Order Out of Chaos: Victoria's New Maximum Penalty Structure*

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The *Sentencing Act* 1991, which is expected to be proclaimed by mid-1992, is the result of the most detailed overhaul of Victorian sentencing law this century. The Act continues an on-going process of bringing within one Act the main powers of courts to sentence offenders under state law, but will also produce improvements in three main areas. First, it will provide more detailed statutory guidance on the hierarchy of sanctions and the sentencing principles to be applied by courts. Secondly, it will create new sentencing options, such as the intensive correction order,[1] and will rationalise older ones. Thirdly, it contains a new scale of maximum penalties which are to be applied, in the first instance, to all offences in the *Crimes Act* 1958. This penalty scale is intended, ultimately, to be of general application. It is the foundation for a continuing re-assessment of all statutory maximum penalties in Victoria.

This paper is about the penalty scale legislated in the *Sentencing Act* 1991, s109. It explains the need for a such a scale, how it was arrived at, its main features, and what are the next stages in the reform process.

THE MAXIMUM MESS

Take ten Victorian Acts containing the most frequently prosecuted indictable or summary offences.[2] Count the different maximum periods of imprisonment allowed for the various offences. There are twenty-one separate ones.[3] The minimum maximum is three days; the maximum is life. One maximum is set at fourteen years (using firearm to resist arrest; burglary; blackmail; handling stolen goods), another in the same Act is set at fifteen years (manslaughter; causing serious injury intentionally; rioters demolishing a building). The one year difference in the maximum is not there because these disparate crimes differ subtly from each other in gravity. It is because the

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1 *Sentencing Act* 1991, ss19–26.

2 The Acts selected in order of number of offences contained in each Act are; *Crimes Act* 1958, *Lotteries Gaming and Betting Act* 1966, *Firearms Act* 1958, *Road Safety Act* 1986, *Summary Offences Act* 1966, *Prostitution Regulation Act* 1986, *Dog Act* 1970, *Drugs, Poisons and Controlled Substances Act* 1981, *Police Offences Act 1958*, *Vagrancy Act* 1966. The total number of penalty provisions included in these ten statutes are 514, approximately one seventh of the total number of offences estimated to exist under Victorian statute law.

3 Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General*, Melbourne, September 1989, Table 1, p 36.

penalties in the *Crimes Act* 1958 include one scale based on multiples of seven (from the lengthy terms originally accompanying orders of transportation), and another which progresses in multiples of five (from the shorter periods authorised when England later replaced transportation by penal servitude). Neither has any relevance in the last decade of the twentieth century.

In the higher reaches of punishment, sentences of imprisonment conventionally come in units of five, ten and fifteen years. At the lower levels, three, six and twelve months are the most commonly used statutory maxima. Six months is used, but not six years. Fitzmaurice and Pease,[4] in writing on the psychology of sentencing, have noted that legislators and sentencers tend to prefer certain numbers and their multiples over others as the basis of scaling of sentences. A statutory maximum, or judicially imposed sentence of five months, is rare; five years is common.

When the same exercise is undertaken with maximum fines a twenty-seven point scale will be produced.[5] It runs from one penalty unit ($100) through to 2,500 penalty units ($250,000). Typically fines are expressed as multiples of five or ten. The most commonly used fine maxima, in order of frequency of use are, five, twenty-five, fifty, ten, twenty, one and fifteen penalty units.

Legislation often allows a fine as an alternative to a maximum term of custody. The relationship between the twenty-one point imprisonment scale and the twenty-seven point fine scale wins no prizes for consistency. There are nineteen levels at which equivalence between one form of sanction and another is acknowledged. The conversion rate fluctuates wildly, as shown in Table 1, and a number of different rates are quoted.

The boxed areas show that five penalty units are the equivalent of two weeks, one month, three months, six months and a year in prison, but ten penalty units have similar equivalents. One thousand penalty units are worth either two years or ten.

If the aim is commutation of imprisonment to a fine, the exchange rate only allows for thirteen levels. Inconsistencies abound. The boxed areas in Table 2 reveal that a year in prison is variously treated as corresponding to five, ten twenty-five, forty, fifty and sixty penalty units, but six months imprisonment is regarded, elsewhere, as worth two hundred and fifty penalty units.

This jumble is compounded by s6 of the *Penalties and Sentences Act* 1985. It currently creates a single general power to impose a fine of 1,000 penalty units ($100,000) in addition to, or as an alternative to, imprisonment for any imprisonable offence in Victoria. The legislation makes no effort to guide sentencers in adjusting this high maximum to fit less grave offences except that, if the offence is one dealt with in the lower courts, the maximum is reduced to 100 penalty units ($10,000).

Then there are inconsistencies in the way statutory offences of similar gravity are currently handled. Offences of comparable seriousness should not be

[4] C Fitzmaurice and K Pease, *The Psychology of Judicial Sentencing*, Manchester, Manchester University Press, 1986, ch 7.

[5] *Task Force Report*, Table 2, p 37.

TABLE 1[6]
FINE AND IMPRISONMENT CORRELATES

Penalty Units	*Imprisonment Months*
1	3d
2	.5; 3
5	.5, 1; 3; 6; 12
8	1
10	1; 2; 6; 12
15	3
20	4; 6
25	3; 6; 12
26	6
30	4
40	12
50	12; 24; 60
60	12
80	24
90	18
100	3; 24
150	84
250	6
1000	24; 120

TABLE 2[7]
IMPRISONMENT AND FINE CORRELATES

Imprisonment Months	*Penalty Units*
3d	1
.5	2; 5
1	5; 8; 10
2	10
3	2; 5; 15; 25; 100
4	20
6	5; 10; 20; 25; 26; 250
12	5; 10; 25; 40; 50; 60
18	90
24	50; 80; 100; 1000
60	50
84	150
120	1000

[6] *Task Force Report*, Table 8, p 93.
[7] *Task Force Report*, Table 9, p 94.

punishable by penalties of different severity, nor unlike offences attract the same level statutory penalty. For example:[8]

SIMILAR OFFENCES ATTRACTING DIFFERENT PENALTIES

Offences involving obstruction, hindering, assaulting, delaying peace officers:

Summary Offences Act 1966, s22(2): 1 penalty unit;

Summary Offences Act 1966, s30(3): 5 penalty units;

Drugs, Poisons and Controlled Substances Act 1981, s42: 20 penalty units;

Summary Offences Act 1966, s52(1): 25 penalty units or imprisonment for 6 months;

Prostitution Regulation Act 1986, s36(3): 60 penalty units or imprisonment for one year.

Property offences:

Road Safety Act 1986, s69: Procuring use or hire of motor vehicle by fraud (10 penalty units or 2 months' imprisonment);

Summary Offences Act 1966, s37: Obtaining goods by valueless cheques: (1 year or 25 penalty units);

Crimes Act 1958, s81(1): Obtaining property by deception (10 years).

Firearms offences:

Summary Offences Act 1966, s4(k): Carrying an offensive weapon not being a firearm without permission (5 penalty units);

Vagrancy Act 1966, s6(1)(e): Found armed with offensive weapon without good reason (1 year).

DIFFERENT OFFENCES ATTRACTING THE SAME PENALTY

Crimes Act 1958, s5: manslaughter (15 years);

Crimes Act 1958, s206(1): rioters demolishing a building (15 years);

Vagrancy Act 1966, s7(1): soliciting alms (2 years);

Road Safety Act 1986, s61(3): failing to stop or render assistance where person killed or suffers serious injury (80 penalty units or 2 years);

Firearms Act 1958, s 32(6): Bringing machine guns into Victoria (50 penalty units or imprisonment for 12 months);

Summary Offences Act 1966, s15: Habitual drunkard (12 months).

The current Victorian penalty structure is incoherent. Its inadequacies, anachronisms and internal inconsistencies, only hinted at here, are set out in more detail elsewhere.[9] It is the *structure* of legislative sentencing that the *Sentencing Act* 1991 is particularly addressing afresh.

THE VICTORIAN SENTENCING COMMITTEE

In 1985, when confidence in the sentencing process in Victoria was at a low ebb, the Victorian Attorney-General appointed a Victorian Sentencing

[8] *Task Force Report*, pp 56–7.
[9] *Task Force Report*, Part 1.

Committee, Chaired by Sir John Starke, a retired Supreme Court judge and former Chairman of the Adult Parole Board, to review sentencing laws and practices in the state. It submitted its three volume report to the Attorney-General in April 1988.[10] In it the Committee said that those engaged in the workings of criminal justice in Victoria were:[11]

> 'acting in a system where many of the maximum penalties set by statute were developed centuries ago, and have no rational basis or relevance to modern views on the seriousness of crimes, the seriousness of penalties and the appropriate policies that ought to guide sentencing.'

The Committee came up with a seven part scale of maximum terms of imprisonment ranging from six months to life to be applied immediately to the *Crimes Act* 1958.[12] The suggested scale did not refer to fines, nor to other non-custodial sanctions. The changes recommended would have produced a significant downward shift in the maximum statutory penalties of imprisonment attached to most *Crimes Act* offences. The reductions were said to be necessary in the interests of rationality and to adjust for the abolition of remissions. The latter was another of Committee's recommendations. Lowering the statutory maxima was intended to influence judges and magistrates to award lower sentences. It was hoped that these lower sentences would produce periods of incarceration similar to those actually served in practice under a system of remissions which normally lopped a third off most sentences. The proposed reduction in maximum penalties is set out in Table 3.

The Committee regarded its work on the *Crimes Act*, and on sentencing generally, as demonstrating that there was a need to review all maximum penalties prescribed by statute in Victoria.[13]

THE SENTENCING TASK FORCE

In December 1988, the Attorney-General appointed a *Sentencing Task Force* under the chairmanship of Frank Costigan QC. Its task was to review existing statutory penalties 'and to recommend new statutory maximum penalties for offences contained in the *Crimes Act* 1958'.

If the Victorian Sentencing Committee under Starke had already completed the work on the *Crimes Act*, why do it again eight months later? There were four troublesome areas. First, adverse media and public reaction to the proposed levels of reduction . Secondly, the Starke revision did not refer to the use of non-custodial sanctions, such as fines, which could be used as maxima in their own right or in conjunction with imprisonment. Thirdly, in applying the new maxima to existing *Crimes Act* offences, the Sentencing Committee obviously modified the seriousness ranking of many of the offences. The

[10] Victorian Sentencing Committee, *Report: Sentencing*, Melbourne: VGPO, 1988 (3 volumes).
[11] *Victorian Sentencing Committee Report*, p 675.
[12] *Victorian Sentencing Committee Report*, pp 309–21.
[13] *Victorian Sentencing Committee Report*, p 304.

TABLE 3[14]
PRESENT CRIMES ACT MAXIMA AND VICTORIAN SENTENCING COMMITTEE PROPOSED MAXIMA

Present Statutory Maximum	*Proposed Statutory Maximum*
Life	Life
25y	12y
20y	12y
15y	9y
14y	6y
10y	6y
7y	3y
5y	3y
3y	1y
2y	6m
1y	6m
6m	6m

report did not indicate how those changes were arrived at. Fourthly, the Committee did not attempt to review other legislation. Could the standards for statutory maxima in the *Crimes Act* be stated in an Act of general application, such as the *Penalties and Sentences Act*, so as to be used to set penalty levels elsewhere?

Empiricise The Task

The Sentencing Task Force reported to the Attorney-General nine months later, in September 1989.[15] It recommended that a new general twelve point scale of maximum penalties (one which referred to fines and community-based orders as well as imprisonment) be incorporated into the *Penalties and Sentences Act* 1985 for initial application to the *Crimes Act* 1958 and thereafter to other indictable and summary offences. This scale is not the one which ultimately appeared in s109. The latter has 14 levels.

The methodology which the Task force applied to reach its conclusions is discussed in its Report and elsewhere.[16] Some features are worthy of note. While subjective judgements are inevitable in any effort to rationalise penalties, the Task Force sought help in the form of empirical data on the recent

[14] *Task Force Report*, Table 9, p 94.
[15] Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney General*, Melbourne: VGPO, 1989.
[16] R G Fox and A Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 165.

patterns of sentencing in Victorian courts The collective experience of the judiciary in dealing with a wide range of cases over a lengthy period played an important part in highlighting the illogicality of the current situation and in determining where a new sentencing scale should be anchored. Looking at how sentencers ranked the relative seriousness of the offences which came before them and ensuring that most sentences recently handed down would be capable of being accommodated within the new sentencing scale was regarded as crucial to acceptance of the proposed new offences rankings and statutory maxima by Parliament, the community and the courts. It was an advance on the methodology adopted by the Starke Committee.

To ascertain the current practice in Victoria, data was gathered on 24 of the major offences, other than murder, for which determinate sentences were imposed in the higher courts. These were crimes for which there was a sufficient number of cases to have some degree of confidence in their validity. The period covered six of the most recent years for which official statistics were then available. The list picked up over 64% of all cases disposed of by the Supreme and County Courts.

The data revealed an enormous gulf between the scales of gravity applied by the courts and those defined by current legislation.[17] The ordering of crimes according to the severity of their statutory maximum penalties bears little relationship to their ranking according to the sentences actually imposed in the courts. In Table 4 the listing is of the offences ranked according to the statutory maximum, together with a comparison of the highest maximum sentence imposed for a principal offence in that period. In the third column, the average sentences for the period 1985–87 are listed.

In graphic form the lack of congruence is more spectacular. Statutory maxima and *highest penalty* imposed are compared in Figure 1.[18] While the legislature and the judiciary both agree that armed robbery and aggravated rape are within the most serious classes of crimes, overall the judges accord greater significance than the legislature to crimes against the person. For instance, the crime of manslaughter is ranked eighth in terms of *Crimes Act* maxima, but first by the judges according to the maximum penalties they award. So too with rape (seventeenth and equal fifth).

To produce another picture of judicial practice, one less shaped by extremes, figures on the *average* sentence for each offence were obtained for the period 1985–87. Because they are an indication of the mid-range sentence, the figures are lower than for the maximum, but are a more sensitive measure of the way the judges view the seriousness of the conduct. It can now be seen that, once again, manslaughter reappears closer to the top of the scale of gravity than allowed for in the legislation. It and aggravated rape, armed robbery, rape and serious sexual offences involving children are treated as the most

[17] Earlier research showed the same, A Freiberg and R G Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216, 224.
[18] *Task Force Report*, Figure 1, p 68.

TABLE 4[19]

MAJOR OFFENCES SENTENCED IN HIGHER VICTORIAN COURTS 1981–87 RANKED ACCORDING TO STATUTORY MAXIMUM

Offence	*Statutory Maximum*	*Highest Penalty Imposed 1981–87*	*Average Penalty Imposed 1985–87*
	Years	*Years*	*Years*
Armed robbery	25	14.0	4.8
Aggravated Rape	20	13.0	7.6
Sexual penetration of child <10	20	10.0	3.7
Aggravated burglary	20	10.0	3.1
Robbery	20	9.0	2.2
Incest	20	12.0	3.2
Arson	20	7.0	2.1
Manslaughter	15	15.0	6.2
Trafficking cannabis	15	9.0	2.4
Intentionally causing serious injury	15	9.0	1.7
Forgery	15	4.0	0.8
Perjury	15	2.5	0.7
Burglary	14	9.0	1.2
Using firearm to resist arrest	14	8.0	2.7
Handling stolen goods	14	8.0	1.2
Blackmail	14	7.0	1.8
Rape	10	10.0	4.5
Theft	10	10.0	1.2
Sexual penetration 10–16	10	8.0	2.7
Obtaining property by deception	10	7.0	0.8
Culpable driving	7	6.0	2.5
Indecent Assault	5	5.0	1.2
Assault with intention to resist arrest	5	3.0	0.9
Obt financial advantage by deceptn	5	3.0	0.8

heinous crimes, again emphasising the priority the judges give to offences against the person.

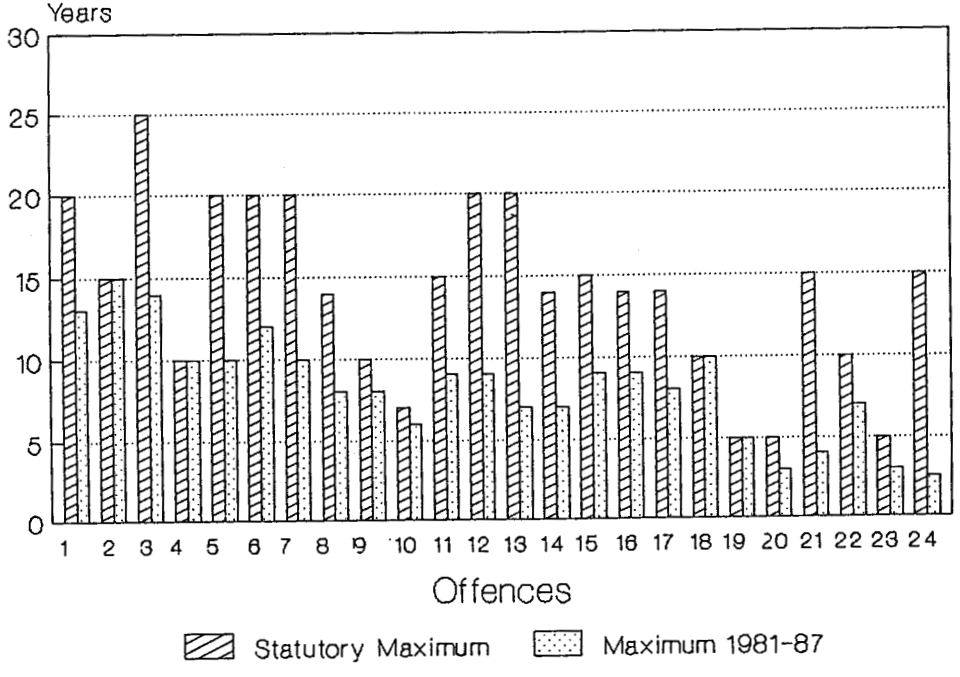
There is no doubt from Figure 2 [20] that the judicial view of the hierarchy of seriousness is markedly different from that which appears in the *Crimes Act*.

The empirical data on local sentencing practice was influential in the efforts of the Task Force to both re-order *Crimes Act* offences according to a modern assessment of their relative gravity and in designing the parameters of a new set of graduated maximum penalties.

[19] *Task Force Report*, Table 5, p 63.
[20] *Task Force Report*, Figure 2, p 69.

Figure 1

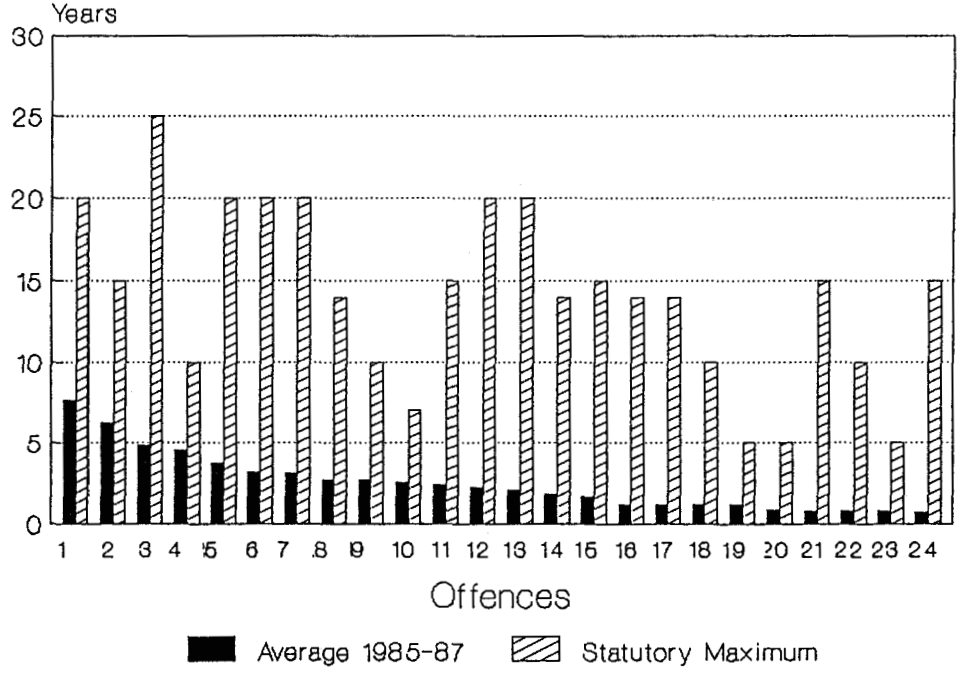
Statutory Maximum and Maximum 1981-87



1. Aggravated Rape
2. Manslaughter
3. Armed robbery
4. Rape
5. Sexual pentn. of child <10
6. Incest
7. Aggravated burglary
8. Using firearm to res arrest
9. Sexual pentn. 10-16
10. Culpable driving
11. Trafficking cannabis
12. Robbery
13. Arson
14. Blackmail
15. Int. caus. serious injury
16. Burglary
17. Handling stolen goods
18. Theft
19. Indecent Assault
20. Assault w. int. to res. arr
21. Forgery
22. Obt prop by deception
23. Obt fin adv by deception
24. Perjury

Figure 2

Statutory Maximum and Average 1985-87



1. Aggravated Rape
2. Manslaughter
3. Armed robbery
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5. Sexual pentn. of child <10
6. Incest
7. Aggravated burglary
8. Using firearm to res arrest
9. Sexual pentn. 10-16
10. Culpable driving
11. Trafficking cannabis
12. Robbery
13. Arson
14. Blackmail
15. Int. caus. serious injury
16. Burglary
17. Handling stolen goods
18. Theft
19. Indecent Assault
20. Assault w. int. to res. arr
21. Forgery
22. Obt prop by deception
23. Obt fin adv by deception
24. Perjury

An Idea Whose Time Has Come

It would have been possible for the legislature to prescribe a single global maximum penalty applicable to all offences (eg 21 years as under the Tasmanian *Criminal Code Act* 1924, s389) so as to avoid having to work out a logical gradation of penalties, or saying anything about the relative seriousness of the offences to which penalties have to be assigned. This only casts upon the judiciary the task of settling sanction hierarchies and offence relativities. In this state, as in most others, it is conventional for legislators to affix different maxima to different offences in accordance with some implicit view of the relative significance of the communal values offended by those breaches. However the legislative choice of penalty level was often arbitrary and, insofar as it related to legislation falling within different ministerial portfolios, uncoordinated.

The idea has been in circulation for some time that, instead of attaching to each separate proscription a maximum penalty of a stated value, only a penalty 'level' should be identified as the maximum. Penalties differing in type and quantum would be divided into levels of increasing severity. A penalty level would be chosen to correspond to the level of offence seriousness. What punishments are allowed for at any particular level, and the judgement that a class of offence belongs at a certain level, can be varied from time to time, but only after due regard has been given to the overall logic and purposes of the penalty and offence hierarchies. Once each offence has been assigned a penalty level, adjustments to penalty rates across the entire statute book can be made by amending the single statute that defines the attributes of each level.

In 1975, a Working Party to reform the criminal law of the Australian Capital Territory[21] put forward an idea for a system based on eight penalty divisions with maximum sentences of imprisonment, fines and periods of conditional release. It was never adopted. However the idea resonated in South Australia. In 1977, the Criminal Law and Penal Methods Reform Committee of South Australia, under the chairmanship of Justice Roma Mitchell, recommended that the legislature adopt nine penalty divisions to which offences would be allocated in order of gravity.[22] A modified version of those recommendations was implemented in South Australia eleven years later, in 1988, when a penalty scale of twelve divisions was introduced. It thus became the first Australian state to fix maximum penalties by reference to penalty divisions.[23] The divisions are not as comprehensive as those designed for Victoria.

The manner in which the Victoria penalty hierarchy was devised is discussed in Part 4 of the *Task Force Report*. The basic reasoning behind the

[21] *Working Party on Territorial Criminal Law* 1975, Draft Legislation, Part VI.
[22] South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report: The Substantive Criminal Law*, 1977: pp 391–3.
[23] *Statutes Amendment and Repeal (Sentencing) Act* 1988 (SA).

choice of twelve[24] divisions or levels was that two were needed for the top and bottom of the scale to represent the most and least serious sanctions and classes of crime. As the top would be life imprisonment, a level below it was needed for the most serious offences punishable by the highest level determinate sentence. For the spread of the remaining indictable offences, one level was needed in which to place the 'standard' examples of offending. One level higher than this would be used for aggravated versions of those offences and three lesser levels were designed to separately accommodate indictable offences in the nature of attempts, conspiracy and endangerment as well as less serious forms of indictable crime. Another two levels were required predominantly for summary offences warranting imprisonment and, below this, two levels to allow distinctions to be drawn between classes of lesser offence not warranting custodial sanctions, but which were normally punishable by fines, supervision, or conditional forms of release — see Table 5.

These suggested groupings were also based on the best fit of the data generated by the analysis of the ten statutes containing the most frequently prosecuted indictable or summary offences and the patterns of recent sentencing practice.

The Product

TABLE 5[25]

PROPOSED DIVISIONAL MAXIMA

Divn No	*Maximum Prison*	*Fine*	*PU CBO*[26]		
1	Life	—	—		Indictable
2	180 months	$180,000	1800	—	Offences
3	150 months	$150,000	1500	—	
4	120 months	$120,000	1200	—	Indictable
5	90 months	$ 90,000	900	—	Offences
6	60 months	$ 60,000	600	—	Triable
7	36 months	$ 36,000	360	500 hours	Summarily
8	12 months	$6,000	120	240 hours	
9	6 months	$3,000	60	120 hours	
10	—	$1,000	10	50 hours	Summary
11	—	$ 500	5	—	Offences
12	—	$ 100	1	—	

[24] This was subsequently altered to a fourteen level scale when the recommendations of the Task Force were translated into legislative form.

[25] *Task Force Report*, Table 13, p 108.

[26] Refers to hours of community service.

Relevance Of Remissions

It was the considered view of the Task Force that the new maximum penalties should be set without reference to the existence or effect of remissions, or any other scheme that allowed for early release of prisoners. The Task Force did not accept that fixing the upper limits of state's power to punish should be defined by, or vary according to the extent which the executive arm of government chose to exercise its inherent power to remit part of the service of a custodial sentence. To try to persuade judges and magistrates to impose lower sentences to compensate for the abolition of remissions by a corresponding reduction in statutory maxima (as envisaged by the Starke Sentencing Committee) was rejected as too uncertain of success.[27] If a change in sentencing behaviour to prevent an accidental extension of sentences and a resultant prison population explosion was urgent, it had to be achieved by means other than manipulating maxima. That other means is *Sentencing Act* 1991, s10. It compels sentencers, for five years after its proclamation, to take the abolition of remissions into account. Sentences must not be handed down that are longer than the actual period that would have been served when one third remission was automatically granted.[28]

PARLIAMENT ADDS ITS STAMP

Alterations in the House

The progress of the Bill through Parliament was stormy. The opposition was suspicious of the penalty scale and its application to the *Crimes Act* fearing that it would lead to a decline in sentencing severity and communal protection. Even before the Bill reached the House, the Attorney-General indicated that he would not agree to any sexual offences being re-classified to lower penalty levels. Since aggravated rape then carried a current maximum of 20 years, the scale was altered to give it a new upper level (now level 2) which allowed for a 20 year maximum prison term where earlier the highest proposed determinate level was 15 years. At the other end, a two year custodial level (now level 9) was inserted to fill what was regarded as a gap between one and three years in the Task Force version.

The Shadow Attorney-General also protested that it was wrong that the upper levels of the scale dealing with serious indictable offences provided for a maximum penalty in the form of a fine or non-custodial measure. Here the government held its ground. Not only had these alternative sanctions always been available, the effect of the legislation was to increase the maximum general fine level from 1,000 penalty units ($100,000) to 2,400 penalty units ($240,000) an increase of 140% and to extend the time during which an

[27] *Task Force Report*, p 16 & 18.

[28] For a close analysis of this section see A Freiberg, *Truth in Sentencing?: The Abolition of Remissions*, Paper presented at a seminar on the Sentencing Act 1991 conducted by the University of Melbourne, Department of Criminology, in conjunction with the Leo Cussen Institute, 16th November 1991.

offender could be called upon to undertake unpaid work under a community-based order.

The Revised Product

The fourteen level scale of maxima are set out in Tables 1 to 4 in s109 of the *Sentencing Act* 1991. In earlier drafts of the Bill the information was presented as a single table showing the prison, fine and community-based order equivalents across a single line at each level. It was disaggregated into four tables at the instigation of the opposition in order to overcome anxiety that, if presented in such an obvious and transparent fashion, the public and possibly the courts, would have reason to think that penalty standards had been eroded by the inclusion of the non-custodial alternatives at each level bar the first. The original tabular form of the penalty scale was in harmony with the concepts of truth in sentencing and clarity in legislation. Both have been undermined by the new form of s109. The reconstructed table is presented as Table 6 below:

TABLE 6
VICTORIAN PENALTY SCALE
Sentencing Act 1991, s109.

Level	*Maximum Prison Term*	*Maximum Fine Penalty Units*	*Community Based Order Maximum Hours of Unpaid Community Work*	
1	Life	—	—	
2	240 months	2400	500 over 24 months	
3	180 months	1800	500 over 24 months	
4	150 months	1500	500 over 24 months	[29]
5	120 months	1200	500 over 24 months	
6	90 months	900	500 over 24 months	
7	60 months	600	500 over 24 months	
8	36 months	360	500 over 24 months	[30]
9	24 months	240	375 over 18 months	
10	12 months	120	250 over 12 months	
11	6 months	60	125 over 6 months	
12	—	10	50 over 3 months[31]	
13	—	5	—	
14	—	1	—	

[29] Offences from levels 5 to 8 inclusive are indictable offences triable summarily, *Magistrates' Court Act* 1989, s53(1A).

[30] Offences at level 8 and above are presumed to be indictable, *Sentencing Act* 1991, s112.

[31] If a maximum term of imprisonment is less than six months, a maximum penalty of 50 hours unpaid community work for over a 3 month period can be substituted, s109, Table 3. Though the scale itself does not permit maximum terms of less than six months, (see Table 1), such provisions still exist outside the *Crimes Act*. If a maximum fine is 10 pu or more, but less than 60 pu, unpaid community work for 50 hours over a 3 month period can be substituted, s109, Table 4. The Table presently states 6 months, but this was enacted in error and will be corrected.

TOPOLOGY OF THE PENALTY SCALE

The scale allows for eleven custodial levels ranging from life to six months (levels 1–11) and three non-custodial levels (levels 12–14). Maximum fines ranging from a high of 2,400 pu ($240,000) to a low of 1 pu ($100) are alternative or additional penalties for thirteen of the levels (levels 2–14) and community-based orders requiring the performance of specified periods of unpaid community work within a maximum nominated period are listed as an additional or alternative measure for eleven levels (levels 2–12).

Penalty Level and Offence Classification

The scale is used to distinguish indictable offences from summary ones. Any offence declared to be punishable by reference to levels 1 to 8 inclusive (ie down to 36 months or 360 pu) is deemed to be an indictable one.[32] This is represented by the dotted line in Table 6. Those punishable at any level below this are treated as summary offences. Magistrates are still permitted to impose a cumulative prison sentence of up to five years[33] and the maximum term permitted in respect of indictable offences triable summarily remains at two years (level 9).[34]

Single Counts

The scale sets the ceiling by way of punishment for individual counts of crime. It establishes no limit for multiple crimes committed by the same offender. Higher effective custodial maxima can be achieved by sentencers overriding the legislative presumption of concurrency[35] and making their sentences of imprisonment, or youth training centre detention, cumulative or partially cumulative. Fines for multiple offences are automatically cumulative, as has always been the case. However, there is now a power to fix a single aggregate fine for offences founded on the same facts or forming a series of similar offences.[36] Multiple community-based orders are presumed to be concurrent. They may be ordered to be served cumulatively, but the durational limits in s39 must not be exceeded.[37] These refer back to s109 so far as caps on unpaid work are concerned.

Ceilings and Guidance

The scale defines the uppermost limit of imprisonment, fines and *one* form of community-based order allowed by law for each offence to which a penalty level is applied. It does not prevent lesser sentences of these type being

[32] *Sentencing Act* 1991, s112.
[33] Surprisingly, the limit is not set by reference to the penalty scale, see *Sentencing Act* 1991, s16(5).
[34] *Sentencing Act* 1991, s113(1).
[35] *Sentencing Act* 1991, s16(1) and s33(1).
[36] *Sentencing Act* 1991, s51. It must not exceed the total of the maximum fines that could have been imposed for all the offences.
[37] *Sentencing Act* 1991, s42.

imposed, nor does it govern the imposition of sentencing orders of a different type, eg youth training centre detention, community-based orders not requiring unpaid community work, conditional adjournment, or conditional discharge.[38] It does not stand in the way of custodial sentences being suspended, or served by way of an intensive correction order.[39] Nor is it an obstacle to the fixing of non-parole periods, or the making of orders in addition to[40] or instead of sentence.[41]

The scale offers no guidance to judges or magistrates in their placement of particular offenders within the range of sentencing possibilities that fall below the prescribed limit. Other provisions in the *Sentencing Act* provide advice on factors to be taken in to account. On the other hand, the attachment of a particular level to a given offence is a legislative and public indication of the relative seriousness of the crime and a guide to how the worst examples of that crime are to be handled. Since Parliament has defined afresh how grave the courts are to regard each type of crime, sentencers are duty-bound to take account of the new offence ranking.[42] They can no longer hide behind any argument that the penalty is out of date or out of kilter with modern legislative and public views of gravity.[43]

The Unattainable Maximum[44]

One of the results of the interplay between s10 and s109 in their application to *Crimes Act* offences is that where there has been no *Sentencing Act* alteration in the maximum statutory period of imprisonment, it will be unlawful, for the next five years,[45] for any judge or magistrate to impose the maximum penalty on an offender for any single charge or count, even in a 'worst possible case' situation. If the maximum is about to be imposed, the sentencer must consider the previous effect of remissions on the service of such a maximum penalty. Since one third would have been remitted, the current sentence must be one third less than the maximum term of imprisonment allowed for under s109(1) in order to ensure that the offender will not spend more time in

[38] Durational limits for these are to be found in *Sentencing Act* 1991, ss32(3), 36(3), 39, 70(1) and 75(1).

[39] But subject to statutory limits upon their use, eg prison sentences of more than 12 months cannot be served by way of an intensive correction order, nor terms of more than 24 months be suspended, *Sentencing Act* 1991, s19(1) and s27(1).

[40] *Sentencing Act* 1991, Part 4, restitution, compensation, forfeiture and disqualification.

[41] *Sentencing Act* 1991, Part 5, hospital orders.

[42] As required by *Sentencing Act* 1991, s5(2)(a).

[43] R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria*, (Melbourne, Oxford University Press, 1985) 11.303; R Douglas, 'When Parliament Barks, Do the Magistrates Bite? The Impact of Changes to Statutory Sentencing Levels' (1989) 7 *Law In Context* 93.

[44] For discussion of the corresponding problem of the irreducible minimum see A Freiberg, *Truth in Sentencing?: The Abolition of Remissions*, Paper presented at a seminar on the Sentencing Act 1991 conducted by the University of Melbourne, Department of Criminology, in conjunction with the Leo Cussen Institute, 16th November 1991, 2.15.

[45] *Sentencing Act* 1991, s10(5).

custody than prior to the abolition of remissions.[46] There is no escape clause. One existed in an earlier version of the Act, but was deleted.

After five years, sentencers must still 'have regard' to sentencing practices current immediately before the expiry of s10,[47] but this will not prevent them utilising the full maximum in those rare cases in which it is appropriate. Even within the five years, a cumulative sentence (where more than one offence is alleged) will allow the equivalent of the maximum on one of the charges to be reached.[48]

Where the maximum term is to be altered by the *Sentencing Act* 1991, the sentencer would be wise to form a a view of what penalty a like offence would have attracted prior to the new Act coming into force. After allowing the reduction for remissions, as required under s10(1), an adjustment up or down in penalty should made to match the degree by which the statutory maximum has been changed.

Sanction Units

Fines

Fines are expressed in the scale and throughout Victorian legislation in terms of *penalty units* each of $100.[49] That has been so for a decade. If adjusted for inflation since 1981, the value of each unit should now be $209.[50] The Task Force recommendation that the penalty unit be retained as the vehicle for imposing fines in Victoria and stay at $100 without being adjusted for inflation[51] was adopted without dissent by the government.[52] However, though the value of the penalty unit was held constant, the effect of inflation from 1981 to the date of the passing of the Act has been countered by increasing the number of penalty units at each level in the penalty scale. This is the means by which the Task Force recommended any future adjustments for inflation should be made.[53] Thus the general maximum fine allowed in addition to, or in lieu of, imprisonment for indictable offences in superior courts has been raised from 1,000 pu[54] ($100,000) to 2,400 pu ($240,000) at level 2.[55] In the lower courts the maximum general fine has been raised from 100 pu ($10,000)[56] to 240 pu ($24,000) at level 9.

46 *Sentencing Act* 1991, s10(2) and (3).
47 *Sentencing Act* 1991, s10(6).
48 The other charge must be properly joined on the presentment or indictment and must not only warrant a prison term in its own right, but also satisfy the principles regarding when a cumulative or partially cumulative sentence is appropriate, see RG Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria*, (Melbourne, Oxford University Press, 1985) 9.416–9.418.
49 *Sentencing Act* 1991, s110.
50 The value of the CPI index was 103 in June 1981 and 215.7 in September 1991 (109.4% increase).
51 *Task Force Report*, pp 52–4.
52 *Sentencing Act* 1991, s110.
53 *Task Force Report*, p 54, para 99.
54 *Penalties and Sentences Act* 1985, s8(b).
55 *Sentencing Act* 1991, s109, Table 2.
56 *Penalties and Sentences Act* 1985, s8(a).

The gradation of maximum fines through the whole of the penalty scale is now based on a constant 10 penalty units per month of the maximum period of imprisonment specified for each division (ie $1,000 per month of imprisonment) instead of the current internally inconsistent rates. The maximum general fine in Victoria has, in effect been increased by 140%. This is more than 30% higher than the rate of inflation for the decade since the introduction of penalty units. This is the consequence of a deliberate policy to raise fine levels across the board to both punish corporate offenders (for whom imprisonment is not an option) and to put a powerful alternative sanction in the hands of the courts to reinforce the legislative direction that imprisonment be used as a sanction of last resort.

Prison

The sanction unit for imprisonment has been deliberately stipulated in terms of months rather than years for a number of reasons. First, as a vehicle for evening out the imprisonment scale. The preferred steps for serious indictable offences in modern times tended to be five, ten and fifteen years. The proposed scale adds new levels at seven and a half and twelve and a half years. The awkwardness of those levels when expressed in years would militate against their acceptance. Secondly, to set up an obvious connection between the imprisonment and fine scales, ie one month = ten penalty units. Thirdly, to make use of psychological findings on the effect of 'least noticeable differences'. These suggest that sentencers at first instance, and on appeal, will have a better understanding of the impact of imprisonment and be more sparing and discriminating in its use when the unit in which it is allocated is smaller.[57]

Community-based order

The community-based order allows for the possibility of a number of different program conditions[58] of which unpaid community work is regarded as the most stringent. Community-based orders containing this condition are a possible substitute for imprisonment even at the higher levels of the sentencing scale. The penalty scale sets an upper limit of 500 hours of unpaid community work within 24 months for all indictable offences tried in the Supreme Court and the County Court This is the normal limit that would apply in any event and somewhat less onerous that the maximum for orders of this type permitted under present legislation.[59] Below level 9 the durational limits of the order are graded downwards to allow the principle of proportionality to operate in respect of matters disposed of summarily. The scale

[57] C Fitzmaurice and K Pease, *The Psychology of Judicial Sentencing*, (Manchester, Manchester University Press), 1986, ch 7.

[58] *Sentencing Act* 1991, s38.

[59] Under *Penalties and Sentences Act* 1985, s29(2)(b) the maximum amount of unpaid work is 500 hours to be undertaken within 12 months. The *Sentencing Act* 1991, s39(2) and s109 keep the same 500 hour limit, but allow it to be worked off over 24 months.

does not inhibit other program conditions being added to a community-based order governed by the scale.

Penalty Equivalence

Are they equivalent?

The Sentencing Task Force took a broader view of the legislative function of setting ceilings on sanctions than did the Starke Sentencing Committee. For most levels, there are now three categories of maximum penalty: custodial, monetary, and other non-custodial (community-based order). In setting up the maxima at each level, the scale is presented in a form which, at least for fines and imprisonment, reveals the direct numerical relationship between the units in which the different sanctions are expressed. This is done in the hope that the maxima specified will be regarded as being of approximately equivalent penal severity by the courts and that, if a mix of imprisonment and fine is going to be used, the desired degree of punishment can be more easily calculated.

The artificiality of declaring that one form of sanction is to be treated as identical in penal impact to another, when the two measures are qualitatively different, has been conceded by the sentencing Task Force.[60] Nonetheless, the Report correctly argues that so long as Parliament continues to invest sentencers with a discretion to use a fine as an alternative to imprisonment, the former must be capable of reaching a level which, though it acts upon an offender's property, produces a personal impact (psychological and economic) not too distant from that achieved by custodial restraint. It was in order to achieve a comparable sense of equivalence in severity of consequences that the fine levels in the penalty scale were pitched so high.

The numerical linkage between fines and imprisonment on the one hand and community-based orders on the other is limited. Indeed for seven of the eleven levels at which a maximum is expressed in community-based order terms, no effort at gradation of the penalty is attempted. This is due to limits on the nature of the supervision and control that can be provided by a community-based order. The design is founded on the premise that the community-based order is capable of producing rehabilitative benefits, the evidence of improvement will appear within two years. Thereafter, according to the Office of Corrections, the return on supervisory effort is minimal. It is obvious that this sanction is not equivalent in penal severity to the other two, even at the lower echelons of the scale.

The fact that maxima are expressed in the form of three types of sanction, all at the same penalty level, does not mean that they are to be treated as exact equivalents and wholly interchangeable. The measures are there to cater for offenders of different types and in different situations. The fine can be used to its limit when the situation is not one of last resort, while the community-based order can be used to its maximum in the hope of producing rehabili-

[60] *Task Force Report*, p 87.

tative results unlikely to be attained by the other two measures. The community-based order is not realistically available as an alternative for 'worst case situations'.

The intended correspondence between fines and imprisonment in the scale has already been undermined by the not assigning all maxima for one offence at the same level. For instance, *Crimes Act* 1958, s60 (soliciting acts of sexual penetration etc), has been allocated a maximum term of imprisonment by reference to one level and the maximum fine by reference to a lower one.[61] This combination was not endorsed by the Sentencing Task Force and is incompatible with the purpose of the *Sentencing Act* in maintaining consistency and proportionality in the ranking of punishments as well as offences. It may be desirable and indeed necessary[62] to give priority to one form of punishment over another in fitting an offence with a penalty, but a principled case for doing so in the course of re-assessing all offences must be made out, rather than making adjustments on an ad hoc basis, as this appears to be.

Additional or substitute?

In general, any one type of measure in the scale can be used in addition to, or as a substitute for, another. This depends on the form of language which nominates what level penalty is being assigned to the offence in question.

If an offence is described in an Act or subordinate legislation as being simply an offence of a certain level, eg 'a level 5 offence', it will ordinarily be punishable by a term of imprisonment of that level as set out in s109, Table 1 and/or a fine of a matching level as specified in Table 2. An offence so described may also be dealt with by way of a community-based order under s36 of the *Sentencing Act* 1991. Any of the programme conditions specified in s38 may be attached and if the community service condition (ie the performance of unpaid community work) is attached the maximum number of hours will be those set out in Tables 3 and 4 of s109.[63] The community-based order may also be additional to any term of imprisonment of less than three months[64] and additional to any fine.

However, the way in which all maxima in the *Crimes Act* have been redesignated is not by reference to a level simpliciter. Rather it is by referral to imprisonment of a certain level, or a fine of a certain level, or both. Even if the attached penalty appears to be limited to imprisonment, eg 'Penalty: Level 4 imprisonment', ss109(3) and 109(4) allow the imposition (in addition to, or lieu of imprisonment) of a fine that, in penalty units, does not exceed ten times the maximum number of months imprisonment that can be awarded at

[61] The penalty currently is 12 months or 50 pu When the amendments come into effect, it will be expressed as 'level 10 imprisonment or level 11 fine', ie 12 months or 60 pu

[62] As in the punishment of corporations or for certain types of commercial crime, see *Task Force Report*, p 89.

[63] *Sentencing Act* 1991, s43. It is possible that s109(3)(c), which is also intended to bring about this result, may not apply where the penalty is fixed only by reference to a level without express mention of imprisonment, ie 'Level 5 penalty' v 'Level 5 imprisonment'. On the other hand, it can be argued that imprisonment is automatically attached to the first 11 levels by s109(1).

[64] *Sentencing Act* 1991, s36(2).

that level. A community-based order is also available as an alternative to imprisonment for any imprisonable offence.[65] The maximum time limits for the various types of program condition are to be found in *Sentencing Act* 1991, s36 and s38, but where a community service condition is attached, the time limit is that set out in s109, Table 3.[66] Within their relevant limits, a combination of a fine and community-based order may also be used in addition to or in substitution for imprisonment.[67] However, s36(2) prevents a court from making a community-based order in addition to a prison term, if the latter is for more than three months.

If the offence is declared to be punishable by a fine of a certain level, imprisonment is excluded. Again, a community-based order may used as an additional or substitute penalty, and if the it contains an unpaid community work condition the maximum is to be found in Table 4.

Where, as with s60 of the *Crimes Act*, an offence is punishable by reference to imprisonment at one level and a fine at another one, so that both Tables 3 and 4 appear to apply in defining the maximum number of alternative hours of unpaid community work, s39(3) dictates that the lesser number of hours applies.

Unassigned offences

Section 109 also contemplates that there exist offences punishable by a imprisonment (other than life) to which no penalty level has yet been assigned nor for which any alternative maximum sanction been specified. If imprisonment is mentioned, but no term identified, s9 of the *Sentencing Act* sets the maximum at level 9 (24 months). If the term is known, s109(3) authorises the use of a fine, or a community-based order with a community service condition, or both. The former is not to exceed ten penalty units for each month of imprisonment permitted for the offence in question, and the latter must comply with the limits set out in Table 3.

APPLICATION TO THE CRIMES ACT

Scale Principles

The scale, as set out in s109, will be applied to all offences punishable under the *Crimes Act* 1958 with the object of producing a system of maximum penalties based on proportionate punishment. An effort has been made to assign penalty levels commensurate to the harm and culpability of the conduct proscribed insofar as the latter can be estimated from the legislative description of the crime. The allocation of penalty to offence was undertaken, for most offences, by the Sentencing Task Force.

Its members took into account the degree of harm or injury done or risked

[65] *Sentencing Act* 1991, s36(1).
[66] *Sentencing Act* 1991, s109(3)(b).
[67] *Sentencing Act* 1991, s109(3)(c).

by each offence; the mental states required for the crime; whether the crime was ancillary or preparatory to another more serious one, whether there were statutory aggravating circumstances; and how the revised penalty would square with the pattern of sentencing of the most commonly prosecuted indictable crimes in Victoria in recent times. Offences against the person, particularly sexual ones, have been given priority over property crime; obvious aberrations have been ironed out; and extreme and unused maxima have been brought back to levels ample to accommodate the range of crimes actually being tried in the courts. The actual steps in that process are described in the Task Force Report. Part 5 of the Report[68] contains a summary of the reasoning behind the decision made in respect of each offence.

The Task Force recommendations were later affected by the insertion of two new penalty divisions and amendments to the *Crimes Act* brought about by the *Crimes (Sexual Offences) Act* 1991. The latter increased penalties for a number of sexual offences.

Another variation was in the treatment of attempt in the hierarchy of offences and punishments. Currently, under *Crimes Act* 1958, s321P(1)(a), a person convicted of an attempt to commit an offence is, in general, liable to a maximum level of punishment identical to that for the completed offence. However other Victorian legislation adhered to a policy of fixing the maximum for attempt below that of the full offence. The two approaches were in conflict. The Task Force's view was that the penalty for attempt should remain at that of the principal offence, but the *Sentencing Act* provides for lesser punishment for attempt. This policy is now to be found in the proposed new wording of s321P(1) which sets out a table of two columns showing how the punishment for attempt is, for most purposes, one level below the punishment for the offence attempted. If the penalty for the offence aimed at is not defined by reference to a penalty level, s321P(1)(b) specifies that the person is subject to a penalty 'not exceeding 60% of the maximum penalty fixed or prescribed by law for the relevant offence.' Though the metrics of proportionality in the *Sentencing Act* may appear crude in this form, they will produce more consistency than under existing law.

The Problem with Level Two

Level 2 which was originally set at 180 months imprisonment (15 years) was raised to 240 months (20 years) in the course of the passage of the *Sentencing Bill* through Parliament. The Task Force Committee had set it at the lower level of 15 years to avoid the incongruity of a determinate sentence 'less' than life actually exceeding what a life sentence meant in practice.[69] The Task Force pointed out there should be a sufficient gap between what a life sentence meant in reality and the next level of maxima (particularly when that maxima is not to be reduced by remissions). Since June 1986, when the life sentence in Victoria became the maximum not the mandatory sentence for murder,

[68] Pp 127–76.
[69] *Task Force Report*, pp 39–41.

determinate sentences of up to life could be imposed together with a minimum term of imprisonment to which no remissions applied. For the first 39 cases since June 1986, the maximum sentences handed down ranged from life to 10 years, with 18 years being the most frequent. The average was also close to 18 years. The actual period served by persons under life sentences during the last 60 years has been an average of 14 years. This is between levels 3 and 4 on the penalty scale. The illogicality which the Task Force sought to avoid has been recreated in the politics of getting the Act passed.

Has the Scale Shifted?

There has been much concern over whether the penalty scale and its application to the *Crimes Act* has reduced or increased the overall severity of the sentencing system.[70] The Starke Sentencing Committee proposals, which initially raised the spectre of lenience, showed a pattern of reduction in the *Crimes Act* that looked like those found in Figure 3.[71] The changes to the *Crimes Act* to be implemented by the *Sentencing Act* show the far more balanced pattern revealed in Figure 4. It can be seen that there have been changes both up and down the scale.[72] The 31 offences whose maximum terms of imprisonment have been increased have done so by amounts ranging from 7% to 150%. The 59 that have decreased have done so by between 10% and 83%. No fines in the *Crimes Act* have been decreased, but the increase in fines for the 12 offences in which a fine is expressly mentioned start at 20% and reach an astonishing 1,100%. The latter is for using a firearm to resist arrest under s29(1) which is to rise from 100 pu ($10,000) to 1,200 pu ($120,000).
For the majority of offences, there has been no alteration at all. A close analysis shows a slight overall tilt towards reduction in maximum prison terms, but this is largely accounted for by high maxima, never used in practice, being brought into closer alignment with current sentencing tariffs. Counterbalancing such reduction is the fact that the scale raises the shortest maximum period of imprisonment from three days to six months and dramatically increases the upper limit of fines right across the board. These may be used in addition to imprisonment for all imprisonable offences, and the ultimate default penalty for non-payment continues to be imprisonment.[73]

Even where there have been reductions in maxima on policy grounds, the new level remains high enough to accommodate the heaviest penalties

[70] I Freckelton and A Thacker, 'The New Sentencing Package: Part 1' (1991) 65 *Law Institute Journal* 1032.

[71] It must be remembered that this level of reduction was to have been the primary means of compensating for the abolition of remissions.

[72] See Explanatory Note to Schedule 2 of the *Sentencing Act* 1991 for details.

[73] Sentencing Act 1991, s62. The rate at which fines are discharged by way of imprisonment (one day for each $100, s63(1)) may produce longer terms of default imprisonment than if the fine were directly translated into imprisonment in accordance with the s109 scale, ie ten pu for one month of custody. For instance, the equivalent of a 360 pu maximum fine ($36,000) at level 8 is six months in gaol. If there is a total and wilful refusal to pay, default imprisonment of almost a year (360 days) could be ordered. Above level 7 a two year maximum of default custody applies and makes the default term less severe than s109 would allow. Preference is given to use of other default penalties, such as community-based orders involving unpaid community work or seizure of property, s62(10).

FIGURE 3

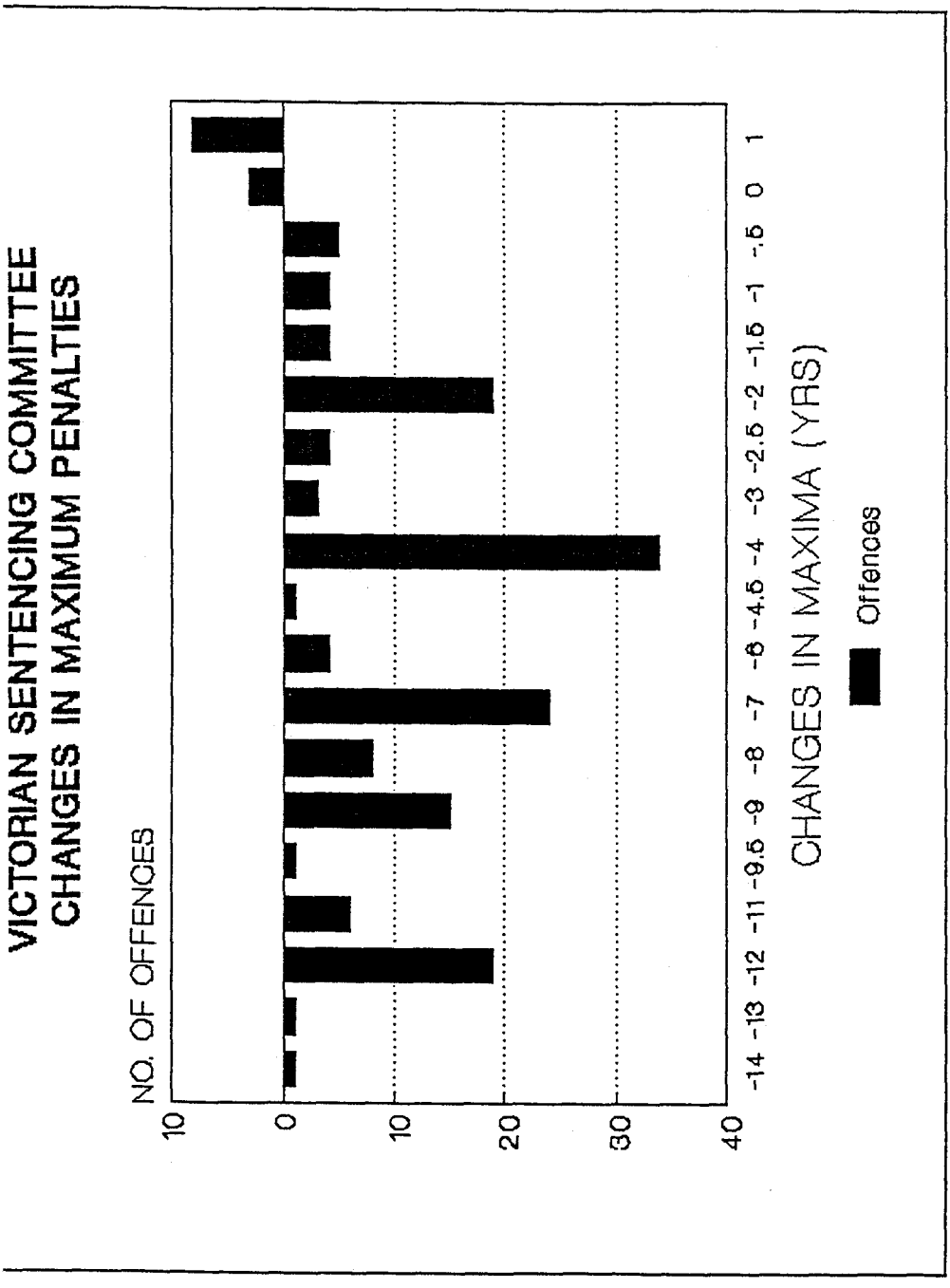
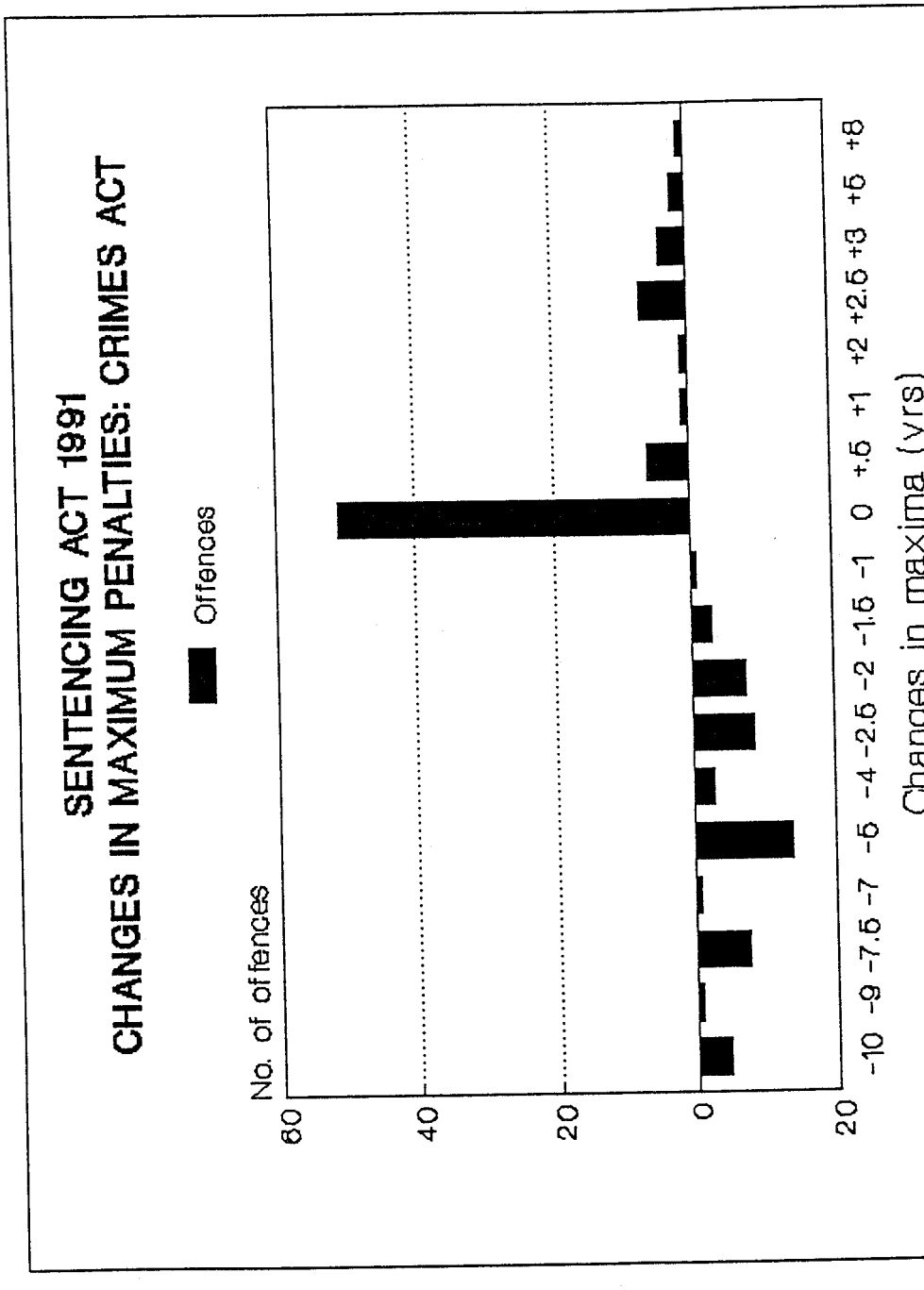

VICTORIAN SENTENCING COMMITTEE
CHANGES IN MAXIMUM PENALTIES
NO. OF OFFENCES
10
0
10
20
30
40
-14 -13 -12 -11 -9.5 -9 -8 -7 -6 -4.6 -4 -3 -2.6 -2 -1.5 -1 -.5 0 1
CHANGES IN MAXIMA (YRS)
Offences

FIGURE 4


SENTENCING ACT 1991
CHANGES IN MAXIMUM PENALTIES: CRIMES ACT
Offences
No. of offences
60
40
20
0
20
-10 -9 -7.5 -7 -6 -4 -2.5 -2 -1.5 -1 0 +.5 +1 +2 +2.5 +3 +5 +8
Changes in maxima (yrs)

imposed by the courts in recent years for a the particular crime affected. The worst cases invariably concern multiple offences and ability of sentencers in such cases to produce adequate punishment by ordering that sentences be served cumulatively is untouched.

MAINTAINING MOMENTUM

The success of the *Sentencing Act* 1991 in reforming sentencing law in Victoria will depend only partly on the neatness of its internal logic and the rationality of its structure. Even when the Act is brought fully into operation, there will be two systems of maximum penalties in force. *Crimes Act* offences will be governed by the ceilings set by s109 of the *Sentencing Act* 1991. Other crimes for which penalty levels have not been set by reference to the *Sentencing Act* are subject to the maxima originally attached to them.[74] These are transitional days: a unitary system is some time away.

Realisation of the full potential of the legislation requires the state government to continue to apply the objectives of the *Sentencing Act* 1991 systematically to the balance of the statute book and to desist from tinkering with the penalty structure until its first years of operation have been assessed. The Sentencing Task Force must continue in existence to complete a review of all state legislation. Over a third of the 600 or so Victorian Acts now in force contain penalty provisions. Over 3,500 references to fines or imprisonment are awaiting attention.

Communal acceptance of the changes wrought by the legislation will turn on how well it is understood by those who are called upon to explain and administer it. That understanding should lead to confidence that it is an advance on the past; that the safety of the community will not be compromised by the changes in maximum penalties being introduced in the Act; that offenders will not have their sentences unfairly extended if sentencers accept the direction to take into account the effect of the abolition of remissions; and that the community will benefit from the Office of Corrections being given a more flexible and diverse range of options through which to attempt the reformation of offenders.

[74] Where this is only imprisonment, it may involve a fine alternative being set by reference to s109.