

AN ARGUMENT FOR SECOND LOOK SENTENCING IN AUSTRALIA

MIRKO BAGARIC,* JOHN ANDERSON** AND BRENDON MURPHY***

In all areas of life, decisions are rarely made that have an impact for decades and which cannot be reviewed. Over long periods circumstances often change which make it desirable to revisit earlier decisions to ensure that the initial objectives are still met. Sentencing stands apart from this process. There are offenders sentenced to lengthy terms of imprisonment, and outside of the appeal system there is no systematic process for reviewing the decision even if dramatic changes have occurred since the sentence was imposed. Several jurisdictions in the United States have implemented 'second look' sentencing schemes which provide a structured process for reviewing long sentences when offenders have been in the correctional system for many years. This provides a mechanism for ensuring that the initial sentence is still justifiable in situations where relevant circumstances may have materially changed. We recommend a similar legislative framework should be implemented in Australian jurisdictions.

I INTRODUCTION

A significant number of offenders are sentenced to prison for long periods, sometimes exceeding 20 years.¹ Sentencing, of course, is a purposeful activity. Courts, in reaching sentencing decisions, are guided by the objectives of sentencing, such as community protection, deterrence, and rehabilitation.² The duration and nature of sentences is also heavily influenced by the principle of proportionality, which is moderated by numerous aggravating factors (such as prior criminality and premeditation) and mitigating factors (such as demonstrated remorse).³

* Professor, Swinburne Law School, Swinburne University of Technology, Victoria.

** Professor, School of Law and Justice, University of Newcastle, New South Wales.

*** Associate Professor, School of Law and Society, University of the Sunshine Coast, Queensland.

1 See Part II of this article – almost 20% of the Australian sentenced prison population are serving sentences of 10 years or more.

2 See Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010) ch 3; Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 11th ed, 2025) 222–68.

3 See Mackenzie, Stobbs and O'Leary (n 2) ch 4; Bagaric, Alexander and Edney (n 2) 272–356, 361–560.

In most personal, business, and institutional endeavours, it is rare for decisions to be made on important matters that will have a long-term impact without the opportunity to review the decision. This is because human foresight is limited, and in many fields circumstances can change markedly with the passage of time. Thus, people in their personal lives, businesses and government institutions rarely make decisions the effects of which are felt for over a decade, without having an opportunity to revisit the appropriateness of those decisions. Sentencing stands apart from this practice.

The inability to review long sentences after many years can undermine the jurisprudential rationale or empirical efficacy of the sentence. Numerous events can occur during a prison term that could not be predicted at the time of sentencing and which undercut the reasons underpinning the sentence. The longer the prison term, the more likely it is that relevant changed circumstances will arise. These changed circumstances can take many forms. For example, after the sentence is imposed, the offender may undergo marked rehabilitative reform through the correctional system or develop a debilitating chronic illness that cannot be effectively treated in prison; the victim of a crime of violence might make an unexpected full recovery; or societal – and legal – views regarding the seriousness of crime (for example, drug trafficking) might change considerably.

Despite this potential for various changes in circumstances, there is no structured process in any Australian jurisdiction for re-evaluating the desirability of long sentences. Parole offers part of the solution; however, this is only relevant toward the end of a prison term given that offenders are typically only eligible for parole after serving between 60% to 75% of the head sentence.⁴ Sentencing decisions can certainly be appealed to higher courts, however, the process is complex and is limited to a small number of situations, namely when there is a sentencing error, the sentence is manifestly excessive, or fresh evidence arises.⁵ The prerogative of mercy, release on licence (in the federal jurisdiction) and re-determination of some life sentences (in the New South Wales ('NSW') jurisdiction) are also very limited avenues raising the potential for early release.⁶

In this article, we suggest that a structured process should be in place where all sentences of a very long duration are revisited at a designated point in time. The precise time period is admittedly to some extent arbitrary, but we propose that all sentences should be revisited once an offender has served 15 years imprisonment. The test to be applied at the resentencing is whether, on the basis of sentencing law

4 There is, however, no standard non-parole period for most offences. See *DP v The Queen* [2011] VSCA 1; *McLean v The Queen* [2018] VSCA 209; *Tutchell v The Queen* [2018] VSCA 269; standard sentences – *Sentencing Act 1991* (Vic) ss 5A–5B. In NSW, there is provision that the non-parole period will be at least three-quarters of the head sentence unless there are special circumstances and there is also a table of standard non-parole periods for certain offences which serve as a guide to the appropriate non-parole period for an offence found to be in the middle range of objective seriousness for that particular offence. See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44, 54D, Table ('*Sentencing Procedure Act*').

5 See Part III. See also *Green v The King* [2025] NSWCCA 16 where an extension of time to appeal was granted on the ground of error by the sentencing judge approximately nine years after the original sentence of 21 years imprisonment with a 12½ year non-parole period was imposed.

6 See Part III.

and practice at the time of the review and in light of the relevant facts that have transpired since the initial sentence, a term of 15 years or less is merited. If so, the offender would be released. If the offender is not released the sentence should be revisited every three years.

In making these recommendations, we draw on certain aspects of the ‘second look’ sentencing regime that exists in some jurisdictions in the United States (‘US’).⁷ In framing the recommendations in this article, we also draw on the fact that the overarching rationale underpinning our proposal (the desire to adapt sentences to changed unforeseen circumstances) is already applied to alter sentences which at the time seemed final. There have been several instances where offenders at the expiration of long prison terms have been subjected to additional prison time or other sanctions due to legislative intervention. For example, in Victoria, legislation has been passed that effectively prevents offenders Julian Knight⁸ and Craig Minogue⁹ from ever being released from prison, despite the fact they have completed their non-parole terms. In the federal jurisdiction, some terrorist offenders have had their prison terms extended after the expiration of their sentences.¹⁰ In addition, the proliferation of legislation directed to high-risk offending (notably in cases of terrorism, serious violence and sex offending), has effectively normalised punitive sentencing models.¹¹ The broad rationale for the changes to these longer or additional sentences is that in light of changed circumstances, the initial sentences were no longer appropriate. We contend that this reasoning should also be applied in some cases to reduce very long sentences.

In the next part of the article, we provide an overview of the second look sentencing schemes in the US. This is followed in Part III by a discussion of the existing opportunities to revisit sentences in Australia. The arguments in favour of an Australian second look scheme are analysed and evaluated in Part IV. In Part V, we then set out how the scheme would operate. The reform recommendations are summarised in the concluding remarks.

⁷ See Part II.

⁸ Julian Knight, responsible for the 1987 Hoddle Street massacre in Melbourne, was sentenced to life imprisonment for seven murders and 46 attempted murders, with a non-parole period of 27 years. As his parole date neared, the Victorian Parliament amended the *Corrections Act 1986* (Vic) by introducing section 74AA, which restricts parole unless Knight is imminently dying or incapacitated. Knight challenged section 74AA, arguing it violated Chapter III of the *Constitution*, invoking the Kable principle. He claimed the law interfered with his Supreme Court sentence and improperly involved judicial members of the Adult Parole Board. Knight distinguished section 74AA from the similar provision upheld in *Crump v New South Wales* (2012) 247 CLR 1, emphasising its singular focus on him. The High Court unanimously dismissed the challenge, ruling that section 74AA did not interfere with judicial sentencing and noting that parole decisions fall under legislative purview: *Knight v Victoria* (2017) 261 CLR 306.

⁹ Craig Minogue was convicted in 1988 of murdering police officer Angela Rose Taylor in a 1986 car bomb explosion in Melbourne. Sentenced to life imprisonment with a non-parole period of 28 years, Minogue applied for parole upon its expiry in 2016. Before a decision was made, section 74AB of *Corrections Act 1986* (Vic) was enacted, specifying conditions for Minogue’s parole, requiring he be incapacitated and no longer a community risk. Minogue argued that section 74AB effectively re-sentenced him, violating Chapter III of the *Constitution*. The High Court rejected this argument, finding section 74AB did not impose additional punishment or usurp judicial power: *Minogue v Victoria* (2019) 268 CLR 1.

¹⁰ See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68.

¹¹ See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW); *Serious Offenders Act 2018* (Vic).

II THE SECOND LOOK SENTENCING MOVEMENT IN THE US

The second look movement is a significant reform initiative in the US that seeks to address issues surrounding extreme and often life-long prison sentences by advocating for the possibility of sentence reassessment.¹² This has resulted in a number of jurisdictions creating legal mechanisms to revisit long prison terms imposed on certain types of offenders, with majority public support and a belief in the possibility of earned early release. The reforms we suggest for Australia are based on the overarching rationale for these measures. We now provide an overview of the second look schemes in the US.

A Origins and Motivations of the Second Look Sentencing Movement

The origins of the second look movement are intertwined with evolving views on justice, rehabilitation, and the rights of individuals, especially juveniles. The backdrop to the movement is the punitive nature of the US sentencing system.¹³ The US has for several decades imprisoned more people than any other country. It also has the highest imprisonment rate of all developed nations. The US has seen a staggering 500% increase in incarceration rates over the past 50 years, with more than two million people currently imprisoned. Notably, over 200,000 inmates are serving life sentences, a number greater than the total prison population in 1970.¹⁴

The number of inmates in US prisons peaked at 2,308,800 in 2009,¹⁵ following a surge in prison numbers for nearly half a century. Imprisonment numbers then slowly fell for over a decade – until 2020.¹⁶ This trend has now stopped. The most recent official data (released in September 2025) shows that at year-end 2023, there was a total incarcerated population of 1,852,900 in US prisons and jails.¹⁷ This data shows that there has been a gradual increase in incarceration levels for each of the past three years.¹⁸ The current incarceration rate is approximately 700 per 100,000 US adult residents.¹⁹ By comparison, the most recent Australian Bureau of Statistics data shows that in the December quarter of 2024, there were 44,262

12 The history of the second look movement and the current main legislative schemes are discussed in Becky Feldman, The Sentencing Project, *The Second Look Movement: A Review of the Nation's Sentence Review Laws* (Report, May 2024) <<https://www.sentencingproject.org/app/uploads/2024/05/Second-Look-Movement.pdf>>. See also Kellie R Hannan et al, 'Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?' (2023) *Criminology and Public Policy* 1 <<https://doi.org/10.1111/1745-9133.12616>>; Paula Smith et al, 'Public Support for Universal Second Look Sentencing: A Research Note' (2025) *Criminology* 1 <<https://doi.org/10.1111/1745-9125.12391>>.

13 Feldman (n 12) 4.

14 Ibid.

15 Lauren E Glaze, Bureau of Justice Statistics, 'Correctional Populations in the United States, 2010' (Bulletin No NCJ 236319, December 2011) 3 <<https://bjs.ojp.gov/content/pub/pdf/cpus10.pdf>>.

16 Shaun Gann and Danielle Kaeble, Bureau of Justice Statistics, *Correctional Populations in the United States, 2023: Statistical Tables* (Report No NCJ 310413, September 2025) 5.

17 Ibid.

18 Ibid.

19 Ibid 7.

prisoners in Australia, 26,530 of whom were sentenced prisoners.²⁰ This equates to 207 per 100,000 adults in the population²¹ – a rate which has been relatively stable for a decade.

The punitive sentencing era in the US, following the declaration of the ‘War on Drugs’ by President Richard Nixon in 1971,²² was characterised by a large increase in harsh prescribed or fixed penalties. Michael Tonry notes that the impact of prescribed penalties has been considerable:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe ‘career criminal’, ‘dangerous offender’, and ‘sexual predator’ laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.²³

This created a backdrop where hundreds of thousands of inmates faced lengthy sentences with no prospect of release, regardless of their progress or rehabilitation over time.²⁴ This led to overcrowded prisons and disproportionately impacted marginalised groups, especially people of colour. The punitive excess coupled with the emotional and financial burden on families fuelled public awareness of the limitations of punitive justice.²⁵

The second look movement gained momentum through its reliance on a growing body of empirical evidence showing that lengthy sentences did not necessarily translate to safer communities.²⁶ Research indicated that rehabilitation, treatment programs, and educational opportunities for incarcerated people were also important in reducing reoffending rates.²⁷ In particular, studies demonstrated that as people age, their likelihood of recidivism drops sharply, questioning the validity of life sentences without the option of parole.²⁸ Meanwhile, neuroscientific findings, especially those related to juvenile development, provided concrete evidence that young people have

20 Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2024* (Catalogue No 4512.0, 13 March 2025).

21 Ibid.

22 See Committee on Causes and Consequences of High Rates of Incarceration, National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, eds Jeremy Travis, Bruce Western and Steve Redburn (National Academic Press, 2014) 119–20.

23 Michael Tonry, ‘Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration’ (2016) 13(4) *Criminology and Public Policy* 503, 514 <<https://doi.org/10.1111/1745-9133.12097>> (citations omitted). For a list of jurisdictions in the US that use guideline sentencing, see ‘Sentencing Guidelines Resource Center: In-Depth Jurisdiction Profiles’, *Robina Institute of Criminal Law and Criminal Justice* (Web Page) <<https://robinainstitute.umn.edu/publications/sentencing-guidelines-resource-center-depth-jurisdiction-profiles>>.

24 Tonry (n 23).

25 Ibid.

26 ‘Second Look Sentencing’, *National Association of Criminal Defense Lawyers* (Web Page, 9 May 2024) <<https://www.nacdl.org/Content/Second-Look>>.

27 Lois M Davis et al, *Evaluating the Effectiveness of Correctional Education: A MetaAnalysis of Programs That Provide Education to Incarcerated Adults* (Report, 22 August 2013) 39.

28 ‘Second Look Sentencing’ (n 26).

a strong capacity for change, and that lengthy periods of exposure to prison early in life is likely to entrench criminality.²⁹ These developments laid the groundwork for rethinking sentencing practices and ultimately inspired the second look approach as a humane and rehabilitative option. Subsequent experimental survey research as to public support for second look sentencing has been positive in showing majority support³⁰ with many members of the public believing ‘in a “Shawshank” redemption effect – that those committing serious crimes as a teenager or young adult can mature into a “different person” and warrant a second look, with the possibility of early release if they have earned it’.³¹

B Key Case Law Developments: *Miller v Alabama* (‘*Miller*’) and *Graham v Florida* (‘*Graham*’)

The concrete impetus for the second look movement stems from seminal decisions by the Supreme Court of the United States. In 2010, the Court in *Graham* ruled that sentencing juveniles to life without parole (‘JLWOP’) for non-homicide offences constituted cruel and unusual punishment under the Eighth Amendment.³² This decision acknowledged that young offenders are inherently different from adults in terms of cognitive and emotional development, making them less culpable and more likely to be rehabilitated. Two years later, the Court in *Miller* built on this foundation by extending protections to juveniles convicted of homicide.³³ The Court held that mandatory life sentences without parole for juveniles also violate the Eighth Amendment, emphasising the importance of individualised sentencing considerations that account for the youth’s background, developmental stage, and potential for rehabilitation. As a result, *Miller* mandated that courts review each juvenile case individually rather than impose blanket sentences, thereby establishing a basis for second look sentencing practices.

State responses to these rulings have varied widely. Even before *Miller*, states like Alaska, Kansas, and Kentucky had already abolished JLWOP.³⁴ After the decision, 25 more states followed suit through legislative reform, and state Supreme Courts in Massachusetts, Iowa, and Washington declared the practice unconstitutional under their own constitutions.³⁵ Some states introduced measures to ensure youth serving long or life sentences have earlier and more meaningful parole opportunities. Non-homicide sentences once deemed constitutional have also come under scrutiny. Courts in states like California, Maryland, and Ohio have reduced sentences ranging from 50 to 112 years, recognising that such punishments

29 See *ibid*; Feldman (n 12).

30 Hannan et al (n 12) 13–15, 19–21.

31 *Ibid* 2, 21. See also Smith et al (n 12), where it is noted that a survey in 2023 demonstrated that most Americans support a universal second look sentencing scheme (with only one in five respondents opposed) that should apply to all offenders (not just those who committed an offence when they were under the age of 25) after serving 15 to 20 years in prison.

32 *Graham v Florida*, 560 US 48 (2010).

33 *Miller v Alabama*, 567 US 460 (2012).

34 Feldman (n 12) 7.

35 *Ibid* 7–9.

deny juveniles a realistic opportunity for release.³⁶ In most cases, the individuals were resentenced to reduce the time before they became eligible for parole.³⁷

Advocacy for broader sentencing reform has grown, with calls for systematic mechanisms to review lengthy sentences in the form of second-look provisions. Formal second look schemes now operate in approximately one-third of the jurisdictions in the US. Twelve state legislatures, the District of Columbia, and the federal government have enacted second look judicial review laws that go beyond JLWOP cases.³⁸ We now examine some of these schemes in more detail.

C Sentences beyond JLWOP for Youth and Young Offenders

Age-dependent second look schemes operate in Oregon, Delaware, Maryland, Florida, North Dakota, the District of Columbia and Oregon. Illustrative of these schemes are those in Oregon, Delaware, Florida and the District of Columbia.

Oregon has provided sentence reviews for youth convicted as adults since 1995, allowing judicial review after half the sentence or 7.5 years, whichever comes first.³⁹ Significant reforms in 2019 abolished JLWOP and introduced earlier parole reviews for youth, though these changes apply only prospectively. Petitioners must prove rehabilitation and public safety by clear and convincing evidence.⁴⁰ The court must hold a hearing and consider 13 statutory factors. Both parties may appeal, though issues on appeal are limited.⁴¹

Delaware abolished JLWOP in 2013 and introduced a retroactive mechanism for sentence review for youth convicted of crimes where lengthy sentences were imposed, including mandatory terms. Juveniles convicted of first-degree murder may seek review after 30 years, while those convicted of other offences may apply after 20 years.⁴² If denied, petitioners may reapply every five years unless the court determines a longer interval is appropriate.

Florida provides sentence reviews for certain youth offences after 15, 20, or 25 years, depending on the conviction.⁴³ While initially limited to offences committed after 1 July 2014, a 2015 Florida Supreme Court ruling extended retroactivity to sentences deemed unconstitutional under *Miller*.⁴⁴ Florida courts have since clarified that only life sentences or their functional equivalents meet the threshold for review.⁴⁵ Sentences exceeding 30 years or life sentences with parole eligibility after 25 years do not qualify.⁴⁶ The statute mandates a hearing and allows one

36 Ibid 8.

37 Ibid.

38 Ibid; Hannan et al (n 12) 3–5.

39 Feldman (n 12) 13.

40 Ibid.

41 Ibid.

42 Ibid 14.

43 Ibid 14–15.

44 *Horsley v Florida*, 160 So 3d 393, 405 (Pariente J) (Fla, 2015).

45 *Pedroza v Florida*, 291 So 3d 541 (Fla, 2020).

46 *Melvis v Florida*, 305 So 3d 763 (Fla App 2 Dist, 2020); *Nugent v Florida*, 338 So 3d 459 (Fla App 2 Dist, 2022); *Florida v Michaud*, 320 So 3d 860 (Fla App Dist, 2021).

petition, except for certain non-homicide first-degree felonies, where a second petition may be filed after 10 years.⁴⁷

The second look statute in the District of Columbia applies to a broader age range. It allows reconsideration of sentences for offences committed before the age of 25 after 15 years of imprisonment.⁴⁸ The *Incarceration Reduction Amendment Act of 2016* initially limited to offences committed before 18 years of age,⁴⁹ was expanded in 2018 to reduce the required time served to 15 years and remove parole eligibility considerations.⁵⁰ In 2021, the statute was further broadened to include emerging adults (up to age 25).⁵¹ Courts are required to hold hearings, consider multiple factors, and provide written decisions.⁵²

D Sentence Reviews for Specific Populations

In 2019, New York introduced a law allowing domestic violence survivors to request sentence reviews when their victimisation significantly contributed to their crimes.⁵³ The law is retroactive, enabling survivors with minimum sentences of eight years or more to petition for relief. Courts must hold hearings if the petition is supported by corroborating evidence and can reduce sentences deemed unduly harsh.⁵⁴

In California, US military veterans and service members can petition for resentencing if their crimes were influenced by service-related trauma, such as PTSD or traumatic brain injury.⁵⁵ This law is retroactive and applies to both plea and trial convictions but excludes serious or life-term offences. Although a significant reform, it benefits only those serving determinate sentences, leaving many incarcerated veterans ineligible.

E Broader Second Look Schemes

Connecticut enacted a broad-ranging second look law in 2021 that permits individuals sentenced after a trial, irrespective of their age at the offence or sentence length, to petition the court for sentence review.⁵⁶ Sentences resulting from guilty pleas can also be reviewed if they are seven years or less.⁵⁷ For longer sentences, the State's attorney must consent to the review. A 2022 revision clarified the law's retroactive application, but mandatory sentences, covering around 70 crimes, remain excluded.⁵⁸ Courts possess broad discretion under the 'good cause' standard to reduce sentences after a hearing. Subsequent petitions are restricted

47 Fla Stat § 921.1402 (2024).

48 Ibid 15–16. See also Hannan et al (n 12) 4.

49 *Incarceration Reduction Amendment Act of 2016*, Pub L No 21-238, tit III, 2016 Stat 8.

50 *Omnibus Public Safety and Justice Amendment Act of 2018*, Pub L No 22-313, 2019 Stat 1, 8–9.

51 DC Code § 24-403.03 (2026); Feldman (n 12) 15–16. See also Hannan et al (n 12) 4–5.

52 DC Code § 24-403.03 (2026); Feldman (n 12) 16.

53 NY Criminal Procedure Law § 440.47 (2019); Feldman (n 12) 19.

54 NY Criminal Procedure Law § 440.47.2(e) (2019); Feldman (n 12) 19.

55 CA Penal Code § 1170.91 (2025); Feldman (n 12) 19.

56 Conn Gen Stat § 53a-39 (2023); Feldman (n 12) 11.

57 Conn Gen Stat § 53a-39 (2023); Feldman (n 12) 11.

58 *An Act Concerning Sentence Modification*, Pub L No 22-36, 2022 Conn Acts 1.

based on the outcome of the first review: five years for denials or full sentence reductions, and three years for partial reductions.⁵⁹

The most widely utilised early release sentencing mechanism in the US is pursuant to the federal *First Step Act of 2018* ('FSA').⁶⁰ This is not a conventional second look scheme because the motivation is not based on remedying very long prison terms. However, it operates as a second look scheme because it has been applied to provide for the early release of large numbers of offenders. The FSA encompasses various sentencing reforms, including the retroactive application of the *Fair Sentencing Act of 2010* (thereby allowing thousands of individuals convicted of crack cocaine offences to have their sentences reduced),⁶¹ increased judicial discretion, the creation of earned time credits, the enhancement of good time credits, the reduction of certain mandatory minimum sentences and the expansion of the safety valve for individuals with minor prior convictions, allowing them to serve shorter sentences.⁶²

To be eligible for early release, offenders do not need to have been sentenced to prison for a minimum period. Instead, eligibility is determined on various criteria, including participation in rehabilitative programming and risk assessment scores that gauge the likelihood of recidivism. Additionally, certain offenders are excluded from earning early release credits, such as those convicted of specific violent or serious crimes. The focus is on encouraging participation in evidence-based programs to reduce recidivism while ensuring public safety.

A key tool used by the FSA is a risk assessment tool termed PATTERN (Prisoner Assessment Tool Targeting Estimated Risk and Needs), which is used to evaluate inmates' risk levels and determine eligibility for earned time credits and early release programs.⁶³ The primary objective of PATTERN is to enhance the predictive accuracy of recidivism risk assessments, thereby improving the allocation of resources and rehabilitation efforts. It incorporates a combination of static and dynamic variables to assess recidivism risk accurately. Static variables are those that do not change over time (such as criminal history) while dynamic variables can change (for example, completion of educational programs) and thus provide more current information about an inmate's risk level.⁶⁴

PATTERN has demonstrated high predictive accuracy in distinguishing between recidivists and non-recidivists. The recidivism rate among those who were released in accordance with the FSA is significantly lower than for other former inmates. Among the approximately 30,000 individuals whose release was

59 Conn Gen Stat § 53a-39c; Feldman (n 12) 11.

60 *First Step Act of 2018*, Pub L No 115-391, 132 Stat 5194. See 'First Step Act', *Federal Bureau of Prisons* (Web Page) <<https://www.bop.gov/inmates/fsa/index.jsp>>.

61 *Fair Sentencing Act of 2010*, Pub L No 111-220, 124 Stat 2372.

62 *First Step Act of 2018*, Pub L No 115-391, § 404, 132 Stat 5194; Ashley Nellis and Liz Komar, The Sentencing Project, *The First Step Act: Ending Mass Incarceration in Federal Prisons* (Policy Brief, August 2023) 1 <<https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf>>.

63 'PATTERN Risk Assessment', *Federal Bureau of Prisons* (Web Page) <<https://www.bop.gov/inmates/fsa/pattern.jsp>>.

64 United States Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System* (Report, 19 July 2019) 26 <<https://www.ojp.gov/First-Step-Act-of-2018-Risk-and-Needs-Assessment-System>>.

expedited by the *FSA*, about 90% have not been rearrested or reincarcerated, resulting in a 12% recidivism rate, which is notably lower than the typical 45% rate for federal prison releases over the same period.⁶⁵

The common themes from the second look schemes across the US jurisdictions include a focus on rehabilitation, public safety, and proportional justice, though procedural safeguards like the right to counsel and mandatory hearings are inconsistently applied. The schemes, however, vary considerably in their scope for eligibility, with age and sentence length being key determinants. It has been suggested that this patchwork approach highlights the need for a uniform framework that balances accountability with the potential for growth and reintegration, particularly for young offenders.⁶⁶ Against this backdrop, we now examine the desirability of a second look process in Australia.

III OPPORTUNITIES FOR EARLY RELEASE IN AUSTRALIA

On 30 June 2024, there were 44,403 prisoners in Australian prisons (an increase of 6% from 2023).⁶⁷ This equates to an incarceration rate of 208 per 100,000 adult population. The number of sentenced prisoners was 26,281. A large portion of these, several thousand, were serving long terms. For the year 2023 to 2024, there were 2,247 inmates serving terms of 10 to under 15 years; 909 inmates serving 15 to under 20 years; 1,043 serving 20 years and over and 996 serving life imprisonment (951 for homicide and related offences).⁶⁸ Thus in total, there were 5,195 prisoners serving terms of 10 years or more (which equates to approximately 19.8% of all sentenced prisoners) and almost 3,000 serving terms of at least 15 years.

A The Restrictive Nature of Current Early Release Options

Despite the significant number of offenders serving long prison terms in Australia, there are no second look schemes nor systems of remission of sentence following the ascendancy of ‘truth in sentencing’ regimes throughout the country since the 1990s.⁶⁹ Further, the circumstances in which offenders who are sentenced to prison (for long or short terms) can be released early are limited. The narrow scope of these options raises for discussion the need for a second look framework. Prior to discussing the proposed second look reform in greater detail we briefly discuss the current options that prisoners have for early release. In short, the options for

65 Nellis and Komar (n 62) 1.

66 Feldman (n 12) 25–9.

67 Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 19 December 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.

68 Ibid Table 11.

69 See George Zdenkowski, ‘Contemporary Sentencing Issues’ in Duncan Chappell and Paul Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, 1994) 171, 203–9; Arie Freiberg, ‘Legislation Comment: Truth in Sentencing? The Abolition of Remissions in Victoria’ (1992) 16 *Criminal Law Journal* 165, 179; Janet Chan, ‘The New South Wales *Sentencing Act 1989*: Where Does Truth Lie?’ (1990) 14 *Criminal Law Journal* 249; Ivan Potas, ‘The *Sentencing Act 1989*: Impact and Review’ (1992) 3 *Current Issues in Criminal Justice* 318 <<https://doi.org/10.1080/10345329.1992.12036535>>.

early release are a sentence appeal; the exercise of the Royal prerogative of mercy; release on licence for offenders convicted of federal matters; and re-determination of some life sentences in the NSW jurisdiction.

1 Sentencing Appeals

Appellate jurisprudence is fundamentally a ‘creature of statute’. That is, the common law did not permit disturbing the decisions of courts once a matter was determined.⁷⁰ Broadly, an appeal may lie in the way in which the jurisdiction of the court is exercised, which can concern both the process and outcome. As explained in *Eastman v The Queen*:

In a variety of legal contexts, courts still recognise that ‘appeal’ has at least four different meanings. It may mean an appeal in the true sense, an appeal by re-hearing on the evidence before the trial court, an appeal by way of re-hearing on the evidence before the trial court and such further evidence as the appellate court admits pursuant to a statutory power to do so, and an appeal by way of a hearing *de novo*. Which of these meanings the term ‘appeal’ has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.⁷¹

When a court sentences a person to a term of imprisonment, they will serve the minimum term of the sentence that the court has stipulated unless they successfully appeal the sentence. In order to successfully appeal a sentence, the offender must establish a legal error in the sentence calculus⁷² or that the sentence was manifestly excessive.⁷³ A unique jurisprudence has developed in sentencing appeal cases which are characterised by a set of principles that on the one hand must be sufficiently clear to properly inform judicial reasoning but are also sufficiently flexible to enable application on a case-by-case basis and to enable consistency with relevant sentencing objectives and source legislation.

To establish manifest excess, the appellant must establish that the sentence imposed is, in the totality of circumstances, obviously in excess of what a sentence for an offence of that type would ordinarily attract, to the point where the sentence is unreasonable or ‘plainly unjust’.⁷⁴ As explained by Gleeson CJ and Hayne J in *Dinsdale v The Queen*:

Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the

70 *A-G (UK) v Sillem* (1863) 2 H&C 581; 159 ER 178; *Sweeney v Fitzhardinge* (1906) 4 CLR 716; *Byrnes v The Queen* (1999) 199 CLR 1.

71 (2000) 203 CLR 1, 40–1 [130] (McHugh J).

72 Classically, see *Markarian v The Queen* (2005) 228 CLR 357 (‘*Markarian*’).

73 See, eg, *Dinsdale v The Queen* (2000) 202 CLR 321; *R v Kilic* (2016) 259 CLR 256.

74 *R v ADJ* (2005) 153 A Crim R 324, 338 [51] (Batt JA).

type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion.⁷⁵

Because the threshold for manifest error is so high, it is common for an appeal against sentence to be directed at the reasoning in the sentencing judgment, particularly the treatment of relevant objective and subjective factors, and often the calculation of aggregate sentences. Identifying and/or attributing weight to specific circumstances of aggravation and mitigation and the timing of guilty pleas are common matters raised in grounds of appeal based on sentencing error. However, where the sentence imposed falls within a range that is otherwise open for the judge in that case, an appellate court will be unlikely to disturb the sentence even where like-minds may marginally disagree.⁷⁶

Appeals must generally be lodged within a short period (28 days) after the imposition of the sentence although a grant of leave can be made to extend the time in which to appeal. The time limits do not apply if the offender can establish that new circumstances have occurred since the sentence was imposed.⁷⁷ In the interests of the finality of court proceedings, courts have narrowly defined what constitutes fresh (or new) evidence.⁷⁸ Because the introduction of new evidence disrupts the application of finality in due process, the circumstances arising from which a court will consider fresh evidence in an appeal against sentence are exceptional and generally not available in most cases. Such evidence needs to be ‘fresh’ in the sense that it was not otherwise available at the time sentence was imposed; must be relevant, admissible and sufficiently credible; and must demonstrate the true significance of facts in existence at the time of sentence.⁷⁹ Examples of instances of fresh evidence being received in sentence appeals include cases where there are significant changes in the prisoner’s health and the period of incarceration would be more onerous than it was considered to be when originally sentenced,⁸⁰ where there has been substantial assistance to law enforcement authorities following conviction,⁸¹ and evidence of collusion between counsel and the police.⁸²

Thus, while it is theoretically possible for offenders in Australia to have their sentence reviewed through an appeal of their sentence, the appeal process is generally tightly time limited and it is difficult to succeed in an appeal based on fresh evidence.

75 (2002) 202 CLR 321, 325–6 [6] (Gleeson CJ and Hayne J).

76 Ibid.

77 See *Green (a pseudonym) v The King* (2025) 393 FLR 339 in relation to the correct approach to sentencing.

78 See, eg, *R v Hughes* (2003) 142 A Crim R 497, 498–9 [4] (McPherson JA). Recently, it has been suggested that for the purposes of sentencing appeals there is no material difference between ‘fresh evidence’ and ‘new evidence’: *Xian v The King* [2024] VSCA 227. Cf *ET v The King* [2024] NSWCCA 131.

79 *R v Nguyen* [1998] 4 VR 394; *R v Abou-Chabake* (2004) 149 A Crim R 417; *R v Davidson* [2008] VSCA 188, [40] (Nettle JA).

80 *R v WEF* [1998] 2 VR 385; *R v Eliassen* (1991) 53 A Crim R 391; *R v Ashton* (2002) 137 A Crim R 73; *Iglesais v The Queen* [2006] NSWCCA 261, [10] (McClellan CJ at CL); *Lissock v The Queen* (2019) 280 A Crim R 133; *Khoury v The Queen* [2014] NSWCCA 272, [19]–[24] (Adams J).

81 *Springer v The Queen* (2007) 177 A Crim R 13.

82 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59.

In addition to the above appeal process, part 7 division 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) establishes a judicially administered post-conviction review mechanism. Section 78 permits a convicted person to apply to the Supreme Court for an inquiry into either a conviction or a sentence. Section 79 provides that on receiving such an application the Court may order an inquiry into the conviction or sentence; refer the case to the Court of Criminal Appeal ('CCA') to be dealt with as an appeal; defer consideration or decline to consider the application.

The Court can refuse an application if there are no 'special facts or special circumstances' that warrant the taking of further action.⁸³ In sentencing applications, this generally requires fresh evidence relevant to penalty or a substantial claim of error not already addressed on appeal. Notably, section 79(3) expressly provides that the Supreme Court can refuse applications which have been 'fully dealt with in the proceedings giving rise to the conviction or sentence' or where an appeal has not been instigated or lapsed.⁸⁴

If the Court does not refuse the application it can order an inquiry or refer the matter to the Court of Criminal Appeal 'if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'.⁸⁵ Sections 81 and 82 govern the conduct of inquiries. They are conducted by a judicial officer, appointed by either the Governor or Chief Justice. At the completion of the inquiry, the judicial officer must send a report of the results of the inquiry to either the Governor or Chief Justice and may refer the matter to the Court of Appeal to review the conviction or sentence.⁸⁶ Kylie Lingard observes inquiries are exceedingly rare in sentencing matters, with referrals preferred.⁸⁷

A review of decisions that have invoked the part 7 division 3 pathway, between January 2014 and May 2023 by Lingard shows that in almost a decade there were only 108 division 3 applications: 59 conviction-only, 42 sentence-only, and seven combined.⁸⁸ Of the 42 sentence-only matters, 17 were referred to the CCA.⁸⁹ Only seven achieved sentencing relief on appeal.⁹⁰ There were no matters directed to inquiry.⁹¹ The majority were refused or deferred.⁹²

83 *Crimes (Appeal and Review) Act 2001* (NSW) s 79(3)(b) ('*Crimes (Appeal and Review) Act*'); Kylie Lingard, 'Accessing Justice after Conviction: A Review of the *Crimes (Appeal and Review) Act 2001* (NSW) Part 7 Division 3' (2024) 47(3) *University of New South Wales Law Journal* 880, 889–90 <<https://doi.org/10.53637/ydby4196>>.

84 See Lingard (n 83) 891–2.

85 *Crimes (Appeal and Review) Act* (n 83) s 79(2).

86 Ibid s 82. Section 82(2)(b) provides that the matter may be referred to the Court of Criminal Appeal 'for review of the sentence imposed on the convicted person (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence)'. Section 88(2) provides that where a matter is referred under section 82(2)(b) the Court is to deal with the matter procedurally in the same way as an application for quashing a conviction under section 85.

87 Lingard (n 83) 896–7.

88 Ibid 888, 897.

89 Ibid 897.

90 Ibid.

91 Ibid.

92 Ibid.

This data underscores the narrowness of part 7 division 3 for sentencing review. Fewer than one in six sentencing applications succeeded during a nearly 10 year period.⁹³ Combined with the ‘special circumstances’ threshold,⁹⁴ the refusal power in section 79(1)(d), the restrictive inquiry provisions in sections 80–3, and the control of repeat applications under section 85, division 3 is best understood as an exceptional safety net rather than a systematic and orderly process.

2 The Royal Prerogative of Mercy

Historically, the only avenue for relief from sentence was a Royal Pardon. The power of the sovereign to grant a pardon outside the court process is a powerful residual discretionary power intended to both augment the power of the sovereign, and to correct errors where judicial avenues have been exhausted.⁹⁵ The Royal prerogative of mercy was received into Australian law as part of the reception of governance from the United Kingdom in the 19th century⁹⁶ and continues to operate, although its preservation tends to have a statutory basis in modern law⁹⁷ and is exercised as a discretionary reserve power by the Governor-General and State Governors on the advice of the executive – ordinarily the Attorney-General.⁹⁸ As the power is extra-judicial, it is rarely used, and only in compelling situations where the offender is ‘morally and technically innocent’,⁹⁹ or in ‘rare and exceptional circumstances’ or on ‘compassionate grounds’ that include ‘medical issues’, that have arisen for the offender since they were sentenced.¹⁰⁰

The key limitation of the prerogative in the context of a second look scheme is that it is a discretionary power that operates outside judicial process. It is a quintessential executive power that does not consist of any particular synthesis of declared principle that can be clearly ascertained and is fundamentally grounded in fact and evidence. As a discretion it has been criticised because of the absence of principle and, for constitutional reasons, the legislature cannot regulate the

93 Ibid.

94 Ibid 892.

95 *R v Milnes* (1983) 33 SASR 211; *Re Therrien* [2001] 2 SCR 3.

96 Gregory D Woods, *A History of the Criminal Law in NSW: The Colonial Period, 1788–1900* (Federation Press, 2002) 5–6.

97 See, eg, *Sentencing Procedure Act* (n 4) s 102.

98 Dianne Heriot, ‘Justice Beyond Law: Clemency and the Royal Prerogative of Mercy’, *Flag Post* (Blog Post, 19 September 2012) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1925114/upload_binary/1925114.pdf>; David Caruso and Nicholas Crawford, ‘The Executive Institution of Mercy in Australia: The Case and Model for Reform’ (2014) 37(1) *University of New South Wales Law Journal* 312, 313; Catherine Dale Greentree, ‘Retaining the Royal Prerogative of Mercy in New South Wales’ (2019) 42(4) *University of New South Wales Law Journal* 1328 <<https://doi.org/10.53637/NTUF6904>>; Julian Murphy et al, ‘An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing’ (2020) 46(3) *Monash University Law Review* 252.

99 Heriot (n 98); ‘Appeals’, *Attorney-General’s Department* (Web Page) <<https://www.ag.gov.au/crime/federal-offenders/appeals>>.

100 See, eg, Communities and Justice, ‘Royal Prerogative of Mercy: Fact Sheet’, *NSW Government* (Fact Sheet, October 2022) <<https://dcj.nsw.gov.au/documents/legal-and-justice/royal-prerogative-of-mercy/royal-prerogative-mercy-fact-sheet.pdf>>. The prerogative may also be granted for expedient reasons, such as to negotiate with hostage abductors: Richard G Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25(1) *Monash University Law Review* 1, 21.

operation of it, and it is non-justiciable.¹⁰¹ Because the prerogative is extra-judicial, it will ordinarily only be exercised after all judicial avenues have been exhausted. As a remedy, it may take years, or decades, to mobilise. Contemporary pardon applications operate concurrently with legislation, such that the decision to refer a matter for a review is an administrative decision that may be reviewed. The result is that engaging the application process can be expensive as it locates the process at the apex of the judicial and executive branches of government and places the burden on the offender to assemble the evidence.¹⁰²

Consequently, while the prerogative of mercy provides an important avenue for offenders subject to lengthy prison terms, it is an option of last resort and not viable in many cases.

3 Release on Licence

For prisoners serving terms of imprisonment for Commonwealth offences, there exists an option to apply for early release on ‘licence’ pursuant to section 19AP(1) of the *Crimes Act 1914* (Cth). The circumstances are, however, limited. The grant of licence resides with the Attorney-General of the Commonwealth, who ‘must not’ grant a licence ‘unless he or she is satisfied that exceptional circumstances exist’.¹⁰³ The section permits all relevant matters to be considered, with particular emphasis on ‘extensive cooperation’ with law enforcement that was either not taken into account on sentence, or post-sentencing, and the existence of any serious medical condition that cannot otherwise be managed in prison.¹⁰⁴ Because of the exceptional nature of the discretion, there are a limited number of cases that assist in its interpretation and application. What has clearly emerged in those cases is a focus on the meaning ‘exceptional circumstances’, and the fact the decision by the Attorney-General is an administrative decision capable of being reviewed, notwithstanding the apparent discretion.¹⁰⁵ The Attorney-General advises that family hardship may also be grounds for a release application, but notes that such applications must be both exceptional and limited to extreme cases, further noting ‘the Explanatory Memorandum specifically states that excellent conduct, remorse or contrition or family hardship (unless of an extreme kind) would not normally constitute exceptional circumstances.’¹⁰⁶

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

102 See, eg, *Crimes (Appeal and Review) Act* (n 83); *Folbigg v A-G (NSW)* (2021) 391 ALR 294.

103 *Crimes Act 1914* (Cth) s 19AP(4).

104 *Ibid* s 19AP(4A).

105 *Gogo v A-G (Cth)* [2022] FCA 70; *Lodhi v A-G (Cth)* [2020] FCA 1383 (‘*Lodhi*’); *Abdul v The Queen* [2020] WASCA 34 (‘*Abdul*’); *Ng v A-G (Cth)* [2017] FCA 1392; *Jasmin v The Queen* (2017) 321 FLR 419; *Wharton v The Queen* [2016] WASCA 21; *Yasmin v A-G (Cth)* (2015) 236 FCR 169; *Hasim v A-G (Cth)* (2013) 218 FCR 25 (‘*Hasim*’); *Dobie v Commonwealth* (2013) 216 FCR 300.

106 ‘Early Release of Federal Prisoners’, *Attorney-General’s Department* (Web Page) <<https://www.ag.gov.au/crime/federal-offenders/early-release-federal-prisoners>>.

What constitutes ‘exceptional circumstances’ is a vexed question. In *Hasim v Attorney-General (Cth)*,¹⁰⁷ Greenwood J stated:

[T]he statute tells the decision-maker the criterion to be considered, that is ‘exceptional circumstances’, [but] ... ‘does not identify the factors upon which the decision-maker might, or might not, be satisfied of that criterion or, in consequence, the weight to be attributed to any factor falling within the criterion since no factors relevant to the criterion are identified expressly by the Act. The criterion itself is identified but not the informing features of that criterion.’¹⁰⁸

Bromwich J subsequently considered the term at some length in *Lodhi v Attorney-General (Cth)*. This case involved a parole application by Faheem Lodhi, who was sentenced to 20 years imprisonment for terrorism offences, as opposed to a release application, pursuant to section 19AL of the *Crimes Act 1914* (Cth). The problem faced by Lodhi, notwithstanding he had crossed the threshold for eligibility for parole by serving 15 years, was the recent introduction of sections 19ALA and 19ALB, which required parole to be *refused* unless exceptional circumstances exist.¹⁰⁹ In this case, his Honour applied the reasoning of Lord Bingham CJ in *R v Kelly*:

We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.¹¹⁰

In applying this reasoning, Bromwich J held:

[I]n order to be able to make a parole order in favour of Mr Lodhi, the Attorney-General had to reach a positive state of satisfaction that Mr Lodhi’s circumstances in some way had a character that was, or was akin to being, to paraphrase Lord Bingham in *Kelly*, out of the ordinary course, unusual, special, uncommon, or going beyond what is regularly, routinely, or normally encountered, but not necessarily unique, unprecedented, or very rare.¹¹¹

In this case, the Attorney-General rejected that exceptional circumstances had been demonstrated by Lodhi in detailed submissions that ‘can be summarised as being good conduct, advancement through the prison classification system, low risk of terrorist re-offending and prosocial family support.’¹¹² Bromwich J agreed with the conclusion of the Attorney-General and dismissed the application for judicial review.

It appears that the Attorney-General is willing to grant release orders for smaller sentences under the right circumstances. In *Abdul v The Queen*,¹¹³ the applicant was a young Indonesian man who was involved in people smuggling. He was of indeterminate age and was subsequently found to be under 18 years. He was sentenced to five years imprisonment on 10 November 2011. He was later ordered to be released under section 19AP after serving six months. In this case the

107 *Hasim* (n 105).

108 *Ibid* 36 [13] (emphasis omitted).

109 See *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Act 2019* (Cth) ss 15–16.

110 [2000] QB 198, 208.

111 *Lodhi* (n 105) [24].

112 *Ibid* [31].

113 *Abdul* (n 105).

conflicting evidence as to his age, and the high likelihood of a successful appeal in this regard were exceptional circumstances.

As a form of relief from a custodial sentence, this option is also unsatisfactory. The limited availability of it because of the high threshold of exceptional circumstances, most of which appear to be outside the person's control, means that in the ordinary course of custody those circumstances are unlikely to manifest. In addition, this is an option that is confined to federal offenders only. Considering that approximately 4.4% of all sentenced offenders in Australia are serving prison terms for federal offences,¹¹⁴ it is an option that is practically unavailable to most offenders.

4 Re-determination of Life Sentences

In NSW, the enactment of section 19A *Crimes Act 1900* (NSW) ('*Crimes Act*') on 12 January 1990 creating a maximum sentence of natural life imprisonment for murder meant that the status of indeterminate 'life' sentences imposed for murder and other crimes prior to that date required a scheme for re-determination of such sentences. To ensure that existing life sentence prisoners were not disadvantaged, the responsibility for re-determination of their sentences was moved to the judiciary consistently with the creation of judicial discretion to impose determinate sentences for the crime of murder under the then new section 19A *Crimes Act*.¹¹⁵ Initially, a life sentence prisoner had to have served at least eight years imprisonment¹¹⁶ to apply to the Supreme Court of New South Wales for the determination of minimum and additional terms, which, if determined, replaced the original sentence of life imprisonment. This period was subsequently increased to 'at least 20 years'¹¹⁷ and then once most of the existing life sentence prisoners had made applications for re-determination it was increased in 2001 to 'at least 30 years' for 'serious offenders the subject of non-release recommendations'.¹¹⁸

Despite the eventual and current largely inaccessible nature of this review mechanism, it is apparent that throughout the 1990s this process was the subject of extensive judicial consideration and provided a large volume of jurisprudence, illustrating a transparent and thorough review procedure where 'particular documents and reports ... [were] prepared for the review hearing and designated matters ... taken into consideration to enable the court to make an informed decision as to the offender's future and the protection of the community'.¹¹⁹ The process involved open public hearings and opportunities for relevant stakeholders

114 Only 1,172 of the 26,530 sentenced prisoners currently incarcerated in Australia have been sentenced under the federal regime: Australian Bureau of Statistics (n 20).

115 See, eg, *R v McCafferty* (Supreme Court of New South Wales, Wood J, 15 October 1991).

116 *Sentencing Act 1989* (NSW) s 13A.

117 See *Sentencing Legislation Further Amendment Act 1997* (NSW), which commenced operation on 9 May 1997.

118 See *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW), which commenced operation on 20 July 2001. The provisions relating to re-determination of life sentences are now found in schedule 1 of the *Sentencing Procedure Act* (n 4).

119 John L Anderson, "'Indefinite, Inhumane, Inequitable': The Principle of Equal Application of the Law and the Natural Life Sentence for Murder" (2006) 29(3) *University of New South Wales Law Journal* 139, 157.

to participate. Judges had to provide reasons for any decisions made in either setting a determinate sentence or refusing to do so in determining the prisoner's application. Ordinary avenues of appeal are available within the scheme and it is arguable that benchmarks were established to promote 'consistent and equitable treatment for these serious offenders ... [as well as] consistent individualised justice ... [to] more readily achieve proportionality [in sentencing]'¹²⁰ with the large majority of former lifers receiving determinate sentences.

Although this scheme is still available in NSW it is now circumscribed to the point that there are few, if any, prisoners eligible to make applications. At the same time, it is also clear that such a review process was very successful in highlighting the gains made by serious offenders in rehabilitation through various treatment programs, work release and other pre-release programs.¹²¹ It provided a rigorous judicial review process for taking a 'second look' at certain offenders after serving lengthy periods of imprisonment. Arguably it is a review process worthy of consideration for implementing on a broader scale for offenders originally sentenced to over 15 years imprisonment for any crime so as to enable the apparent benefits of a 'second look'.

There are also sentencing mechanisms in NSW which facilitate a delayed sentence or a reassessment of a sentence in very limited circumstances. Section 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to defer the sentencing of an offender for up to 12 months (from the time the person is found guilty) to assess the offender's rehabilitative prospects or for any other purpose the court considers appropriate. Sections 60A–60F in part 4 division 2A facilitate the provisional sentencing of offenders who are under 16 years of age when the offence was committed and under 18 years of age when the sentence is imposed. This procedure can be utilised when the court is of the view that it does not have sufficient information to satisfactorily assess the offender's prospects of rehabilitation and whether the offender is likely to re-offend.¹²² While both of these schemes allow a deferral of the sentencing (or final sentence) they are both tightly circumscribed operations either in terms of timeframe or age of offender and only relate to future prospects of rehabilitation.

5 *Parole Not the Answer*

Parole is the term used to describe the early release of a prisoner. It enables them to conditionally return to the community, but subject to the underlying sentence, which continues to run while the person is on parole.¹²³ Therefore, if the person commits another offence, they are liable to immediate arrest and will be returned to prison to serve the remaining term independently of any additional penalty attached to the new offending. The rationale for parole is that it encourages

¹²⁰ Ibid 158.

¹²¹ Ibid 164.

¹²² *Sentencing Procedure Act* (n 4) s 60B(1)(d).

¹²³ *Inge v The Queen* (1999) 199 CLR 295.

reform and rehabilitation of the offender and has the effect of attaching hope for the future.¹²⁴

Parole is a creature of statute, and as such there is substantial variation between jurisdictions on the terms, eligibility and decision-making process involved. Parole has, however, become an entrenched feature of the sentencing process, at least in terms of signifying the point in a custodial sentence at which an offender is eligible to be considered for parole.¹²⁵ Ordinarily, that point is at the two-third mark on the head sentence, although that is a matter of judicial discretion based on the factual matrix and whether circumstances exist to justify a shorter non-parole period. In addition, in some jurisdictions standard non-parole periods sourced in legislation must be considered.¹²⁶ Consequently, there is a lack of transparency in the synthesis involved in the determination of the parole eligibility date. Once a person becomes eligible for parole, the decision to grant parole is a matter for the executive, usually through the respective parole boards.¹²⁷

Parole is sometimes cited as a de facto mechanism for sentence review. For the sake of clarity, it is important to note that this form of probation is not the solution to the problems justifying the need for second look sentencing. Parole boards focus narrowly on whether an offender can be safely released under supervision and/or with conditions. They do not reassess the fairness or proportionality of the original sentence. Moreover, many offenders serve non-parole periods exceeding 15 years, leaving parole irrelevant to their immediate circumstances, particularly in the mid-stage of a custodial sentence, or in cases where there is firm opposition to the grant of parole.

Second look sentencing would not replace parole but would operate alongside it. While parole focuses on assessing an offender's readiness for conditional release, second look sentencing evaluates the broader question of whether the sentence itself remains appropriate.

Thus, while there are some avenues for offenders to be released early from a sentence, they are all narrow and do not provide a coherent or systematic pathway for the possibility of review of long prison terms. We now discuss the desirability of a second look sentencing scheme.

124 *R v Shrestha* (1991) 173 CLR 48, 69 (Deane, Dawson and Toohey JJ), quoting *Bugmy v The Queen* (1990) 169 CLR 525, 536 (Dawson, Toohey and Gaudron JJ) ('*Bugmy*').

125 *Crimes (Sentencing) Act 2005* (ACT) pt 5.2; *Sentencing Procedure Act* (n 4) pt 4 div 1A; *Sentencing Act 1995* (NT) ss 53–7; *Penalties and Sentences Act 1992* (Qld) pt 9 div 3; *Sentencing Act 2017* (SA) pt 3 div 2; *Sentencing Act 1997* (Tas) pt 3 div 2; *Sentencing Act 1991* (Vic) ss 10A–14; *Sentencing Act 1995* (WA) s 9G.

126 See above n 4.

127 *Crimes (Sentence Administration) Act 2005* (ACT); *Crimes (Administration of Sentences) Act 1999* (NSW); *Parole Act 1971* (NT); *Corrective Services Act 2006* (Qld); *Correctional Services Act 1982* (SA); *Corrections Act 1997* (Tas); *Corrections Act 1986* (Vic); *Sentence Administration Act 2003* (WA).

IV REASONS IN FAVOUR OF SECOND LOOK SENTENCING

A The Need to Adapt Strategy and Actions to New Circumstances: The Evolving Nature of Sentencing

The sentencing system in Australia is less harsh than the US. This is most pointedly illustrated by the much lower imprisonment rate in Australia (which is less than one-third that in the US). Thus, the pragmatic catalyst for second look sentencing in Australia is less compelling than in the US. However, as discussed above,¹²⁸ in Australia there are still thousands of prisoners serving long prison terms. Each of these prisoners could potentially benefit considerably from a sentencing review. Moreover, the jurisprudential and normative arguments in favour of second look sentencing are not contingent on the number of prisoners serving excessive terms. It is to these reasons that we now turn.

Despite the profound consequences of very long prison sentences, the legal system lacks a structured mechanism to reassess their appropriateness over time. This contrasts sharply with other domains of life, where long-term decisions are routinely reviewed to ensure they remain suitable and effective. Indeed, undertaking annual reviews of major decisions and commitments, especially in finance and risk management, is a routine part of contemporary social life.

The broadest reason for implementing second look sentencing is the reality that future facts and circumstances often evolve in an unanticipated manner. In government and private sectors, strategies, policies and decisions undergo regular evaluation and review to accommodate new evidence, changing goals, and unforeseen circumstances. On a personal level, individuals frequently reconsider major life choices, adapting to evolving needs, projects and aspirations. Sentencing, however, remains static, immune to the processes of review and adaptation that are otherwise fundamental to sound decision-making and securing desirable outcomes.

Long sentences, handed down at a particular moment in time, are inherently constrained by the knowledge and objectives at that point. Without a mechanism to re-evaluate very long sentences, the justice system risks perpetuating punishments that no longer serve their intended purposes. We now examine the evolving nature of sentencing law and practice.

B The Evolution of Sentencing Objectives

There are three elements of second look sentencing for consideration. Those are (i) the purposes of sentencing (for example, retribution, incapacitation and deterrence); (ii) the role of aggravating and mitigating circumstances; and (iii) changes in personal and social circumstances. These elements are features of sentencing law and practice generally, and certainly in Australia.

128 See Part III.

1 Purposes and Principles of Sentencing

Australian sentencing law is constituted by a composite of governing policy, theories, common law principles and an overarching body of legislation.¹²⁹ That composite is located in the context of a federal system that contains a diverse array of statutes. While there are variations in that network of legislation, there is also a good degree of conceptual unity and interplay of common law. For example, the main sentencing objectives across the country are uniform: retribution, deterrence (specific and general), community protection and rehabilitation.¹³⁰

The application of those objectives is governed by an overarching principle, which is arriving at a punishment that is proportionate to the offending.¹³¹ In *Markarian v The Queen* ('*Markarian*'), McHugh J explained:

The principle of proportionality is one of the fundamental principles of sentencing law. ... [It] requires the judge to make a judgment concerning the relationship of the penalty to the facts. This is a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case.¹³²

In short, proportionality is a principle that requires the judge to arrive at a sentence reflecting the seriousness of the offending based on the admissible facts.¹³³ This principle is essential, but its application is not linear, as it involves a consideration of other principles, such as parity,¹³⁴ parsimony¹³⁵ and totality,¹³⁶ as well as guideline judgments (where they exist), statutory minimum penalties, and standard non-parole periods.¹³⁷

The sentencing synthesis, and the quest for a proportionate sentence, is dominated by a consideration of aggravating and mitigating factors. Those factors are identified in legislation and case authorities but are not a 'closed' category, enabling the judge to consider matters arising out of the unique combination of facts. As a general rule, offences are aggravated by conduct that escalates the

129 Bagaric, Alexander and Edney (n 2).

130 See the main sentencing legislative schemes in Australia: *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Sentencing Procedure Act* (n 4) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

131 *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Markarian* (n 72); *Magaming v The Queen* (2013) 252 CLR 381, 397 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Magaming*'). Proportionality has been given statutory recognition in all Australian jurisdictions.

132 *Markarian* (n 72) 385–6 [69] (McHugh J).

133 *Magaming* (n 131) 397 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

134 Parity is the principle that parties who have committed the same offence should receive the same sentence, or marginally equivalent: see *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ).

135 'The principle of parsimony requires giving effect to "the least sentence that is commensurate with the offence committed and with the purposes for which punishment has to be imposed": *NOM v DPP (Vic)* (2012) 38 VR 618, 640 [68] (Redlich and Harper JJA, Curtain AJA). Some courts have doubted it exists as a distinct principle, being no more than an application of proportionality: see *Blundell v The Queen* (2008) 70 NSWLR 660, 665–6, [47] (Simpson J): 'I do not accept that the principle of parsimony ... is part of the sentencing law of New South Wales.'

136 Totality is the principle that where a person is sentenced for multiple offences, the total sentence must reflect the totality of the offending in the head sentence and non-parole period, which may include a consideration of sentences that are currently being served: see *Mill v The Queen* (1988) 166 CLR 59, 62–3 (Wilson, Deane, Dawson, Toohey and Gaudron JJ); *Postiglione v The Queen* (1997) 189 CLR 295.

137 Mackenzie, Stobbs and O'Leary (n 2); Bagaric, Alexander and Edney (n 2).

harm (physical, financial, psychological, social), and mitigated by aspects of the conduct and the offender that both limit the harm and tend to explain the context of the offending and the offender's circumstances. Examples of aggravating factors include the use of weapons, the seriousness of injury, cruelty, prior offending and systematic planning.¹³⁸ Conversely, minimal injury, spontaneous or provoked conduct, genuine remorse, early guilty plea and assistance to the authorities tend to mitigate sentence.¹³⁹ In some cases, the seriousness of the offence is reflected in a different category of offending or charge, with the result that an aggravating factor that is an element of the offence may not be considered.¹⁴⁰ Accordingly, these factors must be considered as discrete elements operating in the context of the offending rather than specific elements of the offence. The source of law for these factors varies by jurisdiction. In NSW, for example, most aggravating and mitigating factors are sourced in legislation,¹⁴¹ whereas Victoria tends to draw more heavily on the common law. While most mitigating and aggravating factors considered by the courts tend to cluster around a handful of common elements, there are more than 200 factors that have been identified in Australian law.¹⁴²

The methodology behind the application of sentencing jurisprudence in Australia is a qualitative evaluation of the relevant factors referred to as 'instinctive synthesis'. In a much cited decision, Adam and Crockett JJ held in *R v Williscroft* 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process ... such a conclusion rests upon what is essentially a subjective judgment largely intuitively reached'.¹⁴³ That process and label was subsequently endorsed by the High Court in *Markarian*,¹⁴⁴ and remains orthodox method in Australian sentencing. As these statements suggest, sentencing in Australia is not a mathematical or actuarial undertaking, and can result in degrees of variation among judges when presented with the same cases. Consequently, the associated appellate jurisdiction on sentencing recognises that reasonable minds may differ on the appropriate sentence, and will only disturb a sentence where there is clear or manifest error.¹⁴⁵

In light of this doctrinal framework and procedural process we now discuss the three main considerations which can justify review of long sentences.

In essence, the objectives of community protection, specific and general deterrence and retribution if they are applicable to a particular sentence and the presence of aggravating factors incline in favour of a harsher sentence; while rehabilitation and the presence of mitigating factors favour a less punitive sanction. These considerations are relatively stable, in that they have been part of sentencing

138 Mackenzie, Stobbs and O'Leary (n 2); Bagaric, Alexander and Edney (n 2).

139 Mackenzie, Stobbs and O'Leary (n 2); Bagaric, Alexander and Edney (n 2).

140 *Pearce v The Queen* (1998) 194 CLR 610.

141 See, eg, *Sentencing Procedure Act* (n 4) s 21A.

142 Bagaric, Alexander and Edney (n 2).

143 [1975] VR 292, 300 (Adam and Crockett JJ).

144 *Markarian* (n 72).

145 See Part IIIA(1).

law for many decades,¹⁴⁶ however, they are impacted by a number of factors, including community sentiment.

As a general observation, the priority accorded to rehabilitation has reduced over the past half century or so, although it is now of increasing importance for young offenders.¹⁴⁷ From the research perspective, there is increasing evidence that state-imposed punishment does not secure the aims of specific deterrence or marginal general deterrence. It seems that the key to deterring offending is increasing the certainty of detection, prosecution and punishment; not the severity of punishment.¹⁴⁸ If this knowledge influences legislatures it could conceivably result in less emphasis being accorded to these objectives. This would logically result in sentence reductions for crimes which often attract harsh penalties to deter others, such as drug and fraud offences.¹⁴⁹ Thus, it is conceivable that the tariff for drug trafficking, for example, could reduce meaningfully in the foreseeable future.

Moreover, the tariff for criminal offences is informed by new knowledge regarding the impact of crime. Thus, child sexual offences are now punished more harshly than previously.¹⁵⁰ There is no reason that this could not operate in reverse, and some offences come to be viewed less seriously or in fact not offences at all, as we have seen with conduct such as prostitution and homosexuality. To this end, it is notable that many jurisdictions in the US have decriminalised drug use and possession, especially for marijuana.¹⁵¹ It follows that changes to the purposes of sentencing and the punishment tariff for offences could justify a materially different sentence from one that is imposed many years earlier in alignment with marked social change.

2 The Evolution of Aggravating and Mitigating Factors

An area of sentencing law which is especially fluid and in a constant state of development and refinement is mitigating and aggravating factors. Because the genius of the common law is its capacity to evolve, and sentencing is continuously applied and the subject of appellate review, there has been marked development in the nature and extent of aggravating and mitigating factors. For example, in *Bugmy v The Queen* the High Court recognised that serious social and economic deprivation experienced during childhood is a mitigating factor.¹⁵² In the past decade, courts have also recognised that deportation or the risk of deportation

146 Bagaric, Alexander and Edney (n 2) ch 1; Mackenzie, Stobbs and O'Leary (n 2).

147 Bagaric, Alexander and Edney (n 2) ch 1; Mackenzie, Stobbs and O'Leary (n 2).

148 Marta Nelson, Samuel Feineh and Maris Mapolski, Vera Institute, *A New Paradigm for Sentencing in the United States* (Report, February 2023) 9, 14 <<https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf>>; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Paper, Sentencing Advisory Council, 18 April 2011) 2, 11 <<https://www.sentencingcouncil.vic.gov.au/publications/does-imprisonment-deter-review-evidence>>.

149 Bagaric, Alexander and Edney (n 2) ch 12.

150 See *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428.

151 David Montgomery, 'The Push to Decriminalize Marijuana Possession Continues, Town by Town', *Pew Trust* (online, 2 November 2022) <<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/11/02/the-push-to-decriminalize-marijuana-possession-continues-town-by-town>>. Also note Portugal in this regard.

152 *Bugmy* (n 124) 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

at the expiration of a prison term is also a mitigating factor in some Australian jurisdictions.¹⁵³ More recently, it has been held that in order for family hardship to constitute a mitigating factor for federal offences, the level of hardship that would be experienced by family members if the offender was sentenced to imprisonment does not need to be exceptional.¹⁵⁴ Thus, sentencing law can develop in a manner whereby important considerations which inform the ultimate sentence which is arrived at can change significantly over a period of several years. Many prisoners who are undergoing long sentences would benefit from having the opportunity to have their sentence reduced by the above mitigating factors, or at least have a sentence examined in accordance with sentencing jurisprudence at the time of the review, rather than frozen at the time of sentence.

3 *Changes to Personal Circumstances of the Offender*

The third reason which could necessitate or justify a sentencing review is where there has been an unforeseen change in circumstances relating to the offender after the offender was sentenced. There are a myriad of such circumstances. Perhaps the most obvious relate to unexpected and dramatic deteriorations in the health of the offender, which make prison time more burdensome or make it more difficult to receive appropriate health care. Further, the conditions in which a prisoner is housed may become more restrictive than was anticipated at sentencing. For example, it may transpire that a prisoner is required to spend a considerable period of time in super maximum prison conditions – which courts have previously recognised can justify a sentencing discount.¹⁵⁵ Another example could be the prisoner becoming the target of animosity or death threats.

Other relevant changed considerations can emanate from deliberate conduct by the offender. For example, an offender may complete educational courses or other forms of training which provide the offender with a different perspective about criminal behaviour and meaningfully improve the offender's level of prudence and values such that the offender is a significantly less risk to the community.¹⁵⁶ Demonstrated levels of rehabilitation can considerably reduce the weight that should be accorded to community protection in the sentencing calculus. Even the passing of time, in the sense of aging and maturity, can have a marked effect on a person's predilection for offending.

Related to this consideration is the role of emerging technologies in crime and justice. As we noted above,¹⁵⁷ more accurate risk and needs assessment tools are being developed and if they are applied to offenders and strongly indicate a very low risk of recidivism, this new information is relevant to the determination of an appropriate sentence. A person who has demonstrably reformed or whose

153 *Allouch v The Queen* (2018) 276 A Crim R 1. Cf *Kristensen v The Queen* [2018] NSWCCA 189.

154 *Totaan v The Queen* (2022) 108 NSWLR 17.

155 *DPP (Vic) v Faure* (2005) 12 VR 115; *Tognolini v The Queen* [2012] VSCA 311.

156 See Mirko Bagaric and Theo Alexander, 'Taking Rehabilitation Seriously in Sentencing: Transforming It from an Expedient to a Sentencing Principle' (2017) 27(3) *New Zealand Universities Law Review* 654.

157 See Part II.

risk of reoffending has significantly diminished due to age, education, or other factors may no longer warrant the same level of punishment because the need for community protection is reduced. In these circumstances, the only reason for ongoing containment is retribution.

Progress towards rehabilitation is especially important given that evidence shows that long-term incarceration can hinder offenders' reintegration into society, particularly when they are released without adequate support or preparation.¹⁵⁸ Second look sentencing provides an opportunity to assess whether an offender is ready for reintegration, ensuring that release decisions are informed by rigorous evidence of rehabilitation and readiness for societal re-entry. By facilitating the release of individuals who no longer pose a threat to the community, second look sentencing also reduces the social and economic costs of long-term imprisonment. These resources can be redirected towards rehabilitation programs, victim support services, and community safety initiatives, creating a more balanced and effective criminal justice system.

C The Principle of Finality Versus the Need for Review

One of the main obstacles to second look sentencing is the principle of finality in legal decisions, which promotes certainty and efficiency in the legal system. In the context of sentencing, it also assists in providing victims and the broader community a sense that justice has been served, while offenders gain clarity about the consequences of their actions. Finality also prevents the justice system from being overwhelmed by endless appeals and reviews.¹⁵⁹

However, the advantages of judgment finality are not so overwhelming to foreclose the possibility of revisiting long-term sentences. This is evident from the fact that second look schemes operate in the US without any meaningful disquiet or upheaval to the justice process.¹⁶⁰ These precedents provide valuable guidance for crafting a second look sentencing framework that aligns with Australia's legal principles.

Moreover, Australia's legal system already demonstrates a capacity and willingness to revisit sentences when this is desirable due to changed circumstances. As we have seen, there are (albeit limited) review mechanisms in the form of appeal, the prerogative of mercy, federal licences and life sentence re-determination applications.¹⁶¹ The cases of Julian Knight and Craig Minogue illustrate how governments have intervened to extend prison terms for individuals deemed too dangerous to release.¹⁶² These interventions, while exceptional, highlight the principle that sentences should not remain static when public safety or other legal objectives require reconsideration.

158 Bagaric and Alexander (n 156).

159 Ibid.

160 Feldman (n 12).

161 See Part III.

162 See Part I.

The logic behind extending sentences in such cases applies equally to reducing sentences. If new information or changed circumstances justify keeping someone in prison longer than initially planned, they should also logically be capable of justifying early release. A second look sentencing mechanism would provide a fair and consistent framework for such decisions.

V THE FRAMEWORK OF A SECOND LOOK SENTENCING SYSTEM

A Conceptual Model

Thus, in our view, a second look sentencing process is desirable. There is no bright line regarding at what point inmates should be eligible to have a sentence review. However, the period should be long enough to provide considerable scope for material circumstances to change and take into account the fact that sentencing law and practice generally evolves quite slowly. Additionally, resource considerations also need to be kept in mind.

As noted above, there are slightly more than 5,000 prisoners serving terms greater than 10 years' imprisonment in Australia. Of these, approximately 2,200 are serving terms of 10 to under 15 years. Certainly, a tenable argument could be made for reviews of sentences after 10 years, however, given the large number of additional cases that this would impose on the courts, from a pragmatic perspective it is likely to be untenable. In our view, the system should be designed so that offenders serving sentences of more than 15 years would become eligible for review after 15 years. If offenders are not released at this point, reviews would then occur every three years.

There should be no limits placed on the categories of offences or offenders whose sentences would be eligible for review. The situation in the US where second look sentencing is in most instances confined to young offenders is not justifiable. While it is correct that the judgment of people often evolves and becomes more prudent with age, it is also the case that older people commit far less crime than young people. Hence, from the perspective of community safety there is no principled reason that any categories of offenders should be excluded from the second look process.

The review process would be conducted by a single judge similarly to the model of the NSW life sentence re-determination scheme. The criteria which should be applied to determine if an offender should be released at the review stage is the same as if the judge was sentencing the offender at first instance on the basis of the sentencing law and principles that are applicable at the time of the review. The resentencing judge would apply the sentencing objectives, the aggravating and mitigating factors and tariffs which apply at the date of the date of review. Even if there were no legal changes since the initial sentence, the reviewing judge would still have the benefit of full knowledge about the trajectory of the offender since the initial sentence was imposed through the provision of various reports relating

to rehabilitation and other relevant subjective matters. As with initial sentencing, the views of victims should be taken into account during second look reviews. The victim should have the same role as with the initial sentence. If it was determined that a sentence of less than 15 years was appropriate, the offender would be released with parole on relevant conditions or without parole;¹⁶³ otherwise, there would be no change to the sanction initially imposed on the offender.

B The Question of Sentence Increases

While second look sentencing primarily aims to reassess long sentences for potential reduction, an issue that arises is whether the process should allow for the possibility of increases in sentencing. In principle, given that the reviewing judge is effectively assessing the matter afresh, there is no reason that increased sentences should not be permitted. This would occur, for instance, if an offender's behaviour in custody suggests an increased risk to public safety.

However, the justice system must approach such cases with caution. Increasing a sentence years after it was imposed raises concerns about double jeopardy and fairness to the offender. Courts should exercise discretion, as they do in appeals against manifestly lenient sentences, and increase penalties only where absolutely necessary.¹⁶⁴ In such appeals, the jurisprudence clearly shows that even where manifest inadequacy is established, the appeal court has a residual discretion to dismiss the appeal.¹⁶⁵ The principles relating to manifest inadequacy appeals have been expounded over the past few decades and a synthesis of these principles highlights they should be rare and 'instituted sparingly' only where there is such inconsistency with sentencing standards to 'constitute an error in principle', if it is important to 'establish and maintain adequate standards of punishment', and 'to ensure uniformity in sentencing, so far as the subject matter permits'.¹⁶⁶ Overall, the focus is on 'whether there has been an error of principle'¹⁶⁷ and this focus would also be appropriate in the context of any judicial consideration of an increase to a sentence through a 'second look' process.

163 If a period of parole was imposed, it would need to be for a fixed duration.

164 Feldman (n 12).

165 See, eg, *R v Wasson* [2014] NSWCCA 95. In *Western Australia v Charles* [2016] WASCA 108, [53] (McLure P, Buss and Mazza JJA), it was noted that '[t]he State must negative any reason why the residual discretion should not be exercised', citing *CMB v A-G (NSW)* (2015) 89 ALJR 407, 358–9 [33]–[34] (French CJ and Gageler J), 370 [66] (Kiefel, Bell and Keane JJ); *Western Australia v Stoeski* [2016] WASCA 16, [163] (Buss JA). See also Mirko Bagaric, John Anderson and Brendon Murphy, 'Correcting the Manifest Error that is the Approach to Manifest Error in Sentencing Appeals' (2023) 46(3) *University of New South Wales Law Journal* 1039, 1048 <<https://doi.org/10.53637/LZKP3955>>.

166 *R v Rappel* [2019] ACTCA 11, [10] (Murrell CJ, Mossop and Bromwich JJ), citing *R v Clarke* (1996) 2 VR 520, 522 (Charles JA, Winneke P agreeing at 524, Hayne JA agreeing at 524), quoted in *R v Nicholas* [2019] ACTCA 36, [68] (Murrell CJ, Mossop and Rangiah JJ). See also *R v TW* (2011) 6 ACTLR 18, 19–20 [4] (Refshauge J); *R v Lee* [2017] ACTCA 30, [53] (Elkaim, Mossop and Wigney JJ); *R v Harkin* (2011) 109 SASR 334; *R v Saleh* (2015) 257 A Crim R 212.

167 *R v Duffly* (2014) 297 FLR 359, 367 [60] (Murrell CJ, Refshauge and Ross JJ).

VI CONCLUSION

Second look sentencing is a desirable reform for Australia's justice system, providing a mechanism to reassess long-term sentences to ensure they remain just and effective. Thousands of prisoners in Australia serve lengthy terms, often imposed decades prior when sentencing objectives and considerations were significantly different. Yet the legal system lacks a structured process for revisiting these decisions, contrasting starkly with other domains of social and community conduct where long-term policies are routinely reassessed. Introducing second look sentencing would address this gap, aligning the justice system with the principles of adaptability and fairness.

The principle of finality in sentencing, while promoting certainty, does not preclude the need for review. Australia's legal system already demonstrates a willingness to adjust sentences in exceptional cases, as seen in interventions to extend prison terms for public safety. These precedents highlight that justice must be dynamic, capable of addressing both increased risks and the diminished necessity of continued incarceration. The same rationale that justifies extending sentences can also support their reduction when circumstances change. A second look sentencing framework would provide a consistent, equitable process for reassessing sentences, ensuring that decisions reflect the most current knowledge and conditions.

Long sentences are shaped by sentencing objectives such as deterrence, rehabilitation, and community protection, alongside aggravating and mitigating factors. However, these considerations change and evolve over time. Societal attitudes shift, as seen with the increasing emphasis on rehabilitation and the re-evaluation of crimes such as drug offences. Similarly, advancements in expert risk assessment and understanding of rehabilitation offer new insights into an offender's potential threat to society. Without a mechanism for review, outdated sentencing practices may persist, undermining the appropriateness of sentences.

Changes in an individual's personal circumstances further underscore the need for second look sentencing. Unexpected developments, such as deteriorating health, successful completion of rehabilitation programs, or evidence of significant reform, can render a previously appropriate sentence unnecessarily punitive. Additionally, evidence suggests that long-term incarceration often hampers reintegration into society, particularly when prisoners are released without adequate support. By facilitating reviews, second look sentencing ensures that release decisions consider rehabilitation progress and readiness for societal re-entry.

A well-designed second look sentencing process would include eligibility after 15 years for prisoners serving sentences longer than that duration, with subsequent reviews every three years. This approach balances the need for thorough reassessment with resource considerations. The reviewing judge would apply contemporary sentencing principles, considering any changes in law or the offender's circumstances since the original sentence.

Unlike parole, which focuses on conditional release, second look sentencing evaluates the proportionality and fairness of the punishment itself. These two

mechanisms would complement each other, creating a more nuanced criminal justice system in relation to the release of prisoners. By reducing the social and economic costs of long-term incarceration and redirecting resources to rehabilitation and victim support, second look sentencing enhances community safety and fair outcomes. A well-designed second look scheme would address the current rigidity of the sentencing system, ensuring sentences reflect evolving values, knowledge, and circumstances.