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A MODEL FOR THE EARLY COMPASSIONATE RELEASE OF PRISONERS IN AUSTRALIA

Abstract

For many reasons, prisoners' personal circumstances may change during their custodial terms. Their experiences in prison, such as their participation in a rehabilitation program, might have profoundly positive and life-changing effects on them. Yet other circumstances may arise that make their prison terms considerably more onerous than sentencing courts contemplated they would endure. For instance, they might develop a serious illness in prison, or a close relative could require their care. Notwithstanding these possibilities, there are few avenues for incarcerated people in Australia to be able to secure early release from prison for compassionate reasons. To address this shortcoming, this article recommends law reforms that adopt aspects of the early compassionate prisoner release model that operates in the United States of America's federal jurisdiction, and expand the 'release on licence' process available to some prisoners in Australia's federal jurisdiction. The article argues that established sentencing considerations in Australian law could provide justifications for early compassionate release from prison, and proposes grounds on which prisoners should be able to apply for early release.

I Introduction

The United States of America ('US') is one of the most punitive nations on Earth: it imprisons more people per capita than most other countries.[1] Although the number of inmates in Australia is high (214 persons per 100,000

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1 See, e.g.: 'Highest to Lowest — Prison Population Rate', *Word Prison Brief* (Web Page) <https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All>; 'Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of February 2025', *Statista* (Web Page) <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/>. See also Part II of this article.

adult population),[2] it is less than three times the rate in the US.[3] Ironically, however, the federal jurisdiction of the US has a clear process for prisoners to apply for early compassionate release and recent amendments to the process have increased the likelihood of prisoners' applications being granted. By contrast, it is difficult and extremely rare for prisoners in Australia to obtain early release on compassionate grounds.

In sentencing someone to a prison term, a court intends to punish them. Nevertheless, during a custodial sentence, and especially a long one, a prisoner's personal circumstances may change in unforeseen ways and increase the burdens they experience, beyond the hardship that the sentencing court contemplated they would endure. Examples of such a turn of events are where a prisoner develops a serious illness or a close family member requires their care.[4] A prisoner with poor health may suffer greatly due to barriers to receiving high quality healthcare in Australian prisons, which numerous official investigations have documented.[5]

Yet, in Australia, there is no systematic manner for taking into account in the sentencing determination the potential for a prisoner's changed personal circumstances to make a custodial term more onerous for them. Once a defendant has been sentenced, they are generally required to serve the minimum prison term to which they were sentenced, irrespective of any developments that inflict unexpected additional burdens on the prisoner and/or their dependants. The length of a custodial term could potentially be reduced in light of a prisoner's substantially changed personal circumstances through a successful appeal of their sentence. However, it is procedurally and substantively complex for a prisoner to mount an appeal of their sentence.[6] In order to persuade a court to reduce their sentence on the basis of their changed circumstances, the prisoner needs to provide fresh evidence and, even if this test is satisfied, courts tend to be reluctant to reduce the original penalty.[7] A prisoner can petition the executive to exercise the royal prerogative of mercy, but offenders rarely receive a pardon or remission of their sentence under this process.[8]

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2 Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2025*, (Catalogue No 4512.0, 12 June 2025).

3 The incarceration rate in the United States is 700 per 100,000 adults: Emily D Buehler and Rich Kluckow, *Correctional Populations in the United States, 2022 — Statistical Tables* (Report, 30 May 2024) 1.

4 See, e.g., United States Sentencing Commission, *Guidelines Manual* §3E1.1 (Manual, November 2023) §1B1.13 ('*Federal Sentencing Guidelines*').

5 See Part IV(C) of this article.

6 See, e.g., Sentencing Advisory Council, *Sentence Appeals in Victoria* (Summary Paper, August 2012) 2, 4.

7 Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 11th ed, 2025) 178–83.

8 In New South Wales, for example, 18 petitions for the exercise of the royal prerogative of mercy and applications were made under s 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) in the last two completed calendar years. However, only three of them were granted: two on the basis of 'genetics evidence' (not

It is possible for a prisoner who is convicted of a federal offence in Australia to apply for 'release on licence' on the basis of 'exceptional circumstances'.[9] Nevertheless, these licences will only be granted in a limited range of very extreme cases,[10] and no such licences are available to people convicted of crimes in other Australian jurisdictions. Further, only approximately 3% of Australia's prisoners are incarcerated under the federal criminal justice regime.[11]

By contrast, the federal jurisdiction of the US has long had a process for facilitating the early release of prisoners for compassionate reasons. In the past, this was sparingly used due to strict procedural and substantive constraints on its availability. However, the scope of the early compassionate release provision has recently been expanded, resulting in the early release of thousands of prisoners.[12] This article argues that the Australian criminal justice system should adopt aspects of the early compassionate release provision that is available to prisoners in the US federal jurisdiction. Further, these could be incorporated into a process for the release of prisoners on licence for compassionate reasons in all Australian jurisdictions. We argue that this approach is consistent with the existing sentencing considerations of proportionality and mercy, and would not undermine the sentencing objective of community protection.

Part II provides an overview of the sentencing system and approach to early release of prisoners on compassionate grounds in the US federal jurisdiction. This is followed in Part III by a discussion of the limited prospects of early compassionate release from prison for prisoners in Australia at present. Part IV outlines the article's proposal to expand the current licence process available in Australia's federal jurisdiction and extend it to other Australian jurisdictions. It discusses established sentencing considerations in Australian law that could be invoked to justify early compassionate release of prisoners and, drawing particularly on the law in

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on the basis of the prisoner's changed circumstances) and for the other matter, the ground on which review was sought was unpublished: 'Release of Information: Policy for the Release of Information Relating to the Royal Prerogative of Mercy and Reviews of Conviction or Sentence Under the *Crimes (Appeal and Review) Act 2001*', *New South Wales Government* (Web Page) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/release-of-information.html> ('Release of Information'). See also Dianne Heriot, 'Justice Beyond Law: Clemency and the Royal Prerogative of Mercy', *Parliament of Australia* (Blog, 19 September 2012) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1925114/upload_binary/1925114.pdf;fileType=application%2Fpdf#search=%22library/prspub/1925114%22>.

9 *Crimes Act 1914* (Cth) s 19AP ('*Crimes Act*').

10 'Application for Early Release on Licence', *Attorney-General's Department* (Application Form) <https://www.ag.gov.au/sites/default/files/2020-03/Earlyreleaseonlicence-applicationformandgeneralinformation.pdf> ('Application').

11 Only 1,324 of the 44,403 people currently incarcerated in Australia have been sentenced under the federal regime: Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 19 December 2024).

12 See Part II of this article.

the US federal jurisdiction, proposes compassionate grounds on which prisoners could apply for early release from prison in Australia. Part V summarises these arguments.

II Laws Regarding Early Compassionate Release of Prisoners in the United States of America's Federal Jurisdiction

The US is renowned for its harsh sentencing laws and practices,[13] which appear to reflect little compassion for those who offend. As noted above,[14] it has a very high imprisonment rate per capita, compared to other countries in the Organisation for Economic Co-operation and Development. The number of prisoners in US prisons peaked at 2,293,157 in 2007,[15] following a continual increase in prisoner numbers in the preceding four decades. Prisoner numbers then gradually dropped for well over a decade until 2020, by which time they had reduced to their lowest level since 1995–1996.[16] Nevertheless, the most recent official data, released in May 2024, suggests that this downward trend may have ended: by the end of 2021, there was a total of 1,827,600 people in US prisons and jails, compared with 1,776,000 prisoners a year earlier.[17] The incarceration rate in the US in 2022 was 700 per 100,000 adult residents,[18] which is approximately three times higher than prisoner numbers in Australia.[19]

13 Michael Tonry, 'Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration' (2014) 13(4) *Criminology and Public Policy* 503, 506.

14 See Part I of this article.

15 Heather C West, 'Prisoners in 2007' (Bulletin, 2 December 2009) 6 <https://bjs.ojp.gov/content/pub/pdf/p07.pdf>.

16 E Ann Carson, 'Prisoners in 2018' (Bulletin, April 2020) <https://www.bjs.gov/content/pub/pdf/p18.pdf>. See also John Gramlich, 'Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006', *Pew Research Center* (Web Page, 6 May 2020) <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

17 Buehler and Kluckow (n 3) 4. In the United States, incarcerated offenders are held in two forms of detention: prisons and jails. Prisons are institutions run by states or the federal government, which hold offenders with sentences that are typically longer than one year in duration, and include public and private prisons, boot camps and treatment centers. Jails are confinement facilities, which are operated by a sheriff, police chief, or city or county administrator, and generally hold offenders who are sentenced to a prison term of one year or less. The data in this article relates to inmates held in both prisons and jails.

18 Ibid 1.

19 Australian Bureau of Statistics (n 2). In the last quarter of 2025, there were 46,081 persons in custody in Australia, which equates to 214 persons per 100,000 adult population.

Despite the severity of the US's sentencing system, its federal jurisdiction, which has the highest number of prisoners, also has a provision for the early release of prisoners on compassionate grounds, which offers a useful paradigm for Australia. Hundreds of thousands of people are sentenced annually in the US federal jurisdiction, and its prison population is one of the largest in the world.[20] Yet its process for the early compassionate release of prisoners has resulted in the release of thousands of prisoners over the past six years.[21] The following brief discussion of the sentencing system in the US provides some context for these laws.

As is the case in Australia, each state in the US and the federal jurisdiction has its own sentencing system. There are, nonetheless, similarities between sentencing laws throughout the US, most of which have become harsher in the past few decades, leading to increases in the prison population.[22] A principal commonality between the jurisdictions is their prescriptive sentencing laws, which were introduced in the 1980s — influenced by a 'tough-on-crime' political agenda — and significantly constrained sentencing courts' discretion.[23] At least 18 states in the US (and the federal jurisdiction) now have sentencing guidelines, which implement determinate sentencing.[24] They set out prescribed penalties based upon the offence and the offender's characteristics.[25] The extent of courts' discretion to diverge from imposing those terms differs between jurisdictions.[26]

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20 In January 2023, more than 150,000 people were incarcerated in federal prisons in the United States: 'Federal Offenders in Prison', *United States Sentencing Commission* (Web Page, 29 March 2025) <https://www.ussc.gov/research/quick-facts/federal-offenders-prison#:~:text=As%20of%20January%202023%2C%20there,%5B2%5D%2C%5B3%5D>.

21 See Jessie Brenner and Stephanie Wylie, 'Analyzing the First Step Act's Impact on Criminal Justice', *Brennan Centre for Justice* (Web Page, 20 August 2024) <https://www.brennancenter.org/our-work/analysis-opinion/analyzing-first-step-acts-impact-criminal-justice>.

22 Tonry (n 13) 506, 509–10.

23 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, ed Steve Redburn, Bruce Western and Jeremy Travis (National Academies Press, 2014) 3; Michael Tonry, 'Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration' (2014) 13(4) *Criminology and Public Policy* 503, 514.

24 The following US jurisdictions, in addition to the federal jurisdiction, have sentencing guidelines: Alabama; Arkansas; Delaware; District of Columbia; Florida; Kansas; Maryland; Massachusetts; Michigan; Minnesota; North Carolina; Ohio; Oregon; Pennsylvania; Tennessee; Utah; Virginia; and Washington: 'Sentencing Guidelines Resource Center: In-Depth Jurisdiction Profiles', *Robina Institute of Criminal Law and Criminal Justice* (Web Page) <https://robinainstitute.umn.edu/publications/sentencing-guidelines-resource-center-depth-jurisdiction-profiles>.

25 'What Are Sentencing Guidelines', *Robina Institute of Criminal Law and Criminal Justice* (Web Page, 21 March 2018) <https://robinainstitute.umn.edu/articles/what-are-sentencing-guidelines>.

26 Ibid.

In the US federal jurisdiction[27] there was a sharp shift from a system in which sentencing judges were 'guided only by broad sentence ranges provided by federal criminal statutes' to one in which it was intended that they would adhere to 'mandatory guidelines'.[28] The US Sentencing Commission developed the *United States Sentencing Commission Guidelines Manual* (2023) ('*Federal Sentencing Guidelines*'). Despite the original intention behind the introduction of the *Federal Sentencing Guidelines*, in the 2005 case of *United States v Booker,*[29] the US Supreme Court held that it is not mandatory for courts to apply them.[30] The *Federal Sentencing Guidelines* have influenced many of the states' sentencing laws in the US,[31] and provide a model for the early release of prisoners on compassionate grounds that could be applied in Australia. Importantly, Australian sentencing laws share the stated objectives of the *Federal Sentencing Guidelines*; both focus on imposing sentences that will deter, incapacitate, punish and rehabilitate offenders.[32]

Laws regarding the early compassionate release of prisoners in the US federal jurisdiction derive from legislation as well as the *Federal Sentencing Guidelines*. The United States Code ('USC') codifies the law of the US. 18 USC *§* 3582(c)(1)(A) permits the 'modification of an imposed term of imprisonment' in response to what is commonly described as a 'compassionate release' motion.[33] It states that a court

> may reduce the term of imprisonment … after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that —
> (i) extraordinary and compelling reasons warrant such a reduction; or
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) [which prescribes mandatory life prison sentences for 'certain violent felons'] for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.[34]

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27 Most federal criminal offences are set out in 18 USC.

28 William W Berry III, 'Discretion without Guidance: The Need to Give Meaning to Section 3553 after Booker and Its Progeny' (2008) 40(3) *Connecticut Law Review* 631, 633.

29 543 US 220 (2005).

30 Ibid 264–6.

31 Mirko Bagaric, 'Sentencing Developments in the United States in 2023: The Start of Reversing the War on Drugs?' (2023) 46(5) *Criminal Law Journal* 283.

32 *Federal Sentencing Guidelines* (n 4) 2; Bagaric, Alexander and Edney (n 7) 222.

33 United States Sentencing Commission, 'Compassionate Release Data Reports' (Report, 12 March 2025) <https://www.ussc.gov/research/data-reports/compassionate-release-data-reports>; 18 USC § 3582(c)(1)(A) (2018).

34 18 USC § 3582(c)(1)(A) (2018).

'Factors' that a court may need to consider in determining a compassionate release motion, listed in 18 USC § 3553(a), include the following, and the provision states that 'The Court shall impose a sentence sufficient, but not greater than necessary, to comply with' these 'purposes':

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed —
> (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (b) to afford adequate deterrence to criminal conduct;
> (c) to protect the public from further crimes of the defendant; and
> (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The US Sentencing Commission has included in the *Federal Sentencing Guidelines* a policy statement titled, 'Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)'.[35] It adds to the provision for a compassionate release motion in the USC by confirming that the defendant's risk to the public is a separate consideration that the court must take into account if it is contemplating that 'extraordinary and compelling reasons' may 'warrant' a reduction in the prisoner's sentence (that is, not only where the motion is based on the facts that the defendant is 70 years old and has served at least 30 years in prison).

Courts have been able to reduce a sentence in response to a compassionate release motion for several decades, but until recently such motions were rarely made.[36] The main reason for this was that prisoners could not make a compassionate release motion themselves; rather, they needed to petition the Director of the Bureau of Prisons ('BOP') to make a motion to a district court on their behalf, and the BOP did not frequently exercise its discretion in this respect.[37] However, in December 2018, Congress passed the *Formerly Incarcerated Re-enter Society Transformed Safely Transitioning Every Person Act* ('*First Step Act*'), which led to major reforms to the laws regarding compassionate release from prison — as well as to other aspects of federal criminal law — in an attempt to reduce recidivism and lengthy prison terms.[38]

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35 *Federal Sentencing Guidelines* (n 4) §1B1.13.

36 Meredith Esser, 'Extraordinary Punishment: Conditions of Confinement and Compassionate Release' (2023) 92(4) *Fordham Law Review* 1369, 1387–8.

37 Ibid 1388–9.

38 Ibid; The Sentencing Project, 'The First Step: Ending Mass Incarceration in Federal Prisons' (Report, August 2023) 1–2 <https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf>.

The *First Step Act* amended 18 USC *§* 3582(c)(1)(A), so that it now provides that a court can reduce a defendant's term of imprisonment either on the motion of the BOP or the prisoner

> if the prisoner has fully exhausted all administrative rights to appeal a failure by BOP to bring a motion on the prisoner's behalf or upon the lapse of 30 days from the receipt of such a request by the warden of the prisoner's facility, whichever is earlier.[39]

Therefore, a prisoner can make a compassionate release motion directly to a court, where the BOP opposes or neglects to respond to their request for the BOP to bring a motion for their early release.[40] This change to the compassionate release provision considerably increased its use. From 2013 to 2017, the BOP received 5,400 requests for compassionate release, but approved fewer than 350 of them (6% of the applications were granted).[41] By contrast, after the passage of the *First Step Act* and at the height of the COVID-19 pandemic, 2,611 and 1,399 federal prisoners were granted early release in 2020 and 2021 respectively (27% and 12% of applications were granted in those years).[42] Since the pandemic has no longer been considered a public health emergency, the number of compassionate release applications that have been made and approved has diminished, but it remains considerably higher than in the past.[43]

The rate of approval of applications for early compassionate release will likely increase further in the near future as a result of additional amendments that the US Sentencing Commission made recently to its policy statement, 'Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)'. In 2023, the US Sentencing Commission expanded the list in its policy statement of 'circumstances' in which 'extraordinary and compelling reasons' for reducing a prison sentence might exist.[44] Its stated rationale for doing so was 'to reflect the reasons relied upon by many courts after passage of the *First Step Act* in the absence of a binding policy statement', including 'the medical circumstances … that were most often cited by courts in granting sentence reduction motions'.[45] Notable among the circumstances included in the expanded list are the following.

The list refers to a range of 'medical circumstances' of a defendant that might warrant early release. This includes the defendant: (1) 'suffering' from a 'terminal illness';

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39 Congressional Research Service, 'The First Step Act of 2018: An Overview' (Report, 4 March 2019) 18 <https://sgp.fas.org/crs/misc/R45558.pdf>.

40 Esser (n 36) 1389.

41 The Sentencing Project (n 38) 3.

42 Ibid.

43 Ibid.

44 Esser (n 36) 1376.

45 United States Sentencing Commission, 'Amendment #814: Reduction in Sentence Pursuant to Section 3582(c)(1)(A)', *United States Sentencing Commission* (Amendment, 1 November 2023) 1 — 3 <https://www.rid.uscourts.gov/sites/rid/files/historical/documents/USSC%202023%20Amendments%20in%20Brief.pdf>.

(2) 'suffering from a serious physical or mental condition', 'serious functional or cognitive impairment' or 'deteriorating physical or mental health because of the aging progress', from which they are 'not expected to recover' and that 'substantially diminishes' their capacity to 'provide self-care within' prison; (3) being incarcerated in a facility 'affected or at imminent risk of being affected by … an ongoing outbreak of an infectious disease' and their consequent 'increased risk of suffering severe medical complications or death', which 'cannot be adequately mitigated in a timely manner'; and/or (4) suffering from 'a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death'.[46] This latter circumstance could apply to situations where the BOP neglects to treat or disregards a prisoner's serious medical condition.[47]

Other circumstances in which 'extraordinary and compelling reasons' for reducing a prison sentence might exist, which were added to the policy statement, were: (1) the defendant's age (at least 65 years old) and their experience of 'serious deterioration in physical or mental health because of the aging process';[48] and (2) their experience of sexual or physical abuse during custody 'committed by, or at the direction of… any … individual who had custody or control over the defendant'.[49] In addition, the policy statement now lists the defendant's 'family circumstances', which are specified to include: 'death or incapacitation of the caregiver of the defendant's … child'; 'incapacitation' of the defendant's spouse, registered partner or parent, 'when the defendant would be the only available caregiver' for them; and similar circumstances 'involving any other immediate family member' — such as 'a grandchild, grandparent, or sibling of the defendant' — or 'an individual whose relationship with the defendant is similar in kind to that of an immediate family member', 'when the defendant would be the only available caregiver' for them.[50]

Although a prisoner's rehabilitation alone cannot constitute an 'extraordinary and compelling reason' for early release, the policy statement confirms that a court can consider it 'in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted'.[51] The policy statement now permits a defendant to present in support of an application for early compassionate release 'any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons' it lists 'are similar in gravity' to them.[52] As Meredith Esser observes, this 'catch-all provision could potentially open the door to other conditions-based arguments such as being held in particularly restrictive conditions … or other kinds

46 *Federal Sentencing Guidelines* (n 4) §1B1.13(b)(1).

47 Esser (n 36) 27.

48 *Federal Sentencing Guidelines* (n 4) §1B1.13(b)(2).

49 Ibid §1B1.13(b)(4).

50 Ibid §1B1.13(b)(3)(A)–(D).

51 Ibid §1B1.13(d).

52 Ibid §1B1.13(b)(5).

of severe harms experienced in prison'.[53] The policy statement emphasises, too, that 'an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment'.[54] The United States Sentencing Commission 'encourages the court', 'before granting a motion' to modify a prison term, 'to make its best effort to ensure that any victim of the offense' is 'notified' and 'provided … with an opportunity to be reasonably heard'.[55]

The United States Sentencing Commission regularly releases data on the outcomes of prisoners' early compassionate release applications. Its reports are illuminating because they provide details of the nature of the applications that have been made and the circumstances in which early release has been granted or refused. The most recent report, dated April 2025, is for the period 1 October 2024 to 31 March 2025.[56] In that period, 1,375 applications were made, of which 209 (approximately 15%) were approved.[57] Most of the applications that were approved related to sentences of imprisonment of 20 years or more (51.5%) or terms of 10–20 years (25.7%), while only a small portion related to sentences of less than one year (0.5%).[58] The main offences of prisoners whose early release applications were granted were: drug trafficking (45.4%); robbery (15.9%); fraud/theft (6.8%); and murder (6.3)%.[59]

The main reasons provided by the courts for granting a reduction in the custodial sentence include: (1) the prisoner's rehabilitation (54 instances); (2) a serious physical or medical condition of the prisoner (40 instances); (3) the prisoner's terminal illness (18 instances); (4) the BOP's failure to provide treatment (5 instances); and (5) the prisoner's age of 65, deteriorating health and completion of 10 years of their prison sentence (7 instances).[60] In some cases, courts gave more than one reason for granting motions and, in total, 318 reasons were provided.[61]

53 Esser (n 36) 1391.

54 *Federal Sentencing Guidelines* (n 4) §1B1.13(e).

55 Ibid §1B1.13, 'Application Notes'.

56 United States Sentencing Commission, 'Compassionate Release Data Report' (Report, April 2025) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY25Q2-Compassionate-Release.pdf>.

57 Ibid table 4.

58 Ibid figure 2.

59 Ibid table 8.

60 Ibid table 10.

61 Ibid.

III Current Laws regarding Early Compassionate Release for Prisoners in Australia

A *Overview of Current Early Release Options*

As explained below,[62] at present, there are limited opportunities for prison sentences to be reduced for compassionate reasons in Australia. A prisoner could appeal their sentence on the basis of their changed personal circumstances, but they must produce fresh evidence.[63] Courts have imposed tight constraints on the situations in which they can reduce a custodial term on this basis following sentencing, and such appeals have infrequently succeeded.[64] Moreover, Australian courts have not developed any coherent, transparent rules (as opposed to discretionary principles)[65] for determining an appeal of a prison sentence on compassionate grounds.

In most Australian jurisdictions, offenders can apply for a leave of absence from prison for compassionate reasons, such as to attend a funeral, but if granted, that leave will be brief and temporary.[66] Further, in some jurisdictions, a prisoner can be released for compassionate reasons up to a few weeks before their sentence is due to expire.[67] In addition, offenders can make a petition for the executive to exercise the royal prerogative of mercy, which could result in them being pardoned or their sentence being remitted. Nevertheless, such petitions are rarely granted and the

62 See Parts 3(B)–(E) of this article.

63 See Bagaric, Alexander and Edney (n 7) 175–6; *R v Nguyen* [2006] VSCA 184, [36] (Redlich JA) ('*Nguyen*').

64 Bagaric, Alexander and Edney (n 7) 175–6; *Nguyen* (n 63) [36] (Redlich JA); *Lissock v The Queen* [2019] NSWCCA 282 ('*Lissock*').

65 For a discussion of the distinction between rules and principles, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth Books, rev ed, 1978) 22–8, 76–7.

66 *Corrections Act 1997* (Tas) s 42(1); *Correctional Services Act 2014* (NT) ss 109, 118; *Corrective Services Act 2006* (Qld) s 73; *Correctional Services Act 1982* (SA) s 27(1)(d); 'Release Conditions', *Government of South Australia* (Web Page) <https://www.corrections.sa.gov.au/prison/release-from-prison/release-conditions#:~:text=Every%20prisoner%20can%20apply%20for,will%20aid%20the%20prisoner's%20rehabilitation>; New South Wales Government, 'Custodial Operations Policy and Procedures: Application for Compassionate Leave' (Policy) <https://correctiveservices.dcj.nsw.gov.au/documents/copp/09-processing-inmate-requests-applications-and-complaints/09.03-application-for-compassionate-leave.pdf>.

67 In Western Australia, prisoners can be released up to 30 days before their sentence is due to expire: *Prisons Act 1981* (WA) ss 31(1)–(2); Government of Western Australia, 'Commissioner's Operating Policy and Procedure' (Report) 15 <https://www.wa.gov.au/media/34045/download?inline>. In the Australian Capital Territory, the director-general can direct the release of an offender from prison for compassionate reasons, depending on the length of their sentence, one to two weeks before their scheduled release date: *Crimes (Sentence Administration) Act 2005* (ACT) s 31. In the Northern Territory, prisoners can be released up to seven days before their scheduled release date: *Correctional Services Act 2014* (NT) s 62.

circumstances in which the prerogative is exercised are not clearly disclosed.[68] All Australian jurisdictions have adopted a 'truth in sentencing' approach, and hence most remission schemes that previously provided an opportunity for early release from prison have been abolished.[69] In some jurisdictions, such schemes were abolished following the exposure of misuse of discretion and corrupt practices, such as acceptance of bribes in exchange for early release of prisoners.[70]

The federal jurisdiction has a process outlined in legislation, whereby prisoners who have been convicted of a Commonwealth offence can apply for a 'licence' to be released from custody on compassionate grounds (as well as where other 'exceptional circumstances' exist, including a prisoner's 'extensive cooperation … with law enforcement agencies', before or after sentencing).[71] However, applications for licences are unlikely to be granted in circumstances beyond very extreme cases.[72] For the duration of their licence, an offender will not have total freedom. It is perhaps unsurprising that there is no equivalent mechanism to this licence in other Australian jurisdictions. As discussed below,[73] most Australian governments were reluctant even to permit the early release of certain prisoners at the height of

68 See: New South Wales Government, 'Release of Information' (n 8); David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 323. Nevertheless, for a discussion of the advantages of preserving the royal prerogative of mercy, see Catherine Dale Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328.

69 For an overview of these historical schemes, see: Janet Chan, 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release' (1991) 13(2) *University of New South Wales Law Journal* 393; Neil Morgan, 'Now You See It, Now You Don't: Truth and Justice Under the New Sentencing Laws' (2000) 29(2) *University of Western Australia Law Review* 251. In Tasmania, a prisoner's sentence can be remitted, but only by up to three months: *Corrections Act 1997* (Tas) s 86; *Corrections Regulations 2018* (Tas) s 25.

70 For example, Rex Jackson, the New South Wales Corrective Services Minister, established a scheme for early release of prisoners and was later convicted for accepting bribes to release particular inmates: David Marr, 'Time Runs Out for Disgraced Prisons Minister', *Sydney Morning Herald* (online, 2 January 2012) <https://www.smh.com.au/national/nsw/time-runs-out-for-disgraced-prisons-minister-20120101-1ph9s.html>; Janet Chan, *Doing Less Time: Penal Reform in Crisis* (Institute of Criminology Sydney University Law School, 1992) 118–37. We thank the anonymous referee for this point.

71 'Early Release of Federal Prisoners', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/crime/federal-offenders/early-release-federal-prisoners> ('Early Release'); *Crimes Act* (n 9) s 19AP(4A).

72 The Attorney-General's Department does not appear to have released any data on the number of applications for early release on licence that have been granted.

73 See Part 3(E) of this article.

the COVID-19 pandemic when the risk of transmission of the virus in the close confines of prisons was great.[74]

B *Appeal of Sentence*

When a court sentences a person to a term of imprisonment, they will serve the minimum term of the sentence that the court has stipulated unless they successfully appeal the sentence. Thus, a prisoner could seek to be released early from a custodial term on compassionate grounds by appealing their original sentence. An appeal of a prison sentence can be made on the basis of new circumstances that have occurred since the sentence was imposed, but the defendant must produce 'fresh evidence'.[75] In the interests of the finality of court proceedings, courts have narrowly defined what constitutes fresh evidence.[76] Further, they have clarified that fresh evidence principally refers to evidence that raises questions about whether there was a wrongful conviction or a miscarriage of justice, rather than whether prisoners' personal circumstances have changed since sentencing so as to justify early release on compassionate grounds.[77] Such appeals often fail due to the high bar that must be overcome to establish that evidence is fresh and the limitations imposed by the courts on allowing appeals based on compassionate reasons.[78]

In *R v Davidson*,[79] the Victorian Court of Appeal quoted the following statement of Redlich JA in *R v Nguyen*[80] of the 'principles' that apply to the admission of fresh evidence in an appeal of a sentence:

> (i) the new evidence must relate to events which have occurred since the sentence was imposed;
> (ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;
> (iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;
> (iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;

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74 See Brendon Murphy, John Anderson and Mirko Bagaric, 'The Curious Role of COVID-19 in Sentencing: The Relevance and Mitigating Weight of Ill Health and Harsh Prison Conditions' (2021) 47(3) *Monash University Law Review* 25, 45–7.

75 Bagaric, Alexander and Edney (n 7) 175–7; *Nguyen* (n 63) [36].

76 See, e.g., *R v Hughes* [2004] 1 Qd R 541, 543 [40] (McPherson JA), 545 [40] (McMurdo J).

77 Bagaric, Alexander and Edney (n 7) 177; *Nguyen* (n 63) [36].

78 It appears that data on the number of successful appeals of original sentences on compassionate grounds in Australia is unavailable.

79 [2008] VSCA 188 ('*Davidson*').

80 *Nguyen* (n 63) [36].

> (v) upon the admission of the new evidence, it is unnecessary to determine whether the original sentence was vitiated by error, or whether it was manifestly excessive; and
> (vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.[81]

In *Lissock v The Queen* ('*Lissock*'), the New South Wales Court of Criminal Appeal referred to other cases that have confirmed when courts will receive fresh evidence on appeal and when that evidence can lead them to reduce a prison sentence on compassionate grounds.[82] The Court noted:

> In exceptional circumstances, where at the time of sentencing the offender had an existing medical condition, and subsequently fresh evidence comes to light indicating that the condition has worsened during incarceration, this Court will receive such fresh evidence.[83]

The Court in *Lissock* quoted the judgment in *Khory v The Queen*[84] that, in deciding whether it should 'intervene' on the basis of this 'fresh evidence', a court must consider 'whether the applicant's period of incarceration would be more onerous than it was considered to be when he was sentenced and, if so, whether any reduction in his sentence or, at least the non-parole period, is justified'.[85] In addition, the Court in *Lissock* noted that the case of *Iglesias v The Queen* confirmed that 'this question "requires consideration of his [or her] physical condition, the availability of medical facilities and whether he [or she] can be adequately treated within the prison system"'.[86]

Also in *Lissock*, the Court referred to several cases in which offenders' appeals of their sentences did not succeed, despite their production of seemingly compelling fresh evidence that could substantiate their applications on compassionate grounds.[87] One of those cases was *R v Jones*,[88] where the applicant only learned that he was

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81 *Davidson* (n 79) 196, [40] (Nettle JA, Weinberg JA agreeing at [47], Mandie AJA agreeing at [48]), quoting *Nguyen* (n 63) [36] (Redlich JA).

82 *Lissock* (n 64) [98]–[100] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]).

83 Ibid [98] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Iglesias v The Queen* [2006] NSWCCA 261, [10] ('*Iglesias*').

84 [2014] NSWCCA 272 ('*Khoury*').

85 *Lissock* (n 64) [99] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), quoting *Khoury* (n 84) [25].

86 *Lissock* (n 64) [100] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), quoting *Iglesias* (n 83) [13].

87 *Lissock* (n 64) [101] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]).

88 (1993) 70 A Crim R 449 ('*Jones*').

HIV-positive after sentencing.[89] The Court also referred to *R v Jacobs*,[90] where the applicant required medical treatment for an injury he sustained in a car accident prior to sentencing, and provided fresh evidence on appeal that indicated he was unable to access treatment in prison that the sentencing judge had believed would be available; the treatment he had undergone in prison was unhelpful; and 'surgical amputation was the only alternative' in prison, but 'there was another surgical procedure in the private health system that offered good prospects of alleviating [his] condition'.[91] The abovementioned cases can, nonetheless, be contrasted with *Fedele v The Queen*,[92] where a sentence was reduced on the basis that the defendant had undiagnosed early onset dementia at the time of sentence.[93]

Thus, while it is theoretically possible for prisoners in Australia to be granted early release for compassionate reasons through an appeal of their sentence, such appeals are unlikely to succeed, and courts lack coherent, transparent rules to guide their decisions regarding these applications.

C *Royal Prerogative of Mercy*

The royal prerogative of mercy is another means by which prisoners can potentially obtain early release from prison in Australia on compassionate grounds, but it is seldom utilised.[94] The Governor-General and Governors in each Australian state and territory have discretionary power at common law to grant a pardon to, or remit the sentence of, an offender in response to their petition and on the advice of the executive government.[95] The prerogative is usually only exercised in the federal jurisdiction through the grant of a pardon if the Attorney-General recommends that the Governor-General do so on the basis that the offender is 'morally and technically innocent' of the crime in relation to which they are seeking to be pardoned.[96] In other jurisdictions, it seems that the prerogative can be exercised in 'rare and

89 *Lissock* (n 64) [102] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Jones* (n 88).

90 [2001] NSWCCA 212 ('*Jacobs*').

91 *Lissock* (n 64) [103]–[105] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Jacobs* (n 90).

92 [2017] VSCA 363.

93 See also *Brierley v The Queen* [2022] NSWCCA 26 ('*Brierley*').

94 Heriot (n 8). For instance, between 1990 and 2012, the Governor-General only granted four pardons and a few full and partial remissions of fines. It appears that some data regarding the outcomes of petitions for the exercise of the royal prerogative of mercy may not be publicly available: see David Hamer, Gary Edmond and Megan McElhone, 'Submission: Review into Royal Prerogative of Mercy', *University of Sydney* (Submission, 9 February 2018).

95 Heriot (n 8); Caruso and Crawford (n 68) 313.

96 Heriot (n 8); 'Appeals', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/crime/federal-offenders/appeals>.

exceptional circumstances', including on 'compassionate grounds', such as 'medical issues', that have arisen for the offender since they were sentenced.[97]

The royal prerogative of mercy cannot, however, be relied upon to formulate a principled, systematic process for facilitating the early release of prisoners for compassionate reasons.[98] It is vague: legislatures have not provided guidance to the executive regarding the exercise of its discretion.[99] The prerogative has been criticised for contravening the separation of powers doctrine, as it permits the executive to exercise judicial power.[100] In addition, the courts probably have no power to review the executive government's exercise of the prerogative.[101] As a consequence, courts have not formulated clear principles for the exercise of the prerogative.[102] Given that it allows the executive to substitute the court's decision with its own, the royal prerogative of mercy is generally only exercised if the offender cannot obtain redress through any other channel.[103]

Legislative schemes 'operate alongside' the prerogative and empower Attorneys-General to refer a petitioned matter to a court either for its opinion on a question relating to it or as an appeal for review.[104] The decision not to refer a case can be subject to judicial review.[105] However, the court does not conduct an inquiry so

97 See, e.g., 'Royal Prerogative of Mercy', *NSW Government* (Web Page, October 2022) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/royal-prerogative-of-mercy.html>. The prerogative may also be granted for expedient reasons, such as to negotiate with hostage abductors: Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1, 21 ('The Place of Mercy in Sentencing').

98 For a different perspective, see Julian R Murphy et al, 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2020) 46(3) *Monash University Law Review* 252. Those authors argue that the Royal Prerogative of Mercy should be used more expansively to 'respond to the injustices and anomalies produced by mandatory sentencing regimes in Australia': at 254.

99 Law Council of Australia, 'Policy Statement on a Commonwealth Criminal Cases Review Commission' (Report, 21 April 2012) <https://lawcouncil.au/publicassets/0e6c7bd7-e1d6-e611-80d2-005056be66b1/120421-Policy-Statement-Commonwealth-Criminal-Cases-Review-Comission.pdf> ('Policy').

100 Caruso and Crawford (n 68) 313.

101 Heriot (n 8); Fox, 'The Place of Mercy in Sentencing' (n 97) 22.

102 Fox, 'The Place of Mercy in Sentencing' (n 97) 22.

103 Heriot (n 8).

104 See, e.g.: *Criminal Code Act 1889* (Qld) s 672A; *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b)–(c); *Criminal Procedure Act 1921* (SA) s 173(1); *Criminal Code Act 1924* (Tas) s 419. See also: Heriot (n 8); Law Council of Australia, 'Policy' (n 95); Caruso and Crawford (n 68) 313.

105 See *Martens v Commonwealth of Australia* [2009] FCA 207, [19]–[25] (Logan J); Heriot (n 8).

the offender must compile relevant evidence.[106] This process, too, potentially contravenes the separation of powers doctrine, including because it may involve the judiciary providing advice to the executive.[107]

D *Licence in the Federal Jurisdiction*

The federal jurisdiction is the only Australian jurisdiction that has a clear statutory process for prisoners to apply for early compassionate release from prison potentially longer than a few weeks before their scheduled release date, though the availability of this option has been tightly circumscribed. The Commonwealth Attorney-General or their delegate is empowered by the *Crimes Act 1914* (Cth) ('*Crimes Act*') to grant a 'licence' for a prisoner who has been convicted of a crime under Commonwealth legislation 'to be released from prison' on the basis of the existence of 'exceptional circumstances'.[108] Licences have been granted under this provision only in a small number of cases.[109] It has been clarified that a court is not empowered to grant such a licence.[110] However, it seems that judicial review of a decision not to grant a licence would be available.[111]

The Attorney-General has confirmed that '[r]elease on licence on compassionate grounds is only justified in extreme circumstances'.[112] The matters that the Attorney-General can consider in deciding whether 'he or she is satisfied that exceptional circumstances exist which justify the grant of the licence' are not restricted, but the *Crimes Act* provides that they 'may have regard to … any serious medical condition the person has that cannot adequately be treated or managed within the prison system'.[113] The Attorney-General's Department advises:

> In previous cases where a person has been granted early release on licence based on medical grounds, their medical condition has been deemed as terminal and they were

106 Law Council of Australia, 'Policy' (n 99).

107 Caruso and Crawford (n 68) 313–14.

108 *Crimes Act* (n 9) ss 19AP(1), (3)(b).

109 See, e.g.: *Jasmin v The Queen* (2017) 51 WAR 505; *Yasmin v Attorney-General of the Commonwealth of Australia* (2015) 236 FCR 169; *Ng v Attorney-General* [2017] FCA 1392 ('*Ng*'). Attorney-General Roxon relied on this provision to release 15 Indonesian minors who had been imprisoned for people smuggling: Heriot (n 8).

110 See *Wharton v The Queen* [2016] WASCA 21, [13] (Mazza JA).

111 In *Ng* (n 109), the Federal Court of Australia heard (but did not grant) an application for review of the decision of a delegate of the Attorney-General not to make an order under s 19APA(1)(d) of the *Crimes Act* (n 9) amending the terms of a release on licence that had been granted.

112 Attorney-General's Department, 'Early Release' (n 71).

113 *Crimes Act* (n 9) ss 19AP(4), (4A)(c). Sections 19AP(4A)(a)–(b) state that the Attorney-General also 'may have regard' to 'any extensive cooperation by the person with law enforcement agencies before sentencing that the sentencing court did not take into account' or 'any extensive cooperation by the person with law enforcement agencies after sentencing'.

> not able to be managed by the prison system. In these cases the person was released from prison, but was moved to a high care facility for treatment.[114]

The Attorney-General's Department contemplates that a prisoner could also apply for early release 'based on a family member suffering a serious medical condition', but notes (as indicated in the Explanatory Memorandum to the legislation) that '[g]enerally, family hardship (unless of an extreme kind) does not constitute exceptional circumstances'.[115]

There is little case law interpreting this provision for a prisoner to be released early from prison on a licence due to exceptional circumstances. Such guidance would be extremely helpful given the lack of a detailed statutory explanation of how the Attorney-General or their delegate should determine whether circumstances are sufficiently 'exceptional' to warrant granting a release on licence. As Greenwood J observed in *Hasim v Attorney General of the Commonwealth* ('*Hasim*')[116]

> the statute tells the decision-maker the *criterion* to be considered, that is "exceptional circumstances" … [but] does not identify the *factors* upon which the decision-maker might, or might not, be satisfied of that criterion or, in consequence, the weight to be attributed to any factor falling within the criterion since no factors relevant to the criterion are identified expressly by the Act. The criterion *itself* is identified but not the *informing features* of that criterion.[117]

An offender's release from prison on a licence does not give them complete freedom initially and the release may only be temporary. Where a prisoner in the Australian federal jurisdiction has a licence, 'the person is taken to be still under sentence'.[118] Further, licences are 'subject to the condition that the offender must, during the licence period, be of good behaviour and not violate any law' and any other conditions the Attorney-General specifies.[119] The Attorney-General can revoke a licence, for instance, if the offender breaches a condition that they imposed on the licence.[120] The *Crimes Act* states that licences for prisoners with a life sentence 'must specify the day on which the licence period ends',[121] and in the case of prisoners with shorter custodial sentences, generally their licence will end on the final day of

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114 Attorney-General's Department, 'Application' (n 10) 3.

115 Ibid; Attorney-General's Department, 'Early Release' (n 67).

116 (2013) 218 FCR 25 ('*Hasim*').

117 Ibid 36 [49] (emphasis in original). The phrase 'exceptional circumstances' has no fixed meaning and is context sensitive. In criminal law cases, the High Court has refused to define the parameters of this phrase (see, e.g.: *R v Hatahet* (2024) 418 ALR 520; *Hurt v The King* (2024) 418 ALR 63; *HT v The Queen* (2019) 269 CLR 403), other than to observe that it denotes a high threshold, requiring conditions that are unusual, uncommon, or out of the ordinary in the relevant legal context (*United Mexican States v Cabal* (2001) 209 CLR 165).

118 *Crimes Act* (n 9) s 19APB(1)(a).

119 Ibid ss 19AP(7)(a), (c).

120 Ibid s 19AU.

121 Ibid s 19AP(6)(a).

their sentence.[122] An offender can be released from prison permanently if no reason arises for their return to prison during the stipulated licence period.[123]

E *Response to the COVID-19 Pandemic*

There were calls for some prisoners to be released early from their custodial sentences during the COVID-19 pandemic due to the increased risks of them contracting the virus in prison, and developing a serious illness or dying from it, as well as new limits placed on incarcerated people's movement at this time.[124] Yet many Australian governments were resistant to these entreaties.[125] In Victoria, however, prisoners' sentences were modestly reduced through the mechanism of 'emergency management days'; prisoners were granted a reduction of a day of their sentences for each day that they experienced additional restrictions due to the COVID-19 pandemic (such as less time spent out of their cells).[126] In New South Wales, the *Crimes (Administration of Sentences) Act 1999* (NSW) was amended in order to permit the Corrections Commissioner to make an order releasing on parole a prisoner who 'belongs to a class of inmates prescribed by the regulations', which could be prescribed based on, inter alia, 'an inmate's health or vulnerability'.[127] The Commissioner could release the prisoner on parole if they were 'satisfied' that doing so was 'reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic' (though prisoners who were convicted of serious specified offences were ineligible for this leave).[128] This provision did not indicate that a prisoner's sentence was reduced as a result of being granted parole, though it presumably had that consequence. Most other Australian jurisdictions did not introduce such measures,[129] and a prisoner's application under the New South Wales provision would probably be rejected now that the COVID-19 pandemic is no longer classified as a public health emergency.

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122 Ibid s 16(1) (definition of 'licence period').

123 Ibid s 19APB(1)(b).

124 Natalia Antolak-Saper, 'COVID-19 and Prisoners: The Australian Experience of Early Release' (Blog, 17 June 2020) <https://blogs.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/06/covid-19-and-prisoners-australian-experience>.

125 See Murphy, Anderson and Bagaric (n 70) 45–7.

126 *Corrections Regulations 2019* (Vic) reg 100; *Corrections Act 1986* (Vic) s 58E; Murphy, Anderson and Bagaric (n 70) 45–7; Tom Cowie and Noel Towell, 'Victorian Prisoners Get COVID-19 Sentence Cuts', *The Age* (Web Page, 25 September 2020) <https://www.theage.com.au/politics/victoria/victorian-prisoners-get-covid-sentence-cuts-20200924-p55yvi.html>.

127 Antolak-Saper (n 120); Murphy, Anderson and Bagaric (n 70) 46–7; *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) sch 2, s 2.5, inserting *Crimes (Administration of Sentences) Act 1999* (NSW) s 276.

128 *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) sch 2, s 2.5.

129 Antolak-Saper (n 120). See further Thalia Anthony et al, 'Australia', in Friedrich Dünkel et al (eds), *The Impact of COVID-19 on Prison Conditions and Penal Policy* (Routledge, 2022).

IV Reform Proposal

Part IV(A) discusses this article's recommendation to introduce in all Australian jurisdictions a similar statutory process to that available in Australia's federal jurisdiction for offenders to apply, based on compassionate reasons, for early release from prison subject to a licence. As discussed in Part IV(B), three established sentencing considerations — mercy, proportionality, and community protection — could underlie a process outlined in legislation for offenders to apply for such a licence. These considerations could also inform courts' decisions regarding appeals of custodial sentences on the basis of prisoners' changed personal circumstances.[130] Part IV(C) proposes some compassionate grounds for issuing licences to offenders to be released early from prison in Australia. It suggests that the grounds articulated in the US Sentencing Commission's *Federal Sentencing Guidelines*, in particular, provide a starting point in developing those justifications. This part also recommends compassionate reasons that are especially relevant in Australia.

A *A Statutory Process for Applying for Early Compassionate Release from Prison*

This article recommends expanding the grounds on which a licence may be granted to criminal offenders to be released early from prison in the federal jurisdiction.[131] The article also suggests extending the licence process to other Australian jurisdictions, which could pass legislation establishing a similar mechanism. Hence, the scheme would apply to all prisoners in Australia.

As noted above,[132] it can be difficult for prisoners to produce fresh evidence that meets the high threshold that judges have imposed on the nature of evidence that can support an appeal of a sentence. Further, most prisoners would lack the legal training, funds and access to lawyers to initiate an appeal, and backlogs in the court system may inordinately delay the hearing of their appeals. By contrast, prisoners

130 This would only occur if the common law principle relating to mitigation of penalty on the basis of compassionate reasons personal to the offender was broadened in light of the considerations set out in this article. This might occur incidentally if the changes proposed in this article are implemented, but it is not the focus of this article.

131 The proposal for reform in this article is not related to the parole system. Parole boards in some jurisdictions can grant prisoners release on parole before they have completed the non-parole period of their sentence or another stipulated portion of their sentence in exceptional circumstances. See, e.g., *Corrections Act 1997* (Tas) s 70. However, there is no case law or data relating to the use of that provision, though it seems to have been raised in the context of end of life care for prisoners: see Tasmania Government, *Tasmania Prison Service Director's Standing Order DSO — 4.15 End of Life Care, Planning and Support* (2018) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0011/708563/End_of_Life_Care,_Planning_and_Support_-_DSO_4.15.pdf>. In any event, the reform suggested in this article would provide a process for the early release of prisoners for compassionate reasons, irrespective of the portion of their prison term that they have already served.

132 See Part III(B) of this article.

would not require legal expertise to apply for a licence for early release on compassionate grounds, would not incur costs in doing so, and presumably need not experience lengthy delays in receiving an outcome of their application if a non-judicial body makes these decisions.

For these reasons, it is recommended that a non-judicial entity is empowered to determine applications for licences, rather than that Australia follow the model of the US federal jurisdiction in the respect that courts hear compassionate release motions. Some may argue that, in granting a licence for early release, a non-judicial body would be usurping the judiciary's role. Nevertheless, this body would be reviewing a custodial sentence on the basis of information that was not known to the original sentencing court and emerged after it made its decision, in the administration of the sentence, rather than during the process of passing the sentence.[133] Moreover, judicial review of a decision regarding whether to grant an application for early release on licence could be available; as noted above, it appears to be possible for courts to review a decision not to grant a licence in the federal jurisdiction.[134] In addition to the advantages of avoiding the potential costs and delays associated with court applications, a non-judicial body may more effectively preclude vexatious or frivolous applications for early release from prison than courts. To that end, s 19AP(5) of the *Crimes Act* provides that the 'Attorney-General is not required to consider an application … [for a release on licence] in respect of a person if an application has been made … in respect of that person within one year before the first-mentioned application'. The legislature could develop criteria for a non-judicial body to apply in determining licence applications so that this process operates consistently and transparently.

Issuing a licence to an offender might be especially apposite where the decision-maker is uncertain about the risk that the offender may pose to public safety if released from prison. The licence would give the offender an opportunity to be released from prison on compassionate grounds, but ensure they were monitored for the duration of the licence if it is subject to a supervision order or conditions. Also for this reason, the licence process is preferable to the exercise of the royal prerogative of mercy by issuing a pardon or remitting the offender's sentence.

Parole boards would be appropriate and well-suited entities to perform the function of hearing and making decisions in relation to applications from prisoners for licences to be released early from prison on compassionate grounds. Parole boards are independent statutory authorities that have been established in each state or territory, but not in the federal jurisdiction, which may explain why federal offenders' applications for licences for early release are currently determined by the Attorney-General.[135] Empowering parole boards to determine applications for

133 To this end, an analogy can be drawn with parole boards, which are not typically viewed as usurping the role of courts.

134 See *Ng* (n 109).

135 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006) 572 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC103.pdf>.

licences for early release would obviate the need to establish a new independent entity for this purpose in jurisdictions other than the federal jurisdiction, and may even provide further impetus to act on calls for the creation of a parole board at the federal level.[136]

Parole boards have expertise in assessing prisoners' risks to the community and their prospects for rehabilitation. Moreover, they have demonstrated their capacity to make principled decisions without being unduly influenced by political pressure or community sentiment.[137] The membership of parole boards reflects a wide cross-section of the community, including, for instance, members of the legal profession, academics, health professionals and former police officers.[138] Various measures could nonetheless be undertaken to minimise the potential for corrupt practices to infiltrate the process of determining prisoners' applications for licences for early release on compassionate grounds, which, as noted above, have plagued some other early release schemes.[139] Amendments could be made to the legislation that establishes parole boards to empower them to make these decisions as well as to require them to produce clear written justifications for their determinations, which can be subject to public scrutiny and judicial review.

B *Consistency Between the Reform Proposal and Sentencing Considerations*

Although this article is not recommending that the judiciary exercise the authority to release offenders early from prison, the proposal is congruent with considerations that are taken into account in sentencing offenders in Australia. Those considerations reflect broad normative values and jurisprudential principles that underlie the Australian legal system. The consistency between an early compassionate release licence scheme and those sentencing considerations therefore highlights that the proposal would not represent a departure from the way in which criminal offenders are treated in Australia. Importantly, such a scheme advances the concept of individualised justice, which is integral to Australia's sentencing system. According to this notion, offenders receive sentences that differ from one another, depending on their particular circumstances.[140]

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136 Ibid 52; Law Council of Australia, *Principles Underpinning a Federal Parole Authority* (Position Paper, November 2022) <https://lawcouncil.au/publicassets/a7a4b479-1c80-ed11-9478-005056be13b5/2022%2012%2015%20-%20Attachment%20-%20Position%20Paper%20Federal%20Parole%20Authority.pdf>.

137 Robin Fitzgerald et al, 'Building Public Confidence in Parole Boards: Findings from a Four-Country Study' (2022) 62(6) *The British Journal of Criminology* 1395, 1401–2.

138 See, e.g., Adult Parole Board Victoria, 'Board Members' <https://www.adultparoleboard.vic.gov.au/about-us/board-members>.

139 See Part II of this article.

140 Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* 47, 51; Sarah Krasnostein and Arie Freiberg, 'Pursuing

1 *Mercy*

Mercy is an established sentencing consideration,[141] which is consistent with the grant of a licence to an offender to be released early from prison on compassionate grounds.

Judges and magistrates do not possess the prerogative of mercy;[142] rather, the principle of mercy is part of the sentencing discretion. The current consideration of mercy stems, but is distinct from, the royal prerogative of mercy, discussed above,[143] which has a religious origin and is rarely analysed in judicial decisions today.[144] Yet some Australian courts have commented on the role that the court's exercise of mercy can play in sentencing decisions and matters that should inform it. For instance, King CJ observed in *R v Osenkowski* that mercy reflects the court's sympathy for the defendant:

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended, even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.[145]

Nevertheless, in *R v Kane*,[146] the Full Court of the Victorian Supreme Court confirmed that, while sympathy for the defendant can influence the court's decision to exercise mercy, it must also be based on 'considerations which are supported by the evidence and which make an appeal … to well-balanced judgement'.[147] In that case, for instance, the Court considered that the trial judge had not given the sentencing goal of deterrence 'the weight that ought to have been allocated to' it.[148]

Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 265, 267.

141 See, e.g., *R v Osenkowski* (1982) 30 SASR 212 ('*Osenkowski*'). A related concept to mercy is parsimony, which is the principle that a sentence should not be harsher than that required to fulfil its social purpose: *NOM v Director of Public Prosecutions* (2012) 38 VR 618, 640–1 [68]. It has been expressly noted that parsimony is probably not part of sentencing law; see: *Blundell v The Queen* (2008) 70 NSWLR 660, 665–6, [39]–[47]; *Foster v The Queen* [2011] NSWCCA 285, [50]–[53] (Adams J).

142 *Johanson v Dixon (No 3)* [1978] VR 377, 383 (Young CJ for the Court).

143 See Part III(C) of this article.

144 Fox, 'The Place of Mercy in Sentencing' (n 97) 1, 4–5, 22.

145 *Osenkowski* (n 141) 212–13. Other courts have quoted this statement with approval; see, e.g.: *R v Davies* (2006) 164 A Crim R 353, [106] (Gray J); *R v Darby* [2011] NSWCCA 52, [51] (Hoeben J); and *Markovic v The Queen* (2010) 30 VR 589, 590 [1] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) ('*Markovic*'). See also Fox, 'The Place for Mercy in Sentencing' (n 97) 18–19.

146 [1974] VR 759.

147 Ibid 766.

148 Ibid 765.

Various circumstances could engender judges' sympathy for prisoners or their dependants, and lead them to exercise mercy by reducing a custodial sentence. In *Markovic v The Queen*, the Victorian Court of Appeal confirmed that, at common law, a defendant can seek the court's exercise of mercy on the ground of the hardship that their imprisonment would be likely to cause their immediate family or dependants to suffer.[149]

The principle of mercy is admittedly opaque in its application and cannot alone provide a doctrinal justification for the early release of offenders on compassionate grounds. However, mercy is relevant to the reforms proposed in this article because it demonstrates that the impulse to punish wrongdoers is not so strong that there is no place in our legal system for according leniency and compassion even to those offenders who have committed serious crimes. We now turn to another legal doctrine that is similarly consistent with our reform proposals.

2 *Proportionality*

The principle of proportionality is another established sentencing consideration that is congruent with the proposal for some prisoners' early release under a statutory licence for compassionate reasons. The High Court of Australia has confirmed that proportionality is a key objective of sentencing,[150] and legislation in all Australian jurisdictions recognises its importance.[151] The High Court explained the proportionality principle in *Hoare v The Queen*[152] as follows:

149 *Markovic* (n 145) 591 [2], [5], 593 [12].

150 *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

151 Section 5(1)(a) of the *Sentencing Act 1991* (Vic) 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: ss 5(2)(c)–(d). Section 6(1) of the *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence', and s 7(1)(a) of the *Crimes (Sentencing) Act 2005* (ACT) 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 federal crimes: *Crimes Act* (n 9) s 16A(2)(k). The same phrase is used in the New South Wales legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

152 (1989) 167 CLR 348.

> [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.[153]

As Richard Fox highlighted, the notion of proportionality — whereby 'punishments [have] to bear a reasonably predictable relationship to the offender's criminal conduct' — 'seems to embody notions of justice: People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not'.[154] Further, the principle is 'rooted in respect for the basic human rights of those before the court', and 'the idea that a response must be commensurate to the harm caused, or sought to be prevented, is to be found in many other areas of the law, both criminal and civil'.[155]

In the context of sentencing, courts apply the principle of proportionality by attempting to match the harshness of the penalty they impose to the gravity of the crime that the defendant committed. There is no precise, objective means of balancing these two factors,[156] but judges are able to determine the harshness of a sanction by evaluating its likely impact on the defendant's interests and welfare. Courts have acknowledged that aspects of a defendant's experience of incarceration, such as if they are compelled to serve time in solitary confinement, can increase the harshness of their sentence and potentially as significantly as the duration of the custodial sentence.[157]

Various shifts in an offender's personal circumstances that occur while they are in prison may make the experience of incarceration more onerous for them than the sentencing court envisaged. If that is the case, the offender's original sentence might not remain proportionate to the seriousness of their crime. Release of an offender early from prison pursuant to a statutory licence could restore the proportionality of their sentence. For example, it might be found that an offender's development of a serious medical condition while in prison has made incarceration more burdensome for them than if they had remained well, and this assessment could be balanced against the seriousness of the crime that they committed to reach a reduced sentence that remains proportionate.[158]

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153 Ibid 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (citations omitted).

154 Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(3) *Melbourne University Law Review* 489, 491–2.

155 Ibid.

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

157 See: *AB v The Queen* 198 CLR 111, 151–152 [105]; *R v Rose* [2004] NSWCCA 326 [35] (Hoeben J); *R v Patison* (2003) 143 A Crim R 118, 136 [86]–[87] (Carruthers AJ).

158 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. It has been observed that the need for equal impact of sanctions minimally entails that 'the system should strive to avoid grossly unequal impacts on offenders': Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Butterworths, 7th ed, 2021) 97.

There is some precedent for courts adjusting sentences owing to the offender's medical condition, so that they reflect the principle of proportionality. Although judges have considered that a defendant's ill health cannot be used as a 'licence to commit crimes',[159] courts have frequently treated it as a mitigating sentencing factor.[160] They have often conferred a sentencing discount on a defendant whose medical condition would make prison a more difficult experience for them than for a prisoner in better health. Indeed, in *Brierley v The Queen*, the Court reduced the defendant's sentence because it found that

> [f]or an 84-year-old offender with many other fundamental health issues, the endurance of this acute episode [of a diagnosis of and treatment for skin cancer] is a circumstance that has made the relatively short period of imprisonment ordered by the learned sentencing judge very significantly more burdensome than it otherwise would have been and much more burdensome than her Honour anticipated.[161]

3 *Community Protection*

The early release of an offender from prison pursuant to a licence on compassionate grounds will also be consistent with the sentencing aim of community protection if, as a consequence of a prisoner's changed circumstances, the offender poses less risk to the community than at the time of the original sentence. Community protection is set out as a sentencing objective in sentencing legislation in Australia's states and territories, though not in the federal jurisdiction,[162] and some of this legislation expressly states that it is the most important sentencing aim.[163] Courts have also observed that community protection is an important and even the principal goal

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

160 See, e.g.: *Eliasen v The Queen* (1991) 53 A Crim R 391 (the defendant had AIDS); *R v Magner* [2004] VSCA 202 (the defendant had bowel cancer); *AWP v The Queen* [2012] VSCA 41 (the defendant had a serious heart condition); *R v Van Boxtel* (2005) 11 VR 258, 266–7 [29]–[30] (Callaway JA) (the defendant had a spinal injury); *R v Puc* [2008] VSCA 159; *Pfeiffer v The Queen* [2009] NSWCCA 145 [13]–[14] (McClellan CJ at CL).

161 *Brierley* (n 93) [32] (Fagan J, Beech-Jones J agreeing at [1]).

162 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3(1)(b); *Sentencing Act 1991* (Vic) s 5(1)(e); *Sentencing Act 1995* (WA) s 6(4)(b). Section 16A(2) of the *Crimes Act* (n 8) nonetheless clarifies that its list of relevant matters that a court must take into account in sentencing is not exhaustive.

163 See, e.g.: *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 2017* (SA) s 3. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1), which states that 'community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender' (as an alternative to a prison sentence). For analysis of that provision, see: *R v Pullen* [2018] NSWCCA 264; *R v Fangaloka* [2019] NSWCCA 173.

of sentencing at common law, including in relation to federal offences.[164] Justice Brennan stated in *Channon v The Queen*:

> The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes … Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.[165]

To achieve the goal of community protection, courts will generally increase the severity of a sentence and often impose a prison term. Nevertheless, the decision-maker that is considering an application for early release from prison on compassionate grounds may find that fulfilling this objective is less necessary than it was at the time of sentencing owing to the offender's changed personal circumstances. This might especially be the case where the offender's physical condition deteriorates to the point that they cannot pose a risk to others' physical safety.

Thus, the three key established sentencing considerations discussed above are congruent with the proposal in this article for some offenders to be granted early release from prison on a licence for compassionate reasons.

C *Proposed Grounds for Early Compassionate Release of Prisoners in Australia*

We now propose compassionate grounds on which it might be appropriate to grant an offender early release from prison on a licence. We recommend that offenders be considered eligible for early release from prison when a circumstance arises during their incarceration that affects them in a way that could engender public compassion or sympathy for them. Generally, though not always, that circumstance would need to be unusual and unforeseen; otherwise, the court would have factored it into the sentencing calculus at the time of sentencing. Further, the circumstance must significantly increase the burden that the offender's imprisonment imposes on them and/or their dependant/s, which the offender's early release from prison could reduce or alleviate.

We recommend that Australian legislatures follow the model of the US federal jurisdiction by specifying several changes to prisoners' personal circumstances that may occur during their custodial sentence and make their experience of incarceration considerably more onerous than a sentencing court might have envisaged they would endure. Like the US Sentencing Commission's policy statement in the *Federal Sentencing Guidelines*,[166] they could also refer to various scenarios in

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164 See, e.g.: *Lodhi v The Queen* (2007) 179 A Crim R 470, 490–1 [87]–[88], 491 [92], 539 [274]; *DPP (Cth) v MHK* [2017] VSCA 157, [51], [66]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]–[113].

165 (1978) 20 ALR 1, 5. This passage has been cited with approval in numerous cases, including: *Boulton v The Queen* (2014) 46 VR 308, 326 [68] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

166 18 USC § 3553(a).

which those circumstances may arise. This would help address the concern raised by Greenwood J in *Hasim*.

Emulating that model, offenders' medical circumstances should be a key ground on which they may be eligible for early compassionate release from prison in Australia. Legislatures could outline that, as is the case in the US federal jurisdiction, such circumstances may include the offender's suffering from: (1) a terminal illness; (2) a serious physical or medical condition, functional or cognitive impairment or deterioration in their physical or mental health due to ageing, which reduces their capacity to look after themselves in prison and from which they are not expected to recover; or (3) a medical condition that requires long-term or specialised medical care that is unavailable in prison and without which their health may deteriorate significantly and from which they may die. This would expand the provision in the *Crimes Act* that, as noted above,[167] permits the Attorney-General, in deciding whether to grant a release on licence, to consider an offender's serious medical condition that is unable to be treated or managed satisfactorily in prison. Another medical circumstance of an offender that could be listed as a potential basis for early compassionate release is that the prison environment will cause their medical condition to worsen.

These medical circumstances of offenders might warrant their early compassionate release from prison. This might especially be the case, given the substantial deficiencies that numerous official investigations have identified in the healthcare that is available to prisoners in Australia.[168] Providing effective healthcare to offenders in a secure environment can be challenging.[169] Moreover, it has been well-documented that the prison population suffers disproportionately compared with the broader community from a range of serious physical and mental health conditions and thus has a greater need overall for health services.[170] The Australian Institute of Health and Welfare's report on the health of Australian prisoners, published in 2023, states that: 52% 'of prison entrants reported that they had ever been told they had a chronic physical condition'; 39% of 'prison entrants reported that a long-term

167 See Part III(D) of this article.

168 See, e.g.: *Prisoner Mental Health Care Taskforce* (Final Report, Tasmanian Department of Justice and Department of Health, March 2019) 6 <https://apo.org.au/sites/default/files/resource-files/2020-10/apo-nid308995.pdf>; Margaret Stevens, Department of Corrective Services, *Assessment of Clinical Service Provision of Health Services of the Western Australian Department of Corrective Services* (June 2010) 26–7, 31, 33, 45 <https://www.correctiveservices.wa.gov.au/_files/rehabilitation-services/health-care/hs-assessment-report.pdf>. For an extended exploration of these issues, see: Gabrielle Wolf, 'Health Care for Victoria's Prisoners: Honing Government Obligations' (2023) 34(4) *Public Law Review* 343; Gabrielle Wolf and Mirko Bagaric, 'Addressing a Human Rights Crisis: Health Care for Prisoners in Australia' (2024) 31(1) *Journal of Law and Medicine* 42.

169 New South Wales Inspector of Custodial Services, *Health Services in NSW Correctional Facilities* (Report, March 2021) 11 <https://inspectorcustodial.nsw.gov.au/documents/inspection-reports/Health_Services_in_NSW_Correctional_Facilities.pdf>.

170 Ibid.

health condition of disability affected their participation in everyday activities … or employment'; and 51% 'of prison entrants reported being told they had a mental health condition at some stage in their lives'.[171]

State and territory governments are responsible for the operation of prisons within their jurisdictions,[172] and it appears that many of them are not meeting the challenges of addressing offenders' healthcare needs adequately. Several inquiries have found that many prisoners may not obtain healthcare of the same standard as the healthcare that is available in the community.[173] Frequently, prisoners are unable to consult a medical practitioner promptly when they require it.[174] Prisons often lack enough health professionals and training of staff to respond to prisoners' healthcare needs,[175] mental health services,[176] support for prisoners with cognitive, intellectual and physical disabilities,[177] and facilities and treatment for prisoners

171 Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022* (Report, 2023) 25, 34, 37, 44 <https://www.aihw.gov.au/getmedia/e2245d01-07d1-4b8d-81b3-60d14fbf007f/aihw-phe-33-health-of-people-in-australias-prisons-2022.pdf?v=20231108163318&inline=true>.

172 As prisons are not designated as an area over which the Federal Government has legislative power under ss 51 and 52 of the *Australian Constitution*, the state and territory governments exercise this residual power.

173 See, e.g., Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (Report, 24 March 2022) 588 <https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-victorias-criminal-justice-system/reports>.

174 See: ibid 592; Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (November 2017) 11, 70, 72 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/> ('*Implementing OPCAT*'); NSW Inspector of Custodial Services (n 169) 112; Legislative Council Portfolio Committee No. 4 — Legal Affairs, Parliament of New South Wales, *Parklea Correctional Centre and Other Operational Issues* (Report No 38, December 2018) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/Report%20No%2038%20-%20Parklea%20Correctional%20Centre%20and%20other%20operational%20issues.pdf> 111–15.

175 See: Australian Capital Territory Inspector of Correctional Services, *Report of a Healthy Prison Review of the Alexander Maconochie Centre* (2022) 22–3 <https://www.ics.act.gov.au/reports-and-publications/healthy-prison-reviews/healthy-prison-reviews/healthy-prison-review-of-the-alexander-maconochie-centre-2022>; Victorian Ombudsman, *Implementing OPCAT* (n 174) 14, 99.

176 See: Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 41; Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (September 2015) 62, 149–50 ('*Rehabilitation*').

177 See: Australian Capital Territory Inspector of Correctional Services (n 175) 22, 24, 166–7; Legislative Council Legal and Social Issues Committee (n 173) 598; Victorian Ombudsman, *Implementing OPCAT* (n 174) 14, 95–6.

who are withdrawing from drug and alcohol addiction.[178] Appointments with specialists are often cancelled or rescheduled, owing to difficulties in arranging for staff to escort prisoners to them.[179] Further, prisoners can face delays in obtaining necessary medication.[180]

Legislatures could specify a further medical circumstance of an offender that could justify their early compassionate release from prison, namely, their high risk of self-harm and/or dying in custody. This ground might be especially pertinent to Aboriginal and Torres Strait Islander people who are overrepresented in prisons and have an extremely high rate of deaths in custody.[181] Recent inquests into deaths in custody of Aboriginal and Torres Strait Islander prisoners (including Veronica Nelson and Tanya Day) have highlighted prisons' failure to meet their healthcare needs and implement key recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody* regarding caring for prisoners who have a high risk of poor health outcomes, self-harm and suicide.[182]

The COVID-19 pandemic illuminated the heightened risks for prisoners of contracting and suffering from contagious diseases. It would therefore be appropriate for legislatures to mirror the relevant policy statement in the *Federal Sentencing Guidelines* by including in a list of offenders' medical circumstances that could justify their early compassionate release from prison that: they are incarcerated in a facility that is or has a high likelihood of being affected by an infectious disease; they have an inflated probability of suffering serious medical complications or dying if they contract it; and that risk cannot be reduced expeditiously.

178 See: Victorian Ombudsman, *Rehabilitation* (n 176) 6, 59, 149; Australian Capital Territory Inspector of Correctional Services (n 175) 171.

179 See: NSW Inspector of Custodial Services (n 169) 15, 101–6; Australian Capital Territory Inspector of Correctional Services (n 175) 158.

180 See Australian Capital Territory Inspector of Correctional Services (n 175) 21, 146, 174.

181 Megan Williams, 'Comprehensive Indigenous Health Care in Prisons Requires Federal Funding of Community-Controlled Services', *The Conversation* (online, 20 May 2021) <https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131>; 'Deaths Inside: Indigenous Deaths in Custody 2021', *The Guardian* (Web Page, 5 April 2021) <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>; Hannah Miles, Merran McAlister and Samantha Bricknell, *Deaths in Custody in Australia 2022–23* (Report, Australian Institute of Criminology, 17 December 2024) 10–12.

182 Coroners Court of Victoria, *Finding into the Death of Veronica Nelson with Inquest* (COR 2020 0021, 30 January 2023) (Coroner McGregor) [528], [536], [642], [829]–[830], [832]–[834]; Coroners Court of Victoria, *Finding into the Death of Tanya Louise Day with Inquest* (COR 2017 6424, 9 April 2020) (Deputy State Coroner English) [23]–[25], [167], [645], 107–9; Deloitte, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (August 2018) 246–9.

Another recommended potential ground for early compassionate release of prisoners in Australia is their experience of family hardship. As noted above,[183] the Attorney-General's Department has considered that the suffering from a serious medical condition of a family member of the offender could be a basis for their release on licence. However, the policy statement in the *Federal Sentencing Guidelines* outlines more expansive 'family circumstances' of an offender that may warrant their early compassionate release from prison.[184] In referring to the death or incapacitation of the caregiver of an offender's relative or a person who has a similar relationship with the offender to that of a close family member, the statement contemplates that, in this situation, the offender is the only person who can provide care for them. If this recommendation is adopted, in the case of Indigenous prisoners who apply for early release on licence, this ground should recognise their cultural understanding of family and kinship, which may be broader than a non-Indigenous concept of a biological, nuclear family.[185]

Australian legislatures could specify other circumstances listed in the relevant policy statement in the *Federal Sentencing Guidelines* as compassionate grounds for the early release of prisoners, namely: the offender's old age and consequent worsening of their health; and their experience of abuse in prison.[186] While the policy statement refers to abuse of an offender that is perpetrated by or under the direction of corrections staff, an offender could perhaps also be eligible for early compassionate release if they are the victim of severe abuse perpetrated by another prisoner.

Given the difficulty in predicting all possible circumstances that could affect offenders' experience of incarceration and the many risks to prisoners' health and life that can arise during their custodial sentences, it would be prudent for legislatures to adopt the catch-all provision in the policy statement in the *Federal Sentencing Guidelines*.[187] This could enable a decision-maker to take into account circumstances other than those specified, which are similar in gravity to them and might also constitute compassionate grounds for early release from prison. This could encompass, for example, an offender's incarceration for a lengthy period of time in solitary confinement and other similarly harsh conditions.

Despite this article's recommendation to allow for an expansion of the types of matters that could constitute 'exceptional circumstances' and the imprecision of this term, it is envisaged that early release of prisoners on licence would still be

183 See Part III(D) of this article.

184 *Federal Sentencing Guidelines* (n 4) § 1B1.13(b)(3)(D).

185 See Queensland Government, *Child Safety Practice Manual: The Meaning of Family in Aboriginal and Torres Strait Islander Cultures* (2019) <https://cspm.csyw.qld.gov.au/practice-kits/safe-care-and-connection/working-with-aboriginal-and-torres-strait-islander/seeing-and-understanding/the-meaning-of-family-in-aboriginal-and-torres-str>.

186 *Federal Sentencing Guidelines* (n 4) § 1B1.13(b).

187 See ibid § 1B1.13(b)(5).

the exception rather than the rule. Licences would not be granted routinely and would only be available to some offenders in unusual cases where the impact of their circumstances on them is particularly grave. Legislatures could also provide the guidance that Greenwood J called for in *Hasim* regarding 'factors upon which the decision-maker might … be satisfied of that criterion' (namely, that 'exceptional circumstances' exist).[188] For instance, they might indicate the extent to which particular circumstances must have affected the offender's quality of life to warrant a grant of a licence, and the relative significance of various factors in determining whether to grant a licence. Moreover, it is likely that limits on the scope of the suggested catch-all provision would be imposed by reference to case law in the sentencing context regarding the use of similar terms.[189] Notably, in the US, the availability of the compassionate release motion on the basis of 'extraordinary and compelling reasons' (a term that is similarly broad),[190] and the catch-all provision, have not led to the early release of prisoners unless their circumstances are meritorious and exceptional. This is evident from the reasons that US courts have provided for granting a reduction in the custodial sentence, which are noted above.[191]

Mirroring the law in the US federal jurisdiction, Australian laws could require that, in making decisions regarding applications for early release from prison on a licence on compassionate grounds, the key sentencing objectives are also taken into account. As is the case in the US, it is suggested that the reduced sentence must still be 'sufficient', though 'not greater than necessary' to fulfil these aims.[192] A key sentencing goal that should be considered in such matters should always be community protection. It is suggested that compassion for an offender can never override the need to ensure that the community is as safe as is reasonably possible. Thus, offenders who continue to pose a significant risk of committing serious violent or sexual offences should not be eligible for early release from prison for compassionate reasons. Australian courts have in fact already undertaken this weighing process when sentencing offenders. In *R v Wickham*,[193] Howie J stated:

> 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.[194]

188 *Hasim* (n 116) 36 [49].

189 For example, the Court in *DPP v Hudgson* [2016] VSCA 254, [112] (Weinberg, Whelan and Priest JJA) interpreted 'the word "compelling"' as '[connoting] powerful circumstances of a kind wholly outside what might be described as "run of the mill" factors, typically present in offending of this kind'.

190 18 USC § 3582(c)(1)(A).

191 See Part II of this article.

192 18 USC § 3553(a).

193 [2004] NSWCCA 193.

194 Ibid [18].

Like the policy statement in the *Federal Sentencing Guidelines*, Australian laws could stipulate that any victims of an offender must be notified of their application for early compassionate release from prison and given an opportunity to respond to it. It might also be reasonable for Australian law to adopt the specification in the policy statement of the *Federal Sentencing Guidelines* that a decision-maker can consider the offender's rehabilitation in determining whether, and if so the degree to which, it is appropriate to reduce their prison sentence on compassionate grounds. The extent of the offender's rehabilitation may be relevant to an assessment of the need to protect the community. It is recognised that evaluating an offender's prospects of rehabilitation is a difficult task. Nevertheless, sentencing judges and parole boards are required to and regularly do undertake such assessments. It is, however, important, especially in light of rising rates of recidivism in Australia in recent years, that such assessments are as accurate as possible. There are various means of predicting offenders' likelihood of rehabilitation as well as reoffending on which a decision-maker can rely. For instance, recent data shows that a strong predictor of an offender's reduced prospects of reoffending is if they undertake educational courses while in custody.[195]

It might be assumed that a law reform that will result in the early release of some offenders from prison, such as the one proposed in this article, would not appeal to the electorate. Nevertheless, that will not necessarily be the case. Some empirical studies found that the majority of community members who participated in them would have recommended more lenient sentences for offenders than judges.[196] Further, even if voters favour harsh punishment of offenders, they may nonetheless approve of a reform that is measured and jurisprudentially sound.[197] The US is a more punitive nation than Australia, yet its compassionate release provisions have not met with significant political resistance. That example provides a strong basis for having confidence in the smooth passage of similar laws through Australian legislatures.

The precise institutional framework that could be implemented to facilitate the proposed reforms is beyond the scope of this article, but we now canvas some options for decision-makers of licence applications. Decisions regarding prisoners' applications for early release on licence on compassionate grounds could be made

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195 See Mirko Bagaric, 'Reducing Recidivism and Incarceration Through Education' (2024) 54(1) *Australia Bar Review* 42. In the near future, it is possible that artificial intelligence tools will also be able to assist in predicting the likelihood of recidivism: see Dan Hunter, Mirko Bagaric and Nigel Stobbs, 'A Framework for the Efficient and Ethical Use of Artificial Intelligence in the Criminal Justice System' (2020) 47(4) *Florida State University Law Review* 749.

196 Victorian Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2019) 1, 9 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Public_Opinion_about_Sentencing_Research_Overview.pdf>.

197 This is the situation even in countries that have very punitive sentencing practices, such as the US: see Mirko Bagaric et al, 'American Exceptionalism at its Finest: "Soft on Crime" Now a Vote-Winner in the World's Largest Incarcerator' (2021) 25(2) *Lewis and Clark Law Review* 489.

by the Attorney-General's Department or administered by an independent agency. Nevertheless, as discussed above, empowering parole boards to determine applications for licences for early release on compassionate grounds would have various advantages. Parole boards are well-established institutions and have shown they are able to make decisions on the basis of principle, without being swayed by political or public views. In any event, as noted previously, ensuring the transparency of parole boards' decision-making with respect to such applications, for instance, by requiring them to produce written determinations, could be one mechanism to preclude corrupt practices infiltrating this process, which has affected other early release schemes.[198]

V Conclusion

While incarcerated, and especially during long custodial sentences, prisoners can experience changed personal circumstances that may be dramatic and unforeseeable. Although some can have a positive impact on them, others can make their term of imprisonment considerably more onerous than the sentencing court contemplated they would endure and certain justifications for their custodial sentence will no longer be applicable. Incarceration is the harshest sanction in Australia's sentencing system. Creating the potential for an offender's original custodial term to be reduced in response to the impact on them of unfortunate and unforeseen vicissitudes in their life is humane. Early release from prison on compassionate grounds is also consistent with the notion of individualised justice, on which Australia's sentencing system is premised; as noted above, a sentence may deviate from one imposed for other offenders, in order to accommodate the individual's specific circumstances.

Yet there are currently few opportunities for early compassionate release from prison in Australia. Offenders can appeal their sentences, but will face the often difficult hurdle of producing fresh evidence. Further, courts rarely overturn sentences on appeal on compassionate grounds and lack clear rules for doing so. Notwithstanding the opportunity for an offender to petition the executive government to exercise the royal prerogative of mercy, its operation is vague, it is rarely exercised, and it has been criticised for contravening the separation of powers doctrine. In the federal jurisdiction, prisoners can apply for 'release on licence', though that, too, is available only in limited and extreme situations.

This article has suggested reforms to address this gap in the law. It proposes that all Australian jurisdictions pass legislation establishing a statutory process similar to the one that is available in Australia's federal jurisdiction for offenders to apply for early release from prison subject to a licence for compassionate reasons. As the article highlights, this reform proposal is consistent with three established sentencing considerations — mercy, proportionality, and community protection — which reflect significant normative and jurisprudential principles that underlie Australia's legal system.

198 See Part II of this article.

This article has proposed adopting aspects of the law in the US federal jurisdiction to develop compassionate grounds for offenders' early release from prison in Australia. That jurisdiction has a process for prisoners to apply for early compassionate release and has recently expanded the potential for such applications to be granted. The article recommends that, following this model, legislatures specify changes to prisoners' personal circumstances that may occur during their custodial sentence and make their experience of incarceration substantially more burdensome than a sentencing court might have envisaged they would endure. According to this reform suggestion, the major changed circumstances of offenders that could make them eligible for early compassionate release from prison are: some serious medical circumstances (which may be especially applicable to certain offenders due to the documented inadequacies in prisoner healthcare in Australia); hardship for the offender's family and, in particular, where the offender's relative or someone who is as close to the offender as a family member depends on them for care; the offender's old age and consequent deterioration of their health; and the offender's experience of abuse in prison.

In addition, the article recommends that decision-makers be permitted to consider whether circumstances other than those specified are similar in gravity to them and might also constitute compassionate grounds for early release from prison. This could encompass an offender's incarceration for a lengthy time period in solitary confinement or similarly harsh conditions. Further, it is suggested that, in determining an application for early release from prison on a licence on compassionate grounds, decision-makers also be required to take into account the key sentencing objectives, and especially the need for community protection. While it is just and reasonable to consider an offender's changed circumstances, it is vital that their custodial sentence is not reduced if doing so would jeopardise public safety.

This article has focused on explaining the rationale for expanding the potential for some prisoners to be released early from custody on compassionate grounds, but it has also proposed a means of implementing the proposed reforms. As outlined in the article, it is recommended that parole boards determine prisoners' applications for compassionate early release. This would avoid the need to create new entities for this purpose. Moreover, parole boards are longstanding institutions with experience in making principled decisions, and are generally regarded as being less susceptible to political and populist pressure than other non-judicial bodies. Expanding the scope for compassionate early release is congruent with a sentencing system that is informed by principles of mercy and proportionality, and that aims to protect the community.