UNIFORM LAW CONFERENCE OF CANADA
CRIMINAL SECTION

Statutory Exemptions to Mandatory Minimum Penalties: Final Report

Victoria, British Columbia

August 2013

1. In 2011, the Canadian Bar Association introduced a resolution seeking the creation of a working group to examine the issue of statutory exemptions to mandatory minimum penalties. That resolution was passed by the Criminal Section of the Uniform Law Conference of Canada with broad support.

2. The following delegates to the conference are members of the working group[1]:

   Eric V. Gottardi

   Josh Hawkes, Q.C.

   Earl Fruchtman

   Coleen McDuff

   Lane Wiegers

   Nancy Irving

   Samantha Hulme

   Karen Beattie

   Richard de Boer

   Kusham Sharma

   Matthias Villetorte

   Juli Drolet

   Kelly Morton-Bourgon

   Greg DelBigio, Q.C.

3. The group and the Conference also benefited significantly from the comprehensive report prepared by Professor Yvon Dandurand, *Exemptions from Mandatory Minimum Penalties*, accepted by the Criminal Section in 2012. That report surveyed the structure and operation of statutory exemptions to mandatory minimum penalties in 5 other common law jurisdictions; the United States, England and Wales, South Africa, Australia, and New Zealand.

[1] The Working Group would also like to acknowledge and thank Anouk Desaulniers who was a member of the group until her appointment to the Cour du Quebec on April 11, 2013. The remaining members of the working group are solely responsible for the views reflected in this report.

4. Exemption provisions are a common feature of sentencing regimes where mandatory minimum penalties are used. Nine different types of exemption schemes were examined in the Dandurand report ranging from very narrow provisions that applied to an offender charged with specified offences only upon approval into designated treatment programs through to provisions that applied broadly to all offences that would otherwise be subject to a mandatory minimum penalty.

5. The number and scope of offences subject to mandatory minimum sentences of incarceration continues to expand. As of February 2013, 57 offences under the *Criminal Code* attracted mandatory minimum penalties of incarceration.[2] The *Controlled Drugs and Substances Act* specifies a further 9 offences for which mandatory minimum penalties may be imposed. While some of these penalties have been a feature of Canadian criminal law for a significant period of time (incarceration for second and subsequent offences of impaired driving and related offences, life imprisonment for first and second degree murder), many others are of comparatively recent origin. With the exception of the United States, Canada has the most extensive list of offences attracting a mandatory minimum term of incarceration of the jurisdictions examined in the Dandurand report. Canada is also the only one of those jurisdictions without a comprehensive statutory exemption provision.[3]

1) Introduction

6. This report addresses central issues arising from the consideration of an exemption provision from mandatory minimum penalties. The report does not comment on the policy or legal status of any current or proposed mandatory minimum penalties. Rather, it represents the considered answer of the working group to two fundamental questions:

    1) What are the main legal issues that arise in the consideration of an exemption provision?

    2) If the policy choice was made to enact a general exemption provision, which formulation of such a provision would the group recommend?

2) Main Legal Issues

Individualized Sentencing

7. Historically, sentencing in Canada has been a highly individualized process, with great discretion being given to trial judges to impose fit sentences that are responsive to the circumstances of

[2] It should be noted that some of these are only applicable to second or subsequent offences.
[3] s. 10(5) of the *Controlled Drugs and Substances Act* provides for an exemption to the minimum sentences under the *Act* if the offender successfully completes a program administered through a drug treatment court.

the offence and the offender, as well as to local conditions and concerns such as the prevalence of a particular offence in a given jurisdiction. Other sentencing principles, such as parity and proportionality constrain individualized sentencing.[4] Provincial Courts of Appeal and ultimately the Supreme Court of Canada play an important role in ensuring consistency of approach and principle, and in correcting sentences that are demonstrably unfit or clearly unreasonable.[5]

8. Mandatory minimum sentences limit this individualized approach. One of the key challenges faced by the working group was to determine if a general exemption scheme could be created that would allow these sentences to operate in the vast majority of cases, but to create an exception that would operate to provide for flexibility in circumstances where the minimum sentence would be clearly unjust.

9. In order to attempt to illustrate some of the challenges inherent in this task, consideration must be given to the analysis of the related issue of constitutional exemptions by the Supreme Court of Canada.

Constitutional Exemptions

10. One of the key issues examined by the working group was the impact of an exemption provision on the respective roles of Parliament and the Courts as well as on the nature of sentencing itself. The Supreme Court of Canada considered these issues in ***R. v. Ferguson***.[6] Ferguson had been granted a constitutional exemption from the 4 year mandatory minimum sentence applicable to manslaughter with a firearm. The Supreme Court concluded that individual exemptions were not available as a remedy for a violation of the *Canadian Charter of Rights and Freedoms*. That conclusion was based in part on a concern that the court imposed exemption scheme would fundamentally change the legislation in question, and represent an undue interference with the legislative role of Parliament.[7] They held that the remedy of striking down the legislation in its entirety was less intrusive than granting an individualized exemption for a *Charter* breach. Such a remedy would reintroduce judicial discretion where Parliament had expressly excluded it.[8] The Court also noted that an individual exemption as a *Charter* remedy against a cruel and unusual mandatory sentence would be inconsistent with the remedial nature of the *Charter*, and also undermine the accessibility, clarity and predictability of the law. In particular, the court noted that the divergence between the law as written, as opposed to its application would give rise to uncertainty and unpredictability, and would fundamentally alter the nature of constitutional litigation in this area and frustrate the ability of the Courts to

[4] The interrelationship of these factors is discussed in several decisions of the Supreme Court of Canada including ***R. v. Pham*** 2013 SCC 15 at paras 6-10, ***R. v. Knott*** 2012 SCC 42 at paras 1, 47, ***R. v. L.M.*** 2008 SCC 31 at paras 17-23
[5] ***R. v. Nasogaluak*** 2010 SCC 6 at paras 43-46. These principles are also discussed at length in several decisions of provincial Courts of Appeal, including ***R. v. Arcand*** 2010 ABCA 363
[6] ***R. v. Ferguson*** 2008 SCC 6
[7] ***Ferguson****, supra,* at paras 50-51
[8] ***Ferguson****, supra*, at paras 52-57

provide definitive guidance to Parliament regarding the constitutional boundaries of a mandatory minimum penalty. [9]

11. However, the Court noted that the flexibility and individualized nature of an individual exemption were attractive elements of that approach, preserving the law for the majority of cases to which it properly applies, while allowing for individual exemptions to address exceptional cases.[10]

12. A legislative exemption, properly crafted, could address these concerns. First, given that the exemption originated in Parliament and not with the Courts, the concerns about respecting the proper role of Parliament do not arise. Second, if the exemption were crafted, not as a constitutional remedy, but as an ordinary part of the sentencing process, it would have no impact on the remedial nature of *Charter* remedies, and would not impair the ability of the Court to give clear guidance regarding the constitutional boundaries of a mandatory minimum sentence. However, properly crafting an exemption provision that would operate clearly and predictably, and in harmony with the balance of the sentencing provisions of the *Code* is a more complex undertaking.

Key Elements in an Exemption Scheme

13. The Working Group focused on three questions regarding a possible exemption scheme. Each of these issues affects the nature and scope of the proposed exemption as well as the relationship of that exemption with existing sentencing and constitutional mechanisms.

a) Threshold

14. The Working Group examined the nine types of exemption schemes identified by Professor Dandurand. Two of these – the age based exemption reflected in the *Youth Criminal Justice Act*, and the treatment based exemption found in the *Controlled Drugs and Substances Act* were not examined further.[11]

15. One of the key questions considered by the group was the threshold at which the exemption could be triggered. The international experience with exemption schemes reveals a continuum ranging from exemption schemes that would operate "in the interests of justice", or to alleviate what would otherwise be "an unjust sentence" through to those which operate only where

[9] ***Ferguson***, *supra,* at paras 60-65, 68-9, 72-3
[10] ***Ferguson****, supra,* at paras 38-40
[11] These provisions were not examined further in light of the unique constitutional status of a separate justice system for youthful offenders as described by the Supreme Court of Canada in ***R. v. D.(B.)*** 2008 SCC 25, and the recent origin of the treatment exemption in the *Controlled Drugs and Substances Act*. This provision came into force on November 6, 2012. The exemption is contingent on participation in an approved treatment program supervised by a drug treatment court. The availability of these courts and associated treatment programs is far from uniform across the country, and is largely confined to major population centers.

cooperation with the state, usually in the form of providing information to the prosecution or by way of an early guilty plea or both, were present in addition to other factors.

16. Exemptions that are triggered "in the interests of justice", or where "there are good reasons for reducing the minimum penalty" express a threshold very similar to that for existing appellate review of sentence. In the absence of an error of law or principle such appellate review can only intervene where the sentence is "demonstrably unfit". The advantage of such a low threshold is that it would be broadly available. The disadvantages lie both in the difficulty of differentiating it from an ordinary sentence appeal, and from the fact that it would become "the exception that swallows the rule". Further, given the breadth of the exception, it would entirely eclipse the constitutional protection afforded by s. 12 of the *Charter of Rights and Freedoms*. Provisions that impose mandatory minimum sentences that are "grossly disproportionate", or "so excessive as to outrage the standards of decency" would be struck down as violating the *Charter.* Triggering an exemption at a much lower threshold would effectively preclude the constitutional question from ever arising. This would undermine the constitutional role of the courts, and frustrate their ability to provide clear guidance regarding the permissible limits of a mandatory minimum penalty, except on a case by case basis. As the Supreme Court noted in ***Ferguson***, this is an undesirable outcome.

17. Other jurisdictions used language contemplating a higher threshold, such as "substantial and compelling circumstances" or “exceptional circumstances”. This language has been interpreted in those jurisdictions as to require circumstances truly exceptional, and where the specified minimum penalty would not be parted from lightly or for reasons that could not withstand scrutiny. The elevated standard contemplated by the choice of this language highlights the exceptional nature of the exemption. While intended to be higher than the threshold of "demonstrably unfit" required for an ordinary sentence appeal, this threshold is lower than that required for a constitutional remedy under s.12. As a result, this approach would preserve both the more traditional role of sentencing and appellate Courts, while retaining the conceptually separate notion of a constitutional remedy available to strike down the provision in all cases. There was a consensus amongst the members of the working group that this level of triggering threshold was most appropriate.

18. In addition to the nature of the language used to identify the threshold, the group gave careful consideration to the nature of the requirement itself. Thresholds that focused on the circumstance of the offence and the offender fit more comfortably with well-established sentencing principles such as proportionality. That principle, codified as a fundamental principle, is grounded in a consideration of the gravity of the offence and the degree of responsibility of the offender.[12] The Supreme Court has described the significance of this principle as follows:

[12] s. 718.1 of the *Criminal Code*

> *Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.*[13]

19. The addition of other requirements, such as early guilty pleas, or providing substantial assistance to the prosecution gave rise to concern. First, although arguably an indication of remorse, these requirements bring other considerations to bear that have little to do with the offence and the offender, and more to do with conduct that benefits the state or the administration of justice. The addition of requirements that compel benefiting the system also give rise to serious concern regarding wrongful conviction and improperly motivated pleas or plea-bargaining.[14] Creating what would effectively be another category of "in-custody" or "soon to be in custody" informant would significantly broaden the availability and use of this kind of evidence. Such an outcome would be contrary to the recommendations of many inquiries in relation to wrongful conviction, and also contrary to the provisions of many prosecution policies which seek to restrict the use of such evidence. Examination of the use of such criteria in the United States reveals inconsistent application, with potentially troubling impacts on disadvantaged or unpopular defendants. For these reasons the group was not comfortable with the inclusion of such criteria in an exemption model.

20. Consideration was also given to a threshold that would mirror the threshold for a *Charter* remedy pursuant to s.12. Such a scheme could be seen as a simple legislative response to the Supreme Court of Canada in ***R. v. Ferguson***. However, providing for an individualized exemption that would effectively replace a declaration of constitutional invalidity would have far-reaching consequences. For example, the burden of qualifying for an exemption would fall to each individual litigant, whereas at present a declaration of constitutional invalidity would affect all persons sentenced under the impugned provision. In addition, the dialogue between Parliament and the courts would be fundamentally changed. Rather than a final and conclusive ruling, providing clear guidance as to the status of a particular provision, Parliament would be left with the unenviable task of interpreting case and fact specific exemption decisions from appellate and trial courts across the country in order to determine the permissible constitutional scope of a provision.

21. Adopting a lower threshold for an exemption retains a role for the *Charter* in striking down those provisions which offend the "grossly disproportionate" standard as a group or class, while

[13] ***R. v. Ipeelee*** 2012 SCC 13 at para 37

[14] See for example "*Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform"* for an examination of the experience in the United States, 2005 50 Criminal Law Quarterly, 67, *"Thumb on the Scale: How Mandatory Minimum Sentences Distort Plea Bargaining",* The Economist, January 26, 2013

maintaining the ability to deal with exceptional cases on an individualized basis. In fact, where a particular MMP was consistently dealt with by way of an exemption, such circumstances may provide some evidence that the provision itself is flawed. A lower threshold on the exemption could allow it to function as a constitutional barometer of sorts.

b) Relationship to Principles of Sentencing and Sentence Review

22. As noted above, the integration of any exemption provision with existing sentencing principles is an important consideration. Not only does this maintain, to the extent possible, a consistent approach with respect to sentencing principles, it also minimizes the risk of unintended or unforeseen consequences. It also minimizes the prospect for a logical disconnect that may occur if the criteria for the exemption are unrelated to the criteria for sentencing. For example, it is not inconsistent to recognize the validity of a mandatory minimum sentence, while concluding that in the particular circumstances of this offence and offender there are substantial and compelling reasons not to impose that sentence. However, if the sentence is reduced for other reasons, such as cooperation with state, or an early guilty plea, the Court and ultimately the public are left to consider the balance between justice and expedience. Reducing what would otherwise be an appropriate sentence on the basis of mere expedience does little to enhance public confidence in the criminal justice system.

23. The consensus of the Working Group was that any exemption scheme should be consistent with existing sentencing principles, but that mirroring or codifying all of those principles would be both unnecessary and undesirable. The group was also of the view that an exemption scheme should focus on the circumstances of the offence and the offender. Such a focus would fit comfortably with the principle of proportionality codified in section 718.1 of the *Criminal Code*. Using that concept as a guiding principle the group concluded that a <u>non-exhaustive</u> list of factors should be provided to give guidance to trial courts and to ensure that a uniform approach was taken regarding the applicability of exemption provisions. It was also agreed, unanimously, amongst the members of the WG that <u>no one factor would act as an exclusionary or disqualifying factor</u>.

24. These factors could include:[15]

    1) The offender's age and health.

[15] One factor which the Working Group was unanimous in rejecting as a relevant factor was a consideration of an offender's co-operation, and information sharing, with the State. While the consideration of State co-operation has taken on some significance in certain jurisdictions, like the United States of America, it was the strong view of the Working Group that such a factor should not be encouraged and did not sit easily beside the Canadian experience with jailhouse informants and wrongful convictions.

2) Whether the offender's mental capacity at the time of the commission of the offence was impaired due to a mental illness diagnosed or otherwise identified. This would include a consideration of whether the offender suffers from a brain injury or cognitive deficiency, including but not limited to FASD. It would not include impairment caused by a voluntarily induced state of intoxication due to the consumption of alcohol or other drug.

3) Whether the offender has a prior criminal record, and the extent to which the record is related or serious.

4) Whether the offence resulted in death or serious bodily injury to any person.

5) Whether the offender used violence or threats of violence in connection with the offence.

6) Whether a firearm or other dangerous weapon was used in the commission of the offence.

7) Whether the offender played a minor or peripheral role in the offence. This would include consideration of whether the offence was principally the conduct of another person or persons, e.g., whether the offender was an accomplice.

8) Any other factor or constellation of factors that might give rise to "substantial and compelling circumstances" to justify a downward departure from a mandatory minimum penalty.

25. The provision could also specify that in determining whether the case involves **substantial and compelling circumstances**, the sentencing judge should look at the case as a whole. That said, the provision could provide greater flexibility by specifying that there may be a single striking factor related to either the offence or the offender which qualifies to meet the threshold while in other cases it would be a constellation of relevant circumstances.

26. The Working Group also noted that some jurisdictions require the sentencing judge to provide detailed reasons for their reliance on an exemption provision.[16] Such an approach is consistent with recent legislative initiatives in Canada and the Working Group would recommend the adoption of a similar requirement should the Government decide to enact an exemption provision.

27. A further key factor in consistency in the interpretation and application of an exemption provision is the role of appellate review. Recognizing that the decision to grant an exemption should be exceptional, and, that there is a significant public interest in uniformity of approach in relation to these provisions, the group concluded that such matters should be considered questions of law. This would enable provincial Courts of Appeal to provide clear guidance to the trial courts.

[16] See Dandurand Report generally, e.g., South Africa specifically.

28. The notion of "starting point" is a concept that is used in the UK in conjunction with their exemption provisions. Once on exemption is granted the mandatory penalty is converted into a starting point from which variation is then calculated. The attraction of this approach is that it emphasizes the normative character of the specified penalty even where the exemption applies. However, the permissible scope of departure from the starting point would need to be significant in order for the proposed remedy to be consistent with the threshold.

29. The nature and extent of the departure could also be left to appellate review to determine. Presumably, whether the threshold for an exemption was satisfied in a particular case would be considered a question of law, reviewed on a standard of correctness. The ultimate sentence imposed, unless otherwise specified, could then be reviewed on the deferential standard that presently applies to all sentence appeals.

c) Extent / Nature of the Exemption

30. There are a range of alternatives to consider in relation to the extent or nature of the exemption. For example, the provision could simply provide that the stipulated or mandatory minimum penalty no longer applies. That is the case in several jurisdictions. Alternatively, the mandatory minimum could be converted to a starting point – with the sentence varying downward depending on the degree of exceptional circumstance in the case. Finally, it is conceivable that a numerical or percentage variation could be specified.

31. This issue should be closely related to the selection of the threshold. For example, it would be logically inconsistent to select a "substantial and compelling threshold" but then to conclude that only a minor or modest variation in the statutory penalty could be applied. As a result, the strong view of the working group was that the extent and nature of the permitted variation should be up to the trial judge.[17] The higher the threshold, the greater the degree of flexibility that should be permitted in exempting the offender from the mandatory minimum sentence that would otherwise apply.

d) Mandatory Sentences Excluded from the Proposed Exemption

32. The group carefully considered whether any offences should be excluded from the proposed exemption provision. A consensus quickly emerged around one category of offence that has long been the subject of mandatory minimum penalties: Murder. The mandatory minimum

[17] This view was not unanimous, and a view was expressed that an exemption should still result in a custodial sentence – even if that sentence was of a very short or nominal duration. Calibrating the precise balance between deference to Parliament through the mandatory minimum sentence and flexibility in the interpretation and application of the law in individual cases was one of the most difficult tasks facing the group.

sentences of life imprisonment for murder have a well settled provenance, and are related to the abolition of the death penalty. The mandatory minimum itself was seen by some as an exemption from the death penalty.

33. There was some discussion about a second subset of offences; being those relating to impaired driving. They too have long been the subject of mandatory minimum sentences of incarceration. In fact, gaol sentences for these offences are the earliest examples of such sentences in the *Criminal Code*. In light of that long and well settled history, it was felt by some that it was unnecessary to provide for an exemption scheme in relation to these penalties. Other members of the Working Group, however, were opposed to the creation of other statutory "carve-outs" because of the difficulty in articulating a principled basis for crafting the carve-out category. Some members of the Working Group felt that if the rationale for carving out was simply that some offences somehow do not warrant exemption eligibility, then reasonable people can disagree over what the list of offences might be and it would inevitably invite the creation of a carve-out list that is larger than the group might have intended. Accordingly, it was decided that the issue of whether the impaired driving offences should be carved out of any exemption regime was a question better left for policy experts to consider.

e) Reasonable Hypothetical Scenarios

34. The working group made extensive use of hypothetical examples to illustrate circumstances where an exemption scheme should or should not apply. Such examples were extremely useful as analytical tools in illustrating the impact of various formulations of an exemption provision.

Theresa Stonebridge is a 26-year old First Nations woman who lives in a remote Manitoba community that is only accessible by winter road or airplane. She lives with her husband of 8 years, Alan, and their three children aged 6, 4 and 2, respectively. Theresa's husband is an alcoholic and is physically abusive. After a heavy night of drinking, Alan assaults Theresa and for the first time threatens the children. Theresa, fearing the worse, takes the children and tries to drive to her mother's house on the other side of the reserve. Theresa, as a result of drinking all day, was herself intoxicated.

The Royal Canadian Mounted Police (RCMP), see Theresa's erratic driving and pull her vehicle over. They note that she has the usual signs of impairment and her breath smells of liquor. They also note that she has been severely beaten and has swelling to her face. Theresa is charged with impaired driving and after conducting a brief investigation, the RCMP charge her husband with assault and utter threats. Theresa is released on bail later that morning. Her husband is remanded into custody to await his trial on the charges.

Theresa is remorseful and wants to plead guilty as soon as possible. As this is Theresa's second offence for impaired driving (she was involved in a foolish incident when she had

just turned 18), she is facing a mandatory minimum sentence of imprisonment. Since there is no appropriate place for Theresa to serve her sentence in her own community, she will have to be flown out to the nearest facility in Winnipeg. Theresa does not have any close family or friends in Winnipeg. Although the Crown is not opposed to Theresa serving her sentence intermittently (on the weekends), this is not realistic in the circumstances – the sentence would take a number of months to complete and Theresa has no means to travel back and forth to the Reserve.

35. The other hypotheticals that were considered by the Working Group are attached as an annex to this report in the hope that they will aid the discussion of this report by the delegates to the Criminal Section of the conference in August 2013. These hypotheticals are not intended as an express or implied criticism of any existing mandatory sentences, nor should they be used in any constitutional analysis of these provisions.

3) Conclusion

36. This report, together with the research summarized in the Dandurand report, provides an important overview of the experience of other common law jurisdictions with statutory exemption provisions, together with an analysis of some of the fundamental issues to be resolved if such an approach were undertaken in Canada. Such a mechanism, while attenuating the relationship between Parliament and the role of the Courts in relation to mandatory minimum sentences, respects the unique constitutional status and function of both institutions.

37. The ultimate determination of whether such a mechanism should be enacted in Canada is a policy choice to be made by Parliament. It is hoped that this report would make a useful contribution to those policy deliberations, illustrating that statutory exemptions to mandatory minimum sentences can function effectively within the existing constitutional and statutory dimensions of sentencing in Canada.

38. This report is also a tangible illustration of the collegial and collaborative approach that is central to the success of the Uniform Law Conference of Canada. Prosecutors, defence counsel, policy counsel and academics on the working group have reached consensus on a wide range of difficult and sometimes divisive issues. This report is both a tribute to, and a product of, that collegial approach.

Annex A

Substantial and Compelling Hypothetical Fact Scenarios

It was difficult for members of the Working Group ("WG") to articulate where, on a spectrum of difficulty, the triggering threshold for an exemption provision should be situated. It was agreed that it was a threshold more stringent than "fitness" but something less than cruel and unusual or grossly disproportionate. It was agreed that the use of several reasonable hypotheticals might serve to help illustrate the types of situations that might cry out for some relief from an MMP.

Hypothetical #1

> *A 64-year-old man, Nick Nichols, in Toronto subsists on a meagre monthly disability payment. He suffers from a painful degenerative nerve disorder. In order to supplement his income, he intermittently sells his prescription pain medication. On one such occasion, he is caught by an undercover policeman and charged. Unfortunately for Mr. Nichols he lives three blocks from an elementary school, so he is technically caught by the proximity to a school aggravator and is facing a 3-year mandatory minimum jail sentence. He has one prior conviction for possession of a marijuana cigarette. He was 20-years-old at the time of that conviction.*

Would this fact scenario qualify for the threshold in your mind? Would your opinion change if the MMP was 45 days in jail? What about five (5) years? Would it change if Mr. Nichols was First Nations and lived with his family on a remote reserve?

Hypothetical #2

The WG considered the application of an MMP in cases involving individuals who are participating in, or have otherwise participated in, the firearm licensing and registration scheme:

- *An 18-year-old named Jim, to impress his friends, brings his dad's registered handgun to school, and also some ammunition to show friends. Jim's Dad legally possesses the firearm, but the 18 year old son is offending under s.95, because of the readily accessible ammunition and could face a three year minimum if proceeded by indictment. If Jim gave the gun, minus ammunition, to a friend to carry for the day, he could also face the s. 99 minimum of three years.*

- *Thomas, an elderly man who had, in his younger days, had several impaired convictions in a small town, assault convictions arising out of bar scuffles, and convictions for resist arrest. As a result is on the local police data base as aggressive and hostile to the police. Thomas is moving out of his former home. He has several firearms, his licence (and thus registration) is long expired. He does not, however, possess ammunition. Thomas doesn't know what to do with the guns when he moves. A predatory "friend" says that he will "take the guns off his hands", and that he, the friend, will take care of the "legalities" of registering, etc. One of those guns is used in a home invasion. The gun is traced back to Thomas, who gives a statement to the police. Given the large number of firearms the elderly man admits giving to the "friend", and the fact that one of them was used in a home invasion, the police charge him with s.99 trafficking – which carries a minimum 3 year punishment.*

Hypothetical #3

The WG considered the application of an MMP in cases involving suicide, mentally illness and/or cognitive limitations of the accused:

A distraught 25 year old student with no criminal record but a long history of bi-polar disorder, prescription drug dependency and Mental Health Act committals and several prior suicide attempts. After failing an exam (which would mean failing the course) with several exams yet to go (which could mean failing his program), he once again becomes suicidal and takes a loaded handgun from a relative with a plan to kill himself (unbeknownst to his relative). He shoots himself in the chest but survives. He tells his story to emergency physicians at the hospital, who then contacts the police. They seize the handgun from his home. He is charged with possession of a loaded restricted or prohibited firearm under s. 95 and faces a minimum of 3 years if proceeded by indictment.

A young adult man suffering from developmental/cognitive delays; not suffering from a mental disorder so as to be Not Criminally Responsible By Reason of Mental Disorder as per s.672.121, but possessed diminished mental capacity, and emotionally and cognitively younger than his years. In part because of his diminished capacity, he is coerced into participating in a robbery with others where a handgun is used and is charged with s. 344(1)(a) , triggering a 5 year minimum. (If a rifle or shotgun was used then he could face charges under 344()(a.1) and a minimum 4 year sentence).

Hypothetical #4

The WG considered the application of an MMP in cases involving facts which arise often in remote communities and cases involving historically marginalized groups:

Theresa Stonebridge is a 26-year old First Nations woman who lives in a remote community that is only accessible by winter road or airplane. She lives with her husband of 8 years, Alan, and their three children aged 6, 4 and 2, respectively. When Theresa's husband drinks, he can become very violent towards her. He has never hit their children. Lately the episodes of domestic violence have become more and more vicious, the last one leaving Theresa with 15 stitches. One night, her husband is drinking heavily and in a particularly foul mood. Theresa knows that the night will end in her receiving a severe beating. In order to numb the pain of the anticipated episode, Theresa starts to drink. This time her husband not only assaults her but threatens to hit the children as well. Theresa, fearing the worse, takes the children and tries to drive to her mother's house on the other side of the reserve.

The Royal Canadian Mounted Police (RCMP), see Theresa's erratic driving and pull her vehicle over. They note that she has the usual signs of impairment and her breath smells of liquor. They also note that she has been severely beaten and has swelling to her face. Theresa is charged

with impaired driving and after conducting a brief investigation, the RCMP charge her husband with assault and utter threats. Theresa is released on bail later that morning. Her husband is remanded into custody to await his trial on the charges.

Theresa wants to plead guilty as soon as possible because she knows what she did was wrong and that she has no valid defence to the charge. As this is Theresa's second offence for impaired driving (she was involved in a foolish incident when she had just turned 18), she is facing a mandatory minimum sentence of imprisonment. The Crown has told her lawyer that it will be seeking more than the mandatory minimum because Theresa was driving with children in the car. Since there is no appropriate place for Theresa to serve her sentence in her own community, she will have to be flown out to the nearest facility in Winnipeg. Theresa does not have any close family or friends in Winnipeg. Although the Crown is not opposed to Theresa serving her sentence intermittently (on the weekends), this is not realistic in the circumstances – the sentence would take a number of months to complete where either she would have to be flown back and forth to her community or alternatively she would have to live in Winnipeg during the week. Further complicating matters, CFS has told Theresa that they will take her children into care if there is no one appropriate to look after them while she is incarcerated.

As can be seen from the hypothetical scenarios set out above, some of these offenders would be excluded from the regime if the factors enumerated in the Report were treated as exclusionary or disqualifying. It is hard to see why Theresa's prior impaired conviction, for example, might serve to disqualify her from accessing the exemption clause, if all other factors favoured her inclusion. It is because of these kinds of case-specific tensions that the WG agreed that any list of factors should be treated as merely advisory.