THE CURIOUS ROLE OF COVID-19 IN SENTENCING: THE RELEVANCE AND MITIGATING WEIGHT OF ILL HEALTH AND HARSH PRISON CONDITIONS

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Australian courts have held that the COVID-19 pandemic should impact on the nature and severity of criminal sanctions. Broadly, it has been argued that prisoners are more likely to be infected with COVID-19, to experience adverse outcomes because of existing compromised health conditions, and to experience more onerous incarceration due to lengthy periods in lockdown. The courts, on balance, have been sympathetic to these and other arguments, and accordingly have been willing to extend a sentence discount as a result of the pandemic. This article argues that while there is some theoretical support for this approach, it is inconsistent with the weight of established jurisprudence that strictly interprets the circumstances in which a penalty reduction will be accorded for health reasons. The judicial approach to factoring COVID-19 into the sentencing calculus provides the opportunity for broader analysis of the manner in which medical conditions and strict prison conditions should be weighed as relevant factors in sentencing outcomes. The pandemic has also raised the potential use of remissions through executive action as another form of sentence discount for prisoners. The reforms ultimately proposed will make this area of sentencing law more doctrinally coherent and lead to more consistent and predictable outcomes.

I INTRODUCTION

The COVID-19 ('COVID') pandemic has caused enormous disruption and change to every aspect of society. Outside of the health system, the operation of law and courts has been significantly affected, in particular the criminal justice system. This is especially so in Victoria, which has experienced by far the greatest number of COVID cases in Australia.[1] Among the significant effects on the criminal justice

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system in that state has been the introduction of judge-alone trials, the widespread facilitation of evidence by audiovisual link, and the suspension of criminal trials for several months.[2] In addition, in those cases that have progressed to the sentencing stage, there is evidence that the pandemic has also had an impact on sentencing law. This development is of particular importance, given this aspect of criminal justice has the most significant consequences for offenders, often imposing considerable hardships.

Pandemics raise issues for populations who are in confined spaces, with little opportunity to avoid exposure, and where that population suffers other underlying health issues. Aged care facilities and prisons, in particular, have been identified as requiring special measures. This is chiefly so on account of the general overcrowding in prisons, restricted access to health services, the absence of intensive care medicine, and the generally compromised health of those in custody. In this context it has been suggested that prisoners who are especially susceptible to COVID should be released early from prison.[3] Less radically, it has been proposed that the pandemic should result in offenders not being sentenced to prison or at least that shorter terms of imprisonment should be imposed. There are several key reasons in support of these proposals. Logically, they are underpinned by two broad rationales.

The first relates to the intrinsic features of COVID and the adverse health consequences associated with contracting the virus. Thus, it has been suggested that prisoners have a greater risk of being infected with COVID because of the high population densities of prisons, and the fact that access to medical facilities in prison is limited, with virtually no access to intensive care or respirators. Further, some offenders are particularly vulnerable to the health impacts of COVID because

1 At the time of writing, Victoria had recorded 20,484 cases and 820 deaths, representing 70% of all cases and just over 90% of deaths nationally: see Department of Health (Cth), *Coronavirus (COVID-19) at a Glance: 10 April 2021* (Infographic, 10 April 2021) <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-10-april-2021> ('*Coronavirus at a Glance*').

2 See, eg, 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>.

3 Naomi Neilson, 'Top Legal Professionals Call for Safe Release of Adult and Children Detainees', *Lawyers Weekly* (online, 19 August 2020) <https://www.lawyersweekly.com.au/biglaw/29225-top-legal-professionals-call-for-safe-release-of-adult-and-children-detainees>; Stephane Shepherd and Benjamin L Spivak, 'Reconsidering the Immediate Release of Prisoners during COVID-19 Community Restrictions' (2020) 213(2) *Medical Journal of Australia* 58; Adam Cooper and Tammy Mills, 'Barrister Calls for Elderly Prisoner Release to Limit Coronavirus Risk', *The Age* (online, 18 March 2020) <https://www.theage.com.au/national/victoria/barrister-calls-for-elderly-prisoner-release-to-limit-coronavirus-risk-20200318-p54bgw.html>.

of their advanced age or presence of comorbidities. Indeed, a history of smoking and drug abuse appears to be associated with more severe and adverse outcomes.[4] The second rationale relates to the steps taken by prisons in response to the pandemic. To ameliorate the spread of COVID, some prisons have taken measures to limit the interaction that prisoners have with other people, including visitors, resulting in long periods of physical isolation for inmates. These changes in physical conditions can make serving a prison sentence more burdensome on those inmates.[5]

There is no settled jurisprudence as to the manner in which sentencing courts treat the pandemic. However, on balance, the COVID pandemic has been treated as a mitigating factor. To this end, the COVID-based discount has been partially justified simply on account of the stress that offenders supposedly experience by being unable to take steps to avoid contracting the virus while in prison. The extent to which COVID is factored into a decision on sentence is considered on a case-by-case basis with the courts, so far not establishing any general principle or making any definitive statements as to mitigatory weight in what is seen as an evolving situation for everyone, including prisoners.[6]

This approach is inconsistent with the general approach to health considerations in the sentencing calculus. Poor health is an established mitigating factor although its precise scope is not settled, and the weight applied can vary significantly. The broad rationale for this is that prison is more onerous for prisoners suffering as a result of compromised health conditions.[7] However, the pattern of decisions relating to this consideration establishes that the principle has been applied relatively strictly. In particular, courts have not previously justified a sentencing discount on account of the (non-clinical) stress or anxiety that an offender will experience due to the elevated risk of contracting a serious illness in prison. Thus,

4 Pamela Tozzo, Gabriella D'Angiolella and Luciana Caenazzo, 'Prisoners in a Pandemic: We Should Think about Detainees during Covid-19 Outbreak' (2020) 2 *Forensic Science International: Synergy* 162; Talha Burki, 'Prisons Are "in No Way Equipped" to Deal with COVID-19' (2020) 395(10234) *Lancet* 1411; Paul L Simpson and Tony G Butler, 'Covid-19, Prison Crowding, and Release Policies' (2020) 369 *British Medical Journal* m1551:1–2; Frédéric Dutheil, Jean-Baptiste Bouillon-Minois and Maëlys Clinchamps, 'COVID-19: A Prison-Breaker?' (2020) 111(4) *Canadian Journal of Public Health* 480. Further, the empirical evidence does suggest prisoners have worse health conditions than the general community: 'Prisoners', *Australian Institute of Health and Welfare* (Web Page, 16 January 2018) <https://www.aihw.gov.au/reports-data/population-groups/prisoners/overview>.

5 See *Brown v The Queen* [2020] VSCA 60, [33], [48] (Priest and Weinberg JJA) ('*Brown*'); *DPP (Vic) v Beattie* [2020] VSC 229, [47]–[54] (Lasry J) ('*Beattie*').

6 In *Brown* (n 5), Priest and Weinberg JJA held at [48]:

> In the absence of any adequate material concerning the impact of the virus upon the Corrections system, as matters stand, and given that the situation is one that is rapidly evolving, we are hesitant to express a general statement of principle regarding how this Court (and others) should deal with this crisis as regards its effect upon relevant sentencing principles. We do accept … that the situation is causing additional stress and concern for prisoners and their families, as it is for every member of the community. The extent to which that may be taken into account, if at all, will be a matter to be resolved on the particular facts of any individual case.

7 See below Part II.

for example, the prevalence of Hepatitis C is much greater in prison than the broader community,[8] but this risk has not grounded sentencing mitigation.

Similarly, the ready inclination of courts to justify a sentencing discount on the basis of restrictive prison conditions caused by the pandemic is at odds with the generally strict view it has taken to providing a discount when the mobility of prisoners is limited for other reasons. While current orthodoxy maintains that offenders can get a discount if they serve time in protective custody or 'supermaximum' conditions, sentence reductions are not necessarily made for these reasons.[9]

The apparent willingness of courts to mitigate sentences on the basis of COVID prompts a fresh inquiry into the manner in which health considerations and restrictive prison conditions impact on the sentencing calculus. In crude terms, it can be argued that the more liberal approach underpinning sentencing during the COVID pandemic should be applied more broadly, or alternatively that 'COVID jurisprudence' is flawed and the existing more restrictive approach should be maintained and followed. Further, the pandemic also highlights the complex interplay between the judicial function of sentencing and the use of remission of sentences by executive order.

To contextualise the recommendations made in this article, we first provide a general overview of sentencing law, emphasising the role of ill health and burdensome prison conditions as relevant factors in the sentencing calculus. This is followed by a discussion of the COVID pandemic and the manner in which it has been treated by courts together with consideration of the existence and role of remissions from sentence in this context. We then suggest that the nature of punishment and the principle of proportionality support the view that burdensome prison conditions should be mitigatory. Finally, we set out reform considerations for a fairer and more efficient incorporation of prison conditions into the sentencing landscape.

8 Michael Mokhlis Mina et al, 'Hepatitis C in Australian Prisons: A National Needs Assessment' (2016) 12(1) *International Journal of Prisoner Health* 3, 4; Lise Lafferty et al, 'A Policy Analysis Exploring Hepatitis C Risk, Prevention, Testing, Treatment and Reinfection within Australia's Prisons' (2018) 15(1) *Harm Reduction Journal* 39:1–9, 1.

9 See below Part II. See also Mirko Bagaric, Richard Edney and Theo Alexander, '(Particularly) Burdensome Prison Time Should Reduce Imprisonment Length: And Not Merely in Theory' (2014) 38(2) *Melbourne University Law Review* 409 ('(Particularly) Burdensome Prison Time').

II THE SENTENCING SYSTEM AND ROLE OF HARDSHIP IN SENTENCING

A *Overview*

Australian sentencing law is sourced in the interaction of legislation and common law.[10] As might be expected in a federal system, each state has its own legislative scheme, but many of the principles in legislation and case authorities are broadly similar.[11] In this respect there is a set of largely common aims of sentencing: the retributive aims of punishment of the offender and public denunciation, together with the consequential aims of specific and general deterrence, protecting the community from the offender essentially through incapacitation, and rehabilitation of the offender.[12] As a general rule, the type of sentence imposed, the extent of any financial penalty, and the length of any prison term is governed by a consideration of a distinct set of principles, which includes the objective seriousness of the crime, proportionality of the punishment to that level of seriousness, and subjective features of the offender going to mitigation of the ultimate penalty.[13] Importantly in the context of a pandemic where the risk of death in prison is arguably heightened, this risk factor assumes significance with respect to the duty of care owed by the state to those in custody, as well as observance of Australia's domestic and international human rights obligations in a country where the death penalty was abolished long ago.

Courts must also consider relevant aggravating and mitigating factors. The extent to which these apply in any given case is highly variable, depending on the unique factual circumstances. In addition, there is significant variation in the source and nature of these factors, depending on the jurisdiction. There are, for example, more than 30 aggravating and mitigating circumstances sourced in legislative provisions in NSW[14] and Queensland,[15] while other jurisdictions are less directive. In addition, there is a significant body of common law relating to relevant sentencing factors that both combines and overlaps with these legislative provisions

10 For detail, see Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010); Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 7th ed, 2019).

11 Mackenzie, Stobbs and O'Leary (n 10); Bagaric, Edney and Alexander, *Sentencing in Australia* (n 10).

12 *Crimes (Sentencing) Act 2005* (ACT) s 7(1) ('*Sentencing Act* (ACT)'); *Crimes Act 1914* (Cth) ss 16A(1)–(2) ('*Crimes Act* (Cth)'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*Sentencing Procedure Act* (NSW)'); *Sentencing Act 1995* (NT) s 5(1) ('*Sentencing Act* (NT)'); *Penalties and Sentences Act 1992* (Qld) s 9 ('*Penalties and Sentences Act* (Qld)'); *Sentencing Act 2017* (SA) ss 9–10 ('*Sentencing Act* (SA)'); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) ('*Sentencing Act* (Vic)') s 5(1); *Sentencing Act 1995* (WA) s 6 ('*Sentencing Act* (WA)').

13 Mackenzie, Stobbs and O'Leary (n 10); Bagaric, Edney and Alexander, *Sentencing in Australia* (n 10).

14 *Sentencing Procedure Act* (NSW) (n 12) ss 21A–24.

15 *Penalties and Sentences Act* (Qld) (n 12) pt 2.

depending on the particular case. As a result, there are over 200 aggravating and mitigating factors available in Australian sentencing jurisprudence.[16]

In the present context, it appears that recent authorities have established the existence and effect (perceived and real) of the pandemic as a relevant factor in the mitigation of sentence. It is not yet clear whether this is a standalone consideration or whether it is meant to be comprised within the application of existing mitigating considerations. In addition, it is also clear that the pandemic has enlivened executive remissions on sentence, as well as impacted on bail decisions.[17] With respect to mitigation of sentence, it appears that two factors are considered relevant: ill health and harsh prison conditions.

B *The Relevance of Ill Health to Sentencing*

Offenders who have underlying and chronic health conditions will often find prison more burdensome than other inmates due to their vulnerability to illness through a weakened immune system or other compromised functioning. Despite this, the courts have noted that this should not result in a considerable penalty reduction on the basis that ill health cannot be used as a 'licence to commit crimes'.[18] There is a tension here that on the one hand a person of poor health is likely to find prison more onerous, but at the same time this is not to be regarded as justification for not imposing a substantial penalty if such a penalty is merited by the objective seriousness of the crime. These tensions have been reconciled, to some extent, in favour of reducing sanction severity where the ill health experienced by an offender results in an added punitive effect when deprived of their liberty. For example, in *R v Smith*, King CJ stated:

> Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.[19]

16 In Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981), 229 mitigating factors were identified: at 55. In Roger Douglas, *Guilty Your Worship: A Study of Victoria's Magistrates' Courts* (Legal Studies Department, La Trobe University, 1980), 292 mitigating factors were identified: at 62. For an overview of the operation of mitigating factors, see Mackenzie, Stobbs and O'Leary (n 10) ch 4.

17 Brendon Murphy and Tahlia Ferrari, 'Bail in the Time of COVID-19' (2020) 44(4) *Criminal Law Journal* 247.

18 *R v Martin* (1990) 47 A Crim R 168, 173 (Kirby P), citing *R v Smith* (1987) 44 SASR 587, 589 (King CJ) ('*Smith*').

19 *Smith* (n 18) 589. See also *R v Vachalec* (1981) 1 NSWLR 351, 353 (Street CJ). Ill health can affect the total effective sentence and the length of the non-parole period: see, eg, *Eliasen v The Queen* (1991) 53 A Crim R 391 (AIDS); *R v Magner* [2004] VSCA 202 (bowel cancer); *AWP v The Queen* [2012] VSCA 41 (serious heart condition). Old age is also generally regarded as a mitigating factor: *Gulyas v Western Australia* (2007) 178 A Crim R 539, but often given little weight: *Ljuboja v The Queen* (2011) 210 A Crim R 274, 295–6 [102]–[103] (Buss JA); *R v Cave* [2012] SASCFC 42, [33] (Doyle CJ).

In addition to physical health, the mental and psychological health of the offender can be a mitigating factor on sentence. It is not unusual to find statements such as in *R v Puc*,[20] where Maxwell P stated:

> Impaired mental functioning will also be relevant to sentencing where the existence of the condition at the date of sentencing means that the sentence will weigh more heavily on the offender than it would on a person in normal health, or where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health.[21]

The principle of mitigation on account of poor health is partly a recognition of one of our opening observations: that access to health care, particularly specialist health care, in prisons is limited. That limitation not only includes restricted physical access to primary health care but is further aggravated by transportation protocols outside of prison, and specific delays in access to specialists and intensive care facilities should they be required.[22]

But there is no settled principle that ill health must reduce the length of imprisonment in all cases. In *R v Wickham*,[23] the court noted that mitigation for poor health (even when the condition is life threatening) does not need to be accorded where this would undermine the sentencing objective of community protection:

> Common humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offence. However, where as here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.[24]

This is a very significant limitation on the scope of an ill health mitigation principle, given community protection has been acknowledged by some courts as the most important sentencing objective.[25] However, while there is no entrenched pattern that can be discerned regarding the circumstances in which courts accord a discount on account of the ill health of the offender, a discount will typically be applied where the offender's condition makes prison more burdensome and the nature and extent of the available evidence supports such a finding. It is not inevitable, even in relation to offences which do not involve physical or sexual violence (which must usually attract community protection as a primary

20 [2008] VSCA 159 ('*Puc*'). See also *R v Verdins* (2007) 16 VR 269 ('*Verdins*'); *R v Baxter* [2009] VSC 180.

21 *Puc* (n 20) [32], citing *Verdins* (n 20) 275 (Maxwell P, Buchanan and Vincent JJA), *Smith* (n 18) 589 (King CJ) and *R v Tsiaras* (1996) 1 VR 398. Mental illness is a well-established mitigating factor: *Verdins* (n 20).

22 *Pfeiffer v The Queen* [2009] NSWCCA 145, [13]–[14] (McClellan CJ at CL).

23 [2004] NSWCCA 193.

24 Ibid [18] (Howie J).

25 See, eg, *Channon v The Queen* (1978) 20 ALR 1, 5 (Brennan J) ('*Channon*').

objective).[26] For example, in *R v Higgins*,[27] mitigation was denied even though the offender, who had pleaded guilty to three counts of social security fraud involving a substantial amount of money, suffered from HIV:

> In my view the sentence imposed upon the applicant was a lenient one, over all. As the sentencing judge stated, ill health cannot be used as an excuse to commit crime … If a full-time custodial sentence were not imposed … the courts would be indicating that, provided a person is so ill that imprisonment would be deleterious to his well-being, he can commit serious crime with impunity. … Unfortunately for the applicant, this Court cannot give priority to his health and well-being as the medical profession is required to do. The criminal justice system has at its heart the welfare of the community generally and its protection. The courts must tailor their sentences with an eye to that overriding concern so far as common humanity will allow. In the present case this Court must attempt to safeguard the welfare agencies from fraudulent conduct of the type committed by the applicant for the benefit of those who require that support to function in the community. The scarce resources available for that purpose must be protected from those, such as the applicant, who use them for their own gratification and self-interest. The criminal courts must fulfil their role in attaining this objective and, in my view, nothing less than the sentence imposed by Freeman DCJ would be appropriate to that task.[28]

Accordingly, there are many instances when even very sick offenders do not receive discounts because of their physical or mental health.[29] Not surprisingly, there is no precedent for granting a discount to offenders on account of the fact that prison predisposes them to a greater risk of contracting certain illnesses, even serious ones — despite the fact that there is clear medical evidence that diseases such as Hepatitis C are far more prevalent in prison.[30] In addition to this, there is no pre-existing jurisprudence that stipulates that the stress or anxiety that an offender may feel at the prospect of becoming ill in prison can mitigate penalty. The upshot is that there is no established general principle that necessarily entitles an offender to a reduction in sentence merely because they suffer from poor health that could make their experience in prison more onerous, or are exposed to a potential adverse health outcome, as a result of a custodial sentence.

C *Mitigation on the Basis of Harsh Prison Conditions*

A term of imprisonment will always bring about hardships to an offender. That is an expected impact of a custodial sentence. Without that hardship, prison would likely cease to have a deterrent effect.[31] Nevertheless, sentencing jurisprudence does recognise that in certain cases, a custodial sentence may in fact become more

26 Ibid.

27 (2002) 133 A Crim R 385.

28 Ibid 391 [29], [32] (Howie J) (citations omitted).

29 See, eg, *Aitchison v The Queen* [2015] VSCA 348, [82], [100] (Santamaria JA); *R v BJW* (2000) 112 A Crim R 1, 8 [31] (Sheller JA) (Crown Appeal).

30 See Mina et al (n 8) 4; Lafferty et al (n 8) 1.

31 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 83–8, 301.

onerous than might otherwise be the case. Accordingly, it has been recognised that when prison conditions become more onerous, this may be a relevant mitigating factor in sentencing.

1 *Harsh Prison Conditions Related to Protective Custody*

An additional burden on prisoners due to the conditions of custody can arise either because the prisoner is placed in protective custody or in 'supermaximum' conditions.[32] This is relevant to COVID cases[33] because a measure that is utilised to minimise the risk of spread of the virus is to limit the contact prisoners have with other people, including visitors, corrections staff, and other prisoners. The increased isolation that this causes results in conditions approaching 'supermaximum' conditions or protective custody among the general prison population. In effect, every prisoner is moved into a higher and more restrictive category of custody than they would be in usual circumstances.

Much of the jurisprudence regarding the relevance of harsher than normal prison conditions to sentencing has been developed in the context of prisoners considered to be at high risk of being harmed by other prisoners.[34] Prisoners in this category include, in particular, sex offenders and informers.[35] In these instances it is common practice to separate those offenders from the main prison population, which on the one hand has the benefit of increasing personal security, but often has the effect of increasing surveillance, restricting movement, and reducing access to prison amenities. In these cases, it is not unusual for offenders at elevated risk of personal injury in prison, with associated reduction in amenity, to have that reality factored into sentences as mitigation.[36] In some cases the harsh reality of incarceration for certain offenders was an effective 50% reduction in sentence.[37] For example, in *R v Howard*, Wood CJ at CL stated:

> It is the fact, as Kirby J pointed out in [*AB v The Queen*], that every year in protective custody is equivalent to a significantly longer loss of liberty under the ordinary conditions of prison. It is also the fact that such form of detention can deny to a prisoner the full opportunities for programs and courses available to mainstream prisoners. Additionally, any prisoner with a history of being on protection, particularly

32 For discussion, see Bagaric, Edney and Alexander, '(Particularly) Burdensome Prison Time' (n 9) 415–19, 421–3.

33 See Part III below.

34 See Bagaric, Edney and Alexander, '(Particularly) Burdensome Prison Time' (n 9) 415–19.

35 *R v Rostom* (1996) 2 VR 97; *York v The Queen* (2005) 225 CLR 466 ('*York*'); *Scerri v The Queen* (2010) 206 A Crim R 1, 10 [43] (Maxwell P and Buchanan JA).

36 This is not always the case, especially with the rise in extended incarceration for high-risk sex offenders, and the availability of designated prisons for such offenders.

37 *R v Rose* [2004] NSWCCA 326, [35] (Hoeben J), citing *AB v The Queen* (1999) 198 CLR 111, 151–2 [105] (Kirby J) ('*AB*') and *R v Howard* [2001] NSWCCA 309, [18] (Wood CJ at CL) ('*Howard*'). See also *R v Stanbouli* (2003) 141 A Crim R 531, 557 [139] (Hulme J), 565 [180] (Carruthers AJ); *R v Patison* (2003) 143 A Crim R 118, 136 [86]–[87] (Carruthers AJ), quoting *R v Davies* (1978) 68 Cr App R 319, 322 (Lord Lane CJ).

> one who has killed or abused a child, is potentially a marked man for whom the risk of reprisal is high.[38]

Similarly, it has been recognised in cases where there is a 'grave risk' that a person will be assaulted or killed in prison, that is a relevant consideration on sentence. Here, the safety of a prisoner is a valid factor in mitigation of sentence.[39] It should not, however, be conclusively assumed that the risk to the physical safety of an offender will necessarily translate into a reduction on sentence, nor that the conditions of protective custody are, or will be, experienced as more onerous by the offender. In *R v Mostyn*,[40] Howie J was not only careful to avoid assuming protective custody was more onerous than ordinary prison conditions, but was also careful to set out a requirement to establish, on the basis of credible evidence, that the conditions alleged to involve more onerous conditions or elevated risk actually did so.[41] Moreover, it is not clear that a discount is applicable where the circumstance underpinning the need for protective custody is determined to be the fault of the offender.[42]

Consequently the sentencing jurisprudence on this aspect of mitigation is cautious, broadly unsettled, and requires the court to be satisfied on balance that the conditions are significantly more burdensome than would otherwise be the case.[43] Nevertheless, while the law in this area is unsettled, this is not a matter that needs to be finally resolved for the purposes of this article, given that it is not through the fault of any particular offender that a pandemic has occurred. It does, however, indicate that whereas ordinarily these principles would only be considered in relation to a comparatively small number of prisoners, the pandemic has essentially converted them into a universal consideration.

2 *Harsh Prison Conditions Related to 'Supermaximum' Custody and Lockdown*

The strictest prison conditions are those found in 'supermaximum' prisons.[44] These are in fact far stricter than any conditions prisons impose on account of the

38 *Howard* (n 37) [18], citing *AB* (n 37) 151–2 [105] (Kirby J).

39 *York* (n 35) 473–4 [21]–[23] (McHugh J).

40 (2004) 145 A Crim R 304.

41 Ibid 332 [180]–[181].

42 *Houghton v Western Australia* (2006) 32 WAR 260, 268 [26] (Steytler P) ('*Houghton*').

43 *Clinton v The Queen* [2009] NSWCCA 276, [25]–[29] (Howie J); *Geddes v The Queen* [2012] NSWCCA 94, [44] (Whealy JA); *R v Males* [2007] VSCA 302, [49]–[52] (Maxwell P); *R v Liddy* (2002) 84 SASR 231, 259–65 [106]–[124] (Mullighan J); *R v Durocher-Yvon* (2003) 58 NSWLR 581, 587 [23] (Howie J); *Western Australia v O'Kane* [2011] WASCA 24, [68]–[67] (Pullin, Newnes JJA and Mazza J) ('*O'Kane*').

44 'Supermax' prisons are maximum security prisons with the highest level of inmate control, surveillance, and lockdown. These are normally populated by prisoners with the highest level of assessed threat to the public and other prisoners who are usually convicted of the most serious crimes: see David Brown and Bree Carlton, 'From "Secondary Punishment" to "Supermax": The Human Costs of High-Security Regimes in Australia' in Jeffrey Ian Ross (ed), *The Globalization of Supermax Prisons* (Rutgers University Press, 2013); Daniel P Mears, 'Supermax Prisons: The

pandemic. The judicial authorities that deal with 'supermaximum' conditions generally state that it is a mitigating consideration, but there is no strict rule to that end. This is, in part at least, because offenders who are ultimately classified to serve their sentences in these categories of prisons are usually serving extended terms, if not life.

It has been recognised that lockdown prison conditions normally translate into a significant reduction on sentence, particularly in those cases where the conditions experienced by the offender have effectively been equivalent to the exceptional 'supermax' conditions through periods of lockdown.[45]

Ultimately, and similarly to other principles of sentencing, the mitigatory value and weight attributed to harsh prison conditions depends on the individual circumstances of the case. It is necessarily a question of fact and degree. For example, in *Nguyen v The Queen* ('*Nguyen*'), the offender had been on remand pending trial from February 2015 and was not sentenced until 2016. During that time there had been a period of four weeks of 23-hour lockdown resulting from a prison riot.[46] In this case, the Victorian Court of Appeal concluded:

> The applicant does not submit there were personal factors that differentiate his experience on remand from any other prisoner's time on remand. … A significant period of time spent in lockdown does make a prisoner's experience on remand more burdensome and should therefore be factored into the sentencing exercise. However, its mitigatory weight will not ordinarily be significant unless circumstances personal to the offender demonstrate that lockdown conditions were particularly burdensome for that offender. We therefore consider the sentencing judge's failure to take into account the applicant's time spent in lockdown during the 2015 MRC riots to be an error, but not a material error. Were we to reopen the sentencing discretion, we would not impose a less severe sentence.[47]

The recognition of sentence mitigation for lockdown prison conditions is based on two principal factors. The first is what might be regarded as basic humanity, and the second is the reality that long periods of incarceration will often exacerbate aggression and psychological distress linked to isolation for human beings.[48] Thus, while offenders can sometimes receive a sentence discount for harsh prison conditions, this is not a strict rule — even in relation to the harshest of prison conditions.

Policy and the Evidence' (2013) 12(4) *Criminology and Public Policy* 681; Daniel P Mears et al, 'Housing for the "Worst of the Worst" Inmates: Public Support for Supermax Prisons' (2013) 59(4) *Crime and Delinquency* 587.

45 *DPP (Vic) v Faure* (2005) 12 VR 115, 121 [28] (Williams AJA); *Tognolini v The Queen [No 2]* [2012] VSCA 311, [22], [30], [32] (Maxwell P, Buchanan and Redlich JJA); *Nguyen v The Queen* [2017] VSCA 100, [24] (Redlich, Weinberg and Osborn JJA) ('*Nguyen*'); *O'Kane* (n 43) [64] (Pulllin, Newnes JJA and Mazza J), quoting *Houghton* (n 42) 268 [26] (Steytler P).

46 *Nguyen* (n 45) [22].

47 Ibid [25]–[26] (Redlich, Weinberg and Osborn JJA).

48 *DPP (Vic) v AK* [2019] VSC 852, [32], [43] (Kaye JA); *DPP (Vic) v Mercuri* [2017] VCC 1658, [16] (Murphy J); *Mitchell v The Queen* [2016] VSCA 321, [10], [24]–[25] (Maxwell P, Redlich and Tate JJA).

III COVID-19 AS A MITIGATING CONSIDERATION

The above analysis provides the backdrop against which the approach taken by the courts to the pandemic can be assessed. Everyone in Australia will have, to some extent, been impacted by the pandemic. Nevertheless, for the sake of completeness we provide a brief overview of the nature of the COVID virus.

A *COVID-19*

A virus is a parasitic micro-organism that consists of a limited structure of proteins and a core of nucleic acid sufficient to contain a genetic code for replication, but is otherwise unable to sustain or replicate itself outside a living organism. Viral infections can be relatively harmless to their host, but in some cases can be lethal, depending on the system(s) damaged by the virus in the process of replication.[49] There are different kinds of viruses, of which Coronaviruses are a distinct category that have been found in a number of mammals, including humans. It is by no means clear, but it is believed that the virus was originally zoonotic and crossed over to humans, possibly through large live animal and seafood markets. Once the jump had been made, the virus spread rapidly through human-to-human contact, and quickly became an international crisis.[50] Coronaviruses cause respiratory symptoms in humans, which in some cases can be fatal. Following a large outbreak of pneumonia in Wuhan, China, in December 2019,[51] investigation confirmed the origin as a novel strain of coronavirus. In February 2020, the International Committee on Taxonomy of Viruses ('ICTV') named the virus 'Severe Acute Respiratory Syndrome Coronavirus 2', or SARS-CoV-2.[52] The related disease caused by the virus was subsequently named 'COVID-19' by the World Health Organization ('WHO'), as it declared a pandemic.[53]

The virus is thought to spread primarily through respiratory droplets produced when a person coughs or sneezes. Transmission can take place if a person inhales those droplets, although it is also suspected that transmission can take place if a person wipes their eyes or touches their mouth after coming into physical contact

49 Peter Harris, Sue Nagy and Nicholas Vardaxis (eds), *Mosby's Dictionary of Medicine, Nursing and Health Professions* (Elsevier, 3rd rev ed, 2019) 1812.

50 'Situation Summary', *Centers for Disease Control and Prevention* (Web Page, 19 April 2020) 2–3 <https://stacks.cdc.gov/view/cdc/87026>.

51 World Health Organization, 'WHO Statement Regarding Cluster of Pneumonia Cases in Wuhan, China' (Press Statement, 9 January 2020) <https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china>.

52 'Naming the 2019 Coronavirus', *International Committee on Taxonomy of Viruses* (Web Page, 2020) <https://www.talk.ictvonline.org/information/w/news/1300/page>.

53 'Origin of SARS-CoV-2', *World Health Organization* (Web Page, 26 March 2020) <https://apps.who.int/iris/handle/10665/332197>; 'Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It', *World Health Organization* (Web Page) <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it>.

with surfaces or objects that have the virus on it.[54] COVID has vastly different effects on people. In many cases it will produce no symptoms. In most instances, it will produce mild symptoms, such as a fever, cough and running nose, and the individual will recover fully in a matter of days. In about 10% of cases, the symptoms are more serious, and the patient will need hospital treatment.[55] COVID is often compared with common cold, and influenza. There is little doubt that COVID is highly infectious and is also very dangerous for individuals with respiratory weakness — more so than seasonal influenza. Indeed, one international epidemiological study indicates COVID is up to 14 times more likely to kill those infected than seasonal influenza.[56] Given the disease's impacts on the lungs, seriously ill patients often need intensive care, involving respirators and infection control.[57] In this context, the COVID pandemic has clearly exposed the inability of modern health systems to provide this kind of intensive intervention on a mass scale, and equally revealed the inadequacy of funding linked to public health. In Australia, at the time of writing this article, there were approximately 29,400 confirmed cases and 909 deaths from COVID.[58] This is to be sharply contrasted with the United States, which has an estimated 30.8 million confirmed cases and in excess of 557,000 deaths with projections for a continuing increase in these numbers despite now implementing an ambitious vaccination program.[59]

It is not surprising that international concern now exists as to the potential impact on prisons should the virus take hold. Those concerns are not idle. In the United States, where the Federal Government has simply failed to control the spread of the virus, the prison populations are now acutely exposed to infection. There are estimated to have been over 392,500 inmates infected with COVID in the United

54 'How COVID-19 Spreads', *Centers for Disease Control and Prevention* (Web Page, 14 July 2021) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

55 See Zunyou Wu and Jennifer M McGoogan, 'Characteristics of and Important Lessons from the Coronavirus Disease 2019 (COVID-19) Outbreak in China: Summary of a Report of 72 324 Cases from the Chinese Center for Disease Control and Prevention' (2020) 323(13) *Journal of the American Medical Association* 1239, 1239.

56 Shigui Ruan, 'Likelihood of Survival of Coronavirus Disease 2019' (2020) 20(6) *Lancet Infectious Diseases* 630. Here the author wrote at 631 (citations omitted):

> Even though the fatality rate is low for younger people, it is very clear that any suggestion of COVID-19 being just like influenza is false: even for those aged 20–29 years, once infected with SARS-CoV-2, the case fatality ratio is around three times higher than that of seasonal influenza. For people aged 60 years and older, the chance of survival following SARS-CoV-2 infection is approximately 95% in the absence of comorbid conditions. However, the chance of survival will be considerably decreased if the patient has underlying health conditions, and continues to decrease with age beyond 60 years.

57 Ken Junyang Goh et al, 'Preparing Your Intensive Care Unit for the COVID-19 Pandemic: Practical Considerations and Strategies' (2020) 24 *Critical Care* 215:1–12, 1, 5.

58 See *Coronavirus at a Glance* (n 1).

59 'United States COVID-19 Cases and Deaths by State', *Centers for Disease Control and Prevention* (Web Page, 9 April 2021) <https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#case>, archived at <https://web.archive.org/web/20210410191340/https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#cases_casesper100klast7days>.

States, of whom at least 2,516 have died. Similarly, approximately 108,260 prison officers have been infected, with 198 deaths.[60] The rate of infections, and the number of deaths, is disproportionately impacting on African-American and Latino inmates.[61] Prisons function, in effect, as enclosed incubators if the virus takes hold within them, leading to concentrations of infections.[62] Australia, in comparison, has been far more effective at containing the virus, both in the general community and in the prison system. But it has come at a cost. For the general public, that cost is measured primarily in economic terms. For those in prison, the cost has come at enduring lockdown conditions. The recognition of the onerous conditions of incarceration has resulted in two developments in the context of imprisonment. The first of these is the extension of sentencing jurisprudence that has largely adapted existing categories of mitigation to the pandemic. The second is the use of remission of sentences by executive order.

1 *COVID Sentencing Jurisprudence*

There have been a number of decisions which have considered the impact of the pandemic on sentencing outcomes. These have varied from a broad concept of global community impact to specific impacts on individuals in custodial settings in particular jurisdictions, notably Victoria. The most detailed analysis has been by Lasry J in sentencing an offender for manslaughter in the case of *DPP (Vic) v Beattie* ('*Beattie*'), where his Honour stated:

> Since March 2020, our community has been dramatically affected by the advent of COVID-19. This virus has affected the entire world with devastating results. The question has thus arisen as to how this matter might be taken into account in the sentencing process …
>
> The matters … relied upon as making your sentence more burdensome … were the following:

60 Data is being compiled by the Marshall Project: see 'A State-By-State Look at 15 Months of Coronavirus in Prisons', *Marshall Project* (Web Page, 9 April 2021) <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>, archived at <http://web.archive.org/web/20210410212822/https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>. See also 'National COVID-19 Statistics', *COVID Prison Project* (Web Page, 14 September 2021) <https://covidprisonproject.com/data/national-overview/>.

61 Denise N Obinna, 'Confronting Disparities: Race, Ethnicity, and Immigrant Status as Intersectional Determinants in the COVID-19 Era' (2021) 48(4) *Health Education and Behavior* 397, 399.

62 Monik C Jiménez et al, 'Epidemiology of COVID-19 among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons' (2020) 3(8) *Journal of American Medical Association Network Open* e2018851:1–4, 1. The authors wrote at 3 (citations omitted):

> To our knowledge, this is the first examination of COVID-19 burden among incarcerated individuals and staff in both jails and prisons. The rate of COVID-19 among incarcerated individuals was nearly 3 times that of the Massachusetts general population and 5 times the US rate, consistent with recent reports in US federal and state prisons. Systems with smaller reductions in incarcerated populations and higher testing rates demonstrated higher rates of confirmed cases. Limited testing likely underestimates the true infection rate in county jails.

> The prospect of an outbreak in whichever prison you are held creates heightened anxiety in circumstances of forced incarceration as you have no control over measures to reduce your risk of contracting the virus;
>
> You are experiencing increased stress and anxiety in relation to the health of your family members and your mother, in particular, who, at age 75, is at greater risk of more serious illness if infected by the virus;
>
> As Ms Hosking's affidavit confirms, all personal prison visits have been discontinued and, in your case, the isolation from family makes your time in jail more difficult;
>
> Whilst there is the ability to make contact via the telephone and perhaps other technology, the pressure on resources and the demand from within the prison makes that challenging;
>
> There will be increasing isolation within the prison for inmates that will limit opportunities for work, courses or activities within the prison, which has been a significant feature of your rehabilitation.
>
> In addition to those matters, Mr Hallowes relied on the practical consequences of an outbreak within the prison system. Apart from the present anxiety about that risk to which I have already referred, the conditions for prisoners would become significantly more restricted and may include a lockdown. It would be even more burdensome for any who were unfortunate enough to be infected, but did not require hospitalisation, as they would be isolated within their cell.[63]

It is apparent that a number of potential effects and stressors related to COVID were detailed by Lasry J as considerations for mitigation of sentence, and by the time his Honour delivered his sentencing judgments in *DPP (Vic) v Williams* ('*Williams*') three months later on 7 August 2020,[64] the pandemic had surged in Victoria with a significantly higher and increasing number of infections and deaths each day. This resulted in a Stage 4 lockdown of Melbourne and connected regional centres, as well as the closure of all interstate borders to Victoria. The 'lockdown' that was postulated in *Beattie* materialised and this reality, with its clear ramifications for prisoners in the confined custodial environment, was a significant factor in Lasry J's consideration of the sentences imposed on the two offenders who pleaded guilty to manslaughter in *Williams*:

> I … note that … the Melbourne metropolitan area has just begun a 'Stage 4' lockdown that has imposed significant restrictions on the mobility of the whole population. … It is a matter of public record that, for the foreseeable future, Victoria's situation is extremely serious given the current volume of community transmission and, as the Premier of Victoria says regularly, the virus is 'wildly infectious'. There obviously can be no immunity from this for prisons. …

63 *Beattie* (n 5) [47], [51]–[52]. See also *Brown* (n 5) and the remarks of Priest and Weinberg JJA for the Victorian Court of Appeal, giving reasons for including COVID as a mitigating factor: at [48].

64 [2020] VSC 483 ('*Williams*').

> [I]n *Astbury v The Queen [No 2]*, the Court confirmed that it was proper to take into account the practical effect of prison lockdowns on those in custody and the stress they experience due to the increased vulnerability to infection in the prison environment. …
>
> In this matter, it was not put that either of you had an underlying condition that made you particularly susceptible to serious illness if you were infected. However, as the Court of Appeal indicated in *Brown*, both of you are nevertheless affected. First, there is the stress that accompanies the risk of infection whilst in custody and the inability to take your own precautions. That stress may be compounded by the concern for the wellbeing on your family and friends in the community. Second, there remains a ban on personal visits, which is a significant loss and makes the time in custody more burdensome. Despite efforts to connect persons in custody with family and friends over the phone or video conferencing, the increased demand creates other difficulties. Other restrictions imposed include the closing of courses within the gaols, and the movement and contact of prisoners with the mainstream, I assume, has been significantly curtailed.
>
> We in the community now have some concept of the word 'lockdown' as it applies to us. One can easily imagine how much more onerous a prison lockdown must be for those who have the misfortune to be there. I propose to proceed on the basis that it is appropriate to take these matters into account in imposing sentences on you.[65]

While sentencing decisions affected by COVID considerations are not unique to Victoria, that jurisdiction has experienced the most severe restrictions because of the disproportionate number of infections and deaths. The risks posed by COVID and the particular vulnerability of prisoners in this regard has also been recognised by NSW courts, where restrictions have also been imposed but not to the same extent. For example, in *R v Silvia*, Priestley DCJ in the NSW District Court, sentencing an older offender for supplying a commercial quantity of prohibited drugs and money laundering offences, observed that COVID added another layer of adversity, and this was taken into account as having some mitigatory effect on sentence:

> The offender is … 61 years old and not in the best of health, and has never been in full time custody before … Time in prison would be more onerous for him in normal circumstances for these reasons. The Covid 19 situation adds to this onerous position. This is because presently visits are not occurring. Further, should there be an outbreak of the virus in the prison system the offender may well be at a greater health risk, and I note the medical evidence of the offender being at greater risk to coronavirus. I take these matters into account. Should it be necessary, they would found a basis for special

65 Ibid [69], [71], [73]–[74] (citations omitted). See also *R v Madex* [2020] VSC 145, [27], [51] (Incerti J); *DPP (Vic) v Kotiau* [2020] VSC 421, [72], [75] (Coghlan JA) ('*Kotiau*'); *Mendieta-Blanco v The Queen* [2020] VSCA 265, [37]–[38], [40]–[42] (Priest, Kaye and T Forrest JJA) ('*Mendieta-Blanco*'), quoting *DPP (Vic) v Mendieta-Blanco* [2020] VCC 1319, [45]–[51] (Johns J) ('*DPP v Mendieta-Blanco*') and *DPP (Vic) v Tenenboim* [2020] VCC 1277, [37]–[49] (Johns J) ('*Tenenboim*'); *Stanger v The Queen* [2021] VSCA 25, [41], [65] (Maxwell P, Kaye and T Forrest JJA) ('*Stanger*'), citing *DPP (Vic) v Stanger* [2020] VCC 735, [31.2], [32]–[34] (Dalziel J) ('*DPP v Stanger*').

> circumstances, as would the benefit to the offender's rehabilitation of a longer period of supervision.[66]

Further, in *R v Kelso* ('*Kelso*'), COVID was considered as relevant to multiple aspects of the sentencing synthesis, including the prospects of rehabilitation compromised through economic hardship,[67] the elevated risk to prisoners of contracting COVID,[68] and the onerous nature of lockdown conditions.[69] Norrish DCJ concluded, however, that while COVID and its effects constituted '"special circumstances" … ultimately the current COVID-19 situation is not decisive in the disposal of the matter'.[70] In other words, COVID is one relevant factor of many in the sentencing synthesis, which resulted in this offender being sentenced to an intensive correction order including 400 hours of community service for intentionally causing grievous bodily harm to an older man whom he had been involved with in various disputes resulting in time-consuming and costly civil litigation.

The higher criminal courts in NSW have also had occasion to consider the potential mitigatory effect of COVID on sentencing outcomes. In the context of a Crown appeal against the inadequacy of sentences imposed on a 76-year-old offender for

66 [2020] NSWDC 388, [38]. See also *R v Despotovski* [2020] NSWDC 110, [35]–[39] (Haesler DCJ) ('*Despotovski*'); *R v Kelso* [2020] NSWDC 157, [43]–[47] (Norrish DCJ) ('*Kelso*'); *R v Leota* [2020] NSWDC 244, [45], [54]–[56] (Lerve DCJ) ('*Leota*'), quoting *Despotovski* (n 66) [35]–[39] (Haesler DCJ); *R v Barnett* [2020] NSWDC 193, [68]–[71] (Abadee DCJ) ('*Barnett*'); *R v Matthews* [2020] NSWDC 570, [31] (Bourke DCJ) ('*Matthews*').

67 *Kelso* (n 66) [43] (Norrish DCJ):

> Regular employment and stabilising his family's financial position would assist considerably. … The difficulties revealed in the evidence concerning his financial position arising out of the litigation … the costs of selling his business at a reduced price, the fallout from his charge in relation to the current matter and moving … reflected a deterioration in the family's financial position with him as the main breadwinner. That situation must deteriorate through no fault of his in the current economic climate.

68 Ibid [45] (Norrish DCJ):

> [S]uperior courts have acknowledged the justifiable concern within the prison population of the risk of contamination by the coronavirus in a closed environment with limited access to social distancing and other precautionary measures available in the wider community. That justifiable concern held by people about to go into custody or already in custody is noted. It is relevant in this sentencing exercise.

See also *Despotovski* (n 66) [35] (Haesler DCJ); *R v Jones* [2020] NSWDC 147, [31]–[33] (Haesler DCJ); *R v Grimes* [2020] NSWDC 172, [49]–[51] (Haesler DCJ); *R v Croke* [2020] NSWDC 460, [76]–[77], [88] (Syme DCJ) ('*Croke*'); *DPP (Vic) v Dieni* [2020] VCC 1377, [206]–[217] (Riddell J) ('*Dieni*'); *DPP (Vic) v Lennie* [2021] VCC 268, [138] (Riddell J) ('*Lennie*').

69 *Kelso* (n 66) [46] (Norrish DCJ):

> In the process of endeavouring to contain the spread of any infection within correctional facilities there will need to be increased 'lockdowns' or 'lock-ins' of inmates, although the extent of this and how it would directly impact upon this particular prisoner is not known to the court. I appreciate that the consequence of custodial orders currently being served or to be imposed may require isolation of inmates causing additional hardship making the conditions of imprisonment more onerous.

See also *Barnett* (n 66) [68]–[71] (Abadee DCJ); *Leota* (n 66) [54]–[56] (Lerve DCJ), quoting *Despotovski* (n 66) [35]–[39] (Haesler DCJ); *Croke* (n 63) [76]–[77], [88] (Syme DCJ); *Dieni* (n 63) [206]–[217] (Riddell J); *Lennie* (n 68) [138] (Riddell J); *Stanger* (n 65) [41] (Maxwell P, Kaye and T Forrest JJA) ('*Stanger*'), citing *DPP v Stanger* (n 65) [33]–[34] (Dalziel J).

70 *Kelso* (n 66) [47].

three child sexual assault offences, Wilson J, delivering the leading judgment of the NSW Court of Criminal Appeal, held in exercising the residual discretion to dismiss the appeal:

> It is reasonable to conclude that the respondent, a man of advanced age who suffers from a long-term bronchial condition, will experience a level of stress, anxiety, and even fear at the potentially fatal consequences to him were he to be infected with the COVID-19 virus in prison, that would not be the case for a younger, fitter, prisoner.[71]

Also, in *R v Tangi [No 12]* ('*Tangi*'), Rothman J in the NSW Supreme Court specifically drew out the more onerous conditions of custody for the offender being sentenced for the murder of a fellow prisoner because of COVID restrictions. His Honour particularly pointed to limited visitation opportunities rather than the health concerns as a relevant factor in mitigation of the sentence in the circumstances of this prisoner.[72]

Thus, the criminal courts of Victoria and NSW have accepted the pandemic and its ramifications as a mitigating factor. The reasons for this can be divided into two broad categories. The first are those associated with the virus itself. These include the elevated risk of contracting the virus in prison in contrast to the general community;[73] the reduced access to medical facilities if a prisoner contracts COVID in prison and the anxiety that offenders would experience at the prospect of being sent to a facility where they had an elevated risk of contracting COVID. The broadest rationale upon which the COVID discount has been justified is that prisoners might experience stress as a result of the 'concern for the wellbeing [of the inmate on his or her] family and friends in the community'.[74]

The second category to justify mitigating penalties on account of COVID relate to measures taken by prison officials in response to the pandemic. These involve preventative measures, broadly in the form of reducing physical interaction within the prison and more specifically include restricting prisoner access to prison amenities, including rehabilitation courses, therapeutic treatments and receiving personal visits.[75]

71 *RC v The Queen* [2020] NSWCCA 76, [254] (Wilson J, Hamill J agreeing at [4]). See also *Scott v The Queen* [2020] NSWCCA 81, [166] (Hamill J, Brereton JA agreeing at [1], Fagan J agreeing at [172]) ('*Scott*').

72 *R v Tangi [No 12]* [2020] NSWSC 547, [55]–[58] ('*Tangi*'). See also *Despotovski* (n 66) [35]–[39] (Haesler DCJ); *Dieni* (n 68) [206]–[210] (Riddell J); *Lennie* (n 68) [137]–[138] (Riddell J).

73 Not all judges share this view. There is some evidence that prison conditions may in fact carry a lower degree of risk than the general community: see, eg, *Tangi* (n 72) [55]–[56] (Rothman J).

74 *Williams* (n 64) [73] (Lasry J).

75 See, eg, *Scott* (n 71) [166] (Hamill J, Brereton JA agreeing at [1], Fagan J agreeing at [172]); *Tangi* (n 72) [57]–[58] (Rothman J); *Williams* (n 64) [73]–[74] (Lasry J); *Kotiau* (n 65) [75] (Coghlan JA); *Kelso* (n 66) [46]–[47] (Norrish DCJ); *Mendieta-Blanco* (n 65) [37]–[38], [40]–[42] (Priest, Kaye and T Forrest JJA), quoting *DPP v Mendieta-Blanco* (n 65) [45]–[51] (Johns J) and *Tenenboim* (n 65) [37]–[49] (Johns J); *Despotovski* (n 66) [35]–[39] (Haesler DCJ); *Matthews* (n 66) [31] (Bourke DCJ); *Dieni* (n 68) [206]–[210] (Riddell J); *Lennie* (n 68) [138] (Riddell J); *Stanger* (n 65) [41], [65] (Maxwell P, Kaye and T Forrest JJA), citing *DPP v Stanger* (n 65) [31.2], [32]–[34] (Dalziel J).

The most illuminating aspect is the apparent expansive approach that has been taken to the mitigation of penalty. There are several clear points of contrast between the manner in which courts treat COVID and other illnesses (or medical conditions).

The first is that mitigation is justified in part by 'stress' or anxiety because of the increased risk of contracting the virus in prison. This is notable because the concept of 'stress' or 'anxiety' (in a broad, non-clinical sense) has not previously been recognised as a basis for mitigation and certainly the risk of falling ill in gaol is not within the scope of any mitigating principles. Indeed, the emergence of stress as a mitigating factor in sentencing can really be regarded as extraordinary given that incarceration is always stressful. What appears to have emerged is a belief that the lockdown experienced by the general prison population is materially over and above the usual range of expected stressors in prison.

Second, it is foreign to sentencing law and practice that prisoners receive a discount for 'concern' at how their friends and family in the community are coping at the prospect of the offender being imprisoned in a COVID-dangerous environment. This has some relationship to the discount applied for family hardship resulting from an offender being sentenced to prison.[76] Such a discount is rarely invoked and only when the offender's family would experience considerable tangible suffering over and above the usual hardship of experiencing the loss of a breadwinner or carer (for example, being made homeless) as a result of the offender's incarceration.[77] It can, however, also be enlivened in limited circumstances where the offender has heightened concern at the inability of the family to cope without him or her. In *Markovic v The Queen* ('*Markovic*'), the Court stated:

> An offender's anguish at being unable to care for a family member can properly be taken into account as a mitigating factor — for example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender's prospects of rehabilitation.[78]

However, the COVID sentencing ground is seemingly much broader than this because it extends to friends of the offender and relates to the potential tangible difficulties experienced by the offender (contracting the virus), not those associated with the hardships of his or her family or friends.[79] Again, the focus on

76 See *Markovic v The Queen* (2010) 30 VR 589, 590–5 [1]–[21] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) ('*Markovic*').

77 Ibid 591–3 [6]–[11].

78 Ibid 595 [20], citing *R v Williams* [2004] VSC 429, [16] (Kellam J). This has been adopted in *R v Shortland* [2018] NSWCCA 34, [117]–[118] (Hidden AJ) ('*Shortland*'), citing *R v Tuhakaraina* (2016) 75 MVR 434, 445 [86], 445–6 [88] (Wilson J) ('*Tuhakaraina*').

79 For a discussion, see Mirko Bagaric, 'Redefining the Circumstances in which Family Hardship Should Mitigate Sentence Severity' (2019) 42(1) *University of New South Wales Law Journal* 154.

the affective experience of the offender touches on the actual substance of what incarceration is as a form of punishment. The denial of liberty necessarily involves a number of disruptions to normal life, which includes disconnection from familial and other relationships and the resulting psychological impact of it. That aside, this ground is applied very strictly.[80] But this relates to considerations personal to the offender, not a general sense of worry for relatives and friends. Simply stated, the extension to friends is novel.

Third, in order to invoke the COVID discount there is generally no need for offenders to establish the facts underpinning the claim. Thus, the discount has been applied irrespective of the fact that no evidence has been tendered to show that the risk of being infected with COVID is greater in prison than in the wider community. This is in contrast to the evidential requirements associated with the discount on account of time in protective custody.[81]

Over the comparatively short time of the existence of the pandemic there has been increasing judicial attention directed to evidential requirements, although the uncertainties associated with the extent and duration of the pandemic have qualified specific requirements in this regard. In *Tangi*, Rothman J observed that although there was no evidence of a prisoner having contracted COVID and there were no recorded outbreaks in the NSW prison system,[82] the strict conditions imposed to minimise the risk did make conditions of imprisonment 'much more difficult … [and] it cannot be said with any precision when restrictions will ease or when all restrictions will cease'.[83] In *Williams*, Lasry J noted that, as at August 2020, several prisoners and a prison officer had tested positive to COVID, and although neither of the offenders in this case had an underlying condition making them more susceptible to serious illness from the virus, its existence in the prison system and the associated lockdown conditions were stress-inducing because of 'inability to take your own precautions … [and] may be compounded by the concern for the wellbeing on your family and friends in the community'.[84] No specific evidence was provided as to such inability and concerns for each of the offenders.

Fourth, it is novel to suggest that mitigation would be accorded partly on account that prisoners could not take their own precautions to reduce the risk of contracting the virus.[85] An intrinsic aspect of incarceration is a loss of dominion.

80 Ibid 158–60; *R v Nagul* [2007] VSCA 8, [43]–[46] (Chernov JA); *R v Constant* (2016) 126 SASR 1, 29 [89], 33 [103] (Nicholson, Lovell and Hinton JJ); *Shortland* (n 78) [117]–[118] (Hidden AJ).

81 See above Part II.

82 *Tangi* (n 72) [55]–[56].

83 Ibid [57]. Rothman J also noted that a 'World Health Organisation Report on the prevention and control of COVID-19 in prisons and other places of detention dated 15 March 2020' had been tendered: at [57].

84 *Williams* (n 64) [73].

85 Ibid.

Fifth, the courts have also been very willing to base the COVID discount upon relatively mild prison restrictions, such as ceasing contact visits and limiting mobility and access to courses and amenities within the prison.[86] A vastly different approach has been applied in relation to discounts for protective custody and 'supermaximum' conditions, where there are significant restrictions within already restricted custodial environments and specific details of such restrictions have been tendered into evidence during sentencing proceedings.[87]

2 *Remissions*

Another factor that has been brought into the mix for sentencing outcomes during the pandemic has been the prospect that prisoners may receive remissions from their sentences under applicable regulations, or other executive concessions in the form of early release from a sentence of imprisonment.

Remissions from sentences of imprisonment have not existed in Australian jurisdictions since the 'truth in sentencing' policies of the late 1980s and early 1990s were implemented. In Victoria, remissions were available as provided by the *Community Welfare Services Regulations 1974* (Vic) until abolished by the *Corrections (Remissions) Act 1991* (Vic) s 3(1).[88] Interestingly though, there is provision under s 58E of the *Corrections Act 1986* (Vic) ('*Corrections Act*') for emergency management days to be used by the Secretary of the Department of Justice and Community Safety to reduce the length of sentences of imprisonment or the non-parole periods of prisoners for 'good behaviour' where they have suffered 'disruption or deprivation' during an emergency existing in the prison or 'in other circumstances of an unforeseen and special nature'.[89] The amount of this reduction can be 'up to 4 days for each day or part of a day on which the … emergency exists in the prison', or where there are special circumstances a total of 'up to 14 days' can be remitted from a sentence.[90] The power in the Secretary is discretionary but is clearly available when a state of emergency exists encompassing custodial institutions. A state of emergency was declared under the *Public Health and Wellbeing Act 2008* (Vic) throughout Victoria by the Minister for Health on 16 March 2020 in relation to the COVID pandemic.[91] It was extended

86 See above n 75.

87 See above Part II(C).

88 See also *Sentencing Act* (Vic) (n 12) ss 4, 10, as enacted. Section 10 originally directed courts to take the abolition of remissions into account, so as to take into account the abolition of remissions both on the head sentence and non-parole period, with the amount of the reduction fixed by statute until this section sunsetted on 22 April 1997. This approach can be directly contrasted with the approach adopted two years earlier by the New South Wales legislature where remissions were simply abolished as part of the broader 'truth in sentencing' reforms: see Arie Freiberg, 'Truth in Sentencing? The Abolition of Remissions in Victoria' (1992) 16(3) *Criminal Law Journal* 165, 174, 177–84.

89 *Corrections Act 1986* (Vic) s 58E(1).

90 *Corrections Regulations 2019* (Vic) reg 100.

91 'State of Emergency Declared in Victoria over COVID-19', *Premier of Victoria* (Web Page, 16 March 2020) <https://www.premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19>.

monthly and ended on 15 December 2021.[92] Therefore, it is possible that the sentences of all prisoners can be reduced by four days for every day served during this period of emergency. This is arguably an extraordinary form of remission of sentence to compensate prisoners already serving sentences of imprisonment for what may be described as the extra-curial punishment involved during the pandemic.

In NSW, a different approach has been taken. Remissions were abolished in this jurisdiction upon the repeal of the *Probation and Parole Act 1983* (NSW) by s 56 of the *Sentencing Act 1989* (NSW) ('*Sentencing Act* (NSW)') when it commenced operation in September 1989. Up to this point in time remissions had been considered to be a useful 'management tool' for the executive with the opportunity to ultimately control the length of time that an offender actually spent in custody.[93] Statistics illustrate that the NSW courts had responded to the executive use of remissions to reduce sentences by increasing the non-parole period component of sentences.[94] Ultimately, abuse of the remission system through the so-called prisoner 'early release scheme' resulted in the imprisonment of the former Minister for Corrective Services, Rex Jackson,[95] and all forms of remission were seen as dishonest and not promoting the 'truth in sentencing' platform that resulted in the passage of the *Sentencing Act* (NSW). In that setting, the response to the emergency situation presented by the COVID pandemic for prisoners by the NSW Government has been much more restricted. The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) ('*Emergency Measures Act*'), passed on 25 March 2020, amended the *Crimes (Administration of Sentences) Act 1999* (NSW) with the insertion of a new s 276, which allows only certain classes of prisoners to be granted early parole if the Commissioner of Corrective Services considers it reasonably necessary due to public health risks or risks to the 'good order and security of correctional premises' arising from COVID-19.[96] It is arguably a form of remission of sentence by executive order but certainly has not been framed in those precise terms. No doubt this is because of the negative

92 'Victoria's Pandemic Management Framework', *Department of Health (Vic)* (Web Page, 8 March 2022) <https://www.health.vic.gov.au/covid-19/victorias-pandemic-management-framework>. A 'state of disaster' was also declared in Victoria on 2 August 2020 under the *Emergency Management Act 1986* (Vic), giving police greater power to enforce public health directions and was extended monthly until 8 November 2020 when it ended: see Premier of Victoria, 'Statement from the Premier' (Media Release, 8 November 2020) 2; Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Department of Parliamentary Services (Vic), August 2020) <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>; 'Pandemic Order Register', *Department of Health (Vic)* (Web Page, 10 February 2022) <https://www.dhhs.vic.gov.au/victorias-restriction-levels-covid-19>.

93 Don Weatherburn, 'Appellate Review, Judicial Discretion, and the Determination of Minimum Periods' (1985) 18(4) *Australian and New Zealand Journal of Criminology* 272, 276.

94 Ibid 277–80. See also David Brown, 'Battles Around Truth: A Commentary on the *Sentencing Act* 1989' (1992) 3(3) *Current Issues in Criminal Justice* 329, 331.

95 For an excellent study of this period, see Janet Chan, *Doing Less Time: Penal Reform in Crisis* (Institute of Criminology, 1992).

96 *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) sch 2 cl 2.5.

experiences with the system of remissions that operated in the past in this jurisdiction. In practice, this restricted form of special early release by executive order has not been readily utilised.

Available data in NSW shows that despite a reported 10.7% decrease in the adult prison population following the enactment of the *Emergency Measures Act*, the decrease in numbers from 15 March to 10 May 2020 was largely attributed not to incarcerated prisoners being granted early parole, but rather to a decline in prisoners on remand.[97] This decline has been driven by police reducing the number of court attendance notices issued and an increased number of successful bail applications before the courts.[98] The prison population since then has remained relatively stable and overall an

> absence of an increase in parole discharges suggests that the new power allowing the early release of inmates to parole by the Commissioner of Corrective Services has not been widely used.[99]

It is arguable that the NSW approach will have no effect on the sentences of most sentenced prisoners in this jurisdiction, in direct contrast to the availability of discretionary 'emergency management days' under the *Corrections Act* in Victoria. Such remission of sentences available in Victoria can ultimately be used to recognise the extra-curial punishment inflicted on prisoners during the COVID pandemic in a more consistent manner than the cases before the courts where offenders happened to be sentenced during the pandemic. This may be a more effective way of reducing sentences by the period of time that this pandemic has actually imposed more onerous conditions of custody on all prisoners. Utilising a restricted remission scheme may also result in a higher level of prison management by the executive, having the efficacy to reduce the prison population. Addressing the overpopulation issue would have a circular effect in reducing the risk overpopulation presents to prisoners as to contracting the virus.

When court-imposed sentences are meant to encompass the total debt that a person owes to society for their crimes, but that sentence then exposes the prisoner to an ongoing and sustained risk of contracting a deadly virus, it is arguable that more onerous conditions of custody are being borne by the prisoner than was envisioned in the original sentencing exercise. While taking account of the more onerous conditions of custody in sentencing offenders during the pandemic or if a prisoner appeals against their sentence on this basis is one way to address the inequity facing those currently in detention, the more inclusive approach may be to apply a restricted form of executive remission of sentences for all prisoners.

In light of the above discussion, we now examine the appropriate manner in which to reconcile the approach to the COVID discount with the established mitigating

97 Nicholas Chan, 'The Impact of COVID-19 Measures on the Size of the NSW Adult Prison Population' (Bureau Brief No 149, NSW Bureau of Crime Statistics and Research, July 2020) 3–4.

98 Ibid 5–8.

99 Ibid 7.

grounds of ill health and harsh prison conditions as relevant factors in sentencing and the discretionary use of remissions by executive order.

IV ANALYSIS AND REFORM RECOMMENDATIONS

A *Proportionality as the Guiding Principle for Mitigation on the Basis of More Burdensome Prison Time*

The response by the courts to the pandemic has been to endemically expand the scope of the ill-health mitigating ground and to show considerable latitude regarding the circumstances in which harsh prison conditions should reduce sentence severity for those offenders being sentenced during the currency of the pandemic. This provides the opportunity to reassess the manner in which these factors should apply in sentencing. To this end, reforms should be grounded in the overarching principle that governs the nature and extent of punishment: namely, the principle of proportionality.

The High Court in *Hoare v The Queen* stated:

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.[100]

Previously, in the seminal cases of *Veen v The Queen*[101] and *Veen v The Queen [No 2]*,[102] the High Court suggested that proportionality is the primary aim of sentencing. It is considered so important that it cannot be displaced by other sentencing goals such as protection of the community,[103] which has also been declared in other cases as the most important aim of sentencing, and actually shapes the framework in which all other sentencing goals are considered to attain that predominant goal.[104] Proportionality has also been given statutory recognition in all Australian jurisdictions except Tasmania.[105]

100 (1989) 167 CLR 348, 354 (emphasis omitted) (citations omitted).

101 (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

102 (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

103 Ibid.

104 See, eg, *Channon* (n 25) 5 (Brennan J); *R v Rushby* [1977] 1 NSWLR 594, 597–8 (Street CJ); *R v Valentini* (1980) 48 FLR 416, 420 (Bowen CJ, Muirhead and Evatt JJ); *R v Cuthbert* [1967] 2 NSWR 329, 330 (Herron CJ).

105 *Sentencing Procedure Act* (NSW) (n 12) s 3A(a); *Sentencing Act* (Vic) (n 12) ss 5(1)(a), (2)(c)–(d); *Sentencing Act* (WA) (n 12) s 6(1); *Sentencing Act* (ACT) (n 12) s 7(1)(a); *Sentencing Act* (NT) (n 12) s 5(1)(a); *Penalties and Sentences Act* (Qld) (n 12) s 9(1)(a); *Sentencing Act* (SA) (n 12) s 10(1)(a). The need for a sentencing court to ensure that the offender is 'adequately punished' is also fundamental to the sentencing of offenders for Commonwealth crimes: *Crimes Act* (Cth) (n 12) s 16A(2)(k).

When unpacking the principle of proportionality, it is apparent that there are two limbs to be considered. The first is gauging the seriousness of the offence on the spectrum of offending for conduct and fault elements that constitute that specific crime as well as compared to the seriousness of other offences in the criminal calendar. This is also known as ordinal proportionality. The second limb is cardinal proportionality, which involves a consideration of the available sanctions as compared to the harshest sanction available in the jurisdiction in which the offence was committed.[106] Further, the principle has a quantitative component in relation to distribution of punishment, which involves aligning the two components within a range of penalties so that the seriousness of the offence is equal to the harshness of the penalty within a tolerance of floor and ceiling limits of types and durations of punishments.[107]

It has been contended that the concept of proportionality as a sentencing principle is so vague that it is meaningless. Essentially, that particular critique is that aligning the punishment with the crime cannot be done in a transparent and consistent manner when the anchoring points of seriousness vary in the objective assessments by individual judicial officers. There is a subjective overlay in each objective assessment undertaken in this regard.[108] One of the key and detrimental criticisms of proportionality is that it 'presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment'.[109] This critique emphasises the need to give substance to the principle and this necessarily involves an objective ranking of all crimes, all punishments and anchoring of the punishment scales.[110]

This critique does make an important point. However, it is also arguable that precision in matching offence seriousness and severity of punishment is not feasible in the context of the current understanding of proportionality as a limiting

106 For further discussion, see Andrew von Hirsch, 'Proportionate Sentences: A Desert Perspective' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 115, 120.

107 Michael Tonry, 'Proportionality, Parsimony and Interchangeability of Punishments' in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press, 2011) 217, 221–2.

108 Ibid 224–30. Other criticisms are also examined by Tonry, including that proportionality in a 'just deserts' sense cannot be achieved in an 'unjust society' and 'strong proportionality conditions violate notions of parsimony by requiring imposition of unnecessarily severe punishments in individual cases in order to assure formal equivalence of suffering': at 225.

109 Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers, 2004) 184.

110 Ibid 185. Even retributivists have been unable to invoke the proportionality principle in a manner which provides firm guidance regarding appropriate sentencing ranges: see, eg, Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 119–20. See also Ian Leader-Elliott, 'Sentencing by Weight: Proposed Changes to the Commonwealth Code's Serious Drug Offences' (2012) 36(5) *Criminal Law Journal* 265, 277–8, quoting George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press, 1995) 43.

rather than a determining principle.[111] Firmer content could be incorporated into the proportionality principle, but exactitude is not possible.[112]

Although an interesting and enduring issue, a clear resolution is not required in our consideration of the particular relevant sentencing factors identified in the COVID context. Irrespective of the precise manner in which an objective assessment is made of harm caused to determine offence seriousness, a central criterion is the nature of, and extent to which, a victim's interests and welfare are affected by the actual crime. Homicide offences are clearly the most serious with other offences against the person that result in serious forms of injury or impairment, whether physical or mental, ranked towards the top end of seriousness in the ordinal proportionality equation.[113]

On the other side of the proportionality equation, determining cardinal proportionality, there is a similar reasoning process. The primary criterion in assessing severity of punishment is the nature and extent of the effect on the interests of an offender. Imprisonment as the most severe punishment available is singularly deleterious because it deprives an offender of their liberty and dominion.[114] Accordingly, the duration of a term of imprisonment measured against the term prescribed as a maximum includes considerations as to the nature and extent of deprivation of liberty required relative to the offender's moral culpability and personal circumstances. Human beings have an innate desire for freedom, and need to make their own choices in constructing and moulding the activities and routines governing their lives. As we have identified in our earlier analysis, it is apparent, however, that some offenders can experience the pains of imprisonment more acutely because of ill health and in certain circumstances by reason of the conditions of custody being particularly restrictive. There is a qualitative difference in this regard which can be identified and arguably can be quantified in the sentencing exercise when determining sentence length, guided also by the anchoring of the specific maximum penalty and the most severe punishment available in a jurisdiction, usually life imprisonment,[115] together with other sentencing signposts. It is possible to reflect this in the punishment limb of the proportionality equation and if at least an attempt is not made to do this, then the principle will be undercut in its practical application.[116]

111 John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 754–6; von Hirsch (n 106) 119–21; Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(3) *Melbourne University Law Review* 489, 495–6; *R v Dodd* (1991) 57 A Crim R 349, 354 (Gleeson CJ, Lee CJ at CL and Hunt J).

112 See Mirko Bagaric, 'Injecting Content into the Mirage That is Proportionality in Sentencing' (2013) 25(3) *New Zealand Universities Law Review* 411.

113 von Hirsch and Ashworth (n 110) 143–6.

114 Ibid 148.

115 Anderson (n 111) 747–50.

116 This limb is also reflected in the view that sanctions should be structured so that they have the same impact on offenders who are deserving of the same punishment. As noted by Ashworth, the need for equal impact of sanctions minimally entails that 'the system should strive to avoid grossly unequal impacts on offenders': Ashworth (n 31) 105.

B *Mitigation for Ill Health Only When Prison Makes the Condition More Onerous*

This means that ill health should be capable of mitigating penalty. An important issue that arises is whether mitigation for ill health should be accorded whenever the condition makes prison life more burdensome or a narrower interpretation should be adopted such that a sentencing discount is only conferred when the disability will be made more burdensome in prison. This issue was expressly discussed in *R v Van Boxtel* ('*Van Boxtel*'), where the broader approach was taken. Callaway JA (Ormiston and Charles JJA agreeing) in the Victorian Court of Appeal stated:

> Is it that the appellant's residual disabilities will be more burdensome in prison or is it that the burden of serving a prison sentence will be greater for a person with those disabilities? …
>
> [T]he seminal statement on the impact of an offender's ill health upon the duration of a prison term was made by King CJ in *R v Smith*. …
>
> > The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. … Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health. …
>
> [T]he last sentence of that passage identifies two different ways in which ill health may be a factor mitigating punishment.
>
> The evidence in [this] case does not disclose 'a serious risk of imprisonment having a gravely adverse effect on the offender's health'. The question … is whether 'imprisonment will be a greater burden on the offender by reason of his state of health', that is the first, rather than the second, alternative in the last sentence of the passage set out above. The weight of authority, and Victorian sentencing practice, support the view that it is a circumstance of mitigation that a sentence of imprisonment will be significantly more burdensome for a prisoner than for a person in normal health. That applies to both physical and psychiatric illnesses and disabilities.[117]

However, the issue is not settled as Callaway JA further noted in *Van Boxtel*:

> [In *R v Boyes*] [t]he leading judgment was delivered by Chernov JA, with whose reasons Smith AJA agreed substantially. Coldrey AJA also agreed but added some comments of his own. Whilst there are parts of both Chernov JA's and Coldrey AJA's reasons that could be interpreted consistently with the traditional view, the burden of them is that the first alternative in King CJ's judgment in *R v Smith* refers only to the possibility that imprisonment will make it more difficult for an offender to cope with his or her illness or disability. Chernov JA gave the example of an offender who had lost one arm. His Honour said:

117 *R v Van Boxtel* (2005) 11 VR 258, 266–7 [28]–[30] (citations omitted) (emphasis omitted) ('*Van Boxtel*').

> [S]uch an offender may have no more difficulty in coping with the consequences of his impairment in prison than outside it, so that his disability would not cause the burden of imprisonment to be greater from *his* perspective. Relevantly, he could cope with prison life in much the same way as he coped with life outside prison. Compared with ordinary inmates, of course, his burden of imprisonment would be greater, just like his burden of coping with life outside prison with only one arm would be greater by comparison with able-bodied people. In the context of this example, therefore, it does not follow that imprisonment will be a greater burden for him because of his loss of one arm and thus, it would be inappropriate to treat his disability as a mitigating factor.[118]

Callaway JA then noted that, in his view, the interpretation by Chernov JA should not be followed.[119]

Doctrinally, the position adopted in *Van Boxtel* is questionable. There is considerable merit in the approach expressed by Chernov JA in the above passage. People with chronic long-term illnesses or disabilities suffer more than healthy people. This is not fair, but is an unavoidable part of life. Further, many illnesses and physical infirmities are not exacerbated as a result of the prison environment. Offenders who have limited mobility due to matters such as strokes, amputated limbs and paraplegia experience considerable daily burdens in the community but their suffering is not made worse in prison (assuming the existence of handicap facilities no worse than are found in the general community). Of course, their freedom to move will be restricted but this is the same burden experienced by all prisoners. Thus, conditions of this nature should not qualify for sentencing mitigation. Similar considerations relate to a large number of chronic illnesses, such as diabetes, chronic heart disease and HIV so long as prisoners have the same access to medication and medical treatment as in the community. All people who are sentenced to prison suffer a reduction in their level of flourishing. This is a design feature of imprisonment, which is the harshest sanction in our system of law.

The fact that some offenders are already relatively worse off than others prior to being sentenced to prison, for example because of health reasons, should not of itself be a basis for sentence mitigation. To do otherwise involves the court engaging in an empirically impossible and normatively misguided attempt to crudely equalise the burden of imprisonment on all offenders. In the general community, there is no considered attempt to ensure that all people in the community have similar levels of benefits and burdens and it would be an exercise in arbitrary social engineering to make the prison gate the point at which this objective should be pursued.[120] Moreover, such a radical social policy change would be a legislative, not judicial, task.

118 Ibid 267–8 [32] (citations omitted) (emphasis in original).

119 Ibid 268 [33].

120 Moreover, there is no coherent mainstream normative ideology that argues for substantive equality, as opposed to equality of opportunity: see John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

Thus, medical conditions should only mitigate penalty where the prison environment, due to physical design of a prison or the manner in which it is administered, including reduced access to medical services, adds another layer of suffering beyond that which the condition would inflict if the offender was in the community. Admittedly, the number of medical conditions which should qualify for sentencing mitigation depends largely on the ready availability of prescription drugs and necessary medical treatment and care in prisons. If the nature and level of care available in prison for a condition is materially worse than in the general community, then the mitigation would be accorded for a wider range of medical conditions.

C *Additional Burden Needs to be Established: No Discount for 'Stress' or Higher Risk of Contracting COVID-19*

This takes us to the second reform proposal, which is that any additional suffering (which underpins ill-health mitigation) needs to be established, not assumed, and needs to be grounded in tangible concepts that are not intrinsically related to disadvantages associated with prison. Thus, it is untenable to provide a discount on the basis of 'stress' or 'anxiety' at the fear of contracting COVID. No doubt many offenders who are sentenced to prison also feel stressed at the prospect of being detained in an institution where the risks of being subject to a physical or sexual assault are many times greater than in the rest of the community,[121] yet for good reason this does not provide the basis for discounting their sentence.

Moreover, there is no basis for according medically grounded mitigation to prisoners on the basis that they have a concern at the prospect that their family or friends may worry about them. The inability to control the outside community environment is simply one of the intrinsic limitations that stem from an individual having to serve a term of imprisonment as the punishment proportionate to their wrongdoing.

D *No Discount for a Risk of Becoming Unwell*

The third issue is whether a discount should be accorded because prison increases the risk that a prisoner will contract a certain illness, such as COVID. For mitigation on this basis to be tenable, detailed epidemiological comparisons would need to prove that there is in fact a higher risk of infection in prison than in the general community. If this can be established, then the discount would only be applicable to prisoners who had not already been infected with the disease and only to those who would be likely to have a severe response if they were infected —

121 See, eg, Interview with Kriti Sharma (Amy Braunschweiger, Human Rights Watch, 6 February 2018) <https://www.hrw.org/news/2018/02/06/interview-horror-australias-prisons>; Dot Goulding 'Violence and Brutality in Prisons: A West Australian Context' (2007) 18(3) *Current Issues in Criminal Justice* 399; Thomas Noll, 'Prison Violence' (2015) 59(4) *International Journal of Offender Therapy and Comparative Criminology* 335; David Brown, 'Penal Violence' in Julie Stubbs and Stephen Tomsen (eds), *Australian Violence: Crime, Criminal Justice and Beyond* (Federation Press, 2016) 87; Michael A Smyth, *Prison Rape: Law, Media, and Meaning* (LFB Scholarly Publishing, 2011).

hence it would seemingly not apply to young inmates in relation to the COVID pandemic.

On balance, however, the preferable approach is that no discount should be available simply on the basis that imprisonment will expose a prisoner to a greater risk of contracting a disease. This is because the elevated risk of being subjected to an adverse experience of this nature is simply another inevitable consequence of being sentenced to imprisonment and a closed custodial environment. The increased risk of physical and sexual assault that is faced by prisoners also provides a good analogy in relation to this consideration.[122] The fact that inmates have an elevated risk of being physically harmed as opposed to non-inmates is not a recognised basis for mitigation. Instead, it is basis for continual improvement in prison design and conditions, including surveillance mechanisms and education programs. However, if the only manner in which to adjust prison conditions to ameliorate a prisoner being exposed to a significantly elevated risk of harm occurring is by making prison conditions more oppressive, then this can justify a sentencing discount, as currently occurs in relation to some prisoners who are placed in protective custody and in supermaximum conditions.

E *Lockdown Conditions for COVID-19 Justify a Discount or Remission of Sentence*

As we have expounded, clearly there are prison settings which are more burdensome due to enhanced restrictions being placed on the movements and activities of prisoners. Where the nature of the condition leads to the inmate or the entire prison being effectively shut down, this should lead to an additional discount. The Victorian Government announced in late September 2020 that prisoners would receive one day credit for every day served in prison during which they were subjected to significant restrictions.[123] It was noted that '[d]isruptions for prisoners have included fewer hours out of cells, lockdowns and being placed in 14-day quarantine regardless of infection risk'.[124] By the end of August, 4,313 prisoners had received the time served loading, which on average was 16.4 days.[125] This will result in a combined total of 487 years being cut from time to serve by those Victorian prisoners.[126]

Extending this to the broader prison population can be achieved through the use of a system akin to the emergency management days available under the *Corrections Act*. The discretionary reduction of sentences by up to four days for every day

122 See above n 121.

123 Tom Cowie and Noel Towell, 'Victorian Prisoners Get COVID Sentence Cuts', *The Age* (online, 25 September 2020) <https://www.theage.com.au/politics/victoria/victorian-prisoners-get-covid-sentence-cuts-20200924-p55yvi.html>.

124 Ibid.

125 Ibid.

126 Ibid.

served by a prisoner during an emergency situation provides adequate scope for dealing with this form of extra-curial punishment.

There is no binary metric which can be used to determine the appropriate loading that prisoners should receive if they are subjected to restricted prison conditions. Obviously, the extent of the restriction is relevant. The one-day pandemic loading that has been provided by the Victorian Government is, on its face, generous by reference to previous loadings that have been suggested by courts. Courts have previously suggested that, as a rule of thumb, a half-day sentence reduction for every day spent in strict prison conditions is appropriate. In light of this, some commentators have suggested that this approach should be followed and turned into a rule followed by prison administrators.[127] The fact that the Victorian Government conferred a significantly larger premium in response to the pandemic is in parallel with the generally empathetic response taken by the sentencing courts to the COVID pandemic. Given the already arduous nature of prison, any additional systematic restrictions are obviously considerable. Hence, on balance, a day credit should be conferred to any prisoner who is placed in lockdown prison conditions, for any reasons.

Thus, we suggest that the standard reduction of one day for every day of confinement for all prisoners while suffering the deprivations of emergency lockdown measures during the pandemic is justifiable and appropriate. This would be subject to 'good behaviour' by those prisoners during that time, but should otherwise be applied equally and consistently across all prisons and prisoners affected by such extraordinary conditions.

V CONCLUSION

The COVID pandemic has resulted in mitigation being accorded to offenders being sentenced before the courts, particularly in Victoria and NSW where the pandemic has had the most significant community impacts. This has been grounded in several different rationales. These include the increased risk of contracting the virus in prison (compared to the wider community); the reduced access to medical facilities in a prison if an inmate is infected with COVID; stress associated with being sent to a location where there is higher risk of contracting COVID; and being subjected to more restrictive conditions in prison, including not being able to receive visitors.

The reasons underpinning the COVID discount align with two existing mitigating considerations: ill health and harsh prison conditions. So far, the courts have, however, generally interpreted the scope of the COVID discount in broader terms than either of the established mitigating factors. This has provided the catalyst to revisit the circumstances in which the pre-existing mitigating considerations apply. Most of our discussion and analysis has focused on the ill-health consideration, given that a significant proportion of the reasons which have been provided for the COVID discount accord with this factor, which is to be expected given that COVID

127 See Bagaric, Edney and Alexander, '(Particularly) Burdensome Prison Time' (n 9).

is a viral infection that is experienced in differing levels of severity and can be fatal.

The proportionality principle is the key reference point upon which to develop mitigating factors stemming from penalty severity. In terms of sanction severity, prison has both a quantitative and qualitative component. Hence, prisoners who are burdened more greatly by the experience of imprisonment, either as a result of their medical condition or due to restrictions within the custodial environment, should, prima facie, be accorded a discount.

This entails that ill health should be a mitigating factor but only when the prison environment makes that condition more onerous than would have been the situation if the offender remained in the community. There is no basis for according a discount simply because an offender is stressed at being forced into a location where there is a higher risk of being subjected to an adverse situation or as a result of a prisoner being concerned at the welfare of friends or relatives in the community — these are intrinsic aspects of the loss of liberty and dominion through the prison experience. Where an event results in stricter conditions for prisoners, this does justify a discount because of the more onerous resultant burden. The new reality in the extraordinary situation created by the pandemic justifies some concession to ameliorate that which may otherwise be described as extra-curial punishment. A system of remission of sentence has also been considered for consistent application across the prison population, including those already sentenced and those whose sentences will not be reconsidered by the courts during the pandemic. This is an important factor in ensuring equal treatment in the more onerous conditions that have been created for all prisoners.

The approach we have recommended in this article, if adopted, will clarify the circumstances in which COVID should mitigate penalty in the sentencing calculus and at the same time make the mitigating factors relating to ill health and harsh prison conditions more coherent.