

(PARTICULARLY) BURDENSOME PRISON TIME SHOULD REDUCE IMPRISONMENT LENGTH — AND NOT MERELY IN THEORY

MIRKO BAGARIC,* RICHARD EDNEY†
AND THEO ALEXANDER‡

Imprisonment is the harshest sanction in our system of law. It is a sanction that is increasingly imposed by the courts. The severity of imprisonment as a sanction stems principally from the considerable restrictions it imposes on an individual's liberty. However, the deprivation experienced by a prisoner can vary considerably, depending on the strictness of the prison regime in which the prisoner is confined and his or her state of health. Prisoners subjected to non-mainstream conditions almost invariably suffer more than those in normal conditions. There is no settled approach regarding the extent to which prison conditions should impact on the length of a prison term. The jurisprudence in this area is inconsistent. It is particularly unsettled when the additional burden stems from subjective matters relating to an accused, such as ill health. In this article we make recommendations regarding the manner in which prison conditions should impact on the length of a prison term. The main recommendation is that prisoners who spend time in particularly burdensome conditions should have their sentence reduced by a factor of 0.5 days for each day spent in such conditions. In this article we also recommend that Australia should adopt a model similar to those which exist in some Scandinavian countries, whereby the only deprivation stemming from imprisonment is the loss of liberty. This would mean that few prisoners would ever be subjected to particularly burdensome conditions. This would make many of the recommendations in this paper obsolete. However, there is no evidence that Australian prison conditions are about to fundamentally alter. Hence, the recommendations will remain pragmatically relevant in the foreseeable future.

* BA, LLB (Hons), LLM, PhD (Monash); Dean, School of Law, Deakin University.

† BA, LLB (Hons), DipCrim (Melb); Barrister, Victorian Bar.

‡ LLB (Melb), LLM (Deakin); Lecturer, School of Law, Deakin University; Barrister, Victorian Bar.

CONTENTS

I	Introduction.....	410
II	The Existing Law	413
	A Reasons Why Prison Can Be More Burdensome	413
	B Prison More Burdensome because of Strict Conditions.....	415
	1 Protective Custody Is Normally Mitigating if Evidence Shows Conditions Are Harsher	415
	2 Not Clear if the Reason for the Need for Protective Custody Discount Is Relevant	419
	3 Harsh Conditions Not Related to Protective Custody	421
	C Harshness Stemming from the Offender's Subjective Traits	423
III	Analysis: Why and When Prison Conditions Should Mitigate	425
	A The Definition of Punishment and Proportionality	426
	1 Punishment Is a Deprivation and Degree Is Important.....	426
	2 The Principle of Proportionality Already Recognises Degrees of Deprivation	430
IV	Reform Proposals.....	433
	A Additional Burden Stemming from Stricter Prison Conditions — 50 Per Cent Loading	433
	B Additional Burden Stemming from Health Considerations — A Matter for the Court	438
	C The Preferred Solution — Improved Prison Conditions	439
V	Conclusion	442

I INTRODUCTION

Imprisonment is the most severe penalty imposed on criminal offenders. Empirical data support the assumption that a term of imprisonment has a significant negative impact on offenders.¹ This is, of course, the intended effect. Despite the fact that imprisonment is meant to be a sanction of last resort,² the rate at which courts are sentencing offenders to jail in Australia is increasing, as has been the trend for the past decade.³

¹ See Part III below.

² See, eg, *Crimes Act 1914* (Cth) s 17A(1); *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a), pt 9; *Sentencing Act 1997* (Tas) s 12(2); *Sentencing Act 1991* (Vic) s 5(4).

³ Data from the Australian Bureau of Statistics ('ABS') show that in September 2013 more than 30 000 persons were in jail in Australia, which represents an imprisonment rate of 175 pris-

An important consideration that has not been adequately dealt with in relation to setting the length of prison terms and determining the prisoner release date is that imprisonment has both a quantitative and qualitative component. The hardship of imprisonment is primarily, and often solely, measured by courts by reference to the length of the term. The reality is otherwise. Prison conditions vary markedly. Medium- to long-term periods of confinement in ‘supermaximum’ conditions (or other strict regimes), which often involve long periods of solitude and access to little more than life’s necessities, constitute a meaningfully harsher deprivation than ‘normal’ prison conditions, which typically permit interactions with large numbers of other prisoners, visits from friends and relatives, access to educational programs and the capacity to move around in relatively large spatial areas.⁴ The contrast between these conditions of confinement is so stark that it is verging on intellectual and legal sloppiness to describe both forms of confinement under the same terminology: ‘imprisonment’.

The cardinal sentencing consideration is the principle of proportionality, which in broad terms means that the seriousness of the offence should be matched by the severity of the hardship.⁵ Accordingly, it follows that the harshness of the prison conditions should be a factor that influences the length of a prison term. The legal authorities, however, have not consistently endorsed this position.

In recent times, the courts have displayed an increasing reluctance to accord mitigatory weight to harsh prison conditions. We accept that there are a number of reasons why courts might be reluctant to attach significance to the nature of prison conditions in the sentencing calculus. First, prisoner classification and designation is a matter for the executive, not the courts, and, at the time of sentencing, it is normally not feasible to anticipate accurately the circumstances in which an offender will be imprisoned. Secondly, prison conditions vary markedly and it is not easy to make informed and accurate

oners per 100 000 adults: ABS, *Corrective Services, Australia, September 2012* (ABS Catalogue No 4512.0, 21 November 2013). This is an increase of 16 per cent over the past decade, from 151 per 100 000 in 2003: ABS, *Corrective Services, Australia, Dec 2003* (ABS Catalogue No 4512.0, 25 March 2004).

⁴ This type of confinement is elaborated on in Part II below.

⁵ See Richard G Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 491; Richard G Fox, ‘The Killings of Bobby Veen: The High Court on Proportion in Sentencing’ (1988) 12 *Criminal Law Journal* 339; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 53–4; Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Offenders* (Oxford University Press, 2nd ed, 1999) 196–9 [3.303]–[3.304]. See also the discussion in Part IV below.

comparisons between different forms of detention. Thirdly, if harsh prison time is a concrete and significant mitigating factor so far as sentencing length is concerned, prisoners would have an incentive to misbehave in the prison environment in order to be reclassified into stricter conditions to reduce the length of their sentence.

All of these reasons have some validity, but none of them negates totally the need for a more coherent, transparent and normatively sounder approach to recognising the harshness of prison conditions in sentencing determinations.

In this article, we suggest that prisoners who are subjected to especially harsh prison conditions should receive a reduction in their prison term. This should be calibrated during the period of the sentence, rather than at the time of sentencing. To facilitate transparency and clarity, a binary system should be employed such that the reduction in the length of the penalty should be automatic: for example, each day in harsh prison conditions should equate to 1.5 days of a standard term. It is suggested that difficulties associated with demarcating the difference between harsh and normal prison conditions are not insurmountable.

The recommendation is subject to an important caveat. The principle of proportionality is an important sentencing consideration, but it does not swamp all of the factors. In relation to some offenders, other sentencing considerations assume cardinal importance. Incapacitation (removing offenders from the community in order that they cannot reoffend) often assumes considerable importance in the sentencing of offenders who commit serious offences.⁶ Where this is a primary or important rationale in the imposition of a prison term, the harshness of the circumstances of the confinement should not reduce sentence length.

Time in prison can also operate more harshly not because of the extra-strict conditions, but due to the subjective considerations relating to an offender, for example, ill health. We also analyse and attempt to render the law coherent in relation to circumstances where an offender finds prison more burdensome because of his or her subjective predicament. In these circumstances, we argue that the additional burden should again be a concrete mitigating factor. However, it is a matter that should be dealt with by the sentencing judge or magistrate.

In Part II of the article, we examine the existing jurisprudence regarding the relevance of a burdensome prison experience in the sentencing calculus.

⁶ See the discussion in Part IV below.

In Part III, we suggest that the nature of punishment and the principle of proportionality support the view that burdensome prison conditions should be mitigatory. Part IV of the paper sets out reform considerations for a fairer and more efficient incorporation of prison conditions into the sentencing landscape.

A secondary aim of this article is to suggest that prisons in Australia should themselves be reformed so that the only deprivation experienced by offenders is the loss of liberty. This approach is already adopted in a number of countries, most particularly Norway. Implementation of it would obviate the need to develop or at least regularly apply principles regarding how to deal with burdensome prison conditions — quite simply, few prisoners would be subjected to a prison regime which operated in an especially painful manner. This is discussed in the last substantive Part of the article.

II THE EXISTING LAW

A Reasons Why Prison Can Be More Burdensome

The existing jurisprudence regarding the impact of harsh prison conditions is unsettled. To some extent this is because of a failure by the courts to distinguish between the reasons prison may operate more harshly in relation to a particular offender. The first form of additional burden stems from the objective nature of the conditions. In normal circumstances prison conditions vary between minimum and maximum security, with the degree of freedom and number of entitlements diminishing as the regime becomes stricter. There is no strict, uniform classification of prison conditions. Typically, there are a number of different classifications, such as high, maximum, medium and minimum.⁷ In addition, in some prisons there are designated areas for prisoners that are at high risk of being harmed by other prisoners. As discussed in the next Part of the paper, conditions in these areas are sometimes harsher because of the extra security needed to monitor the prisoners and the limited amenities available. Beyond maximum and protective security, there is one regime that is especially restrictive.

This regime is termed ‘supermaximum [security]’ or ‘supermax’.⁸ Facilities in which these conditions are found normally consist of ‘jails within

⁷ See, eg, *Corrections Regulations 2009* (Vic) reg 22.

⁸ See generally Jeffrey Ian Ross (ed), *The Globalization of Supermax Prisons* (Rutgers University Press, 2013).

prisons'.⁹ There is no uniformity to such conditions, but in general they involve 'incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff or other inmates'.¹⁰

It is generally accepted that the first supermaximum prison was the 'rock fortress' Alcatraz in San Francisco Bay, which was operated by the United States Federal Bureau of Prisons from 1934 until its closure in 1963.¹¹ However, this bears little resemblance to modern supermaximum prisons. The conditions which typically manifest in current supermaximum conditions can be traced back over 40 years to the lockdown which occurred in the United States Prison at Marion, Illinois, following increasing prisoner misbehaviour, including the killing of two prison officers.¹² More than 30 states in the United States now have supermaximum prisons.¹³

Supermaximum prisons are now a part of the landscape in a large number of countries, including the United Kingdom, Canada, New Zealand, South Africa, Brazil and the Netherlands.¹⁴ In Australia there are at least eight such facilities.¹⁵ There is no consistency regarding the exact daily regimes of prisoners, but it can include being locked in their cells for up to 23 hours

⁹ Chase Riveland, 'Supermax Prisons: Overview and General Considerations' (National Institute of Corrections, Department of Justice (US), 1999) 1.

¹⁰ *Ibid.* They have also been defined as:

a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious & disruptive behavior while incarcerated. ... [T]heir behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.

National Institute of Corrections, Department of Justice (US), 'Supermax Housing: A Survey of Current Practice' (Special Issues in Corrections, March 1997) 1, quoted in Roy D King, 'The Rise and Rise of Supermax: An American Solution in Search of a Problem?' (1999) 1 *Punishment & Society* 163, 170.

¹¹ King, above n 10, 166.

¹² *Ibid.* 165.

¹³ *Ibid.* 163; Jesenia Pizarro and Vanja M K Stenius, 'Supermax Prisons: Their Rise, Current Practices and Effect on Inmates' (2004) 84 *Prison Journal* 248, 251.

¹⁴ For a discussion of the operation of supermax regimes in each of these countries, see Ross, above n 8.

¹⁵ These are Alexander Maconochie Centre — Supermax Section (Australian Capital Territory), Barwon Prison — Barwon Supermax (Victoria), Brisbane Correctional Centre — Maximum Security Unit (Queensland), Casuarina Prison — Special Handling Unit (Western Australia), Goulburn Correctional Centre — High Risk Management Unit (New South Wales), Port Phillip Prison — Sirius East Unit (Victoria), Risdon Prison Complex — Wilfred Lopes Centre (Tasmania), Yatala Labour Prison — G Division (South Australia): see Supermax Prisons, *Prisons with Supermax Facilities* <<http://supermaxprisons.blogspot.com.au/>>.

per day.¹⁶ When prisoners are out of their cell they move to what is, in effect, no more than another (larger) cell where they normally have contact with no more than one other prisoner.¹⁷ Inmates often do not have access to fresh air, direct sunlight or educational facilities, and have limited visiting rights and access to communications facilities.¹⁸ In some circumstances, the regime is less restrictive but it always involves being warehoused in a concrete room and the time spent out of a cell is, in effect, spent in a slightly larger concrete cell.

The second situation in which prison conditions can be especially burdensome stems not from the intrinsic prison regime in which a prisoner is confined, but from the subjective traits of the inmate, who has a physical or mental condition, or cultural background, which means that confinement and incidental deprivations operate more adversely on him or her.¹⁹

B *Prison More Burdensome because of Strict Conditions*

1 *Protective Custody Is Normally Mitigating if Evidence Shows Conditions Are Harsher*

We now examine the law relating to the first scenario: the extra burden of harsh prison conditions. Much of the jurisprudence regarding the relevance of prison conditions to sentencing has been developed in the context of prisoners who are regarded as being at high risk of being harmed by other prisoners. The key categories of offenders that fit this description are not closed but include those who give evidence against other accused ('informers'),²⁰ police

¹⁶ See *R v Benbrika* [No 20] (2008) 18 VR 410, 418 [30] (Bongiorno J).

¹⁷ Liz Hobday, 'High-Security Prison "Driving Remand Prisoners Mad"', *ABC News* (online), 22 September 2009 <<http://www.abc.net.au/news/2009-09-22/high-security-prison-driving-rem-and-prisoners-mad/1437474>>.

¹⁸ New South Wales Council for Civil Liberties, Submission to General Purpose Standing Committee No 3, Parliament of New South Wales, *Inquiry into Issues relating to the Operations and Management of the Department of Corrective Services*, 30 January 2006, 2. See also David Brown, 'The Effect of Terrorism and Terrorist Trials on Australian Prison Regimes' in Chris Cunneen and Michael Slater (eds), *Proceedings of the 2nd Australian and New Zealand Critical Criminology Conference* (Crime and Justice Research Network, University of New South Wales, 2008) 61.

¹⁹ In this paper, we do not examine overcrowding as a basis for exceptionally burdensome conditions given there are few generalisations that can be formed regarding the increased harshness stemming from the confinement of additional prisoners: see *Police v Bieg* (2008) 191 A Crim R 16.

²⁰ See, eg, *R v Rostom* [1996] 2 VR 97; *York v The Queen* (2005) 225 CLR 466; *Scerri v The Queen* (2010) 206 A Crim R 1, 10 [43] (Maxwell P and Buchanan JA).

and prison officers, justice officials, and child sex offenders. To reduce this risk, prison authorities normally segregate these prisoners from the mainstream of the prison population in parts of prisons which often have fewer amenities than other areas of the prison. This resulted in a general acceptance of the view that being a high risk prisoner should mitigate the sentence.²¹ The reason for this was, in fact, twofold: first, because it was assumed that the prisoner was at greater risk of being targeted by other prisoners (even though protective custody was intended to ameliorate this); and, secondly, because of the worse than normal prison conditions.

Thus, the Victorian Court of Appeal in *R v Rostom* held that the appellant who gave assistance to prosecution authorities against other accused persons was entitled to considerable leniency.²² A similar approach was taken in *R v Howard*, where 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 one who has killed or abused a child, is potentially a marked man for whom the risk of reprisal is high.²³

In *R v Rose* the New South Wales Court of Criminal Appeal held that the sentencing judge's determination that four months of protective custody was equivalent to six months' normal time was not incorrect.²⁴

This formula and approach was adopted in *R v Patison* by Carruthers AJ, who stated:

When one considers the circumstances under which the respondent will serve his sentence, it must be borne in mind that he suffers the disadvantage of not only having been a police officer but he was also, and will continue to be, an informer.

In these circumstances the following passage from the judgment of Lord Lane CJ in [*R v Davies*] is apposite.

²¹ Although this is no longer universally the situation: see below nn 26–8 and accompanying text.

²² [1996] 2 VR 97, 104 (Charles JA).

²³ *R v Howard* [2001] NSWCCA 309 (23 August 2001) [18], citing *AB v The Queen* (1999) 198 CLR 111, 152 [105].

²⁴ [2004] NSWCCA 326 (22 September 2004) [35] (Hoeben J). See also *R v Stanbouli* (2003) 141 A Crim R 531, 557 [139] (Hulme J), 565 [180] (Carruthers AJ).

We are told, and it is submitted with some force and it is perfectly good sense, that in deciding what Davies' sentence ought to be by itself we must bear in mind that every year he will serve could be the equivalent of 18 months or two years in a happier atmosphere.²⁵

The correctness of the approach in the case of *R v Rostom*, so far as it concerned conferring a discount to offenders who were at risk of being attacked in jail, was confirmed by the High Court of Australia in *York v The Queen* ('*York*').²⁶ In *York*, the respondent to the unsuccessful Crown appeal was originally sentenced to a suspended sentence of imprisonment for a number of serious offences. This sentence was appealed and an immediate term of imprisonment was imposed by the Queensland Court of Appeal. In the case of the appellant there was strong evidence that she was at grave risk of harm if she were to serve an immediate term of imprisonment. The lead judgment in *York* was provided by McHugh J, who stated:

The common law's equal concern for the physical safety of each citizen makes it appropriate for a sentencing judge to take into account the grave risk that a convicted criminal could be killed while in jail. What weight should be given to the risk of a prisoner being killed or injured will depend on all the circumstances of the case including the likelihood of its occurrence.²⁷

The other members of the High Court in *York* expressed similar sentiments to that of McHugh J and agreed with the relevance of the safety of a prisoner to the exercise of the sentencing discretion.²⁸

However, in *R v Mostyn* the New South Wales Court of Criminal Appeal took a less generous attitude to protective custody mitigating penalty.²⁹ Howie J stated that it is erroneous to assume that protective custody is more onerous than normal prison conditions or that prisoners in protective custody necessarily have less access to amenities.³⁰

Howie J was correct to state that the supposed disadvantages associated with protective custody needed to be established, not assumed. The Court did not expressly negate the mitigation that previously stemmed from the

²⁵ *R v Patison* (2003) 143 A Crim R 118, 136 [86]–[87], quoting *R v Davies* (1978) 69 Cr App R 319, 322.

²⁶ (2005) 225 CLR 466.

²⁷ *Ibid* 473–4 [23].

²⁸ See *ibid* 478–9 [38] (Hayne J), 486–7 [67]–[68] (Callinan and Heydon JJ).

²⁹ (2004) 145 A Crim R 304.

³⁰ *Ibid* 332 [180]–[181].

assumption that high risk prisoners were more likely to be harmed in prison. However, given that no discount was available for this consideration, presumably this too needed to be proved in order for the sentence to be reduced.

The weight that should be accorded to protective custody was again considered at length in *Clinton v The Queen* where the New South Wales Court of Criminal Appeal stated that no automatic discount is given to prisoners with this status.³¹ In doing so, the Court expressly rejected the approach of Carruthers AJ in *R v Patison*.³² The changed position was based on evidence tendered to the Court in *R v Durocher-Yvon*, where it was stated that protective custody conditions are not necessarily more burdensome than those in the mainstream part of the prison.³³ This approach has been followed in more recent cases. In *Geddes v The Queen* it was stated: 'Protective custody may only be taken into account where there is evidence that the conditions of imprisonment will be more onerous'.³⁴

A similar approach has been taken in Victoria more recently. In *Carroll v The Queen* the Court of Appeal stated that the focus is on the degree of restriction to which a prisoner in protected custody has been subjected.³⁵ This is grounded on the variability of protective custody conditions, as was noted by Kellam JA in *R v Males*:

The circumstances of that protective custody can vary significantly. There are prisoners in protective custody in high security prisons, which custody places significant limits upon their ability to mix with other prisoners, engage in programs and access facilities which are otherwise available to mainstream prisoners. On the other hand, there are prisoners in protective custody in prisons which cater entirely for prisoners with a protected status, where access to all services, facilities and programs provided by the prison are in no way limited. It is incumbent upon counsel for both the prosecution and the defence to provide such information as is available as to the true circumstances of protective custody and the actual hardship such custody is likely to cause, if a submission is made before a sentencing judge that such a matter is relevant to the sentencing task faced by that judge.³⁶

³¹ [2009] NSWCCA 276 (19 November 2009) [25]–[29] (Howie J).

³² *Ibid* [22]–[23], citing *R v Patison* (2003) 143 A Crim R 118, 136 [86]–[87].

³³ (2003) 58 NSWLR 581, 587 [22]–[24] (Howie J), cited in *Clinton v The Queen* [2009] NSWCCA 276 (19 November 2009) [24]–[27] (Howie J).

³⁴ [2012] NSWCCA 94 (15 May 2012) [44] (Whealy JA) (citations omitted).

³⁵ [2011] VSCA 150 (19 May 2011) [39] (Maxwell P).

³⁶ [2007] VSCA 302 (28 November 2007) [40].

Thus, it is clear that generally protective custody is a relevant sentencing consideration but only if evidence is tendered establishing that the conditions are significantly more burdensome.³⁷

2 *Not Clear if the Reason for the Need for Protective Custody Discount Is Relevant*

When evidence of harsher conditions in protective custody is tendered it is not clear to what extent the responsibility of the prisoner for being placed in protective custody is relevant, or whether previous stints in protective custody are relevant to the mitigating impact. The matter was considered but not decided in *R v Males*, where the prosecution submitted that protective custody should not be mitigatory if it were deemed necessary because of the offender's conduct in custody in the period leading up to sentencing, or if the offender had previously spent time in protective custody, such that he or she should have realised that any further offending would result in the harsh conditions.³⁸ Maxwell P expressly declined to resolve these issues:

Plainly enough, these issues will require careful attention in an appropriate case, and a close examination of the authorities. But until that occurs, sentencing judges are entitled to treat the matter of protection as a relevant consideration. The weight to be attached to it will of course depend on the circumstances of the case and the evidence before the court. No authority has been cited by the Crown which holds that protection is irrelevant in any particular class of case.³⁹

Some of these issues were raised in *R v Liddy [No 2]*, where the South Australian Court of Criminal Appeal was split on whether a magistrate who was imprisoned for sexual offences against children was entitled to a discount for spending time in protective custody (which included solitary confinement).⁴⁰

Williams J stated that the harshness of conditions brought on by the hostility of other inmates to the offender justified a discount 'insofar as the extraordinary need for his confinement in isolation arises from a justifiable fear of reprisals unconnected with [the offender's] crimes'.⁴¹ Gray J also said that mitigation may be warranted but to a lesser degree. The need for mitigation is

³⁷ As discussed in the next section, this position is not without exception.

³⁸ [2007] VSCA 302 (28 November 2007) [44] (Maxwell P).

³⁹ *Ibid* [49].

⁴⁰ (2002) 84 SASR 231.

⁴¹ *Ibid* 269 [146].

less powerful in instances like this where the protection arises due to the nature of the offence, as opposed to reasons for which the offender is not to blame (such as where the offender becomes an informer) or has no control over (such as when the offender is ill).⁴² In a similar vein, Mullighan J stated that the harshness of the conditions did not mitigate the penalty because it was the role of the prison authorities to provide adequate conditions and that 'a sentence should not be reduced because the crime is so odious that life in prison must be in a protected environment'.⁴³ His Honour expressly noted that the reason the prisoner is in protective custody is a relevant consideration. His Honour stated:

I am unable to accept the proposition that the reason for the harsh conditions in custody is not to the point. Informers and others who co-operate with the police usually provide benefits to the community in that offenders may be brought to justice and that is often, although not always, cogent evidence of remorse and contrition. However, there are no such benefits to society in the circumstances of cases such as the present case.⁴⁴

A number of other authorities also support Mullighan J's view that child sex offenders should not get a discount for serving time in protective custody.⁴⁵

The link between the reasons that a prisoner is in protective custody and the scope for mitigation was also discussed in *Western Australia v O'Kane*, where the Western Australian Court of Appeal noted that there are authorities suggesting that protective custody conditions are taken into account more where

the harsher prison conditions are not a consequence of the nature of the offence committed by the offender. So, for example, a prisoner who is in protective custody as a result of assisting police in relation to other offenders will ordinarily receive a more substantial discount, arising out of the fact that he or she is consequently required to serve a term of imprisonment in more arduous conditions ... than will an offender who is in protective custody merely because of threats by persons connected with the victim of his or her offence ...⁴⁶

⁴² Ibid 291 [214]–[215].

⁴³ Ibid 261 [114].

⁴⁴ Ibid 262 [117].

⁴⁵ See, eg, *R v Durocher-Yvon* (2003) 58 NSWLR 581, 587 [23] (Howie J).

⁴⁶ [2011] WASCA 24 (4 February 2011) [64] (Pullin and Newnes JJA and Mazza J), quoting *Houghton v Western Australia* (2006) 32 WAR 260, 268 [26] (Steytler P) (citations omitted).

In principle, no relevant distinction exists between the reasons that an individual is in protective custody, so far as according mitigation in penalty is concerned. To the extent that protective custody has harsher conditions, all offenders feel the extra burden equally. Offenders who commit certain offences should not be subject to additional punishment because the collective judgement of the prison community (or at least a considerable part of it) is that the offences are odious and deserving of mob punishment. The ‘odiousness’ of an offence has presumably already been factored into the severity limb of the proportionality analysis by the sentencer, and to not allow it to be factored into the penalty harshness limb would, in fact, mean that the same consideration operates against the offender twice. Further, the fact that a prisoner has previously experienced protective custody does not diminish the hardship of another stint in the same conditions, and hence should not be a basis for negating the discount. Nevertheless, it is clear that the law in relation to this remains unsettled.

3 *Harsh Conditions Not Related to Protective Custody*

Whether the prison conditions are harsher because an offender is in the protective or supermaximum part of a prison, the same principles of mitigation should apply. However, to some extent it is easier to make rules relating to the supermaximum areas of prisons given that normally the likelihood of reprisal is not a relevant factor and there is far greater consistency regarding the nature of the conditions in these areas. The authorities that deal with supermaximum conditions generally state that it is a mitigating consideration, but the extent of mitigation is unclear — and is sometimes illusory.

In *Director of Public Prosecutions (Vic) v Faure* it was assumed that lockdown prison conditions are mitigatory and that the discount should result in a ‘significant reduction’ in the sentence that was otherwise appropriate.⁴⁷ Another example of a case where onerous prison conditions resulted in a discount is *Tognolini v The Queen [No 2]*, where the offender was confined to his cell for 20–22 hours per day and was not permitted to associate with other prisoners.⁴⁸

However, it seems that in some cases even very harsh conditions do not mitigate. In *Western Australia v O’Kane*, the Western Australian Court of Appeal stated:

This position was affirmed in *Milenkovski v Western Australia* (2014) 46 WAR 324, 352 [155] (Buss JA).

⁴⁷ (2005) 12 VR 115, 121 [28] (Williams AJA).

⁴⁸ [2012] VSCA 311 (14 December 2012) [22] (Maxwell P, Buchanan and Redlich JJA).

In [*Western Australia v Richards*], Steytler P (with whom Martin CJ, McLure JA, Buss JA and Miller JA agreed on this point) said that it was settled that in determining the duration of a custodial sentence the courts will take into account features of the offence or the offender which will result in imprisonment bearing down more severely upon the offender than upon the average prisoner. His Honour pointed out, however, that it is also important to bear in mind the objective seriousness of the offence and the importance of ensuring that, after due allowance has been made for subjective factors, the punishment should fit the crime. In that case, the court concluded that the special burden of imprisonment on the offender, an Aboriginal man from a remote community who was not literate in English, warranted a lesser term than would otherwise have been imposed for sexual penetration without consent, but it did not justify the suspended term of imprisonment imposed by the sentencing judge.⁴⁹

Then there are cases where the courts state that such conditions mitigate but the sentence indicates to the contrary. In the case of *Mokbel v The Queen*,⁵⁰ the offender endured only slightly less onerous conditions than those considered in *Tognolini v The Queen [No 2]*.⁵¹ The offender had, in fact, endured them for four years prior to sentence and the Victorian Court of Appeal accorded no meaningful discount. The Court of Appeal quoted the sentencing judge as having said:

Since your return to Australia you have been in custody in the Acacia unit at Barwon Prison. The Acacia unit is a high security unit. Those in custody in that unit are subjected to what I think can fairly be described as a harsh regime. It is not harsh because of physical hardship or deprivations. It is harsh because it is confined and socially isolated.

You may be reclassified after sentence, or at some later date, but given your history and your associations, you may well continue to serve your sentence under a more restrictive regime than is usual. There is a real possibility that you will continue to be held in very restrictive circumstances for an indefinite period. In my view, that is a significant mitigating factor in your case. Prison for you will be more burdensome than it is for others.⁵²

⁴⁹ *Western Australia v O'Kane* [2011] WASCA 24 (4 February 2011) [67] (Pullin and Newnes JJA and Mazza J) (citations omitted), citing *Western Australia v Richards* (2008) 37 WAR 229.

⁵⁰ (2013) 230 A Crim R 523.

⁵¹ [2012] VSCA 311 (14 December 2012).

⁵² *Mokbel v The Queen* (2013) 230 A Crim R 523, 553 [117] (Maxwell ACJ, Buchanan and Weinberg JJA), quoting *R v Mokbel* [2012] VSC 255 (3 July 2012) [72]–[73] (Whelan J).

However, the Court rejected an appeal against a 35-year sentence with a non-parole period of 27 years. This is the second most severe sentence for a drug matter in the State's history⁵³ and was imposed despite the offender experiencing a heart attack (which reduced his life expectancy) between the time of sentence and appeal. If a discount were actually accorded for harsh prison conditions, it is not easily detectable.

C Harshness Stemming from the Offender's Subjective Traits

An even less settled area of law regarding the mitigating impact of burdensome time in prison is where the conditions are more difficult because of the offender's subjective characteristics, the most common of which is ill health.⁵⁴ Conceptually, the matter is complex because ill health cannot be used as a 'licence to commit crimes'.⁵⁵ However, the courts have generally been prepared to confer a discount where medical circumstances make prison more difficult. 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.⁵⁶

⁵³ The most severe penalty for a drug offence is life imprisonment with a non-parole period of 30 years: see *Barbaro v The Queen* (2012) 226 A Crim R 354.

⁵⁴ For an overview of this area of the law, see Mackenzie and Stobbs, above n 5, 82–4; Fox and Freiberg, above n 5, 337–42 [3.901]–[3.903].

⁵⁵ *R v Martin* (1990) 47 A Crim R 168, 173 (Kirby P).

⁵⁶ (1987) 44 SASR 587, 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, *R v Magner* [2004] VSCA 202 (10 November 2004). Old age is also generally regarded as a mitigating factor: see, eg, *Gulyas v Western Australia* (2007) 178 A Crim R 539. However, it is often given little weight: see, eg, *Ljuboja v The Queen* (2011) 210 A Crim R 274, 295–6 [102]–[104] (Buss JA); *R v Cave* [2012] SASCFC 42 (26 April 2012). While old age and adverse health are often coupled together as mitigating considerations, the reasons for which each imposes an additional burden are different. In the case of old age, it is because 'each year of a sentence represents a substantial proportion of the period of life which is left to an offender of advanced age': *Ljuboja v The Queen* (2011) 210 A Crim R 274, 295 [102] (Buss JA). Accordingly, the appropriateness of old age mitigating penalty is not considered further in this article.

There are numerous instances where bad health has been mitigating.⁵⁷ In *R v Puc*, the mental frailty of the offender was mitigatory.⁵⁸ Maxwell P (with whom Nettle JA and Dodds-Streton JA agreed) 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.⁵⁹

This principle is reinforced by the reality that medical treatment in prison is invariably of a lesser standard than in the community due to difficulties in transporting prisoners to medical facilities and delays in seeing specialists.⁶⁰

But there is no settled principle that ill health must reduce imprisonment length. Thus, in *R v Wickham* it was held that

[c]ommon 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.⁶¹

To the extent that a discount applies for an offender's subjective circumstances that make prison harder, it seems to extend to situations where an offender is likely to find prison harder because of his or her cultural background. In *Western Australia v Richards*, the Western Australian Court of Appeal provided a discount because the offender was Indigenous and from a remote community:

It is settled that,

in determining the duration of a custodial sentence, [courts will] take into account features of the offence or of the offender which will result in im-

⁵⁷ See, eg, *Eliassen v The Queen* (1991) 53 A Crim R 391 (AIDS); *R v Magner* [2004] VSCA 202 (10 November 2004) (bowel cancer); *AWP v The Queen* [2012] VSCA 41 (8 March 2012) (serious heart condition). See also *R v Van Boxel* (2005) 11 VR 258, 266–7 [29]–[30] (Callaway JA) (spinal injury).

⁵⁸ [2008] VSCA 159 (28 August 2008).

⁵⁹ *Ibid* [32].

⁶⁰ *Pfeiffer v The Queen* [2009] NSWCCA 145 (15 May 2009) [13]–[14] (McClellan CJ at CL).

⁶¹ [2004] NSWCCA 193 (17 June 2006) [18] (Howie J).

prisonment bearing down more severely upon the offender than upon the average prisoner.

... Consequently, when additional hardship arises as a result of membership of an ethnic or other group, this will be a relevant consideration ...⁶²

Steytler P went on to hold:

It is also important to bear in mind the objective seriousness of the offence and the importance of ensuring that, after due allowance has been made for subjective factors, the punishment should fit the crime. That is to say, allowance for subjective factors, weighty though they may be, should not be so great as to result in a penalty that undervalues the offence for which the offender comes to be sentenced and the need for personal and general deterrence.⁶³

However, the weight given to the offender's cultural background did not appear to be considerable, given that the Court of Appeal upheld a Crown appeal against sentence.

This principle of cultural considerations being capable of mitigating sentence was approved, but not applied, more recently by the High Court in *Munda v Western Australia*.⁶⁴

III ANALYSIS: WHY AND WHEN PRISON CONDITIONS SHOULD MITIGATE

As we have seen, the jurisprudence on the manner in which harsh prison conditions impact on imprisonment length is unclear. Even when relatively clear principles seem to exist, the extent to which they are actually applied is unclear, given the fact that no precise weight is accorded to the relevance of harsh prison conditions. This is, of course, one of the manifestations of the 'instinctive synthesis' approach to sentencing whereby, in relation to most considerations, the weight to be accorded to each is for the sentencer to determine.⁶⁵ Logically and pragmatically, this means that a sentencer is free to

⁶² (2008) 37 WAR 229, 241 [44] (Steytler P) (citations omitted), quoting *R v Astill [No 2]* (1992) 64 A Crim R 289, 293 (Kirby P).

⁶³ *Western Australia v Richards* (2008) 37 WAR 229, 241 [47] (citations omitted). See also *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J).

⁶⁴ (2013) 249 CLR 600.

⁶⁵ For discussion of this approach, see *R v Williscroft* [1975] VR 292, 300–2 (Adam and Crockett JJ); *Markarian v The Queen* (2005) 228 CLR 357; *Hili v The Queen* (2010) 242 CLR 520, 533–4 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 542 [73] (Heydon J); Mackenzie and Stobbs, above n 5, 28–30; Fox and Freiberg, above n 5, 195–9.

give a matter cardinal or negligible emphasis. In the next section we suggest that harsh prison conditions are so significant that they should not be capable of being reduced to insignificance.

Given the confusion and uncertainty in this area, it is necessary to revert to the fundamentals of punishment and sentencing in order to ground a sounder approach.

A *The Definition of Punishment and Proportionality*

1 *Punishment Is a Deprivation and Degree Is Important*

In this part of the article we discuss whether, as a matter of principle, more burdensome prison conditions should mitigate. In order to properly examine this, it is necessary to revert to the basics of punishment and the key objective in determining how much punishment is appropriate.

Ultimately, sentencing is about the infliction of punishment. There is no universally accepted definition of punishment. Numerous definitions have been advanced. McTaggart defines punishment as ‘the infliction of pain on a person because he has done wrong’.⁶⁶ Andrew von Hirsch believes that punishing someone consists of ‘visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong, in a manner that expresses disapprobation of the person for his conduct’,⁶⁷ or ‘doing something painful or unpleasant to him, because he has purportedly committed a wrong’.⁶⁸ Bentham simply declared that ‘all punishment is mischief: all punishment in itself is evil’.⁶⁹ C L Ten stated that punishment ‘involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued’.⁷⁰ Others have placed somewhat emotive emphasis on the hurt that punishment seeks to bring about. Punishment has been de-

⁶⁶ John McTaggart Ellis McTaggart, *Studies in Hegelian Cosmology* (Cambridge University Press, 1901) 129.

⁶⁷ Andrew von Hirsch, ‘Censure and Proportionality’ in R A Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994) 112, 118.

⁶⁸ Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 35. See also C L Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (Clarendon Press, 1987) 2, who stated that punishment is not merely the imposition of unpleasantness on the offender: ‘the imposition is made to express disapproval or condemnation of the offender’s conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct’.

⁶⁹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press, first published 1789, 1970 ed) 158.

⁷⁰ Ten, *Crime, Guilt, and Punishment*, above n 68, 2.

scribed as pain delivery,⁷¹ and similarly it has been asserted that '[t]he intrinsic point of punishment is that it should *hurt* — that it should inflict suffering, hardship or burdens'.⁷² Nigel Walker is somewhat more expansive regarding the type of treatment which can constitute punishment. He believes that punishment involves

the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or, in extreme cases death.⁷³

Of the definitions that have been advanced, the least expansive, when one cuts through the often emotive language, comes down to the view that punishment is a hardship or deprivation; the taking away of something of value for a wrong which has been committed.⁷⁴ Thus, punishment by its very nature involves the infliction of a degree of inconvenience or hardship on an offender. The key aspect is that it comes in degrees. Not all pain or hardship is equivalent and, in fact, the intensity can vary considerably. This is reflected in the fact that all Australian jurisdictions have a hierarchy of sanctions, which in crude terms (in increasing severity) range from a bond (or undertaking) to a fine, then a community-based order, and imprisonment being the harshest disposition.⁷⁵ However, within these categories there is reason that the hardship should be further broken down. This is obviously the case with most other sanctions. Thus, a \$10 000 fine is more punitive than a \$50 fine, and a community-based order with a 500-hour work component is harsher than one with a 10-hour component.

In relation to imprisonment, the main and clearest determinant regarding its harshness is the duration of the term. All imprisonment has the commonality that it involves confinement and a loss of a range of social and economic opportunities. Hence, it is understandable that its harshness is defined mainly

⁷¹ Nils Christie, *Limits to Pain* (Martin Robertson, 1982) 19, 48.

⁷² Anthony Duff, 'Punishment, Citizenship and Responsibility' in Henry Tam (ed), *Punishment, Excuses and Moral Development* (Avebury, 1996) 17, 18 (emphasis in original).

⁷³ Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 1.

⁷⁴ Apart from the qualification relating to the perception of the offence, this definition accords with the one advanced by C L Ten, 'Crime and Punishment' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Reference, 1991) 366.

⁷⁵ See Mackenzie and Stobbs, above n 5, chs 6–7; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook, 2014) ch 14. See generally Fox and Freiberg, above n 5.

by length. In fact, the pains of imprisonment go far beyond the denial of liberty. Other negative consequences of imprisonment are:

- the deprivation of goods and services;⁷⁶
- the deprivation of heterosexual relationships;⁷⁷
- the deprivation of autonomy;⁷⁸ and
- the deprivation of security.⁷⁹

What is less well understood is how these deprivations affect the life trajectories of prisoners. The evidence available indicates that they have a considerable negative impact which transcends the actual term of imprisonment. Imprisonment seems to have an adverse effect on wellbeing measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy.

A study which examined the 15.5-year survival rate of 23 510 ex-prisoners in the State of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population.⁸⁰ There were 2650 deaths in total, which was a 43 per cent higher mortality rate than normally expected (799 more ex-prisoners died than expected).⁸¹ The main causes for the increased mortality rates after release were: human immunodeficiency virus ('HIV'), cancer, cirrhosis, homicide, transportation accidents and accidental poisoning (which included drug overdoses).⁸²

Moreover, prior imprisonment has a profound impact on economic opportunity because it leads to diminished employment opportunities and reduced lifetime earnings. One study in the United States found that this reduction could be up to 40 per cent.⁸³

While an episode in prison can have these negative effects on all former prisoners, particularly harsh conditions can be even more damaging, both during the term of imprisonment and with associated longer effects. So much

⁷⁶ Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, 1958) 67–70.

⁷⁷ *Ibid* 70–2.

⁷⁸ *Ibid* 73–6.

⁷⁹ *Ibid* 76–8.

⁸⁰ See Anne C Spaulding et al, 'Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning' (2011) 173 *American Journal of Epidemiology* 479.

⁸¹ *Ibid* 482.

⁸² *Ibid* 484.

⁸³ Bruce Western and Becky Pettit, 'Incarceration & Social Inequality' (2010) 139(3) *Daedalus* 8, 13.

so that the extent of hardship or deprivation inflicted on a prisoner can, in fact, be of a different nature from that experienced by another prisoner.

As noted in Part II, the deprivations in supermaximum conditions are considerable, and it is clear that these prisoners suffer more than mainstream prisoners during their period of detention. The differences in the degree of relative deprivations are so stark that supermaximum conditions often result in profoundly different consequences for prisoners. The additional suffering seems to extend beyond the duration of the supermaximum confinement.

Research shows that enhanced levels of deprivation such as those endured in supermaximum prisons lead to increased psychological and emotional problems.⁸⁴ The weight of research suggests that

[i]nmates in isolation, whether for the purpose of protective custody or punishment, suffer from numerous psychological and physical symptoms, such as perceptual changes, affective disturbances (notably depression), difficulties in thinking, concentration and memory problems, and problems with impulse control ...⁸⁵

Not surprisingly, supermaximum conditions have received a degree of criticism. The United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in a report issued in 2008, stated that it was

concerned over the harsh regime imposed on detainees in 'supermaximum prisons' [in Australia]. In particular, the Committee [was] concerned about the prolonged isolation periods to which detainees ... are subjected and the effect such treatment may have on their mental health.⁸⁶

Supermaximum conditions received the most pointed judicial criticism by Bongiorno J in *R v Benbrika [No 20]*, when he ruled that the accused, who were detained in the Acacia unit at Barwon Prison in Victoria, could not receive fair trials given the circumstances of their confinement and daily

⁸⁴ See, eg, Stanley L Brodsky and Forrest R Scogin, 'Inmates in Protective Custody: First Data on Emotional Effects' (1988) 1 *Forensic Reports* 268; Pizarro and Stenius, above n 13, 255–8.

⁸⁵ Pizarro and Stenius, above n 13, 256 (citations omitted). See also Sharon Shalev, 'Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis' (2011) 11 *Journal of Forensic Psychology Practice* 151.

⁸⁶ Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 7 [24].

transportation to court.⁸⁷ His Honour ruled that a fair trial could only occur if a number of significant changes were made to the detention regime, including that they were: removed from supermaximum conditions; no longer subject to being shackled; strip-searched less frequently; permitted out of their cells for not less than 10 hours per day, on days when they did not attend court; and had greater access to professional and personal visitors.⁸⁸

Despite such observations, there is no indication that the use of supermaximum facilities is abating in Australia and hence it is necessary to develop informed principles for incorporating them into the sentencing system. Supermaximum facilities are the clearest instance of profoundly more burdensome prison conditions because of the uniform strictness of such conditions. However, as discussed below, other types of prison conditions and additional burdens experienced by certain categories of prisoners also qualify for different treatment so far as length of sentence is concerned.

2 *The Principle of Proportionality Already Recognises Degrees of Deprivation*

The focus on the level of deprivation inherent in a sanction is also an important component of the key determinant regarding how much punishment is appropriate. 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.⁸⁹

In fact, in *Veen v The Queen*⁹⁰ and *Veen v The Queen [No 2]*,⁹¹ the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection (absent a clear legislative intention to the contrary), which at various times has also been declared as the most important aim of sentenc-

⁸⁷ (2008) 18 VR 410.

⁸⁸ *Ibid* 430–1 [100].

⁸⁹ (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis altered) (citations omitted).

⁹⁰ (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

⁹¹ (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

ing.⁹² Proportionality has also been given statutory recognition in all Australian jurisdictions.⁹³

Proportionality has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. Further, the principle has a quantitative component — the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Some commentators have argued that proportionality is so vague as to be meaningless, in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg notes that one of the key and damaging criticisms of proportionality is that it ‘presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment’.⁹⁴ The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg further notes that to give content to the theory it is necessary to rank crimes, rank punishments and anchor the scales.⁹⁵

There is some merit in Ryberg’s critique. And, as noted by Ian Leader-Elliott and George Fletcher, the application of the proportionality principle is especially obscure in the case of offences, such as drug offences, where there is no direct, clear and observable harm caused by the crime:

⁹² See, eg, *Channon v The Queen* (1978) 20 ALR 1.

⁹³ The *Sentencing Act 1991* (Vic) s 5(1)(a) provides that one of the purposes of sentencing is to impose just punishment. It further provides that in sentencing an offender the court must have regard to the gravity of the offence and the offender’s culpability and degree of responsibility: at ss 5(2)(c)–(d). The *Sentencing Act 1995* (WA) s 6(1) states that the sentence must be ‘commensurate with the seriousness of the offence’, and the *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a) provides that the punishment must be ‘just and appropriate’. In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be ‘just in all the circumstances’: *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a). In South Australia, the emphasis is upon ensuring that ‘the defendant is adequately punished for the offence’: *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j). 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 1914* (Cth) s 16A(2)(k). The same phrase is used in the New South Wales legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

⁹⁴ Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers, 2004) 184.

⁹⁵ *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.

The ruling principle of proportionality applies to offenders who traffic in drugs no less than it does to offenders who inflict injury or death. In the trafficking offences, however, there is not the same intuitive, retributive ground for determining a punishment to fit the offence. There is no natural measure of proportionality in offences that are supposed to secure the common good. The American theorist George Fletcher made the point in his discussion of crimes of *lese majeste*:

Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. ... The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.⁹⁶

While, doctrinally, it has been argued that there is a manner in which firmer content could be accorded to the proportionality doctrine,⁹⁷ an exact matching of offence severity and penalty harshness is not feasible in light of the current understanding of proportionality.

However, this is not an issue that needs to be settled and resolved for current purposes. Irrespective of the precise manner in which harmfulness is assessed, it is clear that a cardinal criterion is the extent to which it sets back the interests and welfare of victims. Accordingly, homicide offences are the most serious. Offences causing considerable degrees of permanent impairment (whether physical or mental) also rate highly.

On the other side of the proportionality equation, the same reasoning applies. The main criterion regarding penalty severity is the extent to which the penalty sets back the interests of offenders. Prison is damaging because human beings have an innate desire for freedom, and the capacity to shape their activities and lives according to their preferences. However, as we have seen above, certain prison conditions are considerably harsher than those typically designated by this type of sanction. This qualitative difference is capable of being identified and quantified. It should be reflected in the

⁹⁶ Ian Leader-Elliott, 'Sentencing by Weight: Proposed Changes to the Commonwealth Code Serious Drug Offences' (2012) 36 *Criminal Law Journal* 265, 277–8 (citations omitted), quoting George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press, 1993) 43.

⁹⁷ Mirko Bagaric, 'Injecting Content into the Mirage That Is Proportionality in Sentencing' (2013) 25 *New Zealand Universities Law Review* 411.

sanction limb of the proportionality thesis. A failure to do so undermines the application of the proportionality principle.⁹⁸

IV REFORM PROPOSALS

A *Additional Burden Stemming from Stricter Prison Conditions — 50 Per Cent Loading*

When a court sentences an offender to an immediate term of imprisonment it has relatively little information on the nature of the prison regime to which the offender may be subject. Prisons and their administration are a matter for the executive arm of government and a sentencing court is not involved in this exercise, and will not supervise the implementation of the sentencing order.⁹⁹

Despite this, the additional burden of particularly harsh prison conditions is too weighty to continue with the current legal status quo. A number of principles should apply. The first relates to where the additional burden stems from the strict nature of the prison conditions. The difference between the level of pain and deprivation inherent in supermaximum conditions is so distinct from that in normal prison conditions that it is necessary to incorporate this factor into sentence length.

It is not tenable to do this at the time of sentencing, given that prisoner classification and placement are matters for the executive. Thus, they are matters that need to be adjusted during the sentence. To this end, clarity and transparency are important. There is no precise mathematical manner by which to ascertain the extra burden of supermaximum prison conditions. The most accurate reference point would be to poll prisoners who have served time in both prison regimes and inquire what time-loading would be required before they elected to be confined in supermaximum conditions in order to be released earlier. Presumably a ratio of 3:1 or even 2:1 might have this effect, in which case the premium is too high. In fact, in some circumstances, far more generous loadings have been accorded. In Victoria, prison regulations provide for between 4 and 14 days' reduction in sentence for each day that a prisoner

⁹⁸ This limb of the proportionality principle 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 Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2nd ed, 1995) 80, the need for equal impact of sanctions minimally entails that 'the system should strive to avoid grossly unequal impacts on offenders'.

⁹⁹ *R v Durocher-Yvon* (2003) 58 NSWLR 581, 585 [18] (Howie J).

is in lockdown conditions for circumstances beyond the control of the inmate (such as industrial action at the prison or an emergency situation).¹⁰⁰

In the absence of detailed research in this area, a more modest starting point is prudent. We suggest a ratio of 1.5:1. Thus prisoners who serve time in harsh conditions should have their sentence reduced by half a day for every day in which they are confined in this manner. Of course, there is a degree of arbitrariness associated with this figure. However, as we have seen, it is in keeping with the discount that some courts have previously suggested is appropriate for harsh prison conditions.¹⁰¹ Moreover, the nature of the numerical weighting is no more arbitrary than or out of step with the general impressionistic approach to other mathematical weightings established by courts in the sentencing realm: namely, the reductions commonly allocated for pleading guilty and cooperating with authorities.

To this end, the rationale and fact of these numerical discounts is illuminating. All accused are entitled to plead not guilty and make the prosecution prove its case. In principle, offenders who plead not guilty to a crime should not be punished more heavily than those who plead guilty (apart from the extent to which a guilty plea is indicative of remorse). Yet, for pragmatic reasons, sentencing law provides a large discount to offenders who plead guilty. This is for no higher or more virtuous reason than that without the discount, the court system would become clogged and the criminal justice system would become far more expensive.¹⁰²

The High Court in *Cameron v The Queen* approved of the guilty plea discount and, in the process, the majority rejected a number of arguments against the discount, including that it constitutes a form of discrimination against offenders who elect to pursue their 'right' to a trial.¹⁰³ The normal range of the discount is between 10 per cent and about 30 per cent, depending on the circumstances of the case. In several jurisdictions it is either conventional or a statutory requirement to indicate the size of the discount.¹⁰⁴

¹⁰⁰ See *Corrections Regulations 2009* (Vic) reg 78; *Corrections Act 1986* (Vic) s 58E. For interpretation of these provisions, see *Commissioner, Corrections Victoria v Pavic* [2005] VSCA 244 (4 October 2005); *Rainsford v Victoria* (2001) 126 A Crim R 103.

¹⁰¹ See above nn 24–5 and accompanying text.

¹⁰² See *Cameron v The Queen* (2002) 209 CLR 339.

¹⁰³ *Ibid* 343–4 [11]–[15] (Gaudron, Gummow and Callinan JJ).

¹⁰⁴ In New South Wales and Queensland, the Court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3). In Victoria, the *Sentencing Act 1991* (Vic) s 6AAA states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. The rationale

For example, in *R v Thomson*, the New South Wales Court of Criminal Appeal issued a guideline judgment stating that a guilty plea will generally be reflected in a 10–25 per cent discount on sentence, depending on how early the plea is entered and the complexity of the case.¹⁰⁵ This suggested range relates only to the utilitarian value of a guilty plea to the criminal justice system and does not include additional discounts that may be available — for example, where the guilty plea may be said to evidence remorse. In *Lee v The Queen*, it was held that where the plea was taken on the second day set for trial, a 12.5 per cent discount was appropriate.¹⁰⁶ The co-offender received a 20 per cent discount for pleading on arraignment and it was held that the difference was appropriate.¹⁰⁷

In Western Australia, s 9AA of the *Sentencing Act 1995* (WA) permits a court to reduce a sentence by up to 25 per cent for a plea entered at the first reasonable opportunity. In South Australia, recent legislative changes allow for a guilty plea reduction of up to 40 per cent for an early guilty plea.¹⁰⁸

Providing assistance to authorities is treated in a similar way to guilty pleas, particularly where it results in the detection and prosecution of other offenders.¹⁰⁹ It is important to note that, as with the guilty plea discount, this benefit is given independent of any reasons or remorse that might be demonstrated by assisting the authorities. Criminals, in principle, should not be dealt with less severely because they opportunistically decide to give evidence against co-offenders. However, as a matter of public policy, the law encourages those involved in criminal behaviour to betray the confidence reposed in each other by providing a significant discount at the sentencing stage of the

and size of the typical discount in Victoria is discussed in *Phillips v The Queen* (2012) 222 A Crim R 149. There has been some judicial comment as to the artificiality of s 6AAA, given the instinctive synthesis that produces the actual sentence: see *Scerri v The Queen* (2010) 206 A Crim R 1, 5–6 [23]–[25] (Maxwell P and Buchanan JA); *R v Flaherty [No 2]* (2008) 19 VR 305, 309–10 [10]–[14] (Kaye J). See generally Mackenzie and Stobbs, above n 5, 90–1; Fox and Freiberg, above n 5, 199–202 [3.305]–[3.307].

¹⁰⁵ (2000) 49 NSWLR 383, 419 [160] (Spigelman CJ). See also *Charkawi v The Queen* [2008] NSWCCA 159 (4 July 2008); *R v Bugeja* [2001] NSWCCA 196 (11 May 2001).

¹⁰⁶ [2011] NSWCCA 169 (28 July 2011) [28] (Basten JA).

¹⁰⁷ *Ibid.* The same discount was accorded in *Nakhla v The Queen* [2011] NSWCCA 143 (24 June 2011).

¹⁰⁸ See *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) s 7, inserting *Criminal Law (Sentencing) Act 1988* (SA) ss 10B–10C.

¹⁰⁹ See Mackenzie and Stobbs, above n 5, 93–4; Fox and Freiberg, above n 5, 200–2 [3.306]–[3.307].

criminal justice system.¹¹⁰ This is especially apposite given that it often places the individual in personal danger.¹¹¹

Assistance to law enforcement officials enjoys recognition in a number of statutory regimes.¹¹² In terms of the size of the discount that is available, it has been held that the discount for a plea of guilty and assistance to authorities should be up to 50 per cent.¹¹³

Thus, while the rationale for the guilty plea and cooperation with authorities discount is different to that stemming from harsh prison conditions, it is clear that when the legal system wishes to strongly encourage a course of conduct, the courts and legislatures are willing, with arithmetical clarity, to provide a significant and clear sentencing discount in order to encourage that conduct. This occurs despite the courts' steadfast adherence to the instinctive synthesis approach,¹¹⁴ and despite the questionable basis for permitting resource allocation to dictate the punitive consequences of criminal conduct. The same approach should be adopted when it comes to other equally compelling mitigatory considerations, such as burdensome prison conditions.

The other benefit of having a precise figure is that it is easy to administer and provides a basis which can be used to make necessary adjustments if it transpires that the ratio is either too high or too low.

There is no bright line as to when conditions are sufficiently harsh for the above principles to be applied. Supermaximum conditions clearly satisfy this criterion. So too would other conditions which are especially harsh. Prison management procedures and amenities vary too greatly across Australia for blanket rules to be applied according to the description of a particular custodial regime (apart from the exceptional case of supermaximum detention). The starting point should be that a 1.5:1 day ratio should be applied

¹¹⁰ See *Malvaso v The Queen* (1989) 168 CLR 227, 238–9 (Deane and McHugh JJ).

¹¹¹ *Ibid* 239; *R v Barber* (1976) 14 SASR 388, 390 (Bray CJ). See also *DPP (Cth) v AB* (2006) 94 SASR 316.

¹¹² See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 36; *Crimes (Sentencing) Procedure Act 1999* (NSW) s 23; *Sentencing Act 1995* (NT) s 5(2)(h); *Penalties and Sentences Act 1992* (Qld) s 9(2)(h); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(h), 10A. There is also a similar provision at the Commonwealth level: see *Crimes Act 1914* (Cth) s 16A(2)(h).

¹¹³ For an example of where a 50 per cent discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–51 [15]–[21] (Nettle JA). For an application of these principles, see *Wang v The Queen* [2010] NSWCCA 319 (17 December 2010) [31]–[43] (Schmidt J); *Ma v The Queen* [2010] NSWCCA 320 (17 December 2010) [32]–[38] (Schmidt J); *R v Nguyen* [2010] NSWCCA 331 (21 December 2010). This contrasts with the decision in *R v Sahari* (2007) 17 VR 269, 276–7 [19]–[21] (Kellam JA), where it was held undesirable to specify a particular discount for cooperating with authorities.

¹¹⁴ See above n 65 and accompanying text.

whenever an offender is in non-mainstream conditions. Thus, the default position is that offenders who are placed in protective custody parts of a prison should also qualify for the 1.5:1 day ratio. This could be negated if it were established that the amenities in this part of the jail were not meaningfully worse than the rest of the jail. To this end, the burden should not be on the offender, given the limited access that most prisoners have to detailed information regarding the operating and amenities of prisons.

However, several caveats need to be applied to the above proposals. First, where prior to sentence the offender has already spent time in harsh conditions, this should be factored into the sentence for the sake of clarity. Thus, if an offender has spent two years of remand custody in supermaximum conditions, the court should order that this be deemed to be three years of time already served. Secondly, where offenders are subjected to harsh prison conditions for reasons of misbehaviour in prison, the loading should not apply. Otherwise, some prisoners may be encouraged to be confined in supermaximum conditions. Finally, the loading should not apply where the primary purpose of the prison term is incapacitation in order to protect society from the prisoner. Prison terms can be imposed for a variety of reasons, including denunciation, proportionality, and general and specific deterrence.¹¹⁵ These objectives are not compromised by a time-loading for harsh prison conditions. However, if the offender is regarded by the court as an ongoing danger to the community and for that reason a prison term is imposed,¹¹⁶ then the length of the term should not be reduced, otherwise that objective would be undercut.¹¹⁷ This introduces a layer of complexity into the

¹¹⁵ See *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6. See generally Mackenzie and Stobbs, above n 5, ch 3; Fox and Freiberg, above n 5, ch 3.

¹¹⁶ For concerns regarding the ability of courts to evaluate the likelihood of future offending, see John Monahan, 'The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy' (1984) 141 *American Journal of Psychiatry* 10; Jessica Black, 'Is the Preventive Detention of Dangerous Offenders Justifiable?' (2011) 6 *Journal of Applied Security Research* 317, 322–3; Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009) ch 2.

¹¹⁷ For an analysis of the circumstances in which incapacitation should be pursued as the cardinal sentencing objective, see Mirko Bagaric, 'The Punishment Should Fit the Crime — Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014) 51 *San Diego Law Review* 343.

sentencing determination. However, it could be readily overcome by requiring judges to stipulate when a sentence is principally for incapacitative purposes.

B *Additional Burden Stemming from Health
Considerations — A Matter for the Court*

As we have seen, the current state of the law is that poor health can mitigate a penalty when imprisonment will be a greater burden on the offender as a result of his or her state of health, or where there is a real risk that imprisonment will have a significant negative effect on the offender's health.

An offender who has a pre-existing medical condition or is more susceptible to a medical condition is likely to have a reduced quality of life compared to healthy people. The fact that this relativity regarding quality of life would continue while in prison is not a basis for a lower penalty. Otherwise, individuals with impaired physical or mental functioning would effectively be treated more favourably than other prisoners. Offenders should only receive a poor health discount when, as a result of the condition, it is established that their condition will demonstrably worsen or is more likely to crystallise as a result of being sentenced to prison.

This requirement can be satisfied either because of the fact that as a pragmatic reality the quality of health care in prisons is compromised, or due to the intrinsic restrictions in a prison environment. In either case, ill health should mitigate because the ill suffer more than other prisoners. However, the nature and variability of the additional suffering is immense. This is because of the infinite number of health conditions and the degree to which they can afflict individuals. There is also no clear point at which poor health should be mitigating. To obviate trifling applications, the standard should be set relatively high, such that mitigation only occurs where the offender's medical condition means that he or she will suffer considerably more than other prisoners. Assessment of this will often require detailed evidence and astute judgement. For this reason, the decision needs to be made by the judge or magistrate at the time of sentence. Where the health condition occurs or deteriorates during the term of imprisonment in a manner which was not foreseen at the sentencing hearing, the offender would need to bring an appeal on the basis of fresh evidence in order to secure the benefit of the mitigation.¹¹⁸ When bad health is mitigatory, the discount should be the same as in

¹¹⁸ As is currently the case: see, eg, *AWP v The Queen* [2012] VSCA 41 (8 March 2012); *Driscoll v The Queen* [2013] VSCA 366 (13 December 2013).

the case of strict prison conditions, that is, a ratio of 1.5 days for each day in custody.

Thus, in effect, the law relating to health as a mitigating factor in sentencing should remain unchanged except that when the mitigatory standard is reached, the ratio should be predetermined (at 1.5 days per day served), as opposed to leaving it to the discretion of the sentencer.

Another issue is whether there should be a further adjustment to the sentence where an offender, because of subjective considerations not related to health, finds prison more burdensome: for example, because of his or her cultural background. This always involves a large degree of speculation. There are no generalisations that can be usefully applied to predict the manner in which a person will cope with prison: adaptability, resourcefulness and resilience are not readily measured. Again, this variation is so wide that it can only be dealt with on a case-by-case basis. Thus, the existing law should apply with the qualification that when harshness caused by cultural background is established, a predetermined ratio should operate, once again, at the rate of 1.5 days for each day in custody.

If prisoners experience additional deprivations in prison because of health or for cultural reasons, the discount they would otherwise receive should, once again, be negated where the principal reason for their detention is to protect the community.

C The Preferred Solution — Improved Prison Conditions

The above recommendation will improve transparency and coherency in the sentencing and treatment of offenders who experience especially burdensome prison conditions. This solution assumes the existing regime in Australia so far as the incarceration of offenders is concerned. This assumption is made in order to make the recommendations tenable from the pragmatic perspective. However, in an ideal system a better solution is available.

The underlying premise of this article is that prisoners in Australia sometimes experience burdensome conditions while detained. This normally stems either from the nature of certain prison regimes or from restricted access to health services. None of these considerations is an unchangeable part of the prison landscape. The core deprivation that is meant to stem from incarceration is a loss of liberty. However, as we have seen, there are incidental disadvantages that are associated with the prison experience generally and which are accentuated in the case of burdensome situations.

There is no reason in principle why prison life should be particularly restrictive and harsh. While in Australia the advent of supermaximum condi-

tions in the past decade has moved the prison system to harsher forms of detention, in Scandinavia the opposite has been occurring. Scandinavian countries have long had much lower imprisonment rates than most other countries¹¹⁹ — the average imprisonment rate is slightly more than half of the current rate in Australia which, as noted earlier, is 175 people per 100 000 adults.¹²⁰ Additionally, and more importantly for the purposes of this article, when offenders are sentenced to imprisonment in Scandinavian countries, they are treated far more humanely than in Australia.

In Norway, Finland and Sweden, prisoners have the same access to health, social and educational services as the general population.¹²¹ Moreover, conjugal relations are encouraged and most prisons provide accommodation where the partners and children of inmates can stay without charge for weekends.¹²² Most prisons even provide solarium facilities to ensure prisoners do not become Vitamin D deficient.¹²³ This is merely one illustration of the manner in which the prisons attempt to prevent the onset of chronic health problems.¹²⁴

The exemplar of the non-punitive, integrative approach to imprisonment is Halden Prison in Norway, which houses maximum security prisoners. Each cell has unbarred windows, designer furniture and an ensuite. Guards are not armed and prison conditions are monitored with the assistance of questionnaires completed by inmates regarding their experience in prison and what can be done to improve it.¹²⁵ John Pratt has stated that it is in fact a legislative requirement in Finland that the punishment associated with imprisonment is to be limited to the loss of liberty and that any other deprivations are only justifiable to the extent that this is necessary for security reasons.¹²⁶

The aim of the Norwegian sentencing and prison system is to reduce the rate of re-offending and it is thought this is best achieved by making the

¹¹⁹ John Pratt and Anna Eriksson, *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (Routledge, 2013) 8.

¹²⁰ See above n 3.

¹²¹ Pratt and Eriksson, above n 119, 20–1, 23.

¹²² John Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess — Part 1: The Nature and Roots of Scandinavian Exceptionalism' (2008) 8 *British Journal of Criminology* 119, 122.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Sunanda Creagh, 'Nordic Prisons Less Crowded, Less Punitive, Better Staffed', *The Conversation* (online), 19 March 2013 <<http://theconversation.com/nordic-prisons-less-crowded-less-punitive-better-staffed-12885>>.

¹²⁶ Pratt, above n 122, 120.

prison experience as close as possible to living in the general community.¹²⁷ It is achieving outstanding success with recidivism as low as 20 per cent,¹²⁸ compared to over 40 per cent for Australian prisoners.¹²⁹ Behaviour in Scandinavian prisons is, of course, not always optimal and bullying and intimidation occurs, in some cases leading to prisoners requesting to be placed in isolation for some part of their sentence.¹³⁰ However, prisoners do not get placed into more restrictive conditions as the starting position, as often occurs in Australia.

There are, of course, differences between social, political and economic structures in Scandinavia and Australia. In particular, Scandinavian society is egalitarian, relatively classless and has higher levels of average wealth and education than Australia.¹³¹ For that reason, it may be that aspects of the Scandinavian sentencing system are not readily transportable to Australia. However, all Australians have a strong interest in reducing the recidivism rate of offenders and, for this reason, the Scandinavian prison system is logically (though perhaps not politically) appealing to countries such as Australia.

Changes in the criminal justice system, like most social institutions, occur incrementally and do not leapfrog existing community expectations.¹³² Accordingly, it is not suggested that the Australian prison system will become more humane and progressive in the immediate future. However, in relation to most institutional practices, principle and efficacy eventually prevail over blind allegiance to existing practices. Hence it is suggested prison conditions in Australia will eventually approach those which are currently found in Norway. It is hoped that this paper, by raising awareness of an alternative means of incarcerating offenders, will accelerate this development, even if only slightly.

¹²⁷ Ibid. See also Berit Johnsen, Per Kristian Granheim and Janne Helgesen, 'Exceptional Prison Conditions and the Quality of Prison Life: Prison Size and Prison Culture in Norwegian Closed Prisons' (2011) 8 *European Journal of Criminology* 515, 516.

¹²⁸ See Council of Europe Annual Penal Statistics, *Recidivism Studies: Norway* <<http://www3.unil.ch/wpmu/space/publications/recidivism-studies/>>.

¹²⁹ See Jessica Zhang and Andrew Webster, *Research Paper: An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007* (ABS Catalogue No 1351.0.55.031, 30 August 2010).

¹³⁰ In Helsinki Prison, one in eight prisoners made this request at some stage during their sentence: Pratt, above n 122, 123.

¹³¹ See *ibid* 124–6.

¹³² The sentencing process in particular is poorly receptive to new empirical and scientific evidence: see Bagaric and Edney, above n 75, 167, 187.

Even if Australia does move towards less punitive and more integrative prison structures not all of the problems associated with burdensome prison conditions will be eliminated. There will still be a need to segregate problematic prisoners and there will continue to be some violence in prisons but, certainly, enhanced medical facilities will greatly reduce the frequency of inmates suffering greater burdens due to health considerations.

V CONCLUSION

Criminal punishment in most forms involves the infliction of hardship and pain. It is difficult to quantify the levels of pain, and certainly there is no agreed measure for comparing the differences in hardship between different types of criminal sanctions, such as fines, community-based orders and imprisonment. However, within each type of sanction it is tenable to make at least a crude approximation of the relative degrees of deprivation involved.

A \$200 fine imposes a greater hardship than a \$100 fine; a two-year term of imprisonment inflicts more pain than a six-month term. These concepts are universally accepted but what is not widely recognised, at least at the pragmatic level, is that imprisonment has a qualitative component. Strict prison conditions are far more burdensome than normal prison conditions. The difference is so profound that the punishments are, in effect, different in nature and this should be reflected in sentence duration. Prisoners who are confined in strict conditions should receive a 50 per cent loading for each day in such conditions, except where the reason for such confinement relates to their misbehaviour, or when the principal objective of the prison sentence is to protect the community from their potential wrongdoing.

Where offenders will demonstrably suffer an additional burden because of their subjective considerations, normally relating to ill health, this too should be a mitigating consideration. In this case, the additional burden must be considerable. If this standard is satisfied, once again, a 50 per cent loading is justified.

The ideal solution to dealing with especially burdensome conditions in prison is to alter the construct of the prison experience so that it is never (or almost never) burdensome beyond the hardship inherent in a deprivation of liberty. The introduction of supermaximum facilities in Australia over the past decade constitutes a move to stricter regimes. Hence, there is little basis for confidence that anytime soon Australian prisons will adopt the purposive and progressive practices currently in existence in Scandinavian countries. Raising awareness of this different approach will, it is hoped, increase the rate at which these changes are implemented in Australia — but given the slow rate of

criminal justice reform in Australia, it is likely to be measured in decades, rather than years.