) [12] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA).

184 Ibid [11].

185 *Buckley* (n 15) [50] (Maxwell P and T Forrest JA).

186 *Lombardo* (n 172).

187 Ibid [61] (McLeish, Niall and Kennedy JJA).

188 Ibid [64].

'weighty and forceful or powerful';[189] and (2) whether the circumstances are 'exceptional and rare' in that there are circumstances of a kind 'wholly outside "run of the mill" factors typical of the relevant type of offending'.[190] Once underlying factors have been established, this is an evaluative judgment 'unaffected by notions of burden of proof',[191] and that subjective evaluation may be 'informed by the sentencing judge's experience and observation of the panoply of cases which come before the courts at first instance'.[192] The Court accepted that, as held in the earlier judgment of *Fariah*, 'a set of circumstances may engage the exception in combination, even where the constituent circumstances are mainly, or even wholly, "relatively common"'.[193]

While the Court determined that the sentencing judge had erred in finding that the relevant exceptions had been made out, it declined to interfere with the sentence in the exercise of its residual discretion.[194] The Court also paused to note the 'unfortunate anomaly' that dangerous driving causing death has been deemed by Parliament to be a Category 2 offence, resulting in it being in the same category as the significantly more serious offence of culpable driving causing death, even though as a lesser offence it may involve instances of low moral culpability such as momentary inattention or misjudgement.[195]

For completeness, it should be noted that the High Court refused special leave to appeal in *Buckley*, where the applicant, amongst other things, sought to challenge the Court of Appeal's interpretation of the relevant exception being 'almost impossible to satisfy' and the finding that the applicant's circumstances were 'all too common' and so did not enliven the exception.[196] The applicant submitted that the Court set the bar far too high.[197] The respondent emphasised the judgment of *Lombardo*.[198]

It is important to remember that, when the presumptive sentencing reforms were first introduced, the special reasons exceptions were identified by the then Attorney-General as an important reason why the gross violence reforms preserved judicial discretion in sentencing and indeed were compatible with the *Charter of*

189 Ibid [66], citing *Farmer* (n 66) [47]–[50] (Maxwell P, Kaye and Niall JJA) and *Hudgson* (n 107) [112] (Weinberg, Whelan and Priest JJA).

190 *Lombardo* (n 172) [70] (McLeish, Niall and Kennedy JJA).

191 Ibid [72], citing *Fariah* (n 180) [24]–[25] (Priest and Beach JJA).

192 *Lombardo* (n 172) [87] (McLeish, Niall and Kennedy JJA).

193 Ibid [72], citing *Fariah* (n 180) [24]–[25] (Priest and Beach JJA).

194 *Lombardo* (n 172) [111] (McLeish, Niall and Kennedy JJA).

195 Ibid [104].

196 Transcript of Proceedings, *Buckley v The King* [2022] HCATrans 234.

197 Ibid.

198 Ibid.

Human Rights and Responsibilities Act 2006 (Vic) ('*Charter*').[199] It may be that, as occurred with the test for 'exceptional circumstances' in relation to the restoration of suspended sentences of imprisonment in circumstances of breach, in time the Court of Appeal gives fresh consideration as to whether it may have set the bar too high in relation to the test for establishing 'substantial and compelling circumstances', including those that now have to be 'exceptional and rare'.[200] However, notwithstanding any potential changes in Court of Appeal jurisprudence, the legislative reforms to the 'special reasons' test must be seen as greatly restricting sentencing discretion in practice; the reforms now result in judicial officers being prohibited from considering certain matters in mitigation, and expressly distort the weight to be given to different sentencing purposes. Thus, even where there is a residual discretion, it is greatly fettered, to the point where it has now been described as 'almost impossible to satisfy'.[201] If that is so, then it is questionable whether the reforms preserve sentencing discretion in any meaningful way.

199 Importantly, the then Attorney-General stated:

> The bill does not limit human rights protected under the charter act because the provisions are strictly limited and directed at high-level offending, and they retain the court's discretion to depart from the statutory minimum where appropriate. …
>
> [T]he bill safeguards against the imposition of a disproportionate sentence by allowing a court to depart from the statutory minimum if it finds that the personal characteristics of the offender and/or the circumstances of the case justify doing so. Once a court finds a special reason, it has full discretion and may impose any sentence it considers appropriate.

Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5548–9 (Robert Clark). However, it should be noted that in the second reading speech to the Crimes Amendment (Gross Violence Offences) Bill 2012 (Vic), the then Attorney-General stated that the special reasons provisions are 'limited and specific, and are not intended to be interpreted broadly as occurred with the exceptional circumstances test' with regard to the breach and restoration of suspended sentences: at 5553.

200 In *R v Steggall* (2005) 157 A Crim R 402, 407 [16] (Nettle JA, Buchanan JA agreeing at 411 [30], Eames JA agreeing at 411 [31]) ('*Steggall*'), the Court of Appeal held 'if an offender breaches a suspended sentence he or she shall be compelled to serve the whole of the sentence unless the circumstances are so exceptional as to be beyond reasonable contemplation or expectation'. In *R v Ioannou* (2007) 17 VR 563 ('*Ioannou*'), the Court of Appeal held at 568 [17] (Redlich JA, Chernov JA agreeing at 564 [1], Vincent JA agreeing at 564 [2]) (emphasis added):

> [T]he circumstances which would justify a departure from the strong expectation that an individual who had been permitted to remain in the community under such an order and has breached it by the commission of a further criminal offence will have the sentence restored, must be *clearly unusual or quite special or distinctly out of the ordinary.* As these expressions indicate, the circumstances cannot fall within the range of normally anticipated consequences, behaviours or exigencies. *Steggall* is not authority for the proposition that circumstances can only be exceptional if they are beyond reasonable expectation or contemplation.

In *Ioannou* it was further held that a combination of circumstances could amount to exceptional circumstances: at 570 [24] (Redlich JA, Chernov JA agreeing at 564 [1], Vincent JA agreeing at 564 [2]). See also *R v Ienco* [2008] VSCA 17, [37]–[38] (Nettle JA) (citations omitted):

> [H]aving now read the judgment of Redlich JA in *R v Ioannou*, and with the benefit of reflection, it appears to me that I went too far in *R v Steggall* in suggesting that 'exceptional circumstances' for the purposes of s 31(5A) of the *Sentencing Act 1991* are limited to circumstances which are beyond reasonable expectation or contemplation. As Redlich JA explained in *R v Ioannou*, that is not what the section requires.

201 *Bowen* (n 181) [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA).

There is a live question about whether s 32(1) of the *Charter*, and in particular the human rights to protection from cruel, inhuman or degrading treatment, and to liberty and protection from arbitrary detention,[202] may affect the interpretation of what amounts to 'substantial and compelling circumstances that are exceptional and rare' and that justify making a different order,[203] and/or whether some of the presumptive and mandatory sentencing provisions may be incompatible with the *Charter* and potentially subject to a declaration of inconsistent interpretation.[204] It is beyond the scope of this article to consider those issues in-depth, however the experience in comparative jurisdictions is that human rights instruments may well impact upon presumptive and mandatory sentencing provisions, at least insofar as those provisions might result in the imposition of 'grossly disproportionate' sentences.[205]

202 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 10(b), 21 ('*Charter*').

203 See, eg, *R v Offen* [2001] 1 WLR 253, 276–7 [97] (Lord Woolf CJ for the Court) ('*Offen*'), where the Court of Appeal of England and Wales held that, with regard to a mandatory sentence of life imprisonment for a second serious offence within the former *Crime (Sentences) Act 1997* (UK) ss 2(5) or (6) (replaced by the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 109, which was then replaced by the *Criminal Justice Act 2003* (UK) ss 224A, 225), the 'exceptional circumstances' exception should be interpreted to include circumstances where a particular defendant did not pose an unacceptable risk to the public, in order to be consistent with s 3 of the *Human Rights Act 1998* (UK), and art 3 (the prohibition on inhuman or degrading treatment) and art 5 (the prohibition on arbitrary and disproportionate punishment) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). See Philip Plowden, 'Proper Protection and Automatic Sentences: The Mandatory Life Sentence Reconsidered' (2001) 5 (June) *Journal of Mental Health Law* 101; Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] (2) *European Human Rights Law Review* 125. With regard to *Charter* (n 202) methodology, see *R v Momcilovic* (2010) 25 VR 436. In *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'), the High Court of Australia was divided concerning the correct methodological approach to ss 7(2), 32(1) of the *Charter*. Subsequently, the Court of Appeal has continued to apply *R v Momcilovic* (2010) 25 VR 436. See, eg, *Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* (2012) 38 VR 569, 576–7 [28]–[31] (Warren CJ and Cavanough AJA), 609 [142] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383–4 [85]–[88] (Redlich, Osborn and Priest JJA).

204 *Charter* (n 202) s 36(2). The declaration of inconsistent interpretation proposed to be made by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436 concerning the reverse onus provision in s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) was set aside by the High Court in *Momcilovic* (n 203). It should be noted that in *Momcilovic*, Crennan and Kiefel JJ observed '[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate': at 229 [605]. Whether this observation extends to a sentencing provision is unclear, although it would arguably not undermine a conviction, which their Honours regarded as a 'serious consideration'.

205 See Dyer (n 3); *Offen* (n 203) 276 [95] (Lord Woolf CJ for the Court); *Reyes v The Queen* [2002] 2 AC 235, 256 [43] (Lord Bingham for the Court); *R v Lichniak* [2003] 1 AC 903, 911 [11]–[12] (Lord Bingham); *Harkins v United Kingdom* (2012) 55 EHRR 19, 602 [139]; *Vinter v United Kingdom* (2012) 55 EHRR 34, 1029 [88]–[89]; *Vinter v United Kingdom* [2013] III Eur Court HR 317, 344 [102]; *Ahmad v United Kingdom* (2013) 56 EHRR 1; *R v Nur* [2015] 1 SCR 773, 798 [39] (McLachlin CJ for LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ).

J *The* Justice Legislation Amendment (Police and Other Matters) Act 2019 *(Vic)*

The *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic), amongst other things, created new offences:

1. Discharging a firearm reckless to safety of a police officer or a protective services officer, punishable by a maximum penalty of 15 years' imprisonment[206] which is a Category 2 offence 'in circumstances where the offender's conduct created a risk to the physical safety of the victim or to any member of the public';[207] and

2. Intimidation of a law enforcement officer or a family member of a law enforcement officer, punishable by a maximum penalty of 10 years' imprisonment.[208]

The *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) also increased the maximum penalty for common law assault from five years' imprisonment to 10 years' imprisonment and 15 years' imprisonment for certain offences against police officers and protective services officers on duty. The 10 year maximum applies where an offender has an offensive weapon readily available and conveys that to the victim, and the 15 year maximum applies where an offender has a firearm or imitation firearm readily available and conveys that to the victim.[209] Both offences are defined as Category 2 offences where there is a direct application of force.[210]

K *The* Sentencing Amendment (Emergency Worker Harm) Act 2020 *(Vic)*

After considerable outcry from sections of the media and public concerning the case of James Haberfield, who had pleaded guilty to offences including recklessly causing injury against a paramedic in circumstances where Haberfield was found

206 *Crimes Act* (n 63) s 31C, as inserted by *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) s 3.

207 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence' para (l)), as inserted by *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) s 7.

208 *Crimes Act* (n 63) s 31D, as inserted by *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) s 3. Notably, the offence does not require the offender to have a specific mens rea, rather it is sufficient that the offender, in all the circumstances, 'ought to have known that engaging in that conduct would be likely to arouse that apprehension or fear': *Crimes Act* (n 63) s 31D(3)(b)(ii). Further, the offence does not require the conduct to actually arouse 'apprehension or fear in the victim': *Crimes Act* (n 63) s 31D(4).

209 *Crimes Act* (n 63) s 320A, as inserted by *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) s 4.

210 *Sentencing Act* (n 44) s 3(1) (definition of 'category 2 offence' para (m)), as inserted by *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic) s 7.

to have impaired mental functioning (and accordingly a special reason applied),[211] the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) was enacted. It, amongst other things:

1. Removed the jurisdiction of the Magistrates' Court of Victoria to finally determine injury offences against emergency workers;[212]

2. Amended the *Sentencing Act* to prevent an alleged offender from relying on the exception to presumptive sentencing of impaired mental functioning where that impairment was *substantially* (as opposed to *solely*) caused by self-induced intoxication;[213]

3. Amended the special reason exception for impaired mental functioning related to the offence so that the person must have 'impaired mental functioning that is causally linked to the commission of the offence and substantially *and materially* reduces the offender's culpability';[214] and

4. Placed a reverse onus on alleged offenders who are complicit in offences against emergency workers to demonstrate on the balance of probabilities that their involvement was 'minor' in order to avoid the application of the mandatory sentencing provisions.[215]

Importantly, and unlike the above reforms introduced by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic), these amendments to ss 5, 10AA and 10A of the *Sentencing Act* apply to a person being sentenced irrespective of when the offending occurred.[216] Accordingly the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) has retrospective effect. It should be noted that the reforms would not have altered the sentence imposed on Haberfield, given that he satisfied the Court (and the Crown did not take issue with) the alternative 'special reasons' limb that his impaired mental functioning (major depressive disorder, autism and schizophrenia) would have resulted in him being subject to substantially and materially greater than the ordinary burden or risks of

211 *DPP (Vic) v Haberfield* [2019] VCC 2082 ('*Haberfield*'). See also 'Judge Upholds Magistrate's Decision Not to Jail Man Who Attacked Paramedics', *ABC News* (online, 16 December 2019) <https://www.abc.net.au/news/2019-12-16/judge-upholds-decision-not-to-jail-james-haberfield/11802038>; Christine McGinn, 'Paramedic Assault Laws Work, Says Judge', *News.com.au* (online, 17 December 2019) <https://www.news.com.au/news/national/paramedic-assault-laws-work-says-judge/news-story/64deeecddde2daee7e1c538269b31cdd>.

212 *Criminal Procedure Act 2009* (Vic) sch 2 item 4.1A, as inserted by *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) s 7.

213 *Sentencing Act* (n 44) ss 5(2GC), 5(2HA), 10A(2A), as amended by *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) ss 3(3), 3(5), 5(2).

214 *Sentencing Act* (n 44) ss 5(2H)(c)(i), 10A(2)(c)(i) (emphasis added); *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) ss 3, 5.

215 *Sentencing Act* (n 44) s 10AA(6)(a), as amended by *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) s 4(1).

216 *Sentencing Act* (n 44) s 170, as inserted by *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) s 6.

imprisonment.[217] However, as noted by Liberty Victoria in opposing the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic), and reminiscent of the observations of Nicholas Cowdery AM QC set out at the beginning of this article:

> The Bill reflects a dangerous pattern of the Government seeking to legislate in response to individual court cases that have received adverse attention from sections of the media. That is not a considered or responsible way of enacting legislation. Such an approach fails to consider the many pitfalls of rushing to address individual court outcomes through the blunt instrument of removing judicial discretion in sentencing.[218]

Having set out the key legislative reforms between 2013 and 2020, this article now considers how the Court of Appeal has approached the task of sentencing under the new regime.

IV SENTENCING METHODOLOGY FOR PRESUMPTIVE AND MANDATORY SENTENCES

Since the reforms were introduced, judicial officers have wrestled with proper sentencing methodology in relation to presumptive sentences. In *Mammoliti v The Queen* ('*Mammoliti*'),[219] concerning an aggravated carjacking offence, McLeish and Emerton JJA agreed that:

> [T]he mandatory minimum non-parole period operates as a legislative yardstick, that it must sit alongside the established sentencing principles and that it is not intended to depart from the instinctive synthesis approach to sentencing. …
>
> However, unlike for standard sentences, the guidepost operation of the mandatory minimum non-parole period is problematic because it sets a floor, for the non-parole period only, that applies whether the offender is being sentenced for a single offence or for multiple offences.[220]

Justices of Appeal McLeish and Emerton accepted the correctness of the following principles:[221]

217 *Haberfield* (n 211) [64]–[68] (Judge Tinney). See also *Teryaki v The Queen* [2019] VSCA 120, [35]–[36] (Kaye and Weinberg JJA), where the Crown accepted that the appellant had impaired mental functioning that enlivened *Sentencing Act* (n 44) s 10A.

218 'Liberty Victoria Warns That the Sentencing Amendment (Emergency Worker Harm) Bill 2020 Will Make Us Less Safe', *Liberty Victoria* (Web Page, 16 March 2020) <https://libertyvictoria.org.au/content/liberty-victoria-warns-sentencing-amendment-emergency-worker-harm-bill-2020-will-make-us>.

219 (2020) 281 A Crim R 511 ('*Mammoliti*').

220 Ibid 517–8 [27], [29].

221 Ibid 516–7 [25], citing *Magaming* (n 11) 396 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), *DPP (Cth) v Haidari* (2013) 230 A Crim R 134, 144–5 [42] (Harper JA, Weinberg JA agreeing at 135 [1], Priest JA agreeing at 147 [55]), *Hudgson* (n 107) and *Atherden v Western Australia* [2010] WASCA 33, [42]–[43] (Wheeler JA, McLure P agreeing at [1], Owen JA agreeing at [3]) ('*Atherden*'). See also *Bahar* (n 11) 112–13 [53]–[58] (McLure P, Martin CJ

(a) the mandatory minimum non-parole period operates as a legislative yardstick;

(b) the imposition of a minimum sentencing regime 'does not oust either the sentencing principles of the common law or those affected by [statute], but necessarily modifies both';

(c) although the mandatory minimum non-parole period is a yardstick, it is not necessarily reserved only for those cases falling at the lowest extreme of the spectrum. An offender may still receive the mandatory minimum non-parole period despite having relevant prior convictions and/or despite running a trial;

(d) the principles governing a discount for a plea of guilty do not cease to apply in cases where there is a statutory minimum term. Rather, there will be a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability; and

(e) the requirement to impose a mandatory minimum non-parole period should not be permitted to swamp the sentencing discretion.

In support of principles (b) and (d), the Court of Appeal cited the judgment of *Director of Public Prosecutions (Cth) v Haidari*,[222] where Harper JA held:[223]

> [W]hile 'the common law principles relating to, inter alia, general deterrence, totality and parity apply to the sentencing of federal offenders', minimum sentences may, especially when considerations of totality also apply, affect the sentencing court's approach to mitigating circumstances. The objective circumstances against which the gravity of people smuggling crimes is to be judged include, as an essential element, the fact that Parliament requires the imposition of minimum penalties for those offences. One of the consequences was considered by Wheeler JA in *Atherden v Western Australia*:
>
> > [I]n relation to at least some offences which fall towards the lower end of the range of culpability, the presence of a minimum term makes it impossible for a sentencing judge to apply the quantum of discount for a plea of guilty which he or she would ordinarily apply, because to do so would mean that the sentence imposed would fall below the statutory minimum. Where an offence is right at the bottom of the range of culpability, it may be that no discount at all can be given, for the same reason.
>
> However, I do not think it follows that the principles governing the awarding of a discount for a plea of guilty cease to apply in cases where there is a statutory minimum term. Rather, the result will be that there is a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated

agreeing at 102 [1], Mazza J agreeing at 115 [66]); *Athernden* (n 221) 521 [40]; *R v Karabi* (2012) 220 A Crim R 338, 345 [34] (Muir JA, Fraser JA agreeing at 346 [40], Chesterman JA agreeing at 346 [41]), quoting *Bahar* (n 11) 112–13 [53]–[55] (McLure P).

222 (2013) 230 A Crim R 134.

223 Ibid 144–5 [42] (Harper JA, Weinberg JA agreeing at 135 [1], Priest JA agreeing at 147 [55]), citing *Bahar* (n 11) 109 [34] (McLure P, Martin CJ agreeing at 102 [1], Mazza J agreeing at 115 [66]) and *Atherden* (n 221) [42]–[43] (Wheeler JA, McLure P agreeing at [1], Owen JA agreeing at [3]).

> effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability.

The presumptive sentencing provisions cause clear problems when seeking to apply orthodox sentencing methodology. In *Mammoliti*, Croucher AJA observed:

> First, the requirement that there be a minimum non-parole period tends to invert — or, at least, fundamentally distort — the sentencing process as we know it in this State. Conventional reasoning tells us to fix any individual sentence or sentences first by reference to the circumstances of the offence, the circumstances of the offender and any particular statutory requirements (such as the maximum penalty for the offence and so on); then, in the case of multi-count indictments, to consider the rules of concurrency and cumulation so as to fix a total effective sentence; and then, and only then, to consider the fixing of a non-parole period in relation to that total effective sentence, or, in the case of a single-offence sentence, to consider the fixing of a non-parole period in relation to that single — or head — sentence. …
>
> [T]he reality is that whatever construction [of presumptive sentencing provisions] is arrived at is something rather grotesque to the minds of those trained in applying mostly sensible cohesive principles to varied factual situations. …
>
> It is as if the *Sentencing Act* — a pretty impressive piece of work in its original form — now has (another) addition to it that ensures that the Act will never again make sense as a seamless whole.[224]

One of the pitfalls of the reforms, and indeed of the central mechanism of presumptive sentencing, was powerfully demonstrated in *Esmaili v The Queen* ('*Esmaili*'),[225] a single punch manslaughter case where the appellant was found guilty after trial. After finding that no special reason had been established, Hollingworth J imposed a total effective sentence of 10 years and six months' imprisonment and fixed the minimum 10 year non-parole period.[226]

In the Court of Appeal, Priest and Kyrou JJA observed:

> Plainly, in this case, unfettered by the shackles of s 9C [requiring the imposition of the minimum non-parole period], the sentencing judge would have imposed a head sentence with a non-parole period shorter than 10 years, potentially allowing for a much longer period of supervision on parole. …
>
> The undesirability of a man with the applicant's background being returned to the community without extended supervision and support after a decade's incarceration is self-evident. There is no doubt, in my view, that a man in the applicant's position, and thereby the community, would be best served by the applicant being subject to supervised release for a period much greater than six months. It goes without saying, however, that it would have been completely wrong and offensive to principle for the judge to have imposed a disproportionately long head sentence — one greater than

224 *Mammoliti* (n 219) 524–5 [66], [67], 525 [69].

225 *Esmaili* (n 1).

226 *DPP (Vic) v Esmaili* [2019] VSC 218, [68]–[69]. Pursuant to *Sentencing Act* (n 44) s 11(3), a non-parole period 'must be at least 6 months less than the term of the sentence'.

> justified by the circumstances of the offence and of the offender — so as artificially to allow for a longer potential period of parole.[227]

Esmaili powerfully demonstrates a significant flaw with the presumptive sentencing regime — that by imposing mandatory minimum sentences of imprisonment in circumstances where there is no special reason, this will lead to artificially compressed sentences, and result in people who have committed serious offences (often of violence) being subject to shorter periods of supervision on parole.[228] However, this also needs to be seen in the context of yet another significant reform, the *Serious Offenders Act 2018* (Vic), which expanded the post-sentence detention and supervision order regime from sexual offences to include violence offences,[229] resulting in post-sentence supervision potentially replicating the traditional function of supervision on parole in some cases. This provides yet another example of a significant change in the norms of Victoria's criminal justice system, whereby the compression of periods of supervision on parole occurs simultaneously with the creation of a whole new system of post-sentence supervision (which can include the requirement to reside at a residential facility). In reality, at least from the offender's perspective, this results in an extension of punishment beyond that imposed by the judicial officer,[230] which can be continuously renewed provided the preconditions are met.[231] Accordingly, presumptive and mandatory sentences now also have to be seen in the context of potential indefinite post-sentence detention and/or supervision.

With regard to establishing exceptions to presumptive sentences of imprisonment, the Court of Appeal has observed that, while the question as to whether one or more of the exceptions in the *Sentencing Act* applies is not discretionary, it is evaluative and 'minds might legitimately and reasonably come to a different

227 *Esmaili* (n 1) [63].

228 It should be noted that the Court of Appeal in *Johns* (n 177) 177 [95] (Ferguson CJ, McLeish and Niall JJA), citing *Esmaili* (n 1) [61]–[62] (Priest and Kyrou JJA) held:

> [A]lthough the mandatory non-parole period may, in a certain case, invert the process to the extent that it may force a recalibration of the head sentence, rather than the usual course where the non-parole period is fixed by reference to that sentence, as a practical matter, it will not always have that effect …

The Court also held that '[w]hile those provisions may present a challenge to the orthodox approach of instinctive synthesis and the avoidance of two stage sentencing, they do not mandate a particular linear sequence in which s 10(1) is a necessary starting (or finishing) point': *Johns* (n 177) 177 [95].

229 *Serious Offenders Act 2018* (Vic) s 1(a).

230 But see *Fardon v A-G (Qld)* (2004) 223 CLR 575, 654 (Callinan and Heydon JJ) applied in the joint majority judgment in *Garlett v Western Australia* (2022) 96 ALJR 888, 912–3 [107] (Kiefel CJ, Keane and Steward JJ, Edelman J agreeing at 949 [285]) ('*Garlett*'). This should be contrasted with *Witham v Holloway* (1995) 183 CLR 525, 534 where Brennan, Deane, Toohey and Gaudron JJ held that '[p]unishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes': see the dissenting opinions of Gordon J and Gageler J in *Garlett* (n 230) 925 [176] (Gordon J), 921 [159] (Gageler J). To that end, a criminal sentence is no less of a punishment because the protection of the public is one of the only purposes for which a sentence can be imposed: *Sentencing Act* (n 44) s 5(1)(e).

231 *Serious Offenders Act 2018* (Vic) s 22.

conclusion'.[232] Accordingly an applicant for leave to appeal 'must show that it was not open to the judge to come to the conclusion that [they] did, or that it involved some error of fact or law'.[233]

The residual exception for Category 2 offences and presumptive minimum sentences (that there are substantial and compelling circumstances that are exceptional and rare, and that justify making a different order) has been considered above in Part III. In *Fariah v The Queen* ('*Fariah*') the Court of Appeal held that s 5(2H)(e) of the *Sentencing Act* does not impose a burden on offenders to prove on the balance of probabilities the existence of such circumstances.[234] Rather, '[t]hat is an evaluative judgment for the judge to make once the relevant underlying facts have been established in accordance with settled principle'.[235] Further, it was held that the mere fact that some individual circumstances may commonly be encountered by sentencing judges in the County Court 'will not by that fact alone necessarily deprive them of their character as substantial and compelling and exceptional and rare', and while each case will depend on its facts, individual circumstances which are 'relatively common' may enliven the exception.[236] While the Court of Appeal in *Bowen* and *Buckley* described the residual exception's threshold as 'almost impossible to satisfy',[237] in *Lombardo* the Court emphasised the need to focus on the statutory language and cited the above principles from *Fariah* with approval.[238]

V SOME CRITICAL OBSERVATIONS OF THE NEW REGIME

When one has regard to the relevant legislative reforms and the resulting Court of Appeal jurisprudence, it is clear that the Victorian sentencing landscape has been greatly altered. In retrospect, what originated as the relatively confined introduction of gross violence offences (and the ill-fated introduction of baseline offences) commenced a process that has now been expanded to encompass a broad range of offences and incrementally hardened to limit and remove exceptions.

232 *Peers* (n 172) 389 [51] (Niall and Sifris JJA).

233 Ibid. Although it should be noted that even when error is established and a special reason is made out, the Court of Appeal may still find that a sentence of imprisonment was required in all the circumstances, as it did in *Peers* (n 172): at 393–4 [71]–[74] (Niall and Sifris JJA). See, eg, *Jones v The Queen* [2021] VSCA 114, where the Court of Appeal held that even if, as a result of the COVID-19 pandemic, there were exceptional circumstances that are exceptional and rare, the offending was 'too serious to permit a non-custodial sentence': at [22] (Priest and T Forrest JJA).

234 *Fariah* (n 180) [24] (Priest and Beach JJA), citing *Sentencing Act* (n 44) s 5(2H)(e). This reasoning was applied in *Peers* (n 172) 393 [68] (Niall and Sifris JJA).

235 *Fariah* (n 180) [24] (Priest and Beach JJA), citing *R v Storey* [1998] 1 VR 359, 371 (Winneke P, Brooking and Hayne JJA and Southwell AJA) and *Olbrich v The Queen* (1999) 199 CLR 270, 281 [25]–[27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

236 *Fariah* (n 180) [25] (Priest and Beach JJA).

237 *Bowen* (n 181) [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA); *Buckley* (n 15) [3] (Maxwell P and T Forrest JA).

238 *Lombardo* (n 172) [64] (McLeish, Niall and Kennedy JJA).

Through the continuing erosion of judicial discretion, this has ultimately led to the enactment of mandatory sentencing provisions, where judicial officers now have no sentencing discretion for many offences. On one view, that is simply the logical consequence of a continuing, systematic and bipartisan undermining of judicial sentencing discretion.

Troublingly, such reforms have often been based on a caricature, regularly promoted by sensationalistic media reporting, that members of the public have lost confidence in the judiciary and believe that there needs to be greater consistency in sentencing. Even if there has been a loss of public confidence,[239] the research demonstrates the need for the public to be properly informed about the facts of cases and sentencing principles: the solution does not lie with presumptive and mandatory sentencing.[240]

Unfortunately, it appears clear that the reforms have been motivated, at least in part, by political optics. As Andrew Dyer describes:[241]

> [S]uch laws are not intended (solely) to achieve aims such as general deterrence, but rather are at least primarily to be characterised as acts of law-and-order symbolism; they principally have political, not penological, goals. In such a case, the offender is being treated as an object: he/she is being dealt with unfairly to achieve ends that are considered to be worthwhile, namely, the reassurance of the public and the consequent enhancement of the government's electoral prospects.

Indeed, it has been observed that mandatory sentencing regimes are created, and retained, 'in full knowledge that they will inevitably result in individual instances of injustice'.[242]

The Victorian reforms demonstrate, amongst other things:

1. The mechanism of presumptive sentencing, which was first introduced for gross violence offences in circumstances where the former Attorney-General stated that the provisions are 'directed at high-level offending' and were intended to 'retain the court's discretion',[243] has been greatly expanded to encompass some middle and lower-level offending such as

239 See David Indermaur and Lynne Roberts, 'Confidence in the Criminal Justice System' (Research Paper No 387, Australian Institute of Criminology, 9 November 2009) <https://www.aic.gov.au/publications/tandi/tandi387>.

240 See Chief Magistrate Ian Gray, 'Sentencing and Other Controversial Issues: Why We Need Rational Debate More Than Ever' (2012) 2(1) *DICTUM: Victoria Law School Journal* 7, 8 stating that '[n]ot surprisingly there is a relationship between political "law and order" rhetoric and public attitudes to sentencing. "Penal populism" and misperceptions of judicial leniency in sentencing tend to correspond with the introduction of mandatory sentencing regimes'. See also *Sentencing Guidance in Victoria* (n 72); *Public Judgement on Sentencing* (n 72) 5.

241 Dyer (n 3) 197.

242 Murphy et al (n 10) 270.

243 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5548–9 (Robert Clark, Attorney-General).

minor injury offences against emergency workers and public order offences in residential facilities;

2. The purposes of presumptive and mandatory sentencing have been expanded from attempting to promote consistency in sentencing and community confidence with regard to specific offences to broader attempts to ensure compliance by those subject to detention and supervision orders;

3. Presumptive terms of imprisonment have been prescribed for some offences where, in some circumstances, the penalties are likely to be grossly disproportionate to the offending conduct; [244]

4. New, emotively titled offences have been created (such as gross violence offences, aggravated carjacking and aggravated home invasion), which attract presumptive sentences and in reality reflect aggravated versions of existing offences,[245] with little or no regard to how the Court of Appeal had already been seeking to adjust current sentencing practices for those offences;

5. The categorisation of driving causing death offences has been described by the Court of Appeal as having created an 'unfortunate anomaly' given the potential differences in culpability between different types of offences;[246]

6. The special reasons exceptions, which were initially identified by Parliament as important provisions that preserved judicial discretion and made the reforms compatible with the *Charter*, have in one instance been repealed (young offenders with particular psychosocial immaturity) and in other cases made more difficult to satisfy. After these amendments, the residual category has now been held by the Court of Appeal to be 'almost impossible to satisfy'.[247] While in *Lombardo* the Court conveyed a degree of caution towards that expression,[248] on any view the test presents a very high bar. This incremental hardening of the exceptions is likely to continue;

7. The Court of Appeal has observed that the mandatory sentencing provisions 'require judges to be instruments of injustice',[249] and that this 'reveals a profound misunderstanding of where the community's best

244 *Farmer* (n 66) [52] (Maxwell P, Kaye and Niall JJA).

245 See, eg, *Taleb v The Queen* [2020] VSCA 329, [2] n 1, [18] n 4 (Maxwell P and Weinberg JA).

246 *Lombardo* (n 172) [104] (McLeish, Niall and Kennedy JJA).

247 *Bowen* (n 181) [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA); *Buckley* (n 15) [3] (Maxwell P and T Forrest JA).

248 *Lombardo* (n 172) [64] (McLeish, Niall and Kennedy JJA).

249 *Buckley* (n 15) [5] (Maxwell P and T Forrest JA).

interests lie … [and] a wholly unjustified mistrust of those on whom the sentencing discretion is conferred'.[250] Presumptive and mandatory sentencing provisions prevent judicial officers from sentencing offenders to proportionate sentences that can best advance an offender's prospects of rehabilitation and reduce the risk of reoffending.[251] The Court of Appeal has stated that '[i]t is greatly to be regretted that the legislature has seen fit to limit the sentencing discretion in this way';[252]

8. Presumptive and mandatory sentencing has a particularly deleterious impact on the rehabilitation of young offenders given the criminogenic effects of imprisonment, and this does the community a disservice;[253]

9. Due to their over-representation in the criminal justice system, these reforms will have a disproportionate and deleterious impact on First Nations peoples, despite the clear recommendation of the Royal Commission into Aboriginal Deaths in Custody, made over 30 years ago, that imprisonment should be utilised only as a sanction of last resort;[254]

10. The embrace of presumptive and mandatory sentencing has corresponded with the diminution of CCOs and combined sentences, notwithstanding the recognition by the courts that in many cases CCOs can serve the best interests of the community and the best interests of the offender. The reflects the 'ascendancy of a punitive sentiment and a disregard of the demonstrated benefits of non-custodial orders';[255]

11. The Court of Appeal has observed that a pitfall with the reforms is that they lead to artificially compressed sentences, and shorter periods of supervision on parole which is not in the public interest.[256] There is concern that the *Sentencing Act* has lost internal coherence and that sentencing principles have been inverted or distorted.[257] Further, the reforms have coincided with the expansion of potentially indefinite post-sentence detention and supervision which would appear intended to fulfil a role once occupied by supervision on parole;

12. Notwithstanding the research that clearly demonstrates that, when fully informed, members of the public largely agree with sentences imposed by

250 Ibid [6].

251 *Bowen* (n 181) [11]–[12], [69] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA).

252 Ibid [69].

253 *Buckley* (n 15) [5]–[6], [44], [50] (Maxwell P and T Forrest JA).

254 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) vol 3, ch 22.

255 *Buckley* (n 15) [5] (Maxwell P and T Forrest JA).

256 *Esmaili* (n 1) [63] (Priest and Kyrou JJA).

257 *Mammoliti* (n 219) 524–5 [66]–[69] (Croucher AJA); *Buckley* (n 15) [44] (Maxwell P and T Forrest JA).

judicial officers and support judicial discretion in sentencing,[258] the sentencing reforms appear to be particularly susceptible to 'penal populism'[259] and 'law and order auction' campaigning by major political parties, and further constitute blunt legislative responses to individual, atypical cases that have caused adverse media attention to the Victorian government;

13. The erosion of judicial discretion has now led to the introduction of mandatory sentencing, and the complete removal of judicial discretion in relation to the type of sentence to be imposed for some categories of offending (with no special reasons exceptions that can, at least in theory, prevent the imposition of a term of imprisonment). This is also likely to be expanded; and

14. Parliament has failed to promote and utilise other mechanisms that would allow for an adjustment of current sentencing practices whilst protecting judicial discretion, such as guideline judgments.

VI CONCLUSION

On 10 June 2016, the SAC completed a report on *Sentencing Guidance in Victoria* after a reference from the then Attorney-General, who had cited the purported need to promote consistency of approach in sentencing offenders and to promote public confidence in the criminal justice system.[260] Liberty Victoria took issue with the premises of the reference.[261]

258 See *Sentencing Guidance in Victoria* (n 72); *Mandatory Sentencing* (n 72).

259 Murphy et al (n 10) 270.

260 *Sentencing Guidance in Victoria* (n 72) xxiii.

261 Liberty Victoria, Submission No 10 to the Sentencing Advisory Council, *Sentencing Guidance Reference* (8 February 2016) 16 [56]–[57], 17 [59]:

> It is submitted that the foundation of the reference is flawed — there is no evidentiary basis that there is unacceptable inconsistency in Victorian sentencing, or that members of the public, when fully informed of relevant facts, consider that judicial officers impose inadequate sentences.
>
> When individual sentences are inadequate the Crown can appeal. If there is a systemic issue and it appears that sentences are not meeting the intention of Parliament, then Parliament can increase the maximum penalty or the Crown can seek to have the Court of Appeal declare that current sentencing practices are inadequate, or seek a guideline judgment, the express purpose of which is to ensure consistency in sentencing and to promote public confidence. The executive has a wide range of options to ensure that there is consistency in sentencing and to ensure there is public confidence in the Victorian criminal justice system. …
>
> What undermines public confidence in the criminal justice system is the enactment of rushed and fatally flawed legislation such as the *Baseline Sentences Act*. In that context, the legislature needs to accept a measure of responsibility for perpetuating a sense of crisis in the Victorian criminal justice system. Parliament should be proactive and take a lead in the public arena with regard to explaining the need for there to be a strong and independent judiciary, and to assist the public to understand that we all have a significant interest [in] a criminal justice system that gives due weight to the rehabilitation of offenders.

The SAC's primary recommendation was the reform and greater use of guideline judgments.[262] Instead, as outlined above, the Victorian government committed to the alternative approach of introducing a 'standard sentence' scheme and further expanding presumptive and mandatory sentencing. Unfortunately, *Boulton* remains the first and only guideline judgment in Victoria. Before the State election on 26 November 2022, the government indicated that it did not intend to introduce any sentencing or bail reforms,[263] no doubt wishing to avoid being 'wedged' by the opposition on law and order issues. It remains to be seen what the newly re-elected Labor government will do in this space, and whether it remains committed to other reforms such as the establishment of a Sentencing Guidelines Council.[264]

In Victoria there is now a model of presumptive and mandatory sentencing which appears to be favoured by both major political parties. Unless there is a significant change of tack, it will continue to be expanded and exceptions will continue to be made more difficult to satisfy. Further, potential developments in jurisprudence or other legislative reforms could result in the presumptive and mandatory sentencing provisions having even broader application.[265] It may well be that the warnings of those opposed to such sentencing models will continue to be disregarded.

262 *Sentencing Guidance in Victoria* (n 72) xvii:

> The existing guideline judgment scheme should be enhanced to provide the most appropriate form of sentencing guidance in order to:
>
> - promote consistency of approach in sentencing offenders; and
> - promote public confidence in the criminal justice system.

See also recommendations 4–6. See also Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 284–5. After considering research regarding the efficacy of guideline judgments, it is noted '[t]hese evaluations showed that the guideline judgments successfully responded to informed public opinion regarding the need to increase severity and consistency of sentencing for certain offenses': at 285.

263 Royce Millar and Chris Vedelago, 'Labor Shelves Plans to Revamp Justice Laws until after State Election', *The Age* (online, 15 November 2021) <https://www.theage.com.au/national/victoria/labor-shelves-plans-to-revamp-justice-laws-until-after-state-election-20211115-p598xn.html>.

264 Liberty Victoria, Submission to Sentencing Advisory Council, *Issues Paper: A Sentencing Guidelines Council for Victoria* (19 January 2018) <https://libertyvictoria.org.au/sites/default/files/LV%20Sub%20Sentencing%20Guidelines%20Council%20190118%20web.pdf>. See Sentencing Advisory Council (Vic), *A Sentencing Guidelines Council for Victoria* (Report, 2018) 4 [1.15] <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/A_Sentencing_Guidelines_Council_for_Victoria_Report.pdf>.

265 See, eg, the unsuccessful litigation by the Victorian Director of Public Prosecutions in *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, which if successful would have resulted in the subjective element of 'recklessness' for some offences changed from an offender's foresight of the *probability* of harm (of serious injury or injury), to foresight of the *possibility* of harm: at 765 [98], 766 [101] (Edelman J). This would have affected the interpretation of one or more offences attracting presumptive or mandatory sentences, and significantly lowered the bar for a finding of guilt. It remains to be seen whether, after the High Court judgment, the Victorian government will seek to amend the relevant provisions of the *Crimes Act* (n 63). On 25 October 2022, the Victorian Attorney-General asked the Victorian Law Reform Commission to examine, report and make recommendations on the meaning of

However, there are some indications that the tide is starting to turn. The warnings from the Court of Appeal have been clear. Further, on 24 March 2022, the Victorian Parliament's Legal and Social Issues Committee published its comprehensive report into Victoria's criminal justice system. The Committee recommended, amongst other things, '[t]hat the Victorian Government, in reviewing the *Sentencing Act 1991* (Vic), investigate the operation, effectiveness and impacts of the Act's minimum sentencing provisions (mandatory sentencing)'.[266] It also found that '[s]hort custodial sentences are associated with higher rates of recidivism than longer custodial sentences and custodial sentences combined with parole'.[267] It remains to be seen how the Victorian government will respond to the report.[268] Recent reforms in the Northern Territory demonstrate that some legislatures are now willing to take steps to remedy the harm caused by mandatory sentencing provisions.[269]

The Hon Margaret McMurdo AC has observed that '[t]he uninformed find superficial easy solutions such as mandatory sentencing an attractive answer to a complex problem. … The initial appeal of mandatory sentencing neglects its manifold problems'.[270] In the end, while the reforms have contributed to the dramatic increase in Victoria's prison population and the corresponding cost to the public, they will not succeed in making the community safer. They have had, and will continue to have, a disproportionate impact on the most vulnerable. The reforms demonstrate a worrying and continued erosion of judicial discretion in sentencing — a discretion which is fundamental to do justice — and we ignore warnings from our courts that judicial officers are being required to be instruments of injustice at our great peril.

'recklessness' in Victorian criminal law: 'Recklessness', *Victorian Law Reform Commission* (Web Page, 25 October 2022) <https://www.lawreform.vic.gov.au/project/recklessness/>.

266 *Inquiry into Victoria's Criminal Justice System* (n 7) 543. See the discussion: at 541–4.

267 Ibid 551. See also recommendation 68 which states

> [t]hat the Victorian Government investigate the introduction of a presumption against short terms of imprisonment in favour of community-based sentences or other therapeutic alternatives. Such legislative reform should be informed by the experiences of other Australian and international jurisdictions and ensure that appropriate safeguards are incorporated to protect against persons being sentenced to longer terms of imprisonment …

268 As at 31 December 2022, the Victorian government has not yet released any public response to the report, despite it having been due on or before 24 September 2022.

269 See the enactment of the *Sentencing and Other Legislation Amendment Act 2022* (NT).

270 McMurdo (n 25) 2–3.

APPENDIX 1: CURRENT STATE OF THE LAW IN VICTORIA

PRESUMPTIVE AND MANDATORY SENTENCES

Category 1 and 2 offences

Only apply to offenders aged 18 or older at the time of offending (for children, see Category A and B serious youth offences).

Category 1[i] offences

The Court must impose imprisonment (not in combination with CCO), or a CSTO, a Drug and Alcohol Treatment Order ('DATO') or Youth Justice Centre Order ('YJCO') or Youth Residential Centre Order ('YRCO').

However, if offence is a Category 1 'emergency worker on duty' offence and a special reason applies, then the Court may also impose a MTMO or RTO.

Category 2[ii] offences

The Court must impose imprisonment (not in combination with CCO), or a CSTO, DATO, YJCO or YRCO, unless a special reason applies. If a special reason applies the Court has full sentencing discretion.

Emergency workers on duty

Where the victim is an emergency worker on duty and the offender:

1. Was aged 18 or older at the time of the commission of the offence;
2. Is a principal offender or offended by way of complicity (unless the involvement was minor);
3. Was at least reckless as to whether the victim was an emergency worker; and
4. No special reason applies;

The following offences attract a mandatory minimum NPP:

1. ICSI or RCSI in circumstances of gross violence — **5 years**;
2. ICSI — **3 years**;
3. RCSI — **2 years**; and
4. Expose emergency worker to risk while driving *and* emergency worker is injured — **2 years**.

For intentionally or recklessly causing injury — **6 months** minimum head sentence (but no requirement for a specific non-parole period for this offence).

Even if a special reason applies, the Court must still impose a custodial sentence if the offence is a Category 1 offence. If offender is between 18 and 21 years at the date of sentencing, the court may impose a YJCO (but for the Category A serious youth offence of ICSI in circumstances of gross violence, only in exceptional circumstances).

Manslaughter

Single punch or strike

For manslaughter in circumstances of a single punch or strike, a minimum NPP of **10 years** applies if:

1. Notice is given by the DPP; and
2. The offender was aged 18 or older at the time of the commission of the offence; and
3. The punch or strike is:
    a. a dangerous act;
    b. intentionally delivered to any part of the head or neck;
    c. unexpected by the victim; and
    d. the offender knew the victim was not expecting, or was probably not expecting, the punch or strike; and
4. The offence is not made out by way of some forms of complicity (ss 323(1)(a)–(b) of the *Crimes Act*); and
5. No special reason applies.

Gross Violence

For manslaughter in circumstances of gross violence, a minimum non-parole period ('NPP') of **10 years** applies if:

1. Notice is given by the DPP; and
2. The offender was aged 18 or older at the time of the commission of the offence; and
3. There are circumstances of gross violence:
    a. The offender is in company with two or more persons, or in agreement, arrangement or understanding with two or more persons; and
    b. The offender also:
        i. Planned in advance to have an offensive weapon and used that weapon to cause death; or
        ii. Planned in advance to engage in conduct that caused death and a reasonable person would have foreseen that it was likely the conduct would cause death; or
        iii. caused two or more serious injuries to the victim during a sustained or prolonged attack; and
4. No special reason applies.

Other offences

Where an offender:

1. Was aged 18 or older at the time of the commission of the offence; and
2. No special reason applies;

Special reasons

The following special reasons are available:

1. Assistance to law enforcement;
2. Impaired mental functioning;
    a. At time of offending:
        i. The offender had impaired metal functioning;
        ii. Causally linked to the offence;

The following offences attract a mandatory minimum NPP:

1. Intentionally or recklessly causing serious injury in circumstances of gross violence (not emergency worker on duty) — **4 years**;
2. Aggravated carjacking — **3 years**; and
3. Aggravated home invasion — **3 years**.

Breach of a restrictive condition of a supervision order or interim supervision order made under the *Serious Offenders Act 2018* (Vic) — **12 months** (but no requirement for a NPP for this offence).

Even if a special reason applies, the Court must still impose a custodial sentence if the offence is a Category 1 offence.

iii. That substantially and materially reduced the offender's culpability; and
iv. That was not caused *substantially* by self-induced intoxication; or

b. At the time of sentencing:
i. The offender has impaired mental functioning; and
ii. That would result in the burden of imprisonment being substantially and materially greater than ordinary.

3. Where the Court imposes CSTO or a RTO;
4. Substantial and compelling circumstances that are exceptional and rare and justify making a different order. The Court cannot take into account:
   a. Previous good character;
   b. An early guilty plea;
   c. Prospects of rehabilitation; and
   d. Parity considerations.

[i] **Category 1 offences:**

- Murder
- ICSI and RCSI in circumstances of gross violence
- ICSI, RCSI, intentionally or recklessly causing injury to an emergency worker on duty (if offender was at least reckless as to whether victim was an emergency worker on duty)
- Rape
- Rape by compelling sexual penetration
- Sexual penetration of child under 12
- Persistent sexual abuse of child under 16

[ii] **Category 2 offences:**

- Manslaughter
- Child homicide
- ICSI (not gross violence or emergency worker)
- Kidnapping and common law kidnapping
- Armed robbery (with firearm, or victim suffers injury, or in company)
- Home invasion, carjacking (not aggravated)
- Arson causing death
- Culpable and dangerous driving causing death
- Traffic or cultivate commercial quantity of a drug of dependence/ narcotic plants
- Expose emergency worker to risk while driving (no injury)
- Providing documents or information facilitating terrorist acts

- Incest – child/lineal descendant/stepchild (if child was under 18 at the time of the offence)
- Aggravated home invasion, aggravated carjacking
- Expose emergency worker to risk while driving (if the emergency worker was injured)
- Traffic or cultivate a large commercial quantity of a drug of dependence/ narcotic plants
- Traffic a commercial quantity of a drug of dependence (for the benefit of or at the direction of criminal organisation).
- Discharging a firearm reckless to the safety of police officer or protective services officer on duty (where that created a risk to the physical safety of the victim or any member of the public)
- Common assault against police officer or protective services officer on duty (where there is an application of force and an offensive weapon, firearm or imitation firearm is readily available to the offender).

STANDARD SENTENCES

Standard sentence offence	**Standard sentence**
Murder	30 years if the court is satisfied that the prosecution has proved beyond reasonable doubt that the person murdered was a custodial officer on duty or an emergency worker on duty and at the time of committing the offence the accused knew or was reckless as to whether the person was a custodial officer or an emergency worker; or 25 years in any other case
Homicide by firearm	13 years
Rape	10 years
Sexual penetration of a child under the age of 12	10 years
Sexual penetration of a child under the age of 16	6 years
Sexual assault of a child under the age of 16	4 years
Sexual activity in the presence of a child under the age of 16	4 years
Causing a child under the age of 16 to be present during sexual activity	4 years
Persistent sexual abuse of a child under the age of 16	10 years
Sexual penetration of a child or lineal descendant under the age of 18 years	10 years
Sexual penetration of a stepchild under the age of 18 years	10 years
Culpable driving causing death	8 years
Trafficking in a large commercial quantity of a drug or drugs of dependence	16 years

For a standard sentence offence, the court must fix a non-parole period of at least:

a. 30 years if the relevant term is life imprisonment; or

b. 70% of the relevant term if it is 20 years or more; or

c. 60% of the relevant term if it is less than 20 years;

subject to an interests of justice exception.