



Exemptions from Mandatory Minimum Penalties

Recent Developments in Selected Countries

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Introduction

The question of mandatory minimum penalties and their impact on recidivism, the criminal justice process and prisons continues to be quite controversial. In some instances, the statutory minimum penalties are completely mandatory and do not allow any exception. However, in the majority of countries where they are part of sentencing law, some exceptions to their imposition have been provided by law. These exceptions or exemptions allow courts to impose sentences below a mandatory minimum penalty in some circumstances or whenever their strict application may result in unjust outcomes. At present, with only one small exception, such a “safety valve” or “exceptional relief” provision does not exist in Canadian sentencing law.

In 2012, a report was prepared for the Uniform Law Conference of Canada Working Group studying the question on *Exemptions from Mandatory Minimum Penalties* (Dandurand, 2012). The report examined the application of mandatory minimum penalties and reviewed the experience of several jurisdictions where exceptions to, or other forms of relief from, the application of such mandatory minimum penalties had been provided by law. Most specifically, the report presented a brief comparative analysis of legal provisions permitting a court in appropriate circumstances to provide relief from the imposition of certain mandatory minimum penalties where the imposition of such custodial sentences would result in an unjust sentence. The following year, the Uniform Law Conference of Canada (Criminal Section) published its own report on the issue (Uniform Law Conference of Canada, 2013).

The present report updates the 2012 study, highlights the application of mandatory minimum penalties and reviews the experience of selected jurisdictions where exemptions or other forms of relief have been instituted. The first section revisits the mandatory minimum penalties schemes that were included in the 2012 study to examine whether they have evolved since then. The following section examines the various types of exemptions from these schemes, again with a view to understand if and how they have changed since 2012. This is concluded by a short discussion of these various forms of exemptions and how they have been applied, interpreted or amended in the last four years or so.

Mandatory Minimum Penalties

Mandatory minimum penalties schemes take many forms. Some require that a minimum prison sentence be imposed for designated offences. An automatic life sentence for certain crimes is also a form of mandatory minimum sentence. Mandatory sentences generally prescribe both the type of sanction and the minimum level of the sanction. The mandatory minimum penalty sometimes apply only to recidivists, as they provide for more severe sanctions for repeat offenders or for someone previously convicted of a felony, such as the ‘three strikes and you’re out’ law in many American jurisdictions. Mandatory sentencing may also require that an incremental penalty be imposed on convicted offenders meeting certain criteria (e.g., anyone committing an offence involving a firearm). In some instances, the mandatory minimum sentences scheme is presumptive, when it specifically stipulates grounds upon which the court may find the presumption to be rebutted and proceed to exercise its sentencing discretion. Finally, there are mandatory sentencing provisions that function indirectly by specifying a

minimum non-parole period to apply in the case of certain serious offences. Some of these schemes allow for exceptions or exceptional relief, others do not, or do so only in very limited situations. There is a considerable amount of research and a very heated debate on the advantages and disadvantages of mandatory minimum sentences and the problems associated with them. However, our focus here is not on the impact of these mandatory penalties schemes, but on the different ways in which exceptions or possible relief from their application exist in relation to such schemes and how they are applied.

United States

In the USA, at the federal level, mandatory minimum penalties have been prescribed over the years for a core set of serious offences, such as murder and treason, and also have been enacted to address immediate problems and exigencies. Since the mid-1950s, Congress enacted more mandatory minimum penalties and expanded their application to offences not traditionally covered by such penalties. Mandatory minimum penalties generally relate to controlled substances, firearms, identity theft, and child sex offences (United States Sentencing Commission, 2011). Over the years, most American States have also adopted mandatory minimum penalty laws. It was noted that mandatory minimums were America's most frequently enacted sentencing law changes between 1975 and 1996 (Tonry, 2009; 2014; Spohn, 2014), but a slow movement away from that approach can now be observed.

The Supreme Court's decision in *Alleyne v. United States*¹ heightened the role of prosecutors in determining whether a defendant is subject to a mandatory minimum sentence and held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt.² It was argued at the time that:

“*Alleyne* represents a significant development in the tug-of-war between the judiciary and the legislature over control of the sentencing process: it is thus the next major chapter in the rollback of structured sentencing reforms and legislative authority over sentencing factors that began in *Apprendi*³. Indeed, given the Court's near-total elimination of binding sentencing factors, *Alleyne* may even be the last such chapter.”⁴

In 2013, the U.S. Department of Justice launched the “Attorney General's Smart on Crime Initiative” with the aim of reducing the use of mandatory minimum sentences for low-level, non-violent drug crimes, and encouraging the use of diversion measures (US Department of Justice, 2013). The US Attorney General, Eric Holder, announced that it was “time for meaningful sentencing reform” and that, as a start, he was announcing a change in Department of Justice charging policies so that certain people who have committed low-level, nonviolent drug offenses, who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with

¹ *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

² The Attorney General explained that: “This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty” (US Attorney General, 2013: 3).

³ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁴ Supreme Court, Leading Cases - Mandatory Minimum Sentences — *Alleyne v. United States*, 2013, *Harvard Law Review*, 127:248-257: 257.

offences that impose draconian mandatory minimum sentences (U.S. Department of Justice, 2013:3).

In August 2013, the Attorney General issued two memoranda bringing changes to the federal charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders (US Attorney General, 2013; 2013a). The first memorandum directed prosecutors who are charging an offender with an offence subject to a mandatory minimum sentence to ensure that the charging document includes those elements of the crime that triggers the statutory mandatory minimum penalty. The Attorney General quoted four reasons for the change in prosecutorial policy: (1) “mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences”; (2) these statutes have also resulted in “perceived or actual disparities that do not reflect our Principles of Federal Prosecution.”; (3) long sentences have failed to “promote public safety, deterrence, and rehabilitation”; and, (4) “rising prison costs” must be lowered in order to divert spending to other criminal justice initiatives (the so-called “justice reinvestment” policy) (US Attorney General, 2013). Observers have argued that the “continued reliance on prosecutorial discretion will perpetuate disparity in sentencing and will also undermine Congress’ goal in creating the U.S. Sentencing Commission” (Dahl, 2014: 272).

In addition, several legislative initiatives are being considered in the Senate and the House of Representatives to broaden existing “safety valves”⁵, including: the *Justice Safety Valve Act, 2015*⁶ which would give sentencing judges the authority to depart from mandatory minimum sentences for non-violent offenders who meet specific criteria ; the *Smarter Sentencing Act, 2015*⁷ which would expand the existing “judicial safety valve” for drug related crimes; and the *Safe, Accountable, Fair and Effective Justice Act, 2015*⁸, which would reform federal sentencing statutes to modify mandatory minimum sentences so as to exclude from their reach people whose role in a drug trafficking offense is low-level or minimal. The latter initiative, if successful, would also reinstate judicial discretion through “safety valves” that would allow judges to impose sentences in some drug offence cases that are shorter than those required by mandatory minimums.

Several authors have noted that, when reducing these penalties or repealing them altogether is not possible, a politically viable strategy for reducing the detrimental impact of mandatory minimum penalties and prevent injustices is to permit judges to sentence an offender below a statutory minimum when certain criteria are met (Cassel and Luna, 2011; Tonry, 2014). The issue then becomes one of identifying what these criteria (or thresholds) should be.

Additionally, a recent decision of the United States Supreme Court, in *Miller v Alabama* (2012), declared mandatory sentences of life without parole for juveniles unconstitutional.⁹ It decided

⁵ Currently, the safety valve provision cannot be applied to defendants facing a mandatory minimum sentence for an offense that is not drug-related.

⁶ *Justice Safety Valve Act, 2015*, (S-353/H.R. 706).

⁷ *Smarter Sentencing Act of 2015* (S. 502/H.R. 920).

⁸ *Safe, Accountable, Fair, Effective Justice Reinvestment Act of 2015* (H.R. 2944).

⁹ *Miller v. Alabama*, 567 US (2012): “Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the Federal Government have

that a mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment when the offender is under the age of 18 at the time of the offence (Kennedy, 2014; Fiorillo, 2013; Price, 2013). The decision is ostensibly based on new scientific evidence on the difference between children and adults. At this point, the implications of that decision for those already serving a mandatory sentence are unclear.

England and Wales

In England and Wales, murder carries a mandatory sentence of life imprisonment under the *Murder (Abolition of Death Penalty) Act 1965*. Minimum terms are now set by the courts using sentencing principles set out in the *Criminal Justice Act 2003* (Lipscombe and Beard, 2015). A mandatory life sentence for a second serious violent or sexual offence was once required – it was repealed in 2003. The *Powers of the Criminal Court (Sentencing) Act 2000* includes mandatory minimum sentences for second serious offences (s. 109), as well for a third drug trafficking offence (s.110), or a third domestic burglary (s.111). The *Criminal Justice Act 2003* introduced some mandatory sentences for violent and sexual offenders. It also established a mandatory minimum sentence for unauthorized possession or distribution of a prohibited firearm.¹⁰ Section 29 of the *Violent Crime Reduction Act 2006* introduced a minimum penalty for new firearms related offences.¹¹

The *Criminal Justice Act 2003* also created a second statutory body, the Sentencing Guidelines Council. The Council's guideline list a number of factors as personal mitigation, including remorse, the fact that the offender was a sole or primary carer for dependent relatives and, "good character and/or exemplary conduct." The list is non-exhaustive and leaves room for "discretion for a court as well as room for counsels' submissions on personal mitigation to reflect the highly variable circumstances of individual offenders" (Roberts, 2013: 8; see also: Roberts, 2012).

South Africa

In South Africa, prior to 1980, mandatory minimum sentences were in place for corrective training and the prevention of crime. These mandatory minimum penalties were removed from South African law after the Viljoen Commission¹² found that their mandatory nature did not permit individual circumstances to be taken into account and resulted in unfair sentences (O'Donovan and Redpath, 2006). Very strict mandatory minimum penalties were enacted in 1997 for serious offences and minimum 10, 20, and 30 year sentences were required for first, second and third rapes.¹³ These sentencing dispositions which were initially enacted for a period of two years were successively renewed and remained in effect until 2009. The legislation permits courts to depart from the mandatory minimum sentences if they are satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence,

decided that for some of these offenders life without parole should be mandatory.(...) The majority of this Court now overrules these legislative judgments."

¹⁰ *The Criminal Justice Act 2003*, sections 287 and 293.

¹¹ *Violent Crime Reduction Act 2006*, s. 29(6)(b).

¹² Report of the Commission of Enquiry into the Penal System of the Republic of South Africa ('Viljoen Report'), 1976.

¹³ *The Criminal Law Amendment Act* (No. 105 of 1997).

but does not provide any guidance regarding the meaning and application of the phrase “substantial and compelling.”

Australia

In Australia, the six states, two mainland territories and the federal government establish their own sentencing framework in criminal legislation. Generally, criminal laws in Australia set a maximum penalty for an offence, but do not set a minimum penalty.

People smuggling is the only crime that attracts a mandatory minimum penalty under federal laws. In 2010, the law was amended to extend the mandatory minimum penalty provisions in the *Migration Act 1958 (Cth)* to apply the higher minimum sentence and non-parole period for a new aggravated offence of people smuggling involving exploitation or danger of death or serious harm and where a person is convicted of multiple people smuggling offences.¹⁴ Section 233A(1) of the *Migration Act 1958* creates the offence of people smuggling with no mandatory minimum sentence while section 233C(1) carries a mandatory minimum term of imprisonment of five years with a minimum non-parole period of three years; a person who smuggles a group of five or more unlawful non-citizens could be charged with either offence (See: Roth, 2014; Trotter and Garozzo, 2012; Bagaric and Pathinayake, 2012).

In 2012, there was an unsuccessful legislative initiative to remove the existing mandatory minimum penalties for people smuggling.¹⁵ The Senate Committee that studied the Bill recommended against its adoption, but also recommended that the Australian Government “review the operation of the mandatory minimum penalties applied to aggravated people smuggling offences, with particular reference to: (1) alternative approaches to mandatory minimum sentencing provisions, including where judicial officers are given discretion to impose lesser sentences where they are satisfied that the circumstances would make it unjust to impose the prescribed sentence for an offence; (2) options for differentiating between the organisers of people smuggling operations and boat crew of these operations in sentencing; and, (3) specific concerns raised during this inquiry regarding Australia's human rights obligations under international law” (Commonwealth of Australia, 2012: 22). The same year, following the Report of the Expert Panel on Asylum Seekers (Australian Government, 2012), the Attorney-General, acting under s.8(1) of the *Director of Public Prosecutions Act 1983 (CTH)*, gave specific direction to the Director “not institute, carry on or continue to carry on a prosecution for an offence” under s.233C of the Act unless satisfied that the accused had committed a repeat offence, the accused's role in the people smuggling venture extended beyond that of a crew member, or a death had occurred in relation to the venture” (quoted in Roth, 2014:12).

In 2013, a High Court decision upheld the right of the federal government to set minimum sentences.¹⁶ The High Court was asked to determine “whether the provisions creating the offences, or the provision fixing a mandatory minimum term of imprisonment for the aggravated offence, were beyond legislative power?” In a majority of six to one decision, the High Court dismissed the appeal and held that although prosecuting authorities had a choice as to which

¹⁴ *Anti-People Smuggling and Other Measures Act 2010*.

¹⁵ *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*.

¹⁶ *Magaming v The Queen* [2013] HCA 40 (11 October 2013).

offence to charge, that choice did not involve an exercise of judicial power or confer on prosecuting authorities an ability to determine the punishment to be imposed for the same conduct, even where one available offence prescribed a mandatory minimum sentence. The High Court also held that the imposition of a mandatory minimum sentence was not inconsistent with the institutional integrity of the courts and did not involve the imposition of an arbitrary sentence.

According to a guide for officers in Australian Government departments working on framing criminal offences that are intended to become part of Commonwealth law states, there are several reasons why mandatory minimum penalties should be avoided. It states that “(o)ther than in rare cases, Commonwealth offences should carry a maximum penalty rather than a fixed penalty and should not carry a minimum penalty” (Australian Government, 2011: 37).

A few Australian states have also enacted mandatory minimum penalties. In the *Northern Territory* a mandatory minimum penalties scheme came into force in 1997, through amendments to the *Juvenile Justice Act 1983* (NT) and the *Sentencing Act 1995* (NT).¹⁷ The scheme introduced mandatory minimum penalties for a broad range of property offences, including theft (but not shoplifting), criminal damage, unlawful entry into buildings, unlawful use of a vehicle, possession of goods suspected of being stolen, and receiving stolen property. For juveniles, 15 and 16 year-olds found guilty of a second or subsequent property offence, a 28-day period of detention was made mandatory. For offenders aged 17 and over a minimum term of 14 days applied to a first offence and escalating minimum terms for repeat offenders: 90 days for second time offenders and 12 months for third time offenders.

Two years later, following some controversial cases, the *Sentencing Amendment Act 1999* introduced some ‘exceptional circumstances’ provisions which provided that defendants before the court for a single property offence that was trivial in nature could have a non-custodial penalty imposed on them if they could prove that they cooperated in the investigation of the offence; that there were mitigating circumstances (other than intoxication); that the offence was an aberration from their usual behaviour and that they were otherwise of good character and had made efforts towards restitution.¹⁸

The mandatory penalties for property offences remained in effect until 2001.¹⁹ In 2001, a newly elected government repealed the mandatory sentencing regime for juvenile property offences and replaced it in with a more flexible scheme for adult offenders convicted of robbery. In June 1999, the *Sentencing Act* was amended to impose a mandatory minimum sentence for second offences of assault and first offences of sexual assault. This applies to adults. A jail term is mandatory, but no minimum sentence is prescribed. The mandatory penalties for violent and sexual offences were repealed in 2007. In 2008, a new law²⁰ extended minimum sentencing

¹⁷ *Sentencing Amendment Act (No. 2) 1996* (Act No. 65, 1996).

¹⁸ *Sentencing Act 1995* (NT) s. 78A(6B)-(6C), (6E), enacted by the *Sentencing Amendment Act 1999*. A sentence imposed under the exceptional circumstances provisions did not amount to a ‘strike’ for the purposes of the mandatory imprisonment provisions (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2002).

¹⁹ *Sentencing Act* (NT) s. 78B, s. 78BA and s. 78BB.

²⁰ *Sentencing Amendment (Violent Offences) Act 2008* (NT).

provisions to first time violent offenders with respect to: unlawfully causing harm or serious harm to another; aggravated assault causing harm; and, aggravated assault on a police officer. In 2013, legislation was adopted to replace the existing scheme with a new minimum sentencing scheme for violence offences²¹ (Roth, 2014; Whyte et al., 2015).

Between 1992 and 1994, *Western Australia*'s criminal law mandated the imposition of a minimum sentence for automobile theft.²² In 1996, amendments to the *Criminal Code* introduced "three-strikes" penalties for people convicted of a third and consecutive household burglary offences.²³ Section 401(4) states, in effect, that a person convicted for a third time of entering a home without permission and who commits an offence in "circumstances of aggravation", or who intends to commit such an offence, must be sentenced to imprisonment for at least 12 months. Section 400(1) defines "circumstances of aggravation" as including: being armed with a dangerous weapon; being in company with other armed persons; causing bodily harm; and, threatening to kill or injure. The section is specifically extended to juveniles. If the offender is a young person (as defined in the *Young Offenders Act 1994*), the offender may be sentenced either to imprisonment for at least 12 months or to a term of detention of at least 12 months (as defined in the *Young Offenders Act*). In 2009, minimum sentences of imprisonment were added to the law for persons who commit assaults against a police officer, a prison officer, or a transport security office.²⁴ In 2012, minimum terms of imprisonment for adult offenders committing certain offences at the direction of, in association with or for the benefit of criminal organizations.²⁵ Finally, in 2015, a new legislation increased mandatory minimum penalties for violent offences related to a home invasion.²⁶

New South Wales also imposes some mandatory minimum penalties from which a court may deviate for "good reasons." The law sets standard non-parole periods for a number of serious offences. Standard non-parole periods, are arguably mandatory sentences, but in this case courts may set longer or shorter sentences if there are particular reasons for doing so. In 2013, the State adopted new legislation²⁷ to clarify the process by which a standard non-parole period should be applied in an individual case. In 2014, the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*²⁸: (1) created a separate offence (with a maximum penalty of imprisonment for 20 years) where an assault by intentionally hitting a person causes death (without the necessity to prove that the death was reasonably foreseeable and whether the person was killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault); (2) created an aggravated form of that separate offence and increased the maximum penalty to imprisonment for 25 years when the offence is

²¹ *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT).

²² *Crime (Serious and Repeat Offenders) Sentencing Act 1992*.

²³ *Criminal Code Amendment Act (No.2) 1996*.

²⁴ *Criminal Code Amendment Act 2009* (WA). In 2013, this was extended to youth custodial officers, by *Criminal Code Amendment Act (No. 2) 2013* (WA).

²⁵ *Criminal Organisation Control Act 2012* (WA) (NO 49 of 2012)

²⁶ *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) (NO 25 of 2015).

²⁷ *The Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*. Act No 78 of 2013 (NSW).

²⁸ *Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014*, Act No 2 of 2014 (NSW).

committed by an adult when intoxicated; and, (3) required the court to impose a minimum sentence of imprisonment for 8 years on a person guilty of that aggravated intoxication offence; and, (4) prevents self-induced intoxication being taken into account as a mitigating factor in determining the appropriate sentence for any offence. In 2015, two new laws were adopted which amended the *Crimes (Sentencing Procedure) Act 1999*. The first one established standard non-parole periods for a number of firearms offences²⁹. The second established standard non-parole periods for various child sex offences and made the offence of having sexual intercourse with a child who is under the age of 10 years punishable by a minimum of 8 years of imprisonment and maximum penalty of life imprisonment, while stipulating that a person thus sentenced is "to serve that sentence for the term of the person's natural life".³⁰

In *Queensland*, in 2012, mandatory terms of life imprisonment (without parole for at least 20 years) were introduced in the law for repeat serious child sex offenders.³¹ The same year, Queensland introduced minimum sentencing provisions in relation to serious firearms offences.³² The two sets of provisions do not contain any exception from the mandatory penalties.

In *Victoria*, in 2013, the law was amended to include mandatory terms of imprisonment (with a minimum period of non-eligibility for parole of four years) for adults who commit the offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence.³³ The circumstances of gross violence include planning the offence, acting in company with two or more other persons, participating in a joint criminal enterprise, planning and using a weapon in the offence, and continuing to cause injury to the person after they were incapacitated. These provisions only apply to adults. In addition, the provisions do not apply if a court is satisfied that a "special reason" exists.

New Zealand

In New Zealand, life imprisonment was the mandatory minimum penalty for murder³⁴, until amendments were adopted in 2010.³⁵ The *Sentencing and Parole Act 2010* introduced a "three strike" sentencing regime (or a sentence escalation regime) for certain qualifying offences. In that regime, courts are required to warn qualifying offenders and then increase penalties for subsequent offences. Most importantly, on a "third strike", the courts are to impose the maximum term of imprisonment prescribed for that offence unless that would be "manifestly unjust." The courts are also to order that the offender be ineligible to apply for parole unless that order would be "manifestly unjust."³⁶ These dispositions have not been changed since then.

²⁹ *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Bill 2015*, Act No 17 of 2015.

³⁰ *Crimes Legislation Amendment (Child Sex Offences) Bill 2015*, Act No 13 of 2015 (NSW).

³¹ *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (QLD)

³² *Weapons and Other Legislation Amendment Act 2012* (QLD)

³³ *Crimes Amendment (Gross Violence Offences) Act 2013* (VIC).

³⁴ *Sentencing Act 2002*, Public Act 2002 No 9, New Zealand.

³⁵ *Sentencing and Parole Act 2010*.

³⁶ See: Ekins and Brookbanks (2010) and Chhana et al. (2004).

Israel

In Israel, a mandatory life imprisonment for murder can be avoided only under a few exceptional circumstances prescribed by law. Over the last fifteen years, minimum penalties were introduced for several offenses.³⁷ In such instances, judges are permitted to consider mitigating circumstances and to depart from the minimum sentence as long as they state the reasons for their decision (Gazal-Ayal et al., 2013). In 2015, Israel amended its civil law to establish a minimum prison sentence of three years for people who “firebomb” or throw rocks at Israeli troops, civilians or vehicles. Judges can use their discretion in cases involving “special circumstances”. The law has a sunset clause that will require its review in three years.

Types of Relief Available

Different types of relief from or exceptions to the application of mandatory minimum penalties have been adopted in the laws reviewed here. Each of these approaches is reviewed below, but it should be noted that these categories are far from being mutually exclusive.

1. Relief or exclusion from the application of mandatory minimum penalties to those under 18 (juveniles)

In the United States, as mentioned earlier, the Supreme Court abolished mandatory life imprisonment without parole of juvenile offenders³⁸ (Fiorillo, 2013; Price, 2013). Some of the states that have adopted mandatory minimum penalties for specified offences have also created some exceptions to the application of these minimum penalties in the case of juvenile offenders. This is the case, for example, in the State of Montana where the *Code* creates an exception to mandatory minimum sentences for offenders who were less than 18 years of age at the time of the commission of the offence.³⁹

In the States of Washington and Oregon, the exception to the application of mandatory minimum penalties applies explicitly to sentences imposed upon any person waived from the juvenile court (tried and sentenced as an adult).⁴⁰ In Oregon, however, there are also exceptions to the exception: mandatory minimum penalties can still be imposed in the case of a juvenile sentenced as an adult for aggravated murders⁴¹, and as an enhanced penalty for use of a firearm during the

³⁷ See Penal Law (Amendment No. 91), 5737-1977, 2067 LSI 2, § 377B (2006) (adopting a minimum sentence for offenses of keeping a person under conditions of slavery and human trafficking); Penal Law (Amendment No. 55), 5737-1977, 1746 LSI 226, § 329(B) (2000) (adopting a minimum sentence for causing grievous harm to a family member); Penal Law (Amendment No. 68), 5737-1977, 1849 LSI 422, § 355 (2002) (adopting a minimum sentence for several sex offenses).

³⁸ *Miller v. Alabama*, 567 US (2012):

³⁹ *Montana Code* §46-18-22. The exception for juveniles applies not only to “mandatory minimum sentences”, but also to “restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility.”

⁴⁰ *Revised Code of Washington* (RCW) §9.94A.540(3), and *Oregon Revised Statutes* (ORS), §161.620.; See also: Stith, K. (2013).

⁴¹ ORS §161.620(1) (Sentences imposed upon waiver from juvenile court), and ORS §163.105 (Sentencing options for aggravated murder).

commission of a felony.⁴² Other states have elected to make the mandatory minimum penalties presumptive instead of compulsory in the case of offenders under the age of 18.⁴³

In England and Wales, most mandatory minimum sentences only apply to offenders who, at the time when that offence was committed, were 18 or over⁴⁴, but there are instances where minimum penalties may apply also to offenders between the ages of 16 and 18.⁴⁵ Note that s. 291 of the *Criminal Justice Act 2003* also provides the Secretary of State with the power by order to exclude application of a minimum sentence for certain firearm offences to those under 18.

In South Africa, under the *Criminal Law Amendment Act 1997*, mandatory minimum sentences are not applicable to a child who was under the age of 16 when he or she committed the offence. Should a court decide to impose a minimum sentence upon a child who, at the time of the commission of the offence, was 16 years or older, but under the age of 18 years, the court has, in terms of s. 51(3)(b), to enter its reasons for its decision on the record of the proceedings. However, in *Jan Hendrik Brandt v The State* the Supreme Court of Appeal held that the legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court which is more free to depart from the prescribed minimum sentence.⁴⁶ As a result, the sentencing court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence and offenders under 18 (though over 16).

2. Reduction of minimum penalty for early guilty pleas

There are complex and confounding relations between mandatory minimum penalties, plea negotiation practices, the charging process and sentencing patterns. It is often alleged and there is some evidence to support that the establishment of mandatory minimum penalties lead to some “adjustments” in practice to the plea negotiation and charging processes (Cano and Spohn, 2012; Merritt et al., 2006; Tonry, 2006; 2009; Ulmer et al., 2007; United States Sentencing Commission, 2011; Cappelino and Meringolo, 2014). From a justice system efficiency point of view, it may be advantageous to find ways to increase the likelihood of an early guilty plea. Guilty pleas, particularly when they are entered early in the criminal justice process, can significantly speed up criminal proceedings, eliminate the need for many adjournments and a trial, reduce the need for costly and complicated disclosure processes, and reduce the overall costs of the system. Many jurisdictions have explored ways of increasing the likelihood that accused individuals will not only plead guilty, but also do so at an early stage in the process (Dandurand, 2014).

⁴² ORS §161.620(2) (Sentences imposed upon waiver from juvenile court), and ORS §161.610 (Enhanced penalty for use of firearm during commission of felony).

⁴³ For example, the State of Connecticut: *Connecticut General Statutes* – 21a-278(a) and (b).

⁴⁴ E.g., *Powers of the Court (Sentencing) Act 2000*, sections 109(1)(b), 110(1)(b), 111(1)(b).

⁴⁵ E.g., *Powers of Criminal Courts (Sentencing) Act 2000*, sections 109, 110, 111.

⁴⁶ *Jan Hendrik Brandt v The State*, SCA (SA), 513/03.

Legal provisions establishing mandatory minimum penalties for certain offences typically remove any incentive an offender may have to plead guilty or to cooperate with the prosecution in such cases. Mandatory penalties can increase trial rates and thereby increase workloads and case processing time. In the United States' federal system, for example, there is clear evidence that accused individuals choose to go to trial because of charges carrying mandatory minimum penalties (United States Sentencing Commission, 2011: 116). Prosecutors facing these situations have often found ways to use their discretionary authority to frame the charges in such a way as to circumvent the application of these provisions.

It is possible for the legislator to specifically create an exception to the strict application of mandatory minimum penalties for offenders who plead guilty at an early stage of the process, thus creating an explicit incentive for early guilty pleas. It is also possible for the legislator to provide offenders with an incentive for pleading guilty and collaborating with the prosecution by specifically creating an exception to the application of the mandatory minimum penalties for offenders offering assistance to the prosecution. This kind of exception (or “departure” from the mandatory minimum penalties) is found in the United States federal criminal law relating to certain drug offences. The second approach will be discussed separately in the next section.

England and Wales – Reduction of sentences for early guilty pleas

In England and Wales, s. 152 of the *Powers of the Criminal Court (Sentencing) Act 2000* foresees the possibility for the court to reduce a sentence⁴⁷. This possibility only exists for the court to do so in relation to the minimum penalties established for drug related offences by s. 110 and by s. 111 for domestic burglary.⁴⁸ In such cases, the court may impose a sentence that is no less than 80 percent of the mandatory minimum sentence specified in the law and must state in open court that it has done so:

152. (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court shall take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and

(b) the circumstances in which this indication was given.

(2) If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.

(3) In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 above, nothing in that subsection shall prevent the court, after taking into account any matter referred to in subsection (1) above, from imposing any sentence which is not less than 80 per cent of that specified in that subsection.

A similar possibility for exceptions was not created for the minimum sentences provisions of s. 109 of the same Act⁴⁹ relating to offenders convicted of a third or subsequent serious offence.⁵⁰

⁴⁷ *Powers of the Court (Sentencing) Act 2000*, s. 152 (Reduction of sentences for guilty pleas)

⁴⁸ *Powers of the Court (Sentencing) Act 2000*, sections 110, 111.

⁴⁹ *Powers of the Court (Sentencing) Act 2000*, s. 109.

3. Relief for defendants who offer substantial assistance to the state

Many of the reliefs available in different jurisdictions are tied to the offender's cooperation with the state, or at the very least an agreement to plead guilty. However, some jurisdictions have adopted sentence reduction schemes that apply specifically in cases where a mandatory minimum penalty is required under the law. Such sentence reduction is usually activated at the discretion of the prosecutors who can initiate a motion.

The discretion inherent in the substantial assistance departure provisions allows prosecutors and judges to openly circumvent mandatory minimum sentences. In the United States, it is frequently observed that the existence of mandatory minimum penalties constrains judges' discretion, but that the possibility of departures from the minimum penalties to recognize "substantial assistance" to the government provides prosecutors and judges with an important tool for avoiding mandatory penalties. These substantial assistance provisions clearly serve the operational interests of the prosecution by providing offenders with a clear inducement to plead guilty and to cooperate as informants when they can (Martin, 2001).

Federal criminal law USA – 18 USC §3553 (E)

In the United States, the mandatory penalties may not have to be applied in certain instances if an offender qualifies for a "substantial assistance departure." The federal criminal law establishes a limited authority to impose a sentence below a statutory minimum penalty: 18 USC 3553(e):

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, *United States Code*.⁵¹

This is a motion made by the prosecution once the defendant has entered a plea of guilty. Upon a motion of the U.S. Attorney's Office, a defendant who renders "substantial assistance" to law enforcement (however defined by the U.S. Attorney's Office) may be sentenced below the sentencing guidelines' recommended minimum. If the court grants the motion, the sentencing judge is free to depart anywhere below the minimum recommended by the guidelines.⁵² The judge's decision regarding the appropriate reduction may rest on such things as the significance and usefulness of the defendant's assistance; the truthfulness, completeness, and reliability of the information provided; the nature, extent, and timeliness of the defendant's assistance; and, any danger or risk that resulted from the defendant's assistance.

It is clear that different charging and plea negotiation practices have developed in various federal districts that resulted in the disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length (USSC, 2011: 345). In 2010, almost half (46.7%) of offenders convicted of an offence carrying a mandatory

⁵⁰ See also the similar dispositions retained in: *Criminal Justice Act 2003*, s. 144(2).

⁵¹ 18 USC 3553(e).

⁵² These are known as 5K1 departures (after the federal rule describing them: USSG §5K.1.1; USSC, 2001).

minimum penalty were relieved from the application of such a penalty at sentencing because they provided substantial assistance to the government or qualified for the “safety valve” relief (USSC, 2011: xxviii). Concerns have been raised about the impact of these exceptions on offenders who do not benefit from them or, for example, refuse to plead guilty and collaborate with the government. There is evidence that federal defendants who exercise their right to trial and are convicted receive more severe sentences, a consequence known as a “trial penalty.” Trial penalties vary among types of offences and the characteristics of the offender. However, they were shown to proportionately increase as sentencing guidelines’ minimum sentencing recommendations increase (Ulmer, Eisenstein and Johnson, 2010).

Mario Cano and Cassia Spohn, summarizing the research on “substantial assistance departures” from mandatory minimum sentences, note that legally irrelevant factors affect the likelihood of receiving substantial assistance departures and the magnitude of the sentence discount from which the offenders benefit (Cano and Spohn, 2012). These departures, they argue, may be the primary source of unwarranted sentencing disparity found in research on federal sentence outcomes.

There is clear evidence that substantial assistance departures are used to mitigate the sentences of “sympathetic” and “salvageable” offenders. A study by Nagel and Schulhofer, focusing on guideline circumvention in three U.S. district courts in 1989 and 1990, found that downward departures for substantial assistance were used to mitigate the sentences of “salvageable” or “sympathetic” defendants and that prosecutorial decisions to file motions for substantial assistance departures were based on an assessment of the value of the case and the sentence that was deserved (Nagel and Schulhofer, 1992). Other studies of the impact of offender and case characteristics on sentence outcomes and substantial assistance departures in cases where offenders were facing mandatory minimum penalties have reached similar conclusions (Farrell, 2004; Hartley, 2008; Hartley et al., 2007; Kautt and Delone, 2006; Ortiz and Spohn, 2014; Spohn and Fornango, 2009).

A study of federal sentencing of narcotic offenders in five federal districts near the American southwest border confirmed that departures are significant predictors of sentence-length decisions for both citizens and noncitizens, and in some districts, citizenship status indirectly influences sentences through departure decisions (Hartley and Armendariz, 2011).⁵³ Several studies have looked at substantial assistance departures and how they are used to reduce the sentences of certain types of offenders facing mandatory minimum penalties (Stacey and Spohn, 2006; Cano and Spohn, 2012; Spohn and Fornango, 2009; Ortiz and Spohn, 2014).⁵⁴ They revealed, among other things, that significant inter-prosecutor disparity exists in the likelihood of substantial assistance departures and in the criteria that prosecutors use in deciding whether to file a motion for a substantial assistance departure. One study (Stacey and Spohn, 2006) examined the effect of dependent children on guideline departures in federal court and found that

⁵³ See also: Johnson, Ulmer and Kramer, 2008.

⁵⁴ The United States Sentencing Commission’s data show that female offenders obtain relief from a mandatory minimum penalty at sentencing more often than male offenders (65.5% compared to 44.7%). Female offenders qualify for the safety valve at a higher rate than male offenders (46.4% compared to 26.3%). Female offenders also received relief by providing substantial assistance to the government at a higher rate (36.0%) than male offenders (24.7%) (USSC, 2011).

women with children were more likely to receive a substantial assistance departure than women without children. There were no differences between men with children and men without. The most recent of these studies explored the factors that affect prosecutors' decisions to file motions for substantial assistance departures for recidivist offenders who were convicted of drug offense in federal courts. The study showed that employment status and drug use predicted the likelihood of a recommended departure, and, more importantly, that the effects of these factors were conditioned by the defendant's sex and race/ethnicity (Ortiz and Spohn, 2014).

State laws (U.S.A.)

Many American states make cooperation or assistance with the state a legitimate reason for a departure from a mandatory minimum sentence. In Florida, for example, the state attorney can request the court to reduce or suspend a sentence of any person who is convicted of drug trafficking when the person provides substantial assistance in the identification, arrest, or conviction of any other person engaged in trafficking in controlled substances (pursuant sometimes to a "Substantial Assistance Contract"). A downward departure from the lowest permissible sentence (as calculated according to the total sentence points pursuant to a sentence calculation formula)⁵⁵ is prohibited unless there are circumstances or factors that reasonably justify the downward departure. These factors are quite numerous, but they ostensibly include having entered into a legitimate and non-coerced plea agreement or cooperation with the state to resolve the current offence or any other offence.⁵⁶

In Pennsylvania, the decision to pursue most mandatory minimum penalties belongs solely to the prosecutors. In that context, the mandatory minimum penalties effectively substitute prosecutorial discretion to judicial discretion. After deciding to charge an offence that is eligible for a mandatory minimum penalty, the prosecutors decide whether to move for the application of the mandatory penalty. If the prosecutors decide not to pursue the mandatory minimum sentence, the offenders are sentenced pursuant to State's sentencing guidelines which normally call for penalties that are lower than the mandatory minimum sentences. If the prosecutors move for the application of the mandatory minimum sentence, the court must sentence accordingly.⁵⁷ A study of prosecutors' decisions to apply a mandatory minimum among eligible offenders sentenced for drug crimes or as repeat, "three-strike" offenders in that State found that these decisions were significantly affected by the type and characteristics of the offences and guidelines sentencing recommendations, prior record, mode of conviction, and gender (Ulmer et al., 2007).

Victoria (Australia)

In Victoria, since 2013, the law imposing mandatory minimum penalties for "gross violent offences" includes a list of "special reasons" for not applying the mandatory minimum provisions.⁵⁸ One of these special reasons can be that the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence.

⁵⁵ *Florida Statutes, Criminal Procedure and Corrections*, 921.0024. See also: 921.00265 (recommended sentences; departure sentences; mandatory minimum).

⁵⁶ *Florida Statutes, Criminal Procedure and Corrections*, 921.0026.

⁵⁷ *Pennsylvania Consolidated Statutes*, Title 42, s. 9714(d).

⁵⁸ *Crimes Amendment (Gross Violence Offences) Act 2013 (VCT)*, No. 6 of 2013, s. 10A

4. Relief in view of mitigating factors

The legislator is sometimes prepared to consider exceptions to the automatic application of a mandatory sentence when “good reasons” exist to do so, or there are some important mitigating circumstances requiring consideration. In some cases, the specific “mitigating circumstances” that can be considered by the courts are specifically spelled out. The following are five examples of that approach: South Australia, Victoria, the so-called “safety valve” provisions of the American federal criminal law, the State of Montana, and Sweden.

South Australia – Good reason for reducing the minimum penalty

In South Australia, under s. 17 of the *Criminal Law Sentencing Act 1988*, the courts have the power to reduce a penalty below the minimum stated by the relevant Act where good reason exists to do so:⁵⁹

“17—Reduction of minimum penalty

Where a special Act fixes a minimum penalty in respect of an offence and the court, having regard to—

- (a) the character, antecedents, age or physical or mental condition of the defendant; or
- (b) the fact that the offence was trifling; or
- (c) any other extenuating circumstances,

is of the opinion that good reason exists for reducing the penalty below the minimum, the court may so reduce the penalty.”⁶⁰

Section 21 of the *Criminal Law Sentencing Act 1988* further specifies that in cases where an offender is liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.

Section 21 provides that:

“(1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.

(2) If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term.

(3) If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.

(4) The power conferred on a court by this section is not limited by any other provision of this Part.

(5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties.”

⁵⁹ This section, however, does not allow the court to impose less than the mandatory minimum disqualification of licence, for example, in drinking and driving matters.

⁶⁰ *Criminal Law (Sentencing Act) (SA) 1988*, s. 17.

It may be argued that these particular provisions of the sentencing law are in effect transforming mandatory minimum penalties into presumptive penalties.

Victoria (Australia)

In Victoria, since 2013, the law imposing mandatory minimum penalties for “gross violent offences” includes a list of “special reasons” for not applying the mandatory minimum provisions.⁶¹ Among these reasons are the following: (1) the offender is below the age of 21 and above the age of 18 and having a psychosocial immaturity that has resulted in a diminished ability to regulate their behaviour in comparison with the norm for persons of that age; and, (2) the offender proves on the balance of probabilities that (i) at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability, or (ii) he or she has impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment.

Federal criminal law USA – 18 USC §3553(f)

The federal criminal law in the United States foresees some limitations on the applicability of statutory minimum sentences in certain cases involving offences under sections 401, 404, or 406 of the *Controlled Substances Act*⁶² or sections 1010 or 1013 of the *Controlled Substances Import and Export Act*.⁶³ These are often referred to as “safety valve” provisions. In such instances, the court is to impose a sentence pursuant to the guidelines promulgated by the United States Sentencing Commission without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that:

- “(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offence did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information

⁶¹ *Crimes Amendment (Gross Violence Offences) Act 2013* (VCT), No. 6 of 2013, s. 10A

⁶² 21 USC 841, 844, 846

⁶³ 21 USC 960, 963

shall not preclude a determination by the court that the defendant has complied with this requirement.”⁶⁴

The judge must still consult and consider the guidelines in deciding the sentence to impose, as well as provide a statement of reasons.⁶⁵ As was the case for 18 USC 3553(e) referred to above, collaboration with the government is a requirement.

The Sentencing Commission 2014 guidelines state that the characteristic of family ties and responsibilities is “not ordinarily relevant” and should not be a factor in sentencing decisions.⁶⁶ Some observers have argued that the Guidelines should be amended to indicate that courts can consider family ties and responsibilities when determining a sentence (Anderson, 2015).

The “safety valve” provisions are used quite extensively in drug offence cases. Their impact is not yet fully understood, but it is quite clear that mandatory minimum sentences together with these provisions do not affect sentence outcomes in a uniform manner across federal districts. Hartley, studying decision making practices of judges for narcotic violations in four districts in the southwestern United States, found that “safety valve” provisions do not decrease defendants’ sentence significantly in all districts (Hartley, 2008: 449).

In a survey of prosecutors and defence attorneys conducted for the United States Sentencing Commission, most defence attorneys reported that the safety valve provisions worked well for qualifying offenders (USSC, 2011: 118).⁶⁷ The Commission recommended that Congress consider establishing a statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders for low-level, non-violent offenders convicted of other offences carrying mandatory minimum penalties (USSC, 2011: 346). Proposed legislation is currently being considered that would create a broad “safety valve” that would apply to all federal crimes carrying mandatory minimum sentences. If passed, the *Justice Safety Valve Act*⁶⁸ would allow judges to sentence federal offenders below the mandatory minimum sentence whenever that minimum term does not fulfill the goals of punishment and other sentencing criteria listed at 18 U.S.C. § 3553(a).

Montana

The *Montana Code* (Title 46 – Criminal Procedure) creates several potential reliefs from the application of various mandatory minimum sentences (and mandatory life sentences) based on a number of mitigating factors. In addition to being 18 at the time of committing the offence, the mitigating factors recognized by the law are:

- **Mental capacity:** “the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution. However, a voluntarily

⁶⁴ 18 USC §3553(f) – see: 18 USC 3553(c) Statement of Reasons for Imposing a Sentence.

⁶⁵ See 18 USC 3553(c) - Statement of Reasons for Imposing a Sentence.

⁶⁶ U.S. Sentencing Commission (2014). U.S. Sentencing Guidelines Manual § 5H1.6.

⁶⁷ Some of the prosecutors surveyed complained that the “safety valve” took away the incentive for offenders to cooperate with the prosecution (USSC, 2011: 118).

⁶⁸ Bill S. 353 / H.R. 706, *The Justice Safety Valve Act of 2015*.

induced intoxicated or drugged condition may not be considered an impairment for the purposes of this subsection.”

- **Offence committed under duress:** “the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution.”
- **Minor role in the crime:** “the offender was an accomplice, the conduct constituting the offense was principally the conduct of another, and the offender's participation was relatively minor.”
- **No serious bodily injury:** “in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense.”⁶⁹

Sweden – Special circumstances

The *Swedish Penal Code* provides the penalty for specified crimes, sometimes expressed also as a minimum sentence. For example, the penalty for rape is imprisonment for at least two and at most six years and, if the crime is gross, the penalty is imprisonment for at least four and at most ten years.⁷⁰ For arson, the penalty is imprisonment for at least two and at most eight years, but in the case of gross arson, it is imprisonment for a term of at least six and at most ten years.⁷¹

Notwithstanding the specified minimum penalties stipulated in the Code, the court is required to give reasonable consideration to a number of factors and circumstances and impose a lesser sentence than that prescribed for the crime:

“In determining the appropriate punishment, the court shall, besides the penal value of the crime, give reasonable consideration to:

1. whether the accused has suffered severe bodily harm as a result of the crime,
2. whether the accused to the best of his ability has attempted to prevent, remedy or limit the harmful consequences of the crime,
3. whether the accused gave himself up,
4. whether the accused would suffer harm through expulsion by reason of the crime from the Realm,
5. whether the accused, as a result of the crime, has suffered, or there is good reason to suppose that he will suffer, dismissal from, or termination of, employment, or will encounter any other obstacle or special difficulty in the pursuit of his occupation or business,
6. whether the accused, in consequence of advanced age or ill health, would suffer unreasonable hardship by a punishment imposed in accordance with the penal value of the crime,
7. whether, having regard to the nature of the crime, an unusually long time has elapsed since its commission or

⁶⁹ *Montana Code* §46-18-222 (2) to (5).

⁷⁰ *Swedish Penal Code*, Ch. 6, s. 1.

⁷¹ *Swedish Penal Code*, Ch. 13, sections 1 and 2.

8. whether there exists any other circumstance that calls for a lesser punishment than that warranted by the penal value of the crime.

If any circumstance covered by the first paragraph exists, the court may, if there are special grounds for so doing, impose a less severe punishment than that prescribed for the crime.”⁷²

5. Relief available in exceptional or substantial and compelling circumstances

Some legislators have opted for the much stricter concepts of “exceptional circumstances” or “substantial and compelling circumstances” as a basis for justifying a deviation from a prescribed minimum penalty. These concepts are meant to indicate that the courts should apply the mandatory penalties in the vast majority of cases and to deviate from them only in exceptional cases. Over the years, the courts have had to provide further guidance on how these concepts were to be interpreted. The following briefly describes the experience in that regard of the Northern Territories (Australia), Victoria (Australia), the United Kingdom, and South Africa. In the latter instance, after the exceptions were found to have been used quite extensively in rape cases, the legislator eventually amended the legislation to specifically exclude certain factors from being considered as “substantial and compelling circumstances” in rape cases.

Northern Territories – Exceptional circumstances

In the Northern Territories, Australia, some reliefs from mandatory sentencing provisions have been created to apply in “exceptional circumstances.” The “exceptional circumstances” exception was introduced in June 1999⁷³ but it only applied to a single first adult property offence and is limited in its applicability because four criteria have to be fulfilled, namely:

- the offence must have been of a trivial nature;
- the offender must have made reasonable efforts to make full restitution;
- the offender must be of otherwise good character with mitigating circumstances (which do not include intoxication) which reduce the extent to which the offender is to blame;
- the offender must have cooperated with law enforcement agencies.

In 2013, the government replaced the existing scheme with a new minimum sentencing scheme for violent offences⁷⁴. The new scheme has five levels of violent offences with different levels of minimum penalties applying to each of the top three levels. There are exemptions from the minimum levels of imprisonment if there are “exceptional circumstances” (Roth, 2014:10).⁷⁵

Victoria – Special reasons and substantial and compelling circumstances

Since 2013, Victorian law includes mandatory terms of imprisonment (with a minimum non-parole period of four years) for adults committing the offence of “intentionally or recklessly

⁷² *Swedish Penal Code*, Ch. 29, s. 5.

⁷³ *Sentencing Amendment Act 1999*.

⁷⁴ *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT).

⁷⁵ For a review of the implementation of the scheme, see the report of the Department of the Attorney-General and Justice (Whyte et al., 2015)

causing serious harm to a person in circumstances of gross violence”.⁷⁶ Before establishing a minimum penalty, the Government consulted the Sentencing Advisory Council (Victoria) which had essentially adopted in 2008 a position against mandatory minimum penalties. The Council was specifically asked to provide advice, among other things, on how the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum sentence should best be specified. The Council explained that: “(i)n light of the rationale of high culpability implicit in the gross violence elements of the new severe injury offences, the Council considered that exceptions to the imposition of a statutory minimum sentence should be based on circumstances that significantly diminish an offender’s culpability or that can be justified for public policy reasons” (Sentencing Advisory Council, 2011: 10). It sought to define a merits-based approach to determining what ought to be “exceptional”, rather than an interpretation based on rarity or infrequency. The Council also recommended that the phrase “special reasons” be used to avoid confusion with other tests in Victorian law that use the phrase “exceptional circumstances” (Sentencing Advisory Council, 2011). Finally, the Council recommended that a non-exhaustive list of special reasons be specified in the law. It explained that:

“(…) as a general statement test may be susceptible to broad interpretation and the clear policy objective is to tightly define exemptions from the statutory minimum sentences, the legislation should provide a list of special reasons. The list of special reasons should comprise those circumstances that are foreseeable and commonly regarded as appropriate exemptions on the basis of the rationales of diminished culpability and public policy.” (Sentencing Advisory Council, 2011: 10).

The Council argued that such a list would provide guidance to a court as to the kinds of circumstances that ought to warrant exemption from the statutory minimum sentence and the rationale behind such exemptions. However, the mere existence of one of the listed special reasons in a case should not automatically warrant exemption from the statutory minimum sentences. Instead, a court must consider whether it is also in the interests of justice to do so (Sentencing Advisory Council, 2011).

The new legislation adopted in 2013 included a list of “special reasons” for not applying the mandatory minimum provisions. They were:

- the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence;
- the offender is below the age of 21 and above the age of 18 and having a psychosocial immaturity that has resulted in a diminished ability to regulate their behaviour in comparison with the norm for persons of that age;
- the offender proves on the balance of probabilities that; (i) at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability; or (ii) he

⁷⁶ *Crimes Amendment (Gross Violence Offences) Act 2013* (VIC), No. 6 of 2013.

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

- the court proposes to make a hospital security order or a residential treatment order in respect of the offender;
- there are substantial and compelling circumstances that justify making a finding that a special reason exists.⁷⁷

When a court makes such a finding, it must state in writing the special reason and cause that reason to be entered in the records of the court.⁷⁸

United Kingdom – Exceptional Circumstances

In England and Wales, the concept of “exceptional circumstances” as the basis of an exception to the application of mandatory minimum sentences was introduced as s. 51A of the *Firearms Act 1968* by s. 287 of the *Criminal Justice Act 2003*. The Act provided for a five year minimum custodial sentence for illegal possession and distribution of prohibited firearms, but also provided that a court could impose a lesser sentence if the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so (s. 287(2)). The same exception was included in relation to the minimum penalty applicable to the new firearms offence created in 2006, by s. 28 (using someone to mind a dangerous weapon) of the *Violent Crime Reduction Act 2006*.⁷⁹

The meaning of “exceptional circumstances” was considered in *R v Rehman and Wood*.⁸⁰ The Court of Appeal offered the following guidance:

- Parliament has signalled that it was important that deterrent sentences be imposed. The latter are sentences that “pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider” (para. 4).
- The policy was to treat the specified offences as requiring a minimum term of imprisonment unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out a deterrent message (para. 12)
- In determining whether the case involved ‘exceptional circumstances’, it is necessary to look at the case as a whole. “It is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance” (para. 11).
- Sometimes there may be “one single striking, which relates to either the offence or the offender’ which causes the case to fall within the requirements of exceptional

⁷⁷ *Crimes Amendment (Gross Violence Offences) Act 2013* (VCT), No. 6 of 2013, s. 10A.

⁷⁸ *Idem*.

⁷⁹ *Violent Crime Reduction Act 2006*, s. 29: “the court must impose (with or without a fine) a term of imprisonment of not less than 5 years, unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.”

⁸⁰ *R v. Rehman and Wood* [2005] EWCA Crim. 2056, [2005] *Criminal Law Review* 878.

circumstances”, but in other cases it would be the collective impact of all the relevant circumstances (para. 11).

- The mandatory minimum penalty is capable of being arbitrary and causing considerable injustice, especially bearing in mind that possession of a prohibited firearm is an absolute offence and that “an offender may commit the offence without even realizing that he has done so” (para. 12). It is to be noted, that “if an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect upon him” (para. 14).
- Reading the section in light of the provisions of the *Human Rights Act 1998*, the circumstances will be ‘exceptional’ if it would mean that to impose the minimum sentence would result in an arbitrary and disproportionate sentence (para. 14).
- It is clear that it is the opinion of the court that is critical as to what exceptional circumstances are. Unless the judge is clearly wrong in identifying exceptional circumstances when they did not exist, or clearly wrong in not identifying them when they do exist, the Court of Appeal will not readily interfere (para. 14).

In other cases, the Court of Appeal further specified that s. 51A(2) does not allow for a reduction of the minimum term on account of a guilty plea.⁸¹ Also, where exceptional circumstances are found, the minimum term should be kept as a starting point.⁸²

The following are a few examples of cases where the court have recognized the existence of “exceptional circumstances”: a situation where the consequence of a long imprisonment would be particularly severe because of the offender’s serious physical disabilities;⁸³ a situation where the sole prohibited firearm involved in the possession offence had been acquired before the possession of such a firearm became unlawful;⁸⁴ or, a situation where the offender, someone without a criminal record, kept some prohibited firearms ‘dumped’ on his premises, locked in a secure cabinet, intending to hand them to the police if there was a gun amnesty.⁸⁵ However, leaving a firearm in insecure bedsit after deciding not to use it to commit suicide was held not to be “exceptional.”⁸⁶

South Africa – Substantial and compelling circumstances

In South Africa, the *Criminal Law Amendment Act, 1997* introduced mandatory minimum penalties for certain serious offences, as well as escalating minimum penalties when an offender is found guilty of certain offences for a second or a third time. The law recognizes that a deviation from a mandatory minimum sentence is possible when the court is satisfied that *substantial and compelling circumstances* exist which justify the imposition of a lesser sentence than the sentence prescribed. Ten years later, the *Criminal Law (Sentencing) Amendment Act, 2007* amended the law to specify that, in the case of a rape, the complainant’s previous sexual history, an accused person’s cultural or religious beliefs about rape, or any relationship between

⁸¹ *R v. Jordan; R v. Alleyne; R v. Redfern* [2005] 2Cr.App.R.(S) 44.

⁸² *R v. Beard* [2008] 2.Cr. App. R (S) 70.

⁸³ *R v Blackall* [2006] 1 Cr App R (S) 131.

⁸⁴ *R v Mehmet* [2006] 1 Cr App R (S) 397.

⁸⁵ *R v Bowler* [2007] EWCA Crim 2068.

⁸⁶ *R v Robinson* [2010] 2 Cr. App. R(S) 20 CA.

the accused person and the complainant prior to the offence being committed, do not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

Sections 51 and 53 of the *Criminal Law Amendment Act, 1997* (as amended⁸⁷) provide:

“51. Minimum sentences for certain serious offences.

(...)

- (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant’s previous sexual history;
- (ii) an accused person’s cultural or religious beliefs about rape; or
- (iii) any relationship between the accused person and the complainant prior to the offence being committed.

(...)

- (5) (a) Subject to paragraph (b), the operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(b) If a sentence is imposed in terms of subsection (2)(c), not more than half of that sentence may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

- (6) This section does not apply in respect of a person who was under the age of—
(a) 16 years at the time of the commission of an offence contemplated in subsection (1) or (2)(a) or (b); or
(b) 18 years at the time of the commission of an offence contemplated in subsection (2)(c).
- (7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of the person beyond reasonable doubt.

(...)”

The concept of “substantial and compelling circumstances” has been the object of judicial interpretation. In *S v Mofokeng and Another*, the judge held that for substantial and compelling circumstances to be found, “the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of statutorily prescribed sentence in the particular case, that it can rightly be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.”⁸⁸

⁸⁷ Most recently by the *Criminal Law (Sentencing) Amendment Act, 2007*.

⁸⁸ *S v Mofokeng and Another* 1999 (1) SACR (W) 502, at 523

Most notably, in *S v Malgas*, the court held, at the outset, that the mandatory sentences should ordinarily be imposed and that, when considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.⁸⁹ The Court held that the imposition of the prescribed sentence need not amount to a "shocking injustice" before a departure is justified.⁹⁰ With respect to what may constitute "substantial and compelling circumstances", the Court emphasized the following:

"Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them."⁹¹

The Court unanimously decided that the "ultimate cumulative impact" of all the factors usually considered in sentencing (the traditional mitigating and aggravating factors) must be weighed up to decide whether a departure from the prescribed period is justified. "Substantial and compelling circumstances" may arise from a number of factors considered together even if, taken one by one, these factors may not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be "disproportionate to the crime, the criminal and the needs of society", the court may impose a lesser sentence (O'Donovan and Redpath, 2006: 14).

The court added:

"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances, the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."⁹²

The Court also offered the following guidance for applying mandatory minimum sentences:

"(a) Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or

⁸⁹ *S v Malgas* [2001] 3 All SA 220(A), para. 8.

⁹⁰ *S v Malgas* [2001] 3 All SA 220 (A), para. 23.

⁹¹ *S v Malgas* [2001] 3 All SA 220 (A), para. 9.

⁹² *S. v Malgas* [2001] 3 All SA 220(A), para. 22.

imprisonment for other specified periods for offences listed in other parts of Schedule 2).

- (b) Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- (c) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- (d) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- (e) The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- (f) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- (g) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.
- (h) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- (i) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- (j) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.”⁹³

We may note also that the Constitutional Court of South Africa rejected a challenge to the constitutional validity of these provisions in *Buzani Dodo v The State*.⁹⁴

⁹³ S v. Malgas [2001] 3 All SA 220(A), para. 25.

⁹⁴ *Buzani Dodo v. The State* (case CCT1/01, 5 April 2001).

In practice, the “substantial and compelling circumstances” argument has been invoked regularly to justify a departure from the prescribed minimum sentences (Rudman, 2006). Some have argued that the exception clauses were used too frequently and may have defeated the purpose of the mandatory minimum sentences.⁹⁵

Because of the possibility of invoking “substantial and compelling circumstances”, it was argued that the limiting of judicial discretion in respect of certain rape cases by the Act did not rid such sentencing of outdated myths and stereotypical assumptions about rape. The provisions may have led courts to conduct a grading exercise in rape cases (O’Sullivan, 2006). The Supreme Court of Appeal may have added some ambiguity in defining the circumstances that can justify a departure from the mandatory minimum sentence for rape. In *S v Abrahams*, it stated that “some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.”⁹⁶ In *S v Mahomotsa*, the Court referring to rape cases noted that “they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment.”⁹⁷

In *S v. Mvamvu* the Supreme Court of Appeal considered an appeal by the State of a five year prison sentence imposed on the accused for the abduction and repeated rape and assault of his estranged customary law wife, who had obtained a domestic violence protection order against him.⁹⁸ The Court found the existence of the customary law marriage, Mvamvu’s honest belief that he had a right to conjugal benefits and the fact that he grew up and lived in a world of his own shaped by customary norms and practices, to be mitigating factors.⁹⁹

These and other events eventually led to the inclusion through the *Criminal Law (Sentencing) Amendment Act, 2007* of the new s.3(aA) stipulating what shall not constitute substantial and compelling circumstances when the offender is convicted for the offence of rape.

There is some evidence that the mandatory minimum penalties have exacerbated the problem of prison overcrowding in South Africa and have increased court costs and delays, but their full impact has not been evaluated (O’Donovan and Redpath, 2006; Sloth-Nielsen and Ehlers, 2005). There does not appear to be any data available on the impact of the use of the “exceptional circumstances” provisions of the law.

⁹⁵ Deon Rudman, Deputy Director-General: Legislation and Constitutional Development, Department of Justice and Constitutional Development reported *that* suggestions have been made, especially by women’s rights groups on behalf of rape victims, that the legislature should stipulate circumstances which would not qualify as ‘substantial and compelling’ to ensure that judicial officers do not invoke factors which are irrelevant and which should not warrant a sentence less than the minimum prescribed (Rudman, 2006: 28)

⁹⁶ *S v. Abrahams* 2002 (1) SACR 116 (SCA), para. 29.

⁹⁷ *S v. Mahomotsa* 2002 (2) SACR 85 (SCA), para. 18.

⁹⁸ *S v. Mvamvu* 2005 (1) SACR 54.

⁹⁹ See also: *Nkomo v The State* 2006 SCA 167 RSA, and *S v Mahomotsa* 2002 (2) SACR 435 (SCA), in which the Supreme Court of Appeal pointed out that even in the case of a serious and multiple rapes a sentence of life imprisonment need not necessarily be imposed. If there are compelling and substantial circumstances the appropriate sentence is within the court’s discretion. See also *Rammoko v DPP* 2003 (1) SACR 200 (SCA).

6. Relief in the “interest of justice” or to avoid an “unjust” sentence

It can obviously be argued that, when the law specifies the kind of mitigating or exceptional circumstances that may justify a departure from mandatory minimum penalties, it essentially does so in order to avoid some unjust sentencing outcomes.¹⁰⁰ Nevertheless, in some jurisdictions, the legislator has relied on the concept of “unjust sentences” to create specific exceptions to the application on mandatory penalties. This approach was used in New Zealand, England and Wales, and Scotland.

New Zealand – Exception when a sentence would be “manifestly unjust”

New Zealand offers some interesting examples of exceptions to the application of mandatory minimum penalties.¹⁰¹ The *Sentencing Act 2002* had introduced minimum finite sentences for murder and minimum non-parole periods which applied unless they were considered by the court to be “manifestly unfair”. The Act had also imposed minimum penalties in cases of serious offending where the culpability of the offender has been high and aggravating factors have been present. However, as mentioned before, New Zealand later adopted a sentence escalation regime that amounts to a form of mandatory minimum sentencing regime. The *Sentencing and Parole Act 2010* also replaced the previous mandatory life imprisonment penalty for murder with more flexible sentencing provisions.¹⁰² With these amendments, life imprisonment became the maximum penalty for murder rather than the mandatory penalty but with a strong presumption in favour of its use.¹⁰³ A finite sentence of imprisonment, however, is only available for murder if a life sentence would be “manifestly unjust”. The intent was ostensibly to ensure that finite penalties would only apply in exceptional cases such as mercy killings, failed suicide pacts and situations involving battered defendants, where life imprisonment would be “manifestly unjust” on the facts (Chhana et al., 2004: 13). The new section 102 of the *Sentencing Act 2002* reads as follows:

“102 Presumption in favour of life imprisonment for murder

(1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be *manifestly unjust*.

¹⁰⁰ For example, in Louisiana, Fritch (2015) argued that in the absence of “safety valve” provisions (or relief in the interest of justice) the effect of Louisiana determinate sentencing laws is to create serious injustices. He referred specifically to the *State v. Noble* (*State v. Noble*, 2013-1109 (La. App. 4 Cir. 2/12/14); 133 So. 3d 703.), a case where an individual was eventually sentenced to thirteen years and four months’ imprisonment at hard labor for his possession of two marijuana cigarettes. The trial judge substantially deviated from the mandatory sentence and sentenced the individual to five years’ imprisonment at hard labor. The Fourth Circuit found that the trial judge had adequately justified that the mandatory sentence of thirteen years and four months was constitutionally excessive. That decision was reversed by the Louisiana Supreme Court holding that his mandatory minimum sentence was not constitutionally excessive.

¹⁰¹ *Sentencing Act 2002*, as amended.

¹⁰² *Sentencing and Parole Act 2010*.

¹⁰³ *Sentencing Act 2002*, s. 102.

(2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so. (...)¹⁰⁴

When the courts impose a life sentence for murder, they must also specify a minimum period of imprisonment or imprisonment without parole of no less than ten (10) years and must be the minimum that the court considers necessary to satisfy the purposes of the sentence:

“103 Imposition of minimum period of imprisonment or imprisonment without parole (...)

(2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
- (b) denouncing the conduct in which the offender was involved;
- (c) deterring the offender or other persons from committing the same or a similar offence;
- (d) protecting the community from the offender.

(2A) If the court that sentences an offender convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment would be sufficient to satisfy 1 or more of the purposes stated in subsection (2), the court may order that the offender serve the sentence without parole.

(2B) The court may not make an order under subsection (2A) unless the offender was 18 years of age.”¹⁰⁵

When some aggravating circumstances accompany the murder, the court is required to impose a minimum period of imprisonment or imprisonment without parole of no less than seventeen (17) years, unless it is satisfied that it would be *manifestly unjust* to do so:

“104 Imposition of minimum period of imprisonment of 17 years or more

(1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:

- (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
- (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
- (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
- (d) if the murder was committed in the course of another serious offence; or

¹⁰⁴ *Sentencing Act 2002*, s. 102.

¹⁰⁵ *Sentencing Act 2002*, s. 103

- (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
- (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
- (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
- (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or
- (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or
- (i) in any other exceptional circumstances.”

Finally, when the murder is a “stage 2 or stage 3 offence” (second or third “strike” – see below), the court must sentence the offender to a life sentence without parole, or a minimum period of imprisonment of not less than 20 years unless, again, it would be *manifestly unjust* to do so.¹⁰⁶

The *Sentencing and Parole Act 2010* also introduced a “three strikes” sentencing regime (or, more exactly, a sentence escalation regime) for certain qualifying offences. There are 40 qualifying offences comprising all major violent and sexual offences with a maximum penalty of seven years imprisonment or more, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery. In that three-stage regime, courts are required to warn qualifying offenders and then increase penalties for subsequent offences. Most importantly, on a “third strike”, the courts are to impose the maximum term of imprisonment prescribed for that offence unless that would be “manifestly unjust”.

When one of the qualifying offences is committed, a first warning is to be issued to any offender aged 18 or over at the time of the offence and who does not have any previous warnings. The first “strike” warning stays on the offender’s record (unless his or her conviction is quashed by an appellate court). Should this offender be subsequently convicted of committing another qualifying offence, he or she is to receive a final warning and, if sentenced to imprisonment, will serve that sentence in full without the possibility of parole. On conviction of a third qualifying offence the court must impose the maximum penalty for the offence. The court must also order that the sentence be served without parole, unless the court considers that would be *manifestly unjust*. If there are some exceptional circumstances associated with the offence or the offender, the judge can decide that it would be “manifestly unjust” or extremely unfair to order that the sentence be served without parole.

“86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment

(1) Despite any other enactment,—

¹⁰⁶ *Sentencing Act 2002*, s. 86E.

- (a) a defendant who is committed for trial for a stage-3 offence must be committed to the High Court for that trial;
 - and
 - (b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.
- (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
- (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be *manifestly unjust* to make the order.
- (4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum period of imprisonment of not less than 20 years unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be *manifestly unjust*, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.
- (5) If the court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the court must give written reasons for not doing so.
- (6) If the court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.
- (7) Despite subsection (2), this section does not preclude the court from imposing, under section 87, a sentence of preventive detention on the offender, and if the court imposes such a sentence on the offender,—
- (a) subsections (2) to (5) do not apply; and
 - (b) the minimum period of imprisonment that the court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the court would have imposed under subsection (2), unless the court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be *manifestly unjust*.
- (8) If, in reliance on subsection (7)(b), the court imposes a minimum period of imprisonment that is less than the term of imprisonment that the court would have imposed under subsection (2), the court must give written reasons for doing so.”

The exception can also apply in cases where the court is sentencing an offender to preventive detention. Under s. 89 of the *Sentencing Act 2002*, when a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment, which in no case may be less than 5 years. The minimum period of imprisonment must be the longer of: (a) the minimum period of imprisonment required to reflect the gravity of the offence; or, (b) the minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender’s age and the risk posed by the offender to that safety at the time of sentencing.

Section 86D (7) and (8) of the *Sentencing and Parole Reform Act 2010* specifies that the minimum period of preventive imprisonment that the Court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the Court would have imposed under subsection (2), unless the Court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be *manifestly unjust*.

In all of the relevant instances, the courts must give written reasons for deviating from the expected minimum penalty. The threshold for deviating from the prescribed minimum penalties, as set by the “manifestly unjust” criterion, is quite high so as to apply only to very unusual circumstances. Yet, the threshold is not very specific, so as to allow the courts to deal with unforeseen circumstances.

Since the new regime was adopted, the courts have had several opportunities to explain how the “manifestly unjust” concept should be interpreted. The courts have held that it is a high threshold. What amounts to “manifestly unjust” depends on the particular facts of the case. In *R v O'Brien* the court commented that: “‘Unjust’ can only mean that in the context of a particular murder and a particular offender, the normal sentence of life imprisonment runs counter to both a Judge’s perception of a lawfully just result and also offends against the community’s innate sense of justice. ‘Manifestly’ means that injustice must be patently clear or obvious.”¹⁰⁷

With respect to the court’s discretion to deviate from the “strong presumption” that a sentence of life imprisonment must be imposed (s. 102), the courts have clarified that the assessment of manifest injustice is a conclusion likely to be reached in exceptional cases only and the scope to account for the young age of the offender is greatly limited.¹⁰⁸

In *R v O'Brien* the Court of Appeal noted that: “There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of further risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.”¹⁰⁹ However, it agreed with the court of first instance and held that in the context of a criminally motivated and brutal attack on a vulnerable victim, a mild intellectual impairment, even when coupled with youth, was not sufficient to displace the presumption.¹¹⁰

England and Wales – Exception when a minimum penalty would be unjust

The relief was introduced in the United Kingdom in a proposed new law at the last minute, by the House of Lords to allow judges to have regard to specific circumstances relating to either the offender or the offence when considering the appropriateness of imposing the minimum sentence. Judges were also directed to take into account any specific circumstances that would render the prescribed minimum penalty “unjust in all the circumstances”.

¹⁰⁷ *R v O'Brien*, HC, New Plymouth, 21/2/2003, T06/02.

¹⁰⁸ *R v Rawiri and Ors* [2003] 3 NZLR 794.

¹⁰⁹ *R v O'Brien* 2003, NZ CA107/ 03, para. 36.

¹¹⁰ Several other court decisions are also reviewed in Chhana et al., 2004.

Section 109 of the *Power of Criminal Courts (Sentencing) Act 2000* imposed a mandatory life sentence in the cases of offenders, aged 18 or over, convicted of a second serious offence, “unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so” (s. 109 (2)). In such cases, the court must state in open court that it is of that opinion and specify the exceptional circumstances that were considered (s. 109(3)). The list of serious offences qualifying under these dispositions is a long one (culpable homicide, conspiracy to commit murder, rape, aggravated assaults, possession of firearms, use of firearms to resist arrest, etc.).

Section 110 of the same Act also established a seven year minimum imprisonment penalty for a third “class A drug offence” and s. 111 provided a minimum penalty of three years of imprisonment for a third conviction for burglary. In both cases, the law also left the door open and provided an exception allowing the courts to deviate from these penalties “where the court is of the opinion that there are particular circumstances which: (a) relate to any of the offences or to the offender; and, (b) would make it unjust to do so in all the circumstances” (s. 110 (2) and s. 111(2)). As was the case for s. 109, where the courts do not impose the minimum sentence, they must state in open court that they are of that opinion and what the particular circumstances are.

In *McInerney*, the Court of Appeal expressed the view that the exemption created in s. 111(2) in respect of domestic burglary gives the sentencing judge a fairly substantial degree of discretion as to the categories of situations where the presumption can be rebutted.¹¹¹ The Court gave two examples of situations where a mandatory sentence of imprisonment for three years may be unjust: when two offences were committed before the offender became 16, when two of the offences were committed many years earlier than the third offence, or when an offender has made real efforts to reform or conquer his drug addiction, but some personal tragedy triggers the third offence.

With respect to s. 110 (minimum sentences for drug offences), there are similar examples of cases where the courts have determined that imposing the minimum penalty would be unjust: for example, when an offender’s previous convictions had occurred a number of years before the current offence;¹¹² or when the previous offences only involved supplying small amounts of drugs to a group of friends.¹¹³

Scotland – Exceptions in the interest of justice

Section 205B of the *Crime and Punishment (Scotland) Act 1997* provides a *mandatory* minimum penalty for a third conviction of certain offences related to drug trafficking (Class A drug trafficking offences). However, an exemption is created when the court “is of the opinion that there are specific circumstances which: (a) relate to any of the offences or to the offender; and (b) would make that sentence unjust (s. 205B(3)).

¹¹¹ *R v McInerney R v Keating* [2003] All ER (D) 28 (Jan). Given the identity of language between the relevant paragraphs creating an exception to mandatory penalties in sections 110 and 111, it is likely that this would also for s. 110 in relation to the mandatory minimum sentence for Class A drugs.

¹¹² *R v McDonagh* [2006] 1 Cr. App. R. (S.) 111.

¹¹³ *R v Turner* [2006] 1 Cr App R (S) 95.

7. Relief to allow for the treatment of the offender

The encouragement of diversionary drug courts in the 2013 U.S. Justice Department’s “Smart on Crime” initiative could signal the broader use of relief from mandatory minimum penalties to allow for the treatment of offenders.

In the State of Montana, Section 46-18-222 of the *Montana Code (Title 46 – Criminal Procedure)* creates a possible relief from the application of very severe mandatory minimum penalties in a number of specified sexual offences, such as sexual assault when the victim is less than sixteen years of age and the offender is more than 3 years older than the victim (§45-5-502(3)), or sexual assault without consent (§45-5-503(4)) and incest (§ 45-5-507(5)), when the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence, or for offences such as prostitution (§45-5-601(3)), promoting prostitution (§45-5-602(3)), aggravated promotion of prostitution (§45-5-603(2)) when the “prostitute” was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence, or sexual abuse of children (§45-5-625(4)), when the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence.¹¹⁴

The relief which is provided by §46-18-222(6) is unusual and justified on the basis of the prospect for the rehabilitation of the offender. It requires the judge to determine, “based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of §46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society.” In those cases, the judge must include in his or her judgment a statement of the reasons for the determination.

Also, as mentioned before, in Victoria, a 2013 law imposing mandatory minimum penalties for “gross violent offences” stipulates that the mandatory minimum penalty may be deviated from when the court proposes to make a hospital security order or a residential treatment order in respect of the offender.¹¹⁵

8. Presumptive minimum penalties

A presumptive minimum sentencing regime is one in which prescribed legislative minimum sentences dictate the sentence that must be imposed by a court in sentencing offenders, but where the law also stipulates grounds upon which the court may find the presumption to be rebutted and proceed to exercise its full sentencing discretion (See: Sentencing Advisory Council, 2008: 6).

¹¹⁴ In the case of these last four offences, the mandatory minimum is effectively 25 years. The Code states that the offender shall be punished by imprisonment in a state prison for a term of 100 years and the court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222. During the first 25 years of imprisonment, the offender is not eligible for parole.

¹¹⁵ *Crimes Amendment (Gross Violence Offences) Act 2013 (VCT)*, No. 6 of 2013, s. 10A

It has been argued that much of what mandatory minimum penalties are meant to achieve can be achieved by making such laws *presumptive*, not unlike what is already the de facto situation in many jurisdictions where sentencing guidelines were adopted and are enforced.¹¹⁶ Michael Tonry argues that: “Converting all mandatory penalties to presumptive penalties would sacrifice few of the values sought to be achieved by such laws but would avoid many of the undesirable side effects” (Tonry, 2009: 103; also, Tonry 2014).¹¹⁷ The following are examples of jurisdictions where mandatory minimum penalties have been established (or have evolved) as *presumptive penalties*, allowing deviations from the presumptive sentence in exceptional circumstances.

Four examples are presented here. These are the cases of England and Wales, which has presumptively binding guidelines, Connecticut which has both strict and presumptive minimum sentences, Minnesota which has both presumptive sentencing guidelines and minimum penalties, and New South Wales which has adopted a presumptive standard non-parole period sentencing scheme.

England and Wales

The Sentencing Council of England and Wales has formulated presumptively binding sentencing guidelines that promote uniformity at sentencing by prescribing a sequence of steps for courts to follow when sentencing an offender, while also allowing for a significant degree of discretion (Roberts, 2013; Mallet, 2015). Roberts noted that that the sentencing guidelines are much less rigid than those adopted in the US: “Across the US, most guideline systems employ numerical presumptively binding guidelines with a more rigorous compliance requirement” (Roberts, 2013: 11). A court is only required to “have regard to” the Council’s guidelines and to give reasons in the event of a “departure” from them.

With respect to prescribed minimum sentences for murder, judges are required to consider various starting points, mitigating and aggravating factors, and other considerations, and while the legislation is not binding, it requires judges to state their reason for departing from the guidelines in their sentencing judgment (Fitz-Gibbon, 2016: 51).

¹¹⁶ In the United States, decisions of the Supreme Court have effectively made federal sentencing guidelines presumptive. See: *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court held that the SRA’s mandatory guidelines scheme violates the Sixth Amendment. To salvage the guidelines in a constitutionally permissible manner, the Court severed the SRA provision “that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure).” However, the Court held that district judges must take the guidelines into account in accordance with 18 USC § 3553(a)(4)(a).12. - *Booker*, 543 US at 259-260. See also: The detailed report of the United States Sentencing Commission (2011), *Report to Congress: Mandatory Minimum penalties in the Federal Criminal Justice System*; and, Lynch and Omori (2014).

¹¹⁷ Having argued that one of the unintended consequences of mandatory minimum sentences laws requiring the imposition of penalties sometimes perceived to be too severe is that prosecutors may sidestep the laws by not bringing charges subject to such penalties or by agreeing to dismiss them in plea negotiations (or that judges and prosecutors can find other “disingenuous” ways to evade their applications), Tonry adds that: “If official circumvention of mandatory penalties in cases where they seem unduly harsh is foreseeable, and it is, conversion to mandatory (presumptive) penalties is likely to result in no less systematic enforcement but to lessen hypocritical efforts at avoidance” (Tonry, 2009: 103).

Connecticut - Mandatory minimum penalty as a “presumptive minimum sentence”

As of February 2015, the State of Connecticut had 74 crimes that carry a mandatory prison sentence of a specific duration, 15 of which can result in a person being punished as a persistent dangerous felony offender if he/she stands convicted of certain serious offences and has prior convictions of certain serious crimes (OLR, Connecticut General Assembly, 2015). Over the years, the State has adopted two forms on mandatory minimum penalties: *strict* mandatory minimum sentences requiring a judge to impose a statutorily fixed minimum sentence regardless of mitigating factors (no opportunity for discretion), and *presumptive* minimum sentences. Under the presumptive sentencing dispositions, a judge may exercise his or her discretion to depart from a mandatory minimum prison term with a statement explaining the reasons for the departure.

The *Connecticut General Statutes* contain several drug or firearms related offences which stipulate exceptions to the application of the mandatory minimum penalty, thus making the mandatory penalty presumptive.¹¹⁸ In some instances, the “presumptive nature” of the mandatory minimum sentence only applies to the first conviction for that offence (e.g., a first conviction for driving during license suspension for DWI and DWI related offences).

Minnesota – Presumptive sentencing guidelines and mandatory minimum penalties

In Minnesota, sentencing guidelines were developed several decades ago in order to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offence of conviction and the extent of the offender's criminal history.¹¹⁹ The guidelines are to be used to determine the presumptive sentence, but the Minnesota Sentencing Guidelines Commission makes it clear that “while the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist” (Minnesota Sentencing Guidelines Commission, 2011: 1).

When such factors are present, the judge may depart from the presumptive disposition or duration provided in the guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. When a sentence departs from the sentencing guidelines, it is an exercise of judicial discretion constrained by case law and appellate review. In such instances, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence. Furthermore, when a plea agreement is made that involves a departure from the presumptive sentence, the court must cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted. The Minnesota Sentencing Guidelines Commission, explained:

“The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be

¹¹⁸ Example of such offences include: driving during licence suspension for DWI, operating a motor vehicle under the influence of alcohol or drugs, carrying handgun without permit.

¹¹⁹ See: Minnesota Sentencing Guidelines Commission, 2011.

reduced if judges depart from the guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high” (Minnesota Sentencing Guidelines Commission, 2011: 29).

There are also several serious crimes for which Minnesota statutes prescribe a mandatory minimum sentence (e.g., where a firearm was used during the commission of the offence). However, in most of these cases, judges now have the authority to impose a different sentence if reasons are given. In that sense, some of the mandatory minimum penalties, operating in conjunction with the sentencing guidelines, have become presumptive. According to the State’s Sentencing Guidelines Commission, “when a motion to sentence apart from the mandatory minimum is made by the prosecutor or the judge, it becomes legal to stay imposition or execution of sentence or to impose a lesser sentence than the mandatory minimum” (2011: 38). In such instances, written reasons are required to specify the substantial and compelling nature of the circumstances which led to that decision and to “demonstrate why the sentence selected is more appropriate, reasonable or equitable than the presumptive sentence” (Minnesota Sentencing Guidelines Commission, 2011: 38).

New South Wales: Standard non-parole period sentencing scheme

In New South Wales, a new standard non-parole period statutory scheme for specified indictable offences was added to the *Crimes (Sentencing Procedure) Act 1999* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. It introduced standard non-parole periods for a broad range of serious indictable offences (e.g., murder, wounding or grievous bodily harm with intent, sexual intercourse without consent, sexual intercourse with a child under the age of 10 years, or robbery with arms and wounding). A standard non-parole period for each offence is set out in a table included in the law and “represents the non-parole period for an offence in the middle of the range of objective seriousness for offences.”¹²⁰

There were further amendments to the statutory scheme by the *Crimes (Sentencing Procedure) Amendment Act 2007* and the *Crimes Amendment (Sexual Offences) Act 2008*, adding to the list of offences to which standard non-parole periods applied and excluding from the application of the scheme offenders who were under 18 years of age at the time of the offence.¹²¹

The purpose of the statutory scheme was to make sentencing more consistent and transparent, and not to introduce mandatory sentencing. The scheme was meant to “provide further guidance and structure to judicial discretion.”¹²² Section 54B(2) of the Act provided at the time that “the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter (...).” Legitimate departures from the standard non-parole period set by law are quite possible:

¹²⁰ *Crimes (Sentencing Procedure) Act*, s. 54A(1) and (2).

¹²¹ See: *Crimes (Sentencing Procedure) Act*, s. 54D(3), inserted by the *Crimes Amendment (Sexual Offences) Act 2008*, Sch 2.4[4].

¹²² Then Attorney General (NSW), the Hon RJ Debus, NSW, Legislative Assembly, Debates, 23 October 2002, p 5813.

the use of the word “may” in s. 54B(3) of the *Crimes (Sentencing Procedure) Act* confers a discretion on the court to depart from a standard non-parole period.¹²³

The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are described in s. 21A of the *Crimes (Sentencing Procedure) Act*. Ss. 21A(2) and 21A(3) respectively list various aggravating and mitigating factors, while s. 21A(1) also permits consideration of “any other objective or subjective factor that affects the relative seriousness of the offence” and adds that the matters specifically listed in the section are to be considered “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.”

The court in *R v Way* (2004) said that “statutory and common law factors may still properly be taken into account in determining a sentence even though they are not listed in s. 21A(2) or (3)”, including the fundamental principle of individualised justice.¹²⁴ Therefore, the matters that may justify a departure from the standard non-parole period may include those recognised by the common law but not mentioned in s. 21A (e.g., offender’s ill health, hardship to the offender as a result of protective custody, hardship to third parties, and the principles of parity and totality). In that sense, the standard non-parole periods set by law, act more as reference point, along with the other factors such as authorities, guideline judgments, or the specified maximum penalty for an offence.

The dispositions concerning the application of the standard non-parole periods should not be understood in mandatory terms. This was made clear in *Muldrock v The Queen* (2011), where all Justices of the High Court in a single judgment held that the Court of Criminal Appeal had erred “by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant.”¹²⁵ The High Court also held that “... it was an error [of the court in *R v Way*] to characterise s. 54B(2) as framed in mandatory terms.”¹²⁶

According to s. 44 (1)(3), “(...) when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).” The full range of subjective considerations is capable of warranting a finding of special circumstances. In *R v Simpson*, Chief Justice Spigelman said:

“The words ‘special circumstances’ appear in numerous statutory provisions. They are words of indeterminate reference and will always take their colour from their surroundings ... the non-parole period is to be determined by what the sentencing judge

¹²³ See: s. 54B(3) of the *Crimes (Sentencing Procedure) Act*.

¹²⁴ *R v Way* (2004) 60 NSWLR 168 at [104].

¹²⁵ *Muldrock v The Queen* (2011) 244 CLR 120 at [32]. The High Court also held that *R v Way* was wrongly decided.

¹²⁶ *Muldrock v The Queen* (2011) 244 CLR 120 at [25]. In effect, the High Court held that in sentencing for an offence to which standard non-parole periods applied a court is not required or permitted to engage in a two-stage approach and that the standard non-parole period should not have been determinative in sentencing Mr. Muldrock. This decision has the potential to affect the sentencing of offenders convicted of an offence with a standard non-parole period.

concludes that all of the circumstances of the case, including the need for rehabilitation, indicate ought [to] be the minimum period of actual incarceration.”¹²⁷

The Judicial Commission of New South Wales noted that a finding of special circumstances under ss. 44(2) or 44(2B) authorises a reduction in the otherwise appropriate non-parole period, but it does not authorise an increase in the term of the sentence.¹²⁸ The reform of the offender will often be the purpose in finding special circumstances, but this is not the sole purpose.¹²⁹ The risk of institutionalisation, even in the face of entrenched and serious recidivism, may be regarded as a sufficiently special circumstance to warrant adjusting the statutory ratio.¹³⁰

A study of the impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales, concluded the statutory scheme had generally resulted in a greater uniformity of, and consistency in, sentencing outcomes (Poletti and Donelli, 2010).

9. Relief available post-sentencing

A more indirect way to create exceptions to mandatory minimum sentences is to make them subject to review while they are being served. In the United States, at the federal level, the Bureau of Prosecution can petition the court to reduce an inmate’s sentence if the court finds that “extraordinary and compelling reasons warrant such a reduction”; or the inmate is at least 70 years of age, has served at least 30 years of his or her sentence, and a determination has been made by the Director of the BOP that the inmate is not a danger to the safety of any other person or the community (James, 2014).

A process also exists in Maryland where the code contains mandatory minimum sentences for certain handgun and drug distribution offences. The state’s mandatory sentencing requirements largely target repeat offenders, and judges can impose a lesser sentence provided the prosecution agrees. The Court of Appeals has also stated that plea agreements that stipulate a sentence below a mandatory minimum for repeat offences are acceptable and that prosecutors are free to decide whether or not to seek the mandatory minimum for a repeat offender. Since 1999, Maryland’s criminal procedure code makes it possible for offenders sentenced to prison for more than two years, including offenders sentenced to a mandatory minimum sentence, to apply for reconsideration of their sentence by a three-judge panel (excluding the sentencing judge) from the same circuit in which they were sentenced.¹³¹ In the case of a prisoner serving a mandatory sentence, the sentence cannot be decreased unless the vote of the panel is unanimous. The likelihood of obtaining relief from a sentence review is apparently quite small (Justice Policy Institute, 2006).

¹²⁷ *R v Simpson* (2001) 53 NSWLR 704, at 59.

¹²⁸ *R v Tobar* (2004) 150 A Crim R 104, at 36–37; *R v Huynh* [2005] NSWCCA 220, at 35–39; *Markham v R* [2007] NSWCCA 295, at 29.

¹²⁹ *R v El-Hayek* (2004) 144 A Crim R 90, at 105.

¹³⁰ *R v Lemene* (2001) 118 A Crim R 131, at 66–67; *R v Hooper* [2004] NSWCCA 10, at 62–64; *Jackson v R* [2010] NSWCCA 162, at 24–25.

¹³¹ *Maryland Code, Criminal Procedure* §8-105.

The draft *Model Penal Code Sentencing* of the American Law Institute also includes provisions for a sentence modification judicial review panel to review the sentences of offenders who have served at least 15 years of their sentence (American Law Institute, 2011: 76).

Discussion

1. Recent developments

It is hard to characterize the various developments that occurred since 2012, when this review was first conducted. There was no situation where the legislator decided to repeal existing mandatory minimum penalties. However, three trends can be discerned which were obviously related to political orientations, public debate and court decisions. They were: (1) some increases in the use of mandatory minimum penalties (with or without statutory exceptions); (2) partial limitations of the application of mandatory minimum penalties, usually as result of court decisions and sometimes followed by changes in prosecutorial policies (guidelines); and, (3) growing support for presumptive penalties as an alternative to mandatory minimum penalties as a means to structure sentencing. There were also some modest developments in terms of the further articulation of balanced statutory relief provisions.

Increased use of mandatory minimum penalties

Canada, as we know, has increased its use of mandatory penalties by: (1) the *Safe Streets and Communities Act (2012)*¹³² that amended the *Controlled Drugs and Substances Act* to add mandatory minimum penalties for particular drug offences in certain circumstances, and amended the *Criminal Code* to add mandatory minimum penalties for particular offences involving the sexual exploitation of children; (2) the *Tackling Contraband Tobacco Act (2014)*¹³³ that establish minimum penalties for tobacco contraband offences; and, (3) Bill C-26 (2015)¹³⁴ that amended the *Criminal Code* to increase the mandatory minimum penalty for a number of Code offences, most of them sexual offences involving children and young persons.

Between 2013 and 2015, New South Wales adopted several amendments to its *Crimes (Sentencing Procedure) Act 1999*, imposing standard non-parole period for certain firearms offences and sexual offences, creating a new minimum penalty of 8 years and a maximum penalty of life imprisonment without parole for a sexual offence against a child under the age of ten. The States of Queensland and Western Australia added new offences punishable by minimum penalties (sometimes without the possibility of exceptions) or increased the minimum penalties already set by law.

In 2013, the State of Victoria established mandatory terms of imprisonment (with a minimum period of non-eligibility for parole of four years) for adults who commit the offence of

¹³² *Safe Streets and Communities Act*, SC 2012, c 1.

¹³³ *Tackling Contraband Tobacco Act*, S.C. 2014, c. 23.

¹³⁴ *An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, S.C. 2015, c. 23.

intentionally or recklessly causing serious harm to a person in circumstances of gross violence.¹³⁵ In the Northern Territories, in 2013, the government replaced the existing scheme with a new minimum sentencing scheme for violent offences¹³⁶. Exemptions from the minimum levels of imprisonment are possible if there are “exceptional circumstances”. Other jurisdictions, as was mentioned earlier, also enhanced their mandatory minimum penalty regime, and not just for serious offences.

Limitations to the application of mandatory minimum penalties

Court decisions in Canada and in other countries have set limits on the application of mandatory minimum penalties. In Canada, most notably, the Supreme Court found that the mandatory minimum sentences imposed by s. 95(2)(a)(i) and (ii) of the *Criminal Code* (regarding certain firearms offences) violated s. 12 of the *Charter*.¹³⁷ Writing for the majority, Chief Justice McLachlin explained that:

“Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.”¹³⁸

In the United States, the United States Supreme Court decision, in *Miller v Alabama* (2012), declared mandatory sentences of life without parole for juveniles unconstitutional.¹³⁹ It decided that a mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment when the offender is under the age of 18 at the time of the offence.

On the other hand, in some countries, the highest courts have upheld the right of states to set minimum sentences. For example, this was the case in Australia with the High Court decision in *Magaming v. The Queen*¹⁴⁰.

Prosecutorial guidelines

The continuing debate over the impact of the application of mandatory minimum penalties has increasingly drawn attention to the role and discretion of prosecutors in applying these schemes.

In the United States, the Supreme Court's decision in *Alleyne v. United States*¹⁴¹ heightened the role of prosecutors in determining whether a defendant is subject to a mandatory minimum

¹³⁵ *Crimes Amendment (Gross Violence Offences) Act 2013* (VIC).

¹³⁶ *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT).

¹³⁷ *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

¹³⁸ *Idem*, at para 44.

¹³⁹ *Miller v. Alabama*, 567 US (2012).

¹⁴⁰ *Magaming v. The Queen* [2-13] HCA 40 (11 October 2013).

sentence and held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt.¹⁴² This was a very significant development in that it weakened sentencing factors usually presented as binding.

The same year, the U.S. Department of Justice launched the “Attorney General’s Smart on Crime Initiative” with the aim of reducing the use of mandatory minimum sentences for low-level, non-violent drug crimes, and encouraging the use of diversion measures (US Department of Justice, 2013). The Attorney General also changed the federal charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders (US Attorney General, 2013; 2013a).

In Australia, in 2013, following a Senate review of the operation of mandatory minimum penalties in cases of migrant smuggling, the Attorney General issued some guidelines concerning the charging process in relation to offences carrying these mandatory minimum penalties.

In Canada, following the adoption of the *Safe Streets and Communities Act*, the Director of Public Prosecutions issued guidelines to provide directions to Crown counsel on the implications of these amendments with respect to the charging process (Director of Public Prosecutions, 2014; 2014a). Among other things, with respect to the mandatory minimum penalties attached to offences involving the sexual exploitation of children, the guidelines explain that: “(...) it will generally be inappropriate for Crown counsel to take a plea to a lesser offence, stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline” (Director of Public Prosecutions, 2014a).

Exceptions and Presumptive Guidelines

Some countries have contributed to the discussion on how exceptions to the application of mandatory minimum penalties should be defined. Most notably, the Sentencing Advisory Council (Victoria) articulated several principles upon which it suggested statutory exceptions to mandatory minimum penalties (Sentencing Advisory Council, 2011). These, defined as “special conditions”, informed the legislation adopted in 2013 by the State of Victoria¹⁴³. At home, the Uniform Law Conference of Canada (2013) offered its own suggestion.

In the United States, as mentioned previously, several legislative initiative are being proposed to Congress for broadening the use of existing “safety valves” as it relates to federal drug and other offences. The ultimate fate of these initiatives is still unknown.

Finally, sentencing guidelines in many jurisdictions are slowly turning into de facto “presumptive” guidelines that allow deviations from the prescribed minimum sentences in some circumstances. At the same time, many observers are paying close attention to the work of the

¹⁴¹ *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

¹⁴² The Attorney General explained that: “This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty” (US Attorney General, 2013: 3).

¹⁴³ *Crimes Amendment (Gross Violence Offences) Act 2013* (VCT), No. 6 of 2013

Sentencing Guidelines Council, in England and Wales, including the application of the Council's guidelines concerning personal mitigating factors and the use of discretion by the courts.

2. Impact of exemptions from mandatory minimum penalties

There is some consistent evidence about the impact of mandatory minimum penalties, but very few jurisdictions have compiled and published data on cases where exceptions were made to the application of these mandatory sentencing provisions. It is obvious that the impact in question can be expected to vary depending on the type of crime or type of offenders to which or to whom they apply, but that kind of systematic analysis does not seem to have been conducted yet.

However, notwithstanding these general observations, there is some research available in the United States on the impact of certain forms of departure from federal sentencing guidelines (e.g., Cappelino and Meringolo, 2014; Divita, 2015; Fischman and Schanzenbach, 2012; Krasnostein and Freiberg, 2013; Ortiz and Spohn, 2014). In particular, departures for substantial assistance, because they require the agreement of the prosecution, seem to be essentially used to encourage or compel offenders to plead guilty and cooperate with the state. The research, as was mentioned before, shows that these exceptions may have allowed the courts to more efficiently expedite a significant number of cases, but also that they introduced an alarming level of unjustifiable sentencing disparity and have affected different groups of offenders differently (Fischman and Schanzenbach, 2012; Divita, 2015).

There appears to be only one situation where the resulting deviations from mandatory minimum penalties for serious crimes may have compromised the stated policy objectives for the adoption of these sentencing schemes. That is the case of South Africa where sentencing decisions based on considering “substantial and compelling circumstances” in rape cases appear to have defeated the stated purpose of the sentencing scheme. As was seen earlier, that situation was corrected by amending the law to specify which factors did not constitute “substantial and compelling circumstances” in rape cases. That situation also appears to be the only case where serious public concerns were expressed about the application of reliefs from mandatory minimum sentences.

3. Exemptions and the prohibition of unjust, arbitrary or inhuman punishment

The possibility for the courts to recognize special circumstances and depart from mandatory minimum penalties to prevent the imposition of unjust sentences tends to be regarded as a necessary way to ensure that mandatory sentencing schemes do not contravene some fundamental human rights principles regarding criminal punishment. The countries reviewed in this paper are bound by the *International Covenant on Civil and Political Rights* (ICCPR), in particular articles 7 (Prohibition of inhuman and degrading treatment) and 9 (Prohibition of arbitrary detention). Some, like the United Kingdom, are also bound by the *European Convention on Human Rights*, in particular Article 3 which prohibits “inhuman or degrading treatment” and Article 5 prohibiting arbitrary detention. Several of them have their own human rights law which invariably prohibit arbitrary, inhuman or unjust punishments. In several instances, the question arose of whether mandatory minimum sentences are essentially in

contravention of these human rights principles. In such instances, the fact that there was a possibility for the courts to depart from mandatory minimum penalties in some limited circumstance was deemed directly relevant to the discussion.

The United Nations Human Rights Committee has consistently held that, with respect to Article 9 of the ICCPR, the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. In that sense, as some scholars have argued, “a penalty which might be justified for a serious crime could constitute inhuman treatment or punishment if imposed for a petty offence. To this extent, at least, inhuman treatment is a relative notion” (Jacobs and White, 1996: 51).

That whole discussion is certainly relevant to Canada in the context of the guarantees offered by the *Canadian Charter of Rights and Freedom* Article 9 (the right not to be arbitrarily detained or imprisoned) and Article 7 (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice). In 2015, in *R v. Nur*¹⁴⁴ the Supreme Court declared that the mandatory minimum sentences imposed by s. 95(2)(a)(i) and (ii) of the *Criminal Code* violate s. 12 of the *Charter* and are null and void under s. 52 of the *Constitution Act, 1982*. Also, before the Supreme Court, is the case of *Lloyd v. The Queen* in which the constitutionality of a minimum sentence for a drug offence (with a prior conviction) is being challenged.

United Kingdom

In the UK, the *Human Rights Act 1998* integrating the European Convention also prohibits “inhuman or degrading treatment” and “arbitrary detention.”¹⁴⁵ The question of whether mandatory penalties may contravene the Convention has been raised in at least two cases: *R v Offen and Others*¹⁴⁶ and *R v Rehman and Wood*¹⁴⁷. In the first case, the court considered the requirement to impose a life sentence under section 2 of the *Crime (Sentences) Act 1997* when a person is convicted for a second time of a serious offence (unless there are exceptional circumstances). In the second case, the Court of Appeal was dealing with the mandatory minimum penalty required under Section 51A of the *Firearms Act 1968* (inserted in the Act by section 287 of the *Criminal Justice Act 2003*). One of the appellants had submitted that section 51A required the court to impose sentences that constituted inhuman and degrading treatment and punishment in contravention of Article 3 of the *European Convention on Human Rights*, and that such sentences could result in arbitrary and disproportionate deprivation of liberty in violation of Article 5 or articles 5 and 3 when read together. The Court did not regard that as “being a situation where it is necessary to read the section down (i.e., 51A), relying on section 3 of the *Human Rights Act 1998* so as to comply with the Convention.”

The Court’s reasoning was the mandatory minimum penalty could result in an arbitrary and disproportionate sentence if there was no possibility for the court to consider “exceptional

¹⁴⁴ *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

¹⁴⁵ See: <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

¹⁴⁶ *R v Offen and Others* [2001] 1 Cr App R 372.

¹⁴⁷ *R v Rehman and Wood* [2005] EWCA Crim 2056.

circumstances”, most particularly if the circumstances involved were such that it “would mean that to impose five years’ imprisonment would result in an arbitrary and disproportionate sentence.”¹⁴⁸

In July 2013, the Grand Chamber of the European Court of Human Rights ruled in the case of *Vinter and others v UK* that whole life orders of imprisonment violated Article 3 of the *European Convention of Human Rights* which prohibits inhuman and degrading treatment and torture. This has been successfully challenged. On 18 February 2014, the Court of Appeal held that whole life sentences imposed pursuant to section 269 of the *Criminal Justice Act 2003* were not incompatible with Article 3 of the *European Convention on Human Rights* and judges were to continue to impose them in exceptional circumstances.¹⁴⁹

United States

In the United States, the *Bill of Rights* (specifically, the 8th Amendment to the Constitution) prohibits the infliction of “cruel and unusual punishment.” The United States Supreme Court, in deciding whether or not a particular punishment is cruel and unusual, has relied on principles articulated in *Furman v Georgia*.¹⁵⁰ The punishment must not be: by its severity, degrading to human dignity; a severe punishment that is obviously inflicted in wholly arbitrary fashion; a severe punishment that is clearly and totally rejected throughout society; a severe punishment that is patently unnecessary. The latter principle is frequently quoted with respect to mandatory minimum penalties. The argument often revolves around whether the mandatory severe punishment may be necessary to deter offenders or to protect society and are therefore justified. However, as was mentioned earlier, in *Miller v. Alabama*, the United States Supreme Court declared unconstitutional mandatory sentences of life imprisonment without parole when the offender is under the age of 18 at the time of committing the offence.¹⁵¹ Such sentences were deemed to constitute cruel and unusual punishment.

New Zealand

In New Zealand, section 9 of the *New Zealand Human Rights Act 1990* establishes the “right not to be subjected to torture or cruel treatment” as follows: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.” Section 22 affirms that “(e)veryone has the right not to be arbitrarily arrested or detained,” and section 27 affirms that “(e)very person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognized by law.” These rights are not absolute. Section 5 expressly provides that the rights conferred by the Act may be limited by law to the extent that this can be “demonstrably justified in a free and democratic society.”

¹⁴⁸ *R v Offen and Others* [2001] 1 Cr App R 372, para. 16.

¹⁴⁹ Att. Gen's. Reference (No 69 of 2013), Re; *R v McLaughlin and R v Newell* [2014] EWCA Crim 188.

¹⁵⁰ *Furman v Georgia*, 408 U.S. 238 (1972).

¹⁵¹ *Miller v. Alabama*, 567 US (2012).

The terms “disproportionately severe” (in Section 9) create a requirement for the courts to balance mandatory penalties required for the protection of the public through the imprisonment of dangerous offenders, are the human rights provisions which limit arbitrary and excessive punishment and detention.

South Africa

In South Africa, the *Constitution of South Africa 1996* (Chapter 2 – *Bill of Rights*) refers to the right “not to be deprived of freedom arbitrarily or without just cause” (12(1)(a)), and the right “not to be treated or punished in a cruel, inhuman or degrading way” (12(1)(e))(a non-derogable right).

Article 36 (limitation of rights) of the Bill of Rights, stipulates that:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.

The Constitutional Court found that “proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading.”¹⁵² In *Dodo v S*, the court explained that a sentence would be “cruel, inhuman or degrading” if its length was grossly disproportionate, but also that the court can impose a lesser sentence well before gross disproportionality is reached when “substantial and compelling circumstances” exist, based on the interpretation of that test specified by the Supreme Court of Appeal in *S v Malgas*.¹⁵³ In other words, the fact that a departure from the mandatory minimum sentence is possible in certain circumstances is what makes it possible to avoid gross disproportionate penalties.

4. Policy options

Strict mandatory penalties, whether or not they can in fact deliver on the policy objectives that motivated their adoption in the first place, inherently hold the risk that they may be applied in cases for which they were never intended or in circumstances where they will amount to an unjust sentence.

It is certainly possible, without denying the policy objectives pursued through the adoption of mandatory minimum penalties, to adopt a sentencing scheme where these penalties are affirmed as essentially presumptive rather than a strict framework from which deviations are not possible. There are already some very viable examples of such schemes.

¹⁵² *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, para. 94.

¹⁵³ *Buzani Dodo v The State* (CCT1/01, [2001]), para. 37.

When reducing or repealing mandatory minimum is not a possibility, a politically viable strategy for reducing their detrimental impact and preventing injustices is to permit the courts to sentence an offender below a statutory minimum when certain criteria are met. The issue then becomes one of identifying what these criteria (or thresholds) should be. However, as demonstrated by the experience of other countries, it is possible to craft some exemption provisions that would operate clearly and predictably, and in harmony with the balance of the sentencing provisions of the Criminal Code. The Uniform Law Conference of Canada (2013) has already made some concrete suggestions towards that end.

The main argument in favour of creating exceptions to the application of mandatory minimum penalties remains the need to avoid unjust and arbitrary punishment. As was repeatedly articulated by various courts, the principle of proportionality in sentencing is at the centre of that concern: “(p)roportionality is the sine qua non condition of a just sanction”¹⁵⁴. Proportionality implies ensuring that a sentence reflects the gravity of offence, but also that “it does not exceed what is appropriate, given the moral blameworthiness of the offender”.¹⁵⁵

Several jurisdictions have shown that it is possible and useful to introduce exceptions to mandatory minimum penalties that are based on criteria that set a high threshold for any departure from the legislated mandatory minimum penalty. If necessary, it is also possible to set limits on the interpretation of these criteria.

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¹⁵⁴ *R. v. Ipeelee* 2012 SCC13, at para 37.

¹⁵⁵ *Ibidem*.

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