

# Mandatory and Presumptive Sentencing: Background and jurisprudential underpinnings

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# Two Observations

*“Other jurisdictions have tried similar approaches to sentencing and failed. It is a great pity that we are making the same mistakes”.*

*Justice Croucher, Esmaili v The Queen [2020] VSCA 63, [100].*

*“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...”*

*Nicholas Cowdery AM QC, Former Director of Public Prosecutions, NSW*

*“Mandatory Sentencing”, Speech to Sydney Law School, Distinguished Speakers Program, 15 May 2014, p 12.*

# The Antithesis of Just Sentences?

“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.”

Justice Mildren, *Trenerry v Bradley* (1997) 6 NTLR 175, 187.

# Law Council of Australia

## Mandatory sentencing regimes:

- ▶ Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;
- ▶ Are inconsistent with Australia's international obligations;
- ▶ Increase economic costs to the community through higher incarceration rates;
- ▶ Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability;
- ▶ Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;
- ▶ Fail to deter crime;
- ▶ Increase the likelihood of recidivism because prisoners are placed in a learning environment for crime thereby inhibiting rehabilitation prospects;
- ▶ Wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole; and
- ▶ Displace discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

- Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014.

# Legislative Reforms in Victoria 2013-2020

- ▶ The *Crimes Amendment (Gross Violence Offences) Act 2013*;
- ▶ The *Sentencing Amendment (Baseline Sentences) Act 2014*;
- ▶ The *Sentencing Amendment (Emergency Workers) Act 2014*;
- ▶ The *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014*;
- ▶ The *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016*;
- ▶ The *Crimes Legislation Amendment Act 2016*;
- ▶ The *Crimes Amendment (Carjacking and Home Invasion) Act 2016*;
- ▶ The *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016*;
- ▶ The *Sentencing Amendment (Sentencing Standards) Act 2017*;
- ▶ The *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017*;
- ▶ The *Justice Legislation Miscellaneous Amendment Act 2018*;
- ▶ The *Justice Legislation Amendment (Police and Other Matters) Act 2019*; and
- ▶ The *Sentencing Amendment (Emergency Worker Harm) Act 2020*.

# Crimes Amendment (Gross Violence Offences) Act 2013 (Vic)

- ▶ Created a statutory mechanism that was later expanded to encompass additional offences.
- ▶ Created the offences of causing serious injury intentionally and recklessly in circumstances of “gross violence”.
- ▶ Provided that a Court must impose a sentence of imprisonment and fix a non-parole period of not less than 4 years’ imprisonment unless there was a “special reason”.
- ▶ Inserted s 10A into the *Sentencing Act 1991* (Vic). Section 10A(2) (now amended) provided 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;
  - (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] or a residential treatment order [due to intellectual disability] in respect of the offender; or
  - (e) there are substantial and compelling circumstances that justify doing so.

# *Sentencing Amendment (Baseline Sentences) Act 2014 (Vic)*

- ▶ Required judicial officers to have regard to an aspirational and increased “median” sentence for some types of offences, and to give reasons for sentencing above or below that aspirational median.
- ▶ In *DPP v Walters* (2015) 49 VR 356 the Court of Appeal observed that the *Baseline Sentences Act* was without precedent in Australian sentencing law. The Court held that the legislation was “incurably defective”.
- ▶ The legislation did not provide any mechanism for the achievement of the intended future median. Further, the Act erroneously conflated the idea of a median sentence with a sentence of mid-range seriousness.
- ▶ The Act plainly contemplated to create a two-stage sentencing methodology in practice.
- ▶ Repealed and replaced by the *Sentencing Amendment (Sentencing Standards) Act 2017 (Vic)*.

# *Sentencing Amendment (Emergency Workers) Act 2014 (Vic)*

- ▶ Expanded the prescriptive sentencing provisions introduced by the *Crimes Amendment (Gross Violence Offences) Act 2013 (Vic)* to offences against emergency workers on duty.
- ▶ Introduced significant reforms to the CCO regime. The Act, amongst other things provided:
  - (a) The Court must have regard to the principle of parsimony:
  - (b) Expressly provided that a CCO could be imposed in circumstances that would have previously resulted in a suspended sentence of imprisonment:
  - (c) Provided that a CCO could be combined with a term of imprisonment (not including pre-sentence detention) of two years or less.
- ▶ *Boulton v The Queen* (2014) 46 VR 308, 335 [114]-[115] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA):

“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.

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.”

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

- ▶ Limited the sentence of imprisonment that can be combined with a CCO to one year.
- ▶ Provided for a category of offences that cannot receive a CCO (category 1), and a second category of offences that require “special reasons” to receive a CCO (category 2).
- ▶ Entrenched a system of mandatory imprisonment in Victoria, because it created a category of offences where, with the removal of the CCO option (including in combination with imprisonment), in most cases there is no other sentence available other than immediate imprisonment.
- ▶ *DPP v Hudgson* [2016] VSCA 254, [111]-[112], [115] (Weinberg, Whelan and Priest JJA):

“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.

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...

...the 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”.

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

*Esmaili v The Queen* [2020] VSCA 63, [63] (Priest and Kyrou JJA):

“...Plainly, in this case, unfettered by the shackles of s 9C, 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 our 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 justified by the circumstances of the offence and of the offender – so as artificially to allow for a longer potential period of parole.”

# Justice Legislation Miscellaneous Amendment Act 2018 (Vic)

- ▶ Greatly expanded the number of “category 1” offences to include injury offences against emergency workers on duty, aggravated home invasion and aggravated carjacking.
- ▶ Made “special reasons” more difficult to satisfy:
  - (1) Repealed the youth exception for 18-21 year olds with particular psychosocial immaturity.
  - (2) Provided that the impaired mental functioning exception “does not apply to impaired mental functioning caused solely by self-induced intoxication”.
  - (3) Amended the test so that must be “substantial and compelling circumstances that are exceptional and rare...”
  - (4) Inserted ss 5(2HC) and 10A(2B) into the Sentencing Act:

“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; or
      - (iii) prospects of rehabilitation; or
      - (iv) parity with other sentences.”

# *Sentencing Amendment (Emergency Worker Harm) Act 2020 (Vic)*

- ▶ Followed considerable outcry from sections of the media concerning the case of Mr James Haberfield; *DPP v Haberfield* [2019] VCC 2082.
- ▶ Removed the jurisdiction of the Magistrates' Court of Victoria to hear injury offences against emergency workers.
- ▶ Amended the *Sentencing Act* to prevent an alleged offender from relying on the exception to mandatory sentencing of impaired mental functioning where that impairment was *substantially*, as opposed to *solely*, caused by self-induced intoxication.
- ▶ 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 mandatory sentencing provisions.
- ▶ Retrospective.
- ▶ Liberty Victoria:

"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. To that end, it should be emphasised that the evidence is clear that, when fully informed, members of the public agree with the sentences imposed by judicial officers in most cases".

# Mandatory and Presumptive sentencing: The current state of the law

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# When do presumptions/minimums apply?

- ▶ Category 1 and Category 2 offences
- ▶ Emergency worker on duty offences
- ▶ Manslaughter by gross violence or by a single punch/strike
- ▶ Intentionally or recklessly causing serious injury in circumstances of gross violence
- ▶ Aggravated home invasion and aggravated car jacking
- ▶ Breach of supervision order or interim supervision order under *Serious Offenders Act 2018*

In addition, 'Standard Sentences' apply to twelve serious offences - they will be covered in Part 2

# Category 1 and Category 2 Offences

- ▶ Only apply to those over 18 at the time of the offence
- ▶ There is a presumption of imprisonment for both C1 and C2 offences
- ▶ Not a minimum sentence, just has to be prison
- ▶ No combination sentence available!
- ▶ Special reasons do not apply to C1 offences
- ▶ If a special reason applies to a C2 offence, the court has full sentencing discretion

# Special reasons (to be covered in detail in part 2)

- ▶ Assistance to Law Enforcement
- ▶ Impaired Mental Functioning
- ▶ Court Secure Treatment Order or Residential Treatment Order
- ▶ Substantial and compelling circumstances that are exceptional and rare and that justify doing so.

# Category 1 Offences

## Cannot displace imprisonment, no combo

- ▶ Murder
- ▶ ICSI and RSCI in circumstances of gross violence
- ▶ Rape
- ▶ Sexual penetration of child under 12
- ▶ Persistent sexual abuse of child under 16
- ▶ Incest, where child under 16
- ▶ Expose emergency worker to risk while driving AND causes injury to emergency worker
- ▶ Traffic or cultivate LCQ
- ▶ Traffic CQ - at direction of criminal organisation
- ▶ Aggravated carjacking and home invasion

# Category 2 Offences

## Can displace with special reason

- ▶ Manslaughter
- ▶ Child homicide
- ▶ Intentionally causing serious injury
- ▶ Kidnapping
- ▶ Culpable and dangerous driving cause death
- ▶ Armed robbery: with firearm OR victim suffers injury OR in company
- ▶ Arson causing death
- ▶ Traffic or Cultivate commercial quantity
- ▶ Expose emergency worker to risk while driving (no injury)
- ▶ Providing documents or information facilitating terrorist acts
- ▶ Discharging firearm reckless to safety of police
- ▶ Common assault: WITH application of force AND offensive weapon is available to offender AND victim is police officer

# Manslaughter: Gross Violence or Single Punch/Strike

- ▶ Maximum penalty for all manslaughters - 20 years' imprisonment
- ▶ Minimum sentence 10 years' for 'single punch/Strike' and 'Gross Violence' manslaughters.
- ▶ Special reasons apply to displace presumptive minimum
- ▶ Offender must be over 18 at time of offence

# Manslaughter minimum sentencing: Notice requirements

- ▶ DPP must give notice that it intends to seek imposition of mandatory sentence
- ▶ Must be given:
  - ▶ Before person is committed
  - ▶ With prosecution opening, or seven days before arraignment
- ▶ Purpose: procedural fairness
- ▶ No power for court to waive notice requirements

# Manslaughter minimum sentencing: Gross Violence

Minimum period of 10 years' applies if:

1. Offender is in company or complicit with two or more persons;  
and
2. Court satisfied BRD:
  - i. Planned in advance to have offensive weapon and used that offence 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

# Manslaughter minimum sentencing: Single punch/strike

Minimum period of 10 years' applies if:

1. Dangerous act; and
2. To head or neck; and
3. Unexpected by victim; and
4. Offender knew victim was not expecting

Does not apply to offences made out by way of complicity

See s 323(1)(a)-(b) of the *Crimes Act 1958*

# Manslaughter minimum sentencing: Single punch/strike

Additional guidance in s4A of the *Crimes Act 1958*

- ▶ A single punch or strike is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act
- ▶ Irrelevant that the single punch or strike is one of a series of punches or strikes
- ▶ May be cause of death even if punch/strike results in impact that causes death e.g. victim hits their head on the ground

# Single punch manslaughter

## Case Study: *Esmaili v The Queen* [2020] VSCA 63

- ▶ Contention: actions of V suggested he was anticipating some physical alteration
- ▶ Was V expecting the punch?
- ▶ Did V need to expect any punch/strike? such as ‘a push, a hip and shoulder, a head-butt, a jab to the stomach, or a kick to the shins’
- ▶ Or did V need to expect the particular, fatal punch?
- ▶ Court concluded: the latter

# Single punch manslaughter

## Case Study: *Esmaili v The Queen* [2020] VSCA 63

- ▶ Victim's demeanour appeared to be entirely consistent with a man not expecting to be punched
- ▶ action in putting his hands behind his back seemed calculated
- ▶ V's demeanour is entirely consistent with an individual endeavouring to deal with an angry, loudmouthed, uncouth lout, who was 'all talk and no action'

# Single punch manslaughter

## Case Study: *Esmaili v The Queen* [2020] VSCA 63

### Sentencing

- ▶ 10 years, 6 months head sentence
- ▶ NPP: 10 years
- ▶ ‘inverted the conventional and time-honoured method by which head sentences and non-parole periods are imposed.’
- ▶ Sentencing discretion driven by imposition of NPP
- ▶ ‘Antithetical to general (and venerable) sentencing principles’
- ▶ ‘unacceptably short prospective period of supervision on parole for the applicant.’

# Other offences with presumptive minimums

- ▶ Where over 18 at the time of the offence, and no special reason applies:
  - ▶ Intentionally or recklessly causing serious injury in circumstances of gross violence (not emergency worker on duty) - 4 years NPP
  - ▶ Aggravated Carjacking - 3 years NPP
  - ▶ Aggravated Home invasion - 3 years NPP
  - ▶ Breach of supervision order or interim supervision order under *Serious Offenders Act 2018* - 12 months (no NPP required)

# Emergency workers on duty

- ▶ For presumptive sentences to ‘kick in’ must:
  - ▶ Be over 18 at time of offence
  - ▶ Be against an emergency worker, corrections officer, YJ worker on duty;
  - ▶ Offender must know V is emergency worker, corrections officer, YJ worker on duty;
  - ▶ Not charged by way of complicity

Relevant offences	Section	Minimum period
Intentionally causing serious injury in circumstances of gross violence	15A	5 years NPP
Recklessly causing serious injury in circumstances of gross violence	15B	5 years NPP
Intentionally causing serious injury	16	3 years NPP
Recklessly causing serious injury	17	2 years NPP
Intentionally or recklessly Causing injury	18	6 months
Expose emergency worker to risk while driving and worker is injured	317AC and 317AD	2 years NPP

# Emergency workers on duty

## What is an emergency worker?

- ▶ Police officer or PSO
- ▶ Operational staff member within the meaning of the Ambulance Services Act 1986;
- ▶ Firefighters: MFB or CFA (includes person employed by MFB or CFA) - volunteer, permanent, casual etc otherwise, emergency management at DELWP for e.g. forest firefighters,
- ▶ Employed or engaged to provide emergency treatment to patients in a hospital;
- ▶ Duty or power under Emergency Management Act 2013
- ▶ SES

# Emergency workers on duty

## What does offender need know?

- ▶ Offender must be reckless as to whether the victim was 'on duty'
- ▶ Meaning of reckless - same as in other areas of criminal law: 'probable or likely' that the person was an emergency worker.

*R v Campbell* [1997] 2 VR 585

*DPP Reference No 1 of 2019* [2020] VSCA 181

# Emergency workers on duty

## Young offenders

- ▶ These provisions still apply to young offenders, that is, persons under the age of 21 at the time of sentence.
- ▶ However, a Youth Justice Centre order is available if preconditions for YJ are met:
  - ▶ Reasonable prospects of rehabilitation
  - ▶ Particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.
- ▶ Exception: ss 15 and 16A (gross violence offences) - No YJ available.