1 – Introduction

This fourth edition of the Victorian Sentencing Manual ('VSM') prepared by the Judicial College of Victoria is a substantially revised work.

While the third edition was consistently updated over the years, this was often a reactive process that resulted in the VSM becoming a large and unwieldy manual that did not reflect contemporary practice and needs. The new edition has made the following changes in response.

- Substantial amounts of material have been removed and some sections have been combined or omitted in order to reduce repetition, internally and with material available in other College resources.

- Style and Format:

    - Authorities now appear in footnotes and are hyperlinked.
    - Citations follow the Australian Guide to Legal Citation, with the exception of r 1.4.1 (requiring a previously cited source to be subsequently identified in parenthesis by a cross-reference to the footnote number) and r 2.4.1 (requiring the identification of judicial officers in case names).
    - The text has been substantially revised to enhance clarity.

- All authorities referenced have been comprehensively updated and reviewed for accuracy.

- Case Summaries and Overview Tables have been moved and now comprise the final part of a new *Victorian Sentencing Manual* and *Sentencing Manual - Case Summaries*. Going forward the format of the summaries will be revised to emphasise the points that judicial officers have advised they find to be of most assistance.

- Sentencing statistics are no longer included in the VSM as they are available from the Sentencing Advisory Council.

- Discussion of Commonwealth sentencing has been substantially curtailed, except where it intersects with Victorian sentencing. The Commonwealth Sentencing Database is an excellent resource that does not need duplicating in the VSM.

- The offence-specific chapters, currently being drafted and included as they are completed, focus only on material relevant to that offence. Material that overlaps or repeats content from the manual's discussion of general principles and lists of cases where a general principle was simply applied and the decision did not meaningfully develop or expand on the principle in relation to the particular offence, have been eliminated.

The Judicial College is grateful for the contributions, review, and guidance provided by the VSM Editorial Committee. During the writing of this edition, its members were her Honour Justice Jane Dixon, his Honour Judge Mark Dean, his Honour Judge George Georgiou, Magistrate Jo Metcalf, Emeritus Professor Arie Freiberg AM, Mr Patrick Tehan QC, Mr Chris Michell, Principal Solicitor – Sentencing, at the Office of Public Prosecutions, and Mr Tim Marsh, Victorian Bar.

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Feedback or suggestions for improvement are welcome and may be emailed to info@judicialcollege.vic.edu.au.

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Part A – Method and Process

2 – Method and process

2.1 – The instinctive synthesis

Sentencing is said to be a process of 'instinctive synthesis' which may be compared with the disapproved process of 'two-tier sentencing'.[1]

The instinctive synthesis is where a court identifies all relevant factors, discusses their significance, and at the end of the process makes a value judgment as to the appropriate sentence given its synthesis of the factors.[2] It is a discretionary exercise and weight cannot be allocated to the factors in advance. The correct weight is determined by the circumstances and there is no single correct sentence.[3] The instinctive synthesis is not an 'arcane jurisprudential mantra', but an accurate descriptor of the way a sentence is determined and is why reasonable minds may and do differ on an appropriate sentence.[4]

The process cannot be defined, but the Court has identified areas where caution is warranted.

- It is not appropriate to synthesise the factors by proceeding in stages.[5]
- Overreferencing sentencing statistics and current sentencing practices may distort the instinctive synthesis.[6]
- Sentencing statistics are a very crude indicator of the appropriate sentence in a given case, and to give them great weight would compromise proper exercise of the instinctive synthesis.[7]
- Referring to offending as being in a particular category ('low', 'mid-range' or 'high') risks assessing current sentencing practices for previous offending of that type without considering the circumstances of the specific case before the court. This limits the instinctive synthesis. The better approach is to regard comparable cases as 'yardsticks' indicating where a case sits on the spectrum of offending.[8]

Quantifying a sentence discount is inconsistent with the instinctive synthesis.[9] However, that has been supplanted, in part, by the *Sentencing Act 1991* (Vic) s 6AAA ('the Act'), which requires a court to identify the discount it has given, if any, for a guilty plea.

The instinctive synthesis is not affected by the standard sentencing scheme specified by s 5B(3)(b) of the Act. The standard sentence is just another factor to consider, it is not determinative and does not

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[1] *Trajkovski v The Queen* (2011) 32 VR 587, 598 [70] ('*Trajkovski*'). See also *R v Young* [1990] VR 951 ('*Young*'); *DPP (Cth) v Gregory* (2011) 34 VR 1, 11 [33] ('*Gregory*'); *Markarian v The Queen* (2005) 228 CLR 357, 377–78 [51], 387 [73] (McHugh J) ('*Markarian*').
[2] *DPP (Vic) v Walters* (2015) 49 VR 356, 380 [91] ('*Walters*'). See also *Markarian* 377–78 [51], 387 [73] (McHugh J).
[3] *R v Williscroft* [1975] VR 292, 300; *Markarian* 371 [27]; *Walters* 380 [94]; *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 434 [7] ('*DalglieshHCA*').
[4] *Russell v The Queen* (2011) 212 A Crim R 57, 69 [58] ('*Russell*').
[5] *R v Eastham* [2008] VSCA 67, [11]. See also *Adkins v The King* [2023] VSCA 23 ('*Adkins*').
[6] *Ashdown v The Queen* (2011) 37 VR 341, 398 [167].
[7] *Russell* 70 [61].
[8] *DPP (Vic) v Weybury* (2018) 84 MVR 153, 165 [33]-[34]; *Lee v The Queen* [2018] VSCA 343, [31]-[32].
[9] *R v Johnston* (2008) 186 A Crim R 345, 349 [16]. See also *Adkins*.

interrupt the operation of the instinctive synthesis.[10] In fact, its adoption specifically approves the instinctive synthesis approach.[11] As the High Court has noted, balancing the purposes of the Act 'is a matter of instinctive synthesis'.[12]

2.1.1 – Two-tier sentencing

This method has been rejected in Victoria[13] and by the High Court.[14] But it is still important to identify what two-tier sentencing means because it is not a prohibition on sequential reasoning or even arithmetic deductions in certain cases.[15] What is prohibited is for a court to first identify a 'benchmark sentence',[16] based solely on, for example, the weight of narcotics,[17] the maximum term,[18] a co-offender's sentence,[19] or the scaled 'seriousness' of the offending,[20] and then make proportional deductions from that benchmark. This two-step approach places too much emphasis on the presumably accurately identified and quantified benchmark sentence.[21]

2.2 – The sentencing hearing

2.2.1 – Open court principle

To deny the public knowledge of criminal proceedings is a grave matter, and the fundamental principle is that hearings should be public and open to view.[22] For a court to sit in camera there must be a statutory authorisation or a recognised exception to the rule that court proceedings are conducted openly. A court has no inherent power to, nor should it, exclude the public.[23] Similarly, a judge should not receive information that has the capacity to affect the sentence in chambers.[24]

There is a narrow exception to this rule if the exercise of the court's jurisdiction would be defeated by proceeding in public. For example a court may close its doors to prevent disruption by rioters.[25]

The need to sit in public does not mean a court cannot adopt procedures to protect confidential information, for example by directing that the names of witnesses be concealed or that documents not be

[10] *Brown v The Queen* [2019] VSCA 286, [4], [7], [51], [54].
[11] *R v Brown* [2018] VSC 742, [58].
[12] *DalglieshHCA* 434 [5], 445 [50].
[13] *Young*.
[14] *Wong v The Queen* (2001) 207 CLR 584, 611 [74] ('*Wong*'); *Markarian* 372–73 [30]-[34].
[15] *Markarian* 373 [35]-[37], 375 [39]; *Trajkovski* 601–02 [83], 605 [90].
[16] *Markarian* 378 [53] (McHugh J).
[17] *Wong* 609 [70].
[18] *Markarian* 372 [31].
[19] *Gregory* 11 [32].
[20] *Trajkovski* 597 [62].
[21] *Markarian* 372–73 [30]-[34], 378 [53].
[22] *R v Tait* (1979) 46 FLR 386, 401 ('*Tait*'); *Wong* 611-12 [74]-[76]. See also *Open Courts Act 2013* (Vic) s 28.
[23] *Tait* 401-04.
[24] Ibid 405-07.
[25] Ibid 404.

read in court.[26] But when a court is authorised to sit in camera and does so, or where it receives documents whose content is not published, it must say so in its published reasons.[27]

2.2.2 – Judicial duties

A court has two principal responsibilities with respect to sentencing: it must exercise its discretion judicially[28] and it must ensure the hearing is conducted in accordance with the requirements of procedural fairness.[29]

2.2.2.1 – Exercise of discretion

A sentencing court has very wide discretion, which it must exercise 'judicially'. This means the court must act reasonably and justly, in accordance with legal principle, relevant statutory and common law, in the public interest, and not arbitrarily, capriciously, or by giving effect to the judicial officer's private opinion.[30] The court must not act in a way that frustrates the legislative intent,[31] but must have regard to the scope, subject matter and purpose of legislation and regulations.[32] Neither should a court attempt to remedy a situation it considers to have been inadequately provided for by the legislature, the executive, or social institutions.[33]

Parliament can limit judicial discretion in sentencing, and it has done so in many ways. For example, by setting mandatory penalties for some offences, requiring a custodial term and minimum non-parole period for certain offending or against certain persons, and mandating that preconditions be satisfied before a court can make a youth justice centre order or youth residential centre order.[34]

2.2.2.2 – Procedural fairness

Procedural fairness is a tangible expression of the *audi alteram partem* rule.[35] It is the fundamental requirement that a party who is potentially subject to 'an adverse determination on the basis of any

[26] Ibid 405. See also *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* (2000) 2 VR 346.
[27] *Tait* 407.
[28] *Young* 954.
[29] *Pantorno v The Queen* (1989) 166 CLR 466, 473 ('*Pantorno*').
[30] See, eg, *House v The King* (1936) 55 CLR 499, 503 (Starke J); *Malvaso v The Queen* (1989) 168 CLR 227, 233 ('*Malvaso*'); *Young* 954; *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 131 ALR 377, 386; *Mansfield v DPP (WA)* (2006) 226 CLR 486, 492 [10]; *Quinn v Law Institute of Victoria* (2007) 27 VAR 1, 10 [41].
[31] *Oshlak v Richmond River Council* (1998) 152 ALR 83, 89 [22]; *R v Motherwell* (2004) 150 A Crim R 445, 446–47 [7]; *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] ('*BarbaroHCA*').
[32] See, eg, *Young* 954; *De L v Director General, NSW Department of Community Services* (1996) 139 ALR 417, 431.
[33] *Roadley v The Queen* (1990) 51 A Crim R 336, 344.
[34] See, eg, *Palling v Corfield* (1970) 123 CLR 52, 58–59, 67–68; *Bahar v The Queen* (2011) 45 WAR 100, 111 [46]; *Karim v The Queen* (2013) 83 NSWLR 268, 271 [1], 295 [94], 300 [128]–[129], 301 [135]–[136]; *Sentencing Act 1991* (Vic) ss 9B–9C, 10AA–10AB, 32 ('the Act').
[35] See, eg, Peter Butt (ed), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011).

information, whatever its source, must be made aware' of the information and given an opportunity to respond.[36] A court's duty to afford procedural fairness is vital to the reality and appearance of justice.[37]

Procedural fairness is required in all circumstances, and relief for its breach should only be refused when it's clear the breach could not possibly have affected the sentence.[38] The fact that a sentence falls within an appropriate range is no answer to a denial of procedural fairness.[39]

There are many aspects to procedural fairness, but the ultimate issue is whether there has been a fair hearing. This is an objective test and fault by the decision-maker does not need to be established.[40] The key question is often what is required in the circumstances to provide a fair hearing.[41] An essential requirement is that each party be given a reasonable opportunity to present its case by presenting evidence or through written or oral submissions (or both) to rebut the potentially adverse determination.[42] What is reasonable depends on the circumstances, including:

- the nature of the decision to be made;
- the nature and complexity of the disputed issues;
- the nature and complexity of the submissions the party wishes to make;
- the significance to the party of an adverse decision;
- the competing demands on the time and resources of the court.[43]

2.2.2.2.1 – Notice

Notice is a threshold requirement of procedural fairness and so a considerable onus exists for a sentencing court to advise the parties of varied matters and in varied circumstances.

The parties may agree on a point of law — such as the maximum penalty — and may conduct the case accordingly, although their agreement does not bind the court. If the court determines the law to be different it must advise the parties that the joint position may not be accepted and give them an opportunity to make submissions on any issues arising from the alternate view.[44]

Similarly, the parties may agree to the facts upon which an offender is to be sentenced. Again, the parties cannot (by their statement of agreed facts or plea agreement) prevent the court from obtaining further

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[36] *SD v The Queen* (2013) 39 VR 487, 496 [39] ('*SD*'). See also *R v Carlstrom* [1977] VR 366, 368; *R v Wise* (2000) 2 VR 287, 294 [20] ('*Wise*'); *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492, 503 [27], 511–12 [53]; *Roberts v Harkness* (2018) 85 MVR 314, 317 [9], 331 [46] ('*Harkness*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24-25.
[37] *SD* 496 [39].
[38] *Clark v Ryan* [2005] VSCA 311, [38]; *Davey v The Queen* [2010] VSCA 346, [29]; *Tan v The Queen* (2011) 35 VR 109, 144 [145] ('*Tan*'); *Lennon v The Queen* (2017) 80 MVR 71, 78–79 [23]-[24], 80 [29] ('*Lennon*').
[39] *Tan* 144 [145]; *Lennon* 80 [29].
[40] *Wise* 293–94 [19].
[41] *Harkness* 317 [9], 332 [47].
[42] Ibid 332 [48]. See also *R v Alexandridis* [2008] VSCA 126, [17] ('*Alexandridis*'); *Humphries v The Queen* [2010] VSCA 161, [10]; *Gibbs v The Queen* [2012] VSCA 241 [29]-[30].
[43] *Harkness* 332 [49].
[44] *Malvaso* 233; *Pantorno* 473–74, 482–84; *GAS v The Queen* (2004) 217 CLR 198, 211 [31] ('*GAS*'); *R v McMenomy* [2008] VSCA 62, [14]; *Nguyen v The Queen* (2011) 31 VR 673, 696 [90]; *Nguyen v The Queen* [2019] VSCA 134, [60], [62]; *Wilson v The King* [2023] VSCA 276, [80]-[82].

material – such as a pre-sentence report – necessary for it to carry out its sentencing function.[45] But great care is required if a court departs from the agreed facts,[46] and instances where error has been found in doing so include:

- A court considering facts consistently with a more serious and/or uncharged offence, rather than as essential ingredients of the charged offence to which the offender has pleaded. Although an accepted version of the facts might support a more serious or uncharged offence, the court cannot sentence on the basis that the more serious or different offence was committed.[47] However, uncharged offending or harm arising from it may be mentioned by the judge as part of the narrative context of the circumstances surrounding the offending.[48]
- Imposing a sentence founded wholly or partly on material that has not come before the sentencing judge in open court, or where the court has sought out facts or directed the prosecution to tender certain evidence.[49] If the court has material that has not been provided by the parties, then it should make doubly sure that counsel have access to or are given copies of it, or if not, then that all parties agree the court may continue to consider the material.[50]

A court may not sentence an offender based on a fact it considers important — such as whether an offence is prevalent, or whether a factor is mitigating or aggravating — without first identifying the question and providing the parties with an opportunity to address the point.[51] Similarly, if the court changes its previously expressed views of a factor, it should notify the parties and give them an opportunity to make submissions.[52]

If further facts are considered necessary and/or are requested and provided, then the court must permit a hearing on the new materials even if it requires reopening the plea.[53]

Where the parties agree on a particular approach to sentencing, the court must advise them they should not assume the approach will be followed if the court finds it problematic.[54] The court must also put the parties on notice when there is the risk of imposing a less favourable sentence than that imposed on the offender on a previous occasion for the offence in question (such as when there is a remittal or retrial

[45] *Malvaso* 233; *R v Lowe* [2009] VSCA 268, [16]; *DPP (Vic) v Perry* (2016) 50 VR 686, 711–12 [92]-[93] ('*Perry*').
[46] See, eg, *Ristevski v The Queen* (2011) 31 VR 193, 195 [9]; *SD* 495 [33]; *Ivanov (a pseudonym) v The Queen* [2019] VSCA 219, [130].
[47] *GAS* 210–11 [28]-[31]; *Elias v The Queen* (2013) 248 CLR 483, 493–95 [26]-[27]; *Perry* 712 [95]-[96].
[48] *R v Rankin* [2001] VSCA 158, [8]-[9]; *R v Cropley* (2009) 52 MVR 167, 170 [10]; *Qui v The Queen* [2019] VSCA 147, [54]-[55].
[49] *Tait* 405–07; *Wise* 294 [21]; *Jorgensen v The Queen* [2010] VSCA 171, [14]–[16]; *SD* 496–97 [37], [40]–[41], 500 [53]; *Konidaris v The Queen* [2021] VSCA 309, [87]-[89] ('*Konidaris*').
[50] *Wise* 296 [27].
[51] *Pantorno* 482–83; *R v Mielicki* (1994) 73 A Crim R 72, 79 ('*Mielicki*'); *R v Downie* [1998] 2 VR 517, 520; *R v Propsting* [2009] VSCA 45, [10]; *Beevers v The Queen* [2016] VSCA 271, [34], [39]; *Perry* 710–11 [90], [92]; *Davies v The Queen* [2019] VSCA 66, [713] ('*Davies*'); *Elsayed v The Queen* [2019] VSCA 113, [25]; *Konidaris* [87]-[89].
[52] *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [38]; *Lennon* 78 [22].
[53] *R v Roberts* [2000] VSCA 46, [14]; *R v Bennett* [2006] VSCA 274, [5]-[6], [8], [10].
[54] *Jojic v The Queen* [2017] VSCA 77, [24]-[25].

following a successful appeal),[55] or in circumstances where it reasonably appears from the course of the plea that the offender might not be sentenced to a custodial term.[56]

Lastly, where there is a dispute as to the facts of the offence, a court may not draw an adverse inference from the offender's failure to give evidence on the plea except in rare and exceptional circumstances.[57]

2.2.2.2.2 – Unrepresented offenders

Managing cases with unrepresented litigants is an ongoing difficulty for the courts. It requires them to balance the interests of justice with the competing public interest in the efficient use of public resources and access to justice for other litigants waiting to be heard. It requires patience, judgment, and the ability to determine which cases require an adjournment or prolonged hearing and those that should be disposed of expeditiously.[58]

A sentencing court has special responsibilities when dealing with an unrepresented accused.[59] These include:

- before a plea is entered, making sure the defendant understands the nature of the charge;[60] and knows that a plea is entirely their independent decision on which they may seek legal advice and representation and may obtain an adjournment for that purpose;[61]
- if relevant, making sure the defendant is aware of what bail is, their ability to apply for it, the matters a court considers on an application for bail, and their ability to make submissions in support of bail;[62]
- if the case proceeds, ensuring the defendant is informed of the seriousness of the charge and all possible penalties;[63]
- if a plea is offered and recorded, informing the defendant of their ability to put matters in mitigation, call witnesses or produce other relevant material for the court's consideration;[64] and dispute or comment upon the prosecutor's facts. Where the defendant does dispute the facts, the court must be alive to the possibility that the plea is inconsistent with the dispute, and should advise the defendant to reconsider the plea;[65]
- informing the defendant of any onus they bear, statutory or otherwise, to prove mitigating facts;[66]

[55] *Strangio v The Queen* [2017] VSCA 6, [17]-[18].
[56] *Farah v The Queen* [2019] VSCA 300, [72]-[80].
[57] *Strbak v The Queen* [2020] HCA 10, [13].
[58] *Harkness* 335 [66].
[59] *Cooling v Steel* (1971) 2 SASR 249, 250–51 ('*Cooling*').
[60] Ibid 250.
[61] Ibid 251. See also *McGlynn v SA Police* (1993) 61 SASR 277, 278.
[62] *Cooling* 251.
[63] Ibid.
[64] Ibid. See also *Apostolides v The Queen* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Fullagar and Marks JJ, 21 June 1989) 14.
[65] *Cooling* 251. See also *Coysh v Elliott* [1963] VR 114.
[66] *Williams v The Queen* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Kaye and Southwell JJ, 4 May 1988) 3; *Alexandridis* [17].

- inviting the defendant to address any areas the court feels are relevant that the defendant did not cover.[67]

If an unrepresented accused makes no submissions and imprisonment is a possibility, the court should also ask them about matters of personal character and criminal history to see if there a basis for a more merciful sentence.[68]

In determining what is required to provide a self-represented party a fair hearing, a court will have to assess the capacity of the unrepresented person to formulate and communicate their case. This assessment will typically be based on any written documents they have filed and where there is an oral hearing, the quality of their verbal communication.[69] A critical fair hearing question for the court to consider is whether there is or may be an arguable legal point the unrepresented defendant is unable to articulate. In which case, to provide a fair hearing, the court should seek to elicit and clarify the legal point by speaking with the defendant.[70] Having an unrepresented party file written documents in advance of a hearing is an appropriate procedure well suited to the provision of a fair hearing.[71]

2.2.2.2.3 – Apprehended bias

At sentencing the judge or magistrate should maintain a neutral role and avoid adopting an inquisitorial position. This does not mean they cannot disclose concerns about aspects of the case. In fact there may be circumstances where the failure to do so amounts to a denial of procedural fairness. As Kirby P said in *Chow v DPP,* 'there is a fine line between excessive and unjudicial intervention … and candid disclosure of matters of concern to invite response'.[72]

In informing the parties of its developing views, a court should take care not to give rise to an apprehension of bias. That is, it should not create a perception that it may not bring an impartial and unprejudiced mind to its task.[73] To that end, a judge should avoid gratuitous or intemperate remarks as they may be taken out of context and misinterpreted.[74]

The expression of tentative views during argument on matters that the parties are then permitted to address does not manifest bias.[75] But a greater number of judicial interjections and the degree of their intrusiveness or tone, considered within the context of the entire proceeding, may create a reasonable suspicion of prejudgment.[76]

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[67] *Cooling* 251.
[68] *Bridges v Police* [2017] SASC 35, [18].
[69] *Harkness* 333 [53]-[55].
[70] Ibid 333 [56].
[71] Ibid 334 [58].
[72] *Chow v DPP* (1992) 28 NSWLR 593, [606], cited with approval in *R v Grillo* [2003] VSCA 143, [17].
[73] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293-94; *Clarkson v The Queen* (2011) 32 VR 361, 393–94 [132] ('*Clarkson*').
[74] *Clarkson* 394 [133]. See also *R v Wise* [2004] VSCA 88, [16]; *Gild v The Queen* [2017] VSCA 367, [28] ('*Gild*').
[75] *Gild* [24].
[76] *R v Charter* [2002] VSCA 214, [24].

2.2.3 – Duties of counsel

Both defence and prosecution counsel have a duty to assist the court in doing justice according to law. This is best done by independently representing their clients with skill and diligence to legitimately advance their interests.[77]

More concretely, counsel must not:

- mislead the court;
- cast unjustifiable aspersions on a party or witness;
- withhold documents or authorities that detract from their client's case;
- remain silent in the face of an irregularity;[78] or
- fail to check the maximum penalty for an offence.[79]

2.2.3.1 – Prosecution

The prosecution's duties at sentencing include:

- informing the court of relevant sentencing law, the seriousness and circumstances of the offence, and any matters it knows are helpful to the offender;[80]
- correcting any matters put on plea that it believes to be in error; [81]
- providing an adequate presentation of the facts.[82] An adequate presentation depends on what is fair, reasonable, and practical in the circumstances of the case, but is not limited to the facts of the offence. For example, the offender's criminal history should be canvassed, and any relevant post-offence conduct noted.[83] During the sentencing hearing, the prosecution may give an oral summary of the facts, based on the written material available. However, unlike defence counsel, it cannot make unproved assertions (that have not been sworn to) before the court.[84] A plurality of the High Court has also said that in fulfilling this duty if material detailing an offender's cooperation with authorities is offered for the court to consider any relevant discount but contains items that should not be disclosed to the accused or their counsel, then it may be incumbent on the prosecution to seek appropriate limiting orders from the sentencing court.[85] Other members of the High Court, however, seem less certain that this infringement on the open courts principle and the offender's right to notice is permissible without legislative action;[86]
- identifying comparable and other relevant cases.[87] Merely submitting a schedule of such cases is not sufficient to meet this duty, and counsel should be able to make an informed submission on

[77] *Giannarelli v Wraith* (1988) 165 CLR 543, 578-79.
[78] Ibid 556.
[79] *R v Morton* [1986] VR 863, 865; *Matthews v The Queen* (2014) 44 VR 280, 292 [27] ('*Matthews*').
[80] *Tait* 389; *R v Rumpf* [1988] VR 466, 472 ('*Rumpf*'); *Matthews* 292 [27].
[81] *Rumpf* 471; *Matthews* 292 [27].
[82] *Tait* 389; *Rumpf* 471-72; *DPP (Vic) v Scott* (2003) 6 VR 217; *Matthews* 292 [27].
[83] *Rumpf* 472.
[84] *R v Richards* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Starke, Crockett and Southwell JJ, 6 August 1981) 5-6.
[85] *HT v The Queen* [2019] HCA 40, [43]-[46] (Kiefel CJ, Bell and Keane JJ).
[86] Ibid [61] (Nettle and Edelman JJ).
[87] *DPP (Cth) v Masange* (2017) 325 FLR 363, 367 [3] ('*Masange*').

which decisions are likely to best assist the court.[88] The court, however, must independently review that material to determine what guidance it offers;[89]
- providing a fair test of the defence case as required;[90] and
- assisting the court to avoid appealable error.[91]

Prosecution failure to meet these duties deprives the court of the assistance it is entitled to and may provide a basis for an appellate court to exercise the residual discretion not to intervene if the prosecution seeks to appeal from an error by the sentencing court.[92]

The prosecutor's duty to assist the court allows the prosecution to make submissions on the *type* of sentencing dispositions — imprisonment or otherwise — that it considers appropriate.[93] The duty does not extend to making submissions on the range of permissible *durations* within a particular disposition. Such submissions have been firmly rejected by the High Court as being an impermissible statement of opinion that should not be made.[94] However, the Court of Appeal has ruled that this proscription does not apply to *defence* statements on range.[95] If the defence does make such a submission, the prosecution may respond by making submissions on whether it considers such a sentence would be open, and if not, it may draw the court's attention to 'comparable and other cases, current sentencing practices and other relevant considerations which … support that conclusion'.[96]

If the prosecution wrongly makes a submission on sentencing range, the sentencing discretion will only be vitiated if the court was influenced by that submission in arriving at the sentence.[97]

2.2.3.2 – Defence

During sentencing, defence counsel has a duty to:

- obtain the least punitive sentence properly available for their client;[98]
- identify the relevant sentencing factors, including those weighing in the defendant's favour;[99]
- advance argument;[100]
- tender any relevant evidence;[101]
- identify and canvas all reasonably open sentencing alternatives;[102]

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[88] *Perry* 714 [106]; *DPP (Cth) v Phan* [2016] VSCA 170, [83]; *Masange* 367 [3], 379–80 [48]-[49].
[89] *Masange* 377 [37], 380–81 [51].
[90] *Tait* 389; *Rumpf* 472; *Matthews* 292 [27].
[91] *Tait* 389; *Matthews* 292 [27]; *Masange* 380 [49].
[92] *Tait* 389-90.
[93] *Matthews* 292 [27].
[94] *BarbaroHCA* 66 [7], 69–70 [23], 74-76 [39], [42]-[43], [49].
[95] *Matthews* 291–92 [22].
[96] Ibid 292 [25].
[97] Ibid 285 [7], 288–89 [17].
[98] *R v Anzac* [1987] 50 NTR 6, 15 ('*Anzac*'). See also *R v Storey* [1998] 1 VR 359, 368–69 ('*Storey*').
[99] *Storey* 368-69.
[100] Ibid.
[101] Ibid. See also *R v Dietrich* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, O'Bryan and Gray JJ, 7 March 1985) 7.
[102] *Anzac* 15.

- confirm or, if necessary, challenge the factual basis on which sentence is to be imposed;[103]
- present accurate information regarding rehabilitation;[104]
- consider whether to make submissions on the sentencing range;[105]
- adduce evidence to establish the factual basis on which the court might exercise its jurisdiction, where there are prerequisites for a particular sanction.[106]

The defence must not mislead the court, either affirmatively or by omission. However, this does not require detrimental facts (such as bad character or prior convictions) to be put forward[107] unless counsel's other submissions would be misleading without disclosing such material. For example, if an affirmative assertion is made that the offender is of good character because they have no prior convictions, counsel would need to disclose any knowledge of the defendant's imprisonment on post-conviction charges in another case.[108]

Where defence counsel wishes to argue for the imposition of a Community Correction Order ('CCO'), it will not be sufficient to merely recite the offender's personal circumstances. Counsel needs to make submissions which address the formulation of an order that directly addresses those circumstances. This requires counsel to pay attention to the formulation of conditions that will address the offender's needs, as well as the causes of their offending, and which will promote the required changes in the offender's life that are needed to reduce the risk of reoffending.[109]

2.3 – Findings

The court alone decides the sentence to be imposed[110] and to do so it must find, subject to certain limits, the relevant facts. Some of these will emerge in the evidence at trial, others only during the sentencing proceedings.[111] The primary limitation on a sentencing court's ability to determine the relevant facts is the jury's verdict. While the court may form its own view as to the facts,[112] its findings must be consistent with the jury's verdict or the offender's plea of guilty.[113]

[103] *R v Halden* (1983) 9 A Crim R 30, 35, 40–41 ('*Halden*').
[104] *R v Kane* [1974] VR 759, 763–64 ('*Kane*').
[105] *Matthews* 291 [24].
[106] *R v Bloom* [1976] VR 642, 643–44; *R v Hilary* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, McInerney and Jenkinson JJ, 5 August 1977) 4.
[107] *Rumpf* 472.
[108] Ibid.
[109] *Boulton v The Queen* (2014) 46 VR 308, 333 [101] ('*Boulton*'). See 11 – Community correction order.
[110] *GAS* 211 [31]; *BarbaroHCA* 76 [47]. See also *Cheung v The Queen* (2001) 209 CLR 1, 13 [16] ('*Cheung*').
[111] *Cheung* 12-13 [14], [16], 52 [162].
[112] *R v Harris* [1961] VR 236, 237; *Kane* 762; *R v Hill* [1979] VR 311, 312 ('*Hill79*''); *R v Chamberlain* [1983] 2 VR 511, 513 ('*Chamberlain*'); *Savvas v The Queen* (1995) 183 CLR 1, 8.
[113] *Cheung* 12-15 [14], [17], 19 [36], 28 [76], 34 [99], 53 [163]; *Chamberlain* 513.

2.3.1 – Guilty plea

A guilty plea[114] does two things: it is a formal and conclusive admission of the offence by the offender and it dispenses with the need for the prosecution to prove the facts that establish guilt.[115] The plea is an admission to the essential facts of the crime,[116] but no more,[117] it is not automatically an admission to the facts as stated in the depositions,[118] or the prosecution opening; '[a]ny dispute as to facts beyond the essential ingredients admitted by the plea must be resolved by the application of ordinary principles that apply in criminal cases'.[119] Absent a legislative direction to the contrary, it is the duty of the prosecution to establish any facts beyond those admitted by the plea to the criminal standard.[120] If they do not, the court may not take those facts into account in a manner adverse to the accused.[121]

2.3.1.1 – Acceptance of guilty plea

A court should not accept a guilty plea if it appears that the plea is not freely and voluntarily made.[122] A guilty plea must be unequivocal and cannot be made in circumstances where it does not appear to be a true admission of guilt. 'Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage'.[123] But this does not mean a plea cannot be motivated in part by the wish to obtain a collateral benefit such as a sentencing discount or to avoid the expense of trial.[124] If the court considers the plea is not genuine it must either obtain an unequivocal plea or direct that a not guilty plea be entered.[125]

For this reason, a court should make certain that an unrepresented defendant really understands the effect of a guilty plea, particularly where there appears to be a viable defence.[126] And if an unrepresented accused is charged with a serious offence, the court should adjourn the plea to allow them to seek legal advice or consider the wisdom of doing so. If an unrepresented accused insists on proceeding after being given an opportunity to seek and obtain legal advice, the court may take the plea but if any circumstances subsequently give it cause for concern the plea may be set aside.[127]

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[114] A person cannot plead guilty where they are unfit because of a mental impairment. This is not a sentencing issue. See http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27461.htm. Similarly, the impact of an accused's decision to withdraw their plea may be reviewed at http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27655.htm.
[115] *R v Broadbent* [1964] VR 733, 735 ('*Broadbent*').
[116] Ibid. See also *R v Tonks* [1963] VR 121, 127; *Maxwell v The Queen* (1996) 184 CLR 501, 510 ('*Maxwell*'); *Weston (a pseudonym) v The Queen* (2015) 48 VR 413, 443-45 [109(2)] (Redlich JA); *Jamieson v The Queen* [2017] VSCA 140, [44(2)] ('*Jamieson*').
[117] *Storey* 366.
[118] *Broadbent* 735. See also *Hill79* 312; *Birch v Western Australia* (2017) 51 WAR 454, 468 [69].
[119] *Giri v The Queen* [2022] VSCA 64, [21] ('*Giri*'), quoting *Chow v DPP (NSW)* (1992) 28 NSWLR 593, 605.
[120] *Giri* [23]-[24] (quotations omitted).
[121] Ibid [25].
[122] *Jamieson* [44(3)].
[123] *Maxwell* 511.
[124] See *Meissner v The Queen* (1995) 184 CLR 132.
[125] Ibid. See also *Great Lakes Council v Mood* (2007) 157 LGERA 35, 46-47 [25(a)].
[126] *De Kruiff v Smith* [1971] VR 761, 766.
[127] *R v Clayton* (1984) 35 SASR 232.

Similarly, if the court considers that the evidence does not support the charge or that for any reason the charge is not supportable, it should advise the accused to withdraw their plea and plead not guilty. But the court cannot compel an accused to withdraw their plea. If the accused refuses to do so, the court must consider the plea to be final, subject to its discretion to grant leave to change the plea any time before the matter is finalised.[128]

When the prosecution accepts a plea, the court cannot reject it, unless it is not genuine or constitutes an abuse of process.[129]

2.3.1.2 – Proceedings after plea of guilty

If an accused pleads guilty to only some of the charges on an indictment, and the prosecution accepts that offer then the plea is usually taken in the absence of the jury. A person arraigned on an indictment may plead not guilty to the offence charged, but guilty to a lesser offence.[130]

If an accused is presented on alternative offences and offers to plead guilty to the lesser offence, but the prosecution does not accept that plea, then the trial should proceed on both counts. The plea should be taken before the jury, and it may be used in evidence against the accused, but the court should not record a conviction on the lesser offence until the jury has returned a verdict on the more serious offence.[131]

If an offender pleads guilty to an alternative offence, and the prosecution accepts that plea, the court is not bound by the same facts that persuaded the Crown to accept the plea.[132] But neither can it consider aggravating circumstances that might warrant conviction for a more serious offence.[133]

2.3.2 – Evidence

The *Evidence Act 2008* (Vic) (‘*Evidence Act*’) does not automatically apply to sentencing proceedings. It only applies if the court directs that it should apply, on application of a party in relation to proof of a fact, the court determines that the proceeding does involve proof of the fact and the fact will be significant in determining the sentence. The court must also order that the *Evidence Act* applies if it considers appropriate to make such a direction in the interests of justice.[134]

A court’s refusal to direct that the *Evidence Act* applies does not mean the rules of evidence never apply to a sentencing proceeding. The *Evidence Act* preserves the operation of both statutory evidence law and common-law principles.[135] Even without a judicial direction under the *Evidence Act*, the law of evidence applies to fact finding in sentencing proceedings when the facts are contested.[136]

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[128] *Maxwell* 510-11. See also *DPP (Vic) v King* (2008) 50 MVR 517, 522 [23].
[129] *Maxwell* 514-15.
[130] *Criminal Procedure Act 2009* (Vic) s 219 (‘*CPA*’).
[131] *Broadbent* 735-736. See also *DPP (Vic) v Collins* (2004) 10 VR 1, 11-13 [25]-[27].
[132] *R v Zerey* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Starke, Anderson and Fullagar, JJ, 6 February 1980) 3, 8.
[133] *R v De Simoni* (1981) 147 CLR 383, 389 (‘*De Simoni*’); *Simpson v The Queen* (1993) 68 A Crim R 439, 444, 447.
[134] *Evidence Act 2008* (Vic) s 4 (‘*Evidence Act*’).
[135] Ibid ss 8-9. See also *R v Bourchas* (2002) 133 A Crim R 413, 428 [61] (‘*Bourchas*’).
[136] *Bourchas* 427 [55], 428 [61].

In *Formosa v The Queen*, the Court of Appeal summarised the principles that apply to fact-finding on sentencing, it said:

> The legal principles which apply on a contested plea hearing are the following:
>
> 1. Conventionally, the Crown opening constitutes an agreed factual basis upon which the judge passes sentence.
>
> 2. It is standard practice to use the depositions and related exhibits as the basic materials.
>
> 3. Should either party seek to have the sentencing judge take any additional matter into account in passing sentence, it is for that party to bring the matter to the attention of the judge and, if necessary, call evidence about it.
>
> 4. A contested factual assertion upon a plea must be proved by admissible evidence. There is, however, no requirement that the evidence should all have been given on oath, or that there should have been a prior opportunity for cross-examination.
>
> 5. A sentencing judge may not take facts into account in a way that is averse to the interests of the accused unless those facts have been established beyond a reasonable doubt. On the other hand, if there are circumstances that the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.[137]

Uncontested facts may be proved by admissions, agreed statements or submissions from the bar table.[138] But the court is not obligated to accept such assertions and should not do so if there is a risk the instructions on which they are based are unreliable.[139]

2.3.2.1 – Burden and standard of proof

Because the guilty plea or jury verdict have proved the facts necessary to establish the elements of the offence, there is no general burden of proof in sentencing proceedings unless a party asserts there are other facts the court must consider.[140] In which case, the party calling for reliance on the further fact(s), generally, bears the burden of proof.[141] The consideration of any further facts, aggravating or mitigating, are subject to the requirements of procedural fairness. The party opposing the consideration of further facts must be given notice of the intent to do so and an opportunity to be heard.[142]

As to the standard of proof, a court may not consider facts adverse to the offender unless they have been established beyond a reasonable doubt;[143] however, facts in favour of the offender may be proved on the

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[137] *Formosa v The Queen* (2012) 36 VR 679, 681-82 [8] ('*Formosa*').
[138] *Storey* 371; *Bourchas* 428 [61]; *GAS* 211 [31]; *Vozlic v The Queen* (2013) 39 VR 327, 332-33 [22] ('*Vozlic*'). See also *Tait* 396.
[139] *Tsang v The Queen* (2011) 35 VR 240, 271-72 [144]-[146]; *Kieawkaew v The Queen* [2016] VSCA 269, [79].
[140] *Storey* 367. See also *R v Olbrich* (1999) 199 CLR 270, 281 [28] ('*Olbrich*').
[141] *Olbrich* 281 [25]. But a court may not approach a fact with a predetermined view that it will not be accepted absent formal proof. See *Vozlic* 333 [23].
[142] See 2.2.2.2 – Method and process – The sentencing hearing – Judicial duties – Procedural fairness. See also *R v Harding* (2008) 50 MVR 413, 422 [38]; *Nguyen v The Queen* (2011) 31 VR 673, 696 [90].
[143] *Ashton v The Queen* [2010] VSCA 329, [20]-[22]; *Bourne v The Queen* [2011] VSCA 159, [38]; *Le v The Queen* [2019] VSCA 80, [81].

balance of probabilities.[144] The practical effect of the offender being given the benefit of any reasonable doubt as to adverse facts may be that the court is obliged to sentence on a view of the facts most favourable to them despite there being no explicit requirement that a court sentence in that fashion.[145]

There is no set rule for determining whether a fact is averse to or favours the offender. It depends on the use that the court makes of it.[146] If an offender does not raise any mitigating circumstances, the court must proceed as if there are none upon which evidence might have been given.[147] But a failure to prove the existence of mitigating circumstances does not prove the existence of aggravating circumstances,[148] or vice-verse.[149] Both aggravating and mitigating circumstances must be proved by evidence. A mitigating circumstance cannot be inferred simply from an absence of evidence.[150]

2.3.2.2 – Records, depositions, reports, and statements

In addition to receiving *viva voce* evidence, a court may consider a range of materials in formulating a view of the sentencing facts.

2.3.2.2.1 – Criminal record and subsequent offending

Previous convictions are relevant to several of the sentencing purposes, and under some statutory provisions may affect the character or quantum of the punishment open to the court.[151] An offender's criminal record is a document that sets out all their previous convictions,[152] and complies with the requirements of the *Criminal Procedure Act 2009* (Vic) s 77 or s 244 ('*CPA*'). The criminal record may be provided to the court by the prosecution if the offender is found guilty of a summary offence.[153] In the higher courts, the record can be provided at any time after the indictment is filed and before the sentencing hearing, or if the record is not available before that time, then after the sentencing hearing commences and before sentencing if the court determines it is in the interests of justice to do so.[154] The court must ask if the offender admits the convictions in the criminal record and if the offender (or their legal representative in a summary proceeding) does so the court may sentence them accordingly.[155] If not, then the prosecution may lead evidence to prove the convictions,[156] typically by obtaining a certificate under s 178 of the *Evidence Act*.

[144] *Olbrich* 281 [27]. See also *Phillips v The Queen* (2012) 37 VR 594, 622 [105] (Harper JA); *Davies* [681]-[682].
[145] *Cheung* 11-13 [11], [14], 53-55 [165], [170].
[146] *Storey* 371.
[147] *Dao v The Queen* (2014) 240 A Crim R 574, 582 [17] ('*Dao*').
[148] *Weininger v The Queen* (2003) 212 CLR 629, 638 [25]-[26]; *Hewson v The Queen* [2011] VSCA 57, [30]-[31].
[149] *R v Hoppner* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, McInerney and McGarvie JJ, 7 October 1980) 6-7; *Sagdic v Gowing* (1995) 82 A Crim R 26, 33-34.
[150] *Dao* 587 [40].
[151] See, eg, *Road Safety Act 1986* (Vic) s 48(2).
[152] *CPA* s 3.
[153] Ibid s 78(1).
[154] Ibid s 245(1)-(2).
[155] Ibid ss 78(2)-(3), 78(5), 245(3)-(5).
[156] Ibid ss 78(4), 245(6).

In a summary proceeding, if the accused is found guilty in their absence and the court is satisfied that a copy of their criminal record was served on them at least 14 days before the hearing it may be admitted for sentencing.[157]

Evidence of orders made by the Children's Court relating to a person's offending can only be given if the orders were made in the past 10 years.[158]

Subsequent offending cannot be proved by the *CPA* process just specified, but it can be admitted by the offender or proved via an *Evidence Act* s 178 certificate.

The court should be advised of any pending charges so it may consider deferring sentence until those charges are dealt with[159] or, if applicable, whether to exercise its power under s 100 of the Act to ask if the offender wishes the court to take any admitted subsequent offences into account.[160]

If an accused is prosecuted for subsequent offending while an appeal to the County Court against an earlier finding of guilt is pending, the first conviction may constitute a 'previous conviction' because the notice of appeal does not stay the conviction and if the appeal is struck out because the appellant fails to appear or abandons the appeal, the original sentence is reinstated.[161]

2.3.2.2.2 – Depositions

Depositions consist of the transcript of the committal hearing and any statements accepted in evidence at that proceeding.[162] As noted earlier, they are basic materials used in the sentencing process.[163] If any item in the depositions is disputed, the defence may notify the prosecution and the parties may then call evidence.[164] Where the committal proceeds by way of straight hand-up brief, the court uses the materials it contains in place of the traditional depositions.[165]

There is no requirement that the evidence in the depositions had to have been given on oath or that there should previously have been cross-examination.[166] In Victoria, the practice is for the court to review depositions to broadly determine the nature of the offence without scrutinising them closely to exclude materials that might be inadmissible.[167] However, if the depositions conflict with an agreed statement of facts, the court should raise the matter with the parties.[168]

The court may review depositions relating to prior convictions admitted by the offender or a co-offender's depositions or records of interview if parity is in issue. These items can be used as evidence,

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[157] Ibid s 86.
[158] Ibid s 3; *Children, Youth and Families Act 2005* (Vic) s 584(3).
[159] *Bellizia v The Queen* [2016] VSCA 21, [73] ('*Bellizia*').
[160] See further discussion on the operation of this section below.
[161] *CPA* ss 264(1), 266-67.
[162] Ibid s 3.
[163] *Formosa* 681-82 [8]. See also *Halden* 33.
[164] *Halden* 33-34, 40; *R v Swift* (2007) 15 VR 497, 499 [8] ('*Swift*').
[165] *Halden* 35.
[166] Ibid 34. However, a statement made by a person who dies before the committal is not an admissible part of the deposition. See *R v Casotti* (1994) 74 A Crim R 294, 297.
[167] *Halden* 34-35.
[168] *Mielicki* 79.

are subject to objection (and hearing) by the defence and should not be considered if they relate to an offence more serious than the one before the court.[169]

2.3.2.2.3 – Reports

Pre-sentence reports

If the court finds a person guilty, before passing sentence it *may* order a pre-sentence report and adjourn the proceeding in order for it to be prepared.[170] But if the court is considering making a CCO, a youth justice centre order, or a youth residential centre order, it *must* order a pre-sentence report to determine the person's suitability for the order, establish that the necessary facilities are available, and obtain advice on any appropriate conditions.[171] The court does not need to order a pre-sentence report if it is considering making a CCO with the sole condition of less than 300 hours of unpaid community work.[172]

In addition to numerous specified topics,[173] the pre-sentence report may contain any other information the author[174] believes to be relevant or appropriate or which the court has directed to be set out.[175] The report must be filed with the court by the time specified and the author must provide copies to the prosecution, the offender's legal representatives, the offender (if the court so orders), and any other person the court directs within a 'reasonable time before sentencing'.[176] The court has no obligations regarding the distribution of the report, but if it learns the distribution requirements have not been complied with it should give the parties time to consider the report and provide them with an opportunity to make submissions about the report.[177]

Either party may a file a notice of intent to dispute any part or all of the report, and if they do the court must not sentence based on the report or part until after the disputing party has been given the opportunity to lead evidence on the disputed matter and cross-examine the author.[178] It would be a breach of procedural fairness for the court to sentence before hearing from the party about the disputed evidence, cross-examination or submissions.[179]

Once any disputes about the pre-sentence report are settled, the court may take the report into account in determining the sentence to be imposed.[180] Its discretion to sentence is not controlled by the report, and

[169] *Halden* 35; *R v Cambareri* [2001] VSCA 39, [21]; *R v Rule* [2008] VSCA 154, [24]-[25].
[170] The Act s 8A(1).
[171] Ibid s 8A(2).
[172] Ibid s 8A(3).
[173] Ibid ss 8B(1)(a)-(q).
[174] In s 8A(4) the Act specifies a 'Secretary' as the author of this report. However, the Court has since ruled the report does not actually have to be authored by the relevant department Secretary or even their delegate, so long as it is obtained per processes maintained by that Secretary. See *R v Ngo* [1999] 3 VR 265, 280-81 [46]-[47] ('*Ngo*').
[175] The Act ss 8B(1)(r), 8B(2).
[176] Ibid s 8C.
[177] *DPP (Vic) v Wilson* (2000) 1 VR 481, 485 [13], 490 [25], 492 [29].
[178] The Act s 8D. Cross-examination is limited, however, to the content of the pre-sentence report, although the court may question the author. See *O'Keefe v Tankard* [1989] VR 371, 381 ('*O'Keefe*').
[179] *R v Carlstrom* [1977] VR 366, 367; *O'Keefe* 373-80; *R v Bennett* [2006] VSCA 274, [5]-[6].
[180] *R v Webb* [1971] VR 147, 151.

the fact that the report recommends a certain disposition does not compel the court to impose that sentencing option.[181]

Drug and alcohol assessment reports

If the court is considering making a CCO and is satisfied that the offender had a drug or alcohol dependency that contributed to their offending, it may order a drug and alcohol assessment report.[182] The purpose, distribution requirements and dispute process for this report are effectively identical to those of and for a pre-sentence report.[183]

On receiving a drug and alcohol assessment report, if the court is satisfied the offender has a drug or alcohol dependency and they are sentenced to a term of imprisonment of no more than three months followed by a CCO commencing upon release, the court must then order a drug and alcohol pre-release report.[184] This report must be prepared by an approved agency.[185] It is to specify the treatment the offender must undergo during the period of their CCO on release, and a copy must be provided to the offender a reasonable time before release.[186] There is, however, no dispute process for this report specified by the Act.

Third party reports

If the court receives a report on an offender prepared by a third-party that neither it nor any party to the proceeding has requested, it should not consider the material. Reports should only be obtained by the parties or the court.[187]

Medical reports

It is common practice for defence counsel to tender medical or psychological reports during the hearing without calling the author as a witness. The prosecutor should be shown the report in advance and may indicate it is tendered 'without objection'. This does not mean the Crown concurs with the substance of the report. These medical or psychological reports should focus on relevant facts and properly expressed opinion and should not offer opinions on the sentencing principles or purposes.[188]

2.3.2.2.4 – Statements

Work and character references

With the prosecution's consent, defence counsel may tender written work and character references instead of calling witnesses. The weight attached to this material is entirely for the court to determine,

[181] *R v Webber* (1996) 86 A Crim R 361, 365; *Ngo* 281-82 [48]; *Boulton* 329 [82]-[83].
[182] The Act s 8E(1).
[183] Ibid ss 8E-8G.
[184] Ibid s 8H(1).
[185] Ibid ss 8H(2), 8I.
[186] Ibid ss 8H(3),(5).
[187] *R v Ciaston* (1987) 27 A Crim R 285, 287-88.
[188] *R v Palmieri* [1998] 1 VR 486, 490.

but there is a tendency to disfavour statements written by those with no knowledge of the charged offence.[189]

Victim impact statements

If the court finds a person guilty, the victim of the offence may make a statement to the court to assist it in determining the sentence.[190] The statement is not to be used to punish the offender,[191] to produce an unjust or unfair sentence,[192] or to provide background and context.[193] The purpose of the statement is to give the victim the chance to inform the court of the crime's impact on them and their family and ensure that the court is informed of the victim's concerns.[194]

The victim's statement may be in writing by statutory declaration or by statutory declaration and orally by sworn evidence.[195] The statement may be made by another person on behalf of a victim who is under 18 years of age, is incapable of making the statement, or is not an individual.[196]

The Act defines a 'victim' as someone that 'has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender'.[197] A court should not interpret this term narrowly and must regard the impact of the crime more broadly than just its impact upon the immediate victim.[198] A victim does not have to be the target of the crime or someone related to them. They need only have suffered as a 'direct result' of the offending, and a person might be a victim by their mere presence in the circumstances of the crime.[199]

The Act's definition of 'victim' makes it irrelevant whether any harm suffered by the victim was reasonably foreseeable – the only requirement is that the harm be the 'direct result' of the offending.[200] The offending does not need to be immediate or proximate to the harm; there may be intervening steps.[201] But determining if a victim has been injured 'as a direct result' of a particular act will sometimes involve difficult issues of causation.[202] If the court intends to impose a more severe sentence because of an alleged harm identified in a victim's statement, and there is a dispute about the origin of the harm,

[189] *R v Jagroop* (2009) 22 VR 80, 83 [22]-[23].
[190] The Act s 8K(1).
[191] *R v KHB* [2004] VSCA 219, [38]-[39], [111]. See also *Fichtner v The Queen* [2019] VSCA 297, [58] ('*Fichtner*').
[192] *R v Skura* [2004] VSCA 53, [12] ('*Skura*'); *Swift* 499 [9].
[193] *York (a pseudonym) v The Queen* [2014] VSCA 224, [26] ('*York*'). See also *R v Raimondi* (1999) 106 A Crim R 288, 291 [16], 292 [18], 298 [49].
[194] *Swift* 498 [6]; *Fichtner* [58].
[195] The Act s 8K(2).
[196] Ibid s 8K(3).
[197] Ibid s 3.
[198] *Berichon v The Queen* (2013) 40 VR 490, 495 [19], 498 [36] ('*Berichon*'); *DPP (Vic) v Pell* [2019] VCC 260, [43] n 12.
[199] *Eade v The Queen* (2012) 35 VR 526, 533 [31] ('*Eade*'); *SD* 491-92 [17]-[18]; *Berichon* 493 [9], 495 [19]-[20], 511 [127].
[200] *Eade* 533 [33]-[34].
[201] *Berichon* 494 [17], 509 [115].
[202] Ibid 495 [21].

then a causal connection between the harm and the offending will have to be established beyond reasonable doubt.[203]

The statement details the impact of the offence on the victim and any injury, loss, or damage they suffered as a direct result of the offending.[204] It may contain drawings, photos, poems or other material (including medical reports) that relates to the harm suffered.[205] Some of this content may include inadmissible material.[206] The court may exclude the entire statement, part of it, or any attached medical report if it does.[207] The statement must address only the offence the offender has been convicted of. If the impact of that offence, in a case with multiple offenders and charges, cannot be distilled from the statement it should not be admitted.[208] The court should have clear regard for the statutory regime governing the admissibility of victim impact statements to avoid error.[209] Nonetheless, subject to that obligation, reception of a victim impact statement on the plea should be approached with a degree of flexibility.[210] If an objection is made to any part of a statement, the court should either rule it inadmissible or make clear – during the plea or in its reasons – that no reliance will be placed on that part of the statement.[211]

The victim must file their statement (and any attached medical report) with the court and provide a copy to the offender or their legal practitioner, and to the prosecutor a 'reasonable time before sentencing'.[212]

At the request of the prosecution, the court may call the victim, any person who made a statement on behalf of a victim, or a medical expert who made a report attached to the statement, to give evidence.[213] Similarly, a victim or any person who made a statement on their behalf, may call any person or medical expert to give support to any matter in the statement or medical report attached to it.[214] Any person called may be cross-examined and re-examined,[215] and any party to the proceeding may lead evidence on any matter in the statement or attached medical report.[216] On application or its own motion, the court may make alternative arrangements for the examination and cross-examination of any person called.[217] This may include allowing their appearance via closed circuit television or other facilities, using screens to remove them from the direct vision of the offender, permitting another person of the victim's choice to be beside them during examination to provide emotional support, permitting only specified persons to be present, requiring practitioners not to robe, or requiring practitioners to remain seated while questioning the witness.[218]

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[203] *SD* 493 [22].
[204] The Act s 8L(1).
[205] Ibid ss 8L(2), 8M.
[206] *Swift* 498 [6].
[207] The Act s 8L(3).
[208] *York* [22], [25].
[209] Ibid [17].
[210] *R v Hester* [2007] VSCA 298, [11] ('*Hester*'); *Swift* 498-99 [7].
[211] *R v Dowlan* [1998] 1 VR 123, 132, 140-41; *Swift* 499 [8].
[212] The Act s 8N.
[213] Ibid s 8O(1).
[214] Ibid s 8P(1).
[215] Ibid s 8O(2), 8P(2).
[216] Ibid s 8P(3).
[217] Ibid s 8S(1).
[218] Ibid s 8S(2).

The person making a statement may request that it be read aloud or displayed in court during the sentencing hearing. It may be read by the person making the request, another person of their choosing who consents and the court approves, or the prosecutor.[219] If the request is made the court must ensure that only admissible parts of the statement that are appropriate and relevant to sentencing are read aloud and may do so by directing the person reading the statement.[220] This is a mandatory obligation that the court has no flexibility to waive.[221] It may however assume objection will be taken to irrelevant or inadmissible material and counsel has a duty to do so.[222] As with the examination of witnesses regarding the statement, the court may make similar alternative arrangements for reading the statement aloud or having it displayed.[223]

The weight accorded to a victim impact statement is a matter for the sentencing judge.[224] The court itself may quote admissible parts of the statement during the sentencing hearing or in the course of sentencing the offender.[225] The statement is only one consideration in the sentencing process[226] but a court may not completely disregard the statement or the complainant's attitude towards the offender.[227] A statement favourable to the offender must be given appropriate weight as it may bear on whether the victim has been harmed and the offender's prospects for rehabilitation.[228] But the weight to be given to the victim's attitude varies with the circumstances of the case,[229] and their attitude cannot govern the sentencing process in part because they may not always be able to assess what is in their own best interests.[230]

2.4 – Imposition of sentence

2.4.1 – Defining 'sentence'

The Act does not define 'sentence'. It simply states that subject to its terms and any provision relating to a crime, on finding a person guilty of the offence a court may:

- record a conviction and:
    - order the offender serve a term of imprisonment;[231]
    - order the offender be detained and treated in a designated mental health service as a security patient;[232]
    - make a drug treatment order;[233]

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[219] The Act s 8Q(1).
[220] Ibid ss 8Q(2)-(3).
[221] *York* [20]-[21], [25]. See also *Luciano v The Queen* (2015) 45 VR 844, 848-49 [11] ('*Luciano*').
[222] *Swift* 499 [8]; *Luciano* 848 [10].
[223] The Act s 8R.
[224] *R v Wilhelm* [2005] VSCA 192, [13].
[225] The Act s 8Q(4). See also *R v Harding* (2008) 50 MVR 413, 418 [24]; *Luciano* 850 [17].
[226] *R v Campbell* [2005] VSCA 225, [15] ('*Campbell*').
[227] *Hester* [10].
[228] Ibid [9]. See also *Skura* [13], [48], [50]; *Campbell* [16]-[17]; *R v LFJ* [2009] VSCA 134, [15] ('*LFJ*'); *Ivanov (a pseudonym) v The Queen* [2019] VSCA 219, [103]-[105]. But unsupported assertions regarding the victim's attitude need not be given any weight. See *Smith v The Queen* [2010] VSCA 192, [8].
[229] *R v CLP* [2008] VSCA 113, [31].
[230] *R v Sa* [2004] VSCA 182, [38]-[39]; *Campbell* [15].
[231] The Act s 7(1)(a).
[232] Ibid s 7(1)(aab).
[233] Ibid s 7(1)(ac).

    - order that a young offender be detained in a youth justice centre or youth residential centre;[234]
    - order the discharge of the offender;[235]
- with or without recording a conviction:
    - make a CCO;[236]
    - order the offender to pay a fine;[237]
    - order the release of the offender on the adjournment of the hearing on conditions;[238]
- without recording a conviction:
    - order the dismissal of the charge;[239]
    - impose any other sentence or make any order authorised by the Act or any other act.[240]

However, the *CPA* does define a 'sentence' as including:

- the recording of a conviction; and
- an order made under parts of the Act applying to custody, CCOs, fines, dismissals and etc, contraventions, superannuation, restitution, and mentally ill offenders;[241] and
- a reporting order or an order finding that a person is not a 'registrable offender' under the *Sex Offenders Registration Act 2004* (Vic); and
- an impoundment or immobilisation order under the *Road Safety Act 1986* (Vic) ss 84S, 84T; and
- orders made by the Supreme or County Courts, in their original jurisdiction, relating to accountable undertakings, good behaviour bonds, fines, probation, and youth supervision orders under the *Children, Youth and Families Act 2005* (Vic) ss 365, 367, 373, 380, 387.[242]

The Court of Appeal has held the *CPA* definition also applies to orders for cumulation,[243] concurrency,[244] and any non-parole period which is fixed.[245]

Recording a conviction

In deciding whether to record a conviction, a court must consider all the circumstances of the case including the nature of the offence, the character and history of the offender, and the impact of recording a conviction on their economic or social well-being, or employment prospects.[246] Unless an act provides otherwise, a finding of guilt without recording a conviction must not be taken as a conviction for any purpose.[247] But a finding of guilt without recording a conviction does not prevent the court from making

[234] Ibid ss 7(1)(d)-(da).
[235] Ibid s 7(1)(h).
[236] Ibid s 7(1)(e).
[237] Ibid s 7(1)(f).
[238] Ibid ss 7(1)(g), (i).
[239] Ibid s 7(1)(j).
[240] Ibid s 7(1)(k).
[241] Specifically, the Act pts 3-5.
[242] *CPA* s 3.
[243] *Ludeman v The Queen* (2010) 31 VR 606, 614 [55].
[244] Ibid.
[245] Ibid; *DPP v Jones (a pseudonym)* (2013) 40 VR 267, 274 [18]; *Saleem v The Queen* [2014] VSCA 190, [45].
[246] The Act s 8(1). It is not necessary to identify the many ways a recorded criminal conviction might impact an individual's life, professionally and personally.
[247] The Act s 8(2).

any other order with respect to the finding that is authorised by legislation.[248] And such a finding has the same effect as if a conviction has been recorded for the purposes of appeals against sentence, proceedings for variation or contravention of sentence, proceedings against the offender for subsequent offending, or subsequent proceedings against the offender for the same offence.[249]

2.4.2 – Timing and deferral of sentencing

A sentence may be imposed for an offence in open court at any time and place in Victoria.[250] The trial judge, judge receiving the plea, or another judicial officer empowered to do so, may set the time and place for sentencing.[251]

If the Magistrates' or County Court finds an offender guilty it may defer sentencing for up to 12 months if it is in the interests of justice and the offender agrees.[252] The purpose of this deferral is:

- to allow the offender's capacity and prospects for rehabilitation to be assessed;
- to allow the offender to demonstrate that rehabilitation has taken place;
- to allow the offender to participate in a program that addresses the underlying causes of the offending;
- to allow the offender to participate in a program that addresses the impact of the offending on the victim;
- any other purpose the court considers appropriate in the circumstances.[253]

When deferring sentence, the court may set a date – between the date of its order deferring sentence and the date of the adjourned hearing – for the offender to re-appear for review of the order.[254] The judge or magistrate deferring sentence may further direct that any review of the order be dealt with by them.[255] On review of a deferral order, the court may take no further action or may cancel the order and proceed to sentence the offender as if the review were the adjourned hearing.[256] Similarly, if the offender is found guilty of another offence during the deferral period, the court may re-list the adjourned hearing date to an earlier date and may make any order that it could have had it not deferred sentencing.[257]

In deferring sentence, the court may release the offender on their undertaking to appear on the adjourned date for sentence or it may release them on bail or extend any existing bail to that date.[258] It may also order a pre-sentence report regarding the offender.[259]

At the adjourned hearing the court determines the appropriate sentence for the offender, having regard to any pre-sentence report it ordered, the offender's behaviour during the deferral period, and any other

[248] Ibid s 8(3)(a).
[249] Ibid s 8(3)(b).
[250] Ibid s 101(1).
[251] Ibid ss 101(2), 102.
[252] Ibid ss 7(2), 83A(1).
[253] Ibid ss 83A(1A), (2)(a).
[254] Ibid ss 83A(1B)-(1C).
[255] Ibid s 83A(1E).
[256] Ibid s 83A(1D).
[257] Ibid s 83A(4).
[258] Ibid s 83A(2)(b).
[259] Ibid s 83A(2)(c).

relevant matter.[260] Any time spent in custody during the deferral period can be dealt with as pre-sentence detention.[261] Any statutory obligation on the court to impose any disqualification, or make any other order in respect of the offender remain valid. This includes any order cancelling or suspending a driver licence or permit or disqualifying the offender from obtaining one for any period.[262] Lastly, the court may order that a warrant to arrest the offender issue if they do not appear for the adjourned hearing.[263]

There is also a common law power to remand an offender at large pending imposition of the sentence, but this practice has not developed in Victoria and courts should be cautious in relying upon interstate cases where it arises.

2.4.3 – Formulation

A court may sentence only for the offence a person is convicted of or pleads guilty to and not for uncharged acts or any other offending.[264] If an indictment contains multiple charges, a court should generally impose a separate sentence on each one.[265] Once an appropriate sentence is fixed and announced for each offence, the court should then proceed to consider questions of cumulation, concurrency, and totality, and order cumulation or concurrency where appropriate. All orders for cumulation should be made by reference to a 'base sentence' which ordinarily is the most severe individual sentence imposed.[266]

If orders for cumulation or concurrency are made, the court should articulate the overall effect of the sentences by stating the head sentence, any non-parole period, and indicating commencement dates if federal sentences are involved.

If an offender is sentenced to a term of imprisonment or detention, then any period served in custody in relation to proceedings for that offence must, unless the court directs otherwise, be reckoned as time served.[267] If the informant is available they may advise the court of the length of the custody. Otherwise the court may take or receive evidence on the issue.[268] The court must declare any period already served and have it noted in the records of the court.[269] Later, if the court is satisfied that the period declared was in error it may correct the record and amend the sentence accordingly.[270] There are similar provisions for young offenders sentenced to a term of detention.[271]

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[260] Ibid s 83A(3).
[261] Ibid s 18(1). See also 8.6 – Imprisonment – Pre-sentence detention.
[262] Ibid s 83A(6).
[263] Ibid s 83A(5).
[264] *R v HRA* (2008) 183 A Crim R 91, 130 [129]-[131].
[265] *Ryan v The Queen* (1982) 149 CLR 1, 21; *Pearce v The Queen* (1998) 194 CLR 610, 623-24; *DPP (Vic) v Grabovac* [1998] 1 VR 664, 676-80.
[266] *R v Nikodjevic* [2004] VSCA 222, [39]; *DPP (Vic) v Adams* [2006] VSCA 149, [3]; *R v Nunno* [2008] VSCA 31, [27]; *R v XB* [2009] VSCA 51, [25]; *Beyer v The Queen* [2011] VSCA 15, [5] ('*Beyer*'); *Schulz v The Queen* [2019] VSCA 179, [126]-[127].
[267] The Act s 18(1)-(2).
[268] Ibid s 18(3).
[269] Ibid s 18(4).
[270] Ibid s 18(7)-(8).
[271] Ibid s 35.

It is a discretionary matter for the court whether formal orders and directions are pronounced before or after giving reasons for sentence. In Victoria, the prevailing practice is that sentencing orders are pronounced at the end of sentencing remarks. Where the sentencing orders and directions are complex, it is common for judicial officers to indicate the intended effect of the orders and give counsel an opportunity to make submissions on whether the orders gave effect to the court's intention before entering the orders into the records of the court.

The court must make orders disqualifying an offender from driving or holding a driver's licence where they have been found guilty and convicted of:

- Manslaughter, negligently causing serious injury, culpable driving causing death, or dangerous driving causing death or serious injury arising out of driving a motor vehicle;
- Intentionally or recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;
- Aggravated intentionally or recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving.[272]

2.4.3.1 – Mixed indictments

A mixed indictment is one that charges both State and federal offences. A court must take care to ensure that separate sentences are imposed for the different charges. Any inconsistency must be avoided. For instance, a conditional release after four months of imprisonment[273] for a federal offence would be inconsistent with a CCO for a State offence. Care must also be exercised in formulating orders which relate federal and State sentences to each other (for example commencement dates), and in indicating total terms of imprisonment where necessary.

2.4.3.2 – Multiple indictments

If the court is presented with several indictments simultaneously,[274] each should have a unique identifying number and the court should take care to identify the indictment being addressed (and its related sentence(s)) in its sentencing remarks or when pronouncing sentence. If the indictments are not uniquely identified, then the court should add an identifying alphanumeric, and should announce this for the transcript of the proceedings.

When formulating sentence, the usual practice is to impose sentences in relation to each charge on each indictment separately, along with associated orders for cumulation or concurrency that operate within the individual indictments, then formulate orders for cumulation between the indictments and finally specify a non-parole period or other associated orders. The court should then announce the result of the various directions. For example:

> I direct that the sentence of 24 months on Indictment X be treated as the base sentence. I direct that 12 months of the sentence on Indictment Y be served cumulative upon the sentence imposed on Indictment X. This makes a total of 36 months imprisonment in respect of all offences for which you are presently before the court.

[272] Ibid s 89.
[273] See, eg, *Crimes Act 1914* (Cth) s 20 ('*Cth Crimes Act*').
[274] An 'unenviable' task. *DPP (Cth) v Watson* (2016) 259 A Crim R 327, 362 [105] (Priest JA).

2.4.4 – Representative charges

A representative charge is one of three ways in Victoria for a court to take into account other instances of uncharged offending. It is approved process where there is a guilty plea as it saves time and expense for all parties.[275]

A representative charge does not increase the maximum sentence, nor does it permit a disproportionate sentence to be imposed. But all other things being equal, a representative charge will generally result in a heavier sentence than a charge relating to an isolated incident.[276] This is because it removes a mitigating factor from the offender because they can no longer claim the offending was an isolated incident, and it puts the offence into context.[277]

It does not mean the offender is sentenced for uncharged acts, but rather that those acts are 'directly and highly relevant to the objective gravity of the particular offence' for which they are being sentenced. The gravity of the offending is heightened because the conduct in question is not isolated and because the impact on the victim is likely to be much greater.[278]

Consideration of a representative charge for sentencing is not the same as consideration of other charges,[279] a rolled-up charge,[280] or a course of conduct charge.[281]

The conduct stated in a representative charge must accurately and explicitly reflect the agreement between the parties.[282] This means it must be identified with some level of detail so the whole picture can be seen, but 'detailed articulation' is not required.[283] However, if the prosecution summary accurately reflects the agreement between the parties, the court should not 'go behind the Crown opening' and make its own evidentiary findings as to the basis of the plea.[284]

The prosecution is not allowed to rely on a specific incident that is the subject of another charge as the basis of a representative charge. The 'essence' of a representative charge is that the other acts cannot be sufficiently particularised to legitimately frame individual charges.[285] Nor may it rely on acts occurring outside of the time frame specified in the representative charge.[286]

As indicated the parties must agree to a representative charge. It is essential that the offender's assent be express and unequivocal.[287] If that consent is not given and the proven circumstances do reflect

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[275] *R v SBL* [1999] 1 VR 706, 724 [64] (Ormiston JA).
[276] *DPP (Vic) v EB* (2008) 186 A Crim R 314, 318 [15]; *R v CJK* (2009) 22 VR 104, 111 [46] ('*CJK*'); *Beyer* [17]; *DPP (Vic) v Allen* [2020] VSCA 292, [23] ('*Allen*').
[277] *R v SBL* [1999] 1 VR 706, 726 [70]; *Reid (a pseudonym) v The Queen* (2014) 42 VR 295, 308 [75] ('*Reid*'), quoting *DPP (Vic) v CPD* (2009) 22 VR 533; *Allen* [52]-[56].
[278] *Allen* [57].
[279] See 2.4.9 – Reasons for sentence below.
[280] See 2.4.5 – Rolled up charges below.
[281] See *CPA* sch 1, cl 4A. See also 2.4.6 – Course of conduct charges below.
[282] *NJD v The Queen* [2010] VSCA 84 [46]; *LDF v The Queen* [2011] VSCA 237, [8].
[283] *CJK* 114 [60], quoting *R v RGG* [2008] VSCA 94 ('*RGG*').
[284] *LFJ* [9]-[11].
[285] *OAA v The Queen* [2010] VSCA 155, [21].
[286] Ibid [26].
[287] *Kingswell v The Queen* (1985) 159 CLR 264, 288.

additional uncharged acts, the court must not consider them as aggravating if they would warrant conviction for an additional or more serious offence. It is a fundamental error to punish for any offence other than that convicted or pleaded.[288]

2.4.5 – Rolled-up charges

Rolled up charges are different from representative charges because they are a collection of identifiable charges bundled together in a single charge.[289] Rolled-up charges also require the offender's agreement and are only for the purpose of a guilty plea.[290] They simplify the sentencing court's task and work to the benefit of the offender by allowing multiple instances of similar offending to be dealt with is a single charge rather than through numerous separate charges.[291]

When sentencing on a rolled-up charge, the court must consider all the circumstances of the offence and the offender including if the offending was carried out over an extended period, victimised multiple persons, and the totality of the harm described in the charge.

While the court may consider all the relevant circumstances of a rolled-up charge, the pleading must still be treated as presenting a single formal charge. The maximum penalty is therefore limited to the maximum for a single charge.[292] A court may impose an aggregate sentence when sentencing for a rolled-up charge or a representative charge.[293] A rolled-up charge can only be treated as a continuing criminal enterprise offence if there is at least one individual offence within the rolled-up charge that involves a transaction of $50,000 or more.[294]

2.4.6 – Course of conduct charges

The *CPA* provides for a course of conduct charge, which is 'a charge for a relevant offence that involves more than one incident of the offence'.[295]

A relevant offence is a sexual offence or one of a number of listed fraud-related offences.

A 'sexual offence' is as defined in the Act.[296] The fraud-related offences include:

- theft and similar or associated offences;[297]
- identity crime;[298]
- money laundering;[299]

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[288] *De Simoni* 389, 392, 395-96; *Olbrich* 291 [53].
[289] *R v Jones* [2004] VSCA 68, [12]-[13] ('*Jones04*'); *Reid* 307-08 [73].
[290] *Jones04* [12].
[291] Ibid.
[292] *R v Beary* (2004) 11 VR 151, 157 [14].
[293] The Act s 9(4A).
[294] *Cay v The Queen* (2010) 29 VR 560, 566 [34]. See 9.4 – Statutory Schemes – Continuing Criminal Enterprise Offenders.
[295] *CPA* sch 1, cl 4A.
[296] The Act s 4.
[297] *Crimes Act 1958* (Vic) pt 1, div 2 (other than sections 75, 75A, 76, 77, 78, 80 and 91).
[298] Ibid div 2AA.
[299] Ibid div 2A.

- cheating at gambling;[300]
- computer offences.[301]

A course of conduct charge is a single charge that incorporates multiple incidents of the same offence over a specified period of time. A course of conduct charge enables the prosecution of serial offending where the specific details of any instance are not disclosed in enough detail by the evidence.[302]

Taken together the incidents must amount to a course of conduct having regard to their time, place, or purpose of commission and any other relevant matter. Course of conduct charges are available only if each incident is an offence under the same provision and, for a sexual offence, relates to the same complainant.[303]

It is not necessary to prove an incident with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the offender were charged with a single incidence of the offence.[304]

Although the charge involves more than one incident, the charge is for a single offence.[305] Both rolled-up charges and course of conduct charges include multiple instances of the same offending in a single charge. However, unlike rolled-up charges, course of conduct charges require neither a guilty plea nor the consent of the accused.

Sentencing for a course of conduct charge is particularly difficult because it is so different from the conventional sentencing exercise.[306] A court must sentence within the maximum penalty for the charged offence but must also reflect the totality of the offender's conduct.[307] As a result, sentences for course of conduct charges are likely to be higher than for equivalent conduct prosecuted as a single incident on a 'first occasion' basis. In this respect, sentencing for course of conduct charges will be very similar to the way courts sentence for rolled-up charges.[308]

A course of conduct charge is a form of charging a substantive offence, so the maximum penalty for a course of conduct charge is the same as the maximum penalty for the relevant substantive offence.[309]

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[300] Ibid div 2B.
[301] Ibid div 3, sub-division (6).
[302] *McCray (a pseudonym) v The Queen* [2017] VSCA 340, [29].
[303] *CPA* sch 1, cl 4A(2).
[304] Ibid cl 4A(9).
[305] Ibid cl 4A(6).
[306] *DPP (Vic) v Tullipan (a pseudonym)* [2021] VSCA 191, [4]. Because the exercise is so difficult, the sentencing judge 'should be given maximum assistance by way of reference to relevant sentencing materials'. Ibid [46], [54].
[307] Ibid [5]; The Act s 5(2F)(a).
[308] Department of Justice, *Review of Sexual Offences*, (Consultation Paper 2013), pt 12-160. Available at https://www.justice.vic.gov.au/justice-system/laws-and-regulation/criminal-law/review-of-sexual-offences-consultation-paper.
[309] The Act s 5(2F)(b).

2.4.7 – Commencement and order of service

Generally, a sentence commences[310] on the day it is imposed unless the offender is not in custody, in which case it commences on the day they are arrested on a warrant to imprison for sentence.[311] Unless the court specifically orders otherwise or the legislation otherwise provides, every sentence of imprisonment must be served concurrently with any other uncompleted sentence of imprisonment or detention in a youth justice centre or youth residential centre whether imposed at the same time or not.[312]

If an order for cumulation is made[313] in respect of a sentence or any part of it, that sentence or part commences on completion of the sentence or sentences to which it is cumulative. It is not necessary for the court to specify the commencement date when ordering cumulation of sentences relating to State offences, but if the court imposes a term of imprisonment for a State offence on a person then serving a sentence for a Commonwealth offence, it must direct that the new State term commences immediately after completion of the federal term if a non-parole period or pre-release period[314] was not fixed, or the end of that period if one was fixed.[315] The federal method of ordering cumulation, part cumulation or concurrency is to direct when the sentence for each the federal offence is to commence.[316]

A CCO commences on the date specified by the court, but no later than three months after the order is made.[317] However, if the court makes a CCO in addition to imposing a term of imprisonment, the CCO does not commence until the offender's release from prison.[318]

Declarations of time spent in custody before sentence[319] result in the offender being treated as having commenced their sentence when they first entered custody for the offence. However, the formal commencement date remains the date the sentence was imposed.[320]

If an offender is sentenced to several terms of imprisonment where non-parole periods were fixed, they must be served in the following order:

1. any term or terms without a non-parole period;
2. the non-parole period; and
3. the balance of any term or terms after the end of the non-parole period, unless and until released on parole.[321]

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[310] Victorian law regarding the commencement of sentences applies to federal offending. See *Cth Crimes Act* s 16E.
[311] The Act s 17(1).
[312] Ibid s 16(1).
[313] Ibid s 16(1).
[314] See *Cth Crimes Act* pt IB.
[315] The Act s 16(4).
[316] *Cth Crimes Act* s 19.
[317] The Act s 38(2).
[318] Ibid s 44(3).
[319] Ibid s 18(4).
[320] Ibid s 17(1).
[321] Ibid s 15(1).

If while serving a sentence, a further sentence is imposed, the first sentence must be suspended if necessary for this sequence to be followed.[322]

2.4.8 – Taking other offences into account

The Victorian and Commonwealth regimes both allow the court to dispose of pending charges by taking them into account in sentencing for offences already before the court.[323] Treason and murder are excluded from consideration under the State scheme,[324] and under the federal scheme the court cannot consider any indictable offence it would not have jurisdiction to try.[325] Otherwise both regimes are similar in their requirements and operation.

Before considering the pending charges, the court must be satisfied that a prescribed form listing the offender's other charges has been prepared and provided to the offender. Before passing sentence it is appropriate to ask the offender if they admit committing any or all of the listed offences and want the court to consider them in sentencing for the offences of which they have already been convicted.[326]

If offences are admitted and are to be considered, the court cannot impose more than the maximum penalty available for the offence(s) in respect of which sentence is formally being passed.[327] Nor can it result in a lesser sentence. Instead it has the effect of hardening the sentence particularly if it is a serious offence.[328] However, as general policy, this procedure should not be used for the disposal of serious offences.[329]

When the other charges are contested, those charges are irrelevant, but matters collateral to them – such as the location of the offender, the company they were in or the conduct they engaged in – may be relevant if admitted.[330] If further offending is admitted, the court may use it to 'negate, reduce or qualify an inference as to the offender's later conduct which would otherwise arise and operate in mitigation of sentence'.[331]

2.4.9 – Reasons for sentence

There is a common law duty for a court to provide reasons for sentence.[332] There are several purposes behind this requirement:

- to ensure that an appeal may be prepared properly and in a timely fashion;[333]

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[322] Ibid s 15(2).
[323] Ibid s 100; *Cth Crimes Act* s 16BA.
[324] The Act s 100(1).
[325] *Cth Crimes Act* s 16BA(3).
[326] The Act s 100(1); *Cth Crimes Act* s 16BA(1).
[327] The Act s 100(3); *Cth Crimes Act* s 16BA(4).
[328] *R v Bakopoulos* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Lush and Beach JJA, 12 April 1983) 4. See also *R v Morgan* (1993) 70 A Crim R 368, 372 ('*Morgan93*')
[329] *Morgan93* 371.
[330] *Bellizia* [75]-[76].
[331] Ibid [77].
[332] *R v O'Connor* [1987] VR 496, 501 ('*O'Conner87*'); *Ferguson v Tasmania* [2011] TASSC 51, [35] ('*Ferguson*'); *Ta v Thompson* [2012] VSC 446, [20] ('*Ta*').
[333] *Ferguson* [36]; *Ta* [21]-[22].

- to hold the courts accountable and protect against the arbitrary exercise of power;[334]
- so that the parties and the public can see that justice has been done;[335]
- to assure the offender that they have been dealt with fairly and because they and the public have a right to know the basis of fact and the reasons why a sentencing option has been chosen.[336]

Reasons are not required in every case. For example, cases involving a routine penalty for a routine offence may not require them.[337] But where there is a duty to provide reasons, failure to do so is an error of law. The extent and detail of the reasons depends on the circumstances including the nature of the case, the complexity of the issues, the evidence, and the parties' submissions.[338]

Reasons may be adequate even if they are very short[339] and it is not necessary for a court to state the obvious.[340] Although they don't need to be extensive, sentencing reasons should usually include the court's findings as to the facts and its reasons for making those findings,[341] the factors it regards as mitigating or aggravating, the impact of the crime upon the victim(s),[342] the offender's circumstances that materially bear on the sentence, and the court's conclusions on the parties' primary arguments in controversy.[343] In short, the reasons must clearly identify the court's route to its conclusion.[344]

This does not mean the court must explicitly identify every thought that influenced the outcome,[345] that failure to mention some matter means the factor was not considered, or that due weight was not given to it.[346] Nor must a court always explain why it has rejected alternative sentencing options, particularly those that are 'not reasonably practicable possibilities'.[347]

Where a factor is unusual and may carry weight in the sentence, a court should explain how it has been considered.[348] This may include:

- where an offender is being sentenced for multiple instances of the same offence, identifying why a sentence for one instance of the offence is substantially different to the sentence imposed for another;[349]

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334 *R v Koumis* (2008) 18 VR 434, 439 [62] ('*Koumis*'); *Ta* [22].
335 *WCB v The Queen* (2010) 29 VR 483, 493 [34], 494 [36] ('*WCB*'); *DPP (Vic) v Albert* (2010) 203 A Crim R 1, 7-8 [24] ('*Albert*'); *Ferguson* [35]; *Ta* [22].
336 *Koumis* 439 [62]; *Ferguson* [36].
337 *Ferguson* [37].
338 Ibid [38]; *Ta* [23]-[25]. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 ('*Soulemezis*').
339 *Ta* [29]; *Soulemezis* 280.
340 *Ta* [29].
341 *RGG* [6] (Ashley JA); *Koumis* 439-40 [63]; *Ta* [27]-[28]. However, the findings should not be based on speculation regarding the fact. See, eg, *R v Parker* [2009] VSCA 19, [27], [31].
342 *R v Ahmet* (2009) 22 VR 203, 219 [102].
343 *Koumis* 439-40 [63].
344 *Ta* [28]; *Albert* 7-8 [24].
345 *R v Giakas* [1988] VR 973, 977 ('*Giakas*').
346 *R v Gray* [1977] VR 225, 233. See also *Cuthbertson v The Queen* [2019] VSCA 104, [57]-[59].
347 *R v Bloom* [1976] VR 642, 644. See also *O'Connor87* 501.
348 *Valayamkandathil v The Queen* [2010] VSCA 260, [27].
349 See, eg, *Johns (a pseudonym) v The Queen* [2016] VSCA 97, [28]-[29].

- the reasons for imposing a disproportionately short or unusually high non-parole period,[350] or declining to fix any non-parole period;[351]
- reasons why significant assistance provided to the prosecution or investigators did not attract a discount.[352]

There are also certain statutorily required statements of reasons:

- Before imposing an aggregate sentence the court must announce, in open court and in language likely to be understood by the offender, its decision and reasons for doing so and the effect of the proposed sentence.[353] The court is not required to identify separate events giving rise specific charges and it is not required to state the sentences that would have been imposed for each offence separately, or whether they would have been imposed cumulatively or concurrently.[354]
- When imposing an indefinite sentence.[355]
- Where a sanction might be imposed that has conditions which requires the offender to consent or give an undertaking.[356] Before making the order the court must explain to the offender, in language they are likely to understand, the purposes and effect of the order, the consequences of their failing to comply with it, and the way the order might be varied.[357]
- The fact that a less severe sentence is being imposed because of an offender's cooperation with investigating and/or prosecuting authorities. The facts and details of the undertaking must be noted in the record of the court.[358]
- If an offender pleads guilty and the court imposes a less severe sentence than it otherwise would because of the plea, the court must state the sentence and non-parole period it would have imposed absent the plea.[359] If the offender is being sentenced for more than one offence in these circumstances, the court must state the discounted sentence and non-parole period imposed for the total effective sentence but does not have to do so for each charge.[360] These statements must be recorded in writing or otherwise.[361] A similar scheme exists for Children's Court sentencing when the court imposes a youth attendance order, a youth residential centre order or a youth justice centre order following a plea of guilty.[362]

Where legislation directs that a matter be considered, the court should discuss it in the reasons for sentence and a recitation of the statutory language is generally considered insufficient.[363] However, the

[350] *DP v The Queen* [2011] VSCA 1, [31]-[36]; *BS v The Queen* [2013] VSCA 108, [15].
[351] *R v Sener* [1998] 3 VR 749, 752.
[352] *R v CP* [2008] VSCA 272, [16]-[18].
[353] The Act s 9(3).
[354] Ibid s 9(4).
[355] Ibid s 18G.
[356] Ibid ss 37, 69H(2)(a), 72, 75.
[357] Ibid s 95.
[358] Ibid s 5(2AB).
[359] Ibid s 6AAA(1). For all other offences it must state the sentence it would have imposed but for the plea: at s 6AAA(3).
[360] The Act s 6AAA(2).
[361] Ibid s 6AAA(4).
[362] *Children, Youth and Families Act 2005* (Vic) s 362A.
[363] *R v Iddon* (1987) 32 A Crim R 315, 326; *Giakas* 977.

Act also provides that a court's failure to give reasons does not invalidate any sentence it imposed.[364]

A court should avoid intemperate or formulaic language in its sentencing reasons.[365] It should not, however, avoid references to objective and informed community expectations. A court's sentencing remarks are a reaffirmation of societal values and these may properly be expressed in sentencing reasons.[366]

When a court is sentencing an offender, who is receiving a discount for cooperating with authorities, it faces two competing interests. The first is the need for transparency and accountability by publishing remarks that explain the reasons the sentence was imposed, and the second is the need to avoid compromising an ongoing investigation or risking the offender's safety. To meet both interests, a court should publish two sets of sentencing reasons. The first fully explaining how the offender's cooperation informed its exercise of the sentencing discretion, and the second noting the cooperation in a veiled fashion and possibly referring to the offender by a pseudonym. The fully explained remarks should be restricted and not published beyond the parties, but the second set of reasons should be made available in the usual way.[367]

When a transcript of reasons for sentence is submitted to the court for revision, the court is entitled not only to correct mistakes but to alter words which do not express the intended meaning at the time the words were uttered. However, the court may not change the whole character of the reasons given in court;[368] it must not 'effect any alteration in substance'.[369]

[364] The Act s 103(1).
[365] See *Ryan v The Queen* (2001) 206 CLR 267, 301-02 [118]-[122]; *CJK* 113 [58]; *Scott v The Queen* [2011] VSCA 108, [33].
[366] *WCB* 487-88 [12], 493 [34].
[367] *Haamid (a pseudonym) v The Queen* [2018] VSCA 330, [34]-[39].
[368] *Fletcher Construction Australia Ltd v Lines, MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28, 47-48 [49], [51], 50 [59].
[369] *Moore (a pseudonym) v The King* [2022] VSCA 233, [14], quoting *R v Lazarus* (2017) 270 A Crim R 378, 402 [122]-[124].

2.4.10 – Correction of errors

A court has broad powers, both statutorily and at common law, to correct errors in a sentence. However, it is *functus officio* once an order disposing of criminal proceedings has passed into the record of the court. Historically, at that point it lost any power to vary the judgment, even where the sentence was wholly invalid.[370] The only remedy had been to appeal the sentence, or to seek a writ of certiorari.[371] Parliament appears to have acted to alter that bar by providing for the reopening of a proceeding at any time in order to correct an invalid sentence,[372] but this provision (s 104B discussed below) does not yet seem to have been tested in or employed by the courts.[373]

2.4.10.1 – Common law powers

Every court has a power to correct any judgment or order that does not give effect to what the court intended, especially a clerical error. The court may not vary an order that it intended to make but the order may be corrected to give justice and effect to the court's intention. If the order has passed into the record, the appropriate means of correction is to make a supplemental order.[374]

Because the sentencing process is a public part of the trial proceedings, any subsequent alteration (other than a technical correction per s 104A of the Act) should take place in open court with the parties being given an opportunity to be heard.[375]

2.4.10.2 – Statutory powers

Under the Act a court may, on application or its own motion, amend a judgment or sentence if satisfied that it contains a clerical mistake, an error arising from an accidental slip or omission, a material mistake in figures or in the description of any person, matter or thing, or a defect in form.[376] A court may also amend its sentence if satisfied that it fails to deal with a matter that would have undoubtedly been dealt with if the court's attention had been drawn to it.[377] A court's common law powers remain unaffected by this part of the Act.[378]

This power to amend the sentence for these technical reasons does not have to be exercised in open court and the parties do not need to be heard unless the court considers it necessary in the interests of justice.[379]

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[370] *DPP (Vic) v Edwards* (2012) 44 VR 114, 147 [157], [161], 150 [168], 162 [235] ('*Edwards12*'). See also *CMG v The Queen* (2013) 46 VR 728, 733 [18], 756 [126] ('*CMG*').
[371] *Edwards12* 162 [235].
[372] The Act s 104B.
[373] See, eg, *DPP (Vic) v Phillips* (2018) 361 ALR 635, 640-41 [20]-[21].
[374] *R v Saxon* [1998] 1 VR 503, 507.
[375] *CMG* 735 [30], 758 [132].
[376] The Act s 104A(1)(a).
[377] Ibid s 104A(1)(b).
[378] Ibid s 104A(6).
[379] Ibid s 104A(4).

The Court of Appeal may exercise this power in relation to its sentences or judgments,[380] and for judgments or sentences that are before it on appeal or an application for leave to appeal.[381] The Supreme Court also has the power, on application, to correct sentences of the County and Magistrates' Courts that were beyond power.[382]

Section 412 of the *CPA* also provides very generally that a court may amend any sentence or order to correct any defect in substance or form.[383] But in *DPP (Vic) v Edwards*[384] the Court of Appeal clarified this section is not a "cure all" and does not allow any error to be corrected at any time. 'It was not intended to, and does not, abrogate the doctrine of *functus officio*'.[385] The Court considered that if the provision were read that broadly it would make s 104A of the Act pointless, which would be strange since Parliament had retained it.[386] The following year the Court reiterated that s 412 of the *CPA* does not provide a basis for a court to correct substantive errors, specifically to recall and vary a sentence. It cannot revive a judgment, order, or sentence that has been entered into the record.[387] The section has no application where the sentence did not involve error at the time it was pronounced.[388] It only provides a means for the court 'to cure slips or mistakes'.[389]

In response to *Edwards*,[390] s 104B of the Act commenced in 2015. It permits sentencing courts to reopen proceedings on their own motion or on the application of a party where the court imposed a penalty that was contrary to law or failed to impose a penalty that was required to be imposed by law.[391] In deciding whether to exercise this power, the court must have regard to the time that has elapsed since imposing the original penalty, and in determining a new penalty it must consider the extent to which the offender has already suffered the consequences of the original penalty.[392] Where the court reopens proceedings and imposes a new penalty, the new penalty is taken to have been imposed from the date of the original penalty unless the court orders otherwise.[393] However, time for an appeal only starts to run when the new penalty is imposed.[394]

[380] Ibid s 104A(5).
[381] Ibid s 104A(5A).
[382] Ibid s 104.
[383] *CPA* s 412.
[384] *Edwards12*.
[385] Ibid 162 [238]. See also *CMG* 733 [18].
[386] *Edwards12* 163 [239].
[387] *CMG* 756-57 [125]-[126], [129].
[388] Ibid 756-57 [127].
[389] Ibid 757 [129].
[390] See Explanatory Memorandum, Sentencing Amendment (Correction of Sentencing Error) Bill 2015, 2-4.
[391] The Act ss 104B(1)-(2). For the purposes of this section a penalty is not contrary to law because it was reached through erroneous reasoning or a factual error: at s 104B(6).
[392] The Act ss 104B(3)-(4).
[393] Ibid s 104B(c)(1).
[394] Ibid s 104B(c)(2).

2.4.11 – Sentencing after retrial, in absentia, and by another judicial officer

When sentencing after a retrial, a court must have regard to the sentence previously imposed. It is not bound by it, but instances where the second sentence may permissibly exceed the first will be rare.[395] In part, this may be because the time that has passed since the first trial might mean an offender's circumstances have changed and different weight will need to be given to the relevant sentencing factors.[396]

A trial for an indictable offence must be conducted in the accused's presence. This also includes a right to be present during sentencing. But the court has the discretion to proceed in the accused's absence if they waive their right to be present and absconding on bail is a prima facie waiver of that right.[397] There is a general reluctance to exercise this power if the accused absconds prior to trial or jury empanelment. However, it should not be assumed that the power to proceed to sentencing will also be exercised sparingly.[398] It depends on the circumstances of the case.[399]

If the judicial officer who imposed the sentence goes out of office or is incapacitated, and it appears probable to the Chief Justice, Chief Judge, or Chief Magistrate that they will not be able to deliver sentence within a reasonable time, a second judicial officer may be nominated to do so.[400]

[395] *R v Chen* [1993] 2 VR 139, 158-60; *RHMcL v The Queen* (2000) 203 CLR 452, 475-476 [72]; *R v Tong* (2003) 138 A Crim R 82, 83-83 [8]; *R v Macfie* (No 2) (2004) 11 VR 215, 235 [99]-[100]; *DPP (Vic) v Ty (No 2)* (2009) 24 VR 705, 722 [78] ('*Ty*").
[396] *Ty* 723 [82].
[397] *Taupati v The Queen* [2017] VSCA 106, [20]-[21], [25]-[26].
[398] Ibid [28].
[399] Ibid [33].
[400] The Act ss 102(1), 104A(3).

Part B – Principles, Purposes and Considerations

3 – Sentencing principles

Sentencing is fundamentally a discretionary exercise.[401] As the Court of Appeal explained in *R v Storey*:

> There is no single 'right' answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the 'instinctive synthesis' which takes account of the various purposes for which sentences are imposed – just punishment, deterrence, rehabilitation, denunciation, protection of the community – and which pays due regard to principles of totality, parity, parsimony and the like.[402]

This chapter examines these fundamental principles, and the prohibitions on double punishment and crushing sentences. These principles are treated as fundamental because their application does not depend on the circumstances of the offence or the offender, and because, subject to the conditions and exceptions discussed below, they can make some claim to universal application in sentencing.

However, as is clear from the quote above, the principles are not a blueprint for determining sentence. They do not dictate a path of reasoning to be followed.[403] They are either guiding or limiting principles of broad application, but they do not add up to a closed system for sentencing. They are considerations to be taken together with the gravity of the offence, the purposes of sentencing, the circumstances of the offence and offender, and relevant policy considerations, in the synthesis of a just and appropriate sentence.

[401] *Markarian v The Queen* (2005) 215 ALR 213, 221 [27] ('*Markarian*'); *R v Storey* (1998) 1 VR 359, 366 ('*Storey'*); *DPP (Vic) v Anderson* [2005] VSCA 68, [31].
[402] *Storey* 366.
[403] *Markarian* 221 [27].

3.1 – Proportionality

The principle of proportionality defines the upper and lower limits of punishment. It constrains both excessively lenient and overly severe responses to crime.[404] It is a well-established principle that says that the sentence imposed should be proportionate to the gravity of the offence considered in the light of the circumstances,[405] including the maximum statutory penalty for the offence, the degree of harm, the method of committing the offence, and the offender's culpability.[406]

The maximum penalty (if any) fixed by the legislature defines the absolute limit for the worst class of offending covered by the offence in question.[407] The maximum penalty, however, is only a guidepost for fixing an appropriate sentence,[408] and a lengthy term cannot be imposed merely to cure an offender's condition (including drug addiction),[409] to protect the community[410] or to further preventative detention (even in cases of terrorism).[411]

Proportionality permits a sentence to be fixed 'by reference to all of the purposes of punishment — retribution, denunciation, specific deterrence, general deterrence and protection of the community'.[412] But the principle is qualified to some degree by legislation. Firstly, in sentencing a serious offender for a relevant offence, the Supreme or County Court must consider protection of the community to be the paramount sentencing purpose, and if the court considers it necessary to further that purpose it may impose a sentence longer than that which is proportionate to the gravity of the offence.[413] But this does not oblige a judge to disregard the principle of proportionality.[414] It remains a fundamental consideration and the power to depart from it should be exercised sparingly, with adequate reasons given for any decision to do so.[415] Secondly, a court may impose an indefinite sentence in respect of a serious offence where it is satisfied that the offender is a serious danger to the community.[416] The exercise of this power

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[404] *DPP (Vic) v Jones (a Pseudonym)* (2013) 40 VR 267, 290 [100] ('*Jones13*'). See also *R v Groom* (1999) 2 VR 159, 68 [37] ('*Groom*'); *Azzopardi v The Queen* (2011) 35 VR 43, 61 [62] ('*Azzopardi*'); *Carolan v The Queen* (2015) 48 VR 87, 106 [55] ('*Carolan*').

[405] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 471-72, 485-87, 490–91, 495–496 ('*Veen No 2*'). See also *Hoare v The Queen* (1989) 86 ALR 361, 365 ('*Hoare*'); *R v Young* [1990] VR 951 ('*Young*'); *R v Moffatt* (1998) 2 VR 229 ('*Moffatt*'); *R v KHB* [2004] VSCA 219, [76] (Gillard AJA) ('*KHB*'); *Azzopardi* 63 [69]; *Carolan* . It has also been phrased as requiring there be a rational relationship between the offending and the sentence. See, eg, *R v Krieg* [2005] VSCA 23, [70].

[406] Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thompson Reuters (Professional) Australia Limited, 3rd ed, 2014) 240 ('Fox & Frieberg').

[407] *Veen No 2* 478-79. See 5.1 – Circumstances and gravity of the offence – Maximum penalty.

[408] *DPP (Vic) v Aydin* [2005] VSCA 86, [12].

[409] *Freeman v Harris* [1980] VR 267, 272, 281.

[410] *Veen v The Queen (No 1)* (1979) 23 ALR 281, 295–96; *Veen No 2* 471-72, 485-87, 490–91, 495–96; *Chester v The Queen* (1988) 82 ALR 661, 666; *Boulton v The Queen* (2014) 46 VR 308, 326 [67] ('*Boulton*').

[411] *DPP (Cth) v Besim (No 3)* (2017) 52 VR 303, 314 [37], 315 [42].

[412] *Boulton* 326 [67].

[413] *Sentencing Act 1991 (Vic)* s 6D ('The Act').

[414] *R v Connell* [1996] 1 VR 436, 444 ('*Connell*'). This case was concerned with a section applicable only to serious sex offences, but its rationale has since been applied to those parts applying to all serious offences. See, eg, *R v Natoli* [2001] VSCA 243, [9]; *R v Barca* [2007] VSCA 167, [29].

[415] *Connell* 442–43. See also *R v Taylor* (2004) 8 VR 213, 226-27; *Diver v The Queen* [2010] VSCA 254, [33]-[34].

[416] The Act s 18B.

is similarly confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.[417]

The proportionality principle applies to all aspects of sentencing, including the total effective sentence,[418] parity,[419] mitigation,[420] aggregation,[421] cumulation,[422] and the fixing of a non-parole period[423] or suspended sentence.[424]

Artificially inadequate sentences should not be imposed to accommodate the mandates of cumulation.[425] 'Appropriate and proportionate sentences' should be imposed on each individual count when there are multiple charges in the indictment.

Lastly, sentencing is not a stepped process that first requires a court to set a term proportionate to the crime. There is no justification for that approach, and it will produce inadequate sentences and injustice. Deciding what sentence is proportionate is a matter of discretion and in most cases a range of proportionate sentences is open. There is no single proportionate sentence and an attempt to fix one before fixing the sentence to be imposed will only multiply the possibilities of error.[426]

3.2 – Parsimony

The principle of parsimony holds that a sentencing judge must satisfy themselves that no other sentence is appropriate before imposing a term of imprisonment.[427] It is a common law rule that requires the sentence be no more severe than is necessary to achieve the sentencing purposes.[428] Although often concerned with the type of sanction to be imposed, parsimony also applies to the length of the sanction.[429]

The principle is also enshrined in s 5(3) of the Act[430] and is expanded upon by ss 5(4)–(7) which 'constrain[] the discretion of sentencing courts to impose particular sanctions where another sanction would be of sufficient severity, th[us] creat[ing] a loose hierarchy of sentencing options'.[431] This hierarchy does not mean there is a single less severe sentence that must be imposed.[432] In general, it means only that a sentence of imprisonment cannot be imposed unless the purposes for which the sentence is imposed cannot be achieved by any other sentence. A sentence of imprisonment also may not be imposed

[417] *R v Carr* (1996) 1 VR 585, 590; *Moffatt* 230, 255–56.
[418] *DPP (Cth) v Haidari* (2013) 230 A Crim R 134, 145 [45]; *Sergi v DPP (Cth)* [2015] VSCA 181, [55].
[419] *R v Galea* [2001] VSCA 115, [16].
[420] *KHB* [58] (Eames JA).
[421] *Azzopardi* 62 [66].
[422] *Jones13*. See also *DPP (Vic) v West (a pseudonym)* [2017] VSCA 20, [46]-[47] ('*West*').
[423] *Hoare*.
[424] *Groom* 169 [38].
[425] *Jones13* 288 [90]. See also *West* [46]-[47].
[426] *Young* 959–61. See also *Markarian* 232–33 [68]-[70]; *DPP (Cth) v Estrada* (2015) 45 VR 286; *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 448–49 [63]-[65].
[427] *R v O'Connor* [1987] VR 496, 501 ('*O'Connor87*').
[428] *R v Piacentino* (2007) 15 VR 501, 511 [47] ('*Piacentino*').
[429] See, eg, *Greatorex v The Queen* [2016] VSCA 136; *Tannous v The Queen* [2017] VSCA 91, [41].
[430] *Piacentino* 511 [47]. See also *Bell v The Queen* (2016) 77 MVR 336, 345 [47] ('*Bell')*.
[431] *Bell* 345 [47].
[432] Ibid 345 [48].

where a drug treatment order or conditional Community Corrections Order ('CCO') will serve the sentencing purposes. Further, a drug treatment order cannot be imposed where a CCO will suffice, a CCO must not be imposed where a fine will do, and a fine cannot be imposed if a dismissal, discharge or adjournment is sufficient.[433]

The court is not required to give reasons for rejecting a non-custodial term, nor must it specifically note its consideration of the parsimony principle as this may be evident from the whole of its reasons or the sentence itself.[434]

The principle of parsimony also applies to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39. A finding that there would be little practical difference between a non-custodial supervision order and no order, in terms of the person's freedom and autonomy, violates the principle of parsimony and cannot support a refusal to revoke a non-custodial order.[435]

The area where parsimony has been most recently evident is in the realm of CCOs.[436]

3.3 – Totality

3.3.1 – Purpose and approaches

'The totality principle is related to the proportionality principle'. [437]

The totality principle requires a court in sentencing an offender for multiple offences to ensure that the aggregate term it imposes is 'a just and appropriate measure of the total criminality involved'.[438] There must be appropriate relativity between the totality of all criminality and the totality of the effective length of the sentences.[439] When applied to sentences imposed by a single court, totality may be achieved either by making sentences concurrent – wholly or in part – or by imposing disproportionately low terms.[440]

But when sentencing for multiple offences, a court should not impose artificially inadequate sentences to accommodate cumulation. To fashion an appropriate total effective head term that satisfies the requirements of totality, it is preferable to impose appropriate individual terms, that satisfy all the sentencing objectives, and then make them wholly or partially concurrent, 'rather than by an order or

[433] Ibid 345 [47]; The Act ss 5(4)-(7).
[434] *O'Connor87* 501; *Piacentino* 511 [47].
[435] *Nom v DPP (Vic)* (2012) 38 VR 618, 640–42 [68]-[71].
[436] See 11.7.2 - Community correction order – Interaction with sentencing principles and purposes – Parsimony and 11.8.2 - Community correction order – Combining a CCO with a term of imprisonment – Interaction with the parsimony principle.
[437] *R v Smoker* [2016] SASCFC 114, [74]. This is because by aggregating sentences, the court risks imposing a disproportionate term: at [70], [75].
[438] *Postiglione v The Queen* (1997) 145 ALR 408, 416–17, 442–43 ('*Postiglione*'). See also *Mill v The Queen* (1988) 83 ALR 1, 3 (citation omitted) ('*MillHCA*'); *R v Mangelen* (2009) 23 VR 692, 697 [28] ('*Mangelen*'); *Azzopardi* 59 [57], 63 [69]; *Berry v The Queen* [2019] VSCA 291, [24], [32].
[439] *Mangelen* 697 [28]; *Nguyen v The Queen* (2016) 331 ALR 30, 46 [64] ('*NguyenHCA*').
[440] *MillHCA* 3.

orders for the cumulation of unnecessarily reduced individual sentences'.[441] The individual sentences may not be inadequate, but they may be 'modest'.[442]

There are three reasons for the preferred approach. First, to ensure that each sentence appropriately reflects the criminality of each offence. Second, to ensure that if one or more sentence or conviction is set aside, that the remaining sentences will be appropriate and will allow a new total effective sentence and non-parole period to be calculated. And, third, to avoid artificial claims of disparity by co-offenders aggrieved by the inadequate individual sentences.[443]

It must be emphasised that this is a preferred approach, albeit a *strongly preferred* one that should be departed from only when a special feature of the case requires it.[444] Nonetheless, it is not mandatory and there is more than one approach to the totality principle.[445] So long as its approach is consistent and the sentence is in accordance with the relevant statutory regime, a court should be afforded great flexibility in sentencing.[446] The fact that from time to time a court may approach the task differently than the preferred approach does not demonstrate error, especially if the total effective sentence and the non-parole period are within range.[447]

To comply with the totality principle, the basic sentencing steps that a court should follow are:

1. Determine an appropriate term for each charge, taking the applicable sentencing considerations into account, and designate the highest term as the base sentence.[448]
2. Determine the extent to which there should be cumulation regarding each count.
3. Then 'stand back' and consider, in light of the totality principle, what is an appropriate total effective sentence.

If applying the first two steps produces a total effective sentence that infringes totality, the court should moderate the cumulation to ensure the total effective sentence complies.[449] Generally, the imposition of less severe individual sentences may call for greater cumulation to reflect total criminality where more severe individual sentences may require greater concurrency.[450]

Where it is not possible to follow the preferred approach, a court may follow the secondary 'moderate and cumulate' approach of imposing reduced individual terms and then cumulating a portion of each to produce an appropriate total effective sentence.[451] This may result in a head sentence that does not appropriately reflect the gravity of the offending, which is unfortunate but is to be preferred to the

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[441] *DPP (Vic) v Grabovac* [1998] 1 VR 664, 680, 683 ('*Grabovac*'). See also *MillHCA* 3; *R v Lomax* [1998] 1 VR 551, 563 ('*Lomax*'); *Azzopardi* 43, 61 [61], [63], 62–63 [65]–[68]; *DPP (Cth) v KMD* (2015) 254 A Crim R 244, 265 [90]–[91] ('*KMD*'); *West* [47]–[50]; *Vu v The Queen* [2020] VSCA 59, [54].
[442] *DPP (Vic) v Drake* [2019] VSCA 293, [18]-[21], [25].
[443] *Lomax* 564.
[444] See, eg, *KMD* 267 [96].
[445] *DPP (Vic) v Johnson* (2011) 35 VR 25, 39 [68] ('*Johnson11*'); *Azzopardi* 61–62 [64].
[446] *Grabovac* 683–84; *Johnson v The Queen* (2004) 205 ALR 346, 356 [26] ('*JohnsonHCA*'); *NguyenHCA* 40 [37], 46 [64].
[447] *Cay v The Queen* (2010) 29 VR 560, 569 [58] (Nettle JA).
[448] But see *Barbat v The Queen* [2014] VSCA 202, [49], [51], [72] ('*Barbat*').
[449] *DPP (Vic) v Marino* [2011] VSCA 133, [51].
[450] *NguyenHCA* 46 [64].
[451] *MillHCA* 3; *JohnsonHCA* 356 [26]; *KMD* 265 [90].

injustice of imposing a longer head sentence.[452]

It may be necessary to follow this approach in cases where the offender has previously served substantial periods of imprisonment and imposing conventional terms could result in a disproportionately long sentence. This might occur because the offender committed other offences before imprisonment that are only discovered later, because the offences took place in different jurisdictions, or because there were different victims.[453] It might also be necessary to follow this approach if the offender has committed multiple serious offences,[454] or where there are no exceptional circumstances and so concurrency is expressly precluded by s 16(3B) of the Act.[455] The need to follow the secondary approach in this instance arises because the legislative preclusion does not exclude operation of the totality principle.[456]

The totality principle applies when sentencing for offences that may overlap or be cumulated upon an existing custodial sentence.[457] It applies not only to multiple sentences imposed at the same time,[458] but to sentences imposed for offences committed on different occasions and in different States.[459] There is conflicting authority on whether such interstate offending must be close in time and of a similar kind,[460] so sentencing in such circumstances requires care.[461] The totality principle also applies to fixing of the head sentence and the non-parole period,[462] and it applies where the sentence currently being served derives from a breach of parole.[463]

The overall criminality is what must be assessed,[464] and in most circumstances a court must consider what sentence would have been just and proper if all offences had fallen for sentencing on the same occasion.[465] But in *Sayer v The Queen*,[466] the Court of Appeal considered the case of an offender who had committed three separate rapes during three separate burglaries over five months in 1984 when he was 17 years old. By time he was charged and sentenced for the first offence in 2015, he had long since served full sentences for the second and third offences. The Court said that to the extent totality applies in such a case, it does so distinctly and not by considering the sentence that would have been imposed had all offending fallen for sentencing on the same occasion.[467] Instead, the prior sentences and time spent in

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[452] *MillHCA* 6–7.
[453] *MillHCA*; *R v Izzard* (2003) 7 VR 480, 484–87 [20]-[23] ('*Izzard*'); *R v RLP* (2009) 213 A Crim R 461, 479 [49]; *Morgan v The Queen* (2013) 40 VR 32 ('*Morgan13*').
[454] *R v McIntosh* [2005] VSCA 106, [17] ('*McIntosh*').
[455] See 3.3.3 – Application to Parole below.
[456] *DPP (Vic) v Rongonui* (2007) 17 VR 571, 575–76 [15]-[19].
[457] *Postiglione* 417, 427–28, 441; *Morgan13* 48 [64].
[458] *Piacentino* 508 [35]-[37]; *KMD* 265 [89].
[459] *MillHCA* 4–7. See also *McIntosh (a pseudonym) v The Queen* [2018] VSCA 321; *Butler (a pseudonym) v The Queen* [2021] VSCA 129 ('*Butler*').
[460] See, eg, *Tsang v The Queen* (2011) 35 VR 240, 278 [177] ('*Tsang*'); *Morgan13* 48 [65].
[461] *Morgan13* 56 [106]-[107].
[462] *Mangelen* 697 [28].
[463] *R v Sullivan* [2005] VSCA 286, [20]; *Edwards v The Queen* [2011] VSCA 87, [46] ('*Edwards11*').
[464] *Postiglione* 416-17; *McIntosh* [17]; *Roberts v The Queen* (2012) 226 A Crim R 452, 475 [95] ('*Roberts*'); *McCartney v The Queen* (2012) 38 VR 1, 20 [92] ('*McCartney*').
[465] *Mangelen* 697 [28]. See also *MillHCA* 4–7; *Postiglione* 417; *Scott v The Queen* [2010] VSCA 320, [13]; *Butler* [46].
[466] [2018] VSCA 177 ('*Sayer*').
[467] Ibid [71]. But see *Mendoza-Cortez v The Queen* [2016] VSCA 302.

custody simply remain part of an offender's circumstances that must be considered to comply with the principle of totality.[468]

3.3.2 – Legislative interaction

3.3.2.1 – Victoria

The totality principle interacts with State legislation in two ways beyond those discussed below in the parole context.

First, as noted,[469] s 6D of the Act provides that in sentencing a serious offender the Supreme or County Court may impose a disproportionate sentence if it considers it necessary to protect the community. The Court of Appeal has held that this section has substantially the same impact on totality as it does on proportionality because the sentencing court will have to be satisfied that the offender 'will remain a danger to the community beyond the period that totality would permit'.[470]

Second, unless the court orders otherwise, s 6E of the Act makes cumulation the presumptive order for sentences imposed on serious offenders for serious offences. The High Court has said, with respect to the predecessor provision of s 6E, that the legislation gives effect to a policy that serious offenders are to be treated differently, and that if its operation were subject to the full effect of the totality principle its object would be compromised and defeated in most cases. Therefore, a court needs to be careful not to undermine that legislative policy by applying the totality principle as if the legislation did not exist.[471] Specifically, '[i]t would be wrong to 'direct otherwise' simply in order to achieve what totality might have required in the absence of s 6E'.[472] There is limited guidance for the courts on how to resolve this tension between s 6E and the principle of totality, but as the objective gravity of the total offending increases, so might the degree of cumulation.[473] This will produce a total effective sentence that respects both the legislation and the principle,[474] or, as with s 16(3B), the secondary approach of moderating individual sentences may be employed to give effect to the legislative intent while imposing a sentence that complies with the requirements of totality.[475]

3.3.2.2 – Commonwealth

In State sentencing the primary manner for effecting the totality principle is by tailoring orders for concurrency and cumulation. In Commonwealth sentencing this is accomplished by imposing different commencement dates.[476]

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[468] *Sayer* [78].
[469] See 3.1 Proportionality above.
[470] *Connell* 444.
[471] *RHMcL v The Queen* (2000) 174 ALR 1, 20 [76]. See also *Edwards11* [46]. But see *DPP (Vic) v VH* (2004) 10 VR 234, 237 [10].
[472] *Barbat* [32].
[473] See, eg, *Mush v The Queen* [2019] VSCA 307, [88]-[91]. See also *DPP (Vic) v Hum (a pseudonym)* [2022] VSCA 57, [133]-[138].
[474] *DPP (Vic) v Hopson (a pseudonym)* [2016] VSCA 303, [48]-[51]. See also *Gordon (a pseudonym) v The Queen* [2013] VSCA 343, [74] (Redlich JA).
[475] *Barbat* [33]-[34]. See also *Zhao v The Queen* [2018] VSCA 267, [91]-[94].
[476] *Crimes Act 1914* (Cth) s 19 ('*Cth Crimes Act*').

The *Crimes Act 1914* (Cth) s 16B ('*Cth Crimes Act*') also implicitly recognises the totality principle by providing that a sentencing court 'must' consider any sentence already imposed on a person that they have not served and any sentence they are liable to serve because of a revocation of parole.

However, unlike Victoria, the Commonwealth legislation does not provide any guidance on whether a sentence is to be served concurrently or cumulatively and so this is guided by the common law.

3.3.3 – Application to parole

Totality concerns are important when sentencing an offender for crimes committed while on parole.[477] This is because the Act partially limits the principle's application.[478] Specifically, s 5(2AA) prohibits a sentencing court from considering the possibility or likelihood that the length of time spent in custody 'will be affected by executive action of any kind'. In other words, a sentencing court should not consider whether the offender might be granted parole at the expiration of the non-parole period, either in Victoria or in another jurisdiction.[479]

But it has been held that this creates an anomalous situation because by its use of the prospective language – *'will be*' – s 5(2AA) precludes application of the totality principle only if parole has not been revoked at the time of sentencing. If parole has already been revoked by that date, a court is not precluded from applying the principle.[480]

Further informing this limitation are the automatic cancellation provisions of the *Corrections Act 1986* (Vic). Section 77(6) of which provides that when a person commits a sexual offence, a serious violent offence, a terrorism offence, or a foreign incursion offence while on parole for an earlier such offence, the earlier parole is taken to have been cancelled 'on conviction'. Similarly, s 77(7A) provides that if a prisoner is sentenced to another prison sentence for an offence committed on parole, whether in Victoria or elsewhere, the parole is taken to have been cancelled at the time of sentencing for the subsequent offence. These provisions do not require speculation about future executive action, cancellation is a fait accompli and so the 'whole sentence' an offender must serve as the result of their parole cancellation may be considered.[481] The parole revocation provisions of the *Cth Crimes Act* have the same effect.[482]

What comprises a 'whole sentence' was the subject of conflicting authority. In a long line of cases, the Court of Appeal held this meant that only the additional period the offender is required to serve as the result of their parole being cancelled must be considered.[483] But in *Koumis v The Queen*[484] the Court held the entire period imposed for prior offending, i.e., the period served before release on parole and the balance to be served following cancellation of parole, should be considered when sentencing for subsequent offending.[485] That minority view was affirmed in *DPP (Vic) v Bowen* where a full bench of five

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[477] *R v Hunter* (2006) 14 VR 336, 339 [14], 341 [31] ('*Hunter*'); *Piacentino* 503–04 [9].
[478] *Piacentino* 502 [2], 506–07 [28].
[479] *Morgan13* 57 [117].
[480] *Piacentino* 502 [3], 506–07 [28], 515 [65], 516 [71], 517 [73]-[74], 519–20 [85]-[88], 529 [141]-[144]. See also *Hunter* 341 [28]-[29]; *R v Alashkar* (2007) 17 VR 65, 66 [2] ('*Alashkar*'); *Mangelen* 694 [6].
[481] *Alashkar* 69 [10].
[482] *Piacentino* 523 [105]-[108].
[483] See, eg, *R v Mourad* [2008] VSCA 4, [13]–[16]; *Mangelen* 697–99 [30]–[32]; *DPP (Vic) v Dickson* (2011) 32 VR 625, 626 [2] ('*Dickson*'); *McCartney* 21–22 [99]–[100]; *Waugh v The Queen* (2013) 38 VR 66, 74 [26], 75 [33] ('*Waugh*').
[484] (2013) 44 VR 193.
[485] Ibid 199–200 [25]-[27] (Kaye and Lasry AJJA).

judges said that when a breach of parole is involved, totality requires the court to consider two sentences: the one to be imposed for the breach, and the original sentence imposed for the prior offending. The sentencing court must be satisfied that the combined effect of the two is not 'disproportionate to the aggregated criminality involved in the breach offending and the prior offending'. In doing so, it is the entire period of time served that should be considered.[486]

Section 16(3B) of the Act further directs that absent a finding of exceptional circumstances, every sentence imposed for offending committed while on parole must be served cumulatively on any period an offender must serve as the result of their parole having been cancelled.[487] The obvious intention behind this section is that in cases where an offender has committed a crime while on parole they will normally first be required to serve the balance of the earlier term.[488] A court must give effect to this intention and must not apply the principle of totality to the extent that it is inconsistent.[489]

Absent exceptional circumstances, there must be cumulation with respect to offences committed while on parole, but 'viewed as a whole' the aggregate terms also cannot be greater than what is needed to fulfil the totality principle and the sentencing purposes. As the Court of Appeal explained in *R v Hunter*, '[t]here must be relativity between the totality of the criminality and the totality of sentences, not only for the offences for which the person is being sentenced, but for the sentence which the person is currently serving'.[490] The sentencing court must be satisfied that neither the head sentence nor the non-parole period fixed for the later offences is disproportionate to the total criminality represented by both the later offences and the original offences. 'Beyond that, however, the parole sentence has no role to play in the sentencing for the later offences'.[491]

What constitutes 'exceptional circumstances' for the purposes of s 16(3B) is a 'relative and protean' concept that requires 'a determination of fact and degree on the basis of the facts and circumstances of the case in issue'.[492] The Court of Appeal has found that where an offender re-offends while on parole for a life sentence this is an exceptional circumstance and warrants the imposition of a concurrent term.[493] But this does not preclude cumulation between later offences if the total effective sentence for them is ordered to be served concurrently with the cancelled parole sentence.[494] The court must fix appropriate sentences to reflect the criminality of the parole offending and the totality principle has limited operation in relation to the existing sentence of life imprisonment.[495]

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[486] *DPP (Vic) v Bowen* [2021] VSCA 355, [5]-[8], [26]-[27], [42], [45]. Previous judgments in *McCartney* and *Waugh* to the contrary were expressly disapproved.
[487] Further every sentence imposed for breaching a condition of parole must, again absent exceptional circumstances, be imposed cumulatively on any period required to be served for cancellation and for any offending committed while on parole. See the Act s 16(3BA).
[488] *Alashkar* 75 [40].
[489] *Johnson11* 39 [67]-[68]. See also *Mangelen* 699 [35].
[490] *Hunter* 341 [30]. See also *McCartney* 21 [96].
[491] *Dickson* 640 [52]; *Waugh* 75 [33].
[492] *Singh v The Queen* [2011] VSCA 333, [23].
[493] *Roberts* 474 [89].
[494] Ibid 476–77 [98]-[100].
[495] Ibid 478 [104]-[105].

Note that unlike cases where parole has been cancelled prior to sentencing for the offences committed on parole, where parole has not been cancelled at the time of sentencing, the court may not make an order pursuant to s 16(3B) for cumulation or concurrency without breaching s 5(2AA).[496]

Lastly, to say that totality is significant when parole is cancelled and in aggregating a term for the later offending is not to say that the principle becomes controlling, and it is wrong to assume the offender being ordered to serve further time in custody will offend totality.[497]

3.3.4 – Interaction with the other principles

'[W]here the totality principle is relevant in the sentencing process and the application of that principle requires different sentences for each offender, no breach of the parity principle occurs'.[498]

Disparity in sentences between co-offenders will not give rise to a justifiable sense of grievance where it can be explained by differences in their criminal histories 'and/or an application of the totality principle'.[499]

A crushing sentence is not one that inherently offends the principle of totality. They are not the same and a sentence may offend totality without being crushing.[500]

3.3.5 – Challenges in application

Problems with the application of totality arise when shortcuts are adopted to give effect to the principle.[501] For example: fixing a single term of imprisonment to be served for Commonwealth offences before the commencement of a term for State offences, carries an appreciable risk that the sentence will not adequately reflect the totality of the offending on the Commonwealth charges.[502] This approach is a problematic 'short cut'.[503]

But determining whether the principle of totality has been offended is often – like manifest excess – a matter of impression,[504] which follows since complaints about totality are subsumed within complaints about manifest excess or inadequacy.[505]

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[496] *Alashkar* 70–71 [14]-[17].
[497] *Mangelen* 698 [32]. See also *Alashkar* 75 [39]-[40]; *Dickson* 632 [22].
[498] *Postiglione* 415.
[499] Ibid 421–22. See also *Chatters v The Queen* [2019] VSCA 309, [23].
[500] *Azzopardi* 63 [69]. But see *Mohamed v The Queen* [2022] VSCA 136, [77] (stating that the need to avoid a crushing sentence is 'a very significant part of the totality analysis'), quoting *DPP (Vic) v Alsop* [2010] VSCA 325, [30] (indicating that the need to avoid a crushing sentence is the second limb of the totality principle).
[501] *Grabovac* 676.
[502] *DPP (Cth) v Watson* (2016) 259 A Crim R 327, 352 [71].
[503] Ibid 353 [73].
[504] *R v Aleksov* [2003] VSCA 44, [17]; *Azzopardi* 60 [58].
[505] *Piacentino* 511 [48]; *Johnson11* 31 [31], 38 [58].

3.4 – Double punishment

The rule against double punishment derives from both legislation[506] and the common law.[507] The rule states that a person must not be punished twice for the same criminal conduct. Specifically, to the extent two offences contain common elements, it is wrong to punish an offender 'twice for commission of the elements that are common'.[508] The punishment should reflect only what the offender has done, not the way the legislative boundaries of crimes have been drawn. The boundaries of different offences often overlap and punishing someone twice for conduct that falls within the overlapping area does not punish only for what the person deserves.[509] It is permissible to *prosecute* a person for acts or omissions that may constitute more than one offence, but it is not permissible to *punish* them 'more than once for the same act or omission'.[510]

Identifying a single act as common to two offences can be difficult. The enquiry must be approached as a matter of common sense, not as a matter of semantics.[511] If the elements of one offence are wholly subsumed within another, then an offender should not be sentenced for the subsumed offence,[512] not even if the sentence is made entirely concurrent with the primary sentence.[513]

But where a single act reflects separate harms, particularly separate harms against different people, each may be punished separately, even when linked by time and place.[514] An appropriate measure of cumulation may also be called for where a single action constitutes two distinct harms.[515] The test is whether in the process of arriving at sentences for overlapping offending, a court includes in one sentence an element of punishment that is also included in the other.[516]

'Where there are no elements or factual matters common to two or more of the counts no question of double punishment will arise'.[517]

The risk of double punishment is not likely to arise when an aggregate sentence is imposed because in doing so a court is considering the offender's whole conduct and there is no overlapping criminality.[518]

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[506] See, eg, *Interpretation of Legislation Act 1984* (Vic) s 51 ('*Interpretation Act*'); *Cth Crimes Act* s 4C.
[507] *R v Stamenkovic* [2009] VSCA 185.
[508] *Pearce v The Queen* (1998) 194 CLR 610, 623 [40] ('*Pearce*').
[509] Ibid. See also *R v Langdon* (2004) 11 VR 18, 34 [91] ('*Langdon*').
[510] *Interpretation Act* s 51(1); *Cth Crimes Act* s 4C(1). See also *R v Sessions* (1998) 2 VR 304, 310–15 ('*Sessions*'); *Beqiri v The Queen* (2013) 37 VR 219 ('*Beqiri*'). Prosecution of an accused in these circumstances is beyond the scope of this manual and is not discussed further. The focus here is on what the Court of Appeal has called 'Rule 3'. See *Lecornu v The Queen* (2012) 36 VR 382, 386 [12] ('*Lecornu*').
[511] *Pearce* 623 [42]; *Langdon* 34 [93], 35 [97]; *Beqiri* 229 [56].
[512] *Pearce* ; *Sessions*; *Lecornu*.
[513] *Pearce* 623–24 [44]-[50], 629–30 [69]-[70].
[514] *R v Bekhazi* (2001) 3 VR 321, 326 [8], 332 [20]-[21]. See also *Sutic v The Queen* [2018] VSCA 246, [78] ('*Sutic*').
[515] *Phillips v The Queen* [2017] VSCA 313 ('*Phillips17*').
[516] *Nguyen v The Queen* [2012] VSCA 297, [41] ('*Nguyen No 2*').
[517] *R v Orgill* [2007] VSCA 236, [14].
[518] *Saxon v The Queen* [2014] VSCA 296, [34]-[36].

The double punishment principle has been applied in varied circumstances with varied outcomes for which it is hard to formulate firm guidelines. This area of sentencing law is complex and ambiguous.[519]

3.4.1 – Sex offences

The Court of Appeal has held that where precisely the same action – digital penetration – forms the bases of two offences, rape and recklessly cause serious injury, the *Interpretation of Legislation Act 1984* (Vic) s 51 ('*Interpretation Act*') prohibits punishing the offender for both offences.[520] But it has also held that rapes involving two separate penetrations were effectively part of a single continuing transaction that called for substantial concurrency.[521] Similarly, a sentence of four years' and six months' imprisonment for an offence of abduction with the intent to take part in an act of sexual penetration, of which two years and six months was cumulated on an 11-year term imposed for rape, was held to doubly punish the accused. Some cumulation was considered appropriate, but the sentence 'was so high as to be explicable only on the basis that the sentencing judge must have been influenced, when assessing the gravity of the abduction, by what the abduction led to, namely, the rape itself'.[522]

However, cumulating sentences for breaches of an interim extended supervision order and an extended supervision order upon sentences for the sexual offences that comprise the acts constituting the breaches does not doubly punish the offender because failing to comply with the supervision orders involves the added criminality of failing to comply with orders of the court.[523]

3.4.2 – Harm to/Endangering the person

Decisions often focus on the actus reus of the offending. For example, where offending has a single actus reus, such as the firing of a pistol, it would doubly punish an offender to sentence them for reckless conduct placing another in danger of serious injury, recklessly causing injury, and being a prohibited person using an unregistered firearm.[524] Similarly, if conduct supporting a count of reckless conduct endangering life is the same conduct that supports a count of intentionally causing injury to the same person, it constitutes double punishment to sentence for both.[525]

3.4.3 – Drugs

It is double punishment to sentence an offender for possession of drugs and for possessing the same drugs for trafficking.[526] Approaching it from a common-sense perspective, a count of trafficking is essentially an aggravated form of the offence of possession; thus counts of possessing a traffickable quantity and a commercial quantity merely charge an offender with possession simpliciter of some

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[519] Fox & Frieberg 216.
[520] *Sessions* 310–14.
[521] *Mulligan (a pseudonym) v The Queen* [2017] VSCA 94, [131].
[522] *El-Waly v The Queen* (2012) 46 VR 656, [90]. See also *Price v The Queen (No 2)* [2019] VSCA 44, [64]-[68].
[523] *Loader v The Queen* (2011) 33 VR 86, 96-97 [51]-[54]. See also *Lecornu* 399 [68]-[70].
[524] *R v Le* [2009] VSCA 247, [8]-[9]. But see *Phillips17* [43]-[44] where the Court said the nearly identical single action, firing a shotgun, may breach the legal obligations imposed by two distinct offences – recklessly causing injury and reckless conduct engendering serious injury – and so call for an appropriate measure of cumulation. See also *BBA v The Queen* [2010] VSCA 174, [38] (holding that arson and recklessly cause serious injury do not necessarily involve the same *actus reus* and so some cumulation may be appropriate).
[525] *Bradley v The Queen* [2010] VSCA 70, [13].
[526] *Langdon* 35 [97], 39 [117].

quantity of the drug they are charged with trafficking. These are essentially the same criminal acts for which an offender cannot be doubly punished.[527] Similarly, it is double punishment to sentence for possession of cannabis and cultivating a commercial quantity of cannabis where the possessed cannabis was harvested from that which was cultivated.[528] But although the theft of electricity may be an important part of the enterprise of cultivating commercial quantities of cannabis, it is different and adds to the cultivation offence by concealing it and making it more profitable. Therefore, some period of cumulation is appropriate.[529]

Possession of a precursor chemical is also different in character from possessing substances, materials or equipment for trafficking because the legal elements are different, and the latter offending requires a specific intent that the former does not.[530] Nonetheless, if it is possible for a jury to reason 'that the act constituting possession of the precursor chemical in no less than the prescribed quantity was subsumed within the charge of possession of a substance with the intent of using it to traffick in a drug of dependence', then a court may order concurrency between the terms to avoid double punishment.[531]

Lastly, an offence of conspiracy to import a marketable quantity of a border-controlled drug, with an admission that at least one overt, but unidentified, act has been committed pursuant to the conspiracy, is not the same as attempting to possess a marketable quantity of an unlawfully imported border-controlled drug. The latter 'involve[s] an attempt to capitalise on the importation. Both involved separate acts of criminality'.[532]

3.4.4 – Driving offences

Driving offences often raise a risk of double punishment, particularly if summary offences are charged. Fines imposed for the summary offences of driving under the influence and speeding, which are cumulative on sentences for negligently causing serious injury, may doubly punish an offender if there is overlap between the criminal conduct that underlies the convictions.[533]

Cumulating a sentence for the summary offence of driving with more than the prescribed concentration of alcohol in the blood on a sentence for culpable driving also doubly punishes an offender as the level of alcohol in the blood is an element of both offences.[534] But a sentence imposed for the summary offence of driving while exceeding the prescribed concentration of alcohol does not doubly punish an offender cumulatively sentenced for reckless or dangerous driving causing serious injury. This is because the

[527] *R v Tan* [2005] VSCA 54, [10]. See also *R v Bidmade* [2009] VSCA 90, [24]-[27]; *R v Doherty* [2009] VSCA 93, [23].
[528] *Grixti v The Queen* [2011] VSCA 220, [9]-[14]. See also *Dang v The Queen* [2014] VSCA 49 which held that two *Giretti* charges of trafficking in methylaphetamine and heroin resulting from a single business of selling drugs have commonalities that are not distinguished by the different narcotics trafficked. But see *Nguyen v The Queen* [2011] VSCA 139, [15] where, although the accused similarly trafficked two separate drugs, ecstasy and cocaine, the Court said that sentencing for both is not double punishment despite the two being combined in one tablet.
[529] *Nguyen v The Queen* [2013] VSCA 63, [30].
[530] *Lipp v The Queen* [2013] VSCA 384, [29]-[30], [37].
[531] Ibid [38].
[532] *Nguyen No 2* [41].
[533] *R v Healey* [2008] VSCA 132, [28]-[32]. See also *Shields v The Queen* [2011] VSCA 386, [11]-[12].
[534] *R v Audino* [2007] VSCA 318, [17]-[19].

summary offence occurs as soon as the driver takes charge of their car and it is not an element of reckless or dangerous driving.[535]

In cases of culpable driving involving multiple deaths or serious injury from a single source of conduct, a court needs to recognise the separate harm caused to different victims and to avoid treating any of them as a 'meaningless statistic'. Therefore, it is not double punishment to cumulate sentences in such cases.[536]

However, failing to stop after an accident causing serious injury and failing to render assistance after an accident cover 'essentially the same conduct'.[537]

3.4.5 – Property damage

A sentence for damaging property during a riot imposed cumulatively on the sentence for riot constitutes double punishment.[538]

Where the prosecution contends that the facts underlying a charge of possessing an item with the intention of using it to damage property also partly underlie a charge of intentionally damaging premises by fire with the intent to endanger life, it would be artificial to justify punishment on both charges.[539]

3.4.6 – Theft/Fraud

Continuing transactions and combined events are prominent features of dishonesty offences.

Separating the bases of punishment in cases where several offences are committed within a single incident is complicated where one of the offences is aggravated burglary, and care must be taken in sentencing for that crime to ensure an accused is not doubly punished. This is because an aggravated burglary is complete upon entry, and the sentence for it cannot punish for any of the events which follow that point[540] unless they are the subject of a separate charge.[541] But this does not mean that events occurring after entry are irrelevant to the sentencing process; their effect on the sentence depends on the circumstances.[542]

Property offences involving weapons also pose challenges for the principle of double punishment. The court must be careful not to doubly punish the offender for both possessing a weapon at the time of entry and then using that weapon when committing offences within the premises.[543]

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[535] *Wilson v The Queen* [2012] VSCA 141, [10]-[24]; *Sutic* [82]-[89].
[536] *R v Towle* (2009) 54 MVR 543, 572 [98]. See also *R v Balassis* [2009] VSC 127, [84]; *DPP (Vic) v Hill* (2012) 223 A Crim R 285, 299–300 [53].
[537] *Grewal v The Queen* [2011] VSCA 331, [43].
[538] *R v Sari* [2008] VSCA 137, [56]-[59], [61].
[539] *Maher v The Queen* [2011] VSCA 136, [18]-[19], [36]-[38].
[540] *DPP (Vic) v Meyers* (2014) 44 VR 486, 503 [70]-[71]; *DPP (Vic) v Barnes* [2015] VSCA 293, [45] ('*Barnes*'); *Salapura v The Queen* [2018] VSCA 255, [57] ('*Salapura*').
[541] *Salapura* [58].
[542] *R v Ashdown* [2003] VSCA 216, [12]-[13]; *Salapura* [57].
[543] *Salapura* [65].

Similarly, sentences for burglary and theft committed at the same time, in the same place, and with the same end in mind should be made concurrent; they are part and parcel of the same transaction, and burglary is the precursor to the theft.[544]

Multiple counts of using false documents for fraudulent purposes may not be separate transactions, even if they occurred over different days. The use of the documents might be the actus reus of each count and make cumulation of the sentences an error.[545] Similarly, attempting to obtain financial advantage by deception and dealing with the proceeds of crime are different offences with separate and distinct elements, but there may be considerable overlap if the dealing with proceeds charge involves using them to conceal the earlier attempts.[546]

3.4.7 – Weapons offences

When an offender is sentenced for offending that is aggravated by using a firearm and for being a prohibited person in possession of an unregistered firearm, the sentence for the possession charge cannot include any penalty for the use or possession of the weapon in the first offending without moderating the sentences to account for double punishment.[547]

Where the accused is charged with both an offence involving the use or possession of a weapon, and unlawful possession of the weapon, the court will need to take care to avoid double punishment. In Victoria, offences that involve use of a weapon include:

- causing serious injury intentionally in circumstances of gross violence;[548]
- causing serious injury recklessly in circumstances of gross violence;[549]
- using a firearm to resist arrest;[550]
- being armed with criminal intent;[551]
- armed robbery;[552]
- aggravated burglary;[553]
- home invasion;[554]
- aggravated home invasion;[555]

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[544] *Andrick v The Queen* [2010] VSCA 238, [36].
[545] *Jackson v The Queen* [2010] VSCA 179, [21].
[546] *Jackson v The Queen* [2011] VSCA 338, [31]-[32], [36]-[40].
[547] *Berichon v The Queen* (2013) 40 VR 490, 496-97 [27]-[30], 511-13 [129]-[142]. See also *Armistead v The Queen* [2011] VSCA 84, [11]–[12] (‘*Armistead*’); *Kruzenga v The Queen* [2014] VSCA 10, [12]–[21] (‘*Kruzenga*’); *Saner v The Queen* [2014] VSCA 134, [118]–[123]; *Murrell v The Queen* [2014] VSCA 337, [28]–[31]. But see *Robinson v The Queen* [2017] VSCA 304, [27]-[35] (‘*Robinson*’) where the Court said that a degree of cumulation reflecting the different criminal culpability associated with being a prohibited person possessing a firearm and possessing a firearm as an element of the offence of aggravated burglary is permissible and does not doubly punish the offender.
[548] *Crimes Act* s 15A(2)(d).
[549] Ibid s 15B(2)(d).
[550] Ibid s 29(1).
[551] Ibid s 31B(2).
[552] Ibid s 75A(1).
[553] Ibid s 77(1)(a).
[554] Ibid s 77A(1)(c)(i).
[555] Ibid s 77B(1)(c)(i).

- aggravated carjacking;[556] and
- dangerous goods on an aircraft.[557]

Similarly, if the offending was committed while the accused carried a firearm,[558] that is a separate offence which may be both punished itself and considered as aggravating the principle offence, so long as it is separately charged, and the sentence imposed does not double punish the accused, whether via cumulation or otherwise.[559]

3.5 – Avoidance of a crushing sentence

A court should not impose a 'crushing sentence' unless there are special circumstances.[560] A 'crushing sentence' is so long that it might provoke a feeling of helplessness in the offender (if and) when they're released or destroy any reasonable expectation they have for a useful life after release.[561]

It is wrong, however, to determine a minimum sentence by the need to ensure 'some measure of life after release'. This approach may lead to an impermissible disregard of the circumstances and the other sentencing factors.[562] Obviously, the imposition of a 'crushing' term is of greater concern to older offenders, since their age and a lengthy term of imprisonment increases the likelihood of their having little useful life left upon release. However, while age (advanced or youthful) is a factor to be considered, and may even be a significant factor, it cannot support the imposition of an inappropriate sentence.[563]

Nor does the extreme length of a sentence by itself justify the label of 'crushing'. 'A richly deserved sentence…is not to be disturbed because the offender may feel crushed by it'.[564] There are no 'hard and fast rules' for deciding when the totality of the sentences is crushing. That depends on the facts but is informed by the nature and circumstances of all the offending.[565]

'Special circumstances' may include crimes that arouse deep public revulsion or disquiet, crimes committed by a persistent and unrepentant offender, or by an offender who has committed multiple crimes of considerable gravity.[566] In other words, there will be cases where an offender has, by their criminal act(s), forfeited the right to expect they will be released from confinement with a useful period of

[556] Ibid s 79A(1)(a).
[557] Ibid s 246D.
[558] Ibid s 31A(1).
[559] *Hudson v The Queen* (2010) 30 VR 610, 624 [54]; *Armistead* [10]-[11]; *Lecornu* 385-86 [9]-[10], 399 [68]-[69]; *Kruzenga* [15]-[21]; *Rich v The Queen* (2014) 43 VR 558, 658 [478]-[480]; *Robinson* [57]-[62], quoting *R v De Simoni* (1981) 147 CLR 383, 389; *Acciarito v The Queen* [2019] VSCA 264, [61].
[560] *R v Zakaria* (1984) 12 A Crim R 386, 388 ('*Zakaria*').
[561] *R v Kerbatieh* (2005) 155 A Crim R 367, 395 [125] ('*Kerbatieh*').
[562] *Vaitos v The Queen* (1981) 4 A Crim R 238, 257 ('*Vaitos*'). See also *Bazley v The Queen* (1993) 65 A Crim R 154, 159 ('*Bazley*').
[563] *Bazley* 158. See also *R v Whyte* (2004) 7 VR 397, 405–06 [29] ('*Whyte*'); *R v Cumberbatch* (2004) 8 VR 9, 13 [12] ('*Cumberbatch*'); *Kerbatieh* 395 [125]; *Barbaro v The Queen* (2012) 226 A Crim R 354, 369–71 [50]–[61] ('*BarbaroVIC*'); *Gill v The Queen* [2019] VSCA 92, [89]-[90].
[564] *R v Zaydan* [2004] VSCA 245, [96].
[565] *R v Beck* [2005] VSCA 11, [19].
[566] *Zakaria* 388.

their lifetime left to enjoy.[567] The need to protect the community is also a significant consideration and may similarly justify a sentence that an offender might view as crushing.[568]

3.6 – Parity

Parity is recognised by statute[569] and the common law. Its purpose is to ensure consistency in punishment.[570] It is an aspect of equal justice which, traditionally put, requires that like be treated alike.[571] But this does not mean 'that sentences must strictly compare' or that co-offenders must receive the same sentence for the same offence.[572] As the Court of Appeal put it in *Ah-Kau v The Queen*, 'ultimately, it is an evaluation based on impression'.[573] The concept is simply that when two or more co-offenders are sentenced, any significant difference in the sentences imposed upon them should be capable of a rational explanation.[574]

The court must assess the individuals and the circumstances. Their ages, backgrounds, criminal history, health, characters, and roles played in the offending are all relevant and may justify disparate sentences.[575] A comparative analysis of the culpability and circumstances of co-offenders is indispensable to application of the parity principle.[576] To facilitate that analysis the strong preference is for all co-offenders to be sentenced by the same judge at the same time,[577] and where this is not possible the judge imposing the later sentence should inform themselves of the sentence already imposed and its circumstances.[578]

If a substantial discount is given to one offender, parity requires that their sentence – even if regarded as manifestly too low – be considered in sentencing the co-offender and may also require some reduction in

[567] *Crowley v The Queen* (1991) 55 A Crim R 201, 205–06. See also *Whyte* 405–06 [29]; *Cumberbatch* 13 [12].
[568] *Vaitos* 301.
[569] The Act s 1(a).
[570] *Abdou v The Queen* [2015] VSCA 359, [62] ('*Abdou*').
[571] *Postiglione* 411, 413, 417–18, 439. See also *R v Huu* [1999] VSCA 40, [37] ('*Huu*'); *R v McConkey (No 2)* [2004] VSCA 26, [31] ('*McConkey*'); *R v Mercieca* [2004] VSCA 170, [17] ('*Mercieca*'); *Green v The Queen* (2011) 244 CLR 462, 472-73 [28] ('*GreenHCA*'); *Abdou* [62]; *Anthony v The Queen* [2016] VSCA 22, [12] ('*Anthony*'); *Yoannidis v The Queen* [2018] VSCA 109, [40]. The corollary of this is that unlike cases should be treated differently. See *R v Dinelli* [2010] VSCA 22, [13] ('*Dinelli*').
[572] *Lowe v The Queen* (1984) 154 CLR 606, 612 (Mason J), 623 (Dawson J) ('*Lowe*').
[573] *Ah-Kau v The Queen* [2018] VSCA 296, [51].
[574] *R v Tien* [1998] VSCA 6, [39]-[40]. See also *R v Waugh* [2009] VSCA 92, [17]; *Dawid v DPP (Cth)* [2013] VSCA 64, [43], [45] ('*Dawid*').
[575] See, eg, *R v Taudevin* (1996) 2 VR 402, 403 ('*Taudevin*'); *Postiglione* 411, 413, 422, 439; *Scerri v The Queen* (2010) 206 A Crim R 1; *Osman v The Queen* [2015] VSCA 308, [30]–[33]; *Perri v The Queen* [2016] VSCA 89, [24] ('*Perri*'); *DPP (Vic) v Bowden* [2016] VSCA 283, [53] ('*Bowden*'); *Robinson* [97]; *Rosales (a pseudonym) v The Queen* [2018] VSCA 130, [22]; *Mitchell v The Queen* [2018] VSCA 158, [46]–[53].
[576] *R v Hildebrandt* (2008) 187 A Crim R 42, 49 [49].
[577] *Lowe* 617; *Postiglione* 441 (Kirby J); *Mercieca* [5]-[6]; *R v D'Ortenzio* [1961] VR 432, 433; *R v Stirling* [2000] VSCA 8, [39] (Winneke P). But if this does not occur, an appellate court is not justified in interfering in the sentencing process on parity grounds. See *R v Rodden* [2005] VSCA 24, [28]-[29].
[578] *Lowe* 622.

that sentence.[579] But an excessively lenient sentence cannot justify the reduction of a co-offender's sentence to an inappropriately low level.[580]

The courts have found that disparate sentencing may be justified:

- between offenders who instigate the offending, recruit their co-offender, are a principal, or have a more preeminent role in the offending, and those who are an aider and abettor, subordinate, or recruit;[581]
- if one offender provides significant assistance to the police and prosecution.[582] Depending on the circumstances this may be so even if the non-cooperating offender was a subordinate in the criminal enterprise;[583]
- for an offender who pleads guilty at an early stage compared to a co-offender who pleads not guilty.[584] However, the willingness of one offender to plead guilty earlier than another co-offender, does not justify a 'marked' disparity in sentences between the two;[585]
- between adult and juvenile co-offenders. Parity has only a limited application to these offenders because they are sentenced under different systems where different principles apply.[586] Again, however, the sentence imposed on the youthful offender remains part of the background to be considered in sentencing the adult offender;[587]
- if an offender was armed, whether the weapon is loaded or not, and their co-offender was not;[588]

[579] *Sarvak v The Queen* [2011] VSCA 300, [43]. See also *Izzard* 484 [17]; *O'Loughlan v The Queen* [2010] VSCA 175, [31] ('*O'Loughlan*').
[580] *DPP (Cth) v Peng* [2014] VSCA 128, [36]-[38] ('*Peng*'). See also *Fletcher v The Queen* [2011] VSCA 4, [32], [38]; *Jacobs v The Queen* [2011] VSCA 238, [24]; *DPP (Cth) v Gregory* (2011) 34 VR 1, 12 [37]–[39] ('*Gregory*'); *Dawid* [45]; *Taleb v The Queen* (2014) 42 VR 666, 674–79 [39]–[52]; *Topal v The Queen* [2019] VSCA 289, [28], [54].
[581] See, eg, *R v Sibic* (2006) 168 A Crim R 305, 316–17 [33]–[34] ('*Sibic*'); *Mokbel v The Queen* [2011] VSCA 106, [58]–[60] ('*Mokbel*'); *Marku v The Queen* [2012] VSCA 51, [48]–[49] ('*Marku*'); *Dawid* [46]; *Belhaj v The Queen* [2013] VSCA 67, [24]; *Shahbazi v The Queen* [2016] VSCA 270; *Kada v The Queen* [2017] VSCA 339, [107]–[119]; *Lim v The Queen* [2018] VSCA 64, [19]–[29]; *Apineru v The Queen* [2018] VSCA 206, [32]; *Salapura* [75]; *Sikoulabout v The Queen* [2018] VSCA 268, [87]–[89] ('*Sikoulabout*'); *Shakhanov v The Queen* [2019] VSCA 38 ('*Shakhanov*'); *Zaia v The Queen* [2020] VSCA 9, [94] ('*Zaia*').
[582] *Postiglione* 412–14, 444–45; *Tsang* 273–74 [154]; *Spiteri v The Queen* (2011) 206 A Crim R 528, 538 [54]-[56]; *Zaia* [96]; *Levy v The Queen* [2020] VSCA 44, [85]. Where a co-offender cooperates with the authorities, determining the sentences for other co-offenders involves a more difficult application of the parity principle. See *Perri* [25].
[583] *R v Van Haasen* (1993) 70 A Crim R 207.
[584] *Mercieca* [14]-[16], [25]; *Dinelli* [16]; *Bedson v The Queen* [2013] VSCA 88, [74]; *Zaia* [95].
[585] *O'Loughlan* [33]-[35]. See also *Izzard* 483 [12]; *Harrington v The Queen* [2010] VSCA 249, [7]-[8]; *Crawley v The Queen* [2011] VSCA 131, [27]; *Graziosi v DPP (Cth)* [2011] VSCA 418, [23]. But see *Sikoulabout* [93]-[99].
[586] *Hussein v The Queen* [2010] VSCA 257, [16] ('*Hussein*'); *Poutai v The Queen* [2011] VSCA 382, [20]-[26].
[587] *Hussein* [16].
[588] *Kiezenberg v The Queen* [2017] VSCA 235 ('*Kiezenberg*'); *Salapura*; *Clark v The Queen* [2020] VSCA 125, [23] ('*Clark*').

- due to differences in the co-offender's criminal histories,[589] moral culpability,[590] and any gain (financial or otherwise) from the offending;[591]
- for co-offenders in personal or familial relationships, where one is dependent upon, dominated, or led by the other;[592]
- by significant differences associated with gender – for example, the increased burden of imprisonment on the mother of a young child, even though gender itself does not justify a differential sentence;[593]
- by matters that are personal to the offender such as their prospects for rehabilitation,[594] the importance of deterring them in future,[595] the impact of incarceration on them,[596] or the imposition of a lenient sentence as an exercise of mercy (usually because one offender is gravely ill);[597]
- between an offender sentenced per an agreed statement of facts and one who has not had that benefit.[598]
- when an offender participates positively in the Koori Court and is under its supervision for a year.[599]

Parity applies to all co-offenders (there cannot be a comparison to only the lowest sentence passed on a single co-offender),[600] and to all people involved in a common criminal enterprise.[601] A common criminal enterprise involves a course of criminal activity involving multiple unlawful acts of the same or similar nature, all related to the same criminal purpose. The different offenders will have all participated in the enterprise at some point, which establishes the necessary relationship or association between them. But they do not need to have participated at the same time or have known of the other's participation in similar acts. There will usually be one continuous participant throughout the enterprise.[602] If the offending is very similar and is in some way related, the sentence imposed on one offender may be relevant in sentencing another. The same victim or subject matter might be involved, or there may be

[589] *Postiglione* 413; *R v Bloomfield* [2009] VSCA 302; *McCloskey-Sharp v The Queen* [2015] VSCA 87; *Kelynack v The Queen* [2013] VSCA 303 ('*Kelynack*'); *Anthony*; *Clark* [24]-[25].
[590] *R v Bellerby* [2009] VSCA 59, [18]; *Lunt v The Queen* [2011] VSCA 56, [70]; *Dawid* [43]; *Gianello v The Queen* [2015] VSCA 205, [29]–[37]; *Kamay v The Queen* (2015) 47 VR 475, 493–95 [58]–[69] ('*Kamay*'); *Kiezenberg* [57]–[64]; *Hi v The Queen* [2017] VSCA 315, [68]–[83].
[591] *Kelly v The Queen* [2011] VSCA 10, [11] ('*Kelly*'); *Kamay* 494 [63]; *Ooi v The Queen* [2018] VSCA 78, [100]. But see *Gregory* 13 [42].
[592] See, eg, *O'Loughlan* [24]-[28]; *Johnston v The Queen* [2012] VSCA 271, [60]-[64] ('*Johnston12*'); *Carr v The Queen* [2012] VSCA 299, [75]-[82].
[593] *R v Harkness* [2001] VSCA 87, [57]; *DPP (Vic) v Ellis* (2005) 11 VR 287, 292 [11].
[594] *Kelly* [14]-[18]; *Mokbel* [57]; *Marku* [49]; *Johnston12* [61]-[63].
[595] *Taudevin* 404–05; *Kelynack* [53].
[596] *Barci v The Queen* (1994) 76 A Crim R 103, 111–12; *R v Pulham* (2000) 109 A Crim R 541, 543 [7].
[597] *DPP (Cth) v Vestic* [2008] VSCA 12, [29]; *DPP (Cth) v Thai* (2014) 242 A Crim R 173, 182 [25]; *Anthony* [15]-[16].
[598] *R v Mielicki v* (1994) 73 A Crim R 72, 85; *R v Simmons* [2008] VSCA 185, [35] ('*Simmons*').
[599] *Galea v The Queen* [2020] VSCA 69, [22].
[600] *Abdou* [62].
[601] *Farrugia v The Queen* (2011) 32 VR 140, 143–45 [11]-[19] ('*Farrugia*'); *Gregory* 9 [27]; *Ulutui v The Queen* [2012] VSCA 301, [47]; *Dawid* [440]; *Bowden* [53]. But see *Huu* [26]-[28], [34].
[602] *Farrugia* 146 [23].

some other connection. The weight given to the comparative sentence will depend on 'the nexus between the offenders, the degree of similarity between their conduct, and factors personal to each offender'.[603]

Even when there is no common criminal enterprise, if there is a sufficient nexus between and important common features of the offending, the principles of parity and consistency may become so closely related to the principle of equal justice that the sentence imposed on one offender may be required to closely conform to that imposed on another offender for a related crime. This is, of course, a discretionary decision to be made in all the circumstances of the case.[604]

But parity becomes more difficult to apply as differences in the nature and seriousness between the crimes charged become greater. It may reach a point where the principle can no longer be applied and there are limits upon which a court may compare sentences of people charged with different crimes.[605]

Comparison of the head sentence alone is not an adequate measure of parity. All components of the sentence (including any non-parole period) must be considered, and if totality requires different sentences between the co-offenders, then parity is not breached.[606] In assessing whether disparity is justified, it may be useful to compare the respective non-parole periods and head sentences of co-offenders in percentage terms.[607]

Where parity does require modification of the sentence to be imposed, it is appropriate to err on the side of leniency and eliminate or diminish the appearance of injustice by reducing the more severe penalty, even where it is otherwise appropriate and within the permissible range of sentencing options.[608] Parity may even require the imposition of a penalty substantially less than what might otherwise be imposed because it is a 'fundamental requirement of justice and the rule of law'.[609] Although there is no dictated sentencing sequence, using the sentence of a co-offender as a starting point and then reducing or increasing the sentence being imposed based on other factors is an inappropriate two-step process.[610]

3.6.1 – Appeals

On appeal, disparity in the treatment of co-offenders is approached with the same analytical framework as manifest excess.[611] An appellate court will rarely re-sentence based on disparity because sentencing is imprecise and involves an exercise of judicial discretion respecting conflicting principles that 'will almost inevitably produce disparity between sentences imposed, even in the case of co-offenders'. Therefore, appellate intervention requires the disparity (or lack) to be so 'marked' or 'manifest' that it will 'produce a legitimate and justifiable sense of grievance in the objective observer'.[612] A justifiable sense of grievance

[603] Ibid 147 [27].
[604] Ibid 146-47 [25]-[26]. See also *Liang v The Queen* [2011] VSCA 148, [30].
[605] *Gregory* 9 [27].
[606] *Postiglione* 412-14.
[607] See *Joseph v The Queen* [2014] VSCA 343, [75]-[77].
[608] *Lowe* 612-14; *Postiglione* 411-12.
[609] *Bowden* [73].
[610] *Gregory* 11 [32].
[611] *BarbaroVIC* 371 [63]. See also *Anthony* [12].
[612] *Mercieca* [17]. See also *Lowe* 623; *McConkey* [30]; *Ngaa v The Queen (No 2)* [2015] VSCA 336, [7]; *Maeda v The Queen* [2015] VSCA 367, [86]-[95]; *Anthony* [12]; *Galea v The Queen* [2016] VSCA 40, [7]; *Tran v The Queen* [2022] VSCA 45, [47]-[48] ('*Tran*').

does not refer to the offender's subjective state of mind, it means that a 'sentencing differential' was not reasonably open.[613]

Parity arguments also have very little chance of success on appeal if the co-offenders have been sentenced for multiple counts, or where one offender is sentenced for several counts and the other offender for only one count.[614]

Parity does not preclude the Director from appealing against only one sentence in a case involving two or more offenders. The principle does not require that an appeal be taken from the sentences of all or both.[615]

Normally, given the limited and specific nature of a Crown appeal,[616] the court is constrained from intervening even if it considers sentence to be manifestly inadequate. Specifically, parity may act as a limiting factor when only one of several sentences is challenged: 'In such circumstances a sentence which is regarded as inadequate might still be permitted to stand'.[617] However, parity does not 'so circumscribe[] the sentencing discretion as to require the Court to decline to intervene'.[618] If an appellate court determines the sentence was manifestly inadequate and re-sentences the offender, then as with an offender's appeal, the sentence imposed on their co-offender(s) must be taken into account by the appeals court to minimise any disparity created by the new sentence. Although this can be done by increasing the sentence to the lower range of adequate sentences, parity with the co-offender's sentence cannot require imposing a new sentence that is wholly inappropriate or disproportionate.[619]

Considerations of parity are also relevant to an appellate court's exercise of the residual discretion in a Director's appeal.[620] However, a court may decline to exercise the discretion where giving full weight to parity considerations would lead to unjustifiable disparity that would be an affront to justice.[621]

If the sentence of an offender is reduced on appeal, parity requires the sentencing discretion be re-opened for all co-offenders who have appealed against their sentence. It does not, however, require that a reduced sentence then be imposed on them.[622]

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[613] *KMD* 269 [109]. See also *GreenHCA* 474-75 [31]; *Shakhanov* [16]; *Tran* [48].
[614] *R v Kane* (2001) 3 VR 542, 580 [87].
[615] *DPP (Vic) v Bulfin* (1998) 4 VR 114, 116, 137–39, 141 ('*Bulfin*'). See also *DPP (Vic) v Jovicic* (2001) 121 A Crim R 497, 504 [23].
[616] See, eg, *GreenHCA* 477 [36]; *Bowden* [6].
[617] *DPP (Vic) v Karazisis* (2010) 31 VR 634, 659 [109] ('*Karazisis*').
[618] *Bowden* [70].
[619] *Peng* [38]; *Bowden* [56], [59]. See also *Bulfin* 141.
[620] *Bowden* [69]. See also *Karazisis* 659 [109].
[621] *GreenHCA* 466 [2], 467 [5], 477-79 [37], [40]. See also *Barnes* [141]; *Bowden*.
[622] *Simmons* [29]-[30]. See also *Sibic* 320 [50].

4 – Sentencing purposes

The *Sentencing Act 1991* (Vic) ('the Act') states that the purposes of sentencing are to:

- punish the offender in a manner which is just in all the circumstances;
- deter the offender and others from committing the same or a similar offence;
- facilitate an offender's rehabilitation;
- denounce the offending conduct; and
- protect the community.[623]

The purposes were developed by the courts out of the need to promote consistency in sentencing.[624] But sentencing remains a difficult exercise because of the need to give appropriate weight to each of the purposes, which overlap and cannot be considered in isolation. As the High Court put it in *Veen v The Queen (No 2)*, '[t]hey are guideposts to the appropriate sentence, but sometimes they point in different directions'.[625]

More than one purpose may be (and often is) furthered by a given sentence, and determining which purpose, if any, is paramount depends on all circumstances and is a discretionary matter for the sentencing court.[626]

This chapter discusses the purposes specified by the Act, which are also relevant in Commonwealth sentencing.[627]

4.1 – Just punishment and denunciation

These purposes flow from the community's expectation that certain offences deserve severe punishment, and the assumption that if this expectation is denied there is a danger respect for the law will be diminished and the community will take punishment into its own hands.[628]

Older cases refer to these purposes as 'retribution'.

At its basest, retribution is said to punish the offender 'because they deserve it'.[629] It is more accurate, however, to say that retribution does not require 'an eye for an eye' but requires a court to recognise what accords with 'the moral sense of the community' when imposing sentence.[630] The criminal law must

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[623] *Sentencing Act 1991* (Vic) s 5(1)(a)–(e) ('the Act').
[624] *Boulton v The Queen* (2014) 46 VR 308, 318 [34] ('*Boulton*'); *WCB v The Queen* (2010) 29 VR 483, 488 [13] ('*WCB*'). See also the Act ss 1(a), 6AE(a).
[625] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 ('*Veen No 2*'). See also *R v Storey* [1998] 1 VR 359, 366 ('*Storey*').
[626] The Act s 5(1)(f). See also *R v Williscroft* [1975] VR 292, 299 ('*Williscroft*'); *Ryan v The Queen* (2001) 206 CLR 267, 283–84 [49], 310–11 [145]–[146] ('*Ryan*'); *R v Safatli* [2008] VSCA 232, [9]; *R v Koumis* (2008) 18 VR 434, 437 [54]; *R v Morgan* (2010) 24 VR 230, 236–37 [33].
[627] See, eg, *Crimes Act 1914* (Cth) ss 16A(1), (2)(f), (2)(j)–(k), (2)(n) ('*Cth Crimes Act*'). See also *Wong v The Queen* (2001) 207 CLR 584, 609–10 [71]; *DPP (Cth) v Bui* (2011) 32 VR 149, 153 [17]–[18], 156 [36]–[37]; *DPP (Cth) v Gregory* (2011) 34 VR 1, 14–15 [48]–[50] ('*Gregory*'); *Aitchison v The Queen* [2015] VSCA 348.
[628] *Ryan* 282–83 [46] (McHugh J).
[629] *Veen No 2* 473.
[630] *Williscroft* 300–01.

be administered in a way that can be understood by the community and regarded by it as complying with what it considers 'fair and just'.[631]

Imposing a just sentence requires a court to synthesise different factors, including the offender's circumstances (but not their expectations), the circumstances and gravity of the crime, and current sentencing practices. But determining a just sentence is not a mechanical exercise. The impact of the factors will vary from case to case, with no one factor controlling.[632] It is not possible to set guidelines for the synthesis without impeding the court's discretion to fix a just penalty.[633]

Just punishment is a significant consideration in cases of:

- homicide, particularly of a domestic partner or family member;[634]
- causing serious injury, again with special relevance in situations involving domestic or family violence;[635]
- culpable or dangerous driving;[636]
- armed robbery;[637]
- aggravated burglary;[638] and
- sex offences, especially against children or vulnerable people.[639]

Public denunciation is a logically related fundamental purpose. It requires a sentence to communicate – through its type or duration – society's condemnation and disapproval of the conduct;[640] it is a collective statement that the offender's conduct should be punished for encroaching on society's basic values as embodied in the criminal law.[641] Public denunciation of the offending conduct and reinforcement of society's expectations is a central purpose of sentencing. It 'serves to reinforce the standards which society expects its members to observe'.[642]

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631 Ibid 300. See also *Ryan* 305 [128] (Kirby J); *DPP (Vic) v DJK* [2003] VSCA 109, [18] ('*DJK*'); *WCB* 493-94 [34]-[35].
632 *Storey* 366; *R v Ngui* (2001) 1 VR 579, 582 [8] ('*Ngui*'); *DPP (Vic) v Dalgiesh (a pseudonym)* (2017) 262 CLR 428, 443 [45], 444-45 [49], 449-50 [65], [67]-[68].
633 *Ngui* 583–84 [12].
634 *R v Cumberbatch* (2004) 8 VR 9, 14–15 [13] ('*Cumberbatch*'); *Felicite v The Queen* (2011) 37 VR 329, 333 [20] ('*Felicite*'); *Dutton v The Queen* [2011] VSCA 287, [45] ('*Dutton*'); *Delich v The Queen* [2014] VSCA 66, [35] ('*Delich*'); *DPP (Vic) v Daing* [2016] VSCA 58, [44].
635 *Noa v The Queen* [2013] VSCA 4, [16]; *Curypko v The Queen* [2014] VSCA 192, [41] ('*Curypko*'); *Chol v The Queen* (2016) 262 A Crim R 455 ('*Chol*''); *DPP (Vic) v Lade (a pseudonym)* [2017] VSCA 264; *DPP (Vic) v Evans* [2019] VSCA 239, [83]; *DPP (Vic) v Smith* [2019] VSCA 266, [35] ('*Smith*').
636 *R v Tran* (2002) 4 VR 457, 462 [14]-[15] ('*Tran02*'); *DPP (Vic) v Janson* (2011) 31 VR 222, 233 [53] ('*Janson*'); *McGrath v The Queen* (2018) 84 MVR 189, 204–05 [70].
637 *Williscroft* 302; *R v Reddrop* [2000] VSCA 101, [16] ('*Reddrop*'); *DPP (Vic) v Perry* (2016) 50 VR 686, 725 [155].
638 *DPP (Vic) v Sims* [2004] VSCA 129, [20] ('*Sims*'); *DPP (Vic) v Barnes* [2015] VSCA 293, [49]; *Dirbass v The Queen* [2018] VSCA 272, [69].
639 *DPP (Vic) v DJS* [2003] VSCA 9, [43]; *R v Mathe* [2003] VSCA 165, [52]; *DPP (Vic) v VH* (2004) 10 VR 234, 237–38 [11]; *R v Craddock* [2004] VSC 397, [23a] ('*Craddock*'); *DPP (Vic) v Toomey* [2006] VSCA 90, [22]; *WCB* 494–95 [36]–[38]; *Allen (a pseudonym) v The Queen* (2013) 39 VR 629, 640 [43]–[44] ('*Allen*'); *DPP (Vic) v Meharry* [2017] VSCA 387, [172] ('*Meharry*'); *Holland (a pseudonym) v The Queen* [2018] VSCA 241, [26], [51].
640 *Williscroft* 300; *DPP (Vic) v Coleman* (2001) 120 A Crim R 415, 433 [14] ('*Coleman*'); *R v Towle* (2009) 54 MVR 543, 566 [76]; *DPP (Vic) v Neethling* (2009) 22 VR 466, 478 [56] ('*Neethling*').
641 *Ryan* 302 [118] (Kirby J).
642 *WCB* 493-94 [35].

In denouncing an offender's conduct, a court should speak with reference to community expectations and values. The courts are part of the community and may be viewed as the trustees of the community's power to judge and punish. This means they must vindicate the values of the community and be seen to be doing so.[643]

Moreover, the rehabilitation of the victim is a relevant factor to be considered.[644] This 'social rehabilitation' has not been given the attention it deserves and can be facilitated by the courts.[645] The sentence imposed must acknowledge the personal damage done to the victim and that their rehabilitation may actually be far more difficult than the offender's.[646]

Although it is the offender's conduct that is denounced, and not the offender personally,[647] there may be circumstances of the offender that are relevant both to denunciation and just punishment. For example: the retributive effect and denunciatory aspect of a sentence have less relevance to a mentally disabled offender who is incapable of appreciating the societal condemnation of the sentence, nor would the community likely demand that an individual with such lessened moral culpability be severely punished.[648] Conversely, an offender of intelligence and ability whose conduct might be taken as a deliberate affront to society's expectations cannot expect leniency.[649] Similarly, while rehabilitation is frequently said to be the predominant purpose in sentencing a youthful offender, there are crimes of such gravity or violence that rehabilitation must give way to the requirements of just punishment and denunciation.[650] In particular, the Court of Appeal has said rehabilitation must give way, *significantly*, to the need for a sentence to adequately express the court's and the community's repugnance at an intended terrorist act.[651]

4.2 – Deterrence

It is useful to bear in mind the difference between denunciation and deterrence. Denunciation is a symbolic community condemnation of the offender's wrong, but deterrence is concerned with punishing the offender as a means of deterring others from committing a similar offence.[652]

There are two types of deterrence, as recognised by the Act,[653] general and specific. General deterrence uses one offender's sentence as the vehicle to deter others from committing similar offences. Specific deterrence intends for the offender's sentence to stop that same person from criminal activity in future.

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643 *WCB* 487 [12].
644 *DJK* [17], [31]. See also *DPP (Vic) v DCR* [2004] VSCA 103, [67]–[70]; *Craddock* [23d]; *DPP (Vic) v Brown* [2009] VSCA 314, [28] ('*Brown*'); *Neethling* 478 [56]–[59]; *R v AMP* [2010] VSCA 48, [37]; *WCB* 495 [38]; *DPP (Vic) v Wightley* [2011] VSCA 74, [29]–[33]; *DPP (Vic) v Borg* (2016) 258 A Crim R 172, 190–91 [100]–[101].
645 *DJK* [18].
646 Ibid [28].
647 *Ryan* 302–03 [118]–[120] (Kirby J).
648 *Muldrock v The Queen* (2011) 244 CLR 120, 139 [54] ('*Muldrock*').
649 *R v Henderson* [1999] 1 VR 830, 841 ('*Henderson*'); *R v Belyea* [2003] VSCA 192, [9]; *Latorre v The Queen* (2012) 226 A Crim R 319, 352 [191].
650 *R v PDJ* (2002) 7 VR 612, 629 [82]–[83] ('*PDJ*'); *DPP (Vic) v Lawrence* (2004) 10 VR 125, 132 [22] ('*Lawrence*'); *Azzopardi v The Queen* (2011) 35 VR 43, 57 [44] ('*Azzopardi*'); *DPP (Cth) v MHK (a pseudonym) (No 1)* (2017) 52 VR 272, 289 [56]–[57], 292 [66]–[67], 294 [73] ('*MHK*'); *Siilata v The Queen* [2019] VSCA 277, [31].
651 *MHK* 292 [67].
652 *Kazami v The King* [2023] VSCA 267, [51].
653 The Act s 5(1)(b).

The two deterrent purposes are frequently of equal importance and are often balanced against the rehabilitative purpose, particularly for youthful offenders.

A few points applicable to both general and specific deterrence are worth noting before discussing each separately.

Firstly, general and specific deterrence are tempered by the proportionality principle; a sentence cannot be so stern that it is disproportionate to the gravity of the offending.[654]

Secondly, deterrence is most frequently discussed in terms of an immediate custodial sentence, but it may also be achieved by imposing a non-custodial sentence, including a wholly suspended sentence or a fine.[655] Although a partially suspended sentence has generally been held to have greater deterrent value.[656]

Thirdly, deterrence applies to both the head sentence and the non-parole period.[657] But if a custodial sentence is warranted, fixing an unduly low non-parole period may destroy its deterrent effect.[658] When a term of imprisonment is imposed, and no minimum term is fixed, deterrence is being given the most weight,[659] and if deterrence is the predominant purpose, it may, in rare instances, be appropriate to make little or no allowance for mitigating factors in determining the appropriate sentence.[660]

Lastly, there are circumstances where the need for deterrence is less prominent. For example: an offender's mental illness or impairment[661] may moderate or eliminate the importance of general and specific deterrence, but this is not automatic[662] and sensible moderation is preferred over elimination.[663] Whether general or specific deterrence is moderated or eliminated depends on the nature and severity of the offender's symptoms and the effect of the condition on their mental capacity at the time of offending or sentencing.[664]

Moderation of general and specific deterrence may be required if the offender develops a mental impairment or illness *after* the offending. If so, at the date of sentencing the court will need to determine

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654 *Jopar v The Queen* (2013) 44 VR 695, 704 [44], 714–15 [91] ('*Jopar*'). See also *Bifel v The Queen* [2013] VSCA 82, [4] ('*Bifel*').
655 See, eg, *Pulham v The Queen* (2000) 109 A Crim R 541, 542 [4] ('*Pulham*'); *Sims* [31]; *DPP (Vic) v Fucile* (2013) 229 A Crim R 427, 443 [105]; *Boulton*. Although a fine that is beyond the means of the offender to pay has no deterrent effect. See *Jopar* 699 [9] (Weinberg JA).
656 *Tancredi v The Queen* [2010] VSCA 157, [29] ('*Tancredi*'); *Pulham* 542 [4].
657 *Gregory* 18 [66].
658 *R v VZ* (1998) 7 VR 693, 698 [15], [18]; *DPP (Vic) v Bulfin* (1998) 4 VR 114, 132 ('*Bulfin*').
659 *R v Bateman* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Gillard and McGarvie JJ, 29 June 1977) 17 ('*Bateman*').
660 Ibid 19. See also *R v Raptis* (1988) 36 A Crim R 362, 366; *R v Martin* (1994) 119 FLR 220 ('*Martin*'); *R v Liddell* [2000] VSCA 37.
661 This includes an offender suffering – at the time of offending or sentencing – any mental disorder, abnormality, or impairment, regardless of whether it might properly be considered a serious mental illness. *Verdins v The Queen* (2007) 16 VR 269, 270–71 [3]-[5] ('*Verdins*'). A sentencing court should not concern itself with how a condition is classified, '[w]hat matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time'. Ibid 271–72 [8]–[13].
662 *Muldrock* 137–39 [50]-[55]; *Sikaloski v The Queen* [2012] VSCA 130, [44] ('*Sikaloski*').
663 *Verdins* 272–73 [14]-[18].
664 Ibid 276 [32]. See also *R v O'Neill* (2015) 47 VR 395, 413 [71] ('*O'Neill*').

if, because of the illness or impairment, the offender is not an 'appropriate vehicle' for deterrence. A reduction is not required, however, where the condition has arisen as a result of the crime's discovery and the offender's reaction to the possibility of a long prison term.[665] The reason deterrence is moderated where the illness or impairment developed after, but not as a result of discovering, the offending is because the offender should not be used as a model for others. In these circumstances the community would not expect the same penalty to be imposed.[666] But where the discovery of the offending caused the condition, that view is moderated because the offender 'is the author of their own predicament' and may serve as a deterrent to others. The community will also not expect a lesser penalty to be imposed because an offender has a bad reaction to the discovery of their crime(s) and fears imprisonment. They are then analogous to someone with a gambling or substance addiction, who has contributed in part to their own condition and is still subject to deterrence.[667]

Deterrence, general and specific, may also be less relevant where the offender is motivated by ideology or belief in a religion that calls for martyrdom.[668]

4.2.1 – General deterrence

General deterrence plays a role in almost every case.[669] The hope is that others tempted to offend in the same way will be deterred by the possibility of a severe sentence.[670]

This assumes the community will be aware of the sentence imposed for a given crime and gain awareness of the type of sentences imposed generally for that kind of conduct. Thus, there is a further assumption that an offender was aware, at the time of their offending, of the law and the consequences for its breach.[671] The validity of these assumptions has been questioned by empirical research.[672] However, the NSWCCA has noted that general deterrence 'has another dimension – to maintain public confidence in the administration of justice'.[673]

In any event, Victorian courts have held that maintained that general deterrence has a role in the sentencing synthesis.[674]

The level of community awareness of sentences being consistently imposed determines the extent to which they have a deterrent effect on others. If sentencing outcomes are not known to the community,[675] they will lose their deterrent effect.[676] In short, the deterrent effect of a sentence depends on the extent to

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[665] *R v RLP* (2009) 213 A Crim R 461, 471–73 [21]-[23], [26] ('*RLP*'); *Khoja v The Queen* (2014) 66 MVR 116; *O'Neill* 417 [83].
[666] *RLP* 473–74 [27]-[28].
[667] Ibid 474 [29]-[30]. See also *R v Do* (2007) 180 A Crim R 338, 344 [12]; *R v Grossi* (2008) 23 VR 500, 513–18 [47]-[57]; *R v Wang* [2009] VSCA 67, [17]-[18]; *R v Cusack* [2009] VSCA 207, [21].
[668] *DPP (Cth) v Fattal* [2013] VSCA 276, [231] ('*Fattal*'). But see *MHK*.
[669] *R v Wyley* [2009] VSCA 17, [21] ('*Wyley*').
[670] *R v Mandala* [1999] VSCA 159; *R v Marks* [2017] NSWDC 23, [1].
[671] *WCB* 496 [42].
[672] Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011), 23.
[673] *Kennedy v The King* [2022] NSWCCA 215, [43], citing *Markarian v The Queen* (2005) 228 CLR 357, 389 [82].
[674] *Brayshaw v The Queen* (2011) 59 MVR 149, 151–52 [7]-[9] ('*Brayshaw*').
[675] It is important that the victim also see that society's laws have been applied, but less so than the community. See, eg, *R v Sa* [2004] VSCA 182, [38]; *Craddock* [26].
[676] *WCB* [43]. See also *Walden v Hensler* (1987) 163 CLR 561, 569-70.

which it is punitive (and will be so perceived by the community) and is communicated to those it is meant to deter.[677] A significant problem is that as the courts are poorly equipped to communicate the sentence, the media and government must assist.[678]

General deterrence, as a sentencing purpose, subjects an offender to a punishment that is more severe than would otherwise be the case. A sentence is imposed in the hope that its severity, which the extent of an offender's criminality does not of itself warrant, 'will temper the criminal tendencies of others'.[679] So, a court must be careful to ensure that general deterrence is not permitted to cause injustice, by so overwhelming the other sentencing purposes that an individual sentence becomes disproportionately harsh when assessed against the degree of criminality of an offender's conduct.[680] For general deterrence to be considered to have separately contributed to a sentence, the sentence must have been increased, because of the need to send a deterrent message to others, above the sentence that would otherwise have been appropriate if specific deterrence alone was taken into account.[681]

Similarly, while an offender's case and sentence are used as the vehicle for general deterrence, care must be taken to ensure that general deterrence is not used to target a specific ethnic community.[682]

General deterrence is significant regardless of provocation[683] or motive.[684]

For obvious reasons, general deterrence is particularly important in cases involving:

- homicide, especially in a domestic context;[685]
- indictable driving;[686]
- sexual offending against children;[687]
- family or domestic violence;[688]
- armed robbery;[689]

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[677] *Boulton* 337 [123].
[678] See *Brayshaw* 151–52 [9]; *WCB* 491 [26]; *Boulton* 337 [123]-[126]; *DPP (Vic) v Russell* (2014) 44 VR 471, 483–84 [67]-[73] ('*Russell II*').
[679] *Bifel v The Queen* [2013] VSCA 82, [4]
[680] Ibid.
[681] *Tran v The Queen* (2012) 35 VR 484, 493 [29].
[682] *R v Truong* [2005] VSCA 147, [17]. See also *R v Mao* [2006] VSCA 36, [38]-[42]; *R v Pham* [2007] VSCA 234, [15]-[19].
[683] *DPP (Vic) v Nikolic* [2008] VSCA 226; *Tancredi*; *Felicite* 330 [20].
[684] *DPP (Vic) v Cook* (2004) 141 A Crim R 579, 585 [14], 587–90 [22]–[27], [35] ('*Cook04*').
[685] *R v Gojanovic (No 2)* [2007] VSCA 153, [140]; *Felicite* 330 [19]–[20], 335 [30]; *Dutton* [45]; *Kalala v The Queen* [2017] VSCA 223, [60]–[63] ('*Kalala*').
[686] *Coleman* 422 [20]; *Tran02* 461–62 [12]–[15]; *Neethling* 477 [54]–[55]; *Janson* 229–30 [29]–[35]; *Brayshaw*; *DPP (Vic) v Hill* (2012) 223 A Crim R 285, 295–99 [40]–[52] ('*Hill12*'); *Harrison v The Queen* (2015) 49 VR 619, 645 [115]–[116]; *Lennon v The Queen* (2017) 80 MVR 71, 83 [49]; *Gurovski v The Queen* (2018) 83 MVR 333, 347 [70]; *Nicholson v The Queen* (2018) 84 MVR 421, 429 [30]–[32].
[687] *DPP (Cth) v D'Allesandro* (2010) 26 VR 477, 483 [21], 484 [23]–[24], 486–87 [36]; *Clarkson v The Queen* (2011) 32 VR 361, 383–84 [86], [90] ('*Clarkson*'); *WCB* 494 [36], 495 [38], 495–96 [41], 496–97 [44], 501 [65]; *TRG v The Queen* [2011] VSCA 337, [35]; *Shawcross (a pseudonym) v The Queen* [2018] VSCA 295, [63].
[688] *Felicite* 330 [20]; *Bayram v The Queen* [2012] VSCA 6, [35]; *Filiz v The Queen* [2014] VSCA 212, [21] ('*Filiz'*); *Pasinis v The Queen* [2014] VSCA 97, [53], [57]; *Portelli v The Queen* [2015] VSCA 159, [29]-[30]; *Kalala* [55]–[59]; *Smith* [35].
[689] *Williscroft* 295, 299; *R v McKee* (2003) 138 A Crim R 88, 91 [10] ('*McKee*').

- aggravated burglary;[690]
- 'white collar' crimes, such as fraud, tax evasion or money laundering;[691]
- drug offences, particularly trafficking;[692]
- prevalent offences;[693]
- OH&S offences;[694]
- people smuggling;[695] and
- terrorist offences or preparing for terrorist acts.[696]

General deterrence is important where offences are committed in a familial context, because a person should be able to leave a relationship without fear of reprisal.[697] It is also important to deter people taking the law into their own hands because 'vigilante justice' is a direct threat to the rule and authority of law.[698] Finally, it is of paramount concern for offending committed in a custodial setting because the victim, in part, has no choice but to be where they are and because the courts cannot permit 'the law of the jungle to take hold in prisons'.[699]

Moreover, general deterrence takes priority in circumstances where public safety is put at risk,[700] as in cases involving street violence,[701] and where violent acts are fuelled by drugs or alcohol,[702] or are

[690] *Sims* [20]; *R v Lambourn* [2007] VSCA 187, [39]; *DPP (Vic) v Cooper* [2018] VSCA 21, [47].
[691] *Martin* 224; *Bulfin* 132; *Koch v The Queen* [2011] VSCA 435, [52], [55] ('*Koch*'); *Gregory* 15–16 [53]; *Majeed v The Queen* [2013] VSCA 40, [439]; *DPP (Cth) v Couper* (2013) 41 VR 128, 149 [118]; *Zaia v The Queen* [2020] VSCA 9, [108].
[692] *Sikaloski* [45]; *Dawid v The Queen* [2013] VSCA 64, [35]; *Nguyen v The Queen* [2013] VSCA 63, [23]; *DPP (Cth) v Thai* (2014) 242 A Crim R 173, 179 [11]; *DPP (Cth) v Thomas* (2016) 53 VR 546, 613 [193]; *Arico v The Queen* [2018] VSCA 135, [321]–[322].
[693] *Williscroft* 299; *Bateman* 16; *R v Hatfield* [2004] VSCA 195, [14] ('*Hatfield*'); *Wan v The Queen* [2019] VSCA 81, [38] ('*Wan*'). See 7.4 -Policy considerations – Prevalence.
[694] *DPP (Vic) v Amcor Packaging Pty Ltd* (2005) 11 VR 557, 565 [36]; *R v Irvine* (2009) 25 VR 75**,** 85 [52]; *Orbit Drilling Pty Ltd v The Queen* (2012) 35 VR 399, 414 [60]; *DPP (Vic) v Coates Hire Operations Pty Ltd* (2012) 36 VR 361, 379 [79]; *DPP (Vic) v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676, 730 [233].
[695] *Jopar* 697 [2], 700 [18], 713 [83] 714 [90]; *Bifel* [26].
[696] *MHK* 287 [51], 288 [53].
[697] *R v Monardo* [2005] VSCA 115; cf *R v Farfalla* [2001] VSC 99, [21].
[698] *Craddock* [23b]; *Taskiran v The Queen* [2011] VSCA 358, [22]; *R v Downie* [2012] VSC 27, [38]; *R v Charles* [2013] VSC 470, [32]; *Frost v The Queen* [2020] VSCA 53, [45]; *Harvey v The Queen* [2021] VSCA 84, [52]-[54].
[699] *De Castres v The Queen* (2011) 33 VR 493, 494 [1], 495 [10], 502 [36]**;** *Byrne v The Queen* [2020] VSCA 289, [22].
[700] *R v Kennedy* (2006) 45 MVR 208, 210 [11]; *Vergados v The Queen* [2011] VSCA 438, [70]; *Bedson v The Queen* [2013] VSCA 88, [70].
[701] *Tancredi* [25]-[26]; *Ashdown v The Queen* (2011) 37 VR 341, 350 [24] ('*Ashdown*'); *Russell II* 482 [62]; *Raveche v The Queen* [2015] VSCA 99, [67]; *DPP (Vic) v Betrayhani* [2019] VSCA 150, [48] ('*Betrayhani*').
[702] *Lawrence* 132 [22], 133 [25]; *DPP (Vic) v Simpas* [2009] VSCA 40, [13]; *DPP (Vic) v Malikovski* [2010] VSCA 130, [50] ('*Malikovski*'); *Winch v The Queen* (2010) 27 VR 658, 665–67 [37]–[41]; *Smith v The Queen* (2013) 39 VR 336, 348 [54].

unprovoked;[703] where vulnerable members of the community,[704] law enforcement officers,[705] emergency care workers,[706] or good Samaritans[707] are victimised; or, if the offending is committed in breach of a court order, such as bail,[708] parole[709] or an intervention order.[710]

In some circumstances, it may be necessary to moderate general deterrence when sentencing an elderly offender. It must be considered in light of the effect imposing a jail sentence on elderly person will have on public perception, given the sentence will be more burdensome for that offender.[711] Further, where it is possible that an elderly offender may die in prison, considerations of mercy may require the weight given to general deterrence to be reduced.[712] However, general deterrence remains an important sentencing consideration, irrespective of an offender's advancing age,[713] particularly given the ageing population and increase in elderly offenders coming before the courts.[714]

General deterrence has minimal relevance when sentencing a child. The *Children, Youth and Families Act 2005* (Vic) s 362(1) lists the matters that must be taken into account when sentencing. The nature of the matters referred to in that section preclude general deterrence from being considered when sentencing child offenders pursuant to that Act.[715]

It is unclear whether general deterrence principles apply where an offender is sentenced for charges which might have been dealt with in the Children's Court but were in fact dealt with in a superior court. It is likely the deterrent purpose will apply if a court decides that punishment exceeding that which is available under the *Children, Youth and Families Act 2005*, or under the Act s 32(3)(b) is necessary.[716]

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[703] *Cook04* 588 [26]; *R v Duncan* [2009] VSCA 253, [11] ('*Duncan09*'); *Ashdown* 350 [24]; *Carter v The Queen* [2012] VSCA 99, [18] ('*Carter12*'); *Delich* [35]; *Betrayhani* [2019] VSCA 150, [47].
[704] *Allen* 640–41 [44]–[45]; *DPP (Vic) v Stevens* [2013] VSCA 187, [27]–[31]; *Umi v The Queen* [2013] VSCA 211, [41]–[42]; *Picone v The Queen* [2015] VSCA 5, [9]–[10]; *Kargar v The Queen* [2018] VSCA 148, [53].
[705] The Act s 10AA; *R v Kane* [1974] VR 759 ('*Kane*'); *R v Debs* [2005] VSCA 66, [351]–[352]; *DPP (Vic) v Arvanitidis* (2008) 202 A Crim R 300, 303–04 [4], 314 [50] ('*Arvanitidis*'); *Glascott v The Queen* [2011] VSCA 109, [148] ('*Glascott*').
[706] The Act s 10AA; *Arvanitidis* 303–04 [4], 314 [50]; *Glascott* [148]; *Jaeger v The Queen* [2020] VSCA 116, [35]-[36].
[707] *Hudson v The Queen* (2010) 30 VR 610, 639 [72]; *Carter12* [18].
[708] *Buchwald v The Queen* [2011] VSCA 445, [191].
[709] *McCartney v The Queen* (2012) 38 VR 1, 21 [97].
[710] *R v Breen* [2008] VSCA 178, [18]–[28]; *DPP (Vic) v Johnson* (2011) 35 VR 25, 28 [7], 34 [42]–[43], 41 [75]–[76] ('*Johnson11*'); *Filiz* [21].
[711] *RLP* 474–75 [33]; *R v Saw* [2004] VSC 117, [41].
[712] *RLP* 474–76 [32]–[39]. See also *Fichtner v The Queen* [2019] VSCA 297, [90].
[713] Ibid. See also *Cumberbatch* 13–15 [11]–[13].
[714] *DPP (Vic) v Kien* (2000) 116 A Crim R 339, 343–44 [18].
[715] See, eg, *CNK v The Queen* (2011) 32 VR 641, 643 [4], 644 [7], [10], 645 [12]–[15]. See also *Poutai v The Queen* [2011] VSCA 382, [24]–[26]; *RAC v The Queen* [2011] VSCA 294, [9]; *JPR v The Queen* [2012] VSCA 50, [29] ('*JPR*'); *Webster (a pseudonym) v The Queen* (2016) 258 A Crim R 301, 303 [12], 314 [67]. While s 362(1)(h) mentions the need, in appropriate cases, to deter the child from committing offences in remand centres, youth residential centres and youth justice centres, the wording of the provision indicates that it is referring to specific deterrence rather than general deterrence.
[716] See *Fuller (a Pseudonym) v The Queen* [2013] VSCA 186, [30]–[34]; *DPP (Vic) v Anderson* (2013) 228 A Crim R 128, 140 [46]–[47].

General deterrence does, however, continue to have relevance, albeit moderated, when sentencing an adult for offending committed while they were a child.[717] The weight to be given to general deterrence in such cases will depend on multiple factors, including the seriousness of the offence and of the offending; the extent of the offender's remorse (if any); and the offender's rehabilitation prospects. Where general deterrence is a significant purpose, there is less scope for leniency based on the offender's youth.[718]

For youthful offenders, rehabilitation is usually far more important than general deterrence.[719] But this is only a general principle and does not apply automatically. The weight to be given to an offender's youth and their rehabilitation decreases as the seriousness of the offence for which they are to be sentenced increases. In cases where a youthful offender carries out, or plans to carry out, acts of extreme violence, protection of our society and upholding fundamental values require that youth is diminished quite substantially in determining the weight to be given to general deterrence.[720] For example, in cases of murder 'there is much less room for the offender's youth to have a significant role…'; it cannot overshadow the seriousness of that crime and the need to emphasise the importance of deterrence.[721]

Lastly, general deterrence may be accorded reduced weight where there has been a delay in sentencing because of the tardiness of investigators or a prosecuting authority.[722] However, this reduction does not apply where a delay is attributable to a victim's reluctance to come forward.[723]

4.2.2 – Specific deterrence

Every sentence is meant, in part, to have the salutary effect of deterring the offender being sentenced from future criminal conduct.[724] But, again, there is no formula for determining a sentence that will have that effect; it is derived from a consideration of the circumstances of the offender and the offending.

An offender's criminal history is probably the most significant consideration in determining the importance of specific deterrence. Most relevantly it may indicate whether they tend to disobey the law, and so require greater punishment to deter them in future.[725] Generally, the greater the risk of re-offending, the more weight is given to specific deterrence.[726] Persistent recidivism may also preclude a moderate sentence because it demonstrates that previously lenient sanctions have not proved

[717] *Rootsey v The Queen* [2018] VSCA 108, [14].
[718] *DPP v SJK* [2002] VSCA 131, [66] ('*SJK*').
[719] *R v Mills* [1998] 4 VR 235, 241 ('*Mills*'). See also *Balshaw v The Queen* [2021] VSCA 78, [54]-[57] ('*Balshaw*').
[720] *MHK* 289 [56]–[57], 292 [66]–[67], 284 [73]. See also *Tran02* 462 [14]; *PDJ* 629 [80]–[84]; *Lawrence* 132 [22]; *Duncan09* [12]–[14]; *Neubecker v The Queen* (2012) 34 VR 369, 385 [73]; *Azzopardi* 55–57 [38]–[40], [44]; *Rosenlis v The Queen* [2012] VSCA 217, [21]; *ELJ v The Queen* [2012] VSCA 70, [17]; *Hill12* 299–300 [49]–[53]; *Wan* [38].
[721] *AB (a pseudonym) v The Queen* [2019] VSCA 278, [33]; *Todd v The Queen* [2020] VSCA 46, [49] ('*Todd*').
[722] *R v Schwabegger* [1998] 4 VR 649, 659.
[723] *Curypko* [44]–[56].
[724] *R v Murray* [2018] VSC 133, [52]; *Haddara v The Queen* [2018] VSCA 303, [17].
[725] *Veen No 2* 477–78. See also *Henderson* 841 [44]; *DPP v Wareham* (2002) 5 VR 439, 443–44 [17]–[18] ('*Wareham*'); *DPP (Vic) v Gull* [2003] VSCA 123, [12]–[16] ('*Gull*'); *DPP (Vic) v Terrick* (2009) 24 VR 457, 472 [60] ('*Terrick*'); *Berichon v The Queen* (2013) 40 VR 490, 513–14 [146]–[150]; *Pasznyk v The Queen* (2014) 43 VR 169, 184–85 [67]–[68], [75]; *Uzun v The Queen* [2015] VSCA 292, [33]–[34].
[726] *R v Dent* [2005] VSCA 42, [13].

effective.[727] But specific deterrence is only reduced, not excluded, where an offender is of good character or unlikely to re-offend.[728]

Relatedly, a person's willingness to offend while subject to another court order,[729] such as bail,[730] parole,[731] or an intervention order[732] requires specific deterrence to be emphasised.

Specific deterrence may also assume great significance where the subject offence represents a significant escalation of prior offending.[733]

Specific deterrence will be less significant where an offender is genuinely remorseful for their actions as it demonstrates an increased likelihood of rehabilitation and appreciation for the wrongfulness of their conduct.[734] But mere entry of a guilty plea does not establish remorse; proper evidence is required.[735] Conversely, where an offender does not exhibit genuine remorse, they have not shown an appreciation for their wrongdoing or good prospects of reform, and specific deterrence will be particularly important.[736] In this regard, an offer of restitution may be an indicator of remorse, but if it is not spontaneous or if it is only made after discovery of the crime, it will be of limited consequence.[737]

The fact that the offender was on summons for another offence, which did not lead to conviction, at the time of offending is not relevant to assessing the need for specific deterrence.[738]

4.3 – Rehabilitation

The public interest is served by rehabilitating offenders to stop committing crimes,[739] and a court should reward steps taken towards rehabilitation by giving them due weight in determining the sentence to be imposed.[740] However, the court's task is not to set a period of rehabilitation.[741] Nor may it protect an offender by imposing a disproportionate sentence to emphasise and facilitate their rehabilitation.[742]

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[727] *Terrick* 470–72 [54]–[62]; *Hunter v The Queen* (2013) 40 VR 660, 671–73 [36]–[45].
[728] *R v Pignataro* [2003] VSCA 54, [35]; *Alavy v The Queen* [2014] VSCA 25, [7]–[18].
[729] *Wilson v The Queen* [2012] VSCA 141, [35]–[36]; *Lecornu v The Queen* (2012) 36 VR 382, 390 [30], 400 [76]; *DPP (Vic) v Weston* (2016) 262 A Crim R 304, 322 [87].
[730] *Marku v The Queen* [2012] VSCA 51, [46]; *Osborne v The Queen* [2018] VSCA 160, [42].
[731] *Johnson11* 41 [72], [75]–[76]; *Chol* 459 [10].
[732] *Johnson11* 34 [42]; *Aitkin v The Queen* [2017] VSCA 103, [112].
[733] *Clarkson* 383–84 [86]; *DPP (Vic) v Oksuz* (2015) 47 VR 731, 755 [104], 764 [143].
[734] *Barbaro v The Queen* (2012) 226 A Crim R 354, 365 [39] ('*BarbaroVIC*'); *CD v The Queen* [2013] VSCA 95, [36]–[37], [43].
[735] *BarbaroVIC* 365–66 [35], [40]–[41].
[736] *R v Kumar* (2002) 5 VR 193, 225–26 [139]–[140]; *Koch* [52], [55]; *Delich* [41]–[43].
[737] *DPP (Cth) v Milne* [2001] VSCA 93, [13]; *DPP (Cth) v Gaw* [2006] VSCA 51, [10].
[738] *Singh v The Queen* (2013) 41 VR 230, 240–41 [38]–[42].
[739] *DPP (Vic) v Buhagiar* [1998] 4 VR 540, 547 ('*Buhagiar*').
[740] *R v Tiburcy* (2006) 166 A Crim R 291, 294 [16]; *R v Merrett* (2007) 14 VR 392, 403 [49]; *R v Lay* [2008] VSCA 120, [37] ('*Lay*').
[741] *R v Ioannou* (1985) 16 A Crim R 63, 70–71; *Lawrence* 132 [22].
[742] *Freeman v Harris* [1980] VR 267, 272, 281; *Boulton* 327 [72].

Rehabilitation of the offender has two parts: remorse and reform. Both must be demonstrated,[743] and less weight is given to rehabilitation if there is a lack of genuine remorse[744] or a mere absence of further offending.[745] There is a distinction between an offender's sorrow at being caught and punished and regret for the harm caused by their actions – only that regret is remorse for sentencing purposes.[746] Remorse is measured by post-conduct action and while a court is not bound to accept it, it is error not to do so because it was inconsistent with a lack of remorse at the time of the offending.[747]

A guilty plea may indicate remorse and rehabilitation,[748] but a failure to plead guilty is not itself a basis for finding that an offender has no prospects of rehabilitation.[749] Further, while entitled to run a defence, running a spurious and unmeritorious one may reflect poorly on an offender's prospects for rehabilitation.[750]

The absence of a motive for the criminal conduct is also relevant as it can be difficult to assess an offender's prospects of rehabilitation if a court cannot conclude whether the likelihood of reoffending has been reduced by the removal of the motive or reason for the crime.[751]

There is an increased emphasis on rehabilitation following a delay between the offending and the time of sentence that is not attributable to the offender.[752] This is because rehabilitation that is underway should not be halted or endangered by the sentence.[753] Similarly, electing to have a matter dealt with in the County Koori Court, which results in the accused having to endure a longer period as a remandee and eight days of quarantine in order to participate, is evidence of a commitment to rehabilitation and a factor to take into account in reducing sentence.[754] But where an offender has been afforded every opportunity to rehabilitate themselves and has not done so, other purposes may take precedence.[755]

There are certain circumstances of the offender that are relevant to rehabilitation. Firstly, an adverse criminal record impacts sentencing in several ways, including as an indicator of the offender's prospects for rehabilitation.[756] So too are subsequent convictions,[757] which may indicate a lack of remorse,[758] or

[743] *BarbaroVIC*; *CD* [2013] VSCA 95.
[744] *BarbaroVIC* 365 [36]-[39].
[745] *Tones v The Queen* [2017] VSCA 118, [41]–[45]. But see *TC v The Queen* [2011] VSCA 190, [55].
[746] *Lyddy v The Queen* [2019] VSCA 35, [62].
[747] Ibid [67]-[69].
[748] *R v Bo* [2006] VSCA 247, [64]–[65]. See 7.1 – Policy considerations – Guilty plea.
[749] *R v Spirakos* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Brooking and Charles, JJA, 15 April 1998) 10.
[750] *Bass (a pseudonym) v The Queen* [2014] VSCA 350, [227] ('*Bass*').
[751] *Saenz v The Queen* [2011] VSCA 154, [33]–[34].
[752] *R v Cockerell* (2001) 126 A Crim R 444, 447–48 [9]–[11]; *Malikovski* [52].
[753] *Buhagiar* 547; *Sergi v DPP (Cth)* [2015] VSCA 181, [43] ('*Sergi*').
[754] *DPP (Vic) v McCarty (a pseudonym)* [2020] VCC 1741, [52].
[755] *Gull* [14]–[16].
[756] *R v Taudevin* (1996) 2 VR 402, 404; *Wareham* 443–44 [17]–[18]; *R v James* [2003] VSCA 13, [53]; *R v Connolly* [2004] VSCA 24, [42]; *Beckerton v The Queen* [2011] VSCA 107, [40]; *Jones v The King* [2023] VSCA 167, [35].
[757] *Kane* 762–64; *R v Pham* [2003] VSCA 207, [12].
[758] *R v Walsh* [2000] VSC 114, [43].

offending committed while on bail, parole, or a non-custodial sentence.[759] It follows that any rehabilitation occurring between absconding and new offending may be accorded slight weight.[760]

Secondly, the courts have always emphasised the significance of rehabilitation when sentencing young offenders, it is 'usually far more important than general deterrence'.[761] This may be so even where the offender has committed very serious offences.[762] The reason for this emphasis is because society benefits by the successful rehabilitation of a young person who is led away from a life of crime.[763]

Lastly, alcohol or drug addiction are also relevant where the prospects of rehabilitation depend on an offender addressing their addiction.[764] Similarly, an offender's mental impairment may increase the need for community protection but does not mean a court should conclude that every mentally impaired offender is incapable of rehabilitation.[765]

While the circumstances of an offender often make rehabilitation a more important consideration than the other purposes, this is not an automatic process. There are cases involving serious, grave or violent offending where deterrence, community protection and denunciation may become predominant, and rehabilitation, even for a young offender, becomes secondary.[766] For example, 'in a case involving serious and violent offending in the context of family violence where deterrent and punitive considerations loom so large'.[767]

The type of sentence imposed will depend in part on whether rehabilitation is the sole, the dominant, or a minor purpose.

A custodial sentence is 'skewed towards retribution and deterrence'.[768] The Court of Appeal has noted that the restrictions of imprisonment mean there is little opportunity or incentive for rehabilitation and the serious detriments imposed on the prisoner by custody impacts the community by creating individuals who are ill-equipped to function outside a penal environment and catalyses their renewed criminal activity on release.[769]

Although a custodial sentence is not ordinarily considered rehabilitative, the shortness of the term may reflect a rehabilitative aspect.[770]

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[759] *DPP (Vic) v Rongonui* (2007) 17 VR 571, 581 [41]–[42]; *R v Sebborn* (2008) 189 A Crim R 86, 91 [32]; *Pak v The Queen* [2012] VSCA 4, [53]; *Bass* [227]; *Sergei* [43].
[760] *R v Berry* [2009] VSCA 219, [31]–[40].
[761] *Mills* 241; *DPP (Vic) v REE* [2002] VSCA 65, [21]; *DPP (Vic) v Bridle* [2007] VSCA 173, [10]; *JPR* [45], [50].
[762] *R v Edwards* (1993) 67 A Crim R 486, 489; *Bowen v The Queen* [2011] VSCA 67, [48], [50] ('*Bowen*').
[763] *Azzopardi* 54 [35]; *Boulton* 361 [242]; *DPP (Vic) v Milson* [2019] VSCA 55, [71].
[764] *R v Sotiropoulos* [1999] VSCA 115, [28]; *McKee* 92 [13]; *R v Bowdler* [2005] VSCA 246, [10]; *Yeomans v The Queen* [2011] VSCA 277, [40] ('*Yeomans*').
[765] *DPP (Vic) v Sokaluk* (2013) 228 A Crim R 189, 197–99 [38]–[41], 197 [39], 199 [42].
[766] *Kane* 764–65; *Williscroft* 299; *R v Dole* [1975] VR 754, 762–64 ('*Dole*'); *Reddrop* [2], [15]; *PDJ* 629 [80]–[84]; *Tran02* 462 [14]; *SJK* [60], [65]–[66]; *Cumberbatch* 14–15 [13]; *Lawrence* 132 [22]; *Wyley* [10]–[11]; *Brown* [29]; *Bowen* [39], [43], [45]–[46]; *Yeomans* [46]; *Brayshaw*; *Hill12* 299–300 [49]–[53]; *Siilata v The Queen* [2019] VSCA 277, [31].
[767] *DPP (Vic) v Reynolds (a pseudonym)* [2022] VSCA 263, [95]-[96].
[768] *Boulton* 334 [113].
[769] Ibid 334 [107]–[108].
[770] See, eg, *Hewson v The Queen* [2011] VSCA 57, [34].

Rehabilitation is an important consideration in determining the length of a non-parole period. By allowing a term to be fixed, a legislature provides for mitigation of punishment in favour of rehabilitation,[771] so it is proper to give effect to a rehabilitative purpose in a custodial sentence by fixing a non-parole term lower than would otherwise be imposed.[772] To assist a young offender's rehabilitation a longer period of parole may be imposed,[773] but it is erroneous to assume the head sentence reflects the punitive and deterrent purposes, and the non-parole period reflects rehabilitation and mitigation.[774]

A youthful first offender should not, if it can be avoided, be given a custodial sentence.[775] Instead, they should be given the opportunity to reform.[776] Alternatives like a youth justice centre are to be preferred as rehabilitative to adult prison.[777]

To assist certain offenders with treatment, a court may impose a Residential Treatment Order requiring them to reside in a specified facility for that purpose for up to five years.[778]

4.3.1 – Non-custodial sentences and non-conviction dispositions

A Community Correction Order ('CCO')[779] is a non-custodial disposition that may further an offender's rehabilitation.[780] Similarly, the Magistrates' Court may defer sentencing for up to 12 months[781] to assess an offender's prospects for rehabilitation or to allow them to demonstrate they have been rehabilitated (and so may deserve a non-custodial term).[782]

The Act further permits the court to:

- release an offender on adjournment following conviction;[783]
- discharge an offender unconditionally after conviction;[784]
- release on adjournment without conviction;[785] and
- dismiss the charge unconditionally without conviction.[786]

[771] *Deakin v The Queen* (1984) 54 ALR 765, 766.
[772] *R v Hill* [2004] VSCA 116, [28]; *R v Ilic* [2003] VSCA 82, [18]; *R v TG* [2008] VSCA 83, [31]; *Borthwick v The Queen* [2012] VSCA 180, [12].
[773] *R v Lay* [2008] VSCA 120, [38]; *Azzopardi* 69–70 [91].
[774] *Bulfin* 122.
[775] *Mason v Pryce* (1988) 34 A Crim R 1, 9; *Balshaw* [57].
[776] *A-G (Tas) v Blackler* (2001) 121 A Crim R 465, 468–69 [11]–[12].
[777] *R v O'Blein* [2009] VSCA 159, [33]–[34].
[778] The Act s 82AA.
[779] Ibid s 36.
[780] See 11 – Community correction order.
[781] The Act s 83A(1).
[782] Ibid ss 83A(1A)(a)–(b).
[783] Ibid s 72.
[784] Ibid s 73.
[785] Ibid s 75.
[786] Ibid s 76.

The purpose of each disposition is to promote the offender's rehabilitation within the community or demonstrate their reform.[787] A court also has the discretion not to record a conviction,[788] though the exercise of this in cases of serious offending will be limited to 'out of the ordinary' or 'exceptional' circumstances that facilitate an offender's rehabilitation.[789]

4.4 – Protection of the community

Protecting the community from the danger posed by an offender is done by incapacitating them, which usually means removing them from society through the imposition of a custodial term.[790] But the community may be protected by other means and imprisonment is not the only way to give effect to this purpose.[791]

An offender's circumstances are often most relevant in determining the need for community protection. A person's prior convictions may indicate a continuing attitude of disobedience for the law such that community protection assumes greater, if not primary, importance.[792] So too might their reluctance to participate in treatment for a disorder,[793] or where they have a disorder that cannot presently be cured, and which fuelled their offending.[794]

Community protection is often said to be the primary purpose of sentencing.[795] However, community protection is also largely limited by the proportionality principle. A sentence must be proportionate to the crime, and a disproportionate sentence may not be imposed to extend the period of protection of society from the risk of recidivism on the part of an offender.[796]

There are legislative exceptions that arguably elevate the protective purpose above the requirements of proportionality. Firstly, section 6D of the Act provides that in sentencing a serious offender for a relevant offence, if the court considers that imprisonment is justified it must then regard protection of the community from the offender as the principal purpose for which the sentence is to be imposed.[797] To achieve that purpose, the court may impose a longer sentence than is proportionate to the gravity of the offence given the objective circumstances.[798] The Court of Appeal has noted that since community protection is always relevant, this direction has little impact except where mitigating factors might call for a shorter term.[799]

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[787] Ibid ss 70(1)(1), (ba).
[788] Ibid s 8.
[789] See, eg, *DPP (Vic) v Candaza* [2003] VSCA 91, [13]; *R v Woolley* [2008] VSCA 44, [14].
[790] *R v Benbrika* (2009) 222 FLR 433, 457 [139]; *Fattal* [173]; *DPP (Vic) v AJP (No 2)* [2016] VSC 198, [13]; *DPP (Cth) v Besim* [2017] VSCA 158, [113]. See also *Todd* [60] ('Community protection is promoted through just punishment'.).
[791] *Buhagiar* 547.
[792] *Henderson* 841 [44]; *Terrick* 470–71 [54], [56]; *DPP (Vic) v Alsop* [2010] VSCA 325, [26]; *Frost v The Queen* [2012] VSCA 282, [23]; *Meharry* [193].
[793] *Khudruj v The Queen* [2012] VSCA 2, [31].
[794] *Todd* [60].
[795] *Kane* 764–65; *Dole* 763; *R v Valentini* (1980) 48 FLR 416, 420; *Boulton* 326 [68].
[796] *Veen No 2* 472–73; *Boulton* 326 [67].
[797] The Act s 6D(a).
[798] Ibid s 6D(b).
[799] *R v LD* [2009] VSCA 311, [27].

Moreover, the language of the Act is important: a court 'may' impose a disproportionate term. There is no requirement that it do so, nor that it disregard proportionality (or any other) principle.[800] The circumstances of the offending and the offender may allow the principal purpose of protection to be achieved without exercising the discretion to impose a disproportionate sentence. A sentence may be of a length that is both proportionate to the gravity of the offending and which satisfies the primary purpose of protecting the community and all other sentencing purposes.[801]

And before imposing a disproportionate term to further the community's protection, the court must also be satisfied that the prisoner will remain a danger to the community beyond the period proportionality would indicate is an appropriate term and it must provide reasons for doing so.[802]

When the discretion is exercised under s 6D, the gap between the head sentence and non-parole period will generally be increased, because the non-parole period has a more limited role in the protection of the community.[803]

Invoking s 6D may also produce a crushing sentence, but if that is necessary to protect the community then it is a consequence that may have to be accepted,[804] as might the fact that an elderly offender will likely die in jail.[805]

The second legislative exception allows a court sentencing a serious offender for a serious offence to impose an indefinite term if it is satisfied to a high degree of probability that the offender is a serious danger to the community because of their circumstances, the nature or gravity of the offending, or any special circumstances.[806]

The High Court has ruled the principle of proportionality limits the imposition of an indefinite sentence to exceptional cases where it is demonstrably necessary to protect the community from physical harm. In other words, to those cases where the court is clearly satisfied by cogent evidence that the offender is so likely (because of their circumstances or their offending) to commit further crimes of violence that they are a continuing danger to the community.[807]

The assessment of serious dangerousness to the community is made at the time of sentencing. It is not a prediction of the offender's future dangerousness when they complete their sentence.[808] Similarly, upon an application for review of the indefinite term, ss 18H and 18M of the Act require an assessment as at the time of review, as though the offender might then be released from custody.[809]

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[800] *R v Connell* [1996] 1 VR 436, 443 ('*Connell*'); *R v Barnes* [2003] VSCA 156, [30] ('*Barnes03*'); *Dukic v The Queen* [2021] VSCA 18, [35] ('*Dukic*').
[801] *Dukic* [35].
[802] *Connell* 443; *R v Natoli* [2001] VSCA 243, [13]–[14]; *R v Taylor* (2004) 8 VR 213, 226–27 [24].
[803] *Barnes03* [22].
[804] Ibid [31].
[805] *Macfie v The Queen* [2012] VSCA 314, [92]–[93].
[806] The Act ss 18A, 18B(1).
[807] *Chester v The Queen* (1988) 165 CLR 611, 618–19. See also *Carolan v The Queen* (2015) 48 VR 87, 106–09 [54]–[62] ('*Carolan*').
[808] *Carolan* 105 [50], 113 [78]. See also *R v Carr* [1996] 1 VR 585, 592.
[809] *Carolan* 105 [51].

5 – Circumstances and gravity of the offence

When a court considers the circumstances of the offence it is largely considering the gravity of the offending from both a generic and specific perspective, even though the two cannot be neatly divided.

The generic gravity of an offence is reflected in the maximum penalty fixed by Parliament and in the elements of the crime and it is on these factors that a court will typically rely in making an initial pronouncement, such as 'murder is a most serious offence'. The first part of this chapter will consider these tools for determining offence gravity at the generic level.

However, a court must also assess the gravity of the specific offending falling for sentence. That requires it to assess the relative gravity of the offending with other examples of the offence. The first step in doing that is to identify the relevant circumstances of the offending which includes its particulars (such as planning, method, abuse of trust etc.), its explanation (such as the existence of mitigatory factors that reduce moral culpability but not offence gravity), and its consequences (be it on the victim, the community or society). In identifying the relevant circumstances, a court has broad latitude subject to a few firm limits. These considerations will be the subject of the second part of this chapter.

5.1 – Maximum penalty

Unless an indefinite sentence is available under the *Sentencing Act 1991* (Vic) s 18A ('the Act') the maximum penalty fixed by Parliament is:

- absolutely the highest term that may be imposed for the offence;
- indicates Parliament's view of the gravity of the offence; and
- a mandatory consideration for a court in determining the appropriate sentence.[810]

5.1.1 – Identifying the maximum penalty

Maximum penalties may be found:

- at the foot of the individual section for statutory indictable offences;[811] and
- in the offence specific chapters of this Manual.[812]

Unless the statutory language clearly states otherwise, the penalty stated at the end of a statutory section is the maximum penalty that *may* be imposed, not the mandatory penalty that *must* be imposed.[813]

Where a statutory offence is created but no maximum penalty is specified, then the maximum is presumptively two years imprisonment.[814] When there is no maximum fixed for a common law offence, it is said to be 'at large' and there is no legal limit on the maximum penalty. This will rarely arise as penalties for most common law offences have now been defined by statute.[815] If a court needed to

[810] *Sentencing Act 1991* (Vic) s 5(2)(a) ('the Act').
[811] Ibid s 111; *Crimes Act 1914* (Cth) s 4D(1) ('*Cth Crimes Act*').
[812] For example, see 21 – Murder.
[813] *Sillery v The Queen* (1981) 180 CLR 353, 356-57, 359, 363.
[814] The Act s 113C.
[815] *Crimes Act 1958* (Vic) s 320 ('*Crimes Act*').

sentence for such an offence then it may be guided by the maximum fixed for similar statutory offending, and any sentence may be imposed so long as it is not 'inordinate'.[816]

In Victoria,[817] the maximum penalty is often expressed as being a certain 'level' or 'unit'. The Act s 109 defines the 'levels' for imprisonment:

TABLE 1

Level	Maximum Term of Imprisonment
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

And the 'units' for fines:

TABLE 2

Level	Maximum Fine
1	—
2	3000 penalty units
3	2400 penalty units
4	1800 penalty units
5	1200 penalty units
6	600 penalty units
7	240 penalty units

[816] *R v Noble* (Unreported, Supreme Court of the Northern Territory – General Division, Fox, Muirhead and McGregor JJ, 10 March 1981) 23.
[817] The Commonwealth does not use penalty levels to describe maximum terms of imprisonment.

8	120 penalty units
9	60 penalty units
10	10 penalty units
11	5 penalty units
12	1 penalty unit.

However, some pieces of legislation continue to refer to the maximum sentence in terms of years or months. If there is any inconsistent description of imprisonment in years or months and a penalty 'level', then the 'level' prevails unless there is a contrary intention.[818]

Generally, in Victoria, except for life imprisonment, if an offence is punishable by imprisonment it may also or alternatively be punished by a maximum fine of 10 times the number of penalty units than the maximum number of months of imprisonment that might be imposed for the offence.[819] If the offence is a Level 2 offence, and the offender is a natural person, the fine may only be additional, and not an alternative to imprisonment.[820] If the offender is a body corporate, and is found guilty of an offence against the *Crimes Act 1958* (Vic), a court may impose a fine up to five times the amount of the maximum fine that could be imposed on a natural person found guilty of the same offence committed at the same time.[821]

The Treasurer sets the monetary value of a penalty unit for a fine annually.[822] For the last 10 years in Victoria they have been as follows:

Commencement date	Value	Instrument
1 July 2023	$192.31	Government Gazette No S256, 23/05/2023
1 July 2022	$184.92	Government Gazette No G16, 21/04/2022
1 July 2021	$181.74	Government Gazette No S233, 20/05/2021
1 July 2020	$165.22	Government Gazette No G16, 23/04/2020
1 July 2019	$165.22	Government Gazette No G14, 04/04/2019
1 July 2018	$161.19	Government Gazette No S145, 29/03/2018
1 July 2017	$158.57	Government Gazette No G13, 30/03/2017
1 July 2016	$155.46	Government Gazette No G15, 29/03/2016
1 July 2015	$151.67	Government Gazette No S86, 17/04/2015

[818] The Act s 109A.
[819] Ibid s 109(3).
[820] Ibid s 109(3A).
[821] Ibid s 113D(1).
[822] The Act s 110; *Monetary Units Act 2004* (Vic) s 5(3).

Commencement date	Value	Instrument
1 July 2014	$147.61	Government Gazette No S123, 15/04/2014
1 July 2013	$144.36	Government Gazette No G16, 18/04/2013
1 July 2012	$140.84	Monetary Units Act 2004 s11

The monetary value of a Commonwealth penalty unit is currently $275.00.[823] This figure is subject to indexation every three years from July 2023.[824]

These regular increases appear to constitute an increase in the maximum penalty for an offence, as the Court of Appeal has indicated the maximum fine is fixed based on the penalty unit value applicable at the time of the offending.[825]

In the Commonwealth scheme, except for a life term, if the maximum sentence is described only in terms of imprisonment, a court may instead impose a 'pecuniary penalty'. The maximum pecuniary penalty is a number of penalty units equal to five times the maximum number of months of imprisonment for the offence.[826] If the maximum sentence is a life term, a court may instead impose a maximum penalty of 2000 penalty units.[827] If a corporate body is convicted of an offence, a court may impose a maximum of five times the amount that could be imposed on a natural person.[828]

5.1.1.1 – Identifying the maximum in the Magistrates' Court

The criminal jurisdiction of the Magistrates' Court is limited to summary offences and indictable offences triable summarily.

For Victorian summary offences, the maximum term of imprisonment is fixed at two years, regardless of what maximum penalty is specified for that offence.[829]

Victorian indictable offences (statutory and common law) that may be tried summarily include offences that are:

- listed in Schedule 2 of the *Criminal Procedure Act 2009* (Vic);
- described *as being* a Level 5 or Level 6 offences (and so attracting maximum terms of 5 and 10 years respectively);
- described as being *punishable by* Level 5 or Level 6 imprisonment or fine, or both;
- described as being punishable by up to 10 years imprisonment, a fine of 1200 penalty units, or both.[830]

[823] *Cth Crimes Act* s 4AA(1).
[824] Ibid ss 4AA(1), (3)-(7).
[825] *DPP (Vic) v Vibro-Pile* (2016) 49 VR 676, 683-84 [15] n 8.
[826] *Cth Crimes Act* s 4B(2).
[827] Ibid s 4B(2A).
[828] Ibid s 4B(3).
[829] The Act s 113A.
[830] *Criminal Procedure Act 2009* (Vic) s 28(1).

Here too the Magistrates' Court may not impose a term exceeding two years for any single offence.[831] Further, when sentencing for multiple offences committed at the same time, the court cannot impose a cumulative term exceeding five years unless expressly provided for by an Act.[832]

If a person is found guilty in a summary proceeding of a Victorian indictable offence, the maximum fine the Magistrates' Court may impose is 500 penalty units.[833] For a corporate body found guilty in the same circumstances, the maximum fine that can be imposed is 2500 penalty units.[834]

Indictable Commonwealth offences that may be tried summarily are those punishable by up to 10 years imprisonment[835] and those relating to property valued up to $5000.[836] Indictable Commonwealth offences that may not be tried summarily are effectively all those related to treason, espionage, or advocating terrorism or violence.[837]

If the Commonwealth offence is punishable by up to five years imprisonment, the Magistrates' Court may impose a sentence of imprisonment not exceeding 12 months or a fine of up to 60 penalty units, or both.[838] Where the Commonwealth offence is punishable by between five- and ten-year terms of imprisonment, the Magistrates' Court may impose a sentence of imprisonment not exceeding two years or a fine not exceeding 120 penalty units, or both.[839]

It is important to note that this limit on the Magistrates' Court's power to impose a term of no more than two years is 'jurisdictional' only. It does not displace the maximum penalty prescribed for the substantive offence that a court must consider pursuant to s 5(2)(a) of the Act in determining an appropriate sentence.[840] This means that a sentence might be imposed at the two-year jurisdictional limit for offences that do not fall within the 'worst' category of the offence.

5.1.2 – Significance of maximum penalty

Firstly, as noted, the maximum penalty is a mandatory consideration under the Act for a court determining an appropriate sentence.[841] It reflects Parliament's view of the gravity of the offending but is also 'an aspect of the duty of all courts not to exceed their jurisdiction or powers'.[842] The maximum

[831] The Act s 113.
[832] Ibid s 113B.
[833] Ibid s 112A.
[834] Ibid s 113D(1A).
[835] *Cth Crimes Act* s 4J(1).
[836] Ibid s 4J(4).
[837] Ibid s 4J(7).
[838] Ibid s 4J(3)(a).
[839] Ibid s 4J(3)(b).
[840] *Hansford v Neesham* [1995] 2 VR 233, 236-37, 240-41 ('*Hansford*''); *R v Duncan* (2007) 172 A Crim R 111, 116-17 [18]-[22]; *Loader v The Queen* (2011) 33 VR 86, 92-93 [31]-[36]; *Dankovic v The Queen* [2012] VSCA 255, [18].
[841] The Act s 5(2)(a).
[842] *Hansford* 236.

penalty set by Parliament is a lighthouse, and like a ship, the court does not steer towards it but by it. It is a navigational aid, not an end in itself,[843] but careful attention to the maximum is always required.[844]

A court must assess where the circumstances of the offence and the offender fall along a spectrum of least serious instance of the offence to worst. Despite practices in the past, offences that do not warrant the maximum penalty should not be referred to as being 'within the worst category'. That description should be reserved for cases where the maximum penalty is warranted.[845] A court should also avoid using 'within the worst category' as a 'convenient form of legal shorthand' because it may lead the public to believe the court has undervalued the gravity of the offending and its effects. It is better for a court to simply state, when relevant, whether the offending is so grave as to warrant the maximum penalty or not.[846]

Factors relevant to determining if the maximum penalty is called for include:

- the offender's role (principal or subordinate) in the offending;
- for drug offences: the quantity and value of the drugs, the sophistication of the operation, and its international scope;
- the offender's relevant prior history; [847]
- the stage at which a guilty plea is entered;[848]
- the existence of genuine remorse;[849]
- if there was a commercial motive for the offending;[850]
- the length of any delay between the offending and the sentencing;[851]
- for sexual offending against children, including incest: the existence or lack of grooming, predatory behaviour, if the offender was in a position of authority that was exploited, the vulnerability of the victim, the age of the child, the existence and explicitness of any images, whether there was penetration, was the child isolated or manipulated, was the offending consistent, the duration of the offending, the depravity and degradation of the acts, the location of the offending, and the offender's disregard for the impact of their actions on the child;[852]
- for rape and other sexual offences: whether the offender was known to the victim, if the victim was overpowered, the location of the attack, the duration of the offending, the violence of the offending, the impact upon the victim, if the offending was committed in company, if the offence was planned, whether the offender was a serious offender, if the offending was predatory or

[843] *R v Ma* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Tadgell and Callaway JJA, 18 March 1998) 11; *DPP v Aydin & Kirsch* [2005] VSCA 86, [12].
[844] *DPP (Vic) v Gonzalez* [2011] VSCA 175, [30], quoting *Markarian v The Queen* (2005) 228 CLR 357, 372 [30]-[31]; *Latif v The Queen* [2013] VSCA 51, [59] ('*Latif*').
[845] *R v Kilic* (2016) 259 CLR 256, 266 [19] ('*Kilic*'). See also *Reid (a pseudonym) v The Queen* (2014) 42 VR 295, 320 [107] (Priest JA); *Davies v The Queen* [2019] VSCA 66, [717] ('*Davies*').
[846] *Kilic* 266 [20]. See also *La Rosa v The Queen* [2019] VSCA 152, [33].
[847] *Barbaro v The Queen* (2012) 226 A Crim R 354, 368 [47]-[49] ('*BarbaroVIC*'); *Ash v The Queen* [2011] VSCA 112, [93] ('*Ash*')
[848] *BarbaroVIC*.
[849] Ibid.
[850] Ibid.
[851] *Ash*.
[852] Ibid [92]-[93]; *DPP (Cth) v D'Allesandro* (2010) 26 VR 477, 481-83 [15]-[20]; *PDI v The Queen* (2011) 216 A Crim R 577, 594-95 [84]-[87]; *McNiece v The Queen* [2019] VSCA 78, [48]-[50].

persistent, whether there was penetration and if so by what means, if the offending consisted of multiple attacks, whether the victim suffered any injuries, and whether a weapon was used.[853]

If an indictable offence might be tried summarily, but is not, it is appropriate for a court to consider this fact, but it does not mean it is limited to the maximum sentence that could be imposed in the summary jurisdiction.

Misidentifying the applicable maximum penalty is an appealable error unless it can be shown to be immaterial.[854] Indicators that there has been a *material* effect on the sentence include where:

- the sentence imposed represents a high percentage of what the court erroneously believed the maximum to be;
- the sentences imposed for charges where the maximum was incorrect represented a large part of the total effective sentence;
- the court appeared to have been influenced by the incorrect maximum;[855]
- the error cannot be disregarded, such as when the sentence imposed is imprisonment, but the maximum is a fine.[856]

5.1.3 – Effects of alterations to maximum penalty

The impact of changes to the maximum penalty for an offence vary depending on the nature of the change and the date of offending.

For offences occurring before the date of a change of penalty, the court must sentence in accordance with any reduction in maximum penalty but must not consider any increase in maximum penalty.[857]

One exception to this rule is where the maximum penalty is reduced then increased between the date of offending and the date of sentence. In that situation, the court is not required to take into account the temporarily reduced penalty and may instead sentence in accordance with the original maximum penalty, if the current penalty is of the same magnitude or higher.[858]

For offences occurring after a change to the maximum penalty, the court must take into account that change as reflecting Parliament's new assessment of the seriousness of the offence. Where the penalty is increased, courts must treat that as a signal by Parliament that existing sentences have been insufficient and should be increased.[859]

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[853] *R v Gill* [2010] VSCA 67, [51]-[58]; *DPP (Vic) v Elfata* [2019] VSCA 63, [36]-[37]; *DPP (Vic) v Macarthur* [2019] VSCA 71, [64] ('*Macarthur*').
[854] *Ritchie v The Queen* [2016] VSCA 27, [19], quoting *R v Beary* (2004) 11 VR 151, 159 [21], 163 [39].
[855] *LDF v The Queen* [2011] VSCA 237, [5]-[6].
[856] *Gangur v The Queen* [2012] VSCA 139, [7]-[9].
[857] The Act s 114; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27(2).
[858] *R v AMP* [2010] VSCA 48, [27]-[29].
[859] See *R v AB (No 2)* [2008] VSCA 39, [41] ('*AB*''); *DPP (Vic) v Janson* (2011) 31 VR 222, 227 [21]-[23], 232 [47], 233 [55]; *Muldrock v The Queen* (2011) 244 CLR 120, 133 [31]; *Wassef v The Queen* [2011] VSCA 30, [26], [30].

If an offence has been repealed, the maximum penalty for that repealed offence continues to apply to conduct under the old offence. The enactment of a new offence for similar conduct has no impact on the assessment of maximum penalty for the old offence.[860]

5.2 – Statutory factors

The Act prescribes a number of non-exclusive circumstances relevant to determining the gravity of offending, including:

- its nature and gravity;
- the offender's culpability and degree of responsibility for the offence;
- whether the offending was motivated, wholly or partly, by hatred or prejudice against a group of people with whom the victim was associated or the offender believed they were associated;
- its impact on the victim;
- the circumstances of the victim;
- any injury, loss, or damage resulting directly from the offending;
- any aggravating or mitigating circumstances of the offender;
- '*or of any other relevant circumstances*'.[861]

Generally, a court's assessment of gravity 'is informed by the degree of risk of harm being caused and the extent of the potential harm'.[862] The seriousness of an offence should be assessed on the individual circumstances of the case, even if multiple categories of offending might be covered by one offence.

It is also important to remember in considering the gravity of the offending that there will frequently be overlap with the circumstances of the offender, the sentencing purposes and principles, and that lines between each may not be easily drawn.[863]

5.2.1 – Planning and scale

A premeditated or planned offence (even if inept or unsuccessful) is usually considered to be more serious than one that is spontaneous, opportunistic or unplanned, even if violent.[864] However, while it may seem contradictory, the Court of Appeal has also said there may often be little to distinguish between the culpability of a premeditated attack and a random one of sustained violence.[865] In doing so it seems the Court was reinforcing the need to strongly condemn the gravity of violence occurring either in public[866] or in the family context[867] regardless of a lack of planning by the offender.

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[860] *Interpretation of Legislation Act 1984* (Vic) s 14. See also *Andrews v The Queen* [2011] VSCA 191.
[861] The Act ss 5(2)(c)-(db), (g) (emphasis added).
[862] *R v Towle* (2009) 54 MVR 543, 563 [66], [68] ('*Towle*').
[863] *R v Storey* [1998] 1 VR 359, 365.
[864] *DPP (Vic) v Nguyen* [2010] VSCA 31, [10], [32]; *Chandler v The Queen* [2010] VSCA 338, [25] ('*Chandler*'); *Lunt v The Queen* [2011] VSCA 56, [66]-[68]; *TP v The Queen* [2012] VSCA 166, [80]; *Heath (a pseudonym) v The Queen* (2014) 45 VR 154, 163 [27]; *Beljulji v The Queen* [2017] VSCA 279, [43].
[865] See, eg, *DPP (Vic) v Terrick* (2009) 24 VR 457, 472-73 [63] ('*Terrick*'); *Felicite v The Queen* (2011) 37 VR 329, 333 [19]-[20] ('*Felicite*'); *Bedson v The Queen* [2013] VSCA 88, [67]-[68] ('*Bedson*').
[866] *Terrick* 472-73 [63]; *Bedson* [67]-[68]. See also *Lee v The Queen* [2018] VSCA 63.
[867] *Felicite* 333 [19]-[20].

But, generally, the greater the planning, duration, and scale of the offending, and the more sophisticated its method, the more gravely it will be considered.[868] This is particularly so for quantity-based offending, such as drug trafficking or importation, where the quantity trafficked (or manufactured, as actual distribution is not required)[869] or imported is more significant than other factors, such as duration or number of transactions,[870] and is a key indicator of the gravity of the offending.[871]

5.2.2 – Intent and knowledge

All things being equal, intentional offending should attract a higher sentence than reckless offending.[872] Similarly, someone who acts with knowledge of a possible risk has greater culpability than someone who does not,[873] and particularly if their knowledge is of a 'large-scale risk' as opposed to a 'small risk'[874] or involves separate attacks of escalating violence.[875] The level of recklessness may be reduced if the offender's decision making is impaired, but this will depend on the nature and severity of the impairment.[876] The offender's knowledge of risk or its possibility must be established by evidence beyond a reasonable doubt.[877]

Repetitive or persistent offending increases culpability because of the offender's knowledge of its unlawfulness and their failure to take the opportunity to cease, as well as the fear it engenders in victims and the community.[878] By contrast intermittent offending is less serious.[879]

5.2.3 – Role and status

For offending committed by multiple co-offenders, it is generally necessary to assess each participant's role. Depending on the circumstances, this consideration may magnify or reduce their culpability. Where an offender takes a subordinate or non-consequential role, their culpability for the offence will generally

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[868] *R v Hou* [2010] VSCA 36, [16]; *Latif* [85]; *XY v The Queen* [2013] VSCA 261, [11]; *Kalala v The Queen* [2017] VSCA 223, [80] ('*Kalala*'); *R v Tarrant* [2018] NSWSC 774, [152]; *R v Scott* [2018] NSWDC 290, [48]; *R v Kat* [2018] QCA 306, [41]. It also invokes the need for general deterrence and community protection. See, eg, *DPP (Cth) v MHK (a pseudonym) (No 1)* (2017) 52 VR 272, 288 [53] ('*MHK*'); *DPP (Cth) v Besim* [2017] VSCA 158, [112] ('*Besim*'); *Davies* [720], [780].
[869] *Chandler* [25].
[870] *Nguyen v The Queen* (2011) 31 VR 673, 676 [2]; *Kneifati v The Queen* [2012] VSCA 124, [42]; *DPP (Cth) v Maxwell* (2013) 228 A Crim R 218, 223 [20].
[871] *DPP (Cth) v KMD* (2015) 254 A Crim R 244, 257 [52]; *Qui v The Queen* [2019] VSCA 147, [58]; *DPP (Vic) v Fatho* [2019] VSCA 311, [70]; *Dang v The Queen* [2020] VSCA 24, [15].
[872] *DPP (Vic) v Monteiro* [2009] VSCA 105, [11] (Maxwell P).
[873] *Towle* 559 [50], 562 [64]. See also *DPP (Vic) v Russo* [2019] VSCA 129, [70].
[874] *Towle* 562-63 [65].
[875] *Ashe v The Queen* [2010] VSCA 119, [27].
[876] *Navaratnam v The Queen* [2021] VSCA 26, [29].
[877] *R v Aquilina* [2010] VSCA 6, [16]-[17].
[878] *DPP (Vic) v Avci* (2008) 21 VR 310, 321-22 [40]-[41]; *DPP (Vic) v BDJ* [2009] VSCA 298, [32]; *DPP (Vic) v Brown* [2009] VSCA 314, [26]; *R v RLP* (2009) 213 A Crim R 461, 479-80 [51].
[879] *LDF v The Queen* [2011] VSCA 237, [17].

be reduced. Where the offender's role is substantial or leading, their culpability may be increased.[880] The magnitude of certain offences, such as terrorism or drug trafficking, is such that any involvement in it indicates a high degree of moral culpability and calls for a heavy penalty.[881] However, in seeking to identify the offender's role, a court should never lose sight of the particular offence charged, and what the particular offender actually did.[882]

One circumstance where a court will often be asked to make findings about an offender's role is where different identified roles have been placed in a notional hierarchy of culpability. Drug offending is the prime example of this approach, but the High Court has warned against placing excessive weight on the task of positioning offenders within these hierarchies.[883] This is because an offender's role might only be fully known after examining all of the circumstances, including those surrounding, but not necessarily constituting part of, the offence. If those circumstances are not established by material before the court, it is not required to inquire into the facts and in the absence of evidence is not required to make a finding favourable to the offender.[884] This does not mean distinctions cannot be drawn between multiple offenders based on their roles in the same enterprise. Such distinctions can be particularly important when parity is an issue,[885] but there must be an evidentiary basis for establishing such differences.[886]

Where evidence establishes that one joint offender was a principal, and another an accessory, but it cannot be determined which offender was which, then both must be treated as being no more culpable than an accessory.[887] This does not apply when there is no evidence of a distinction between the two offenders, nor should it be assumed that an accessory's culpability is presumptively lower than a principal's culpability.[888]

The objective seriousness of offending may also be aggravated by the offender's abuse or misuse of their status or position,[889] particularly involving a breach of trust, such as in:

- offending by individuals within the justice system, such as police officers, judges, lawyers;[890]

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[880] *R v Bloomfield* [2009] VSCA 302, [20]; *Tomkinson v The Queen* [2010] VSCA 282, [16]-[17]; *CNK v The Queen* (2011) 32 VR 641, 661 [73]; *Ho v The Queen* (2011) 219 A Crim R 74, 88 [63]. Different terms are used to describe roles in offending, but each effectively describes the relationship between a subordinate and a principal. See, eg, *R v Kheir* [2003] VSCA 209, [5]; *R v Andrakakos* [2003] VSCA 170, [21]; *Nguyen v The Queen* (2016) 311 FLR 289, 316 [84]; *Beqiri v The Queen* [2017] VSCA 112, [150]; *Kalala* [45].

[881] *R v Nicholas* (2000) 1 VR 356, 408 [171]; *DPP (Cth) v Vestic* [2008] VSCA 12, [12]; *DPP (Cth) v Fattal* [2013] VSCA 276, [158]; *Besim* [119], [121]; *MHK*.

[882] *R v Olbrich* (1999) 199 CLR 270, 279 [19] ('*Olbrich*').

[883] Ibid 277-80 [13]-[20].

[884] Ibid 278-80 [15]-[20].

[885] *R v Nicholas* (2000) 1 VR 356, 404-06 [159]-[164], 407-08 [165], 409 [173].

[886] *Olbrich* 281 [27]; *R v Do* [2008] VSCA 199, [27]-[33]. See 2.3.2.1 – Method and process – Findings - Evidence - Burden and standard of proof.

[887] *R v Bannon* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Crocket and Vincent JJ, 21 September 1993) 36.

[888] *R v SJK* [2002] VSCA 131, [45]-[47].

[889] Clearly, it is also subjectively relevant to the offender. See 6.3.3 – Circumstances of the offender – Actions and behaviour – Personal history and circumstances.

[890] *R v Wright (No 2)* [1968] VR 174, 181; *R v Jones* (1989) 41 A Crim R 1, 21; *R v Fraser* [2004] VSCA 147, [29]; *R v Strawhorn* (2008) 185 A Crim R 326, 357-58 [220]; *R v Ferguson* (2009) 24 VR 531, 597 [401], 598 [404]; *Miechel v The Queen* (2010) 207 A Crim R 334, 359-60 [129]; *DPP (Vic) v Blackberry* [2019] VSCA 269, [29].

- offending by public officials and public servants;[891]
- offending by a parent, or other person with the care, supervision or custody of, against a child, as in cases of incest or other sexual offending[892] and manslaughter;[893]
- sexual offending against a child by a family friend;[894]
- offending by persons in positions of trust, such as teachers,[895] doctors,[896] and employees,[897] and others.[898]

5.2.4 – Provocation

If the victim provokes offending conduct, it may lessen an offender's culpability, but it does not lessen the significance of any harm suffered by the victim.[899] The jurisprudence around provocation originated largely where it was a partial defence to murder. With the abolition of provocation as a defence to murder, provocation considerations are now confined to sentencing. The weight to be given to this issue is a matter of degree and circumstance with few set guidelines.[900] One exception is that alleged provocation or emotional stress in the context of a family relationship will be subordinate to considerations of general deterrence, denunciation and just punishment, unless the offending stems from fear rather than anger.[901]

5.2.5 – Hate crimes

Section 5(2)(daaa) of the Act requires a sentencing court to consider if 'hatred for or prejudice against a group of people with common characteristics' motivated (or partly motivated) the offending. If so, then it is as an aggravating factor, which increases the gravity of the offence and the moral culpability of the offender.[902]

The Act does not identify – or limit – groups that share 'common characteristics', but the Attorney-General's second reading speech did identify key groups the provision is designed to protect. They are those characterised by:

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[891] *DPP (Vic) v Armstrong* [2007] VSCA 34, [36]; *R v Petroulias (No 36)* [2008] NSWSC 626, [213]; *R v Buckskin* [2010] SASC 138; *R v Note Printing Australia Ltd* [2012] VSC 302, [56]; *R v Lamella* [2014] NSWCCA 122, [57].
[892] *R v Franklin* (2008) 191 A Crim R 354, 365 [36], 367 [45]; *EDM v The Queen* [2010] VSCA 308, [18]-[19] ('*EDM*"); *Russell v The Queen* (2011) 212 A Crim R 57, 68 [50], 70 [63]; *EMT v The Queen* [2012] VSCA 193, [13]; *PG v The Queen* [2013] VSCA 9, [103]; *Carter (a pseudonym) v The Queen* (2018) 272 A Crim R 170, 179-80 [44] ('*Carter18*'), quoting *DPP (Vic) v Dalgliesh (a pseudonym)* [2016] VSCA 148, [128]-[130].
[893] *R v Kesic* [2001] VSCA 171, [54].
[894] *Dibbs v The Queen* (2012) 225 A Crim R 195, 214 [89]; *Neubecker v The Queen* (2012) 34 VR 369, 385 [73].
[895] *DPP (Vic) v Riddle* [2002] VSCA 153, [24], [30]; *R v Dunne* [2003] VSCA 150, [24], [43]; *R v Coffey* (2003) 6 VR 543, 551-52 [28]; *DPP v Ellis* (2005) 11 VR 287, 295 [23].
[896] *Pahuja (No 2) v The Queen* (1989) 40 A Crim R 252, 263; *DPP (Vic) v Joseph* [2001] VSCA 151, [24].
[897] *DPP (Vic) v Gonzalez* [2011] VSCA 175, [27]; *DPP (Vic) v Caulfield* [2019] VSCA 131, [33], [57].
[898] *R v Manners* [2002] VSCA 161, [7]-[8]; *DPP (Vic) v Fabriczy* (2010) 30 VR 632, 640 [27]; *Murray v The Queen* [2011] VSCA 232, [10].
[899] *Va v The Queen* (2011) 37 VR 452, 459 [33], 461-62 [42] ('*Va*'); *R v Pearce* (1983) 9 A Crim R 146, 150.
[900] See, eg, *AB* 402 [33]-[35]; *R v Tran* [2008] VSCA 80, [32]-[38]; *DPP (Vic) v McMaster* (2008) 19 VR 191 ('*McMaster*'); *R v Alexandridis* [2008] VSCA 126, [14]; *Va* 459-62 [29]-[42]; *Felicite* 336 [33].
[901] *Va* 460 [36]; *Felicite* 333 [19]-[20], 335 [30].
[902] Sentencing Advisory Council, 'Sentencing for Offences Motivated by Hatred or Prejudice' (2009) 16 ('SAC Report').

- religious affiliation;
- racial or cultural origin;
- sexual orientation;
- sex;
- gender identity;
- age;
- impairment (within the meaning of the *Equal Opportunity Act 1995* (Vic)); or
- homelessness.[903]

In recommending the enactment of this provision, the Sentencing Advisory Council considered that the courts were best placed to determine the relevant groups on a case-by-case basis.[904]

Parliament intended this section to apply broadly by noting that a victim might be:

- a member of the group;
- a 'Good Samaritan' coming to the assistance of a member of the group during an offence;
- an advocate or lobbyist for the group;
- someone in employment related to the group;
- an acquaintance or family member of a group member who is victimised due to hatred or prejudice against the group.[905]

There has been little judicial consideration of the provision, except for one case noting the court must be satisfied of the existence of a hateful or prejudicial motive 'beyond a reasonable doubt'.[906]

5.2.6 – Impact on and circumstances of the victim

The circumstances of the victim are highly significant in determining the gravity of any offence, with the most important consideration usually being any harm to them. Other considerations include the victim's vulnerability, whether they are in a protected class, their conduct, relationship to the offender, and, in some instances, their attitude to the sentence.

This consideration of the victim's circumstances is required by both statute[907] and the common law.[908] But, as discussed further below,[909] a statute may specify that harm to the victim is an element of an offence and if it does, then Parliament has already taken their harm into account in fixing a maximum penalty and a court must then be careful not to doubly weigh harm in determining the appropriate sentence.

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[903] Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3358 (Rob Hull, Attorney-General) ("*Debates*").
[904] SAC Report 12.
[905] Debates 3358-59.
[906] *R v O'Brien* [2012] VSC 592, [37], rev'd on other grounds; *Hudson v The Queen* [2013] VSCA 218.
[907] The Act ss 5(2)(daaa)-(db); *Cth Crimes Act* ss 16(2)(d)-(e).
[908] *R v Webb* [1971] VR 147, 150-51; *R v Mallinder* (1986) 23 A Crim R 179, 183.
[909] See 5.2.8 – Aggravating, mitigating and other relevant circumstances below.

'Victim' is construed broadly to include the direct victim, their family,[910] or secondary victims like witnesses;[911] a victim can also be society or the community,[912] and there can be more than one victim in either a single offence or multiple offences.

Offending against 'vulnerable victims' is considered to be particularly grave. These victims include:

- elderly people;[913]
- younger people,[914] children,[915] and infants.[916] In particular, significant disparity in age tends to increase the gravity of offending where an adult sexually exploits a child;[917]
- sleeping[918] or unconscious[919] people;
- sex workers;[920]
- pregnant people;[921]
- intoxicated people;[922]
- physically or intellectually disabled people;[923]
- small businesses;[924] and
- women going about their business in a public place at night.[925]

Similarly, offending against protected persons is especially serious. These are law enforcement officers, including police, corrections and youth justice custodial officers, emergency service workers,[926] and prisoners.[927]

The existence of a relationship between the offender and the victim may be relevant in assessing the gravity of the offending. Offending in a domestic context can never be mitigating and may be

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910 *R v Penn* (1994) 19 MVR 367, 369-70; *R v Miller* [1995] 2 VR 348, 354.
911 *DPP (Vic) v Nguyen* [2010] VSCA 31, [11], [23].
912 *Chester v The Queen* (1988) 165 CLR 611, 618; *R v Grossi* (2008) 23 VR 500, 505 [17]; *Haddara v The Queen* (2016) 260 A Crim R 306, 317 [49].
913 *DPP (Vic) v Grabovac* [1998] 1 VR 664, 677-76; *GAS v The Queen* (2004) 217 CLR 198, 207 [19]; *Hi v The Queen* [2017] VSCA 315, [58].
914 *R v Cardamone* (2007) 171 A Crim R 207, 219-20 [46]; *Saleh v The Queen* [2012] VSCA 210, [20].
915 *DPP (Vic) v Clunie (a pseudonym)* [2016] VSCA 216, [7]; *Harlow (a pseudonym) v The Queen* [2018] VSCA 234, [86(1)]; *Bromley v The Queen* [2018] VSCA 329, [60].
916 *R v Quarry* (2005) 11 VR 337; *DPP (Cth) v Garside* (2016) 50 VR 800, 821 [72].
917 *Clarkson v The Queen* (2011) 32 VR 361, 376-79 [54]-[66]; *Soo v The Queen* [2014] VSCA 304, [36]; *Sadrani v The Queen* [2015] VSCA 202, [37]; *Wakim v The Queen* [2016] VSCA 301, [48].
918 *Hasan v The Queen* (2010) 31 VR 28, 37 [36]-[37]; *R v Wano* [2018] QCA 117, [58].
919 *Cedic v The Queen* [2011] VSCA 258, [30]; *DPP (Vic) v McInnes* [2017] VSCA 374, [4]; *Wan v The Queen* [2019] VSCA 81, [38].
920 *DPP (Vic) v Daly* [2004] VSCA 63, [1]-[2]; *R v Brown* [2009] VSCA 23, [33]; *Dulihanty v The Queen* [2013] NSWCCA 275, [70]; *R v Livas* [2015] ACTSC 50, [34].
921 *R v Mizon* [2002] VSC 115, [25]; *Crawford v The Queen* [2018] VSCA 113, [77].
922 *R v Browne* [2002] VSCA 143, [28]; *R v Nabegeyo* (2014) 34 NTLR 154, 157-58 [13], 159 [25].
923 *R v LD* [2009] VSCA 311, [18(2)], [33]-[34]; *Turner (a pseudonym) v The Queen* [2018] VSCA 24, [26].
924 *Adams v The Queen* [2011] VSCA 77, [64].
925 *Macarthur* [69].
926 See, eg, The Act s 10AA; Notes to ss 15A-15B, 16-18 of the *Crimes Act*. See also *Higgins v Fricker* (1992) 63 A Crim R 473, 480; *Martinez v The Queen* [2019] VSCA 135, [29]-[31].
927 *R v Allen* (1994) 77 A Crim R 99, 119-20.

aggravating,[928] particularly in cases of family violence,[929] rape,[930] or other sexual offending.[931] Similarly, the absence of any relationship may be significant, and offending against an 'innocent stranger' is a serious offence.[932]

A victim's conduct, if established by a balance of probabilities,[933] may have bearing on the sentence,[934] even if it does not lessen the offender's moral culpability or affect the gravity of the offending.[935] It is not helpful, however, to describe this conduct as being mitigating or otherwise,[936] nor to refer to the victim as being 'complicit' as that is a well-defined term attributing criminal responsibility to them.[937] The weight to be given to this factor is a matter for the court to determine based on the circumstances of the case.[938]

Generally, a victim's attitude regarding the sentence to be imposed is irrelevant. But in appropriate cases their forgiveness may indicate that the effects of the offending have not been long lasting and that their suffering is lessened.[939] It is also of greater relevance for negligence offences.[940] However, a court should generally be cautious in considering evidence of forgiveness,[941] and it should be treated with 'extreme caution' for offending in the context of family violence.[942] Lastly, a victim's failure to make a victim impact statement or take part in the sentencing proceedings are not mitigating factors.[943]

5.2.7 – Harm (direct injury, loss, or damage)

The nature and degree of any harm suffered is highly relevant to determining the gravity of the offending[944] and the forms and types of harms are extremely varied. Attempting to compile a catalogue of them would be futile. In injury cases, harm may be physical and/or psychological. It may be transient, short-term, long-term or permanent. It may substantially impair the victim's functioning as an ordinary member of society or constitute an annoying inconvenience. For endangerment offences, the harm to be examined is the risk created. For dishonesty offences, the financial loss to any victim may be significant.

The Act requires a court to consider both the impact of an offence on the victim and any resulting injury, damage, or loss ('harm'). As 'victim' is defined to mean one directly suffering from that harm, regardless of whether it was reasonably foreseeable by the offender,[945] this displaces the common law rule which

928 *R v MFP* [2001] VSCA 96, [19]-[20].
929 *Nolan v The Queen* [2017] VSCA 240, [31]. See also 5.2.8.3 – Family violence below.
930 *Forbes (a pseudonym) v The Queen* [2018] VSCA 341, [31], [41]-[42].
931 *R v Mason* [2001] VSCA 62, [7]-[8]; *Samuels (a pseudonym) v The Queen* [2018] VSCA 251, [39]-[40].
932 *Ashton v The Queen* [2010] VSCA 329, [20].
933 *Guseli v The Queen* [2019] VSCA 29, [69] ('*Guseli*').
934 *Spanjol v The Queen* (2016) 55 VR 350, 361-62 [40]-[41], [46] ('*Spanjol*').
935 *Guseli* [69], [73].
936 *Spanjol* 362 [47].
937 Ibid 362-63 [48].
938 *Guseli* [73]-[76].
939 *R v Skura* [2004] VSCA 53, [48].
940 *Marsh v The Queen* [2011] VSCA 6, [33].
941 *R v Sa* [2004] VSCA 182, [38]-[40]; *Hards v The Queen* [2013] VSCA 119, [17]-[18].
942 *R v Hester* [2007] VSCA 298, [27] (Neave JA); *Smith v The Queen* [2010] VSCA 192, [8].
943 *DPP (Vic) v Gerrard* (2011) 211 A Crim R 171, 182 [43].
944 *Edmond v The Queen* [2017] NTCCA 9, [6].
945 The Act ss 3, 5(2)(daa), (db).

limited harm to that which was reasonably foreseeable and means a sentencing court must consider harm regardless of whether or not it was intended.[946]

The prosecution must demonstrate a temporal or other connection between the harm and the offending sufficient to show the one was the direct result of the other.[947] Although evidence of harm will normally be led during the course of a trial, or in a plea by statements in the depositions, a court will often have to look beyond these. Most often this will be through victim impact statements, but if these are not tendered a court may draw reasonable inferences regarding the impact of an offence on the victim or their family,[948] particularly in cases of sexual offending.[949]

5.2.8 – Aggravating, mitigating, and other relevant circumstances

Aggravating circumstances are not limited to those that are strictly contemporaneous with the offending.[950] Common-sense dictates that the circumstances of the offence are not marked out by neat lines marking the technical beginning and ending of a crime. It may be a question of degree best left to the sentencing court to determine.[951]

The elements of an offence help determine its seriousness and influenced Parliament's choice of maximum penalty. In categorising facts as aggravating or mitigating, a court cannot count a factor that is an element of the offence. Such matters are instead assessed as part of the inherent gravity of the offence. This limitation, however, rarely arises as most offences capture conduct of various degrees and conduct that exceeds the minimum needed to satisfy an element can be treated as indicating a more serious example of offending.[952]

5.2.8.1 – Weapons

The use of a weapon is relevant to assessing the gravity of the offending. While there are few limits on what might be considered a 'weapon', the more dangerous the item and the greater its capacity to invoke fear, the greater the seriousness of the offending.[953]

The use made of the weapon is also relevant to determining gravity. More serious instances include when a weapon is used:

- to overcome resistance;[954]

[946] *Eade v The Queen* (2012) 35 VR 526, 533 [32]-[34]; *SD v The Queen* (2013) 39 VR 487, 491 [17].
[947] *Best v The Queen* (2015) 46 VR 196, 210-11 [72]-[76] ('*Best*').
[948] *R v Miller* [1995] 2 VR 348, 354.
[949] *R v Rankin* [2001] VSCA 158, [10].
[950] *DPP (Vic) v England* [1999] 2 VR 258, 263 [17].
[951] Ibid 263-64 [18], 267-68 [35], 268-69 [41]-[42].
[952] See, eg, *EDM* [16]-[20].
[953] See, eg, *R v Roy* (2001) 119 A Crim R 147, 149-50 [7], [9]; *R v Johns* [2003] VSC 415, [22]; *R v Keenan* (2009) 236 CLR 397, 416 [60]; *Vergados v The Queen* [2011] VSCA 438, [69].
[954] *R v Alameddine* [2004] NSWCCA 286, [59]; *DPP (Tas) v CSS* [2013] TASCCA 10, [22].

- to obtain submission in sexual offences;[955]
- to instil fear and enforce demands;[956]
- to attack or harm the victim;[957]
- in a public place or at a busy time when many people might be present and injured;[958] and
- against vulnerable victims[959] or those protected by law, such as police and emergency workers.[960]

Legislation and most cases draw little or no distinction between the use of an imitation or a real weapon;[961] however, some authority has found that using an imitation or unloaded weapon makes the offending less serious.[962]

5.2.8.2 – Benefit and loss

The gravity of many offences can be assessed by any benefit gained by an offender and any loss suffered by the victim. This is most evident in property offences but is also significant in cases of offending for reward such as drug trafficking. Generally, all reasonable efforts should be made to obtain an accurate assessment of the value of property, but errors as to the quantum may be immaterial and value is only one guide to determining the seriousness of the offending.[963]

In assessing the benefit from an offence, a court may have broad regard to any profit component if reliable information is available, but it should not undertake a detailed examination of the offender's illegal dealings. The benefit an offender receives is often simply any amount of money they have received from the offending, and among co-offenders in the absence of evidence to the contrary a court may assume each shared equally.[964]

The demonstration of actual enrichment may be a significant aggravating circumstance.[965] But any form of personal benefit, including to third parties dependent on the offender, may be regarded as a form of

[955] *R v Vaitos* (1981) 4 A Crim R 238, 277-76, 300; *DPP (Vic) v Devaldez* (2003) 141 A Crim R 11, 14 [8]-[11], [13] 16-17 [26]-[28], 18 [34]; *DPP (Vic) v Moses* [2009] VSCA 274, [31], [33], [38], [59]-[62]; *DPP (Vic) v Dowie* (2009) 196 A Crim R 288, 289-90 [2], 293 [8], 297 [27], 298 [31]; *DPP (Vic) v Jones (a pseudonym)* (2013) 40 VR 267, 277 [27], [32], 279 [44], 281 [53], 290-91 [98]-[101].
[956] *R v Gregory* [2001] VSCA 32, [10]; *DPP (Vic) v Brown* (2004) 10 VR 328, 329 [1], 332 [19], 335-36 [39]-[40], 338 [49]; *Spiteri v The Queen* [2018] VSCA 254, [51], [69].
[957] *R v Laffey* [1998] 1 VR 155, 158, 161-62; *R v Kelly* [2000] VSCA 164, [7], [21]-[23]; *R v Chong* [2008] VSCA 119, [1] (Neave JA); *Nash v The Queen* (2013) 40 VR 134, 137 [10] (Maxwell P); *Best* 204 [44].
[958] *R v Legarda* [2002] VSCA 179, [16], [18]; *Hudson v The Queen* (2010) 30 VR 610, 624 [56], 628 [69], 629 [72] ('*Hudson*'); *MHK* 290-91 [61]-[62].
[959] *McMaster* 211 [81]; *DPP (Vic) v Brown* (2004) 10 VR 328, 335-36 [39]; *DPP (Vic) v Maynard* [2009] VSCA 129; *Raccosta v The Queen* [2012] VSCA 59, [26].
[960] See, eg, The Act s 10AA; Notes to ss 15A-15B, 16-18 of the *Crimes Act*.
[961] See, eg, *Crimes Act*; *Riley v The Queen* [2015] VSCA 259, [21].
[962] *Armistead v The Queen* [2011] VSCA 84, [11]; *Western Australia v Warmdean* [2019] WASC 6, [171]; *Marks v The Queen* [2019] VSCA 253, [52]-[55].
[963] *R v Ash* [2005] VSCA 43, [25], [41].
[964] *DPP (Vic) v Nieves* [1992] 1 VR 257, 262, 264.
[965] *R v Tran* (1997) 96 A Crim R 53, 58; *R v Koumis* (2008) 18 VR 434, 436 [51]; *Vozlic v The Queen* (2013) 39 VR 327, 334 [29].

enrichment.[966] The fact that the offender was not actually enriched by their conduct, perhaps because the offending failed, is not necessarily a mitigating factor.[967]

An individual who is lower in the hierarchy of a criminal enterprise, and benefits less, is not as culpable as another higher up who has more to gain.[968]

The extent of the victim's loss is another relevant factor.[969] Failure by the prosecution to quantify the value of a loss may limit the sentencing range available to the court.[970]

Where the loss is recouped by payment from a third party, such as a professional indemnity fund or personal insurer, that consideration may be relevant but will carry little or no weight in mitigation if it simply represents the shifting of loss from one sector of the community to another.[971]

5.2.8.3 – Family violence

'Sentencing law has long recognised the prevalence of violence by men against women in (or after) domestic relationships…'.[972]

For numerous reasons – including the breaches of trust involved, the gravity of the harm caused, and the vulnerability of its victims – Victorian courts have repeatedly emphasised the need to strongly condemn family violence.[973] Those considering the brutal and degrading abuse of a domestic partner must understand the courts have duty to protect vulnerable members of the community and will not hesitate to punish them sternly.[974]

The community abhors such conduct and is completely unwilling to tolerate it.[975] Family violence 'undermines the foundations of personal relationships and family trust upon which our society rests…,'[976] and so requires that denunciation, just punishment and general deterrence be given primacy in sentencing in this context.[977]

For these same reasons, the breach of a family violence intervention order will exacerbate the seriousness of the offending.[978]

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[966] *R v Coukoulis* (2003) 7 VR 45, 52 [16].
[967] *R v Healey* [1999] VSCA 219, [19]-[20].
[968] *Velevski v The Queen* [2010] VSCA 90, [21], [24]; *Chandler* [26].
[969] *R v Zotos* [2008] VSCA 82, [36]; *Minotto v The Queen* [2010] VSCA 310, [19].
[970] *Chhim v The Queen* [2010] VSCA 347, [21].
[971] *R v Senese* [2004] VSCA 136, [80].
[972] *Kalala* [63].
[973] *Pasinis v The Queen* [2014] VSCA 97, [54]; *Filiz v The Queen* [2014] VSCA 212, [23] ('*Filiz*'); *Mercer (a pseudonym) v The Queen* [2015] VSCA 257, [54]; *Kalala* [59].
[974] *DPP (Vic) v Smith* [2019] VSCA 266, [35] ('*Smith*'). See also *Guirguis v The Queen* [2020] VSCA 48, [37].
[975] *Kalala* [63].
[976] *Felicite* 333 [20].
[977] Ibid. See also *DPP (Vic) v Evans* [2019] VSCA 239, [83]-[85]; *Smith* [35]; *Baker (a pseudonym) v The Queen* [2021] VSCA 158, [30], [32] ('*Baker*').
[978] *Filiz* [21]; *Marrah v The Queen* [2014] VSCA 119, [20], [25]; *Baker* [32]; *Skeates (a pseudonym) v The King* [2023] VSCA 226, [60] ('*Skeates*').

Family violence encompasses physically, sexually, emotionally, psychologically, and economically abusive, threatening, or coercive behaviour. 'That kind of behaviour produces situations where people, disproportionately women, live in 'real and justified fear of men who are, or were, their intimate partners'. It robs them of capacity and agency and engenders shame.[979] So it follows that in assessing the totality of the circumstances for an offence committed in the context of family violence, 'the surrounding behaviours of the offender must be considered to assess the true gravity of the offending'.[980]

The degree of physical injury sustained in an assault is relevant, but the offending must be understood in the context of an offender's persistent perpetration of family violence. The gravity of family violence is not to be measured solely by the physical consequences. The offending as a whole cannot be deconstructed in order to divorce individual charges from a context of degradation, control, threats, and creating an environment of fear and dread.[981]

5.2.8.4 – Entrapment

Entrapment is not a defence but entrapping conduct by police may be relevant to mitigation.[982] The weight to be given to police involvement depends on the circumstances of the case.[983] 'The fact that there is a real possibility the specific offending would not have occurred but for the involvement of the police may carry some weight'.[984] The primary focus is on how their involvement bears upon the offender's culpability, and there is a spectrum along which this impact is assessed ranging from very little to substantial.[985] Relevant factors include how police involvement contributed to the offending, including whether coercion, pressure, or inducement was applied to the offender, and if so to what degree and of what nature.[986] It is also relevant whether the police dealt with the offender directly or through an intermediary – ordinarily the more remote their involvement (and coercion etc.) the less weight it is entitled to in the sentencing synthesis. Further, little weight is merited if the offender instigated the offending,[987] but if their will was overborne by the police it is entitled to greater weight.[988]

5.2.8.5 – Uncharged conduct and surrounding facts

The circumstances of an offence do not commence and conclude with the proven elements of the offence.[989] Uncharged conduct or discreditable conduct may be treated as an aggravating feature of the offence, and as an indicator of increased moral culpability. But where the uncharged conduct constitutes an aggravated version of the offending or should have been alleged as a separate charge entirely, a court may not take it into account.

Uncharged acts cannot be taken as aggravating factors where they warrant conviction for a more serious offence. It does not infringe that principle for a court consider the fact of a victim's injury when

[979] *Skeates* [61].
[980] Ibid [62].
[981] Ibid [77].
[982] *R v Papoulias* [1988] VR 858, 863-64; *Kada v The Queen* [2017] VSCA 339, [59] ('*Kada*').
[983] *Kada* [72(a)-(b)].
[984] Ibid [72(c)]. See also *R v Campanella* (2004) 90 SASR 1, 10 [69].
[985] *Kada* [72(d)].
[986] Ibid [72(e)].
[987] Ibid. See also *R v Vuckov* (1986) 40 SASR 498, 523; *R v Bernath* [1997] 1 VR 271, 277.
[988] *Kada* [72(e)].
[989] *DPP (Vic) v England* [1999] 2 VR 258.

sentencing for the offence of recklessly exposing an emergency worker to risk where no separate charge was brought with respect to the injury. However, where an offender stands to be sentenced separately for causing injury, that conduct cannot be taken into account in sentencing for reckless exposure offence as that would involve double punishment.[990]

The dividing line between permissibly using uncharged conduct as an aggravating factor and impermissibly punishing an offender for separate criminality is a matter of degree, and often it will only be a 'fine line'.[991] Whether uncharged conduct can be used as an aggravating factor may depend on whether the uncharged conduct was contemporaneous with the offending, and on any disparity between the seriousness of the charged offence and the offence that could constitute the uncharged conduct.[992]

Examples of circumstances where uncharged conduct was permissibly used as an aggravating factor have included:

- taking steps to conceal the crime such as disposing of a body or denying knowledge of the victim's whereabouts;[993]
- delay in rendering or actively preventing medical assistance;[994]
- enlisting others to participate in a lie;[995]
- offending while released on some form of conditional liberty or in contravention of specific court orders.[996]

These considerations are highly fact-dependent, and a court may decline to draw a negative inference where there is another explanation for the action.[997]

5.2.9 – Current sentencing practices

5.2.9.1 – Requirement and purpose

A court must also have regard to current sentencing practices.[998] But as with all sentencing factors, current sentencing practice is just one among many that must be considered in reaching a just sentence.[999]

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[990] *Hutchinson v The Queen* [2021] VSCA 235, [76]-[77].
[991] Ibid. See also *Farah v The Queen* [2019] VSCA 300, [62].
[992] *R v De Simoni* (1981) 147 CLR 383; *R v Newman* [1997] 1 VR 146; *R v Scholes* [1999] 1 VR 337, 348-50 [23]-[24] ('*Scholes*'); *Semaan v The Queen* [2017] VSCA 261, [91]-[92].
[993] *R v Boyle* (2009) 26 VR 219; *Xypolitos v The Queen* (2014) 44 VR 423; *DPP (Vic) v Zhuang* (2015) 250 A Crim R 282, 301 [53]. See also The Act s 5(2CA).
[994] *Kavanagh v The Queen* [2011] VSCA 234, [14]; *Portelli v The Queen* [2015] VSCA 159, [31].
[995] *DPP (Vic) v Weston* (2016) 262 A Crim R 304, 310 [32]; but cf *Semaan v The Queen* [2017] VSCA 261, [92].
[996] *R v Gray* [1977] VR 225, 229-30; *R v Basso* (1999) 108 A Crim R 392, 397-98; *Folino v The Queen* [2017] VSCA 295, [48],[55]; *DPP (Vic) v Milson* [2019] VSCA 55, [66]. But see *DPP (Vic) v Dickson* (2011) 32 VR 625, 628 [11].
[997] For example, dragging a body into an open area and covering it with a sheet was not considered an attempt at concealment but as confused actions due to the offender's impaired mental functioning. *R v Astbury* [2019] VSC 97, [49]; cf *R v Budimir* [2013] VSC 149.
[998] The Act s 5(2)(b).
[999] *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 434 [9], 444 [47]-[48], 450 [68] ('*Dalgliesh HCA*').

The Act does not define 'current sentencing practices', but the Court of Appeal has said they are 'the approach currently adopted by sentencing judges when sentencing for the particular offence'.[1000]

The requirement that courts consider current sentencing practices promotes consistency in sentencing as 'an aspect of the rule of law'.[1001] But what is sought is consistency in the application of the relevant legal principles,[1002] and in searching for 'reasonable consistency' the courts should treat 'like cases alike, and different cases differently'.[1003] However, a court should not adhere to a sentencing range that appears contrary to principle; for example, where past sentences have not attributed sufficient significance to an offence's maximum penalty, or the seriousness of a particular offence.[1004] Nor should a court consider cases having idiosyncratic features, they are unlikely to be useful comparator.[1005]

5.2.9.2 – Changes to current sentencing practices

Before *Dalgliesh HCA*,[1006] courts in Victoria treated current sentencing practices as a primary consideration. To address the need for sentencing practices to remain current and respond to changing conditions, the Court of Appeal would, on occasion, express the view that sentencing practices for an offence, or class of offences, were inadequate and needed to increase. The Court would do this where:

- the maximum penalty for an offence was increased and sentencing practices did not reflect the increase;
- there was evidence that an offence had become more prevalent;
- community attitudes regarding the relative gravity of a specific offence changed, thereby impacting on the length of sentence considered appropriate;
- the community expressed concerns regarding a particular offence;
- the impact of the offence on the victim was better understood;
- a category of offenders had been persistently treated erroneously, with too much weight being given to mitigating factors (for example, too much weight being ascribed to good character in the case of those sentenced for white collar crimes or culpable driving); or
- the objective seriousness of particular conduct had been wrongly categorised, or a particular type of sentencing disposition was not ordinarily appropriate.[1007]

Previously, Court of Appeal statements that sentencing practices for offences were inadequate were meant to be applied incrementally, or progressively, following the appellate decision holding them to be so. The purpose was to allow sentencing practice to gradually approach a range that better accorded with

[1000] *DPP (Vic) v CPD* (2009) 22 VR 533, 552 [77] ('*CPD*').
[1001] Ibid 48 [50]. The goal of consistency in sentencing has received explicit statutory recognition in Victoria. Section s 6AE of the Act lists considerations the Court of Appeal must have regard to in giving or reviewing a guideline judgment. The first of these is 'the need to promote consistency of approach in sentencing offenders'.
[1002] *Hili v The Queen* (2010) 242 CLR 520, 535–36 [49] ('*Hili*'); *R v Pham* (2015) 256 CLR 550, 564–65 [46] ('*Pham*').
[1003] *Hili* 535–36 [49].
[1004] *Dalgliesh HCA* 445 [50].
[1005] *DPP v Currie* [2021] VSCA 272, [131] ('*Currie*').
[1006] *Dalgliesh HCA*.
[1007] See, eg, *Markarian v The Queen* (2005) 228 CLR 357; *Ashdown v The Queen* (2011) 37 VR 341, 403 [180] ('*Ashdown*'); *Dalgliesh HCA*.

the gravity of offending, while not being unduly unfair to an offender who expected to be sentenced according to the range established by past cases.[1008]

Dalgliesh HCA and subsequent Court of Appeal decisions have made it plain this approach is no longer to be followed.[1009] Now, current sentencing practices are merely one consideration among many and, where an appellate court has indicated that sentencing practices need to change, sentencing courts should immediately give effect to that decision.

The Court of Appeal has commented on the adequacy of current sentencing practices in relation to the following offences:

Offence	Relevant cases	Key statements
Recklessly causing serious injury involving 'glassing'	*Winch v The Queen* (2010) 27 VR 658	Sentences imposed for glassing as an instance of RCSI do not sufficiently reflect the fact that such conduct is inherently dangerous and should not be treated as a less serious form of the offence of RCSI. [31] Glassing cases should be treated as being in the same category as other RSCI offences that involve the use of a dangerous weapon likely to produce serious injury. [54]
Confrontational aggravated burglary	*Hogarth v The Queen* (2012) 37 VR 658; *DPP (Vic) v Meyers* (2014) 44 VR 486; *DPP (Vic) v Bowden* [2016] VSCA 283	Current sentencing for confrontational aggravated burglary does not reflect the objective seriousness of this form of the offence. The clustering of sentences around a median of two years shows how far current sentencing has departed from the parameters set by the maximum penalty of 25 years. *Hogarth* [58]

[1008] *DPP (Vic) v Dalgliesh (a Pseudonym)* [2016] VSCA 148, [131].
[1009] *Dalgliesh HCA* 448-50 [63]-[68], 454-55 [84]-[85]; *Carter v The Queen* (2018) 272 A Crim R 170, 189 [80]-[81] ('*Carter18*'); *DPP (Vic) v Dalgliesh (a pseudonym)* [2017] VSCA 360; *DPP (Vic) v Tewksbury* [2018] VSCA 38.

Offence	Relevant cases	Key statements
Offences of negligently causing serious injury by driving falling into the upper range of seriousness	*Harrison v The Queen* (2015) 49 VR 619	Current sentencing practices for NCSI involving driving in the upper category of this offence are plainly inadequate. First, they do not reflect an adequate response to the increase in the maximum penalty. [137] Four years should not be treated as a ceiling for this offence. [140] Sentences of six or seven years would have been well within range, given the seriousness of the offending. [141]
Cultivation of narcotic plants	*Nguyen v The Queen* (2016) 261 A Crim R 1	Sentences for mid-category offending should be uplifted and substantially expanded. But the uplifted range should not include sentences that have previously been reserved for less culpable offenders such as crop sitters falling towards the upper end of the lowest category. [152] (Redlich JA) The range of sentences being imposed for offences of mid-category seriousness is both too low and too narrow. [245] (Whelan JA)
Dangerous driving causing death	*Stephens v The Queen* (2016) 50 VR 740	There has been an inappropriately narrow range of sentences imposed for this offence. Further, the sentences imposed since the doubling of the maximum penalty do not give effect to the decision of Parliament to increase the penalty. [41] (As in *Harrison*) there should be a similar uplifting of current sentencing practices for dangerous driving causing death. [43]
Statutory murder/unintentional killing in furtherance of a violent crime	*DPP (Vic) v Perry* (2016) 50 VR 686	Sentencing standards for statutory murder must be increased to properly reflect the objective gravity of the offence, which carries the same maximum penalty as common law murder. The range of sentences for statutory murder — from the least serious to the most serious instances of the offence — should be encompassed within the range of sentences for common law murder. [8]

Offence	Relevant cases	Key statements
Serious examples of trafficking in a commercial quantity of a drug of dependence	*Gregory (a Pseudonym) v The Queen* [2017] VSCA 151	Sentencing for the upper category of the offence is plainly inadequate. [100] Ten years should not be treated as a ceiling for this offence. [102]
Less serious examples of trafficking in a commercial quantity of a drug of dependence	*Fernando v The Queen* [2017] VSCA 208	Recalibration of sentencing practices for this offending must continue to allow for some low- and mid-category offending to receive sentences at the very bottom of the relevant range. [62] (Redlich JA)
Trafficking in a large commercial quantity	*Arico v The Queen* [2018] VSCA 135; *DPP (Vic) v Condo* [2019] VSCA 181; *DPP (Vic) v Fatho* [2019] VSCA 311	The sentence must be considered in the light of what was said in *Gregory* about the inadequacy of sentencing for such trafficking, and the need for increases in sentences for that offence — and for corresponding increases in sentencing for LCQ trafficking. There is no substance in the applicant's contention that the sentence of nine years' imprisonment was outside the range reasonably open. *Arico* [341] Similarly, a sentence of 54 months for the principal of a syndicate who trafficked in an amount 700x the commercial quantity is manifestly inadequate. *Fatho* [71]-[72] As is a term of 30 months imposed on an active participant trafficking 260x the commercial quantity. *Fatho* [74] There is no tension between what was said in *Gregory* and *Fernando* about the need for an uplift in TCQ sentencing and the need for individualised sentencing as expressed in *Dalgliesh* and etc. While uplifted sentencing practice is not a controlling factor, neither can it be ignored and is particularly important in a quantity-based sentencing regime. *Condo* [20], [28]-[29]; *Fatho* [70].

Offence	Relevant cases	Key statements
Incest	*DPP (Vic) v Dalgliesh* [2017] VSCA 360; *Carter (a pseudonym) v The Queen* (2018) 272 A Crim R 170; *Grantley (a pseudonym) v The Queen* [2018] VSCA 112; *DPP (Vic) v Tewksbury* [2018] VSCA 38; *DPP (Vic) v Walsh* [2018] VSCA 172	The maximum penalty for incest, being 25 years' imprisonment, reflects the community's abhorrence of that offence. *Dalgliesh No 2* [75] A sentence of five years, with a non-parole period of two years and 10 months was inadequate to reflect the seriousness of the offending, notwithstanding the mitigating factors. The same observation applies with respect to the sentences for indecent assault. Although not then within the definition of incest, and thus carrying a reduced maximum sentence, the indecent assaults had all the characteristics of incest and were therefore of the most serious kind. *Walsh* [54]

5.2.9.2.1 – Sentencing practices for historic offences

When sentencing for historic offences the Court of Appeal has concluded that for the purposes of the Act, 'current sentencing practices' refers to those in effect at the time of sentencing, not those which existed at the time an offence was committed.[1010] The Court has also said that 'current sentencing practices' is not limited to the actual term imposed in a given case, but also includes 'the weight and effect given to particular sentencing considerations in the exercise of the sentencing discretion'.[1011] However, use of current sentencing practices must then take place alongside an awareness of the maximum penalty that applied at the time of the offending.[1012] Caution is thus called for in using current sentencing practices for an offence that now carries a higher maximum penalty than at the time of offending.

While sentencing practices at the time of the offending are not 'current sentencing practices' for the purposes of the Act, equal justice may require a court to consider historical sentencing practices so far as they can be established,[1013] and if they demonstrate that a materially lesser sanction must have been imposed for a like offence than current sentencing practice would impose.[1014] But this is not an inflexible rule, and practices at the time of offending are only applied if it is reasonably practicable to do so as changes in a statutory regime may complicate determination of the applicable law.[1015]

[1010] *Stalio v The Queen* (2012) 46 VR 426, 432-33 [11]-[12], 445 [78] ('*Stalio*').
[1011] *Mush v The Queen* [2019] VSCA 307, [108] ('*Mush*').
[1012] *Bavage v The Queen* [2012] VSCA 149, [11]; *Duncan (a pseudonym) v The Queen* [2014] VSCA 215, [7].
[1013] *Stalio* 440 [53]; *Curypko v The Queen* [2014] VSCA 192, [72]-[73].
[1014] *Thrussell (a pseudonym) v The Queen* [2017] VSCA 386, [150], citing *Stalio* 432 [9], 440 [52]. See also *Carter18* 182 [55].
[1015] *Bradley (a pseudonym) v The Queen* [2017] VSCA 69, [119]-[121]; *Mush* [109].

5.2.9.3 – Resources for determining current sentencing practices

5.2.9.3.1 – Case comparisons

Case comparisons are an important primary resource for determining current sentencing practices.[1016] However, they will only be helpful when the cases being considered are 'relevantly comparable or instructively different'.[1017]

Relevantly comparable cases

Comparable cases generally involve offending in the same category of seriousness. It is the circumstances of the offender and the offending that determine whether they are 'relevantly comparable'.[1018] The mere fact that the same physical conduct exists in two cases does not mean they are 'relevantly comparable'.[1019]

It is hard to comprehensively specify what makes cases 'relevantly comparable'. The Court of Appeal has said that to the extent counsel is relying on comparable cases they must identify the cases and 'spell out' what makes them so.[1020] Simply providing a list or table of past sentences for a given offence is not enough.[1021] Tables of recorded cases will only be useful if they provide more information than just the sentence imposed. They must also explain the key features of each case, to assist a court in understanding the extent to which the case is (or is not) comparable.[1022]

References to other cases are only useful if they articulate the unifying principles that the disparate sentences reveal.[1023] Such detailed comparisons help to ensure consistency in sentencing, they provide the 'yardstick' by which a court complies with its obligation to take current sentencing practices into account, or by which an appellate court may determine whether a sentence is manifestly excessive or inadequate.[1024] Further, where a party places particular reliance upon a given case on the plea, and that case on its face involves 'strikingly similar' facts to those in the case before the court, the sentencing judge must ordinarily explain the extent to which their exercise of the sentencing discretion has been informed by the decision.[1025]

Instructively different cases

[1016] *CPD* 552 [78]. See also *Hudson* 617 [28];*Trajkovski* 598 [67]; *DPP (Vic) v Coates Hire Operations Pty Ltd* (2012) 36 VR 361, 380 [81].
[1017] *Zogheib v The Queen* (2015) 257 A Crim R 454, 457 [2] ('*Zogheib*').
[1018] *Chol v The Queen* (2016) 262 A Crim R 455, 462 [26]; *Gregory (a pseudonym) v The Queen* [2017] VSCA 151, [50].
[1019] *Soo v The Queen* [2014] VSCA 304, [42].
[1020] *Sharbell v The Queen* [2018] VSCA 324, [66].
[1021] Ibid.
[1022] *DPP (Cth) v Thomas* (2016) 53 VR 546, 609 [179]-[180]. See also *Nguyen v The Queen* (2011) 31 VR 673, 684 [38]-[39].
[1023] *Hili* 537 [54]-[55]; *DPP (Cth) v Haynes* [2017] VSCA 79, [35] ('*Haynes*').
[1024] *DPP (Cth) v Edge* [2012] VSCA 289, [4] ('*Edge*'). The consistency that is to be achieved is in the approach and application of principle, not a mathematical equivalence in sentences for a given offence. *Djordjic v The Queen* [2018] VSCA 227, [74]; *DPP (Vic) v Lian* [2019] VSCA 75, [98].
[1025] *DPP (Vic) v Browne* [2023] VSCA 13, [59].

Comparable cases can also include those that are 'instructively different'. They are useful to establish why a given sentence might be outside the available range.[1026] For example, in *DPP (Vic) v Weston* ('*Weston*'), the Court of Appeal approved of the prosecutor's reliance on an 'instructively different' case.[1027] *Weston* was a Crown appeal against a sentence imposed for charges of negligently causing serious injury and recklessly causing injury, offences which can encompass a broad range of conduct. The negligently causing serious injury charge involved the respondent vigorously shaking a four-week-old infant after losing his temper. In support of its argument of manifest inadequacy, the prosecution referred to the decision of *Mok v The Queen* ('*Mok*'), where the Court of Appeal had sentenced the offender to two years' imprisonment (with all but nine months suspended) on a charge of negligently causing serious injury.[1028] The charge in *Mok* arose out of an episode in which the father of a 23-month-old child, left him in a hot bath for less than 30 seconds causing serious burns. The Court in *Weston* agreed with the prosecutor's submission that *Mok* was instructively different because of the clear differences in the offenders' moral culpability, the type and degree of negligence displayed, and the relative need for specific and general deterrence.

The Court has also stated that when considering comparable cases, it is important to have strict regard to the offence under consideration.[1029] However, in *rare instances*[1030] it will be appropriate for a court to consider sentences imposed for a different offence to the one currently being sentenced, as part of its consideration of current sentencing practice. This is most common for quantity-based offences, such as drug offence schemes that increase in severity depending on the amount of drug imported.[1031]

Limitations

Courts should use case comparisons cautiously. While past comparable cases may indicate a range of sentences that have been imposed in similar matters, that range does not set the outer limits for exercising the sentencing discretion.[1032] It also does not confirm that a range or its boundaries are correct.

Similarly, the sentencing range should not be defined by only a few select cases. It will not be possible to discern a 'sentencing practice' for an offence when there are only a small number of sentences that have been imposed. At most, where only a few cases are relevantly comparable, they may represent points along a spectrum of seriousness, and it may be misleading to give too much weight to comparisons between them.[1033]

Sentencing requires a court to consider where the matter before it fits within a range of seriousness. As each case is unique, it can be difficult to find truly comparable cases where the gravity of the offending and the circumstances of the offender are similar.[1034] This is particularly relevant when the offending is extremely serious, and the offender's has limited mitigating circumstances. Moreover, a court should not

[1026] *Zogheib* 457 [2]. See also *Wong v The Queen* (2001) 207 CLR 584, 608 [65] ('*Wong*').
[1027] (2016) 262 A Crim R 304 ('*Weston*').
[1028] [2011] VSCA 247.
[1029] *DPP (Vic) v Weybury* (2018) 84 MVR 153, 165 [35].
[1030] *Weston* 321-22 [82].
[1031] See, eg, *DPP (Cth) v KMD* (2015) 254 A Crim R 244, 263 [80]; *Haynes*.
[1032] *R v Kilic* (2016) 259 CLR 256 ('*Kilic*'); *Dalgliesh HCA*.
[1033] *Edge* [3]. See also *Kilic* 268 [25]; *Nguyen v The Queen* [2017] VSCA 127, [54]; *Haynes* [38]; *DPP (Vic) v Russo* [2019] VSCA 129, [75].
[1034] *Fichtner v The Queen* [2019] VSCA 297, [100].

engage in a detailed analysis of similar cases to conclude that a specific sentence is the 'right one' or that a sentence should fall within a confined range. Doing so ignores the fact that sentences imposed in other cases are not binding precedent.[1035]

Case comparisons are of particularly limited use when the nature of an offence means that the circumstances in which it is committed vary greatly, for example, cases of manslaughter[1036] and intentionally causing serious injury.[1037]

Great caution is required with cases that predate an appellate decision that declared that current sentencing practices for the offence in question were inadequate.[1038] However, cases that demonstrate past practices might be relevant to show that the present sentence has not paid sufficient regard for the need to increase current practices.

Victorian courts also do not often have substantial regard to sentencing practices in other States. However, for Commonwealth offences, a court *must* have regard to sentencing practices for the same offences in other jurisdictions throughout Australia.[1039]

5.2.9.3.2 – Statistics

Another primary resource for determining sentencing practices are sentencing statistics.[1040] Statistics alone, however, are insufficient to establish sentencing practices and there are important limitations to their use.[1041] Nonetheless, if used correctly, sentencing statistics can also act as a 'valuable yardstick', against which to measure a particular sentence.[1042]

Statistics are frequently provided to demonstrate that a sentence is manifestly excessive or inadequate. While cognisant of the limits of statistics, courts have used the material to assist in determining whether a particular sentence accords with current sentencing practices.[1043] An appellate court may also use statistics to help determine whether a sentencing consideration was afforded too little or too much weight.

For example, sentencing statistics have been used as a resource for confirming whether a court gave inadequate weight to an offender's youth.[1044] Appellate courts have also received statistical material that clearly shows a sentence (or minimum term) is outside the usual range, and where that departure was made with no evident justification.[1045]

[1035] *Hudson* 618 [32].
[1036] *DPP (Vic) v Arney* [2007] VSCA 126.
[1037] *Kilic*.
[1038] *DPP (Vic) v MacArthur* [2019] VSCA 71, [71]-[73].
[1039] *Pham* 559–60 [29].
[1040] *CPD* 552 [78]; *White v The Queen* [2010] VSCA 261, [35] ('*White*'); *DPP (Vic) v Maynard* [2009] VSCA 129, [34] ('*Maynard*').
[1041] *Maynard* [35].
[1042] *DPP v Hill* (2012) 223 A Crim R 285, 298–99 [46].
[1043] See, eg, *Ashdown* 347 [12], 367 [122]; *White* [4], [43].
[1044] *Pettiford v The Queen* [2011] VSCA 96 [72].
[1045] See, eg, *Pilgrim v The Queen* [2014] VSCA 191 ('*Pilgrim*').

The Court of Appeal has identified several shortcomings with respect to the value of statistics in determining sentencing practices:

- their use is limited as they do not identify the appropriate range for an offence;[1046]
- undue reliance on statistics has the potential to distract the court from considering the circumstances of the case;[1047]
- they cannot be a substitute for the court's instinctive synthesis of the many factors in each case;[1048]
- statistics by themselves do not establish a sentencing practice;[1049]
- statistics alone are insufficient to demonstrate that a sentence is manifestly excessive;[1050]
- they cannot effectively analyse offences that encompass a wide range of conduct and criminality;[1051]
- they say nothing about why sentences were fixed as they were and fail to account for the circumstances,[1052] they lack key details;[1053]
- a median sentence for an offence is 'an accidental or contingent statistic', it is not a measure of offence seriousness, and cannot represent the sentence that should be imposed for an offence of 'mid-range seriousness'."[1054]

The Court has also said that selecting a median sentence and then determining whether the offending falls above or below it risks engaging in an improper two-stage approach to sentencing.[1055]

[1046] *Hasan v The Queen* (2010) 31 VR 28.
[1047] *Maynard* [35]. See also *Kamal v The Queen* [2021] VSCA 27, [69].
[1048] *Russell v The Queen* (2011) 212 A Crim R 57, 70 [61]; *Pilgrim* [62].
[1049] *Maynard* [35]; *Pasznyk v The Queen* (2014) 43 VR 169, 177 [41].
[1050] *FD v The Queen* [2011] VSCA 8, [16]; *Le v The Queen* [2012] VSCA 43, [40].
[1051] *Wong* 608 [66].
[1052] *Hili* 535 [48]; *Raveche v The Queen* [2015] VSCA 99, [60]; *Cotton (a pseudonym) v The Queen* (2015) 45 VR 341, 353 [54]; *Currie* [130].
[1053] *Brown v The Queen* [2021] VSCA 204, [33] ('*Brown*')
[1054] *DPP (Vic) v Walters (a pseudonym)* (2015) 49 VR 356, 365-66 [31]; *Tiong v The Queen* [2016] VSCA 257, [4]; *Brown* [33].
[1055] *Currie* [130].

6 – Circumstances of the offender

The personal circumstances of an offender are a fundamental sentencing consideration. They are relevant in different ways and to multiple issues, and frequently overlap with the circumstances of the offence.[1056]

Identifying the sentencing purposes to be furthered in a case cannot be done if the court does not consider the personal circumstances of the offender. Rehabilitation may be emphasised for a young offender, while protection of the community and deterrence may assume greater significance for an offender with a poor criminal history. Similarly, deterrence is likely to be of reduced value when sentencing an offender with compromised mental or intellectual capacity.

Independently of these considerations, an offender's circumstances can also indicate the degree of lenience or severity called for in a particular case: youth, advanced age, poor health, or another personal or family hardship may call for leniency. By contrast, an offender's status as a member of a certain profession, or as a parole or bail violator, may call for a more severe sentence.

Finally, an offender's circumstances may be relevant to the applicability of particular statutory regimes: 'young offenders' may be sentenced to youth custody in place of adult imprisonment, and offenders with serious drug addictions may be appropriate candidates for targeted rehabilitative sanctions.

6.1 – Innate characteristics

6.1.1 – Age

The age of an offender is a common law consideration. There are also special statutory considerations that apply in sentencing a child or a 'young offender'. This part looks only at sentencing mature or elderly offenders. The considerations raised in sentencing a child or a 'young offender' are discussed in the Children's Court Bench Book.

Age may be a mitigating factor where:

- imprisonment may adversely affect an elderly offender's health;[1057]
- the offender may be less likely to pose a danger to the community;[1058]
- the offender may be more likely to die in prison[1059] and so any period of imprisonment will represent a larger proportion of their remaining life expectancy;[1060] and
- imprisonment is likely to be more burdensome than on a younger offender.[1061]

A significant delay between offending and sentencing can also be relevant, because it means the offender is older than they would have been if sentenced closer to the offending, and it is the offender's age at the

[1056] *R v Storey* [1998] 1 VR 359, 365.
[1057] *R v Iles* [2009] VSCA 197, [19] ('*Iles*').
[1058] Ibid [22].
[1059] Ibid [26], [33]-[35].
[1060] *R v King* (1993) 66 A Crim R 74, 79; *R v Vella* [2001] VSCA 174, [18]; *R v RLP* (2009) 213 A Crim R 461, 476 [39] ('*RLP*'). See also 3.5 – Sentencing principles – Avoidance of a crushing sentence.
[1061] *R v DD (No 2)* [2008] VSCA 15, [19] ('*DD*'); *RLP* 474 [32].

time of sentencing that is relevant.[1062] However, the effect of the delay on the victim must also be considered,[1063] and a sentence should not be moderated purely because the offender is significantly older as a result of delay.[1064]

Age is also relevant to determining whether to set a minimum term and in fixing any non-parole period.[1065]

The mitigating weight of age-based considerations depends on the circumstances of the case and other personal factors such as ill-health may be relevant.[1066] Age can never by itself excuse punishment.[1067] For serious offences, a significant period of imprisonment may be appropriate despite an offender's advanced age.[1068] Just punishment, proportionality and deterrence always remain primary sentencing considerations, regardless of the offender's age.[1069]

6.1.2 – Gender

An offender's gender is largely irrelevant to sentencing,[1070] and there can be no difference in sentencing based solely on sex.[1071] But this does not mean a court must disregard the individual characteristics of an offender and treat a male offender as if they were female and vice-versa.[1072] In effect, this means that factors closely associated with gender, such as pregnancy, may be considered in appropriate circumstances.

Nor is 'gender' limited to its traditional biological meaning. Transgender offenders also have closely associated factors, such as increased risk of harm in a specified facility, or the ability to access treatment, and these should be considered where appropriate.[1073] But this does not mean that gender identity is relevant to culpability, it is not. It is only relevant to the extent that prison will likely be more onerous for the offender.[1074]

6.1.3 – Ethnicity, culture and race

Similarly, ethnicity, culture and race are not in themselves bases for differential sentencing, but they may be associated with considerations that can properly be taken into account where relevant and depending

[1062] *R v AP* [2009] VSCA 249, [6]-[10].
[1063] *DD* [22].
[1064] *Mush v The Queen* [2019] VSCA 307, [98].
[1065] *R v Lowe* [1997] 2 VR 465, 489-490.
[1066] *Cobiac v Liddy* (1967) 119 CLR 257, 265; *Iles* [19], [26].
[1067] *R v Bazley* (1993) 65 A Crim R 154, 158; *R v Belbruno* (2000) 117 A Crim R 150, 153-54 [9]; *R v Gregory* [2000] VSCA 212 [21]; *RLP* 476 [39].
[1068] *Iles* [17].
[1069] *RLP* 476 [39]. See also *Fichtner v The Queen* [2019] VSCA 297, [90], [95].
[1070] *DPP (Vic) v Ellis* (2005) 11 VR 287, 291-92 [8], [10] ('*Ellis*').
[1071] *R v Harkness* [2001] VSCA 87, [58].
[1072] *Ellis* 292 [11].
[1073] See, eg, *Palmer v WA* [2018] WASCA 225.
[1074] *Packard (a pseudonym) v The Queen* [2022] VSCA 128, [89].

on their connection with the circumstances of the offence.[1075] For example: to say that Aboriginal offenders are generally less culpable than a non-Aboriginal offender because of their deprived background is racial stereotyping of a kind that denies a 'full measure of human dignity' to Aboriginal people.[1076] However, an Aboriginal offender's deprived background may be taken as a mitigating factor to the same extent as is the deprived background of a non-Aboriginal offender.[1077]

Moreover, an Aboriginal offender's participation in a Koori Court sentencing conversation may be mitigating[1078] because of various factors, including:

- the fact that participation is voluntary and may be confronting for the offender as the result of their being 'shamed';
- whether the offender takes participation in the process as an opportunity to demonstrate remorse and insight into the seriousness and effect of the offending, express an intent to reform and explain how that will be done; and
- the genuineness of the offender's statements during the conversation.[1079]

More generally, the weight to be given to a cultural norm is a discretionary matter for the court[1080] informed by whether the norm obliged the offender to engage in the criminal conduct or confined their choices so as to diminish their moral culpability or was merely a justification for engaging in the criminal act(s).[1081] If the norm made the offender feel obligated, as if they had little or no choice but to engage in the conduct, their moral culpability may be diminished and their prospects of rehabilitation considered positively. If it was merely a justification it does not.[1082]

However, a cultural norm may not be given such weight that it outweighs the seriousness of the offending or the sentencing principles. For example: so-called 'honour killings' call for denunciation in the strongest possible terms and an increased need for general and specific deterrence. To describe the killing of another person in such a manner invests it with a wholly inappropriate degree of legitimacy; no civilised society can tolerate the killing of another person for such an amorphous concept as honour. In addition, the whole notion of an honour killing is based on a view of women as being merely the property of men, which has no place in this country.[1083]

[1075] *Neal v The Queen* (1982) 149 CLR 305, 326 ('*Neal*'); *R v Fuller-Cust* (2002) 6 VR 496, 514-15 [60] ('*Fuller-Cust*'); *DPP (Vic) v Terrick* (2009) 24 VR 457, 468-69 [46]-[48]; *Tan v The Queen* (2011) 35 VR 109, 131 [83] ('*Tan*'); *Bugmy v The Queen* (2013) 249 CLR 571, 594 [41] ('*Bugmy13*'); *Munda v WA* (2013) 249 CLR 600, 619 [53] ('*Munda*'); *Walker v The Queen* [2019] VSCA 137, [69], [74].

[1076] *Munda* 619 [53].

[1077] *Bugmy13* 592 [37].

[1078] *Honeysett v The Queen* (2018) 56 VR 375, 386 [46] ('*Honeysett*'), citing *R v Morgan* (2010) 24 VR 230, 238 [40] ('*Morgan10*'). See also *DPP (Vic) v Heyfron* [2019] VSCA 130, [66]-[67] ('*Heyfron*).

[1079] *Honeysett* 389 [54].

[1080] *Tan* 131 [83], citing *Neal* 326.

[1081] *Tan* 132 [87].

[1082] Ibid 133 [91]-[93]; *Marannu v The Queen* [2011] VSCA 105, [8] ('*Marannu*').

[1083] *R v Iskandar* [2012] NSWSC 1324, [91]-[92], rev'd on other grounds [2013] NSWCCA 235. See also *R v Najibi* [2015] VSC 260, [41]-[42], [44], [46], [59].

It also cannot give rise to a different range of sentences that are appropriate to an offender based on whether or not they are a member of a particular cultural group.[1084]

Nor is a court required to act upon a simple assertion that cultural background affected the offending - it must be established by evidence relevant to the offender.[1085]

Lastly, it is important to note that when sentencing for Commonwealth offences, a court is specifically precluded from using customary law and cultural practices either in aggravation or mitigation.[1086]

6.2 – Health

6.2.1 – Physical health or disability

The physical health or disability of the offender is relevant where:

- imprisonment will be a greater burden because of their health; or
- there is a serious risk of imprisonment having a grave effect on their health.[1087]

Although mitigating, the weight given to these factors depends on the circumstances.[1088]

6.2.1.1 – Increased burden of imprisonment

Where imprisonment will be significantly more burdensome than for a person in normal health, this will be a circumstance of mitigation. A court must consider whether the offender's ill health will make imprisonment a greater burden, not whether imprisonment will make the offender's ill health a greater burden.[1089] The need for dietary management, physical therapies, and other courses of treatment within prison have been recognised as increasing the custodial burden.[1090]

If the offender's condition is likely to result in death within the period of sentence this goes to the burden of imprisonment,[1091] but the prospect that an offender may die in prison can never justify a manifestly inadequate sentence and all sentencing principles remain relevant.[1092]

6.2.1.2 – Adverse effect on offender's health

The second mitigating circumstance is where there is a serious risk of imprisonment having a materially adverse effect on the offender's health.[1093] This often takes the form of a more rapid progression of the disease from the circumstances of incarceration,[1094] such as stress adding further complications to a pre-

[1084] *Tan* 133 [90].
[1085] Ibid 132-33 [89].
[1086] *Crimes Act 1914* (Cth) s 16A(2A) ('*Cth Crimes Act*').
[1087] *R v Eliasen* (1991) 53 A Crim R 391, 396-97, citing *R v Smith* (1987) 44 SASR 587, 589 ('*Smith*').
[1088] *R v Van Boxtel* (2005) 11 VR 258, 268 [33] ('*Van Boxtel*'); *R v Harris* (2009) 54 MVR 582, 588 [24] ('*Harris*').
[1089] *Van Boxtel* 268 [33]; *Smith v The Queen* [2018] VSCA 208, [32]-[33].
[1090] *R v Grossi* (2008) 23 VR 500, 518 [58] ('*Grossi*'); *Price (a pseudonym) v The Queen* [2018] VSCA 54, [7].
[1091] *Cardona v The Queen* [2011] VSCA 58, [13]-[15] ('*Cardona*').
[1092] *R v Cumberbatch* (2004) 8 VR 9, 14-15 [13] ('*Cumberbatch*'); *R v Wright* [2009] VSCA 27, [67].
[1093] *R v Pilarinos* [2001] VSCA 9, [10].
[1094] *Smith* 589; *Linou v Hayes* (1988) 47 SASR 172 ('*Linou*').

existing condition.[1095]

6.2.1.3 – Generally

There are no special rules for particular illnesses or disabilities, and each case should be decided according to its own circumstances.[1096] The presence of a condition does not on its own immediately constitute a mitigating factor. The evidence must establish that an offender will suffer hardship in prison as a result of their illness, especially as there may be some instances where imprisonment may actually improve the offender's health.[1097] Where no evidence is led, a court may decline to discount sentence.[1098]

If a court reduces sentence because of the offender's health, but their prognosis subsequently becomes substantially worse, evidence of that changed situation may be led on appeal as fresh evidence.[1099] But where the offending is serious, imprisonment beyond life expectancy was expected, and there is no chance that period will be reduced on appeal, the offender's condition and prognosis are instead a matter for the Executive to consider in the exercise of the prerogative of mercy rather than a basis to re-open the sentencing discretion.[1100]

Injuries sustained during offending or while in custody may also be considered as 'extra-curial punishment'.[1101]

An offender's ill-health may also be relevant to the sentencing principles because of the likelihood that the person has a lowered life expectancy may reduce the need for specific deterrence.[1102]

6.2.2 – Mental impairment[1103]

6.2.2.1 – Generally (Verdins)

A court must take into account an offender's impaired mental or intellectual functioning – whether it be the result of illness, injury, disability, or disorder, whether permanent or temporary, mild or severe, newly acquired or longstanding and whether the impairment existed at the time of the offending or at the time of sentencing. The *Verdins* principles do not depend on diagnostic labels: 'What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time'.[1104] Specifically, how did it affect them at the time of the offending or how is it likely

[1095] *R v McDonald* (1988) 38 A Crim R 470, 475; *Grossi* 518 [58].
[1096] *Linou* 176.
[1097] See *Gagliardi v The Queen* (1999) 108 A Crim R 344, 348-49 [13]-[14] (HIV+ heroin addict's physical health improved during incarceration because of treatment for condition and cessation of drug abuse).
[1098] *R v Grant* [2003] VSCA 53, [15].
[1099] *R v Mitchell* (2000) 112 A Crim R 315. See also *Spence v The Queen* [2013] VSCA 197.
[1100] *Martin (a Pseudonym) v The Queen [No 2]* [2019] VSCA 60, [86].
[1101] *DPP (Vic) v King* (2008) 50 MVR 517, 518 [4]; *R v De Montero* (2009) 25 VR 694, 721 [103]. See also 7.8.2 – Policy considerations - Punishment from other sources - Injury or loss sustained in offending.
[1102] *Cardona* 58 [13].
[1103] The names and ways of referring to mental health and capacity conditions in the relevant cases are too numerous to track, but given the largely similar treatment they are generally afforded regardless of what specific condition is at issue this manual will use the broad term 'mental impairment' except where specifically necessary.
[1104] *R v Verdins* (2007) 16 VR 269, 271 [8] ('*Verdins*').

to impact their experience of imprisonment.[1105]

In *R v Verdins* ('*Verdins*'), the Court of Appeal identified six ways that mental impairment may be relevant to sentencing:

1. It may reduce an offender's moral culpability and so affect what is considered to be a just punishment and lessen the need for denunciation;
2. It may have a bearing on the kind of sentence that is imposed and the conditions under which it should be served;
3. General deterrence may be moderated or eliminated as a consideration depending on the nature and severity of the offender's symptoms, and the effect of their impairment at the time of offending, sentence, or both;
4. Specific deterrence may be similarly moderated or eliminated in the same circumstances;
5. The existence of an impairment at the time of sentencing, or its reasonably foreseeable reoccurrence, may mean that a specific sentence may weigh more heavily on the offender than it would on a person in normal health;
6. If there is a serious risk that imprisonment will have a significantly adverse impact on the offender's mental health, this will be a mitigating factor.[1106]

These *Verdins* 'principles' or 'considerations' may moderate both the minimum term and the head sentence,[1107] but they are exceptional and should not be invoked in routine cases.[1108] Lastly, a court is not required to run through and recite all of the *Verdins* principles as though exhausting a checklist.[1109]

6.2.2.2 – Moral culpability

The first *Verdins* principle says that if a mentally impaired offender is less morally culpable for their actions then it may not be appropriate to punish them as harshly as someone who is fully responsible.[1110]

An offender's moral culpability may be reduced if, at the time of the offence, their impairment:

- reduced their ability to exercise appropriate judgment, make calm and rational choices, think clearly, or appreciate the wrongfulness of their conduct; or
- made them disinhibited; or
- obscured the intent to commit the offence; or

[1105] *Verdins* 270 [1], 271 [5]-[8], 272 [13], 275-76 [25], [32]. See also *Leeder v The Queen* [2010] VSCA 98, [39] ('*Leeder*'); *Ashe v The Queen* [2010] VSCA 119, [14] ('*Ashe*'); *Bowen v The Queen* [2011] VSCA 67, [27] ('*Bowen*'); *Carroll v The Queen* [2011] VSCA 150, [19] ('*Carroll*''); *Kavanagh v The Queen* [2011] VSCA 234, [11]; *DPP (Vic) v Gerrard* (2011) 211 A Crim R 171, 181 [38]-[42]; *Romero v The Queen* (2011) 32 VR 486, 490 [13] ('*Romero*'); *Rich v The Queen* [2012] VSCA 273, [47] ('*Rich*'); *Tran v The Queen* (2012) 35 VR 484, 492 [22], [26] ('*Tran12*'); *DPP (Vic) v Sokaluk* [2013] VSCA 48, [41]; *O'Connor v The Queen* [2014] VSCA 108, [68] ('*O'Connor14*'); *DPP (Vic) v O'Neill* (2015) 47 VR 395, 408-09 [55]-[58] ('*O'Neill*').

[1106] *Verdins* 276 [32].

[1107] *R v Vuadreu* [2009] VSCA 262, [36] ('*Vuadreu*').

[1108] Ibid [37]. See also *Mune v The Queen* [2011] VSCA 231, [31] ('*Mune*'); *Charles v The Queen* (2011) 34 VR 41, 69-70 [162] ('*Charles*'); *O'Toole v The Queen* [2013] VSCA 62, [25].

[1109] *R v Zander* [2009] VSCA 10, [33] ('*Zander*').

[1110] *Verdins* 273 [32]. See also *DPP (Vic) v Weidlich* [2008] VSCA 203, [17] ('*Weidlich*').

- contributed causally to the commission of the offence.[1111]

This is not an exhaustive list - it is descriptive rather than prescriptive.[1112]

The effect of an impairment on moral culpability is a matter of degree. A court should consider the gravity of the offending and, with the assistance of any expert evidence, the offender's conduct before, during, and after the offending in order to determine the extent of the impairment's contribution to the offending.[1113] The relevant question is whether the evidence establishes that the impairment contributed in a way that made the offender 'less blameworthy as a result'.[1114] This is a discretionary assessment with no fixed guidelines,[1115] although the High Court has said that there will usually be such a link if the offender is intellectually disabled.[1116]

As noted, one way that moral culpability may be reduced is where there is a *causal* connection between the offender's impairment and the offending conduct.[1117] While a *causal* connection is not required by *Verdins* to reduce the offender's culpability (or to moderate or eliminate general and specific deterrence),[1118] some connection is still required. If the impairment existed at the time of the offending there must be a '*realistic connection*' between the two, or the impairment must have '*caused or contributed to*' or be '*causally linked*' to the offending.[1119]

If the offence is serious, an offender's culpability may only be reduced to a minor extent, even if their impairment is significant.[1120] Similarly, culpability may only be reduced to a limited extent where the offender was fully aware of the nature and gravity of what they were doing, and that it was wrong.[1121] Planning and management of the offending and avoiding detection are indicative of such knowledge.[1122]

A common feature of both *Verdins* and *Bugmy*[1123] principles is that both permit a court to view the offender's moral culpability as being reduced where their psychological functioning or personality structure has been impaired.[1124] But it will require expert evidence to show how the two are

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1111 *Verdins* 275 [26]; *R v Howell* (2007) 16 VR 349, 356 [20] ('*Howell*''); *O'Neill* 415 [75], 417-18 [85].
1112 *Wright v The Queen* (2015) 257 A Crim R 261, 272 [42] ('*Wright*'), citing *O'Donohue v The Queen* [2013] VSCA 196, [25] ('*O'Donohue*'); *Tran12* 490-91 [20].
1113 *Green v The Queen* [2011] VSCA 311, [22]-[25] ('*GreenVIC*').
1114 *DPP (Vic) v Patterson* [2009] VSCA 222, [46]-[49] ('*Patterson*'). See also *Arthars v The Queen* (2013) 39 VR 613, 618 [13] ('*Arthars*'); *Wright* 271 [41].
1115 *Verdins* 275 [25]; *GreenVIC* [22].
1116 *Muldrock v The Queen* (2011) 244 CLR 120, 139 [54] ('*Muldrock*').
1117 *Verdins* 275 [26]; *Vuadreu* [37]; *Bowen* [28]-[29], [33]; *DPP (Vic) v HPW* [2011] VSCA 88, [61]-[63]; *Pettiford v The Queen* [2011] VSCA 96, [32]–[34]; *Carroll* [20]; *Freeman v The Queen* [2011] VSCA 214, [17] ('*Freeman*').
1118 *O'Donohue* [25], citing *Tran12* 490 [17]-[19].
1119 *O'Neill* 414-15 [74] (emphasis added). See also *Bowen* [33]; *Arthars* 618 [13]-[15]; *Qui v The Queen* [2019] VSCA 147, [73] ('*Qui*').
1120 *R v Dupuy* [2008] VSCA 63 ('*Dupuy*'); *Freeman*; *Barton v The Queen* [2013] VSCA 360, [30] ('*Barton*').
1121 *GreenVIC* [23]; *Pato v The Queen* [2011] VSCA 223, [28] ('*Pato*'); *DPP (Vic) v Davis* [2017] VSCA 341, [65] ('*Davis*'). But see *Howell* 357 [23].
1122 *Walker v The Queen* [2011] VSCA 230, [8]-[9]; *DM v The Queen* [2012] VSCA 227, [30], citing *Sikaloski v The Queen* [2012] VSCA 130, [28]-[29] ('*Sikaloski*'); *Thomas v The Queen* [2021] VSCA 97, [35].
1123 See 6.3.3.1 – Circumstances of the offender – Actions and behaviour – Personal history and circumstances – childhood.
1124 *DPP (Vic) v Herrmann* [2021] VSCA 160, [78]-[79] ('*Herrmann*').

connected,[1125] and if there is convergence between the two care should be taken to avoid 'inappropriate double counting'.[1126] '[T]he principles identified in *Bugmy* must be considered in their own right quite apart from the impact of any mental impairment pursuant to *Verdins* principles'.[1127]

6.2.2.3 – Type of sentence and conditions

An offender's impairment may be relevant to the type of sanction imposed.[1128] It may make some sanctions – such as imprisonment, where the offender's mental impairment is significantly impacted, or they are unable to obtain treatment – inappropriate.[1129]

There are specific statutory sanctions that are appropriate for offenders who are mentally impaired,[1130] as well as alternatives to custodial terms that can be imposed for those offenders.[1131]

6.2.2.4 – General deterrence

General deterrence may be moderated or eliminated if an offender suffers from an impairment at the time of offending, sentencing, or both.[1132] There does not need to be a causal relationship between the impairment and the offending for general deterrence to be moderated or eliminated.[1133] But the existence of an impairment does not automatically mean general deterrence must be moderated or eliminated.[1134]

There must be an evidentiary basis to moderate general deterrence. It is not sufficient to find that an offender suffers from a mental impairment. There must be 'proper and informed' consideration of how the impairment materially diminished the offender's capacity to reason appropriately about the wrongfulness of their conduct at the time of the offending, or how the offender's condition might make full application of the principles of general deterrence repugnant to the humanitarian considerations that guide proper sentencing.[1135]

Another consideration is whether the offender is an 'appropriate vehicle' for general deterrence. This may be determined by looking at whether the offender's impairment would evoke the community's sympathy and make people wonder why the offender is being punished.[1136] A causal relationship between the impairment and the offending is usually sufficient to find that an offender is <u>not</u> an

[1125] Ibid [80]-[81].
[1126] Ibid [82].
[1127] *Ellis v The Queen* [2021] VSCA 229, [63].
[1128] *Verdins* 276 [32].
[1129] *R v Vardouniotis* (2007) 171 A Crim R 227, 235-36 [30]-[33] ('*Vardouniotis*').
[1130] See 14 - Residential treatment orders and 15 – Court assessment & secure treatment orders.
[1131] See, eg, *Boulton v The Queen* (2014) 46 VR 308, 361 [242]. See 11 – Community correction order.
[1132] *Verdins* 276 [32]; *Vardouniotis* 233-34 [28]; *RLP* 473 [26]; *Muldrock* 139 [54]-[55]. Moderating the significance of general deterrence does not mean it must be eliminated entirely. *Verdins* 278 [39].
[1133] *Tran12* 488 [12].
[1134] *Sikaloski* [44]; *Barton*.
[1135] *O'Neill* 410 [59].
[1136] *Vardouniotis* 235 [29], citing *R v Engert* (1995) 84 A Crim R 67, 72.

appropriate vehicle for general deterrence.[1137] Although, this may not apply if the offender acted knowing that their conduct was wrong.[1138]

The extent to which an impairment will moderate or eliminate general deterrence depends on three factors:

- the nature and severity of the symptoms exhibited by the offender;
- the effect of the condition on the mental capacity of the offender; and
- the nature and gravity of the offence.[1139]

It is relatively clear that general deterrence will be wholly eliminated in the most extreme cases, such as where an offender might have established a substantive defence of mental impairment.[1140] It is also clear that general deterrence should not be moderated where the offender's mental impairment arose as a reaction to the discovery of their crimes or the prospect of incarceration.[1141] Ultimately, however, each case must be decided on its facts.[1142]

6.2.2.5 – Specific deterrence

One of the purposes of punishment is to specifically deter the offender from re-offending. This assumes the offender is capable of learning from the experience of punishment and can therefore be deterred from repeating the same or similar conduct. However, if the offender suffers from a mental impairment, 'specific deterrence may be more difficult to achieve and is often not worth pursuing'.[1143]

Whether and to what degree specific deterrence applies to an impaired offender depends on the circumstances.[1144] Where the impairment makes them unable to accept their role in and responsibility for the offending, specific deterrence has little relevance.[1145] But if an offender is able to appreciate the wrongfulness of their conduct, specific deterrence is relevant.[1146]

Specific deterrence should also not be moderated where the offender's mental impairment arose as a reaction to the discovery of their crimes or the prospect of incarceration.[1147] Nor should it be moderated or eliminated if the court finds that imprisonment will actually have a specifically deterrent effect notwithstanding the offender's impairment.[1148]

[1137] *R v Wright* [2002] VSCA 46, [13]; *Harmon (a pseudonym) v The Queen* [2017] VSCA 169, [84] ('*Harmon*').
[1138] *Davis* [66].
[1139] *Verdins* 276 [32]; *O'Neill* 416 [82].
[1140] *R v Anderson* [1981] VR 155, 160.
[1141] *RLP* 471-74 [20]-[31]; *Harris* 588 [23].
[1142] *Howell* 357 [24].
[1143] *R v Tsiaras* [1996] 1 VR 398, 400. See also *Verdins* 276 [32].
[1144] *GreenVIC* [28].
[1145] *R v Imadonmwonyi* [2008] VSCA 135, [22] ('*Imadonmwonyi*').
[1146] *Dennis v The Queen* [2017] VSCA 251, [118] ('*Dennis*').
[1147] *RLP* 471-74 [20]-[31]; *Harris* 588 [23].
[1148] *Patterson* [54].

6.2.2.6 – Consequences of imprisonment

The consequences of imprisonment are relevant in sentencing a mentally impaired offender in two ways.

Firstly, imprisonment may weigh more heavily on an impaired offender than it would a person in normal health.[1149] But in order to mitigate sentence on this basis it must be shown the impaired offender will suffer a significant additional burden. In determining this, a court should consider the nature of the custody. The burden of incarceration may be increased if the offender's term will be served in isolation, protective custody, or under other circumscribed conditions,[1150] or if the offender's custodial placements are limited by the unavailability of appropriate treatment regimes.[1151]

Secondly, a sentence should be mitigated if there is a 'serious risk' imprisonment will have a 'significantly adverse effect' on an offender's mental health.[1152] The deterioration that is likely to be caused by imprisonment must be greater than the mental deterioration that imprisonment generally causes any person to suffer.[1153] In assessing the risk, a court should consider the history of the offender's illness, the likely conditions of imprisonment, any difficulties in management presented by the offender, and the likelihood of the offender receiving treatment (and its effectiveness) while imprisoned.[1154]

In either case, it does not matter that an offender's mental impairment arose because their crimes were discovered or due to the prospect of incarceration. If their condition is likely to be aggravated by the experience of imprisonment, a court may reduce the offender's sentence.[1155] However, the weight to be given to these considerations always varies and does not displace consideration of the other sentencing purposes in the instinctive synthesis.[1156]

The existence of the impairment alone or stress at the prospect of a prison term is not sufficient to mitigate the sentence.[1157] The defence must establish the likely effect the offender's impairment will have on the offender's experience of imprisonment.[1158] Where there is no evidence that prison would be more burdensome for the offender, or may worsen their condition, there is no need to moderate sentence.[1159] It is open for the court to infer, in the absence of direct evidence, that a prisoner who suffers from a severe mental health condition would find prison more burdensome than another prisoner in normal health. However, whether that inference should be drawn depends on the totality of the evidence.[1160]

Fresh evidence that an offender's condition has deteriorated to a much greater degree than anticipated by the sentencing court may be admissible on appeal.[1161]

[1149] *Verdins* 276 [28], [32].
[1150] *Weidlich* [23]; *R v Crowley* [2009] VSCA 176, [15], [18]; *R v Fitchett* [2010] VSC 393, [20]-[21] ('*Fitchett*').
[1151] *DPP (Vic) v Pennisi* [2008] VSC 498, [13]; *Teryaki v The Queen* [2019] VSCA 120 ('*Teryaki*').
[1152] *Verdins* 276 [29]-[30], [32]. See also *Teryaki*.
[1153] *Howell* 357 [25].
[1154] *R v Arnott* [2007] VSC 351, [51], [66]; *Fitchett* [20]-[21]; *DPP (Cth) v Kent* [2009] VSC 375.
[1155] *RLP* 473 [26], [31].
[1156] *Harris* 588-89 [24]-[25].
[1157] *Zander* [32].
[1158] *Verdins* 287 [85]; *Ashe* [20].
[1159] *Pato* [30].
[1160] *Sweeney v The King* [2023] VSCA 9, [40].
[1161] *Giordano v The Queen* [2010] VSCA 101, [77]; *Teryaki*.

6.2.2.7 – Community protection

An offender's mental impairment may reduce their culpability for an offence, but it may also make them a danger to society thereby increasing the importance of community protection as a sentencing consideration.[1162]

Community protection is also important where an impaired offender has a significant criminal record,[1163] or they understood that in stopping their medication there was a risk they would reoffend having done so previously,[1164] or that substance abuse would lead to violent behaviour and yet continued to indulge.[1165]

Where the offender is sentenced as a 'serious offender', the court must regard protection of the community as the principal sentencing purpose, despite the existence of a mental impairment.[1166] But, as always, although community protection may be a key sentencing consideration, a court should not focus on one consideration to the exclusion of other relevant factors.[1167]

6.2.2.8 – Rehabilitation

Mental impairment is relevant to the extent that it bears upon an offender's prospects for rehabilitation.[1168] It may also make rehabilitation the primary consideration where the other purposes (such as punishment, denunciation and deterrence) do not require significant emphasis because of the offender's impairment.[1169]

In such cases, a court may emphasise rehabilitation by setting a shorter than usual non-parole period so that treatment can be carried out at an earlier stage than usual. The relevant authorities may then also monitor the offender's condition for a longer period of time once they are returned to the community. This course might be appropriate where the offender's impairment cannot be properly treated or managed in a prison environment.[1170]

6.2.2.9 – Substance abuse

The mitigatory effect of mental impairment may be reduced where the condition is self-induced, often by drug or alcohol use. The key issue is what the offender knew about the possible consequences of taking the relevant substance,[1171] what is required is foreknowledge that use of a substance 'was likely to produce a delusional state'.[1172] An offender's culpability is unlikely to be reduced where they have a

[1162] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476-77 ('*Veen No 2*'); *Imadonmwonyi* [26], [33].
[1163] *DPP (Vic) v Moore* [2009] VSCA 264, [64].
[1164] *R v Parton* [2007] VSCA 268, [2], [15]-[16].
[1165] *R v Barrett* [2008] VSC 234, [38]-[39].
[1166] *Patterson* [50]-[51].
[1167] *Ashton v The Queen* [2010] VSCA 329, [33].
[1168] *Weidlich* [17].
[1169] *Muldrock* 140 [58].
[1170] *R v Cheney* [2009] VSC 154, [55]; *Gray v The Queen* [2010] VSCA 312, [22]-[24] ('*Gray*').
[1171] *R v Martin* (2007) 20 VR 14, 18-22 [15]-[53]; *Alexander (a pseudonym) v The Queen* [2021] VSCA 217, [43] (*Alexander21*').
[1172] *Sanyasi v The Queen* [2019] VSCA 227, [74]. See also *Marks v The Queen* [2019] VSCA 253, [60]-[66].

history of using substances known to lead to hallucinations and violence. Indeed, use of substances in that situation may be an aggravating factor.[1173]

However, where the offender's mental impairment and substance abuse are independent, the *Verdins* principles will continue to have full force,[1174] meaning the considerations of denunciation and deterrence (general and specific) will have little role to play.[1175] Similarly, where the substance abuse is caused by the offender's impairment, their moral culpability may be reduced, and the need for general and specific deterrence may be moderated.[1176] But it is not enough to establish the impairment led to substance abuse. The defence must still prove that the impairment was connected to the offending.[1177] In determining whether drug use was caused by an impairment, the court may take into account the quantity of drugs used.[1178]

An offender cannot rely on a relapse of a pre-existing mental impairment as mitigating if it is caused by their failing to take prescribed medication or ingesting illegal drugs, but their moral culpability may still be reduced if another factor beyond their control - such as significant stress from the breakdown of a relationship or personal loss - also played some part in their relapse into a mentally impaired state.[1179]

6.2.2.10 – Personality disorders

The *Verdins* principles apply to personality disorders as they do to any other condition, there is no blanket exclusion of them from that framework.[1180] But neither does the existence of such a disorder necessarily demonstrate impaired mental functioning.[1181] The question of whether an offender's personality disorder engages any of the *Verdins* principles does not depend on its particular diagnostic label, but on what the expert evidence before the court shows about how the condition affected the offender's mental functioning at the time of the offending or how it will do so in the future.[1182]

An offender with a diagnosed personality disorder stands in precisely the same position as any other offender who wishes to rely on impaired mental functioning in order to mitigate their sentence in one or more of the ways identified by *Verdins*, and any statement to the contrary in *DPP (Vic) v O'Neill*[1183]should not be followed.[1184]

[1173] *R v Rees* [2011] VSC 523, [34]-[35]. See also *DPP (Vic) v Kao* [2009] VSCA 273, [35], [42] ('*Kao*'); *R v Ambrose* [2009] VSCA 265, [37] ('*Ambrose*'); *Mune* [32].
[1174] *Bennett v The Queen* [2011] VSCA 253 ('*Bennett*').
[1175] *Alexander21* [46].
[1176] *Dupuy* [29].
[1177] *R v Shafik-Eid* [2009] VSCA 217, [22]-[27].
[1178] *Londrigan v The Queen* [2010] VSCA 81, [25].
[1179] *Williams v The Queen* [2018] VSCA 171, [40]-[41].
[1180] *Brown v The Queen* [2020] VSCA 212, [59] ('*Brown*').
[1181] *Van Kempen v The King* [2023] VSCA 26, [47].
[1182] Ibid [5]-[6], [61]. See also *Herrmann* [49]-[77].
[1183] See, eg, *O'Neill* 413-14 [71]-[72], 417-418 [85]. See also *Dennis* [115]-[116].
[1184] *Brown* [6], [28]-[29].

6.2.2.11 – Consideration and evidence

Generally, a court only needs to consider the *Verdins* principles in cases where the issue is clearly raised by counsel,[1185] and there is a sufficient evidentiary basis to do so. Defence counsel must submit evidence supporting a *Verdins* point advanced in mitigation, particularly when the court indicates that it is unpersuaded by their submissions. A court does not have an obligation to inquire into the evidence[1186] or to make a factual inference about a mental impairment (unless there was a link between the impairment and the crime and a factual inference was the only conclusion reasonably open).[1187] Similarly, there is no obligation for a court to consider the *Verdins* principles where defence counsel mentions the principles, but later retreats from reliance on them.[1188]

The *Verdins* principles are six different, non-exhaustive, aspects of sentencing, so the nature and degree of a relevant impairment may be different depending on which aspect of the process is under consideration.[1189] It is mechanistic, simplistic, and wrong to say that because an offender suffers from a mental impairment the *Verdins* principles apply. There has to be a careful and rigorous consideration of whether the evidence establishes that the offender's mental capacity has been impaired and which of the circumstances identified in *Verdins* are applicable.[1190]

There needs to be cogent evidence, normally in the form of expert evidence, establishing on the balance of the probabilities that the *Verdins* principles are enlivened.[1191] The evidence must establish that the impairment existed at the time of offending, sentence, or both, as well as its nature, extent, and effect on the offender or its likely effect on them in the future.[1192] Expert evidence also needs to be assessed against what is known about the circumstances of the offending.[1193]

It is generally not sufficient for an expert to simply give evidence about the offender's mental impairment. As noted, the *Verdins* principles do not depend on diagnostic labels, but on the impact of an impairment on the offender and the offender's behaviour.[1194] Moreover, an impairment may have subtle abnormalities that affect perception and conduct and expert evidence on those subtleties will assist.[1195]

While expert evidence is required, it is not determinative, and it is ultimately for the court, not a psychiatrist or psychologist, to decide if and how the *Verdins* principles apply in a given case.[1196] It is wholly outside of a psychiatrist's or psychologist's expertise to express a view on whether one or more of the principles apply, and practitioners relying on expert reports should ensure they don't contain impermissible opinions of that kind.[1197] Expert evidence presented to support a *Verdins* argument should

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[1185] *Davey v The Queen* [2010] VSCA 346, [101]; *Wassef v The Queen* [2011] VSCA 30, [18]. See also *Zander* [36]-[37] (Nettle JA).
[1186] *Ambrose*; *Harmon* [76]-[78], [83].
[1187] *Charles* 62 [136], 70-71 [166], 71 [174]; *Qui* [73].
[1188] *R v Secombe* [2010] VSCA 58, [108]-[110]; *Azzopardi v The Queen* (2011) 35 VR 43, 50 [18]-[19]; *Carroll* [29].
[1189] *O'Neill* 412 [66]-[67].
[1190] Ibid 412 [68].
[1191] *Romero* 491 [17]-[18]; *Charles* 69-70 [162]; *Tokay v The Queen* (2014) 67 MVR 445, 450 [13] ('*Tokay*').
[1192] *O'Neill* 415 [77]. See also *O'Connor14* [65]; *Tokay* 449 [12]; *Harmon* [60].
[1193] *Davis* [58].
[1194] *Leeder* [39]; *Carroll* [19]; *Rich* [47]; *O'Neill* 408-09 [56].
[1195] *Harmon* [65].
[1196] *Carroll* [17]; *O'Connor14* [22], [63]; *Harmon* [64].
[1197] *Wright* 267 [22]-[24].

be a 'legitimate expression of psychological opinion' and should not include 'unsubstantiated conclusions on matters [falling] clearly outside any psychologist's expertise'.[1198]

A court should be cautious before concluding that an offender suffered from a mental impairment at the relevant time, and that the impairment had one of the necessary effects.[1199] Imprecision in expert opinions should signal to the court that it will be difficult to make a firm conclusion on their findings.[1200]

A court's assessment of the evidence must be rigorous and careful, and the prosecution plays an important part in identifying and challenging any inadequacy in the expert's opinion or the circumstances on which it is formed. [1201]

If a court is not inclined to accept the uncontested evidence of an expert,[1202] or to only give it limited weight because the author of an expert report is not called to give evidence, it must give counsel notice of this and an opportunity to be heard.[1203]

As the Court of Appeal has noted, because many expert reports are self-serving and almost always based on self-reported information, a court has an obligation to carefully consider this evidence and must exercise great caution in determining if *Verdins* has been enlivened.[1204] Thus, a court may reject an uncorroborated expert report based on self-reported information,[1205] particularly if the report writer believes the offender was lying.[1206]

If the court accepts the evidence and concludes that one or more of the *Verdins* principles apply, its reasons should clearly explain the ways the impairment has been taken into account. It is not sufficient to merely refer to the competing submissions, or state that the offender's impaired mental functioning affected the sentence without explaining how or to what extent.[1207] Similarly, if a court concludes the evidence is inadequate to support an expert opinion and rejects an application of *Verdins* it must state its reasons for reaching that conclusion.[1208]

6.2.3 – Addictions

Addictions, such as gambling addiction, drug addiction or alcoholism, can be relevant in several ways.

Firstly, addiction may bear on an offender's moral culpability.[1209] For example, it is relevant if the offender trafficked drugs in order to feed their own addiction rather than purely from greed and for

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[1198] *O'Connor14* [58].
[1199] *Bennett* [60]-[61].
[1200] *Davis* [56], [62]-[63].
[1201] *O'Neill* 415 [78], 416 [80].
[1202] *R v Finlayson* [2008] VSCA 50, [8]-[9].
[1203] *Glascott v The Queen* [2011] VSCA 109, [145]-[146].
[1204] *O'Neill* 415-16 [79]-[80].
[1205] *Kao* [34]-[40].
[1206] *R v Coombes* [2011] VSC 407, [72].
[1207] *Patterson* [30]; *Gray* [14]; *Pato* [20]-[22]; *Shaw v The Queen* [2012] VSCA 78, [47]-[50].
[1208] *O'Neill* 416 [81].
[1209] *R v Koumis* (2008) 18 VR 434, 437 [54] ('*Koumis*'). See also *R v McKee* (2008) 138 A Crim R 88, 92-94 [13] ('*McKee*'). But it does not require a conclusion that moral culpability is lessened. See *R v Audino* (2007) 180 A Crim R 371, 381 [36].

profit.[1210] But the weight to be attributed to this fact depends on the circumstances of each case and is greatly diminished, often to the point of non-existence, when considering trafficking operations above street level.[1211] Similarly, an offender's advantaged background, the way they were involved in a trafficking scheme, how they attempted to obtain a drug, and what they intended to do with it are all relevant to determining their culpability and may lessen any mitigating impact.[1212]

Moreover, unless there is evidence to the contrary, it should be inferred that a person importing drugs is doing so for profit. The fact that an offender needs money to pay off a debt does not affect culpability, and their prior good character is given less weight in drug importation offences.

Secondly, addiction is also relevant to rehabilitation, deterrence and community protection.[1213] However, someone who has had repeated opportunities for reform should not reasonably expect to rely on addiction in mitigation.[1214]

Lastly, an offender's addiction may be relevant to the choice of sanction, either because it may qualify them for a sanction specifically tailored to their addiction or by emphasising the value of a general rehabilitative sanction.[1215]

6.2.4 – Intoxication

Intoxication – whether through alcohol or narcotic consumption – will rarely mitigate offending,[1216] and may even be an aggravating factor.[1217] For intoxication to reduce moral culpability, the circumstances will have to be 'quite exceptional'.[1218] The key question is the degree of foreknowledge. If the offender knew of the likely consequences of drug ingestion their culpability is increased, and intoxication may be an aggravating factor.[1219] Where a long history of alcohol consumption has not revealed the slightest indication that an offender poses a risk of violence, this may mean the circumstances are sufficiently exceptional to be mitigating.[1220]

And as with addiction, intoxication may be relevant to sentencing purposes such as remorse and rehabilitation.[1221]

[1210] *Koumis* 437 [55], citing *R v Bouchard* (1996) 84 A Crim R 499, 501. See also *Vozlic v The Queen* (2013) 39 VR 327, 335 [33] ('*Vozlic*'). If the lack of an addiction is to be used to prove the offender acted solely from greed, then proof (beyond a reasonable doubt) that they are not addicted is required. Ibid 333-34 [26].
[1211] *R v Bernath* [1997] 1 VR 271, 275-76.
[1212] *Nguyen v The Queen* (2011) 31 VR 673, 681-83 [34]; *Mohtadi v The Queen* [2018] VSCA 238, [41]-[43].
[1213] *McKee* 92-93 [13], 438-39 [58].
[1214] *Hoang v The Queen* [2013] VSCA 287, [28].
[1215] See 20 – Other ancillary orders and 11 – Community correction order.
[1216] *R v Redenbach* (1991) 52 A Crim R 95, 99.
[1217] *Hasan v The Queen* (2010) 31 VR 28, 33 [21].
[1218] Ibid 37 [33]. See also *Morrison v The Queen* [2012] VSCA 222, [18]-[19], [25]-[26] ('*Morrison*').
[1219] *Humphries v The Queen* [2010] VSCA 161, [6]; *R v Aquilina* [2010] VSCA 6; *Edwards v The Queen* [2011] VSCA 87, [23]; *Dosen v The Queen* [2012] VSCA 307, [18]-[21].
[1220] *Morrison* [25]-[26].
[1221] Ibid [20], [24].

6.3 – Actions and behaviour

6.3.1 – Character

'Character', 'past history', and 'antecedents' have been used synonymously and refer (at a minimum) to an offender's previous criminal history. Under both the Victorian and Commonwealth regimes consideration of an offender's character is required when determining the sentence to be imposed,[1222] when deciding whether to exercise the discretion to record a State conviction,[1223] and when fixing a non-parole period or making a recognizance release order.[1224]

In determining an offender's character, a court may consider:

- the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions;[1225]
- their general reputation;[1226] and
- any significant contributions they've made to the community.[1227]

6.3.1.1 – Good character

Good character is an established mitigating factor, but what makes a person of good character varies according to the individual and it impossible to state a universal rule.[1228]

In determining whether an offender is of good character, a court must not consider the offending for which it is sentencing the offender. The issue at sentencing is whether, apart from the current offending, the person is otherwise of good character.

If the evidence establishes that the offender is 'otherwise of good character' then, subject to a statutory exception, this must be taken into account in sentencing. However, the weight given to good character will vary according to the circumstances of the case and the offender.[1229]

A lack of similar prior convictions is 'a significant matter in mitigation'.[1230] An offender's prior good character will always entitle them to some leniency, although it may be minimal.[1231] Good character must be balanced against the circumstances of the offence and the sentencing purposes.[1232] The weight to be given to good character may depend on the seriousness of the offence and whether it was an isolated act

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[1222] *Sentencing Act 1991* (Vic) ss 5(2)(f)-(g) ('the Act'); *Cth Crimes Act* s 16A(2)(m).
[1223] The Act s 8(1)(b).
[1224] Ibid s 11(1); *Cth Crimes Act* ss 19AB(3)(a)(ii), 19AC(4)(a)(ii), 19AD(2)(c), 19AE(2)(c), 19AR(4).
[1225] The Act s 6(a).
[1226] Ibid s 6(b).
[1227] Ibid s 6(c). See also *R v Fraser* [2004] VSCA 147, [36] ('*Fraser*'); *DPP (Vic) v West* [2017] VSCA 20, [44].
[1228] *Ryan v The Queen* (2001) 206 CLR 267, 277 [31], 279 [36], 309 [143], [145], 317 [174] ('*Ryan*').
[1229] *Ryan* 277 [32], 279 [36] (McHugh J).
[1230] *Tran v The Queen* [2011] VSCA 383, [29].
[1231] *Ryan* 278-79 [35]-[37], 297-300 [100], [102], [107], [112], 319 [178]; *SD v The Queen* (2013) 39 VR 487, 493 [26] ('*SD*').
[1232] *Ryan* 278-79 [33]-[34], [36] (McHugh J), 311 [149] (Hayne J); *SD* 494 [30]; *Samuels-Orumnwense v The Queen* [2015] VSCA 152, [88].

or part of a course of conduct.[1233] In the case of an offender charged with multiple offences the sentencer may attach less weight to previous good character.[1234]

Good character is significant in cases of first offenders, particularly mature first offenders[1235] or those acting under extraordinary external pressures.[1236] But, again, this is qualified by the gravity of the offending and the other sentencing purposes.[1237]

Good character is also relevant to an offender's prospects of rehabilitation.[1238]

Good character will be of reduced significance for offences that are commonly committed by offenders of otherwise good character, or who exploit their respectability to further their offending.[1239] Further, in sentencing for a child sexual offence, a court cannot consider an offender's previous good character if the court is satisfied that their good character helped them commit the offence.[1240] Factors such as breach of trust will similarly go to the weight to be given to the offender's 'otherwise good character'.[1241] But undue weight cannot be given to an offender's breach of trust. It cannot be used both as an aggravating factor and to diminish an offender's good character.[1242]

6.3.1.2 – Bad character

Evidence of an offender's bad character, *i.e.,* their prior criminality,[1243] is also relevant to a court in exercising the sentencing discretion, but it cannot be used in aggravation to increase a sentence[1244] or to doubly punish an offender.[1245] Instead, it may indicate an offender's moral culpability, persistent lawlessness or a propensity to commit particular crimes and so inhibit consideration of mitigatory factors such as rehabilitation.[1246]

The list of legislative considerations above is not exclusive: 'previous findings of guilt or convictions' does not refer only to those made or recorded prior to the commission of the offence currently before the court.[1247] However, as with prior convictions, subsequent convictions cannot be used to increase the head sentence, but only to counter an inference that an offender's later conduct was mitigating.[1248]

[1233] *R v Liddell* [2000] VSCA 37, [72]-[75]; *Ryan* 278 [34]; *DPP (Cth) v Afford* [2017] VSCA 201, [39], [56]; *Kao* [63].
[1234] *Ryan* 278 [34]; *Wakim v The Queen* [2016] VSCA 301, [41]-[42].
[1235] *R v Okutgen* (1982) 8 A Crim R 262, 265-66; *R v Konsol* [2002] VSCA 3, [8].
[1236] *DPP (Vic) v Mobbs* [2003] VSCA 148, [18].
[1237] *DPP (Vic) v Kien* (2000) 116 A Crim R 339, 342-44 [16]-[18]; *Cumberbatch* 14-15 [13]; *R v Whyte* (2004) 7 VR 397, 405-07 [27]-[31] ('*Whyte*').
[1238] *R v Rau* [2010] VSC 370, [32].
[1239] *R v T* (1990) 47 A Crim R 29, 39.
[1240] The Act s 5AA(1).
[1241] *Ryan* 278 [34], 288 [69]-[70], 302 [117], 311 [148].
[1242] *SD* 494 [31]; *Torrefranco v The Queen* [2021] VSCA 157, [41].
[1243] *Veen* 478; *DPP (Vic) v Di Nunzio* (2004) 40 MVR 97, 105 [27].
[1244] *Ryan* 287-88 [67], 317-18 [174]; *Galuak v The Queen* [2015] VSCA 300, [23].
[1245] *Ryan* 287-88 [67] (Gummow J). See 3.4 – Sentencing principles - Double punishment.
[1246] *Veen* 477-78; *Saunders v The Queen* [2010] VSCA 93, [13]; *R v Johnson* [2011] VSC 633, [23]-[24]; *Maher v The Queen* (2017) 83 MVR 224, 252 [109].
[1247] *R v Rumpf* [1988] VR 466, 475 ('*Rumpf*').
[1248] Ibid.

Subsequent convictions recorded after the commission of the offence before the court are also relevant, but again cannot be considered to aggravate an offence and can only be considered for the purpose of rebutting alleged circumstances of mitigation.[1249] The defence has no duty to inform the court of subsequent convictions, unless relying on the offender's good character, but the prosecution has a duty to prove later convictions and other relevant subsequent conduct whenever it is open to the court to fix a non-parole period.[1250] 'Subsequent convictions' are not proved through the *Criminal Procedure Act 2009* (Vic) provisions on tendering an offender's previous convictions. Instead, they may be placed before the court in the course of submissions.

Lastly, if there is evidence of rehabilitation subsequent to the offending and prior to sentencing, then bad character may have a reduced negative impact.[1251]

6.3.2 – Motive

An offender's motive may be considered in assessing their culpability.[1252] It may be an aggravating or mitigating factor,[1253] and the weight it is to be given depends on the circumstances.

Culpability may be lessened if the offending was motivated by:

- genuine altruism,[1254] as opposed to 'false' altruism;[1255]
- addiction linked to offending with no profit motive;[1256]
- personal or financial pressures or need;[1257] or
- threats falling short of the defence of duress.[1258]

Culpability may be aggravated for offending motivated by:

- misguided loyalty;[1259]
- greed or profit;[1260]
- a desire for status, self-aggrandisement or to fund a lavish lifestyle;[1261]

[1249] *Rumpf* 475; *Alexandros v Birchell* (2000) 31 MVR 307, 310 [18]; *Bellizia v The Queen* [2016] VSCA 21, [19], [22], [54], [70]-[79]; *Rootsey v The Queen* [2018] VSCA 108, [8].
[1250] *Rumpf* 476.
[1251] *Bala v The Queen* (2010) 201 A Crim R 505, 508 [16].
[1252] *Neal* 324; *Davies* [721].
[1253] *R v Malcotti* [2001] VSCA 97, [14].
[1254] *R v Hood* (2002) 130 A Crim R 473, 478 [33]; *Bayram v The Queen* [2012] VSCA 6, [16], [27]-[29].
[1255] See, eg, *R v Bui* [2003] VSCA 125, [28] (trafficking in heroin by a non-addict to support the rehabilitation of an addicted relative is not a 'moral dilemma'); *DPP (Cth) v Alateras* [2004] VSCA 214, [30] (defrauding the Commonwealth as 'Robin Hood' figure).
[1256] *R v Sebborn* (2008) 189 A Crim R 86, 89 [18]-[22]; *Koumis* 436 [51]; *Velevski v The Queen* [2010] VSCA 90, [31]; *Vozlic* 334 [29]; *Short v The Queen* [2016] VSCA 210, [24], [28].
[1257] *R v Arundell* [2003] VSCA 69, [35];*Tiknius v The Queen* (2011) 221 A Crim R 365, 376 [43]; *Shakhanov v The Queen* [2019] VSCA 38, [44].
[1258] *R v Roach* [2005] VSCA 162, [14]-[15].
[1259] *R v Howden* (1999) 108 A Crim R 240, 244 [21].
[1260] *DPP (Cth) v Rowson* [2007] VSCA 176, [23]; *DPP (Cth) v Maxwell* (2013) 228 A Crim R 218, 223 [21]; *Shakhanov v The Queen* [2019] VSCA 38, [44].
[1261] *DPP (Cth) v Goldberg* (2001) 184 ALR 387, 397 [47].

- vigilantism, the law does not condone revenge or an offender punishing the victim;[1262] or
- revenge, spite, or dislike.[1263]

6.3.3 – Personal history and circumstances

Mercy may permit an offender's background of extreme disadvantage and hardship to be recognised as mitigating factors.[1264]

6.3.3.1 – Childhood

An offender's circumstances and experience during their childhood and formative years must be considered in sentencing – not just out of historical curiosity but because the effects of social disadvantage do not diminish with time.[1265] They are likely to have profound and lasting consequences and can explain, but not excuse, the offending. Taking lifelong damage that is the result of childhood exposure to violence, abuse, or neglect into account when sentencing is 'the mark of a humane society….'[1266] It is also relevant in applying the fundamental principles and sentencing purposes.[1267]

It is not possible to identify every relevant and mitigating circumstance, but significant circumstances include being raised in an environment of, or being exposed or subjected to:

- family violence or abuse;[1268]
- parents or caretakers who were addicts or alcoholics;[1269]
- educational disadvantage;[1270]
- sexual abuse;[1271]
- separation from natural parents;[1272] or,
- severe forms of persecution and violence, including witnessing death of family members, and time spent as a refugee.[1273]

1262 *R v El-Ahmad* [2004] VSCA 93, [39]; *R v Lowe* [2009] VSCA 268, [26]-[27]; *Sumner v The Queen* (2010) 29 VR 398, 419-20 [86]-[87]; *Taskiran v The Queen* [2011] VSCA 358, [22]; *Wyka v The Queen* [2020] VSCA 104, [3]-[4], [8]-[9], [96], [100].
1263 *R v Moroney* (2008) 49 MVR 324, 327 [14]; *R v Sotto* [2009] VSCA 70, [14]; *Withers v The Queen (No 2)* [2010] VSCA 151, [19]; *Mantovani v The Queen* [2012] VSCA 225, [37]-[38]; *Hogarth v The Queen* (2012) 37 VR 658, 664 [21]-[22].
1264 *Guode v The Queen* [2020] VSCA 257, [45]-[46].
1265 *Bugmy13* 594-95 [42]-[44]; *DPP (Vic) v Green* [2020] VSCA 23, [81].
1266 *Herrmann* [46].
1267 *Marrah v The Queen* [2014] VSCA 119, [16] ('*Marrah*'). See also *Dhal v The Queen* [2020] VSCA 90.
1268 *Bugmy13* 594-95 [43]-[44]; *Johnson v The Queen* [2013] VSCA 277, [18] ('*Johnson13*'); *Heyfron* [53]-[54]; *DPP (Vic) v Green* [2020] VSCA 23, [81].
1269 *Heyfron* [53]-[54].
1270 Ibid [56].
1271 *R v AWF* (2000) 2 VR 1, 3-4 [4], [6], 10 [34]; *Abdou v The Queen* [2015] VSCA 359, [50]; *Beevers v The Queen* [2016] VSCA 271, [35].
1272 *Fuller-Cust* 517 [65], 519 [74]; *Johnson13* [18].
1273 *Wilson (a pseudonym) v The King* [2023] VSCA 276, [88]-[90].

However, it is an error to require the offender to demonstrate 'significant childhood deprivation'.[1274]

For detailed research relating to experiences of disadvantage and deprivation please see the NSW Public Defenders' Bar Book Project.

A court should make clear to what extent the offender's background and history have moderated the weight given to one purpose or principle over another.[1275]

While disadvantage will always remain relevant, at some point mitigation must yield in the face of serious violent offending and the need for community protection.[1276] This is particularly so in cases of domestic violence; childhood disadvantage cannot mitigate a sentence, 'such that victims of domestic violence… are treated as less worthy of protection or that the crimes against them warrant less denunciation'.[1277]

But as with youth, a disadvantaged upbringing may elevate the importance of rehabilitation, and so of the need to avoid or minimise incarceration, as a sentencing consideration in order to end a cycle of offending that is of 'great detriment to the community and of the applicant….'[1278]Lastly, there must be an appropriate evidentiary foundation before an offender's deprived background can be taken into account.[1279]

6.3.3.2 – Employment

The employment history of an offender is relevant during sentencing as it is an indication of their prospects for rehabilitation.[1280] There are also professions associated with government and the justice system whose members are expected to act with highest levels of honesty and integrity, and their failure to do so may be taken as an aggravating factor and emphasise the need for just punishment and general deterrence.[1281]

6.3.4 – Remorse and restitution

6.3.4.1 – Remorse

Remorse is also referred to as 'repentance' or 'contrition' and is a relevant consideration at common law and a statutory consideration when sentencing for Commonwealth offences.[1282] It is not directly identified as a relevant consideration under the Victorian regime, but the Act implicitly incorporates it as

[1274] *Newton (a pseudonym) v The King* [2023] VSCA 22, [42]-[43].
[1275] *Marrah* [17]. See, eg, *DPP (Vic) v Green* [2020] VSCA 23, [86], [90], [96].
[1276] *Stewart v The Queen* [2015] VSCA 368, [5].
[1277] *Kennedy v The King* [2022] NSWCCA 215, [43].
[1278] *Bergman (a pseudonym) v The Queen* [2021] VSCA 148, [90]-[100].
[1279] *Herrmann* [44], [88].
[1280] *Morgan10* 238 [41].
[1281] See, eg, *R v Wright (No 2)* [1968] VR 174, 180-81; *Fraser* [29]; *DPP (Vic) v Aydin* [2005] VSCA 86, [21]; *Einfeld v The Queen* (2010) 200 A Crim R 1, 23 [81]-[82].
[1282] *Cth Crimes Act* s 16A(2)(f).

one by stating that a court may consider the effects of a forfeiture order or an offender's conduct during trial or hearing as an indicator of remorse.[1283]

Genuine remorse is extremely rare and a very important element of sentencing as it enhances the offender's prospects of rehabilitation and reduces the need for specific deterrence and community protection. It may be demonstrated by making admissions to conduct that would otherwise have been difficult to prove or that provide the prosecution with evidence necessary to obtain a conviction, and when such a confession is made it warrants a 'demonstrable discount' in sentence in order to encourage similar admissions from other offenders.[1284] This significantly mitigating factor is known in Victoria as the '*Doran* Discount', and it has been held to apply further to admissions that lead to the laying of an increased number of charges or to more serious charges.[1285] The discount is not confined to cases where the crime was unknown before the confession or where the complainant did not have capacity to give evidence. The discount may also be available where the offender made the confession after the offender was presented with the evidence against them, if that affected the form of the charge.[1286] Depending on the admissions, a discount of 30% to 50% may be appropriate.[1287] The discount will generally be more substantial when the confession is made to an unknown crime and less when it only provides detail of existing allegations. Nonetheless, if proof depends entirely on the confession, leniency is called for. The amount is a matter of degree and fact depending on the circumstances.[1288]

An offender's guilty plea made appreciating the wrongfulness of their conduct, its impact on the victim, and wishing to repair any harm out of a wish to clear their conscience also calls for an exercise of mercy in the form of a significant sentence reduction beyond that given to all guilty pleas for their utilitarian value.[1289]

However, even genuine remorse cannot make up for some harms and it does not displace the need for the gravity of offending to be reflected in the sentence.[1290]

Genuine remorse must be contrasted with feigned remorse, self-pity, or depression. The 'anguish' at being caught and punished is not an indication of remorse. An offender's determination to change their behaviour and to make amends to the extent possible is.[1291]

An offender who wants to rely on remorse in mitigation must 'satisfy the court there is genuine penitence and contrition and a desire to atone'.[1292] This must be established on proper evidence and a court should be cautious before accepting that an offender's guilty plea indicates remorse warranting more than a

[1283] See, eg, the Act ss 5(2B), (2C), (2D).
[1284] *R v Doran* [2005] VSCA 271, [15]-[16].
[1285] *Latina v The Queen* [2015] VSCA 102, [12], [14]-[17] ('*Latina*'); *Younan v The Queen* [2017] VSCA 12, [38]-[39] ('*Younan*').
[1286] *Sharman (a pseudonym) v The Queen* [2017] VSCA 241, [36] ('*Sharman*'); *Latina* [18].
[1287] *Younan* [40], citing *Adamson v The Queen* (2015) 47 VR 268.
[1288] *Sharman* [42].
[1289] *Whyte* 403 [21]; *Phillips v The Queen* (2012) 37 VR 594, 614 [68]-[69] ('*Phillips12*'); *Barbaro v The Queen* (2012) 226 A Crim R 354, 365 [39] ('*BarbaroVIC*'); *R v Bayliss* [2013] VSCA 70, [20]-[21], [23] ('*Bayliss*'); *CD v The Queen* [2013] VSCA 95, [36] ('*CD*'); *Lane v The Queen* [2017] VSCA 289, [37] ('*Lane*'). See 7.1 – Policy considerations – Guilty plea.
[1290] *Lane* [42].
[1291] *BarbaroVIC* 365 [36]. See also *Whyte* 403 [21]; *CD* [36].
[1292] *BarbaroVIC* 365 [38].

utilitarian discount.[1293] A court is also entitled to consider a lengthy period of delay between the offending and the guilty plea as detracting from the quality of the offender's remorse and prospects for rehabilitation.[1294]

The degree of an offender's true remorse is a question of fact to be determined on the balance of probabilities.[1295] The most 'compelling evidence' of remorse is the offender's testimony and a court is not bound to accept other 'second-hand evidence'. The words and deeds of the offender over time are 'more informative and precise'.[1296] Hardship to the offender and the willingness to assume significant burdens to make restitution is a strong indication of remorse.[1297]

A victim impact statement cannot be used to disprove a claim of remorse. The prosecution will ordinarily need to lead admissible evidence in order to disprove a claim of remorse.[1298]

In addition to the *Doran* Discount discussed above, remorse may be indicated by other conduct, including:

- confessing to the police sometime after the crime;[1299]
- seeking treatment;[1300]
- acting in a manner that saves the victim further distress;[1301]
- making restitution;[1302]
- cooperating with the police and authorities;[1303]
- apologising to the victim;[1304]
- facilitating the conduct of the trial or the administration of justice.[1305]

Similarly, conduct may also qualify or indicate a lack of remorse, such as where an offender:

- attempts to deceive the court or exaggerates a mitigating factor to obtain a lesser sentence;[1306]
- contests the mental elements of a crime;[1307]
- lies in the face of charges or offers false alibis;[1308]

[1293] Ibid 366 [40], citing *Phillips12* 614 [69]; *Dibbs v The Queen* (2012) 225 A Crim R 195, 215 [93].
[1294] *Laa v The Queen* [2020] VSCA 136, [45].
[1295] *R v Cooper* (1998) 103 A Crim R 51, 55; *R v Gillick* [2000] VSCA 127, [20].
[1296] *BarbaroVIC* 365 [38], 366 [40], citing *Phillips12* 614 [69]; *Bonacci v The Queen* (2012) 224 A Crim R 194, 202 [44]; *Bayliss* [22].
[1297] *R v Bandjak* (2011) 109 SASR 315, 330-31 [80] ('*Bandjak*').
[1298] *R v R* (1999) 106 A Crim R 288, 291 [15]-[16].
[1299] *CD* [35]; *DPP (Vic) v McInnes* [2017] VSCA 374, [78].
[1300] *CD* [35]; *DPP (Cth) v Zarb* (2014) 46 VR 832, 842 [29].
[1301] *CD* [35]; *DPP (Vic) v McInnes* [2017] VSCA 374, [78].
[1302] *R v Starr* [2002] VSCA 180, [26]; *R v Hildebrandt* [2014] VSC 321, [68].
[1303] *R v Su* [1997] 1 VR 1, 78-79; *CD* [35]. But see *Latorre v The Queen* (2012) 226 A Crim R 319, 348-49 [173]-[177].
[1304] *Neal* 315; *CD* [35].
[1305] The Act s 5(2C); *Whyte* 403 [21]; *McCloskey-Sharp v The Queen* [2015] VSCA 87, [32]-[33]; *Higgs v The Queen* [2015] VSCA 223, [50]-[52].
[1306] *R v Fisher* (2009) 22 VR 343, 360 [80].
[1307] *R v Cropley* (2009) 52 MVR 167, 170-71 [13].
[1308] *R v Asad* [2003] VSCA 3, [14]; *R v Rogers* [2008] VSCA 114, [49].

- pleads largely in 'recognition of the inevitable', such as where the prosecution's case is strong;[1309]
- conceals the victim's body and lies to cover up their involvement in the crime.[1310]

The absence of remorse cannot be a circumstance of aggravation.[1311] But it may indicate a need for specific deterrence.[1312] If evidence establishing a lack of remorse reveals a contemptuous attitude to the victim or the law, it may also be relevant to the offender's moral culpability and prospects for rehabilitation. Whether this is so will depend on the circumstances of the individual case.[1313]

The genuineness of remorse and the time and manner it manifests should be evaluated in light of the overall facts.[1314] Timing is relevant in that remorse is generally given less weight the later it appears.[1315] But an offender's remorse is not measured at the time of the offending.[1316]

6.3.4.2 – Restitution

If an offender repays or compensates a victim, this restitution is a statutorily required consideration in assessing remorse for Commonwealth offending,[1317] but apart from that it is also a relevant factor at common law that allows for a sentence to be reduced or a shorter non-parole period to be fixed.[1318] But even full reparation does not entitle an offender to avoid all aspects of punishment.[1319]

The principles of restitution may be summarised as follows:

- it is always relevant and mitigating;[1320]
- it should be encouraged;[1321]
- it provides some reparation for the victim, indicates remorse, and means the offender has not profited from their crime;[1322]
- hardship and the willingness to assume significant burdens to make restitution should be given great weight;[1323]
- mitigation is not removed but may be lessened when restitution is made by third-parties or by court order;[1324]

[1309] *R v Pajic* (2009) 23 VR 527, 532 [19]; *Bayliss* [23]; *Zogheib v The Queen* (2015) 257 A Crim R 454, 472 [74], 474 [80].
[1310] *DPP (Vic) v Ristevski* [2019] VSCA 287, [6]-[9], [73]-[74] ('*Ristevski II*').
[1311] *R v Duncan* [1998] 3 VR 208, 215 ('*Duncan98*'); *Mune* [12].
[1312] *Delich v The Queen* [2014] VSCA 66, [42]-[43].
[1313] *R v Scholes* [1999] 1 VR 337, 350 [24]; *R v Rogers* [2008] VSCA 114, [46]-[47]. See also *Ristevski II* [2]-[9].
[1314] *BarbaroVIC* 366 [41], citing *Phillips12* 615 [72]; *Karam v The Queen* [2015] VSCA 50, [156].
[1315] See *DPP (Cth) v Peng* [2014] VSCA 128, [14]; *R v CJK* (2009) 22 VR 104, 107 [23]; *Gandhok v The Queen* [2018] VSCA 29, [45].
[1316] *R v Broadbent* [2009] VSCA 320, [19].
[1317] *Cth Crimes Act* s 16A(2)(f)(i).
[1318] *R v Allen* (1989) 41 A Crim R 51, 57; *DPP (Cth) v Goldberg* (2001) 184 ALR 387, 396 [42]; *R v Reichstein* [2007] SASC 374, [15].
[1319] *R v Morris* [1993] 2 VR 192, 198.
[1320] *Bandjak* 330-31 [80] (White J).
[1321] Ibid [80]; *DPP (Vic) v Wightley* [2011] VSCA 74, [39]-[40] ('*Wightley*').
[1322] *Bandjak* 330-31 [80].
[1323] Ibid. See also *Marannu* [10]; *Boyton v The Queen* [2016] VSCA 13, [63].
[1324] *R v Nath* (1994) 74 A Crim R 115, 118; *Bandjak* 330-31 [80].

- a court should not permit an offender to buy, or appear to buy, a reduction in or suspension of their sentence;[1325]
- offers of restitution made for the first time on plea are to be viewed cautiously;[1326]
- there may be rare circumstances where it is appropriate for a court to defer sentencing to permit an offender a chance to make good on an offer of restitution, but requests to do so should be viewed cautiously;[1327]
- differences in the amount of restitution made may explain disparate sentences;[1328]
- failure to make full or partial restitution is not an aggravating factor.[1329]

[1325] *Bandjak* 325 [45] (Vanstone J), 330-31 [80] (White J); *Wightley* [39]-[40].
[1326] *Bandjak* 330-31 [80].
[1327] Ibid; *R v O'Brien* (1991) 57 A Crim R 80, 91-92.
[1328] *Gianello v The Queen* [2015] VSCA 205, [35]-[36].
[1329] *Keane v The Queen* [2011] VSCA 156, [24].

7 – Policy considerations

Not every sentencing consideration is derived from the offender or the offending: some considerations have their sources in policy. This chapter focuses on those considerations.

7.1 – Guilty plea

7.1.1 – Benefits

The value of an accused's plea of guilty is recognised both by the common law and statute.

The *Sentencing Act 1991* (Vic) ('the Act') requires a court to consider whether the offender pleaded guilty and at what stage in the proceedings any plea or intention to plead occurred.[1330] Moreover, when an accused is being committed for trial, the magistrate must inform them that the sentencing court may consider any plea and the stage at which it is given.[1331]

The courts have consistently acknowledged the public interest in an accused pleading guilty. A guilty plea saves the State and the victims the cost (human and financial), and trauma of a trial.[1332] The economic advantage to the community when a person pleads guilty are the saving of judicial, prosecutorial and legal aid resources, witness fees, and the fees paid to (and the inconvenience experienced by) jurors.[1333]

For witnesses and their families, particularly those in homicide and sexual offence cases, a guilty plea spares them from the ordeal of having to give evidence.[1334] Pleas of guilty assist victims to put their experiences behind them, to receive vindication and support from their family and friends, and possibly to obtain assistance from the community for any injury they may have suffered.[1335]

The other benefits of an accused person pleading guilty are relieved congestion in the courts, and improved finalisation rates for criminal cases with a consequent increase in public confidence in the criminal justice system.[1336]

When an accused person offers their plea of guilty, they abandon any chance of being acquitted, even undeservedly.[1337]

For these reasons, an accused person's plea of guilty is publicly rewarded: the purpose being to encourage offenders to plead guilty[1338] because of the significant public good that follows when they do.

In particular, while Victorian courts work under the adverse effects of the COVID-19 pandemic, a sentencing court should 'view a plea of guilty as carrying with it a greater utilitarian benefit than at other

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[1330] *Sentencing Act 1991* (Vic) s 5(2)(e) ('the Act').
[1331] *Criminal Procedure Act 2009* (Vic) ss 144(1)(a)-(b) ('*CPA*').
[1332] *Anderson v The Queen* (2013) 230 A Crim R 38, 43 [14] ('*Anderson II*').
[1333] *Cameron v The Queen* (2002) 209 CLR 339, 360–61 [66] ('*Cameron*').
[1334] Ibid 361 [67].
[1335] Ibid.
[1336] Ibid.
[1337] Ibid.
[1338] *Phillips12* 609 [52].

times, and in other circumstances, and, concomitantly, as attracting an augmented mitigatory effect on sentence, simply because the plea will benefit the beleaguered administration of justice'. Given the circumstances courts must provide actual encouragement to relieve strains on the system by encouraging the accused to plead guilty. All other things being equal, a plea entered during the currency of the pandemic is worth greater weight in mitigation than a plea entered at a time when the community and the courts are not affected by the effects of the pandemic. It should attract a significant discount (which the court does not need to quantify)[1339] but not one 'with a malleable weight, dependent on Court venue….'[1340] The discount for having pled during the pandemic must be applied consistently. [1341]

7.1.2 – Weight

Every plea of guilty must be considered in sentencing. But the weight to be given it depends upon the circumstances of each case and should be the result of 'specific and sound' consideration.[1342] A plea does not always need to result in a sentencing discount, nor is the court bound to accept a Crown concession that a guilty plea should reduce the sentence.[1343]

7.1.2.1 – Utilitarian benefit

In all but exceptional cases, the utilitarian value of a plea must be acknowledged by a reduction in the sentence imposed.[1344] This recognises the objective benefit to the community regardless of whether the plea is accompanied by any evidence of remorse or contrition.[1345] Even a plea motivated by self-interest has a utilitarian benefit.[1346]

The strength of the Crown case will have no bearing on the assessment of (and reward for) the utilitarian value of a guilty plea[1347] because it does not bear upon the objective benefits of the plea.[1348] But the length and complexity of any trial that has been rendered unnecessary by the guilty plea is relevant to the assessment of the utilitarian benefit.[1349] If the Crown must prove an overwhelmingly complex and lengthy circumstantial case, the benefit of a guilty plea might be considered great.[1350]

When an accused pleads guilty to some charges but contests others, this does not diminish the weight to be attached to the utilitarian benefit of the pleas of guilty.[1351]

While a plea of guilty must always be taken into account as a mitigating factor,[1352] a plea of not guilty is

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[1339] *Worboyes v The Queen* [2021] VSCA 169, [35]-[39]. See also *Chenhall v The Queen* [2021] VSCA 175, [35] (total effective sentence reduced by six months for failing to discount for plea during pandemic); *Rossi v The Queen* [2021] VSCA 296, [21] (total effective sentenced reduced by one year).
[1340] *Biba v The Queen* [2022] VSCA 168, [26].
[1341] Ibid.
[1342] *Phillips12* 613 [65].
[1343] *R v Donnelly* [1998] 1 VR 645, 649 ('*Donnelly*').
[1344] See 5.1.2 – Circumstances of the offence – Maximum penalty – Significance of maximum penalty.
[1345] *Phillips12* 608–09 [47].
[1346] Ibid 614 [68].
[1347] *R v Pajic* (2009) 23 VR 527, 532 [20] ('*Pajic*').
[1348] *Zogheib v The Queen* (2015) 257 A Crim R 454, 466–67 [51].
[1349] Ibid 469-70 [64].
[1350] Ibid.
[1351] *Anderson II* 43 [14].
[1352] *Phillips12* 609 [50]-[52].

never an aggravating factor. An accused person cannot be penalised for insisting on their right to trial, and a court may not mark its disapproval of the accused having put the issues to proof or having presented a time wasting or even scurrilous defence by increasing what is a proper sentence.[1353]

Clearly there is a 'certain illogicality' between the principle of a guilty plea discount and the prohibition on treating a plea of not guilty as aggravating.[1354] But the principles, however competitive, are entrenched and operate to restrain a wrongful approach to sentencing.[1355]

7.1.2.2 – Indicator of remorse

A guilty plea that demonstrates genuine remorse, that is entered at the earliest practical opportunity, that saves the State a trial and witnesses both trauma and inconvenience normally deserves a substantial sentencing discount.[1356]

The strength of the Crown case may be relevant when determining the degree to which a guilty plea reflects the offender's remorse.[1357] A strong Crown case may warrant a conclusion that the plea is merely the offender 'recognising the inevitable' and a finding that remorse, contrition and willingness to facilitate the course of justice are not indicated.[1358] However, care should be taken before concluding that a plea of guilty to a strong Crown case indicates an absence of contrition because whatever the strength of the Crown case an offender may be genuinely remorseful and accepting of responsibility.[1359] For guilty pleas where the Crown case is weak, an additional level of discount is generally warranted.[1360]

Where remorse may be inferred from a guilty plea, a court should identify the weight it has attributed to the plea and how it was taken into account.[1361]

7.1.2.3 – Timing

A plea given early and unconditionally should ordinarily attract a substantial sentencing discount.[1362] A plea made at the earliest opportunity that evidences genuine remorse and prospects of rehabilitation, which saves the State a trial and witnesses trauma and inconvenience, normally justifies a high discount. An early plea that does nothing but save the costs of a trial usually still attracts a significant discount.[1363]

A late plea attracts a discount, but it will generally be of lower value. How the timing of a guilty plea is characterised depends on the facts of the case and involves establishing the time it could first be said it was reasonably open to the offender to plead guilty.[1364]

[1353] *R v Gray* [1977] VR 225, 231 ('*Gray*').
[1354] Ibid.
[1355] *Duncan98* 215.
[1356] Ibid. See 6.3.4.1 – Circumstances of the offender – Actions and behaviour – Remorse and restitution – Remorse.
[1357] *Pajic* 532 [19]-[20].
[1358] Ibid 532 [20].
[1359] *Phillips12* 614 [70].
[1360] *Pajic* 532 [19].
[1361] *Craft (a pseudonym) v The Queen* [2021] VSCA 66, [23]-[24].
[1362] *R v Howard* [2009] VSCA 281[16] ('*Howard*').
[1363] *Duncan98* 215.
[1364] *Cameron* 345 [21]. See also *Ngo v The Queen* [2021] VSCA 21, [29]-[40].

A guilty plea will not be late:

- when it is made to a lesser offence shortly after the prosecution discontinues a more serious charge;
- when it is entered after the prosecution withdraws other charges, where the accused was avoiding forensic prejudice by withholding the plea until those other charges were withdrawn;[1365]
- if the offender pleaded guilty to the offence of which they were ultimately convicted as soon as they were told that it was the only charge they would face;[1366]
- where the offender pleads guilty as soon as a charge was amended to reflect the proper factual basis or particulars of the offending.[1367]

However, where a statutory alternative is available, a shift in the factual basis of the allegation will not necessarily mean a later plea is recast as 'early' if the offender could have pleaded guilty to the alternative allegation at an earlier stage.[1368]

Where a plea is late, and an accused has caused lengthy expensive extradition proceedings, the discount for the plea may be small.[1369]

Where the ultimate conviction reflects a previously rejected plea offer, the offender should be afforded the discount they would have been given had the plea offer been accepted[1370] in recognition of the lost utilitarian value of the offer.[1371] An unaccepted plea may also demonstrate acceptance of responsibility, remorse and a willingness to facilitate to course of justice.[1372]

7.1.3 – Application of discount

The discount for a guilty plea needs to be applied consistently with the form of the sentence, but its application may change the form of the sentence itself.[1373]

7.1.3.1 – Imprisonment

Where a sentence of imprisonment is imposed, the discount is first applied to the head sentence as the prisoner must, hypothetically, serve every day of that sentence. Next, the discount is applied to the non-parole period. The plea may even incur an additional discount at this stage if it also evidences rehabilitative prospects.[1374]

A mandatory minimum term of imprisonment can create complications for reductions in sentence for mitigatory factors, including pleas of guilty. A minimum sentencing regime does not oust common law

[1365] Ibid.
[1366] Ibid.
[1367] Ibid 346 [23]-[25].
[1368] *Maybus v The Queen* [2017] VSCA 125, [43].
[1369] *R v Dixon-Jenkins* (1991) 55 A Crim R 308, 313.
[1370] *Carr v The Queen* [2012] VSCA 299, [70] ('*Carr*'). See also *Zarghami v The Queen* [2020] VSCA 74.
[1371] *Sherna v The Queen* (2011) 32 VR 668, 672 [21].
[1372] *Carr* [69].
[1373] *Farr v The Queen* (2010) 30 VR 219, 228 [39].
[1374] *Duncan98* 215.

sentencing principles but necessarily modifies both.[1375] There is little authority available on the question of mitigation in the context of mandatory sentencing regimes; the issue is likely to arise more frequently as the number of offences subject to minimum sentencing requirements increases. There is some guidance from Western Australia.[1376]

7.1.3.2 – Suspended sentences

When a suspended or partially suspended sentence is available the discount applies first to the sentence itself and then to the extent the sentence is to be served immediately.[1377]

7.1.3.3 – Gravity of offending

There are competing authorities on the question of whether an offender pleading guilty to an offence in the 'worst category' of offending should be entitled to a discount for their plea.

One line rejects the notion that a more serious offence is less likely to attract a plea discount. Those cases tend to focus on the utilitarian benefit of the plea and the fact that it spares victims (or their families) from the trauma of giving evidence. Reasoning in this way, the greater the seriousness of the crime, the greater the weight to be given to a plea of guilty.[1378]

However, more recent authority considers whether the enormity of the offenders' criminality is such that the utilitarian benefit of their guilty plea must yield to greater considerations such as the protection of the public and the maintenance of the rule of law.[1379]

It is now generally held that for the worst instances of murder, the entry of a guilty plea is a necessary condition for the fixing of a non-parole period,[1380] but it should not be assumed that a plea will save a murderer from life imprisonment.[1381]

7.1.4 – Section 6AAA notional sentence

The common law holds that the justification for a sentence reduction must be transparent.[1382] Further to that proposition, Parliament has legislated to advance the public interest in having offenders plead guilty by providing conspicuous rewards to those who do so.[1383]

Specifically, section 6AAA of the Act requires a court, when imposing certain forms of sentence, to state the benefit the offender has received because of their guilty plea.[1384] The court must articulate a 'notional sentence' it would have imposed after trial if the offender had not pleaded guilty.

[1375] *DPP (Cth) v Haidari* (2013) 230 A Crim R 134, 144-45 [42].
[1376] See *Bahar v The Queen* (2011) 45 WAR 100.
[1377] Ibid.
[1378] *Donnelly* 649.
[1379] *Phillips12* 613 [67].
[1380] *Hunter v The Queen* (2013) 40 VR 660, 663-64 [14].
[1381] *R v DJH* [1998] VSCA 108, [12]; *R v Goodall* [2000] VSCA 106, [17].
[1382] *Phillips12* 615-16 [73].
[1383] *R v Flaherty* (2008) 19 VR 305, 308 [8] ('*Flaherty No 2*').
[1384] The Act ss 6AAA(1)-(5).

This obligation arises when the sentence involves:

- a custodial order; or
- an order that the offender serve a term of imprisonment; or
- a Community Corrections Order for a period of two years or more; or
- a fine exceeding 10 penalty units; or
- an aggregate fine exceeding 20 penalty units.[1385]

The notional sentence only needs to be stated if the court has imposed a less severe sentence because of the guilty plea.[1386] It also only needs to be stated in relation to the overall sentence, not in relation to individual charges. If a total effective sentence is imposed in respect of multiple offences, the periods to be stated are the total effective sentence and single non-parole period, if any.[1387]

Aggregate sentences are to be treated as a single sentence for the purposes of s 6AAA.[1388] If a non-parole period is imposed, the notional undiscounted non-parole period must also be stated.[1389]

It is unclear what is expected of the s 6AAA statement when the offender has pleaded guilty to some but not all charges. The Court of Appeal has suggested the notional sentence is to be made regarding only the total effective sentence.[1390]

In cases where a s 6AAA statement is not required because of the form of sentence being imposed, a court may still state the notional sentence that would have been imposed but for the offender's plea of guilty.[1391]

7.1.4.1 – Obligation to record

Where the court states a notional sentence, it must record or cause it to be recorded (whether in writing or in another form) in the records of the court.[1392]

Section 6AAA requires the court (at least privately) to isolate considerations flowing from the plea. However, it does not require the court to explain that allocation in the sentencing reasons. Judicial silence in this respect may be consistent with the doctrine of instinctive synthesis, and it may avoid some difficulties of unravelling interlinked considerations.

However, if a factor such as remorse has an important impact on sentence, it may be appropriate to indicate whether it has been treated as part of the general synthesis or as a consequence of the guilty plea. Sometimes, mitigating factors will continue to have force even after they are considered as part of

[1385] The Act ss 6AAA(1)(b)(i)–(iii).
[1386] Ibid s 6AAA(1)(a).
[1387] Ibid s 6AAA(2).
[1388] Ibid s 6AAA(5).
[1389] Ibid s 6AAA(1). Note that a challenge based on the reduction of the head sentence being proportionally different to that for the non-parole period does not indicate error in the sentence. The Court has stated that such a disproportionate reduction due to a guilty plea, particularly where it promotes rehabilitation, is consistent with the principles expressed in applicable authorities. See *R v Whitlow* [2009] VSCA 103, [47].
[1390] *Alecu v The Queen* [2010] VSCA 208, [37].
[1391] The Act s 6AAA(3).
[1392] Ibid s 6AAA(4).

the mitigation for the plea of guilty.[1393] A failure to note an important factor affecting sentencing may erode the explanatory value of the statement of the notional post-trial sentence.

7.1.4.2 – Aspects of the plea relevant to fixing

The statement of the notional sentence requires the court, as a hypothetical exercise, to ignore the plea of guilty and determine the sentence that would have been imposed after a trial.[1394] This exercise has been described as artificial and intellectually difficult.[1395]

One aspect of the difficulty arises when the court considers what part of the plea should be quantified for the purposes of the sentence reduction. Can a plea of guilty be isolated from the remorse, admissions and acceptance of responsibility that attend it? Should the utilitarian value of the plea be isolated, for example, while other aspects of the plea such as the presence of remorse or an acceptance of responsibility are left out of this analysis?

In Victoria, the preference is to take each aspect of the plea together to arrive at the reduction in sentence. On this approach, an offender who had made admissions, pleaded guilty, was remorseful and offered to assist authorities would have the combination of these considerations quantified for the purposes of the reduction in their sentence. Once such factors are considered as part of the reduction in sentence for the plea of guilty, that does not exhaust the mitigating effect of factors such as remorse and contrition. They continue to have independent force in the sentencing process.[1396]

7.1.4.3 – Methodology

The Court of Appeal has endorsed the following process:[1397]

- determine the sentence that should be imposed by the instinctive synthesis; and
- attempt to identify how much longer the sentence would have been had the offender not pleaded guilty.[1398]

An alternative approach is to determine the notional sentence first, and then determine the actual sentence by subtracting the benefit attributable to the guilty plea and its attendant considerations from that notional sentence. Ultimately the method is not governed by the Act or authority, and it remains a discretionary decision. However, courts should be cautious not to engage in two-tiered sentencing when applying s 6AAA. It is not permissible to take a starting-point and then add or subtract periods of time representing aggravating or mitigating circumstances.[1399]

7.1.4.4 – Undertakings to cooperate

Past cooperation should be taken into account when declaring a notional sentence,[1400] but different

[1393] *Flaherty No 2* 310 [14].
[1394] Ibid 309 [10].
[1395] Ibid 309 [11].
[1396] Ibid 310 [14].
[1397] See *SD v The Queen* (2013) 39 VR 487, 501–02 [53] n 50.
[1398] *Flaherty No 2* 310–11 [15].
[1399] *Scerri v The Queen* (2010) 206 A Crim R 1, 5–6 [23] (*'Scerri'*).
[1400] *Flaherty No 2*.

approaches have been taken where an offender has given undertakings as to future cooperation.[1401]

Though perhaps 'unrealistic' and 'artificial' to assess future assistance for the purpose of stating the notional sentence, the process has some utility when resentencing an offender who failed to comply with their undertaking. Where the reduction for offering to co-operate and the other aspects of the guilty plea are dealt with compendiously, it would be inappropriate to increase the sentence by more than part of the discount allowed when resentencing the offender who failed to cooperate in accordance with their undertaking.[1402]

7.1.4.5 – Further difficulties

Sometimes a guilty plea has significance in an unusual way, making the statement of the notional sentence even more difficult.

In *Marannu v The Queen*[1403] the Court noted that the s 6AAA statement was particularly artificial in circumstances where it thought that a jury may not have convicted the appellant in all the circumstances of the case.[1404]

In *R v Mohamad*[1405] the Court noted that the notional sentence was difficult to apply because if he had not pleaded guilty, the offender would have faced more serious charges at trial.[1406]

The hypothetical post-trial sentence was also the subject of comment in *Samac v The Queen*[1407] when the Court noted the difficulty of declaring the hypothetical sentence after trial; sentencing facts cannot sensibly be presumed to coincide with the evidence led at the hypothetical trial, which resulted in the presumed guilty verdict.[1408] The question of the facts that would have been found at the hypothetical trial also arises on appeal if the factual bases as found by the sentencing judge are successfully challenged on appeal and the appellant falls to be resentenced.[1409]

In *Mason (a pseudonym)*[1410] the Court observed that where both *Sentencing Act 1991* s 6AAA and *Crimes Act 1914* (Cth) s 16AC apply, it is not desirable to aggregate the discounts and specify the component attributable to both factors (plea of guilty and discount for future co-operation). Contrary to the approach encouraged in *Couper*,[1411] the Court held that the process of attempting to assimilate the s 6AAA statement and the s 16AC specification is unnecessary and causes confusion. The two processes are better kept separate.[1412] The judge should assess what they would have done in the absence of the undertaking

[1401] Compare *DPP (Cth) v Bui* (2011) 32 VR 149 and *R v Rau* [2010] VSC 370 with *Emini v The Queen* [2011] VSC 336 [55] n10.
[1402] See, eg, *DPP (Vic) v Connally* [2010] VSCA 301, [22]. The notional sentence at first instance was two years wholly suspended for three years. The sentence imposed by the Court of Appeal after the offender failed to comply with their undertaking was two years wholly suspended for 30 months.
[1403] [2011] VSCA 105.
[1404] Ibid [18].
[1405] [2009] VSC 56.
[1406] Ibid [30].
[1407] [2011] VSCA 171.
[1408] Ibid [88].
[1409] Ibid [89].
[1410] *Mason (A Pseudonym) v The King* [2023] VSCA 75 ('*Mason*').
[1411] *DPP v Couper* (2013) 41 VR 128, [141].
[1412] *Mason* [88].

and make the appropriate specification and separately identify what sentence would have been imposed if there had been no plea of guilty.[1413] The Court did not, however, identify if the specification of the sentence that would have been imposed but for the undertaking assumes that the offender pleaded guilty or not guilty. The Court's disapproval of the previous practice of specifying the aggregate 'without discount' sentence and then itemising the components of the discount suggests that the sentencing judge should assume a plea of not guilty. But as most offers to provide future co-operation occur in conjunction with a plea of guilty, any attempt to formulate a discount for co-operation in the absence of a plea of guilty is likely to be an especially artificial exercise.

7.1.4.6 – Appellate issues

The notional sentence is not a part of the sentence imposed, and errors or inadequacies in that figure are, in themselves, not appealable.

Section 6AAA does not identify any consequences for failing to specify the discount. However, the Act states generally that a court's failure to give reasons or to comply with another procedural requirement of the Act does not invalidate any sentence it imposes.[1414] This likely applies to the s 6AAA requirement. Moreover, the Court of Appeal has noted that a failure to make the s 6AAA declaration is an irregularity and will 'rarely, if ever, justify interfering with the sentence' when sufficient weight has nonetheless been given to the plea of guilty.[1415]

Ultimately, s 6AAA statements are based on an uncertain hypothesis[1416] and sentencing courts synthesise a number of factors to arrive at an appropriate sentence. A plea of guilty is one of those factors.[1417] Accordingly, it is not always helpful to simply consider any percentage discount given to determine whether sufficient weight was given to the guilty plea. Further, it may be that the sentencing court erred not in the actual sentence, but in the hypothetical sentence.[1418]

Despite these observations, the Court of Appeal has used the s 6AAA statement (with other factors) to reason that the sentence imposed contained error. For example: the notional sentence may be relevant as a particular of a ground asserting the actual sentence was manifestly excessive or inadequate,[1419] or in reasoning that insufficient weight was given to a guilty plea.[1420] However, these cases will be rare.[1421]

7.2 – Sentence indication

The sentence indication schemes in the *Criminal Procedure Act 2009* (Vic) ('*CPA*') are designed to put defendants who may ultimately plead guilty in a position to make this decision early in the

[1413] Ibid [88]-[90].
[1414] The Act ss 103(1)-(2).
[1415] *Harrington v The Queen* [2010] VSCA 249, [9]. See also *Mokbel v The Queen* (2011) 211 A Crim R 37; *R v O'Blein* [2009] VSCA 159.
[1416] *Dutton v The Queen* [2011] VSCA 287, [38].
[1417] *Scerri* 5-6 [23].
[1418] *El Tahir v The Queen* [2011] VSCA 46, [24]; *Giordano v The Queen* [2010] VSCA 101, [46].
[1419] *R v Burke* (2009) 21 VR 471, 477 [30]-[31]; *Scerri* 6 [24]; *LJ v The Queen* [2011] VSCA 3; *R v Gill* [2010] VSCA 67, [61].
[1420] *Howard* [12], [15]. See also *Andrick v The Queen* [2010] VSCA 238, [34]; *Key v The Queen* [2010] VSCA 242, [24]; *Davy v The Queen* (2011) 207 A Crim R 266, 275 [33].
[1421] *Saab v The Queen* [2012] VSCA 165, [61].

proceedings.[1422] The schemes allow for more authoritative advice to be given to the accused on the likely penalty to assist in making their plea decision earlier. There are some significant differences between the schemes in the Magistrates' and the higher courts for sentencing indications. The procedural aspects will be dealt with separately here.

7.2.1 – Magistrates' Court

A magistrate may give a sentence indication on their own initiative[1423] at any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily.[1424]

However, a magistrate's power to give a sentence indication is only engaged once summary jurisdiction has been invoked: the legislative purpose of the sentencing indication is not so broad as to encompass a sentence indication where the Magistrates' Court had no power to deal with the charge.[1425]

A magistrate *may* indicate which one of two results will follow if the accused pleads guilty to a particular charge at that time. These are either:

- the court would be likely to impose a sentence of imprisonment to be served immediately; or
- the court would be likely to impose a sentence of a specified type.[1426]

While a magistrate may indicate a sentence of 'a specified type', this is limited to indicating the 'type of sanction' and does not permit indication of the quantum.

A magistrate who indicated that the sentence would likely be a sentence of a particular type must not impose a more severe type than was indicated. However, they may sentence to a less severe sanction than that indicated.[1427]

If the accused receives a sentence indication but does not plead guilty at the first available opportunity, another magistrate must hear the matter unless all the parties agree otherwise.[1428] A sentence indication only binds the magistrate who gives the indication. It does not bind the court on any hearing before a different judge or magistrate.[1429]

The application for a sentence indication and its determination cannot be used as evidence against the accused.[1430]

7.2.2 – Higher courts

A judge may give a sentence indication at any time after the filing of the indictment,[1431] but only on an

[1422] *CPA* ss 60-61, 207-209.
[1423] Ibid s 60.
[1424] Ibid.
[1425] *Jeffrey v Schubert* [2012] VSC 144, [34] ('*Schubert*').
[1426] *CPA* s 60.
[1427] Ibid s 61(1).
[1428] Ibid s 61(2).
[1429] Ibid s 61(3).
[1430] Ibid s 61(5).
[1431] Ibid s 207.

application of the accused with the consent of the prosecution.[1432]

The Court of Appeal has cautioned against the use of informal sentencing indications made in the absence of a formal application by the accused and the other protections afforded by the *CPA* because of the risk the indication might be given prematurely on an uninformed basis and an accused may feel pressured into pleading guilty to offences which they intend to contest.[1433]

The court may indicate which of two results will follow if the accused pleads guilty to a particular charge at that time. These are that the court would be likely to impose a sentence of a specified type, or a specified maximum total effective sentence.[1434]

If the applicant for a sentence indication is already in custody, an indication that an immediate sentence of imprisonment will be imposed means, practically, that on sentencing, the offender will be actually imprisoned from the time of sentence and extending into the future.[1435]

A court that gives a sentence indication must not impose a more severe sentence than the sentence type or maximum total effective sentence than was indicated.[1436] But the court may sentence the offender to a less severe sentence type or maximum total effective sentence than stated in the sentence indication.[1437]

A sentence indication only binds the judge who gives the indication. It does not bind the court on any hearing before a different judge.[1438]

7.2.3 – Discretionary considerations

Both higher court judges and magistrates have discretion whether to give a sentence indication.[1439] That decision is final and conclusive.[1440] However, the discretion must be exercised judicially and must not consider any irrelevant consideration.[1441] There is no appellate review of the decision to give or not give a sentencing indication, however judicial review is available.[1442]

Sentencing courts will generally decline to give an indication where the decision turns upon material that is not yet before the court. The *CPA* explicitly states that the court may decline to give a sentence indication if it considers that there is insufficient information before the court that addresses the effect of an offence on any victim.[1443] The specific reference to the impact on any victim does not mean the other mandatory considerations do not need to be considered at the sentence indication stage.

Regarding the presence or absence of remorse as a sentencing consideration, in New South Wales it has

[1432] Ibid ss 208(1)-(2).
[1433] *Gild v The Queen* [2017] VSCA 367, [28].
[1434] *CPA* s 207(1).
[1435] *R v McLaughlin* [2016] VSC 85, [2].
[1436] *CPA* s 209(1).
[1437] Ibid.
[1438] Ibid s 209(3).
[1439] Ibid ss 60, 207.
[1440] Ibid ss 61(4), 209(4).
[1441] See 2.2.2 – Method & process – The sentencing hearing – Judicial duties.
[1442] See *Schubert* [34].
[1443] *CPA* ss 60(2), 208(5).

been held that a guilty plea that follows a sentence indication may be given less weight in mitigation than a guilty plea that is an expression of remorse.[1444] However, reliance upon a sentence indication is not necessarily inconsistent with the existence of remorse. This is a question of fact to be determined in all the circumstances of the case.

7.3 – Co-operation with the authorities

7.3.1 – Policy

It is very much in the public interest that those who commit offences received every encouragement by the courts to inform upon their co-offenders;[1445] the courts have long recognised the community interest in fostering 'dishonour among thieves'.[1446]

An offender who assists the authorities is entitled to have that assistance considered in mitigation of sentence. An aspect of this factor in mitigation is its public nature. Section 5(2AB) of the Act requires the court to announce it is imposing a less severe sentence and have the undertaking and its details noted in the record of the court.[1447]

The courts' role in fostering cooperation with authorities is capable of producing sentences much lower than those that would otherwise be expected. This is a price that society must be willing to pay.[1448]

The discount varies according to the level of cooperation, its subjective significance, and the utility or potential utility of the assistance given.

7.3.2 – Applying the discount

The discount to be applied will rise or fall according to both objective and subjective factors. The lowest level of cooperation is making admissions and entering a plea of guilty. At higher levels, cooperation may involve implicating co-offenders or providing other information of assistance to authorities and giving evidence in criminal proceedings. The highest-level discount is reserved for so-called 'true informers', who assist authorities proactively, acting as 'undercover' agents to provide information and evidence, commonly at greatly increased personal risk.[1449]

The term 'informer's discount' has been applied to both the 'true informer' and to the person who co-operates with authorities after participating in the offending and being charged.[1450] But terminology is of little assistance: the focus should be on the nature of the assistance that an offender provides and the consequences for the offender of providing that assistance.

7.3.2.1 – No 'standard' discount

Many factors are relevant to the exercise of the discretion in these circumstances and there is no

[1444] *R v Warfield* (1994) 34 NSWLR 200, 209.
[1445] *Cottee v The Queen* [2010] VSCA 285, [25] ('*Cottee*').
[1446] *R v Su* [1997] 1 VR 1, 77 ('*Su*').
[1447] The Act s 5(2AB).
[1448] *Cottee* [25].
[1449] *Haamid (a pseudonym) v The Queen* [2018] VSCA 330, [24(d)] ('*Haamid*").
[1450] See, eg, *R v McMahon* (1988) 40 A Crim R 95, 98 ('*McMahon*'); *R v Nikolich* [2001] VSCA 128, [39] ('*Nikolich*').

mathematical or mechanical process for fixing the value of the cooperation discount.[1451] The discount is determined according to a range of factors, including — but not limited to — the nature and extent of the cooperation, any willingness to give evidence against co-offenders, and any danger flowing from the cooperation.[1452] The extent of any sentencing discount will, of course, vary from case to case.[1453]

Sometimes, courts have expressed the appropriate discount as fractions (or percentages) of the starting point for sentence. The Court of Appeal has said that the highest level of co-operation could attract discounts of 50%[1454] to 66% for a 'true informer'.[1455] However there is no 'tariff' or standard discount.[1456] And the Court has emphasised the need to assess each discount for cooperation in context and to avoid approaching the task in a mathematical way.[1457]

7.3.2.2 – Identifying the level and value of cooperation

The following matters should be considered when assessing the level of the discount to be given to an offender who has assisted or promised to assist the authorities.

An appropriate reward should be provided for the giving of assistance, regardless of the motivation. But the extent of the discount may depend on the willingness of the disclosure. In some instances, it will only be relevant if the cooperation was voluntary.[1458] In others, where the motive is one of genuine remorse and contrition, this will warrant greater leniency.[1459]

If the offender tailors their assistance to reveal only information they know the authorities already have, there will be no applicable discount. But an offender will not lose the discount if they did not know the authorities already have the information. The reward should be granted if the offender has genuinely cooperated, regardless of whether the information objectively turns out to be effective.[1460]

Nor will the offender lose the discount if the authorities do not act on the information because, for example, they received it from another source.

The full and frank co-operation of the offender is to be encouraged. The discount will rarely be substantial unless the offender discloses everything they know.[1461] To this extent the inquiry is into the subjective nature of the offender's cooperation. The degree of effectiveness of the assistance may throw light upon

[1451] *R v Crossley* [2008] VSCA 134.
[1452] *DPP (Vic) v Cooper* [2018] VSCA 21, [45] ('*Cooper*'); *Anderson v The Queen* [2019] VSCA 42, [68].
[1453] *Cottee* [23].
[1454] *Haamid* [24(e)]; *R v Johnston* (2008) 186 A Crim R 345, 350 [20] ('*Johnston08*').
[1455] *Haamid* [24(d)]; *Johnston08* 350-51 [20]-[21].
[1456] *Haamid* [24(a)].
[1457] *Cooper* [45].
[1458] *Ungureanu v The Queen* [2012] WASCA 11, [69]-[72].
[1459] *Haamid* [24(c)]. Where an offender's cooperation takes the form of other acts, such as returning to the jurisdiction, the court will need to consider whether that conduct is motivated by a desire to cooperate with authorities. Where it is motivated by other considerations, then the offender will not have the same claim to a reduced sentence. See, eg, *Nguyen v The Queen* [2012] VSCA 119, [27] ('*Nguyen12*').
[1460] *Haamid* [24(g)].
[1461] *Haamid* [24](b)(ii); *Su* 79.

whether and to what extent the informer has made full and frank disclosure. What is relevant is the potential for the information to assist the authorities, as comprehended by the offender.

The information must be true – there is no discount for the giving of false information.

The offender will not lose the discount if they do not give evidence because the person who is the subject of the information pleaded guilty[1462] or was acquitted for an unrelated reason.[1463]

The court should not assess whether the offender will comply with their undertaking in order to arrive at the discount.[1464]

7.3.2.3 – Indicia of useful cooperation

Indications of valuable assistance may include whether:

- property was recovered as a result of the assistance;[1465]
- the evidence given was valuable;[1466]
- the offender would be at risk in the future because of the assistance;[1467]
- the disclosure would adversely affect the offender's personal relationships, e.g. where evidence is given against a family member;[1468]
- people guilty of wide scale criminal operations have been brought to justice;
- crimes that would have otherwise been difficult to detect or to resolve have been effectively cleared up.

7.3.2.4 – Forms of cooperation

Examples of different forms cooperation are:

- confessing offences and implicating accomplices;[1469]
- returning to the jurisdiction while aware of the risk of prosecution;[1470]
- a burglar identifying receivers of stolen goods;[1471]
- giving evidence (or being willing to give evidence) for the Crown;[1472]
- disclosing offences where the accused was not suspected by police;[1473]

[1462] *Su* 78-79.
[1463] *DPP (Cth) v Wang* [2019] VSCA 250, [42] ('*Wang*').
[1464] *R v Johns* [2010] VSCA 63.
[1465] *Haamid* [24](b)(vii).
[1466] *Haamid* [24](b)(i); *Johnston08* 350 [18]; *Collins v The Queen* [2018] VSCA 131, [23] ('*Collins*').
[1467] *Haamid* [24](b)(vii).
[1468] *Saner v The Queen* [2014] VSCA 134, [84]; *Haamid* [24(b)(vi)]; *Cooper* [45]; *Collins* [24].
[1469] *R v Cako* [2000] VSCA 147 ('*Cako*'); *McMahon*.
[1470] *Nguyen12*.
[1471] *R v Hayes* (1981) 3 A Crim R 286 ('*Hayes*'); *Mejia (a pseudonym) v The Queen* [2020] VSCA 141, [23] ('*Mejia*').
[1472] *R v Heaney* [1992] 2 VR 531; *R v Feretzanis* [2003] VSCA 8 ('*Feretzanis*'); *Nikolich*; *R v Nunno* [2008] VSCA 31; *Johnston08*.
[1473] *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*'); *JBM v The Queen* [2013] VSCA 69. See also 6.3.4.1 – Circumstances of the offender – Actions and behavior – Remorse and restitution - Remorse for discussion of the '*Doran* Discount'.

- providing useful information about offences not known to the police;[1474]
- helping in the controlled delivery of drugs;[1475]
- assistance leading to recovery of goods.[1476]

7.3.2.5 – Reporting cooperation

The Court of Appeal has suggested that when sentencing an offender who seeks a discount on the plea for cooperating with the authorities, a court should prepare two versions of sentencing remarks:

- one that fully explains how the offender's cooperation informed its exercise of the sentencing discretion; and
- a second version, which may identify the offender by a pseudonym, that is either silent regarding the cooperation or makes only a 'veiled reference' to it.

The first version is restricted and is published only to the parties, the second is made publicly available.

By proceeding this way, the courts will strike a balance between informing the offender (and any reviewing court) of the reasons for sentence while protecting the offender on the one hand, and by promoting transparency, encouraging other offenders to cooperate and furthering the general deterrent purpose of sentencing on the other.[1477]

7.3.2.6 – Other cooperation

Assistance given to authorities may be considered despite being given in relation to offences other than those for which the offender stands to be sentenced, but this does not mean informers accrue some kind of immunity when they offend after giving assistance to authorities earlier.[1478]

And it is not necessary that the assistance be provided in the jurisdiction where the offender is being sentenced. Courts can set a reduced sentence to reflect assistance given to interstate or international law enforcement agencies. However, the sentencing court must ensure that it does not double count the offender's assistance. Where the offender has already received the benefit of the assistance in another jurisdiction, the sentencing discount will be exhausted.[1479]

[1474] *R v QMN* [2004] VSCA 32 ('*QMN*').
[1475] *Su*.
[1476] *Nikolich*.
[1477] *Haamid*.
[1478] *Hayes* 287; *R v Williamson* (Unreported, Supreme Court of Victoria, Court of Appeal, Tadgell JA, Charles JA, Southwell AJA, 20 February 1995) [10].
[1479] *Shaw v The Queen* [2010] NSWCCA 23, [14]; *R v Quinn* [2005] VSCA 100.

7.3.2.7 – Consequences for cooperating offender(s)

Cooperating with authorities will often expose an offender to a risk of retributive violence. This risk is a significant component of the discount warranted for cooperation with authorities.[1480] It is neither necessary nor possible to calibrate with precision the degree of risk to which a person exposes themselves by giving evidence against co-offenders,[1481] though a court will generally find that the risk is substantial.[1482]

However, it has been said that an offender who undertakes to give such evidence becomes a known offender who faces a notorious and grave risk of reprisal, in contrast to an offender whose assistance is unknown and so is not exposed to a present risk. Because of that difference a sentencing court is entitled to treat the question of whether the cooperation is known, or likely to become known, or not as factor relevant to determining the quantum of the discount.[1483]

Not every assistance to authority will earn an offender the 'informer's discount'. There is no policy justification for the victim of an offence to receive a discounted sentence for entirely separate offending, merely because they performed their public duty and give evidence as a victim.[1484] However, where assistance by an offender who is also a victim of separate offending causes the offender/victim to serve their imprisonment in protective custody, a reduction in sentence is appropriate.[1485]

7.3.2.8 – Evidentiary matters

An offender's assistance should appear from or be proved in evidence to allow a court to assess the appropriate amount of any discount. It is not enough to make assertions from the Bar table, even with the consent of the Crown.[1486] It is necessary that the applicant establish, in the course of the plea, on the balance of probabilities, that assistance has been given to the authorities, and the nature and value of that assistance.[1487]

7.3.2.9 – Ultimate sentence must still be proportionate to the offending

A court will sometimes need to revise its initial views about the discount so that the combined effect of a guilty plea and the promise of future cooperation does not result in an inadequate sentence. While there is no strict rule regarding whether sentencing discounts for a guilty plea and promised cooperation must be applied sequentially or globally, courts have warned against the risk of reducing a sentence unjustifiably due to the combined effect of those two factors.[1488]

[1480] *Nguyen v The Queen* (2011) 31 VR 673, 689-90 [59] ('*Nguyen11*'); *Scerri* 8 [33]-[34].
[1481] *Scerri* 8 [33].
[1482] *Nguyen11* 690-91 [64].
[1483] *Mejia* [24]-[26].
[1484] *R v Koumis* (2008) 18 A Crim R 421, 425 [13].
[1485] Ibid; *R v Rostom* [1996] 2 VR 97 ('*Rostom*'); *R v ZMN* (2002) 4 VR 537 ('*ZMN*').
[1486] *R v Schioparlan* (1991) 54 A Crim R 294, 304.
[1487] *R v Zoumbilis* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Charles JA, and Southwell AJA, 4 June 1996) 13.
[1488] *LB v The Queen* [2013] NSWCCA 70, [44]-[46]. See also *SZ v The Queen* (2007) 168 A Crim R 249, 252; *Cooper* [46].

7.3.3 – State v Commonwealth scheme

7.3.3.1 – Identification of discount

The requirements for identification of the sentencing discount for cooperation are different under State and Commonwealth schemes.

Under the Victorian scheme, if a sentencing court imposes a less severe sentence than it otherwise would have because the offender has undertaken to assist law enforcement authorities, the court must both announce that it is doing this and have the details of the undertaking placed in the record.[1489] Failure to comply with these requirements does not automatically vitiate a sentencing exercise,[1490] but compliance with them remains important.[1491]

However, the quantum of the sentence that the court would have imposed except for the undertaking does not have to be stated.[1492] The court *may* state the sentence that would have been imposed, but it is undesirable to do so except in the simplest cases that have a small number of relevant considerations.[1493]

But under the Commonwealth scheme[1494] this requirement to state that a discount has been given only applies to discounts for future, not past, cooperation.[1495] The value of past cooperation is a general mitigating factor in the Commonwealth scheme, which must be considered as part of the instinctive synthesis. It is not a matter that should be quantified. In contrast, the value of an undertaking to provide further cooperation in the future must be spelt out,[1496] identifying both the impact on the head sentence and, if relevant, the non-parole period.[1497] Nevertheless, a failure to make the s 16AC specification is not an error which vitiates the sentence.[1498] Further, given that the 16AC specification is entirely hypothetical, there is no point in querying whether that figure is manifestly excessive.[1499]

7.3.3.2 – Appeals when there is failure to comply with an undertaking to cooperate

Under both the Victorian and Commonwealth schemes a failure to comply with an undertaking to assist the authorities, which has led to a sentencing benefit, can provide a basis for a Crown appeal to reverse the benefit. In Victoria, the appellate court is empowered to impose the sentence it considers appropriate, having regard to the failure of the respondent to fulfil their undertaking. This power is enlivened if the appeal court considers that the respondent has failed, wholly or partly, to fulfil the undertaking to assist that the respondent had previously given.[1500] Under the Commonwealth scheme, the Director of Public Prosecutions ('DPP') may appeal against the inadequacy of the reduced sentence if the offender, without

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[1489] The Act s 5(2AB).
[1490] *Feretzanis* [32]-[36].
[1491] *R v Sadler* [2003] VSCA 206, [3]. See also *R v Kuzucu* [2000] VSCA 110, [16]-[19].
[1492] The Act s 5(2AC).
[1493] *Johnston08* 349 [16]. See also *Markarian v The Queen* (2008) 228 CLR 357, 375 [39]; *R v Young* [1990] VR 951; *R v Nagy* [1992] 1 VR 637, 638.
[1494] *Crimes Act 1914* (Cth) s 16AC ('*Cth Crimes Act*').
[1495] *R v Tan* (1995) 78 A Crim R 300, 303 ('*Tan95*'); *R v Kokkinos* [1998] 4 VR 574, 579.
[1496] *Cth Crimes Act* s 16AC(2); *DPP (Cth) v Johnson* [2012] VSCA 38, [20]-[21] ('*JohnsonCTH*'); *Tan95* 303.
[1497] *Mason (A Pseudonym) v The King* [2023] VSCA 75, [59].
[1498] Ibid [78].
[1499] Ibid [49].
[1500] The Act ss 260(1)(b), 291(b).

reasonable excuse, fails to cooperate in accordance with their undertaking and the DPP is of the opinion that such an appeal is in the interests of the administration of justice.[1501]

Considerations upon non-cooperation appeals

The purpose of re-sentencing is not to punish for failing to fulfil the undertaking, but to impose the sentence that would have been imposed if the offender had not offered to cooperate.[1502]

Where the offender does not admit failing to fulfil their undertaking, the appellate court must decide whether the failure is proved. In determining this matter, the court may take the views of the trial judge, who observed the offender give evidence in other proceedings, into account. A trial judge will often be well placed to express a view on whether the offender gave evidence to the best of their recollection or prevaricated. These views may inform the appellate court but are not binding.[1503]

A sentencing court will sometimes need to reduce its initial assessment of the value of different sentencing discounts so that the total sentence is not unreasonably reduced. Where this takes place and an offender subsequently fails to fulfil an undertaking to cooperate, the appellate court may restore the original value of other sentencing considerations, to impose the sentence that should have been imposed if the offender had not given an undertaking to assist.[1504]

At common law, prior to the abolition of double jeopardy principles on Crown appeals, courts recognised that those principles did not apply to appeals against the breach of an undertaking.[1505] While the double jeopardy principles have now been abolished for Crown appeals against sentence, the court retains a residual discretion not to interfere.[1506] However, those discretionary considerations do not operate with the same strength on Crown appeals against a failure to fulfil an undertaking. The reluctance to return an offender on parole to custody does not apply as the Crown appeal flows from the offender's own conduct.[1507]

7.4 – Prevalence

Prevalence is neither a circumstance of the offence nor a circumstance of the offender; but rather is 'a circumstance of other offences'.[1508] When and how prevalence can be invoked as a sentencing consideration has to be navigated carefully.

7.4.1 – Issues in relying on prevalence

There remain unresolved issues as to the material or evidentiary foundations sufficient for a finding of prevalence.

[1501] *Cth Crimes Act* ss 16AC(3)(a)-(b).
[1502] *JohnsonCTH* [24]-[30]. See also *DPP v Akkari* [2003] VSCA 98, [13], [28]-[30] ('*Akkari*'); *Wang* [38(2)].
[1503] *DPP (Cth) v Carey* [2012] VSCA 15, [40]-[41].
[1504] See *R v Lenati* [2008] NSWCCA 67, [44]-[47].
[1505] *Akkari* [17]; *DPP (Cth) v Haunga* (2001) 4 VR 285, 294.
[1506] *DPP v Karazisis* (2010) 31 VR 634, 648-649, 661.
[1507] *JohnsonCTH* [31].
[1508] Ibid.

Prevalence is not 'a sentencing fact' in the *Storey* sense and so does not need to be proved beyond reasonable doubt.[1509] All that is required is that a court should be sure that an offence is prevalent before weighting the instinctive synthesis in favour of general deterrence and giving less weight to mitigatory factors.[1510] But even if the court is certain that an offence is prevalent or locally prevalent, an increased sentence is not inevitable.[1511] There may be countervailing factors of greater significance.[1512]

A sentencing court is entitled to use its general knowledge of the prevalence of particular offences, but when a court relies upon its own knowledge gleaned from some particular area of expertise or experience, it should advise the parties of its intention to use that special knowledge. And an offender (or their counsel) should then be afforded the opportunity to address prevalence.[1513] There are earlier cases that state the prevalence of some offences is so notorious that no proof, and no prior canvassing of the issue is required.[1514] However, the better view is now that any reliance on prevalence as a sentencing factor demands the court afford the parties procedural fairness on the issue and disclose the source of the reasoning.[1515]

Sentencing judges often make observations on the incidence in the community of a particular offence. While a judge may observe that an offence is common, or even prevalent, the principles applicable to 'prevalence' will not be invoked unless the court uses that consideration to aggravate the offence. Ideally, this will be discernible from the sentencing reasons, but it may also be seen in the discussion upon the plea, or by an examination of the sentence imposed.[1516]

7.4.2 – Nature of prevalence

In the past, courts have sometimes found prevalence relevant to a particular locality or ethnic community.[1517] However, more recent cases focus on the content of the offending itself.[1518] Examples are:

- family violence;[1519]
- ice related offending;[1520]
- armed robbery;[1521]
- drug importation;[1522]

[1509] *R v Downie* [1998] 2 VR 517, 521 ('*Downie*').
[1510] Ibid 522.
[1511] Ibid.
[1512] Ibid.
[1513] Ibid 520; *R v Propsting* [2009] VSCA 45, [10] ('*Propsting*'); *Nguyen11* 694 [82]; *Trajkovski* [104]. See also 2.2.2 – Method & process – The sentencing hearing – Judicial duties.
[1514] *Downie* 520.
[1515] Ibid; *Nguyen11* 694 [82]; *Trajkovski* [104]; *Propsting* [10]. Evidence may be adduced, or official statistics tendered to establish prevalence. See, eg, *TS v The Queen* [2014] VSCA 24, [32]; *Haddara v The Queen* (2016) 260 A Crim R 306 ('*Haddara*').
[1516] See, eg, *R v Paoletti* [2003] VSCA 77 ('*Paoletti*').
[1517] For examples of local prevalence see *Downie*; *R v Tran* (1997) 96 A Crim R 53.
[1518] An exception is in more current references to young people committing high volumes of violent crimes. See, eg, *Azzopardi v The Queen* (2011) 35 VR 43.
[1519] *Kalala v The Queen* [2017] VSCA 223.
[1520] *Haddara*.
[1521] *Chol v The Queen* [2012] VSCA 204.
[1522] *Nguyen11*.

- child sex tourism;[1523]
- cultivation of cannabis;
- sexual abuse of children;[1524] and
- firearms charges.[1525]

The prevalence of a crime is a factor that operates independently alongside the seriousness of the offence to place increased importance on the sentencing purpose of general deterrence.[1526]

7.5 – Delay

Significant delay between the time an offender is interviewed by police and the time charges are laid, as well as delay between the laying of charges and trial, can be a powerful mitigating factor.[1527] However, delay in itself creates no automatic right to a sentencing discount. The most that can be said is that where the prosecution unduly delays bringing the matter to court there is much more likely to be a discount.[1528]

There are two limbs to delay as a mitigating factor. The first concerns unfairness to the offender in that a charge (or its prospect) was 'hanging over' their head and caused them anxiety ('unfairness limb').[1529] These effects are not eliminated by the offender's failure to confess to undisclosed offences during the period of delay.[1530]

The second limb concerns whether during the period of the delay the offender made progress towards rehabilitation and if prospects of ongoing rehabilitation are good ('rehabilitation limb').[1531]

How these two limbs operate to mitigate sentence depends upon the cause of the delay, the length of the delay and the consequences of the delay. The presence of delay calls for 'a considerable measure of understanding and flexibility in approach'.[1532]

Where delay is relevant to sentence, it is prudent for the court to refer to that factor in its sentencing remarks.[1533] Further, while a court does not need to refer to each limb of delay separately, where it specifically refers to one limb and not to the other, this may call into question whether the limb not mentioned has been accorded any weight in the sentencing synthesis.[1534]

7.5.1 – Evidence of delay

Where an offender relies on either limb of delay, they must provide some evidence to support the

[1523] *Merrill v The Queen* [2018] VSCA 62.
[1524] *R v GMT* [2006] VSCA 13.
[1525] *Paoletti*.
[1526] *Haddara* 322 [62].
[1527] *Tones v The Queen* [2017] VSCA 118, [36] (*'Tones'*);*Thomas v The Queen* [2019] VSCA 223, [66].
[1528] *R v Nikodjevic* [2004] VSCA 222, [22] ('*Nikodjevic*').
[1529] Ibid.
[1530] *Mackie v The Queen* [2022] VSCA 28, [34].
[1531] Ibid; *R v Merrett* (2007) 14 VR 392, 400–01 [36]-[39] ('*Merrett*'); *Bourne v The Queen* [2011] VSCA 159, [30]-[32]; *R v Miceli* [1998] 4 VR 588, 591 ('*Miceli*'); *R v Cockerell* (2001) 126 A Crim R 444 ('*Cockerell*').
[1532] *Mill v The Queen* (1988) 166 CLR 59.
[1533] *O'Brien (a Pseudonym) v The Queen* [2014] VSCA 94 ('*O'Brien*').
[1534] *Rodriguez v The Queen* [2013] VSCA 216 ('*Rodriguez*').

submission.[1535]

Where the unfairness limb is invoked, a psychological report may support distress endured by the offender. But there may also be cases where depending on the duration of the delay, its cause, and other circumstances, a court might accept that the delay caused anxiety to the offender without the need for supporting evidence.[1536]

Evidence of the rehabilitation limb will need to address its twin aspects: remorse and rehabilitation.[1537] Both must be demonstrated for the court to give full weight to this limb.[1538] The abstinence from further offending will be relevant but not, in itself, sufficient.[1539] Evidence that an offender has made significant positive changes in their life enables the court to mitigate for this aspect of delay.[1540]

7.5.2 – 'Undue' delay

A delay does not need to be inordinate before it may be considered in mitigation.[1541] But if it is 'unduly long' it may and often will be taken as a mitigating factor.[1542]

Whether a delay is 'undue' depends on a range of factors, including:

- its elapsed time;
- the nature, complexity and sophistication of the offence;
- the extent of the investigation needed to prepare for a charge and proof of the offence;
- for a series of offences, the period of time over which they were committed; and
- the degree to which the offender or suspect cooperated with authorities, or conversely their lack of cooperation or any obstruction.[1543]

This is not an exhaustive list. Determining if delay was undue 'is essentially a matter of degree to which common sense is to be applied'.[1544] The question of how and if delay might affect a court's exercise of the sentencing discretion will vary according to the circumstances of the case.[1545]

Where the crime being prosecuted is sexual abuse, the accused is often not able to rely upon delay in mitigation because delay in the detection or complaint of such abuse is a common consequence of the nature of the offending.[1546]

[1535] *Tones* [38].
[1536] Ibid.
[1537] *Tones* [38].
[1538] *Merryfull* [46], [63].
[1539] Ibid [48]; *Tones* [42].
[1540] *Merrett*.
[1541] *Miceli* 591.
[1542] *R v Idolo* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Tadgell and Ormiston JJA, 21 April 1998) 13 ('*Idolo*').
[1543] Ibid. If the subject offending was committed over such a period, and in such a way that long and complex investigations were necessary, the weight attributable to delay may be reduced. See, eg, *Nikodjevic*; *R v Roussety* [2008] VSCA 259; *Day v The Queen* [2011] VSCA 243 ('*Day*').
[1544] *Idolo* 13.
[1545] *Nikodjevic* [22].
[1546] *R v Glennon* [1993] 1 VR 97; *Nikodjevic*; *R v MWH* [2001] VSCA 196 ('*MWH*'). But see *O'Brien* [69].

7.5.3 – Responsibility for delay

7.5.3.1 – Offender's responsibility for delay

Delay is most commonly a direct mitigating circumstance where the responsibility for that delay does not lie with the offender.[1547]

Delay that is solely attributable to the fact that an offender exercises their right to contest criminal charges will never be considered the 'fault' of the offender, for the purpose of considering the effect of the delay on them and the extent to which that delay is mitigatory.[1548]

On the other hand, defendants cannot be encouraged to delay sentence by asserting an intention to stand trial in the face of an overwhelming prosecution case, and then at the door of the court pleading guilty and asserting the delay as relevant to mitigation of their sentence.[1549] Where delay can be positively attributed to the offender, courts will give less significance to delay, even to the point of giving less credit for rehabilitation established during that period.[1550]

Some of the ways an offender might contribute to delay are:

- absconding;[1551]
- lack of cooperation with investigators;[1552] and
- standing by while doing nothing to bring the case to fruition.[1553]

However, an absconding offender's rehabilitation will not necessarily lose all significance. One way to achieve the balance between competing considerations is to reflect the offender's demonstrated rehabilitation by imposing a shorter non-parole period than would otherwise have been imposed.[1554]

Delay may not be 'undue' where it is explained by a witness's fear of the accused. However, while the court may decline to compensate delay in these circumstances, it may still take into account any rehabilitation of the offender between the time of offending and sentence.[1555]

An offender's decision to enter into plea negotiations will also not necessarily disentitle them from the benefit of a discount for delay, unless they use the negotiations as a deliberate delaying tactic. Such cases are, however, likely to be rare.[1556]

Lastly, an offender's decision to challenge the validity of the legislation under which they are charged

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[1547] *Miceli*; *R v Schwabegger* [1998] 4 VR 649 ('*Schwabegger*'); *Cockerell*; *Nikodjevic*; *Arthur v The Queen* [2018] VSCA 37; *Pang v The Queen* [2018] VSCA 5, [37].
[1548] *Arthars v The Queen* (2013) 39 VR 613, 621 [27] ('*Arthars*'). See also *Dragojlovic v The Queen* (2013) 40 VR 71, 131 [295] ('*Dragojlovic*').
[1549] *Arthars* 622-23 [32].
[1550] *R v Whyte* [2004] VSCA 5, [25]-[26].
[1551] *Marshall v The Queen* [2011] VSCA 130 ('*Marshall*'); *Bradley v The Queen* [2017] VSCA 69, [124].
[1552] *R v Tran* [2006] VSCA 222; *Nikodjevic*.
[1553] *Day* [18].
[1554] *Marshall* [20].
[1555] *R v Vella* [2008] VSCA 28.
[1556] *Chandler v The Queen* [2010] VSCA 338. But see *R v Ververis* [2010] VSCA 7, [14].

cannot reduce the significance of delay as a mitigatory factor.[1557]

7.5.3.2 – Systemic responsibility

Delay is more likely to be a major mitigatory factor where the prosecution or the justice system is responsible for delay. Where an offender relies on delay as a source of unfairness, rather than as being the product of harm to themselves, then the extent to which the prosecution or investigators are responsible for that delay will assume greater significance. When the prosecuting authorities have in fact unduly delayed bringing the matter to court, there is much more likely to be a discount, without the need to have regard to its particular consequences.[1558]

Prosecuting authorities must act promptly when they have evidence of serious criminality.[1559] It is incongruous, on one hand, to assert that an offence is so serious the courts must limit its occurrence by imposing stern sentences, and, on the other hand, sanctioning a 'leisurely progression of the criminal justice proceedings which follow its commission that literally years pass before the matter comes before the court, on the other'.[1560]

Generally, the length of a trial will not be able to be used in mitigation. However, where a trial is of extraordinary duration, it may be appropriate to take this factor into account.[1561]

7.5.3.3 – Unexplained delay

Sometimes there is no or only insufficient explanation for delay. But the absence of an explanation for the delay cannot, by itself, justify any greater reduction than if it was satisfactorily explained.[1562] In effect explanations for delay are relevant only in so far as they may demonstrate that the offender is responsible for it.

7.5.4 – Consequences of delay

7.5.4.1 – Unfairness limb

The two principal direct consequences of delay in this limb are its impact as additional punishment, and as producing unfairness. These consequences are often considered as one.

This limb of delay is mitigating because it indicates additional punishment of the offender or carries an unfairness that requires compensation.[1563] There is the natural anxiety occasioned to a person suspected of or charged with an offence until arraignment.[1564] If this period is unduly long it may, and ordinarily will, be appropriate to reflect it by way of mitigation of the sentence to be imposed.[1565] The sentence is reduced in recognition of the fact that that the sentence has been hanging over the offender for an

[1557] *R v ONA* [2009] VSCA 146, [36].
[1558] *Nikodjevic* [22].
[1559] *Cockerell* 447 [10], quoting *R v Blanco* (1999) 106 A Crim R 303, 306 [17].
[1560] *Schwabegger* 659–60.
[1561] *Dragojlovic* 131 [295].
[1562] *Merrett* 394 [9].
[1563] *Rodriguez*.
[1564] *Idolo*.
[1565] Ibid.

unreasonable time.[1566]

Delay where the outcome of the case is likely to be imprisonment, and the offender has put their life 'on hold' after an early guilty plea might be an additional punishment that should be considered on sentencing.[1567] Similarly, in some circumstances being subjected to strict bail conditions, including curfew, during a lengthy period of delay may be mitigating.[1568]

7.5.4.2 – Rehabilitation limb

Both aspects of rehabilitation — remorse and reformation — must be demonstrated in order for a court to give full weight to rehabilitation.[1569] Less than full weight will be accorded where reliance is placed merely on abstinence from further offending.[1570]

Delay provides an opportunity for rehabilitation to proceed before sentencing, thus permitting a court to assess both the offender's prospects of rehabilitation and any achieved rehabilitation. Delay will thus be mitigating where there has been a substantial and positive change in an offender's personal circumstances between the time of the offending and the disposition of the matter. Prospective rehabilitation may warrant mitigation of sentence by authorising a merciful approach and by indicating the imposition of a disposition directed at rehabilitation, or at least, the earlier return of the offender to the community. Where rehabilitation is not just prospective, but achieved, the focus may move from the need to promote rehabilitation, to the need to preserve the progress already achieved. This recognises the community's vested interest in ensuring the continuation of any process of rehabilitation that has already commenced.[1571]

The length of any delay will be relevant where an offender has not committed any further offences during the period of the delay. This is because the longer the period of non-offending, the greater are the offender's rehabilitation prospects.[1572] However, as noted, a mere absence of reoffending will mean less than full weight of the delay will be applied in mitigation.[1573]

Other rehabilitative aspects of the changes that may unfold during a period of delay are:

- the offender may have aged, making reoffending less likely;
- the offender's age or life expectancy may make a sentence of imprisonment more onerous; and
- they may have expressed genuine remorse in the sense of repentance.[1574]

[1566] *Nikodjevic* [22]. See also *Stevens v The Queen* [2020] VSCA 170, [60] ('*Stevens*').
[1567] *R v Katsoulas* [2008] VSCA 278, [10]-[14].
[1568] *Stevens* [60].
[1569] *Tones* [42].
[1570] Ibid [48].
[1571] *Cockerell*.
[1572] *R v Talia* [2009] VSCA 260, [22] ('*Talia*').
[1573] *Tones* [42].
[1574] *MWH* [18]. See also *R v AP* [2009] VSCA 249.

7.5.4.3 – Structural consequences

The fact that a delay means that an offender is liable to a different statutory regime, as in the case of a child offender subsequently prosecuted as an adult, may be taken into account in mitigation of penalty.[1575]

This mitigation is available when the offender has displayed a significant degree of rehabilitation and there has been no further offending. It recognises the fact that the assessment of the nature and gravity of the crime, and of the offender's moral culpability, must take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity.[1576]

Similarly, where a delay in prosecution precludes an offender from being dealt with in the youth justice system, which may otherwise have been available had the offender been dealt with more expeditiously, this may mitigate the penalty.[1577]

However, the weight given to this fact may be reduced where the offence is of such a gravity that service of a sentence in the youth justice system would not have been open on the facts.[1578]

7.5.5 – Form of impact on mitigation

Where delay is a relevant sentencing factor, it will be relevant to both head sentence and non-parole period.

It is not an application of the totality principle for a sentence to be reduced because of the strain that an offender experiences by having a matter hanging over their head.[1579]

In Commonwealth cases delay may justify an immediate or early release on recognizance.[1580]

7.6 – Hardship of sanction

Courts are frequently urged to mitigate sentence on the basis of matters that make a sanction harder upon the particular offender than on others sentenced for the same offence. This hardship is not a circumstance of the offender but is a measure of the consequence of a sanction on the offender considering their circumstances.

Hardship may be experienced by:

1. the offender, through their personal experience of the sanction;
2. the offender's family (and sometimes other associates of the offender); and
3. the offender, through their sense of responsibility for the hardship experienced by their family.

[1575] *R v Nutter* [1995] VSCA 187; *R v Better* [2003] VSCA 71, [12]; *R v Berry* [2007] VSCA 202, [125]; *Rodi v The Queen* [2011] VSCA 48, [66]; *Pettiford v The Queen* [2011] VSCA 96; *Sherritt v The Queen* [2015] VSCA 1, [33].
[1576] *R v Boland* (2007) 17 VR 300, 304 [16].
[1577] *Leddin v The Queen* [2014] VSCA 155.
[1578] *Curypko v The Queen* [2014] VSCA 192.
[1579] *Morgan v The Queen* [2013] VSCA 33, [108].
[1580] *Schwabegger*.

Limbs one and three do not require the offender to establish any 'exceptional' hardship to mitigate sentence. The second limb, hardship to the family (or other associates) of the offender, demands that the offender establish exceptional circumstances before it will go to mitigating sentence.

7.6.1 – Legal bases of mitigation for hardship of sanction

In Victoria, the Act provides for consideration of hardship in relation to the imposition of a conviction.[1581] The additional hardship of other sanctions for the offender is a relevant consideration at common law, but the general concept has not been recognised in the statute.

There is a statutory foundation for taking account of 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants' under Commonwealth legislation, but there is no equivalent regarding impact on the actual offender.[1582]

7.6.2 – Hardship of imprisonment

7.6.2.1 – Protection prisoners

The main categories of protection prisoners are informers, child sex offenders and former police officers. Where a prisoner is being held in protective custody, that is a factor relevant to sentence.[1583] The extent to which it is to be taken in the prisoner's favour depends upon why protection is needed, the particular circumstances, and likely duration of the protection.[1584] In assessing the weight to be given to this factor, the court must assess the actual effect on the offender of their classification as a protection prisoner. The degree of restriction varies greatly from one case to the other. Some regimes will be very restrictive and involve circumstances very close to the solitary confinement of past days. Others will involve little comparative hardship.[1585]

If a submission is made that such a matter is relevant to sentencing, it is incumbent upon counsel for both the prosecution and the defence to provide such information as is available as to the true circumstances of protective custody and the actual hardship protective custody is likely to cause.[1586]

Classes of protection prisoner

The different protection prisoners are not necessarily treated equally. The leniency to be given to a prisoner placed in protection because of cooperation is greater than that allowed other protection prisoners, for example corrupt police officers and sex offenders.[1587]

[1581] The Act s 8(1)(c).
[1582] *Cth Crimes Act* s 16A(2)(p).
[1583] *R v Males* [2007] VSCA 302, [5] ('*Males*'); *R v Everett* (1994) 73 A Crim R 550; *Rostom*; *R v Ulla* (2004) 148 A Crim R 356, 367 [38]; *QMN* [31]; *DPP v Fraser* [2004] VSCA 145, [15]–[16] ('*Fraser I*'); *R v Pividor* [2002] VSCA 174 ('*Pividor*'); *Cako*; *York v The Queen* (2005) 225 CLR 466 ('*YorkHCA*').
[1584] *Males*.
[1585] Ibid [38], [40]; *Fraser I* [15]-[16]; *Carroll v The Queen* [2011] VSCA 150, [39].
[1586] *Males* [40].
[1587] See, eg, *ZMN* 543 [24].

Informers may be exposed to threats of future harm. Such a risk can never be accurately measured.[1588] Nevertheless, in circumstances where there is a real risk that the threats will be carried out, a court must adjust the sentence accordingly. To do so does not involve 'bow[ing] to pressure from criminals'.[1589] Assessment of the risk must factor into the instinctive synthesis. A sentencing judge must not determine an appropriate sanction in the absence of a risk and then consider whether the risk provides a sufficient basis to depart from the otherwise appropriate sanction.[1590]

If the offender's placement within the system is attributable to their own past conduct such as violence towards others, or drug use, or the refusal to comply with the ordinary standards that must be maintained if the prison environment is to remain safe then no significance can be attributed to it when considering the sentence to be imposed.[1591]

7.6.2.2 – Separation from family

Incarceration will commonly involve some level of separation of the offender from their family, but their hardship is relevant only in limited circumstances. Hardship to the offender's family is a discrete consideration, dealt with below.

An offender's anguish at being unable to care for a family member may properly be a mitigating factor, if the court is satisfied this will make imprisonment more burdensome or that it materially affects the need for specific deterrence or the offender's prospects of rehabilitation.[1592]

The weight to be attributed to this factor will depend on the circumstances and can never result in a sentence that is otherwise not appropriate for the gravity of the offending.[1593]

Note also that the *Corrections Act 1986* (Vic) gives the Secretary of the Department of Justice the power to allow a parent of a child to have the child live with them in prison.[1594]

7.6.2.3 – Age[1595]

If age has a direct effect on the hardship of imprisonment, this may operate to mitigate the sentence.[1596] Care should be taken to deal with the effects of old age and ill health separately, as age alone is not mitigating.

[1588] *YorkHCA* 478 [37].
[1589] Ibid 479 [39].
[1590] Ibid.
[1591] *R v Stevens* [2009] VSCA 81, [23].
[1592] *R v Ilic* [2003] VSCA 82, [14]; *R v THN* [2004] VSCA 7, [2]; *R v Esposito* [2009] VSCA 277 ('*Esposito*'); *Markovic v The Queen* (2010) 30 VR 589, 595 [20] ('*Markovic*').
[1593] *R v Zampaglione* (1981) 6 A Crim R 287, 310.
[1594] *Corrections Act 1986* (Vic) s 31. See also *R v Holland* [2002] VSCA 118, [51]-[52].
[1595] This part deals with hardship as it relates to youth and old age. Age (youth or old age) as general mitigatory factory is discussed here. See 6.1.1 – Circumstances of the offender – Innate characteristics – Age.
[1596] *R v Iles* [2009] VSCA 197, [17]-[21], [33].

However, the Court of Appeal has said that despite this burden, an elderly adult is not a suitable subject for adult parole and the Parole Board's activities are better directed at younger offenders who can derive a benefit from supervision.[1597]

7.6.2.4 – Ill health[1598]

The following are examples of where the prisoner's ill health arose as a consideration because of its direct effect on the hardship of imprisonment:

- a prisoner with cerebral palsy having to spend part of their imprisonment in a unit for intellectually disabled prisoners;[1599]
- evidence of consequences of a shot gun injury found to increase the burden of imprisonment;[1600]
- asbestos exposure and medical evidence suggesting increased risk of developing asbestos-related injury;[1601]
- lung cancer, with prognosis of three to six months' survival, allowed adjustment of non-parole period to allow for immediate release;[1602]
- failure to comply with medication regime as the result of mental illness made prison more burdensome;[1603]
- diagnosis of terminal cancer and incarceration preventing the appellant from accessing clinical trials found to be burdensome;[1604]
- custodial disruptions for health care did not amount to increased hardship requiring sentencing;[1605]
- brain injury not sufficient to reduce sentence for hardship.[1606]

7.6.2.5 – Nationality and religion

A foreign national imprisoned in an Australian jail will find prison more burdensome because they will be far from the support of family and friends. This is always relevant to sentence. However, the weight given to this factor will vary from case to case.[1607] Factors relevant to that assessment include the extent of any language or cultural differences between Australia and the offender's country of origin, the circumstances of the offending and the extent of any family ties in the offender's country of origin.[1608]

If the offender entered Australia with the intention of committing a crime, the hardship of imprisonment

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[1597] *Mackie v The Queen* [2022] VSCA 28, [40]-[41].
[1598] Mental illness or impairment, and poor or impaired physical health are among the most significant circumstances leading to an increased burden of imprisonment. Those topics are dealt with at 6.2 – Circumstances of the offender – Health.
[1599] *Ranger v The Queen* [2018] VSCA 271.
[1600] *Hayes v The Queen* [2010] VSCA 170, [15].
[1601] *DPP v RAL* [2008] VSCA 140, [21], [27].
[1602] *Cardona v The Queen* [2011] VSCA 58.
[1603] *Cosic v The Queen* [2011] VSCA 209, [13], [19]. For the effect of mental ill health on the burden of imprisonment see 6.2.2 – Circumstances of the offender – Health – Mental impairment.
[1604] *Price* [7].
[1605] *Beyer v The Queen* [2011] VSCA 15.
[1606] *R v Healey* [2008] VSCA 132, [63]-[64].
[1607] *DPP (Cth) v Estrada* [2015] VSCA 22, [38].
[1608] *R v Thomas* [1999] VSCA 204, [16] ('*Thomas*').

here will ordinarily be given little weight.[1609] Similarly, the hardship of a foreign national's incarceration in Australia may also be given little weight if they entered for an innocent purpose – for example, a holiday – and opportunistically seized the chance to commit an offence.[1610]

However, if the offender comes to Australia for a lawful purpose, and commits an offence through gross negligence, such as culpable driving, a court may consider the hardship to be of greater weight.[1611] Where the offender is from a country that is vastly different to Australia, the hardship of their incarceration will generally be greater and therefore more mitigating on account of the social or linguistic isolation they are likely to experience. Where an offender's religious practices are likely to make them a target in prison, this may also be taken into account.[1612]

7.6.2.6 – Gender

Gender alone does not form the basis for differential treatment in sentencing. However, the pregnancy of an offender may make incarceration more onerous and should be considered.[1613] But it may not suffice to avoid a custodial term for a woman, nor will a due date necessarily have the effect of shortening a sentence where justice demands a longer sentence be served.[1614]

It may also be necessary to shorten a custodial term for a transgender woman who will have to serve her sentence in a men's prison where she will be at risk and under protection.[1615]

7.6.2.7 – Deportation

The prospect that an offender will be deported following sentence is relevant to sentence if it will make the burden of imprisonment more onerous or may result in the offender losing the opportunity to settle permanently in Australia.[1616] This depends on the personal circumstances of the offender[1617] and a court should not consider the possibility of deportation as a mitigatory factor unless it will actually be a hardship for the offender.[1618] Moreover, it will be given limited weight in cases where the offending is particularly serious.[1619]

There must also be evidence of both the likely risk of deportation and the impact of that risk.[1620] Specifically, the evidence must be 'sufficient to permit a sensible quantification of that risk to be

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[1609] *R v Adams* [2007] VSCA 37, [34]; *Lau v The Queen* [2011] VSCA 324, [43]; *Pham v The Queen* [2012] VSCA 101, [8], [41]; *R v Ngui* [2000] VSCA 78, [7]; *Thomas* [16]; *R v Zehavi* [1998] VSCA 81, [10].
[1610] *R v Van Der Aar* [2001] VSCA 205, [25].
[1611] *DPP v Miller* [2005] VSCA 7, [42].
[1612] *DPP v Goldberg* [2001] VSCA 107, [43]-[45].
[1613] *R v Frazer* [2001] VSCA 101; *R v Grant* [2003] VSCA 53 ('*Grant*'); *Dong v The Queen* [2016] VSCA 51.
[1614] *Grant* [15]-[17].
[1615] *Palmer v WA* [2018] WASCA 225, [71], [76].
[1616] *Guden v The Queen* [2010] VSCA 196, [25]-[27] ('*Guden*'). See also *Konamala v The Queen* [2016] VSCA 48, [36] ('*Konamala*'); *Lima Da Costa Junior v The Queen* [2016] VSCA 49 ('*Da Costa*'); *Schneider v The Queen* [2016] VSCA 76; *Nguyen v The Queen* [2016] VSCA 198; *DPP (Vic) v Macarthur* [2019] VSCA 71, [68].
[1617] *Konamala* [34].
[1618] *DPP (Cth) v Peng* [2014] VSCA 128.
[1619] *Fichtner v The Queen* [2019] VSCA 297, [96].
[1620] *Guden* [25]-[27]. See also *Hatzis v The Queen* [2021] VSCA 43, [28].

undertaken'.[1621] A reduction will be permissible and appropriate where the prospect of deportation (and its impact) is certain.[1622] It may also be appropriate where deportation and its adverse impacts are probable.[1623]

A court cannot be asked to speculate. Without evidence or a prosecution concession, a court need not consider the possibility of deportation.[1624] However, where there are unusual circumstances demonstrating a connection to Australia – such as a lengthy period of residency before the commission of the offence, or where the offender's family have made considerable financial sacrifices to send the offender to Australia – the court should consider these matters.[1625]

The *Migration Act 1958* (Cth) make visa cancellation mandatory for an offender sentenced to one year of imprisonment or more, unless the relevant Minister is satisfied there is a reason to revoke the cancellation.[1626] There are also provisions that make visa cancellation mandatory for specific kinds of offences, including child sex offences.[1627] But these provisions do not remove the prospect of deportation as a proper matter for consideration at sentence.[1628]

7.6.3 – Fresh evidence of hardship in custody

It is relatively common for evidence of hardship to be pressed on an appeal where it has emerged since the original sentence was imposed and was not argued on the original plea.

New evidence may be admitted if it:

- relates to events which occurred since the sentence was imposed; and
- demonstrates the true significance of facts in existence at the time of the sentence.[1629]

Fresh evidence is not admissible where it relates only to events that have occurred after sentence and show the sentence has turned out to be excessive.[1630]

For example: evidence of an assault on a police informer after incarceration may be admitted on appeal and ameliorate the sentence on the basis that the risk to the offender had eventuated and imposed a heavier burden than was foreseeable at the original time of sentencing. [1631]

Most often, fresh evidence is sought to be admitted where a significant medical condition emerges after

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[1621] Ibid [29].
[1622] Ibid [28]; *R v Kwon* [2004] NSWCCA 456.
[1623] *Guden*.
[1624] Ibid [28].
[1625] *Valayamkandathil v The Queen* [2010] VSCA 260, [28]; *Ankur v The Queen* [2021] VSCA 110, [117]. See also *Matamata v The Queen* [2021] VSCA 253.
[1626] *Migration Act 1958* (Cth) ss 501(3A), 501(6)(a), 501(7)(c), 501CA.
[1627] Ibid ss 501(3A)(a)(ii), 501(6)(e)(i).
[1628] *Konamala* [35]–[36]; *Da Costa* [41]–[43], [44]–[51] in relation to changes in Ministerial Directions regarding the decision-making process in respect of visa cancellations.
[1629] *R v Eliasen* (1991) 53 A Crim R 391, 394–95. See also *Rostom* 99–100; *Price (a Pseudonym) v The Queen* [2018] VSCA 54 ('*Price*'); *R v Nguyen* [2006] VSCA 184, [36].
[1630] *R v Eliasen* (1991) 53 A Crim R 391, 394–95. See also *Rostom* 99–100; *Price*; *R v Nguyen* [2006] VSCA 184, [36].
[1631] *R v Pivdor* [2002] VSCA 174.

sentence. The Court of Appeal has accepted that the diagnosis may increase both the burden of imprisonment on an applicant and the serious risk it will have a gravely adverse effect on their health.[1632]

7.6.4 – Hardship to third parties/family

Hardship to a *third party* as a consequence of imprisonment is not normally a mitigating circumstance. But a court has discretion to mitigate sentence when that sentence causes hardship to a third party and it is satisfied there are exceptional circumstances. For Victorian offences, the Court of Appeal has previously said that hardship to third parties is only relevant in mitigation where it is 'highly exceptional' or 'the exceptional case where the plea for mercy is seen as irresistible'.[1633] However, the NSW Court of Criminal Appeal has said there is no exceptionality requirement for Commonwealth offences[1634] and this is now followed by the Victorian Court of Appeal.[1635]

It appears now that for Victorian offences, the circumstances must be such that they rise above the general and sometimes tragic hardship commonly suffered by the families of imprisoned offenders; they must be 'so significant that they will weigh heavily in the sentencing calculus'.[1636]

This consideration will generally only arise where the third party is an especially vulnerable dependent of the offender, or where there are a number of vulnerable dependents.[1637] The decided cases are overwhelmingly concerned with hardship to the offender's family when the offender must serve a term of imprisonment.[1638]

Moreover, there must be cogent evidence that the offender's imprisonment would expose the family member or third party to this hardship.[1639] This may also be established by a combination of lesser hardships to multiple family members.[1640] These cases will be rare.[1641] Whether or not, in any particular case, family hardship is sufficient to be significantly mitigating is a question of fact and degree.[1642]

A finding of such circumstances is also not a 'passport to freedom' but simply one factor that can be taken into account.[1643] And where family hardship may reduce sentence, it may also be relevant to the type of sentence imposed, the quantum of sentence, and any ameliorative orders that may be made.[1644] To attract

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[1632] Ibid [7]. But see *Spijodic v The Queen* [2014] VSCA 251; *George v The Queen* [2017] VSCA 152 ('*George*'); *Slaveski v The Queen* [2018] VSCA 44.
[1633] *Markovic* 592 [7]. See also *Lam v The Queen* [2021] VSCA 24, [31]-[32].
[1634] See *Totaan v The Queen* [2022] NSWCCA 75.
[1635] *Mohamed v The Queen* [2022] VSCA 136, [81]-[93]; *Rodgerson v The Queen (No 2)* [2022] VSCA 154, [73]; *El Masri v The King* [2023] VSCA 93, [45]-[48] ('*El Masri*'); *Mohamed v The King (No 2)* [2023] VSCA 177, [22].
[1636] *El Masri* [56]-[57].
[1637] See, eg, *Markovic*; *R v Xeba* [2009] VSCA 205; *Esposito*; *Nguyen v The Queen* [2010] VSCA 152; *Reilly v The Queen* [2010] VSCA 278; *Rajic v The Queen* [2011] VSCA 51; *DPP v Gerrard* [2011] VSCA 200; *MGP v The Queen* [2011] VSCA 321; *HAT v The Queen* [2011] VSCA 427 ('*HAT*'); *El-Hage v The Queen* [2012] VSCA 309; *Burrell v The Queen* [2013] VSCA 146; *Ramezanian v The Queen* [2013] VSCA 71; *Suckling v The Queen* [2013] VSCA 278; *Zhou v The Queen* [2014] VSCA 123; *Saleem v The Queen* [2014] VSCA 190; *Robb v The Queen* [2016] VSCA 125; *Trinh v The Queen* [2016] VSCA 307; *George*; *Cth Crimes Act* s 16A(2).
[1638] *R v Williams* [2004] VSC 429, [16].
[1639] *El Masri* [57]. See also *Esposito* [14]; *Cross v The Queen* [2019] VSCA 310, [52].
[1640] *R v Spicer* [2003] NSWCCA 108, [74]-[75].
[1641] *Markovic* 603 [77].
[1642] Ibid.
[1643] *DPP v Gaw* [2006] VSCA 51, [21].
[1644] *R v Nagul* [2007] VSCA 8.

a reduction in sentence, the reduction would have to be capable of ameliorating the circumstances of the hardship claimed.[1645]

7.6.5 – COVID-19

It is important, 'in the present time', for a court to be mindful of the fact that the conditions of incarceration will be significantly more restrictive and difficult because of the steps taken by prison authorities to prevent the spread of the COVID-19 virus in the prison population.[1646] Any period of time in custody has been and is likely to continue to be 'significantly more punitive than its numerical equivalent before the onset of the current pandemic'.[1647]

7.7 – Punishment from ancillary orders

In sentencing, the principle of totality makes it generally appropriate to take account of all punishment formally inflicted upon the offender, even of those in ancillary form. However, there are some specific legislative exceptions.

7.7.1 – Forfeiture and pecuniary penalty orders

Confiscation orders may sometimes be seen as punitive, and so considered in sentencing, because they are 'part of the retribution exacted from offenders on behalf of the community'.[1648] By contrast compensation and restitution orders, which benefit private victims of crime, are not regarded as punitive and are not considered.[1649]

7.7.1.1 – Forfeiture orders

The Act provides that when a forfeiture order has the effect of disgorging any profit obtained from the offending it is not to be considered in sentencing. This is because there is no punishment in merely restoring the offender to the position they occupied before the offending occurred. However, if the forfeiture order goes further or relates to previously owned property, this may be punitive, and be taken into consideration when sentencing. There is a 'clear distinction' between an order forfeiting the proceeds of crime and one that punishes by going beyond what is required simply to prevent the offender from profiting from their crime.[1650]

In Commonwealth prosecutions, the question is governed by the *Proceeds of Crime Act 2002* (Cth) s 320. But the Court of Appeal has said that the same principles apply to the federal forfeiture provisions.[1651]

The principle of proportionality requires that the nature and extent of any forfeiture of property be considered in fixing sentence, but forfeiture orders will not require mitigation of the penalty. The court

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[1645] *R v Davidson* [2008] VSCA 188.
[1646] *Surtees v The King* [2023] VSCA 42, [10], [64(b)].
[1647] Ibid [10].
[1648] *Allen v The Queen* (1989) 41 A Crim R 51. See also *R v McLeod* (2007) 16 VR 682, 685 [17] ('*McLeod*'); *HAT*; *R v Strawhorn* [2008] VSCA 101; *R v Mileto* [2014] VSCA 161; *Kapkidis v The Queen* [2013] VSCA 35 ('*Kapkidis*').
[1649] *Werden v Legal Services Board* (2012) 36 VR 637, 643 [19], citing *R v Barham* [1977] VR 104; *R v Virgo* (1988) 38 A Crim R 109, 111.
[1650] The Act ss 5(2A)(a), (b), (c), (e); *McLeod* 685-87 [14]-[21]; *R v Hoar* (1981) 148 CLR 32.
[1651] See *HAT* [55].

must consider whether forfeiture will have a disproportionate or exceptional effect on the offender and if the order will have a substantial deterrent effect.[1652]

7.7.1.2 – Future forfeiture

Possible future forfeiture presents a particular difficulty for a sentencing court as the court will not be able to measure the extra punishment, if any, that may flow from future forfeiture. It is proper for a court to take future forfeiture into account. However, there does need to be sufficient evidence before the court to enable an assessment to be made of the likely effect of the forfeiture upon the offender. There will be no error committed if the information available is insufficient to enable the court to assess the likelihood and effect of future forfeiture.[1653]

7.7.1.3 – Onus of proof

The offender bears the onus of establishing forfeiture as a mitigating circumstance. Where lawfully acquired property has been used in the commission of a crime and it is 'tainted' property the punitive element of its forfeiture must be sufficiently identified for it to be considered in mitigation.[1654] How much of the property was lawfully acquired, the offender's interest in the property and the extent to which it was used to facilitate the commission of the crime may all require proof.[1655] Where an offender seeks to rely in mitigation upon the loss of benefits in excess of profits derived from the commission of the offence, the offender must produce evidence to enable the court to make a positive determination on the balance of probabilities.[1656] The burden will not be discharged by evidence from the applicant's solicitor as to the applicant's assertions about forfeiture. Direct evidence from the applicant, together with confirmatory evidence as to the lawful source of the funds used to acquire the property, is required.[1657]

Where there is likely to be a successful application to have the property excluded pursuant to s 22 of the *Confiscation Act* 1997 (Vic), because the property can be established as lawfully acquired, there is no reason to take account of forfeiture because the offender will not suffer the additional punishment.[1658]

7.7.1.4 – Weight to be given to forfeiture and pecuniary penalty orders

Where it is determined that a forfeiture or pecuniary penalty order should be considered in sentencing, the question then is what weight it should be given. This will vary with the circumstances. For one example of how such loss is treated see *R v Gant*.[1659] In that case, lawfully acquired property to the value of $825,000 was forfeited as it was the building in which fraudulent artworks were said to have been painted.[1660]

[1652] *McLeod* 686 [18].
[1653] Ibid 687 [21]; *R v Tabone* [2006] VSCA 238, [12].
[1654] *McLeod* 689 [29].
[1655] Ibid.
[1656] Ibid [30]; *Kapkidis* [46].
[1657] *Kapkidis* [48].
[1658] *R v Filipovic* [2008] VSCA 14, [78]. See also *Confiscation Act 1997* (Vic) s 22.
[1659] [2016] VSC 662.
[1660] Ibid [111].

7.7.2 – Punishment in registration as sexual offender

A sentencing court is not to consider any consequence that may arise under the *Sex Offenders Registration Act 2004* (Vic) or the *Working With Children Act 2005* (Vic) from the imposition of sentence.[1661]

7.7.3 – Continuing detention orders

The *Criminal Code Act 1995* (Cth) s 105A.3 provides that a continuing detention order, which requires an offender to be detained after the end of their sentence, may be made in relation to any offender convicted of, generally speaking, terrorism related offences and:

- who is serving a sentence of imprisonment and will be at least 18 years old when the sentence ends; or
- who is under a continuing detention order or interim detention order.

The maximum duration of a continuing detention order is three years, although a court may make successive continuing detention orders.[1662]

Section 105A.23 provides that, when a court sentences an offender for a terrorism related offence it must warn them that an application for a continuing detention order may be made. This applies in relation to any sentence imposed after the commencement of the section, irrespective of when the offence was committed.

The potential relevance of continuing detention orders to sentencing is marginal. Assuming that they may have some relevance, they should not have such an effect on the relevance of community protection and incapacitation as to result in a reduction in the sentence imposed.[1663] Moreover, a court should not infer or presume the existence of hardship from the prospect an offender might be subject to an application for a continuing detention order that will make their imprisonment more burdensome.[1664]

The potential application of this part is an incident of the offending and of the sentences imposed that is to be regarded as an unavoidable consequence of imprisonment and must not be given special mitigatory weight.[1665]

[1661] The Act s 5(2BC). This applies to all consequences under the Act, regardless of whether the order is made automatically or by court order. See, eg, *Chan v The Queen* [2006] VSCA 125, [18]-[19].
[1662] *Criminal Code Act 1995* (Cth) s 105A.25 contains a sunset provision, providing that continuing detention orders cannot be applied for or made 10 years after the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) received Royal Assent. In other words, after 7 December 2016.
[1663] *DPP (Cth) v Besim* [2017] VSCA 180, [47]-[49].
[1664] Ibid [60]-[61].
[1665] Ibid [62].

7.8 – Punishment from other sources

7.8.1 – Public opprobrium

An offender's loss of reputation may be a form of punishment. However, it is unclear whether opprobrium as a result of conviction may be considered by the court in sentencing. There is a tension between the recognition of the additional loss that conviction will visit upon an offender, against the fact that, unlike many who come before the courts, the offender occupied (or possibly even exploited) a position of privilege or power during the term of their offending.[1666]

There are only a few instances where this has been held to be relevant:

- if serious and/or significantly damaging publicity arising from a proceeding generated hardship to the offender;[1667]
- where an offender loses their career as the result of being convicted for criminal offending.[1668] However, any mitigation may be less arguable if the offender used their career to commit the offending.[1669] Conversely, where the offending conduct is remote from the employment, the incidental loss of career may be mitigating.[1670]

7.8.2 – Injury or loss sustained in offending

Where an offender suffers an injury or loss in the course of, or as a direct consequence of, their offending, this is a matter that a sentencing court will generally take into account. Courts dealing with offenders who have suffered loss and injury as the result of their crimes have found that it is not a complete answer that the offender brought the injuries upon themselves.[1671]

But this factor does not apply in mitigation of every case involving loss or injury to the offender. Injuries or loss have been found to be relevant considerations in the following cases:[1672]

- culpable driving causing death where offender suffered serious injury in the collision;[1673]
- dangerous driving causing death where the offender was seriously injured as well;[1674]
- dangerous driving where the offender suffered psychological sequelae from the accident including flashbacks and symptoms of PTSD;[1675]
- offender shot and severely injured by shop proprietor during failed armed robbery;[1676]

[1666] See, eg, *R v Rumpf* (1987) 29 A Crim R 64, 71; *Ryan* 284-85 [52]-[55], 303-04 [123], 313-14 [156]-[157], 318-19 [177]; *R v Dunne* [2003] VSCA 150, [37].
[1667] *R v Pilarinos* [2001] VSCA 9, [11]; *DPP (Vic) v Fucile* (2013) 229 A Crim R 427, 445 [112] ('*Fucile*').
[1668] *Fucile* 444-45 [110]-[111].
[1669] *Talia*.
[1670] Ibid.
[1671] *R v Barci* (1994) 76 A Crim R 103, 111 ('*Barci*').
[1672] See also *McPadden v The Queen* [2018] VSCA 57, [68].
[1673] *DPP v King* [2008] VSCA 151; *Pasznyk v The Queen* [2014] VSCA 87.
[1674] *Rooke v The Queen* [2011] VSCA 49; *Howton v The Queen* [2012] VSCA 281.
[1675] *DPP v Oates* [2007] VSCA 59.
[1676] *Barci*.

- offender forfeited police superannuation following robbery conviction;[1677]
- arsonist suffered severe burns in setting fire;[1678]
- culpable driver responsible for death of his own child;[1679]
- drug trafficker injured in amphetamine laboratory fire.[1680]

But in *R v Taylor*,[1681] the Court dismissed an offender's claim that the sexually transmitted disease he claimed to have contracted in the course of committing the crime of rape should be taken into account.

Injury or loss to the offender generally 'take its place as one of the matters to be taken into account in the development of an appropriate synthesis'.[1682] Injury or loss to the offender may assume significance in the assessment of the just punishment required, the weight to be given to expressions of remorse or to general and specific deterrence in the circumstances of the particular matter.

For the injury or loss to be mitigating, the offender will need to argue that the loss or injury would (a) add to the burden of the appellant's imprisonment; and (b) constitute a form of extra-curial punishment.[1683]

And although no distinction is to be drawn between mental illness and physical injury, the circumstances in which mental illness will count as additional punishment are strictly limited.[1684] Specifically, where the illness is caused by the offender's reaction to the consequences of the offending (e.g., fear of imprisonment), it is not an additional punishment.[1685] A distinction must be drawn, no matter how difficult that may be to do, 'between a mental condition caused by the offending and one caused by the offender's reaction to the offending'.[1686]

[1677] *R v Wright (No 2)* [1968] VR 174.
[1678] *R v Haddara* (1997) 95 A Crim R 108.
[1679] *R v Teh* [2003] VSCA 169.
[1680] *R v Howden* [1999] VSCA 130.
[1681] *R v Taylor* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Gowans, Nelson and Anderson JJA, 21 May 1974).
[1682] Ibid [20].
[1683] *Delzoppo v The Queen* [2011] VSCA 141[22].
[1684] *Singh v The Queen* [2021] VSCA 161, [48]-[49].
[1685] Ibid [52]-[54].
[1686] Ibid [54].

Part C – Sanctions

8 – Imprisonment

Imprisonment is primarily a creature of statute, both for Victorian and Commonwealth offences.[1687] This chapter focuses largely on Victorian schemes. For a detailed review of federal sentencing please see the Commonwealth Sentencing Database.[1688]

A statutory offence is punishable by imprisonment only if that sanction is expressly provided for. This is generally done by prescribing a maximum penalty.[1689] Almost all indictable offences are punishable by imprisonment. A notable exception is possession of a drug of dependence (small quantity of cannabis), which is punishable only by a fine.[1690]

Summary offences may or may not be punishable by imprisonment, and care should always be taken when dealing with them, especially in combination with other offences attracting a custodial term.

Common law offences are punishable by imprisonment and either have maximum penalties set by statute or have a maximum penalty that is 'at large'.[1691]

In Victoria a court has the discretion whether to record a conviction or not.[1692] However, a sentence of imprisonment can only be imposed if a conviction is recorded.[1693]

8.1 – Sanction of last resort

Legislation and the common law state that imprisonment is the sanction of last resort and is not to be imposed unless the court is satisfied that no other penalty is appropriate. Specifically, the *Sentencing Act 1991* (Vic) ss 5(4)-(4C) ('the Act') state that a sentence requiring confinement of the offender cannot be imposed unless the court considers that the sentencing purposes cannot be met by another sentence.[1694]

There are also certain offenders the courts are traditionally reluctant to imprison for humanitarian reasons or reasons of principle, such as those with mental impairments or those who are gravely ill.[1695]

[1687] See *Sentencing Act 1991* (Vic) ss 3, 5, 7, 9-18P, 109 ('the Act'); *Crimes Act 1914* (Cth) ss 16, 16B, 16E-20AC ('*Cth Crimes Act*').
[1688] https://csd.njca.com.au/.
[1689] See 5.1 – Circumstances and gravity of the offence of the offence – Maximum penalty.
[1690] *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)(a).
[1691] See *Crimes Act 1958* (Vic) s 320 ('*Crimes Act*').
[1692] There is no such discretion under the Commonwealth scheme, a conviction will always be recorded there with a sentence of imprisonment.
[1693] The Act s 7(1)(a).
[1694] See, eg, the Act ss 5(3)-(4C); *Cth Crimes Act* s 17A; *R v O'Connor* [1987] VR 496, 501; *R v Holland* (2002) 134 A Crim R 451, 453 [6]. See also *Boulton v The Queen* (2014) 46 VR 308, 335 [111] ('*Boulton*').
[1695] See 6.2.2.4 – Circumstances of the offender – Health – Mental impairment – General deterrence and 3.6 – Sentencing principles - Parity.

8.2 – Individual and head sentences

A court must impose a sentence for each offence.[1696] Where a person is sentenced to multiple periods of imprisonment, the total term of imprisonment is commonly called the 'head sentence' or 'total effective sentence' and is determined by making orders for cumulation or concurrency, or in Commonwealth matters, by making differential orders for the commencement of individual sentences.[1697]

The term 'head sentence' has no statutory basis but is used to distinguish the total custodial term from other parts of the sentence, such as the non-parole period.[1698] This does not mean that a head sentence and a non-parole period are distinct punishments. They are still one sentence.[1699]

Individual sentences should not be imposed in a mechanistic manner, for example as a fixed proportion of the maximum term.[1700] A court should ensure the sentences reflect the criminality of the specific offences and are appropriate to the gravity of each charge.[1701] Particular care is required when there are numerous offences,[1702] although, within limits, a 'broad-brush' approach of categorising similar kinds of offending and imposing the same sentence for offences of the same type may be adopted.[1703] This might be appropriate in cases involving an ongoing course of fraudulent conduct or where criminal behaviour on several counts was similar and repetitive in nature.[1704] In those circumstances, the sentences imposed only need to be roughly proportional to the gravity of the offending and any amounts taken.[1705]

8.3 – Non-parole period

The non-parole period of a sentence of imprisonment is the minimum term a court determines that justice requires the offender must serve, given all of the circumstances, before being eligible for release on parole.[1706] A minimum term is fixed because mitigating considerations or rehabilitation may make it undesirable for an offender to serve their entire term in prison.[1707] The non-parole period does not determine the date an offender *will be* released on parole. It fixes a time after which the Parole Board or authorised individuals or entities may decide if and when the offender is to be released.[1708]

A court sentencing an offender to imprisonment for two years or more *must* fix a non-parole period unless it considers that the nature of the offence or the circumstances of the offender make it

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[1696] Unless the court is imposing an aggregate sentence. See 8.5 – Aggregate sentence below.
[1697] See 8.4 – Cumulation and concurrency below.
[1698] See 8.3 – Non-parole period below.
[1699] *Hudson v The Queen* (2010) 30 VR 610, 630 [76] ('*Hudson*'), citing *R v Rajacic* [1973] VR 636, 641. See also *Power v The Queen* (1974) 131 CLR 623, 628-29 ('*Power*').
[1700] *R v RLP* (2009) 213 A Crim R 461, 478 [47].
[1701] *R v Harris* [2009] VSCA 189, [21]-[22]; *DPP (Vic) v Malikovski* [2010] VSCA 130, [40]-[41]; *GJW v The Queen* [2010] VSCA 193, [11], [15] ('*GJW*'); *Barfoot v The Queen* [2011] VSCA 282, [24].
[1702] *DPP (Vic) v Moses* [2009] VSCA 274, [59]-[61].
[1703] *Hoy v The Queen* [2012] VSCA 49, [17].
[1704] Ibid.
[1705] Ibid [18], [21].
[1706] *DPP (Vic) v Josefski* (2005) 13 VR 85, 94 [43], 103 [79] ('*Josefski05*'), citing *R v VZ* (1998) 7 VR 693 ('*VZ*'). See also *Bugmy v The Queen* (1990) 169 CLR 525, 538 ('*Bugmy90*'); *Kumova v The Queen* (2012) 37 VR 538, 545-46 [27]-[28] ('*Kumova*').
[1707] See *R v Currey* [1975] VR 647, 650-61; *Bugmy90* 536; *Josefski05* 94 [43], 103 [78].
[1708] *R v Chan* (1994) 76 A Crim R 252, 255.

inappropriate to do so.[1709] These criteria for declining to impose a non-parole period are not exclusive. A court must also have regard to the head sentence, and the sentencing purposes and principles.[1710]

Historically, the Court of Appeal has held that the need to avoid any interaction between parole periods and a CCO did not provide a basis for exercising the discretion to decline to fix a non-parole period.[1711] More recently, the Court has noted that significant amendments to the Act, meant that, at least in the case of an arson offence, it could be appropriate to impose a term of imprisonment without a non-parole period, so there was no risk the offender would have to serve a CCO while on parole.[1712]

A court *may* fix a non-parole period if the sentence is between one year and two years.[1713]

Courts must fix separate non-parole periods for both State and Commonwealth sentences and specify the commencement date for those periods.[1714] The *Crimes Act 1914* (Cth) ('*Cth Crimes Act*') creates a wholly separate system from the Victorian regime.[1715] For more detail on federal non-parole periods and Recognizance Release Orders please see the Commonwealth Sentencing Database.[1716]

8.3.1 – Restrictions on setting non-parole periods

The Act sets four significant restrictions on how a court sets a non-parole period.

First, a court *cannot* impose a non-parole period if the total sentence is less than 12 months imprisonment.[1717]

Second, the non-parole period *must* be at least six months less than the total sentence. In other words, the period of potential parole eligibility must be six months or more.[1718]

Third, if the sentence is between 12 months and two years, and is combined with a CCO, the court *cannot* fix a non-parole period.[1719]

[1709] The Act s 11(1). See also *R v Sener* [1998] 3 VR 749, 752.
[1710] *Josefski05* 94 [43], 103 [79], citing *VZ* 694 [2], 696 [10], 697-98 [12]-[18], 700 [22]. See also *Power* 627; *Bugmy90* 531-32, 538; *R v Tran* [2006] VSCA 222, [28]-[29] ('*Tran06*'); *Shrestha v The Queen* (1991) 173 CLR 48, 68 ('*Shrestha*'); *Romero v The Queen* (2011) 32 VR 486, 492-93 [23]-[25] ('*Romero*'); *Kneifati v The Queen* [2012] VSCA 124, [29] ('*Kneifati*'); *Kumova* 545 [27].
[1711] *Deng-Mabior v The Queen* [2015] VSCA 179; *Baldwin v The Queen* [2015] VSCA 299; *Abdou v The Queen* [2015] VSCA 359; *Debono v The Queen* [2016] VSCA 16; *DPP (Vic) v Grech* [2016] VSCA 98.
[1712] *Tannous v The Queen* [2017] VSCA 91, [66]-[67]; *Robson v The Queen* [2018] VSCA 256, [72]-[73]. See also 11.8.3 – Community correction order – Combining a CCO with a term of imprisonment – Interaction with a non-parole period.
[1713] The Act s 11(2).
[1714] *Cth Crimes Act* s 19AJ; *R v Fulop* (2009) 236 FLR 376, 378 [9]; *Fasciale v The Queen* (2010) 30 VR 643, 647 [27].
[1715] *Hili v The Queen* (2010) 242 CLR 520, 527 [22] ('*Hili*').
[1716] https://csd.njca.com.au/principles-practice/5-particular-issues-in-sentencing/non_parole_period/.
[1717] The Act s 11(2).
[1718] Ibid s 11(3).
[1719] Ibid s 11(2A).

Fourth, when sentencing for a 'standard sentence offence'[1720] or for multiple offences where at least one of them is a 'standard sentence offence', a court must (unless it considers that it is not in the interests of justice) fix a non-parole period of at least:[1721]

- 30 years if the relevant sentence is a life term;
- 70% of the relevant term if it is 20 years or more;
- 60% of the relevant term if it is 20 years or less.[1722]

8.3.2 – The 'usual non-parole period'

As a matter of practice, sentencing courts have tended to impose a non-parole period that is between 60% and 75% of the head sentence.[1723] However, different standards may apply both for longer and shorter sentences. In particular, the Court of Appeal has said a 'usual non-parole period' of 60% to 75% 'ceases to be of much guidance where the head sentence is in the order of 10 years' imprisonment or more' and might lead to the imposition of a non-parole period that does not adequately reflect the gravity of the offending, comply with the sentencing principles, or meet the sentencing purposes.[1724]

State sentencing thus appears to accept that the proper application of principle results in head sentences and non-parole periods that fall within a common proportional range and that comparisons to these ranges is permissible in exercising the sentencing discretion.[1725] While courts have stated that there is 'no usual non-parole period',[1726] the empirical observation that non-parole periods usually fall within the 60% to 75% range still 'informs the sentencing task by providing an important guide to sentencing judges'.[1727]

A non-parole period that falls outside the common proportional range – whether higher or lower – does not vitiate the sentence but may attract greater appellate scrutiny than one that falls within the range.[1728] So, when fixing an unusual non-parole period,[1729] a court should give reasons for doing so. The failure to give reasons does not indicate error but it also invites appellate scrutiny.[1730] Similarly, where a sentencing judge indicates an intention to impose a proportionately short (or long) non-parole period, a

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[1720] See 9.2 – Statutory Schemes – Standard sentence scheme.
[1721] The Act ss 11A(1), (4).
[1722] Ibid s 11A(4).
[1723] See, eg, *Boulton* 699; *Tran06* [27]; *R v Dang* [2010] VSCA 13 ('*Dang*'); *Ashe v The Queen* [2010] VSCA 119; *Diver v The Queen* [2010] VSCA 254 ('*Diver*'); *DP v The Queen* [2011] VSCA 1; *Romero*; *Green v The Queen* [2011] VSCA 236; *Solomano v The Queen* [2013] VSCA 320, [17] ('*Solomano*').
[1724] *Kumova* 542-43 [14], 544 [19], 545 [25]; *Romero* 493 [25]; *Mush v The Queen* [2019] VSCA 307, [102].
[1725] *Josefski05* 94 [43]. See also *Romero* 493 [25]; *Kumova* 542 [14]. But note that an excessive head sentence cannot stand merely because the non-parole period is within range. See *Denman v The Queen* [2012] VSCA 261, [22].
[1726] *Wallace v The Queen* (2012) 35 VR 520, 523 [16] ('*Wallace*'); *Kneifati* [24], [27]; *Kumova* 541 [10], 545 [25], 545 [30]; *Roberts v The Queen* (2012) 226 A Crim R 452, 481-82 [123] ('*Roberts*').
[1727] *Kumova* 547-48 [34]-[35]. See also *McLean v The Queen* [2018] VSCA 209, [18]-[19]; *Tutchell v The Queen* [2018] VSCA 269, [48].
[1728] *Josefski05* 94 [43]; *DPP (Vic) v Huby* [2019] VSCA 106, [21], [70] ('*Huby*'); *Gaunt v The Queen* [2019] VSCA 241, [35].
[1729] A non-parole period may be 'unusual' by comparison to other cases, the facts of the case, or the course of the plea. See *IRJ v The Queen* [2011] VSCA 376, [49].
[1730] *Josefski05* 94 [43]. See also *Diver* [33]; *Dang* [14]; *BS v The Queen* [2013] VSCA 108, [15]; *Solomano* [19]; *Huby* [21], [70], [73]; *Wyka v The Queen* [2020] VSCA 104, [104]-[107].

non-parole period which falls within the usual range may be evidence that the sentence failed to give effect to the judge's stated intention and may be indicative of appealable error.[1731] However, this is an exceptional occurrence that is unlikely to occur, it is improbable that a sentence will fail to give effect to the judge's stated intention.[1732]

8.3.3 – Special considerations

8.3.3.1 – Community corrections order

If the term of imprisonment imposed is less than two years but is at least one year, the court *may* fix a non-parole period[1733] unless it also intends to impose a CCO, in which case it *may not* do so.[1734] A CCO and a non-parole period should be considered alternatives in those circumstances.[1735]

8.3.3.2 – Parole eligibility

The Act prohibits a court from considering the possibility or likelihood that the length of time spent in custody 'will be affected by executive action of any kind'. This includes executive action such as release on parole.[1736] In fixing a non-parole period, the court must consider that the offender may have to serve every day of the head sentence.[1737]

However, a court may consider the possibility of release on parole, the rehabilitative potential of parole, and the offender's suitability for parole in fixing a non-parole period. Doing so does not transgress the prohibition against a court considering possible future executive action. That prohibition primarily excludes consideration of the possibility that parole will be cancelled for the purpose of assessing totality. It does not prevent a court from taking into account the possibility that a person will serve a period on parole, provided the court still sets a head sentence that would be appropriate whether or not the prisoner is released on parole.[1738]

8.3.3.3 – Prior sentences

Additional considerations apply when fixing a non-parole period for an offender who at the time of sentence is serving the non-parole period of a prior sentence of imprisonment (the 'parole sentence'). If the court intends to sentence the offender to a further term of imprisonment ('new sentence'), it must fix a new single non-parole period for *all* sentences the offender is to serve or complete.[1739] Because the non-parole period is the minimum term an offender must serve before the jurisdiction of the parole board is enlivened, it is wrong to approach the new sentence as if there must be an 'overall minimum term'

[1731] *Dosen v The Queen* [2012] VSCA 307, [7]-[9]; *Wallace* 521 [2]-[3].
[1732] *Rahmani v The Queen* [2021] VSCA 51, [45].
[1733] The Act s 11(2).
[1734] Ibid s 11(2A).
[1735] *Boulton* 352 [199]; *Atanackovic v The Queen* (2015) 45 VR 179, 189 [26]. See also 11.8.3 – Community correction order – Combining a CCO with a term of imprisonment – Interaction with a non-parole period.
[1736] *Morgan v The Queen* (2013) 40 VR 32, 57 [117]. See also 3.3.3 – Sentencing principles – Totality – Application to parole.
[1737] *R v Kasulaitis* [1998] 4 VR 224, 232.
[1738] *R v Boland* (2007) 17 VR 300, 303 [12]-[13], 306 [25], [27]; *R v Nunno* [2008] VSCA 31, [74]-[79].
[1739] The Act s 14(1).

consisting of any time remaining on the parole sentence and any non-parole period the court might fix for the new sentence.[1740]

This new non-parole period supersedes any previous non-parole period and must not allow the offender to become eligible for release on parole earlier than if the new sentence had not been imposed.[1741]

The requirement to set a new non-parole period does not apply to an offender serving a prior sentence of imprisonment that was originally a straight sentence without potential eligibility for parole[1742] or who has completed their original non-parole period.[1743] Nor does it apply to an offender sentenced at one time to offences across multiple indictments.[1744]

The single new non-parole period is not a 'sentence of imprisonment' for the purposes of determining when a sentence commences.[1745] Although a new single non-parole period could start at the date of either the parole sentence or the new sentence, as a matter of practice courts are encouraged to fix the date of the new sentence as the date of the new single non-parole period, or, on appeal, the date of the order under appeal. The most vital concern is that the date be expressly stated.[1746] When a court fixes a new single non-parole period to commence from the date of the new sentence it must make an allowance for the parole sentence already served.[1747]

The length of the new single non-parole period should reflect the standard considerations for fixing a non-parole period.[1748]

8.3.4 – Process

If a court is sentencing for multiple offences, the non-parole period applies to the aggregate period of incarceration the offender must serve for all offences.[1749]

A court ordinarily fixes a non-parole period by stating the term in months or years, which is preferable to nominating a specific date when the offender will be eligible for release on parole. Selecting a specific date may cause confusion and lead to error.[1750]

The failure to fix a non-parole period does not invalidate the sentence. The Act provides for a reviewing court to correct any such failure on application.[1751] However, a court's decision not to fix a non-parole period is, as noted, within its discretion and so does not provide a basis for a reviewing court to fix a non-

[1740] *DPP (Vic) v Dickson* (2011) 32 VR 625, 640 [51]. See also 8.6 – Imprisonment – Pre-sentence Detention below.
[1741] The Act s 14(2).
[1742] *R v Droste* [2009] VSCA 102, [40] ('*Droste*')
[1743] The Act s 14(1); *R v Bradley* [2010] VSCA 70, [16].
[1744] *R v XA* [2009] VSCA 52, [26].
[1745] *R v Rich (No 2)* (2002) 4 VR 155, 165-66 [103].
[1746] Ibid 157 [9], 166-167 [106]; *R v Brown* [2009] VSCA 23, [44]. See also *R v Stares* (2002) 4 VR 314, 324-25 [31], [33] ('*Stares*').
[1747] *R v Bortoli* [2006] VSCA 62, [58].
[1748] *R v Morgan* [2008] VSCA 258, [16]-[17], [24]-[25].
[1749] The Act s 11(4).
[1750] *Droste* [67].
[1751] The Act s 13.

parole period. The remedy there is an application for leave to appeal against sentence. The fixing of a non-parole period on application is limited to irregularities in sentencing.[1752]

An offender must not be denied eligibility for parole on the basis they are likely to be deported or transferred interstate on the expiration of any minimum term.[1753] However, as deportation or transfer may be relevant to an offender's prospects of rehabilitation, a court may consider it for that purpose but should be careful to explain that the length of the non-parole period has not been increased because of this possibility.[1754]

8.4 – Cumulation and concurrency

In sentencing an offender to be imprisoned for more than one offence the court must generally fix a total effective sentence. In State sentencing this is usually achieved by imposing individual sentences for each offence, and then making orders for concurrency or cumulation of all or part of those sentences. In federal sentencing the total effective sentence is produced by first imposing individual sentences for each offence, and then making differential orders for commencement. In both federal and State sentencing, some formalities associated with these procedures may be avoided in appropriate cases by imposing an aggregate sentence.[1755]

In Victorian sentencing, a judge must select a 'base sentence'. The longest term should be the 'base' sentence, and this is ordinarily the most severe individual sentence.[1756] Cumulation orders then add periods to be served in addition to that base sentence. A judge should usually select the longest individual sentence to be the base sentence. Otherwise, there is a risk of distorting the sentencing process if a shorter sentence is used as the 'base sentence', it may for example give undeserved primacy to a lesser offence.[1757] Similarly, imposing the total effective sentence on one charge and ordering total concurrency for all other charges is problematic because no punishment is attributed to those other offences and the resulting term on the single charge is disproportionate.[1758]

There is no formal rule governing the minimum length of any cumulation order. However, it is rare for cumulation orders to be made that are measured in days or weeks and most orders are measured in months. Subject to the dictates of totality, there is also no maximum period of cumulation. Cumulation orders can produce a total period of cumulation that exceeds the base sentence and even the maximum penalty for a single charge.[1759]

When an offender is sentenced on multiple indictments in the one proceeding, there are two distinct methods available for cumulation. The first approach is to disregard the different sources of the charges and cumulate directly towards the total effective sentence.[1760] The second approach is to cumulate

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[1752] *R v Heazlewood* [1999] 1 VR 172, 175-76; *Droste* [69]-[79].
[1753] See, eg, *Shrestha* 71-73, 76; *R v Friedemann* [1999] 1 VR 162, 169-70 [27]; *Nguyen v The Queen* [2010] VSCA 244, [15]-[17]; *Adenopo v The Queen* [2011] VSCA 269, [6]; *Cth Crimes Act* s 19AK.
[1754] *Mann v The Queen* [2011] VSCA 189, [40]-[44].
[1755] See 8.5 – Imprisonment – Aggregate Sentences below.
[1756] *DPP (Vic) v Swingler* [2017] VSCA 305, [64], citing *R v Nikodjevic* [2004] VSCA 222 and *Barbat v The Queen* [2014] VSCA 202; *Schulz v The Queen* [2019] VSCA 179, [126]-[127].
[1757] See, eg, *R v MDB* [2003] VSCA 181, [14].
[1758] *Frost v The Queen* [2020] VSCA 53, [48].
[1759] See *R v Towle* (2009) 54 MVR 543, 572 [99].
[1760] *DPP (Vic) v McClelland* (2008) 187 A Crim R 472, 478-79 [34]-[35], 481-82 [47], [54].

towards notional total sentences for each indictment, and then make further orders in respect of those subtotals to reach the final total effective sentence.[1761] Both approaches are correct. However, the second is more appropriate when the indictments each address discrete offending, as it enables a court to reach conclusions about the criminality on the separate occasions.[1762]

Cumulation orders must reflect differences in the seriousness of each offence, the different episodes of offending, and recognise each victim.[1763] Imposing uniform sentences, or uniform cumulation orders, across all offences of a certain type may indicate a failure to give appropriate consideration to each charge and risk producing an excessive head sentence.[1764]

The fundamental principle most relevant to cumulation and concurrency is totality.[1765]

8.4.1 – Victorian regime

The Act presents prima facie rules in respect of concurrency and cumulation, which are or may be modified if an offender falls into certain categories.

The principal rule presumes that sentences will be served concurrently,[1766] so if no order is made with respect to concurrency or cumulation sentences will be concurrent by operation of law. A court must exercise sound discretion in deciding whether to cumulate sentence, in relation to some or all counts and whether in whole or in part. The question is whether to depart from the prima facie statutory preference for concurrency.[1767] There must be good reason to order concurrency when a statute calls for cumulation and to order cumulation when it calls for concurrency.[1768]

However, there are exceptions to the prima facie rule. For terms of imprisonment for the following offences, the default rule is cumulation rather than concurrency:

- defaulting on a fine or payment of money,[1769] but only for uncompleted terms relating to a similar default;[1770]
- a prison offence or escape;[1771]
- a serious offender convicted of a relevant offence;[1772]
- an offence committed while released on parole or for breaching parole;[1773]
- an offence committed while released on bail;[1774]

[1761] *RBN v The Queen* [2011] VSCA 261, [25]-[26].
[1762] Ibid [27].
[1763] *Jenkins v The Queen* [2021] VSCA 65, [32]-[33].
[1764] *GJW* [8], [11].
[1765] See *R v Mantini* (1998) 3 VR 340, 348 ('*Mantini*'); *Rankine v The Queen* [2022] VSCA 27, [24]. See also 3.3 – Sentencing principles – Totality.
[1766] The Act s 16(1).
[1767] *R v O'Rourke* [1997] 1 VR 246, 253; *Mantini* 347.
[1768] *Mantini* 348.
[1769] The Act s 16(1A)(a).
[1770] Ibid s 16(2)(a).
[1771] Ibid ss 16(1A)(b), 16(3).
[1772] Ibid ss 6E, 16(1A)(c).
[1773] Ibid ss 16(1A)(d), 16(3B)-(3BA).
[1774] Ibid ss 16(1A)(e), 16(3C).

- a young offender whose subsequent offending was escape or involved property damage to specified correctional facilities;[1775]
- intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[1776]
- aggravated offence of intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[1777]
- recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[1778]
- aggravated offence of recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[1779]
- damaging an emergency vehicle.[1780]

Cases where the default rule is cumulation remain subject to fundamental principles and in particular the totality principle.[1781]

In cases involving a prison offence, escape, breaching parole, or offending committed while on parole, a court must find that 'exceptional circumstances' exist before displacing the prima facie cumulation of new sentences with the previous sentence.[1782]

For offences that do not require a showing of exceptional circumstances – fine or payment defaults, serious offender convicted of a relevant offence, offending committed while on bail, or specified offences against emergency workers and custodial officers – the court has wide discretion whether to order concurrency.[1783] In these cases, the totality principle can provide a basis for departing from the statutory presumption of cumulation.[1784]

Where an offender is paroled from a life sentence, a further sentence cannot be cumulated upon that life term.[1785] However, cumulation may be ordered between subsequent offences committed during release on parole independently of whether any cumulation is ordered with the parole sentence, even if that is a life sentence.[1786]

A court may express the sentence as involving either cumulation or concurrency, regardless of which is presumed by the legislation. The underlying requirement is that the individual elements of the sentence are clear. While it is preferable to formulate the sentence to state any deviation from the legislative presumption, there is no strict requirement to do so.[1787]

[1775] Ibid ss 16(1A)(f), 16(3D).
[1776] Ibid ss 16(1A)(g), 16(3D).
[1777] Ibid ss 16(1A)(h), 16(3D).
[1778] Ibid ss 16(1A)(i), 16(3D).
[1779] Ibid ss 16(1A)(j), 16(3D).
[1780] Ibid ss 16(1A)(k), 16(3D).
[1781] *R v Garcia* [2007] VSCA 194, [18].
[1782] The Act ss 16(3)-(3BA).
[1783] *Mantini* 348.
[1784] *R v Sebborn* (2008) 189 A Crim R 86, 89-90 [25]-[27].
[1785] *R v Jolly* [1982] VR 46; *R v Taikmaskis* (1986) 19 A Crim R 383; *R v Chamberlain* [2001] VSCA 159, [15].
[1786] *Roberts* 476-77 [100].
[1787] *DPP v OJA* (2007) 172 A Crim R 181, 199 [43]; *R v Harvey* [2007] VSCA 127, [25].

If an offender is already serving a sentence for a Commonwealth offence the court must direct when the new term commences. This must be no later than immediately after completion of the Commonwealth sentence, if no non-parole period or pre-release period was fixed, or immediately after the end of any non-parole or pre-release period fixed as part of the Commonwealth sentence.[1788]

For Victorian offending, the Magistrates' Court must not impose cumulative sentences of imprisonment exceeding five years in respect of several offences committed at the same time.[1789] There is no equivalent provision in the *Cth Crimes Act*. It is not clear whether there is any jurisdictional limit to the cumulative length of Commonwealth sentences imposed in the Magistrates' Court.[1790]

8.4.2 – Commonwealth regime

The Commonwealth regime requires that issues of cumulation and concurrency be addressed by the court making differential orders for the commencement of sentence(s). Specifically, if an offender is sentenced to imprisonment for a Federal offence and this means they will be serving multiple sentences of imprisonment, then the court must direct when each new sentence is to commence. The effect of the court's orders must be that any new sentence commences no later than the end of the sentences already fixed.[1791]

These rules apply in three different circumstances:

- where at the time of sentence the offender is already serving a State or Commonwealth sentence of imprisonment;[1792]
- where an offender is sentenced at one sitting to imprisonment on multiple Commonwealth offences;[1793]
- where an offender is sentenced at one sitting to imprisonment on a combination of State and Commonwealth offences.[1794]

Where a State non-parole period is relevant an additional rule applies, and the first Commonwealth sentence must commence immediately after the conclusion of that period.[1795]

A court cannot order cumulation of a State sentence on a Commonwealth sentence; it has no power to make such an order.[1796]

For more on the operation of cumulation and concurrency in Federal sentencing and their complex interaction with State sentencing please see the Commonwealth Sentencing Database.[1797]

[1788] The Act s16(4).
[1789] Ibid s 113B.
[1790] See the Act s 113B; *Judiciary Act 1903* (Cth) ss 39(2), 68(2); *Hansford v Judge Neesham* [1995] 2 VR 233, 237; *Ly v Jenkins* (2001) 114 FCR 237, [74]-[125]; *Zotos v The Queen* [2014] VSCA 324, [25] n 20.
[1791] *Cth Crimes Act* s 19(1)-(4).
[1792] Ibid s 19(1).
[1793] Ibid s 19(2).
[1794] Ibid s 19(3).
[1795] Ibid ss 19(1)(b), 19(3)(d).
[1796] *R v O'Brien* (1991) 57 A Crim R 80, 87.
[1797] See https://csd.njca.com.au/concurrent_consecutive_2/.

8.5 – Aggregate sentence

In sentencing an offender for 'two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character',[1798] a court may impose an aggregate sentence of imprisonment, addressing multiple offences in one sentence instead of separate sentences for each offence.[1799]

A court sentencing an offender for federal offences may also impose an aggregate sentence of imprisonment for proceedings on indictment pursuant to the Act,[1800] and for summary proceedings by operation of the *Cth Crimes Act*.[1801]

An aggregate sentence of imprisonment cannot exceed the total effective sentence that might have been imposed if the court had imposed separate sentences of imprisonment in respect of each offence.[1802] But an aggregate sentence is a 'term of imprisonment' for the purposes of the Act,[1803] which means a court may make any order for cumulation or concurrency in respect of an aggregate sentence that it might properly make for any other term of imprisonment.[1804] There is no prohibition on imposing more than one aggregate sentence for different offences sentenced in one proceeding. There is no requirement that offences grouped for different aggregate sentences follow the structure of the indictment. Offences can be grouped for aggregation in any way a court considers just and convenient.[1805]

The Act establishes a statutory maximum of two years imprisonment for an offender convicted by the Magistrates' Court of an indictable offence heard and determined summarily.[1806] While a total effective sentence exceeding two years may be imposed by the Magistrates' Court through cumulation orders,[1807] it is not clear whether this is also permissible through an aggregate sentence.[1808]

An aggregate sentence of imprisonment cannot be imposed:

- on a 'serious offender' where any of the offences for which they are convicted is a 'relevant offence';[1809]
- if one or more of the offences is a 'standard sentence offence';[1810]

[1798] The test is the same as applied to the joinder of charges on an indictment. See *DPP (Vic) v Rivette* [2017] VSCA 150, [80]-[81] ('*Rivette*'), quoting *R v Grossi* (2008) 23 VR 500, 510 [39] (Redlich JA) ('*Grossi*').
[1799] The Act s 9(1). Aggregate sentences are available even if the underlying offences are representative or rolled up charges: at s 9(4A). This overturned a limitation that had been identified in *DPP v Felton* (2007) 16 VR 214, 228-29 [41]-[42].
[1800] *Putland v The Queen* (2004) 218 CLR 174, 182 [13]-[14], 189 [42]-[43] ('*Putland*').
[1801] *Cth Crimes Act* ss 4K(3)-(4); *Putland* 180 [9], 190 [46], citing *R v Bibaoui* [1997] 2 VR 600, 603, 606-08.
[1802] The Act s 9(2); *Grossi* 510 [40] (Redlich JA).
[1803] The Act s 16.
[1804] *Grossi* 511 [42] (Redlich JA).
[1805] Ibid 511-12 [43].
[1806] The Act s 113(1).
[1807] Ibid s 113B.
[1808] See *Finn v Wallace* [2016] VSC 10.
[1809] The Act s 9(1A)(a). See 9.3 – Statutory schemes – Serious offenders.
[1810] The Act s 9(1A)(b). See 9.2 – Statutory schemes – Standard sentence scheme.

- if the offences include both an offence committed in violation of a parole order and an offence 'committed at another time'.[1811]

And an aggregate sentence may be inappropriate in the following circumstances:

- where the indictment contains only a small number of counts;[1812]
- where the charges represent a significant number of individual crimes and the imposition of an aggregate sentence precludes scrutiny of the sentence;[1813]
- for charges of significantly disparate gravity.[1814]

But imposing an aggregate sentence in these circumstances does not necessarily indicate error, and offences may be grouped for an aggregate sentence despite their disparity of kind and gravity where all were part of a single episode.[1815]

If a court proposes to impose an aggregate sentence of imprisonment, it must announce its decision in open court as well as its reasons for doing so and the effect of the proposed aggregate term.[1816] However, the court does not have to identify the separate events giving rise to the specific charges or to announce the sentences it would have imposed for each offence if separate sentences had been imposed, or whether they would have been imposed concurrently or cumulatively.[1817]

The Children's Court has similar powers to impose an aggregate term of detention on a child convicted of two or more offences.[1818]

8.6 – Pre-sentence detention

8.6.1 – Victorian regime

Section 18 of the Act requires that the time an offender spends in custody after being charged and before being sentenced for an offence must be taken into account and declared as time already served when they are sentenced to imprisonment or a period of detention for that same offence.[1819] If an offender is charged with a series of offences committed on different occasions and has been in continuous custody since their arrest, a sentencing court must take into account the whole of the custodial period from the time of their arrest even if they are not convicted of the offence underlying the first arrest or any other offence.[1820]

[1811] Ibid s 9(1)(b).
[1812] *Rivette* [81], [87].
[1813] *R v Faneco* [2009] VSCA 110, [7]-[8], [56].
[1814] *Rivette* [81], [87]; *Stevens v The Queen* [2020] VSCA 170, [54]-[56].
[1815] *DPP (Vic) v Rout* [2008] VSCA 87.
[1816] The Act s 9(3).
[1817] Ibid s 9(4).
[1818] See http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#60919.htm
[1819] The Act ss 18(1), (4).
[1820] Ibid s 18(6).

The Act does give a court discretion not to consider these pre-sentence detention ('PSD') periods if it 'otherwise orders',[1821] but this discretion should not be exercised without good reason.[1822] It cannot, for example, be because the court intends to impose a combination sentence of imprisonment and a CCO.[1823]

A court must make a PSD declaration both where s 18 requires and if it exercises its discretion to 'otherwise order'. In the first circumstance, it is acceptable to state:

> Under s 18(4) of the *Sentencing Act 1991* I declare that the period of x days is to be reckoned as a period of imprisonment already served under this sentence and I direct that the fact of this declaration and its details be noted in the records of the court.

When exercising its discretion not to consider PSD, the court's declaration must enter the time reckoned to have been served as 'nil days'.[1824] In either case, the declaration must then be entered in the records of the court.[1825] If, on application, a court is satisfied that the declaration is incorrect, it may declare the correct period and amend the sentence accordingly.[1826]

Similar provisions are made for any periods a young offender is detained.[1827] The *Cth Crimes Act* does not independently provide for PSD to be considered but instead applies State law to federal sentences.[1828]

In fixing a new single non-parole period when sentencing an offender who is already serving an earlier non-parole period, the Act prohibits the later sentencing court from taking into account a PSD period considered by the first sentencing court.[1829] However, where a PSD declaration has been made at the time of the first sentence, that declaration continues to operate, and the new single non-parole period set by the later sentencing court should not include the PSD declared on the first occasion. A later court setting a new single non-parole period must also declare a further PSD period unrelated to a PSD period already declared by the first court in setting the original sentence. And the correctional authorities should aggregate the two periods of pre-sentence detention declared.[1830]

The maximum length of imprisonment on a combination imprisonment and CCO sentence is one year plus time served as PSD.[1831]

Section 18 does not apply to:

- custodial periods of less than one day.[1832] Although the courts apply this in a practical manner where the only custodial period is the day of sentencing;

[1821] Ibid s 18(1).
[1822] See, eg, *Rivette* [62], citing *R v Foster* [2000] VSCA 187, [38]-[39]; *Pang v The Queen* [2019] VSCA 56, [45] ('*Pang*').
[1823] *Pang* [46].
[1824] Ibid [36].
[1825] The Act s 18(4). *Pang* [30].
[1826] The Act s 18(7); *R v Nguyen* [1999] VSCA 119, [22]; *R v Le Broc* (2000) 2 VR 43, 68 [75]; *Mokbel v The Queen* [2011] VSCA 106, [63] n6.
[1827] The Act s 35. See also http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#60915.htm.
[1828] *Cth Crimes Act* s 16E(2).
[1829] The Act s 14(2)(d). See 8.3 – Imprisonment – Non-Parole Period above.
[1830] *Stares* 322-23 [23]-[26].
[1831] The Act s 44(1). See 11.8.4 – Community correction order – Combining a CCO with a term of imprisonment – Application of time served.
[1832] The Act s 18(2)(a).

- imprisonment or detention in a designated mental health service of less than one day.[1833] This most commonly occurs when an offender is sentenced 'to the rising of the court';
- a period already declared as reckoned to be a period of imprisonment or detention already served under another sentence of imprisonment or detention or Court Secure Treatment Order imposed on the offender.[1834]

In addition to these express statutory exceptions, the courts have identified other circumstances where the Act does not apply, including:

- custodial periods when the offender was already serving another sentence or period of youth detention.[1835] This includes custody served once parole is cancelled after the offender is charged for the subject offence(s).[1836] But there is a significant exception where a sentence of imprisonment is quashed on appeal. If an offender is resentenced on appeal, time served under the quashed sentence requires a PSD declaration;[1837]
- detention served for offending in another jurisdiction or overseas pending extradition for trial in Victoria for another offence;[1838]
- immigration detention pending trial.[1839]

8.6.2 – *Renzella* discretion – common law pre-sentence detention declarations

The Act is not the exclusive pronouncement on the extent that pre-sentence detention ('PSD') may be considered. Courts have an independent common law '*Renzella* discretion' to consider an offender's PSD which is not subject to a s 18 declaration.[1840] Historically, this arose because of limitations in when a s 18 declaration could be made. Now, it allows courts to count periods served in a residential rehabilitation facility or an immigration detention facility because of its restrictive and punitive aspects, but this is not equivalent to 'real incarceration' and so does not attract the same deduction or weight.[1841]

Undeclared PSD periods are sometimes called 'dead time'. That term is not defined, but the Court of Appeal has said it is a period of time that, with the benefit of hindsight, should not have been served. It is particularly relevant to time spent on remand:

- for charges that are discontinued or withdrawn; or
- during which the accused was not serving another sentence or was not on remand for another offence for which they were ultimately tried; or

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[1833] Ibid s 18(2)(b).
[1834] Ibid s 18(2)(d).
[1835] *R v Broad* [1999] 3 VR 31, 33-35 [11]; *Barrett v The Queen* (2010) 27 VR 522, 532-33 [46]; *Lunt v The Queen* [2011] VSCA 56, [41]-[46]; *Nov v The Queen* [2020] VSCA 11, [5]-[7]. Cf *Younger v The Queen* [2017] VSCA 199, [68]-[71].
[1836] *R v Youil* (1995) 80 A Crim R 1 ('*Youil*'); *R v Smith* [2006] VSCA 23, [8].
[1837] *R v Jennings* [1999] 1 VR 352, 369 [67], 371 [75]; *DPP (Vic) v Ty (No 2)* (2009) 24 VR 705, 710-12 [21]-[27].
[1838] *Tsang v The Queen* (2011) 35 VR 240, 276 [169(2)-(3)]; *Gavanas v The Queen* [2013] VSCA 178, [102]; *Buddle v The Queen* [2014] VSCA 232 ('*Buddle*').
[1839] *Sahhitanandan v The Queen* [2019] VSCA 115, [30]-[31] ('*Sahhitanandan*'); *Underwood (a pseudonym) (No 2) v The Queen* [2018] VSCA 87, [37]. See also *Frost v The Queen* [2020] VSCA 53, [58].
[1840] *R v Renzella* [1997] 2 VR 88, 96-97 ('*Renzella*'); *Stares* 322 [24]; *Karpinski v The Queen* [2011] VSCA 94, [30] ('*Karpinski*'); *Wheldon v The Queen* (2011) 31 VR 297, 300-03 [18]-[19], [26], [31]-[32], [41].
[1841] *Akoka v The Queen* [2017] VSCA 214, [111]-[112]; *Sahhitanandan* [30]-[31].

- on charges of which the accused was later acquitted.[1842]

Courts take PSD 'dead time' into account by reducing the base sentence or moderating orders for cumulation to reduce the head sentence. Taking 'dead time' into account is not a mathematical exercise and the court does not need to reduce the sentence by the precise amount of 'dead time'. Instead, the court should reduce the sentence by the amount it considers appropriate in the circumstances.[1843]

Time served under a previous sentence is not declarable PSD. Instead, a court sentencing a person who was already undergoing sentence must make clear that it has taken the earlier sentence into account through the principle of totality to ensure the total period of imprisonment to be served is appropriate.[1844]

In some cases, there may be no practical difference between exercising the *Renzella* discretion or applying the principle of totality, as both are concerned with fairness and imposing a sentence that is just and appropriate.[1845]

When exercising the *Renzella* discretion, previous periods of detention should be taken into account at the earliest opportunity and not left to a court imposing a later sentence.[1846] But the discretion has been exercised even where the custodial period that should not have been served arose in the distant past.[1847]

The *Renzella* discretion does not operate where an offender is on parole from a life sentence – this is because otherwise the period served for the life sentence would be taken into account and serial offenders would be entitled to substantial deductions for their most recent offending, which is manifestly unreasonable and not in the public interest.[1848]

8.7 – Indefinite sentence

An adult offender who is convicted of a 'serious offence'[1849] by the Supreme or County Courts may be sentenced to an indefinite term of imprisonment, regardless of any maximum penalty set for that offence.[1850] They will not be eligible for parole and a non-parole period will not be fixed.[1851] Instead, the court fixes a 'nominal sentence' equal to the non-parole period of the fixed term it might have

[1842] See, eg, *Warwick v The Queen* (2010) 201 A Crim R 580, 583 [8], 585 [17] ('*Warwick*'); *Karpinski* [28]-[29], [38]; *Vella v The Queen* [2011] VSCA 126, [32], [34]; *El-Waly v The Queen* (2012) 46 VR 656, 673-74 [113(d)] ('*El-Waly*'); *Kheir v The Queen* [2012] VSCA 13, [16], [21] ('*Kheir*')
[1843] See, eg, *Youil* 4; *Stares* 325 [33]; *R v Chimirri* [2003] VSCA 45, [5]-[6]; *Warwick* 584-85 [10], [13]-[14]; *El-Waly* 673-74 [110]; *Kheir* [17]; *Liang v The Queen* [2011] VSCA 148, [35]; *Thurlow v The Queen* [2021] VSCA 71, [42] ('*Thurlow*').
[1844] *R v Boyd* [2002] VSCA 102, [21]-[25]; *Thurlow* [42].
[1845] *Buddle* [44], [50]-[51]; *Thurlow* [42]-[43].
[1846] *Renzella* 98; *Kheir* [14].
[1847] *El-Waly* 673-74 [113(d)]. See also *Karpinski* [6] (Weinberg JA).
[1848] *Roberts* 479-80 [114]-[116].
[1849] The Act s 6B(3).
[1850] Ibid ss 18A(1), (6).
[1851] Ibid ss 18A(2), (4).

imposed.[1852] Presumably, this means the nominal sentence is fixed by the same considerations involved in fixing a non-parole period.[1853]

The court may impose an indefinite sentence on its own initiative or on application of the Director of Public Prosecutions ('DPP').[1854] However, because an indefinite sentence is a form of preventative detention, which is at odds with the fundamental principle of proportionality, it is a power that should be exercised sparingly in the exceptional case where a court is compelled to find the offender is a serious danger to the community.[1855] Therefore, before imposing an indefinite sentence a court must:

- consider whether the provisions of the Act regarding the making of a Court Secure Treatment Order apply, and if so, it must make that order instead;[1856] and
- be satisfied to a *high degree of probability* that, at the time of sentencing,[1857] the offender poses a serious danger to the community because of their circumstances, the gravity of the offending, and any special circumstances.[1858]

In deciding whether the offender poses a 'serious danger' the court must consider:

- whether the nature of the serious offence is exceptional;[1859]
- anything relevant contained in the transcript of any proceeding against the offender for a serious offence;[1860]
- any medical, psychiatric or other relevant report received;[1861]
- the risk of serious danger to community if an indefinite sentence is not imposed and the need to protect the community from that risk;[1862] and
- anything else that it thinks fit.[1863]

The DPP may only apply for an indefinite sentence if it has filed a notice of intention to apply either on the day of conviction or within five working days after that date and have made the application itself within 10 working days after the date of the conviction or any longer period fixed by the court with that ten-day period.[1864]

[1852] Ibid s 18A(3).
[1853] *R v Moffat* [1998] 2 VR 229, 246 ('*Moffat*').
[1854] The Act s 18A(5).
[1855] *Moffat* 234, 256. See also *Chester v The Queen* (1988) 165 CLR 611, 618-19; *R v Davies* (2005) 11 VR 314, 331 [48]-[51], 336 [67], [69]; *Carolan v The Queen* (2015) 48 VR 87, 106 [54], 109 [62] ('*Carolan*').
[1856] The Act s 18A(7).
[1857] *R v Carr* [1996] 1 VR 585, 592. See also *Moffat* 248, 254; *Carolan* 105 [50].
[1858] The Act s 18B(1). The prosecution has the burden of proving the offender is a serious danger: at 18B(3); *Moffat* 234, 246-247.
[1859] The Act s 18B(2)(a). The nature of a serious offence as 'exceptional' is an important consideration and may mean that some special feature of the case attracts sterner punishment. See *Moffat* 254-55.
[1860] The Act s 18B(2)(b).
[1861] Ibid s 18B(2)(c).
[1862] Ibid ss 18B(2)(d)-(e).
[1863] Ibid s 18B(2).
[1864] Ibid s 18C(1).

On the DPP's filing of a notice of intention to apply for an indefinite sentence, the court must revoke any order releasing the offender pending sentence and remand them in custody.[1865] If the court is considering imposing an indefinite sentence (on its own initiative or the DPP's application) it must, on the day of conviction or within five working days afterwards, explain in clear and comprehensible language that it is considering imposing that sentence and what it means for the offender. It must then adjourn the date of sentence for at least 25 working days after the date of conviction.[1866]

Before imposing an indefinite sentence, the court must also:

- allow the parties to lead any relevant evidence and consider their submissions on that sentence;[1867]
- consider any victim impact statements and evidence related to those statements;[1868] and
- consider any pre-sentence reports filed with the court.[1869]

If it then imposes an indefinite sentence, the court must give its reasons for doing so and have them entered in the record of the court.[1870]

If the court has imposed an indefinite sentence after it considered a psychiatrist's report made while the offender was subject to Court Assessment Order, it must deduct any period the offender was detained under that order from the nominal sentence.[1871]

A court must review an indefinite sentence:

- on application of the DPP made as soon as practicable after service of the nominal sentence;
- on application of the offender made three years after review on the DPP's application; and
- after that at intervals of not less than three years.[1872]

On an offender making application for review the court must provide the DPP with a copy and must within 10 working days make directions for the application's hearing and must hear it within 25 working days of the filing.[1873]

A reviewing court does not need to be constituted by the same judge who imposed the indefinite sentence,[1874] and may order any report on the offender it considers appropriate as relates to the period since the indefinite sentence was imposed or last reviewed.[1875] These reports must be provided to the

[1865] Ibid s 18C(2).
[1866] Ibid s 18D.
[1867] Ibid ss 18F(a), (c).
[1868] Ibid s 18F(ab).
[1869] Ibid s 18F(b).
[1870] Ibid s18G.
[1871] Ibid s 18E(1).
[1872] Ibid ss 18H(1)-(2).
[1873] Ibid ss 18H(3)-(4).
[1874] Ibid s 18H(5).
[1875] Ibid ss 18I(1), (3).

parties and the offender (if the court directs).[1876] The parties may also file any reports they have had prepared for the review and must provide copies to each other.[1877]

The parties may file a notice of intention to dispute, in whole or in part, any report.[1878] If they do so the court must not consider that report (or disputed part) on the review hearing before the parties have been given the opportunity to lead evidence on the disputed matters and cross-examine the author of the report.[1879] On review, the court must give the parties the opportunity to lead admissible evidence on any relevant matter, consider any report filed subject to decisions made respecting any dispute, and have regard to the submissions on review.[1880] The offender must be present at a disputed report or review hearing unless they act in a way that makes their appearance impracticable. In which case, the court may order them removed and proceed in their absence. The court may also proceed in the offender's absence if it is satisfied doing so will not prejudice their interests, and that it is in the interests of justice to do so.[1881]

On review the court must, unless satisfied to a *high degree of probability* that the offender still poses a danger to the community at the time of review,[1882] make an order discharging the indefinite sentence, making the offender subject to a re-integration program, and issuing a warrant to imprison in the same way as if it had sentenced the offender to a five year term.[1883] If the court is satisfied to the requisite standard and so does not make a discharge order, the indefinite sentence continues in force.[1884]

In reviewing an indefinite sentence, the court is not 'imposing sentence'[1885] and so the prohibition on considering whether an offender is subject to an order under the *Serious Offenders Act 2018* (Vic) and the prohibition on speculation about future executive action under the Act of the Act do not apply.[1886] A reviewing court considering whether an offender continues to pose a danger to the community should therefore assume the relevant authorities will responsibly exercise their statutory powers to protect the community.[1887]

An offender has the right to appeal the refusal to make a discharge order, and conversely, the DPP has the right to appeal any discharge order.[1888] The Court of Appeal may then confirm the refusal or discharge order and dismiss the appeal, or it may uphold the appeal and either make the order it considers should have been made or set aside any order made.[1889] This means it is an appeal in the 'strict sense' and the

[1876] Ibid s 18J(1).
[1877] Ibid s 18J(2).
[1878] Ibid s 18K(1).
[1879] Ibid s 18K(2).
[1880] Ibid s 18L.
[1881] Ibid s 18P.
[1882] *Carolan* 113 [78].
[1883] The Act s 18M(1).
[1884] Ibid s 18M(2).
[1885] *Carolan* 100-01 [35]-[37].
[1886] Ibid 98-103 [30]-[44], 104 [48]. See 9.3 – Statutory schemes – Serious offenders.
[1887] *Carolan* 110 [68].
[1888] The Act ss 18O(1)-(2).
[1889] Ibid s 18O(3).

appellant must show 'that the primary judge erred in accordance with the principles in *House v The King*'.[1890] If the Court of Appeal sets aside a discharge order, the indefinite sentence revives.[1891]

8.8 – Suspended sentence

Victoria progressively abolished suspended sentences from 1 May 2011. Suspended sentences are not available for offences committed after the following dates:[1892]

Offences and court	**Date**
All offences heard in the County or Supreme Courts	1 September 2013
Serious or significant offences heard in the County or Supreme Courts	1 May 2011
All offences heard in the Magistrates' Court at first instance	1 September 2014
All offences heard in the Magistrates' Court following a transfer from a higher Court	1 September 2013

"Serious offences" and "significant offences" were defined to include:

- murder;
- manslaughter;
- child homicide;
- defensive homicide;
- intentionally causing serious injury;
- recklessly causing serious injury;
- threats to kill;
- rape;
- assault with intent to rape;
- incest (except where the participants were both over 18 and consented);
- sexual penetration of a child under 16;
- persistent sexual abuse of a child under 16;
- abduction or detention;
- abduction of a child under 16;
- kidnapping;
- armed robbery;
- aggravated burglary;
- arson;
- arson causing death;
- trafficking a large commercial quantity of a drug of dependence;

[1890] *Carolan* 97 [24]-[25].
[1891] The Act s 18O(4).
[1892] *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

- trafficking a commercial quantity of a drug of dependence.[1893]

[1893] The Act s 3 (definition of 'serious offence' and definition of 'significant offence'), as in force before 1 September 2014.

9 – Statutory Schemes

9.1 – Mandatory imprisonment schemes

9.1.1 – Category 1 and 2 offences

Despite the principle that imprisonment is the sentence of last resort, Parliament has created categories of offences (called Category 1[1894] or Category 2[1895] offences) where a court must impose a sentence of imprisonment unless an exception is engaged.

For most Category 1 offences, a court must impose a sentence of imprisonment and must not attach a Community Correction Order ('CCO').[1896] An exception applies to Category 1 offences that are also mandatory minimum sentence offences against protected officials.[1897] This exception is described below.

For Category 2 offences, a court must impose a sentence of imprisonment (without a CCO) unless:

- the offender has assisted or given an undertaking to assist law enforcement authorities in the investigation or prosecution of an offence.[1898] This is to be distinguished from an admission, which is not the same thing for the purposes of this exception;[1899]

- the offender proves on the balance of probabilities that, at the time of offending, they had impaired mental functioning (which is not substantially caused by self-induced intoxication) that is causally linked to the commission of the offence which substantially and materially reduces their culpability;[1900] or

- the offender proves on the balance of probabilities they have impaired mental functioning that would result in their being subject to 'substantially and materially greater' than ordinary burdens or risks of imprisonment;[1901]

    - this provision cannot apply if there is no extant mental illness at the time of sentence, only the possibility that one might be developed in prison;[1902]

    - but when an offender has complex mental health needs, submits evidence outlining those needs, and has further submitted that their impaired mental functioning would result in them being subjected to a substantially and materially greater than ordinary burden of imprisonment, then the *prosecution* is best placed to adduce evidence that those needs can be met in custody.[1903]

[1894] *Sentencing Act 1991* (Vic) s 5(2G).
[1895] Ibid s 5(2H)-(2HA).
[1896] Ibid s 5(2G).
[1897] See 9.1.2.3 – Violence offences against protected officials – 6m to 5y minimum non-parole period below.
[1898] The Act s 5(2H)(a).
[1899] *Farmer v The Queen* [2020] VSCA 140, [72], [83]-[84] ('*Farmer*').
[1900] The Act ss 5(2H)(c)(i), 5(2HA). See also *Dabaja v The King* [2023] VSCA 209, [44].
[1901] Ibid s 5(2H)(c)(ii).
[1902] *DPP (Vic) v Lombardo* [2022] VSCA, [46] ('*Lombardo*').
[1903] *Peers v The Queen* [2021] VSCA 264, [54] ('*Peers*').

- the court proposes to make a Court Secure Treatment Order or a Residential Treatment Order;[1904] or

- 'there are substantial and compelling circumstances that are exceptional and rare and that justify' not imposing a sentence of imprisonment.[1905]

The exceptions closely follow the test of 'special reasons' for not imposing a mandatory minimum sentence,[1906] including provisions about the weight given to general deterrence and denunciation, limits on the consideration of good character, guilty plea, rehabilitation, or parity, and a need to have regard to Parliament's intention that a sentence of imprisonment should ordinarily be imposed for offences of this type.[1907]

The last exception – the existence of substantial and compelling circumstances that are exceptional and rare – 'is a residual category of limited scope'.[1908] It presents a stringent test, one that is not discretionary and which presents a higher hurdle than *Verdins*.[1909] In fact, the Court of Appeal has said the test will not often, if ever, be satisfied.[1910]

However, the Court has also said that at best such an observation only describes the apparent operation of the legislation without providing any guidance as to its meaning, particularly given that the subsection applies to many different offences and the degree of difficulty in satisfying the exception may vary depending on which offence is under consideration.[1911]

The relevant inquiry has two key steps:

1. The court must identify whether there are substantial and compelling circumstances, which means circumstances that are sufficiently weighty and powerful to justify not imposing a custodial sentence.[1912]

2. And if so, are the circumstances also 'exceptional and rare' in the sense that they are 'wholly outside the "run of the mill" factors typical of the relevant offending'.[1913]

But because it is an evaluative test, the Court has also said that minds might reasonably come to a different conclusion on its applicability. In addition, it has stated the test for the exception is one in which the accumulation of detail may compel a conclusion that the mandatory detention provision should not apply.

[1904] The Act s 5(2H)(d).
[1905] Ibid s 5(2H)(e).
[1906] Compare the Act s 10A. See 9.1.3 – Special reason below.
[1907] See, eg, the Act ss 5(2HC), 5(2I).
[1908] *Farmer* [51].
[1909] *Peers* [51].
[1910] *Farmer* [51]; *DPP (Vic) v Bowen* [2021] VSCA 355, [11], [51]-[53], [68]-[69]; *Buckley v The Queen* [2022] VSCA 138, [3]-[14], [44], [47]-[49].
[1911] *Lombardo* [64].
[1912] Ibid [66].
[1913] Ibid [67], [70], quoting *Hudgson v The Queen* [2016] VSCA 254, [112].

As a result different conclusions have been reached.[1914]

9.1.2 – Mandatory minimum sentences

In addition to the requirement that courts impose a sentence of imprisonment for Category 1 and Category 2 offences, Parliament has specified that, for some offences, and subject to certain requirements and exclusions, a court must impose a sentence of imprisonment with a non-parole period of at least a certain length. These minimum non-parole period provisions can be divided into five groups:

- manslaughter offences;
- gross violence offences;
- offences against protected officials;
- driving offences against protected officials; and
- aggravated home invasion or carjacking offences.

The Act also sets a mandatory minimum sentence of imprisonment for certain breaches of supervision orders under the *Serious Offenders Act 2018* (Vic).

9.1.2.1 – Manslaughter offences – 10-year minimum non-parole period

The Act specifies two situations in which a 10-year minimum non-parole period applies to a conviction for manslaughter. These are:

- manslaughter in circumstances of gross violence;[1915] and
- manslaughter by a single punch or strike.[1916]

In each situation, the prosecution must give notice that it intends to apply for the minimum non-parole period provisions to apply.[1917]

Manslaughter in circumstances of gross violence requires proof beyond reasonable doubt that:

- the offender:
    - caused the victim's death in company with two or more people; or
    - entered into an agreement, arrangement or understanding with two or more people to engage in the conduct that caused the victim's death; and
- the offender:
    - planned in advance to have and use an offensive weapon or firearm, and did use the offensive weapon or firearm to cause the victim's death; or
    - planned in advance to engage in the conduct that caused the victim's death and at the time of planning a reasonable person would have foreseen that the conduct would be likely to result in death; or

[1914] See, eg, *Farmer* [56]-[66]; *Fariah v The Queen* [2021] VSCA 213, [25]; *Peers* [58]-[59], [67]-[68]; *Buckley* [43]; *Al-Anwiya v The Queen* [2022] VSCA 181, [34]-[35]; *Lombardo* [65]-[90]; *DPP (Vic) v Silivaai* [2023] VSCA 19.
[1915] The Act s 9B(2).
[1916] Ibid s 9C(2).
[1917] Ibid s 9A.

- caused two or more serious injuries to the victim during a sustained or prolonged attack.[1918]

Manslaughter by a single punch or strike requires proof beyond reasonable doubt that:

- the victim's death was caused by a punch or strike that is taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act; [1919] and
- the offender intended that the punch or strike be delivered to the victim's head or neck; and
- the victim was not expecting to be punched or struck by the offender; and
- the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.[1920]

The minimum non-parole period for these manslaughter offences does not apply if:

- the offender was under 18 at the time of the offence;[1921] or
- the court finds special reasons for not applying the statutory minimum.[1922]

In addition, the minimum non-parole period for manslaughter by a single punch or strike does not apply to a person who intentionally directed, assisted or encouraged the offence, or who intentionally directed, assisted or encouraged another offence knowing it was probable the charged offence would occur.[1923]

The Court of Appeal has observed that the fact the legislation fixes only a mandatory minimum non-parole period, has two undesirable consequences. First, in cases where the mandatory term must be imposed it is antithetical to general sentencing principles and skews a court's exercise of the sentencing discretion. Secondly, it may lead 'to an unacceptably short prospective period of supervision on parole'.[1924]

9.1.2.2 – Gross violence offences – four-year minimum non-parole period

When sentencing a person for offences of intentionally or recklessly causing serious injury in circumstances of gross violence, a court must impose a non-parole period of at least four years unless:

- the provisions for offences against protected officials apply;
- the accused was found guilty on the basis of intentionally directing, assisting or encouraging the offence, or intentionally directing, assisting or encouraging another offence knowing it was probable the charged offence would occur;
- the offender was under 18 at the time of the offence;[1925]

[1918] Ibid s 9B(3).
[1919] Under the *Crimes Act 1958* (Vic) s 4A(2) ('*Crimes Act*').
[1920] The Act s 9C(3). As used in this part the "punch" or "strike" the victim must not expect is the same one that caused their death and was intended by the offender. They do not have to expect any kind of "punch" or "strike". See, eg, *Esmaili v The Queen* [2020] VSCA 63, [47]-[51] ('*Esmaili*').
[1921] Ibid ss 9B(4), 9C(6)(b).
[1922] Ibid ss 9B(2), 9C(2).
[1923] Ibid s 9C(6)(a); *Crimes Act* ss 323(1)(a)-(b).
[1924] *Esmaili* [60]-[63], [98]-[99].
[1925] The Act s 10(2); *Crimes Act* ss 323(1)(a)-(b).

- the court finds special reasons for not applying the statutory minimum.[1926]

9.1.2.3 – Violence offences against protected officials – six-month to five-year minimum non-parole period

The Act specifies a series of minimum non-parole periods for offences against certain protected officials.

The following officials are protected for this purpose:

- emergency workers on duty; [1927]
- custodial officers on duty;
- youth justice custodial workers on duty.[1928]

The minimum non-parole period varies depending on the relevant offence, as follows:

Offence	**Minimum non-parole period**
Intentionally causing serious injury in circumstances of gross violence	5 years
Recklessly causing serious injury in circumstances of gross violence	5 years
Intentionally causing serious injury	3 years
Recklessly causing serious injury	2 years
Intentionally or recklessly causing injury	6 months

The Act provides that a court may decide not to impose a sentence of imprisonment with the associated minimum non-parole period and instead impose a youth justice centre order of a term not less than the prescribed minimum non-parole period if:

- the offender, at the time of being sentenced, is under the age of 21;
- the court does not find special reasons for not applying the statutory minimum; and
- the court has received a pre-sentence report and believes that:
    - the offender has reasonable prospects for rehabilitation; or
    - the offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[1929]

This exception does not apply to charges of intentionally or recklessly causing serious injury in circumstances of gross violence.

The mandatory minimum non-parole period only applies if it is proved beyond reasonable doubt that:

[1926] The Act s 10(1).
[1927] These include any person or body who is employed or engaged by a State, Territory or the Commonwealth to perform similar functions while on duty in Victoria. Ibid s 10AA(m).
[1928] These terms are defined in the Act ss 10AA(8)-(11).
[1929] The Act ss 3 (definition of 'young offender'), 10AA(2)-(3).

- a victim of the offence was an emergency worker on duty, a custodial officer on duty, or a youth justice custodial worker on duty (as the case may be); and
- at the time of carrying out the conduct the offender knew or was reckless as to whether the victim was an emergency worker or a custodial officer or a youth justice custodial worker (as the case may be).

The statutory minimum non-parole period does not apply if:

- the accused was found guilty on the basis of intentionally directing, assisting or encouraging the offence, or intentionally directing, assisting or encouraging another offence knowing it was probable the charged offence would occur and they prove on the balance of probabilities that their involvement was minor;
- the offender was under 18 at the time of the offence;[1930]
- the court finds special reasons for not applying the statutory minimum.[1931]

If the offender was charged with intentionally causing serious injury, recklessly causing serious injury or intentionally or recklessly causing injury and finds that special reasons exist for not applying the statutory minimum, the court must sentence in accordance with s 5(2GA) of the Act. This requires the court to either impose a sentence of imprisonment (without a CCO) or make one of the following orders:

- a mandatory treatment and monitoring order;
- a Residential Treatment Order; or
- a Court Secure Treatment Order.

A court may only make one of these therapeutic orders if:

- the offender proves on the balance of probabilities that, at the time of the commission of the offence, they had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces their culpability;
- the impaired mental function was not caused substantially by self-induced intoxication;
- the court has received a report addressing these matters from a psychiatrist or a registered psychologist who has examined the offender in relation to the offending;
- the court has had regard to that report and any other evidence it considers relevant; and
- the court is satisfied that a mandatory treatment and monitoring order, a Residential Treatment Order, or a Court Secure Treatment Order, as the case requires, is appropriate.[1932]

[1930] Ibid s 10AA(6); *Crimes Act* ss 323(1)(a)-(b).
[1931] The Act s 10AA(1).
[1932] Ibid ss 5(2GA)-(2GB).

9.1.2.4 – Driving offences against protected officials – two-year minimum non-parole period

A person convicted of an offence against *Crimes Act 1958* (Vic) ss 317AC[1933] or 317AD[1934] must be sentenced to imprisonment with a non-parole period of at least two years if, in the commission of the offence, the protected official was injured.[1935]

This statutory minimum does not apply if:

- the offender was under 18 at the time of the offence; or
- the court finds special reasons for not applying the statutory minimum.[1936]

If the court finds special reasons for not applying the statutory minimum, the court must either impose a sentence of imprisonment (without a CCO) or make one of the following orders:

- a mandatory treatment and monitoring order;
- a Residential Treatment Order; or
- a Court Secure Treatment Order.

The circumstances in which the court can make one of the above orders is the same as for violence offences against protected officials, described above.

9.1.2.5 – Aggravated home invasion or carjacking – three-year minimum non-parole period

A court must impose a sentence of imprisonment and a non-parole period of at least three years when sentencing a person for the offences of:

- aggravated home invasion;[1937]
- aggravated carjacking.[1938]

This statutory minimum does not apply if:

- the offender was under 18 at the time of the offence;[1939]
- the court finds special reasons for not applying the statutory minimum.[1940]

The Court of Appeal has held that (as with standard sentencing) this mandatory minimum serves as a yardstick that sits alongside existing sentencing principles but does not displace the instinctive

[1933] Intentionally exposing an emergency worker, a custodial officer or youth justice custodial worker to risk by driving.
[1934] Aggravated intentionally exposing an emergency worker, a custodial officer or youth justice custodial worker to risk by driving.
[1935] The Act s 10AE(1).
[1936] Ibid s 10AE(2).
[1937] Ibid s 10AC(1).
[1938] Ibid s 10AD(1).
[1939] Ibid ss 10AC(2), 10AD(2).
[1940] Ibid ss 10AC(1), 10AD(1).

synthesis.[1941] However, for cases involving multiple charges the significance of the mandatory minimum as a guidepost will be different than in cases involving a single charge.[1942] This is because it operates alongside the s 11(3) requirement that a non-parole period be at least six month's less than the term of the sentence, therefore the mandatory minimum term for a single charge will be three years and six months.[1943] But in a multiple charge case, if other sentencing orders produce a head sentence of three and a half years or higher, and a non-parole period of three years or higher, then the mandatory minimum might be satisfied by an individual sentence of three years' imprisonment or less on a charge of aggravated carjacking. Therefore, the guidepost for a head sentence is uncertain in a multiple charge case.[1944]

9.1.2.6 – Contravening supervision orders – 12-month minimum imprisonment

When sentencing a person for contravention of a supervision or interim supervision order,[1945] the court must impose a sentence of imprisonment of at least 12 months.

This minimum term only applies if the court is satisfied beyond reasonable doubt that the offender intentionally or recklessly contravened a restrictive condition of the order.[1946]

9.1.2.7 – Federal minimum non-parole period offences

Federal legislation also defines treachery, terrorism, treason and espionage offences,[1947] and aggravated people smuggling[1948] as 'minimum non-parole offences'. When sentencing an offender convicted of one or more of these offences, a court must fix a single non-parole period of at least three-quarters of the head sentence.[1949]

[1941] *Mammoliti v The Queen* [2020] VSCA 52, [27]-[28] ('*Mammoliti*'), citing *Brown v The Queen* [2019] VSCA 286 ('*Brown COA*').
[1942] *Mammoliti* [29].
[1943] Ibid [39], [59].
[1944] Ibid [29].
[1945] Contrary to *Serious Offenders Act 2018* (Vic) s 169.
[1946] The Act s 10AB(2).
[1947] *Crimes Act 1914* (Cth) s 19AG(1) ('*Cth Crimes Act*').
[1948] *Migration Act 1958* (Cth) s 236B.
[1949] *Cth Crimes Act* s 19AG(2).

9.1.3 – Special reason

Victorian mandatory minimum sentence provisions all provide an exception where the court finds a 'special reason'. If a court finds that a 'special reason' exists, it may decline to impose a term of imprisonment (in the case of a Category 1 offence) or may impose a non-parole period below the statutory minimum (in the case of minimum non-parole period offences).[1950]

A special reason may exist in four circumstances.

Firstly, if the offender has assisted or given an undertaking to assist authorities in the prosecution or investigation of an offence.[1951]

Secondly, if the offender proves on the balance of probabilities that at the time of committing the offence they had a mental impairment that is causally related to their offending, which substantially and materially reduces their culpability,[1952] or that would cause them substantially greater than ordinary burdens or risks of imprisonment.[1953]

Thirdly, if the court intends to impose a Court Secure Treatment Order or Residential Treatment Order.[1954]

Lastly, if there are substantial and compelling reasons, that are exceptional and rare, which justify not imposing term of imprisonment.[1955] In determining if there are 'substantial and compelling reasons' a court must:

- regard general deterrence and denunciation as the primary sentencing purposes;[1956]
- give less weight to the offender's personal circumstances than to other matters such as the nature and gravity of the offending;[1957]
- not consider the offender's prior good character (other than a lack of previous convictions or findings of guilt), early guilty plea, prospects for rehabilitation, or parity;[1958] and
- have regard to Parliament's intention that a custodial term should ordinarily be imposed.[1959]

[1950] However, if the court finds that a special reason exists in cases where the underlying offence is a Category 1 offence of causing serious injury intentionally or recklessly, causing injury intentionally or recklessly to an emergency worker, or exposing or aggravatedly exposing such a worker to a risk by driving, and it declines to impose a term of imprisonment, it must impose a mandatory treatment and monitoring order, a Residential Treatment Order, or a Court Secure Treatment Order. The Act s 5(2GA)(b).
[1951] Ibid s 10A(2)(a).
[1952] Ibid s 10A(2)(c)(i). This does not apply to instances where the impairment was caused substantially by self-induced intoxication: at s 10A(2A).
[1953] Ibid s 10A(2)(c)(ii). See also *Teryaki v The Queen* [2019] VSCA 120, [35]-[36]; 6.2.2 – Circumstances of the Offender – Mental impairment.
[1954] The Act s 10A(2)(d).
[1955] Ibid s 10A(2)(e).
[1956] Ibid s 10A(2B)(a).
[1957] Ibid s 10A(2B)(b).
[1958] Ibid s 10A(2B)(c).
[1959] Ibid s 10A(3).

If the court finds that a special reason exists it must state the reason in writing, and have it entered in the record of the court.[1960]

9.2 – Standard sentence scheme

The standard sentence scheme became effective on 1 February 2018.

The scheme only applies to offences committed after that date. It does not apply to offences committed by offenders under the age of 18 at the time of the offending, or to offences heard and determined summarily.[1961]

The scheme says that if an act creating an offence or prescribing a maximum penalty for an offence specifies a period as the standard sentence, then it is a 'standard sentence offence' ('SSO').[1962] The period specified as the standard sentence is 'the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[1963]

However, consideration of the standard sentence for certain offences, such as sexual penetration of a child under 12, can be a difficult task because 'the offence covers such a wide range of sexual misconduct as to make the notional "mid-range" very difficult to identify'.[1964]

In determining the objective factors, a court must consider only the nature of the offence and not the personal circumstances of the offender.[1965] However, this determination is only intended to give 'content to the hypothesised mid-range offence'. Nothing in the standard sentence scheme circumscribes the manner in which the court is to assess the seriousness of an offence; this 'is to be done as it has always been done….'[1966] It must not be given too much weight in the sentencing exercise.[1967]

The Court of Appeal has said that the key requirement is that a court must take the standard sentence into account as a relevant sentencing factor when sentencing for a SSO. But as with the maximum penalty, it is a legislative guidepost. It does not affect the instinctive synthesis, permit 'two-stage sentencing', or otherwise affect matters a court may or must consider when sentencing.[1968] A court does not start by asking whether or not the standard sentence should be imposed and then work its way up or down.[1969]

[1960] Ibid s 10A(4).
[1961] Ibid ss 5B(1), 162; *R v Brown* [2018] VSC 742, [2] ('*Brown18*').
[1962] The Act s 5A(1)(a). However, conspiring, inciting, or attempting to commit a SSO is not itself an SSO: at s 5A(2).
[1963] Ibid s 5A(1)(b).
[1964] *McPherson v The Queen* [2021] VSCA 53, [31] ('*McPherson*').
[1965] Ibid s 5A(3). Cf *Lockyer (a pseudonym) v The Queen* [2020] VSCA 321, [67] (the consideration of mitigating factors, including personal circumstances, is not excluded by the scheme).
[1966] *Brown COA* [34]-[37]. See also *Lugo v The Queen* [2020] VSCA 75, [25]-[26].
[1967] *McPherson* [31].
[1968] *Brown COA* [4], [44], [106].
[1969] *Brown18* [131].

Specifically, the standard sentence provisions do not change the requirement to or means of assessing the seriousness of an offence. That remains an integral part of the instinctive synthesis and a sentencing judge is not constrained by the legislative definition of 'objective factors'.[1970]

When sentencing for a SSO, consideration of current sentencing practices is limited. A court may only consider sentences previously imposed if the offence in question was subject to the standard sentencing scheme.[1971] However, a court is not precluded from considering principles established in past cases, particularly for sentencing purposes.[1972] Moreover, while a sentence imposed for a SSO may exceed what might have accorded with current sentencing practices before the introduction of the standard sentencing scheme, that does not mean it is manifestly excessive.[1973]

Lastly, the court must give reasons for imposing the sentence, any non-parole period fixed under the Act that is shorter than that specified in s 11A(4),[1974] and state how the sentence imposed relates to the standard sentence.[1975] This requires it to identify the facts, matters and circumstances bearing upon its judgment as to the appropriate sentence.[1976] The standard sentence legislation does not require or permit a court to classify the subject offence on a scale of seriousness by reference to a hypothetical mid-range instance of it.[1977] Reasons such as the following meet this requirement:[1978]

> The sentence I impose is higher than the standard sentence for the offence of X, which is # years' imprisonment. Having identified and considered what I consider to be the relevant factors in assessing the sentence, including my assessment as to the very serious nature of the offending and the offender's high degree of culpability, against his plea of guilty and display of remorse, I have formed the conclusion that this is appropriate.

In contrast, the following statement is not adequate to explain how the sentence imposed relates to the standard sentence:[1979]

> In relation to the six charges of X the provisions in relation to standard sentencing are enlivened. The standard sentence for X is # years. It is but one of the multitudinous matters that I must take into account. It stands no higher than any other factor, nor lower.

However, even if the reasons given are inadequate, this does not necessarily vitiate the sentencing discretion.[1980]

Standard sentence offences and the associated standard sentence are:

[1970] *Brown COA* [7]-[8], [34]-[38], [51], [54]-[55].
[1971] The Act s 5B(2)(b); *Brown18* [107]-[111]; *R v Robertson* [2019] VSC 145, [77]-[79].
[1972] *Brown18* [110]-[111].
[1973] *Brown COA* [109]-[110].
[1974] The Act s 5B(4). See 8.3.1 – Imprisonment – Non-parole period – Restrictions on setting non-parole periods.
[1975] The Act s 5B(5).
[1976] *Brown COA* [43].
[1977] Ibid [42].
[1978] Ibid [45].
[1979] *DPP (Vic) v Drake* [2019] VSCA 293, [14]-[17].
[1980] Ibid.

Standard sentence offence	Standard sentence
Murder	30 years (emergency workers and custodial officers), 25 years (all others)
Homicide by firearm	13 years
Rape	10 years
Sexual penetration of a child under 12	10 years
Sexual penetration of a child under 16	6 years
Sexual assault of a child under 16	4 years
Sexual activity in the presence of a child under 16	4 years
Causing a child under 16 to be present during sexual activity	4 years
Persistent sexual abuse of a child under 16	10 years
Sexual penetration of a child of lineal descendant under 18	10 years
Sexual penetration of a step-child under 18	10 years
Culpable driving causing death	8 years
Trafficking in a drug or drugs of dependence – large commercial quantity	16 years

9.3 – Serious offenders

The Victorian serious offenders regime has three primary outcomes.[1981]

Firstly, if the Supreme or County Court sentences a 'serious offender' to imprisonment for a 'relevant offence', it must regard protection of the community as the principal sentencing purpose. To achieve that purpose, the court may sentence the offender to a term that is longer than one appropriate to the gravity of the offending (a 'disproportionate sentence').[1982]

This does not mean, however, that the other sentencing purposes have been excluded.[1983] The legislative intent is that the prison term is long enough to protect the community from the risk posed by the offender, but how long that is depends on the assessed risk of re-offending.[1984] So, if the risk of re-

[1981] The provisions do not apply to Commonwealth offences. See *Lyons v The Queen* [2019] VSCA 242, [23], citing *McKenzie v The Queen* [2018] VSCA 34, [22]; *Murphy (a pseudonym) v The King* [2022] VSCA 259, [43].
[1982] The Act s 6D.
[1983] *R v Dunne* [2003] VSCA 150, [24]. See also *R v Connell* [1996] 1 VR 436, 443 ('*Connell*').
[1984] *R v LD* [2009] VSCA 311, [25] ('*LD*').

offending is low, protection of the community weighs less heavily than it would if the risk were high.[1985] The aim of the requirement that a court regard protecting the community as the predominant purpose is to ensure that it gives proper consideration to the question and undertake a 'requisite risk assessment'.[1986]

The power to impose a disproportionate sentence is one that should be exercised rarely. If the court does impose a disproportionate sentence, then failure to explain its reasons for assessing an offender as likely to remain a risk to the community beyond a proportionate term may give rise to appealable error.[1987]

Where a disproportionately long sentence is imposed on a serious offender for the purpose of protecting the community, the gap between the head sentence and non-parole period will generally be increased, because the non-parole period has a more limited role in protecting the community compared to the longer head sentence.[1988]

The second primary outcome of the serious offenders regime is that every term of imprisonment imposed by the court for 'relevant offending' must, unless it directs otherwise, be served cumulatively upon any uncompleted sentence(s) imposed on that offender regardless of when they were committed.[1989] This is a prima facie rule, not a mere rule of interpretation, and there must be good reason to order concurrency.[1990] But this does not require the court to find there are exceptional circumstances to justify an order for concurrency.[1991]

There is tension between the requirement of cumulation and the principle of totality, but as the objective gravity of the total offending increases, so will the degree of cumulation thereby producing a total effective sentence that meets both.[1992]

The third principal effect of the serious offender regime is that a court must cause the fact that the offender was sentenced as a 'serious offender' to be entered in the records of the court.[1993]

A 'serious offender' is a:

- serious arson offender (who is a person convicted of a serious arson offence);[1994]
- serious drug offender (who is a person convicted of a drug offence);[1995]
- serious sexual offender (who is a person convicted of):[1996]
    - two or more sexual offences;
    - persistent sexual abuse of a child under 16;

[1985] Ibid [26]; *Beyer v The Queen* [2011] VSCA 15, [16].
[1986] *LD* [27]; *DPP (Vic) v Patterson* [2009] VSCA 222, [33].
[1987] *R v GLH* [2008] VSCA 88, [25]-[26]. See also *Connell* 443; *R v Barnes* [2003] VSCA 156, [21] ('*Barnes03*').
[1988] *Barnes03* [22].
[1989] The Act s 6E.
[1990] *Mantini* 346-348.
[1991] *R v Milne* (1995) 78 A Crim R 133, 139.
[1992] *Gordon (a pseudonym) v The Queen* [2013] VSCA 343, [74].
[1993] The Act s 6F.
[1994] Ibid ss 6B(2)-(3).
[1995] Ibid.
[1996] Ibid s 6B(3).

    - committing the incidents of a sexual offence included in a course of conduct charge;
    - at least one sexual offence and one violent offence arising out of the same course of conduct);[1997] or
- serious violent offender (who is a person convicted of a serious violent offence).[1998]

None of these offenders may be a 'young offender', that is, someone under the age of 21 at the time of committing an offence that qualifies as a 'relevant offence'.[1999] Moreover, each of the convictions must have resulted in the offender being imprisoned or detained in a youth justice centre.[2000]

A person's status as a serious offender depends on them having been convicted of relevant qualifying offences. For this purpose, convictions recorded in the current sentencing hearing or on a previous occasion are both relevant.[2001] A person acquires the serious offender status only after being sentenced for a qualifying offence. Therefore, if a person with no relevant prior convictions is sentenced to imprisonment for a serious drug offence, the court does not apply the serious offender provisions in relation to that sentence. But if they are sentenced to imprisonment for a second such offence, then they would be a 'serious offender' in respect of the second offence.[2002]

The court must be satisfied *beyond reasonable doubt* that a conviction was indeed a conviction for a relevant offence.[2003] In considering a conviction against a law of the Commonwealth or recorded in an interstate or international jurisdiction, the court must be satisfied that the offence is substantially similar to an arson, drug, serious violent, sexual, or violent offence (as the case requires) and that the offender was sentenced to a term of imprisonment or detention for that offence.[2004]

Moreover, where an offender is sentenced as a 'serious offender', the provisions associated with that status are only applicable to relevant offences, and not to other offences that may be on the indictment.[2005]

A 'relevant offence' is:

- an arson offence[2006] in the case of a serious arson offender;[2007]
- a drug offence[2008] in the case of a serious drug offender;[2009]
- a sexual[2010] or violent offence[2011] in the case of a serious sexual offender;[2012] and

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1997 Ibid 6B(2).
1998 Ibid ss 6B(2)-(3).
1999 Ibid ss 3(1), 6B(2).
2000 Ibid s 6B(2).
2001 Ibid s 6C(1).
2002 *R v Arnautovic* (2001) 121 A Crim R 412, 415 [7]; *LD* [22]; *Cardona v The Queen* [2011] VSCA 58, [6]-[8].
2003 The Act s 6C(2).
2004 Ibid s 6C(3).
2005 *R v Fuller-Cust* (2006) 6 VR 496, 508-10 [44]-[48].
2006 The Act s 6B(1), sch 1 cl 5.
2007 Ibid s 6B(3)(a).
2008 Ibid s 6B(1), sch 1 cl 4.
2009 Ibid s 6B(3)(b).
2010 Ibid s 6B(1), sch 1 cl 1.
2011 Ibid s 6B(1), sch 1 cl 2.
2012 Ibid s 6B(3)(c).

- a serious violent offence[2013] in the case of a serious violent offender.[2014]

Many 'relevant offences' are also 'serious offences' for the purpose of imposing an indefinite sentence. However, apart from these coincidences of subject matter and naming, there is no particular relationship between the serious offender and indefinite sentence schemes.[2015]

9.4 – Continuing criminal enterprise offenders

A continuing criminal enterprise ('CCE') offender, sentenced for a CCE offence, may be liable to a term of imprisonment that is twice the maximum term available for that offence or to 25 years, whichever is less.[2016]

A CCE offence is one listed Schedule 1A of the Act.[2017] It includes three classes of offences, all in relation to property, financial advantages, goods, gains, or losses valued at $50,000 or more.

The $50,000 value raises particular issues when the offence under consideration is a rolled-up charge. It is common in plea indictments for multiple transactions to be rolled up in one charge. However, where the value of a single charge exceeds $50,000 only by virtue of the rolled-up value, that does not qualify the offence to be treated as a CCE offence.[2018] A rolled-up charge only qualifies as a CCE offence if at least one of the constituent transactions exceeds $50,000.[2019]

A 'CCE offender' means someone who is guilty of:

- a CCE offence and had been found guilty of two or more relevant offences in another trial or hearing;
- two CCE offences and had been found guilty of a relevant offence in another trial or hearing;
- three or more CCE offences.[2020]

A 'relevant offence' means a CCE offence the offender has been found guilty of within 10 years before the date of their latest offence,[2021] including those committed before the legislative definition came into effect.[2022] This might include an offender found guilty of three or more CCE offences in one hearing, but who has no prior 'relevant offences'.[2023]

While the effect of the CCE provisions is that the effective maximum penalty is doubled, or increased to 25 years, the maximum penalty remains only one of a number of considerations; it does not compel a given sentence or require an automatic increase.[2024] Imposing uniform penalties for CCE offences and a

[2013] Ibid s 6B(1), sch 1 cl 3.
[2014] Ibid s 6B(3)(d).
[2015] See 8.7 – Imprisonment – Indefinite sentence.
[2016] The Act s 6I(1).
[2017] Ibid sch 1A.
[2018] *R v Ralphs* [2004] VSCA 33, [10].
[2019] *Cay v The Queen* (2010) 29 VR 560, 566 [34].
[2020] The Act s 6H(1).
[2021] Ibid.
[2022] *R v Roussety* [2008] VSCA 259, [1]-[4], [22]-[26], [53]-[55] ('*Roussety*') citing *R v Arundell* [2003] VSCA 69, [19].
[2023] *Roussety* 272 [1]-[4], [30]-[38], [53]-[54], [56]-[65] citing *Grossi* 521-26 [68]-[82] (Redlich JA).
[2024] *Shiel v The Queen* [2017] VSCA 359, [41].

different, but uniform, penalty for non-CCE offences without explaining the reason for the difference is likely to demonstrate error in principle. In contrast, where different sentences are imposed for difference offences, with the circumstances of offence and offender fully identified, it is not necessary to go further and explain the reason why sentences for CCE offences differed from non-CCE offences.[2025]

If a court sentences a CCE offender for a CCE offence, it must cause that fact to be entered in the records of the court.[2026]

Comparison with serious offender scheme

While the CCE scheme has some similarities to the serious offender scheme, the two must be seen as wholly separate.

Whereas the serious offender scheme modifies the applicable sentencing purposes and allows the court to impose a disproportionate sentence, the CCE scheme only adjusts the relevant maximum penalty.

Further, the serious offender scheme operates based on other *sentences*, whereas the CCE scheme depends on *findings of guilt*. For this reason, the CCE provisions immediately apply to the qualifying offences, rather than only to subsequent offences.[2027]

[2025] *Abela v The Queen* [2014] VSCA 266, [33], [36].
[2026] The Act s 6J(1).
[2027] Compare The Act ss 6B and 6H.

10 – Youth and youth detention

Sentencing children for criminal offending is a difficult and complex exercise that is subject to different considerations and operates within a largely separate system of criminal justice.[2028] Detailed guidance on that process and its unique concerns may be found in the Children's Court Bench Book. This chapter focusses on the limited circumstances where children, or 'young offenders',[2029] are sentenced in the higher courts for serious offending and on the availability of youth detention as an alternative sanction for that offending.

However, the relevance of youth in sentencing is also discussed in the following chapters:

- 2.3.2.2.3 – Method and process – Findings – Evidence – Records, depositions, reports, and statements – Reports – Pre-sentence reports
- 3.5 – Sentencing principles - Avoidance of a crushing sentence
- 3.6 – Sentencing principles – Parity
- 4.1 – Sentencing purposes - Just punishment and denunciation
- 4.2 – Sentencing purposes – Deterrence
- 4.2 – Sentencing purposes – Deterrence – General deterrence
- 4.3 – Sentencing purposes - Rehabilitation
- 5.2.9.3.2 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices – Resources for determining current sentencing practices - Statistics
- 6 – Circumstances of the offender
- 7.5.4.3 – Policy considerations – Delay – Consequences of delay – Structural consequences
- 11.7.5 – Community correction order – Interaction with sentencing principles and purposes - Rehabilitation
- 11.8.1 – Community correction order – Combining a CCO with a term of imprisonment – Errors and exclusions
- 21.4.1 – Murder – Formulation of sentence – Life sentence with no parole period
- 23.3 – Indictable driving offences – Sentencing purposes

[2028] See, eg, *Webster (a pseudonym) v The Queen* (2016) 258 A Crim R 301, 302-03 [6]-[8], 306-07 [26]-[28] ('*Webster*').

[2029] The terms will be used interchangeably in this chapter because the *Sentencing Act 1991* (Vic) s3(1) ('the Act') defines a 'young offender' as someone who is under the age of 21 at the time of sentencing, but it does not define a 'child'. That term is defined in the *Children, Youth and Families Act 2005* (Vic) s3(1) ('*CYFA*') as a person who at the time of the offence was 10 years old or more but was under the age of 18.

10.1 – Legislative regime

The Supreme Court or County Court must hear charges of murder, attempted murder, manslaughter, child homicide, arson causing death, or culpable driving causing death in cases where the accused is a child. These offences are not within the jurisdiction of the Children's Court and must be 'uplifted' to the higher courts.[2030] Parliament has also characterised certain offences as 'Category A serious youth offences'. For these offences, the court must uplift the charge to the higher court unless a party requests the charge be heard summarily, the court is satisfied its sentencing options are adequate and either it is in the victim's interests to hear the charge summarily, the accused is particularly vulnerable because of cognitive impairment or mental illness, or there is a substantial and compelling reason why the charge should be heard and determined summarily.[2031]

For other offences, the Court of Appeal has said the policy of the *Children, Youth and Families Act 2005* (Vic)('*CYFA*') clearly indicates that the Children's Court has jurisdiction to hear and determine summarily all charges for indictable offences against children, other than the few specifically excluded 'death-related' offences, and it must do so unless the child objects or the Children's Court concludes it should not hear the charges because there are 'exceptional circumstances' that justify an uplift to the higher courts.[2032]

10.1.1 – Youth detention orders

Regardless of the charge, if a custodial sentence is deemed appropriate for a young offender on conviction (or appeal) in a higher court, that court may make a youth justice centre order ('YJC') or a youth residential centre order ('YRC').[2033] These youth detention orders are not sentences of imprisonment.[2034]

The purposes of a youth detention order are to punish the young offender while also promoting their rehabilitation and separating them from experienced adult offenders who might increase their criminal knowledge and so their possibility of re-offending.[2035]

10.1.1.2 – Prerequisites and limits

Before making either detention order, the court must have received a pre-sentence report and believe the young offender:

- has reasonable prospects of rehabilitation; or
- is particularly impressionable, immature or likely to be subject to undesirable influences in adult prison.[2036]

[2030] *CYFA* s 516(1)(b).
[2031] Ibid s 356(6), (7).
[2032] *CNK v The Queen* (2011) 32 VR 641, 663-64 [83] ('*CNK*'). For more on this see the Children's Court Bench Book ss 23.2.3, 23.4 and 23.4.1.
[2033] The Act ss 7(1)(d)-(da), 32(1). There is no Commonwealth youth detention. The *Crimes Act 1914* (Cth) s 20C(1) adopts State sentencing provisions for young offenders convicted of a Commonwealth offence.
[2034] *Bradshaw v The Queen* [2017] VSCA 273, [54] ('*Bradshaw*').
[2035] See, eg, *R v Wright* [1999] 3 VR 355, 364-65 [39]-[41]; *DPP (Vic) v REE* [2002] VSCA 65, [21]; *R v PP* (2003) 142 A Crim R 369, 374 [9] ('*PP*'); *DPP (Vic) v Bridle* [2007] VSCA 173, [10]; *Moresco v The Queen* [2018] VSCA 336, [50]-[51].
[2036] The Act ss 32(1)(a)-(b).

As noted, if the court (on appeal or uplift) is considering making a YJC or YRC order it must first order a pre-sentence report.[2037] While the recommendations made in this report must be given weight in the overall sentencing synthesis, they are not controlling, and the court is not required to follow them, as each case depends on its own facts.[2038]

In determining whether to make a youth detention order, a court must also consider:

- the nature of the offence; and
- the age, character, and past history of the offender.[2039]

A YJC order cannot be made for an offender who is under the age of 15 at the time of sentencing;[2040] and an YRC order cannot be made for an offender who is 15 or over at that same time.[2041] Because the *Sentencing Act 1991* (Vic) ('the Act') defines a 'young offender' as someone who is under the age of 21 at the time of sentencing,[2042] this effectively means that a YJC order can only be made for offenders who are between 15 and 21 at the time of sentencing, and a YRC order can only be made for an offender who is under 15 at that time.

Before making a detention order for a young offender charged with a Category A Serious Youth Offence, or with a Category B Serious Youth Offence where they have also previously been convicted of a Category A or B Serious Youth Offence, a court must be satisfied that exceptional circumstances exist.[2043] Although it does not appear to have been the legislative intent,[2044] this requirement might be seen as creating a presumption in favour of imprisonment for anyone under the age of 21 who has been convicted of a serious youth offence. But the requirement does not prevent a non-custodial sentence from being imposed if the court has concluded that detention is not justified,[2045] and that the sentencing purposes can be met by a sanction that does not involve confinement.[2046] The requirement instead is probably better viewed as an expression of Parliament's intent that young offenders convicted of Category A or B offences be sentenced to terms of imprisonment in appropriate cases rather than to a term of youth detention.

The maximum period of detention allowed under either detention order, regardless of the number of convictions in the same proceeding is four years in the County Court or Supreme Court, or two years in the Magistrates' Court.[2047] While it is technically possible for a young offender's period of actual detention

[2037] *CYFA* s 430I(2).
[2038] *Webster* 320 [86] (Beach JA). See also *PP* 375 [12].
[2039] The Act s 32(2).
[2040] Ibid s 32(2A).
[2041] Ibid s 32(2B).
[2042] Ibid s 3(1).
[2043] Ibid ss 32(2C)-(2D). The term 'exceptional circumstances' has been the subject of limited judicial scrutiny in this context. The Court of Appeal has said only that 'the ability of common circumstances to combine to produce exceptional circumstances is necessarily fact dependent.' *Castillo (a pseudonym) v The King* [2023] VSCA 150, [47].
[2044] See Victoria, *Parliamentary Debates*, Legislative Council, 7 September 2017, 4576-78 (Jenny Mikakos); Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 2017, 3874 (Cesar Melhelm), 3891 (Fiona Patten).
[2045] *CYFA* s 32(1).
[2046] The Act s 5(4).
[2047] Ibid ss 32(3)-(4).

to exceed this formal maximum by declining to credit pre-sentence detention,[2048] the authority for that proposition has since been confined.[2049]

10.1.1.3 – Concurrency, cumulation, calculation, and commencement

There is a presumption that terms of youth detention, regardless of when they are imposed, will be served concurrently with any other uncompleted term of detention or imprisonment, unless the court orders otherwise.[2050] If a sentence of detention is to be served concurrently with a sentence of imprisonment, the detention must be served in a prison until the sentence of imprisonment has been served.[2051] With respect to concurrency and cumulation, the Court of Appeal has noted that while a sentence of youth detention may be served concurrently or cumulatively upon a sentence of imprisonment, if a higher court imposes a term of imprisonment exceeding the maximum possible term in a YJC, it can be impracticable to also sentence the offender to a YJC on any other charge.[2052]

The presumption of concurrency does not apply when sentencing a young offender for escaping from or damaging a youth justice centre or youth residential centre. Sentences of detention for those offences must be served cumulatively on any other sentences of detention, unless the court orders otherwise and gives reasons for ordering concurrency.[2053] Similarly, there is a presumption of cumulation on any uncompleted sentence in default of payment on a fine or sum of money.[2054]

The maximum period of youth detention[2055] also operates as the maximum that may be achieved by cumulation of sentences on several occasions. If the offender is sentenced to youth detention while already undergoing a sentence of youth detention, cumulation orders only operate to the point when the maximum period is reached.[2056]

Generally, if a young offender is in custody on the day of sentencing, the term of their detention commences immediately.[2057] If they are serving a sentence of imprisonment that is cumulative on the sentence of detention, the detention commences on the day the sentence of imprisonment is complete.[2058] In all other cases, detention commences on the date the young offender is arrested pursuant to a detention warrant.[2059]

If a young offender sentenced to detention is allowed to go free for any reason, the time between release and their return to custody for service of the sentence does not count in its calculation and the sentence is suspended during that period.[2060] Similarly, if they escape or fail to return after a lawful release, the

[2048] *R v Hill* [1996] 2 VR 496, 505.
[2049] *DPP (Vic) v Grech* [2016] VSCA 98, [74].
[2050] The Act s 33(1).
[2051] Ibid s 33(3).
[2052] *Cairns (a pseudonym) v The Queen* [2018] VSCA 333, [36] ('*Cairns*').
[2053] The Act s 33(1A).
[2054] Ibid s 33(2).
[2055] Two years in the Magistrates' Court or four years in the County or Supreme Court.
[2056] The Act s 32(5).
[2057] Ibid s 34(1)(a).
[2058] Ibid s 34(1)(b).
[2059] Ibid s 34(1)(c).
[2060] Ibid s 34(2), (4).

period between that time and their apprehension or surrender similarly does not count in calculating the term and the sentence is suspended.[2061]

However, if a young offender, whose sentence has been suspended because they have escaped or failed to return, is detained or imprisoned under another sentence, the unexpired portion of their sentence of detention takes effect:

- if it is to be served cumulatively on the sentence they are then serving, on the date that sentence is complete;
- in all other cases, at the end of the period of suspension.[2062]

If the young offender sentenced to a term of detention has been released pending appeal, or reservation of a case stated or question of law, is detained or imprisoned under another sentence at the time that appellate review is completed, their first sentence of detention (or any unexpired part of it) takes effect:

- if it is to be served cumulatively on the sentence they are then serving, on the date that sentence is complete;
- in all other cases, on the date the appellate review is determined.[2063]

10.1.1.4 – Aggregate sentences of detention

Aggregate periods of youth detention may be imposed in largely the same manner as aggregate sentences of imprisonment for adult offenders. Specifically, a court may impose an aggregate sentence of detention when sentencing an offender for two or more offences that are founded on the same facts or that form or are part of a series of offences of the same or similar character.[2064] An aggregate sentence of detention may be imposed that addresses multiple offences in one sentence instead of ordering separate periods of detention for each offence.[2065] The aggregate sentence of detention cannot exceed the total sentence that might have been imposed if separate sentences of detention had been imposed on each offence.[2066]

If the court proposes to impose an aggregate sentence of detention, it must announce its decision in open court, give its reasons for doing so, and explain the effect of the proposed aggregate sentence.[2067] But it does not have to identify the separate events giving rise to the specific charges or announce the sentences it would have imposed on each charge if sentenced separately, nor does it need to state whether the sentences would have been concurrent or cumulative.[2068]

[2061] Ibid s 34(3)-(4).
[2062] Ibid s 34(5).
[2063] Ibid s 34(6).
[2064] Ibid s 32A(1).
[2065] Ibid s 32A(2). Aggregate sentences of detention are available even if the underlying offences are representative or rolled up charges: at s 32A(6).
[2066] Ibid s 32A(3).
[2067] Ibid s 32A(4).
[2068] Ibid s 32A(5).

10.1.1.5 – Pre-detention custody

Any period of time a young offender was held in custody in relation to proceedings for the offence on which they are sentenced to detention, or in relation to proceedings arising from those proceedings, must be declared as time already served unless the court orders otherwise.[2069] This does not apply to:

- custodial periods of less than one day;[2070]
- a sentence of detention of less than one day;[2071]
- a period already declared as reckoned to be a period of imprisonment or detention already served under another sentence of imprisonment or detention or Court Secure Treatment Order imposed on the offender.[2072]

If the young offender is charged with a series of offences committed on different occasions and has been in continuous custody since their arrest, a sentencing court must take into account the whole of the custodial period from the time of their arrest even if they are not convicted of the offence underlying the first arrest or any other offence.[2073]

10.1.2 – Sentencing children in adult courts

Although not without ambiguity, it appears that the Supreme Court or County Court may impose a sentence under the *CYFA* or, if it concludes that the dispositions available under the *CYFA* are inadequate, may impose any sentence available under the Act.[2074]

The dispositions available under the CYFA, in ascending hierarchical order,[2075] are:

- dismissing the charge, without conviction;
- dismissing the charge and ordering the giving of an undertaking, without conviction;
- dismissing the charge and ordering the giving of an accountable undertaking, without conviction;
- placing the child on a good behaviour bond, without conviction;
- imposing a fine, with or without conviction;
- placing the child on probation, with or without conviction;
- releasing the child on a youth supervision order, with or without conviction;

[2069] Ibid s 35(1).
[2070] Ibid s 35(2)(a).
[2071] Ibid s 35(2)(b).
[2072] Ibid s 35(2)(c).
[2073] Ibid s 35(6).
[2074] See *Cairns* [33]-[35], quoting *DPP (Vic) v Anderson* (2013) 228 A Crim R 128, 140 [46]-[47] ('*Anderson*') and *Fuller (a pseudonym) v The Queen* [2013] VSCA 186, [30]-[35] ('*Fuller*').
[2075] Meaning a court may not impose a sentence in a given paragraph of the following list unless it is first satisfied that it is not appropriate to impose one given in any preceding paragraph. *CYFA* s 361.

- convicting the child and making a youth attendance order;
- convicting the child and making a youth control order;
- convicting the child and making a YRC order;
- convicting child and making YJC order.[2076]

In determining an appropriate sentence, a reviewing court must, 'as far as practicable,' consider:

- the need to strengthen and preserve the relationship between the child and their family;
- the desirability of allowing the child to live at home;
- the desirability of allowing the education, training or employment of the child to continue;
- the need to minimise stigma to the child;
- the suitability of the sentence to the child;
- if appropriate, the need to ensure that the child is aware they must bear responsibility for any illegal action by them;
- the need to protect the community, or any person, from violent or other wrongful acts of the child —
    - in all cases where the sentence is for a Category A serious youth offence or a Category B serious youth offence; or
    - in any other case — if it is appropriate to do so; and
- if appropriate, the need to deter the child from offending in remand centres, youth residential centres or youth justice centres.[2077]

The Court of Appeal has held that 'as far as practicable' are terms of emphases that mean the sentencing court 'must have regard to each of the listed considerations to the maximum extent possible'. They are policy objectives that govern the sentencing of young offenders.[2078] This means the reviewing court must impose a sentence that fits a young offender as much as (or maybe more) than it fits the crime. The sentence must, as far as practicable, achieve the following policy objectives:

- strengthen and preserve the child's relationship with their family;
- allow them to live at home;

[2076] *CYFA* s 360(1).
[2077] Ibid s 362(1).
[2078] *CNK* 644 [8].

- allow them to continue with their education, training, or employment;
- minimise stigma to the child.[2079]

Determining whether youth detention or adult custody is adequate may depend on whether the maximum period that can be ordered for youth detention is a sufficient punishment given the seriousness of the offending, the offender's criminal history, the likely assistance towards their rehabilitation available in the youth justice system, the public nature of the offending, and the circumstances of and harm to the victim.[2080]

Lastly, Parliament requires the higher courts in sentencing an offender aged 16 years or more but under 18 years at the time of the commission of an indictable offence, to 'have regard to any requirement in [the] Act that a specified minimum non-parole period…be fixed or a specified minimum term of imprisonment be imposed, had that offence been committed by an adult'.[2081] This requirement operates as an additional sentencing consideration. While the mandatory minimum non-parole period or specified minimum sentence provisions do not directly apply to sentencing an offender aged 16 or 17, the court must take those provisions into account in assessing the gravity of the offence.[2082]

10.1.2.1 – Interaction with sentencing principles and purposes

Broadly speaking, when sentencing a young offender the normal considerations apply, although they may be subordinate when the court is first assessing if a disposition under the *CYFA* is adequate. This is because that legislation requires consideration of very different factors than those specified by the Act. This may lead to some dispositions that would not be considered appropriate for an adult offender.[2083]

A significant exception to this general proposition involves the relevance of general deterrence. In the case of *CNK v The Queen*[2084] the 15-year old applicant was sentenced in the Supreme Court because he had been charged with attempted murder. Following his acquittal on that charge but on his conviction for other offences that had been uplifted, the Court of Appeal held that it was necessary to sentence the applicant on the remaining uplifted charges as if exclusively governed by the *CYFA*. The Court further held that on a proper construction of the *CYFA* general deterrence is not a relevant consideration when sentencing children.[2085]

However, the Court later clarified that if it is determined that the sentencing dispositions available under the *CYFA* are not adequate and that adult custody is necessary, general deterrence is an applicable consideration although it may be ameliorated because of the offender's youth.[2086]

In cases where rehabilitation is of paramount importance, as in the sentencing of a young offender, the purposes of sentencing might be met without an order of confinement and consideration of imposing a

[2079] Ibid 644-45 [11].
[2080] *Anderson* 138-39 [42]-[43].
[2081] The Act s 5(2J); *CYFA* s 586(2). See, eg, 9.1.2.3 – Violence offences against protected officials – six-month to five-year minimum non-parole period.
[2082] Amended Explanatory Memorandum, Justice Legislation Miscellaneous Amendment Bill 2018 (Vic), 41-44.
[2083] *R v Evans* [2003] VSCA 223, [44].
[2084] (2011) 32 VR 641.
[2085] Ibid 643 [2], [4], 644 [7], [10], 645-52 [12]-[39], 663-64 [82], [86].
[2086] *Anderson* 140 [47]. See also *Cairns* [38].

Community Correction Order ('CCO') takes on greater importance.[2087] But a court may not impose a CCO in combination with a YJC order; the Act only provides for a YJC order to be made in combination with a sentence of imprisonment. There is no provision allowing one to be made in combination with a sentence of detention. While this would be useful in advancing a young offender's rehabilitation, there is a gap in the legislation that does not allow the court to adopt this sentence.[2088]

Rehabilitation is the 'cardinal principle' of the youth justice system.[2089] It is only for the gravest offending where the offender has almost no prospect of rehabilitation, that youth may not be a mitigating factor.[2090] However, the weight it is given as a mitigating factor may need to be modified where the young offender is 'involved in serious and dangerous offending' such as terrorist activity.[2091] The planning of those acts is callous, involves a very high level of moral culpability, and may measurably diminish the weight to be given to youth as a factor in the sentencing synthesis in favour of protecting society and upholding its fundamental values.[2092] In such cases, general deterrence and denunciation become primary purposes instead of the offender's youth and rehabilitation.[2093]

[2087] *Bradshaw* [50].
[2088] Ibid [54].
[2089] *Anderson* 140-41 [49].
[2090] Ibid 141-43 [50]-[58], citing *Azzopardi v The Queen* (2011) 35 VR 43 and *McGuigan v The Queen* [2012] VSCA 121. See also *Fuller* [38]-[39]; *Mansfield v The Queen* [2017] VSCA 220, [36]-[45]. This proposition is particularly true where the offender becomes an adult during the course of their offending. See *DPP (Vic) v Ghazi* (2015) 45 VR 852, 861 [36]-[38].
[2091] *DPP (Cth) v MHK (a pseudonym) (No 1)* (2017) 52 VR 277, 289 [56]-[57] ('*MHK*'). See also *Sianas v The Queen* [2016] VSCA 84, [37].
[2092] *MHK* 290-92 [61]-[66].
[2093] Ibid 294 [73].

11 – Community correction order

A Community Correction Order ('CCO') is provided for by Part 3A of the *Sentencing Act 1991* (Vic) ('the Act').

There is no independent CCO scheme under Commonwealth legislation, but CCOs are available in a limited manner (as discussed later) when sentencing federal offenders.[2094]

11.1 – Prerequisites and limits

A CCO is an available sentencing option if:

- the offender has been convicted or found guilty of an offence punishable by more than five penalty units;[2095] and
- either:
    - the court receives a pre-sentence report and has regard to any recommendations, information or matters that it contains;[2096] or
    - the Court intends to impose a CCO with only a condition of 300 hours or less of unpaid community work;[2097] and
- the offender consents to the order.[2098]

11.1.1 – Pre-sentence reports

Except as just noted with respect to a CCO limited to 300 hours or less of community work, a court must order a pre-sentence report to establish the offender's suitability for a CCO, ascertain that necessary facilities exist, and gain advice regarding the most appropriate conditions to be attached to the CCO.[2099] Information regarding the availability of treatment and programs is critical and should be included in the pre-sentence report.[2100]

The pre-sentence report should also inform the court of any material indicating how long the offender is likely to need support in achieving rehabilitation and is likely to need monitoring or another deterrent from committing further offences. As the Court of Appeal said in the *Boulton* guideline judgment, '[t]hat may include information, based on empirical research or experience, concerning the periods of time required to overcome or at least manage substance abuse problems'.[2101]

There may often be a borderline case where the sentencing judge refers a matter for a CCO assessment while deciding whether to impose a term of imprisonment, a CCO or both. But presuming that a CCO will

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[2094] *Crimes Act 1914* (Cth) ss 20AB(1)–(1AA) ('Cth Crimes Act'); *Crimes Regulations* 1990 (Cth) reg 6.
[2095] The Act s 37(a).
[2096] Ibid s 37(b).
[2097] Ibid s 8A(3).
[2098] Ibid s 37(c).
[2099] Ibid s 8A(3). See also *Boulton v The Queen* (2014) 46 VR 308 ('*Boulton*'), Appendix 1 – Community Correction Orders: Guidelines for Sentencing Courts [31] ('Appendix 1').
[2100] *Graeske v The Queen* [2015] VSCA 229, [43]–[44].
[2101] Appendix 1 [41].

be imposed if the judge orders an assessment, and it was positive, 'fundamentally misconceives'[2102] the relevant provisions of the Act and the Victorian Court of Appeal's Guideline Judgment in *Boulton v The Queen.*[2103] The sentencing court's discretion is not so fettered.

11.1.2 – Consent

The offender's informed consent is required for the imposition of a CCO,[2104] so the court must ensure they have been made aware of the proposed length and conditions of the order, and that their representatives have explained the nature and effect of the proposed conditions – namely, what compliance with them will entail and the serious consequences of failing to comply.[2105]

In this regard it is appropriate for the scope and purpose of the CCO to be communicated to the offender, and even for the judge to share any reservations they may have about the offender's ability to successfully comply with its terms.[2106] However, care must be taken in how such reservations are expressed. For example, it is improper for a judge to state in absolute terms that they know the offender will breach the conditions of a CCO and that the result of the breach will be imprisonment.[2107]

Normally, an offender is bound by their counsel's conduct on the plea but informed consent to a CCO does not preclude a later complaint that a sentence was erroneous or excessive.[2108]

[2102] *Gul v The Queen* [2016] VSCA 82, [50] ('*Gul*').
[2103] *Boulton*.
[2104] The Act s 37(c).
[2105] *Boulton* 354 [201]–[202]; Appendix 1 [42]. See also the Act s 95.
[2106] *Younger v The Queen* [2017] VSCA 199, [39] ('*Younger*').
[2107] Ibid [41].
[2108] *Boulton* 373–74 [312]–[316].

11.1.3 – Maximum CCO term

A CCO may only be imposed for a limited period. The period of a CCO imposed by the Magistrates' Court must not exceed two years for one offence, four years for two offences, or five years for three or more offences.[2109] The period of a CCO imposed by the Supreme or County Court, whether for one or more offence, must not exceed five years.[2110] Further, for a sentence that combines a term of incarceration and a CCO, a 'combination sentence', the sum of all terms of imprisonment cannot exceed one year, following deduction of any period of pre-sentence detention.[2111] This one-year limitation does not apply to arson offences, for which any sentence of imprisonment may be imposed by the Supreme or County Court in addition to a CCO.[2112] The Magistrates' Court, however, remains limited in that it may not impose a sentence that exceeds two years even for an arson offence.[2113]

If the offender is convicted or found guilty of more than one offence based on the same facts or which form part of a series, the court may make a single CCO in respect of all offending. However, this CCO may not exceed the maximum period specified above.[2114]

If the court makes a CCO of six months or longer, it may fix an intensive compliance period during which time any attached conditions must be completed.[2115]

11.1.4 – Timing

If the court imposes a CCO in a combination sentence, the CCO commences upon the date of the offender's release from imprisonment. Otherwise it will commence on a date specified by the court that is no later than three months after the order was made.[2116]

[2109] The Act s 38(1)(a).
[2110] Ibid s 38(1)(b).
[2111] Ibid s 44(1). See also *Younger*; *Pang v The Queen* [2019] VSCA 56, [38]; *Nov v The Queen* [2020] VSCA 11, [1]-[8]. At the time of *Boulton* the maximum custodial term was two years.
[2112] The Act s 44(1A).
[2113] Ibid s 44(1B).
[2114] Ibid s 40. See 11.3 – Community correction order - Aggregation, concurrence, and cumulation below.
[2115] Ibid ss 39(1)-(2).
[2116] The Act ss 38(2), 44(3).

11.2 – Considerations in setting length

In fixing the period of a CCO, a court will need to consider material specifically directed to the offender's rehabilitation, including expert reports, which should form part of the pre-sentence report.[2117] There may be circumstances, however, where the evidence establishes that a CCO of long duration will be necessary. *Boulton* does not require that specific evidence and submissions regarding the duration of a CCO must be provided in every case.[2118] Further, care should be taken before inviting counsel to address the court on the length of a CCO, as this course, approved by *Boulton*, is possibly at odds with the High Court's decision in *Barbaro v The Queen*[2119] where the practice of the parties – particularly the prosecution – providing views on an appropriate range of sentences was disapproved.[2120]

The sentencing purposes influence the period fixed for and the conditions attached to a CCO,[2121] and as a court must assume the offender will serve every day of a custodial sentence imposed, it must make the same assumption in considering the length of a CCO.[2122] It must not consider the possibility of the CCO's future variation or cancellation in setting its duration.[2123]

Although a sentencing court will be assisted by an estimate of the time-period needed to benefit and manage an offender,[2124] the Court of Appeal has emphasised that even the best expert report can provide only limited guidance. The court will always have to make its best assessment of how long the offender should have to 'submit to therapeutic intervention'.[2125]

As discussed below,[2126] this does not mean that rehabilitation is the primary consideration in determining the length of a CCO.

11.2.1 – Error to compare terms

The mere fact that the term of imprisonment and the duration of a CCO's conditions are the same length does not mean a sentencing court has fallen into error.[2127] Comparing the custodial term that might be imposed will be of limited assistance in considering the appropriate length of a CCO. All other things being equal, the best that might be said is that 'the term of a CCO is likely to be longer – often, markedly longer – than the term of imprisonment which might otherwise have been imposed'.[2128]

[2117] *Boulton* 344–45 [166]–[170], 346–48 [175]–[179]. See 11.1.1 – Community correction order – Prerequisites and limits – Pre-sentence reports above.
[2118] *Hach v The Queen* [2018] VSCA 196, [53]–[54] ('*Hach*').
[2119] (2014) 253 CLR 58.
[2120] *Hach* [52].
[2121] *Boulton* 341-42 [146]-[152]. See 11.7 – Community correction order – Interaction with sentencing principles and purposes below.
[2122] *Boulton* [153].
[2123] Ibid 344 [162]-[163].
[2124] Ibid 344-45 [166]-[170], 346-48 [175]-[179]; Appendix 1 [38].
[2125] Ibid 348 [180]. See 11.1.1 – Community correction order – Prerequisites and limits – Pre-sentence reports above.
[2126] See 11.7.5 – Community correction order – Interaction with sentencing principles and purposes – Rehabilitation below.
[2127] *Melnikas v The Queen* [2016] VSCA 112, [54] ('*Melnikas*').
[2128] *Boulton* 337 [122].

Similarly, it is fruitless to compare the duration of a combination sentence with the length of a possible head sentence, including a non-parole period, to try and show the combination sentence (with its custodial period) is too long. Such a comparison is not required by the instinctive synthesis, nor does it serve to advance the issue of whether a combination sentence is manifestly excessive.[2129]

11.3 – Aggregation, concurrence, and cumulation

Section 40 of the Act provides that a court sentencing an offender to community correction for multiple offences may choose between making a single aggregate CCO and making multiple orders.[2130]

If the court makes separate CCOs for two or more offences, the attached conditions are presumed to be concurrent with each other and with any other CCO then in force unless the court orders otherwise.[2131] Similarly, unless otherwise ordered, the hours of unpaid community work required under a fines order are concurrent with such hours ordered under a CCO, regardless of whether the CCO was made before or at the same time as the fines order.[2132]

Cumulative CCOs must not exceed five years in total.[2133]

If cumulative CCOs with intensive compliance periods are fixed for more than one offence, then the intensive periods run cumulatively from the commencement of the first order.[2134]

11.4 – Conditions

11.4.1 – Mandatory conditions

CCOs have mandatory conditions that attach to each order. These require that an offender must:

- not commit an offence punishable by imprisonment during the period of the order;
- comply with any obligation or requirement prescribed by the regulations;
- report to and receive visits from the Secretary during the period of the order;
- report to the community corrections centre specified in the order within two clear working days after the CCO comes into force;
- notify the Secretary of any change of address or employment within two clear working days after the change;
- not leave Victoria without the permission of the Secretary; and
- comply with any direction given by the Secretary to ensure the offender complies with the order.[2135]

[2129] *Greatorex v The Queen* [2016] VSCA 136, [31]-[32] ('*Greatorex*').
[2130] The Act s 40. See also *Sankey v The Queen* [2016] VSCA 244, [75]. See 11.1.3 – Community correction order – Prerequisites and limits – Maximum CCO term above.
[2131] The Act s 41.
[2132] Ibid s 42(1).
[2133] Ibid s 41A.
[2134] Ibid s 39(3).
[2135] Ibid ss 45(1)(a)-(f).

11.4.2 – Discretionary conditions

In making a CCO, the court must also attach one or more of the conditions under Division 4 or a condition under Division 2 of Part 3AB.[2136]

Division 4 provides for the following conditions:

- unpaid community work;
- treatment and rehabilitation;
- supervision;
- non-association;
- residence restriction or exclusion;
- place or area exclusion;
- curfew;
- alcohol exclusion;
- judicial monitoring;
- electronic monitoring;
- bond.[2137]

The Part 3AB, Division 2 condition is available for intellectually disabled offenders. It requires the offender to comply with a plan of available services designed to reduce the likelihood of re-offending in accordance with the objectives and principles specified in Part 2 of the *Disability Act 2006* (Vic).[2138]

In addition, the court may attach any other condition it considers appropriate, except for one related to the making of restitution, or the payment of compensation, costs, or damages.[2139] Ancillary orders may be made in these areas pursuant to other provisions of the Act,[2140] but they cannot be *conditions* of a CCO.

The court must attach conditions in accordance with the principles of proportionality, to address the circumstances of the offender, and to further any of the sentencing purposes specified in s 5 of the Act.[2141]

If defence counsel seeks a CCO, they must make submissions about the relationship between the conditions sought and their client's needs and personal circumstances.[2142] For this reason, defence counsel, in arguing for the imposition of a CCO, need to clearly articulate to the sentencing court a formulation of conditions which address 'the offender's particular needs, and the causes of the offending, and which will promote the necessary changes in the offender's life to reduce the risk of reoffending'.[2143]

[2136] Ibid s 47.
[2137] Ibid ss 48C-48LA.
[2138] Ibid s 80(2)(b).
[2139] Ibid s 48.
[2140] Ibid ss 84-87.
[2141] Ibid s 48A. See 11.7 – Community Correction Order – Interaction with sentencing principles and purposes below.
[2142] *Boulton* 333 [101].
[2143] Ibid.

11.4.2.1 – Unpaid community work condition

The court may impose a condition requiring the offender to perform a certain number of hours of unpaid community work. Although it cannot be work of a nature that would normally be performed by paid labour, unpaid community work may include any of the following:

- work at a hospital, educational or charitable institution or any other non-profit body;
- work at the home of any socially disadvantaged or disabled person or any institution for such persons;
- work on any Crown land or land occupied by the Crown;
- work on any land owned, leased or occupied for a public purpose by any person or body under any Act.[2144]

A community work condition is the only condition that the Act expressly describes as being for the purposes of punishment,[2145] 'but that does not detract from the reality that the other conditions have punitive operation'.[2146]

Further 'there is no general requirement to impose an unpaid community work condition, in preference to a term of imprisonment, where that would achieve the purposes of the sentence'.[2147]

Duration and expiration

The court must specify both the number of hours of unpaid community work the offender must complete and the period within which they must do so. The period set by the court may be less than the duration of the CCO.[2148]

An unpaid community work condition may require a maximum of 600 hours of unpaid community work.[2149] No more than 20 hours may be required to be worked in any period of seven days, but an offender may choose to work up to 40 hours in a seven-day period.[2150]

A court need not order a pre-sentence report before imposing a CCO with less than 300 hours of unpaid community work as the only condition.[2151] Further, if such a condition is the only one attached to a CCO, the order expires on the satisfactory completion of the hours of work.[2152]

Concurrency

Unless the court directs otherwise, multiple orders to perform unpaid community work must generally be performed concurrently with any hours required to be performed under a new or existing CCO.[2153] This

[2144] *Sentencing Regulations 2011* (Vic) reg 7 ('*Sentencing Regs*').
[2145] The Act s 48C(2).
[2146] *Dyason v The Queen* (2015) 251 A Crim R 366, 373 [37] ('*Dyason*').
[2147] *Bell v The Queen* (2016) 77 MVR 336, 346 [53] ('*Bell*').
[2148] The Act ss 48C(3), (9).
[2149] Ibid s 48C(4).
[2150] Ibid ss 48C(5)-(6).
[2151] Ibid s 8A(3).
[2152] Ibid s 48C(7).
[2153] Ibid s 41.

presumption of concurrency also applies to hours of unpaid community work required under a CCO and a 'fines order'[2154] and under one or more standard CCOs. A fines order is a fine conversion order or a fine default unpaid community work order.[2155]

An exception applies for hours required to be performed under multiple fine conversion orders or fine default unpaid community work orders. These orders are mutually cumulative unless directed otherwise.[2156] However, there is a presumption of concurrency between these and standard CCO unpaid work orders.[2157]

Where an offender is subject to more than one CCO, the court must not make a direction that causes the total period of unpaid community work under all the community work conditions to exceed the maximum time limits for orders.[2158]

If a court attaches both an unpaid community work condition and a treatment and rehabilitation condition to a CCO, it may determine that some or all the hours undertaken for treatment and rehabilitation are to be counted as hours of unpaid community work for the purposes of that condition. If such a determination is made but the number of hours undertaken for treatment and rehabilitation that are to be counted as hours of unpaid community work is not specified, then all the hours satisfactorily undertaken for treatment and rehabilitation are to be counted as hours of unpaid community work.[2159]

11.4.2.2 – Treatment and rehabilitation conditions

A court may require an offender to undergo specified treatment and rehabilitation. The court must specify one or more of the following types of treatment and rehabilitation:

- assessment and treatment (including testing) for drug and/or alcohol abuse or dependency;
- assessment and treatment (including testing) at a residential facility for withdrawal from or rehabilitation for alcohol and/or drug abuse or dependency;
- any medical assessment and treatment, including general or specialist treatment or treatment in a hospital or residential facility;
- mental health assessment and treatment, including treatment in a hospital or residential facility;
- programs that address factors relating to the offender's offending behaviour.
- any other treatment and rehabilitation the court considers necessary and is specified in the order, including employment, educational, cultural and personal development programs consistent with the purpose of the condition.[2160]

[2154] Ibid s 42(1).
[2155] Ibid s 42(2).
[2156] Ibid s 69R.
[2157] Ibid s 42.
[2158] Ibid s 48C(8).
[2159] Ibid s 48CA.
[2160] Ibid s 48D(3).

When imposing a treatment and rehabilitation condition, the court must have regard to the need to address the underlying causes of the offending, and to the recommendations, information and matters identified in the pre-sentence report in relation to the treatment and rehabilitation of the offender.[2161]

The court may structure a CCO so that successful completion of rehabilitation programs entitles an offender to a commensurate reduction in any unpaid community work hours they are required to complete.[2162]

In assessing whether to impose a CCO, the sentencing judge should generally assume that the order will be complied with, and that any initial difficulties will abate once treatment gets underway. However, there may be cases where the court concludes that a CCO is not appropriate because there is no realistic prospect of compliance.[2163]

11.4.2.3 – Supervision condition

A supervision condition requires that the offender be supervised, monitored and managed as directed by the Secretary. It is separate and distinct from the reporting and visitation requirements and compliance with directions of the Secretary required under the terms of every CCO. The purpose of this condition is to address the need to ensure the offender complies with the order.[2164]

This condition may run for the duration of the CCO or for a lesser period specified by the court.[2165]

When imposing this condition, the court must have regard to the recommendations, information and matters identified in the pre-sentence report.[2166]

11.4.2.4 – Non-association condition

The court may impose a non-association condition that requires the offender not to contact or associate with a person or class of persons specified in the order.[2167]

This condition may run for the duration of the CCO or for a lesser period specified by the court.[2168]

When imposing this condition, the court may consider any effect the condition may have on the offender's employment,[2169] but it must have regard to the recommendations, information and matters identified in the pre-sentence report in relation to the treatment and rehabilitation of the offender.[2170]

[2161] Ibid s 48D(2).
[2162] Ibid s 48CA.
[2163] *Boulton* 345-46 [172]-[173].
[2164] The Act ss 48E(1)-(2).
[2165] Ibid s 48F(4).
[2166] Ibid s 48E(3).
[2167] Ibid s 48F(1).
[2168] Ibid s 48F(3).
[2169] Ibid s 48F(2).
[2170] Ibid s 48E(3).

11.4.2.5 – Residence restriction or exclusion condition

A court may attach a residence restriction or exclusion condition that requires the offender to reside or not reside at a specified place.[2171]

In imposing this condition, the court may consider the risk the condition poses to the safety of any person likely to reside there with the offender and any effect the condition may have on the employment of the offender.[2172]

While this condition is in place, the offender must not change their place of residence unless the court first varies the CCO to specify a new residence restriction or exclusion.[2173]

The court must not impose this condition where it would be inconsistent with a family violence intervention order, a personal safety intervention order or a child protection order.[2174]

This condition may run for the duration of the CCO or for a lesser period specified by the court.[2175]

11.4.2.6 – Place or area exclusion condition

The court may attach a condition requiring the offender not to enter or remain in a specified place or area, including licenced premises.[2176]

When imposing this condition, the court may consider the effect of the condition on the offender's employment.[2177]

The court must not impose this condition where it would be inconsistent with a family violence intervention order or a personal safety intervention order.[2178]

This condition may run for the duration of the CCO or for a lesser period specified by the court.[2179]

11.4.2.7 – Curfew condition

A court may attach a curfew condition that requires the offender to remain at a specified place between specified hours each day for a specified period.[2180]

In attaching this condition, the court may consider the risk the condition poses to the safety of any person who is likely to reside with the offender and the effect of the curfew on the offender's employment.[2181]

[2171] Ibid s 48G(1).
[2172] Ibid s 48G(2).
[2173] Ibid s 48G(4).
[2174] Ibid s 48G(5).
[2175] Ibid s 48G(3).
[2176] Ibid s 48H(1).
[2177] Ibid s 48H(2).
[2178] Ibid s 48H(4).
[2179] Ibid s 48H(3).
[2180] Ibid s 48I(1).
[2181] Ibid s 48I(2).

A curfew must be between a minimum of two hours and a maximum of 12 hours each day, for a period not to exceed six months.[2182]

The court must not impose a curfew condition that is inconsistent with a family violence intervention order or a personal safety intervention order.[2183]

11.4.2.8 – Alcohol exclusion condition

The court may attach an alcohol exclusion condition to address the role of alcohol in the offender's offending behaviour.[2184] It requires that an offender:

- must not enter or remain in any licensed premises characterised as a nightclub, bar, restaurant, café, reception centre or function centre;
- must not enter or remain in the location of a 'major event';[2185]
- must not enter or remain in a bar area of any licensed premises to which the foregoing two categories do not apply; and
- must not consume liquor in any licensed premises not covered by the first two items above.[2186]

However, the court may specify a licensed premise to which these restrictions do not apply.[2187] The court may also specify whether the condition applies at all times, or only for specified hours each day.[2188]

When imposing this condition, the court may consider the effect of the condition on the offender's employment.[2189]

This condition may run for the duration of the CCO or for a lesser period specified by the court.[2190]

The following principles apply to an alcohol exclusion order:

- its primary purpose is to protect the community, which it does by limiting the opportunity for the offender to consume alcohol in venues where others are present and who may be harmed if the offender becomes intoxicated
- it may facility an offender's rehabilitation by addressing one of the underlying causes of their offending
- it is capable of being punitive because it imposes restraints on the offender's liberty in addition to a sentence of imprisonment, and these restraints are part of the circumstances the court must generally consider in the intuitive synthesis
- it may have a punitive element, which extends beyond the deprivation of liberty, that necessarily arises from its provisions, but the existence and extent of this will depend on the individual

[2182] Ibid s 48I(3).
[2183] Ibid s 48I(4).
[2184] Ibid s 48J(4).
[2185] *Liquor Control Reform Act 1998* (Vic) s 14B.
[2186] The Act s 48J(1)–(2).
[2187] Ibid s 48J(3).
[2188] Ibid s 48J(6).
[2189] Ibid s 48J(5).
[2190] Ibid s 48J(7).

circumstances of the offender. And any adverse impacts may be ameliorated by an exemption granted under s 89DE(5) of the Act
- if the offender wishes to contend the order has an additional punitive impact, they must do so expressly, provide evidence supporting the contention, and address whether s 89DE(5) is amelioratory
- if an offender expressly contends their sentence should be moderated because of the order, the sentencing court should make a finding on the extent (if any) to which the order is punitive and explain how the order informed its exercise of the sentencing discretion.[2191]

11.4.2.9 – Bond condition

The court may attach a condition requiring the offender to pay an amount of money as bond to ensure they comply with the CCO.[2192] All or part of that sum may be forfeit if the offender fails to comply.[2193]

When attaching a bond condition, the court must have regard to whether the offender's financial circumstances (as contained in the pre-sentence report) are sufficient to support the payment of the bond and fix a period for the offender to pay.[2194]

Where an offender pays money as part of a bond condition, it must be paid to the court that makes the order and be held on trust by the Crown until the money is repaid or forfeited pursuant to the Act.[2195] Any interest that is received as a result of the investment of bond money is credited to the Consolidated Fund, irrespective of whether the money is eventually repaid.[2196] Similarly, if a person contravenes a CCO that has a bond condition attached and the court orders that they forfeit all or part of the bond, the money forfeited is paid into the Consolidated Fund.[2197]

If the CCO or bond is cancelled, varied or otherwise dealt with, the Crown must repay the bond money to the offender within seven days, unless the court orders a longer period.[2198] In other circumstances where the money is not liable to be forfeited, the Crown must repay the offender, on the later of the following:

- within three months of the expiry of the relevant CCO; or
- within seven days of the finalisation of a proceeding, where that proceeding is for an offence (punishable by imprisonment) committed during the operational period of the relevant CCO, and the offender was charged with the offence within three months of the expiry of the order.[2199]

For this purpose, a proceeding is 'finalised' after the final determination of the charge by a court, when the charge is withdrawn, or when prosecution of the charge is discontinued.[2200]

[2191] *Frecker v The Queen* [2021] VSCA 331, [66], [79].
[2192] Ibid s 48JA(1)–(2).
[2193] Ibid s 48JA(1).
[2194] Ibid s 48JA(3).
[2195] Ibid s 48JA(4).
[2196] Ibid s 48JA(5).
[2197] Ibid s 48JA(9).
[2198] Ibid s 48JA(6).
[2199] Ibid s 48JA(7).
[2200] Ibid s 48JA(8).

11.4.2.10 – Judicial monitoring condition

If the court is satisfied that it is necessary for the court to review the offender's compliance with a CCO during its course, it may attach a condition directing that the offender be monitored by the court.[2201]

The court may specify when the offender must re-appear before the court for a review hearing and any information, reports or tests that must or may be provided during the review.[2202] However, a judicial monitoring condition does not empower the offender to be medically tested without their consent.[2203]

A judicial monitoring condition applies for the duration of the CCO, or such shorter period as the court specifies.[2204]

A review hearing may be conducted by the judicial officer who imposed the CCO or another judicial officer of the same court.[2205] It may also be conducted via videolink with the offender at a remote location if that promotes their best interests and rehabilitation.[2206] At the hearing a court may:

- require or invite the offender to answer questions or provide information, including reports or the results of medical examinations or medical tests;
- invite the offender's medical practitioner to produce medical reports or the results of medical tests that concern the offender; and
- require or invite information from the Secretary to the Department of Justice, the person who prosecuted the offender for the offence and any other person the court considers appropriate.[2207]

After conducting a review hearing, the court may cancel or vary the monitoring condition, including changing the duration of the condition, the timing of review hearings and the information that must be provided on future reviews. Alternatively, the court may leave the condition in place and unchanged.[2208]

If an offender fails to re-appear for review in accordance with a judicial monitoring condition, the court may issue a warrant to arrest.[2209]

11.4.2.11 – Electronic monitoring condition

To monitor an offender's compliance with a 'monitored condition' (that is, only a curfew condition or a place or area exclusion condition)[2210] the Supreme or County Courts may attach an electronic monitoring condition to a CCO.[2211]

[2201] Ibid s 48K(1).
[2202] Ibid s 48K(2).
[2203] Ibid s 48K(3).
[2204] Ibid s 48K(4).
[2205] Ibid s 48K(5).
[2206] See, eg, *Treloar v The Queen* [2020] VSCA 6, [41].
[2207] The Act s 48L(1).
[2208] Ibid s 48L(2).
[2209] Ibid s 48L(3).
[2210] See, eg, *Robson v The Queen* [2018] VSCA 256, [68] ('*Robson*'); The Act s 3.
[2211] The Act ss 48LA(1)-(2).

When determining whether to attach an electronic monitoring condition, the court must consider the recommendations, information and matters identified in the pre-sentence report in relation to the electronic monitoring of the offender.[2212]

A court may only attach an electronic monitoring requirement if:

- the pre-sentence report includes a positive statement that having had regard to the circumstances of the offender's residence, the offender is a suitable person to be electronically monitored and appropriate resources or facilities are available to enable the monitoring; and
- the court is satisfied that the offender is a suitable person to be electronically monitored, it is appropriate in all of the circumstances that the offender be electronically monitored, and appropriate resources or facilities are available to enable the monitoring.[2213]

An electronic monitoring requirement must specify the period for which the offender is to be electronically monitored. This period must be the same or a lesser period than that which is specified in respect of the monitored condition itself.[2214] If no such period is specified, the period will be the same as the period for which the monitored condition applies.[2215]

Where an electronic monitoring requirement is attached, the following terms are attached to the CCO:

- the offender must comply with any direction given by the Secretary that is necessary to ensure the offender is electronically monitored in accordance with the requirement;
- the offender must for 24 hours of each day be electronically monitored and wear an electronic monitoring device fitted at the direction of the Secretary for the specified period;
- the offender must not, without reasonable excuse, tamper with, damage or disable any electronic monitoring device or equipment used;
- the offender must accept any visit by the Secretary to the place where the offender resides, at any time that it is reasonably necessary, for any purpose including to install, repair, fit or remove any electronic monitoring device or equipment used; and
- the offender must comply with any direction given by the Secretary in respect of the electronic monitoring requirement of a curfew condition.[2216]

11.4.2.12 – Justice plan condition

A court that is considering imposing a CCO on an intellectually disabled offender may attach a justice plan condition directing them to participate in the plan of services that the court must request (see below) before imposing the condition.[2217]

Before imposing the condition, a court may request, and must consider:

- a pre-sentence report;

[2212] Ibid s 48LA(3).
[2213] Ibid s 48LA(4); *Boulton* 332 [98].
[2214] The Act s 48LA(5).
[2215] Ibid s 48LA(6).
[2216] Ibid s 48LA(8).
[2217] Ibid ss 47(2)(b), 80(1),

- a statement from the Secretary to the Department of Human Services that the person has an intellectual disability; and
- a plan of available services designed to reduce the likelihood of the offender committing further offences that is in accordance with the objectives and principles of Part 2 of the *Disability Act 2006* (Vic).[2218]

The justice plan condition may apply for a period of less than two years specified by the court or the period of the sentence, whichever is shorter.[2219]

If the court attaches a justice plan condition, it must cause a copy of the CCO to be supplied to the Secretary of the Department of Human Services.[2220] The court may also direct that the Secretary review the justice plan at a specified time, or, if no direction is made, the Secretary must review the plan not later than one year after imposition of the CCO and thereafter at intervals not exceeding one year until the special condition of the sentence ceases to have effect.[2221]

On application by the offender or the Secretary,[2222] the court that attached the condition may, following a hearing of the application, confirm, vary or cancel the justice plan condition if satisfied that:

- the offender is no longer willing to comply with the condition;
- the needs of the offender are not being met by the condition;
- the offender has failed without reasonable excuse to comply with the condition; or
- the condition is no longer appropriate.[2223]

If the court cancels the justice plan condition, it may cancel the sentence and deal with the offender for the offence or offences with respect to which the sentence was imposed as if it had just found the offender guilty of that offence.[2224]

In determining how to deal with an offender following the cancellation of a sentence, a court must consider the extent to which the offender had complied with the sentence before its cancellation.[2225]

11.5 – Variation

On application, the court that made the CCO may take a variety of actions if satisfied that:

- the circumstances of the offender have materially altered and as a result the offender will not be able to comply with any condition of the CCO;
- the circumstances of the offender were wrongly stated or inaccurately presented to the court or the author of a pre-sentence report, or drug and alcohol report, before the CCO was made;
- the offender no longer consents to the CCO;

[2218] Ibid ss 80(2)-(3).
[2219] Ibid s 80(4).
[2220] Ibid s 80(5).
[2221] Ibid s 81(1).
[2222] Ibid s 82(2).
[2223] Ibid s 82(1).
[2224] Ibid s 82(5).
[2225] Ibid s 82(6).

- the rehabilitation and reintegration of the offender would be advanced by dealing with the CCO; or
- the continuation of the CCO is no longer necessary in the interests of the community or the offender.[2226]

If satisfied of any of the foregoing, the court may:

- confirm the CCO or a part of it;
- cancel the CCO and deal with the offender for the offence(s) underlying the order in any way that the court could deal with the offender as if it had just found them guilty;
- cancel the CCO and make no further order with respect to the underlying offence(s);
- vary the CCO;
- cancel, reduce, suspend, vary or reduce a condition of the CCO;
- attach a new condition;
- cancel, reduce, suspend, vary or reduce the requirement that a program be undertaken;
- impose a new program to be undertaken.[2227]

The court must decide what action to take after assessing the extent of the offender's compliance with the CCO,[2228] and the Secretary must advise the court of any notices it has given to the offender regarding non-compliance.[2229]

At any time while the CCO is in force, an application to vary it may be made by a prescribed person or a member of a prescribed class of persons,[2230] the informant or police prosecutor (if the Magistrates' Court was the sentencing court), the Director of Public Prosecutions, the offender, or the Secretary.[2231]

Notice of any application to vary must be provided to different individuals and entities.[2232]

The court may issue a warrant to arrest if the offender does not attend a hearing on the application to vary.[2233]

11.6 – Contravention

Contravention of a CCO is a State offence[2234] that invokes the procedures specified in Division 2 of Part 3C and, relevantly, requires the court finding an offender guilty of contravening a CCO to exercise the same powers as when it allows an application to vary a CCO.[2235]

[2226] Ibid ss 48M(1)(a)-(e).
[2227] Ibid ss 48M(2)(a)-(h).
[2228] Ibid s 48M(3).
[2229] Ibid s 48M(4).
[2230] These are persons employed in the Department of Justice under Part 3 of the *Public Administration Act 2004* (Vic) at a level of Grade 6 or higher to whom the Secretary has delegated the power to apply for variance of a CCO. See, eg, the Act s 115B(1)(a)(iii); *Sentencing Regs* reg 15.
[2231] The Act s 48N(1).
[2232] Ibid s 48N(2).
[2233] Ibid s 48N(3).
[2234] Ibid s 83AD(1).
[2235] Ibid s 83AS.

The court may, on finding an offender who has paid a bond guilty of contravening a CCO, order the bond forfeit to the Crown in whole or part if the court varies or confirms the order.[2236] If it cancels the CCO, the court must order the bond forfeit in whole or in part.[2237]

In determining how to deal with an offender who has contravened a CCO, the court must take account of the extent to which they have complied with the order.[2238] The failure to comply with the conditions of a CCO diminishes an applicant's prospects of rehabilitation[2239] and is also relevant to specific deterrence.[2240]

The Court of Appeal has considered approaches to exercising the power of cancelling a CCO and dealing with the offender for the offence as if it had just found them guilty.[2241] The Court has said that the judge should set aside the whole sentence and sentence afresh as if the offender had just been convicted of the first offence. Pre-sentence detention would then be declared and include time already served under the first sentence.[2242] This is the better course than cumulating a new sentence when re-sentencing because that leaves the question of pre-sentence detention uncertain.[2243]

It would be a 'very unusual case' where a CCO is cancelled and the court then imposed a custodial term that is 'longer than the period of the original combination sentence'.[2244]

[2236] Ibid s 83AS(4)(a).
[2237] Ibid s 83AS(4)(b).
[2238] Ibid s 83AS(3); *Luu v The Queen* [2018] VSCA 92, [27] ('*Luu*').
[2239] *Luu* [27]; *Bieljok v The Queen* [2018] VSCA 99, [58] ('*Bieljok*'); *Hamoud v The Queen* [2018] VSCA 123, [36] ('*Hamoud*').
[2240] *Hamoud* [36].
[2241] *Luu*.
[2242] Ibid [23]; *Bieljok* [4], [62].
[2243] *Bieljok* [60].
[2244] *Luu* [26].

11.7 – Interaction with sentencing principles and purposes

In 2014, the Victorian Court of Appeal issued its first Guideline Judgment: *Boulton v The Queen*.[2245] In addition to providing detailed practical guidance to sentencing courts and discussing the significant changes brought about by the CCO regime, the Court discussed the key principles and purposes that guide the imposition of CCOs for state offences.[2246] In addition to the principles identified by *Boulton*[2247] the Court later noted that a CCO may achieve all the general purposes of sentencing described in s 5(1) of the Act.[2248]

11.7.1 – Proportionality and suitability

A CCO is a flexible sentencing option that allows several purposes of sentencing to be served simultaneously and in a variety of circumstances,[2249] but the overarching principles that govern the CCO regime are proportionality and suitability.[2250]

For example, a CCO cannot be disproportionate to the seriousness of the offending by being of longer duration or having more onerous treatment and rehabilitative conditions.[2251] The willingness of the offender to consent to the order does not relieve the court of the need to ensure that the CCO remains proportionate to the offending.[2252]

In *Boulton*, the Court appears to have accepted the submission by Victoria Legal Aid that the principle of suitability derives from the text of the Act because it requires a court considering whether to impose a CCO to have regard for 'an offender's circumstances and capacity to comply (while remaining subject to the principle of proportionality)'.[2253] For example, an offender cannot be deemed unsuited for a CCO simply because they have a disadvantage or disability that makes their compliance with it difficult.[2254]

The Court declined, however, to define 'the outer limits on the suitability of a CCO as a sentencing option' for any given offence, preferring to leave to time and experience the question of whether accepted views about imprisonment as the only sentencing option might be reconsidered.[2255]

Without expressly addressing suitability or its limits, the Court has since said that for dangerous driving causing death, a term of imprisonment of less than two years was not open.[2256] Further, it has approved findings that a CCO alone is insufficient to serve the sentencing purposes in cases involving 'white-collar'

[2245] *Boulton*.
[2246] *Boulton* was subsequently held not to apply to sentencing for federal offences. See *Atanackovic v The Queen* (2015) 45 VR 179, 207–12 [94]–[117] ('*Atanackovic*'). See 11.10 – Community Correction Order – Interaction with Federal Sentencing.
[2247] *Boulton* 325 [63], 336–37 [121]. See also *McGrath v The Queen* [2015] VSCA 176, [30]–[32] ('*McGrath*').
[2248] *Cole (a pseudonym) v The Queen* [2015] VSCA 44, [22].
[2249] *Boulton* 311 [2], 335–36 [116].
[2250] Ibid 325 [63]; Appendix 1 [5].
[2251] *Boulton* 326 [66], 328 [75], 346 [174]; the Act s 48A(a).
[2252] *Boulton* 328 [76].
[2253] Ibid 328 [77]; Appendix 1 [8].
[2254] *Boulton* 328-29 [80].
[2255] Appendix 1 [29].
[2256] *DPP (Vic) v Borg* (2016) 258 A Crim R 172, 193 [111], 194 [114] ('*Borg*').

financial crimes.[2257] It also appears the Court might be of the view that some period of incarceration is required for intentionally causing serious injury,[2258] reckless conduct causing injury (such as driving while intoxicated),[2259] or for a series of linked incidents that occur over some hours and involve domestic violence.[2260]

Conversely, the Court has said that while trafficking offences will normally attract an immediate term of imprisonment, this may not be so if there are strong mitigating factors.[2261] It has also concluded that although rape (particularly if unprotected and involving ejaculation) might ordinarily require a substantial term of imprisonment, an offender's specific circumstances may permit the imposition of a CCO alone.[2262] Similarly, while sexual offending against children and child pornography offences normally require a significant term of imprisonment, a CCO might be appropriate given powerful mitigating factors and an individual's circumstances.[2263]

11.7.2 – Parsimony[2264]

Boulton said the first question a sentencing court should consider is: 'Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?'[2265]

As was noted later, in posing this question *Boulton* was simply restating the task that a sentencing judge has always had to undertake. That is, determining if confinement is necessary to satisfy all relevant sentencing principles – and, if so, then identifying the minimum term that is required.[2266] Nothing in *Boulton* altered the principle of parsimony.[2267] A sentencing judge has always been required, per ss 5(3)-(4) of the Act, not to impose a term of confinement unless the sentencing purposes cannot be met by anything less. Section 5(4C) merely supplemented those long-standing provisions by introducing the option of a CCO.[2268]

[2257] See, eg, *Melnikas*; *Young v The Queen* [2016] VSCA 149, [118], [134]; *Thorpe v The Queen* [2016] VSCA 158; *Arthur v The Queen* [2018] VSCA 58, [15]. But see *Dyason* 370 [20].
[2258] See, eg, *DPP (Vic) v Hudgson* [2016] VSCA 254 ('*Hudgson*'); *May-Jordan v The Queen* [2017] VSCA 30 ('*May-Jordan*'); *DPP (Vic) v Weber* [2017] VSCA 93.
[2259] *Hutchinson v The Queen* (2015) 71 MVR 8 ('*Hutchinson15*').
[2260] *DPP (Vic) v Natoli* [2016] VSCA 35, [39]-[47].
[2261] *DPP (Vic) v Apostolopoulos* [2016] VSCA 201.
[2262] *DPP (Vic) v McInnes* [2017] VSCA 374.
[2263] *DPP (Cth) v Hutchison (a pseudonym)* [2018] VSCA 153, [54], [64]–[66], [69], [72] ('*Hutchison18*').
[2264] See also 11.8.2 – Community correction order – Combining a CCO with a term of imprisonment – Interaction with the parsimony principle below.
[2265] *Boulton* 335 [115], 336–37 [121].
[2266] *Dawson v The Queen* [2015] VSCA 166, [42] ('*Dawson*').
[2267] Ibid. See also *McGrath* [30].
[2268] *McGrath* [31]-[32]. See also *Greatorex* [29].

11.7.3 – Punishment

A CCO is a flexible sentencing option that in theory can displace the need for imprisonment, even for serious offences, because it may serve all the purposes of punishment.[2269] However, the very flexibility of a CCO can make it difficult for a sentencer to gauge the punitive nature of a CCO. A given condition may be more or less onerous for an individual offender, depending on whether the condition requires a radical change in behaviour.[2270]

The severity of a sentence can be measured by the impact it has on an offender's rights and interests; the more important the right and significant the intrusion, the more severe the sanction.[2271] From this perspective, a CCO has obvious punitive elements because:

- the mandatory conditions significantly impinge an offender's liberty.[2272]
- the breach of a condition is an offence itself that may attract a three-month term of imprisonment and the possibility of resentencing on the original offence. These are 'significant burdens' that should have a powerful deterrent effect.[2273]
- the range and nature of the conditions that might attach to a CCO are coercive, restrictive, and prohibitive, and may bind the offender for the duration of the order.[2274]
- an 'intensive compliance period' both increases the punitive burden of a CCO condition and maximises compliance.[2275]
- a condition that requires treatment and rehabilitation is both coercive and intrusive.[2276] In fact, orders that contain such conditions will have a significant impact on the offender's ability to live as they choose and by imposing them a court may effectively require the person to begin a new life.[2277]
- an electronic monitoring condition is self-evidently punitive.[2278]

Because the punitive effect of a CCO is determined by the extent and duration of the curtailment of the offender's freedom, it follows that the period of the CCO, and the conditions attached, affect the extent to which a CCO is considered punitive.[2279] The most obviously punitive condition is that the offender undertake community work for a specified number of hours, but other conditions can significantly restrict the offender's freedom of movement and association.[2280] However, whatever conditions are attached, the punitive effect of a CCO can never be equated to imprisonment 'which is uniquely punitive

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[2269] *Boulton* 311 [2], 312 [6], 335–36 [116]. But see *DPP (Vic) v Reynolds (a pseudonym)* [2022] VSCA 263, [108]-[112] (because the punitive effects of a CCO cannot compare with imprisonment it follows that there will be cases where a court concludes that certain sentencing purposes – typically punishment, denunciation, and deterrence – cannot be met by a CCO or combination term even with onerous conditions).
[2270] *Boulton* 332-33 [99]-[101].
[2271] Ibid 331 [90].
[2272] Ibid 331 [91]. See also *DPP (Vic) v Merryfull* [2023] VSCA 244, [65].
[2273] *Boulton* 331 [92] (concurring with Warren CJ's observations in *DPP (Vic) v Edwards* (2012) 44 VR 114 ('*Edwards12*').
[2274] *Boulton* 331 [93].
[2275] Ibid 331 [94].
[2276] Ibid 331-32 [95].
[2277] Ibid 332 [97].
[2278] Ibid 332 [98].
[2279] Ibid 342 [152].
[2280] *Borg* 192 [105].

because of that feature which distinguishes it from all other forms of sanction, namely, the complete loss of liberty'.[2281] But this does not mean that a CCO is a 'mere slap on the wrist'[2282] or a ''soft' sentencing option'; [2283] it is a 'significant punishment'.[2284]

Boulton emphasised a distinction between the 'narrow punitive purpose (and effect) of imprisonment' and 'the multi-purpose character of the CCO'.[2285] This multi-purpose character, which incorporates both punitive and rehabilitative purposes, means that the CCO 'offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and those of the offender'.[2286] A CCO offers the court something that imprisonment cannot: the ability to impose a sentence that demands the offender take personal responsibility for self-management and self-control, that they pursue treatment and rehabilitation, and refrain from undesirable activities, associations, persons and places.[2287] The emphasis on rehabilitation in many CCOs does not detract from the fact that every CCO has a punitive nature every day it is in force.[2288]

For the purposes of punishment, a sentencing court may impose a CCO that is longer than the period considered necessary for the order to achieve its rehabilitative purposes.[2289] But following a term of imprisonment, the pursuit of the punitive purpose should be progressive, and the levels of supervision to which the offender is subject should reduce over time to facilitate the offender's rehabilitation and reintegration.[2290]

11.7.4 – Deterrence

A CCO provides both specific and general deterrence.[2291]

The degree to which a sentence is effective as a general deterrent depends on the degree to which it is perceived by the community as punitive and the extent to which the fact of the sentence (and its punitive character) is communicated to those it is meant to deter.[2292] A CCO can operate to deter others, but unlike imprisonment it is not self-evidently punitive,[2293] so it will be challenging to adequately convey to the public its punitive nature and operation.[2294] This will require the court, in the first instance, to clearly set out the reasons for its conclusion that a CCO sufficiently punishes the offender for their crime.[2295]

[2281] Ibid 192 [106]; *DPP (Vic) v Rivette* [2017] VSCA 150**, [**37] ('*Rivette*'); *DPP (Vic) v Grech* [2016] VSCA 98, [81] ('*Grech*'); *Mackay v The Queen* [2015] VSCA 125, [13].
[2282] *Edwards12* 163 [240] (Weinberg JA and Williams AJA).
[2283] Ibid 143 [135] (Warren CJ).
[2284] Ibid 163 [240].
[2285] *Boulton* 336–37 [121].
[2286] *Atanackovic* 208 [97].
[2287] *Borg* 191-92 [104].
[2288] *Bell* 344-45 [45].
[2289] Ibid; Appendix 1 [31].
[2290] *Boulton* 340–41 [142]–[145].
[2291] Ibid 337–38 [123]–[130]. See also *Edwards12* 163 [240]; *Melnikas* [60].
[2292] *Boulton* 337 [123].
[2293] Ibid 337 [124].
[2294] Ibid 337 [125].
[2295] Ibid 337 [126].

Further, a CCO may effectively serve as a specific deterrent because:

- it will be a real punishment and should deter repeat offending;
- the mandatory conditions attached to every CCO include a prohibition on committing an offence punishable by a term of imprisonment. If this condition is breached, three separate penalties follow:
    - a penalty for the offence;
    - a penalty for the breach;
    - resentencing for the original offending that underlies the CCO;[2296]
- the conditions attached to a CCO will minimise the risk of reoffending and thereby protect the community, which is the purpose of specific deterrence.[2297]

In *Dyason v The Queen*,[2298] a question arose regarding the compatibility of the sentencing principles applicable to white collar crimes and the CCO regime. Earlier cases had established that in such cases the need for general deterrence ordinarily warranted a substantial term of actual imprisonment.[2299] In *Dyason*, it was argued that *Boulton's* emphasis on the punitive nature of a CCO required reconsideration of the primacy of deterrence for these offences. The Court of Appeal rejected that submission and said the developed legal principles applicable in sentencing proceedings for white collar cases were unaffected by *Boulton.*[2300] It follows that, in assessing whether a CCO is appropriate for a white-collar offender, the court must give general deterrence considerable weight.[2301]

11.7.5 – Rehabilitation

The CCO regime reinforces the common law purpose of rehabilitation[2302] by including treatment, exclusion and monitoring conditions.[2303] A CCO also promotes rehabilitation by permitting the offender to remain in the community, potentially preserving established employment, and drawing on the support of family and friends.[2304]

It is, however, an error to view a CCO as serving an entirely rehabilitative purpose,[2305] and the rehabilitative purpose cannot in any event vitiate the error of a manifestly inadequate sentence.[2306] Nor, as noted, may a CCO contain onerous treatment and rehabilitative conditions that make the resulting order disproportionate to the seriousness of the offending.[2307]

[2296] Ibid 338 [129].
[2297] Ibid 338 [130].
[2298] *Dyason*.
[2299] See, eg, *DPP (Vic) v Bulfin* (1998) 4 VR 114.
[2300] *Dyason* 373 [38].
[2301] Ibid 374 [45]. See also *Gianello v The Queen* [2015] VSCA 205, [26]–[28]; *Melnikas* [66].
[2302] See, eg, *DPP (Vic) v Leys* (2012) 44 VR 1 ('*Leys*').
[2303] The Act ss 48D-48J, 48K-48LA. See also *DPP (Vic) v Fatho* [2019] VSCA 311, [75]-[76].
[2304] *Borg* 191-92 [104]; *Boulton* 340 [142], 341 [145].
[2305] *Greatorex* [28].
[2306] *Rivette* [57]–[72].
[2307] *Boulton* 328 [75]; Appendix 1 [47]. This was a reason the Court resentenced in Mr Boulton's individual appeal. See *Boulton* 361-62 [242]-[244].

The rehabilitative purpose of a CCO comes to the fore in sentencing youthful offenders.[2308] This is because the CCO can be used to rehabilitate and punish simultaneously, which significantly diminishes the conflict between sentencing purposes when sentencing a young offender. A court will not have to give less weight to denunciation, or specific or general deterrence, to promote the young offender's rehabilitation, but will be able to fashion a CCO that adequately achieves all the sentencing purposes.[2309]

Certain considerations may justify a shorter CCO for a youthful offender than would be appropriate for an older offender in similar circumstances, such as:

- the fact that most youthful offenders disengage from criminal conduct quickly rather than becoming career criminals, so a CCO should avoid alienating them and diminishing protective factors;
- time has a different dimension for the young and a longer CCO may have a greater impact on them;
- youthful offenders may be more receptive to change and able to respond more quickly to treatment;
- an immature brain may respond to punitive measures in way likely to increase the possibility of recidivism. Specifically, a lengthy CCO may perpetuate the stigma of being associated with criminal conduct and adversely impact on protective factors and rehabilitation;
- careful use of the judicial monitoring condition has the potential to enhance the rehabilitation of young offenders who offend because they are drug addicted.[2310]

It does not follow, however, that wherever a young offender is concerned a CCO or combination sentence must be imposed. The circumstances of the offender, the offence and the sentencing considerations always control the decision.[2311]

11.7.6 – Community protection

Boulton noted that when setting a term of imprisonment for serious offenders, the Act requires protection of the community to be considered the principal purpose of the sentence. This plainly does not apply to non-custodial CCOs, '[b]ut it may have some relevance in deciding whether a CCO should be combined with a term of imprisonment'.[2312] While this legislative primacy does not apply to non-custodial CCOs, protection of the community clearly remains the ultimate purpose of punishment[2313] and may be considered in determining an appropriate sentence.[2314]

In the context of the CCO regime, it is the ability to impose treatment and rehabilitative conditions that serve this purpose; society is protected by requiring offenders to obtain appropriate treatment so they do

[2308] See, eg, *Leys*; *Boulton* 348–49 [184]; *Sherritt v The Queen* [2015] VSCA 1; *McAleer v The Queen* (2015) 45 VR 258; *Boyton v The Queen* [2016] VSCA 13; *Borg*; *DPP (Vic) v Majok* [2017] VSCA 135; *DPP (Vic) v McInnes* [2017] VSCA 374; *Gandhok v The Queen* [2018] VSCA 29; *Hutchison18*.
[2309] *Boulton* 349 [186].
[2310] Ibid 349-50 [187]-[190].
[2311] *May-Jordan* [44]; *Sianas v The Queen* [2016] VSCA 84, [37].
[2312] *Boulton* 325-26 [65] n 39.
[2313] Ibid 326 [68].
[2314] Ibid 326 [69].

not reoffend.[2315] But an offender cannot be required to comply with treatment conditions for a longer period than is necessary merely to protect the community.[2316]

11.8 – Combining a CCO with a term of imprisonment

The decision to impose a CCO is quintessentially an exercise of the sentencing discretion,[2317] and the fact that a CCO is now a sentencing option does not change the latitude of a court's discretion. The statements of *Boulton* are general and nothing said there requires that a judge reach a particular conclusion; it does not fetter their exercise of the sentencing discretion.[2318]

A CCO imposed in addition to a term of imprisonment[2319] is what *Boulton* calls a 'combination sentence'.[2320] It is the type of sentence that adds to the flexibility of the CCO regime because it allows a court to conclude, even for serious offending, that all purposes of sentencing may be achieved by a short period of incarceration followed by a lengthy CCO with conditions targeted to the offender's circumstances.[2321]

This is so even when the imprisonment component of the combination sentence is for an excluded offence (such as home invasion) but the CCO component is for other non-excluded offences. The power to order a combination sentence is broadly stated under s 44(1). It arises when sentencing an offender for one or more offences. While there is an initial limitation in that a combination sentence cannot be imposed individually in respect of an excluded offence, so long as that limitation is observed, and the sum of all terms of imprisonment imposed when sentencing for multiple offences (including an excluded offence) does not exceed 12 months, a court may make a CCO for one offence in addition to a sentence of imprisonment for another offence or offences.[2322]

Although a CCO might be appropriate even in cases of relatively serious offending, *Boulton* does not offer a 'Get Out of Jail Free' card in cases where a term of imprisonment is necessary to satisfy the sentencing purposes.[2323] Nothing in that case requires a judge to impose a CCO where such a sentence would not reflect the objective seriousness of the offence and the circumstances of the offender.[2324] As the Court of Appeal said in *McGrath*, 'the option of a CCO does not mean that the imposition of a custodial sentence is presumptively erroneous'.[2325]

Nor is there any tension between s 5(4C) and current sentencing practice because answering *Boulton's* first question – is there any feature of the offending that requires the conclusion imprisonment is the only option – requires a court to consider current sentencing practice. *Boulton* acknowledges that the

[2315] Ibid 327 [72], 328 [75], 340 [142], 341 [145].
[2316] Ibid 326 [69], 327 [72].
[2317] *Greatorex* [27], quoting *Melnikas* [63].
[2318] *McGrath* [61].
[2319] The Act s 44(1).
[2320] *Boulton* 339 [136].
[2321] Ibid 340 [140]-[141].
[2322] *Wright v The King* [2023] VSCA 243, [64]-[65].
[2323] *Hutchinson15* 13 [17].
[2324] Ibid 13 [18].
[2325] *McGrath* [53].

recognition that certain serious offences typically attract a certain term of imprisonment marks the beginning of the court's consideration, not the end.[2326]

11.8.1 – Errors and exclusions

The challenge for a court is to re-examine the types of offending that will ordinarily attract a term of imprisonment.[2327] But *Boulton* is not authority for the proposition that sentencing courts must re-examine the types of offending that attract a term of imprisonment or that a failure to ask the *Boulton* question – whether imprisonment is the only option – illustrates error.[2328] Nor must a sentencing judge expressly rule out a CCO before imposing a term of imprisonment.[2329] The Act only requires a judge to consider the matters it sets out; unlike s 6AAA it does not require sentencing remarks to explicitly to refer to a CCO or set out reasons for refusing to set one.[2330]

Where a combination sentence is imposed it is erroneous to assume that the term of imprisonment deals with deterrence, denunciation and just punishment, and that the CCO is limited to dealing with rehabilitation.[2331] Further, the Court has rejected the notion that a CCO is primarily punitive and Youth Supervision Order is primarily rehabilitative.[2332] By imposing a combination sentence, the judge imposes a sentence that accounts for all relevant matters and there is no requirement that they parse the considerations and assign them to either the custodial term or the CCO.[2333]

In the case of a combination sentence, the Court of Appeal has also said 'the overall sentence may be manifestly excessive due to the relative prominence given to the two components'. As, for example, where the composition of the sentence undermines an important sentencing purpose and a different composition could give effect to that purpose without adversely affecting any other sentencing purpose.[2334]

A CCO cannot be combined with detention in a youth justice centre because the Court of Appeal has found that this does not constitute a term of 'imprisonment' under the Act.[2335]

Nor does a sentence of imprisonment include a suspended sentence.[2336] But the Act does provide, without limiting where a CCO may be imposed, that a CCO may be an appropriate sentence where, prior to their abolition, the court may have imposed and then suspended a sentence of imprisonment, whether imposed for a single offence, or for separate offences.[2337]

[2326] *Dawson* [43]. See also *Hutchison18* [70].
[2327] *Boulton* 333 [103].
[2328] *McGrath* [28]-[29].
[2329] Ibid [36].
[2330] The Act s 5(4C); *Gul* [44].
[2331] *Greatorex* [28].
[2332] *Baker (a pseudonym) v DPP (Vic)* [2017] VSCA 58, [111].
[2333] *Greatorex* [28], citing *Melnikas* [60].
[2334] *Matamata v The Queen* [2021] VSCA 253, [90]-[92], [98].
[2335] *Scammell v The Queen* (2015) 72 MVR 56, 62 [20]. See also *DPP (Vic) v Jordan* [2016] VSC 55.
[2336] The Act s 44(4).
[2337] Ibid s 36(2).

Finally, when sentencing for a category 1 offence or a category 2 offence, a court must impose a sentence of imprisonment without combining that sentence with a CCO.[2338] This rule is subject to exceptions, which are described in Chapter 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 & 2 offences.

11.8.2 – Interaction with the parsimony principle[2339]

Parsimony applies to every case in which a term of imprisonment is imposed, including a combination sentence. However, there is no single term in a combination sentence above which the principle will be infringed. Reasonable minds will differ as to the maximum term that can be imposed before it is considered more severe than is necessary to satisfy the sentencing principles.[2340] The principle of parsimony will only be infringed when the term of imprisonment in a combination sentence falls clearly beyond the range of terms available within a sound exercise of the sentencing discretion.[2341] *Boulton* recognises that a court may conclude certain sentencing purposes are not served by a CCO and that, consistent with the principle of parsimony, a short term of imprisonment may need to be imposed to achieve those purposes.[2342] There is no reason to treat an argument that the parsimony principle has been infringed in a combination sentence any differently than in the context of a term of imprisonment alone or a CCO on its own. The question is not more complex, and remains the same: was the total sentence wholly outside the range of sentencing options open to the judge?[2343]

11.8.3 – Interaction with a non-parole period

In *Boulton*, the Court noted that 'there are significant conceptual and practical difficulties' in combining a CCO with a non-parole period, and they should ordinarily be treated as alternatives.[2344] And indeed legislative anomalies were subsequently identified, and the Court of Appeal repeatedly had to address the problems they created.[2345]

However, those difficulties have since been largely obviated by amendments that commenced on 20 March 2017. The Act now provides that if the term of imprisonment imposed is less than two years but more than one year, the court *may* fix a non-parole period[2346] unless it also intends to impose a CCO, in which case it *may not* do so.[2347]

The Court of Appeal has noted these amendments have changed the landscape for fixing a non-parole period and may broaden the circumstances in which it will be appropriate to refuse to fix a non-parole

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[2338] Ibid ss 5(2G) – 5(2I).
[2339] See also 11.7.2 – Community Correction Order – Interaction with Sentencing Principles and Purposes – Parsimony above.
[2340] *Dawson* 166 [40]; *Greatorex* [29], quoting *Melnikas* [62].
[2341] *Greatorex* [30].
[2342] *Dawson* [42].
[2343] *Greatorex* [33].
[2344] *Boulton* 352 [199]. See also *Atanackovic* 189 [26].
[2345] See, eg, *Deng-Mabior v The Queen* [2015] VSCA 179; *Baldwin v The Queen* [2015] VSCA 299; *Abdou v The Queen* [2015] VSCA 359; *Debono v The Queen* [2016] VSCA 16; *Grech*; *DPP (Vic) v Basic* [2016] VSCA 99; *Dordevic v The Queen* [2016] VSCA 166; *Hudgson*; *May-Jordan*; *Tannous v The Queen* [2017] VSCA 91 ('*Tannous*'); *Rivette*; *Younger*.
[2346] The Act s 11(2).
[2347] Ibid s 11(2A). See 8.3.3.1 – Imprisonment – Non-parole period – Special considerations – Community correction order.

period. The Court noted that Parliament did not intend the combination of parole and CCO as a routine sentencing option.[2348]

11.8.4 – Application of time served

The Act provides that any period of pre-sentence imprisonment must be deducted from any term of imprisonment imposed as part of a combination sentence unless the court otherwise orders.[2349] The Court of Appeal, however, has said that the discretion to 'otherwise order' is not unfettered.[2350] If there is a compelling reason, such as the offender's own conduct being responsible for additional pre-trial detention, then it may be appropriate not to give credit for time served, but in general the practice is not to be encouraged.[2351]

The Court has also rejected the contention that the length of time served may affect the length of any custodial period imposed with a CCO. It has made it clear that the custodial period is determined after the amount of time served is deducted,[2352] and it does not matter if the time served includes a concurrent period for another offence.[2353]

The interplay with the 'ceiling' imposed by s 44(1) must also be considered as it provides that (except for arson) the sum of all terms of imprisonment cannot exceed one year, following deduction of any period of pre-sentence detention.[2354] This effectively means it is likely that only a relatively short term of imprisonment will result if a CCO is imposed for an indictable offence.

11.8.5 – Appeal

If the Court of Appeal is considering varying a combination sentence that increases either component of the sentence, that is, the term of imprisonment or the CCO, this should be viewed as a potentially more severe sentence, which requires the Court to warn the accused pursuant to the *CPA* s 281(3).[2355]

11.9 – Mandatory treatment and monitoring order

This is a legislatively specified type of CCO.

If a court sentencing an offender for offending against protected workers[2356] finds that special reasons exist[2357] and that a 'mandatory treatment and monitoring order' is appropriate, then it must make a CCO with:

[2348] *Tannous* [66]-[67]; *Robson* [72].
[2349] The Act s 18(1).
[2350] *Grech* [55].
[2351] Ibid [56], [63]-[72].
[2352] *Younger* [4], [66].
[2353] Ibid [68]-[70].
[2354] See also *Nov v The Queen* [2020] VSCA 11, [2]; 11.1.3 – Community Correction Order – Prerequisites and Limits – Maximum CCO Term above.
[2355] *Greatorex* [6]-[8].
[2356] See 9.1.2.3 – Statutory schemes – Mandatory imprisonment schemes – Violence offences against protected officials – 6m to 5y minimum non-parole period.
[2357] See 9.1.3 – Statutory schemes– Mandatory imprisonment schemes – Special reason.

- a judicial monitoring condition; and
- either:
    - a treatment and rehabilitation condition; or
    - a justice plan condition.[2358]

This does not limit the conditions a court might attach to this type of CCO,[2359] nor does it limit a court's ability to impose a combination sentence.[2360]

However, the mandatory conditions attached to this order may not be cancelled or varied unless the varied conditions are as onerous (or more so) than those originally imposed.[2361]

11.10 – Interaction with federal sentencing

The guideline judgment of *Boulton* does not apply to sentencing for federal offences because it cannot be picked up by the *Crimes Act 1914* (Cth) s 16A ('*Cth Crimes Act*') or satisfy the requirements of the *Judiciary Act 1903* (Cth) s 80.[2362] In addition, s 44 of the Act does not apply to federal offenders, meaning that a combination sentence cannot be imposed for a single federal offence.[2363]

However, CCOs remain available as a sentencing option for federal offences. While a combination sentence is not available, this does not prevent the making of a CCO for one federal offence and a sentence of imprisonment on another federal offence. It merely prevents a combination sentence being imposed for a single offence.[2364]

Similarly, the court may impose a CCO for one federal offence, and may impose a fine, a pecuniary penalty, reparation or other permitted order for another federal offence.[2365] The CCO simply may not include the latter orders as conditions of or to be imposed in combination with the one offence.[2366]

As with State offences, the court must explain the order to the offender before making a CCO.[2367]

While a court may make a Victorian CCO with or without recording a conviction,[2368] a federal CCO may only be made following conviction.[2369]

[2358] The Act s 44A(1).
[2359] Ibid s 44A(2).
[2360] Ibid s 44A(5).
[2361] Ibid s 44A(3).
[2362] *Atanackovic* 207-12 [94]-[117].
[2363] Ibid 205 [82].
[2364] Ibid; *DPP (Cth) v El Sabsabi* [2017] VSCA 160, [49]-[51].
[2365] *Cth Crimes Act* ss 20AB(4)(a)-(b).
[2366] Ibid s 20AB(3).
[2367] *Cth Crimes Act* s 20AB(2).
[2368] The Act ss 7(1)(e), 37(a).
[2369] *Cth Crimes Act* ss 20AB(1)-(1AAA).

Moreover, while the variation process identified above applies to Commonwealth CCOs,[2370] the contravention process is controlled by the *Cth Crimes Act.* That process is substantially similar,[2371] but the breach is not itself made a separate offence.[2372]

Despite some areas of overlap, the Victorian and Commonwealth sentencing regimes are very different. Perhaps most importantly, the critical question for a sentencing court is different when approaching State and federal offences. Where *Boulton* requires a court sentencing for a Victorian offence to ask, having regard to the availability of a CCO, if there is any feature of the offence or the offender that requires a custodial term; the court sentencing for a Commonwealth offence must consider if the sentence to be imposed is appropriately severe given the circumstances of the offence.[2373]

It could be said that the Victorian regime thus reflects a concern for parsimony where the Commonwealth regime favours totality. However, even though s 5(4C) of the Act – which precludes the imposition of a term of imprisonment unless the sentencing purposes cannot be achieved by a CCO – does not apply to federal offenders, a sentencing judge remains bound by the principle of parsimony and must consider non-custodial alternatives to imprisonment under s 17A(1) of the *Cth Crimes Act*. And there is no dispute that a CCO is non-custodial option.[2374]

[2370] Ibid s 20AC(9).
[2371] Ibid ss 20AC(1)-(5).
[2372] Ibid s 20AC(6).
[2373] *Atanackovic* 209 [101].
[2374] *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [65].

12 – Fines

12.1 – Overview

Both the Commonwealth and State sentencing schemes provide for the imposition of fines. This chapter focuses on the Victorian scheme. For information about the Commonwealth regime please see its Sentencing Database.[2375]

A fine is a sum of money that a court orders an offender to pay after finding them guilty of an offence.[2376] A fine includes costs, but does not include:

- money payable by way of restitution or compensation;
- any costs of, or incidental to, an application for restitution or compensation;
- costs incurred between the parties in a civil proceeding;
- costs incurred by third parties;
- money an offender is ordered to pay to an organisation that provides a charitable or community service, or to the court for payment to such an organization.[2377]

A fine can be imposed with or without conviction[2378] and may be imposed in addition to, or instead of, any other sentence.[2379] However, fines cannot be imposed as an alternative or in addition to imprisonment for Level 1 (life imprisonment) offences.[2380] For Level 2 offences (punishable by 25 years' imprisonment), a fine can only be imposed in addition to imprisonment. It cannot be imposed as an alternative, unless otherwise stated or if the offender is a body corporate.[2381] Lastly, a fine may not be imposed if the purposes for which a sentence is imposed can be achieved by dismissal, discharge, or adjournment.[2382]

The main purposes for imposing a fine are punishment and deterrence.[2383] In appropriate cases, a fine can be an extremely effective deterrent.[2384]

12.2 – Maximum fine

The maximum fine may be given in the provision governing the substantive offence,[2385] but if not then it is determined according to the level of the offence.[2386]

Where the maximum penalty for an offence is expressed in terms of years and does not include a penalty

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[2375] https://csd.njca.com.au/principles-practice/sentencing-options/fine2/.
[2376] The Act s 49.
[2377] Ibid s 3(1).
[2378] Ibid s 7(1)(f).
[2379] Ibid ss 43, 49.
[2380] Ibid s 109(3).
[2381] Ibid s 109(3A).
[2382] Ibid s 5(7).
[2383] *R v Bernstein* [2008] VSC 254 ('*Bernstein*'). See also *R v Irvine* (2009) 25 VR 75, 85 [52] ('*Irvine*').
[2384] *DPP (Vic) v Fucile* (2013) 229 A Crim R 427, 443 [105] ('*Fucile*').
[2385] The Act s 50(1)(a).
[2386] Ibid ss 50(1)(b), 109(2). See 5.1.1 – Circumstances & gravity of the offence – Maximum penalty – Identifying the maximum penalty.

level, the maximum penalty, expressed in penalty units, is 10 times the maximum term of imprisonment expressed in months.[2387]

The maximum fine that may be imposed on a body corporate is five times the maximum fine that could be imposed on a natural person for the same offence.[2388] Where a matter involving a body corporate is heard summarily the maximum fine that can be imposed is 2500 penalty units.[2389]

The value of a penalty unit is fixed by the Treasurer under the *Monetary Units Act 2004* (Vic) s 5(3).[2390]

12.3 – Determining the amount

The following factors are relevant in determining the appropriate size of a fine:

- the maximum fine available;[2391]
- the gravity of the offence;[2392]
- the financial circumstances of offender and their ability to pay;[2393]
- whether the offender is a natural person or a body corporate;[2394]
- any loss, destruction, or damage to property suffered by a person as a result of the offending;[2395]
- the value of any benefit derived by the offender from the offending;[2396] and,
- any time already spent in custody for either the offending[2397] or because of immigration status.[2398]

12.3.1 – Financial circumstances

An offender's financial circumstances can only be considered after the court has decided to impose a fine; they are irrelevant to determining if a fine should be imposed.[2399] This is because deciding whether to make a sentence custodial or monetary based on an offender's financial circumstances creates one law for the rich and another for the poor.[2400]

But financial circumstances – including the ability to pay – are relevant to determining both the amount of

[2387] The Act s 109(3).
[2388] Ibid s 113D(1).
[2389] Ibid s 113D(2).
[2390] Ibid s 110(1). See 5.1.1 – Circumstances & gravity of the offence – Maximum penalty – Identifying the maximum penalty.
[2391] The Act s 5(2)(a).
[2392] *Irvine*.
[2393] The Act s 52(1).
[2394] Ibid s 113D(1).
[2395] Ibid s 54(a).
[2396] Ibid s 54(b). See also *Bernstein* [49]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47, [61]–[64], [69]–[70]; *Paolucci v Town of Cambridge* [2013] WASC 50, [104].
[2397] *Hodder v Western Australia* [2008] WASCA 146.
[2398] *Darter v Diden* (2006) 94 SASR 505, 509 [24].
[2399] *R v Cheshire* (1994) 76 A Crim R 261, 269 ('*Cheshire*').
[2400] Ibid.

any fine imposed and its method of payment.[2401] When considering the offender's financial circumstances, a court must take into account any forfeiture, restitution or compensation orders that it or any other court has made or proposes to make.[2402]

For punishment to be achieved, the amount of a fine must constitute an appropriate punishment when considering the offender's capacity to pay. This means that the amount and method of payment must take into account the offender's financial resources, and the nature of the burden the fine will impose.[2403] The amount of the fine must be sufficient to both punish the offender and deter those who may consider committing similar offences.[2404] It cannot be so low that it becomes merely a tax on the illegal conduct.[2405] In order to be sufficiently punitive and deterrent, the fine must 'have some real sting in it' from the point of view of the offender.[2406]

While an offender's capacity to pay is a relevant consideration, it is not the dominant factor in determining the amount of the fine.[2407] A court should not impose a more severe sentence, such as imprisonment, if it considers a fine is appropriate but the offender does not have the means to pay a fine that properly reflects the gravity of the offence.[2408]

Fines can be imposed even where an offender is a bankrupt.[2409] A smaller fine than might otherwise be appropriate can be imposed on an offender who is clearly unable to pay the greater amount.[2410] Similarly, an otherwise appropriate fine should not be increased merely because an offender is affluent or is likely to receive a sum of money in the future.[2411]

It is never just or rational to impose a fine beyond the offender's reasonable capacity to pay.[2412] A fine that is totally beyond the means of an offender and which the court, the offender and the community realise will never be paid, has no general deterrent effect.[2413] Further, such a fine may be counterproductive if it pushes the offender to commit further offences in order to pay it.[2414]

The onus is on the offender to put material before the court in relation to their financial circumstances.[2415] The court may draw an adverse inference if an offender declines to disclose their

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[2401] The Act s 52(1). See also *Fucile* 444 [108].
[2402] The Act s 53.
[2403] *Sgroi v The Queen* (1989) 40 A Crim R 197, 200 ('*Sgroi*'); *Di Tonto v The Queen* [2018] VSCA 312, [30].
[2404] *R v* Healy (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Tadgell and Charles JJA, 4 August 1997) 8.
[2405] *Jetopay Pty Ltd v Dix* (1994) 76 A Crim R 427, 436.
[2406] *Snyman v The Queen* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Pidgeon, Seaman and White JJA, 1 September 1994). See also *Sgroi* 200.
[2407] *CEO of Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]–[36].
[2408] *R v Repacholi* (1990) 52 A Crim R 49 ('*Repacholi*').
[2409] *CC Containers Pty Ltd v Lee (No 9)* [2015] VSC 595, [29]; *Thunder Studios Inc (California) v Kazal (No 2)* [2017] FCA 202, [9]. Fines are not provable debts and survive bankruptcy. See *Bankruptcy Act 1966* (Cth) s 82(3).
[2410] Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thompson Reuters (Professional) Australia Limited, 3rd ed, 2014) 474.
[2411] Ibid 473–74.
[2412] See *Fraser v The Queen* (1985) 9 FCR 397, 401 ('*FraserFC*'); *Price v Westphal* [2010] NTSC 57, [14].
[2413] *Smith v The Queen* (1991) 25 NSWLR 1, 21 (Kirby P dissenting). See also *Jopar v The Queen* (2013) 44 VR 695, 699 [10] (Weinberg JA).
[2414] *Belcher v The Queen* (1981) 3 A Crim R 124, 128 ('*Belcher*').
[2415] *R v Wright* (1990) 2 WAR 171, 174-75; *Cheshire* 270.

financial circumstances or if it is satisfied that the offender has not been honest about them.[2416] The court is not prevented from imposing a fine if an offender's financial circumstances cannot be ascertained.[2417]

12.4 – Fine as additional sanction

The principle of proportionality applies when determining whether to impose a fine in addition to another sentence. The combined sentences considered as a whole must be proportionate.[2418] Accordingly, where a fine is imposed in addition to a term of imprisonment, it may be necessary to reduce the term of imprisonment that would otherwise have been appropriate.[2419]

A fine should not be imposed in addition to a term of imprisonment where the offender is likely to default and then be liable to serve an additional sentence.[2420] To do so would produce a disproportionately severe sentence.[2421]

Consideration of an offender's capacity to pay is particularly relevant when a fine is being imposed in addition to a term of imprisonment because the offender will be unable to earn an income while imprisoned and will likely face difficulties re-establishing themselves upon release.[2422]

12.5 – Fines and multiple offences

Ordinarily each offence attracts a single sentence. The Act does not provide for courts to order concurrency between separate orders for fines. The result is that where fines are imposed for multiple offences, they must be treated as cumulative penalties. If the principle of totality is not applied, this can result in a total sentence that offends the principle of proportionality.

There are two solutions to this problem. The first is to impose an aggregate fine, where available. The second is to moderate the individual fines to achieve a proportionate total sentence.[2423]

An aggregate fine can be imposed for two or more offences that are founded on the same facts, or form, or are part of, a series of offences of the same or similar character.[2424] This is the same test that is used for when offences can be joined on the one charge sheet or indictment.[2425] This allows a court to impose aggregate fines where offences are validly joined, even if some of the offences are rolled-up or representative charges.

The amount of an aggregate fine cannot exceed the sum of the maximum fines that could be imposed in

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[2416] *Cheshire* 270; *Magjarraj v The Queen* [2001] WASCA 261, [10].
[2417] The Act s 52(2).
[2418] *Cheshire* 269; *DPP (Vic) v Gyucski* (2007) 178 A Crim R 153, 159 [20]; *R v General Television Corporation Pty Ltd* [2009] VSC 84, [74]–[75]; *Agar v McCabe (No 3)* [2015] VSC 542, [10].
[2419] *Bernstein* [55].
[2420] *Belcher* 126-27.
[2421] Ibid 128.
[2422] Ibid. See also *FraserFC* 405-06.
[2423] *Fucile* 444 [109] n 35.
[2424] The Act s 51.
[2425] *Criminal Procedure Act 2009* (Vic) s 3, Sch 1 cl 5.

respect of each of those offences.[2426]

An aggregate fine is not available if one of the offences is a standard sentence offence.[2427]

The second solution, to moderate the individual fines, is an approach that has been disapproved with respect to accommodating the principle of totality in relation to imprisonment.[2428] However, those concerns were expressed in a context where it is possible to make sentences concurrent, whereas fines must operate cumulatively.

12.6 – Liability of directors

If an offender is a body corporate, an informant or police prosecutor may apply to the court for a declaration that any person who was a director of the body at the time of the offence is liable for paying the fine. The court may only make such a declaration if it is satisfied that:

- the body will not be able to pay an appropriate fine; and
- immediately before the offence was committed there were reasonable grounds to believe that the body would not be able to meet any liabilities that it incurred at that time.[2429]

The court must not make such a declaration in respect of a director who satisfies it that:

- at the time of the commission of the offence they believed, on reasonable grounds, that the body would be able to meet any liabilities that it incurred at that time; and
- in carrying on the business of the body, they had taken all reasonable steps to ensure that it would be able to meet its liabilities as and when they became due.[2430]

[2426] The Act s 51.
[2427] Ibid s 51(1A).
[2428] *DPP (Cth) v KMD* (2015) 254 A Crim R 244, 266-67 [95].
[2429] The Act s 55(1).
[2430] Ibid s 55(2).

12.7 – Payment of fine by third party

While a fine is imposed on an offender, a court has no power to direct that the offender personally pay the fine.[2431]

Whether an offender is likely to pay a fine personally affects its punitive and deterrent value and is therefore relevant in determining whether to impose one.[2432] Where a fine is likely to be paid by an offender's family, it may still have a punitive and deterrent effect if it places them under a substantial obligation to their family.[2433]

Where the court determines that a fine is appropriate, the quantum of the fine should not be fixed by reference to an alternative source of payment.[2434] A fine imposed and calculated on the assumption that the offender's employer would probably pay it may involve an irregularity in the exercise of the sentencing discretion, but each case must be determined on its facts.[2435]

12.8 – Instalment and time to pay orders

Once a fine is imposed, it is ordinarily payable immediately. However, a court may allow an offender to pay a fine in instalments[2436] or give an offender time to pay.[2437]

On application, the court may vary or cancel an instalment or time to pay order if it is satisfied that:

- the circumstances of the offender have materially altered and as a result the offender is unable to comply with the order;
- the circumstances of the offender were wrongly stated or inaccurately presented to the court or the author of a pre-sentence report, before the order was made; or
- the offender is no longer willing to comply with the order.[2438]

If the court cancels the order it may deal with the offender as if it had just found them guilty of the offences for which the order was imposed.[2439] In determining how to deal with an offender following cancellation, the court must consider the extent to which the offender had complied with the order.[2440]

At any time while an instalment order or time-to-pay order is in force, but before an enforcement hearing begins, an application to vary or cancel the order may be made by the offender, a prescribed person or

[2431] *Hinch v Attorney-General* [1987] VR 721, 730–31 ('*Hinch*").
[2432] *Gallagher v Durack* (1983) 152 CLR 238, 245.
[2433] *Repacholi* 52-53, 63. See also *DPP v Kose* [2006] VSCA 119, [19].
[2434] *Hinch* 729–31.
[2435] *Perez v The Queen* (1999) 21 WAR 470, 484 [52].
[2436] The Act s 56.
[2437] Ibid s 59.
[2438] Ibid s 63(1).
[2439] Ibid s 63(2).
[2440] Ibid s 63(3).

member of a prescribed class of persons,[2441] or the Director of Public Prosecutions.[2442]

Notice of any application must be provided to different individuals and entities.[2443]

The court may issue a warrant to arrest the offender if they do not attend the hearing of the application.[2444]

12.9 – Fine work orders

Fine work orders convert unpaid fines into unpaid community work. There are two types of fine work orders: fine conversion orders and fine default unpaid community work orders.

An offender, who is not in default, may apply for a fine conversion order that converts their fine into unpaid community work.[2445] The application must be made to the court that imposed the original fine and before the commencement of an enforcement hearing.[2446] The court can only make a fine conversion order if the amount of the fine does not exceed 100 penalty units or the application relates to a part of the fine up to 100 penalty units.[2447]

If an offender is in default of payment of a fine or fine instalment order, they may apply to the court that sentenced them to have their fine converted to a fine default unpaid community work order. The court can only make the order if the amount of the unpaid fine does not exceed 100 penalty units.[2448]

A court must set the date on which a fine work order commences. It must not be more than three months after the order is made.[2449]

A fine work order expires once the offender has satisfactorily completed all the hours of work that the court ordered them to perform.[2450] If an offender pays part of the original fine while a fine conversion order is in force in relation to that same fine, they are entitled to a proportionate reduction in the number of hours of community work they are required to perform.[2451]

12.9.1 – Calculating unpaid community work hours

An offender subject to a fine work order is required to perform one hour of unpaid community work for each unpaid 0.2 of a penalty unit, or part thereof.

[2441] These are persons employed in the Department of Justice under Part 3 of the *Public Administration Act 2004* (Vic) at a level of Grade 6 or higher. See, eg, the Act s 115B(1)(a)(iii); *Sentencing Regulations 2011* (Vic) reg 18AA.
[2442] The Act s 61.
[2443] Ibid s 62.
[2444] Ibid s 63(4).
[2445] Ibid ss 64(1), 65(1).
[2446] Ibid s 65.
[2447] Ibid s 64(2).
[2448] Ibid s 69D.
[2449] Ibid s 69S(2).
[2450] Ibid s 69T.
[2451] Ibid s 69U.

A fine conversion order must be for at least eight hours.

If an offender is subject to more than one fine conversion order or is in default of more than one fine or instalment, the orders must, in aggregate, be for between eight and 500 hours.[2452]

The maximum period that a court may impose for completing unpaid community work is set out in the table below:[2453]

Hours of unpaid community work	Maximum period of order
375-500	24 months
251-375	18 months
126-250	12 months
51-125	6 months
50 or less	3 months

An offender cannot be required to perform more than 20 hours of unpaid community work in any seven-day period.[2454] However, an offender may perform up to 40 hours of unpaid community work in a seven-day period if they request to do so and give written consent.[2455]

12.9.2 – Presumption of cumulation for multiple orders

Unless the court directs otherwise, the number of hours of unpaid community work an offender is required to perform is cumulative on any hours of unpaid community work they are required to perform under any other fine work order.[2456] If the hours under the orders are cumulative, the later order commences once the earlier order is completed.[2457]

12.9.3 – Terms of fine work orders

Fine work orders have mandatory terms that attach to each order. These require that an offender must:

- not commit an offence punishable by imprisonment during the period of the order;
- comply with any obligation or requirement prescribed by the regulations;
- report to, and receive visits from, the Secretary during the period of the order;
- report to the community corrections centre specified in the order within two clear working days after the order comes into force;
- notify the Secretary of any change of address or employment within two clear working days after the change;

[2452] Ibid ss 64(1), 69O(1).
[2453] Ibid s 69Q.
[2454] Ibid s 69Q(2).
[2455] Ibid s 69Q(3).
[2456] Ibid s 69R.
[2457] Ibid s 69S.

- not leave Victoria except with the permission of the Secretary; and
- comply with any direction given by the Secretary to ensure that the offender complies with the order.[2458]

12.9.4 – Variation of fine work orders

On application, the court that made the fine work order may vary the order if satisfied that:

- the circumstances of the offender have materially altered and as a result the offender is unable to comply with the order;
- the circumstances of the offender were wrongly stated or were not accurately presented to the court before the order was made; or
- the offender no longer consents to the order.[2459]

If the court is satisfied of any one of these matters, it may:

- confirm some or all of the order;
- cancel the order and deal with the offender as if they had just been found guilty of the offence(s) for which the order was imposed;
- cancel the order and make no further orders; or
- vary the order.[2460]

The court must decide what action to take after assessing the extent of the offender's compliance with the order.[2461]

An application to vary the order may be made at any time while the order is in force by the offender, the informant, the police prosecutor (in the Magistrates' Court) or Director of Public Prosecutions (in the County or Supreme Courts), the Secretary, a prescribed person, or a member of a prescribed class of persons.[2462]

Notice of any application to vary must be provided to different individuals and entities.[2463]

The court may issue a warrant to arrest if the offender does not attend a hearing on the application to vary.[2464]

12.9.5 – Contravention of fines work order

Contravention of a fines work order is an offence[2465] that invokes specified procedures and requires the court finding an offender guilty of contravening a fines work order to exercise the same powers as when

[2458] Ibid s 69V(1).
[2459] Ibid ss 67(1), 69I(1).
[2460] Ibid ss 67(2), 69I(2).
[2461] Ibid ss 67(3), 69I(3).
[2462] Ibid ss 68(1), 69J(1).
[2463] Ibid ss 68(2), 69J(2).
[2464] Ibid ss 68(3), 69J(3).
[2465] Ibid ss 83ADA, 83ADB.

it allows an application to vary one.[2466]

If the court is satisfied that the circumstances of the offender have materially altered and as a result the offender is unable to comply with the order, or the circumstances of the offender were wrongly stated or inaccurately presented to the court before the order was made, then the court may:

- discharge the outstanding fine(s) in full;
- discharge up to two-thirds of the outstanding fine(s);
- discharge up to two-thirds of the outstanding fine(s) and order that the offender be imprisoned for a period of one day for each penalty unit, or part thereof, which remains outstanding;
- adjourn the matter for up to six months.[2467]

Where a court has discharged part of the outstanding fine(s), the court may order that the offender be given time to pay or pay in instalments for the remainder.[2468]

In determining how to deal with an offender who has contravened a fines work order the court must consider the extent to which they have complied with the order.[2469]

The court can order a sentence of imprisonment if it considers the above orders to be inadequate, due to the nature of the offence, the characteristics of the offender, and because the offender has refused to pay the fine and perform unpaid community work. The court may impose a sentence of imprisonment of one day for each unpaid penalty unit, or part thereof, up to a maximum of two years.[2470]

12.10 – Enforcement

Enforcement action can be taken against an offender who has not paid their fine or instalment order for 28 days or more after it was due to be paid.[2471]

If the court is satisfied that the offender is unable to comply with the order because their circumstances have materially changed since the order was imposed, or their circumstances were wrongly stated or inaccurately presented to the court before the order was made, then the court can exercise any of the same powers as when an offender has contravened a fines work order.[2472]

In all other cases the court may make one or more of the following orders:

- an unpaid community work order, provided that the offender consents and the fine is less than 100 penalty units;[2473]
- that the offender be imprisoned;
- that the amount of the outstanding fine be levied under a warrant to seize property;

[2466] Ibid s 83ASA(1).
[2467] Ibid s 83ASA(2), (3).
[2468] Ibid s 83ASA(4).
[2469] Ibid s 83ASA(6).
[2470] Ibid s 83ASA(7).
[2471] Ibid ss 69(4), 69D(4).
[2472] Ibid s 69G.
[2473] Ibid s 69K. The number of unpaid community work hours required is determined in accordance with s 69O. See 12.9.1 - Calculating unpaid community work hours above.

- that the instalment or time to pay order be varied (if one was made);
- that the matter be adjourned for up to six months;[2474] and
- any order for costs that it thinks fit, including, where an order for imprisonment or unpaid community work has been made, an order that unpaid costs be levied under a warrant to seize property.[2475]

The court can only order the offender's imprisonment for default if it is satisfied that it is the only appropriate order in all the circumstances.[2476] The court cannot order imprisonment if it is satisfied that the offender did not have the capacity to pay the fine or instalment or had a reasonable excuse for the non-payment.[2477]

An offender may be imprisoned for one day for each unpaid penalty unit, or part thereof, up to a maximum of 24 months imprisonment.[2478] An offender who is already in custody serving a sentence of imprisonment can request to serve a period of imprisonment in default of payment of an outstanding fine or instalment.[2479] Unless otherwise ordered, imprisonment ordered in default of payment for a fine is cumulative on any other imprisonment imposed in default of payment of a fine, but concurrent with any other uncompleted sentence.[2480]

Imprisonment ordered for a Commonwealth fine default must be served concurrently with any other periods of imprisonment, unless otherwise ordered.[2481]

Where an offender has been held in custody only because of their unpaid fine or instalment order, an amount equivalent to the value of one penalty unit must be taken as having been paid for each day, or part of a day, that the offender spent in custody up to the maximum amount of the unpaid fine or instalment.[2482]

If a warrant to seize property is returned unsatisfied, the offender may be brought before the court and ordered to serve a term of imprisonment or complete an unpaid community work order.[2483]

[2474] The Act ss 69H(1)–(2).
[2475] Ibid s 69L.
[2476] Ibid s 69H(4).
[2477] Ibid s 69H(3).
[2478] Ibid s 69N.
[2479] Ibid s 16A.
[2480] Ibid s 16(2).
[2481] *Crimes Act 1914* (Cth) ss 15A(3)–(4).
[2482] The Act s 69P.
[2483] Ibid ss 69N, 69M & 69O.

13 – Dismissals, discharges, and adjournments

Orders for the dismissal, discharge, and release of offenders are available for both Commonwealth[2484] and Victorian offences. These orders are the least punitive form of sentencing and so are generally reserved for less serious offences.

For Victorian offences, a court may release an offender where a charge has been proved, by making the following orders:

- dismissal without recording conviction;
- discharge on conviction;
- release on adjournment without conviction; or
- release on adjournment following conviction, on the offender giving an undertaking with conditions attached.

They may be made to:

- provide for an offender's rehabilitation by allowing their sentence to be served in the community;
- take account of the trivial, technical or minor nature of the offence committed;
- allow the offender to demonstrate remorse in a manner agreed to by the court;
- allow for circumstances where it's not appropriate to record a conviction;
- allow for circumstances where it's not appropriate to impose more than a nominal punishment;
- allow for other extenuating or exceptional circumstances that justify the court showing mercy to an offender.[2485]

13.1 – Dismissals

If a court finds a person guilty it may order dismissal of the charge without recording a conviction.[2486] This is solely available as a non-conviction order; there is no alternative of dismissal with conviction.

The discretion to dismiss arises only when the court is satisfied that the charge is proved or made out on the evidence and that the plea was a proper one.[2487] Moreover, the offence must be of such a nature that it can properly be characterised as 'trifling'. The circumstances must clearly indicate that it would be manifestly unfair and unreasonable to penalise an offender and impose the stigma of a conviction.[2488]

[2484] *Crimes Act 1914* (Cth) ss 19B, 20. For information about the operation of these provisions please see the Commonwealth Sentencing Database. https://csd.njca.com.au/principles-practice/sentencing-options/section_19b/ and https://csd.njca.com.au/principles-practice/sentencing-options/conditional_release2/.
[2485] *Sentencing Act 1991* (Vic) s 70(1) ('the Act').
[2486] Ibid ss 7(1)(j), 76.
[2487] *Cameron v James* [1945] VLR 113; *McCarthy v Codd* [1959] VR 88; *DPP (Vic) v Jones* [2014] VCC 168 [16] ('*JonesCCV*').
[2488] *Coles Myer Ltd v Catt* (1992) 58 SASR 298.

This might include trivial offending[2489] or where a conviction might disqualify the offender from their profession.[2490]

Dismissals may also be granted where strong steps have been taken towards rehabilitation,[2491] or where previous good character and post-offence conduct would make a conviction disproportionate to the crime.[2492]

Although the *Sentencing Act 1991* (Vic) ('the Act') does not confer any power to attach conditions to a dismissal, a court may make a separate order for compensation or restitution.[2493]

Once a charge has been dismissed, it is not possible for it to be revived, even where the finding was later impugned.[2494]

Once a charge is dismissed without a finding of guilt, it cannot be taken as a conviction for any purpose except as provided in the Act.[2495] However, the Act provides it has the same effect as if a conviction had been recorded for:

- appeals against sentence;
- proceedings for variation or breach of sentence;
- proceedings against the offender for a subsequent offence; and
- subsequent proceedings against the offender for the same offence.[2496]

13.2 – Discharge

If a court finds a person guilty of an offence it may record a conviction and order they be discharged without further conditions being imposed.[2497] This requires a finding of guilt and a conviction to be recorded before the court may discharge.

An unconditional discharge is sometimes appropriate where:

- the offence is one of low culpability;[2498]
- where minor conduct is subsumed in a more serious offence;[2499] or

[2489] *JonesCCV*.
[2490] *DPP v Robinson* [2000] VSCA 190, [6] ('*Robinson00*').
[2491] *R v McLaughlin* [2018] VSC 310.
[2492] *Robinson00*.
[2493] The Act s 77.
[2494] *Impagnatiello v Campbell* (2003) 6 VR 416. Contrast this with the charge being struck out, which allows revival of the charge, or where the judicial officer 'cleared the summons' though dismissing the charge without making a final order. See *Keech v County Court of Victoria* (2017) 55 VR 32.
[2495] The Act s 8(2).
[2496] Ibid s 8(3)(b).
[2497] The Act ss 7(h), 73.
[2498] *Eade v The Queen* (2012) 35 VR 526.
[2499] *DPP v Williams* [2016] VCC 1698, [74].

- there are compelling personal circumstances,[2500] such as if financial circumstances preclude a fine,[2501] or to allow rehabilitation and treatment to continue.[2502]

However, where the offence was a serious one, the court may decide to impose a higher sentence than an unconditional discharge to denounce the conduct, notwithstanding other mitigating factors.[2503]

Again, the Act does not confer any power to attach conditions to a discharge, but a court may make a separate order for compensation or restitution.[2504]

13.3 – Release on adjournment

Where a person has been found guilty of an offence, the court may adjourn the hearing and release the offender on an undertaking with conditions ('adjourned undertaking'). This may be with or without recording a conviction.[2505]

An adjourned undertaking is considered a 'sentence' despite not having a custodial component, and an offender is serving a sentence when placed on such an order.[2506]

13.3.1 – Imposing the order

An order for an adjourned undertaking requires the court to be satisfied of the offender's guilt[2507] and it must have regard to the:

- nature of the offence;
- character and past history of the offender; and
- impact recording a conviction will have on the offender's economic or social well-being or their employment prospects.[2508]

This must also be balanced with the need for general deterrence.[2509]

Before pronouncing sentence, the court should expressly indicate whether the accused is convicted or not.[2510]

[2500] *R v Rutland* [2000] VSCA 168, [9]; *Robinson00*.
[2501] *DPP v Dowling* [2017] VCC 331, [19].
[2502] *DPP v Marshall* [2015] VCC 979, [33]; *DPP v Hamann* [2015] VCC 1043.
[2503] *R v Kheir* [2003] VSCA 209, [5].
[2504] The Act s 74.
[2505] Ibid ss 7(g), 7(i), 72, 75.
[2506] This is relevant for the trigger provisions in the *Bail Act 1977.* See, eg, *Application for Bail by Allen Matemberere* [2018] VSC 762.
[2507] The Act ss 72, 75.
[2508] Ibid s 8(1)*; DPP (Vic) v Nader* [2017] VCC 355; *DPP (Vic) v Lord* [2018] VCC 1613, [20] ('*Lord*''); *DPP (Vic) v Pettitt* [2018] VCC 1667, [17]; *DPP (Vic) v Repac* [2019] VCC 175, [36].
[2509] *DPP (Vic) v McKechnie* [2016] VCC 1751, [35] ('*McKechnie*').
[2510] *R v Gillan* (1991) 100 ALR 66.

In addition to adjourning on an undertaking, a court may make an order for compensation or restitution.[2511] Additional orders may also be imposed by operation of other legislation, such as license suspensions[2512] and compulsory accredited driver education programs.[2513]

13.3.2 – Undertaking and length of order

The offender must first agree to give an undertaking before this sentencing option can be used and an agreement obtained just because imprisonment is a realistic alternative does not vitiate the consent.[2514]

If a court places an offender on an adjourned undertaking, it must have the following conditions attached. That the offender:

- attend court if called on to do so and at the time to which the further hearing is adjourned (if specified);[2515]
- be of good behaviour during the duration; and
- observe any special conditions imposed by the court.

Special conditions may include requiring the offender to make a payment directly to an organisation that provides a charitable or community service, or to the court through the Court Fund for payment to such an organisation.[2516] If payment is made to the court, the court may choose the organisation at a later date.[2517]

The court may also attach a justice plan condition, which will last for either the length of the adjournment or two years, whichever is shorter.[2518]

The maximum duration of adjournment is five years (60 months).

13.3.3 – Special conditions

As the Act does not define special conditions, it is open for the court to impose whatever condition it considers fit. Examples might include placing an offender under the care and direction of psychiatric clinicians,[2519] a firearm prohibition,[2520] non-contact conditions,[2521] or special conditions as specified in other legislation, including:

[2511] The Act ss 74, 77.
[2512] *Road Safety Act 1986* (Vic) s 28 ('RSA').
[2513] Ibid s 50A(3).
[2514] *Re Barnett* [1987] VR 367.
[2515] This may be through court order or notice issued by the proper officer of the court and must be served on the offender not less than four days before the time specified. The Act ss 72(4)-(5), 75(4)-(5).
[2516] Any such payment is no longer considered a 'fine' and may be validly imposed as a special condition because the definition of 'fine' and the relevant sections were amended in 2013 as a result of *Brittain v Mansour* [2013] VSC 50. See the Act s 3 (definition of 'fine').
[2517] *DPP (Vic) v Jiang* [2016] VCC 494, [39].
[2518] See 11.4.2.12 – Community correction order – Conditions – Justice plan condition.
[2519] *R v Whincup* [2001] VSC 408 ('*Whincup*'); *R v Elias* [2013] VSC 123, [26].
[2520] *DPP v Smith* [2012] VSC 314, [9].
[2521] *Whincup*.

- completing an approved drug education and information program per the *Drugs, Poisons & Controlled Substances Act 1981* (Vic) s 76;[2522] or
- completing an accredited driver education program[2523] and a first-stage behaviour change program.[2524]

A court should be cautious about imposing special conditions on leaving Victoria, residing out of Victoria, or any condition that might amount to an unauthorised deportation order.[2525] Consideration should also be given to the appropriateness of an offender being simultaneously subjected to special conditions and to parole. In some circumstances declining to fix a minimum term may be the appropriate course.

13.3.4 – Exercise of discretion to make order

An adjourned undertaking is usually made for minor offences.[2526] However, it should not be made if doing so would breach the fundamental principles or sentencing purposes.[2527]

An adjourned undertaking may be imposed for serious offences in exceptional circumstances. Instances include marginally excessive self-defence in the context of family violence,[2528] serious psychiatric illness,[2529] wellbeing of children or a partner as their carer,[2530] possession of child pornography material in unusual circumstances,[2531] or assistance to authorities.[2532]

Other mitigating factors may also cause an adjourned undertaking to be imposed, such as significant delay,[2533] the challenging environment of operation for a corporate offender,[2534] the presence of an intellectual disability or mental health issue,[2535] the offender's youth or advanced age,[2536] being an unwilling accomplice,[2537] or time spent in immigration detention.[2538]

[2522] *Drugs, Poisons & Controlled Substances Act 1981* (Vic) s 76(1A).
[2523] *RSA* s 50A(3).
[2524] Ibid s 58C(6). The Court must also inform the Roads Corporation of the undertaking.
[2525] *Constitution Act 1975* (Vic) s 92.
[2526] *DPP v McGregor* [2017] VCC 1360, [24]; *R v Cerantonio* [2019] VSC 284, [154].
[2527] See, eg, *DPP v Koc* [2002] VSCA 122, [22]; *DPP v Abad* [2016] VSCA 279; *DPP v Tupou* [2018] VCC 603, [32]; *DPP v Perks* [2018] VCC 1464, [37]; *DPP v Ferguson* [2018] VCC 1683, [31]; *DPP v Bills* [2019] VCC 98, [40].
[2528] *R v Gazdovic* [2002] VSC 588, [10].
[2529] *Whincup* [36].
[2530] *R v Bailey* [2001] VSC 461; *DPP v Metzke* [2018] VCC 712.
[2531] *DPP v Ortell* [2016] VCC 1459; *DPP v Schulz* [2018] VCC 615.
[2532] *Lord* [33].
[2533] *DPP v Ellard* [2016] VCC 882; *DPP v Coombes (a pseudonym)* [2018] VCC 389, [35].
[2534] *DPP v Department of Health and Human Services* [2018] VCC 886, [33].
[2535] *DPP v Gray* [2016] VCC 911; *DPP v Randall (a pseudonym)* [2017] VCC 1873; *DPP v Cheong* [2017] VCC 1262. But there may be circumstances where the increased reporting regime and supervision of a CCO are more appropriate. See *DPP v Hill* [2016] VCC 1487, [36].
[2536] *DPP v Walters* [2016] VCC 92; *DPP v Ellett* [2016] VCC 1841, [39], [49].
[2537] *McKechnie*.
[2538] *DPP v Ozer* [2018] VCC 606, [81] ('*Ozer*').

13.3.5 – Effect of compliance with undertaking

If at the further hearing the court is satisfied that the offender has observed the conditions of the undertaking, it must

- if a conviction has been recorded, discharge the offender without any further hearing,[2539] or
- if no conviction has been recorded, dismiss the charge without any further hearing.[2540]

13.3.6 – Variation/Cancellation/Contravention of order

The court may vary or cancel an adjourned undertaking on application at any time while the order is in force. The court must be satisfied that either:

- the offender's circumstances have materially altered since the order was made and as a result the offender will not be able to comply with any condition of the undertaking;
- the offender's circumstances were wrongly stated or not accurately presented to the court or the author of a pre-sentence report before the order was made; or
- the offender is no longer willing to comply with the conditions of the undertaking.[2541]

The court must also consider the extent of the offender's compliance with the order.[2542]

If the court is so satisfied, it may vary or cancel the order and deal with the offender for the original offences as if it had just found them guilty of that offending. If a person is unable to comply with conditions, the court may impose a new adjourned undertaking without any conditions.[2543]

If an offender contravenes the order without reasonable excuse, they may be liable for a maximum level 10 fine and having the order varied or cancelled.[2544] If a court finds a person guilty of contravening an adjournment order, it must, in addition to sentencing the offender for that offence:

- vary the order as if an application was made to do so;
- confirm the order originally made;
- cancel the order (if it is still in force) and deal with the offender for the original offence as if it had just found them guilty of that offence; or
- make no further order with respect to the offence in respect of which the original order was made.[2545]

In determining how to deal with the offender a court must take account of the extent to which the offender has complied with the order, and their ability to comply.[2546]

[2539] The Act s 72(6).
[2540] Ibid s 75(6).
[2541] Ibid s 78(1).
[2542] Ibid s 78(2).
[2543] *Ozer* [82].
[2544] The Act s 83AC. Breaching by offending may also be an aggravating feature of the offence. *DPP v Hardin (a pseudonym)* [2016] VCC 1189, [7]; *DPP v Roach* [2019] VCC 145, [3].
[2545] The Act s 83AT(1).
[2546] Ibid s 83AT(2); *DPP v NP* [2018] VCC 1970; *Ozer* [45].

Variation or cancellation proceedings are commenced by application to the original sentencing court by:

- the offender;
- the DPP;
- an informant in the original sentencing proceeding;
- a member of the police force; or
- an OPP lawyer.

Notice of an application must be given to the offender, the DPP, and the informant or police prosecutor, depending on the circumstances.[2547] The court may order that an arrest warrant be issued if the offender does not attend the hearing of the application.[2548]

For contravention proceedings, if the original adjournment order was made in the Magistrates' Court, proceedings are commenced by filing a charge sheet in that court. A charge sheet may be filed by:

- the DPP;
- the Chief Commissioner of Police;
- a member of the police force;
- an informant in the original sentencing proceeding;
- a Crown prosecutor;
- a Regional Manager;
- a community corrections officer; or
- the Secretary to the Department of Justice.[2549]

A proceeding must be brought in accordance with the provisions of, and rules and regulations made under, the *Criminal Procedure Act 2009* (Vic) *('CPA')*, the *Bail Act 1977* (Vic), and the *Magistrates' Court Act 1989* (Vic), with any necessary modifications.[2550]

For contraventions where the offender committed an offence punishable by imprisonment during the operation of the adjournment order, the proceeding must commence within six months of the conviction or finding of guilt for the later offence[2551] and no more than two years after the adjournment order ceases to be in force.[2552] For all other contraventions the proceeding must commence within one year of the adjournment order ceasing to be in force.[2553]

[2547] The Act s 78(4). Notice to the DPP is only where the original sentencing court was the Supreme or County Court and notice to the informant or police prosecutor is where the sentencing court was the Magistrates Court.
[2548] The Act s 78(5).
[2549] Ibid s 83AG(2); *Sentencing Regulations 2011* (Vic) reg 31 ('*Sentencing Regs*').
[2550] The Act s 83AG(3).
[2551] Ibid s 83AH(1)(a).
[2552] Ibid s 83AH(2).
[2553] Ibid s 83AH(1)(b).

If a charge sheet is filed in the Magistrates' Court, but that court did not make the order that is the subject of the offence, it must transfer the proceeding to the appropriate sentencing court.[2554] If this occurs, the Supreme or County Courts may hear and determine the proceeding under Chapter 3 of the *CPA*.[2555]

If the original adjournment order was made in the Supreme or County Courts, and the offender has been convicted or found guilty of an offence that also contravened the adjournment order, the proceeding must be commenced by filing a charge sheet in the relevant sentencing court.[2556]

If the original adjournment order was made in the Magistrates' Court, and the offender has been convicted or found guilty of an offence that also contravened the adjournment order, the relevant sentencing court may proceed to hear and determine the proceeding as if it were an unrelated summary offence.[2557]

The charge sheet must be filed by:

- the DPP;
- the Chief Commissioner of Police;
- a member of the police force;
- an informant in the original sentencing proceeding;
- a Crown prosecutor;
- a Regional Manager;
- a community corrections officer; or
- the Secretary to the Department of Justice.[2558]

[2554] Ibid s 83AJ(1).
[2555] Subject to any modifications made by the relevant court rules. The Act s 83AJ(4).
[2556] The Act s 83AL(1).
[2557] Within the meaning and rules of *Criminal Procedure Act 2009* (Vic) s 243. The Act s 83AM.
[2558] The Act s 83AL(2); *Sentencing Regs* reg 31.

14 – Residential treatment orders

A court may make a Residential Treatment Order ('RTO') directing that an offender be detained for up to five years in a residential treatment facility ('RTF') to receive specified treatment.[2559]

An RTO is designed to detain and treat people with an intellectual disability who have committed serious sexual or other violent offences.[2560] The intent is to 'reduce the likelihood of re-offending by increasing the person's ability to self-regulate and manage the[ir] offence-specific and related thoughts and behaviours with the ultimate aim of living in a less restrictive environment'.[2561]

Since an RTO requires detention and treatment for a specified period, it should not be imposed if a less restrictive sanction is more suitable.[2562]

An intention to impose an RTO may constitute 'special reasons' for not imposing a mandatory imprisonment term or a mandatory minimum term.[2563]

An RTO may be ordered where the offender has been found guilty of sexual assault,[2564] sexual assault by compelling sexual touching,[2565] or a *serious offence*, which includes:

- murder, manslaughter, or child homicide;[2566]
- causing serious injury offences;[2567]
- threats to kill;[2568]
- rape, rape by compelling sexual penetration, and assault with intent to commit a sexual offence;[2569]
- sexual penetration offences occurring within a familial context;[2570]
- sexual abuse or penetration of a child under 16;[2571]
- kidnapping and abduction for sexual purpose offences;[2572]
- armed robbery;[2573]

[2559] *Sentencing Act 1991* (Vic) s 82AA(1) ('the Act').
[2560] *DPP (Cth) v Bloomfield* [2013] VCC 1509, [31] ('*Bloomfield*'').
[2561] *Farr v The Queen* (2010) 30 VR 219, 222 [11] ('*Farr*').
[2562] *Disability Act 2006* (Vic) s 152(1)(c) ('*Disability Act*'). Less restrictive sanctions in this context include CCOs and releases on adjournment with s 80 justice plan conditions. See, eg, the Act s 36(1); *Farr* 223 [15]; *Bloomfield* [31].
[2563] The Act ss 5(2H)(d), 10A(2)(d). See 9.1.3 – Statutory schemes – Mandatory imprisonment schemes – Special reason.
[2564] Ibid s 82AA(1)(b).
[2565] Ibid.
[2566] Ibid s 3 (definition of 'serious offence' paras (a)-(baa)).
[2567] Ibid (c)(iaa)-(i). This includes intentionally causing serious injury, intentionally causing serious injury in circumstances of gross violence, and recklessly causing serious injury in circumstances of gross violence
[2568] The Act s 3 (definition of 'serious offence' para (c)(ii)).
[2569] Ibid (c)(iii)-(iva), (e). For rape and assault with intent to commit a sexual offence this also includes their common law equivalents.
[2570] The Act s 3 (definition of 'serious offence' para (c)(v)).
[2571] Ibid (c)(vi), (viii).
[2572] Ibid (c)(ix)-(xi).
[2573] Ibid (c)(xii).

- repealed equivalents of these listed offences;[2574] or
- conspiracy, incitement, or attempting to commit any of these offences.[2575]

Where an offender faces multiple charges, some of which are eligible for an RTO, the eligible offences cannot be used as a gateway to impose an RTO on all offences on the indictment. Separate sanctions that do not interfere with the RTO will need to be imposed for ineligible offences.[2576]

If an offender faces multiple eligible charges, a single RTO may be imposed where all the offences are of the same kind and the same treatment program will be relevant. While a court may impose separate RTOs in respect of different charges, there is no power under the *Sentencing Act 1991* (Vic) to order cumulation in respect of separate RTOs, and so the additional orders will be redundant.[2577]

A court considering making an RTO may request:

- a pre-sentence report;[2578]
- a statement from the Secretary to the Department of Human Services ('DHS Secretary') that the person has an intellectual disability;[2579] and
- a plan of available services.[2580]

The pre-sentence report will list the services or treatment specific to the offender that may assist them during the RTO.[2581] A plan of available services lists the facilities and treatment programs available at the RTF and may be either generic[2582] or detailed and specific to the offender's circumstances.[2583]

An RTO may only be ordered if the DHS Secretary has specified:

- the offender is suitable for admission to a RTF; and
- the services identified in the plan of available services are available at the RTF.[2584]

If a court does make an RTO, it must provide the DHS Secretary with a copy.[2585]

There is little specific guidance on fixing the length of an RTO, but it is a sentence and so must not be more severe than necessary to achieve its purposes.[2586] However, depending upon the circumstances of the offence and the offender, it may be open for the court to make an RTO that exceeds the minimum period recommended in a pre-sentence report. The court is not required to determine the duration of the

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[2574] Ibid (ca)-(da).
[2575] Ibid (f).
[2576] *DPP (Vic) v Gauscoine* [2013] VCC 503, [12] ('*Gauscoine*').
[2577] *Farr* 227 [34].
[2578] The Act s 82AA(2)(a). This must be from the Secretary to the Department of Justice: at s 8A(4)(b).
[2579] Ibid s 82AA(2)(b).
[2580] Ibid s 82AA(2)(c).
[2581] Ibid ss 8B(1)(l)-(m).
[2582] Victorian Government Department of Human Services, *Disability Services Criminal Justice Practice Manual 2007* (Big Print, 2007) 30, 95-96.
[2583] *DPP (Vic) v Murphy* [2016] VCC 1663, [12].
[2584] The Act s 82AA(3).
[2585] Ibid s 82AA(4).
[2586] Ibid s 5(3).

order by what would have been the appropriate length of imprisonment, so long as the RTO is proportionate to the offending conduct.[2587]

An offender or the DHS Secretary may apply to the court for 'extended leave' from detention to enable the offender to be reintegrated within the community.[2588] Before granting the application, the court must be satisfied on reasonable grounds that the safety of the offender or the public will not be seriously endangered as a result.[2589]

Applications can be made and granted more than once,[2590] and are for a maximum of 12 months and subject to any conditions imposed by the court.[2591] The availability of extended leave may form part of the offender's treatment in a pre-sentence report and may be a factor in ordering an RTO.[2592]

Upon application,[2593] the court that made the RTO may confirm, vary or cancel it if satisfied that:

- the offender is not complying with the order;[2594]
- the offender's needs are not being met by the order; or
- the order is no longer appropriate.[2595]

An offender's needs may not be met if the court determines a more restrictive environment, such as prison, will be more effective.[2596] The court should also consider the need to protect the staff and other residents, or if any changes to the offender's course of treatment has too great an impact on the RTF's usual operations.[2597]

If the court cancels the order, it may then deal with the offender as if they had just been found guilty of the offence(s).[2598] If relevant, a new s 6AAA declaration must be made.[2599]

In determining how to deal with an offender after cancelling an RTO, a court must consider the extent of the offender's compliance with the order,[2600] including whether the non-compliance was wilful or due to the offender's complex needs.[2601] The court may also adjourn sentence to assess the offender's progress in a new environment for a new pre-sentence report.[2602]

[2587] *Farr* 228 [35]–[36].
[2588] *Disability Act* s 162(2).
[2589] Ibid s 162(5).
[2590] Ibid s 162(6).
[2591] Ibid s 162(1).
[2592] *Gauscoine* [14].
[2593] The Act s 82A(2).
[2594] Examples of non-compliance may include assaults to staff or co-residents, self-harm, property damage, or attempted escapes from the RTF. See, eg, *Gauscoine* [2]; *DPP (Vic) v DJD* [2017] VSC 776, [23]-[28].
[2595] The Act s 82A(1).
[2596] *Gauscoine* [3]-[6], [11].
[2597] Ibid [30]; *Secretary to the Department of Health and Human Services v Durham* [2018] VCC 1300, [18]-[20], [26] ('*Durham*').
[2598] The Act s 82A(5).
[2599] *Gauscoine* [19].
[2600] The Act s 82A(6).
[2601] *Gauscoine* [11].
[2602] *Durham* [38].

Pre-sentence detention cannot be declared for the RTO-imposed offence if it has already been declared for other offences dealt with at the time, although it may be considered generally.[2603]

[2603] *Gauscoine* [12].

15 – Court assessment and secure treatment orders

A court can make orders for the involuntary assessment, treatment or detention of mentally ill offenders.

Two kinds of orders can be made under the Victorian regime: court assessment orders[2604] and court secure treatment orders.[2605] These are governed by Part 5 of the *Sentencing Act 1991* (Vic) ('the Act') and the *Mental Health Act 2014* (Vic) ('*Mental Health Act*').[2606] There are also two orders for Commonwealth offenders: hospital orders and psychiatric probation orders.[2607] For more on these, please see the Commonwealth Sentencing Database.[2608]

Prior to the *Mental Health Act*, the Act gave a court the power to make four different involuntary orders: assessment orders, diagnosis, assessment and treatment ('DAT') orders, restricted involuntary treatment orders, and hospital treatment orders.

These four species of orders have essentially been replaced with the two kinds of order now available. Court assessment orders effectively replace DAT orders and assessment orders, and court secure treatment orders replace hospital treatment orders. Restricted involuntary treatment orders are now inpatient treatment orders.[2609]

A court can only make a court assessment order or a court secure treatment order if 'no less restrictive means' are reasonably available to enable the person to be assessed or treated.[2610] The inquiry into whether a less restrictive means is reasonably available will likely involve consideration of whether the patient can receive voluntary mental health treatment.[2611]

The *Mental Health Act* operates on a presumption that people have the capacity to give informed consent to mental health assessment and treatment.[2612]

15.1 – Mental illness

Orders under the Act can only be made if, among other requirements, the court is satisfied that the offender 'appears to have a mental illness' (in the case of a court assessment order) or in fact has a mental illness (in the case of a court secure treatment order).

In Victoria, 'mental illness' is a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.[2613] A person is not considered to have a mental illness only because they:

[2604] *Sentencing Act 1991* (Vic) s 91 ('the Act').
[2605] Ibid s 94B.
[2606] In July 2014 the *Mental Health Act 2014* (Vic) *('Mental Health Act')* replaced the *Mental Health Act 1986 (Vic).*
[2607] *The Crimes Act 1914 (Cth)* ss 20BS-20BU, 20BV-20BX.
[2608] https://csd.njca.com.au/principles-practice/sentencing-options/hospitalorder/ and https://csd.njca.com.au/principles-practice/sentencing-options/psychiatricorder/.
[2609] Made by the Mental Health Tribunal under Part 8 of the *Mental Health Act.*
[2610] The Act ss 91(2)(d), 94B(1)(c)(iv). This requirement did not appear in the predecessor to the *Mental Health Act*.
[2611] Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 458, (Mary Wooldridge).
[2612] *Mental Health Act* s 70.
[2613] The Act s 3 defines 'mental illness' as having the same meaning as under the *Mental Health Act* s 4(1).

- express, refuse, or fail to express a particular political opinion or belief;
- express, refuse, or fail to express a particular religious opinion or belief;
- express, refuse, or fail to express a particular philosophy;
- express, refuse, or fail to express a particular sexual preference, gender identity or sexual orientation;
- engage in, refuse, or fail to engage in a particular political activity;
- engage in, refuse, or fail to engage in a particular religious activity;
- engage in sexual promiscuity;
- engage in immoral conduct;
- engage in illegal conduct;
- engage in antisocial behaviour;
- are intellectually disabled;
- use drugs or consume alcohol;
- have a particular economic or social status or are a member of a particular cultural or racial group;
- are or have previously been involved in family conflict;
- have previously been treated for mental illness.[2614]

While the consumption of drugs or alcohol is not sufficient to assess a person as mentally ill, the serious temporary or permanent physiological, biochemical or psychological effects of such consumption may be regarded as an indication that a person has a mental illness.[2615]

For the purposes of making a court assessment order or a court secure treatment order, the court does not need to be satisfied that the offender's mental illness was a cause of the offending. It is only necessary that the offender be assessed as mentally ill at the time of sentencing, and that the other requirements for the orders are met.[2616]

15.2 – Designated mental health service

The provisions of the Act dealing with court assessment orders and court secure treatment orders, refer to examination[2617] and treatment occurring at a 'designated mental health service'.[2618]

A 'designated mental health service' means:[2619]

- a prescribed public hospital;[2620]
- a prescribed public health service;[2621]
- a prescribed denominational hospital;[2622]

[2614] *Mental Health Act* s 4(2).
[2615] Ibid s 4(3).
[2616] *R v Sirillas* (2004) 8 VR 138, 139 [6] ('*Sirillas*'); *Garden v Secretary, Department of Family and Community Services* (2001) 111 FCR 312, 319 [22].
[2617] The Act s 90(3) – with reference to inpatient court assessment orders.
[2618] Ibid s 94B(1)(d).
[2619] The Act s 3 defines 'designated mental health service' as having the same meaning as in the *Mental Health Act* s 3.
[2620] *Health Services Act 1988* (Vic) s 3(1).
[2621] Ibid.
[2622] Ibid.

- a prescribed privately-operated hospital;[2623]
- a prescribed private hospital that is registered as a health service establishment;[2624] or
- the Victorian Institute of Forensic Mental Health.[2625]

15.3 – Court assessment orders

There are two types of court assessment order:

- a community assessment order that a person be examined by an authorised psychiatrist in the community;[2626] or
- an inpatient court assessment order that a person be taken to, and detained at, a designated mental health service and examined by an authorised psychiatrist.[2627]

The order must state whether it is a community court assessment order or an inpatient court assessment order.[2628]

Regardless of where the examination occurs, its purpose is to determine whether the person should be subject to either a temporary treatment order,[2629] or a court secure treatment order.[2630]

15.3.1 – Required criteria

The court may make a court assessment order if:

- on the trial or hearing of a person, the person is found guilty or pleads guilty;[2631]
- the person is not in custody pending sentencing;[2632]
- the person appears to have a mental illness;[2633]
- due to the appearance of mental illness, the person appears to need immediate treatment to prevent:
    - serious deterioration in the person's mental or physical health; or
    - serious harm to the person or another person;[2634]
- if an order is made, the person can be assessed;[2635]
- there is no less restrictive means reasonably available to enable the person to be assessed;[2636]

2623 Ibid.
2624 Ibid.
2625 Ibid.
2626 The Act ss 90(1)(a), 90(3).
2627 Ibid ss 90(1)(b), 90(3).
2628 Ibid s 92(1)(a).
2629 *Mental Health Act* s 45. This is an order made by an authorised psychiatrist after assessing a person (in accordance with an appropriate order) that means a person is compulsorily treated in the community or taken to, detained and treated in a designated mental health service. Such an order will ordinarily last 28 days: at s 51.
2630 The Act ss 90(1)(a)–(b), 94B.
2631 Ibid s 91(1)(a).
2632 Ibid s 91(1)(b).
2633 Ibid s 91(2)(a).
2634 Ibid s 91(2)(b).
2635 Ibid s 91(2)(c).
2636 Ibid s 91(2)(d).

- a report has been received from an authorised psychiatrist for the designated mental health service where a person is to be assessed stating there are facilities and services available for such assessment;[2637] and
- in the case of an inpatient court assessment order – the assessment cannot otherwise occur in the community.[2638]

15.3.2 – Additional requirements, duration, and powers

After making an assessment order, a court must notify the authorised psychiatrist that the order has been made and provide them with a copy.[2639]

If an inpatient court assessment order is made, the person must be taken to a designated mental health service as soon as practicable after it is made.[2640]

A community assessment order comes into force when it is made and remains in force for seven days (for an inpatient court assessment order, the order expires seven days after the person is received at a designated mental health service).[2641]

The authorised psychiatrist may vary a community assessment order to an inpatient court assessment order, or vice versa.[2642]

If the court has considered a report made by an authorised psychiatrist after examining a person subject to a court assessment order, the court may:[2643]

- make a court secure treatment order; or
- impose sentence according to law.

Either way, the court must deduct any period of detention under the court assessment order from the duration of the sentence or court secure treatment order.[2644]

15.4 – Court secure treatment orders

A court secure treatment order is a sentencing order that enables a person to be compulsorily detained and treated at a designated mental health service.[2645] It is imposed on conviction.[2646]

[2637] Ibid s 91(1)(d).
[2638] Ibid s 91(1)(e).
[2639] Ibid s 92(2).
[2640] Ibid s 93(1).
[2641] Ibid s 93(2).
[2642] *Mental Health Act* s 41(1).
[2643] The Act s 94(1).
[2644] Ibid s 94(2).
[2645] Ibid s 94A.
[2646] Ibid s 7(1)(aab).

A hospital security order, the predecessor to a court secure treatment order, has been the subject of some judicial consideration[2647] and given similarities between the two provisions, it is likely the analyses still largely apply.

Hospital security orders were made 'by way of sentence' but were not said to amount to a sentence of imprisonment.[2648] However, a person subject to such an order was not excused from responsibility. They were not detained because they were mentally ill – they were detained because they had committed a serious offence.[2649]

A court secure treatment order is a distinct sentencing option. A court that wishes to order a period of custody in an approved mental health service must make a court secure treatment order and may not impose a sentence of imprisonment with a direction on how it shall be served.[2650]

15.4.1 – Required criteria

The court may make a court secure treatment order for a person who has been found guilty or pleads guilty, subject to several mandatory considerations.[2651]

The first is that but for the person having a mental illness, the court would have sentenced them to a term of imprisonment.[2652]

Second, the court is to consider the person's current mental condition, physical and mental health, forensic history, and social circumstances.[2653]

Third, the person must be examined by a psychiatrist and the court must be satisfied by the psychiatrist's report (and any other evidence) that:

- the person has a mental illness;
- because of this, they need treatment to prevent:
    - serious deterioration in their mental or physical health; or
    - serious harm to themselves or another person;
- the treatment will be provided if they are made subject to an order; and
- there is no less restrictive means reasonably available to receive the treatment.[2654]

The requirement that a person 'has a mental illness' is different than for a hospital security order, which only requires the court to be satisfied that the person 'appears to be mentally ill'. The change is consistent with the higher bar for involuntary treatment orders set by the *Mental Health Act*.

[2647] See, eg, *R v Jolly* [1994] 1 VR 446 (*'Jolly'*); *Sirillas*.
[2648] *Sirillas* 139 [6].
[2649] Ibid.
[2650] *R v Tognolini* (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking and Callaway JJA, and Southwell AJA, 21 October 1996) 3–4.
[2651] The Act s 94B(1).
[2652] Ibid s 94B(1)(a).
[2653] Ibid s 94B(1)(b).
[2654] Ibid s 94B(1)(c).

Finally, a court may only make a court secure treatment order after receiving a report from the authorised psychiatrist of the designated mental health service where it is proposed to treat the person. The report must recommend the making of the order, and state that there are facilities or services available at that service for the treatment of the person.[2655]

15.4.2 – Duration and effect as a term of imprisonment

The duration of the order must not exceed the period of imprisonment that would have been ordered if the court had not made a court secure treatment order.[2656] Thus, a court must consider what would otherwise have been the appropriate period of incarceration.[2657]

If the offender is discharged from a court secure treatment order, the order has effect as a sentence of imprisonment for its unexpired period. That period must be served in prison unless the offender is released on parole.[2658] The potential effect of this is that an offender subject to a court secure treatment order may be required to serve some, or virtually all, of the period in prison.[2659]

Because a court secure treatment order is a sentencing order, the court must take into account all relevant sentencing considerations, in addition to the statutory criteria.[2660]

An order for detention for the remainder of the offender's life may be imposed for offences punishable by life imprisonment, as a life term is a sentence of a 'specified duration'.[2661]

When making a court secure treatment order, the court must fix a non-parole period as if it were a term of imprisonment.[2662]

15.4.3 – Aggregate court secure treatment order/multiple sanctions

A court may impose a single court secure treatment order in respect of multiple offences.[2663] This power is available as a matter of statutory interpretation of the provisions allowing for court secure treatment orders and does not depend on the power to impose an aggregate sentence.[2664]

The single order must not be longer than the appropriate period of imprisonment. A sentencing judge who imposes a single court secure treatment order must consider the otherwise appropriate dispositions for the individual offences and any cumulation orders. The totality principle applies to both the operational period of the order and non-parole period.[2665]

[2655] Ibid s 94B(1)(d).
[2656] Ibid s 94C(3); *Guven v The Queen* [2017] VSCA 92, [39] ('*Guven*').
[2657] *Guven* [41].
[2658] Ibid [40]; The Act s 94C(5).
[2659] *Guven* [40].
[2660] Ibid [47]-[54].
[2661] *Jolly* 453.
[2662] The Act s 94C(4); *Guven* [39]-[41].
[2663] *Jolly* 450–451; *Guven* [39].
[2664] Compare the Act s 9.
[2665] *Sirillas* 140 [8]; *Guven* [41].

It has been held that the court should specify the individual sentences that provide the basis for the court secure treatment order. This has been considered part of the obligation to provide adequate reasons.[2666] While the obligation to give reasons has been limited by statute in relation to aggregate sentences of imprisonment,[2667] there are no corresponding provisions relating to court secure treatment orders.

It may be inappropriate to impose multiple court secure treatment orders.[2668]

A court sentencing an offender for multiple offences may impose different penalties for the different offences, provided all orders can be given effect.[2669]

15.4.4 – Notification

An order may include the names of persons responsible for taking the offender to or from the designated mental health service named in the order.[2670] As soon as practical, the court must notify the authorised psychiatrist of the order and give them a copy.[2671]

[2666] *Sirillas* 140–41 [9]-[10]. See also *DPP v Felton* (2007) 16 VR 214.
[2667] The Act s 9(4)(b).
[2668] *Jolly* 450–451.
[2669] Ibid.
[2670] The Act s 94D.
[2671] Ibid s 94B(2).

16 – Licence disqualification

The *Sentencing Act 1991* (Vic) ('the Act') provides for the cancellation of a driver licence and the disqualification from obtaining a licence.[2672]
The cancellation, suspension or disqualification from holding a driver licence constitute part of a punitive sentence.[2673]

16.1 – Mandatory disqualification

Mandatory licence disqualification follows if an offender has been found guilty or convicted of a serious motor vehicle offence,[2674] which includes:

- manslaughter arising out of the driving of a motor vehicle;[2675]
- negligently causing serious injury arising out of the driving of a motor vehicle;[2676]
- intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[2677]
- intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving, in aggravated circumstances;[2678]
- recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving;[2679]
- recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving, in aggravated circumstances;[2680]
- culpable driving causing death;[2681]
- dangerous driving causing death or serious injury;[2682]
- murder or attempted murder arising out of the driving of a motor vehicle;[2683] or
- any of the following offences, if arising out of the driving of a motor vehicle while under the influence of alcohol or alcohol and a drug ('substance-influenced offence'):
    - intentionally or recklessly causing serious injury in circumstances of gross violence;[2684]
    - intentionally or recklessly causing injury or serious injury;[2685]
    - reckless conduct endangering life or persons;[2686]

[2672] *Sentencing Act* 1991 (Vic) s 89(1)(a) ('the Act'). Section 3 of the Act defines 'driver licence' as a licence granted under Part 3 of the *Road Safety Act* 1986 (Vic) ('*RSA*').
[2673] *R v Novakovic* (2007) 17 VR 21, 30, [45] ('*Novakovic*').
[2674] The Act s 89(1).
[2675] Ibid s 87P(a).
[2676] Ibid s 87P(b); *Crimes Act 1958* (Vic) s 24 ('*Crimes Act*').
[2677] The Act s 87P(ba); *Crimes Act* s 317AC.
[2678] The Act s 87P(ba); *Crimes Act* s 317AD.
[2679] The Act s 87P(ba); *Crimes Act* s 317AE.
[2680] The Act s 87P(ba); *Crimes Act* s 317AF.
[2681] The Act s 87P(c); *Crimes Act* s 318.
[2682] The Act s 87P(d); *Crimes Act* s 319.
[2683] The Act s 87P(e).
[2684] The Act s 87P(f)(i); *Crimes Act* ss 15A-15B.
[2685] The Act s 87P(f)(ii); *Crimes Act* ss 16-18.
[2686] The Act s 87P(f)(iii); *Crimes Act* ss 22-23.

- statutory kidnapping;[2687]
- common law kidnapping;[2688]
- carjacking;[2689] and
- aggravated carjacking.[2690]

For dangerous driving causing death or serious injury, the minimum period of disqualification is 18 months.[2691] For a substance-influenced offence (other than aggravated carjacking), the minimum period of disqualification is 12 months.[2692] For any other serious motor vehicle offence, the minimum disqualification period is two years.[2693] There is no maximum period of disqualification.

Mandatory disqualification also follows if an offender has been convicted for:

- dangerous or negligent driving while being pursued by police;[2694] or
- stealing or attempting to steal a motor vehicle.[2695]

For dangerous or negligent driving while being pursued by police, the minimum period of disqualification is 12 months.[2696] There is no minimum period for stealing or attempting to steal a motor vehicle, but there is a statutory default period of three months that applies if the court does not specify a period.[2697]

A period of disqualification commences on the day the order is made, or on any later date specified by the court.[2698]

The powers of the court in respect of the types of orders it may make depend on whether and what type of licence the offender holds at the time of sentence. Thus:

- if the offender holds a driver licence or learner permit, the court must cancel that licence or permit and disqualify them from obtaining a further one for a specified period;[2699]

- if the offender does not hold a Victorian driver licence or learner permit, but holds an equivalent licence or permit issued by another State, Territory or country, the court must disqualify them from driving a motor vehicle on a Victorian road for the equivalent period;[2700]

[2687] The Act s 87P(f)(iv); *Crimes Act* s 63A.
[2688] The Act s 87P(f)(v).
[2689] The Act s 87P(f)(vi); *Crimes Act* s 79.
[2690] The Act s 87P(f)(vii); *Crimes Act* ss 79A.
[2691] The Act s 89(2)(a).
[2692] Ibid s 89(2)(c).
[2693] Ibid s 89(2)(b).
[2694] Ibid s 89(3); *Crimes Act* s 319AA.
[2695] The Act s 89(4).
[2696] Ibid s 89(3)(a).
[2697] Ibid s 89(5).
[2698] Ibid s 89B.
[2699] Ibid ss 89(1)(a), 89(3)(a), 89(4)(a)(ii).
[2700] Ibid ss 89(1)(b), 89(3)(b), 89(4)(b).

- in any other case where the offender does not hold a driver licence or learner permit, the court must disqualify them from obtaining one for the equivalent period.[2701]

A person disqualified from obtaining a licence or whose license is cancelled, suspended, or varied by order of the Magistrates' Court may appeal to the County Court,[2702] and the Magistrates' Court may stay operation of its order pending the decision on appeal.[2703]

16.2 – Discretionary licence disqualification

A court's discretionary power to suspend or cancel driver licences or learner permits and to disqualify a driver can arise under two overlapping provisions.

Firstly, the Act provides that a court may disqualify a person from driving or may cancel or suspend their licence where they have been found guilty or convicted of any offence, other than the mandatory disqualification offences discussed above or an offence under the *Road Safety Act 1986* (Vic) ('*RSA*'), or the *RSA's* regulations or rules.[2704]

The default period of suspension or disqualification is three months unless otherwise specified.[2705] It commences when the order is imposed, or on any later date the court specifies.[2706]

At the time of making the order, the court must enter in the records of the court that it is made under s 89A of the Act and state the offence(s) of which the person was found guilty or convicted.[2707]

Secondly, the *RSA* provides that a court may disqualify a person from driving, or may cancel or suspend their license, where they have been found guilty or convicted of an offence under the *RSA*,[2708] or any other offence 'in connection with the driving of a motor vehicle'.[2709] 'In connection' requires a substantial relation between the other offence and the driving of a motor vehicle, but not the manner of driving.[2710]

If a person is disqualified under this provision, the court must specify the period of disqualification.[2711] If a court disqualifies a person without expressly cancelling any driver licence or learner permit, they are taken to have been cancelled by that order unless the court specifies otherwise.[2712]

[2701] Ibid ss 89(1)(c), 89(4)(c).
[2702] *RSA* s 29(1).
[2703] Ibid s 29(2).
[2704] The Act s 89A(1), (4).
[2705] Ibid s 89A(2).
[2706] Ibid s 89B.
[2707] Ibid s 89A(3).
[2708] This does not apply to other mandatory disqualification offences in the *RSA* or the offence of obstruction of taking blood samples unless the offender was in charge of a motor vehicle less than 3 hours before. See, eg, *RSA* ss 28(1A), 56(7).
[2709] Ibid s 28(1).
[2710] *Novakovic* 32 [59]–[61].
[2711] *RSA* s 28(3A).
[2712] Ibid s 28(4).

While this order generally applies to all motor vehicle categories, a court may limit the order to specific categories if satisfied that the circumstances warrant it.[2713]

16.3 – Finding in respect of drug or alcohol contribution

When a court makes a licence disqualification order, it *may* make a finding that the offence was committed while the offender was under the influence of alcohol, a drug, or both, which contributed to the offence.[2714]
This finding affects the person's ability to re-acquire a licence and may make the grant of a new licence conditional on the installation of an alcohol interlock device.[2715]

A court *must* make this finding where:

- the offender is found guilty or convicted of culpable driving; and
- the culpable driving was constituted by the offender being under the influence of a substance to the extent that they were incapable of having proper control of a vehicle.[2716]

16.4 – Presumption of concurrency and interaction with the *RSA*

Where an offender's driver licence or learner permit is already suspended under specified provisions and their driver licence or learner permit is later suspended under the same provisions, the later suspension is presumed to be concurrent with the earlier suspension unless the court orders otherwise.[2717]

This presumption does not apply if the *RSA* (or its regulations or rules) requires the suspension or disqualification to be consecutive.[2718]

Separately, if the person has had their driver licence or learner permit suspended under Part 6B of the *RSA*, and the court orders that:

- their driver licence or learner permit is cancelled, and disqualifies them from obtaining one for a specified time; or
- the person's driver licence or learner permit is suspended;

the court must take into account that period of suspension in fixing the period of suspension or disqualification.[2719]

16.5 – Determining period of disqualification

[2713] Ibid s 28(2).
[2714] The Act s 89C(1).
[2715] These matters are beyond the scope of this Manual and are not considered further here. For more information see Part 5 of the *RSA*.
[2716] The Act s 89C(2). If the court fails to expressly make this finding, the finding is taken to be made: at s 89C(3).
[2717] Ibid s 89D.
[2718] Ibid s 89D(3).
[2719] RSA s 85P. Also see the notes in ss 89 and 89A of The Act.

Fixing a disqualification period is similar to exercising the general sentencing discretion. Aggravating or mitigating factors must be considered, as well as the competing sentencing principles and purposes.[2720] A failure to give reasons for fixing the period of disqualification may indicate error.[2721]

The period of disqualification commences on the date of sentence,[2722] but its length may be fixed according to a defined event rather than being set as a fixed term of years. The usual event is the offender's release from custody.[2723]

Important sentencing considerations in fixing a disqualification period include:

- punishment and denunciation of the conduct;[2724]
- protection of the community;[2725] and
- rehabilitation of the offender.[2726]

A court must consider the disqualification period's effect on rehabilitation and whether the period fixed would be counter-productive to its achievement.[2727] A disqualification period may be reduced to facilitate rehabilitation if necessary to transport for drug treatment[2728], meet CCO conditions,[2729] or to obtain or maintain employment on release.[2730] A court must examine the degree of dependency, particularly economic dependency, of the offender.[2731] It may be inferred that the ability to obtain a licence once on parole will enhance an offender's rehabilitation prospects, notwithstanding a lack of direct evidence.[2732]

However, where no legitimate need for a driver licence is demonstrated, or where the offender's prior criminal history involved unlicensed or disqualified driving, a longer period of disqualification may be justified.[2733]

In imposing a disqualification period and its commencement date, a court should consider its interaction with other sanctions and the actual impact on the offender. A period of licence disqualification after release emphasises the punitive purpose of sentencing. Failure to consider the interaction with other sanctions and impact on the person may constitute error.[2734]

2720 *Novakovic* 32-3 [63].
2721 Ibid. See also *R v Stevens* [2009] VSCA 81, [32]; *Rodi v The Queen* [2011] VSCA 48, [75] ('*Rodi*'); *Rooke v The Queen* [2011] VSCA 49, [37] ('*Rooke*'); *Koukoulis v The Queen* [2020] VSCA 19, [23].
2722 The Act s 89B.
2723 *R v Tran* (2002) 4 VR 457, 470 [40] ('*Tran02*'); *R v Caldwell* (2004) 8 VR 1, 8 [40] ('*Caldwell*').
2724 *Tran02* 469-70 [39]; *Novakovic* 32-3 [63].
2725 *R v Franklin* (2009) 52 MVR 544, 550 [35] ('*Franklin*'). The need for community protection may mean a higher than average disqualification period, such as twenty years: *DPP (Vic) v Panayides* [2019] VCC 1849, [77].
2726 *Novakovic* 33-4 [65]–[67]; *Rodi* [74].
2727 *Franklin* 551 [37].
2728 *R v Lefebure* (2000) 31 MVR 131, 134 [8].
2729 *Koukoulis v The Queen* [2020] VSCA 19, [22]
2730 *Tran02* 469-70 [39]; *Franklin* 551 [37]; *Rooke* [38].
2731 *Tran02* 469-70 [39].
2732 *Caldwell* 7 [38]; *R v Nguyen* [2009] VSCA 64, [71].
2733 *Sharkey v The Queen* [2010] VSCA 273, [16].
2734 See, eg, *R v Birnie* (2002) 5 VR 426, 437-8 [31] ('*Birnie*'); *R v Wootton* [2002] VSCA 165, [23]–[28]; *Rodi* [76]; *Rooke* [37].

The impact of any disqualification period will vary substantially according to the sanction imposed. For example, a suspended sentence may mean that the disqualification will 'bite' immediately, while pre-sentence detention will mean that disqualification commencing on the date of sentence may extend further into the post-release period than intended.

The courts have acknowledged that for the duration of any period of actual custody, the sanction has little real consequence for an offender.[2735] To the extent that licence disqualification is intended to represent a substantial penalty, it will ordinarily exceed any period of actual minimum custody. [2736]

[2735] *Birnie* 437 [30]; *Franklin* 550 [36].
[2736] See *R v Wootton* [27]; *Franklin* 550 [36].

Part D – Ancillary Proceedings and Orders

17 – Confiscation

The *Confiscation Act 1997* (Vic) ('*Confiscation Act*') is the primary mechanism for confiscating the proceeds and instruments of crime in Victoria, although there is other legislation that may also require a court to make a confiscation order.[2737] A confiscation order may take a variety of forms.

A confiscation order is not part of a sentence. It is imposed in addition to the sentence.[2738] This chapter is included in this manual only because there are difficult questions about the interaction of confiscation legislation with the sentencing principles and purposes.[2739]

Forfeiture – whether by order or automatically under the *Confiscation Act* or via the operation of another piece of legislation – can be a mitigating factor where it places an offender in a worse position than before the offending, and so is punitive and deterrent.[2740]

Because a confiscation order may affect the exercise of the sentencing discretion, it is best if an application seeking one is heard contemporaneously with or as close as possible to passing sentence.[2741]

On appeal, confiscation orders are *treated* as if they were part of the sentence.[2742]

To the extent separation is possible, this chapter is restricted to issues relevant to a sentencing court and to confiscation orders that may be imposed at the time of sentencing.

17.1 – Statutory regime

The operation of the *Confiscation Act* is beyond the scope of this chapter, but certain parts of it should be identified before discussing their relevance to sentencing.

17.1.1 – Available orders

At the time of sentencing for a Victorian offence, a court has two primary options. Firstly, if an offender is convicted of a Schedule 1 offence (which includes a Schedule 2 offence) a court may, on application, make a forfeiture order for 'tainted property'[2743] or it may defer sentencing until after determining the

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[2737] See, eg, *Control of Weapons Act 1990* (Vic) s 9; *Crimes Act 1958* (Vic) s 51X; *Fisheries Act 1995* (Vic) ss 105-06; *Firearms Act 1996* (Vic) s 151; *Summary Offences Act 1966* (Vic) s 60A; *Therapeutic Goods (Victoria) Act 2010* (Vic) s 53; *Wildlife Act 1975* (Vic) s 60(4).
[2738] *R v Tilev* [1998] 2 VR 149, 153 ('*Tilev*').
[2739] *R v McLeod* (2007) 16 VR 682, 685 [15] ('*McLeod*').
[2740] Ibid 685 [16]-[17]. See also *R v Campbell* (1999) 109 A Crim R 174, 189 [40]; *Tilev* 155; *R v Nguyen* [2007] VSCA 165, [22] ('*Nguyen07*').
[2741] *R v Tsolacos* (1995) 81 A Crim R 434, 438-39 ('*Tsolacos*'). This also helps to ensure memory is sharp and materials are available. See also *DPP (Vic) v Cini* (2013) 38 VR 83, 95 [70] ('*Cini*').
[2742] *Confiscation Act 1997* (Vic) s 142(1), (3) ('*Confiscation Act*'). See also *Tsolacos* 438; *Zakhour v The Queen* [2022] VSCA 63, [62], [65].
[2743] *Confiscation Act* s 32(1).

forfeiture application.[2744] A forfeiture order directs that the 'tainted property', or any part of it specified by the court, be forfeited to the Minister.[2745] The order must specify the interests in the property to which it applies.[2746] A court may also restrain 'tainted property' at or closely before the time of charge.[2747] This prevents the accused from disposing of tainted property in anticipation of being convicted of the relevant offending.

Secondly, a court may, on application, make a pecuniary penalty order ('PPO') requiring the offender to pay the State a penalty equal to the value of any 'benefits' they derived from committing the offence.[2748] The court has the discretion to reduce this by any amount paid as restitution or compensation,[2749] and may also defer sentencing until after determination of the pecuniary penalty application.[2750]

17.1.2 – Automatic forfeiture

If a person is convicted of a Schedule 2 offence under the *Confiscation Act* and an order was previously made restraining disposition of the property, and no exclusion order has been made, then the property is automatically forfeited to the Minister 60 days after the restraining order is made or the offender is convicted, whichever is later.[2751] The statutory scheme also provides for the automatic forfeiture of almost all property of offenders declared to be 'serious drug offenders' under the *Sentencing Act 1991* (Vic) ('the Act').[2752]

17.1.3 – 'Tainted property'

The definition of 'tainted property' includes property:

- used or intended to be used in or in connection with the offence;
- derived or realised directly or indirectly from such property; or
- derived or realised directly or indirectly from the commission of the offence.[2753]

In considering if property is tainted, the Court of Appeal has made the following observations about the statutory definition:

- The term 'used' should be given its ordinary meaning – that is, employed or made use of for a particular purpose or end.
- The definition is wide and inclusion of 'in connection with' extends the definition of tainted property to beyond that used in committing the offence.

[2744] Ibid s 33(3). The wording of s 33(3) clearly proceeds on the basis that a person may be convicted of an offence before the court passes sentence for that offence, and thus that 'convicted' should be given its ordinary meaning. See *DPP (Vic) v McCoid* [1988] VR 982 (which considered the similarly worded *Crimes (Confiscation of Profits) Act 1986* (Vic) s 5(3)).
[2745] *Confiscation Act* s 33(1).
[2746] Ibid s 33(2).
[2747] Ibid ss 16(1)-(2A).
[2748] Ibid ss 58(1)-(2), 59(1).
[2749] Ibid s 59(1)(b).
[2750] Ibid s 59(3).
[2751] Ibid s 35(1).
[2752] Ibid s 36GA(1).
[2753] Ibid s 3(1) (definition of 'tainted property').

- Whether there is a connection between use of the property and commission of the crime is a question of degree and fact. There does not need to be a substantial connection, nor does it need to be shown the offence could only have been committed with the property.
- The nature, extent, and significance of the use of the property in connection with the commission of the crime are relevant to the court in determining whether to exercise its discretion to order its forfeiture.[2754]

The question of whether the property was 'used' will often be decisive,[2755] but the mere fact that an act was done in or on particular property is normally not sufficient to bring it within the definition of 'tainted property'.[2756] It is only when the property or some feature of it is turned towards bringing about the offender's purpose that it can be said to have been 'used'.[2757] The more passive the property's use, the less likely it is the relevant connection will be found.[2758]

17.1.4 – 'Benefits'

For the purpose of determining the quantum of a PPO, the 'benefits' of offending include:

- any money received as a result of the commission of the offence, regardless of any expenditures incurred;
- any property derived or realised, directly or indirectly, by the offender or another at the offender's request or direction, as the result of the offence;
- any benefit, service, or financial advantage provided for the offender or another person, at the request or direction of the offender, as the result of the commission of the offence;
- any increase in the total value of property in which the offender has an interest immediately before the commission of the offence and ending after the commission of the offence that was due to the commission of the offence;
- any profits derived by the offender, or by another person on behalf of the offender or at the offender's request or direction, from a depiction of the offence in an entertainment medium;
- any other thing the court considers appropriate.[2759]

17.1.5 – Jurisdiction

The Magistrates' and Children's Courts have limited jurisdiction to make confiscation orders. Relevant to sentencing, they may not:

- make a forfeiture order in respect of real property;

[2754] *Chalmers v The Queen* (2011) 37 VR 464, 479-80 [77] ('*Chalmers*'). See also *DPP (Vic) v Moran* [2012] VSCA 154.
[2755] *Chalmers* 480-81 [78]-[79].
[2756] Ibid 481 [80].
[2757] Ibid 481 [79], [81]. For example, where a house is used to grow cannabis, or a secluded location is used to lure victims of sexual assault, or where a fenced property is used to facilitate murder and store the body of the victim. See *DPP (NSW) v King* (2000) 49 NSWLR 727; *DPP (WA) v White* (2010) 41 WAR 249; *Hendricks v The Queen* [2014] VSCA 185 ('*Hendricks*').
[2758] *Chalmers* 483 [91].
[2759] *Confiscation Act* s 67(1).

- in relation to the conviction of an offender for a particular offence, make a forfeiture order in respect of property, or a PPO, whose value exceeds the jurisdictional limit of the Magistrates' Court in civil proceedings, unless personal injury damages are claimed.[2760]

In these circumstances, the Supreme Court or County Court may make the necessary order.[2761]

17.1.6 – Relevant considerations

In determining whether to make a forfeiture order for tainted property, a court may consider:

- the use that is made, or is ordinarily intended to be made, of the property;[2762]
- any hardship the order is reasonably likely to cause anyone;[2763]
- the claim of any person to an interest in the property;[2764]
- the value of the property;[2765]
- the nature and gravity of the offending;[2766]
- the degree of the offender's involvement and their criminal history;[2767]
- the value of any other property confiscated;[2768]
- the penalty imposed;[2769]
- the nature of the offender's interest in the property;[2770]
- the value of any drugs involved or the size of the crop;[2771]
- whether the property was acquired with proceeds from the sale of drugs;[2772]
- the utility of the property to the offender;[2773]
- the extent of the property's involvement with the commission of the offence;[2774]
- the deterrent purpose of forfeiture;[2775] and
- the extent to which retention of the property might bear on the offender's rehabilitation.[2776]

Only some of these factors are legislatively mandated, but the multiplicity of principles to be considered, and their continued viability, indicates that the court's discretion is broad and multi-faceted when making a confiscation order.[2777]

[2760] Ibid ss 12(2), (4)-(5).
[2761] Ibid s 12(6).
[2762] Ibid s 33(5)(a).
[2763] Ibid s 33(5)(b).
[2764] Ibid s 33(5)(c). See also *R v Winand* (1994) 73 A Crim R 497, 501 ('*Winand*').
[2765] *Winand* 500.
[2766] Ibid.
[2767] Ibid.
[2768] Ibid.
[2769] Ibid.
[2770] Ibid.
[2771] Ibid 501.
[2772] Ibid.
[2773] Ibid.
[2774] Ibid. See also *Chalmers* 479-80 [77].
[2775] *Winand* 501. See also *McLeod* 686 [18].
[2776] *Winand* 501.
[2777] *Cini* 88 [31]-[32].

17.2 – Interaction with sentencing principles and purposes

17.2.1 – Proportionality

Proportionality requires due consideration of any confiscation order, but it will not always be a mitigating factor. The question is whether confiscation will have a disproportionate (or deterrent) effect on the offender.[2778] Any forfeiture order must be proportionate to the nature and gravity of the offence and the offender's circumstances. This can be the critical consideration if ordering forfeiture would cause unacceptable hardship.[2779]

The Act limits the manner in which a court may consider confiscation.[2780] It distinguishes between orders disgorging the profits of crime, which are not to be considered,[2781] and orders directing the forfeiture of lawfully acquired property or a PPO relating to benefits that exceed the profits of the offence, which may both be taken into consideration in determining an appropriate sentence.[2782] The Act also prohibits a court from taking into account the automatic forfeiture of a serious drug offender's property.[2783]

17.2.2 – Punishment

If confiscation does more than deprive an offender of the profits of crime, it constitutes punishment and can be considered by the court in determining an appropriate sentence. The failure to do so may constitute error.[2784]

This is difficult where at the time of sentencing there is only a possibility of forfeiture. The Court of Appeal has nonetheless held this should be considered because it might constitute 'substantial additional punishment'. However, there must be sufficient evidence for the court to consider the likely effect on the offender,[2785] and an offender relying on this point in mitigation has the burden of persuading the court on the balance of probabilities.[2786]

Moreover, if lawfully acquired property is used in the commission of a crime and becomes 'tainted property', the punitive element of its forfeiture must be sufficiently identified for the court. Specifically, how much was lawfully acquired, the offender's interest in it, and the extent it was used to facilitate the offence are all relevant and may require proof.[2787] An offender must present 'credible material' identifying the property's source, so the court may positively conclude that at least a substantial portion was lawfully acquired.[2788]

[2778] *McLeod* 686 [18].
[2779] *Winand* 501. See also *R v Kardogeros* [1991] 1 VR 269, 277; *Hendricks* [25]-[27].
[2780] *McLeod* 686 [19].
[2781] *Sentencing Act 1991* (Vic) ss 5(2A)(b), (d)-(e) ('the Act). See also *R v El Cheikh* [2004] VSCA 146, [12] ('*El Cheikh*').
[2782] The Act ss 5(2A)(a)-(ab), 5(2A)(c). See also *R v Wright* [2008] VSCA 19, [45]; *El Cheikh* [10].
[2783] The Act s 5(2A)(f).
[2784] *El Cheikh* [12]; *R v Tabone* [2006] VSCA 238 [6] ('*Tabone*'); *McLeod* 687 [21]; *Nguyen07* [23]-[24]; *R v Pajic* (2009) 23 VR 527, 534 [26]; *R v Dang* (2009) 197 A Crim R 53; *Hendricks*.
[2785] *McLeod* 688 [25]. See also *R v Le* [2005] VSCA 284, [12]; *Tabone* [14].
[2786] *McLeod* 688 [29].
[2787] *McLeod* 688 [29]; *Rajic v The Queen* [2011] VSCA 51, [14]-[17].
[2788] Ibid 688 [30].

Similarly, if an offender alleges they have lost benefits in excess of profits derived from the crime, they must produce evidence for the court to make a positive determination on the balance of probabilities.[2789]

17.2.3 – Remorse and cooperation

The Act allows the court to consider a forfeiture order as indicative of remorse or cooperation.[2790] However, the weight to be given to it will turn on the facts of the case[2791] and the Act is not to be read as creating some kind of deeming provision, such that compliance with any relevant order is evidence of remorse or cooperation.[2792]

For an offender's conduct in relation to confiscation proceedings to constitute cooperation, the conduct must be something more than a pragmatic decision and must involve the offender consciously facilitating resolution of the proceedings.[2793]

17.3 – Appeals

A person with an interest in property in respect of which a forfeiture order or pecuniary penalty order has been made or refused may appeal against the order or refusal in the same manner as if the order were part of the sentence imposed.[2794] On appeal, the order or refusal may be confirmed, discharged or varied or the matter may be remitted for rehearing.[2795]

Where the true impact of a confiscation order becomes apparent after sentence, this may constitute fresh evidence and enliven an appellate court's discretion to resentence the offender.[2796]

[2789] Ibid. See also *El Cheikh* [13]-[14].
[2790] The Act s 5(2B).
[2791] *Mileto v The Queen* [2014] VSCA 161, [26] ('*Mileto*').
[2792] *Kapkidis v The Queen* [2013] VSCA 35, [59].
[2793] *Mileto* [26].
[2794] The Act ss 142(1)-(3), (5).
[2795] Ibid ss 142(4),(6).
[2796] *McLeod* 682-83 [2]; *Hendricks* [25]-[27].

18 – Compensatory orders

A court may make compensatory orders for personal injury, property loss or damage, and restitution of property. Under Commonwealth legislation, a court may also make an order for reparation, which incorporates monetary payments and the return of goods for Commonwealth offences.

Compensation is ordered in addition to imposing sentence and is intended to provide a convenient mechanism for a victim to recover compensation.[2797] An application seeking compensation is a civil proceeding, ancillary to sentencing, to which the civil standard of proof applies.[2798]

The *Victims of Crime Assistance Act 1996* (Vic) ('*VOCA Act*') also enacts a complementary scheme, which provides for compensation to victims out of consolidated revenue up to certain statutory limits. That scheme operates independently of the sentencing hearing and is not considered in this manual.

Under the *Crimes Act 1914* (Cth), a court has discretion to make a Reparation Order in relation to a Commonwealth offence, for more on that ancillary order please see the Commonwealth Sentencing Database.[2799]

18.1 – Compensation orders

18.1.1 – Threshold requirements

The *Sentencing Act 1991* (Vic) ('the Act') establishes two independent and parallel compensation schemes for victims of crime who have suffered personal injury and property damage.[2800] There are some requirements specific to each.

18.1.1.1 – Personal injury compensation

A guilty or convicted person may be ordered to pay compensation to someone who has suffered any injury as a direct result of their offending,[2801] which includes any other occurrence of the same offence involved in the course of conduct of a representative or sample charge.[2802]

Generally, a person is convicted when the trial judge accepts the jury's verdict or by some action accepts the offender's plea of guilty. But in the context of compensation orders, this has not been determined.[2803]

'Injury' is defined as:

- actual physical bodily harm; or
- mental illness or disorder, or its exacerbation, whether or not flowing from nervous shock; or
- pregnancy; or

[2797] *R v Braham* [1977] VR 104 ('*Braham*'); *DPP (Vic) v Energy Brix* (2006) 14 VR 345, 346 [2] ('*Energy Brix*').
[2798] *RK v Mirik* (2009) 21 VR 623, 628 [14] ('*Mirik*'); *Moresco v Budimir* [2015] VSC 51, [24] ('*Moresco*').
[2799] https://csd.njca.com.au/principles-practice/7-ancillary-order/reparation/.
[2800] *Sentencing Act 1991* (Vic) ss 85B(1), 86(1) ('the Act').
[2801] Ibid s 85B(1).
[2802] Ibid s 85B(3).
[2803] *Sullivan v Gibson* [2018] VSC 785, [32]-[41] ('*Sullivan*').

- grief, distress or trauma[2804] or other significant adverse effect; or
- any combination arising from an offence, but not including injury due to loss of or damage to property.[2805]

A compensation order for personal injury may only be made on application by the injured person,[2806] who may appear personally or be represented by a legal practitioner or third party.[2807]

An application may be made by the injured person, or on their behalf:

- by any person other than the offender if the victim is a child, or is incapable of making the application due to injury, disease, senility, illness or physical or mental impairment;[2808]
- by the Director of Public Prosecutions ('DPP'), the informant or police prosecutor if the sentencing court was the Magistrates' Court;[2809] or
- by the DPP if the sentencing court was not the Magistrates' Court.[2810]

An application for personal injury must be made within 12 months after the offender is found guilty or convicted of the offence,[2811] and may be extended on application or by the court's own motion if the court believes it is in the interests of justice to do so.[2812] As noted earlier, it is unclear if the limitation period begins to run after a plea or finding of guilt, or upon the imposition of sentence.[2813]

In considering an extension of time and assessing reasons for delay, a court must balance the principles of finality and rehabilitation against the rights of victims. In so doing, the court should view out of time applications liberally, as they arise from a criminal statute and not a civil one.[2814] A competing factor, however, is that rehabilitation is important in any system of criminal justice and late applications should not be permitted that may significantly prejudice an offender's rehabilitation.[2815]

The court will consider the circumstances of the application, such as:

- whether the order would have succeeded if brought within time;[2816]
- the length of delay in comparison to other cases;[2817]

[2804] These do not need to be explicitly stated and may be implied. See *Sullivan* [56].
[2805] The Act s 85A(1).
[2806] Ibid s 85B(1).
[2807] Ibid s 85E(1). If the injured party is represented by someone who is not a legal practitioner, they can only be represented with the leave of the court: at s 85E(1)(b)(ii).
[2808] The Act s 85C(1)(b)(iii).
[2809] Ibid s 85C(1)(b)(iii)(B). Where the application is made in the County Court, the County Court Criminal Procedure Practice Note (PNCR 1-2015) governs the procedure for applications for compensation.
[2810] The Act s 85C(1)(b)(iii)(A). The legislation does not require the DPP, the informant or police prosecutor to make an application on behalf of a victim: at s 85C(2).
[2811] The Act s 85C(1)(a).
[2812] Ibid s 85D(1)-(2).
[2813] *Sullivan* [31]-[41].
[2814] *Robertson v Esso (Australia) Pty Ltd* [2004] VSC 101, [4] ('*Robertson04*'); *Moresco* [14]-[15].
[2815] *Robertson04*.
[2816] *Sullivan* [43].
[2817] For example, three months may be too long in certain situations, while periods as long as eight years have been accepted. See *Hunt v Akkus* [2017] VSC 79, [28] ('*Hunt*'); *Sullivan* [44].

- the reasons for delay, and whether the applicant took prompt action to apply;[2818]
- whether the delay would significantly prejudice the offender's rehabilitation;[2819]
- whether the delay will cause forensic disadvantage to the offender.[2820]

Examples where time has been extended include where injuries are insidious, such as with some psychological disorders,[2821] but ultimately each decision turns on its own facts.

18.1.1.2 – Property loss or damage

An order may be made on the application of the victim,[2822] by the DPP on their behalf (in higher courts), or by the DPP, informant or police prosecutor on their behalf (in the Magistrates' Court).[2823]

If a court finds a person guilty or convicts them of an offence, and evidence is presented that loss, destruction or damage to property has occurred as a result, the court must ask the prosecution if an application for a compensation order will be made.[2824]

An order may also be made on the court's own motion where:

- the person in whose favour the order is to be made does not oppose it; and
- the court has given the offender the opportunity to be heard in respect of the order.[2825]

The application must be made as soon as practicable after the offender is found guilty or convicted of the offence.[2826] Whether the application was made 'as soon as practicable' must be determined by the circumstances, and again a court should interpret that broadly in favour of the claimant.[2827] However, claimants do not have an open-ended right to compensation orders, as that would undermine the finality of proceedings.[2828] For example, waiting to determine if the offender has the financial means to pay before making the application would not be considered 'as soon as practicable'.[2829]

18.1.2 – Process

[2818] *Brown v Loveday* [2012] VSCA 57, [27]; *Marceta v Efandis* [2016] VSC 265 ('*Marceta*'); *Hunt* [42].
[2819] *Hunt* [32]; *Sullivan* [45].
[2820] *Marceta*; *Hunt* [36].
[2821] *DPP (Vic) v Esso Australia* [2003] VSC 367 [8], [14] ('*Esso Australia*').
[2822] The Act s 86(5)(b)(i).
[2823] Ibid s 86(5)(b)(ii). Nothing in the legislation requires the DPP, informant or police prosecutor (as the case requires) to make an application on behalf of a person: at s 86(6).
[2824] The Act s 87(1). Failure by the court to ask the prosecution does not prevent a person applying for a compensation order: at s 87(2).
[2825] The Act ss 86(1A)-(1B). The court may only make an order on its own motion in respect of offences for which the hearing of the charge commences on or after 31 January 2013: at s 146(1).
[2826] The Act s 86(5)(a).
[2827] *Werden v Legal Services Board* (2012) 36 VR 637, 646 [35].
[2828] Ibid 647-8 [41].
[2829] Ibid 647-8 [41]-[42].

It is important to note at the outset that all requirements of procedural fairness apply to compensation proceedings.[2830] During the hearing, the victim or offender may give evidence or call another person to give evidence, and all parties who give evidence may be cross-examined and re-examined.[2831] The court may also treat a finding of any fact as evidence and, in the absence of evidence to the contrary, will be proof of that fact.[2832] The finding may also be proved by production of a document under the seal of the court from which the finding appears.[2833]

18.1.3 – Considerations

Once a compensation order is applied for, a court must first consider whether to grant it before determining the amount of any compensation. Two considerations inform this decision. Firstly, a court must hear and determine a compensation application unless the relevant facts do not sufficiently appear from specific documents, statements, or evidence.[2834]

The relevant facts include:

- the fact of the commission of the crimes;
- the identification of the offender(s);
- the injuries sustained;
- the physical and psychological impact of those injuries on the victim as may be relevant to an assessment of the pain and suffering experienced;
- the character and amount of special expenses;[2835]
- the elements of a compensation order (*i.e.* whether loss was caused by the offence).[2836]

For **personal injury compensation**, a court may also have regard to any statement of the material facts relevant to the charge given to a court in a proceeding for the offence by the prosecution and not disputed by or on behalf of the accused.[2837]

For **property loss compensation**, a court may also have regard to any other acceptable documentary evidence of:

- loss, destruction, or damage to property suffered because of the offence; or
- the amount of the loss suffered, or the expense incurred due to that destruction or damage.[2838]

A court may also have regard to all this evidence in determining quantum and may have regard to any available documents or admissions referred to with the parties' consent.[2839]

[2830] The Act ss 85D(3), 85G(2), 85J(1)-(2). See 2.2.2.2 – Method and process – The sentencing hearing – Judicial duties – Procedural fairness.
[2831] The Act ss 85G(1)(a)-(b).
[2832] Ibid ss 85G(1)(c), 86(7)(a).
[2833] Ibid ss 85G(1)(d), 86(7)(b).
[2834] Ibid ss 85F(1)-(2), 86(8)-(9).
[2835] *Mirik* 639 [69]-[70].
[2836] *R v Gant* [2016] VSC 662, [185] ('*Gant*').
[2837] The Act s 85F(1)(b).
[2838] Ibid s 86(9)(e).
[2839] Ibid s 85G(1)(e).

Secondly, the court must also decide if the case is too complex for hearing and determination. As compensation orders are intended to provide a simple process for the benefit of claimants, the discretion to make a compensation order should be exercised only in clear cases.[2840]

Where the court can expediently hear and determine the application based on the material already before it or with some supplementary evidence, the application will not be considered too complex.[2841] Conversely, where there are still significant and unresolved conflicts over the facts after the trial, the parties should be left to their civil remedies.[2842]

The court should be able to easily determine the following:

- the extent of offending by each offender;
- the order for each offender that must appropriately reflect the contribution which they each individually made to the pain and suffering experienced by the victim;
- the financial circumstances of the offenders and the nature of the burden that payment will impose (although a court may still impose an order notwithstanding an inability to discover the offender's financial circumstances).[2843]

If there is difficulty determining these or other elements, then the court may conclude that the relevant facts do not sufficiently appear or that there are issues raised that are too complex to be dealt with in a compensation proceeding. Other situations include where there were prior civil proceedings against those involved, which may act as a bar to the present compensation order application. Where no information is provided, it may indicate that the relevant facts do not appear. Where information is provided, it may reveal questions of the offender's ability to pay, joint/several liability, contribution against co-offenders and the like that are too complex.[2844]

However, a court must also consider the victim's trouble, expense, time and additional trauma of making an application to the civil court.[2845]

18.1.4 – Assessing amount and method of payment

18.1.4.1 – General considerations

Where a court concludes there is an entitlement to compensation, whether for personal injury[2846] or property loss,[2847] it must intuitively synthesise all the material circumstances of the case, including the:

- seriousness of the offending;
- relationship between the offence and the victim, and the victim and the offender;
- degree of injury suffered by the victim;

[2840] *Kaplan v Lee-Archer* (2007) 15 VR 405, 412 [30] ('*Kaplan*'); *Mirik* 639 [69].
[2841] *Mirik* 640 [75].
[2842] *Braham*; *Esso Australia* [6]; *Kaplan* 412 [31].
[2843] *Mirik* 640 [75].
[2844] *Gant* [168]-[186].
[2845] *Mirik* 627-8 [11].
[2846] The Act s 85H(1).
[2847] Ibid s 86(2).

- offender's financial circumstances;
- effect of a compensation order on the offender's prospects for rehabilitation; and
- nature of the burden that payment will impose.[2848]

The offender's means are a relevant, but not controlling, consideration.[2849] These include whether the offender can pay the award outright, what assets are currently available, the existence of dependents, the availability of attachments to income, and the offender's remaining funds after compensation is made.[2850]

Separately, the court may look at the offender's personal circumstances as part of determining the nature of the burden. This includes the usual sentencing considerations of character, antecedents, age, physical or mental health, and the custodial burden the offender is already undergoing.[2851]

Most importantly, the court may look at the burden a compensation order will impose on an offender's rehabilitation.[2852] This includes the offender's capacity to earn, their youthfulness and prospects of rehabilitation,[2853] and the potential of leaving the offender bankrupt and therefore the possibility of future criminality.[2854] The court must balance the need to compensate the applicant and the public interest in the offender's rehabilitation.[2855] There is also a balance between reducing the amount so as to allow payment while also denouncing the crime.[2856]

As noted, a court is not prevented from making a compensation order only because it has been unable to find out the financial circumstances of the offender.[2857]

Compensation mostly applies to adult offenders. Child offenders cannot be ordered to pay compensation above $1000, and their financial circumstances must be taken into account.[2858]

Once the court decides to make a compensation order, the amount must be calculated by reference to common law principles of assessment of damages,[2859] which may include principles of contributory negligence.[2860] But the heads of claimable damages, unlike common law, are expanded by the legislative definitions of injury and loss, destruction, or damage to property.[2861]

[2848] *Moresco* [25]. See also *Brooks v Meade* [2017] VSC 172, [20] ('*Brooks*').
[2849] *Mirik* 652 [135].
[2850] *Sullivan* [115].
[2851] *Mirik* 642 [94]; *Sullivan* [116].
[2852] *Esso Australia* [7]; *Josefski v Donnelly* [2007] VSCA 6 ('*Josefski07*').
[2853] *Mirik* 642 [94]; *Shepherd v Kell* [2013] VSC 24, [39] ('*Shepherd*').
[2854] *Mirik* 642 [94].
[2855] *Chalmers v Liang* [2011] VSCA 439, [22] ('*Chalmers II*').
[2856] *Mirik* 653-4 [142]; *Stevens v Baxter* [2009] VSC 257, [35].
[2857] The Act s 85H(1), 86(3); *Cheng v Zhuang* [2016] VSC 24, [34] ('*Cheng*').
[2858] *Children, Youth and Families Act 2005* (Vic) s 417; *Mirik* 653 [140].
[2859] *Dura Constructions v Dovigi* [2004] VSC 252, [51] ('*Dovigi*'); *Kaplan* 411 [28].
[2860] *Dovigi* [51].
[2861] Ibid; *Kaplan* 406 [2].

As orders for compensation are intended to recompense the applicant's loss rather than punish the offender, orders must be limited to true compensatory amounts, as defined in the Act, and punitive damages cannot be awarded.[2862]

Moreover, since a compensation order is intended to be a convenient and speedy mechanism, it lacks the detailed forensic and judicial examination available in civil proceedings. Because offenders may not thus be able to fully test the applicant's claims, the courts have emphasised the need for the compensation ordered to be appropriate to 'give the victim an appropriate measure of justice without running the risk of doing injustice to the offender'.[2863] It is therefore open to the courts to reduce the amount ordered to avoid over-compensating the victim,[2864] especially in situations where the claims cannot be tested or where there is a need for further cross-examination or expert evidence.[2865] This amount is discretionary and dependent on the specific circumstances; there is no authority for a blanket discount.[2866]

Where there are joint offenders, the loss may be apportioned between those offenders. The apportionment should not be automatic, and if it is likely to disadvantage the complainant, it may be undesirable.[2867] But a court has discretion to impose an amount that reflects the extent of liability.[2868] The alternative is for offenders to be made jointly and severally liable for the total sum.[2869] Where this raises questions of complexity, the court may decline to make a compensation order.[2870]

18.1.4.2 – Assessing personal injury claim

A compensation order may consist of amounts for:

- pain and suffering experienced by the victim;
- some or all expenses incurred, or reasonably likely to be incurred,[2871] by the victim for:
    - reasonable counselling services;
    - medical expenses;[2872] or
- any other expenses not relating to property loss or damage.[2873]

'Pain and suffering' is not defined by the Act, but the effects of the crime on the claimants must be considered as a matter of intuition and experience.[2874] To that end, the pain and suffering caused by leaving a victim to die, or preventing a victim's parents from burying their child by concealing the body, is

[2862] *Mirik* 655 [150].
[2863] Ibid 656 [154].
[2864] Ibid.
[2865] *Sullivan* [98].
[2866] *Kelley (a pseudonym) v R1 (a pseudonym)* [2016] VSCA 90, [21]-[22].
[2867] *Braham* 111.
[2868] *Mirik* 657-8 [161]-[164]; *Shepherd* [37].
[2869] *Shepherd* [37].
[2870] *Gant* [178].
[2871] Although damages for loss of earnings or earning capacity are not explicitly stated in the Act, it would appear the entitlement for amounts for expenses reasonably likely to be incurred is broad enough to include this, if linked to the definition of injury. See, eg, *Brooks* [30].
[2872] 'Medical expenses' includes dental, optometry, physiotherapy, psychology treatment, hospital and ambulance expenses. The Act s 85A.
[2873] The Act s 85B(2).
[2874] *Josefski07* [22].

considered compensable.[2875] This also makes the closeness of the claimant's relationship relevant; the impact of a murder may be felt by close relatives more profoundly despite them not actually living with the victim.[2876] The requirement that the injury be the 'direct result of the offence' does not mean that the offence must be the sole cause of the injury. It should be assessed according to common law tort principles of causation and remoteness, and not extend further.[2877]

In assessing causation, the damage must be reasonably foreseeable and not tenuously related to the offending.[2878] In this sense, 'direct' is not intended to be immediate, proximate or obvious, but the crime must play a significant role in bringing about the compensable injury,[2879] or be a substantial and operating cause.[2880]

This should be assessed in a common-sense manner,[2881] and injuries may be directly caused despite the contribution of extraneous factors,[2882] including where mental health issues could have been caused by previous abuse or other circumstances.[2883]

An injury may be directly caused by a crime notwithstanding that it:

- develops gradually;
- becomes manifest only after a lapse of time; or
- is revealed only by expert diagnosis of multiple symptoms (especially with psychological or mental injury.[2884]

However, while feelings about the trial process may arguably be 'compensable injury', they would not be caused 'as a direct result of the offence' but are instead tenuously related.[2885]

In assessing grief or trauma in an application for personal injury compensation, a court must have regard to the following factors:[2886]

- the circumstances in which the death occurred;
- the effect on the applicant on hearing of the events causing loss;
- the closeness of the relationship between the person seeking compensation and the person who has been killed;
- the age of the person seeking compensation; and
- the extent of grief and psychological suffering experienced as a result of the loss.[2887]

[2875] Ibid [26]; *Chalmers II* [14].
[2876] *Re Wathen* [2007] VSC 80, [20].
[2877] *Kaplan* 411 [28].
[2878] Ibid 410-11 [25].
[2879] Ibid 411 [28].
[2880] *Moresco* [50].
[2881] Ibid [34]; *Kaplan* 410 [22], 411 [28], 417 [56].
[2882] *Hunt* [82].
[2883] *Re Wathen* [2007] VSC 80 [21]; *Moresco* [49].
[2884] *Kaplan* 410-11 [25].
[2885] *Sullivan* [70].
[2886] *Energy Brix*.
[2887] Ibid 356-357 [50].

Previous cases have noted that this is a highly discretionary consideration, and there will be widely differing views as to what the appropriate award should be in each case.[2888] Different applicants will be able to cope with the incident in different ways, and the circumstances of the case may cause the applicants to suffer increased trauma (for example, if the victim was killed in a murder as opposed to an accident).[2889]

Cultural factors may also be relevant in determining the extent of suffering; the concealment of a victim's body increases the applicant's suffering as an aggravating circumstance.[2890] Other aggravating factors include the offender's refusal to acknowledge responsibility, the failure to locate the body of the deceased and the lengthy curial process.[2891]

18.1.4.3 – Assessing property loss or damage claim

The loss, destruction, or damage to property because of an offence are also compensable.[2892] 'Property' may include motor vehicles[2893] and inheritances under a will.[2894] But it does not cover the costs to extinguish a fire by a public authority.[2895]

Because the power to compensate is enlivened only if the victim suffers loss, where property is recovered and returned without any loss to the owner, there is no basis for a compensation order.[2896]

The extent of compensation will be determined as the court thinks fit but must not exceed the value of the property lost, destroyed or damaged.[2897]

18.1.4.4 – Discounting and limiting factors

An assessment of any amount to be paid may also be affected by discounting factors, such as legislative requirements or compensation already paid.

For personal injury compensation orders, any amount ordered must be reduced by any compensation awarded under the *VOCA Act*.[2898] This is designed to prevent double compensation of victims of crime.

The *VOCA Act* compensates for losses analogous to 'injury' suffered in personal injury compensation orders, and for clothing worn at the time of the offence.[2899] Where there is an overlap, the requisite amount for the same head of damage must be reduced and the rest remains untouched.[2900]

2888 Ibid 352–53 [30].
2889 Ibid.
2890 *Chalmers II* [12]-[15]; *Cheng* [29]-[30].
2891 *Tanner v Smart* [2010] VSC 463, [31].
2892 The Act s 86(1).
2893 Ibid s 86(11).
2894 *Coleman v DPP (Vic)* [2018] VSCA 264, [51].
2895 *Robson v The Queen* [2018] VSCA 256, [76].
2896 *DPP (Vic) v Tan* [2018] VCC 883, [52].
2897 The Act s 86(1).
2898 Ibid s 85I.
2899 *Victims of Crime Assistance Act 1996* (Vic) s 8(4).
2900 *Jackson v Graham* [2014] VCC 241, [35]; *Adams v Xypolitos* [2015] VSC 747, [38].

Where an overlap arises in circumstances not prescribed by legislation, the court is entitled to reduce the amounts for the overlap and avoid double payment, especially where the offender is serving a life sentence.[2901] This includes where the application has already received compensation for property loss, or where compensation was not provided by the Victims of Crime Assistance Tribunal ('VOCAT') but by another compensatory scheme (such as the Transport Accident Commission).[2902]

It is also usual for the quantum of compensation to be reduced by amounts already repaid.[2903]

The *Wrongs Act 1958* (Vic) ('*Wrongs Act*') may also be relevant in certain situations. Part IV allows claims of contribution from 'concurrent wrongdoers'. These provisions may be applicable to compensation orders, especially where there are co-offenders or responsible third parties in questions of liability. However, if there are substantial questions of contribution to be investigated, it will frequently render a matter too complex to be dealt with through the summary compensation procedure.[2904]

Part IVAA of the *Wrongs Act* creates rules for proportionate liability in specified cases of economic loss or damage to property arising from a failure to take reasonable care.[2905]

Part VB describes a detailed scheme concerning the assessment of personal injuries damages, which allows awards save for 'where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct'.[2906] This operates to exclude intentional offences from the ambit of Part VB. However, as 'damages' includes any form of monetary compensation and 'fault' includes an act or omission,[2907] this may indicate that Part VB may apply to negligent and reckless offences.

Part VBA of the *Wrongs Act* describes 'thresholds in relation to recovery of damages for non-economic loss'. These provisions do not apply to orders under the Act.[2908]

18.1.4.5 – Method

The court may direct that payment be made by instalments, and any default will cause the outstanding amount to become due and payable.[2909] Even if the court does not make an order that compensation be paid by instalments, the debtor may apply for an instalments order under the *Judgment Debt Recovery Act 1984* (Vic) s 6.[2910]

Depending on the circumstances, the court could order no or reduced compensation, defer payment of compensation or order payment of compensation by instalments over a reasonable period.[2911] Alternatively, the court may decide to order full compensation regardless of the offender's circumstances,

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[2901] *DPP (Vic) v Farquharson* [2009] VSC 186, [5].
[2902] *Bentley v Furlan* [1999] 3 VR 63, [168]; *DPP (Vic) v Spanidis* [2015] VCC 1906, [59].
[2903] *DPP (Vic) v Deo* [2018] VCC 57, [38].
[2904] *Kaplan* 405 [33], [59]-[60].
[2905] *Wrongs Act 1958* (Vic) s 24AF(1)(a).
[2906] Ibid s 28C(2)(a).
[2907] Ibid s 28B.
[2908] *DPP (Vic) v Esso Australia* [2004] VSC 440, [19]-[20]; *Esso Australia v Robertson* [2005] VSCA 138.
[2909] The Act s 86(4).
[2910] *Josefski07*.
[2911] *Mirik* 652 [137]; *Shepherd* [39]; *Sullivan* [119].

as long as it is taken into account.[2912] This is especially in cases where future possibilities such as a windfall payment may occur.[2913]

18.1.5 – Costs

All parties bear their own costs of a compensation proceeding unless the court orders otherwise.[2914] This determination is usually dependent on whether there was considerable complexity 'such that engagement of solicitors and counsel were essential', or whether there were other particularly special or unusual circumstances.[2915]

In determining whether to award costs, the court must consider the:

- impact of the crime on the victim;
- complexity of the matter requiring representation;
- number of offences committed against an applicant;
- length of time between offending and award of compensation;
- need for proper representation; and
- need for specialist medical opinions to be provided.[2916]

Other considerations have included the existence of extensive supporting documentation,[2917] whether costs were otherwise kept down,[2918] and the conduct of the offender.[2919]

18.1.6 – Impacts

A compensation order is an independent discretionary consequence of a finding of guilt. Therefore, it may be combined with other sanctions subject to certain conditions.

Compensation orders may be made in addition to dismissals, discharges and adjournments,[2920] and can also be made in respect of offences taken into account.[2921] Compensation orders cannot be made as a condition of a CCO,[2922] but can be made in the usual fashion as an ancillary order to sentence.

Compensation orders are relevant to assessing whether to impose a fine, in that the court must consider the effect of any compensation order on the financial circumstances of the offender.[2923] Where the court

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[2912] *Mirik* 652 [137].
[2913] *Nicholson v Kostov* [2006] VSC 328, [20]; *Mirik* 653 [139].
[2914] The Act s 85K.
[2915] *AA (a pseudonym) v Cooper* [2015] VCC 233, [17]-[19] (*'CooperCCV'*); *Dutton Garage Wholesale Pty Ltd v Sandro Mark Terzini* [2017] VCC 1991, [55] *('Dutton Garage'*).
[2916] *Curtis (a pseudonym) v Patton (a pseudonym)* [2018] VCC 91, [15]-[17]. For a discussion of cases where applicants have had costs awarded in their favour see *Dutton Garage* [41]-[55].
[2917] *Gregory v Gregory* [2000] VSC 190.
[2918] For example, by multiple applicants using the same solicitor. See *R v Scarborough* [2000] VSC 255, [31].
[2919] *CooperCCV* [17].
[2920] The Act ss 74, 77.
[2921] Ibid s 100(4).
[2922] Ibid s 48(1).
[2923] Ibid s 53(1).

intends to impose a fine and a compensation order, but the offender has insufficient means to pay both, the compensation order must be given priority.[2924]

A compensation order is considered a sentence under the *Criminal Procedure Act 2009* (Vic).[2925] An appeal against such an order is, consequently, an appeal against sentence, for which leave is required.[2926] A decision to hear a compensation application is also reviewable as an exercise of discretion.[2927]

The right of any person to bring civil proceedings is unaffected.[2928] A compensation order, including any costs ordered, must be taken to be a judgment debt due by the offender to the person in whose favour the order is made. Payment of any unpaid amount may be enforced by the court in which it was made,[2929] and may be satisfied out of money restrained under the *Confiscation Act 1997* (Vic).[2930]

18.2 – Restitution

Under the Act a court has discretion to make a Restitution Order ('RES Order') where goods have been stolen, and a person has been found guilty or convicted of an offence connected with the theft.[2931]

A court may order that:

- the goods be returned to the person entitled to them ('entitled person');[2932]
- goods which 'directly or indirectly represent the stolen goods' ('replacement goods') be returned to the entitled person;[2933]
- the value of the stolen goods be paid to the entitled person out of money in the offender's possession at the time of arrest;[2934]
- the purchase price of the stolen goods be paid to a third party out of money in the offender's possession at the time of arrest, if the stolen goods were purchased in good faith or money lent on the security of the stolen goods.[2935]

Replacement goods are those traceable as the proceeds of disposal or realisation of the goods.[2936] Goods or replacement goods may therefore still be returned where minor alterations are made.[2937] However,

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[2924] Ibid s 53(2).
[2925] *Criminal Procedure Act 2009* (Vic) s 3 ('*CPA*').
[2926] *CPA* s 278; *Chalmers II* [3].
[2927] *Kaplan* 412-3 [32].
[2928] The Act s 85L.
[2929] Ibid s 85M.
[2930] *Confiscation Act 1997* (Vic) s 30.
[2931] The Act s 84(1). Blackmail, obtaining property by deception and analogous offences committed outside Victoria are covered by the expanded definition of theft contained in sections 90(1) and (4) of the *Crimes Act 1958* (Vic): at s 84(9)(a); cf *DPP (Vic) v Miao* [2018] VCC 1290, [68].
[2932] The Act s 84(1)(a).
[2933] Ibid s 84(1)(b).
[2934] Ibid s 84(1)(c).
[2935] Ibid s 84(4).
[2936] *Koeleman v Nolan* [2012] VSC 128, [19] ('*Koeleman*').
[2937] For example, where a wheelbarrow is stolen and then painted, a restitution order may properly be made in respect of the whole of the wheelbarrow despite the added paint. See *R v Nousis* (2004) 8 VR 381, 384 [11] ('*Nousis*').

where goods are intermingled, the court may only order restoration of the parts that were stolen.[2938]

A RES Order may be executed upon innocent third parties,[2939] including police.[2940] The entitlement to a RES Order follows the relevant property rights.[2941]

A court may make a combined order for replacement goods and money if the entitled person does not recover more than the stolen goods' value.[2942]

18.2.1 – Process

A RES Order may be sought by the prospective beneficiary,[2943] by the DPP in the higher courts, or by the informant or a police prosecutor in the Magistrates' Court.[2944] Application should be made 'as soon as practicable' after the finding of guilt or conviction.[2945]

The court must not make a RES Order unless all relevant facts are established by evidence admitted at the hearing or are contained in 'the available documents' or any relevant admissions.[2946] 'Available documents' are:

- any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or
- the depositions in the committal proceeding.[2947]

A RES Order is intended for straightforward cases, and the discretion should not be exercised where civil remedies may be better suited to do justice between parties.[2948] Where multiple beneficiaries seek a RES Order, the court may make one order for a total sum with beneficiaries individually listed.[2949] The court may also tailor repayment of the order, allowing for instalments.[2950]

18.2.2 – Combination with other sanctions

[2938] Ibid 384 [13].
[2939] The Act s 84(1).
[2940] *DPP (Vic) v Garland* [2016] VCC 10, [39].
[2941] For example, if a bank repays the victims of fraud, the bank will now be the entitled person. *R v Nobelius* [2001] VSCA 176, [8].
[2942] The Act s 84(3).
[2943] Ibid s 84(5)(b)(i); *Vines v Djordjevitch* (1955) 91 CLR 512.
[2944] The Act s 84(5)(b)(ii). The DPP, informant or the police prosecutor is empowered but not required to make a RES Order application on behalf of a person: at s 84(6).
[2945] The Act s 84(5)(a).
[2946] Ibid s 84(7).
[2947] Ibid s 84(8).
[2948] *Nousis* 384 [12]; *Koeleman* [19].
[2949] *DPP (Vic) v Nicoll* [2015] VCC 866, [37].
[2950] *Schultze v Victoria Police (Review and Regulation)* [2015] VCAT 634, [9].

A RES Order may be combined with other sanctions, such as a community-based order,[2951] dismissals, discharges and adjournments.[2952] RES Orders can also be made in respect of offences taken into account.[2953]

RES Orders are also relevant to assessing whether to impose a fine. The court must consider the effect of any restitution order on the financial circumstances of the offender.[2954]

If the court considers that the offender cannot pay both a fine and a RES Order, and it is appropriate to impose both, a court must give preference to a RES Order.[2955]

18.2.3 – Enforcement and appeals

A RES Order for money is enforceable as a judgment debt,[2956] and payment takes priority over other civil orders[2957] and fines.[2958] A RES Order in favour of a third party may be enforced in the original court, and the court has all the powers of a civil court in enforcement.[2959]

A RES Order may be appealed by the offender, or by the DPP where there is an error and it is in the public interest.[2960] Dissatisfied victims cannot appeal a RES Order or a decision by the court not to make one but must instead commence proceedings for compensation in the court's civil jurisdiction.[2961]

If a RES Order is made by the Supreme Court or the County Court, the order will be stayed during the appeal period unless otherwise directed.[2962] The Court of Appeal also has the power to set aside or vary the direction by the Supreme Court or the County Court.[2963]

The court may refuse leave to appeal against a RES Order where a third party who had changed their position in good-faith reliance on the order would suffer injustice.[2964]

18.2.4 – Discretionary considerations

A RES Order is discretionary and should only be made in 'relatively straightforward cases'. Parties should be left to civil remedies where:

[2951] *De Moor v Davies* [1999] VSC 416; *R v Deakes* [2002] VSCA 136.
[2952] The Act ss 74, 77.
[2953] Ibid s 100(4).
[2954] Ibid s 53(1)(b).
[2955] Ibid s 53(2).
[2956] Ibid s 85(2).
[2957] Ibid s 85(1).
[2958] Ibid s 53.
[2959] Ibid s 85(2).
[2960] *CPA* ss 3, 287.
[2961] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 239 [9.67].
[2962] *CPA* s 311(2).
[2963] *CPA* s 311(4).
[2964] *Nousis* 386 [17]-[18]; *R v GAM (No 2)* (2004) 9 VR 640, 664 [46].

- there are significant conflicts over the facts requiring a complicated or extensive inquiry;[2965]
- difficulties arise due to the evidentiary limitations in s 84(8) of the Act; or
- the goods were dealt with in such a way that the taking of accounts or the moulding of equitable relief is required.[2966]

The matters that influence the exercise of this discretion are similar to those in compensation orders.

[2965] *Braham* 110; *Esso Australia* [6].
[2966] *Nousis* 384 [12]; *Koeleman* [19].

19 – Forensic sample orders

A forensic sample order directs a person to undergo a procedure to take a forensic sample from any part of their body.[2967] These orders are commonly made at the time of sentencing but do not form part of the sentence.[2968]

An order may be made following a finding of guilt for a forensic sample offence (or of conspiracy or incitement to commit or attempting to commit a forensic sample offence).[2969]

A forensic sample order may be made in respect of any relevant finding of guilt after 1 July 1998.[2970]

The prosecution applies for the order, subject to certain time and procedural restrictions. The making of the order is discretionary, and the *Crimes Act 1958* (Vic) ('*Crimes Act*') provides a framework for the exercise of that discretion.

A similar regime previously existed for the *retention* of forensic samples. It still exists for applications to retain forensic samples taken from children and is subject to the same discretionary considerations. But if a sample has already been taken from an adult, such as where the police have taken a sample during the investigation process, it is automatically retained (subject to certain requirements) and there is no need to make any other order.[2971]

The State provisions do not apply to proceedings for Commonwealth offences. The *Crimes Act 1914* (Cth) ('*Cth Crimes Act*') provides for the taking of forensic samples following sentence for a 'serious offence', i.e., one with a maximum penalty of five years or more,[2972] and for the retention of a sample previously taken under now-withdrawn consent.[2973] Applications under these provisions are not generally made to a sentencing court, and as a result, their operation is not considered here.

[2967] *Crimes Act 1958* (Vic) s 464ZF(2) ('*Crimes Act*').
[2968] *Sari v The Queen* [2008] VSCA 137, [107] ('*Sari*').
[2969] *Crimes Act* ss 464ZF(2)(a)-(b).
[2970] The commencement date of the *Crimes (Amendment) Act 1997 (Vic)* s 25.
[2971] *Crimes Act* s 464ZFB(1AA).
[2972] *Crimes Act 1914* (Cth) s 23WA ('*Cth Crimes Act*').
[2973] Ibid ss 23XWO, 23XWV.

19.1 – Definitions

'Forensic procedure' means taking a sample from any part of the body, whether an intimate sample or any other type, or conducting any procedure on or a physical examination of the body, excluding taking a fingerprint.[2974]

An intimate sample means a sample of blood, pubic hair, saliva, or a swab/washing/sample from the external genital or anal region of a man or woman, or a woman's breast, or a scraping from the mouth, or a dental impression.[2975]

A non-intimate sample means a sample of hair (other than pubic hair), or of matter taken from under a fingernail or toenail, or a swab/washing/sample taken from any external part of the body other than the genital or anal region or breast.[2976]

A 'forensic sample offence' means any indictable offence, or an offence specified in Schedule 8 of the *Crimes Act*.[2977] This broad definition applies to any findings of guilt after 1 July 2014.[2978]

Schedule 8 largely includes several repealed offences, which are categorised into four groups:

- 'Offences against the person – non-sexual offences' which picks up a repealed conspiracy to murder provision and a number of repealed violent offences;
- 'Offences against the person – sexual offences' includes repealed sexual offences and offences that, at the time they were committed, were forensic sample offences;
- 'Property offences' includes repealed and abolished property offences and arson offences; and,
- 'Drug offences' includes the predecessors to current drug offences.

[2974] *Crimes Act* s 464.
[2975] Ibid.
[2976] Ibid.
[2977] Ibid s 464ZF(1).
[2978] When the relevant provisions of the *Crimes Amendment (Investigation Powers) Act 2013* (Vic) *commenced. For a finding of guilt made before 1 July 2014,* the relevant definition of 'forensic sample offence' is that which applied when the finding of guilt was made. See *Crimes Act* ss 464ZF(2)(a)–(b).

19.2 – Process

19.2.1 – Application and notice

A member of the police force often applies for a forensic sample order,[2979] though in the higher courts the DPP applies on behalf of the informant.

An application must specify the type of sample (whether intimate or non-intimate) sought to be taken in the forensic procedure.[2980]

An adult offender does not need to be given notice of the application[2981] but where the offender is a child, notice must be served on the offender and a parent or guardian.[2982] In practice, notice is often given by court mandated pre-hearing filing and service provisions.[2983]

19.2.2 – Time limits

A standard application can be made at any time after a court finds the offender guilty of a forensic sample offence or conspiracy to commit a forensic sample offence, but no later than six months after the expiration of the relevant appeal period[2984] (or the final determination of any actual conviction or sentence appeal).[2985]

Applications can also be made in respect of offenders who were found guilty of a forensic sample offence prior to 1 July 1998 and were detained, then or later, for any other offence.[2986]

A 12-month time limit applies in narrow circumstances to certain old drug offences (trafficking a drug of dependence, commercial cultivation of a narcotic plant, and cultivation for trafficking purpose offences).[2987]

19.2.3 – Hearing procedure

[2979] *Crimes Act* s 464ZF(2).
[2980] Ibid s 464ZF(4).
[2981] Ibid s 464ZF(5)(a). This provision (and the provisions concerning hearing procedure) was enacted in response to conflicting Victorian Supreme Court authority – *Lednar v Magistrates' Court of Victoria* (2000) 117 A Crim R 396 ('*Lednar*') and *Pavic v Magistrates' Court of Victoria* (2003) 140 A Crim R 113 - as to whether there was a natural justice requirement to provide notice and a right to be heard. See, eg, *Crimes (Amendment) Act 2004* (Vic) s 1(a)(iv); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 May 2004, 1335-36 (Robert Hulls, Attorney-General).
[2982] *Crimes Act* s 464ZF(5A)(a).
[2983] See, eg, Supreme Court of Victoria, *Practice Note SC CR 4 (Second Revision) Sentencing Hearings*, 1 July 2018; County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 13 November 2018.
[2984] This period is 28 days. See *Criminal Procedure Act 2009* (Vic) ss 255(1), 272(3), 275, 279.
[2985] *Crimes Act* s 464ZF(2).
[2986] Ibid s 464ZF(3).
[2987] Ibid s 464ZF(2AA).

The offender is not a party to the application[2988] and may not call or cross-examine witnesses on the application.[2989] This applies to both adult and child offenders.

An adult offender may only make submissions to the court in response to inquiries made by the court.[2990] A child offender is similarly limited but may also make submissions in respect of 'the seriousness of the circumstances of the forensic sample offence' and whether 'in all the circumstances, the making of the order is justified'.[2991] In exercising the right of address, a child may be represented by a legal practitioner, or, with leave of the court, a parent or guardian.[2992]

19.2.4 – Determination of the application

In deciding whether to make a forensic sample order, the court must:

- consider the seriousness of the circumstances of the forensic sample offence; and,
- be satisfied that, in all the circumstances, the making of the order is justified.[2993]

The court may make such inquiries on oath or otherwise as it considers desirable. [2994]

The making of a forensic sample order does not follow automatically from a finding of guilt for a forensic sample offence; it involves an exercise of a court's discretion.[2995]

The 'seriousness of the circumstances of the offence' is the only mandated statutory consideration.[2996] Beyond this, the court need only be satisfied that the making of the order is justified 'in all the circumstances', leaving a very broad discretion.[2997]

A common circumstance is the risk of recidivism, as indicated by the circumstances of the offender and the offence.[2998] However, even where an offender offers no risk of recidivism, the gravity of the offending may be such as to make the order justified in all the circumstances.[2999]

The social utility of the order may also be relevant to the exercise of the discretion.[3000]

These are all matters that may properly be the subject of evidence, but it is not clear that evidence is generally (or at least in every case) necessary.[3001]

[2988] Ibid ss 464ZF(5)(b), (5A)(b).
[2989] Ibid ss 464ZF(5)(c), (5A)(c).
[2990] Ibid s 464ZF(5A)(d).
[2991] Ibid ss 464ZF(5A)(d), (8)(a)-(b).
[2992] Ibid s 464ZF(5B).
[2993] Ibid ss 464ZF(8)(a)-(b).
[2994] Ibid s 464ZF(8)(c).
[2995] *R v Abebe* [1999] VSC 214, [23]-[24]; *R v Skura* [2003] VSC 290, [2].
[2996] *Crimes Act* s 464ZF(8)(a).
[2997] Ibid s 464ZF(8)(b).
[2998] *Lednar* 426 [268].
[2999] *R v England* (Unreported, Supreme Court of Victoria, Kellam J, 23 October 1998).
[3000] *R v Lagona* [1998] VSC 220, [27] ('*Lagona*').
[3001] See generally *R v Heriban* [2005] VSC 76, [7]. But see *Lagona* [27].

19.3 – Content of the order, statement of reasons and appeal

19.3.1 – Content of the order

An order must direct the person to undergo a forensic procedure[3002] and, unless they are a detained or protected person, direct them to attend at a place and within a specified period (commencing after the expiry of the appeal period) to undergo the forensic procedure.[3003]

A detained or protected person means someone who is:

- held in a prison, police jail, youth training centre or youth residential centre;
- held in an institution within the meaning of the *Corrections Act 1986* (Vic) s 56;
- a security resident within the meaning of the *Disability Act 2006* (Vic); or
- a patient within the meaning of the *Mental Health Act 2014* (Vic).[3004]

In the higher courts the order will normally specify the kind of forensic sample to be taken, and not just whether the sample is to be an 'intimate' or 'non-intimate' sample, as must be specified in the application.[3005] In the higher courts, the samples are always 'intimate samples' and the usual approach is to specify the actual form of intimate sample in the order. The commonly requested samples are blood and/or saliva samples and mouth scrapings.

In the higher courts, the prosecution routinely provides the court with draft orders for the taking of the sample in custody or in the community.

19.3.2 – Statement of reasons/use of force

Where a court makes a forensic sample order it must:[3006]

- give reasons for its decision;[3007]
- cause a copy of the order and reasons to be served on the person who is to undergo the forensic procedure (or in the case of a child – serve it on them and their parent or guardian);[3008] and
- inform the person that a police officer may use reasonable force to enable the procedure to be conducted.[3009]

19.3.3 – Appeals

[3002] *Crimes Act* s 464ZF(2).
[3003] Ibid s 464ZF(2A).
[3004] Ibid s 464.
[3005] Ibid s 464ZF(4).
[3006] A failure to do any of these things will not invalidate an order but constitutes non-compliance for the purposes of s 464ZE(1)(a): at s 464ZF(10).
[3007] *Crimes Act* s 464ZF(9)(a).
[3008] Ibid ss 464ZF(9)(a)(i)-(ii).
[3009] Ibid s 464ZF(9)(b).

As noted, an order for the taking of a forensic sample is not part of the sentence. As such, an order may not be challenged on an appeal against sentence.[3010]

Where a party seeks review, the proper approach is to apply for a judicial review of the decision to make the order.[3011]

19.4 – Retention orders

19.4.1 – Adults

In some instances, a forensic procedure will already have been conducted on a person.

No order is needed for retention of that sample if:

- the forensic procedure has been conducted on an adult (a person of or above the age of 18 years);[3012] and
- a court finds the person guilty (or not guilty because of mental impairment) of –
    - the indictable offence in respect of which the forensic procedure was conducted;
    - any other indictable offence arising out of the same circumstances; or
    - any other indictable offence in respect of which evidence obtained as a result of the forensic procedure had probative value.[3013]

This means the sample and any related material and information may be retained indefinitely.[3014]

If the finding of guilt (or verdict of not guilty because of mental impairment) is set aside on a successful appeal, the sample must be destroyed unless it is retained for non-identifying statistical purposes.[3015]

19.4.2 – Children

If at any time on or after 1 July 1998,[3016] a forensic procedure is conducted on a child[3017] a police officer can make application, subject to certain requirements, to retain the sample.

The first requirement is the court find the child guilty of:

- the offence in respect of which the forensic procedure was conducted;
- any other offence arising out of the same circumstances; or
- any other offence in respect of which evidence obtained as a result of the forensic procedure had probative value.

[3010] *Sari* [107].
[3011] Ibid.
[3012] *Crimes Act* ss 464R, 464SA, 464T(3), 464V(5), 464ZFB(1AA)(a).
[3013] Ibid s 464ZFB(1AA)(b).
[3014] Ibid s 464ZFB(1AA).
[3015] Ibid ss 464ZFB(1AB), 464ZFC, 464ZFD.
[3016] The commencement date of *Crimes (Amendment) Act 1997* (Vic) s 26.
[3017] *Crimes Act* ss 464U(7), 464V(5).

Secondly, an application must be made within six months of the expiration of the relevant appeal period (or the final determination of any actual conviction or sentence appeal). The application is made to the court which made the finding of guilt or to the Children's Court.[3018]

In determining whether to make a retention order, the court must:

- consider the seriousness of the circumstances of the forensic sample offence; and
- be satisfied that, in all the circumstances, the making of the order is justified.[3019]

The court may make such inquiries on oath or otherwise as it considers desirable.

The court must give reasons for its decision and cause a copy of the order and reasons to be served on the person on whom the forensic procedure was conducted.[3020]

An order made before the expiry on any appeal period takes effect once it expires or has no effect if set aside on a successful appeal.[3021]

The same discretionary considerations apply to an application for retention as those that apply for the taking of samples.

There is no provision for notice of an application to be given to a child, unlike the provisions relating to the taking of a sample.

There is no practical reason for offenders to be denied basic notice of an application, or a right to be heard, particularly so for children.

The same process applies where a forensic procedure is conducted and there is a finding of not guilty because of mental impairment.[3022] However, it does not apply to an offence heard and determined summarily.[3023]

[3018] Ibid s 464ZFB(1).
[3019] Ibid s 464ZFB(2).
[3020] Ibid s 464ZFB(3). A failure to do so will not invalidate an order but constitutes non-compliance for the purposes of s 464ZE(1)(a): at s 464ZFB(4).
[3021] *Crimes Act* ss 464ZFB(2A)–(2B).
[3022] Ibid s 464ZFB(1A).
[3023] Ibid s 464ZFB(1B).

20 – Other ancillary orders

20.1 – Alcohol related orders

Both the *Sentencing Act 1991* (Vic) ('the Act') and the *Liquor Control Reform Act 1998* (Vic) ('*LCRA*') empower courts to make two orders against offenders in relation to alcohol: alcohol exclusion orders ('AEOs'), and exclusion orders ('EOs').

These orders are intended to exclude offenders from attending certain areas, premises or events, to further the purposes of specific deterrence and community protection.[3024]

DIFFERENCES BETWEEN ALCOHOL RELATED ORDERS		
	Alcohol Exclusion Orders	**Exclusion Orders**
Governing legislation	*Sentencing Act 1991*	*Liquor Control Reform Act 1998*
When can an order be made	Conviction recorded for relevant offence. No previous AEO in relation to offence circumstances. Court satisfied on balance of probabilities that offender was intoxicated at time of offence, and intoxication significantly contributed to offending.	Offender found guilty of specified offence committed wholly/partly in designated area. Sentence for specified offence less than 12 months. Court satisfied EO may be an effective and reasonable means of preventing offender committing further specified offences in designated area.
Duration	24 months only	Up to 12 months
Available for	'Relevant' offences (indictable only)	'Specified' offences (indictable and summary)
Condition types	Exclusion from licensed premises, bar areas, or major events. Prohibition on consuming alcohol.	Exclusion from designated area or licensed premises. Any other condition the court deems appropriate.
Variations	Add/vary/remove exemptions only	Anything the court thinks fit
Penalties for contravention	Level 7 imprisonment (maximum)	60 penalty units (maximum)

[3024] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4683 (Robert Clark, Attorney-General); *Kordister Pty Ltd v Director of Liquor Licensing* (2012) 39 VR 92, 117 [115].

20.1.1 – Alcohol exclusion orders

The Act provides that a court *must* make an AEO if:

- it records a conviction against the offender for a relevant offence; and
- it is satisfied on the balance of probabilities that:
  - at the time of the relevant offence the offender was intoxicated;[3025] and
  - the offender's intoxication significantly contributed to the commission of the relevant offence; and
- the offender is not, or has not been, the subject of a previous AEO in relation to the current offence.[3026]

AEOs last for two years.[3027] If the offender is serving a custodial sentence for another offence, or the AEO is made in combination with a custodial sentence, the AEO takes effect on their release from prison.[3028] Otherwise, the AEO takes effect at the time the order is made.[3029]

A 'relevant offence' includes:

- murder or manslaughter;
- intentionally, negligently or recklessly causing injury offences;
- administering certain substances offences;
- threat to kill, conduct endangering, kidnap and assault offences;
- certain resisting arrest and assisting offender offences;
- use of firearms in the commission of offences;
- certain sexual offences against adults;
- certain sexual offences against children; and
- child abuse material offences.[3030]

The Director of Public Prosecutions ('DPP') or a police officer may apply for an AEO where the accused has been charged with a relevant offence.[3031] The application must be filed and served on the accused before the first mention hearing, committal mention hearing, or first directions hearing, or later with leave of the court.[3032]

[3025] *Sentencing Act 1991* (Vic) s 89DC ('the Act') defines 'intoxicated' as where 'the person's speech, balance, coordination or behaviour is noticeably affected as a result of the consumption of liquor'.
[3026] The Act s 89DE(1).
[3027] Ibid s 89DE(3).
[3028] Ibid s 89DE(6)(b).
[3029] Ibid s 89DE(6)(a).
[3030] Ibid s 89DC.
[3031] Ibid s 89DD(1).
[3032] Ibid s 89DD(2).

A court may also make an AEO on its own motion if satisfied that the circumstances listed above apply.[3033] If the Supreme Court makes an AEO, it may also direct that any application to vary the AEO be made in the Magistrates' Court ('Magistrates' Court Determination Direction').[3034]

An AEO must contain:

- the offender's name;
- the grounds on which the order is made;
- the conduct prohibited by the order and any exemptions imposed; and
- when the order takes effect and its duration.[3035]

An AEO prohibits an offender from consuming or attempting to consume liquor in any licensed premises[3036] or from entering or remaining in the location of any major event.[3037]

Exemptions are permitted if the court considers that there is a good reason and it is otherwise appropriate in all the circumstances.[3038] This may include for special occasions such as weddings or sporting events,[3039] but the circumstances of the exemption should be detailed.[3040]

If a court makes an AEO, it may not also make an EO or attach an alcohol exclusion condition to a CCO for the AEO's duration.[3041] However, the court may order an AEO in conjunction with a CCO.[3042]

The offender or a police officer may apply to vary the AEO at the Magistrates Court,[3043] or at the Supreme Court if a Magistrates' Court Determination Direction was not given.[3044] The court may impose a new exemption or vary or remove an existing exemption,[3045] and must specify the date on which the varied AEO takes effect.[3046]

The court may vary an AEO if it:

- is satisfied that new facts or circumstances have arisen since making or last varying the AEO;
- is satisfied that there is a good reason why the offender should or should not be allowed to enter specified premises or event; and
- considers a variation is appropriate in all the circumstances.[3047]

[3033] Ibid s 89DD(4).
[3034] Ibid s 89DD(5).
[3035] Ibid s 89DE(7).
[3036] Ibid ss 89DE(4)(a), (c)–(d).
[3037] Ibid s 89DE(4)(b).
[3038] Ibid s 89DE(5).
[3039] *DPP v Johnson* [2015] VCC 834, [86]-[93], [111] ('*JohnsonCCV*').
[3040] Ibid [101]-[111].
[3041] The Act s 89DE(8).
[3042] *JohnsonCCV* [74].
[3043] The Act ss 89DG(1)-(2)(a).
[3044] Ibid s 89DG(2)(b).
[3045] Ibid s 89DG(4).
[3046] Ibid s 89DG(5).
[3047] Ibid s 89DG(3).

For enforcement purposes, an AEO made in the Supreme Court or County Court that is varied by the Magistrates' Court is considered an order of the Magistrates' Court.[3048]

A person under an AEO (an 'AEO offender') must not enter, remain, or attempt to enter or remain in any place that the person knows is, or is reckless as to whether the place is, prohibited.[3049]

However, it is not a contravention if the conduct was caused by circumstances beyond the AEO offender's control and they took reasonable precautions to avoid offending.[3050]

An AEO offender also must not consume, or attempt to consume liquor, in any place they know is, or is reckless as to whether the place is, a licensed premise.[3051]

The maximum penalty for these offences is Level 7 imprisonment.[3052]

Proof of the AEO offender's presence in court when the AEO was made or service of the AEO on them, is admissible to establish that they knew an AEO was in effect.[3053]

20.1.2 – Exclusion orders

The *LCRA* provides that an EO *may* be made if a court:

- finds the offender guilty of a specified offence that was committed in a designated area;[3054]
- does not sentence the offender to serve 12 months imprisonment or more; and
- is satisfied that an EO may be an effective and reasonable means of preventing the offender from committing further specified offences in the designated area.[3055]

EOs cannot exceed 12 months[3056] and may be made on the application of a police officer or the DPP, or on the court's own initiative.[3057]

A 'specified offence' includes:

- causing injury and assault offences;
- threat offences, endangering conduct and administering substances offences;
- being armed with criminal intent and prohibited weapons offences;
- rape and sexual assault offences;
- destroying or damaging property offences; and

[3048] Ibid s 89DG(6).
[3049] Ibid s 89DF(1).
[3050] Ibid s 89DF(3).
[3051] Ibid s 89DF(2).
[3052] Ibid ss 89DF(1)-(2).
[3053] Ibid s 89DF(4).
[3054] *Liquor Control Reform Act 1998* (Vic) s 3 ('*LCRA*') defines a 'designated area' as an area ordered by the Victorian Commission for Gambling and Liquor Regulation to be a designated area and published in the Government Gazette.
[3055] *LCRA* s 148I(1).
[3056] Ibid s 148I(4).
[3057] Ibid s 148I(3).

- offensive and obscene behaviour offences, disorderly conduct and failure to leave licensed premises.[3058]

To determine if an EO might be an effective and reasonable deterrent, a court must consider:

- the nature and gravity of the specified offence;
- whether the offender has previously been found guilty of a specified offence committed in the designated area;
- whether the offender is or has been the subject of an EO in relation to another specified offence committed in the same or another designated area;
- the likely impact of the EO on the offender, any victim, public safety, and public order; and
- any other matter it considers relevant.[3059]

An EO may exclude the offender from the designated area or licensed premises completely or with exceptions for specified purposes or times.[3060] An EO may also include any other conditions the court thinks fit.[3061]

The offender, the DPP or a police officer may apply to vary the EO at the court that made the EO.[3062] The court may vary the EO in any way it considers appropriate if it is satisfied that facts or circumstances have arisen since the making or last variation of the order that make it appropriate for the order to be varied.[3063]

An offender under an EO ('EO offender') must not enter, re-enter, or attempt to do so, the designated area or licensed premises.[3064]

If the EO offender contravenes the order, they must obey any lawful direction to leave by a police officer. Failing to do so is a second offence.[3065]

It is a defence for the EO offender to prove:

- they were under a mistaken but honest and reasonable belief about facts which, had they existed, meant the conduct would not have constituted an offence; or
- the conduct was caused by circumstances beyond the EO offender's control and they took reasonable precautions to avoid offending.[3066]

[3058] Ibid sch 2.
[3059] Ibid s 148I(6).
[3060] Ibid ss 148I(5)(a)-(b).
[3061] Ibid s 148I(5)(c).
[3062] Ibid s 148M(1).
[3063] Ibid s 148M(2).
[3064] Ibid s 148J(1).
[3065] Ibid ss 148J(2), 148K, 148J(4). A lawful direction requires that the police officer is either in uniform or produces proof of identity and official status, informs the person that the officer is empowered to direct the person to leave the relevant premises and that failure to comply is an offence, and makes all reasonable attempts to ensure the person understands the direction.
[3066] Ibid s 148J(3).

The maximum penalty for these offences is 60 penalty units.[3067]

20.2 – Identity crime certificates

The Act and the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') both empower courts to issue identity crime certificates ('ID certificates').

The purpose of this certificate is to assist a victim of identity crime obtain new identification documentation and help them with their personal or business affairs. They are intended to prove beyond a reasonable doubt that the victim's personal information was misused to facilitate identity crime.[3068]

DIFFERENCES BETWEEN IDENTITY CRIME CERTIFICATE SCHEMES		
	Victorian	**Commonwealth**
Governing legislation	*Sentencing Act 1991* (Vic)	*Criminal Code Act 1995* (Cth)
When can an ID certificate be issued	If a court finds a person guilty of an identity crime offence.	A magistrate is satisfied on balance of probabilities that: • ID info was dealt with • dealer intended ID info would be used to pretend to be/to pass off as, another person, to commit/facilitate the commission of a Commonwealth indictable offence, and • the ID certificate may help with any problems caused in relation to the victim's personal or business affairs.
Who may apply	Victim; Person on victim's behalf in certain circumstances; ID offence prosecutor or person on their behalf; Court's own motion.	Victim only
Available for	All identity crime offences	When ID information is dealt with (regardless of offence commission)

[3067] Ibid ss I48J(1)–(2).
[3068] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 March 2009, 784 (Rob Hulls, Attorney-General).

20.2.1 – Victorian certificates

If a court finds a person guilty of an identity crime offence ('ID offence'), it may issue an ID certificate to a victim of the offence.[3069] This may be done on the court's own motion, or on application by the victim (or on their behalf in certain circumstances)[3070] or the ID offence prosecutor (or anyone on their behalf).[3071]

An ID offence uses identification information ('ID info') that does not relate to the offender.[3072] Applications for an ID certificate may be made in relation to any ID offence, irrespective of when that offence occurred.[3073]

A victim of an ID offence is a person whose ID info has been used without that person's consent, in connection with the ID offence's commission.[3074] Where there are multiple victims, an ID certificate can be issued for each victim in the same proceeding.[3075]

ID info means information relating to a person (whether living, dead, real, or fictitious) that is capable of being used (alone or in conjunction with other information) to identify or purportedly identify the person.[3076] This includes:

- a name, address, date of birth or place of birth;
- information on a person's marital status or that identifies another person as a relative of the person;
- a driver licence or driver licence number, passport or passport number;
- biometric data, a voice print or a digital signature;
- a credit or debit card, its number, or data stored or encrypted on it;
- a financial account number, username or password;
- a series of numbers or letters (or both) intended for use as a means of personal identification; or
- an Australian Business Number.[3077]

The certificate must identify the ID offence, the victim's name,[3078] and anything else the court considers relevant.[3079]

In hearing an ID certificate application, a court is not required to have regard to the rules of evidence and may inform itself any way that it thinks fit.[3080] The court may also direct that notice be given for the ID

[3069] The Act s 89F(1).
[3070] These circumstances include where the victim is a child or is incapable due to injury, disease, senility, illness or physical or mental impairment. The Act s 89F(2)(b).
[3071] The Act s 89F(2).
[3072] Ibid s 89E.
[3073] Ibid s 137.
[3074] Ibid s 89E.
[3075] *DPP v Boyton* [2015] VCC 1341; *DPP v Greer* [2017] VCC 1042, [60].
[3076] The Act s 89E; *Crimes Act 1958* (Vic) s 192A ('*Crimes Act*').
[3077] *Crimes Act* s 192A.
[3078] The Act s 89G(a).
[3079] Ibid s 89G(b).
[3080] Ibid s 89H(1).

offence prosecutor to appear to assist it. However, the ID offence prosecutor may appoint another person to appear on their behalf.[3081]

20.2.2 – Federal identity crime certificates

Under the *Criminal Code*, Magistrates have the power to issue ID certificates to victims of identity crime. This power is conferred in a personal capacity[3082] and Magistrates need not accept it.[3083] However, if the power is exercised, the Magistrate has the same protection and immunity as if they were exercising it as a member of their court.[3084]

A Magistrate may issue an ID certificate if they are satisfied on the balance of probabilities that:

- another person has dealt in ID info ('the dealer');
- the dealer intended that the ID info would be used by anyone to pretend to be, or to pass themselves off as, another person (whether the victim or someone else), to commit or facilitate the commission of a Commonwealth indictable offence; and
- the ID certificate may help with any problems caused in relation to the victim's personal or business affairs.[3085]

An application for an ID certificate must be made by the victim of identity crime.[3086]

ID info means information relating to a person that is capable of being used (alone or in conjunction with other information) to identify or purportedly identify the person. This includes:

- a name, address, date of birth or place of birth;
- information on a person's marital or relationship status, information on relatives' identity, or similar information;
- a driver licence or driver licence number, passport or passport number;
- biometric data, a voice print or a digital signature;
- a credit or debit card, its number or data stored or encrypted on it;
- a financial account number, username or password;
- a series of numbers or letters (or both) intended for use as a means of personal identification; or
- an Australian Business Number.[3087]

'Dealing' in ID info includes making, supplying or using ID info.[3088]

An ID certificate may be issued:

[3081] Ibid ss 89H(2)-(3).
[3082] *Criminal Code Act 1995* (Cth) sch 1 s 375.4(1) ('*Criminal Code*').
[3083] Ibid s 375.4(2).
[3084] Ibid s 375.4(3). The Commonwealth and State schemes are intended to operate concurrently: at s 370.3(1).
[3085] *Criminal Code* s 375.1(1).
[3086] Ibid.
[3087] Ibid s 370.1.
[3088] Ibid s 370.1.

- even if it is impossible to commit the offence referred to or the offence has not yet been committed;[3089]
- even if the offending occurred prior to commencement in 2011;[3090]
- whether or not the person that the ID info relates to consented to the dealing;[3091]
- whether or not the dealer is identifiable;[3092]
- whether or not civil or criminal proceedings have been or can be taken against a person for or in relation to the dealing, or are pending.[3093] However, the Magistrate must not issue an ID certificate if doing so would prejudice those proceedings.[3094] An ID certificate will also not be admissible in those proceedings.[3095]

The ID certificate must identify the victim and describe the dealing of ID information. It must not identify the dealer,[3096] but may otherwise include any other information the Magistrate considers appropriate.[3097]

[3089] Ibid s 375.1(2)(a).
[3090] As there are no relevant transitional provisions in the Criminal Code, it appears that Magistrates may grant ID certificates irrespective of when the offending occurred.
[3091] *Criminal Code* s 375.1(2)(b).
[3092] Ibid s 375.3(1)(a).
[3093] Ibid s 375.3(1)(b).
[3094] Ibid s 375.3(2).
[3095] Ibid s 375.3(3).
[3096] Ibid s 375.2.
[3097] Ibid s 375.2(2).

Part E – Specific offences

21 – Murder

Murder is the most serious of all criminal offences. It has always possessed a special significance as the law attributes enormous significance to the sanctity of human life, and its deliberate taking must never be regarded as anything other than a matter of the utmost seriousness. Anyone who contemplates the unlawful killing of another must anticipate that the penalty to be imposed on conviction may be severe.[3098]

This includes the following offences:

- Murder (intentional and reckless);[3099]
- Unintentional killing in the furtherance of a crime of violence;[3100]
- Defensive homicide;[3101]
- Infanticide;[3102]
- Attempted murder;[3103] and
- Incitement to murder.[3104]

21.1 – Penalties and current sentencing practices

21.1.1 – Penalties

Offence	Provision	Maximum Penalty	Applies to offences committed on or after

[3098] *R v Dupas* [2004] VSC 281, [9] ('*Dupas No 2*'); *R v Gemmill* [2004] VSC 30, [57]; *R v Sok* [2012] VSC 229, [16]; *R v Zandipour* [2016] VSC 387, [70].
[3099] Common Law.
[3100] *Crimes Act 1958* (Vic) s 3A ('*Crimes Act*').
[3101] Applies to offences committed on or after 23 November 2005 (when the offence was introduced by the *Crimes (Homicide) Act 2005* (Vic) and before 1 November 2014 (when it was repealed by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).
[3102] *Crimes Act* s 6.
[3103] Ibid s 321M.
[3104] Ibid s 321G.

Murder	Common law	Level 1 imprisonment (life) or for such other term as is fixed by the court.[3105] Standard sentence of 25 years, or 30 years if the victim was a custodial officer or emergency worker on duty[3106]	All dates
Unintentional killing in the furtherance of a crime of violence	*Crimes Act 1958* (Vic) s 3A(1) ('*Crimes Act*')	Level 1 imprisonment (life) or for such other term as is fixed by the court	All dates
Defensive Homicide	*Crimes Act* s 9AD	Level 3 imprisonment (20 years)	23/11/2005 – 1/11/2014
Infanticide	*Crimes Act* s 6	Level 6 imprisonment (5 years)	All dates
Attempted murder	*Crimes Act* ss 321M, 321P(1A)	Level 2 imprisonment (25 years)	1/9/1997
Incitement to murder	*Crimes Act* ss 321G, 321I(1)(ba)	Level 1 imprisonment (life) or such other term as is fixed by the court.	1/8/1993

21.1.2 – Current sentencing practices

Current sentencing practices for murder have steadily increased over time.[3107]

[3105] A Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). See *Sentencing Act 1991* (Vic) ss 3, 5(2G), 160 ('the Act')

[3106] *Crimes Act* s 3. The standard sentence is relevant for offences committed after 1 February 2018. See 9.2 – Statutory schemes – Standard sentence scheme.

[3107] *Bradley v The Queen* [2017] VSCA 69, [86].

It is generally accepted that a plea of guilty to murder will attract the imposition of a non-parole period.[3108]

The Court of Appeal has also stated that inciting the murder of a partner, former partner or family member is an extreme form of family violence whose gravity is not reflected in current sentencing practices, which should be increased to adequately deter and denounce family violence.[3109]

21.2 – Offence gravity

21.2.1 – Murder

When sentencing an offender for common law murder, the court has a duty to impose a sentence that denounces and condemns the offender's conduct. It must impose a just punishment, vindicate the rights of the deceased, and acknowledge the grief and trauma for those left behind. The principle of general deterrence is also an important consideration,[3110] and a murder that is motivated by a desire to punish or take revenge against a person who has assisted law enforcement in the prosecution of a crime is very serious and 'calls for punishment and denunciation of a very high order'.[3111]

21.2.2 – Unintentional killing in the furtherance of a crime of violence

Statutory murder (unintentional killing in the furtherance of a violent crime) is not an inherently less serious crime than common law murder.[3112] It might even be more serious and attract a higher sentence than some instances of common law murder.[3113] It 'has no bearing on the sentencing outcome.'[3114]

These killings may encompass a wide variety of circumstances, 'from the case where the death is an accidental result of the act of violence to the case where the death is the intended result of the act'.[3115]

The relevant issue for sentencing is the nature of the violent act which caused the victim's death, and the offender's state of mind when committing that violent act.[3116]

21.2.3 – Reckless murder

Similarly, depending on the circumstances, an offence of reckless murder might be regarded as seriously as a murder where specific intent has been proved.[3117] It is not necessarily a crime of lesser seriousness or moral culpability.[3118] A distinction cannot always be drawn between a premeditated murder, and one

[3108] *Hunter v The Queen* (2013) 40 VR 660 ('*Hunter*').
[3109] *Kalala v The Queen* [2017] VSCA 223, [3] ('*Kalala*').
[3110] *Dupas No 2* [3].
[3111] *DPP (Vic) v Pan* [2022] VSCA 98, [45].
[3112] *R v Perry* (2016) 50 VR 686, 690 [8] ('*Perry*').
[3113] See, eg, *R v Cooper* [2018] VSCA 21; *R v Williamson* [2018] VSC 172.
[3114] *Perry* 708 [81].
[3115] Ibid 699 [47].
[3116] Ibid 709 [82], 718 [122]. See also *Kelson v The Queen* [2020] VSCA 112, [69]-[74] (the characterisation of a particular type of murder is not determinative of the objective gravity of a case).
[3117] *R v Chan* (1994) 76 A Crim R 252; *Barrett v The Queen* [2010] VSCA 133, [24].
[3118] *R v Hegarty* [2011] VSC 262, [34]. See also *Noori v The Queen* [2021] VSCA 46, [49]-[51].

committed where the offender went armed with a loaded weapon, to a place they knew to be occupied, intending to use it and cause, at the least, property damage.[3119]

21.2.4 – Defensive homicide

The crime of defensive homicide is a serious crime, involving the intentional taking of the life of another.[3120] The maximum sentence of 20 years' imprisonment indicates its gravity.[3121]

In assessing the seriousness of defensive homicide, 'courts have usually looked at the degree of disproportion between the perceived threat or violence and the offender's response to it'.[3122] But this is difficult in the family violence context where the legislation provides that an offender might have reasonable grounds for believing their conduct is necessary to defend themselves or family, even if it involves the use of excessive force[3123] or where the victim of the crime is not the one who poses the threat to the offender.[3124]
Moreover, in the family violence context a man will often use his hands against a female partner where a woman 'invariably uses a weapon' against a male partner fearing that otherwise she will be overpowered and injured further.[3125] For that same reason it is not unusual for a woman to strike multiple times.[3126]

Conversely, in cases not involving family violence, multiple strikes in response to a verbal or minor physical attack may be seen as so totally disproportionate that the killing becomes a very serious example of the offence.[3127]

The critical question is what inference should be drawn about the offender's state of mind from the fact of their having inflicted such violence and from the surrounding circumstances.[3128]

21.2.5 – Infanticide

The mental condition relevant to infanticide is that the balance of a woman's mind was disturbed because of a disorder consequent on her having given birth within the preceding two years.[3129] The sentence to be imposed is then determined by reference to the maximum penalty of five years for that offence and having regard to the nature and gravity of the disturbance of the woman's mind.[3130]

However, the prosecution's acceptance of a plea to a charge of infanticide is not relevant to the sentences imposed on any other offences committed at the same time.[3131] Those are to be imposed by reference to

[3119] *Bedson v The Queen* [2013] VSCA 88, [68] ('*Bedson*').
[3120] *R v Baxter* [2009] VSC 178, [14].
[3121] Ibid [9].
[3122] *R v Williams* [2014] VSC 304, [30].
[3123] Ibid [31].
[3124] See, eg, *Sawyer-Thompson v The Queen* [2018] VSCA 161 ('*Sawyer-Thompson*').
[3125] Ibid [34].
[3126] Ibid.
[3127] Ibid [32].
[3128] *Sawyer-Thompson* [34].
[3129] *R v Guode* [2020] HCA 8, [21] ('*Guode HCA*').
[3130] Ibid.
[3131] Ibid [20].

their maximum penalties and in accordance with *Verdins.*[3132] While this is likely to require consideration of the same evidence, sentencing for the other offences is not to be informed by the unique sentencing regime created for the offence of infanticide.[3133]

Use of phrases such as a 'very serious example' do not attach to this offence in a simplistic manner and the surrounding circumstances need to be considered.[3134]

21.2.6 – Attempted murder

Attempted murder is a very serious offence which, unlike murder, requires a specific intent to kill.[3135] There is no specific practical ceiling on the period of imprisonment that may be imposed,[3136] each case must be decided on its facts, given the serious nature of the offence and the maximum penalty.[3137]

The gravity of an attempted murder is assessed by reference to the murderous intent.[3138] Attempted murders committed in the context of family violence,[3139] of a police informer,[3140] or where the intended victims suffer catastrophic injuries can aggravate the seriousness of the offending.[3141]

21.2.7 – Incitement to murder

The seriousness of the incitement depends on the gravity of the crime being incited.

Where murder is incited, the case is in a special category in the sense of being a serious example of the crime of incitement and in some cases will call for more serious punishment than some instances of murder.[3142] In considering the appropriate sentence, the court must consider the circumstances that gave rise to the incitement to murder.[3143]

Inciting the murder of a partner is an extreme form of family violence.[3144] The Court of Appeal has held that sentences for incitement to murder in the context of family violence must be increased to reflect the degree of criminality involved in inciting another person to kill a victim.[3145] The degree of moral culpability of the offender in such a case will typically be high, as they will have intended the death of the victim and taken active steps to bring it about.[3146]

[3132] Ibid [22].
[3133] Ibid [23].
[3134] *R v Nikat* [2017] VSC 713, [39].
[3135] *Hudson v The Queen* (2010) 30 VR 610, 628 [69] ('*Hudson*').
[3136] *R v McIntosh* [2005] VSCA 106, [10].
[3137] Ibid.
[3138] *R v Byrne* [2016] VSC 580, [32].
[3139] *R v Sandhu* [2016] VSC 516, [29].
[3140] *R v Goldman* [2004] VSC 245.
[3141] *R v Rapovski* [2015] VSC 359, [44].
[3142] *R v Massie* (1999) 1 VR 542.
[3143] *R v Boucher* [1995] 1 VR 110, 127.
[3144] *Kalala* [3].
[3145] Ibid.
[3146] Ibid.

21.3 – Circumstances of the offence

Murder attracts a number of possible aggravating circumstances that may lead to a more severe sentence.

21.3.1 – Location of murder

The location of the killing is frequently important.

A murder committed in the victim's home may be an aggravating feature.[3147] A murder committed by a stranger in a family home where children are present is also considered particularly serious.[3148]

Murders committed in public places where ordinary members of the community are endangered can constitute aggravating circumstances,[3149] as can murders committed in remote locations.[3150]

21.3.2 – Manner of death and post offence conduct

A more severe sentence will usually be imposed where victims are made to suffer a particularly painful death or are degraded by the offender.[3151]

This includes circumstances such as:

- Prolonged and excruciating death;[3152]
- Where a victim was tortured, degraded or made to suffer a particularly painful death;[3153]
- Particularly callous or cold-blooded killing;[3154]
- Defilement of the body through sexual intercourse;[3155]
- Mutilation or dismemberment of the victim's body.[3156]
- Failing to reveal the victim's remains or hiding the victim's body may be a significant aggravating factor.[3157]

21.3.3 – Cases involving domestic or relationship killings

[3147] *R v Stensholt* [2014] VSC 668.
[3148] *R v Kunduraci* [2015] VSC 707.
[3149] *Hudson*; *Bedson*.
[3150] *Murphy v The Queen* [2004] VSCA 23.
[3151] *R v Crosbie* [2003] VSC 69, [36]-[37].
[3152] *R v Whyte* (2004) 7 VR 397; *R v Likiardopolous* [2009] VSC 271; *R v Budimir* [2013] VSC 149; *Cardamone v The Queen* [2019] VSCA 190, [127], [129] ('*Cardamone II*').
[3153] *Hunter*; *R v Kerr* [2015] VSC 249; *R v Aleluia* [2017] VSC 204.
[3154] *Semaan v The Queen* [2017] VSCA 261.
[3155] *DPP (Vic) v England* [1999] 2 VR 258; *R v Crosbie* [2003] VSC 69.
[3156] *R v Stone* [1988] VR 141; *DPP (Vic) v England* (1999) 2 VR 258; *R v McKee* [1999] VSC 207; *R v Giles* [1999] VSCA 208; *R v Dupas* [2001] VSCA 109 ('*Dupas No 1*'); *R v Kellisar* [2001] VSCA 224; *R v Walker* [2003] VSC 155; *Dupas No 2*; *R v Spaliaris* [2017] VSC 33.
[3157] *DPP (Vic) v Cavkic* [2004] VSC 158; *DPP (Vic) v Boyle* (2009) 26 VR 219.

Cases involving domestic or relationship killings are particularly grave.[3158]

Breach of an intervention order is a serious aggravating feature for murder, as the purpose of the order is to protect the individual who was entitled to the protection of such an order.[3159]

21.4 – Formulation of sentence

21.4.1 – Life sentence with no parole period

The imposition of a life sentence with no parole is an 'exceptional step and is a dreadful punishment.'[3160] It has only been imposed in a handful of cases in Victoria.[3161]

The refusal to impose a non-parole period is typically reserved for the most 'dreadful crimes,' taking into account the nature of the offence and the offender's history.[3162] For example, the abduction and subsequent murder of a 6-year-old child while she rode her bicycle in broad daylight was considered to belong in this category.[3163] There have only been three cases where an offender has pleaded guilty to a murder and has received a life sentence with no parole.[3164]

The fact that an offender is youthful will not be a bar to the imposition of a life sentence.[3165] However, it is a grave step to pass a sentence of life imprisonment on a young offender for the obvious reason that the younger the offender, the more severe that sentence will generally be.[3166]

Additional sentences of imprisonment cannot be imposed on persons already sentenced to, or serving a life sentence, other than concurrently with the life sentence.[3167]

There is no particular type of murder for which a life sentence is appropriate, but the case will usually need to fall into the worst category for that type of killing.[3168]

The fixing of a non-parole period will depend in any case on all its circumstances; and 'those who kill a number of victims in horrendous circumstances, where no substantial factor of clemency is present, must

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[3158] *Felicite v The Queen* (2011) 37 VR 329, 333 [20]. See also *R v Singh* [2010] VSC 299; *R v O'Neill* (2015) 47 VR 395; *R v Zhuang* [2015] VSCA 96; *R v Daing* [2016] VSCA 58; *R v Browning* [2016] VSCA 153; *Shaptafaj v The King* [2023] VSCA 91, [51]-[52].
[3159] *DPP v Paulino* [2017] VSC 794, [11]. See also *R v Meade* [2015] VSCA 171; *R v McDermott* [2016] VSC 489.
[3160] *R v Cardamone* [2017] VSC 493, [90] ('*Cardamone I*'); *Cardamone II* [129].
[3161] See, eg, *R v Lowe* (1997) 2 VR 465 ('*Lowe*'); *Dupas No 1*; *R v Camilleri* (2001) 119 A Crim R 106; *Dupas No 2*; *R v Roberts* [2005] VSCA 66; *R v Farquharson* [2007] VSC 469; *R v Debs* (2008) 191 A Crim R 231; *R v Haigh* [2009] VSC 185; *R v Robinson* [2010] VSC 10; *Cardamone II* [129].
[3162] *Lowe* 488.
[3163] Ibid.
[3164] *R v Coombes* [2011] VSC 407 (two prior convictions for murder); *Hunter* (one prior conviction for murder); *Cardamone II* (extremely grave offending with prior conviction for sexual offending).
[3165] *DPP (Vic) v Crosbie* [2003] VSC 69.
[3166] See *Lowe*; *R v DJH* [1998] VSCA 108; *R v SJK* [2002] VSCA 131; *R v PDJ* [2002] VSCA 211.
[3167] *R v Jolly* [1982] VR 46; *R v Taikmaskis* (1986) 19 A Crim R 383; *R v Chamberlain* [2001] VSCA 159.
[3168] *R v Quarry* [2005] VSCA 65, [25].

in general expect to be seriously considered for the possible imposition of life sentences unmitigated by the hope of parole.'[3169]

21.4.2 – Fixing a non-parole period

Generally, non-parole periods have been fixed on life sentences for murder, even where the offender had previous convictions for murder.[3170] Declining to fix a non-parole period removes one of the most significant incentives to rehabilitation and the hope of ultimate release.[3171]

[3169] *R v Beckett* [1998] VSCA 148, [21], quoting *R v Coulston* [1997] 2 VR 446, 463.
[3170] See, eg, *R v Knight* [1989] VR 705; *R v Denyer* (1995) 1 VR 186; *R v Williams* [2007] VSC 131.
[3171] *R v Sharpe* [2005] VSC 276, [63].

22 – Manslaughter, child homicide, and homicide by firearm

The modern manslaughter offence encompasses three disparate offences that involve the killing of another person in circumstances that are not treated as murder.

They are:

- Manslaughter by unlawful and dangerous act;
- Manslaughter by criminal negligence; and
- Suicide pact manslaughter.

This chapter also considers the statutory offences of child homicide and homicide by firearm, which are analogous to manslaughter, with the added respective elements that the victim was under six years of age and the discharge of a firearm caused the death of the victim.

Additional homicide offences of culpable driving causing death and dangerous driving causing death are addressed in 23 – Indictable driving offences. The additional homicide offence of workplace manslaughter is addressed in 31- Occupation health and safety offences.

22.1 – Penalties and current sentencing practices

22.1.1 – Penalties

Manslaughter (whether by unlawful and dangerous act or by criminal negligence) is a common law offence. The maximum penalty is Level 2 imprisonment, which is 25 years' imprisonment.[3172]

Manslaughter is not a 'serious violent offence' for the purposes of the Act.[3173] However, it is a 'serious offence'[3174] and may attract an indefinite sentence.[3175]

From 1 November 2014, a mandatory minimum non-parole period of 10 years' imprisonment applies to manslaughter committed in the following circumstances:[3176]

- Single punch or strike;
- Gross violence.

[3172] *Crimes Act 1958* (Vic) s 5 ('*Crimes Act*'). Prior to 1 September 1997 the maximum penalty for this offence was a term of 15 years, this was increased by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60, sch 1, cl 3. Between 1 September 1997 and 30 June 2020, the maximum penalty for this offence was a term of 20 years but was again increased by the *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) ss 3, 9.
[3173] *Sentencing Act 1991* (Vic) sch 1, cl 3 ('the Act').
[3174] Ibid s 3.
[3175] See 8.7 – Imprisonment – Indefinite sentence.
[3176] See 9.1.2.1 – Manslaughter offences for information on the operation of these minimum non-parole period provisions.

Suicide pact manslaughter is a statutory offence with a maximum penalty of Level 5 imprisonment (10 years).[3177]

Child homicide is a statutory offence that was created on 19 March 2008 with a maximum penalty of Level 2 imprisonment (25 years).[3178]

Homicide by firearm is a statutory offence that was created on 1 July 2020 with a maximum penalty of Level 2 imprisonment (25 years).[3179]

The offences of manslaughter, child homicide, and homicide by firearm are Category 2 offences if the offender was 18 or older at the time of offending. If either the first two offences was committed on or after 20 March 2017, or if homicide by firearm was committed after or on after 1 July 2020, the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order) unless specified circumstances exist.[3180]

22.1.2 – Current sentencing practice

22.1.2.1 – Manslaughter - Generally

Generally, sentences for all forms of manslaughter have significantly increased since 2011,[3181] and specifically, on 1 July 2020, Parliament increased the maximum penalty for manslaughter offences from 20 years to 25 years' imprisonment, thereby suggesting that past sentences for this type of offending have been inadequate.[3182]

However, consideration of current sentencing practices for manslaughter is difficult because of the vastly different circumstances that may give rise to the charge.[3183] It can be difficult to infer that a particular sentence for manslaughter is severe when compared to other cases because the ranges of culpability and possible sentences are so wide.[3184] For this same reason sentencing statistics are also of little utility,

[3177] *Crimes Act* s 6B. Prior to 1 September 1997 the maximum penalty for this offence was 7-½ years' imprisonment, it was increased by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60, sch 1, cl 5.
[3178] *Crimes Act* s 5A. Prior to 1 July 2020 the maximum penalty for this offence was 20 years' imprisonment, it was increased by the *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) ss 4, 9.
[3179] *Crimes Act* s 5B.
[3180] See 9.1.1 – Statutory Schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.
[3181] *Vincec v The Queen* [2018] VSCA 18, [68] ('*Vincec*').
[3182] *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) s 3; Victoria, *Parliamentary Debates*, Legislative Assembly, 6 February 2020, 181-83 (Jill Hennessy, Attorney-General).
[3183] They are effectively infinite, ranging range from a joke gone wrong to something just short of murder, and this is reflected in the wide variety of sentencing dispositions for the crime. See, eg, *DPP (Vic) v Whiteside* (2000) 1 VR 331, 337 [20] ('*Whiteside*'); *DPP (Vic) v McMaster* (2008) 19 VR 191, 193-96 [5], 198 [25] ('*McMaster*'); *R v Jagroop* (2009) 22 VR 80, 85 [34] ('*Jagroop*'); *Va v The Queen* [2011] VSCA 426, [1] ('*Va*'); *DPP (Vic) v Torun* [2015] VSCA 15, [57]; *R v Donker* (2018) 84 MVR 279, 296 [131] ('*Donker*'); *R v Phan* [2019] VSC 153, [67]; *DPP (Vic) v Yucel* [2019] VSCA 53, [59] ('*Yucel*'); *DPP (Vic) v White* [2019] VSC 400, [74]; *Vu v The Queen* [2020] VSCA 59, [33] ('*Vu*').
[3184] *Jagroop* 85-86 [35], [37], citing *R v Johnston* (2007) 173 A Crim R 540, 550 and *R v Lavender* (2005) 222 CLR 67, 77 [22], 90 [63] ('*Lavender*').

particularly where they do not differentiate between intentional and negligent manslaughter, and do not identify the circumstances and bases for the sentences imposed.[3185]

22.1.2.2 – Child homicide

The circumstances in which child homicide might arise and the sentences imposed for it can vary widely.[3186] The variations will probably be narrower, however, because every victim will be a child under six.[3187]

When introducing the new offence, the Attorney-General explained that the offence of child homicide was being created in response to concerns regarding the perceived inadequacy of sentences for the manslaughter of young children. The new offence was intended to highlight the aggravating factors of the victim's age and vulnerability and give the courts scope to develop new practices freed from the constraints of past practices, while generally being guided by those same practices.[3188]

Despite this intention, the Court of Appeal has held that creation of the new offence did not manifest an intention by Parliament that people found guilty of child homicide must receive a punishment closer to the maximum term than the sentences imposed in past cases involving the manslaughter of a young child. This is because the text of the relevant legislation[3189] says nothing about how a court should approach sentencing for child homicide; it merely retains all the elements of manslaughter and adds the requirement that the victim be under six years old.[3190] The Court concluded that if Parliament had intended heavier sentences to be imposed for child homicide it would have used directive language.[3191] But it also noted that creation of the offence had one clear legislative purpose: it uncoupled sentences for child homicide from any constraint in current sentencing practices for manslaughter.[3192]

22.1.2.3 – Homicide by firearm

The circumstances in which homicide by firearm might arise are likely to vary widely and include situations where it may be difficult to prove the intent necessary to support a murder charge beyond a reasonable doubt, or where a person has used a firearm dangerously, regardless of whether that use was reckless or intentional.[3193]

When introducing the new offence, the Attorney-General explained that it was being created in response to concerns regarding the perceived inadequacy of sentences for certain firearm related manslaughters.

[3185] *Jagroop* 85-86 [37]-[38]. See also *Whiteside* 337-38 [21]; *R v Walker* [2016] VSC 116, [66] ('*Walker*'); *Kells v The Queen* [2017] VSCA 7, [48]; *R v Brown* [2017] VSC 240, [147] ('*Brown*'); *R v McKnight* [2017] VSC 782, [90] ('*McKnight*'); *Donker* 297 [133]; *DPP (Vic) v McDowall* [2019] VSC 604, [56] ('*McDowall*').
[3186] There have only been a handful of reported judgments for the offence.
[3187] *R v Hughes* [2015] VSC 312, [113] ('*Hughes*').
[3188] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4412-14 (Rob Hull, Attorney-General).
[3189] See, eg, the Act s 5A.
[3190] *DPP (Vic) v Woodford* [2017] VSCA 312, [4]-[6] ('*Woodford*') [70]-[71].
[3191] Ibid [79].
[3192] Ibid [73]. Following *DPP (Vic) v Dalgliesh* (2017) 262 CLR 428, the limiting effect of past sentencing practices for manslaughter has been further reduced. Moreover, since *Woodford*, Parliament has increased the maximum penalty for child homicide, which indicates a perceived insufficiency in existing sentences for the offence.
[3193] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 February 2020, 181-83 (Jill Hennessy, Attorney-General).

As with child homicide, the new offence is intended to give the courts scope to develop new practices freed from the constraints of past practices, while generally being guided by those same practices.[3194]

22.2 – Gravity and culpability

Although manslaughter is less serious than murder, it is still an extremely serious offence because it also involves the unlawful taking of a human life.[3195] This taking of life is the key element in assessing the gravity of the offence.[3196] But since that may occur in such a variety of circumstances, a court must determine where the particular offending before it falls on a spectrum of seriousness.[3197] Accordingly, sentencing for manslaughter will always be highly fact specific.[3198]

Generally, manslaughter by unlawful and dangerous act is regarded as the more serious form of manslaughter compared to manslaughter by criminal negligence. However, there is no fixed rule and some negligent killings will call for a heavier sentence than those occurring in the context of an unlawful and dangerous act.[3199]

Factors that affect the gravity of manslaughter and the offender's culpability include:

- the degree of violence or aggression involved. If the offender acted excessively, gravity and culpability may be increased;[3200]
- the intent behind the fatal act. Gravity and culpability are lessened where there was no premeditation or intent, and conversely, they are increased where there is an intent or plan;[3201]
- covering up or attempting to cover up the killing;[3202]
- vigilante conduct, taking the law into one's own hands;[3203]
- threats of violence from the victim may reduce gravity and culpability where the offender acted defensively to protect themselves.[3204] In particular, aggressive, violent attacks by the victim on

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[3194] Ibid.
[3195] *R v Farfalla* [2001] VSC 99, [16]; *DPP (Vic) v Ristevski* [2019] VSC 253, [30] ('*Ristevski I*'); *DPP (Vic) v Ristevski* [2019] VSCA 287, [68] (Priest JA) ('*Ristevski II*').
[3196] *R v Sypott* [2003] VSC 327, [30] ('*Sypott*').
[3197] *Ristevski I* [30]. See also *R v Loveridge* (2014) 243 A Crim R 31, 57-59 [208]-[215] ('*Loveridge*').
[3198] *Yucel* [60]. See also *R v Lai* [2015] VSC 346, [41] ('*Lai*'); *McKnight* [30]; *Donker* 288 [56]; *Ristevski II* [2].
[3199] *McKnight* [30]. See also *Jagroop* 90-91 [64]-[66] (Weinberg JA); *Lai* [41]; *Donker* 288 [56]. Historically, provocation manslaughter (where murder was reduced to manslaughter by the partial defence of provocation) was regarded as generally more serious than unlawful and dangerous act manslaughter. With the abolition of the partial defence of provocation on 23 November 2005, this is likely to be of historical relevance only.
[3200] *R v Alexander* (1994) 78 A Crim R 141, 144 ('*Alexander94*'); *Donker* 288-89 [57], [61], [65], 291 [74]; *R v Vinaccia* [2019] VSC 683, [87] ('*Vinaccia*').
[3201] *R v AB (No 2)* (2008) 18 VR 391, 401-02 [30]-[32], [35] ('*AB*'); *R v Mohamed* [2008] VSC 299, [14]; *Donker* 288-89 [57], [63], [67], 291 [74]; *DPP (Vic) v Lovett* [2008] VSCA 262, [33], [42]; *Loveridge* 51 [150]-[157]; *Walker* [15], [22]; *R v Cicekdag* [2017] VSC 781, [50] ('*Cicekdag*'); *McKnight* [31], [35]; *R v Naddaf* [2018] VSC 429, [28] ('*Naddaf*'), citing *Jagroop* 90-91 [66] (Weinberg JA); *Vinaccia* [87]; *Vu* [34].
[3202] *R v Culleton* [2000] VSC 559, [23] ('*Culleton*'); *R v Hunter* [2002] VSC 162, [4]-[9] ('*Hunter*'); *R v Nguyen* [2003] VSC 62, [17] ('*Nguyen*'); *R v Sun* [2004] VSC 276, [5]-[6]; *AB* 402 [35]; *Jagroop* 89 [57]; *McKnight* [34]; *Ristevski I* [5]-[12]; *Ristevski II* [5]-[8], [78]; *DPP (Vic) v White* [2020] VSCA 37, [81] ('*White*'); *Freeburn v The Queen (No 2)* [2020] VSCA 176, [44] ('*Freeburn*').
[3203] *AB* 402 [35]; *Whiteside* 337-38 [20]-[21].
[3204] *Brown* [108]; *Donker*; *Yucel* [66]-[69]. But see *R v Moore* [2002] VSCA 33, [16].

the offender, both immediately before the act causing death and for a lengthy period of time during a domestic relationship, lessen the offender's culpability;[3205]

- the vulnerability, innocence, or surprise of the victim;[3206]
- where the victim is a spouse or family member gravity and culpability are increased. The courts cannot condone domestic killings, they strike at the foundation of society and must be condemned;[3207]
- the age of the victim, killing a young person or a child increases the gravity;[3208]
- the way in which the body is disposed of;[3209]
- the use of a weapon;[3210]
- using martial arts or weapons training or skills, or failing to do so properly;[3211]
- failing to summon medical assistance that may have saved the victim's life, delaying before doing so, or preventing others from doing so;[3212]
- the foreseeability of the mechanism of death. Gravity and culpability are lessened where the mechanism was the result of a 'freakish accident';[3213]
- isolating or restraining the victim;[3214]
- initiating an attack;[3215]
- time, a protracted attack is more serious than one that is brief;[3216]
- whether the offending occurred in company;[3217] and
- failing to explain the killing or its circumstances.[3218]

[3205] *Donker* 289 [66], 288-89 [57], [65], 291 [74]; *R v Laracy* [2008] VSC 67, [23] ('*Laracy*').
[3206] *R v Bux* (2002) 132 A Crim R 395, 401 [24]; *DPP (Vic) v SJK* [2002] VSCA 131, [62]-[63]; *R v Johns* [2003] VSC 415, [23] ('*Johns*'); *R v Mohammed* [2004] VSC 423, [42], [45] ('*Mohammed*'); *Walker* [9], [18]; *McKnight* [33]; *Freeburn* [39].
[3207] *R v Lubik* [2011] VSC 137, [48], [68] ('*Lubik*'); *R v Ramage* [2008] VSC 508, [53] ('*Ramage*'); *DPP (Vic) v Osborn* [2018] VSCA 207, [44] ('*Osborn*'); *R v Edwards* [2019] VSC 234, [7]-[8] ('*Edwards*'); *Ristevski I* [36]-[37]; *Ristevski II* [8], [10], [73]-[74], [78]; *Vu* [34]; *Freeburn* [40], [45]-[48].
[3208] *Johns* [29]; *R v Thompson* [2004] VSC 288, [45]-[46] ('*Thompson*'); *R v Lefau* [2004] VSC 481, [21], [39] ('*Lefau*'); *Mohammed* [46]; *DPP (Vic) v Arney* [2007] VSCA 126, [15], [20]-[21] ('*Arney*').
[3209] *Culleton* [23], [26]; *R v Walker* [2003] VSC 155, [29], [32], [34], [80]; *Sypott* [30]; *R v Sun* [2004] VSC 276, [6]; *McKnight* [34]; *R v BA* [2019] VSC 90, [61], [63] ('*BA*'); *Ristevski II* [4], [7], [78].
[3210] *Sypott* [30]; *R v Deniz* [2003] VSCA 23, [22], [25]; *R v Ibrahim* [2006] VSC 96, [38], [40]; *AB* 402 [35]; *Donker* 288 [58]-[59]; *Cicekdag* [48], [54]; *White* [80]; *Freeburn* [36].
[3211] *Johns* [22], [45]; *Lee v The Queen* [2018] VSCA 343, [15], [28], [33] ('*Lee*'); *DPP (Vic) v Russo* [2019] VSCA 129, [70] ('*Russo*').
[3212] *Jagroop* 88-89 [50]-[51], [57], 90 [62]; *Hughes* [118]; *Walker* [23]; *Naddaf* [55]-[56]; *R v Rowe* [2018] VSC 490, [27] ('*Rowe*'); *Vinaccia* [86]; *Freeburn* [10]-[11], [41]-[43].
[3213] *Donker* 288-89 [57], [64], 291 [74].
[3214] *Walker* [10], [19]; *BA* [34], [60]; *McDowall* [10]-[14].
[3215] *R v Clappers* [2003] VSC 462, [30] ('*Clappers*'); *AB* 402 [35]; *Walker* [10], [19]; *BA* [34], [60].
[3216] *Nguyen* [16]; *Clappers* [30]; *Mohammed* [24], [45]; *AB* 402 [35]; *Walker* [14]; *Cicekdag* [55]; *McKnight* [38]; *McDowall* [10]-[14]; *Freeburn* [36].
[3217] *Clappers* [30]; *Walker* [10], [19]; *McDowall* [10]-[14].
[3218] *Culleton* [21]; *Ristevski I* [2]; *Ristevski II* [16], [75] (Priest JA).

22.2.1 – Manslaughter by unlawful or dangerous act

Manslaughter by unlawful and dangerous act occurs where an offender causes the death of another person by an act that is both unlawful and dangerous, and which a reasonable person in the circumstances would have realised was exposing others to a risk of serious injury.[3219]

In addition to the factors outlined above, the gravity of this form of manslaughter is influenced by the gravity of the underlying unlawful act, the degree of dangerousness and the accused's subjective awareness of that dangerousness.[3220]

For example: a killing which is the result of a single punch, may be a serious example of unlawful and dangerous act manslaughter.[3221] An objectively serious feature being the offender's knowledge that throwing a punch towards the head of another person, regardless of their intent to strike, is inherently dangerous.[3222] The general rule is the more dangerous the act, the more objectively serious is the offence.[3223]

Care should be taken in drawing comparisons between the now abolished offence of defensive homicide and manslaughter by unlawful and dangerous act. Depending on circumstances, defensive homicide may be more or less culpable than unlawful and dangerous act manslaughter.[3224] The offences also involve significantly different states of mind. Defensive homicide required proof of an intent to kill or cause really serious injury (or recklessness with regard to those consequences), whereas unlawful and dangerous act manslaughter does not require either intent.[3225]

22.2.2 – Negligent manslaughter

Manslaughter by negligence is relatively unusual.[3226] It occurs where death is caused by actions that fall so short of the standard of care that a reasonable person would have exercised in the circumstances, and that involved such a high risk of death or serious injury, that criminal punishment is merited.[3227] Failing to summon medical assistance may reach this standard if the offender owes the victim a duty of care, such as the duty owed by a parent to their child, or the duty owed by a person who causes injury to another.[3228]

Further, the degree of negligence is relevant to culpability in that it may increase as the negligent act becomes more extreme.[3229]

[3219] *Wilson v The Queen* (1992) 174 CLR 313, 332-34; *R v Besim* (2004) 148 A Crim R 28, 31-32 [8], 33 [17], 38-39 [42].
[3220] See, eg, *R v Gordon (No 8)* [2017] NSWSC 574, [40]-[49]; *R v O'Connor* [2018] VSC 516, [24]-[30].
[3221] *Loveridge* 61 [232].
[3222] *Lee* [33]. See also *R v Sharp* [2015] VSC 116, [9].
[3223] *White* [75].
[3224] *Va* [30].
[3225] Ibid [31].
[3226] *Jagroop* 86 [39]. See also *R v Blackwell* [2013] VSC 499, [11] ('*Blackwell*'); *Naddaf* [28].
[3227] *Blackwell* [11].
[3228] *Blackwell* [23]. See also *Reid v The Queen* (2010) 29 VR 446, 459-60 [50]-[52]; *Naddaf v The Queen* [2020] VSCA 41, [50] ('*Naddaf II*'). But see and compare *Burns v The Queen* (2012) 246 CLR 334 and *R v Taktak* (1988) 14 NSWLR 227 on when a duty will be owed to an adult.
[3229] See, eg, *R v Osip* (2000) 2 VR 595, 606 [36]. See also *Lavender* 108 [128] (Kirby J), quoting *Wilson v The Queen* (1992) 174 CLR 313, 334; *Naddaf II* [56].

In addition, the length of time during which an offender fails to act is relevant to determining the gravity of manslaughter by criminal negligence, and a prolonged period of inaction elevates the seriousness.[3230]

While the statutory sentencing regime does not distinguish between manslaughter by negligence and manslaughter by unlawful and dangerous act,[3231] an offender who negligently kills another person will usually be viewed as less culpable than someone who killed as the result of an unlawful and dangerous act. This is because the first offender will not have had an intent to kill or harm, where the later offender usually (but not always) will have at least an intent to cause harm.[3232] However, this is not an inflexible rule.[3233]

22.2.3 – Child homicide

Child homicide is a hybrid statutory and common-law offence.[3234] Section 5A of the *Crimes Act* provides that if a child under six is killed by a person in circumstances that would otherwise be manslaughter they are guilty of child homicide and not manslaughter.[3235] The *Crimes Amendment (Manslaughter and Related Offences) Act 2020* has since introduced a s 5C which has made clear Parliament's intention that child homicide is an alternative charge to manslaughter and homicide by firearm. As a result, the offence has the same elements as manslaughter except that the victim is a child under six.[3236] The age of the victim is central to the criminality involved.[3237]

By definition, child homicide is a serious offence and it is more so when it is the result of criminal behaviour by someone entrusted with care of the child.[3238] However, the fact that the victim is a young and vulnerable child has always been a significant aggravating factor in cases of manslaughter involving violence.[3239]

Where the death is caused in circumstances of excessive corporal punishment, the offender's right to use such punishment may be a mitigating factor. This is because an offence involving excessive corporal punishment, by a person who knows they have no right to do so, would be a more serious example of the offence.[3240]

Anger and frustration may explain the context, but they do not mitigate the gravely criminal act of killing a young child.[3241]

Child homicide is a serious offence and 'the courts have a responsibility to impose sentences which send a strong and unequivocal message to the community that any person who unlawfully caused the death of a

[3230] *Naddaf* [105]-[106]l *Naddaf II* [53]-[54].
[3231] *Jagroop* 85 [34].
[3232] *Jagroop* 89-90 [58], 91 [67]-[68], 90-91 [64]-[66]; *Lubik* [64]; *Lai* [41]; *Brown* [106]; *McKnight* [30]; *Donker* 288 [56]. But see *Osborn* [33], [39]-[40], [178]-[180].
[3233] *Naddaf II* [50].
[3234] *Vinaccia* [71].
[3235] *Crimes Act* s 5A. See also *Hughes* [19]-[20].
[3236] *Woodford* [44].
[3237] Ibid [80].
[3238] *Hughes* [111], [120]; *Rowe* [19]; *Vinaccia* [71]-[72], [114].
[3239] *Woodford* [72].
[3240] *Hughes* [103].
[3241] Ibid [116]. But see *Vinaccia* [87].

young and vulnerable child by either criminal negligence or by an unlawful and dangerous act will…suffer a deprivation of [their] liberty for a significant period of time'.[3242]

An offender found guilty of child homicide may find imprisonment to be substantially more burdensome and dangerous because the killing of a young child is likely to be seen as cowardly by other prisoners. They will therefore probably need to spend a large part of their sentence in protective custody and so imprisonment is likely to be more burdensome for them.[3243]

22.2.4 – Homicide by firearm

Homicide by firearm is a statutory offence with a standard sentence of 13 years that was created on 1 July 2020.[3244] Section 5B of the *Crimes Act* provides that where a victim is killed as a result of a person discharging a firearm in circumstances that constitute manslaughter they are guilty of homicide by firearm.[3245] This makes clear Parliament's intention that homicide by firearm is an alternative charge to manslaughter and child homicide. As a result, the offence has the same elements as manslaughter except that the death of the victim must be caused by the discharge of a firearm. The dangerousness of the manner in which a firearm is used is likely to be central to the criminality involved. By definition, homicide by firearm is a serious offence. When introducing the offence, the Attorney-General indicated that it is more so when committed in circumstances that would amount to murder but for the inability of the prosecution to prove intent due to lack of witnesses and in circumstances where the death resulted from the dangerous handling of a firearm by an individual.[3246]

22.2.5 – Provocation and excessive self-defence

Before the defence was abolished in 2005[3247] a person who intended to kill could be convicted of manslaughter, instead of murder, because they had only acted after being provoked to such a degree that they lost control of themselves. This 'provocation manslaughter' was usually seen as the most serious form of the offence because the fatal act was intended even if the result was not.[3248]

Following the abolition of the partial defence, provocation by itself cannot reduce murder to manslaughter.[3249] Despite this, provocation remains relevant as a sentencing consideration because a court may temper its sentencing discretion by understanding the reasons that led to the criminal behaviour.[3250]

The relevance of provocation as a sentencing consideration will depend on:

[3242] *Staples v The Queen* [2021] VSCA 307, [72].
[3243] *Hughes* [155]-[156], [158]; *Rowe* [23]; *Vinaccia* [119]-[121].
[3244] *Crimes Act* s 5B.
[3245] The Act s 5(3) provides that discharge is given the same meaning as in s 31C(4).
[3246] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 February 2020, 181-83 (Jill Hennessy, Attorney-General).
[3247] *Crimes Act* s 603.
[3248] *McMaster* 193-96 [5].
[3249] A person who forms an intention to kill or cause really serious injury after being provoked will be sentenced for murder, whereas a person who kills following provocation without forming that intention may be sentenced for manslaughter (usually by an unlawful and dangerous act).
[3250] *Va* [35].

1. The degree of provocation.[3251] If provocation is low, then the gravity of the manslaughter increases and may even reach 'the very confines of murder'.[3252] Conversely, where provocation is great, gravity and culpability are reduced.[3253]
2. The time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control. If the period is short this may reduce gravity and culpability.[3254]

At common law, provocation could only reduce murder to manslaughter where the provocation caused the accused to lose control and the provocation was capable of causing an ordinary person to lose control and act in the way the accused did.[3255] As a sentencing factor, provocation is not limited in this way, and may be relevant even where the offender's conduct was excessive. However, it appears that where provocation would meet the common law requirements, it will have greater weight as a mitigating factor.[3256]

Alleged provocation is likely to be of limited relevance where the offender has previously engaged in domestic violence against the victim. In such circumstances, sentencing principles of general deterrence, denunciation and just punishment will remain primary considerations.[3257] Conversely, where the provocation consists of a further instance of domestic violence by the victim *against* the offender, then provocation is likely to be a relevant mitigating factor.[3258]

Excessive self-defence is also a factor that, while no longer capable of excusing criminal liability,[3259] remains relevant to sentencing. Historically, excessive self-defence was capable of giving rise to provocation manslaughter. This recognised that while provocation is often associated with anger, and self-defence often associated with fear, there was an overlap for the purposes of sentencing.[3260]

Now, with the abolition of both excessive self-defence and provocation as factors giving rise to discrete offences, excessive self-defence may be relevant either in its own right 'or under cover of provocation'. However, as with provocation, excessive self-defence where there is a history of family violence must be approached with caution, especially where the offender's actions spring from anger rather than fear.[3261]

22.3 – Sentencing purposes

The principle sentencing purposes in cases of manslaughter are deterrence, denunciation and just punishment.[3262] This is particularly so in cases:

[3251] *Alexander94* 144; *AB* 401-02 [30]. In considering this, the court may look at an entire course of conduct and not just a 'triggering event'. See, eg, *Mogilkoff v The Queen* [2010] NTCCA 10, [28]-[29], [32].
[3252] *AB* 402 [33]-[35], quoting *R v Ibrahim* [2006] VSC 96, [41]. See also *Mohammed* [24]; *Ramage* [38(c)].
[3253] See, eg, *Alexander94* 144; *R v Stavreski* (2004) 145 A Crim R 44, 49 [21] ('*Stavreski*'); *Laracy* [23]. See also *McKnight* [31] (provocation alluded to but dismissed as slight and not squarely in issue).
[3254] *Alexander94* 144; *Stavreski* 49 [21]; *Donker* 288-89 [57], [65], 291 [74].
[3255] *Masciantonio v The Queen* (1995) 183 CLR 58; *Stingel v The Queen* (1990) 171 CLR 312.
[3256] See and compare *Va* [35]; *Donker* 290-91 [68]-[74]; *Felicite* [33].
[3257] *Felicite* [30]; *Va* [36].
[3258] *Donker* 290-91 [68]-[71], [74], 299-300 [151], [154]. But see *Edwards* [70] (culpability is not lessened where the offender was equally or more abusive in the domestic relationship).
[3259] Following the abolition of defensive homicide on 1 November 2014: *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*.
[3260] *Va* [34].
[3261] *Va* [36].
[3262] *R v Winter* [2004] VSC 329, [32]-[34], [44]; *Walker* [72]; *Naddaf II* [72].

- involving domestic or family violence;[3263]
- of alcohol or drug fuelled violence in public places;[3264]
- involving 'one punch/strike' attacks;[3265]
- where a weapon is used or is used without proper regard for safety procedures;[3266] and
- of child homicide.[3267]

In these circumstances, there is a particular need for the sentence to make clear that the use of violence is intolerable and calls for the strongest denunciation and stern punishment.

Although an offender's moral culpability is reduced where they were provoked in circumstances where there is a history of domestic violence, this does not remove the importance of general deterrence, just punishment, and denunciation when sentencing. Despite provocation and family violence, unlawful behaviour that results in the death of another must still be denounced and (usually) result in a term of imprisonment.[3268]

There is an exception in cases of manslaughter involving a suicide pact.[3269] In these cases, the principles of specific deterrence, denunciation, and just punishment are lessened.[3270] General deterrence remains significant because the law protects the sanctity of human life and its unlawful taking, even where an offender's motives are pure.[3271] However, mercy has a part to play when sentencing in such circumstances, and a sentence may be imposed that releases the offender and does not carry a custodial component.[3272]

[3263] *Culleton* [26], [29]; *Thompson* [45]-[47]; *Lefau* [21], [39]; *Mohammed* [46]; *Arney* [15], [20]-[21]; *Jagroop* 89-90 [56]-[58].
[3264] *DPP (Vic) v Closter* [2014] VSC 484; *DPP (Vic) v Simpas* [2009] VSCA 40, [3], [8]-[9], [13], [98]-[99], [104]-[107]; *Vincec* [66].
[3265] *Loveridge* 59 [216]; *Lee* [34].
[3266] *Nguyen* [29]; *Russo* [70].
[3267] *Hughes* [120]-[121], [161], [183]; *Woodford* [90]; *Rowe* [28]; *Vinaccia* [124].
[3268] See, eg, *Hunter* [9]; *Donker* 296 [125]. But see *R v Gadzovic* [2002] VSC 588, [9]-[10]; *Stavreski* 49 [20]-[27].
[3269] See, eg, *Crimes Act* s 6B(1).
[3270] *R v Marsden* [2000] VSC 558, [17]-[18].
[3271] *DPP (Vic) v Rolfe* (2008) 191 A Crim R 213, 217 [25]-[27].
[3272] Ibid 218 [31].

23 – Indictable driving offences

This chapter addresses sentencing for the six indictable offences that are necessarily, or at least commonly, committed while driving:

- Culpable driving causing death;[3273]
- Dangerous driving causing death;[3274]
- Negligently causing serious injury;[3275]
- Dangerous driving causing serious injury;[3276]
- Driver of motor vehicle failing to stop or assist after an accident that caused death or serious injury;[3277]
- Driver of other vehicle failing to stop or assist after an accident that caused death or serious injury.[3278]

It also presents basic sentencing information, in the penalty table, for five offences that primarily address the endangerment of protected officers by driving.

23.1 – Penalties and current sentencing practice

23.1.1 – Penalties

Offence	Provision	Maximum Penalty	Applies to offences committed on or after
Culpable driving causing death	*Crimes Act 1958* (Vic) s 318 ('*Crimes Act*')	Level 3 imprisonment (20 years). Level 3 fine (2400 penalty units). Standard sentence** of 8 years applies. License disqualification for at least 24 months.	1 September 1997
Intentionally exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	*Crimes Act* s 317AC	Level 3 imprisonment (20 years). Minimum non-parole period - 2 years (if worker or officer is injured). License disqualification for at least 24 months.	5 April 2018

[3273] *Crimes Act 1958* (Vic) s 318 ('*Crimes Act*').
[3274] Ibid s 319(1).
[3275] Ibid s 24.
[3276] Ibid s 319(1A).
[3277] *Road Safety Act 1986* (Vic) ss 61(1)(a)–(b) ('*RSA*').
[3278] Ibid ss 61A(1)(a)–(b)
** The standard sentence is relevant for offences committed after 1 February 2018. See 9.2 – Statutory schemes – Standard sentence scheme.

Offence	Provision	Maximum Penalty	Applies to offences committed on or after
Aggravated intentionally exposing an emergency worker, custodial officer or a youth justice custodial officer to risk by driving	*Crimes Act* s 317AD	Level 3 imprisonment (20 years). Minimum non-parole period - 2 years (if worker or officer is injured). License disqualification for at least 24 months.	5 April 2018
Recklessly exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	*Crimes Act* s 317AE	Level 5 imprisonment (10 years). License disqualification for at least 24 months.	5 April 2018
Aggravated recklessly exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	*Crimes Act* s 317AF	Level 5 imprisonment (10 years). 'Category 2 offence' if committed by an offender who was aged 18 years or more at the time of offending. The court must impose a straight custodial sentence unless a 'special reason' applies. License disqualification for at least 24 months.	5 April 2018
Dangerous driving causing death	*Crimes Act* s 319	Level 5 imprisonment (10 years). License disqualification for at least 18 months.	19 March 2008
Dangerous driving causing serious injury	*Crimes Act* s 319	Level 6 imprisonment (5 years). License disqualification for at least 18 months.	19 March 2008
Damaging emergency service vehicle	*Crimes Act* s 317AG	Level 6 imprisonment (5 years).	5 April 2018
Dangerous or negligent driving while pursued by police	*Crimes Act* s 319AA	3 years' imprisonment. License disqualification for at least 12 months.	20 December 2012

Offence	Provision	Maximum Penalty	Applies to offences committed on or after
Driver of motor vehicle failed to comply with *Road Safety Act 1986* (Vic) ss 61(1)(a)–(b) ('*RSA*') after an accident that caused death or serious injury	*RSA* s 61(3)	Level 5 imprisonment (10 years) 1st offence - license cancellation and dis-qualification for at least 4 years if conviction recorded, 2 years otherwise Subsequent offence - licence cancellation and dis-qualification for at least 8 years if conviction recorded, at least 4 years otherwise	1 June 2005
Driver of other vehicle failed to comply with *RSA* ss 61A(1)(a)–(b) after an accident that caused death or serious injury	*RSA* s 61A(3)	Level 6 imprisonment (5 years)	18 June 2009

23.1.2 – Current sentencing practice

A driving offence that results in the death or serious injury of another person is very serious.[3279] Absent exceptional circumstances, a substantial custodial sentence will be required to satisfy the need for general and specific deterrence, community protection, and just punishment.[3280]
A non-custodial sentence may be available where the offender's moral culpability is exceptionally low,[3281] and a ten-year term of imprisonment for a culpable driving offence with a single fatality invites appellate scrutiny, though it may be within range for very grave offending.[3282]

In 2016, the Court of Appeal noted that sentences for dangerous driving causing death had not changed significantly since the maximum penalty was increased in 2008.[3283] This demonstrated a failure to recognise Parliament's view of the seriousness of the offence and indicated that current sentencing

[3279] *DPP (Vic) v Chambers* (2006) 47 MVR 22, 27 [25] ('*Chambers*').
[3280] *R v Scott* (2003) 141 A Crim R 323, 336 [24] ('*Scott*'); *Chambers* 27 [25]; *R v Williamson* (2009) 21 VR 330, 339 [71]; *Leddin v The Queen* [2014] VSCA 155, [17]–[21] ('*Leddin*'); *Wassef v The Queen* [2011] VSCA 30, [31] ('*Wassef*'); *Tang v The Queen* [2013] VSCA 31, [15]; *Tokay v The Queen* (2014) 69 MVR 24, 31 [26] ('*Tokay*'); *Sarikaya v The Queen* (2015) 73 MVR 1, 11 [37] ('*Sarikaya*'); *Vasilevski v The Queen* (2018) 83 MVR 351, 363 [47] ('*Vasilevski*'); *Nicholson v The Queen* (2018) 84 MVR 421, 429 [32]; *DPP (Vic) v Browne* [2023] VSCA 13, [40]-[47], [55]-[56].
[3281] *R v Whyte* (2002) 55 NSWLR 252, 284 [203]-[204], 286 [214] ('*Whyte*'); *DPP (Vic) v Oates* (2007) 47 MVR 483, 486 [22], 488 [31], 489 [38] ('*Oates*'); *DPP (Vic) v Chhatre* (2014) 69 MVR 1, 9 [40] ('*Chhatre*'); *Stephens v The Queen* (2016) 50 VR 740, 745 [21] ('*Stephens*'); *Lennon v The Queen* (2017) 80 MVR 71, 83 [49] ('*Lennon*').
[3282] *Pasznyk v The Queen* (2014) 43 VR 169, 183 [61] ('*Pasznyk*').
[3283] *Stephens* 749–50 [37]–[39].

practices were inadequate and should increase.[3284] The Court has since firmly rejected the contention the increase in sentencing for these offences should be gradual or incremental.[3285]

23.2 – Gravity and culpability

Victorian courts have accepted that the principles described in the New South Wales Court of Criminal Appeal guideline judgment of *R v Whyte*[3286] *also apply to* assessing the gravity of Victorian indictable driving offences.[3287]

Whyte provides a non-exhaustive[3288] list of features that may aggravate the gravity of driving offences that cause death or serious injury, including:

- extent and nature of injuries inflicted;
- number of people put at risk;
- speed;
- degree of intoxication or of substance abuse;[3289]
- erratic driving;
- competitive driving or showing off;
- length of the journey during which others were exposed to risk;
- ignoring warnings;
- escaping police pursuit;
- sleep deprivation;
- failing to stop.[3290]

The Victorian Court of Appeal has suggested additional possible aggravating features:

- driving experience;
- familiarity with the vehicle driven;
- familiarity with the terrain driven;

[3284] Ibid [41]–[43].
[3285] *DPP (Vic) v Weybury* (2018) 84 MVR 153, 161–62 [19]–[20], 165 [32], 167–68 [44]–[47] ('*Weybury*').
[3286] (2002) 55 NSWLR 252. In that case the Court reformulated its earlier guidelines regarding the offences of dangerous driving occasioning death or grievous bodily harm under the *Crimes Act 1900* (NSW) s 52A.
[3287] See, eg, *Oates* 487 [25], 488 [31], 489 [38]; *DPP (Vic) v Neethling* (2009) 22 VR 466, 473 [31]–[32] ('*Neethling*'); *R v Towle* (2009) 54 MVR 543, 560 [52] ('*Towle*'); *Da Costa v The Queen* (2016) 258 A Crim R 60, 64–66 [20] ('*Da Costa*'). While NSW guidelines relating to principles are useful, guidelines about the appropriate length of a custodial sentence are unhelpful in the Victorian context, given the different structure of maximum penalties that apply in NSW. Additionally, some conduct that is charged as culpable driving in Victoria may be charged as manslaughter in NSW.
[3288] *Kerr v The Queen* (2016) 78 MVR 191, 206 [96]; *Stephens* 746–47 [25].
[3289] Alcohol or drug use may not be treated as an aggravating factor for an offender who is to be sentenced with culpable driving established by culpability under s 318(2)(c) or 318(2)(d) of the Act. However, where culpability is established under s 318(2)(b), evidence of alcohol or drug use may be treated as an aggravating factor. See *DPP (Vic) v Walden* (2003) 39 MVR 451, 458 [37] n 5. In some circumstances, the absence of alcohol or drugs may worsen an offender's conduct if it indicates that they demonstrated a willful disregard for the road laws and the safety of other road users. See, eg, *R v Guariglia* (2001) 33 MVR 543, 545–46 [14].
[3290] *Whyte* 286 [216]–[217].

- degree of protection given to passengers;[3291]
- use of a mobile phone while driving.[3292]

However, these factors 'do not constitute some mere checklist,'[3293] such that it can be asserted that the absence of one or more of them means that a case cannot be regarded as serious or very serious.[3294]

23.2.1 – Culpable driving causing death

Since 1992 culpable driving causing death has shared the same maximum penalty as manslaughter, supporting its recognition as a type of 'involuntary manslaughter'.[3295]

Four forms of culpability can constitute culpable driving:

- Recklessness: the offender consciously and unjustifiably disregarded a substantial risk that the death of another person, or the infliction of grievous bodily harm upon another person, might result from their driving.[3296]

- Negligence: the offender failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances.[3297]

- The offender drove while under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle.[3298]

- The offender drove while under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.[3299]

There is no inherent distinction between the gravity of negligent behaviour constituted by lack of good judgment due to excessive drug or alcohol consumption and other negligent behaviour, such as using a mobile phone while driving or driving while fatigued.[3300]

In *Pasznyk v The Queen*, the Court of Appeal confirmed that the *Crimes Act* does not contain a hierarchy of culpability.[3301] The Court said that the objective gravity of each case is determined with reference to the

[3291] *Stephens* 746–47 [25].
[3292] *DPP (Vic) v Johnstone* (2006) 16 VR 75, 81 [21] ('*Johnstone*').
[3293] *Stephens* 746 [25].
[3294] Ibid 747 [26].
[3295] *R v O'Connor* [1999] VSCA 55, [19]; *Scott* 327 [8]; *R v Caldwell* (2004) 8 VR 1, 6 [31].
[3296] *Crimes Act* s 318(2)(a).
[3297] Ibid s 318(2)(b).
[3298] Ibid s 318(2)(c).
[3299] Ibid s 318(2)(d).
[3300] *Scott* 336 [24]; *Johnstone* 80 [17].
[3301] (2014) 43 VR 169, 182 [57]. This decision overturned earlier suggestions that the most serious offending would involve culpable driving based on recklessness rather than culpable driving based on negligence. Specifically: *R v McGrath* [1999] VSCA 197, [16]; *R v Toombs* (2001) 34 MVR 509, 513–14 [34]; *R v Franklin* (2002) 36 MVR 190, 193 [14].

relevant facts, including the offender's state of mind. On their facts, however, some cases of grossly negligent culpable driving may be objectively more serious than reckless culpable driving.[3302]

In sentencing an offender for culpable driving by gross negligence, the starting points for assessing gravity and moral culpability are whether:

- the offender was solely responsible for the manner of their driving;
- the manner of the offender's driving was the sole cause of the victim's death;[3303] and
- whether another person's conduct qualified either of the first two propositions.[3304]

The first proposition goes to the offender's moral culpability, which may be qualified if they establish that another person or external circumstance was partly responsible for their decision to drive or the manner of their driving.[3305] But a victim's willingness to be a passenger despite knowing the driver is intoxicated or fatigued does not by itself make this showing, as the victim did not contribute to the offender's conduct.[3306] Further, if evidence demonstrates that the victim's conduct as a passenger was distracting, this has only limited mitigating impact as it is a driver's responsibility to prevent passengers from causing distractions.[3307]

The second proposition concerns causation, which similarly may be qualified if the offender shows there was something else, outside of their control, which was also a material cause of the victim's death.[3308] The fact that a victim was not wearing a seatbelt at the time of collision will usually not be enough, on its own, to make this showing. Evidence would need to demonstrate on the balance of probabilities that the failure to wear a seatbelt would have prevented the victim's death, and even then the weight to be given to the failure will be 'relatively modest.'[3309] Additionally, where the victim was the offender's passenger, the offender as driver would have been responsible for ensuring they were wearing their seatbelt.[3310]

23.2.2 – Dangerous driving causing death or serious injury

Although negligently causing serious injury is not a driving offence, it is often associated with serious injury caused by negligent driving.[3311]

The Court of Appeal has clarified the relationship between dangerous driving and negligently causing seriously injury by driving. It noted that although death is a more serious consequence than serious injury, the conduct which comprises negligence is often more serious than the conduct that could make

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[3302] *Pasznyk* 182 [57]. See also *R v Birnie* (2002) 5 VR 426, 431 [11].
[3303] *George v The Queen* (2017) 80 MVR 436, 466–67 [109] ('*George*'). See also *Spanjol v The Queen* (2016) 79 MVR 33, 44 [48] ('*Spanjol*''); *Arpaci v The Queen* [2020] VSCA 81, [264]-[265], [267] ('*Arpaci*')
[3304] *Spanjol* 44 [48]; *George* 466–67 [109].
[3305] *George* 466–67 [109]. See also *R v Cowden* (2006) 47 MVR 128, 133–34 [26]–[29] ('*Cowden*'); *Johnstone* 83 [27].
[3306] *Spanjol* 43 [42]; *George* 466–67 [108]–[109].
[3307] *Cowden* 134 [28]; *Johnstone* 83 [27].
[3308] *George* 466–67 [109]. See also *Pan v The Queen* [2020] VSCA 42, [42]-[43], [76] ('*Pan*'); *Arpaci* [264], [266]-[267].
[3309] *Guseli v The Queen* [2019] VSCA 29, [69], [76].
[3310] *Spanjol* 46–47 [61]–[66]; *George* 466–67 [108]–[109].
[3311] While much of the commentary in this chapter will be relevant when the offence occurs in those circumstances, other considerations relating to the offence are discussed in 25 – Causing injury offences and further information may be found in chapters 7.2.5 & 7.2.6 of the Victorian Criminal Charge Book.

up dangerous driving. This, and the shared maximum penalty, explain why conduct under either offence may be regarded as being similarly serious.[3312]

The gravity of dangerous driving causing death or serious injury offending is heavily influenced by the offender's moral culpability and the objective dangerousness of their driving.[3313] Another important consideration for dangerous driving causing serious injury is the extent of the victim's injuries.[3314]

Considering all the circumstances of a given case, the extent to which the offender should have foreseen the consequences of their driving behaviour will inform a court's assessment of moral culpability. An offender will have a higher moral culpability when they knew the risks associated with their driving behaviour.[3315] They will have lower moral culpability if the accident occurred because of momentary inattention[3316] or misjudgement,[3317] or where external circumstances such as the poor design of an intersection, contributed to the accident.[3318]

The question to ask is 'what degree of care, and in particular what degree of alertness to risk, was reasonably to be expected of the driver in the circumstances'?[3319]

The degree of dangerousness of the offender's driving is assessed by reference to the extent of risk that it creates. The extent of risk includes both the likelihood that something will go wrong, and the extent of harm which will result if it does.[3320]

23.2.3 – Failing to stop or assist after an accident causing death or serious injury

Section 61 of the *RSA* creates separate offences for failing to stop or failing to render assistance after an accident that causes death or serious injury. When the *RSA* first commenced, these offences had a maximum penalty of 80 penalty units or two years' imprisonment. In response to community concerns, Parliament increased the maximum penalty to 10 years.[3321] This fivefold increase indicated a marked increase in Parliament's view of the gravity of the offending.[3322]

Offences under s 61(3) of the *RSA* are intended to deter people from fleeing the scene of an accident they were involved in. Some offenders flee because they were aware they were driving dangerously, were intoxicated at the time of the accident, or have a poor driving record.[3323] An offender's excuse for fleeing

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[3312] *Stephens* 749 [35].
[3313] *Oates* 486 [21], 488 [31], 489 [39]; *Neethling* 473 [33]; *Board v The Queen* [2013] VSCA 190, [34] ('*Board*'); *Stephens* 745–46 [21], 747 [26]; *Weybury* 159–60 [13]–[15]; *Woldesilassie v The Queen* [2018] VSCA 285, [23]; *Lee v The Queen* [2021] VSCA 156, [18].
[3314] *Lennon* 81 [41]; *Harrison v The Queen* (2015) 49 VR 619, 629 [44]; *DPP (Vic) v Bausch* [2019] VSCA 235, [37].
[3315] *Stephens* 746–47, [25]–[28].
[3316] *Bell v The Queen* [2018] VSCA 281, [54] ('*Bell*').
[3317] *Towle* 559–60 [50]–[51]; *Board* [34]. See also *Whyte* 286 [214].
[3318] *Pan* [83], [85]-[86] (adopting the principles settled in *Spanjol* and *George* as applicable to sentencing for these offences).
[3319] *Towle* 559–60 [51].
[3320] Ibid 563 [66]; *Board* [34]; *Da Costa* 74 [61]; *Stephens* 745 [20].
[3321] Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2005, 942-43 (Peter Batchelor). See also *Tokay* 31 [26].
[3322] *Wassef* [30]
[3323] *Chhatre* 9 [38].

an accident or failing to assist will usually carry no weight at sentence.[3324] Evidence that an offender failed to stop because of the quality of their driving or their capacity to drive will aggravate their offending.[3325]

In rare circumstances, however, an offender's reason for fleeing an accident or not rendering assistance may carry some weight in mitigation. For example, in *R v Mohamed*, the Court of Appeal accepted that evidence might support an offender's claim that his post-traumatic stress disorder, caused him to panic and flee, thus reducing the gravity of the offence.[3326] The Court has also found a failure to stop was slightly mitigated when the offender, after stopping to determine that the victim who he had struck with his vehicle had no pulse, left to seek medical assistance for his injured passenger.[3327] The Court of Appeal has also suggested that fleeing out of fear for physical safety may be a mitigating factor.[3328]

A court may mitigate a sentence for an offence under the *RSA* if an offender reports an accident to police very soon after fleeing the accident. For example, in *DPP (Vic) v Fairley* the offender reported the accident only 15 minutes after fleeing. By voluntarily giving up his identity, the offender lost the main perceived benefit of committing the offence, which is to avoid detection.[3329]

23.3 – Sentencing purposes

The Victorian Court of Appeal has said there is a need to send the message that 'no matter who is driving a car the community will not tolerate driving by a person under the influence of alcohol or driving at excessive speed.' General deterrence is therefore often the principal consideration in sentencing for an indictable driving offence.[3330]

Moreover, the inherent seriousness of these offences and the need for their deterrence means that features such as youth, good character and remorse carry less weight in mitigation than they otherwise would.[3331]

An offender's poor driving record is an important sentencing consideration in culpable and dangerous driving cases, particularly if it includes previous serious indictable driving offences, driving while affected by drugs or alcohol, or driving while disqualified. It affects moral culpability, rehabilitation prospects, the weight to be given to specific deterrence, protection of the community and denunciation.[3332]

[3324] *Wassef* [31].
[3325] (2009) 53 MVR 82, 86 [27] ('*Mohamed*''); *Sarikaya* 11 [37].
[3326] *Mohamed* 85–86 [21]–[22], 86–87 [28]–[29].
[3327] *DPP (Vic) v Martinez* (2008) 50 MVR 545, 550 [29].
[3328] *Mohamed* 86 [28].
[3329] (2004) 40 MVR 403, 412 [35].
[3330] *McGrath v The Queen* [2018] VSCA 134, [68]. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2005, 942-43 (Peter Batchelor); *Oates* 486 [22]; *Neethling* 472 [30]; *Sarikaya* 10 [34]; *DPP (Vic) v Trueman* (2017) 79 MVR 364, 374 [40]–[41]; *Bell* [54].
[3331] *DPP (Vic) v Gany* (2006) 163 A Crim R 322, 333–34 *[35]; R v Franklin* (2009) 52 MVR 544, 547 [13] ("*Franklin No 2*'); *Neethling* 477 [53]–[55]; *DPP (Vic) v Hill* (2012) 223 A Crim R 285, 296 [41], 299 [51] ('*Hill*'); *Leddin* [18]; *Lennon* 83 [49]; *Bell* [54].
[3332] *DPP (Vic) v Scholes* (1999) 1 VR 337, 346–49 [18]–[24]; *DPP (Vic) v Teh* (2003) 40 MVR 195, 199 [17] ('*Teh*'); *R v Brown* (2003) 39 MVR 293, 296 [8]; *Pasznyk* 185 [68].

Community protection is usually a significant consideration for indictable driving offences. Its significance will be reduced when the death or injury results from culpable or dangerous driving that is triggered by fatigue, as opposed to speed, drugs, alcohol, or deliberately driving on the wrong side of the road, *i.e.*, 'hooning'.[3333]

23.4 – Imposition of sentence

As a single driving accident often results in more than one fatality or injury, indictments for serious driving offences commonly contain multiple charges relating to one or more victim. Courts must be careful to avoid double punishment, while ensuring that each individual victim is adequately recognised in the sentence imposed.

The general principles are that courts must:

- Consider whether multiple deaths or serious injuries arose from a single course of driving.[3334]
- Carefully consider whether any act or omission forms part of more than one offence.[3335]
- Order cumulation to reflect different incidents, offences, and victims.[3336]
- Ensure that each death or serious injury is adequately recognised in the overall sentence and non-parole period, such that the total sentence imposed does not treat any victim as a 'meaningless statistic'.[3337] For cases of multiple culpable driving offences, for example, it is not uncommon to order 50% cumulation to recognise the second victim.[3338]
- Ensure that the overall sentence, after cumulation, does not breach the principle of totality.[3339]

Vasilevski v The Queen demonstrates the complexity that can arise in matters involving multiple driving charges. The offender ran a red light at a pedestrian crossing, killing one pedestrian and seriously injuring another. His conduct gave rise to six indictable driving offences. With respect to the first victim, the offender was charged with dangerous driving causing death, failing to stop after a fatal accident, and failing to render assistance after a fatal accident. He was charged with the serious injury equivalents with respect to the second victim.

The sentence imposed for dangerous driving death was the base sentence. The sentencing judge ordered 12 months' cumulation for dangerous driving causing serious injury, 18 months' cumulation for each of the failure to stop charges and ordered that both failure to render assistance charges were to be wholly concurrent.[3340]

The Court of Appeal noted that it may have been more appropriate to order cumulation on the failure to assist charges, and little or no cumulation on the failure to stop charges.[3341] The offender's failure to stop

[3333] *Maher v The Queen* (2017) 83 MVR 224, 251–52 [106].
[3334] *Towle* 572 [97]; *Franklin No 2* 548 [24], 549 [29].
[3335] *Vasilevski* 362 [43]–[45].
[3336] *Teh* 202 [25]; *Vasilevski* 362 [43]–[45]; *Stewart v The Queen* (2018) 83 MVR 535, 544 [22]–[23].
[3337] *DPP (Vic) v Whittaker* (2002) 5 VR 508, 514 [25]; *DPP (Vic) v Solomon* (2002) 36 MVR 425, 429–30 [19]; *Johnstone* 79 [15]; *Towle* 571 [95]; *Hill* 299–300 [53]; *Vasilevski* 362 [45].
[3338] *George* 471 [132].
[3339] *Teh* 202 [25]; *Towle* 572 [99].
[3340] *Vasilevski* 354 [3].
[3341] Ibid 362 [45].

was a single act that gave rise to two charges because it affected two victims, who were otherwise separately recognised in the sentence. In contrast, each failure to assist charge was a separate act relating to a separate victim. However, the Court refused leave to appeal as the total sentence was appropriate, and adequately recognised both victims.[3342]

Significant cumulation will be required when offences arising out of the same accident are nevertheless very different. For example, in *Stewart v The Queen* the Court of Appeal considered sentences for dangerous driving causing serious injury and failing to stop after an accident arising out of the same accident. Both offences have different elements and are constituted by different acts and omissions. Significant cumulation was required to recognise the different criminality involved in each offence.[3343]

23.4.1 – Culpable driving involving drugs or alcohol

Where culpable driving is constituted by driving under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the motor vehicle,[3344] double punishment will arise if an offender is additionally punished for a related summary offence such as exceeding the prescribed blood alcohol concentration.[3345] Taking that example, since excess alcohol in the blood is an element of both offences, if they are to be charged together, then sentences should be wholly concurrent.[3346]

This issue relates to culpability under s 318(2)(c)-(d) of the Act. It does not arise in relation to other forms of culpable driving, or dangerous driving, where there is no overlap between elements of offences.[3347]

[3342] Ibid 362–63 [46].
[3343] (2018) 83 MVR 535, 544 [23]. See also *DPP (Vic) v Bekhazi* (2001) 3 VR 321, 329–31 [13]–[15].
[3344] *Crimes Act* ss 318(2)(c)–(d).
[3345] *RSA* s 49.
[3346] *R v Audino* (2007) 180 A Crim R 371, 374–75 [13]–[18].
[3347] Ibid 375–76 [19]; *Gangur v The Queen* [2012] VSCA 139, [21]–[25].

24 – Sexual Offences

There are broadly two groups of sexual offences:

- Sexual offences against adults; and
- Sexual offences against children and vulnerable persons.

This chapter examines the maximum penalties and sentencing principles for sexual offences generally, as well as specific principles relevant to offences in each group.

24.1 – Penalties and current sentencing practice

More than most offences, sexual offences are often prosecuted many years after they were committed. But the relevant maximum penalty in sentencing is the one that was in force at the time of the offending, not the time of sentencing.[3348] For this reason, ***careful attention is required to identify the maximum penalty that applied at the time of the offending***. This is a common area of mistake which is discussed further in 24.1.8.1 – Historic sex offences.[3349]

For this reason, the following tables show current and historic maximum penalties as well as those for offences that have been repealed. Further details on the offences themselves can be found in the *Victorian Criminal Charge Book.*

24.1.1 – Current penalties for sexual offences against adults

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**	**Applies to offences committed on or after**
Rape	ss 38(2)-(3)	Level 2 imprisonment (25 years)#[3350] Standard sentence[3351] (10 years)	1 September 1997
Rape by compelling sexual penetration	s 39(2)	Level 2 imprisonment (25 years)#	1 July 2015
Assault with intent to commit a sexual offence	s 42(2)	Level 4 imprisonment (15 years)	1 July 2015
Sexual assault	s 40(2)	Level 5 imprisonment (10 years)	1 July 2015

[3348] *Bromley v The Queen* [2018] VSCA 329, [47] ('*Bromley*'). See also *Sentencing Act 1991* (Vic) s 114 ('the Act).
[3349] See also 5.2.9.2.1 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices – Changes to current sentencing practices – Sentencing practice for historic offences.
[3350] # A Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). The Act ss 3, 5(2G), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.
[3351] The standard sentence is relevant for offences committed after 1 February 2018. See 9.2 – Statutory schemes – Standard sentence scheme.

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Sexual assault by compelling sexual touching	s 41(2)	Level 5 imprisonment (10 years)	1 July 2015
Administration of an intoxicating substance for a sexual purpose	s 46(2)	Level 5 imprisonment (10 years)	1 July 2017
Abduction or detention for a sexual purpose	s 47(2)	Level 5 imprisonment (10 years)	1 July 2017
Procuring sexual act by threat	s 44(2)	Level 5 imprisonment (10 years)	1 July 2017
Threat to commit a sexual offence	s 43(3)	Level 6 imprisonment (5 years)	1 July 2015
Sexual penetration of a parent, lineal ancestor or step-parent	s 50E(2)	Level 6 imprisonment (5 years)	1 July 2017
Sexual penetration of a sibling or half-sibling	s 50F(2)	Level 6 imprisonment (5 years)	1 July 2017
Procuring sexual act by fraud	s 45(2)	Level 6 imprisonment (5 years)	1 July 2017
Sexual activity directed at another person	s 48(2)	Level 6 imprisonment (5 years)	1 July 2017
Bestiality	s 54A(2)	Level 6 imprisonment (5 years)	1 July 2017
Sexual activity with the corpse of a human being	s 34B	Level 6 imprisonment (5 years)	1 July 2017

24.1.2 – Current penalties for sexual offences against or involving children

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Sexual penetration of a child under the age of 12	ss 49A(2)-(3)	Level 2 imprisonment (25 years)# Standard sentence (10 years)	1 July 2017
Persistent sexual abuse of a child under the age of 16	ss 49J(2)-(2A)	Level 2 imprisonment (25 years)# Standard sentence (10 years)	1 July 2017
Sexual penetration of a child or lineal descendant (where the victim was under the age of 18 at the time of the offending)	ss 50C(2)-(3)	Level 2 imprisonment (25 years)# Standard sentence (10 years)	1 July 2017

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Sexual penetration of step-child (where the victim was under the age of 18 at the time of the offending)	ss 50D(2)-(3)	Level 2 imprisonment (25 years)# Standard sentence offence (10 years)	1 July 2017
Facilitating a sexual offence against a child	s 49S(2)	Level 3 imprisonment (20 years)	1 July 2017
Sexual penetration of a child under the age of 16	ss 49B(2)-(3)	Level 4 imprisonment (15 years) Standard sentence offence (6 years)	1 July 2017
Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity	s 49K(2)	Level 5 imprisonment (10 years)	1 July 2017
Sexual assault of child under the age of 16	ss 49D(2)-(2A)	Level 5 imprisonment (10 years)	1 July 2017
Sexual activity in the presence of a child under the age of 16	ss 49F(2)-(2A)	Level 5 imprisonment (10 years) Standard sentence offence (4 years)	1 July 2017
Causing a child under the age of 16 to be present during sexual activity	ss 49H(2)-(2A)	Level 5 imprisonment (10 years) Standard sentence offence (4 years)	1 July 2017
Sexual penetration of a child aged 16 or 17 who is under offender's care, supervision or authority.	s 49C(2)	Level 5 imprisonment (10 years)	1 July 2017
Grooming for sexual conduct with a child under the age of 16	s 49M(2)	Level 5 imprisonment (10 years)	1 July 2017
Abduction or detention of a child under the age of 16 for a sexual purpose	s 49P(2)	Level 5 imprisonment (10 years)	1 July 2017
Causing or allowing a sexual performance involving a child	s 49Q(2)	Level 5 imprisonment (10 years)	1 July 2017
Inviting or offering a sexual performance involving a child	s 49R(2)	Level 5 imprisonment (10 years)	1 July 2017
Sexual assault of a child aged 16 or 17 under offender's care, supervision or authority	s 49E(2)	Level 6 imprisonment (5 years)	1 July 2017

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority	s 49G(2)	Level 6 imprisonment (5 years)	1 July 2017
Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity	s 49I(2)	Level 6 imprisonment (5 years)	1 July 2017
Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity	s 49L(2)	Level 6 imprisonment (5 years)	1 July 2017
Loitering near schools etc. by sexual offender	s 49N(2)	Level 6 imprisonment (6 years)	1 July 2017
Failure by person in authority to protect a child from a sexual offence	s 49O(2)	Level 6 imprisonment (6 years)	1 July 2017

24.1.3 – Current penalties for child abuse material offences

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Involving a child in the production of child abuse material	s 51B(2)	Level 5 imprisonment (10 years)	1 July 2017
Producing child abuse material	s 51C(2)	Level 5 imprisonment (10 years)	1 July 2017
Distributing child abuse material	s 51D(2)	Level 5 imprisonment (10 years)	1 July 2017
Possession of child abuse material	s 51G(2)	Level 5 imprisonment (10 years)	1 July 2017
Accessing child abuse material	s 51H(2)	Level 5 imprisonment (10 years)	1 July 2017
Administering a website used to deal with child abuse material	s 51E(2)	Level 5 imprisonment (10 years)	1 July 2017
Encouraging use of a website to deal with child abuse material	s 51F(2)	Level 5 imprisonment (10 years)	1 July 2017
Assisting a person to avoid apprehension	s 51I(2)	Level 5 imprisonment (10 years)	1 July 2017

24.1.4 – Current penalties for sexual offences against the cognitively impaired

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Sexual penetration of a person with a cognitive impairment or mental illness	s 52B(2)	Level 5 imprisonment (10 years)	1 July 2017
Sexual assault of a person with a cognitive impairment or mental illness	s 52C(2)	Level 6 imprisonment (5 years)	1 July 2017
Sexual activity in the presence of a person with a cognitive impairment or mental illness	s 52D(2)	Level 6 imprisonment (5 years)	1 July 2017
Causing a person with a cognitive impairment or mental illness to be present during sexual activity	s 52E(2)	Level 6 imprisonment (5 years)	1 July 2017

24.1.5 – Current penalties for sexual servitude offences

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Aggravated sexual servitude	s 53E(2)	Level 3 imprisonment (20 years)	1 July 2017
Using force, threat etc. to cause another person to provide commercial sexual services	s 53B(2)	Level 4 imprisonment (15 years)	1 July 2017
Causing another person to provide commercial sexual services in circumstances involving sexual servitude	s 53C(2)	Level 4 imprisonment (15 years)	1 July 2017
Conducting a business in circumstances involving sexual servitude	s 53D(2)	Level 4 imprisonment (15 years)	1 July 2017
Aggravated deceptive recruiting for commercial sexual services	s 53G(2)	Level 5 imprisonment (10 years)	1 July 2017
Deceptive recruiting for commercial sexual services	s 53F(2)	Level 6 imprisonment (5 years)	1 July 2017

24.1.6 – Historic penalties

24.1.6.1 – Sexual offences against adults (5 August 1991 – 30 June 2017)

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Rape	ss 38(2)-(3)	25 years	1 January 1992 – 30 August 1997
	s 40	10 years	5 August 1991 – 12 December 1991
Rape with aggravating circumstances	s 41	20 years	5 August 1991 – 12 December 1991
Compelling sexual penetration	s 38A	Level 2 imprisonment (25 years)	1 December 2006 – 30 June 2015
Assault with intent to rape	s 40	Level 5 imprisonment (10 years)	15 August 1993 – 1 September 1997
Indecent assault	s 39	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2015
		10 years	1 January 1992 – 31 August 1997
	s 42	5 years	5 August 1991 – 12 December 1991
Indecent assault with aggravating circumstances	s 43	10 years	5 August 1991 – 12 December 1991
Administering a drug, matter or thing or causing a drug, matter or thing to be taken by a person for the purposes of sexual penetration	s 53	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 5 imprisonment (10 years)	22 April 1992 – 31 August 1997
		10 years	5 August 1991 – 21 April 1992
Abduction or detention of a person for marriage or sexual penetration	s 55	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 5 imprisonment (10 years)	22 April 1992 – 31 August 1997
		10 years	5 August 1991 – 21 April 1992
Procuring sexual penetration by threats or intimidation	s 57(1)	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017
		Level 6 imprisonment (7½ years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Incest – person aged 18 or above who permits sexual	s 44(3)	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
penetration with father or mother or other lineal ancestor or step-father or step-mother		Level 6 imprisonment (7½ years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Incest – sexual penetration with sister, half-sister, brother or half-brother	s 44(4)	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017
		Level 6 imprisonment (7½ years)	22 April 1992 – 31 August 1997
		7 years	5 August 1991 – 21 April 1992
Procuring sexual penetration by fraud	s 57(2)	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Bestiality	s 59	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Intentionally sexually interfere or commit indecent act with the corpse of a human being	s 34B	Level 6 imprisonment (5 years)	1 July 2005 – 30 June 2017
Sexual offence whilst armed with an offensive weapon	s 60A (summary offence)	Level 7 imprisonment (2 years)	1 September 1997 – 30 June 2017
		Level 8 imprisonment (3 years)	15 August 1993 – 31 August 1997

24.1.6.2 – Sexual offences against or involving children (5 August 1991 – 30 June 2017)

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Sexual penetration of a child under the age of 12	ss 45(2)(a), 45(2A)	Level 2 imprisonment (25 years)#	17 March 2010 – 30 June 2017

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Sexual penetration of a child under the age of 10	s 45(2)(a)	Level 2 imprisonment (25 years)	5 August 1991 – 16 March 2010[3352]
Persistent sexual abuse of a child under the age of 16	s 47A	Level 2 imprisonment (25 years)#	1 December 2006 – 30 June 2017
Maintaining a sexual relationship with a child under the age of 16	s 47A	Level 2 imprisonment (25 years)	1 September 1997 – 30 November 2006
		'a penalty not exceeding the maximum penalty fixed…for the offence which the relevant act would constitute'	5 August 1991 – 31 August 1997
Incest – sexual penetration with child or other lineal descendant or step-child	s 44(1)	Level 2 imprisonment (25 years) if the victim was under the age of 18 at the time of the offending	1 September 1997 – 30 June 2017
		Level 2 imprisonment (20 years)	22 April 1992 – 31 August 1997
		20 years	5 August 1991 – 21 April 1992
Incest – sexual penetration with person under 18 who is the child, other lineal descendant or step-child of de facto	s 44(2)	Level 2 imprisonment (25 years)#	1 September 1997 – 30 June 2017
		Level 2 imprisonment (20 years)	22 April 1992 – 31 August 1997
		20 years	5 August 1991 – 21 April 1992
Facilitating a sexual offence against a child	s 49A	Level 3 imprisonment (20 years)	1 September 1997
		Level 2 imprisonment (20 years)	13 June 1995 – 31 August 1997
Sexual penetration of child aged between 10 and 16 under the care, supervision or authority of the offender	s 45(2)(b)	Level 4 imprisonment (15 years)	5 August 1991 – 16 March 2010[3353]
Sexual penetration of child where child aged between 12 and 16 and under the care supervision or authority of the offender	s 45(2)(b)	Level 4 imprisonment (15 years)	17 March 2010 – 30 June 2017

[3352] See, eg, *Crimes Act 1958* (Vic) ss 45, 593(5)–(7) ('*Crimes Act*').
[3353] Ibid.

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Sexual penetration of child aged between 10 and 16 but not under the care, supervision or authority of the offender	s 45(2)(c)	Level 5 imprisonment (10 years)	5 August 1991 – 16 March 2010[3354]
Sexual penetration of child aged between 12 and 16 but not under the care, supervision or authority of the offender	s 45(2)(c)	Level 5 imprisonment (10 years)	17 March 2010 – 30 June 2017
Owner, occupier, or manager of premises inducing or knowingly allowing a child under the age of 13 to enter or remain on premises for the purpose of taking part in an unlawful act of sexual penetration	s 54	Level 4 imprisonment (15 years)	1 September 1997 – 30 June 2017
		Level 5 imprisonment (10 years)	22 April 1992 – 31 August 1997
		10 years	5 August 1991 – 21 April 1992
Owner, occupier, or manager of premises inducing or knowingly allowing a child between the age of 13 and 17 to enter or remain on premises for the purpose of taking part in an unlawful act of sexual penetration	s 54	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Indecent act with or in the presence of a child under the age of 16	s 47	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 5 imprisonment (10 years)	22 April 1992 – 31 August 1997
		10 years	5 August 1991 – 21 April 1992
Sexual penetration of a child aged 16 or 17 who is under offender's care, supervision or authority.	s 48	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 8 imprisonment (3 years)	22 April 1992 – 31 August 1997
		3 years	5 August 1991 – 21 April 1992

[3354] Ibid.

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Abduction of a child under the age of 16 for sexual penetration	s 56	Level 6 imprisonment (5 years)	1 September 1997 – 30 June 2017
		Level 6 imprisonment (7½ years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Soliciting or procuring a child under the age of 16 to take part in an act of sexual penetration or an indecent act	s 58(1)	Level 5 imprisonment (10 years)	1 December 2006 – 30 June 2017
Soliciting or procuring a person to take part in an act of sexual penetration or an indecent act with a child under the age of 16	s 58(2)	Level 5 imprisonment (10 years)	1 December 2006 – 30 June 2017
Soliciting or procuring a person aged 16 or 17 who is in offender's care, supervision or authority to take part in an act of sexual penetration or an indecent act	s 58(3)	Level 5 imprisonment (10 years)	1 December 2006 – 30 June 2017
Procuring sexual penetration of a child under 16	s 58	Level 6 imprisonment (5 years)	1 September 1997 – 30 November 2006
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Indecent act with or in the presence of a child aged 16 or 17 who is under the offender's care, supervision or authority	s 49	Level 6 imprisonment (5 years)	1 December 2006 – 30 June 2017
Indecent act with or in the presence of a 16 year old child who is under the offenders' care, supervision or authority	s 49	Level 6 imprisonment (5 years)	1 September 1997 – 30 November 2006
		Level 8 imprisonment (3 years)	22 April 1992 – 31 August 1997
		2 years	5 August 1991 – 21 April 1992

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Soliciting or encouraging a child under the age of 18 and who is under the offender's care, supervision or authority to take part in an act of sexual penetration or an indecent act	s 60 (summary offence)	Level 8 imprisonment (1 year) or Level 8 fine (120 penalty units)	1 September 1997 – 30 November 2006
		Level 10 imprisonment (12 months)	22 April 1992 – 31 August 1997
		12 months imprisonment	5 August 1991 – 21 April 1992
Loitering near schools etc. by sexual offender	s 60B (summary offence unless offender previously sentenced as a serious sexual offender)	Serious sexual or violent offender – Level 6 imprisonment (5 years) or Level 6 fine (600 penalty units); or Any other offender – Level 7 imprisonment (2 years) or Level 7 fine (240 penalty units)	4 November 1998 – 30 June 2017
		Level 8 imprisonment (1 year) or Level 11 fine (5 penalty units)	1 September 1997 – 3 November 1998
		Level 10 imprisonment (12 months) or Level 11 fine (60 penalty units)	21 December 1993 – 31 August 1997

24.1.6.3 – Child abuse material offences (1 January 1996 – 30 June 2017)

Offence	Provision	Maximum penalty	Applies to offences committed on or after or in period specified
Procurement of a minor for child pornography	*Crimes Act 1958* (Vic) s 69 ('*Crimes Act*')	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017
		Level 7 imprisonment (2 years)	1 January 1996 – 31 August 1997
Production of child pornography	*Crimes Act* s 68	Level 5 imprisonment (10 years)	1 September 1997 – 30 June 2017

Offence	Provision	Maximum penalty	Applies to offences committed on or after or in period specified
		Level 9 imprisonment (6 months)	1 January 1996 – 31 August 1997
Publication or transmission of child pornography	*Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 57A	10 years	8 November 2001 – 30 June 2017
Possession of child pornography	*Crimes Act* s 70	Level 5 imprisonment (10 years)	1 December 2015 – 30 June 2017
		Level 6 imprisonment (5 years)	22 November 2000 – 30 November 2015
		Level 7 imprisonment (2 years)	1 September 1997 – 21 November 2000
		Level 10 (fine only)	1 January 1996 – 31 August 1997
Administering a child pornography website	*Crimes Act* s 70AAAB	Level 5 imprisonment (10 years)	1 December 2015 – 30 June 2017
Encouraging use of a website to deal with child pornography	*Crimes Act* s 70AAAC	Level 5 imprisonment (10 years)	1 December 2015 – 30 June 2017
Assisting a person to avoid apprehension	*Crimes Act* s 70AAAD	Level 5 imprisonment (10 years)	1 December 2015 – 30 June 2017

24.1.6.4 – Sexual offences against the cognitively impaired (5 August 1991 – 30 June 2017)

Offence	***Crimes Act 1958* (Vic)**	Maximum penalty	Applies to offences committed on or after or in period specified
Sexual penetration of a person with a cognitive impairment by provider of medical or therapeutic services	s 51(1)	Level 5 imprisonment (10 years)	1 December 2006 – 30 June 2017
Sexual penetration of a person with impaired mental functioning by provider of medical or therapeutic services	s 51(1)	Level 5 imprisonment (10 years)	1 September 1997 – 30 November 2006
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Indecent act by provider of medical or therapeutic services with a person with a cognitive impairment	s 52(2)	Level 6 imprisonment (5 years)	1 December 2006 – 30 June 2017
Indecent act by provider of medical or therapeutic services with a person with impaired mental functioning	s 52(2)	Level 6 imprisonment (5 years)	1 September 1997 - 30 November 2006
		Level 8 imprisonment (3 years)	22 April 1992 – 31 August 1997
		3 years	5 August 1991 – 21 April 1992
Sexual penetration of a resident with a cognitive impairment at a residential facility by a worker at that facility	s 51(1)	Level 5 imprisonment (10 years)	1 December 2006 – 30 June 2017
Sexual penetration of a resident by a worker at a residential facility	s 51(1)	Level 5 imprisonment (10 years)	1 September 1997 – 30 November 2006
		Level 7 imprisonment (5 years)	22 April 1992 – 31 August 1997
		5 years	5 August 1991 – 21 April 1992
Indecent act by or with a resident with a cognitive impairment at a residential facility by a worker at that facility	s 52(2)	Level 6 imprisonment (5 years)	1 December 2006 – 30 June 2017
Indecent act by a worker at a residential facility with a resident	s 52(2)	Level 6 imprisonment (5 years)	1 September 1997 - 30 November 2006
		Level 8 imprisonment (3 years)	22 April 1992 – 31 August 1997
		3 years	5 August 1991 – 21 April 1992

24.1.6.5 –Sexual servitude offences (19 May 2004 – 30 June 2017)

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after or in period specified
Causing a person aged under 18 to provide a commercial sexual service	s 60AC	Level 3 imprisonment (20 years)	19 May 2004 – 30 June 2017
Causing another person to provide commercial sexual services in circumstances involving sexual servitude	s 60AB	Level 4 imprisonment (15 years)	19 May 2004 – 30 June 2017
Deceptive recruiting of a person aged under 18 for commercial sexual services	s 60AE	Level 5 imprisonment (10 years)	19 May 2004 – 30 June 2017
Deceptive recruiting for commercial sexual services	s 60AD	Level 6 imprisonment (5 years)	19 May 2004 – 30 June 2017

24.1.6.6 – 1 March 1981 to 4 August 1991[3355]

Offence	*Crimes Act 1958* (Vic)	Maximum penalty
Indecent assault (including indecent assault upon a child under 16 pursuant to s 44(3))	s 44(1)	5 years
Indecent assault with aggravating circumstances (including indecent assault upon a child under 16 with aggravating circumstances pursuant to s 44(3))	s 44(2)	10 years
Rape	s 45(1)	10 years
Attempted rape or assault with intent to commit rape	s 45(2)	5 years

[3355] Prior to the amendments commencing on 5 August 1991, Victoria's sexual offences were largely as enacted by the *Crimes (Sexual Offences) Act 1980* (Vic). This Act came into operation on 1 March 1981.

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**
Rape with aggravating circumstances	s 45(3)	20 years
Attempted rape or assault with intent to commit rape with aggravating circumstances	s 45(4)	10 years
Sexual penetration of a child under the age of 10	s 47(1)	20 years
Attempted sexual penetration of a child under the age of 10 or assault with intent to take part in an act of sexual penetration with a child under the age of 10	s 47(2)	10 years
Sexual penetration of a child between the age of 10 and 16	s 48(1)	10 years
Sexual penetration of a child between the age of 10 and 16 where child is under the care, supervision or authority of offender	s 48(3)	15 years
Attempted sexual penetration of a child between the age of 10 and 16 or assault with intent to take part in an act of sexual penetration with a child between the age of 10 and 16	s 48(2)	5 years
Attempted sexual penetration of a child between the age of 10 and 16 or assault with intent to take part in an act of sexual penetration with a child between the age of 10 and 16 where child is under the care, supervision or authority of offender	s 48(3)	7 years
Sexual penetration of a person aged between 16 and 18	s 49(1)	2 years

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**
Attempted sexual penetration or assault with intent to take part in an act of sexual penetration of a person aged between 16 and 18	s 49(2)	1 year
Where a person is under the care, supervision or authority of the offender with respect to s 49(1)	s 49(3)	3 years
Gross indecency by, with or in the presence of a person under the age of 16	s 50(1)	2 years
Gross indecency by, with or in the presence of a person under the age of 16: (a) Where person was under the care, supervision or authority of the offender; or (b) The offender has previously been convicted of gross indecency	s 50(2)	3 years
Sexual penetration or attempted sexual penetration or assault with intent to commit sexual penetration by a person employed by any institution of a mentally ill or intellectually defective person	s 51(1)	5 years
Sexual penetration or attempted sexual penetration or assault with intent to commit sexual penetration by a person who has the care or charge of a mentally ill or intellectually defective person	s 51(2)	5 years
Incest – sexual penetration with own child aged above 10 or other lineal descendant or step-child	s 52(1)	20 years
Attempted incest – attempted sexual penetration with own child aged above 10 or other lineal descendant or step-child	s 52(2)	10 years

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**
Incest – Person aged above 18 who permits sexual penetration with father, mother or other lineal ancestor or step-father or step-mother	s 52(3)	5 years
Incest – sexual penetration with a person above the age of 10 known to be his sister, half-sister, brother or half-brother	s 52(4)	7 years
Attempted incest – attempted sexual penetration or assault with intent to take part in sexual penetration of a person aged above 10 known to be his sister, half-sister, brother or half-brother	s 52(5)	5 years
Procuring an act of sexual penetration by threats or intimidation or fraud	s 54	5 years
Administering a drug, matter or thing or causing a drug, matter or thing to be taken by a person for the purposes of sexual penetration	s 55	10 years
Abduction or detention with intent to marry or take part in an act of sexual penetration	s 56	10 years
Abduction of person aged under 18 from possession of parents with intent to take part in an act of sexual penetration	s 57	5 years
Bestiality	s 58	5 years
Procuring or attempted procuring of sexual penetration with a third person or prostitute	s 59	5 years

Offence	*Crimes Act 1958* (Vic)	Maximum penalty
Owner or occupier allowing person under the age of 18 to take part in an act of sexual penetration: if person aged under 13 years	s 60	10 years
if person under the age of 18 years		5 years
Unlawful detention for the purpose of sexual penetration	s 61	5 years

24.1.6.7 – 1 April 1959 to 28 February 1981[3356]

Offence	*Crimes Act 1958* (Vic)	Maximum penalty
Rape	s 44(1)	20 years
Rape with mitigating circumstances	s 44(2)	10 years
Attempted rape or assault with intent to rape	s 45	10 years
Carnal knowledge and abuse of a girl under the age of 10	s 46	20 years
Attempted carnal knowledge and abuse or assault with intent of a girl under the age of 10	s 47	10 years
Carnal knowledge and abuse of a girl aged between 10 and 16	s 48(1)	10 years
Carnal knowledge and abuse of a girl aged between 10 and 16 where the offender is a schoolteacher and the girl his pupil	s48(1)	15 years
Attempted carnal knowledge and abuse of a girl aged between 10 and 16	s 48(2)	3 years Misdemeanour*[3357]
Attempted carnal knowledge and abuse of a girl aged between 10 and 16 where the offender is a schoolteacher and the girl is a pupil		5 years Misdemeanour*

[3356] Prior to the amendments commencing on 1 March 1981, Victoria's sexual offences were largely as enacted by the original *Crimes Act,* which came into operation on 1 April 1959. Minor amendments in 1961 and 1967 are also indicated in this table.

[3357] * Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Crimes) Act 1981* (Vic).

Offence	*Crimes Act 1958* (Vic)	Maximum penalty
Carnal knowledge of an unmarried female between the age of 16 and 18 where the offender is aged above 21	s 50(1)	12 months
Incest – carnal knowledge of a daughter, lineal descendant or step-daughter above 10 years of age	s 52(1)	20 years
Incest – attempted carnal knowledge or assault with intent of a daughter, lineal descendant or step-daughter above 10 years of age	s 52(2)	10 years
Incest – carnal knowledge of a sister or mother above 10 years of age	s 52(3)	7 years
Incest –attempted carnal knowledge of a sister or mother above 10 years of age	s 52(4)	5 years
Incest – woman or girl who consents to her father or other lineal ancestor or step-father or brother or son having carnal knowledge of her	s 53	5 years
Person employed in any mental hospital or person having the care of any female patient who carnally knows or attempts or assaults with intent any female under care and treatment	s 54(1)	5 years Misdemeanour*
Indecent assault of a woman or girl	s 55	3 years or in the case of a second offence, 10 years Misdemeanour*
	From 8 November 1967 (Act No 7577)	5 years or in the case of a second offence, 10 years
Procuring or attempting to procure a woman to have a carnal connection	s 56	2 years Misdemeanour*
	From 26 April 1961 (Act No 6761)	5 years Misdemeanour*
Carnal connection by threats, intimidation, or fraud	s 57	2 years Misdemeanour*
Owner or occupier permitting carnal knowledge of a girl under the age of 13	s 58	10 years Felony*
Owner or occupier permitting carnal knowledge of a girl between the age of 13 and 16	s 58	2 years Misdemeanour*
	To 25 April 1961 (Act No 6761)	
	s 58	5 years

Offence	*Crimes Act 1958* (Vic)	Maximum penalty
Owner or occupier permitting carnal knowledge of a girl between the age of 13 and 18	To 25 April 1961 (Act No 6761)	Misdemeanour*
Abduction of a girl under the age of 18 with intent to have carnal knowledge	s 59 Before 26 April 1961	2 years Misdemeanour*
	s 59 From 26 April 1961 (Act No 6761)	5 years
Unlawful detention of any woman or girl to have carnal knowledge	s 60	2 years Misdemeanour*
	s 60 From 26 April 1961 (Act No 6761)	5 years
Abduction of woman from motives of lucre with intent to marry or carnally know	s 61	15 years
Forcible abduction of any woman with intent to marry or carnally know	s 62	10 years
Buggery with any person or animal	s 68(2)	15 years
Attempted buggery or assault with intent to commit buggery with any person or animal	s 68(3)	10 years Misdemeanour*
Indecent assault upon a male person	s 68(3) Before 8 November 1967	10 years Misdemeanour*
	s 68(3) From 8 November 1967	5 years
Indecent assault upon a male person (with prior convictions)	s 68(3B) From 8 November 1967	10 years
Gross indecency with or in the presence of any girl under 16 years of age	s 69	2 years or in the case of a second offence, 3 years Misdemeanour*
Gross indecency with any male person	s 69(4)	3 years Misdemeanour*

24.1.7 – Commonwealth offences

There are a number of current Commonwealth offences relating to sexual misconduct. Those that target certain specialised classes of offending (eg, genocide, crimes against humanity, and war crimes) have been excluded from this table.

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty
Sexual intercourse with a child outside Australia	s 272.8	20 years

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty
Sexual activity (other than intercourse) with child outside Australia	s 272.9	15 years
Aggravated sexual intercourse or sexual activity with a child outside Australia[3358]	s 272.10	25 years
Persistent sexual abuse of a child outside Australia	s 272.11	25 years
Sexual intercourse with a young person outside Australia – defendant in position of trust or authority	s 272.12	10 years
Sexual activity (other than intercourse) with a young person outside Australia – defendant in position of trust or authority	s 272.13	7 years
Procuring child to engage in sexual activity outside Australia	s 272.14	15 years
Grooming child to engage in sexual activity outside Australia	s 272.15	12 years
Benefitting from sexual offences against children outside Australia	s 272.18	20 years
Encouraging sexual offences against children outside Australia	s 272.19	20 years
Preparing for or planning offences involving sexual intercourse or activity against children outside Australia	s 272.20(1)	10 years
Preparing for or planning offences involving sexual intercourse or activity with young person outside Australia	s 272.20(2)	5 years

[3358] These offences are aggravated if the child has a mental impairment, the offender is in a position of trust or authority in relation to the child, or the child is under the offender's care, supervision or authority. *Criminal Code Act 1995* (Cth) s 272.10(b) ('*Criminal Code*').

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty
Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia+[3359]	s 273.6	15 years
Aggravated possessing, controlling, producing, distributing or obtaining child abuse material outside Australia+	s 273.7	25 years
Possession of child-like sex dolls etc	s 273A.1	15 years
Using a postal or similar service for child abuse materials	s 471.19	15 years
Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service++[3360]	s 471.20	15 years
Aggravated offence of using a postal or similar service for child abuse materials++	s 471.22(1)(a)(iii)	25 years
Aggravated offence of possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service++	s 471.22(1)(a)(iv)	25 years
Using a postal or similar service to procure persons under 16	s 471.24	15 years
Using a postal or similar service to groom persons under 16	s 471.25	12 years
Using a postal or similar service to send indecent material to person under 16	s 471.26	7 years
Aggravated offences involving private sexual material – using	Standard aggravated offence s 471.17A(1)	5 years

[3359] + These possession etc offences are aggravated if the offender has committed the offence on 3 or more separate occasions and each offence involves 2 or more people. *Criminal Code* ss 273.7(1)(a)-(b).

[3360] ++ These postal offences involving child abuse materials are aggravated if the offender commits an offence on 3 or more separate occasions and each offence involves 2 or more people. *Criminal Code* s 471.22(1).

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty
a carriage service to menace, harass or cause offence	Special aggravated offence s 471.17A(2)	7 years
Using a carriage service for child abuse material+++[3361]	s 474.22	15 years
Possession or controlling child abuse material obtained or accessed using a carriage service+++	s 474.22A	15 years
Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service+++	s 474.23	15 years
Aggravated offences involving use of a carriage service and child abuse material+++	s 474.24A	25 years
Using a carriage service for sexual activity with person under 16 years of age	s 474.25A	15 years
Aggravated use of a carriage service for sexual activity with person under 16 years of age[3362]	s 474.25B	25 years
Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16	s 474.25C	10 years
Using a carriage service to procure persons under 16 years of age	s 474.26	15 years
Using a carriage service to groom persons under 16 years of age to engage in sexual activity with the offender or another	ss 474.27(1)-(2)	12 years

[3361] +++ These offences involving use of a carriage service and child abuse materials are aggravated if the offender commits an offence on 3 or more separate occasions and each offence involves 2 or more people. *Criminal Code* s 474.24A(1)

[3362] This offence is aggravated if the child has a mental impairment, the offender is in a position of trust or authority in relation to the child, or the child is under the offender's care, supervision or authority *Criminal Code* s 474.25B(1).

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty
Using a carriage service to groom persons under 16 years of age to engage in sexual activity with another person under 18 years of age in the presence of the offender or another	s 474.27(3)	15 years
Using a carriage service to transmit indecent communication to person under 16 years of age	s 474.27A	7 years

24.1.8 – Current sentencing practices

Sentences for serious sexual offences have increased in recent years; [3363] most significantly for rape and incest,[3364] following the decisions in *Dalgliesh* which established both that current sentencing practices for incest were inadequate, and that current sentencing practices are not a controlling consideration in the sentencing process.[3365]

24.1.8.1 – Historic sex offences[3366]

Many sex offences are not prosecuted until years after their occurrence. It is well-established that for the purpose of s 5(2)(b) of the *Sentencing Act 1991* (Vic) ('the Act'), "current sentencing practices" means the practices which apply at the time of *sentencing*, rather than at the time of offending.[3367] Contemporary practice reflects a greater understanding of the impact sex offending has on the victim, and so a court may bring its present understanding of that impact to bear even though it may not have been a feature of sentences imposed at the time of the offending.[3368]

But this is a complex exercise because in addition to considering sentencing practices at the time of sentencing, equal justice also requires a court to consider sentencing practices at the time of *offending* if it can be shown they would 'have required the imposition of a materially lesser sentence for like offences'.[3369] However, if it was the offender's conduct which made it impossible for them to have been

[3363] *DPP (Vic) v Lian* [2019] VSCA 75, [60] ('*Lian*').
[3364] Ibid. See also *DPP (Vic) v Cooper (a pseudonym)* [2017] VSCA 8, [68]-[70] ('*Cooper*'); *Shrestha v The Queen* [2017] VSCA 364, [3], [31] ('*Shrestha*'); *Grantley (a pseudonym) v The Queen* [2018] VSCA 112, [35]; *DPP (Vic) v MacArthur* [2019] VSCA 71, [75]-[77], [81] ('*MacArthur*').
[3365] See, eg, *DPP (Vic) v Dalgliesh (a pseudonym)* [2017] VSCA 148 ('*Dalgliesh I*'); *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 ('*Dalgliesh HCA*'); *DPP (Vic) v Dalgliesh (a pseudonym)* [2017] VSCA 360 ('*Dalgliesh II*'); *Shawcross (a pseudonym) v The Queen* [2019] VSCA 295, [65] ('*Shawcross*'). See also See 5.2.9.2 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices – Changes to current sentencing practices.
[3366] See also 5.2.9.2.1 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices – Changes to current sentencing practices – Sentencing practice for historic offences.
[3367] *Stalio v The Queen* (2012) 46 VR 426, 432-33 [11]-[12], [14], 445 [78]; *Bromley* [49].
[3368] *Bromley* [51].
[3369] *Mush v The Queen* [2019] VSCA 307, [106]-[107] ('*Mush*'). See also *Bromley* [49]-[50].

sentenced contemporaneously with the offending, they may not be able to contend they should be treated as if their criminal responsibility had been established at that time.[3370] Lastly, since there is a tension between these requirements and the need to consider this in light of the maximum penalty in force at the time of the *offending*,[3371] it is an area where care is required.

The key point is that current sentencing practices are only one of the many factors that a sentencing court has to consider. Previous cases are not precedents and while they may provide a broad sense of the appropriate parameters they do not necessarily demonstrate there is a material difference between practices at the time of offending and the time of sentencing. They may be sufficiently harmonious to comply with the requirements of equal justice.[3372]

24.1.8.2 – Sexual offences against adults

Absent exceptional circumstances, rape offences usually attract an immediate custodial term and the court should ensure that a substantial part of the sentence will actually be served.[3373] But since rape covers a wide spectrum of criminal liability and each case must be considered in light of its particular circumstances,[3374] some factors (usually in combination) such as an early plea of guilty, diminished culpability, genuine remorse, and instances where the victim supports or forgives the offender may be 'exceptional' and justify the imposition of a suspended, non–custodial, or substantially reduced term.[3375]

For sexual offences against adults other than rape, a greater range of sentences may be imposed. There is little guidance on sentencing practice for these other offences,[3376] and instances of sentences imposed in conjunction with more serious sexual offences may be of little guidance because the more serious offending may aggravate the overall offending or raise the significance of principles such as deterrence, denunciation and incapacitation.

24.1.8.3 – Offending against children

Sexual offending against children, particularly those under the offender's care and protection, is a gross breach of trust justifying a term of imprisonment. While there is no sentencing tariff for such offending because the circumstances may vary considerably, non-custodial terms are likely to be rare and particularly inappropriate where the offender has abused many victims over a significant period of time.

The fact that the offending against children involves the same physical acts does not make cases relevantly comparable.[3377]

[3370] *Mush* [109], citing *Bradley v The Queen* [2017] VSCA 69, [123]-[124].
[3371] *Bromley* [47].
[3372] *Mush* [110]-[111], citing *DalglieshHCA*.
[3373] *R v Schubert* [1999] VSCA 25, [16]; *R v Mason* [2001] VSCA 62, [7] ('*Mason*'); *R v Browne* [2002] VSCA 143, [29]-[30]; *DPP (Vic) v Fellows* [2002] VSCA 58, [32]-[35] ('*Fellows*'); *DPP (Vic) v Stewart* [2003] VSCA 197, [24] ('*Stewart*'); *DPP (Vic) v McInnes* [2017] VSCA 374, [69] ('*McInnes*').
[3374] *Lian* [53].
[3375] *DPP (Vic) v Sims* [2004] VSCA 129, [31]-[35] ('*Sims*'); *McInnes* [76], [79]; *DPP (Vic) v Cramp* [2019] VSCA 174, [63]; *Ivanov (a pseudonym) v The Queen* [2019] VSCA 219, [3]-[5], [10], [52]-[60], [139], [151], [159] ('*Ivanov*').
[3376] See, e.g., *Perry v The King* [2023] VSCA 218, [32].
[3377] *Soo v The Queen* [2014] VSCA 304, [26], [31], [42] ('*Soo*').

24.1.8.3.1 – Incest

In 2016, the Court of Appeal and then the High Court found that sentences for incest in the mid-range of seriousness were disproportionately low.[3378] The Court of Appeal called for sentences in such cases to be adjusted upwards[3379] and gave, as an example of inadequate sentencing, the case before it where three years and six months' imprisonment was imposed for incest resulting in pregnancy.[3380]

Consideration of an appropriate sentence for incest offences in this range must now take into account 'the dramatic change in sentencing parameters.'[3381]

Incest offences which attract longer sentences have usually involved offending that occurred over a long period, against younger children or multiple victims, accompanied by threats or violence, or which was multifaceted, perverse or depraved.[3382]

24.1.8.3.2 – Child abuse material

Absent exceptional circumstances, the possession, creation, or transmission of child abuse material will normally warrant an immediate term of imprisonment. However, each case depends on its own circumstances and a term of imprisonment is not necessarily appropriate, depending on the presence of mitigating factors.[3383]

Moreover, Commonwealth offences, such as using carriage service to access child abuse material,[3384] require a court to consider sentencing practices across Australia, not merely Victorian practice.[3385]

24.2 – Circumstances of the offence

24.2.1 – Harm

The law recognises that sexual offences are crimes of violence that cause appalling, and often irreparable, psychological and physical harm to the victims.[3386]

Rape is an intensely personal crime. The effects on the victim are not just those that flow from the physical invasion of their person and security, but also from the more intangible loss of their rights and

[3378] *Dalgliesh I* [7].
[3379] Ibid [128].
[3380] Ibid [62]-[64].
[3381] *Crawford (a pseudonym) v The Queen* [2018] VSCA 113, [57] ('*Crawford*').
[3382] *DPP (Vic) v CJA* [2013] VSCA 18, [35] ('*CJA*'); *Reid (a pseudonym) v The Queen* (2014) 42 VR 295, 312 [88] ('*Reid*'); *Thrussell (a pseudonym) v The Queen* [2017] VSCA 386, [161] ('*Thrussell*'); *Triangle (a pseudonym) v The Queen* [2021] VSCA 210, [55]-[81], [90].
[3383] *DPP (Cth) v Smith* [2010] VSCA 215, [26]-[29] ('*Smith*'); *DPP (Cth) v Guest* [2014] VSCA 29, [24], [48] ('*Guest*'); *DPP (Cth) v Garside* (2016) 50 VR 800, 810-11 [25], 819 [62] ('*Garside*'); *DPP (Cth) v Watson* (2016) 259 A Crim R 327, 342-43 [34] ('*Watson*'); *Dennis v The Queen* [2017] VSCA 251, [41] ('*Dennis*'); *DPP (Vic) v Meharry* [2017] VSCA 387, [166] ('*Meharry*'); *McNiece v The Queen* [2019] VSCA 78, [47] ('*McNiece*').
[3384] *Criminal Code* s 474.19.
[3385] See, eg, *Dennis* [94].
[3386] *Mush* [77].

freedoms.[3387] This significant impact of rape on the victim needs to be given proper weight in sentencing; it cannot be overlooked or undervalued.[3388]

It is also well established that the harm caused by sexual abuse of children and young people is severe and long lasting.[3389] And, more particularly, that 'severe psychological repercussions' are presumed to be the result of incest. In fact, in incest cases, harm of this sort, rather than physical harm, may be a primary consideration.[3390]

24.2.1.1 – Presumption of harm to children

In *Clarkson v The Queen* the Court of Appeal held that under the legislative scheme, a child under 16 cannot consent to sexual penetration.[3391] This prohibition has two purposes: protecting the child from harm that can come from premature sexual activity; and deterring adults who would contemplate having sex with someone under the age of 16.[3392] The prohibition is founded on a presumption that premature sexual activity will cause long term physical and psychological harm and is unaffected by the presence of apparent consent.[3393] To conclude otherwise, and to treat apparent consent as mitigating would run counter to the legislative purpose.[3394]

The *Clarkson* presumption of harm is rebuttable. In circumstances where the apparent consent is freely given and reflects genuine affection, the offender may be able to demonstrate that the circumstances of offending are not likely to cause the kinds of harm the law presumes flow from premature sexual activity. This will require the court to focus on the circumstances in which consent was given, rather than on the mere fact of consent. In particular, the court will look at the ages of the offender and the victim, and whether consent was given in circumstances of exploitation or abuse of trust.[3395]

Rebutting the presumption will be likely to succeed only in very limited circumstances. A statement from the child victim will not be sufficient to establish that no harm was caused or is likely to occur.

[3387] *Mason* [8].
[3388] *Gray (a pseudonym) v The Queen* [2018] VSCA 163, [53]. See also *DPP (Vic) v Moses* [2009] VSCA 274, [18]-[19] ('*Moses*'). But see *A-G (Vic) v Harris* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Strake, Crockett and Gray JJ, 11 August 1981) 6-7 (the rape of a sex worker is not as grave because she supposedly won't react with the same revulsion to a forced sexual act as would a 'chaste' woman). And before dismissing this as the statement of an older, less enlightened, era, see *Onnis v The Queen* [2013] VSCA 271, [27]-[28] (procuring sexual penetration by fraud from a sex-worker is less serious than it is from 'a woman to whom the idea of selling herself is anathema' since all that a sex-worker purportedly forgoes is her fee and as this is compensable it does not, by itself, rank 'as especially grave').
[3389] *Fichtner v The Queen* [2019] VSCA 275, [66] ('*Fichtner*'); *Lugo (a pseudonym) v The Queen* [2020] VSCA 75, [6] ('*Lugo*'), quoting *DPP (Vic) v Walsh (a pseudonym)* [2018] VSCA 172 ('*Walsh*').
[3390] *R v Lomax* (1998) 1 VR 551, 559-60 ('*Lomax*'). See also *Dalgliesh II* [67]-[70]; *DPP (Vic) v Tewksbury (a pseudonym)* [2018] VSCA 38, [72] ('*Tewksbury*').
[3391] *Clarkson v The Queen* (2011) 32 VR 361, 364 [1], 367-68 [23]-[24] ('*Clarkson*').
[3392] *Clarkson* 368 [26]. See also *Nguyen* 482 [15]; *Woods v The Queen* [2019] VSCA 259, [133]-[134] ('*Woods*'); *Schembri v The Queen* [2020] VSCA 217, [75] ('*Schembri*').
[3393] *Clarkson* 371 [33], 371 [36], 372 [39]; *Wakim v The Queen* [2016] VSCA 301, [51] ('*Wakim*').
[3394] *Clarkson* 372 [37]. See also *Sims v The Queen* [2022] VSCA 114, [45].
[3395] The onus of disproving it rests on the offender. See *Adamson v The Queen* (2015) 47 VR 268, 282 [22], 293 [58] ('*Adamson*').

Independent expert evidence will normally be required, and it will only be in a very clear case that a material reduction might be warranted.[3396]

The *Clarkson* presumption of harm is founded on the rationale that children will be harmed by and must be protected from 'premature sexual experience of *all* kinds'.[3397] Specifically, the presumption of harm applies to both "cybersex" offences and those committed "in person".[3398] Legislation prohibiting in person offending and cybersex offences both have the same objectives of deterring offenders and protecting children, so there is no basis for distinguishing between them.[3399]

The fact that cybersex offences may occur without physical proximity is irrelevant because the internet permits intimidation and coercion to be employed to ensure the child's participation.[3400] It is also irrelevant that the child may be exploring their sexuality online or may even enjoy the attention of the offender; this does not relax the protections for children online. Similarly, the attitude, demeanour, conduct, "attractiveness" of the victim, and their effect on the respondent is irrelevant. Harm continues to be presumed by the interaction, with the responsibility on adults to avoid premature sexual activity with children under 16.[3401] This also includes "preparatory"' offending, such as procuring or grooming, and offending where the age of the victim is extended to include children who are 16 or 17.[3402]

The degree of harm will vary according to the objective gravity of the conduct; the character of the offending affects the severity of the harm that is inferred, and it may be lessened where the offending is less serious.[3403] Where the content of the activity is less sexually explicit the gravity of the offending may be reduced, in some instances to the point where it is almost negligible.[3404] Where there is no child victim (such as where a communication-based offence is committed with a police officer who is posing as a child) the presumption does not apply.[3405]

24.2.2 – Gravity and culpability

Offences that violate the bodily integrity and personal dignity of another person by means of sexual intrusion are serious. This is reflected in the maximum penalties for sexual offences, which stretch to 25 years' imprisonment.[3406]

[3396] *Clarkson* 372 [53]; *Treloar* [34]-[39]. See also *Adamson* 288-89 [44] (presumption unlikely to be displaced where communication is overtly sexual in nature) and [58] (ordinarily difficult to overcome the presumption).
[3397] *Adamson* 281-83 [20] (emphasis added).
[3398] Ibid 279 [15]-[16], 282-83 [23].
[3399] Ibid 282-84 [23], [25], [27], 293 [56].
[3400] Ibid 284 [28]. See also *Meadows v The Queen* [2017] VSCA 290, [44] ('*Meadows*') (geographic distance between the offender and the victim is irrelevant as the offender's pursuit of his sexual objective may not be dependent on making direct contact with the victim) and *Kebriti v DPP (Cth)* [2019] VSCA 275, [9], [30] ('*Kebriti*') (offence of using a carriage service to procure a person under 16 for sex is complete regardless of whether a meeting actually occurs).
[3401] *Adamson* 284-85 [29], [31]; *Abad* [34]-[35], [81].
[3402] *Adamson* 289-93 [45]-[57].
[3403] Ibid 287-89 [37]-[44].
[3404] Ibid 293 [58].
[3405] Ibid 285 [30].
[3406] But see, eg, *Traeger (a pseudonym) v The Queen* [2019] VSA 231, [2] (indecent assault is a serious offence, but given the maximum penalties of the two, it is significantly less so than rape). See also *Cummins* 331 [68].

The gravity of a sexual offence depends on the circumstances of the case.[3407] For penetration offences, there is no hierarchy of penetration making one offence inherently more or less severe than another.[3408] For example: although digital rape does not involve some of the risks of penile rape, namely disease and pregnancy, that does not mean a particular instance of it is less serious. An assessment of gravity, as always, depends on the facts of the case.[3409]

However, sexual offences that involve a breach of trust,[3410] or which occur in the victim's home,[3411] where they have a right to feel safe, are particularly egregious.

24.2.2.1 – Rape

Rape must always be regarded as a very serious offence as indicated by the maximum penalty of 25 years.[3412] But there are no universal or inflexible sentencing principles for the offence;[3413] rape encompasses a wide range of culpability, and a sentence that is appropriate in one case may be manifestly inadequate in another, or even manifestly excessive in yet a third.[3414]

In particular, there is no rule that a rape committed by a partner or former partner is intrinsically more or less serious than one committed by a stranger.[3415]

In assessing the gravity of rape (or attempted rape) and the offender's culpability, the following factors are relevant.

1. The existence of premeditation or planning.[3416] A rape that is opportunistic may tend to make the offending less culpable than one that has been premeditated or planned.[3417] However, the characterisation of an attack as "unpremeditated" ceases when the offending persists.[3418] Stalking and attacking a woman at night is incredibly serious, predatory behaviour.[3419]
2. Was the offending in company? If so, this will likely heighten the culpability of the offender as it is seen as being more vicious and cowardly and underlining the victim's powerlessness.[3420] "Taking it in turns" rape is particularly appalling because it treats the victim as mere chattel.[3421]

[3407] *Ibbs v The Queen* (1987) 163 CLR 447, 452.
[3408] *Lomax* 558-59; *Tewksbury* [67]; *DPP (Vic) v Elfata* [2019] VSCA 63, [36].
[3409] *MacArthur* [81]. See also *R v Brown* (2002) 5 VR 463, 478 [57] ('*Brown*').
[3410] *DPP (Vic) v Coffey* [1999] VSCA 146, [3], [29] ('*Coffey*'); *Heathcote (a pseudonym) v The Queen* [2014] VSCA 37, [48] ('*Heathcote*'); *Wakim* [52]; *Cooper* [71].
[3411] See, eg, *Fellows* [37]; *Sims* [13] (Batt JA); *Moses* [22]; *Heathcote* [48]; *Mush* [71].
[3412] *Lian* [52]. See also *Brown* 478 [59]; *Stewart* [24]; *Moses* [20]; *Hasan v The Queen* (2010) 31 VR 28, 38 [40] ('*Hasan*'); *MacArthur* [63] (rape and attempted rape).
[3413] *Mason* [7].
[3414] *Coronado v The Queen* [2016] VSCA 86, [20] ('*Coronado*'), citing *R v Simon* [2010] VSCA 66, [60].
[3415] *Mason* [7]. See also *Shrestha* [17]; *MacArthur* [65], [75].
[3416] *Jurj v The Queen* [2016] VSCA 57, [80] ('*Jurj*'). See also *R v MDB* [2003] VSCA 181, [11] ('*MDB*'); *R v Welsh* [2005] VSCA 285, [38] ('*Welsh*'); *Shrestha* [17]; *Grey (a pseudonym) v The Queen* [2018] VSCA 163, [47], [49] ('*Grey*').
[3417] *Coronado* [22(a)].
[3418] *Jurj* [84]. See also *Lian* [71]; *DPP (Vic) v Beck* [2021] VSCA 88, [56] ('*Beck*').
[3419] *Shrestha* [19]. See also *MacArthur* [62].
[3420] *Jurj* [80], [82]. See also *DPP (Vic) v Granata* [2016] VSCA 190, [77] ('*Granata*'); *Shrestha* [18]; *Lian* [101].
[3421] *Jurj* [87].

3. The duration of the offending?[3422] Rape committed over a very limited duration will tend to be less serious than rapes committed over a longer period.[3423] Persistent and prolonged offending is an aggravating factor as it is likely to heighten the victim's fear and harm.[3424]
4. Was there a single instance or multiple instances of offending?[3425] Successive instances of rape may also heighten the victim's fear and the offender's culpability.[3426] Multiple rapes occurring in one episode are successive crimes and gravity is not lessened for any single one. Each attack is a 'conscious, deliberate choice to violate the person'.[3427] The offender's culpability might then be heightened not only because of the victim's increased fear, but because each time the offender is more aware of their suffering.[3428]
5. Was the rape accompanied by violence or threats of violence[3429] (either to the victim or their family)?[3430] Rapes accompanied by violence are viewed as being at the higher end of seriousness and may even be 'akin to torture over a protracted period'.[3431]
6. Was a weapon was used, either to force compliance[3432] or as the means of raping the victim?[3433]
7. The degree of harm, pain, or injury to the victim.[3434]
8. Was a condom used? Having unprotected sex and ejaculating in the victim is aggravating because it is a reckless act that creates a risk of unwanted pregnancy and sexually transmitted disease.[3435] If there is no risk of pregnancy or sexually transmitted disease, gravity may be moderated.[3436]
9. Whether the victim was humiliated or degraded, such as by being treated as nothing more than an object to be used for the offender's gratification.[3437] Offending committed in public or in front of others is considered humiliating and degrading.[3438] So too, is filming sexual acts the victim was made to perform.[3439]

[3422] Ibid [80]. See also *Welsh* [39]; *Moses* [59]; *Granata* [77]; *Shrestha* [18]; *Grey* [48]; *Mush* [71].
[3423] *Coronado* [21], [23(g)].
[3424] *Jurj* [88]-[92].
[3425] Ibid [80]. See also *Welsh* [39]; *Moses* [59]; *Granata* [77]; *Shrestha* [18]; *Mush* [71].
[3426] *Moses* [47], [59].
[3427] *Mush* [72].
[3428] Ibid [73], citing *DDJ* 452 [32]; *DPP (Vic) v Mokhtari* [2020] VSCA 161, [42]-[43]. Care must be taken, however, not to doubly punish the offender and to be mindful of the requirements of totality. See, eg, 3.3 – Sentencing principles – Totality and 3.4.1 – Sentencing Principles – Double punishment – Sex offences.
[3429] *Jurj* [80]. See also *Brown* 478 [59]; *MDB* [11]; *Granata* [77]; *Shrestha* [17]; *Grey* [48]; *MacArthur* [64], [75]; *Mush* [71]-[72]; *Kalofolias v The Queen* [2019] VSCA 308, [53] ('*Kalofolias*'); *DPP (Vic) v Patil (a pseudonym)* [2020] VSCA 337, [57] ('*Patil*').
[3430] *MDB* [11]; *Granata* [29], [77].
[3431] *Granata* [24].
[3432] *Jurj* [80]. See also *MDB* [11]; *Moses* [54].
[3433] *Granata* [77].
[3434] *Jurj* [80]. See also *Brown* 478 [59]; *Welsh* [38]; *Granata* [77]; *Grey* [53]; *Lian* [101]; *Mush* [71]-[72], [76].
[3435] *Hasan* 37 [38].
[3436] *Shrestha* [18].
[3437] *Jurj* [80]. See also *Brown* 478 [59]; *Welsh* [38]; *Grey* [48]; *MacArthur* [64]-[65]; *Mush* [76]; *Guirguis v The Queen* [2020] VSCA 48, [37]; *Patil* [56]-[57].
[3438] *MacArthur* [75]. See also *MDB* [11]; *Mush* [71], [76]; *Beck* [56].
[3439] *Granata* [77].

10. The vulnerability of the victim.[3440] Taking advantage of a sleeping victim, when she cannot protest or resist, is aggravating and a highly culpable act.[3441] Similarly, a tourist or traveler, who is alone and isolated from the support of friends and family is also vulnerable.[3442]
11. Did the offending occur despite the victim's protest or resistance? Ignoring the victim's pleas to stop and their distress[3443] is relevant as it can underline the humiliation and harm suffered.[3444]
12. Was there any relationship between the offender and the victim?[3445] There is no principle that sexual offences committed in the context of a previous or existing relationship are necessarily more or less serious than offences committed by a stranger.[3446] However, sexual violence used to punish or humiliate a partner or ex-partner, or to try and force them to return to a relationship, is usually viewed as particularly grave.[3447] Similarly, the offender's position of authority and power over the victim is relevant to gravity.[3448]
13. Was the victim restrained or imprisoned?[3449] This does not need to be a physical restraint. The extent to which an offender terrifies and dominates the victim by threats and other actions may make their failure to physically isolate her of little relevance, as isolation may occur as the result of psychological control.[3450]
14. The location of the offence. If it is in the victim's home, the family home or a parent's home, where the victim is entitled to feel safe, the offending may be aggravated.[3451] Similarly, isolating the victim or attacking them in a remote or distant area may be relevant to the gravity of the offending.[3452]

24.2.2.2 – Offences against children

'Sexual crimes against children are abhorrent'[3453] and are 'without question' serious offences.[3454] Particularly where the offending involves a breach by one in a position of care or trust.[3455] Courts have denounced these offences as 'inherently evil and depraved', violating the basic norms of civilised behaviour and striking at the value the community places on the lives and wellbeing of the young.[3456]

[3440] *Jurj* [80]. See also *Shrestha* [17]; *Kalofolias* [46], [53]; *Mush* [71].
[3441] *Hasan* 37 [37].
[3442] See, eg, *Granata* [77]; *MacArthur*.
[3443] *Jurj* [80]. See also *MDB* [11]; *Lian* [70], [101]; *MacArthur* [64], [75]; *Mush* [76]; *Kalofolias* [53]; *Beck* [56].
[3444] *Jurj* [83].
[3445] *Mason* [8]; *Johns (a Pseudonym) v The Queen* [2016] VSCA 97, [33]; *Granata* [36].
[3446] *R v Harris* [1998] VR 21, 28.
[3447] *DPP (Vic) v Bastan* [2009] VSCA 157, [36]; *Marrah v The Queen* [2014] VSCA 119, [24]. Cf *Ivanov*.
[3448] *Kalofolias* [46], [53].
[3449] *MDB* [11]; *Moses* [59].
[3450] *Granata* [28]-[30].
[3451] *R v Groom* [1999] 2 VR 159, 171 [44]; *Fellows* [37]; *Sims* [13] (Batt JA); *Moses* [22]; *Reid* 304 [52]; *Horton (a pseudonym) v The Queen* [2015] VSCA 319, [149]; *Cooper* [18]; *Fichtner* [71], [76]-[79]; *Mush* [71].
[3452] *R v Camilleri* (2001) 119 A Crim R 106; *DPP (Vic) v Werry* (2012) 37 VR 524; *Jurj* [9], [11].
[3453] *McPherson v The Queen* [2014] VSCA 59, [50] ('*McPherson*').
[3454] *Soo* [33].
[3455] *Waldon v The Queen* [2016] VSCA 260, [30] ('*Waldon*'). See also *Clunie* [7], [55], [71].
[3456] *Fichtner* [67]. Sexual offences against cognitively impaired people are equally serious and their gravity may be compared with sexual offences against children. See, eg, *DPP (Vic) v Barnes* [2007] VSCA 51, [8] ('*Barnes*'). See also *R v Wu* [1999] VSCA 209, [16]-[18]; *Hawke v DPP (Cth)* [2019] VSCA 276, [27].

While *Dalgliesh* did not explicitly call for an uplift in sentences for sexual offending against children other than incest,[3457] its observations regarding the seriousness of such offending 'are directly relevant to sentencing for all offences of that nature'.[3458] While the categories of sexual offences against children 'covers a broad range of human perversity',[3459] common factors relevant in assessing gravity and the offender's culpability include:

1. Was there a betrayal of trust, either of the child victim or their parents, such as where the offender uses their position as a religious leader, teacher, or family friend to abuse the child?[3460] Protestations of love for the child cannot mitigate the breach of trust involved in such offending.[3461]
2. The duration of the offending.[3462] Abuse over a protracted period is more serious[3463] and goes to the offender's culpability as it shows a level of insight into the seriousness of their conduct.[3464]
3. Was there premeditation or planning, including "grooming"?[3465] Grooming offences are not at the low end of seriousness if they are committed over a period of time, involve sexualised messaging or images, and the offender encourages the child to meet for sex, to send explicit photos, or delete messages.[3466] The explicitness of the language used may increase the seriousness of a grooming offence since it may advance the objective of procuring the victim's participation in sexual activity.[3467] Conversely, grooming offences may fall at the lower end of the range where the offender does not seek to procure sex for themselves or another, offers no inducement, does not suggest or arrange a meeting, and does not disguise their identity or age.[3468]
4. The vulnerability of the child,[3469] which may be exacerbated if they are impaired by alcohol.[3470]
5. Was there a significant age difference between the offender and the child,[3471] or an imbalance in power or authority between the two?[3472] The greater any age difference the more serious the offence and the offender's culpability. If the age difference is not great and the sexual activity was

[3457] *Shawcross* [55].
[3458] Ibid [57].
[3459] *Soo* [26].
[3460] *Coffey* [3], [29]; *DPP (Vic) v WJW* (2000) 2 VR 497, 500 [13] ('*WJW*'); *R v Garratt* [2002] VSCA 160, [30] ('*Garratt*'); *McPherson* [47]; *Soo* [36]; *Bussell (a pseudonym) v The Queen* [2014] VSCA 310, [26] ('*Bussell*'); *Gillespie (a pseudonym) v The Queen* [2018] VSCA 151, [65] ('*Gillespie*'); *Schulz v The Queen* [2019] VSCA 179, [109], [123]-[124] ('*Schulz*'); *Shawcross* [63]; *Fichtner* [71], [76], [78]-[80].
[3461] *WJW* 500 [14].
[3462] *WJW* 500 [13]; *Garratt* [30]; *Bussell* [26]; *Kebriti* [25]; *Shawcross* [63]; *Fichtner* [73], [76].
[3463] *DHC v The Queen* [2012] VSCA 52, [110] ('*DHC*'); *Browne (a pseudonym) v The Queen* [2015] VSCA 274, [106]-[107] ('*Browne*'); *Meharry* [155]-[156], [160].
[3464] *R v CVP* [2002] VSCA 193, [42]; *Gillespie* [65].
[3465] *DPP (Vic) v DL* [2006] VSCA 280, [49]-[50] ('*DL*'); *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [46]-[47] ('*Boyles*'); *DPP (Vic) v Swingler* [2017] VSCA 305, [54] ('*Swingler*'); *Meharry* [160]; *Schulz* [109], [123]; *Fichtner* [72], [78]-[80]; *Lugo* [30]-[31].
[3466] *Schulz* [110]. See also *Boyles* [46]-[48]; *Meadows* [42]-[43]; *Kebriti* [25]
[3467] *Meadows* [45].
[3468] *McNiece* [49].
[3469] *WJW* 500 [13]; *DL* [36], [50]; *Soo* [36]; *Browne* [107]; *Waldon* [31]; *Boyles* [46]-[47]; *Gillespie* [65]; *Schulz* [119], [123]; *Schembri* [64].
[3470] *DPP (Vic) v Hardy* [2011] VSCA 86, [19]; *NJ v The Queen* (2012) 36 VR 522, 535 [56]; *Schulz* [125]. See also *Shawcross* [48] (if the offender is under the influence of illegal drugs this may also aggravate the offending).
[3471] *WJW* 500 [13]; *Clarkson* 364 [6]; *BW v The Queen* [2013] VSCA 3, [9], [19], [35] ('*BW*'); *Soo* [36]; *Bussell* [26]; *Boyles* [46]-[47]; *Gillespie* [65]; *Schulz* [109]; *Schembri* [62].
[3472] *Clarkson* 364 [6]; *BW* [21]-[22]; *Boyles* [46]-[47], [55].

truly consensual, with the result that the presumption of harm[3473] is rebutted, gravity and culpability may be lessened.[3474]

6. The age of the child.[3475] While all sexual offences against children are serious, offences against very young children, all other things being equal, tend to be considered even more serious.
7. Was a condom used? Pregnancy or the risk of pregnancy or transmission of a sexually transmitted disease is aggravating. Unprotected sex goes to the offender's culpability as deliberately having unprotected sex with a child that results in pregnancy is by its nature an act of violence. An offender who wishes to establish there was no such risk must lead evidence to prove this was an impossibility.[3476]
8. Was there conduct that blames the child, denigrates them, or attempts to manipulate, coerce or bribe them into cooperation or silence? This may increase the offender's culpability.[3477]
9. The harm to the child; as noted, '[t]he objective gravity of sexual offending against children rests upon the presumption that harm will occur irrespective of whether it is immediate and manifest'.[3478] Further, where the gist of the offence is an indecent communication with a child, exposing a child to explicit sexual language has been described as self-evidently harmful.[3479]
10. Did the offender lack remorse?[3480]
11. Was additional violence, force or threats of violence? While the sexual penetration of a child is in itself an act of violence,[3481] use of additional violence is an aggravating circumstance.[3482] Further, a proven absence of consent will increase the gravity of the offending and the offender's culpability.[3483]
12. Was the offending in the presence of or did it involve another?[3484]
13. Was the abuse degrading and humiliating, either physically or verbally, such as by treating the child as an object for the offender's sexual gratification?[3485]
14. Was the offending against more than one child?[3486]

The absence of one or more of these factors is not necessarily mitigating. Rather, it may simply be characterised as the absence of an aggravating factor.[3487]

The fact that some time has passed since the sexual offending was committed against a child is irrelevant to objective gravity and the offender's culpability, since, as noted, these offences are often unlikely to be

[3473] See 24.2.1.1 – Presumption of harm to children.
[3474] *Clarkson* 364-65 [6]-[7]; *Best v The Queen* [2019] VSCA 124, [44]-[45], [55] ('*Best*'); *Rose (a pseudonym) v The Queen* [2022] VSCA 112, [70]-[71].
[3475] *Browne* [107]; *Boyles* [46]-[47]; *Meharry* [163]; *Fichtner* [79]; *Roberts v The King* [2023] VSCA 92, [16]-[17].
[3476] *WJW* 500 [13]; *Gillespie* [65]; *BM v The Queen* [2013] VSCA 3, [25], [27]-[28]; *Fichtner* [77], [79]; *Best* [37], [48].
[3477] *Garratt* [30]; *DL* [50]; *Browne* [107]; *Meharry* [160]; *Fichtner* [78]-[80].
[3478] *Adamson* 287 [36], 293 [56]; *Boyles* [46]-[47]; *Meharry* [165].
[3479] *Meadows* [46].
[3480] *DL* [37]-[38]; *Gillespie* [65].
[3481] *Dalgliesh I* [46]; *Dalgliesh HCA* 447 [57].
[3482] *Fichtner* [67], [76], [78]. See also *Meharry* [160].
[3483] *Clarkson* 364 [4], 371 [36].
[3484] *Meharry* [162]; *Fichtner* [77], [79].
[3485] *Jurj* [80]; *Meharry* [160]-[161]; *Fichtner* [76]-[77], [80]; *Schembri* [70].
[3486] *DPP (Vic) v Riddle* [2002] VSCA 153, [30]; *Meharry* [157]-[159].
[3487] *R v Dennis* (2000) 114 A Crim R 33, 38 [17]; *Clarkson* 382 [80]; *Adamson* 299 [83].

reported or detected for a substantial period of time.[3488] Nor is an offender's culpability or the gravity of an offence lessened in cases where the "child" is actually a covert police operative.[3489]

Incest

The most common forms of incest involve acts of sexual penetration by an offender against their minor children, step-children, or the children of their de facto partners.[3490] In practice, most of these offences may be viewed as an aggravated form of the broader category of child sex offences just discussed.

Incest is an offence that erodes the decency of family life and the trust of its young victims.[3491] Society and the courts have condemned incest in the strongest possible terms. It is an extremely serious crime, especially where it involves a breach of trust and responsibility by those who are responsible for caring for a child.[3492]

A plea of guilty to a charge of incest is 'entitled to more than just the usual utilitarian benefits'. This is because it means the victim and their family do not have to undergo the extreme stress of a trial.[3493]

Incest by a parent against a child carries a 25 year maximum penalty,[3494] and the gravity of incest offences will usually be affected by the same considerations as those affecting the gravity of serious child sexual offences.[3495] In assessing the gravity of incest, a court must consider the nature and extent of the offending, its frequency, duration, and the circumstances of its occurrence. Any of these may increase the gravity of the crime, the culpability of the offender, and the harm to the victim and their family.[3496] In addition to the general factors that apply to sexual offences against children, the following considerations are particularly relevant when sentencing for incest:

1. Violence[3497] and/or threats of violence.[3498] Incest involving an adult and a child is inherently a violent crime as it involves the sexual penetration and subordination of the child.[3499] It is terrifying and causes extreme pain.[3500] The significance of this violence and harm to the child

[3488] *Dick* 307-08.
[3489] *DPP (Vic) v Conos* [2021] VSCA 367, [64].
[3490] There are two other incest offences. The *Crimes Act* s 50E criminalises the conduct of the junior party in parent-child incest if they are over the age of 18, and s 50F addresses the incest of siblings regardless of age. Both carry a maximum penalty of five years' imprisonment. While the strongest comments in respect of incest offences that will be discussed in this section are generally not directed to these two offences, they still share some of the same condemnation, and in some instances of s 50F offences, where the offender is a much older sibling, the offence may bear all the characteristics of the most serious incest offences.
[3491] *DPP (Vic) v G* [2002] VSCA 6, [9] ('*G*').
[3492] *Dalgliesh I* [43], [123]; *Walsh* [1]; *McCray (a pseudonym) v The Queen* [2017] VSCA 340, [39]; *Lugo* [5]-[6].
[3493] *Reid* 321 [111]; *Carter* 187 [75].
[3494] Thereby reflecting 'the community's abhorrence of sexual crimes against children'. *Dalgliesh I* [78]
[3495] Which is not surprising as they all 'bear the hallmarks of abuse of power, breach of trust and lasting impact upon the victims'. *Clunie* [71].
[3496] *Tewksbury* [66], citing *Dalgliesh I* [73]. See also *Crawford* [67].
[3497] *R v PBW* [2003] VSCA 144, [34] ('*PBW*'); *Reid* 310-12 [84], [88]; *Thrussell* [161].
[3498] *Harlow (a pseudonym) v The Queen* [2018] VSCA 234, [86] ('*Harlow*').
[3499] *Dalgliesh I* [46]. See also *Tewksbury* [70]; *Walsh* [2]; *Pickford (a pseudonym) v The Queen* [2019] VSCA 195, [67] ('*Pickford*'); *Lewers (a pseudonym) v The Queen* [2019] VSCA 272, [67] ('*Lewers*'); *Lugo* [30]-[31].
[3500] *Dalgliesh I* [46]

cannot be overstated.[3501] Acts of incest that involve penetration are at the very high end of seriousness.[3502] However, 'any sexual touching of a child by a parent or guardian is to be viewed as very serious.'[3503]

2. Breach of trust.[3504] Incest involving a child is 'an offence of very high culpability' because it is contrary to the basic tenet of parental care for a child; 'every parent is taken to understand that sexual activity is absolutely prohibited'.[3505]
3. Degrading the child,[3506] such as by photographing or filming the abuse[3507] and posting the photos online. This is a permanent dissemination of degrading material that is difficult to erase.[3508] Similarly, offending in the presence of other family members, or involving other people in the offending, whether for financial gain or to share the child as a 'play-thing' are deplorable acts that substantially aggravate the offender's culpability by adding to the humiliation and degradation of the child.[3509]
4. Attempting to conceal or continue the offending by bribes, psychological coercion, or telling the child not to tell others is indicative of the seriousness of the offence and the offender's culpability.[3510]

A representative charge of incest may be viewed as significantly more serious, and the offender's culpability significantly greater, than if the charge had been based on a single or small number of acts.[3511]

24.2.2.3 – Child abuse material

While child abuse material offence are offences against children, the considerations that apply to these kinds of offences can be different to contact-based offences against children.

Child abuse material offences are considered especially grave.[3512] Production and viewing of child abuse material is an international problem that is becoming increasingly prevalent.[3513] In determining an adequate sentence for these offences, a court needs to be mindful of the fact that the internet is rapidly evolving and provides an easy means of exploiting children because the anonymity it affords increases

[3501] Ibid [47], [85], [129]. See also *Reid* 310-12 [84], [88]; *Cotton (a pseudonym) v The Queen* (2015) 45 VR 341, 354 [57] ('*Cotton*').
[3502] *Walsh* [21].
[3503] *Lugo* [34].
[3504] *R v McL* [1999] 1 VR 746, 778-79 [102] ('*McL*'); *PBW* [35]; *Reid* 311 [85], 320 [109]; *Dalgliesh II* [66]-[67]; *Thrussell* [161]; *Crawford* [76], [90]; *Walsh* [1]; *Harlow* [86]; *Lewers* [67], [69]; *Pickford* [66]; *Lugo* [34].
[3505] *Walsh* [33].
[3506] *Tewksbury* [68]. See also *Reid* 309-10 [79].
[3507] *R v Bellerby* [2009] VSCA 59, [39] ('*Bellerby*'). See also *McL* 778-79 [102]; *R v DH* [2003] VSCA 220, [12], [22], [28]-[30], [32]; *Reid* 312 [88]; *Tewksbury* [73].
[3508] *Reid* 310 [81], 320 [108].
[3509] *Bellerby* [33], [39]. See also *McL* 778-79 [102]; *PBW* [34]; *Reid* 309-10 [79], 312 [88].
[3510] *Crawford* [30], [48], [60], [76], [81], [90]; *Pickford* [66]-[67], [76]. See also *DPP (Vic) v Shearer (a pseudonym)* [2019] VSCA 47, [50].
[3511] *Walsh* [21].
[3512] *Garside* 808 [19].
[3513] Ibid 810-11 [25]. See also *Watson* 342-43 [34]; *Dennis* [41].

the difficulties in detecting such crimes.[3514] The expanded breadth of offending involving internet use and the increased maximum penalties for those offences are indicative of their gravity.[3515]

In *Minehan v The Queen*, the New South Wales Court of Criminal Appeal identified thirteen factors that are relevant to assessing the gravity of possession or dissemination or transmission of child abuse material:[3516]

- Whether actual children were used in the creation of the material.
- The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
- The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
- The number of images or items of material — in a case of possession, the significance lying more in the number of different children depicted.
- In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in *R v De Simoni* (1981) 147 CLR 383.
- In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
- Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
- The proximity of the offender's activities to those responsible for bringing the material into existence.
- The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
- Whether the offender acted alone or in a collaborative network of like-minded persons.
- Any risk of the material being seen or acquired by vulnerable persons, particularly children.
- Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
- Any other matter in … s 16A *Crimes Act 1914* (for Commonwealth offences) bearing upon the objective seriousness of the offence.

Several of these factors have been the subject of further comment.

Firstly, with regard to the nature and content of the material, Australian law enforcement classifies child abuse material into six levels reflecting a taxonomy of objective seriousness.[3517] Specifically, the Australian National Victim Image Library ('ANVIL')/Child Exploitation Tracking System ('CETS') scale which is as follows:

- Level 1 – Images depicting underage persons nude or in erotic poses with no sexual activity.

[3514] *Garside* 810-11 [25]. See also *Watson* 342-43 [34], 345-46 [45], 356 [90]; *Dennis* [41]; *Boyles* [89]-[95] (Tate JA).
[3515] *Watson* 341-42 [33], 356 [89]; *McNiece* [46].
[3516] *Minehan v The Queen* (2010) 201 A Crim R 243, 260-61 [94]. See also *D'Alessandro* 483-84 [21]. See also *Heathcote* [40], [42], [45]; *DPP (Cth) v Zarb* (2014) 46 VR 832, 842 [27] ('*Zarb*'); *Garside* 808 [20]-[21], 810 [25]; *Watson* 342-43 [34], 346 [47]-[48], 348 [56]; *Dennis* [41]; *Maine v The Queen* [2018] VSCA 56, [18] ('*Maine*').
[3517] *Smith* [25]; *Heathcote* [14]; *Maine* [6].

- Level 2 – Solo masturbation by a child or non-penetrative sex acts between children.
- Level 3 – Non-penetrative sexual activity between adults and children.
- Level 4 – Penetrative sexual activity between children only, or between children and adults.
- Level 5 – Sadism, bestiality or humiliation.
- Level 6 – Anime, cartoons, drawings and etc. depicting children engaged in sexual poses or activity.

The experience of courts is that such classifications are a helpful way to assist courts form a view about the nature and gravity of material.[3518]

But it is important to consider the actual content of the images, not merely their classification level.[3519] Even before the creation of a statutory regime governing random samples of seized child abuse material,[3520] courts considered it appropriate to receive a sample of material agreed by the parties to form an impression about its degree of depravity.[3521] The fact that material accessed is Level 1 does not necessarily lessen the gravity of the offending.[3522] 'Category 1 images are not benign or innocuous'.[3523] Assessing gravity by reference to categorisation level may lead to salient features being given insufficient consideration. There are varying degrees of seriousness of images within each particular category. The absence of material in higher categories cannot be allowed to minimise the gravity of possessing materials in the lower level categories.[3524]

In cases of personal possession or access, the number of children depicted and victimised also needs to be considered.[3525]

Secondly, and similarly, the number of images or items possessed is not necessarily determinative. The court must consider the culpability of the offender in the context of the offending as a whole.[3526] For example, in *Maine v The Queen*, the Court of Appeal said that although the number of images downloaded was low, this was outweighed by the offending having occurred very soon after the offender's completion of his non-parole period and rehabilitation program.[3527]

Assessing the objective seriousness of the offending cannot be a mathematical comparison of the number of images or videos accessed or possessed with those in other cases. Gravity must be assessed in light of the circumstances of each case[3528] and possessing only a 'moderate' number of images, compared to others, does not mean offending cannot be serious.[3529]

[3518] *R v Porte* [2015] NSWCCA 174, [75].
[3519] *Heathcote* [44]; *Smit v Western Australia* [2011] WASCA 124, [17] ('*Smit*').
[3520] See *Crimes Act* s 51V.
[3521] *Smit* [17]; *R v Jongsma* (2004) 150 A Crim R 386, 403-405 [33]-[35] ('*Jongsma*').
[3522] *Garside* 820 [67]; *Zarb* [30].
[3523] *Hutchinson v The King* [2022] VSCA 217, [36] ('*Hutchinson*').
[3524] Ibid 820-21 [71]; *Watson* 345-46 [43]-[46].
[3525] *Garside* 810-11 [25]; *Watson* 342-43 [34].
[3526] *Heathcote* [45].
[3527] *Maine* [19].
[3528] *Heathcote* [45].
[3529] *Dennis* [64].

Whether the possession or importation is for further distribution or sale, and whether the offender will profit, are somewhat blended.

The Court of Appeal has unequivocally said that the objective seriousness of using the internet to exploit children is grave, even if the offender is not procuring the exploitation. In other words, being charged only with accessing or possessing child abuse material does not mitigate the gravity of the offending or the offender's culpability.[3530] This is because possession of child abuse material is not a victimless crime; it encourages and creates a market for the corruption and exploitation of children who are sexually abused in order to meet demand.[3531] The offending will be further aggravated where there is evidence the offender possessed the material for the purpose of sale or further distribution, rather than personal use.[3532]

However, active involvement that goes beyond being a passive recipient, such as by the distribution or propagation of images, links an offender more closely to the market, increases the number of people viewing the material, and implicitly means they are more culpable given their affirmative acts of exploitation. Failing to earn a monetary profit from this offending does not detract from the offender's status as an active participant.[3533] Not paying to access child abuse material is similarly irrelevant. 'Children will continue to be sexually abused and degraded while there is a demand for this material, regardless of whether there is a commercial transaction involved'.[3534]

In addition, to the *Minehan* factors, Australian courts have also recognised the following factors as relevant in assessing the objective seriousness of child abuse material offences:

- the length of time the material was possessed,[3535] and whether the files were stored or sorted;[3536] and
- the duration of the offending, as gravity and culpability are increased where the offences are committed over a longer period of time.[3537]

24.3 – Circumstances of the offender

A court must not have regard to an offender's prior good character or lack of previous convictions when ***sentencing for a child sexual offence*** if it is satisfied that the prior good character or lack of convictions assisted them in committing the offence.[3538] This limitation only applies where the sentencing court is able to make a finding of fact that good character (or more often, the absence of prior convictions) was "of assistance" in the commission of the offences.[3539]

[3530] *Garside* 809 [22]. See also *D'Alessandro* 483 [21]; *Swingler* [55]. But see *Schulz* [112] (possession falls at the lower end of seriousness if the images are few and unsolicited).
[3531] *Garside* 810-11 [25]. See also *Jongsma* 394-95 [14], 400-01 [28]; *Watson* 342-43 [34]; *Dennis* [41]; *Lyons v The Queen* [2019] VSCA 242, [40].
[3532] *Heathcote* [45]; *DPP v Smith* [2010] VSCA 215, [25]; *R v Gent* (2005) 162 A Crim R 29; *R v Fulop* [2009] VSCA 296, [19].
[3533] *Heathcote* [42]. See also *McNiece* [53].
[3534] *Hutchinson* [41].
[3535] *Garside* 810-11 [25]; *Watson* 342-43 [34]; *Maine* [18].
[3536] *R v Fulop* (2009) 236 FLR 376, 380 [20].
[3537] *Garside* 821 [72]. See also *Zarb* 843 [31]; *Tewksbury* [95].
[3538] The Act s 5AA(1). See also *DPP (Cth) v D'Alessandro* (2010) 26 VR 477, 483 [21], 485 [27] ('*D'Alessandro*'); *Garside* 809-11 [23], [25]; *Watson* 342-43 [34]; *Dennis* [41]; *Schulz* [105].
[3539] See *Fichtner* [56].

'[T]his requires the court to be affirmatively satisfied of the connection' between character and offending, and also requires that the parties be allowed to make submissions on the point (upon which it further appears the Crown bears the burden of proof).[3540] One way in which good character might assist the offender in committing the offence 'is if the offender "takes advantage" of that status in some discernible way to commit the offending.'[3541]

But this is not the only way in which an offender can be so assisted, and the term is sufficiently broad and flexible to allow the court some scope to apply it justly depending on the circumstances.[3542] The requirement of "assistance" does not set a high causal threshold, but it does at least require that good character made a material contribution to the offender committing the offence.[3543]

24.4 – Sentencing purposes

In sentencing for sexual offences, courts regularly emphasise the following:

- general deterrence;[3544]
- specific deterrence;[3545]
- just punishment;[3546]
- protection of the community;[3547] and
- denunciation.[3548]

Rehabilitation, especially in cases of historic offending, may be a factor for mitigation but each case turns on its circumstances.

24.5 – Formulation of sentence

[3540] *DPP (Vic) v Ooms* [2023] VSCA 207, [61].
[3541] Ibid [62].
[3542] Ibid [63].
[3543] Ibid [64].
[3544] **Rape**: *Moses* [21], [59]; *Granata* [37]-[39], [122]; *MacArthur* [68]; *Lian* [59]; *Ivanov* [153]-[154]. **Sex offending against a child (including incest)**: *DPP (Vic) v David* [2003] VSCA 202, [13] ('*David*'); *DPP (Vic) v Toomey* [2006] VSCA 90, [14], [17] ('*Toomey*'); *G* [10]; *Soo* [37]-[38], [42]; *Browne* [71]; *Meadows* [47]-[49]; *Woods* [140]; *Shawcross* [63]; *Fichtner* [68]-[69]. **Cybersex**: *Adamson* 292 [53]; *Meharry* [166]. **Child abuse materials:** *Jongsma* 395 [15]; *D'Alessandro* 483 [21], 486-87 [36]; *Heathcote* [42]; *Guest* [29]; *Zarb* 843 [34]; *Watson* 342-43 [34]; *Garside* 810-11 [25]. **Sex offending against the cognitively impaired**: *Barnes* [8], [23].
[3545] **Rape**: *Moses* [21], [59]; *Granata* [37]-[39]; *Lian* [59]. **Sex offending against a child (including incest)**: *David* [13]; *G* [10]; *Soo* [37]-[38], [42]; *Fichtner* [68]-[69]. **Cybersex**: *Adamson* 292 [53]; *Watson* 349 [62]; *Meharry* [166]-[171]. **Sex offending against the cognitively impaired**: *Barnes* [8], [23].
[3546] **Rape**: *Moses* [21], [59]; *Lian* [59]; *MacArthur* [69]; *Ivanov* [153]-[154]; *Mush* [93]. **Sex offending against a child (including incest)**: *David* [13]; *G* [10]; *Soo* [37]-[38], [42]; *Shawcross* [63]; *Fichtner* [68]-[69]. **Cybersex**: *Meharry* [166].
[3547] **Rape:** *Moses* [21], [59]; *Granata* [37]-[39], [122]; *MacArthur* [68]; *Lian* [59]. **Sex offending against a child (including incest)**: *R v Connolly* [2004] VSCA 24, [40]; *G* [10]; *Meadows* [47]-[49].
[3548] **Rape**: *Granata* [37]-[39]; *MacArthur* [68]; *Lian* [59]; *Ivanov* [153]-[154]. **Sex offending against a child (including incest)**: *Dick* 307; *David* [13]; *Toomey* [14], [17]; *DHC* [110]; *Soo* [37]-[38], [42]; *Browne* [71]; *Dalgliesh I* [129]; *Woods* [140]; *Shawcross* [63]; *Fichtner* [68]-[69]. **Cybersex**: *Adamson* 292 [53]. **Sex offending against the cognitively impaired**: *Barnes* [8], [23].

Cumulation and concurrency

Sexual offences are often committed either in association with other offences, or as part of a substantial series of offences. As a result, courts must often make orders regarding concurrency and cumulation.

The rules guiding the discretion to order cumulation and concurrency may be found in Chapter 8.4.

For most offences, a court is less likely to order the cumulation of sentences where they arise out of a single incident involving a single victim, and where the individual offences do not involve fresh harm. However, in relation to sexual offending it is appropriate to acknowledge by orders for cumulation that acts closely associated in time do represent separate and substantial harms. The objective gravity of the total offending is relevant to assessing the need to cumulate sentences for individual offences.[3549]

Differentiating between rape offences by simple reference to the number of penetrative acts is a crude mechanism for determining punishment, particularly within the context of a complex progression of separate assaults, degradations, threats and rapes.[3550] Punishing an offender for successively degrading, harming, traumatising, and assaulting the victim is not double punishment. It properly characterises each offence in light of what came before and takes into account the 'appalling suffering to which the victim had already been subjected'.[3551]

Similarly, transmitting an explicit photo of sexual arousal to a child involves separate criminality from those parts of an online conversation where the offender sought to procure the child to take part in sexual activity, and some cumulation is appropriate.[3552]

Sex Offender Registration Orders

Commission of sexual offences, whether against adults or children, can lead to reporting obligations under the *Sex Offenders Registration Act 2004*. For information about that Act, see the Guide on the Judicial College's website.

However, a sentencing court must not consider any consequences that might flow from the making of any order under that Act.[3553]

Sentencing Options

A Drug Court order is not available for a sexual offence.[3554]

Indefinite sentences

[3549] *Granata* [40].
[3550] Ibid [82]-[83], [103], [112]-[113].
[3551] *Mush* [74]. See also *Crawford* [80], [84]. But see *Flynn v The Queen* [2020] VSCA 173, [108]-[132] (in a 'single transaction' case cumulating one-third of the sentence for a second charge of rape on the sentence imposed on the first charge of rape was 'significantly out of kilter').
[3552] *Kebriti* [26].
[3553] The Act s 5(2BC); *DPP (Vic) v Cartwright* (2015) 45 VR 168, 172 [12] n5.
[3554] The Act s 18Z(1)(a)(i).

The following sexual offences are 'serious offences' for which an indefinite sentence is available:

- Rape;
- Rape by compelling sexual penetration;
- Assault with intent to commit a sexual offence;
- Sexual penetration of a child or lineal descendant, unless both people are aged 18 or older and each consented to the sexual penetration;
- Sexual penetration of a step-child, unless both people are aged 18 or older and each consented to the sexual penetration;
- Sexual penetration of a sibling or half-sibling, unless both people are aged 18 or older and each consented to the sexual penetration;
- Sexual penetration of a child under 12;
- Sexual penetration of a child under 16;
- Persistent sexual abuse of a child under 16;
- Abduction or detention for a sexual purpose;
- Abduction or detention of a child under 16 for a sexual purpose;
- An offence under prescribed previous enactments;
- An offence that, at the time it was committed, was a serious offence; and
- An offence of conspiracy to commit, incitement to commit or attempting to commit one of the above offences.[3555]

[3555] Ibid s 3 (definition of 'serious offence').

25 – Causing injury

The offences covered in this chapter directly involve causing injury to another person, and the related offences of administering substances, intentionally causing a very serious disease, stalking, and assaults.

Kidnapping, blackmail, threats, and endangerment offences are considered in 26 – Other offences against the person.

The *Criminal Code Act 1995* (Cth) contains several offences relating to causing harm to individuals, normally in a narrowly defined class. The principles discussed here are generally relevant to sentencing for those offences as well.

25.1 – Penalties and current sentencing practice

25.1.1 – Penalties for causing injury offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty and minimum non-parole period (if applicable)**	**Maximum applies to offences committed on or after**
Intentionally causing serious injury in circumstances of gross violence	s 15A(1)	Level 3 imprisonment (20 years)*[3556] Minimum non-parole period - 4 years (5 years if victim is protected worker)[3557]	1 July 2013
Recklessly causing serious injury in circumstances of gross violence	s 15B(1)	Level 4 imprisonment (15 years)* Minimum non-parole period - 4 years (5 years if victim is protected worker)[3558]	1 July 2013

[3556] * Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). *Sentencing Act 1991* (Vic) ss 3, 5(2G), 160 ('the Act'). See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.
[3557] The Act ss 10(1), 10AA(1). In this chapter "protected worker" is shorthand for an emergency worker, custodial officer, or youth justice custodial worker on duty as referenced in s 5(2GA) of the Act.
[3558] The Act ss 10(1), 10AA(1).

Intentionally causing serious injury	s 16	Level 3 imprisonment (20 years)**[3559], +[3560] Minimum non-parole period – 3 years if victim is protected worker[3561]	1 September 1997
Recklessly causing serious injury	s 17	Level 4 imprisonment (15 years)** Minimum non-parole period – 2 years if victim is protected worker[3562]	1 September 1997
Intentionally causing injury	s 18	Level 5 imprisonment (10 years)** Minimum non-parole period – 6 months if victim is protected worker[3563]	1 September 1997
Recklessly causing injury	s 18	Level 6 imprisonment (5 years)** Minimum non-parole period – 6 months if victim is protected worker[3564]	1 September 1997
Negligently causing serious injury	s 24	Level 5 imprisonment (10 years)	19 March 2008

[3559] ** Category 1 offence if the victim was a protected worker.

[3560] + If the offender was not a protected worker, this is a Category 2 offence if the offender was 18 or older at the time of offending. If the offence was committed on or after 20 March 2017, the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order) unless specified circumstances exist. The Act ss 3, 5(2H), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

[3561] The Act s 10AA(1).

[3562] Ibid ss 10AA(1)-(2).

[3563] Ibid s 10AA(2), (4).

[3564] Ibid.

25.1.2 –Penalties for assault and associated offences

Offence	Provisions	Maximum penalty	Maximum applies to offence committed on or after
Administering substances	*Crimes Act 1958 (Vic)* s 19(1) ('*Crimes Act*')	Level 6 imprisonment (5 years)	22 April 1992
Stalking	*Crimes Act* s 21A(1)	Level 5 imprisonment (10 years)	23 January 1995
Assault	*Crimes Act* ss 31(1), 320 & at common law	Level 6 imprisonment (5 years)	1 September 1997

25.1.3 – Current sentencing practices

25.1.3.1 – Gross violence and protected workers

The *Sentencing Act 1991* (Vic) ('the Act') specifies minimum sentences to be imposed for most causing injury offences committed in circumstances of gross violence or against a protected worker.[3565]

The Act recognises four exceptions to these minimum terms. These are:

1. The offender has assisted or given an undertaking to assist authorities in the prosecution or investigation of an offence.
2. The offender proves, on the balance of probabilities, that at the time of offending they had a mental impairment that is causally related to their offending, which substantially and materially reduces their culpability, or that would cause them substantially and materially greater than ordinary burdens or risks of imprisonment.
3. The court intends to impose a Court Secure Treatment Order or Residential Treatment Order.
4. There are substantial and compelling reasons, that are exceptional and rare, which justify not imposing a term of imprisonment.[3566]

The fourth category of substantial and compelling reasons requires there be powerful circumstances that are wholly outside run of the mill factors usually present in such offending.[3567] The offender carries the burden of showing there is a "special reason" not to impose the mandatory term. This burden 'should be a heavy one, and not capable of being lightly discharged'.[3568]

[3565] See, eg, 9.1.2.2 – Statutory schemes – Mandatory imprisonment schemes – Mandatory minimum sentences – Gross violence offences, and 9.1.2.3 – Statutory schemes – Mandatory imprisonment schemes – Mandatory minimum sentences – Violence offences against protected officials. See also *DPP (Vic) v Hudgson* [2016] VSCA 254, [11] ('*Hudgson*'); *DPP (Vic) v El-Lababidi* [2018] VSCA 116, [31]; *McKay v The King (No 2)* [2023] VSCA 8, [46].
[3566] The Act s 10(a)(2).
[3567] *Hudgson* [112].
[3568] Ibid [111].

25.1.3.2 – Intentionally causing serious injury and recklessly causing serious injury

Intentionally causing serious injury

Sentences for intentionally causing serious injury ('ICSI) have increased recently.[3569] The offence generally calls for a term of immediate imprisonment, even more so than in cases of recklessly causing serious injury ('RCSI').[3570] An intention to cause serious injury is the essence of the offence and so in that respect it is graver than an unintentional homicide.[3571] Therefore, some cases of ICSI may be so grave and result in such serious consequences that they will warrant a penalty like (or even exceeding) one imposed for manslaughter.[3572]

The Court of Appeal has said that in cases where there is an intention to cause serious injury and severe injury results, *Nash v The Queen*[3573] and *Cedic v The Queen*[3574] are the yardsticks for measuring a proposed ICSI sentence in that category of seriousness.[3575] More specifically, it has said that sentences for ICSI exceeding 10 years (half the maximum penalty) usually involve 'life threatening or catastrophic injuries, or ongoing serious physical or mental disablement'.[3576]

Recklessly causing serious injury

RCSI is triable summarily and is commonly prosecuted in the Magistrates' Court and the higher courts. Where RCSI is the principal proven offence in the higher courts it will generally attract a custodial sentence.

The Court of Appeal said in 2010 that sentences imposed for "glassing" as an instance of RCSI, did not reflect the inherent dangerousness of the conduct and should be increased.[3577] A custodial sentence will usually be required to give effect to the maximum penalty and the seriousness of the offence.[3578]

Moreover, where the facts of a RCSI case are very similar to an ICSI case, as in glassing cases or offending involving a "king hit",[3579] no meaningful difference in sentence will be warranted.[3580]

[3569] *Lukudu v The Queen* [2019] VSCA 248, [46] ('*Lukudu*').
[3570] *DPP (Vic) v Gerrard* (2011) 211 A Crim R 171, 180-81 [34]-[37], 183 [48], 184 [54] ('*Gerrard*'). See also *Kumar v The Queen* [2013] VSCA 191, [32] ('*Kumar*').
[3571] Or, possibly, even an intentional killing. See *Kelson v The Queen* [2020] VSCA 112, [68]-[69].
[3572] *DPP (Vic) v Zullo* [2004] VSCA 151, [11] ('*Zullo*').
[3573] (2013) 40 VR 134 ('*Nash*').
[3574] [2011] VSCA 258 ('*Cedic*').
[3575] *Chol v The Queen* (2016) 262 A Crim R 455, 464 [34] ('*Chol*').
[3576] *O'Toole v The Queen* [2019] VSCA 185, [46]. Somewhat contradictorily, however, the court has also said that offending which results in such harm normally calls only for a sentence of '*close to* double figures'. See *DPP (Vic) v Evans* [2019] VSCA 239, [75] ('*Evans*') (emphasis added).
[3577] *Winch v The Queen* (2010) 27 VR 658, 664 [31] ('*Winch*').
[3578] Ibid 669 [53]-[54], 672 [71].
[3579] *DPP (Vic) v Betrayhani* [2019] VSCA 150, [6] ('Betrayhani').
[3580] *Hamid v The Queen* [2019] VSCA 5, [44] ('*Hamid*'), citing *Ashe v The Queen* [2010] VSCA 119, [31] ('*Ashe*').

But the Court has also cautioned, given the High Court's decisions *Kilic* and *Dalgliesh*,[3581] against comparing the nature and gravity of offending in older cases when determining the appropriate sentence for RCSI.[3582]

25.1.3.3 – Negligently causing serious injury by driving

The Court of Appeal held in 2015 that current sentencing practice for negligently causing serious injury by driving ('NCSI–Driving') at the upper end of seriousness was inadequate and needed to be uplifted, and that this would have a flow-on effect for sentencing in mid and low-range instances of the offence.[3583] The Court observed that Parliament had increased the maximum penalty to 10 years' imprisonment in order that sentences for the offence would be correspondingly increased, but that had not occurred and failed to 'sufficiently "recognise the harm caused by the offender"', and the seriousness of the offence.[3584]

The most serious instances of NCSI–Driving involve negligence of the very highest order.[3585] But in comparing cases where the negligent driving is at the upper end, a court should not draw 'detailed distinctions between the precise injuries suffered in different cases' since this does not alter the fact that the offence remains in the upper range of seriousness.[3586]

NCSI–Driving and culpable driving causing death often have critical features in common – speed, inattention or intoxication, and often prior convictions for driving offences – that allow case comparisons to be more effectively drawn between them than by relation to other offences.[3587]

It may be that some instances of NCSI-Driving can be appropriately dealt with by a CCO or combination sentence, but this becomes less likely as the degree of negligence and the seriousness of the injury increase, even if there are significant mitigating factors.[3588]

Sentences for mid and low-range instances of the offence also need to increase to maintain appropriate relativities.[3589]

25.2 – Gravity and culpability

Where an offender is found guilty of a causing serious injury offence, a court cannot regard the injury sustained by a victim as anything other than "serious". But this does not mean that when an offender pleads guilty to a lesser offence such as RCI or ICI that a court can sentence them for a more serious

[3581] *DPP (Vic) v Dalgliesh* (2017) 262 CLR 428.
[3582] *Hamid* [63]-[74].
[3583] *Harrison v The Queen* (2015) 49 VR 619, 622 [12] ('*Harrison*').
[3584] Ibid 644 [110]-[112], 650 [137], [139].
[3585] Ibid 643 [106].
[3586] Ibid 635 [68]-[69]. See also *Fox v The Queen* [2020] VSCA 3, [25] ('*Fox*').
[3587] *Gorladenchearau v The Queen* (2011) 34 VR 149, 160 [43] ('*Gorladenchearau*'). See also 23.2.1 – Indictable driving offences – Gravity and culpability - Culpable driving causing death.
[3588] *Harrison* 648-49 [130]; *DPP (Vic) v Barry* (2017) 82 MVR 448, 461-62 [66]-[67], [70] ('*Barry*'); *Gurovski v The Queen* (2018) 83 MVR 333, 346 [60] ('*Gurovski*').
[3589] *Harrison* 650 [140]. See also *Sutic v The Queen* [2018] VSCA 246, [70] ('*Sutic*').

offence. This would be contrary to principle even if the evidence might permit an implication of intent to be drawn or if the injury caused might meet the statutory definition of a "serious injury".[3590]

However, a sentencing court is fully entitled to generally consider the seriousness of an injury or the degree of recklessness in a case. These are major considerations in determining the gravity of the offence and the offender's culpability.[3591]

25.2.1 – Generally

Because all the causing injury offences may be committed in such widely varying circumstances,[3592] they share many of the same factors relevant to gravity and going to the offender's culpability. These include:

1. the offender's proven intent to cause injury, serious injury, really serious injury, or the maximum possible injury;[3593]
2. the seriousness of the injury caused: including, present and future harm,[3594] physical and psychological harms,[3595] the impact of the injuries on the victim,[3596] how the injuries were inflicted,[3597] and whether the accused delayed, refused or obstructed the victim from receiving medical assistance for the injury or to identify its cause.[3598] This assessment is made at the time the injury is sustained;[3599]
3. the vulnerability of the victim;[3600]
4. the use of a weapon,[3601] particularly one with a blade, is a significantly aggravating factor, as it is extremely dangerous and capable of causing both serious injury and death.[3602]

[3590] See, eg, *R v MFP* [2001] VSCA 96, [3], [28]-[29] ('*MFP*'); *Rivera v The Queen* [2020] VSCA 5, [37].
[3591] The Act s 5 (2)(db); *MFP* [28]; *DPP (Vic) v Coleman* (2001) 120 A Crim R 415, 421 [17] ('*Coleman*').
[3592] See, eg, *Ashe* [32]; *Cedic* [27]; *Nash* 145-46 [55]; *Kumar* [27]; *Tasevski v The Queen* [2014] VSCA 153, [53] ('*Tasevski*'); *Lukudu* [35], [46]; *McLean v The King* [2023] VSCA 6, [33] ('*McLean*').
[3593] *Nash* 137 [10]. See also *Brown v The Queen* [2018] VSCA 328, [63], [71] ('*Brown*'); *Jaeger v The Queen* [2020] VSCA 116, [35]-[36] ('*Jaeger*').
[3594] *DPP (Vic) v Terrick* (2009) 24 VR 457, 477 [83] ('*Terrick*'); *Arthars v The Queen* (2013) 39 VR 613, 626 [48]-[49] ('*Arthars*'); *Nash* 137 [10]; *DPP (Vic) v Weston* (2016) 262 A Crim R 304, 314-15 [57]-[59] ('*Weston*'); *Ranger v The Queen* [2018] VSCA 271, [79] ('*Ranger*'); *Hamid* [42], [74].
[3595] *Pasinis v The Queen* [2014] VSCA 97, [54]-[56] ('*Pasinis*'); *Hamid* [42], [74].
[3596] *Terrick* 477 [83]; *Ashe* [32]; *Gorladenchearau* 156 [22], 157 [28]; *Ali v The Queen* [2010] VSCA 182, [58] ('*Ali*'); *Cedic* [41], [58]; *Arthars* 626 [48]-[49]; *Nash* 137 [10]; *Kilic v The Queen* [2015] VSCA 331, [31] ('*Kilic1*'); *Chol* 458 [7]; *Mansfield v The Queen* [2017] VSCA 220, [41], [58] ('*Mansfield*'); *Ranger* [78]-[79]; *Hamid* [42]-[43], [74]; *Betrayhani* [45]; *Evans* [75], [83]; *Lukudu* [35], [40], [46].
[3597] *Jones v The King* [2023] VSCA 167, [32].
[3598] *Pasinis* [39], [48]-[49], [73]; *Hamid* [42]-[43], [74].
[3599] *McLean* [31] citing *Sarjeant v The Queen* [2020] VSCA 45.
[3600] *Nash* 137 [10], 146 [57], [60]. See also *Ali* [58]; *Arthars* 626 [48]-[49]; *Ranger* [74], [78].
[3601] *Gerrard* 183 [48]; *Nash* 137 [10]; *Brown* [54]; *Wyka v The Queen* [2020] VSCA 104, [88] ('*Wyka*').
[3602] *Hamid* [42]-[43], [74]; *Lukudu* [35]-[36]. See also *Ranger* [84]-[85] (use of bladed weapon was serious but given the physical disabilities of the offender and the slight injuries to the victim, the sentence imposed was outside available range).

5. persistence: a prolonged or lengthy attack or failing to stop despite having an opportunity to do so, until after the victim has been rendered helpless, others intervene, or the victim escapes, are strong indications of serious and highly culpable offending.[3603]
6. whether the offender acted alone or in company.[3604]
7. the violence of the attack,[3605] which does not necessarily require the use of a weapon. An offender who repeatedly and forcefully kicks or strikes the victim may be just as culpable as someone who was armed.[3606] Similarly, a clenched fist may not be a weapon, but it can be extremely dangerous when punching someone hard, particularly if the offender is a trained and experienced fighter.[3607] And choking someone is a 'pernicious and dangerous form of violence' whose risk 'cannot be ignored when assessing its gravity'.[3608]
8. family violence; brutal treatment of a domestic partner or family member involves a serious breach of trust,[3609] especially in the home where the victim is entitled to feel safe illustrates the gravity of the crime and the offender's moral culpability.[3610] As do controlling actions such as monitoring the victim's movements, habits, reactions, fears, and responses.[3611] Any sort of violence in the domestic realm is never permissible and self-justifying statements such as, "I snapped", do not mitigate either the offender's culpability or the seriousness of the offending.[3612]

   Similarly, inaction in the domestic context may be reflective of gravity and culpability. A parent/adult has a high duty of care to a child or infant they are looking after. This duty has two aspects: provide for the child's needs and protect them from harm. Failing to protect the child from harm, or causing that harm, even if negligently in the belief that it is appropriate discipline, is a grave breach of this duty.[3613]

   Although being exposed to domestic violence at a young age may explain an offender's attitude towards family violence and discipline of children, it cannot excuse negligent conduct or reduce the offender's culpability for causing harm to a child. Further, post-offence conduct, such as attempting to shift fault, illuminates the offender's moral culpability even in cases where is not

[3603] *Terrick* 477 [83]; *Ashe* [32]; *Ali* [58]; *Cedic* [41], [58]; *Arthars* 626 [48]-[49]; *Nash* 137 [10]; *Chol* 457-58 [4]; *Mansfield* [41], [58]; *Ranger* [78]; *Brown* [54]; *Lukudu* [35], [39]; *Akot v The Queen* [2020] VSCA 55, [13] ('*Akot*'); *DPP (Vic) v Reynolds (a pseudonym)* [2022] VSCA 263, [78], [82] ('*Reynolds*'). However, an assault that is 'of a relatively short duration' is not mitigating. See *Arthars* 624 [42].
[3604] *Nash* 137 [10]. See also *McCluskey* [12]; *Terrick* 477 [82] (attacking in company is more frightening, cowardly, and likely to be lethal); *Arthars* 626 [48]-[49]; *Brown* [54]; *Akot* [13].
[3605] *DPP (Vic) v Natoli* [2016] VSCA 35, [45] ('*Natoli*'); *Evans* [83].
[3606] *Terrick* 473 [64]; *Nash* 146 [57]; *McLean* [36].
[3607] *DPP (Vic) v Russell* (2014) 44 VR 471, 480 [51] ('*Russell*').
[3608] *Reynolds* [80].
[3609] *Shau v The Queen* [2020] VSCA 252, [46].
[3610] *MFP* [20]; *Robbins v The Queen* [2012] VSCA 34, [39], [43]-[45]; *Nawrozi v The Queen* [2012] VSCA 272, [15] ('*Nawrozi*'); *Pasinis* [39], [48]-[49], [53]-[56]; *Kilic1* [65]; *Natoli* [43], [45]; *R v Kilic* (2016) 259 CLR 256, 269 [28] ('*KilicHC*'); *Nolan v The Queen* [2017] VSCA 240, [30]-[31] ('*Nolan*'). See also 5.2.8.3 – Circumstances and gravity of the offence – Statutory factors – Aggravating, mitigating, and other relevant circumstances - Family violence.
[3611] *Pasinis* [39]; *Reynolds* [80].
[3612] *Evans* [84]-[85].
[3613] *Weston* 312 [45]-[47].

directly raised on the plea.[3614] Behaving in a manner that harms a child after having been repeatedly warned not to act in such a fashion, makes the offender highly culpable.[3615]

9. offending in public,[3616] particularly when the offender is disinhibited by alcohol.[3617] Intoxication and disinhibited behaviour combined with unprovoked violence is notorious.[3618] Moreover, youth and rehabilitation will take a back seat in cases of such wanton violence. Causing serious injury offences do not permit youth to be given much significance in this context because those who commit it are predominately young men acting under the influence of alcohol, drugs, or both.[3619]
10. premeditation or planning: an unprovoked or spontaneous attack *may*[3620] be less serious than one that is given some forethought.[3621]
11. the part of the body attacked: striking or kicking vulnerable parts of another person, such as their head (particularly if this knocks them out), are particularly serious.[3622]

Although it is not a legal defence to charges of causing injury, the degree to which the offender was provoked to violence is also relevant to sentence and may be a significant extenuating circumstance that lessens the offender's moral culpability.[3623] This does not apply when the offender acts from revenge or to "punish" the victim.[3624] Moreover, conduct recognised as being sufficiently provocative is limited to words or deeds by the victim that incite or induce the offender to lose control and offend almost immediately while agitated or angry.[3625] The passage of time or existence of a "cooling off" period after the allegedly provocative behaviour lessens the mitigation of "provocation" by the victim.[3626] Moreover, a given community's cultural sensitivity to certain language, such as swearing, may not be enough to constitute provocation sufficient to mitigate moral culpability.[3627]

25.2.2 – Intentionally causing serious injury and recklessly causing serious injury

By their very terms ICSI and RCSI are serious offences. This is clearly recognised by the courts.[3628]

ICSI

[3614] Ibid 313 [50].
[3615] Ibid 313 [51]-[53], 322 [86].
[3616] *Zullo* [9]; *Russell* 473 [4]; *McLean* [36].
[3617] *Terrick* 471 [56]; *Gerrard* 183 [48].
[3618] *Dang v The Queen* [2018] VSCA 43, [3] ('*Dang*').
[3619] *DPP (Vic) v Lawrence* (2004) 10 VR 125, 132 [22] ('*Lawrence*'); *Mansfield* [40]-[41], [44]-[45]; *Atem v The Queen* [2020] VSCA 35, [61]-[63] ('*Atem*').
[3620] See, eg, *R v Calcedo* [2004] VSCA 80, [31]; *Terrick* 472-73 [63]; *Winch* 668 [48].
[3621] *Ali* [58]; *Gerrard* 183 [48]; *Cedic* [41], [58]; *Pasinis* [39]; *Mansfield* [41], [58]; *Brown* [54]; *Hamid* [42], [74]; *Lukudu* [35], [37]; *Akot* [13]; *Wyka* [88].
[3622] *Terrick* 477 [83]; *Cedic* [30], [41], [58]; *Nash* 146 [57]; *Chol* 457-58 [4]; *Mansfield* [41]; *Betrayhani* [6].
[3623] *Okutgen v The Queen* (1982) 8 A Crim R 262, 264; *R v Pearce* (1983) 9 A Crim R 146, 150.
[3624] *Wyka* [3]-[4], [8]-[9], [96], [100].
[3625] *R v Kelly* [2000] VSCA 164, [13]-[14] ('*Kelly*'); *Kennedy (a pseudonym) v The Queen* [2015] VSCA 49, [22]; *DPP (Vic) v Milson* [2019] VSCA 55, [66].
[3626] *Kelly* [15]; *R v Rushby* [2002] VSCA 44, [12]; *DPP (Vic) v North* [2002] VSCA 57, [14], [16].
[3627] *R v Tuimauga* [2003] VSCA 218, [11]-[14].
[3628] See also *Lawrence* 132 [23]; *Winch* 665 [34]; *Gerrard* 180-81 [34]-[37], 185 [54]; *Hudgson* [85]; *Dang* [33]; *Lukudu* [35].

The 20-year maximum penalty demonstrates the seriousness of ICSI.[3629]

The Court of Appeal has specifically endorsed the first six of the principles listed above as providing a useful framework but emphasised that the list is not prescriptive.[3630] However, the key indicators of seriousness for ICSI are the offender's proven intent,[3631] the seriousness of the victim's injury, and the way in which the injuries were inflicted.[3632] The presence of one or more of the other factors will likely aggravate the gravity of the offending[3633] or may demonstrate existence of the relevant intent. For example, persistent offending and the repetition of heavy blows to the victim's head have been held to show there was an intention to cause serious injury.[3634]

Where an offender causes a serious injury, the fact they did not foresee the precise nature or extent of the injuries caused does not reduce their culpability.[3635] Nor does the fact that more significant injuries might have resulted mean that the offending cannot be characterised as a serious example of ICSI.[3636]

"Glassing" is a serious instance of ICSI, which is made worse if the offender was sober and the victim intoxicated.[3637] All things being equal, glassing done with the intent of causing serious injury should receive a higher sentence than where the injury is caused recklessly.[3638]

RCSI

As with ICSI, the gravity of RCSI is reflected in its maximum penalty of 15-years' imprisonment.[3639] Determining the seriousness of a particular instance of RCSI involves considering: 1) the degree of probability that serious injury will result,[3640] and 2) the seriousness of the probable injury foreseen.[3641]

[3629] *Cedic* [58].
[3630] *Chol* 458 [5]-[6].
[3631] The offender's intent becomes particularly important when they contend that they did not intend the degree of injury sustained. If the court is considering finding there was intent to cause injury at the higher end of seriousness and that is different from the way the plea proceeded, then the offender should be given an opportunity to be heard on this point. *Brown* [69]-[75]. See also 2.2.2.2 – Method and process – The sentencing hearing – Judicial duties – Procedural fairness.
[3632] *Gommers v The Queen* [2021] VSCA 258, [44] (noting 'The applicant's was a nasty and cruel act of gratuitous violence, which resulted in significant injury requiring surgical intervention'.).
[3633] *Chol* 458 [7].
[3634] Ibid 457-58 [4].
[3635] *Terrick* 467 [41]. See also *DPP (Vic) v Lepoidevin* [2003] VSCA 61, [36]. But see *DPP (Vic) v Marino* [2011] VSCA 133, [32] (*Terrick* involved *very* serious injuries that were intended or foreseen but here there was a substantial disparity between the serious injury the offender foresaw and the catastrophic injuries the victim sustained in a King-hit attack (RCSI)).
[3636] *Brown* [56].
[3637] *Gumwel v The Queen* [2016] VSCA 14, [12] ('*Gumwel*'). See also *Gerrard* 180-81 [34]-[37], 184 [54].
[3638] *Kumar* [32].
[3639] *Hamid* [71].
[3640] For example: road rage may be a serious instance of RCSI. A person cannot behave arrogantly and selfishly because they are in and operating a car. They are not insulated from society and must take care when driving. So, it is 'entirely appropriate' to consider the degree of recklessness when deciding the penalty to be imposed in this context. *Coleman* 420-21 [14], [17].
[3641] *Russell* 480 [50], citing *Ashe* [27] and *Winch* 665 [36]. See also *Betrayhani* [44].

Acting in the face of both of these factors demonstrates a high level of culpability on the part of the offender.[3642] The impact on the victim is also a key consideration,[3643] albeit only one.[3644]

An offender may be highly culpable for the injuries caused by RCSI in circumstances of gross violence even if they did not physically inflict the injuries and were not present at the time.[3645]

"Glassing" may also be a serious instance of RCSI, and since serious injury results regardless of whether the attack was intended or not, there is no inherent reason to treat glassing as being in a lower category of seriousness than RCSI involving the use of a more conventionally dangerous weapon.[3646]

25.2.3 – Negligently cause serious injury by driving

Negligently causing serious injury is a generic offence that might apply to any conduct that causes serious injury. However, it is most often laid when injury results from driving.[3647] NCSI–Driving sits above dangerous driving causing serious injury but below dangerous driving causing death.[3648]

The objective gravity of the offence and the offender's culpability are to be assessed by both the degree of negligence and the seriousness of the injury caused.[3649]

Negligence, and culpability, may be increased where if the offender:

- drives while intoxicated (by alcohol or drugs) or fatigued;[3650]
- drives knowing their licence is suspended or that they don't have one;[3651]
- has been previously apprehended for driving on a suspended licence;[3652]
- drives significantly over the speed limit;[3653]
- drives through red lights/intersections;[3654]
- was warned against driving;[3655]
- drives on the wrong side of the road, into oncoming traffic, on the verge of the road, or fails to take evasive action;[3656]

[3642] *Russell* 480-81 [52].
[3643] The Act s 5(2)(daa); *Betrayhani* [45].
[3644] *Hamid* [73].
[3645] *Hi v The Queen* [2017] VSCA 315, [79].
[3646] *Winch* 669 [53]-[54], 672 [71].
[3647] *Harrison* 621 [1].
[3648] Ibid 621 [2]. See also 23.2.2 – Serious driving offences – Gravity and culpability – Dangerous diving causing death or serious injury.
[3649] *Gorladenchearau* 156-57 [22]-[25]. See also *Harrison* 629 [44]; *Halket v The Queen* (2016) 77 MVR 509, 515 [27] ('*Halket*'); *Papachristodoulou v The Queen* (2017) 82 MVR 27, 37 [34]-[35], 39 [44] ('*Papachristodoulou*'); *Barry* 459 [48], 461 [62]; *Sutic* [46]; *Weston* 312 [44]; *Gurovski* 346 [57]; *R v Teh* (2003) 40 MVR 195, 199 [17] ('*Teh*').
[3650] *Harrison* 629 [44], 638 [82]. See also *Gorladenchearau* 157 [26]-[27]; *Halket* 514 [19]-[20], 515 [24]-[26]; *Barry* 461 [63]; *Sutic* [47], [51]-[52];*Cook v The Queen* [2021] VSCA 293, [40] ('*Cook21*').
[3651] *Harrison* 629 [44], 638 [82].
[3652] Ibid 629 [44]. See also *Spanjol v The Queen* (2016) 55 VR 350, 366 [66] ('*Spanjol*').
[3653] *Harrison* 629 [44], 638 [82]. See also *Gorladenchearau* 157 [26]-[27]; *Papachristodoulou* 37 [35]; *Cook21* [40].
[3654] *Harrison* 629 [44]; *Halket* 514 [18].
[3655] *Harrison* 638 [82]; *Halket* 514 [18].
[3656] *Harrison* 638 [82]; *Halket* 514 [18]-[19], [21]; *Sutic* [47], [50].

- is an experienced driver with knowledge of the legal requirements for rest breaks and disregards them or drives without adequate sleep;[3657]
- drives a long distance, gravity and culpability increase the further the offender proceeds;[3658]
- drives a large vehicle;[3659]
- drives knowing the victim is near the vehicle.[3660]

These factors are relevant not only to whether the offender's conduct has met the threshold of negligence for NCSI-Driving, but also demonstrate the extent of the negligence and the gravity of the offending.[3661] Moreover, the absence of one or more of these factors does not necessarily put the offence into the lower end of the scale of seriousness. Similarly, complying with obligations under the *Road Safety Act 1986* (Vic) to remain at the scene of an accident and render assistance are not mitigating factors.[3662]

The court should start from the presumption that the offender was solely responsible for the manner of their driving and that it was the sole cause of the victim's injury. However, evidence may qualify either of those presumptions.[3663]

A passenger's knowledge of the driver's intoxication or fatigue does not, by itself, reduce the driver's responsibility for negligent driving.[3664] Similarly, the passenger's failure to wear a seatbelt does not demonstrate this was a contributing cause of the passenger's injury. And even if it did so, the driver remains responsible given their legal obligation to ensure passengers are wearing seatbelts.[3665]

The conduct of the victim is relevant to the offender's responsibility and moral culpability only if it bears on how bad their driving was or on their choice to drive.[3666] If there is evidence that another, either the passenger or another person in the vehicle, persuaded the offender to drive faster or more dangerously and that because of this their driving was worse than it otherwise would have been, the offender's moral culpability for the negligent driving is reduced. The presumption that an offender was solely responsible for the manner of their driving may thus be qualified if evidence shows they were not solely responsible for their conduct in choosing to drive, or in their manner of doing so.[3667] An offender may also be able to establish that there were factors outside their control that were a material cause of the injuries, which should also result in a reduced penalty.[3668]

[3657] *Gurovski* 345-46 [56], [58].
[3658] *Halket* 514 [18], 515 [26]; *Papachristodoulou* 37 [35], 39 [44].
[3659] *Halket* 514 [18], 515 [24]-[26].
[3660] *Fox* [4]-[5], [21].
[3661] *Sutic* [49]; *Cook21* [40].
[3662] *Papachristodoulou* 38-39 [41].
[3663] *Spanjol* 362 [47].
[3664] Ibid 353 [6]. Doing so confuses the offender's criminal liability for negligent driving with any civil liability they may have to the victim for the injury caused: at 361 [43].
[3665] Ibid 353 [7].
[3666] Ibid 361 [40].
[3667] Ibid 361 [41]-[42].
[3668] Ibid 362 [46].

An offender's loss or injury of their own child as a result of their criminally irresponsible driving and gross breach of duty is a relevant sentencing consideration as a factor both in mitigation,[3669] and aggravation.[3670]

25.2.4 – Administering substances

This offence is triable summarily and is rarely charged. Given the statutory language,[3671] its gravity would appear to turn significantly on the dangerousness of the substance administered and the motivation behind the administration.

25.2.5 – Stalking

This offence is triable summarily and is most commonly tried in the Magistrates' Court. When it is in the higher courts it is usually not the principal offence but does result in an immediate custodial sentence. It is a serious offence because it intends to cause physical or mental harm to the victim or to arouse fear or apprehension in them for their safety or the safety of another. This psychological harm can be devastating.[3672]

25.2.6 – Assault

Statutory assault

There are four assault offences under the *Crimes Act*:

- Assault with the intent to commit an indictable offence;[3673]
- Assault of a protected worker;[3674]
- Assault of a person who is lawfully assisting a protected worker;[3675]
- Assault with the intent to prevent their lawful apprehension or detention.[3676]

The seriousness of these offences is often limited by overlapping offences attracting higher maximum penalties. For example, assault with the intent to commit an indictable offence overlaps directly with the offence of assault to commit a sexual offence which has a maximum penalty 15-years' imprisonment.

These offences can be determined summarily and are most commonly prosecuted in the Magistrates' Court. They are only very rarely the principal proven offence in the higher courts.

Common law assault

[3669] *Teh* 199-200 [20]-[21].
[3670] Ibid 201 [23].
[3671] The Act ss 19(1)-(2).
[3672] *R v Bouras* [2012] VSC 77, [19]. See also *R v Maccia* (2005} 152 A Crim R 88, 92 [14]. See also *Wasif v The Queen* [2022] VSCA 182, [48]-[49].
[3673] *Crimes Act 1958* (Vic) s 31(1)(a) ('*Crimes Act*').
[3674] Ibid s 31(1)(b). See definition of 'protected worker' above at n 2.
[3675] *Crimes Act* s 31(1)(c).
[3676] Ibid s 31(1)(d).

This common law offence is constituted by an "assault", which incorporates either or both an "assault" and "battery". At common law it is defined as any act which intentionally causes another to apprehend immediate unlawful personal violence.[3677] A "battery" is the actual application of unlawful force however slight to another person. Significant limitations on the range of the offence are the availability of the causing injury offences where an "assault" results in actual injury and of the statutory threatening offences where a threat fits the elements of those offences.

25.3 – Sentencing purposes

Causing injury offences call for emphasis of the following sentencing factors:

- general deterrence;[3678]
- specific deterrence;[3679]
- just punishment/denunciation;[3680]
- community protection.[3681]

General deterrence and denunciation are particularly for offending occurring in the context of family violence, even where the victim supports the offender and seeks leniency on the plea.[3682]

25.4 – Statutory schemes

None of the offences considered in this chapter is a continuing criminal enterprise offence,[3683] an automatic forfeiture offence,[3684] or a sex offender registrable offence.[3685]

However, intentionally or recklessly causing serious injury in circumstances of gross violence, and intentionally causing serious injury are "serious offences"[3686] and "serious violent offences"[3687] for the purposes of the Act. Therefore, the serious offender's regime[3688] may apply or an indefinite sentence might be imposed.[3689]

[3677] *Knight v The Queen* (1988) 35 A Crim R 314, 316-17.
[3678] **ICSI:** *Nash* 146 [58]; *Pasinis* [53], [57]; *Tasevski* [58]; *Kilic1* [65]; *KilicHC* 269 [28]; *Gumwel* [13]; *Lukudu* [46]; *Jaeger* [35]-[36] (emergency worker by driving). **RCSI:** *Winch* 667 [43], 669 [53]-[54], 672 [71]; *Betrayhani* [47]-[48]; *Tan v The Queen* [2019] VSCA 226, [41], [63] ('*Tan*'). **NCIS-Driving**: *Harrison* 643 [107], 645 [116]; *Spanjol* 366 [66]; *Papachristodoulou* 38 [39]-[40], 39-40 [45]; *Gurovski* 347 [70].
[3679] **ICSI:** *Nash* 146 [58]; *Pasinis* [39], [49], [73]-[75]; *Tasevski* [58]; *Jaeger* [35]-[36] (emergency worker by driving). **RCSI:** *Winch* 667 [43]; *Nawrozi* [17]; *Russell* 473 [4]; *Nolan* [30]-[31]; *Hamid* [43], [50]-[55]; *Betrayhani* [47]-[48]; *Tan* [41], [63]. **NCSI-Driving**: *Papachristodoulou* 38 [39]-[40], 39-40 [45].
[3680] **ICSI:** *Nash* 146 [58]; *Tasevski* [58]; *Kilic1* [65]; *Evans* [83]; *Jaeger* [35]-[36] (emergency worker by driving). **RCSI:** *Betrayhani* [47]-[48]; *Atem* [59]. **NCSI-Driving:** *Harrison* 643 [107], 645 [116]; *Papachristodoulou* 38 [39]-[40], 39-40 [44]-[45]; *Gurovski* 347 [70].
[3681] **ICSI:** *Terrick* 471 [56]; *Pasinis* [39], [49], [73]-[75]; *Jaeger* [35]-[36] (emergency worker by driving). **RCSI**: *Hamid* [43], [50]-[55]; *Tan* [41]; *Atem* [59].
[3682] *Shau* [47]
[3683] See 9.4 – Statutory schemes – Continuing criminal enterprise offenders.
[3684] See 17.1.2 – Confiscation – Statutory regime – Automatic forfeiture.
[3685] *Sex Offenders Registration Act 2004* (Vic) s 7.
[3686] The Act s 3.
[3687] Ibid sch 1, cl 3.
[3688] See 9.3 – Statutory schemes – Serious offenders.
[3689] See 8.7 – Imprisonment – Indefinite sentence.

Moreover, as noted, most causing injury offences committed in circumstances of gross violence or against a protected worker will call for the imposition of a mandatory minimum non-parole period.[3690]

[3690] See, eg, 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences; 9.1.2.2 – Statutory schemes – Mandatory imprisonment schemes – Mandatory minimum sentences – Gross violence offences; 9.1.2.3 – Statutory schemes – Mandatory imprisonment schemes – Mandatory minimum sentences – Violence offences against protected officials.

26 – Other offences against the person

This chapter considers offences that generally share two characteristics: they are primarily concerned with protecting the integrity of the person, and they do not require actual bodily harm to occur. Harm instead is found in a deprivation of liberty, causing fear, making unwarranted demands, or the creation of danger.

26.1 – Penalties and current sentencing practices

26.1.1 – Current and historic penalties for kidnapping and related offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**	**Applies to offences committed on or after**
Child stealing	s 63(1)	Level 6 imprisonment (5 years)	22 April 1992
Taking away a child	s 63(2)	Level 6 imprisonment (5 years)	1 September 1997
		Level 7 imprisonment (7½ years)	22 April 1992 – 30 August 1997
Kidnapping (for ransom or gain)	s 63A	Level 2 imprisonment (25 years)*[3691]	1 September 1997
		Level 2 imprisonment (20 years)	22 April 1992 – 30 August 1997
Kidnapping[3692]	Common law Penalty: s 320	Level 2 imprisonment (25 years)*	1 September 1997

[3691] * Category 2 offence if the offender was 18 or older at the time of offending. If the offence was committed on or after 20 March 2017, the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order) unless specified circumstances exist. The Act ss 3, 5(2H), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

[3692] Kidnapping remains an offence at common law despite the enactment of the *Crimes Act 1958* (Vic) ss 63, 63A. See, eg, *R v Nguyen* [1998] 4 VR 394, 406-07 ('*Nguyen*'); *R v McEachran* (2006) 15 VR 615, 633 [33] (*McEachran*').

	Common law	At large	22 April 1992 – 30 August 1997
False imprisonment	Common law Penalty: s 320	Level 5 imprisonment (10 years)	1 September 1997
	Common law	At large	22 April 1992 – 30 August 1997

26.1.2 – Current and historic penalties for blackmail, extortion, and threats

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**	**Applies to offences committed on or after**
Blackmail	s 87	Level 4 imprisonment (15 years)	1 September 1997
		Level 4 imprisonment (12½ years)	22 April 1992 – 30 August 1997
Threats to kill	s 20	Level 5 imprisonment (10 years)	1 September 1997
		Level 7 imprisonment (5 years)	22 April 1992 – 30 August 1997
Threats to inflict serious Injury	s 21	Level 6 imprisonment (5 years)	1 September 1997
		Level 8 imprisonment (8 years)	22 April 1992 – 30 August 1997
Extortion with threat to kill or injure	s 27	Level 4 imprisonment (15 years)	1 September 1997
		Level 6 imprisonment (7½ years)	22 April 1992 – 30 August 1997
Extortion with threat to destroy property	s 28	Level 5 imprisonment (10 years)	1 September 1997
		Level 7 imprisonment (5 years)	22 April 1992 – 30 August 1997
Threatening injury to prevent arrest or investigation	s 30	Level 6 imprisonment (5 years)	1 September 1997
		Level 7 imprisonment (5 years)	22 April 1992 – 30 August 1997

26.1.3 – Current and historic penalties for endangerment offences

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Reckless conduct endangering life	s 22	Level 5 imprisonment (10 years)	22 April 1992
Reckless conduct endangering person	s 23	Level 6 imprisonment (5 years)	22 April 1992
Setting traps etc to kill	s 25	Level 4 imprisonment (15 years)	1 September 1997
		Level 4 imprisonment (12½ years)	22 April 1992 – 30 August 1997
Setting traps etc to cause serious injury	s 26	Level 5 imprisonment (10 years)	22 April 1992

26.1.4 – Current sentencing practices

While kidnapping is not common, it is as an extremely serious offence against the person and generally warrants the imposition of a substantial custodial sentence;[3693] as do the offences with which it is often related such as false imprisonment.[3694] Where the kidnapping is for ransom, or leads to rape or sexual offending, it often attracts sentences in 'double figures'.[3695] Total effective sentences of eight to nine years for 'payback' kidnappings are not unusual, and sentences exceeding seven years to just under ten years are not uncommon for kidnapping generally and associated offences.[3696]

26.2 – Gravity and culpability

Many of these 'other offences against the person' are hybrid offences involving a substantial personal component and a quantifiable financial component. For example: kidnapping for ransom involves personal harms in the deprivation of liberty and physical assault as well as a property element in the amount of money demanded. Similarly, extortion can combine the emotional consequences of a threat to kill or injure with the quantifiable element of the amount demanded or paid.

The amount of money demanded may be an indicator of the scale and seriousness of the offending, but this should be assessed with all of the circumstances and not in isolation.[3697] An offence aggravated by brutality or callousness does not become less serious because the amount realised is meagre, especially if this was by fortune rather than design. Moreover, the fact the offender receives no benefit is irrelevant; being motivated out of a desire for revenge is itself a relevant consideration in determining gravity and culpability.[3698]

[3693] *R v Chapple* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Lush and Jenkson, JJ, 11 November 1980) 10, 14 ('*Chapple*'); *R v Phuc* [2000] VSC 296, [17]; *Mwamba v The Queen* [2015] VSCA 338, [157].
[3694] *Hanna v The Queen* [2014] VSCA 187, [88] ('*Hannah*'). Kidnapping was originally regarded as a form of false imprisonment but has for a long time been regarded as 'a separate and distinct offence'. *Chapple* 10-11, 14; *Nguyen* 407. But see *McEachran* 633 [37] ('kidnapping is an aggravated form of false imprisonment and a species of assault').
[3695] *Hanna* [88]; *Young v The Queen* [2015] VSCA 265, [79] ('*Young*').
[3696] *Hanna* [88]. See also *DPP (Vic) v Saltmarsh* [2013] VSCA 290, [37] ('*Saltmarsh*').
[3697] *DPP (Vic) v Grabovac* [1998] 1 VR 664, 682, 688 ('*Grabovac*').
[3698] *Mantovani v The Queen* [2012] VSCA 225, [37]-[38].

26.2.1 – Kidnapping, false imprisonment and child stealing

The gravity of kidnapping, false imprisonment, and child stealing is indicated by their maximum penalties.[3699] Kidnapping has also been described as a form of terrorism,[3700] and kidnappings for ransom, to extort money, gain an advantage, or out of a desire to subjugate the victim to the offender's will are considered particularly grave.[3701] Kidnapping is not less serious because trickery or deceit is used rather than physical violence or coercion.[3702]

The violent kidnapping of a child followed by threats to their life will cause a parent anguish, and it is because kidnapping can have this effect that Parliament set a maximum penalty of 25 years' imprisonment.[3703] Child stealing is similarly very serious because it too involves great danger to the health and safety of the child and trauma to the parents that may result in lasting psychological damage.[3704]

With respect to false imprisonment, the gravity of the offending may be increased where the offender knew a further serious assault would follow and that restraining the victim facilitated that subsequent attack. The victim being bound and left in the company of co-offenders to face further assault would have added significantly to the terror they would have experienced. It is also relevant in these circumstances whether the offender took any steps to end the false imprisonment before leaving the premises.[3705]

In addition, the gravity of these offences and an offender's culpability for them may be increased by the following:

- premeditation or planning;[3706]
- the length of the period of detention;[3707]
- violence, threats, fear or harm to the victim or their family;[3708]
- any breach of trust;[3709]
- motives such as intending to pervert the course of justice or intimidate a witness;[3710]

[3699] *Saltmarsh* [35] (kidnapping); *R v Shahabi* [2003] VSCA 108, [18] (false imprisonment); *R v McKinley* [2000] VSC 287, [38] ('*McKinley*') (child stealing, but noting that the public would probably be surprised to find the maximum penalty was only five years' imprisonment).
[3700] *Dixon-Jenkins v The Queen* (1991) 55 A Crim R 308, 315; *R v Dunn* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Marks and Phillips, JJ, 30 August 1991) 28.
[3701] *R v Vodopic* [2003] VSCA 172, [37]-[38]; *DPP (Vic) v Ramos* [2003] VSCA 215, [6], [41] ('*Ramos*'); *R v Zaydan* [2004] VSCA 245, [84], [95] ('*Zaydan*'); *Buchwald v The Queen* [2011] VSCA 445, [197] ('*Buchwald*').
[3702] *Judge v The Queen* [2021] VSCA 315, [93] ('*Judge*').
[3703] *Ramos* [29].
[3704] *McEachran* 639 [59]; *McKinley* [56].
[3705] *Harvey v The Queen* [2021] VSCA 84, [42] ('*Harvey*').
[3706] *Buchwald* [194]. See also *R v Cunliffe* [2000] VSCA 146, [5], [20]-[21]; *R v Bisset* [2005] VSCA 10, [25]; *Judge* [93].
[3707] *Zaydan* [84]; *Buchwald* [194]; *Saltmarsh* [39]; *Young* [84]; *Harvey* [43].
[3708] *Zaydan* [84]; *DPP (Vic) v Muliaina* [2005] VSCA 13, [21]-[22] ('*Muliaina*'); *R v Dent* [2005] VSCA 134, [13] ('*Dent*'); *R v Casey* [2005] VSCA 135, [46] ('*Casey*'); *Buchwald* [195]; *Saltmarsh* [39]; *Elmaghraby v The Queen* [2016] VSCA 326, [63] ('*Elmaghraby*'); *R v Dobbie* [2019] VSC 275, [69].
[3709] *Muliaina* [2005] VSCA 13, [21]; *Dent* [13]; *Casey* [46], [56].
[3710] *R v Read* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, McInerney, Menhennitt, and McGarvie, JJ, 19 July 1978) 3-4; *Zaydan* [85].

- isolating the victim;[3711]
- vigilantism;[3712] or
- exposing the victim to serious risks to health and safety.[3713]

26.2.2 – Blackmail, extortion, and threats

Blackmail cases commonly fall within one of two categories:

- demanding money by means of a threat to expose or accuse the victim; or
- demanding money under a threat of violence.

It is debatable whether one is more serious than the other.[3714] Blackmail as a whole, however, is an inherently serious offence because while it is not necessarily a crime of physical violence, its nature as a direct attack upon a specific victim means that its impact may be similar in the fear, stress and anxiety it engenders.[3715]

The gravity of threatening offences often turns upon the nature of the threat, and those reinforced by threatening the use of a bomb are a serious variant of offending and call for a heavy sentence.[3716]

The gravity of the use of a bomb threat does not depend entirely upon evidence that the offender had the means then and there to carry out the threat. The offending is serious where there are multiple calls/threats, that are menacing, are designed to be taken seriously and which cause alarm, inconvenience and distress, to a number of people.[3717]

Making a threat of being in possession of a specific explosive device and showing an imitation device to reinforce the threat is relevant to its gravity. But, when considered within a range of conduct, it is also relevant that the imitation was not actually a bomb or device capable of harming others.[3718]

The following are also particularly relevant when assessing the gravity of blackmail, extortion and threat offences:

- the impact on the victim impact/fear created;[3719]
- planning and premeditation;[3720]
- the use of stand-over tactics;[3721]

[3711] *Judge* [93].
[3712] Ibid.
[3713] Ibid.
[3714] *R v Hsin* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Hampell, and Hansen, JJ 29 November 1994) 7. Cf *Grabovac* 664; *Oksuz* 735-36 [11], 740 [28], 756-57 [107], [112].
[3715] *Grabovac* 682, 687-88.
[3716] *R v McHardie* (1983) 10 A Crim R 51, 86-87.
[3717] *R v Gambier* [2009] QCA 138, [29]-[30]; *Marks v The Queen* [2019] VSCA 253, [47], [53]-[54] ('*Marks*').
[3718] *Marks* [47], [53]-[54].
[3719] *Latorre v The Queen* (2012) 226 A Crim R 319, 352 [191] ('*Latorre*'); *Aitkin* [91], [101]; *Kamal v The Queen* [2021] VSCA 27, [61], [64]-[65]('*Kamal*').
[3720] *Aitkin* [103].
[3721] *Latorre* 352, [191]; *Aitkin* [101].

- persistence and duration in threats;[3722]
- the use of weapons;[3723]
- a breach of trust;[3724]
- the number of victims or individuals threatened and any familial relationship between them;[3725] or
- where the purpose of the offence is to deter the enforcement of a legal right.[3726]

26.2.3 – Endangerment offences

In considering the gravity of an endangerment offence, the key factors are the nature and degree of risk created, and whether a weapon was used.[3727] It is difficult to imagine a more serious instance of such an offence than where a firearm is deliberately fired at close quarters in the direction of another person,[3728] especially a police officer performing their duties.[3729] Those who disregard the risks they impose on others to satisfy their own ends, even if they do not intend to harm or kill others but only themselves, must expect to pay a substantial price.[3730]

The injury or death of the victim is not an aggravating feature, but it is relevant to an understanding of the offence and an appreciation of the seriousness of the danger to which the offender exposed the victim. It demonstrates that the risk created by the offender's actions was not artificial or hypothetical, but real.[3731]

If the offender acted out of genuine fear, the seriousness of the offending may be mitigated even if the fear was erroneous.[3732] But an offender taking the law into their own hands, or acting to intimidate, threaten, or retaliate, is 'patently dangerous, frightening, and unacceptable' and may bring the offending into the upper end of the spectrum of seriousness.[3733]

26.3 – Circumstances of the offence

The principal points to note with respect to the circumstances of these offences is, firstly, their breadth.

[3722] *Latorre* 352 [191]-[192]; *Saltmarsh* [40]; *Oksuz* 735-36 [11], 756-57 [107], [112]; *Aitkin* [55], [91], [101], [103], [109]; *Kamal* [70].
[3723] *Oksuz* 735-36 [11], 756-57 [107], [112].
[3724] *Aitkin* [91], [102].
[3725] *Latorre* 352 [191]-[192]; *Oksuz* 735-36 [11], 756-57 [107], [112], 784 [226]; *Aitkin* [101], [109].
[3726] *Latorre* 346-47 [162].
[3727] *Avan v The Queen* [2019] VSCA 257.
[3728] *DPP (Vic) v Gardner* [2004] VSCA 119, [8] ('*Gardner*'); *Zogheib v The Queen* (2015) 257 A Crim R 454, 458 [8] ('*Zogheib*'); *R v Natale* [2019] VSC 30, [22] ('*Natale*'); *DPP (Vic) v Le* [2019] VSCA 258, [4], [54] ('*Le*'); *Cooper v The Queen* [2020] VSCA 288, [69] ('*Cooper*').
[3729] *R v Liszczak* [2017] VSC 103, [65]-[67], [69]-[71], [130] ('*Liszczak*'); *Le* [39].
[3730] *Navaratnam v The Queen* [2021] VSCA 26, [31]-[32], quoting *Tedford v The Queen* [2020] VSCA 71, [35].
[3731] *DPP (Vic) v Majok* [2017] VSCA 135, [44]; *Natale* [22]-[23].
[3732] *Zogheib* 477 [97]. It does not however extinguish the offender's criminality, particularly if they are a prohibited person in the possession of a weapon and fire it after the danger to them has passed. See *DPP (Vic) v Graoroski* [2018] VSCA 332, [32].
[3733] *Zogheib* 477 [98]; *Cooper* [69].

For example, endangerment offences can take many forms from driving dangerously to avoiding arrest,[3734] discharging a firearm during a confrontation,[3735] to failing to provide adequate care or medical attention.[3736]

And, secondly, the difficulty in definitively categorising them. Blackmail may involve a threat of personal harm in order to achieve a non-financial goal, thus constituting an obvious offence against the person. At the other end of the spectrum, it is commonly constituted by non-violent threats of negative personal revelations combined with demands for money, making it more naturally a property offence.[3737]

The same is true of the extortion offences. The *Crimes Act 1958* (Vic) s 27 clearly creates an offence against the person (making a demand with a threat to kill or injure), where s 28 creates an offence much closer to the standard property offence (making a demand with a threat to destroy or endanger specified forms of property).

Ultimately the categorisation is not significant; the court should focus on the actual harms exhibited in the particular case falling for sentence.

26.4 – Sentencing purposes

The sentencing purposes for each of these offences are quite clearly:

- deterrence;[3738]
- just punishment/denunciation;[3739] and
- protection of the community.[3740]

26.5 – Statutory schemes

None of the offences considered in this chapter is a continuing criminal enterprise offence,[3741] or a sex offender registrable offence.[3742] But blackmail, extortion with threat to kill, and extortion with threat to destroy property are automatic forfeiture offences.[3743]

[3734] *R v Roach* [2005] VSCA 162; *Borg v The Queen* [2017] VSCA 71; *Shau v The Queen* [2020] VSCA 252, [54]
[3735] *Gardner* [8]; *Le* [4], [54].
[3736] *Kiril (a pseudonym) v The Queen* [2019] VSCA 133.
[3737] See, eg, *Aitkin* [101]-[102] (to kill or post intimate images on social media); *DPP (Vic) v Minutoli* [2003] VSCA 201 (to damage property); *Oksuz* (2015) 47 VR 731 (to physically harm a family member); *Adamson v The Queen* (2015) 47 VR 268 (to reveal criminal conduct).
[3738] *Elmaghraby* [63] (kidnapping); *Oksuz* 733 [1], 757-58 [113] (blackmail); *Loftus v The Queen* [2019] VSCA 24, [86]-[87] (blackmail); *Liszczak* [71], [103] (endangerment); *Cooper* [70], [74] (endangerment).
[3739] *Elmaghraby* [63] (kidnapping); *Latorre* 352 [191] (blackmail); *Liszczak* [71], [103] (endangerment); *Natale* [59] (endangerment); *Cooper* [70], [74] (endangerment).
[3740] *Elmaghraby* [63] (kidnapping); *Latorre* 352 [191] (blackmail); *Cooper* [70], [74] (endangerment).
[3741] See 9.4 – Statutory schemes – Continuing criminal enterprise offenders.
[3742] *Sex Offenders Registration Act 2004* (Vic) s 7.
[3743] See 17.1.2 – Confiscation – Statutory regime – Automatic forfeiture.

Kidnapping and threatening to kill are "serious offences"[3744] and "violent offences",[3745] threatening to kill is also a "serious violent offence",[3746] and threatening to inflict serious injury is a "violent offence"[3747] for the purposes of the *Sentencing Act 1991* (Vic). Therefore, the serious offenders regime[3748] may apply or an indefinite sentence might be imposed.[3749]

[3744] The Act s 3.
[3745] Ibid sch 1, cl 2.
[3746] Ibid cl 3.
[3747] Ibid cl 2.
[3748] See 9.3 – Statutory schemes – Serious offenders.
[3749] See 8.7 – Imprisonment – Indefinite sentence.

27 – Property Offences

27.1 – Penalties and current sentencing practices

27.1.1 – Victorian penalties

27.1.1.1 – Theft simpliciter and theft-adjacent offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Theft	s 74	Level 5 - 10 years	22 April 1992
Theft of firearm	s 74AA	1800 penalty units ('p.u.') or 15 years imprisonment	1 December 2015
Handling stolen goods	s 88	Level 4 - 15 years	1 September 1997
Going equipped to steal	s 91	Level 7 - 2 years	1 September 1997

27.1.1.2 – Violent property offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Robbery	s 75	Level 4 - 15 years	1 September 1997
Armed robbery	s 75A	Level 2 - 25 years	1 September 1997
Burglary	s 76	Level 5 - 10 years	1 September 1997
Aggravated burglary	s 77	Level 2 - 25 years	1 September 1997
Home invasion	s 77A	Level 2 - 25 years	7 December 2016
Aggravated home invasion	s 77B	Level 2 - 25 years[3750] Minimum non-parole period[3751] - 3 years	7 December 2016

[3750] A Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). See *Sentencing Act 1991* (Vic) ('the *Act*'), ss 3, 5(2G), 160.

[3751] Ibid s 10AD. See also 9.1.2.5 – Statutory schemes – Aggravated home invasion or carjacking.

Carjacking	s 79	Level 4 - 15 years	7 December 2016
Aggravated carjacking	s 79A	Level 2 - 25 years[3752] Minimum non-parole period[3753] - 3 years	7 December 2016

27.1.1.3 – Deception offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Obtaining property by deception	s 81	Level 5 - 10 years	22 April 1992
Obtaining financial advantage by deception	s 82	Level 5 - 10 years	22 April 1992
False accounting	s 83	Level 5 - 10 years	22 April 1992
Falsification of documents	ss 83A(1)–(5B)	Level 5 - 10 years	1 September 1997
Make or possess material for making false document	s 83A(5C)	Level 6 - 5 years	1 September 1997
Liability of company officers for company offences	s 84	Level 5 - 10 years	1 September 1997
False statements by company directors	s 85	Level 5 - 10 years	1 September 1997
Suppression of documents	s 86	Level 5 - 10 years	1 September 1997
Conspiracy to defraud	Common law (s 320)	Level 4 - 15 years	1 September 1997
Conspiracy to cheat and defraud	Common law (s 320)	Level 4 - 15 years	1 September 1997

[3752] A Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). See the *Act*, ss 3, 5(2G), 160

[3753] Ibid s 10AD. See also 9.1.2.5 – Statutory schemes – Aggravated home invasion or carjacking.

27.1.1.4 – Damaging property offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Intentionally destroying or damaging property	s 197(1)	Level 5 - 10 years	1 September 1997
Intentionally destroying or damaging property intending to endanger life	s 197(2)	Level 4 - 15 years	1 September 1997
Criminal damage with view to gain	s 197(3)	Level 5 - 10 years	1 September 1997
Criminal damage by arson	s 197(7)	Level 4 - 15 years	1 September 1997
Arson causing death	s 197A	Level 2 - 25 years	1 September 1997
Threats to destroy or damage property	s 198	Level 6 - 5 years	1 September 1997
Possessing anything with intent to destroy or damage property	s 199	Level 6 - 5 years	1 September 1997
Intentionally or recklessly causing a bushfire	s 201A	Level 4 - 15 years	7 May 2003
Rioters demolishing buildings	s 206(1)	Level 4 - 15 years	1 September 1997
Rioters damaging or injuring buildings	s 206(2)	Level 6 - 5 years	1 September 1997
Causing unauthorised computer function with intent to commit a serious offence	s 247B	Same maximum as the "serious offence" intended	7 May 2003
Unauthorised modification of data to cause impairment	s 247C	Level 5 - 10 years	7 May 2003
Causing unauthorised impairment of electronic communication	s 247D	Level 5 - 10 years	7 May 2003
Possessing etc data with intent to commit a serious computer offence	s 247E	3 years	7 May 2003

Producing etc data with intent to commit a serious computer offence	s 247F	3 years	7 May 2003
Causing unauthorised access to or modification of restricted data	s 247G	Level 7 - 2 years	7 May 2003
Causing unauthorised impairment to data	s 274H	Level 7 - 2 years	7 May 2003
Sabotage	s 247K	Level 2 - 25 years	7 May 2003
Threats to sabotage	s 247L	Level 4 - 15 years	7 May 2003
Contamination of goods with intent to cause public alarm or economic loss	s 249	Level 5 - 10 years or 1200 p.u. (or both)	1 January 1999
Threat of contamination of goods with intent to cause public alarm or economic loss	s 250	Level 5 - 10 years or 1200 p.u. (or both)	1 January 1999
Making false statement concerning contamination of goods with intent…	s 251	Level 5 - 10 years or 1200 p.u. (or both)	1 January 1999

27.1.1.5 – Corruption offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Secret commissions	ss 176, 178-80	Level 5 - 10 years or 1200 p.u. (or both)	1 September 1997
Dealing with proceeds of crime …knowing dealing	s 194(1)	Level 3 - 20 years	1 January 2004
…intentional dealing	s 194(2)	Level 4 - 15 years	1 January 2004
…reckless dealing	s 194(3)	Level 5 - 10 years	1 January 2004
…negligent dealing	s 194(4)	Level 6 - 5 years	1 January 2004

Dealing with property suspected of being proceeds of crime	s 195	Level 7 - 2 years	1 January 2004
Dealing with property which subsequently becomes an instrument of crime …intentional dealing	s 195A(1)	Level 4 - 15 years	1 January 2004
…reckless dealing	s 195A(2)	Level 5 - 10 years	1 January 2004
…negligent dealing	s 195A(3)	Level 6 - 5 years	1 January 2004

27.1.2 – Commonwealth penalties

27.1.2.1 – Theft, robbery, burglary, deception and related offences

Offence	***Criminal Code* (Cth)**	**Maximum Penalty**	**Applies to offence committed from**
Theft	s 131.1	10 years	24 May 2001
Receiving	s 132.1	10 years	24 May 2001
Robbery	s 132.2	15 years	24 May 2001
Aggravated robbery	s 132.3	20 years	24 May 2001
Burglary	s 132.4	13 years	24 May 2001
Aggravated burglary	s 132.5	17 years	24 May 2001
Making off without payment	s 132.6	2 years	24 May 2001
Going equipped for theft or a property offence	s 132.7	3 years	24 May 2001
Dishonest taking or retention of property	s 132.8	2 years	24 May 2001
Damaging Cth property	s 132.8A	10 years	30 June 2018
Obtaining property by deception	s 134.1	10 years	24 May 2001

Obtaining a financial advantage by deception	s 134.2	10 years	24 May 2001
Forgery	s 144.1	10 years	24 May 2001
Using a forged document	s 145.1	10 years	24 May 2001
Possession of a forged document	s 145.2	10 years	24 May 2001
Possession etc device etc for making forgery	s 145.3	10 years /2 years	24 May 2001
Falsification of documents	s 145.4	7 years	24 May 2001
Giving information derived from false documents	s 145.5	7 years	24 May 2001

27.1.2.3 – Money laundering offences

Offence	***Criminal Code* (Cth)**	**Maximum Penalty**	**Applies to offence committed from**
Dealing in proceeds of crime-worth $1million …with knowledge	ss 400.3(1), (1A), (1B)	25 years, or 1500 p.u., or both	1 January 2003. (1A),(1B) on 17 February 2021
… recklessly	ss 400.3(2), (2A), (2B)	12 years, or 720 p.u., or both	1 January 2003. (2A),(2B) on 17 February 2021
… negligently	ss 400.3(3), (3A), (3B)	5 years, or 300 p.u., or both	1 January 2003. (3A),(3B) on 17 February 2021
Dealing in proceeds of crime-worth $100,000 … with knowledge	ss 400.4(1), (1A), (1B)	20 years, or 1200 p.u., or both	1 January 2003. (1A),(1B) on 17 February 2021
… recklessly	ss 400.4(2), (2A), (2B)	10 years, or 600 p.u., or both	1 January 2003. (2A),(2B) on 17 February 2021

… negligently	ss 400.4(3), (3A), (3B)	4 years, or 240 p.u., or both	1 January 2003. (3A),(3B) on 17 February 2021
Dealing in proceeds of crime-worth $50,000 … with knowledge	s 400.5(1)	15 years, or 900 p.u., or both	1 January 2003
… recklessly	s 400.5(2)	7 years, or 420 p.u., or both	1 January 2003
… negligently	s 400.5(3)	3 years, or 180 p.u., or both	1 January 2003
Dealing in proceeds of crime-worth $10,000 … with knowledge	s 400.6(1)	10 years, or 600 p.u., or both	1 January 2003
… recklessly	s 400.6(2)	5 years, or 300 p.u., or both	1 January 2003
… negligently	s 400.6(3)	2 years, or 120 p.u., or both	1 January 2003
Dealing in proceeds of crime-worth $1,000 … with knowledge	s 400.7(1)	5 years, or 300 p.u., or both	1 January 2003
… recklessly	s 400.7(2)	2 years, or 120 p.u., or both	1 January 2003
Possession etc. of property reasonably suspected of being proceeds of crime etc.	s 400.9	2 years, or 50 p.u., or both	1 January 2003

27.1.3 – Current sentencing practices

27.1.3.1 –Theft, burglary and associated offences

Offences of theft simpliciter, burglary (without violence), handling stolen goods and going equipped to steal may be committed in a wide variety of circumstances. See the Sentencing Advisory Council statistics database for further information on current sentencing practices for theft, burglary, handling stolen goods and going equipped to steal.

27.1.3.2 – Violent property offences

In all but the most exceptional case, persons who plead guilty to or who are convicted of robbery or armed robbery should expect to have convictions recorded against them and a custodial sentence to follow.[3754]

In *Hogarth v The Queen*, the Court of Appeal held that current sentencing practice[3755] for "confrontational" aggravated burglary was inadequate and needed to be uplifted.[3756] Offences of the kind described in *Hogarth* were subsequently included in the *Crimes Act 1958* (Vic) as the offences of home invasion and aggravated home invasion. The Court subsequently expanded the *Hogarth* ruling to include all 'more serious forms' of aggravated burglary,[3757] and discouraged a rigid application of the categories of aggravated burglary.[3758] Terms of imprisonment in the range of five to seven years are regularly imposed in these cases.[3759]

As carjacking and aggravated carjacking are relatively new offences, the guidance on current sentencing practice is limited and still evolving.[3760] However, carjacking is essentially a specialised form of robbery and so the sentencing considerations relevant to robbery may provide some guidance for carjacking offences. The same is true for aggravated carjacking and armed robbery, except that aggravated carjacking is subject to a minimum non-parole period and armed robbery is not.

27.1.3.3 – Deception offences

The offences of obtaining property or financial advantage by deception traverse a wide range of conduct, from isolated instances of credit card fraud, through the exploitation of false information or false identities to obtain credit or goods, to the largest scale systematic fraud upon institutions and investors.

Long terms of imprisonment are to be expected for serious instances of such 'white collar offending'.[3761] Sentencing dispositions that do not involve an immediate term of imprisonment with a non-parole period are likely to be inadequate.[3762] Offences relating to secret commissions will almost inevitably attract a custodial sentence.[3763]

[3754] *DPP (Vic) v Candaza* [2003] VSCA 91, [17]; *R v Roberts* (1994) 73 A Crim R 306, 308-9.
[3755] At that time, sentences were commonly around two years' imprisonment.
[3756] (2012) 37 VR 658, 673 [62] ('*Hogarth*').
[3757] *DPP (Vic) v Meyers* (2014) 44 VR 486, 495 [37] ('*Meyers*').
[3758] *Meyers* 495 [36]-[37]; *Maslen v The Queen* [2018] VSCA 90, [33]-[34] ('*Maslen*'); *Collier v The Queen* [2018] VSCA 47, [40] ('*Collier'*); *Comensoli v The Queen* [2020] VSCA 2, [20] ('*Comensoli*').
[3759] *DPP (Vic) v Bowden* [2016] VSCA 283, [41]-[49] ('*Bowden'*); *Maslen* [40]; *DPP (Vic) v O'Brien* (2019) 280 A Crim R 1, 9 [38] ('*O'Brien*'); *DPP (Vic) v Wol* [2019] VSCA 268, [79] ('*Wol*'); *Dean v The Queen* [2020] VSCA 100, [87] ('*Dean*'); *Brown v The Queen* [2021] VSCA 204, [39]-[47]; *Salvaggio v The Queen* [2022] VSCA 88, [106] ('*Salvaggio')*.
[3760] *Mammoliti v The Queen* (2020) 281 A Crim R 511, 524 [59] ('*Mammoliti')*.
[3761] *DPP (Vic) v Bulfin* (1998) 4 VR 114, 131-32 ('*Bulfin'*); *DPP (Cth) v Couper* (2013) 41 VR 128, 149 [118] ('*Couper'*); *Majeed v The Queen* [2013] VSCA 40, [44] ('*Majeed')*; *Zaia v The Queen* [2020] VSCA 9, [108].
[3762] *Bulfin* 115,132, 141; *DPP (Cth) v Gregory* (2011) 34 VR 1, 16 [53] ('*Gregory* '); *Dyason v The Queen* (2015) 251 A Crim R 366, 373-74 [37]-[38], [40] ('*Dyason'*).
[3763] *R v Jamieson* (1988) VR 879, 888 ('*Jamieson'*).

27.1.3.4 – Damaging property offences

Arson is a sub-category of the offence of intentionally destroying or damaging property. It is an offence which may be committed in a very wide range of circumstances. It is a presumptively serious offence, as reflected in the maximum custodial sentence of 15 years. Arsonists must generally expect to receive a sentence of imprisonment, although there will be cases where imprisonment would not be appropriate.[3764] Conduct at the serious end of the scale will warrant an immediate custodial sentence of some length.[3765] It is appropriate to use manslaughter sentences as a guide in sentencing arson causing death.[3766]

27.1.3.5 – Money laundering offences

Money laundering is a serious criminal activity which justifies severe punishment.[3767] Although there are an increasing number of money laundering cases which have been the subject of appellate decision, they have been held to offer no more than a broad indication of developing sentencing practice.[3768] Nevertheless, having regard to comparable cases from intermediate appellate courts across the Commonwealth is an important aspect of sentencing for federal offences for two reasons. These decisions may provide guidance in identifying and applying relevant sentencing principles. And they may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence.[3769]

27.1.3.6 – Commonwealth fraud offences

In many cases, imprisonment will be the only sentencing option for serious fraud in the absence of powerful mitigating circumstances.[3770] However, courts have warned that such 'ritual incantations' are of little practical value, because "serious" must inevitably depend upon the finding of the sentencing judge in the case under consideration.[3771] This remains the case even if the fraud is committed for the benefit of another.[3772]

[3764] *R v Haddara* (1997) 95 A Crim R 108, 111-112, citing *R v Dowell* (1982) 6 A Crim R 113, 116; *R v Stallworthy* [2002] VSCA 135, [16]-[17].
[3765] *R v James* (1981) 27 SASR 348 (‘*Dowell’*); *R v S (A Child)* (1992) 60 A Crim R 121, 135 (‘*S (A Child)*').
[3766] *R v Chambers* (2005) 152 A Crim R 164, 169-70 [19]-[20].
[3767] *R v Huang* (2007) 174 A Crim R 370, 381 [36] (‘*Huang’*); *R v Guo* (2010) 201 A Crim R 403, 418 [91], 420 [103]; *Majeed* [39], [44].
[3768] *Majeed* [34]; *R v Truong* [2016] VSCA 228, [35]; *Kim v The Queen* [2016] VSCA 238, [60] (‘*Kim’*).
[3769] *Samarakoon v The Queen* [2018] VSCA 119, [80] (‘*Samarakoon’*).
[3770] *R v Whitnall* (1993) 68 A Crim R 119, 126; *R v Nguyen* (1997) 1 VR 386, 389; *R v Purdon* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Hunt CJ at CL, McInerney J, Donovan AJ, 27 March 1997) (‘*Purdon’*); *R v Schwabegger* (1998) 4 VR 649, 654; *DPP (Cth) v Thomas* (1998) 3 VR 188, 200 (‘*Thomas’)*.
[3771] *DPP (Cth) v Carter* (1998) 4 VR 601, 606.
[3772] *R v Smith* [2004] QCA 417, [16]–[17].

27.2 – Gravity and culpability

27.2.1 – Theft, burglary and associated offences

The offence of theft varies widely in seriousness. It is impossible to categorise thefts in such a way that types of theft can be put into a hierarchy of seriousness. It is the presence or absence of particular factors which will indicate the gravity of the instant offence.

The objective gravity of any theft must be considered by reference to what was taken, its value, from whom it was taken, and all other relevant surrounding circumstances, including the purpose for which it was taken.[3773] While the value of property stolen or dealt with will commonly be a key consideration in determining offence seriousness, it is not necessarily decisive. Generally, the greater the value the greater an offender's culpability.[3774] This is particularly so where taking something of value is the fundamental harm of the offence. However, where the offending involves another harm to the victim, the value of property may be completely subordinate to other circumstances.[3775]

The key elements which determine the seriousness of offences of theft and burglary are the level of planning,[3776] the role of the offender,[3777] and the value of the goods taken.[3778] Theft and burglary will be particularly serious where the offending is brazen,[3779] involves a breach of trust by a burglar who is or has been employed by the victim,[3780] or is prolific and persistent.[3781]

However, the overall criminality must be assessed with reference to the nature and character of the entire offending – a series of poorly planned and haphazardly carried out thefts must be distinguished from highly organised serious 'commercial' offending.[3782] Nevertheless, 'incompetence' is not mitigatory, and a high degree of persistence in offending may elevate offending to a more serious level of criminality.[3783]

[3773] *Chamma v The Queen* [2020] VSCA 232, [71] ('*Chamma*').
[3774] See, eg, *R v Zakaria* (1984) 12 A Crim R 386, 387, 389; *R v Nunno* [2008] VSCA 31, [31], [47].
[3775] For example, in *DPP (Vic) v Rivette* [2017] VSCA 150, [39] the theft of a vehicle was "very serious" offending because the offender drove the stolen vehicle for more than 20 minutes with the vehicle owner hanging onto the bonnet for his life.
[3776] *DPP (Vic) v Jovicic* (2001) 121 A Crim R 497, 502 [17] ('*Jovicic*'); *R v Mercieca* [2004] VSCA 170, [22]; *R v Berry* [2009] VSCA 219, [10] (series of thefts of 'almost military precision' as part of a gang operation targeting convenience stores for tobacco products); *Nguyen v The Queen* [2019] VSCA 249, [30]; *Donnelly v The Queen* [2020] VSCA 151, [68], [72] ('*Donnelly*') ('almost industrial scale' thieving and repurposing of stolen goods using false identities and documents); *Ralph v The Queen* [2022] VSCA 185, [39] ('*Ralph*').
[3777] *Donnelly* [11] ('the organising mind and key criminal force').
[3778] *DPP (Vic) v Bowd* [2019] VSCA 246, [20], [27]-[28] ('*Bowd*') (property worth $332,000 stolen); *Donnelly* [7] (the total value of the thefts – which could not be calculated precisely – was in the order of hundreds of thousands of dollars).
[3779] *White v The Queen* [2021] VSCA 247, [80].
[3780] *R v Manners* [2002] VSCA 161, [17]; *DPP (Vic) v Brown* (2004) 10 VR 328, 332 [39]; *R v SH* [2006] VSCA 83, [27]; *R v Hyland* [2008] VSCA 220, [19].
[3781] *Bowd* [28].
[3782] *Kulafi v The Queen* [2021] VSCA 368, [47] ('*Kulafi*').
[3783] *DPP (Vic) v Truong* [2004] VSCA 172, [23] ('*Truong*').

There is little distinction between burglary of commercial premises and residential dwellings.[3784] Offending against both types of premises will be considered serious for different reasons. Burglaries of dwellings tend to involve a breach of the privacy or sanctity of the home and instil fear and terror,[3785] and the theft of items of significant sentimental value may cause pain and anguish,[3786] while commercial burglaries often involve greater planning and professionalism. The theft of a motor vehicle is not a categorically less serious form of theft than other thefts.[3787]

The offence of theft of a firearm is a particularly serious kind of theft, as is demonstrated by the maximum penalty of 15 years' imprisonment compared to 10 years for theft.[3788] The increased penalty recognises that the theft of firearms contributes to the illegitimate flow of firearms in the community which, in turn, may facilitate serious criminal activity.[3789] The risk presented by the theft and sale or distribution of firearms exists regardless of whether the theft is opportunistic or pre-meditated.[3790] Nevertheless, the court has held that plainly premeditated offending, which involved bringing down gun safes using chains attached to the offenders' vehicle, cannot be categorised as 'low level offending'.[3791]

Handling stolen goods is generally regarded by Victorian courts as a more serious offence than theft, and generally through the modern history of the offence, this has been reflected in its greater maximum penalty. This gravity is generally linked to the role of the offence in encouraging and ensuring the success of the preceding thefts. Handling stolen goods has been said – in the context of an offender who drove a stolen vehicle – to show a 'sense of entitlement' that was an 'affront to decent minded people and those who work hard and pay legitimately for the vehicles they own'.[3792] Because the offence of handling may occur in a wide variety of circumstances, the courts have never formulated any sentencing practice of general application in relation to the offence.

Offences of handling stolen goods are most serious where:

- the dealing in stolen goods is planned,[3793] as opposed to a 'casual purchase in a bar';[3794]
- the scale of the operation is significant in its sophistication or professionalism and the volume and value of goods handled;[3795]

[3784] *Kulafi* [35].
[3785] *R v Hayes* (1984) 11 A Crim R 187, 189-190 (*'Hayes'*); *R v Ward* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Murphy, Marks, and Gobbo JJ, 4 September 1989) 6; *Jovicic* 507 [32]; *Ralph* [38].
[3786] *Ralph* [37], [41].
[3787] *Chamma* [71].
[3788] *Barry v The Queen* [2021] VSCA 321, [27] (*'Barry'*).
[3789] *Benkic v The Queen* [2019] VSCA 34, [18] (*'Benkic'*)].
[3790] *Barry* [27]; *Ralph* [41].
[3791] *Benkic* [17].
[3792] *Said v The Queen* [2020] VSCA 178, [62] (*'Said'*).
[3793] *DPP (Vic) v Louden* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Murphy, Brooking, and Hampel JJ, 6 May 1987) 4 (*'Louden'*); *R v Nikodjevic* [2004] VSCA 222, [24] (*'Nikodjevic'*); *R v Powell* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Lush, Murphy, and Fullage JJ, 2 February 1983) 3-4.
[3794] *R v Reid* (Unreported, Victorian Court of Appeal, Phillips CJ, Ormiston, and Kenny JJ, 3 April 1998) 8 (*'Reid'*).
[3795] *Louden* 4; *R v Park* ((Unreported, Supreme Court of Victoria, Court of Criminal Appeal, McInerney, Anderson, and McGarvie JJ, 3 December 1982) 2 (*'Park'*); *R v Sumner* (1985) 19 A Crim R 210, 210; *Nikodjevic,*[24];*R v Konsol* [2002] VSCA 3, [9] (a business which handled a relatively small number of stolen parts was neither "extensive" nor "significant"); *DPP (Vic) v Sarkis* [2006] VSCA 303, [3]–[4].

- the offender's role is that of a leader or organiser,[3796] or is, at least, not that of a mere passive recipient;[3797]
- the offender abuses a position of power or trust or responsibility, especially where the offender can disguise the stolen goods as stock-in-trade of a legitimate business;[3798] or
- the stolen property handled is specialised or unique – such as items of sentimental value procured through domestic burglaries.[3799]

The offence of going equipped to steal has been held not to have 'noticeably different gradations of seriousness'.[3800]

27.2.2 – Violent property offences

Violent theft offences include aggravated burglary, robbery, armed robbery, home invasion, aggravated home invasion, carjacking and aggravated carjacking. Violent theft offences are considered serious offending,[3801] as they invariably involve a terrifying experience for the victims and threaten the wider community's sense of security.[3802] Sentencing decisions concerning home invasion as a form of aggravated burglary remain directly relevant to sentencing for the new offence. [3803] By introducing mandatory sentencing requirements for a class of home invasion offences, the legislature has signalled that those offences are to be regarded — other things being equal — as more serious than offences of aggravated burglary.

27.2.2.1 – Common features going to gravity and culpability

The value, quantity or quality of goods stolen in a violent theft offence is of less relevance – and may even be irrelevant – in assessing the gravity of offending than is the violence, threats or fear instilled in the victim.[3804] Certain common features are relevant in assessing the gravity of serious violent theft offences and the offender's culpability.

These features include:

[3796] *Louden* 4.
[3797] See, eg, *R v Reimers* (Unreported, Supreme Court of Victoria, McGarvie J, 31 October 1979) 2 (used grinder to remove identification numbers from stolen firearms); *R v Dragani* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Starke, Anderson, and Fullagar JJ, 4 April 1979) 3 (let storage space for profit, unloaded goods left there, took some items for himself); *Reid* 14 (trusted to guard the goods and to live on the property with all expenses paid).
[3798] See, eg, *R v Hayblum* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Anderson, and Gobbo JJ, 2 April 1982) 6 ('*Hayblum'*); *R v Prokop* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Brooking, and King JJ, 27 February 1987) 17 ('*Prokop'*); *R v Davies* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Crockett, and Nathan JJ, 5 December 1989) 6 (breach of motor vehicle trader licence) ('*Davies 1989*'), *R v Wills* [1999] VSCA 15, [18] (motor vehicle wrecker); *Mendieta-Blanco v The Queen* [2020] VSCA 265, [23]-[24] (breach of second-hand dealer licence) ('*Mendieta-Blanco')*.
[3799] *Mendieta-Blanco* [13].
[3800] *R v Hartwick* (1985) 17 A Crim R 281, 284.
[3801] *DPP (Vic) v Stevens* [2013] VSCA 187, [31] (armed robbery); *Comensoli* [20] (aggravated burglary); *Taleb v The Queen* [2020] VSCA 329, [33] (home invasion); *Russo v The Queen* [2021] VSCA 244 [48]-[49] (carjacking) ('*Russo'*).
[3802] *R v Williscroft* (1975) VR 292, 301 ('*Williscroft'*).
[3803] *O'Brien* 3, 9 [4], [38].
[3804] *DPP (Vic) v Crow* [2003] VSCA 104, [13].

- planning[3805] and professionalism such as:
  - selection of the place to be robbed in advance; [3806]
  - the victim's home is targeted for theft; [3807]
  - particular care is taken before entry;[3808]
  - carrying items for the purpose of restraining victims,[3809] which may also be important to an assessment of criminality because carrying such items will inevitably be terrifying to the victims;[3810]
  - use of a disguise,[3811] even if this is unsuccessful;[3812]
- where the mode of entry is violent such as forcing a door or breaking a window[3813] - offending is less serious where the property is entered by invitation;[3814] however, a surreptitious entry may facilitate the commission of an intended sexual assault by ensuring that the victim is not forewarned;[3815]
- offending occurs late at night;[3816]
- the offence is committed in company – although this may also be an element of some offences, such as home invasion and aggravated home invasion;
- the offender remains for a "not fleeting" length of time;[3817]
- the offender confronts and threatens to kill or harm victims to procure compliance and submission to demands, terrifying them;[3818]
- threats are accompanied by actual violence or force;[3819]
- the offending is serial, prolific or persistent.[3820]

As with burglary, there is little distinction between offending against commercial premises and residential dwellings.[3821] Offending against both types is serious for different reasons: aggravated burglaries or home invasions of dwellings tend to involve a breach of the privacy or sanctity of the home

[3805] *Wol* [59]; *DPP (Vic) v Simmonds* [2019] VSCA 288, [36] ('*Simmonds'*); *Dean* [86].
[3806] *R v Svorc* [1998] VSCA 22, [13]; *R v Reddrop* [2000] VSCA 101, [14]; *DPP (Vic) v Doherty* [2002] VSCA 213, [27] ('*Doherty'*); *DPP (Vic) v Pau* [2007] VSCA 238, [13]; *R v Ozbec* [2008] VSCA 9, [19]; *Balshaw v The Queen* [2021] VSCA 78, [48]-[49] ('*Balshaw'*).
[3807] *Wol* [61].
[3808] *R v Lim* (Unreported, Victorian Court of Appeal, Winneke P, Charles JA, and Hedigan AJA, 13 March 1997) 7-8.
[3809] *Meyers* 498 [50]; *R v Vella* [2014] VSCA 140, [8] (items found at the victim's house may indicate that the offending was opportunistic rather than planned in advance); *DPP (Vic) v Tuite* [2019] VSC 159, [22]; *Simmonds* [36].
[3810] *Sikoulabout v The Queen* [2018] VSCA 268, [60] ('*Sikoulabout*').
[3811] *Walker v The Queen* [2019] VSCA 137, [63]; *Frost v The Queen* [2020] VSCA 53, [45] ('*Frost*') (absence of disguise); *Balshaw* [48]-[49]; *Schaeffer v The Queen* [2021] VSCA 171, [33].
[3812] *Maslen* [38].
[3813] *Meyers* 498 [48].
[3814]*Frost* [45].
[3815] *Salvaggio* [105].
[3816] *Meyers* 498 [48]; *Maslen* [38]; *Dirbass v The Queen* [2018] VSCA 272, [65] ('*Dirbass')*; *Wol* [59]; *Dean* [86]; *Hill v The Queen* [2020] VSCA 220, [48] ('*Hill*'). *Russo* [48]-[49] (a mid-range example of carjacking).
[3817] *Dirbass* [65]; *Wol* [59].
[3818] *Wol* [59]; *Dean* [86]; *Shok v The Queen* [2020] VSCA 294, [38] ('*Shok'*).
[3819] *Murrell v The Queen* [2014] VSCA 337, [64]; *Bidong v The Queen* [2022] VSCA 33, [37].
[3820] *R v Kittikhoun* [2004] VSCA 194, [14] ('*Kittikhoun')*.
[3821] *Kulafi* [35].

and instil fear and terror,[3822] while those committed on commercial premises often involve greater planning and professionalism.

27.2.2.2 – Aggravated burglary, home invasion and aggravated home invasion

Home invasion offences are, essentially, a subtype of aggravated burglary,[3823] and there is a clear relationship between the elements of these offences.[3824] In *Hogarth*,[3825] the Court of Appeal adopted the terminology suggested by the Sentencing Advisory Council in dividing aggravated burglaries into six categories. The most serious included intimate partner, intent to commit a sexual assault, and confrontational,[3826] while intent to steal,[3827] intent to rob, and spontaneous encounter were considered to be, comparatively, less serious. The Court of Appeal has, however, subsequently discouraged a rigid application of the categories described in *Hogarth*.[3828] While it will be necessary to consider other instances of the offence, by reference to both the offender and the offending, and identify what made them more or less serious examples of the offence, that does not mean that the absence of an aggravating factor seen in another case means that the instant offence is necessarily less serious. Rather, it may simply mean that the cases are different. Any process of reasoning by way of subtraction of the absent potentially aggravating features is impermissible two-stage sentencing.[3829]

The following considerations will ordinarily be relevant to an assessment of the gravity of a particular instance of aggravated burglary:

- the offender's intent at the point of entry;
- the mode of entry;
- whether the offender was carrying a weapon;
- whether the offender was alone or in company;
- the time of day at which the burglary took place;
- what the offender knew or believed about who would be inside, and where the person(s) would be; and
- whether the offender was someone of whom the victim was particularly frightened.[3830]

Where offending occurs in the context of family violence, it is not considered any less serious because the offender is known to the victim. [3831] Indeed, the criminal law now gives greater recognition to the

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[3822] *Hayes* 189-190; *R v Ward* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Murphy, Marks, and Gobbo JJ, 4 September 1989) 6; *Jovicic* 507, [32].
[3823] *O'Brien* 2 [2]. Note, however, that the mandatory imprisonment scheme applies to aggravated home invasion offences, but not aggravated burglary or home invasion. See, eg, the *Act* s 10AC.
[3824] *Sikoulabout* [62].
[3825] *Hogarth* 660 [3]–[4].
[3826] Alternatively described as "home invasion–style offending", this subset was said by the Sentencing Advisory Council to have the defining characteristic of entry into premises in the context of a dispute with, or a grievance against, a person in the premises.
[3827] If all other things are equal, an intent to steal may be less serious than an intent to assault or damage property. See, eg, *Dirbass* [62]-[63]; *Comensoli* [18]-[20].
[3828] *Meyers* 495 [36]-[37]; *Maslen* [33]-[34]; *Collier* [40].
[3829] *Salvaggio* [103]-[104].
[3830] *Meyers* 498 [47]-[49].
[3831] *R v Filiz* [2014] VSCA 212, [22]-[23]; *Meyers* 498 [48]; *Hill* [45].

devastating effects of family violence, and recognises the fundamental importance of general deterrence in cases of domestic violence.[3832]

The extent to which conduct that occurs after entry may be relevant to the proper sentence to be imposed on a charge of aggravated burglary is not entirely straightforward. Subsequent conduct that could have been but was not the subject of a charge of a more serious offence should not be treated as an aggravating factor.[3833] For example, the actions of an offender who ties up and threatens victims will constitute the separate offences of false imprisonment and assault. If the offender is not charged with these offences, that criminality cannot be taken into account adversely to the offender in sentencing for the aggravated burglary.[3834] However, the fact that an offender carries a loaded firearm during a home invasion offence has been held to be a 'very significant aggravating feature' of that offence, even where the offender is not charged with any firearms offences.[3835] The act of carrying a firearm was said to reveal premeditation, illuminate the offender's intention at the point of entry, and it greatly increased the danger associated with the act of entry into the premises. The common law principle that a sentencing judge is bound to consider all the circumstances relevant to the commission of the offence with which the offender has been charged must, in the appropriate circumstances, give way to the other common law principle that a person cannot be punished for an uncharged offence or where there is an acquittal.[3836] Equally, where other criminal acts are separately charged, a sentencing judge must ensure that elements of that separate offence are not taken into account in formulating sentence for the violent property offence.

Post-entry conduct is plainly capable of being relevant to establishing the intent for which the person entered the building.[3837] For example, all other things being equal, aggravated burglaries committed with intent to sexually assault a victim are generally considered more serious than those committed for theft or criminal damage purposes.

27.2.2.3 – Weapons

All weapons are serious because the mere presence of a weapon carries with it the risk of serious injury or death,[3838] and may induce terror in victims. The use or presence of a weapon of 'great lethality' will bear directly on the objective gravity of the offending.[3839] While unloaded firearms, imitation weapons, and innocuous items brandished as weapons plainly do not carry that same risk of injury or death and so are less dangerous than the genuine article,[3840] these are still capable of instilling terror in victims [3841] and possible serious emotional damage,[3842] and are dangerous in terms of potential police response.[3843]

[3832] *Pasinis v The Queen* [2014] VSCA 97, [53], [57].
[3833] *R v De Simoni* (1981) 147 CLR 383.
[3834] *Bava v The Queen* [2021] VSCA 34, [61]-[62].
[3835] *Clark v The Queen* [2020] VSCA 125, [23] ('*Clark*').
[3836] *R v Newman* (1995) 81 A Crim R 191, 195-96.
[3837] *Salvaggio* [100].
[3838] *R v Bortoli* [2006] VSCA 62, [23]; *Clark* [23].
[3839] *Bruce v The Queen* [2022] VSCA 100, [33].
[3840] *R v Smith* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, McInerney, Menhennitt, and McGarvie JJ, 31 July 1978) 12 ('*Smith'*).
[3841] *Ellis v The Queen* [2015] VSCA 320, [28] (firearm carried visibly to intimidate the victim into handing over property) ('*Ellis'*).
[3842] *Driver v The Queen* [2012] VSCA 242, [28].
[3843] *Shok* [40].

For several violent theft offences, carrying a weapon is an element of the offence and should not be treated as an aggravating circumstance. However, it is appropriate to consider the nature of the weapon, its potential to cause harm and the manner in which it was used in the committing the offence. Indeed, the use of a weapon in aid of a carjacking will almost always heighten the objective gravity of the offence of aggravated carjacking, regardless of the fact that the use of the weapon is the "qualifying" circumstance for aggravated carjacking.[3844]

Where the possession of a firearm and its discharge are the subject of other charges, these features should not be "double-counted". However, the carrying of a loaded firearm will generally be a 'significantly aggravating feature' of a violent theft offence.[3845] The absence of a weapon will commonly be a basis for considering an aggravated burglary to be at the lower end of seriousness where the offending is 'casual and opportunistic',[3846] but not necessarily in the case of an otherwise grave offence.[3847]

How a weapon is used during the offending is relevant to the assessment of criminality.[3848] Brandishing and pointing a firearm at a shop attendant while threatening to shoot has been characterised as a 'mid-range' example of armed robbery.[3849] Pointing a firearm and pulling the trigger (the weapon misfired) during an armed robbery was considered a particularly egregious feature, not commonly encountered.[3850] The firing of shots increases both terror in the victims and the risk of injury or death, and is an aggravating feature.[3851] An offender's use of a chainsaw to lacerate another's arm during an armed robbery was held to have 'elevated his [offending] to an alarming extent'.[3852] Similarly, the gratuitous nature of the violence inflicted by an armed robber who lacerated his victim's face with a box cutter was held to be a major determinant of the degree of criminality involved.[3853] Serious offending will remain so even if only 'relatively minor injuries' are sustained by the victim.[3854]

27.2.3 – Deception offences

Offences of deception also encompass a wide range: obtaining property by deception, obtaining financial advantage by deception, making and using false documents, false accounting, false statements by a company director, suppression of documents, and conspiring to cheat and defraud.

Deception offences are considered serious offending, and often involve a carefully calculated course of conduct over a long period, repeated deliberate acts of dishonesty and the loss of significant funds.[3855]

[3844] *Sabbatucci v The Queen* [2021] VSCA 340, [35] ('*Sabbatucci*').
[3845] *Clark* [23] (home invasion)
[3846] *R v Ashdown* [2003] VSCA 216, [19].
[3847] *Maslen* [34], [38].
[3848] *Bowden* [30]-[32]; *Whelan v The Queen* [2018] VSCA 279, [17].
[3849] *Shok* [35].
[3850] *DPP (Vic) v Hodgson* [2019] VSCA 49, [67].
[3851] *R v King* (1993) 66 A Crim R 74, 76; *DPP (Vic) v Gardner* [2004] VSCA 119, [20]; *R v Wilson* [2005] VSCA 78, [26]; *R v Vitale* [2018] VSC 197, [26]; *DPP (Vic) v Heyfron* [2019] VSCA 130, [48].
[3852] *Piacentino v The Queen* [2019] VSCA 153, [45].
[3853] *McGuigan v The Queen* [2012] VSCA 121, [52].
[3854] *Alexander (a pseudonym) v The Queen* [2021] VSCA 217, [23].
[3855] *Bulfin* 132.

These offences are difficult to detect and investigate, expensive to prosecute and 'most often devoid of excuse'.[3856]

Deception offences will be particularly egregious where:

- The offender holds a position of power, trust or responsibility,[3857] and abuses that status to facilitate the offending or enable the offender to camouflage the dishonest conduct.[3858]
- The offending involves an appalling breach of trust.[3859]
- The offending involves the appropriation of a very large amount of money.[3860]
- The dishonest conduct is systematic and deliberate, and occurs over a period of time.[3861] This is particularly so where the offender persists despite having multiple opportunities to reflect and desist from offending.[3862] Conversely, an offender who voluntarily ceases offending before being exposed by a third party, such as an auditor or a whistle-blower, should have this reflected in sentence by a real discount.[3863]
- The offending has a significant – or even "tragic" – impact on the victims because they are "small" investors,[3864] particularly vulnerable due to age, ill-health or bereavement,[3865] or because the victims include both individuals and financial institutions,[3866] or where no funds are ever recovered.[3867]

[3856] *R v Poyser* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Murphy, Gray, and Nathan JJ, 15 September 1988) 4-5; *R v Patniyot* [2000] VSCA 55, [38].

[3857] Such positions commonly arise from the nature of the offender's profession (including solicitors, accountants, financial advisors and security guards), or from an offender's role as an employee (eg book-keeper or payroll) or from the offender's relationship with the victims (eg family, friend, or priest), but is not confined to any of these factors.

[3858] *DPP (Vic) v Ryan* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Kaye, and Tadgell JJ, 7 April 1986) 6; *Bulfin* 131-32; *R v Gallagher* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Nathan, and Vincent JJ, 20 September 1994) 4 ('*Gallagher'*); *R v Licastro* [1999] VSCA 104, [3] ('*Licastro')*; *DPP (Vic) v Raddino* (2002) 128 A Crim R 437, 438-39 [7]; *R v Racky* [2003] VSCA 196, [11] ('*Racky'*); *R v Coukoulis* (2003) 7 VR 45, [41]-[42] ('*Coukoulis')*; *DPP (Vic) v Ralphs* [2004] VSCA 33, [13] ('*Ralphs'*); *R v Senese* [2004] VSCA 136, [81] ('*Senese')*; *R v Fernandez* [2006] VSCA 38, [21]; *R v Elias* [2007] VSCA 125, [3] ('*Elias')*; *Kotsifas v The Queen* [2021] VSCA 368, [61]-[62] ('*Kotsifas')*.

[3859] *R v Kiss* (1993) 69 A Crim R 436, 439; *Gallagher* 4; *R v Woodward* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Vincent, and McDonald JJ, 29 November 1995) 6 ('*Woodward')*; *R v Shaw* [2000] VSCA 218, [48]; *Coukoulis* [17], [41]; *R v De Stefano* [2003] VSC 68, [20]-[22] ('*De Stefano*'); *Senese* [81]; *Elias* [27]; *DPP (Vic) v Felton* (2007) 16 VR 214, [49] ('*Felton'); Kotsifas* [86].

[3860] See, eg, *Coukoulis* (theft by solicitor of $8.167 million) and *De Stefano* (theft by an accountant of $8.6 million).

[3861] *Licastro* [21]; *Elias* [27]; *Racky* [11], *Coukoulis* [41]; *Ralphs* [12]-[13]; *Woodward* 6; *Felton* [49]; *Maddock v The Queen* [2020] VSCA 271, [33] ('*Maddock'*); *DPP (Vic) v Blackberry* [2019] VSCA 269, [29] ('*Blackberry'*).

[3862] *Kotsifas* [59].

[3863] *R v Berry* [2007] VSCA 60, [26], citing *R v Lopez* [1999] NSWCCA 245, [17]-[18].

[3864] *Bulfin* 131-32; *R v Bieske* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston, and Coldrey JJ, 18 March 1994) 5.

[3865] *R v Hoskin* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Southwell, and Vincent JJ, 13 May 1994) 5; *Gallagher* 4.

[3866] *Ralphs* [12].

[3867] *Felton* [49].

The value of the gains dishonestly obtained by the offender will generally be an important indicator of the seriousness of the offending,[3868] but the extent and breadth of offending, and its sophistication, may make a particular instance of offending more serious than other less sophisticated offences which involved greater sums of money.[3869]

While the absence of financial loss as a result of the offending is a significant matter which reduces the objective gravity of the offending, the importance of safeguarding the integrity of systems means that absence of loss must not unduly erode the importance of general deterrence.[3870]

The difference in moral culpability between offenders who are motivated by greed and those driven by financial need is said to be 'slight and in most cases illusory'.[3871] The absence of greed is not uncommon.[3872] Motive may bear on the genuineness of any expression of remorse, or be relevant to the need for specific deterrence, or the prospects of rehabilitation. Only extremely rarely will the presence of extreme financial pressures mitigate the level of culpability in cases of significant breach of trust.[3873] In general, individuals in desperate financial straits who turn to fraud to get out of their difficulties cannot expect any special leniency.[3874]

Corruption is insidious. Offences involving secret commissions, for example, are serious offences because they threaten the integrity of public institutions and commercial life.[3875] The features relevant to the offence gravity include the amount of commercial profit attributable to the giving or receiving of a secret commission, and the duration and scale of the offending.[3876]

27.2.4 – Damaging property offences

There are a large number of offences which involve the damaging of property. Criminal damage offences vary greatly in their gravity – the property damaged may vary from a book to a mansion[3877] - however offences charged as arson are generally regarded as being of substantial gravity,[3878] and arson causing death is the most serious offence in this section. Offending involving computers[3879] and contamination of goods[3880] are commonly at the lesser end of the scale of seriousness.

In Australia, criminal damage caused by bushfire is always regarded as a serious offence. High risk fires may spread out of control, fires are difficult to detect when lit in the countryside, and natural fires are an annual threat which makes deliberate fires 'particularly repugnant'.[3881]

[3868] *Coukoulis* [34]; *McNamara v Western Australia* [2010] WASCA 193, [13].
[3869] *Blackberry* [31].
[3870] *Mao v The King* [2022] VSCA 211, [29], [48].
[3871] *Brancatella v The Queen* [2016] VSCA 94, [23].
[3872] *Maddock* [29].
[3873] *R v Arundell* [2003] VSCA 69, [35].
[3874] *R v Duncan* (1998) 3 VR 208, 214.
[3875] *DPP (Vic) v Page* [2006] VSCA 224, [68] ('*Page*').
[3876] Ibid [39].
[3877] *R v Halden* (1983) 9 A Crim R 30, 38-39.
[3878] *Ralph* [12].
[3879] *Crimes Act 1958* (Vic) pt 1, div 3, subdivision (6) ('*Crimes Act*').
[3880] Ibid pt 1, div. 4.
[3881] *R v Bontoft* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Anderson, and Gobbo JJ, 29 March 1983) 5 ('*Bontoft')*.

Arson and criminal damage are serious crimes that may be committed in a variety of ways, in a variety of circumstances and for a variety of reasons,[3882] including revenge, to conceal the commission of another offence, as an act of vandalism, for financial gain, as a result of mental ill-health,[3883] or as part of a conflict between warring gangs.[3884].

Offences of arson and criminal damage are considered particularly serious where:

- one offender has committed multiple offences of arson;[3885]
- the offender had a leading role (if the offending occurred in company);[3886]
- the resulting damage or loss is substantial;[3887]
- the offender is motivated by revenge or reward;[3888]
- the arsonist knew or believed that the building they set fire to was occupied;[3889]
- there is risk of harm to others in general[3890] and neighbours in particular;[3891]
- the fire is lit during a 'fire danger period' declaration, during a total fire ban or on a hot windy day;[3892] or
- the fire is difficult to detect.[3893]

27.2.4.1 – Intent and unintended consequences

While the extent of the damage is relevant in arson cases, it is the intention of the offender which characterises the seriousness of the offence.[3894] In particular, men who direct violence (whether arson or criminal damage of property) towards former partners should expect 'condign punishment'.[3895] There are many examples of offending against a former partner motivated by revenge,[3896] although it has been said that such cases are no more serious than an arson committed for profit or material advantage.[3897]

At common law, a sentencing court was entitled to have regard to the unintended consequences of the offender's acts where these were reasonably foreseeable by the offender. In arson and other criminal

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[3882] *Anderson v The Queen* [2019] VSCA 42, [70]-[71] (*'Anderson'*).
[3883] *Dowell* 116. See, eg, *Nolch v The Queen* [2020] VSCA 195, [26] (deliberate act designed to cause great offence, annoyance and hurt to the community at large).
[3884] *Said* [80].
[3885] See, eg, *R v Mattheas* [2003] VSCA 221; *Hasan v The Queen* [2004] VSCA 137; *R v Noonan* [2007] VSCA 5 (*'Noonan'*); *R v Crowley* [2009] VSCA 176; *Hasan v The Queen* [2010] VSCA 352.
[3886] *Said* [61], [80].
[3887] *Davies v The Queen* [2019] VSCA 66, [762].
[3888] *Noonan* [55].
[3889] Ibid [56].
[3890] *R v Nugnes* [2002] VSCA 114, [18]-[19] (*'Nugnes'*); *DPP (Vic) v Bright* (2006) 163 A Crim R 538, 540 [2] (*'Bright'*).
[3891] *Dowell* 116; *Ralph* [12]; *DPP (Vic) v Derby* (2007) 171 A Crim R 302, 307 [21] (*'Derby'*); *Phillips v The Queen* [2017] VSCA 313, [62] (*'Phillips'*); *McPadden v The Queen* [2018] VSCA 57.
[3892] *Bontoft* 5; *Robson v The Queen* [2018] VSCA 256, [57] (*'Robson'*); *Stanger v The Queen* [2021] VSCA 25, [40] (*'Stanger'*).
[3893] *Anderson* [70]-[71]; *Stanger* [40].
[3894] *S (A Child)* 132.
[3895] *Derby* 303 [2].
[3896] See, eg, *Bright; Noonan*; *BBA v The Queen* [2010] VSCA 174; *Cotter v The Queen* [2011] VSCA 240; *Luciano v The Queen* [2015] VSCA 173;
[3897] *Noonan* [55].

damage cases, an offender who had no idea that by causing minor damage, a vast amount of damage would ultimately result, would not have such consequences 'used against him'.[3898] Sections 5(2)(daa) and 5(2)(db) of the *Sentencing Act 1991* (Vic) have entirely displaced the common law requirement of reasonable foreseeability.[3899] Under these provisions, the court must now have regard to the victim impact of the offending, and the extent of loss or damage resulting.

27.2.4.2 – Planning, premeditation, and method

In general, criminal damage offences which are planned and premeditated are considered more serious than those which are impulsive.[3900] However, in arson cases, offending that is "completely unplanned", and characterised as a mere "add-on" to other offending, has nevertheless been found to be very serious offending.[3901]

The use of a sophisticated technique which an ordinary lay person would not possess[3902] will generally be more serious than unplanned and unsophisticated offending,[3903] although 'unsophisticated but purposive' offending may still be grave.[3904] The method by which the arson is accomplished also dictates its objective seriousness.[3905]

27.2.4.3 – Risk

Offences involving fire are so dangerous because fire spread can be unpredictable. The court may consider the nature of the landscape or physical environment, and the impact it has on the risk of fire spreading in assessing the objective seriousness of offending.[3906]

27.2.4.4 – Injury in the course of offending

Arsonists are not uncommonly injured in the course of their offending. Whether injuries sustained by an offender as a result of the commission of an offence should be regarded as mitigatory is unsettled. It seems that how injuries sustained in the course of offending are to be treated depends on the circumstances of each case.[3907]

[3898] *R v Boyd* (1975) VR 168, 172.
[3899] *Vanstone v The Queen* (2012) 222 A Crim R 93, 532 [30].
[3900] *Davies v The Queen* [2019] VSCA 66, [719]-[720] ('*Davies 2019*'); *Said* [80]; *Smith v The Queen* [2013] VSCA 219, [19].
[3901] *Salmi v The Queen* [2020] VSCA 250, [42]-[44] ('*Salmi')*.
[3902] *Davies 2019* [720].
[3903] See *McDonough v The Queen* [2011] VSCA 310, [26]; *Brown v The Queen* (2020) 62 VR 491, 495 [18].
[3904] *Stanger* [40].
[3905] *Phillips* [62] (Molotov cocktails); *Anderson* [73] (makeshift bombs in attempted arson).
[3906] *Robson* [57].
[3907] *R v Barci* (1994) 76 A Crim R 103, 111 (offender shot by police during his arrest, causing very serious lifelong injuries which constitute 'some punishment' for his criminality); *R v Noble* (1994) 73 A Crim R 379, 381 (serious injuries suffered by an offender shot by the victim in defence of his property should go in mitigation of penalty); *R v Benton* [2007] VSCA 71, [14], [20] (offender's hand nearly severed, which would cause his period of imprisonment to be more onerous).

27.2.5 – Money laundering offences

The following principles have so far emerged from the authorities on Commonwealth offending involving money laundering or dealing with proceeds of crime.[3908]

- The starting point is to consider the seriousness of the offence within the scheme of 'money laundering' offences in s 400 of the *Criminal Code*.[3909] The seriousness of a Commonwealth offence depends on the fault element involved and the value of the money at stake.[3910] Division 2A of the *Crimes Act 1958* contains an offence scheme with gradations of severity based on the fault element involved but – unlike the Commonwealth offence scheme – not the value of the money dealt with.
- The Court must consider the precise circumstances of the conduct which constitutes the offending, including:[3911]
    - the nature of the actions which constitute the 'dealing';
    - the duration of the offending;
    - the number of transactions involved. In general, prolific offending involving small amounts of money will be more serious than a single transaction of a larger amount, which may be seen as an isolated offence;[3912]
    - the amount of money involved in the offending is treated differently depending on how the charge is laid. For Commonwealth offending, the amount of money involved is a highly significant matter in assessing the objective seriousness of the offence, and the primary identifier of the maximum penalty for any given offence.[3913] For Victorian offending, the value involved is a relevant, but not dominant, factor;[3914]
    - the role of the offender, including his or her degree of authority and initiative; and
    - the extent of the offender's belief or knowledge that the money is proceeds of crime.[3915]
- the Court should not stray into considering which sentence the offender may have been liable for had they been charged with the predicate offence.[3916]

27.2.6 – Commonwealth fraud offences

The features relevant to assessing the gravity of Commonwealth fraud and dishonesty offences are very similar to other fraud and dishonesty offences. The common considerations of scale, duration, breach of trust and restitution help characterise the gravity of the offence.

Like other deception offences, Commonwealth fraud and dishonesty offences are difficult to detect, where offending goes undetected the proceeds may be significant, and their investigation and prosecution consumes considerable public resources.[3917]

[3908] *Kim* [61].
[3909] *Majeed* [36].
[3910] *Samarakoon* [61].
[3911] *Palmisano v The Queen* [2021] VSCA 124, [24], citing *Kim* [60]–[61]; *Majeed* [1],[36]–[39], [52] . See also *Huang* 381 [34]–[35]; *R v Li* (2010) 202 A Crim R 195, 204 [41] (*'Li'*); *R v Ly* (2014) 241 A Crim R 192, 214–15 [138] (*'Ly'*).
[3912] *Huang* 381 [35]; *Ly* 205 [86].
[3913] *Huang* 381 [34]; *R v Ansari* (2007) 70 NSWLR 89, 119 [122]; *Li* 204 [41]; *Ly* 205 [86]; *Samarakoon* [66]–[68].
[3914] *Truong* [31].
[3915] *Majeed* [38]; *Li* 204 [41]; *R v Foster* [2009] 1 Qd R 53, 64 [60].
[3916] *Elias v The Queen* (2013) 248 CLR 483, 497–98 [35]–[36] ; *Ly* 214 [137].
[3917] *Keefe v The Queen* [2014] VSCA 201, [77] (*'Keefe')*.

The special feature of offending against the Commonwealth is that defrauding the revenue detrimentally affects the whole community.[3918] The impacts may include:

- impeding the ability of the government to provide for the community out of revenue funds;[3919]
- the introduction of more checks on applicants seeking government assistance which causes delays in the payment of benefits and hardship to those whose need is urgent;[3920]
- a public loss of confidence in the integrity and worth of the system (as the honesty of participants in the public revenue is essential to the system's successful operation), which risks vilifying those in genuine need of government assistance[3921]
- the unfair advantages obtained by offenders over law abiding citizens[3922] or honest business competitors;[3923]
- the potential harm to the integrity of the financial market as an institution;[3924] and
- the potential impairment of public health in illicitly importing, distributing or selling tobacco in contravention of the regulation of that harmful product.[3925]

27.3 – Circumstances of the offender

27.3.1 – Previous good character

An offender's personal circumstances, including good character, will ordinarily be given less weight in offending involving deception.

It is a feature of "white collar" crime that offenders are likely be of prior good character, have no prior convictions, have good character references, and good prospects of rehabilitation.[3926] Indeed that is often what enables them to attain a position of trust in the first place[3927] and facilitates offenders in avoiding detection for long periods.

However, a sentencing court may give mitigating weight to the reputational damage involved in a conviction for dishonesty, and the offender's loss of capacity to engage in their chosen profession.[3928]

27.4 – Sentencing purposes

27.4.1 – Theft, burglary and associated offences

For theft offences, the scale of the offence and the personal circumstances of the offender will generally be the strongest determiners of the dominant purpose. General deterrence is a key sentencing purpose in

[3918] *R v Liddell* [2000] VSCA 37, [74] ('*Liddell'*); *Keefe* [77].
[3919] *R v Rumpf* (1987) 29 A Crim R 64, 70-71 ('*Rumpf*').
[3920] *Purdon* 7.
[3921] *DPP (Cth) v Goldberg* (2001) 184 ALR 387, 398 [51];*Warden v The Queen* [2019] VSCA 2, [32] ('*Warden'*).
[3922] *Rumpf* 70-71; *Gregory* 15 [51].
[3923] *Thomas* 37.
[3924] *Couper* 150 [120].
[3925] *Tran v The Queen* [2021] VSCA 292, [7].
[3926] *Bulfin* 131. See also *R v Gent* (2005) 162 A Crim R 29, 43 [59]; *Page* [37] (secret commissions and thefts by senior manager at Australia Post); *DPP (Cth) v Phan* [2016] VSCA 170, [67]-[74] (Medicare fraud).
[3927] *Gallagher* 7.
[3928] *R v Kong* [2007] VSCA 106, [58]; *R v Bunning* [2007] VSCA 205, [47].

cases of theft, burglary and handling stolen goods, and especially for prevalent offences such as shoplifting and vehicle theft, and burglaries where those offences have been committed against vulnerable "soft targets" such as rural properties.[3929] Just punishment and general deterrence are the key sentencing purposes for handling stolen goods offences.[3930] Deterrence is a big focus because handling stolen goods is seen as an offence which supports and encourages theft, so if handling stolen goods is supressed then theft will be too. The offence of going equipped to steal is considered to be a deterrent or "preventative" offence in itself. Specific deterrence is particularly important in instances of serial offending.

27.4.2 – Violent property offences

The principle sentencing purposes in cases of violent thefts are just punishment, denunciation, general deterrence,[3931] and protection of the community,[3932] especially for offences involving vulnerable victims or soft targets[3933] including taxi drivers,[3934] lone attendants in late-night convenience stores,[3935] sex workers,[3936] elderly people, women or children[3937] and rural properties.[3938] The Court of Appeal has held that 'particular circumstances of vulnerability engage and necessitate a special protective obligation on the part of a sentencing Court'.[3939] Those convicted of aggravated home invasion will forfeit their right to live freely in the community for 'a very long time'.[3940]

Specific deterrence is particularly important in instances of serial offending.[3941]

An offender's youth and rehabilitation will be secondary to specific and general deterrence in serious cases of violent offending,[3942] particularly where an offender has squandered previous opportunities to reform. However, in the rare instance where an offender with a bad record has reached a stage in his life

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[3929] *Benkic* [20].
[3930] *Park* 5; *Davies 1989* 5 ('but for handlers, there would be many fewer thefts').
[3931] *Williscroft* 299; *Smith* 11; *R v Knell* [2001] VSCA 82, [9]; *R v McKee* (2003) 138 A Crim R 88, 91-92 [10]–[11]; *Kittikhoun* [15]; *R v Hatfield* [2004] VSCA 195, [13]-[14] ('*Hatfield'*); *Leishman v The Queen* [2019] VSCA 270, [25]; *Siilata v The Queen* [2019] VSCA 277, [31]; *Wol* [62]; *Dean* [87]; *Simmonds* [38]; *Frost* [45]; *Jaeger v The Queen* [2020] VSCA 116, [35]-[36]; *Turney v The Queen* [2020] VSCA 131, [43]; *Shok* [51].
[3932] *R v Baldwin* (1988) 39 A Crim R 465, 466; *R v Lee* [2006] VSCA 80, [24] ('*Lee'*); *R v Alashkar* (2007) 17 VR 65, 74 [36] ('*Alashkar'*); *Wol* [62].
[3933] *R v Pratt* [2003] VSCA 186, [20]; *Kittikhoun* [15] ; *Hatfield* [14]; *Kargar v The Queen* [2018] VSCA 148, [51], [53] ('*Kargar'*).
[3934] *R v Shahabi* [2003] VSCA 108, [18]; *Lee* [24].
[3935] *R v Deering* [2000] VSCA 181, [18]; *R v Ponton* [2001] VSCA 36, [12]; *R v McDonald* [2003] VSCA 137, [18]; *Kittikhoun* [14]-[15]; *Hatfield* [13]-[14]; *Alashkar* [36]; *R v Mourad* [2008] VSCA 4, [8]; *Umi v The Queen* [2013] VSCA 211, [42]; *Gerbing v The Queen* [2015] VSCA 209, [30]; *Bieljok v The Queen* [2018] VSCA 99, [46]; *DPP (Vic) v Green* [2020] VSCA 23, [71]; *Kargar* [51], [53].
[3936] *Raccosta v The Queen* [2012] VSCA 59, [8].
[3937] *R v Crupi* (Unreported, Victorian Court of Appeal, Phillips CJ, Charles, and Batt JJA, 26 February 1998) 8; *R v Jones* [1999] VSCA 191, [15]; *R v S H* [2006] VSCA 83, [27]-[28]; *Johnson v The Queen* [2011] VSCA 348, [25]; *Williamson v The Queen* [2019] VSCA 138, [99]; *Le v The Queen* [2019] VSCA 299, [27]; *Mammoliti* 522-23 [51] (carjacking); *Atonio v The Queen* [2021] VSCA 31, [45].
[3938] *Ellis* [28].
[3939] *Fariah v The Queen* [2021] VSCA 213, [17].
[3940] *Wol* [79].
[3941] *Shok* [46].
[3942] *R v Wright* [1998] VSCA 84, [6].

when reform is a real prospect, rehabilitation may displace deterrence and denunciation as the primary sentencing purpose.[3943] Rehabilitation may also be emphasised in less serious instances of the offence or where the offender is young and without significant previous convictions.

27.4.3 – Deception offences

For deception offences, the scale of the offence and the personal circumstances of the offender will generally be the strongest determiners of the dominant purpose. White collar thefts are said to deserve utmost condemnation and condign punishment.[3944] The principle sentencing factors are commonly general deterrence[3945] and strong denunciation of the breach of trust.[3946]

Personal mitigatory factors – such as previous good character - will generally be given less weight than the factor of general deterrence.[3947] It is unusual for white collar criminals to have previous convictions for dishonesty; such offenders will not normally be found in positions of trust responsible for large sums of money. Specific deterrence will often not feature prominently in sentencing consideration in cases of white collar offending, as the consequences of discovery and punishment make recidivism unlikely by depriving offenders of future opportunities to reoffend.[3948]

27.4.4 – Damaging property offences

Deterrence is a key sentencing principle because arson is simple and easy to commit, usually with destructive (if not tragic) consequences.[3949] The crime of arson is said to be difficult to detect and calls for a deterrent sentence.[3950] Both general and specific deterrence are important as sentencing considerations in cases where men motivated by feelings of jealousy or rejection direct violence towards former partners by damaging property,[3951] in cases of 'misguided vigilantism',[3952] arson committed during a total fire ban[3953] and where the offending entails significant risk to others.[3954]

Community protection is also a key sentencing principle.[3955]

[3943] *DPP (Vic) v Samarentsis* (2007) 170 A Crim R 224, 230-31 [32]-[35]; *Guo v The Queen* [2020] VSCA 273, [26]-[29], citing *Attorney-General v Chmil* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, McInerney, and Jenkinson JJ, 1 August 1977) 3.
[3944] *R v D'Aprano* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Southwell, and Vincent JJ, 17 May 1994) 7-8; *Coukoulis* [42].
[3945] *Jamieson* 888; *Bulfin* 115, 132, 141; *Gregory* 16 [53]; *Dyason* 373-74, [37]-[38], [40].
[3946] *Bulfin* 131.
[3947] Ibid 132.
[3948] Ibid 58-59.
[3949] *R v Catts* (1996) 85 A Crim R 171, 176.
[3950] *Anderson* [70]-[71].
[3951] *Bright* 540 [2]; *Derby* [2].
[3952] *Salmi* [44].
[3953] *Bontoft* 5.
[3954] *Nugnes* [18]-[19].
[3955] *R v Bowman* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Charles, and Batt JJA, 26 February 1998) 14; *Noonan* [58]; *Quarrell v The Queen* [2011] VSCA 125, [31]; *Davies* [723]; *Maddocks* [46].

27.4.5 – Money laundering offences

The principal sentencing factor in sentencing secret commissions offences is general deterrence.[3956] Offences of this kind are hard to detect, and are often found to have been committed by persons who have been regarded as of good character and reputation.[3957]

Money laundering is vital to the functioning of organised criminal syndicates, and in particular drug trafficking syndicates. Such offenders are an important cog in the wheel of organised crime. Accordingly, the offence of money laundering is one where the principle of general deterrence is given significant weight.[3958]

27.4.6 – Commonwealth fraud offences

The courts have a significant responsibility to protect the integrity of the revenue system by imposing punishments for deliberate and sustained fraud which are likely to deter others who may be otherwise tempted to indulge in this conduct.[3959] There are further reasons given in support of the need to impose deterrent sentences for this kind of offending:

- revenue systems often rely on honesty;[3960]
- the cost of fraud is borne by the whole community;[3961]
- the investigation and prosecution of fraud consumes considerable public resources;[3962]
- these offences are considered 'easy to commit and difficult to detect' – and if undetected the rewards may be great;[3963]
- the deliberateness of this type of offending – compared to impulsive and relatively spontaneous criminal activity – is thought to be effectively deterred by appropriate sentencing;[3964] and
- general deterrence is considered likely to have a 'more profound effect' on white-collar criminals.[3965]

Deterrence and denunciation remain the key sentencing principles in frauds on the revenue, regardless of whether the offending involves a breach of trust or position of responsibility – such as public servants who offend in the course of their employment – and social security frauds by private individuals who obtain more funds in benefits than they are entitled to.[3966]

As is the case with other kinds of white collar offending, personal mitigatory factors – such as previous good character - will generally be given less weight than the factors of general deterrence and denunciation.[3967]

[3956] *Jamieson* 888.
[3957] Ibid.
[3958] *Majeed* [39]; *Huang* 381 [36]; *Ly* 205 [86].
[3959] *DPP (Cth) v Rowson* [2007] VSCA 176, [24].
[3960] *Keefe* [77].
[3961] Ibid.
[3962] Ibid.
[3963] Ibid.
[3964] *Liddell* [53].
[3965] *Keefe* [77].
[3966] *Aitchison v The Queen* [2015] VSCA 348, [78]-[79].
[3967] Ibid [71]-[75].

General deterrence will be emphasised in cases where the offending is considered prevalent. However, where the offending is no longer as prevalent as it once was, the purpose of general deterrence will reduce in importance.[3968] Specific deterrence will be important where the offending occurred over a very lengthy period of time and the amount involved is substantial,[3969] or where the offender has an extensive history of dishonesty and persists in offending after detection.[3970]

27.5 – Formulation of sentence

27.5.1 – Statutory schemes

The only property offences that fall within the **serious offender scheme**[3971] are arson offences which includes destroying or damaging property in circumstances where the offence is charged as:

- arson;[3972]
- arson causing death;[3973]
- intentionally or recklessly causing a bushfire;[3974]
- placing inflammable material for the purpose of causing fire;[3975]
- causing fire in a country area with intent to cause damage;[3976]
- an offence of conspiracy regarding any of these offences; and
- any equivalent interstate offence.

The following offences are **Category 2 offences**[3977] if the offender was 18 or older at the time of offending, and the offences were committed on or after 20 March 2017:

- armed robbery[3978] if the offender has a firearm, or a victim suffers injury as a direct result of the offence, or the offence was committed in company;
- home invasion;[3979]
- carjacking;[3980] and
- arson causing death.[3981]

[3968] *Rumpf* 73.
[3969] *Warden* [32].
[3970] *Dickinson v The Queen* [2021] VSCA 50, [65]-[66].
[3971] The *Act* pt 2A. See also 9.3 – Statutory schemes – Serious offenders.
[3972] *Crimes Act* s 197; common law.
[3973] *Crimes Act* s 197A.
[3974] Ibid s 201A.
[3975] *Forests Act 1958* (Vic) s 66.
[3976] *Country Fire Authority Act 1958* (Vic) s 39C.
[3977] See 9.1.1 – Statutory Schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.
[3978] *Crimes Act* s 75A(2).
[3979] Ibid s 77A(3).
[3980] Ibid s 79(2).
[3981] Ibid s 197A.

With the exception of going equipped to steal,[3982] dealing with property suspected of being proceeds of crime[3983] and two computer offences under ss 247G and 247H, each of the Victorian offences considered in this chapter is a **forensic sample offence**.[3984]

Each of the Victorian offences considered in this chapter is subject to the **civil forfeiture regime**[3985] except for dealing with property suspected of being proceeds of crime[3986] and two computer offences under ss 247G and 247H.

The **automatic forfeiture regime**[3987] applies to certain offences where the value of the property that is the subject of the offending is $50 000 or more, or where multiple offences are charged on the same facts (or form part of a series of offences of similar character) the value of the property that is the subject of the offending is $75 000 or more. These offences are:

- theft;[3988]
- robbery;[3989]
- armed robbery;[3990]
- obtaining property by deception;[3991]
- obtaining financial advantage by deception;[3992]
- handling stolen goods;[3993]
- receipt or solicitation of secret commission by an agent;[3994]
- giving or receiving false or misleading receipt or account with intent to defraud or deceive principal;[3995]
- gift or receipt of secret commission in return for advice;[3996]
- secret commission to trustee in return for substituted appointment[3997]
- fraudulently inducing persons to invest money;[3998] and
- conspiracy to commit such offences.[3999]

[3982] Ibid s 91.
[3983] Ibid s 195.
[3984] Ibid s 464ZF.
[3985] *Confiscation Act 1997* (Vic) sch 1 ('*Confiscation Act*').
[3986] *Crimes Act* s 195.
[3987] *Confiscation Act* sch 2. See also 17.1.2 – Confiscation – Statutory regime – Automatic forfeiture.
[3988] *Crimes Act* s 74.
[3989] Ibid s 75.
[3990] Ibid s 75A.
[3991] Ibid s 81(1).
[3992] Ibid s 82(1).
[3993] Ibid s 88.
[3994] Ibid s 176.
[3995] Ibid s 178.
[3996] Ibid s 179.
[3997] Ibid s 180.
[3998] Ibid s 191.
[3999] Ibid s 321(1).

Offences considered in this chapter which are **continuing criminal enterprise** offences[4000] include the following offences where the value of the property stolen, obtained, handled, gained or lost, or damaged or destroyed is $50,000 or more:

- theft;[4001]
- robbery;[4002]
- armed robbery;[4003]
- obtaining property by deception;[4004]
- obtaining financial advantage by deception;[4005]
- false accounting;[4006]
- handling stolen goods;[4007]
- receipt or solicitation of secret commission by an agent;[4008]
- giving or receiving false or misleading receipt or account with intent to defraud or deceive principal;[4009]
- gift or receipt of secret commission in return for advice;[4010]
- secret commission to trustee in return for substituted appointment;[4011]
- offences of dealing with proceeds of crime;[4012]
- destroying or damaging property;[4013] and
- conspiracy to cheat and defraud and conspiracy to defraud.[4014]

Where relevant offences are charged as a single rolled up count and the count comprises at least one transaction of $50,000 or more, the rolled-up count should be regarded as a continuing criminal enterprise offence falling within Schedule 1A.[4015]

27.5.2 – Cumulation for aggravated burglary and ulterior offences

Double punishment issues may arise where a burglar is to be sentenced for trespassing with intent to either steal, commit assault or damage property, and also for the subsequent theft, assault or property damage. Orders for cumulation are designed to ensure that the sentence reflects the separate criminality involved in the individual offences.[4016] But the principle of totality requires that the total effective

[4000] See 9.4 – Statutory schemes – Continuing criminal enterprise offenders.
[4001] *Crimes Act* s 74.
[4002] Ibid s 75.
[4003] Ibid s 75A.
[4004] Ibid s 81(1).
[4005] Ibid s 82(1).
[4006] Ibid s 83(1).
[4007] Ibid s 88.
[4008] Ibid s 176.
[4009] Ibid s 178.
[4010] Ibid s 179.
[4011] Ibid s 180.
[4012] Ibid ss 194(1)-(3).
[4013] Ibid ss 197(1)-(3), (6)-(7).
[4014] Common law.
[4015] *Cay v The Queen* [2010] VSCA 292, [34].
[4016] See 2.4.3 - Imposition of sentence – Formulation.

sentence not be disproportionate to the aggregate criminality involved in all of the offences.[4017] Where a number of factors going to offence seriousness are common to multiple offences, this will impact the overall criminality and must be reflected in the orders for cumulation. A sentencing court should not order cumulation of the whole of a sentence imposed for aggravated burglary upon a sentence imposed for the offence of intentionally causing serious injury which was committed on the same occasion.[4018]

[4017] *DPP (Vic) v Jones (a pseudonym)* [2013] VSCA 330, [90]; 3.3 – Totality.
[4018] *R v Madiera* [2002] VSCA 5, [32]. See also *Evison v The Queen* [2014] VSCA 132, [18].

28 – Drug offences

28.1 – Penalties and current sentencing practices

28.1.1 – Victorian penalties

28.1.1.1 – Trafficking and supply

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Trafficking large commercial quantity	s 71	Level 1 – life and fine not exceeding 5000 penalty units ("p.u.")*[4019] Standard sentence – 16 years (other than for attempted trafficking)	1 January 2002
Trafficking commercial quantity	s 71AA	Level 2 – 25 years**[4020] Level 1 – life and fine not exceeding 5000 p.u. if trafficking at direction of criminal organisation	1 January 2002
Trafficking to a child	s 71AB	Level 3 – 20 years	1 January 2002
Trafficking	s 71AC	Level 4 – 15 years Level 3 – 20 years if within 500 metres of a school	1 January 2002
Supplying to a child for sale or use	s 71B	Level 4 – 15 years and/or fine of 1000 p.u. Level 3 – 20 years if within 500 metres of a school	3 September 1997

[4019] * Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). *Sentencing Act 1991* (Vic) ss 3, 5(2G), 160 ('*the Act*'). See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

[4020] ** Category 2 offence if the offender was 18 or older at the time of offending. If the offence was committed on or after 20 March 2017, the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order) unless specified circumstances exist. *The Act* ss 3, 5(2H), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Use of violence or threats to cause trafficking	s 71AD	Level 6 – 5 years	20 October 2016
Permitting use of premises for trafficking	s 72D(1)	Level 6 – 5 years	20 October 2016

28.1.1.2 – Possession

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Possession of items for trafficking	s 71A	Level 5 – 10 years	1 September 1997
Possession of a tablet press	s 71C	Level 6 – 5 years and/or fine of 600 p.u.	10 May 2006
Possession of precursor chemicals	s 71D	Level 6 – 5 years and/or fine of 600 p.u.	10 May 2006
Possession of document containing information about trafficking or cultivating[4021]	s 71E	Level 6 – 5 years and/or fine of 600 p.u.	20 October 2016
Possession of a small quantity of cannabis or tetrahydrocannabinol for a purpose unrelated to trafficking***[4022]	73(1)(a)	Fine not exceeding 5 p.u.	1 September 1997
Possession for a purpose unrelated to trafficking***	73(1)(b)	Level 8 – 1 year and/or fine not exceeding 30 p.u.	1 September 1997
Possession in any other case***	73(1)(c)	Level 6 – 5 years and/or fine of 400 p.u.	1 September 1997

[4021] Note that while this section is entitled 'Possession of document containing *information about*…" the text indicates the actual crime is possessing 'a document containing *instructions for the*….'

[4022] *** Section 73(1) creates only a single offence of "possession". This table is only intended to clarify the circumstances in which different penalties may apply and should not be read as stating there are three such offences.

28.1.1.3 – Cultivation of narcotic plant

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Cultivation in **large commercial quantity**	s 72	Level 1 - Life and fine not exceeding 5000 p.u.*[4023]	1 January 2002
Cultivation in **commercial quantity**	s 72A	Level 2 – 25 years**[4024]	1 January 2002
Cultivation unrelated to trafficking in that plant	s 72B(a)	Level 8 – 1 year and or fine not exceeding 20 p.u.*+[4025]	1 January 2002
Cultivation **in any other case**	s 72B(b)	Level 4 - 15 years	1 January 2002
Permitting use of premises for cultivation	s 72D(2)	Level 6 – 5 years	20 October 2016

28.1.1.4 – Using, administering and obtaining

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Using or attempting to use cannabis or tetrahydrocannabinol****[4026]	s 75(a)	5 p.u.	1 September 1997
Using or attempting to use another drug****	s 75(b)	Level 8 – 1 year and/or 30 p.u.	1 September 1996
Introducing or attempting to introduce a drug into another without licence or authorisation	s 74	Level 8 – 1 year and/or 30 p.u.	1 September 1997
Forging prescriptions and orders for drugs	s 77	Level 8 – 1 year and/or 20 p.u.	1 January 2002

[4023] * Category 1 offence if the offender is 18 years or older at the time of offending. For Category 1 offences committed on or after 20 March 2017 the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order). *The Act* ss 3, 5(2G), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

[4024] ** Category 2 offence if the offender was 18 or older at the time of offending. If the offence was committed on or after 20 March 2017, the court must impose a custodial sentence (other than a sentence of imprisonment imposed in addition to making a community correction order) unless specified circumstances exist. *The Act* ss 3, 5(2H), 160. See also 9.1.1 – Statutory schemes – Mandatory imprisonment schemes – Category 1 and 2 offences.

[4025] *+ This offence may qualify for an adjourned bond under s 76(1)(a).

[4026] *** Section 75 creates only a single offence of use/attempted use this table is intended to clarify the circumstances in which different penalties may apply and should not be read as stating there are two such offences.

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Obtaining drugs by false representation	s 78	Level 8 – 1 year and/or 20 p.u.	1 January 2002

28.1.1.5 – Producing, selling, supplying and advertising psychoactive substances

Offence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	Maximum penalty	Applies to offence committed from
Producing psychoactive substance – natural person	s 56D	2 years and/or 240 p.u.	1 November 2017
Producing psychoactive substance – body corporate	s 56D	1200 p.u.	1 November 2017
Selling or supplying psychoactive substance – natural person	s 56E	2 years and/or 240 p.u.	1 November 2017
Selling or supplying psychoactive substance – body corporate	s 56E	1200 p.u.	1 November 2017
Advertising psychoactive substance – natural person	s 56F	2 years and/or 240 p.u.	1 November 2017
Advertising psychoactive substance – body corporate	s 56F	1200 p.u.	1 November 2017

28.1.2 – Commonwealth Penalties

Many Commonwealth drug offences replicate existing State offences. Federal law also contains a number of less significant offences that are only rarely prosecuted.[4027]

28.1.2.1 – Trafficking, cultivation and selling

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Trafficking commercial quantity of a border controlled drug	s 302.2	Life and/or 7500 p.u.	6 December 2005

[4027] See, eg, Crimes (Traffic in Narcotic Goods and Psychotropic Substances) Act 1990 (Cth) ss 9-14.

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Trafficking marketable quantity of a border controlled drug	s 302.3	25 years and/or 5000 p.u.	6 December 2005
Trafficking border controlled drug	s 302.4	10 years and/or 2000 p.u.	6 December 2005
Cultivating commercial quantity of controlled plant for commercial purpose	s 303.4	Life and/or 7500 p.u.	6 December 2005
Cultivating marketable quantity of controlled plant for commercial purpose	s 303.5	25 years and/or 5000 p.u.	6 December 2005
Cultivating a controlled plant for commercial purpose	s 303.6	10 years and 2000 p.u.	6 December 2005
Selling a commercial quantity of a controlled plant	s 304.1	Life and/or 7500 p.u.	6 December 2005
Selling a marketable quantity of a controlled plant	s 304.2	25 years and/or 5000 p.u.	6 December 2005
Selling a controlled plant	s 304.3	10 years and/or 2000 p.u.	6 December 2005

28.1.2.2 – Manufacture and pre-trafficking

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Manufacturing commercial quantity of a controlled drug	s 305.3	Life and/or 7500 p.u.	6 December 2005
Manufacturing marketable quantity of a controlled drug	s 305.4	25 years and/or 5000 p.u.	6 December 2005
Aggravated manufacturing marketable quantity of a controlled drug	s 305.4	28 years and/or 5600 p.u.	6 December 2005
Manufacturing a controlled drug	s 305.5	10 years and/or 2000 p.u.	6 December 2005
Aggravated manufacturing a controlled drug	s 305.5	12 years and/or 2400 p.u.	6 December 2005

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Pre-trafficking commercial quantity of a controlled precursor	s 306.2	25 years and/or 5000 p.u.	6 December 2005
Aggravated pre-trafficking commercial quantity of a controlled precursor	s 306.2	28 years and/or 5600 p.u.	6 December 2005
Pre-trafficking marketable quantity of a controlled precursor	s 306.3	15 years and/or 3000 p.u.	6 December 2005
Aggravated pre-trafficking marketable quantity of a controlled precursor	s 306.3	17 years and/or 3400 p.u.	6 December 2005
Pre-trafficking a controlled precursor	s 306.4	7 years and/or 1400 p.u.	6 December 2005
Aggravated pre-trafficking a controlled precursor	s 306.4	9 years and/or 1800 p.u.	6 December 2005

28.1.2.3 – Import/export offences

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Import/export commercial quantity of a border controlled drug or plant	s 307.1	Life and/or 7500 p.u.	6 December 2005
Import/export marketable quantity of a border controlled drug or plant	s 307.2	25 years and/or 5000 p.u.	6 December 2005
Import/export a border controlled drug or plant	s 307.3	10 years and/or 2000 p.u.	6 December 2005
Import/export a border controlled drug or plant – no defence relating to lack of commercial intent	s 307.4	2 years and/or 400 p.u.	6 December 2005
Import/export commercial quantity of a border controlled precursor	s 307.11	25 years and/or 5000 p.u.	6 December 2005

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Import/export marketable quantity of a border controlled precursor	s 307.12	15 years and/or 3000 p.u.	6 December 2005
Import/export a border controlled precursor	s 307.13	7 years and/or 1400 p.u.	6 December 2005

28.1.2.4 – Possession

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Possession of a commercial quantity of an unlawfully imported border controlled drug or plant	s 307.5	Life and/or 7500 p.u.	6 December 2005
Possession of a marketable quantity of an unlawfully imported border controlled drug or plant	s 307.6	25 years and/or 5000 p.u.	6 December 2005
Possession of an unlawfully imported border controlled drug or plant	s 307.7	2 years and/or 400 p.u.	6 December 2005
Possession of a commercial quantity of border controlled drug or plant reasonably suspected of having been unlawfully imported	s 307.8	Life and/or 7500 p.u.	6 December 2005
Possession of a marketable quantity of a border controlled drug or plant reasonably suspected of having been unlawfully imported	s 307.9	25 years and/or 5000 p.u.	6 December 2005
Possession of a border controlled drug or plant reasonably suspected of having been unlawfully imported	s 307.10	2 years and/or 400 p.u.	6 December 2005

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Possession of a controlled drug	s 308.1	2 years and/or 400 p.u	6 December 2005
Possession of a controlled precursor	s 308.2	2 years and/or 400 p.u	6 December 2005
Possession of plant material, equipment or instructions for commercial cultivation of controlled plants	s 308.3	7 years and/or 1400 p.u.	6 December 2005
Possession of substances, equipment or instructions for commercial manufacture of controlled drugs	s 308.4	7 years and/or 1400 p.u.	6 December 2005

28.1.2.5 – Offences involving children

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
Supplying controlled drug to children	s 309.2	15 years and/or 3000 p.u.	6 December 2005
Supplying marketable quantity of controlled drug to children for trafficking	s 309.3	Life and/or 7500 p.u.	6 December 2005
Supplying controlled drug to children for trafficking	s 309.4	25 years and/or 5000 p.u.	6 December 2005
Procuring children for trafficking marketable quantity of controlled drug	s 309.7	Life and/or 7500 p.u.	6 December 2005
Procuring children for trafficking controlled drug	s 309.8	25 years and/or 5000 p.u.	6 December 2005
Procuring children for pre-trafficking marketable quantity of controlled precursor	s 309.10	Life and/or 7500 p.u.	6 December 2005
Procuring children for pre-trafficking controlled precursor	s 309.11	25 years and/or 5000 p.u.	6 December 2005
Procuring children for importing/exporting	s 309.12	Life and/or 7500 p.u.	6 December 2005

Offence	*Criminal Code Act 1995* (Cth)	Maximum penalty	Applies to offence committed from
marketable quantity of controlled drug/plant			
Procuring children for importing/exporting controlled drug/plant	s 309.13	25 years and/or 5000 p.u.	6 December 2005
Procuring children for importing/exporting marketable quantity of border controlled precursor	s 309.14	Life and/or 7500 p.u.	6 December 2005
Procuring children for importing/exporting border controlled precursor	s 309.15	25 years and/or 5000 p.u.	6 December 2005
Danger of serious harm to person under 14 from exposure to unlawful manufacturing of controlled drug or precursor	s 310.2	9 years and/or 1800 p.u.	6 December 2005
Causing harm to person under 14 from exposure to unlawful manufacturing of controlled drug or precursor	s 310.3	9 years and/or 1800 p.u.	6 December 2005

28.1.3 – Penalties for conspiring and aiding and abetting

The primary versions of extended liability for State drug offences attract the same maximum penalty as their reference offence.[4028] Under Federal law these offences are characterised as 'extended liability' offences and, with the exception of incitement, they too attract the same maximum penalty as their reference offence.[4029]

[4028] Drugs, Poisons and Controlled Substances Act 1981 (Vic) ss 79-80 ('DPCS Act').
[4029] *Criminal Code Act* 1995 (Cth) ss 11.1-11.6 ('*Criminal Code*').

28.1.4 – Current sentencing practice[4030]

28.1.4.1 – Trafficking and cultivation offences

Generally, an immediate custodial sentence will be imposed for commercial trafficking or cultivation offences.[4031]

Trafficking in a commercial quantity

In *Gregory (a pseudonym) v The Queen* ('*Gregory*'),[4032] the Court of Appeal concluded that current sentencing practice for trafficking in a commercial quantity ('CQ trafficking') was inadequate and unduly compressed at the upper-end of seriousness for that offence. Because trafficking cases have an ascending order of seriousness depending on the quantity involved, the Court said that an appropriate relativity between the sentencing standards for each quantity based offence needs to be maintained.[4033]

Further, because it found that current sentencing practice did not reflect the gravity of the offence, the impact of it on the community, and the high maximum penalty set by Parliament, the Court held that sentencing courts should no longer consider themselves constrained by existing practice.[4034] Sentencing practice for CQ trafficking had to be uplifted in order to emphasise deterrence, denunciation, the gravity of the offence, and the need to protect the community.[4035]

The Court of Appeal expected that sentences for this offence would be spread across the statistical range given the wide variation in seriousness of CQ trafficking offences, the culpability of the offender and variations in their role, and the possible quantities involved. Nonetheless, the Court said that a sentence of double figures might be expected where one or more of the following features were present:

- the offending involves a quantity approaching the large commercial quantity trafficking ('LCQ trafficking') threshold
- the offender is in charge of the trafficking enterprise
- the business is conducted for a substantial period
- the offender pleaded not guilty
- the offender had relevant prior convictions.[4036]

Of course sentences imposed before *Gregory*, and statistics depending on those sentences, should be approached with caution.

Trafficking in a large commercial quantity

[4030] See generally 5.2.9 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices.
[4031] See *R v Clohesy* [2000] VSCA 206, [8]; *DPP (Vic) v Leach* (2003) 139 A Crim R 64, 67 [9] ('*Leach*'); *DPP (Vic) v Rzek* [2003] VSCA 97, [1], [30] ('*Rzek*').
[4032] (2017) 268 A Crim R 1 ('*Gregory*').
[4033] Ibid 5 [9].
[4034] Ibid 5 [9], 24 [100].
[4035] Ibid 24-25 [101]-[102].
[4036] Ibid 24 [97]-[98].

In *Gregory* the Court also said that sentences for LCQ trafficking will similarly need to substantially increase in order to maintain appropriate sentencing relativities between the two offences.[4037] Although this is obiter as stated in *Gregory*, the Court has since consistently followed that line of reasoning.[4038]

In *Fernando v The Queen*,[4039] the Court said *Gregory's* requirement that there be appropriate relativity between sentences for each category of seriousness means that sentences for commercial trafficking offences in the upper range will be most affected by the uplift requirement, and there will be 'an increasingly diminished effect as one moves away from the upper to the middle and lower categories of seriousness'. The Court said that if sentences for each category of offence increased uniformly, the necessary relativity between the categories of seriousness would be lost.[4040]

The Court of Appeal has also said there is no tension between *Gregory* and *Fernando's* calls for an uplift and *Dalgliesh's* caution that current sentencing practices are only one factor to consider in sentencing. The Court noted that while the need to uplift sentencing for commercial trafficking offences is also not a controlling factor, neither can it be ignored.[4041]

Cultivation of a commercial quantity

Given the overlap between the two offences, when sentencing for a cultivation offence a court may consider trafficking cases in assessing current sentencing practices.[4042]

The Court of Appeal has said that as with quantity-based trafficking offences, 'the legislature has deliberately constructed a hierarchy of cultivation offences'; therefore, what was said in *Gregory* and subsequent cases about the need for appropriate relativities between sentences for offences of different levels applies equally to cultivation offences.[4043]

In *Nguyen v The Queen*,[4044] the Court found sentencing for offences in the mid-category of seriousness of CQ cultivating was inconsistent and had become compressed at a low level. Further, it said the highest sentences imposed on a *principal* for CQ cultivating and the lowest sentences for LCQ cultivating had combined to become a ceiling for the offence of CQ cultivation.[4045] It held that sentencing courts must, by increments, increase the sentences for mid-category offending so that the range is uplifted and substantially expanded.[4046] The 'by increments' requirement has since been overruled.[4047]

[4037] Ibid 25 [103].
[4038] See, e.g., *Djordjic v The Queen* [2018] VSCA 227, [9], [73]-[81] ('*Djordjic*'); *Nguyen v The Queen* [2019] VSCA 184, [49] ('*Nguyen 2019*'); *Kim v The Queen* [2019] VSCA 149; *Rahmani v The Queen* [2021] VSCA 51, [29]-[34] ('*Rahmani*').
[4039] (2017) 268 A Crim R 26 ('*Fernando*').
[4040] Ibid 41 [61]-[62].
[4041] *DPP (Vic) v Condo* [2019] VSCA 181, [20] ('*Condo*'). See also *Lytras v The Queen* [2020] VSCA 150, [58] ('*Lytras*'); *Gayed v The Queen* [2021] VSCA 141, [29] ('*Gayed*').
[4042] *Spiteri v The Queen* (2011) 206 A Crim R 528, 534-35 [41] ('*Spiteri*').
[4043] *Nguyen v The Queen* [2021] VSCA 211, [48] ('*Nguyen 2021*').
[4044] Nguyen v The Queen (2016) 311 FLR 289 ('Nguyen 2016').
[4045] Ibid 313 [75], 332-33 [147]-[149], [152], [155], 365-66 [272].
[4046] Ibid 295-96 [4], 333 [152], 355 [230], 365-66 [272].
[4047] See, eg, *Carter (a pseudonym) v The Queen* [2018] VSCA 88, [80].

28.1.4.2 – Quantity as a comparator

The sentencing scheme for trafficking and importation is quantity-based, which means that quantity is generally a key indicator of both offence seriousness and a key point of comparison between cases.[4048] Therefore it is important that information about quantity be presented simply and clearly to the court to enable it making meaningful judgments and comparisons about relative offence seriousness.[4049] In cases where quantity is a guide to offence seriousness, comparisons to other cases 'by reference to the quantity of drug trafficked or imported will usually be illuminating'. This is straightforward where the drug in both cases is the same, but where different drugs are involved simply identifying the raw quantities will not allow for a sensible comparison to be drawn. Nor will describing the amount as being "more than 120 times the minimum marketable quantity", or referring to the estimated wholesale or retail value, provide any meaningful guidance as to the seriousness of the offence.[4050]

If a past sentence is to provide a meaningful basis for comparison, the quantities involved must be given a common denominator, and courts have identified that the preferred common denominators are a commercial quantity (for a commercial or marketable quantity) or a large commercial quantity.[4051]

The court in *DPP (Cth) v KMD* demonstrated the value of converting quantities to a common denominator with this example.

- An offender has trafficked 750g of heroin, this is 50% of a CQ for a Commonwealth offence.
- The prosecution wishes to rely on the sentence of an offender who imported 750g of cocaine, this is only 37.5% of the CQ for a Commonwealth offence.
- Converting the raw quantities into percentages of a CQ demonstrates that so far as quantity is a measure, the case of the heroin trafficker is more serious than that of the cocaine trafficker.[4052]

Because a high end marketable quantity offence may be more serious than a low end CQ offence, some CQ cases may be comparators for a marketable quantity case.[4053]

Although both the Commonwealth and Victorian regimes are quantity based, the Commonwealth does not distinguish between a CQ and a LCQ. In addition, a Commonwealth CQ is generally equal to or higher than a Victorian LCQ. So, importing a Commonwealth CQ may involve a very large quantity indeed.[4054] Here too expressing the quantity imported as a multiple of the CQ threshold gives a clearer picture of the scale of the importation and is an important guide to the seriousness of the offence. It allows meaningful comparisons to be drawn between cases involving different drugs.[4055] Towards that end the provision of tables of comparable cases may be helpful, provided they give sufficient information about the features of each case that will allow useful comparisons to be drawn and are not merely numerical tables, charts, or graphs.[4056]

[4048] *DPP (Cth) v KMD* (2015) 254 A Crim R 244, 247 [4] ('*KMD*').
[4049] Ibid 247 [5], 260 [64].
[4050] Ibid 258 [54]-[55].
[4051] *Holder v The Queen* (2014) 41 VR 467, 470 [10]; *KMD* 258 [56].
[4052] Ibid 258-59 [57].
[4053] Ibid 261 [69].
[4054] *DPP (Cth) v Brown* [2017] VSCA 162, [1]-[2] ('*Brown*').
[4055] Ibid [4], citing *KMD*.
[4056] Ibid [69]-[71].

Lastly, quantity is only one factor to be taken into consideration; comparing drug cases only by reference to weights risks a fundamental departure from principle.[4057]

28.2 – Statutory factors

Drug offences are distinguished by a number of statutory factors.

28.2.1 – Mitigating factors

The *DPCS Act* creates several offences where a lower maximum penalty applies when certain statutorily mitigating factors are proved on the balance of probabilities. For these offences, the onus of proving the mitigating factor lies on the offender.[4058]

The offences and associated mitigation factors are:

- cultivation not committed for any purpose relating to trafficking[4059]
- possession of a small quantity of cannabis[4060]
- possession unrelated to trafficking cannabis[4061]
- possession unrelated to trafficking any drug of dependence[4062]
- using cannabis[4063]

While the *Criminal Code 1995* (Cth) ('*Criminal Code*') creates an array of offences of scaled severity, it does not create any particular offence that may be proved in a mitigated form. For example, while importing a commercial quantity of a border controlled plant is a more serious version of the offence of importing a border controlled plant, the latter is not a mitigated version of the former, but rather a separate offence.

The mitigated forms of the possession offence which raise the issue of whether the possession was related to trafficking must be approached with care. The definition of trafficking includes where a person has the drugs "in possession for sale". An offender who is convicted of possession cannot be sentenced as though they had been convicted of the more serious offence of trafficking.[4064] Courts have drawn a distinction for the purposes of sentencing between "possession for sale" and "possession for a purpose relating to trafficking". While the former is not a valid basis for aggravation (as it would contravene the rule from *De Simoni*), the latter is a permissible basis for aggravation if it is proved beyond reasonable doubt, unless that purpose amounted to trafficking.[4065]

28.2.2 – Quantity

[4057] *Vincent v The Queen* [2021] VSCA 99, [45] ('*Vincent*').
[4058] *R v Pantorno* [1988] VR 195, 199-200.
[4059] *DPCS Act* s 72B.
[4060] Ibid s 73(1)(a)(i).
[4061] Ibid s 73(1)(a)(ii).
[4062] Ibid s 73(1)(b).
[4063] Ibid s 75(a).
[4064] *Wyllie* 32; *Morgan* [46], [48].
[4065] *Morgan v The Queen* [2016] VSCA 143, [46]-[48]; *R v Wylie* [1989] VR 21, 30-32.

As noted, in both the Commonwealth and Victorian schemes the primary statutory factor used to determine the seriousness of offending is the quantity of drug. In *R v Pidoto* the Court of Appeal said that since Parliament has created a statutory hierarchy based on quantity, it is not proper for the courts to make judgments about the *relative* harmfulness of a drug.[4066]

Drugs of dependence are principally defined by the lists in Parts 1-3 of Schedule 11 of the *DPCS Act*. The tables in these Parts list the quantity required to constitute a large commercial, commercial, traffickable or small quantity of each drug of dependence.[4067] The threshold for traffickable quantity isn't directly used in sentencing, but only triggers an evidentiary presumption about the purpose of possession.

The *Criminal Code* identifies three quantities: commercial, marketable, and trafficable.[4068] Schedules 1 and 2 of the *Criminal Code Regulations 2019* (Cth) contain two tables which identify controlled and border controlled drugs, plants, and precursors and states their marketable, commercial and traffickable quantities. It is important to note that while a drug may be both a controlled drug and a border controlled drug, the relevant quantity thresholds may differ. For example, the marketable quantity of heroin as a 'controlled drug' (for offences of trafficking and manufacturing) is 250 grams, but the marketable quantity heroin as a 'border controlled drug' (for offences of importation and possession offences) is 2 grams.

28.2.2.1 – Substance to be measured

The quantities described in the *Criminal Code* are all quantities of a pure substance, as opposed to quantities of a mixture.

The Victorian offences address both drugs of dependence and narcotic plants. The parts of a narcotic plant are also defined as a drug of dependence.[4069] The *DPCS Act* in Part 1 of Schedule 11 describes quantities for pure samples of a drug; in part 3 it describes two separate quantity scales for drugs, distinguishing between mixtures containing drugs and other substances, and pure drugs. It appears that the 'small' and 'traffickable' quantities to refer to a quantity of pure substance.

Despite these distinctions, a drug may be treated as "pure" even if it contains minor contaminants if its purity matches the prevailing standard for a pure drug of that kind. Thus, 100 grams of 99.7% pure pseudoephedrine may be regarded as a commercial quantity of that drug because this degree of purity matches the prevailing standard for pure pseudoephedrine.[4070]

Australian courts take judicial notice of the standards for the purity of pharmaceutical drugs set by the British Pharmacopeia.[4071]

Part 2 of Schedule 11 deals with narcotic plants and classifies them by quantity or by number. The main narcotic plant is Cannabis L.

[4066] (2006) 14 VR 269, 271 [4], 278 [42] ('*Pidoto*').
[4067] *DPCS Act* s 70, sch 11.
[4068] *Criminal Code* ss 301.10-301.12.
[4069] DPCS Act s 4.
[4070] *R v Strawhorn* (2008) 19 VR 101, 106-09 [197]-[207] ('*Strawhorn*').
[4071] *Therapeutic Goods Act 1989* (Cth) s 56; *Strawhorn* 105-06 [193]-[194].

When determining the weight of the plant, it should be measured in light of conditions existing at the time the offence is committed. So, if the crop is "green" it's weight is whatever it is in that condition, not that which it would be when dried and so become usable.[4072] However, the extent to which the crop would produce usable material is relevant when assessing the gravity of the offending.[4073]

Where the quantity assessment is to be made on the basis of number of plants rather than weight of plants, the primary difficulty is raised by the meaning of "plant". Plant within the *DPCS Act* is an ordinary English word, however it is one with a wide range of meanings.[4074] Effectively, a cutting becomes a plant when it develops a root. Not a root system, a root. Nor does it need to be viable - it continues to be a plant even if it dies.[4075]

28.2.2.2 – Measuring quantities for continuing offences

In *R v Giretti* ('*Giretti*')[4076] the Court of Appeal found that "trafficking" can encompass not just discrete acts, but also continuous offending, where that offending is properly characterised as a single act of trafficking. One basis for that characterisation is where the separate acts could be seen to be part of the unified conduct of a business of trafficking. When considering a continuous offence of this nature, it is permissible to accumulate the individual quantities proven.[4077] A *Giretti* charge does not have to be confined to one particular type of drug, and can involve a mixed drug dealing business, providing it was an ongoing activity.[4078]

The *Criminal Code* expressly provides for the calculation of quantity by reference to combined quantities, where the prosecution proves that the defendant was involved in an organised criminal activity involving repeated commission of the offence in question.[4079]

Where the offender is acting in concert with others, the quantity of drugs is not divided by the number of offenders.[4080]

28.2.2.3 – Aggregation of different quantities

Quantities of individual substances in a mixture may be aggregated, but the individual drugs in a concoction 'will not lead to the commission of as many offences as there are drugs of dependence present in the mixture'.[4081]

Both the *Criminal Code* and the *DPCS Act* permit the charging of single offences for offending involving multiple substances. Each scheme provides a mechanism for determining whether the aggregate amount

[4072] *R v Coviello* (1995) 81 A Crim R 293, 295.
[4073] *R v Kardogeros* [1991] 1 VR 269, 275-276.
[4074] *R v Francis-Wright* (2005) 11 VR 354, 355 [2].
[4075] Ibid 355 [3], 365 [42].
[4076] (1986) 24 A Crim R 112 ('*Giretti*').
[4077] Ibid 119.
[4078] *R v Kolmjenovic* [2006] VSCA 136 [29]-[35].
[4079] Criminal Code s 311.
[4080] *R v Hunter* (1995) 80 A Crim R 46, 47-48.
[4081] *R v Ahmed* (2007) 17 VR 454, 457-58 [16], 460-61 [29]. The fact that the substances are mixed may be taken into account. Ibid 460-61 [26], [29].

of substance falls within one of the aggravated statutory categories (commercial, marketable, large commercial, etc).

The *DPCS Act* provides for this through the definitions of commercial quantity, large commercial quantity, aggregated commercial quantity and aggregated large commercial quantity,[4082] while the *Criminal Code* provides for this through a separate provision.[4083]

Both schemes produce a similar calculation method. In both schemes, the simple quantities of the individual drugs are not added together. Rather, their values as a proportion of the relevant quantity (eg, commercial, marketable, large commercial) are added. If those proportional values total greater than one, then the aggregation falls within the relevant category.

These provisions do not permit aggregation of drugs that are the subject of multiple counts.

28.2.2.4 – Significance of traffickable quantities

In both the State and Commonwealth schemes, the traffickable quantity is not a statutory factor which operates upon the applicable maximum penalty.

In the State scheme, the *DPCS Act* provides that a person's possession of a traffickable quantity of a drug is prima facie evidence of trafficking by that person in that drug.[4084]

Similarly, in the Commonwealth scheme, the significance of the trafficable quantity lies in the creation of a rebuttable presumption in respect of the person's intent or belief in respect of the substance in question. The exact nature of this presumption depends on the offence alleged.[4085]

28.2.2.5 – Significance of small quantities

Parts 2 and 3 of Schedule 11 of the *DPCS Act* specify small quantities for most drugs of dependence and narcotic plants.[4086] However the only instance where this is relevant to the maximum penalty is where the drug is cannabis, and the offence is possession. In that case the combination of factors, if established, means the maximum penalty for that offence is a fine of five penalty units rather than one year or five years' imprisonment.

Apart from this, the only relevance of the small quantity amount is found in s 76. Under that section, any person charged with possession or use (or the inchoate versions of those offences) should presumptively, if other strict criteria are met, be sentenced to an adjourned bond (released on adjournment without conviction) upon that offender giving an undertaking.

28.2.3 – Identity of drug

[4082] *DPCS Act* s 70.
[4083] Criminal Code s 312.2.
[4084] *DPCS Act* s 73(2).
[4085] See, eg, *Criminal Code* s 302.5 (trafficking), s 305.6 (manufacturing *for a commercial purpose*), and s 309.5 (supplying drugs to child to traffick).
[4086] *DPCS Act* sch 11, pt 3.

The type of drug is not a primary basis for distinction in either the Commonwealth or Victorian statutory schemes. Except as noted above with respect to cannabis, once it is proved that the substance is a relevantly prohibited drug , the identity of the drug is only relevant to determining whether the offender committed an aggravated or mitigated form of the offence .

Until *Pidoto* it had been commonly considered that drug type (and the relative harm of that drug) was relevant as a circumstance of the offence. That case comprehensively rejected that view.[4087]

Sections 56D–56F of the *DPCS Act* prohibit the production, sale, supply and advertisement of substances that either have a psychoactive effect when consumed, or are represented as having such an effect (subject to certain exclusions). These psychoactive substance offences target new synthetic drugs that are not included in Schedule 11. The offences intend to address the diversity of substances that are being made available and the speed with which new drugs are developed. These provisions apply to offences committed on or after 1 November 2017.[4088]

[4087] *Pidoto* 271 [3], [8], 278 [42], 283 [63], 287 [83].
[4088] *DPCS Act* s145(1).

28.3 – Gravity and culpability

For a long time the courts have been clear and unequivocal: drug offences are a substantial social evil which cause significant harm to the community and its most vulnerable members.[4089]

But there is certain information a court requires to correctly assess the gravity of an offence and it is counsel's duty to provide it with:

- the identity of the drug
- how it can be used
- what is known about its effects, if anything
- what it might sell for at a wholesale or retail level.[4090]

28.3.1 – No hierarchy of harmfulness

Trafficking, importing, cultivating, possessing, or using one drug is generally no more or less serious than trafficking, importing, cultivating, possessing, or using another drug.[4091] General propositions about the relative harmfulness of one drug compared to another are, as was found by *Pidoto*, irrelevant for sentencing purposes.[4092]

Many drug offences are classified by quantity and if Parliament had intended to adopt harm-based classification a very different scheme would have been required.[4093] A court cannot evaluate the relative harmfulness of a particular drug because that requires special expertise, detailed investigation, and extensive information on a range of issues.[4094]

But this does not mean that quantity is the only factor to be considered, or that harm is irrelevant in sentencing.[4095] The legislation only precludes a court from considering the purported harm of a given drug relative to the purported harm of another drug, not to the harm drugs in general do to the user and to the community. Those are legitimate considerations.[4096]

Lastly, *Pidoto* limited its impact to trafficking and cultivation offences. Victorian offences expressly excluded include possession, use, trafficking to a child, and supply a drug of dependence to a child.[4097]

28.3.2 – Common features going to gravity and culpability

[4089] *R v Piercey* [1971] VR 647, 653; *R v Berisha* [1999] VSCA 112, [33] ('*Berisha*'); *R v Starr* [2002] VSCA 180, [26]; *R v James* [2003] VSCA 13, [32]; *Lieu v The Queen* (2016) 263 A Crim R 173, 189-90 [54] ('*Lieu*').
[4090] *Hibgame v The Queen* [2014] VSCA 26, [40], [50] ('*Hibgame*').
[4091] *Pidoto* 278 [39], 279 [46].
[4092] Ibid 279 [46]. See also *DPP (Vic) v Sullivan* [2000] VSCA 99, [14]; *Adams v The Queen* (2008) 234 CLR 143, 148 [10] ('*Adams*').
[4093] *Pidoto* 271-74 [5], [9]-[24], 278 [40], 279 [45]; *Adams* 148 [10].
[4094] *Pidoto* 271 [6], 277 [35], 279-82 [49]-[61], 289 [95].
[4095] Ibid 282-83 [62]-[63]; *Wong v The Queen* (2001) 207 CLR 584, 609 [70] ('*Wong*').
[4096] *Pidoto* 278 [43]. See also *R v D'Aloia* [2006] VSCA 237, [56] ('*D'Aloia*').
[4097] *Pidoto* 279 [47]-[48].

Across most serious drug offences the courts have found that certain common features are relevant in assessing the gravity of the given offence and the offender's culpability.

These features include:

- the quantity of drugs involved, or attempted to be involved[4098]
- the offender's role in the hierarchy (where it can be determined)[4099]
- any financial gain or motive[4100]
- the offender's knowledge or belief[4101]
- the size and sophistication of the operation[4102]
- the duration of the offending[4103]
- any assistance to authorities[4104]
- the offender's criminal history[4105] and
- the offender's prospects of rehabilitation.[4106]

28.3.2.1 – Quantity

Drug offences are extremely serious crimes as indicated by the maximum penalties which range from 10 years' to life imprisonment for offences at the upper end of the range. And because the sentencing regime is quantity-based, the amount of the drug involved is a significant factor. Generally, the higher the quantity, the more serious the offence will be.[4107]

The Court of Appeal has said the quantity based hierarchy of drug offences deliberately reflects 'Parliament's view of the ascending order of offence seriousness' and that this differential in offence gravity needs to be reflected in sentencing if Parliament's intention is to be effectuated.[4108]

4098 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 44 [184], 64-66 [267] ('*De La Rosa*'); *Nguyen v The Queen* (2011) 31 VR 673, 683 [35] ('*Nguyen 2011*'); *Lau v The Queen* [2011] VSCA 324, [38] ('*Lau 2011*'); *Gregory* 4 [6]; *Dang v The Queen* [2020] VSCA 24, [15] ('*Dang*'); *Nguyen 2021* [30].

4099 *De La Rosa* 62 [255]; *Nguyen 2011* 683 [35]; *Lau 2011* [38]; *Gregory* 4 [6], 8 [24]; *McClelland v The Queen* [2017] VSCA 124, [40]; *Nguyen 2021* [30]; *Lieu* 185 [41]; *Djordjic* [7], [70], [83].

4100 *De La Rosa* 44 [182]; *Wong* 609 [69]; *Nguyen 2011* 683 [35]; *DPP (Cth) v Maxwell* (2013) 228 A Crim R 218, 223 [20]-[21], 227 [35] ('*Maxwell*'); *Lau 2011* [38]; *Gregory* 8 [24], 19 [80]; *Kim v The Queen* [2019] VSCA 149, [29], [31] ('*Kim*'); *Condo* [28]-[30]; *Topal v The Queen* [2019] VSCA 289, [53] ('*Topal*'); *Roach v The Queen* [2020] VSCA 205, [53] ('*Roach*'); *Le v The Queen* [2021] VSCA 220, [12] ('*Le*'); *Rahmani* [31]

4101 *Wong* 609 [69].

4102 *Gregory* 4 [6]; *Nguyen v The Queen* [2013] VSCA 63, [18] ('*Nguyen 2013*'); *Lieu* 185 [41]; *Djordjic* [7], [70], [83]; *Nguyen 2019* [50]; *Topal* [53]; *Fatho v The Queen* [2019] VSC 311, [71] ('*Fatho*').

4103 *Gregory* 8 [24]; *R v Nguyen* [2008] VSCA 235, [61]; *Condo* [28]-[30]; *Nguyen 2019* [50]; *Topal* [19]; *Fatho* [71]; *Brown* [64], [91]. But see *Quah v The Queen* [2021] VSCA 164, [46]-[47] (duration of possession is not important, it is its character. Here it was associated with a continuing criminal enterprise, thereby making it more serious) ('*Quah*').

4104 *De La Rosa* 64-66 [267]; *Nguyen 2011* 683 [35]; *Lau 2011* [38].

4105 *De La Rosa* 64-66 [267]; *Nguyen 2011* 683 [35]; *Lau 2011* [38].

4106 *De La Rosa* 64-66 [267]; *Nguyen 2011* 683 [35]; *Lau 2011* [38].

4107 *Nguyen 2011* 676 [2]; Spiteri 540 [72]; *Latif v The Queen* [2013] VSCA 51, [59]; *Dawid v DPP (Cth)* [2013] VSCA 64, [35] ('*Dawid*'); *DPP (Vic) v Holder (a pseudonym)* (2014) 41 VR 467, 470 [10] ('*Holder*'); *Brown* [60]-[61]; *Gregory* 8 [24]; *Sharbell v The Queen* [2018] VSCA 324, [63] ('*Sharbell*'); *Nguyen 2019* [56]; *Topal* [53]; *Fatho* [70]; *Roach* [53]; *Lau v The Queen* [2021] VSCA 162, [31].

4108 *Quah* [54], [57]. See also *Nguyen 2019* [56].

However, it is an error to attribute chief importance to quantity, without considering other relevant factors. While weight may be a significant factor in assessing an offender's criminality or the gravity of the crime, it is not the sole variable affecting sentence.[4109]

The Court has also noted that while the standard sentence is for a notional offence in the middle range of objective seriousness, giving content to that difficult notion is made more difficult in cases where the offending has a quantitative threshold and the quantity trafficked is central to assessing the gravity of the offence.[4110]

Where an offender is sentenced for several drug offences, the obligation to consider the quantity dealt with does not require the court to mathematically adjust the sentences to reflect those differences in quantity.[4111]

28.3.2.1.1 – Inferences from quantity

The quantity of drug is commonly used to support inferences going to the gravity of a particular offence.

Inferences drawn from the seizure of a large quantity of drugs have included:

- the drug was not possessed for personal use[4112]
- the offending was part of large scale criminal business[4113]
- the offender had an expectation of profit/reward from offending.[4114]

28.3.2.1.2 – Quantity and purity

The purity of the drug in a mixture is a relevant consideration. The Court of Appeal has said for example that there is a difference between trafficking 3.9 kg of pure methylamphetamine and trafficking 1.9 g of methylamphetamine in a mix of 3.9 kg.[4115] Gravity and culpability are increased by the higher purity of the drugs involved.[4116]

Further, where the purity of the drug in a mixture is known, there is no error assessing the gravity of the offending by considering the proportion of the mixture consisting of the relevant drug 'and then comparing that amount to the qualifying commercial amount of the pure drug'.[4117] A court is not obliged to consider only the amount of the drug measured as a mixture and ignore the amount of the pure drug.[4118]

[4109] *R v Pham* (2015) 256 CLR 550, 562 [35]-[36]; *Wong* 609 [70]; *Hibgame* [41]-[51]; *Fatho* [70]; *Condo* [28].
[4110] *DPP (Vic) v Kumas* [2021] VSCA 215, [48] ('*Kumas*').
[4111] *R v Djukic* [2001] VSCA 226, [41].
[4112] *R v Setters (1999)* 107 A Crim R 281, [11]; *Symons v The Queen* [2021] VSCA 276, [22] ('*Symons*').
[4113] *Lieu* 185 [42]; *Dang* [15].
[4114] *R v Perrier (No 2)* [1991] 1 VR 717, 720 ('*Perrier*'); *Lieu* 185 [42]; *Dang* [15]; *Le* [12].
[4115] *Trajkovski v The Queen* (2011) 32 VR 587, 611 [123]-[128] ('*Trajkovski*').
[4116] *Djordjic* [7], [70], [83]. See also *Polos v The King* [2022] VSCA 258, [57] ('*Polos*').
[4117] *Polos* [60].
[4118] Ibid [61].

In Commonwealth matters the substance to be measured to determine the quantity of a drug is the pure quantity of the drug. In State matters the legislation takes a variable approach. In some instances, a scale is provided for quantities of drugs mixed with other substances, and in other cases, the only scale is for pure substances.

28.3.2.1.3 – Plant quantities

The *DPCS Act* defines the variable quantities of cannabis by two measures: the number of plants or their weight. Where cultivation is commercial because of the number of plants, but not weight, this may indicate an offence lower in the scale of seriousness.

In *R v Belbruno*,[4119] the offender was charged with a number of drug offences including trafficking a commercial quantity of cannabis. Police seized 168 cannabis plants from premises he rented. The potential weight of the crop was estimated at a little over 10 kg. The Court described the commercial quantity as in the low to mid-range.[4120]

28.3.2.2– Value of drug

Assessments are commonly offered in respect of the value of drugs and can be a valuable indicator of the scale of the offending and may provide some basis for comparison with other cases. However, the legislation emphasises quantity as the main indicator of gravity, not value which may change depending on the circumstances.[4121]

Despite these concerns, assessments of drug value are regularly accepted as a guide to gravity where it reveals the actual or anticipated benefit to the offender.[4122] Evidence of estimated values is usually provided by police officers.[4123]

28.3.2.3 – Harvest size and value of crop

The potential yield and value is a material factor in sentencing for cultivation offences as it gives some indication of the nature of the offending as well as its outcome and purpose.[4124] However, estimating the potential yield of a crop is difficult.[4125] Much may depend upon the stage of development of the plants and the care which would be required to ensure their full development.[4126]

28.3.2.4 – Offender's role

The offender's role in the hierarchy of any drug enterprise is also significant in determining gravity and culpability. Traditionally, courts have distinguished between street dealers, couriers, middlemen,

[4119] (2000) 117 A Crim R 150 ('*Belbruno*').
[4120] Ibid 151 [2].
[4121] *R v Tsolacos* (1995) 81 A Crim R 434, 436-37.
[4122] *R v Zeccola* (1983) 11 A Crim R 192, 205-06.
[4123] *DPCS Act* s 122A.
[4124] *R v Carbone* (1984) 36 SASR 306, 307-08 ('*Carbone*').
[4125] *Belbruno* 153 [8].
[4126] See *R v Vourlis* (1982) 30 SASR 223, 224-25; *Carbone* 308.

wholesalers and principals at the apex of the organisation. But the terms used for roles vary widely[4127] and as discussed below such labels are not the focus of a court's consideration.

A sentence will generally reflect the level of the offender in the hierarchy. Principals typically have a higher degree of moral culpability than couriers or middlemen, who in turn have a higher degree of culpability than street level dealers and persons possessing drugs for personal use.[4128] But this does not mean there is a particular benchmark or tariff rigidly applied in formulating sentence.[4129]

'There is no reason to think large scale drug offences are undertaken by organisations that are structured by rank or roles distributed according to some formal job description'. A court can only sentence on the basis of the facts known, and a full picture of relative roles and responsibilities is unlikely to be known with any precision.[4130]

In *Olbrich v The Queen*,[4131] the High Court held that identifying the precise nature of an accused's involvement is not essential to the sentencing process.[4132] It is not a task that must be undertaken in every case and its utility is limited by the extent to which the material facts about the person's involvement in the offending are known.[4133]

The Court further said that distinguishing between a "courier" and a "principal" may be a useful shorthand description of different kinds of participation in the enterprise, and that in a given case different levels of culpability may attach to those roles. But it always necessary to remember the crime that the offender is being sentenced for, and characterising them as a "courier" or "principal" cannot obscure the assessment of what they did.[4134]

In this respect it is important to remember that couriers and other low level participants are important, if not essential, to serious drug offences[4135] and deserve suitable punishment because the narcotics trade would collapse without their participation. Moreover, in certain circumstances, such as "one man" cultivation operations where the offender is the sole proprietor, they cannot also be classified as a mere "crop sitter" and their moral culpability will be high.[4136] Normally, drug offending even at this level calls for immediate imprisonment.[4137]

[4127] See, eg, *Perrier* 719; *R v Lam* (1991) 53 A Crim R 118, 120-21; *R v Spizzerri* [2001] VSCA 49, [3]-[4]; *R v Goodwin* [2003] VSCA 120, [12]; *R v Derham* [2003] VSCA 211, [10], [16]-[17], [43]; *R v Sotiriadis* [2004] VSCA 171, [4]; *R v Roberts* (2004) 9 VR 295, [136]-[137], [146], [140]-[150]; *Dawid* [46]; *Stanley v The Queen* (2017) 265 A Crim R 407, 411 [12].

[4128] *R v Combey* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Starke, Anderson and Fullagar JJ, 5 February 1980) 4, 10; *Hoang v The Queen* [2018] VSCA 86, [36], [38]-[40].

[4129] *Dang* [198]; *Nguyen v The Queen* [2020] VSCA 76, [23] ('*Nguyen 2020*').

[4130] *Awad v The Queen* [2021] VSCA 285, [216] ('*Awad*'). Where little is known of the offender's role, the quantity possessed assumes more importance in assessing the seriousness of the crime and the offender's knowledge of this quantity may affect that assessment. *R v Morton* (1987) 28 A Crim R 409, 410-11.

[4131] (1999) 199 CLR 270 ('*Olbrich*').

[4132] Ibid 277 [13].

[4133] Ibid 277-78 [14]. See also *Nguyen 2016* 315–16 [56].

[4134] *Olbrich* 279-80 [19]-[20]. See also *Nguyen v The Queen* [2017] VSCA 100, [17]-[21] ('*Nguyen 2017*'), quoting *Olbrich*. See also *Dang* [198].

[4135] *Leach* 66 [3].

[4136] *Symons* [24].

[4137] *DPP (Cth) v Bui* (2011) 32 VR 149, 156-57 [38], [40].

In *R v Nguyen*, the New South Wales Court of Criminal Appeal set out a series of principles distilled from earlier authorities regarding the offender's role for Commonwealth importation and possession cases.[4138]

- The criminality of the offender is assessed by considering their involvement in the steps taken to effect the offence. Their role is important to assessing criminality.
- Attempting to categorise an offender's role can be problematic as a court is often unlikely to know the full nature and extent of the enterprise.
- The criminality involved in the importation is what needs to be identified. While one person might be identified as the "mastermind" of the operation, that does not mean another person who manages the importation can be said to have had only mid-level responsibility.
- There is a rebuttable inference that a person importing drugs is doing so for profit; the fact that they need money to pay off a debt does not necessarily affect their culpability.
- Prior good character is generally given less weight as a mitigating factor, as prior good character is not unusual among people involved in drug importation.
- In sentencing for an attempted possession, it is important to remember that an act of attempted possession attracts a wide range of moral culpability, so the circumstances in which a person attempted to come into possession of a drug and what they intended to do with it are relevant to determining their culpability.
- Attempted possession offences are not any less serious than importation offences.

The label attached to the offender should not distract from the various factors relevant to assessing the gravity of the offence, including tasks the offender might have performed, the nature of their relationship with others in the enterprise, or the degree of trust and responsibility given to them.[4139]

For example, in *Nguyen v The Queen*,[4140] the Court found that the offender moving into the premises where the crop was grown and cultivated put them in a position of significant trust within the enterprise. And in that context, a large number of communications between a "principal" and the offender further permitted the inference that their role was not confined to that of a "crop sitter". So too did the content of such communications where quantity and price were discussed; content like that was sufficient to conclude the offender had an interest in the revenue that extended beyond idle curiosity and that they were a principal in the syndicate.[4141]

Similarly, in *Awad v The Queen*,[4142] which involved two offenders, the Court noted that despite having apparently different roles and being in possession of the drugs for differing periods of time, both offenders still went to a warehouse with repackaging equipment and that given the large quantity of the

[4138] *R v Nguyen* (2010) 205 A Crim R 106, [72]. Adopted and endorsed with minor changes in *DPP (Cth) v Masange* (2017) 325 FLR 363, 398-99 [139] ('*Masange*').
[4139] *Nguyen 2017* [27]-[28], quoting *Lieu* [41]-[42]; *Nguyen 2020* [23].
[4140] [2017] VSCA 286.
[4141] Ibid [35]-[38]. See also *Brown* [63], [65]-[67], [91]-[92] (offender had advance knowledge of the first importation and was essential in effecting it. The success of the first importation and the considered decision to be involved in a second, much larger, made it especially egregious beyond just the vast increase in quantity); *Topal* [53] (the applicant's role was deliberate and important to operation of business; they had direct contact with customers, and worked extensively, repeatedly, and significantly); *Osman v The Queen* [2021] VSCA 176, [98].
[4142] [2021] VSCA 285.

drugs involved, it was open to conclude they would be involved in the further movement of the drugs.[4143] Considering these matters, the Court held it was open to conclude that neither offender was a "mere conduit" or had only a "transitory connection" to the drugs. It said the sentencing judge had been entitled to find the role played by each involved foresight, planning, and was motivated by the promise of financial gain. Even though it was not possible to precisely identify the role played by each offender, the steps taken by each (individual and joint possession, movement, and storage) displayed an 'executive function' beyond that of a functionary.[4144] Although the two might have played different roles, it was open to regard them as on par with each other. A precise degree of equivalence was not required, assessing the relative criminality involved is an evaluative judgment. The degree of culpability for each was not to be measured merely by comparing the period of time when each was in possession of the drugs.[4145]

Lastly, whether others in the hierarchy stood to gain from an offender's conduct does not affect their sentence; the question is what the offender did and who they are, not what others might have hoped to gain.[4146]

28.3.2.5 – Financial gain or motive

An offender's culpability may be affected by their motivation for the offending. Thus, an offender who is motivated by greed will be considered more culpable than one whose only motivation was to fund their own drug addiction or use.[4147] An offender is also more morally culpable because of their willingness to engage in criminal conduct that is harmful to the community in expectation of reward.[4148] In these circumstances, the principles of general and specific deterrence 'loom large'.[4149]

The amount of the reward received or anticipated is also relevant to the gravity of the offence: offending expected to bring a large financial reward is more serious than one where the reward is small or non-existent.[4150] An offender may seek to mitigate their culpability by establishing on the balance of probabilities that they stood to derive little or no financial benefit.[4151]

Similarly, they may also attempt to mitigate the offending by proving that a quantity of the particular drug had a lower wholesale or retail value of another drug.[4152] This is why consistently lower sentences for GHB are reasonably justified by the enormous reward differential for offending involving that drug compared with others. The offender's culpability is materially reduced because their likely financial reward is relatively small.[4153] *Pidoto* and *Adams* established that under quantity-based sentencing

[4143] Ibid [220].
[4144] Ibid [222].
[4145] Ibid [223].
[4146] *Olbrich* 280 [21].
[4147] *Marku v The Queen* [2012] VSCA 51, [43] ('*Marku*'); *Nguyen 2013* [18]; *KMD* 254 [34]-[35]; *Brown* [62]-[63], [93]; *Mourkakos v The Queen* [2021] VSCA 26, [119] ('*Mourkakos*'), citing *R v Koumis* (2008) 18 VR 434; *Quah* [42]. And as noted above, *Nguyen* and *Masange* indicate that for importation and Commonwealth possession offences there is a rebuttable presumption that the offending is financially motivated.
[4148] *Maxwell* 223 [20]-[21].
[4149] *Le* [13].
[4150] *Maxwell* 223 [20]-[21].
[4151] Ibid 226 [29].
[4152] Ibid 226 [30].
[4153] Ibid 226 [33].

regimes, there is no scope to differentiate between drugs based on 'perceived differences in harmfulness'. Neither case said that anticipated financial reward is irrelevant.[4154]

However, the fact that an offender gave much of the money gained to their family or others is not a significant mitigating factor, the important fact is that a substantial financial reward was gained from the offending.[4155]

Failing to obtain a reward or complete a sale is generally not mitigating,[4156] and an accused who did not organise the sale or profit from it, may nonetheless be as culpable as the person who did if they accompany them to the sale 'knowing that the transaction would take place and for the purpose of providing armed support…in successfully carrying out the transaction.'[4157]

28.3.2.6 – Knowledge or belief

In an importation case, an offender's knowledge or belief as to the identity or quantity of the drug imported is relevant to sentencing, but it is not unusual for an offender not to know how much 'pure' drug they are importing and so where there is ignorance of quantity a court may be better guided by other considerations such as expected reward.[4158] However, a later offence may be 'comparable' to an earlier offence that was objectively more serious if it involves the offender knowingly returning to selling the same drug.[4159]

Unless there is evidence to the contrary, a court may sentence on the basis that the accused knew the quantity of drug he or she was dealing with, and it is not necessary or appropriate to speculate that the accused may have thought he or she was dealing with a lesser quantity.[4160]

Similarly, when assessing an offender's culpability, there should be no difference between offenders who are reckless as to the nature of the substance and those who know what it is.[4161]

28.3.2.7 – Sophistication and scale

The sophistication and scale of the drug enterprise will elevate the objective seriousness of the offending.[4162] The primary indicator of scale will generally be the quantity of drug involved, but price may also be indicative.[4163] The lack of sophistication and impossibility of an operation's success may not be of great significance in the face of serious offending (as measured by the quantity of the drug involved).[4164]

[4154] Ibid 225-26 [27]-[28].
[4155] *Masange* 399 [140] (Beale AJA).
[4156] *DPP v Gonzalez* [2011] VSCA 175, [26] ('*Gonzalez*'); *Holder* 472-73 [25].
[4157] *Nawar v The Queen* [2018] VSCA 6, [65] ('*Nawar*').
[4158] *Wong* 609 [68]-[69].
[4159] *Gioffre v The Queen* [2020] VSCA 177, [22]-[25].
[4160] *R v Tudman* (1986) 30 A Crim R 468, 469-70.
[4161] *DPP (Cth) v Afford* [2017] VSCA 201, [30]-[31].
[4162] *Marku* [43].
[4163] *R v Chaouk* [2000] VSCA 238, [41]; *Awad* [221].
[4164] *Sharbell* [59]-[60].

The strain on community resources as a result of extensive police involvement and investigation may also be an indicator of the scale of a drug operation and is useful in the assessment of the gravity of the offence.[4165]

A court may infer that an operation of some scale and sophistication would be possible given the possession of a significant quantity of specialised equipment, even when there is no evidence of the precise quantity of drugs that might be manufactured from that equipment.[4166]

Lastly, the sophisticated nature and large scope of a drug cultivation operation may permit an inference that the offender played a principal role in caring for the crop, and so occupied an important position in the enterprise.[4167]

28.3.3 – Importation

The legislative scheme makes clear that offenders who are reckless as to the substance imported are to treated the same way as those who intentionally import a given substance. If there had been a plan to treat the two differently, this would have been reflected in separate provisions imposing lower maximum terms on reckless offenders than the maximum sentence for intentional offenders.[4168]

28.3.4 – Trafficking

Trafficking covers both doing the act that constitutes trafficking and attempting to do such an act;[4169] there is no difference between trafficking and attempted trafficking.[4170] Trafficking is no less serious simply because the drugs do not make their way to the ultimate consumer.[4171] But this does not mean that all acts that constitute trafficking or attempts to traffick should be treated the same or that the same sentence should be imposed for an attempt as for a completed offence.[4172]

The actual or potential harm of particular conduct is potentially relevant depending on the circumstances of each individual case. A court may assess the seriousness of a trafficking offence by its potential consequences and the offender's intentions, regardless of what they were actually able to achieve.[4173] Potential harm is as serious as actual harm when considering acts of trafficking,[4174] and the offender's moral culpability is not lessened because there is no prospect of drugs actually reaching the streets.[4175]

[4165] *R v Harkness* [2001] VSCA 87, [28]-[29] ('*Harkness*').
[4166] *Djemal v The Queen* [2020] VSCA 25, [13]-[15] ('*Djemal*').
[4167] Nguyen 2017 [34].
[4168] *Lau 2011* [26].
[4169] *Mokbel v The Queen* (2011) 211 A Crim R 37, 47 [43] ('*Mokbel*').
[4170] *Taumoefolau v The Queen* (2015) 253 A Crim R 508, 518-19 [33]-[34] ('*Taumoefolau*').
[4171] *R v Spaull* [1999] VSCA 18, [11] ('*Spaull*'); *Holder* 469 [6], 472-73 [24]-[25]; *Taumoefolau* 519 [35]-[36]. In a similar vein, fraudulent transactions, where an offender supplies a substance purporting to be a drug when it is not, are objectively serious offences, although the criminality in such cases may be less than where there is a genuine plan to supply drugs. *R v Kijurina* [2017] NSWCCA 117, [99]-[103].
[4172] *Taumoefolau* 519 [35].
[4173] Ibid 519 [35]-[36].
[4174] *Arico* 511-12 [324]-[325] (Maxwell P). See also *Spaull* [11]; *Mokbel* 47 [43]; 472-73 [24]-[25].
[4175] *Arico* 513 [329]-[331] (Maxwell P).

The absence of actual harm may be given little weight where distribution is thwarted by the offender's arrest, covert police intervention,[4176] or the offender's own ineptitude.[4177]

For the purpose of determining the relative seriousness of one trafficking offence against another, it is useful to convert the weight of the drug into multiples of a large commercial quantity or a commercial quantity, and the parties should present their plea submissions accordingly.[4178]

28.3.5 – Cultivation

The Court of Appeal has stated that, save perhaps in exceptional circumstances, cultivation of a commercial quantity requires the imposition of a custodial sentence, though it may be possible to wholly suspend the sentence, if that sanction is still available in the circumstances of the particular case.[4179]

There is overlap between cultivation and trafficking offences, where possession for sale is the basis of the trafficking charge, and when a commercial or large commercial quantity is involved the two offences carry the same maximum penalty.[4180] This may raises question of double punishment or double jeopardy,[4181] and a sentencing court must look closely at the factual elements of the offending to determine if there are any in common. Those which are not in common must be the subject of separate punishment.[4182] This can be a difficult exercise, but as the High Court explained in *Pearce v The Queen*[4183] '[i]t should be approached as a matter of common-sense, not as a matter of semantics'.[4184]

Cultivation offences are often charged alongside the theft of electricity. It is common for crop farmers to bypass electricity meters in order to power grow lights. Sentencing judges should consider what impact this might have on orders for cumulation. While the theft may be an integral part of the hydroponics system, the act itself is a discrete offence and it may be appropriate to impose a measure of cumulation.[4185]

28.3.6 – Sale to children

The *DPCS Act* creates separate offences for trafficking or supplying drugs to children, and supply or trafficking to children within 500 metres of a school is a statutory factor leading to qualification for a higher maximum penalty.[4186] Further, the age of the "child" and the circumstances of the offending are also relevant in determining gravity.[4187]

[4176] *Mokbel* 47-48 [46].
[4177] *Spaull* [11].
[4178] *Holder* 470 [10].
[4179] *Rzek* [1], [30].
[4180] *Spiteri* 534-35 [41].
[4181] See, eg, *R v Langdon* (2004) 11 VR 18 ('*Langdon*'); *R v Ngo* [2007] VSCA 240; *R v Nunno* [2008] VSCA 31.
[4182] *Langdon* 38 [115].
[4183] (1998) 194 CLR 610.
[4184] Ibid 623 [42]. See also *Langdon* 33-34 [88]-[93]. For more on avoiding these pitfalls see Chapter 3.4 – Sentencing principles – Double punishment.
[4185] Nguyen 2013 [30].
[4186] *DPCS Act* ss 71B(1A), 71AB(2).
[4187] See *Harkness* [41] (offence was at the lower end of the scale as the child was 17 years old, had several times requested heroin and on the one occasion when the offender agreed only a small quantity of heroin was provided). See also *Allen v The Queen* [2021] VSCA 249, [67].

28.3.7 – Police involvement

The involvement of a police operative may affect the gravity of the offending or the offender's culpability, but this is limited where police simply facilitate an offence the accused was ready and willing to commit.[4188]

The primary focus should be on how the circumstances of their involvement bear on the culpability of the offender. Police involvement does not have a predetermined impact on culpability - there is a spectrum along which that impact is assessed, ranging from very little to substantial.[4189]

Factors that affect the impact of police involvement on culpability include:

- the way their involvement 'contributed to the offending, including the nature and degree of any pressure or coercion applied, or encouragement or inducement offered….'
- the extent to which their involvement contributed to the offending
- whether they dealt directly with the offender or through an intermediary
    - the more remote the police involvement, the less weight it will generally have on sentencing
- how readily did the offender respond to a police request for drugs
    - it will carry great weight if their will was overborne and less if they regarded the request as a welcome expansion to their trafficking
    - it also carries less weight if the trafficking was instigated by the offender rather than the police
- was the offender already trafficking when the police became involved and if so, what was the scale of the offender's operation at that time and after the police involvement
    - if the police request was accommodated through the offender's existing supply lines it will carry less weight, than where it could only be accommodated by a material change to the scale of the offender's operation and supply lines.[4190]

28.3.8 – Violence

Drug trafficking that depends on violence and intimidation for its operational effectiveness is more serious than trafficking which does not. An offender who engages in drug trafficking for profit is undertaking transactions of sale and purchase, and by using violence to complete a transaction they are more culpable than an offender who is not so brutal. The violence is intrinsic to the criminal activity and warrants a heavier sentence than would otherwise be called for.[4191]

28.4 – Circumstances of the offender

[4188] *Pham v The Queen* [2018] VSCA 200 [11]-[12] ('*Pham*').
[4189] *Kada v The Queen* (2017) 270 A Crim R 197, 214-15 [72].
[4190] Ibid. See also *Kumas* [4].
[4191] *Gregory* 5 [8], 17-18 [73]-[74].

An offender's personal circumstances, including good character, will ordinarily be given less weight in serious importation cases than might otherwise be so.[4192] This is because people involved in serious drug importation activities are often approached because of their good character.[4193]

Similarly, while the age of the offender is relevant, it does not carry as much weight in drug cases because competing considerations, such as gravity, deterrence, and denunciation may assume greater significance.[4194]

Nor will an offender's own addiction usually be a mitigating factor. However, it may sometimes be relevant to their prospects of rehabilitation, or the needs for specific deterrence and to protect the community.[4195] Whether addiction is mitigating will depend on the circumstances,[4196] and it is less likely to operate for activities that are above street-level.[4197] Further, there must a sufficient link between the addiction and the offending to mitigate sentence.[4198]

In some circumstances an offender's professional status,[4199] or their breach of an employer's trust – by using an official position to facilitate a drug offence – may be an aggravating factor.[4200]

An offender's cooperation with authorities is important in drug offences because of the difficulties involved in their detection.[4201] Moreover, offenders who provide information about drug offending frequently jeopardise their own safety both within and outside the prison environment and this is also an important consideration.[4202]

28.5 – Sentencing purposes

Given how serious drug offences are, it is not surprising courts have emphasised the sentencing purposes of general and specific deterrence, just punishment, denunciation, and protection of the community.[4203] Sentencing for drug offences must reflect the serious harm they cause within the community and the high maximum penalties set by Australian parliaments.[4204] They must signal that the potential financial reward is neutralised by the risk of severe punishment.[4205]

4192 *Nguyen 2011* 681-83 [34]; *Lieu* 185-86 [43]; *DPP (Cth) v Thomas* (2016) 53 VR 546, 613 [193] ('*Thomas*'); *Pham.*
4193 *Brodie v The Queen* (1977) 16 ALR 88, 91; *Berisha* [27].
4194 *R v Thomas* [1999] VSCA 204, [16]; *Belbruno* [9].
4195 Mourkakos [118]
4196 *R v Nagy* [1992] 1 VR 637, 640.
4197 *R v Bernath* [1997] 1 VR 271, 275-76.
4198 Ibid. See also *DPP (Vic) v Brown* [2002] VSCA 62, [12].
4199 *R v Fraser* [2004] VSCA 147, [29]
4200 *R v Ferguson* (2009) 24 VR 531, 597; *Gonzalez* [26]-[27]
4201 *R v Carey* [1998] 4 VR 13, 17; *Lieu* 190 [56].
4202 *R v THN* [2004] VSCA 7, [2]-[3].
4203 See, eg, *Dawid* [34]; *KMD* 254-55 [37]-[41]; *Thomas* 613 [193]; *Lieu* 185-86 [43]; *Nawar* [66]; *Pham* [20]; *Djordjic* [68], [83]; *Arico* 511 [321], 526 [398]; *Kim* [29]-[31]; *Condo* [32]-[33]; *Nguyen 2019* [50]-[51]; *Topal* [52]; *Djemal* [19], [21]; *Nipoe v The Queen* [2020] VSCA 137, [48]; *Roach* [53]; *Rahmani* [31]; *Kumas* [4], [49].
4204 *R v Belyea* [2003] VSCA 192, [9]; *R v Langdon* (2004) 11 VR 18, 38 [109] ('*Langdon*'); *Topal* [52].
4205 *Nguyen 2011* 681-83 [34]; *Lieu* 185-86 [43], 190 [55].

28.6 – Formulation of sentence

Drug offences are commonly committed either in association with other offences, or as part of a substantial series of offences. As a result, sentencing commonly requires decisions about concurrency and cumulation.[4206]

Generally, where two or more offences are committed in the course of a single transaction, all sentences should be concurrent rather than cumulative.[4207] For example, in *R v Glaister*,[4208] the offender was convicted of trafficking by manufacture and of possession. The Court of Appeal held as the possession was a consequence of the manufacture, the plea to trafficking consumed the count of possession, and it had been an error to cumulate part of the sentences on the two counts. Similar circumstances may lead not just to a conclusion that cumulation is inappropriate, but to a determination that any punishment on a count is unlawful.[4209]

A *Giretti* charge is not duplicitous because "trafficking" is a continuing activity.[4210] But issues of double punishment may arise in such offending where there are separate *Giretti* charges; 'it is a matter of determining whether, in the commission of the offences,…there is any commonality….'[4211] In *Dang v The Queen*[4212] the Court held that two *Giretti* charges of trafficking in methylamphetamine and heroin resulting from a single business of selling drugs had commonalities that were not distinguished by the different narcotics being trafficked.

The Court said there may be commonality between charges where:

- the conduct relied on was indistinguishable in time
- the conduct was indistinguishable in behaviour
- there was no differentiation by victim
- there was no differentiation by result
- there were no separate obligations owed to specific or contemplated individuals
- the conduct occurred as part of a general on-going course of conduct and was relied on precisely for that reason as a *Giretti* charge
- the facts establish there was a single business involved in the sale and supply of different drugs.[4213]

[4206] See 8.4 – Cumulation and concurrency.
[4207] *R v Koushappis* (1988) 34 A Crim R 419, 422. See also *Nguyen 2019* [62] (the fact that different drugs are trafficked deserves separate recognition in sentencing, with due regard being had for the overall offending and the principle of totality) and *R v Draper* [2002] VSCA 63, [10]-[12] (some cumulation is appropriate where a hydroponic operation involves the theft of electricity).
[4208] (1997) 92 A Crim R 161.
[4209] *Langdon* 35 [97], 38 [112].
[4210] *Giretti* 118; *Dang* 43-44 [64]; *Trajkovsi* 612 [135].
[4211] *Dang* 37-38 [47].
[4212] Ibid.
[4213] Ibid 49 [83].

28.7 – Statutory schemes

Indefinite sentences are not available in relation to drug offences, as there are no drug offences that are "serious offences" under the *Sentencing Act 1991* (Vic).

However, some State drug offences may be included in the following statutory categories.

Serious offender offences.[4214]

- Trafficking large commercial quantity.[4215]
- Trafficking commercial quantity.[4216]
- Cultivation in large commercial quantity.[4217]
- Cultivation in commercial quantity.[4218]
- Conspiracy where the purpose of the conspiracy is commission of one of the above trafficking or cultivation offences.[4219]
- Inciting where the offence incited is one of the above trafficking or cultivation offences.[4220]
- Aiding or abetting where the offence assisted is one of the above trafficking or cultivation offences.[4221]
- Doing a preparatory act where the offence prepared for is one of the above trafficking or cultivation offences.[4222]

The consequences of the serious offender provisions do not apply to Commonwealth offences[4223] and there is no similar scheme in Federal law. However, convictions for certain Commonwealth offences can operate to qualify an offender found guilty of a Victorian Schedule 1 drug offence to be sentenced as a serious offender.[4224] These include:

- import/export commercial quantity of a border controlled drug or plant[4225]
- import/export marketable quantity of a border controlled drug or plant[4226]
- possession of a commercial quantity of an unlawfully imported border controlled drug or plant[4227]
- possession of a marketable quantity of an unlawfully imported border controlled drug or plant[4228]

4214 *The Act* sch 1(4). See also 9.3– Statutory schemes – Serious offenders.
4215 Ibid s 71.
4216 Ibid s 71AA.
4217 Ibid s 72.
4218 Ibid s 72A.
4219 Ibid ss 79(1), 80(3)(a).
4220 Ibid s 80(1).
4221 Ibid s 80(3)(b).
4222 Ibid s 80(4).
4223 *McKenzie v The Queen* [2018] VSCA 34, [22].
4224 *The Act* sch 1 s (4)(ba). Certain older Commonwealth offences will also operate in this way. Ibid s 4(b).
4225 Criminal Code s 307.1.
4226 Ibid s 307.2.
4227 Ibid s 307.5.
4228 Ibid s 307.6.

- possession of an unlawfully imported border controlled drug or plant[4229]
- possession of a commercial quantity of border controlled drug or plant reasonably suspected of having been unlawfully imported[4230]
- possession of a marketable quantity of a border controlled drug or plant reasonably suspected of having been unlawfully imported.[4231]

Forfeiture offences and **continuing criminal enterprise offences** are any indictable drug offence under Victorian law or a Schedule 2 offence, and include:[4232]

- producing psychoactive substance[4233]
- selling or supplying psychoactive substance[4234]
- advertising psychoactive substance.[4235]

In addition, the following are **automatic forfeiture offences** and **civil forfeiture offences:**[4236]

- trafficking large commercial quantity[4237]
- trafficking commercial quantity[4238]
- trafficking to a child[4239]
- trafficking[4240]
- cultivation in large commercial quantity[4241]
- cultivation in commercial quantity[4242]
- conspiracy where the purpose of the conspiracy is commission of one of the above trafficking or cultivation offences[4243]
- inciting where the offence incited is one of the above trafficking or cultivation offences[4244]
- aiding or abetting where the offence assisted is one of the above trafficking or cultivation offences.[4245]

Drug offences provide the most important field for the operation of the forfeiture provisions of the *Confiscations Act 1997.*[4246]

[4229] Ibid s 307.7.
[4230] Ibid s 307.8.
[4231] Ibid s 307.9.
[4232] *Confiscation Act 1997* (Vic) s3, sch 1 ('*Confiscation Act*'); the Act sch 1A.
[4233] *DPCS Act* s 56D.
[4234] Ibid s 56E.
[4235] Ibid s 56F.
[4236] *Confiscation Act* s 3, sch 2. See also 17.1 – Confiscation – Statutory regime.
[4237] *The Act* s 71.
[4238] Ibid s 71AA.
[4239] Ibid s 71AB.
[4240] Ibid s 71AC.
[4241] Ibid s 72.
[4242] Ibid s 72A.
[4243] Ibid ss 79(1), 80(3)(a).
[4244] Ibid s 80(1).
[4245] Ibid s 80(3)(b).
[4246] See 7.7.1 – Forfeiture and pecuniary penalty orders.

Lastly, there are significant considerations at issue if an offender is declared to be a "serious drug offender" – namely, a person who is being sentenced for repeat offending of the same kind.[4247] If such a declaration is made under s 89DI, the court is to regard protection of the community as the principle sentencing purpose, and to further that purpose may impose a disproportionate sentence.[4248] It also triggers a presumption of cumulation unless the court orders otherwise.[4249] The court must also have entered into the record the fact that the offender was sentenced as a serious drug offender.[4250]

[4247] *Dimovski v The Queen* [2022] VSCA 6, [21].
[4248] *The Act* s 6D.
[4249] Ibid s 6E.
[4250] Ibid s 6F.

29 – Offences against justice

This chapter covers the most frequently charged offences against justice: perverting and attempting to pervert the course of justice, contempt, and perjury.

29.1 – Penalties and current sentencing practices

29.1.1 – Victorian penalties for perverting the course of justice and related offences

Offence	Legislation	Maximum penalty
Perverting the course of justice	*Crimes Act 1958* (Vic) s 320	Level 2 imprisonment (25 years)
Attempting to pervert the course of justice	*Crimes Act 1958* (Vic) s 320	Level 2 imprisonment (25 years)
Bribery of public official	*Crimes Act 1958* (Vic) s 320	Level 5 imprisonment (10 years)
Misconduct in public office	*Crimes Act 1958* (Vic) s 320	Level 5 imprisonment (10 years)
Escape from custody	*Corrections Act 1986* (Vic) s 84E	7 years
Breach of prison	*Crimes Act 1958* (Vic) s 320	Level 6 imprisonment (5 years)
Escape	*Crimes Act 1958* (Vic) s 479C	Level 6 imprisonment (5 years)
Aiding a prisoner in escaping	*Crimes Act 1958* (Vic) s 479B	Level 6 imprisonment (5 years)
Destruction of evidence	*Crimes Act 1958* (Vic) s 254	Level 6 imprisonment (5 years)
Falsely recording evidence	*Evidence (Miscellaneous Provision) Act 1958* (Vic) s 137	5 years
Forging, counterfeiting or falsifying certain seals, stamps or signatures	*Evidence (Miscellaneous Provision) Act 1958* (Vic) s 142	5 years

Printing or using documents falsely purporting to be printed by government printer	*Evidence (Miscellaneous Provision) Act 1958* (Vic) s 143	5 years
Giving false certificates	*Evidence (Miscellaneous Provision) Act 1958* (Vic) s 144	2 years

29.1.2 – Commonwealth penalties for perverting the course of justice and related offences

Offence	***Crimes Act 1914* (Cth)**	**Maximum penalty**
Judge or magistrate acting oppressively or when interested	s 34	2 years
Fabricating evidence	s 36	5 years
Intimidation of a witness etc	s 36A	5 years
Corruption of a witness	s 37	5 years
Deceiving witnesses	s 38	2 years
Destroying evidence	s 39	5 years
Preventing witness from attending court	s 40	1 year
Conspiracy to bring false accusation	s 41	10 years

Conspiracy to defeat justice	s 42	10 years
Attempting to pervert justice	s 43	10 years
Compounding offences	s 44	3 years
Inserting advertisements without authority of court	s 45	2 years
Aiding prisoner to escape	s 46	5 years
Aiding prisoner to escape – conveying things into prison etc	s 46A	5 years
Escaping	s 47	5 years
Rescuing a prisoner from criminal detention	s 47A	14 years
Person unlawfully at large	s 47B	5 years
Permitting escape	s 47C	5 years
Harbouring etc. an escapee	s 48	5 years

29.1.3 – Victorian penalties for contempt

Offence	**Legislation (where applicable)**	**Maximum penalty**
Contempt in the face of the court	*Magistrates' Court Act 1989* (Vic) s 133	6 months or 25 penalty units ('p.u.')

	County Court Act 1958 (Vic) s 54	At large
	Supreme Court Act 1986 (Vic) s 61 and the common law	
Contempt of court	*Magistrates' Court Act 1989* (Vic) s 134	1 month or 5 p.u.
	County Court Act 1958 (Vic) s 54	At large
	Supreme Court Act 1986 (Vic) s 61	
Contempt	*Coroner's Act 2008* (Vic) s 103	Natural person: 1 year or 120 p.u. Corporation: 600 p.u.
	Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 137	Natural person: 5 years, 1000 p.u., or both Corporation: 5000 p.u.
	Crimes (Mental Impairment and Unfitness to be Tried) Act 1991 (Vic) s 73(d)	10 p.u.
Contempt of Chief Examiner	*Major Crimes (Investigative Powers) Act 2004* (Vic) s 49	At large[4251]
Contempt of the Victorian Inspectorate	*Victorian Inspectorate Act 2011* (Vic) ss 72, 76	At large
Contempt of the IBAC	*Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 152, 157	At large

[4251] However, the maximum five-year penalty for the cognate offence of refusing to take an oath or affirmation may be a useful comparator. See *R v Murray* [2018] VSC 133, [19], citing *R v QF* [2014] VSC 81, [16], *R v Smith* [2017] VSC 708R, [40], and *R v DA* [2017] VSC 274R, [6].

Contempt of a Commission of Inquiry	*Biological Control Act 1986* (Vic) s 46	1 year, 20 p.u., or both
Contempt of Tribunal	*Victims of Crime Assistance Act 1996* (Vic) s 64	50 p.u.
	Mental Health Act 2014 (Vic) s 206	120 p.u.
Contempt of the Victorian Racing Tribunal	*Racing Act 1958* (Vic) s 50ZK	2 years, 240 p.u., or both
Contempt of PRS Board	*Victoria Police Act* (Vic) s 162	1 year, 120 p.u., or both
Sending or delivering etc. false process	*Unauthorized Documents Act 1958* (Vic) s 4	10 p.u.

29.1.4 – Victorian penalties for perjury

Offence	**Legislation**	**Maximum penalty**
Perjury	*Crimes Act 1958* (Vic) s 314	Level 4 imprisonment (15 years)
Giving false testimony	*Crimes Act 1914* (Cth) s 36	5 years
False or misleading statement as to swearing etc of affidavit	*Evidence (Miscellaneous Provision) Act 1958* (Vic) s 126B	10 penalty units
Make false statutory declaration	*Oaths and Affirmations Act 2018* (Vic) s 36	600 penalty units or 5 years or both
Make false or misleading statement as to making of a statutory declaration	*Oaths and Affirmations Act 2018* (Vic) s 37	10 penalty units
Present false copy for certification	*Oaths and Affirmations Act 2018* (Vic) s 47	600 penalty units or 5 years or both

False certification	*Oaths and Affirmations Act 2018* (Vic) s 48	600 penalty units or 5 years or both
False or misleading statement as to certification	*Oaths and Affirmations Act 2018* (Vic) s 49	10 penalty units

29.1.5 – Current sentencing practices[4252]

The maximum penalty for perverting and attempting to pervert the course of justice is 25 years' imprisonment, but caution should be applied here.[4253] The rarity of these offences and the wide variety of circumstances in which they may be committed means that sentencing judges have little guidance and can derive minimal assistance from the high maximum penalty.[4254]

Authoritative guidance on the appropriate sentencing range for contempt is similarly limited.[4255]

29.2 – Gravity and culpability

29.2.1 – Perverting and attempting to pervert the course of justice

Perverting the course of justice is a serious offence because it strikes at the heart of the justice system.[4256] An attempt to pervert the course of justice is an equally serious substantive offence. It is not inchoate despite the term "attempt", and any conduct that meets this description is serious.[4257] In *DPP (Vic) v Oksuz*[4258] the Court of Appeal said the attempt was serious because it involved an offender trying to deter a witness from giving evidence in a criminal proceeding, and so attempted to undermine the prosecution's ability to bring an accused person to justice. This obviously results in serious harm to public safety and the rule of law.[4259]

But since the offences are broadly defined, and can arise in a variety of circumstances,[4260] the gravity of the offending will depend on the particular circumstances of the case. Some factors going to gravity and culpability include:

- the consequences the offending was calculated to avoid;[4261]
- the duration of the deception and whether it was actively repeated or persisted in, or passively allowed to continue;[4262]

[4252] See generally 5.2.9 – Circumstances and gravity of the offence – Statutory factors – Current sentencing practices.
[4253] *DPP v Aydin* [2005] VSCA 86, [7]-[11] ('*Aydin I*'). See also *Saleem v The Queen* [2014] VSCA 190, [41].
[4254] Ibid [26], [28].
[4255] *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 134, [6] ('*Grocon*').
[4256] *Beljulji v The Queen* [2017] VSCA 279, [39] ('*Beljulji*'); *Hill v The Queen* [2021] VSCA 349, [36] ('*Hill*').
[4257] *Carter v The Queen* [2020] VSCA 156, [70].
[4258] (2015) 47 VR 731 ('*Oksuz*').
[4259] Ibid 753-54 [95].
[4260] *R v Obeid (No 12)* [2016] NSWSC 1815, [79] ('*Obeid*').
[4261] *Beljulji* [39]; *Oksuz* 751-52 [88], 754 [96].
[4262] *Beljulji* [39]; *Obeid* [79]. Attempts to pervert the course of justice may be continuing offences. Where the accused concocts a false story, the length of time the accused maintained the falsehood is relevant. A momentary lapse of judgment, as when an offender gives police false identification but quickly corrects themself, is at the bottom of the scale. More serious is where the offender maintains the fabrication, despite police attempts to uncover the truth. See *R v Goulding* (1991) 56 A Crim R 75.

- whether it involved threats or violence;[4263]
- whether it was spontaneous or premeditated;[4264]
- did the deception result in deceiving a court or tribunal or creating false public records, and if so, what were the consequences of the deception;[4265]
- the gravity of the criminal conduct the offender was attempting to pervert;[4266]
- was someone else recruited or coerced, especially an official or vulnerable person, into participating in the corruption, or was there an attempt at recruitment or coercion;[4267]
- did the offender prey on a pre-existing fear;[4268]
- was the offending committed in a curial setting, particularly to gain a sentencing advantage;[4269] and,
- motive.[4270]

While the likelihood of success is usually relevant in determining the seriousness of an attempted offence, its significance is substantially reduced for attempts to pervert the course of justice. Instead, the potential consequences may assume greater weight than any concern about whether the attempt succeeded or was likely to succeed.[4271]

29.2.1.1 – Perpetrators in the legal system

When the offending is committed by a person who is 'embedded in the legal system',[4272] the gravity of the offending and the culpability of the offender may be at their highest.

People who are 'embedded in the legal system' include:

- police
- judicial officers
- lawyers
- other support personnel.

29.2.1.1.1 – Police officers

Police officers can exercise considerable power over others and the abuse of that power is serious as it has significant social consequences. It can undermine public confidence in the police, erode the morale of honest officers, and encourage other police to turn a blind eye.[4273]

[4263] *Beljulji* [39]; *Oksuz* 751-52 [88], 754 [96], 785 [232].
[4264] *Beljulji* [39]; *Oksuz* 751-52 [88], 754 [96], 785 [232]; *Obeid* [79]. Where offending is said to '[evolve], rather than being a premeditated course of behaviour', the offender's culpability may be reduced. *DPP v Josefski* (2005) 13 VR 85, 102 [74] ('*Josefski*'). Conversely, offences which involve a substantial degree of planning and premeditation will raise the seriousness of the offending. *R v Morgan* (1995) 82 A Crim R 518, 528 ('*Morgan*').
[4265] *Beljulji* [39].
[4266] Ibid [62]; *Oksuz* 754 [97]; *Shiryar v The Queen* [2022] VSCA 96, [38].
[4267] *R v Marinellis* [2001] NSWCCA 328, [37], [42]; *Josefski* 101-02 [72], [74]; *Aydin I* [14], [21], [24]-[25]; *Oksuz* 751-52 [88], 754 [96], 785 [232]; *Baker (a pseudonym) v The Queen* [2021] VSCA 158, [36] ('*Baker*').
[4268] *Oksuz* 751-52 [88], 754 [96], 785 [232]. Persistent and cynical control and exploitation of a victim's known vulnerabilities can make this offending just a serious as if there were explicit threats or actual violence. Further, if the conduct the victim was asked to lie about is the offender's criminal violence against them, the offender's culpability may be high. *Mercer (a pseudonym) v The Queen* [2021] VSCA 132, [65] ('*Mercer*').
[4269] *Hill* [23], [30]; *Borg v The Queen* [2020] VSCA 191, [52].
[4270] For example: an imagined conflict of loyalties may reduce the offender's culpability as the offending is done out of concern for another but being motivated by possible profit is an aggravating factor. *R v Del Piano* (1990) 45 A Crim R 199, 203 ('*Del Piano*').
[4271] *R v Taouk* (1992) 65 A Crim R 387, 390-92 ('*Taouk*').
[4272] *Dieni v The Queen* [2022] VSCA 16, [132] ('*Dieni*').
[4273] *DPP (Vic) v Armstrong* [2007] VSCA 34, [32]-[34] ('*Armstrong*'); *R v Bunning* [2007] VSCA 205, [51] ('*Bunning*').

Police may be especially tempted to extort money or abuse their power when dealing with criminal offenders, who are unlikely to complain because it would reveal that they too have offended. For this reason, police abusing criminals in this way may be considered more serious than when they deal with honest members of the public who are more likely to report attempts at extortion. Equally, a police officer's moral culpability is not reduced because the victims of their corruption are themselves criminal offenders.[4274]

Attempts by an experienced police officer to corrupt a more junior officer or acquiescing to a junior officer's corruption may make the senior officer more culpable than the junior officer.[4275]

29.2.1.1.2 – Judicial officers

The public is entitled to expect that only people of good character will be appointed to judicial office. Where the offender was a judicial officer at the time of the offending, their previous good character cannot be given anything like the weight it would for different offending. This is especially true if the offender used their judicial office as part of the offending.[4276]

29.2.1.1.3 – Lawyers

Where the offender is a member of the legal profession or someone who intends to enter the profession, offences against justice will be treated especially seriously.[4277]

Given the frequent contact between lawyers and police officers, opportunities abound for lawyers to attempt bribery or to use other means to pervert the course of justice. When this occurs the status of the accused as a member of the legal profession automatically increases the seriousness of the offending.[4278]

29.2.1.1.4 – Other trusted personnel

Offending may also be aggravated where the offender is in another trusted position in the legal system. For example, in *Dieni v The Queen*,[4279] the offender was a coordinator and counsellor at a drug rehabilitation centre. His offending involved giving false evidence about his intention to supervise and support offenders in rehabilitation programs, and about their compliance with the conditions of bail or sentencing orders. This offending was objectively serious because it undermined the trust courts placed in the evidence from rehabilitation providers and undermined the efforts of other offenders to rehabilitate.[4280]

29.2.1.2 – Targets in the legal system

The gravity of the offence of perverting or attempting to pervert the course of justice may also be affected by who the offender has attempted to influence.

[4274] *Armstrong* [34]-[35].
[4275] *DPP (Vic) v Aydin* [2005] VSCA 87, [30] ('*Aydin II*'); *Armstrong* [33].
[4276] *Farquhar v The Queen* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Hope JA, Lee and Finlay JJ, 29 May 1985) 17.
[4277] *Aydin II* [25].
[4278] *R v Pangallo* (1991) 56 A Crim R 441, 443-44 ('*Pangallo*').
[4279] *Dieni*.
[4280] Ibid [102], [131]-[136].

29.2.1.2.1 – Police officers

Acting against the police is serious, such as in attempting to bribe a police officer.[4281] The fact that the bribe was not accepted does not meaningfully reduce the seriousness of the offence, though an element of entrapment may entitle the offender to a reduced sentence.[4282] Attempting to influence through bribery will also usually be less serious where no threats are involved.[4283]

29.2.1.2.2 – Judicial officers

Attempts to compromise the judiciary are treated very seriously. The public has an interest in seeing that the courts will not tolerate such attempts and cannot be left with the perception that judges do not treat bribery seriously, as that may itself promote a belief that judges can be bribed.[4284]

29.2.1.2.3 – Lawyers

As with police officers, actions against lawyers may also be serious. For example, where attempts to secure the withdrawal of charges are made by subjecting the prosecutor to threats of either physical violence or vexatious legal proceedings.[4285]

29.2.2 – Contempt

Contempt comes in different forms,[4286] but it is a serious offence regardless of the form since at the core of each is a threat to the rule of law and administration of justice.[4287]

However, the *degree* of seriousness may depend on the form and circumstances, with wilful instances (e.g., those that are 'deliberate or contumacious') of each type being considered more serious than those that were inadvertent or technical.[4288] This is because an intentional contempt contains an attitude of defiance towards a court or a court's order that undercuts both the court's authority and respect for the law.[4289]

29.2.2.1 –Interfering with jurors or witnesses

Contempt that interferes with the function of the jury is very serious.[4290] Calling a juror by name or threatening them or using offensive language are aggravating factors. This is a direct and serious interference with the independence, security, and function of the jury, and is likely to have a serious impact on the juror.

Contempt is also committed where an offender interferes or attempts to interfere with a witness, because if a witness cannot freely and voluntarily give evidence without fear of threats or violence, they may not

[4281] *R v Sener* [1998] 3 VR 749, 751.
[4282] See *R v Reading* [1998] VSCA 37, [16]-[17]; *Taouk* 396-404, 416.
[4283] *Aydin II* [24].
[4284] *Taouk* 393.
[4285] *Aydin I* [14], [21], [24]-[25].
[4286] *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 531-32 [1] ('*CFMEU*').
[4287] See, eg, *CFMEU* 561-62 [129]-[130], [132]-[133]; *R v Wright (No 1)* [1968] VR 164, 165-66 ('*Wright (No 1)*'; *R v Garde-Wilson* (2005) 158 A Crim R 20, 30 [36] ('*Garde-Wilson I*').
[4288] *Victorian Legal Services Board v Thexton* [2021] VSC 357, [11]; *CFMEU* 564 [142]; *Grocon* [86], [99].
[4289] *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 112-14 ('*Meat Industry Union*').
[4290] *DPP (Vic) v Paisley* [2002] VSC 594, [8] ('*Paisley*').

do so at all or may shade their evidence. Any conduct calculated to interfere with this freedom is 'a most serious and fundamental interference with the administration of justice'.[4291]

It is also contempt of court to publish something that, 'as a matter of practical reality,' has a tendency to interfere with the course of justice in a particular case or that has a 'real and definite tendency to prejudice or embarrass pending proceedings'.[4292] Proof of an intent to interfere is unnecessary, but the absence of intent is an important mitigating factor.[4293]

29.2.2.2 –Disobedience of court orders or rules

When an order is made it is the duty of those bound by it to strictly obey its terms. This is vital to the administration of justice. This duty exists until the order is discharged and applies even if there is doubt as to its validity.[4294]

Defiance of the order does not have to be public, but public defiance may increase the gravity of the offending.[4295] Continuing disobedience of a court order, in the face of notice of its making and the bringing of contempt proceedings, is also an aggravating factor.[4296] Similarly, where the contempt is committed by a large representative body (like a union), it is more serious than contempt committed by an individual.[4297] And contempt involving a public disturbance that requires the deployment of considerable resources to maintain public order is more serious than one that does not.[4298]

In assessing gravity, the extent to which the conduct tends to frustrate the order should be distinguished from the contemnor's intentions, which are only relevant to the related assessment of their culpability.[4299] For example, a real and substantial risk that the terms of a suppression order might be breached by media publication of certain facts demonstrates the tendency to frustrate the purpose of the order. This is relevant to assessing the gravity of the contempt. It is the consequences of publication that are relevant to assessing the contemnor's culpability.[4300]

29.2.2.3 –Refusal to give evidence

A witness' refusal to give evidence is another type of contempt. It is important that witnesses answer questions, especially when directed to by the court,[4301] tribunal or other authority.[4302] But the gravity of the underlying offence for which the witness refuses to give evidence should be taken into account in assessing the seriousness of the refusal. Consideration should also be given, where possible, to the likely weight of the evidence withheld. This will not always be possible and any assessment of the weight of unknown evidence may be unreliable.[4303]

[4291] *Wright (No 1)* 165-66.
[4292] *R v The Herald and Weekly Times Pty Ltd* [2008] VSC 251, [14] (*'Herald I'*). See also *CFMEU* 563 [138] (it is not necessary to establish a specific intention to breach a court order or interfere with the proper administration of justice).
[4293] *Herald I* [19].
[4294] *Law Institute of Victoria v Nagle* [2005] VSC 47, [4]-[5] (*'Nagle'*). But see *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, [55], [71] on the limits of this principle for orders made by an inferior court without jurisdiction.
[4295] *Grocon* [103]-[114], [134].
[4296] Ibid [89].
[4297] Ibid [123], [140].
[4298] Ibid [143].
[4299] *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 523, [244].
[4300] Ibid [254]. See also *R v Vasiliou* [2012] VSC 216, [37].
[4301] *Garde-Wilson I* 30 [36].
[4302] *Australian Crime Commission v DTO21* [2022] FCA 288, [29] (*'DTO21'*).
[4303] *R v Garde-Wilson* [2005] VSC 452, [18].

If a witness falsely states that they are unable to answer a question, that will usually constitute perjury and may constitute contempt. Of the two, contempt is generally considered more serious because deliberate falsehoods do not obstruct the administration of justice to the same extent as refusals to answer questions. [4304]

29.2.3 – Perjury

Perjury is a serious offence because justice cannot be administered unless people tell the truth under oath; justice 'inevitably suffers whatever the motive for the perjury, and in whatever circumstances it is committed'.[4305] It is an offence that is easy to commit, yet not easy to detect or prove.[4306] Where perjury goes undetected, it can produce unjust results and lead to a decline in community confidence in the reliability of the courts.[4307]

This is so even when the perjury appears to involve only a minor infraction. For example, making a false statement to avoid paying a parking or traffic fine does not seem significant, but it still undermines a system which depends on public honesty in nominating the driver who is in fact responsible. It is a serious offence given its effect on public confidence in the enforcement system and by requiring public money to be spent investigating and prosecuting.[4308]

The circumstances in which perjury can be committed are infinite.[4309] It can occur in both curial and non-curial proceedings, and while both instances are serious, curial perjury is regarded as the more serious.[4310] However, perjury in a curial context that does not result in a false conviction or acquittal may be considered less serious than perjury that places another person at risk of conviction.[4311]

Similarly, police and lawyers stand in a special relationship in relation to the administration of justice. This makes perjury by them more serious than if it were committed by others.[4312]

Finally, perjury that occurs on more than one occasion, rather than on the spur of the moment, is more serious.[4313]

29.3 – Circumstances of the offence

29.3.1 – Perverting and attempting to pervert the course of justice

The scope of this offence is wide and is designed to cover any act which tends to and is intended to pervert the course of justice. For this purpose, "justice" is not confined to that administered by the courts but includes the proceedings of judicial tribunals.[4314]

While the "course of justice" typically begins when process issues that invokes the jurisdiction of a court or when a step is taken that marks the beginning of criminal proceedings, the offence of attempting to

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[4304] *Keeley v Brooking* (1979) 143 CLR 162, 178.
[4305] *Smith v The Queen* [2014] VSCA 241, [10]-[11].
[4306] *R v Schroen* [2001] VSCA 126, [14] ('*Schroen*').
[4307] Ibid.
[4308] *DPP (Vic) v Toma* [2007] VSCA 315, [23]-[32] ('*Toma*').
[4309] *Schroen* [15].
[4310] *R v Taylor* [2006] VSCA 124, [24]-[25].
[4311] *R v Kellow* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Anderson and Jenkinson JJ, 17 August 1979) 5 ('*Kellow*'); *R v Dunn* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, McInerney, Murphy and Fullagar JJ, 17 July 1979) 6 ('*Dunn*'); *R v Patniyot* [2000] VSCA 55, [54] ('*Patniyot*');*Toma* [31].
[4312] *Kellow* 5-7.
[4313] *Toma* [28]; *Donohue v The Queen* [2019] VSCA 160, [51].
[4314] *R v Rogerson* (1992) 174 CLR 268, 276, 280, 298 ('*Rogerson*').

pervert the course of justice can be committed before curial proceedings have begun. For example, while police investigations are not an ordinary part of the course of justice, an accused who intentionally acts in a way that has a tendency to frustrate or deflect police from prosecuting a criminal offence thereby frustrates the course of an anticipated future curial proceeding and may be guilty of the offence.

And action taken to prevent the institution of a proceeding is as much an interference with the course of justice as one taken to obstruct a proceeding after it has already commenced.[4315]

29.3.2 – Contempt

A court should consider whether the conduct amounted to a wilful disobedience of an order or whether the accused held an honest, though unreasonable, belief that the order did not apply or have the purported effect.[4316]

Where the contempt involves a threat to the jury, the court will take account of the principle that jury service is a cornerstone of the criminal justice system and those participating in it need to be protected.[4317] However, it is also relevant to consider the type of threat made to them and the offender's capacity to carry it out,[4318] as well as the objective effect of the conduct on the trial (but not the personal feelings of any judge or juror who experienced the contempt).[4319]

The Supreme Court rules require an order to include a statement noting that the failure to comply with its terms will expose the offender to the possibility of imprisonment for contempt.[4320] A court has discretion to waive compliance with this rule, but the seriousness of contempt means this should not be done lightly. Where the rule has not been complied with, a court should hesitate to impose a sentence of imprisonment.[4321] Waiver of the indorsement rule requires 'the utmost strictness in procedure and proof'. It must be shown beyond a reasonable doubt that the defendant was aware of their obligations under the order and the consequences of breaching it.[4322]

In deciding whether to punish for contempt and in determining the appropriate penalty, a court should consider:

- the nature and circumstances of the contempt; [4323]
- its effect on the administration of justice;[4324]
- the contemnor's culpability;[4325]
- the need for general and specific deterrence;[4326]
- the existence of any prior convictions for contempt;[4327]
- the contemnor's financial means;[4328]

[4315] *Tognolini v The Queen* (2011) 32 VR 104, 113-14 [42]-[43].
[4316] *Primelife Corporation v Newpark* [2003] VSC 106, [40] ('*Primelife*').
[4317] *Paisley* [10].
[4318] Ibid [15], [17].
[4319] Ibid [12]. See also *R v Hoser* [2001] VSC 480, [9] ('*Hoser*').
[4320] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.10(3) ('*SCV Rules*').
[4321] *Miller v Eurovox* [2004] VSCA 211, [30]-[37]. This does not, however, preclude the imposition of a fine for wilful contempt. See *Primelife* [34]-[36].
[4322] *Alpass v Hession* [2017] VSC 748, [48].
[4323] *Grocon* [91]; *Herald I* [16].
[4324] *Grocon* [91]; *Herald I* [16].
[4325] *Grocon* [91].
[4326] Ibid; *Herald I* [16].
[4327] *Grocon* [91]; *Herald I* [16].
[4328] *Grocon* [91]. A court is not precluded from considering imposition of a fine because the offender is bankrupt, but neither does this provide a basis for imposing a term of imprisonment where that would not otherwise be appropriate. *Koulouris* [53]-[54]. Nor does financial difficulty discount the possibility of a fine. See *Zhang* [134].

- whether they have exhibited contrition and made a full apology;[4329]
- the contemnor's intent, and specifically whether the contempt was contumacious;[4330]
- the seriousness of the offence;[4331]
- whether any harm was actually caused;[4332]
- the existence or otherwise of any organisational system for the prevention of contempt;[4333]
- whether legal advice was sought;[4334]
    - but the weight to be given to this factor depends upon the extent to which the evidence discloses the nature of the advice, and the circumstances in which it occurred. An offender who asks for lenience based on this factor while maintaining legal professional privilege cannot complain if a court does not give it significant weight;[4335] and,
- the nature and purpose of any publication.[4336]

'The list of considerations is not exhaustive and each case will depend on its own facts'.[4337] But any factors that are considered aggravating must be proved beyond reasonable doubt.[4338]

29.3.3 – Perjury

The impact of perjury on a third party is relevant, particularly if the consequences of the offending on that person could have been foreseen by the offender.[4339]

29.4 – Sentencing purposes

29.4.1 – Perverting or attempting to pervert the course of justice

Perverting or attempting to pervert the course of justice calls for sentences that are sufficient to denounce the conduct, even for conduct falling in the lower range of seriousness, and to deter others.[4340]

29.4.2 – Contempt

Historically, sentencing for contempt depended on whether the contempt was classified as civil contempt or criminal contempt. The defining feature which brought contempt into the criminal sphere was that it involved deliberate defiance or was contumacious.[4341]

The distinction between civil and criminal contempt was thought to lie in the different purposes of punishment: civil proceedings were said to be remedial or coercive of an individual's private interest, where criminal proceedings were taken 'in the public interest to vindicate judicial authority or maintain the integrity of the judicial process'.[4342]

[4329] *Grocon* [91]; *Witt (No 2)* [93].
[4330] *CFMEU* 564 [141], 598 [299].
[4331] *Herald I* [16].
[4332] Ibid.
[4333] Ibid. This is an important mitigating factor but failing to comply with it undercuts its weight. Ibid [25].
[4334] *Herald I* [16].
[4335] Ibid [28].
[4336] Ibid [16].
[4337] *Koulouris* [50], citing *Primelife* [39].
[4338] *Koulouris* [51].
[4339] *Toma* [23], [29], [31].
[4340] *Bunning* [51]; *Oksuz* 755 [104], 785 [232]; *Obeid* [83], [85], [94], [138]; *Hill* [23], [30]; *Baker* [35]; *Armstrong* [35]; *Aydin II* [29]; *Pangallo* 443-44.
[4341] *Witham v Holloway* (1995) 183 CLR 525**,** 530, 538-39 ('*Holloway*'). See also *Sidebottom v The Queen* [2018] VSCA 280, [53] ('*Sidebottom*').
[4342] *Holloway* 531, 539; *Meat Industry Union* 102.

More recently, courts have held that this is not a satisfactory distinction. Even where a private person brings a proceeding to enforce an order or undertaking for their benefit, there is also a public interest since that proceeding vindicates the court's authority. Further, *all orders* are made in the interests of justice and any non-compliance is necessarily an interference with the administration of justice, even if the position can be remedied between the parties.[4343]

'Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes'. And fines, the usual sanction for contempt, constitute punishment.[4344]

Contumacious contempt calls for just punishment. The amount of a fine must reflect the contumacious conduct, be sufficient to deter both the offender and others, and be sufficient to demonstrate the court's readiness to ensure that its orders are obeyed.[4345]

Punishing for a contempt that involves wilful disobedience to a court order serves the substantial purpose of disciplining the contemnor, vindicating the authority of the court, and maintaining respect for the law.[4346]

29.4.23 – Perjury

The difficulties of detection and proof are such as to require both general deterrence and community disapproval to be marked in fixing a sentence for perjury.[4347]

29.5 – Formulation of sentence

29.5.1 – Perverting or attempting to pervert the course of justice

Perverting or attempting to pervert the course of justice are indictable and forfeiture offences. They are also offences for which a forensic sample order may be made.[4348] They may not be determined summarily.

Cumulation may be appropriate where the attempt to pervert justice was related to efforts to avoid detection or prosecution for other offences.[4349]

29.5.2 – Contempt

In the higher courts, the penalty for contempt is at large and, in all courts, common-law sentencing principles apply.[4350] This means the principle of parsimony requires selecting the least severe sentence

[4343] *Holloway* 533, 539.
[4344] *Holloway* 534.
[4345] *McKinnon v Adams* [2003] VSC 502, [34], [40]-[41]. See also *Wright (No 1)* 167; *R v Witt (No 2)* [2016] VSC 142, [118]-[119], [128], [134] ('*Witt (No 2)*'); *Nagle* [4]-[5], [10], [13]; *Paisley* [7]-[8], [14].
[4346] *Meat Industry Union* 112-14.
[4347] *Dunn* 8; *Morgan* 525; *Schroen* [14];*Toma* [22].
[4348] *Crimes Act 1958* (Vic) s 464ZF ('*Crimes Act*').
[4349] *Del Piano* 211.
[4350] *Grocon* [81]-[84], [198].

necessary to achieve the purpose of punishment,[4351] and that an offender should receive the benefit of the "single course of conduct" and totality principles.[4352]

Regardless of whether the supposed distinction between civil and criminal contempt continues, the types of available punishment for both are broadly the same.[4353] Possible penalties included imprisonment for a definite or indefinite term, fines, and sequestration of assets.[4354] The Supreme Court may also impose a suspended sentence, including upon a condition that that the contemnor perform unpaid community work.[4355]

There is some question to what extent the *Sentencing Act 1991* applies to contempt proceedings,[4356] but it does not apply in its entirety.[4357] A number of the community based sentencing options provided by the Act might be inconsistent with a superior court's inherent power to summarily punish contempt by committing the offender for a fixed term.[4358] However, because contempt is a serious offence it should be approached, so far as possible, consistently with the approach to dealing with criminal conduct in general. And because the Act deals with a range of matters important to the imposition and operation of sentences, a court may have regard to them as a matter of common sense when dealing with contempt.[4359]

Sections that have specifically been held to apply include:

- the power to impose a non-parole period;[4360]
- the order of sentences;[4361]
- whether sentences apply concurrently or cumulatively;[4362]
- the power to impose youth justice centre and youth residential centre orders;[4363]
- the power to imprison;[4364]
- the power to fine;[4365]
- the power to record a conviction and discharge the offender;[4366]
- the power to dismiss the charge without recording a conviction;[4367] and,
- the discretion to record a conviction.[4368]

[4351] Ibid [16], [87]. See also *Varnavides v Victorian Civil and Administrative Tribunal* (2005) 12 VR 1, 12 [42] ('*Varnavides*'); *Koulouris v Haidaris (No 3)* [2020] VSC 240, [52] ('*Koulouris*'); *Zhang v Shi (No 6)* [2022] VSC 271, [28] ('*Zhang*').
[4352] *Grocon* [89].
[4353] *CFMEU* 569 [170]. However, a conviction may only be recorded in a case of criminal contempt, and a finding of criminal contempt is more likely to result in a term of imprisonment. Ibid 570 [173].
[4354] *Grocon* [73]; *DTO21* [36].
[4355] *Zhang* [26]-[27], [36], relying on *SCV Rules* r 75.11(4).
[4356] *Grocon* [75]-[78].
[4357] *National Australia Bank Ltd v Juric (No 2)* [2001] VSC 398, [56] ('*NAB No 2*'); *Nagle* [12], citing *Rich v Attorney-General (Vic)* (1999) 103 A Crim R 261 ('*Rich*').
[4358] *Rich* 281-82 [46].
[4359] *Varnavides* 6 [17]-[18].
[4360] *Sentencing Act 1991* (Vic) ss 11-14 ('the Act'); *DPP (Vic) v Johnson* (2002) 6 VR 235, 237 [5]-[7] ('*Johnson*');
[4361] The Act s 15; *Rich* 282 [47]; *Varnavides* 6 [18].
[4362] The Act s 16; *NAB No 2* [47]; *Johnson* 236 [3]; *Nagle* [37].
[4363] The Act s 32; *R v Ford (a pseudonym)* [2018] VSC 491, [3], [18]-[23].
[4364] The Act s 7(1)(a); *Herald I* [49]. Although, as with any offence, this should be a penalty of last resort, *Hoser* [18].
[4365] The Act s 7(1)(f); *Herald I* [49].
[4366] The Act s 7(1)(h); *Herald I* [49].
[4367] The Act s 7(1)(j); *Herald I* [49].
[4368] The Act s 8; *Herald I* [49].

Costs may also be awarded, in contrast to normal criminal proceedings. Such costs tend to be awarded on the standard basis,[4369] though circumstances may persuade the court to award costs on a lower scale.[4370]

A sentence for contempt that orders an offender to be imprisoned for one month in default of paying costs is improper. Firstly, it pre-emptively sentences the offender for the future contempt of failing to pay costs; an offence which has not been committed, and of which the offender has not been convicted. Secondly, if the offender fails to pay costs and is then imprisoned, they will not need to pay costs on release and this effectively deprives a successful plaintiff of their costs. This is important because although costs have a punitive element, they are still primarily orders made for the benefit of the plaintiff.[4371]

If the contempt is found in the refusal to give evidence in an ongoing proceeding, it may be appropriate to impose coercive punishment of an indeterminate length.[4372]

Contempt of court is a unique offence, and no statutory categories apply.

29.5.3 – Perjury

Cumulation is important when formulating a sentence for perjury (a comparison with contempt may also be appropriate). While there is no absolute rule that a sentence for perjury should be served cumulatively on any other sentence of imprisonment it would be 'very rare indeed' for full concurrency to be ordered.[4373]

In Victoria, when the perjury is committed in curial proceedings, custodial sentences should be imposed unless there are exceptional circumstances.[4374]

Perjury is an indictable offence and a forfeiture offence. As it is an indictable offence, it is one for which a forensic sample order may be made.[4375] It may also be determined summarily,[4376] but no other statutory categories apply.

[4369] See, eg, *NAB No 2*, noting that at the time of the decision, *SCV Rules* r 63.30 used the language of 'solicitor and client basis', whereas the current rules use the term 'standard basis'.
[4370] *Hoser* [27].
[4371] *Slaveski v The Queen* (2012) 40 VR 1, 28 [92], 30 [104]. See also *Varnavides* 8-9 [27]-[29] (noting that no Victorian court could make a self-executing sentencing order under the Act).
[4372] See *Wood v Galea* (1995) 79 A Crim R 567.
[4373] *R v Hewitt* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Starke and Murphy JJ, 7 February 1985) 2; *R v Evans* [1996] QCA 553.
[4374] *Patniyot* [54].
[4375] *Crimes Act* s 464ZF.
[4376] *Criminal Procedure Act 2009* (Vic) s 28, sch 2, item 4.26.

30 – Offences against public order

This chapter covers offences that involve violence and public alarm. Riot, rout and unlawful assembly were common law offences that described an escalating chain of offending by a collective to commit unlawful acts. The common law offences of riot, rout and affray were abolished in 2017. Riot and rout were replaced with the statutory offence of violent disorder,[4377] while affray was replaced with statutory affray.[4378]

30.1 – Penalties and current sentencing practices

30.1.1 – Current and historic penalties for offences against public order

Offence	*Crimes Act 1958* (Vic)	Maximum penalty	Applies to offences committed on or after
Riot	Common law	Level 5 imprisonment (10 years)	1 September 1997 – 12 September 2017
Rout	Common law	Level 6 imprisonment (5 years)	1 September 1997 – 12 September 2017
Unlawful assembly	s 320	Level 6 imprisonment (5 years)	1 September 1997
Affray	Common law	Level 6 imprisonment (5 years)	1 September 1997 – 12 September 2017
	s 195H	Level 6 imprisonment (5 years) Imprisonment for 7 years if the offender is wearing a face covering at the time of the offending to conceal their identity or protect them from the effects of a crowd-controlling substance [4379]	13 September 2017
Violent disorder	s 195I	Level 5 imprisonment (10 years) Level 4 imprisonment (15 years) if the offender is wearing a face covering at the time of the offending to conceal their identity or protect them from the effects of a crowd-controlling substance[4380]	13 September 2017

[4377] *Crimes Act 1958* (Vic) s 195G ('*Crimes Act*').
[4378] Ibid s 195H(1).
[4379] Ibid s 195H(1)(b).
[4380] Ibid s 195I(3)(b).

30.1.2 – Current sentencing practice

30.1.2.1 – Riot and violent disorder

Prosecutions for riot in Victoria are rare. In 2016, the County Court stated that it is not possible to discern current sentencing practices.[4381] Most sentences imposed in Victoria between 2016 and 2021 relate to one prison riot event. As this was a serious example of riot, most offenders had a custodial sentence imposed. However, this cannot indicate sentencing practices for riot in general.

Violent disorder, which is a statutory offence that replaced the common law offences of rout and riot, is a relatively new offence and there have not been enough cases to discern current sentencing practices.

30.1.2.2 –Affray

Sentencing practices for affray under both common law and statute can differ widely since affray may occur in wide-ranging circumstances and involve numerous sentencing considerations, such as the seriousness of the offence, whether there were significant aggravating or mitigating factors, whether there was a plea of guilty or not, or whether there were significant priors.[4382]

Short custodial sentences are common where serious injury or death occurs. But Community Correction Orders, fines or good behaviour bonds are all within range for less serious instances of the offence and where there are compelling mitigating circumstances.[4383]

Please refer to the Sentencing Advisory Council statistics database for more information on current sentencing practices for riot, common law affray and statutory affray.

30.2 – Gravity and culpability

30.2.1 – Riot

Riot is a very serious offence which derives its gravity from persons acting in numbers and using those numbers to achieve their purpose.[4384] A riot usually involves an inherent danger of injury to persons, property or both. There is a danger that participants will respond to "the psychology of the crowd" and that mob violence may suddenly erupt at a high level and quickly move in new directions.[4385]

The principal factors to consider in assessing the gravity of riot are the size of the riot, the actual level of violence used and the harm caused to people or property.[4386] Considerations for the size of the riot include the number of people involved, the duration of the riot, and the level of alarm generated.[4387]

The culpability of an individual participant should not be assessed in isolation, as the acts are not committed in isolation. A person who participates in a riot bears some responsibility for the collective damage and harm caused. However, a sentencing judge should take into account the part an individual played in the offence and the extent to which they were to blame for the riot as a whole.[4388]

[4381] *DPP v Luca* [2016] VCC 1573, [64] (*'Luca'*).
[4382] *R v Casley* [2021] VSC 503, [120] (*'Casley'*).
[4383] See, e.g., *DPP v Lenehan* [2017] VCC 1238 (*'Lenehan'*), where a youthful offender was fined $700 without conviction for affray.
[4384] *Luca* [15].
[4385] *R v Sari* [2008] VSCA 137, [63] ('*Sari*'), citing *R v McCormack* [1981] VR 104, 108 (*'McCormack'*).
[4386] *McCormack* 108.
[4387] *Luca* [17]; *DPP (Vic) v Hinton* [2008] VSCA 34, [16].
[4388] *Luca* [15].

Matters that affect an individual's culpability in a riot include:

- Leadership and encouragement – assuming a leadership role and actively encouraging others to join in or commit acts throughout a riot are aggravating factors as they underscore the essence of the offence: weight in numbers.[4389]
- Planning – an individual who was not involved in the planning of a riot and whose participation was not premeditated is a factor going to mitigation.[4390]
- Identity of the victim – attacks on police or prison officers in the execution of their duties are an aggravating factor and generally call for a custodial sentence.[4391]
- Disguises – attempting to obscure one's identity to achieve anonymity is relevant to determining whether the perpetrator intended to behave violently or commit unlawful acts.[4392]
- Harm to persons or property – a person's active involvement in damaging property or injuring others is considered more serious than others who are mere followers.[4393] Likewise, if a person knew that a riot was dangerous or foresaw or intended a particular injury or a type of injury, that may be treated as an aggravating factor.[4394]

30.2.2 – Violent disorder

Violent disorder does not replicate the abolished common law riot offence, but it is intended to capture much of the conduct that would have been captured by common law riot.[4395] Violent disorder is a serious offence because it creates a violent mob mentality.[4396]

As with riot, the gravity of violent disorder is reflected in its maximum penalty of 10-years' imprisonment. The statute also creates an aggravated form of violent disorder, where the offender wears a face covering to disguise their identity or protect themselves from a crowd-controlling substance. The maximum penalty for the aggravated form is 15-years' imprisonment.[4397]

30.2.3 – Affray

For an affray to be made out at common law and in statute, there must be a degree of unlawful violence or a threat of violence which would terrify a reasonably firm person present at the scene.[4398] As such, the seriousness of an affray can vary enormously depending on the circumstances.

Broadly speaking, the gravity of an affray is informed by its duration, the number of participants involved, whether weapons were used, and any injuries sustained.[4399] An affray may range from a short, spontaneous fight outside a bar to a lengthy pitched battle that lasts for hours with many people injured and extensive property damage.[4400] It may also start small but escalate as the violence spreads to other locations, draws in more people and involves weapons.[4401]

[4389] *DPP (Vic) v Mustafaa* [2017] VCC 1091, [33]; *Sari* [65].
[4390] *McCormack* 109; *Luca* [19].
[4391] *McCormack* 109; *Luca* [15].
[4392] *Sari* [71]; *DPP (Vic) v Barnes* [2017] VCC 447, [29] (*'Barnes'*); *DPP (Vic) v Braithwaite* [2017] VCC 960, [39].
[4393] *DPP (Vic) v Davis* [2017] VCC 747, [20].
[4394] *McCormack* 108, citing *R v Boyd* [1975] VR 168, 172.
[4395] Explanatory Memorandum, *Crimes Legislation Amendment (Public Order) Bill 2017* (Vic) 5.
[4396] *DPP (Vic) v Puoch* [2022] VCC 1063, [6].
[4397] *Crimes Act* s 195I(3)(b).
[4398] *DPP (Vic) v Johnston* (2004) 10 VR 85 97 [31] (*'Johnston'*); *Crimes Act* s 195H.
[4399] *DPP (Vic) v Achor* [2018] VCC 2194, [6] (*'Achor'*).
[4400] *DPP (Vic) v Russell* (2014) 246 A Crim R 494, 501 [40] (*'Russell'*).
[4401] *R v Feretzanis* [2003] VSCA 8, [17] (*'Feretzanis'*).

Like riot and violent disorder, affray is a collective offence. The acts of individual participants cannot be taken in isolation, as any participation helps to promote the totality of the affray.[4402]

The *Crimes Act 1958* creates an aggravated form of affray which applies where the offender wore a face covering to disguise their identity or protect themselves from a crowd-controlling substance. The maximum penalty for this aggravated form is 7-years' imprisonment, compared to the maximum penalty for the basic offence being 5-years' imprisonment.[4403]

A number of factors can affect the gravity of an affray and the individual culpability of participants:

- Extent of injury – the seriousness of injuries inflicted is indicative of the gravity of an affray.[4404] Aside from the direct impact on victims who suffer serious injury or loss of life, bystanders may experience an increased level of terror from witnessing the infliction of injuries.[4405] However, a sentencing judge must take care not to sentence an offender for more serious offending for which they are not responsible.[4406]
- Location – the location of an affray affects the potential number of victims involved and the impact on victims. For instance, an affray in a public place that moves from one area to another can create a frightening atmosphere across a large area and increase the number of witnesses.[4407] Likewise, an affray in a private premise may be more serious where there are multiple witnesses,[4408] and where children are present.[4409]
- Planning – a level of organisation or planning can be viewed more seriously.[4410] Serious examples of affray include where participants make pre-arranged plans to meet in a specified location and armed for an altercation.[4411]
- Weapons – bringing a weapon to an affray is an aggravating factor even if the weapon isn't used.[4412] This is because the presence of weapons gives rise to a possibility that someone will be attacked with the weapon and creates an objectively significant risk of serious injury.[4413]
- Role – although affray is a collective offence, the role an individual plays is an important factor in sentencing. Potential aggravating roles include where an offender held a leadership role in the affray and was capable of stopping it[4414] and recruiting others to join in the affray.[4415] If an offender was an enthusiastic participant whose presence enabled and encouraged fellow participants, their role may be regarded as significant.[4416]

30.3 – Sentencing purposes

General deterrence is the key sentencing purpose in riot to make it less likely that others will join a riot in the future. For riots that occur in a prison setting, deterrence assumes a particular importance to prevent "the law of the jungle" from taking hold. [4417]

[4402] *Russell* 501 [40].
[4403] *Crimes Act* s 195H(1)(b).
[4404] *Russell* 502 [43]; *Feretzanis* [18]; *DPP (Vic) v Athel* [2017] VCC 268, [38] (*'Athel'*).
[4405] *R v Ly* [2004] VSCA 45, [13] (*'Ly'*).
[4406] *Casley* [63].
[4407] *Athel* [38]; *DPP (Vic) v Brown* [2018] VCC 405, [26] (*'Brown'*).
[4408] *R v Lacey* [2006] VSCA 4, [25] (*'Lacey'*).
[4409] *DPP (Vic) v Bidong* [2020] VCC 1076, [13] (*'Bidong'*).
[4410] *Johnston* 100 [40]; *Athel* [38].
[4411] *Athel* [38]; *Smith v The Queen* [2012] VSCA 5, [55] (*'Smith'*).
[4412] *Ly* [24]; *Lacey* [25]; *Athel* [36].
[4413] *Smith* [220].
[4414] *Johnston* 101 [42].
[4415] *Lacey* [29].
[4416] *Russell* 502 [44].
[4417] *Luca* [15].

For affray, courts have emphasised general and specific deterrence, denunciation and community protection as key sentencing purposes.[4418] Courts frequently express condemnation of groups of men who go out drinking and "throw their weight around" and highlight that appropriate punishment should be given to denounce and deter the conduct.[4419] Where the motive for affray is revenge, general deterrence and denunciation are important sentencing principles to prevent people from taking the law into their own hands to resolve grievances.[4420]

For youthful offenders in riot or affray offences, rehabilitation may be given more significance over deterrence and community protection.[4421]

Where a riot or affray participant has previous convictions for similar offences, it will be part of the context for sentencing and may be an aggravating factor when compared with other co-offenders.[4422]

30.4 – Formulation of sentence

Riot and affray are often committed at the same time as other offences and with other offenders. Sentences for these offences commonly require careful consideration of parity and double punishment.

Parity

As riots frequently involve a large number of offenders, parity is potentially complex to apply where there is great variation in individual roles and personal circumstances. This is especially apparent where only a small number of offenders have been sentenced out of a large cohort,[4423] and where there may have been different sentencing judges.[4424]

In these cases, a sentencing judge should adopt a pragmatic approach by looking at the first sentence imposed on a participant to discern any real and substantial differences between offenders.[4425] Any disparity between offenders should be explained, but precise mathematical evaluations of differences are unnecessary.[4426]

Double punishment

Where an offender is to be sentenced for both affray and offences arising out of or contributing to the affray, the sentencing judge must take care to avoid double punishment.[4427] Where affray shares specific legal elements with other offences (such as causing injury offences), the court cannot increase the sentence for affray simply because of those factors. While some cumulation may be ordered, it should be limited so as to not offend totality or double punishment.[4428]

[4418] *Russell* 496 [4]; *Stevenson* [2000] VSCA 161, [22]-[23]; *Achor* [37]; *Athel* [56]; *Bidong* [40].
[4419] *Stevenson* [27]; *Brown* [80].
[4420] *Bidong* [41].
[4421] *Achor* [38]; *Lenehan* [14]; *Athel* [57]; *DPP (Vic) v Maulio* [2006] VSC 188, [66]; *Luca* [53]; *DPP (Vic) v Dodd* [2017] VCC 1256, [82]; *Mustafaa* [52].
[4422] *Sari* [85]; *Athel* [52].
[4423] *Barnes* [70].
[4424] *Kumas v The Queen* [2017] VSCA 287, [33].
[4425] Ibid [34].
[4426] Ibid [42].
[4427] *Russell* 503 [49]; *Casley* [131]; *Smith* [40].
[4428] *Russell* 507-508 [74]; *Ly* [30].

31 – Occupational health and safety offences

The majority of occupational health and safety ('OHS') offences in Victoria are governed by the *Occupational Health and Safety Act 2004* (Vic) ('the *OHSA*').

While there are many ancillary statutes dealing with safety in specific contexts,[4429] and other states and territories (except WA) are also governed, with minor variations, by the harmonised *Work Health and Safety Act 2011* (Cth), these are outside the scope of this chapter.

31.1 – Penalties and current sentencing practices

Almost all indictable offences under the *OHSA* are triable summarily[4430] and are forfeiture offences,[4431] but are not forensic sample offences.[4432] The sole exceptions are the workplace manslaughter offences, which cannot be heard and determined summarily.[4433]

31.1.1 – Penalties for current offences

31.1.1.1 – Penalties for indictable OHS offences punishable by imprisonment

Section	Offence	Maximum penalty (Individual)	Maximum penalty (Company)
32	Recklessly endangering persons	5 years imprisonment and/or fine of 1800 penalty units	20,000 penalty units
39G	Workplace manslaughter (after 1 July 2020)	25 years imprisonment	100,000 penalty units
125(2)	Assault or intimidation of inspector or person assisting	2 years imprisonment and/or fine of 240 penalty units	1,200 penalty units

31.1.1.2 – Penalties for higher maximum fine OHS offences

- Individual maximum penalty: Fine of 1800 penalty units

[4429] For example, mining, maritime safety, dangerous goods, explosives, radiation, agricultural and veterinary chemicals, petroleum and gas, and electrical safety.
[4430] *Criminal Procedure Act 2009* (Vic) s 28, sch 2 item 20.1 ('*CPA*').
[4431] *Confiscation Act 1997* (Vic) sch 1. They however are not civil or automatic forfeiture offences under that Act.
[4432] *Crimes Act 1958* (Vic) s 464ZF.
[4433] Section 28 of the *CPA* does not apply to them. See *Occupational Health and Safety Act 2004* (Vic) s 39G ('*OHSA*').

- Corporate maximum penalty: Fine of 9000 penalty units.

Section	Offence
21(1)	Failure by employers to provide and maintain a safe working environment
23(1)	Exposure of non-employees to risks
24(1)	Exposure of non-employees to risks by self-employed persons
25(1)	Failure by employee to take reasonable care and comply with health and safety requirements
25(2)	Misuse of or interference with health and safety equipment
26(1)	Failure by managers to provide and maintain a safe working environment
27(1)	Failure by plant designers to comply with health and safety design requirements
29(1)	Failure by plant manufacturers to comply with health and safety design and information requirements
30(1)	Failure by plant or substance suppliers to comply with health and safety design and information requirements
31(1)	Commissioning, installing or erecting a plant in an unsafe manner

31.1.1.3 – Penalties for lower maximum penalty OHS offences

- Individual maximum penalty: Fine of 500 penalty units
- Corporate maximum penalty: Fine of 2500 penalty units.

Section	Offence
16(3)	Contravening an undertaking given in connection with a matter relating to a contravention

	or alleged contravention
28(1)	Building or structure designer failing to comply with health and safety design requirements
40(1)	Conducting an undertaking at a workplace without a required licence
62	Failure to comply with a provisional improvement notice which does not need to be affirmed by an inspector
63	Failure to comply with a provision improvement notice affirmed by an inspector
76(4)	Discrimination
110(4)	Failure to comply with a non-disturbance notice
111(4)	Failure to comply with an improvement notice
112(5)	Failure to comply with a prohibition notice
120(2)	Failure to comply with a direction from an inspector

31.1.1.4 – Penalties for summary OHS offences

Section	Offence	Maximum individual penalty units	Maximum company penalty units
9(2)	Failure to provide information to Victorian Workcover Authority	60	300
10(2)	Misuse of information obtained in an official capacity	100	N/A
22(1)	Failure to monitor the health of employees and workplace conditions	240	1200

22(2)	Failure to record information on the health and safety of employees and employ people to advise on OHS	60	300
35	Failure to consult with employees	180	900
38	Failure to report safety breaches to Victoria Workcover Authority	240	1200
39	Failure to preserve incident site	240	1200
40(2)	Failure to hold a required licence for the use of a plant	100	500
40(3)	Failure to hold a required licence for the use of a substance	100	500
40(4)	Failure to hold a required licence for an activity	100	500
41	Failure to hold the required qualifications or experience for an activity	100	500
42	Failure to hold the required permit or certificate of competency for an activity	100	500
43	Failure to commence negotiations for the formation of work groups within 14 days	10	50
44(2)	Failure to give written notice giving effect to negotiated agreement concerning formation of work group	10	50
44(4)	Failure to give written notice of variation of work group	10	50

48(2)	Failure by multiple employers to give written notice giving effect to negotiated agreement concerning formation of work group	10	50
48(4)	Failure by multiple employers to give written notice of variation of work group	10	50
53	Coercion in negotiations for the formation of work group	60	300
60(4)	Failure to circulate a provisional improvement notice	5	25
67	Failure to allow health and safety representative to attend course	60	300
69(1)	Failure to allow health and safety representative to perform duties	60	300
69(2)	Breach of privacy in provision of information to health and safety representative	60	300
71	Failure to keep and display list of health and safety representatives	5	25
72(1)	Failure to establish health and safety committee	10	50
73(2)	Appointment of inappropriate representative for resolution of health and safety issue	60	300
91	Misconduct by authorised representative of employee organisation	60	N/A
93	Obstruction of authorised representative of employee organisation	60	300

94	Impersonating an authorised representative of an employee organisation	60	N/A
100	Failure to provide information to an inspector	60	300
108(3)	Failure to comply with terms imposed for return of item taken by inspector	60	300
115(2)	Failure to circulate non-disturbance notice	5	25
119(3)	Failure to supply personal details to inspector	5	N/A
121	Failure to provide assistance to inspector	60	300
122(2)	Failure to allow person assisting inspector access to workplace	60	300
125(1)	Hindering an inspector	60	300
126	Impersonating an inspector	60	N/A
138(c)	Breach of adjournment order	10	50
151A	Failure to provide information used to calculate contribution payments to Victoria Workcover Authority	1	5
151B	Failure to provide information relating to employment, health and safety to Victoria Workcover Authority	1	5
151C	Failure to provide further information requested by Victoria Workcover Authority	1	5

151D	Failure to provide information concerning collection, collation, storage and retrieval of information to Victoria Workcover Authority	1	5
151E	Failure to comply with request by Victoria Workcover Authority to change manner of information collection, collation, storage, retrieval or transferral	1	5
153(1)	Provision of false or misleading information	240	1200
153(2)	Provision of false or misleading document	240	1200

31.1.2 – Penalties for repealed OHS offences

Most sections of the *OHSA* commenced on 1 July 2005. Before then the relevant legislation was the *Occupational Health and Safety Act 1985* (Vic) ('*OHSA 1985*'). Section 47 contained a general penalty provision of the following maximum penalties:

	Individual	Company
Indictable offences	500 penalty units	2500 penalty units
Summary offences	100 penalty units	400 penalty units

All breaches of the *OHSA 1985* were indictable offences, while breaches of the regulations were capable of being summary offences.[4434]

If an offender had been previously convicted of an offence under the *OHSA 1985*, a court was allowed to impose an additional penalty under *OHSA 1985* s 53 as follows:[4435]

	Individual	Company

[4434] *Occupational Health and Safety Act 1985* (Vic) ss 47(1), 47(3) ('*OHSA 1985*').
[4435] *OHSA 1985* ss 47, 53.

Indictable offences	Fines between 10 and 500 penalty units and up to 5 years' imprisonment	Between 50 and 2500 penalty units
Summary offences	Fines between 10 and 200 penalty units and up to 2 years' imprisonment	Between 50 and 400 penalty units

Where s 53 is invoked, the court must identify the further penalty. This requires the court to omit consideration of prior convictions from the base penalty to ensure there is no double counting. This does not, however, require a two-step process. The factors relevant to s 53 are:

- the nature and number of prior convictions,
- the proximity or remoteness in time of the prior convictions;
- the relevance of the prior convictions;
- the character of the offender;
- whether the prior convictions and present convictions demonstrate a systemic failure, or a general or flagrant failure of the accused to comply with occupational health and safety legislation.[4436]

The *OHSA* replaced the general penalty structure with specific penalties for each offence. Further, there is no longer a provision authorising additional penalties for subsequent offences.

31.1.3 – Current sentencing practice

As with other offences, the use of comparable cases is of limited assistance. They are helpful only where they are relevant comparators — whether because they are materially the same, or because they are instructively different — and sufficient information must be provided to enable meaningful comparisons.[4437]

The cases must also be related to the relevant offence. For OH&S offences, it is the seriousness of the breach of duty, not the causing of a death or harm, which is the relevant point of comparison between cases.[4438]

31.2 – Gravity and culpability

Occupational health and safety offences are different to most other criminal offences but are not merely quasi-criminal.[4439] The heavy maximum penalties available indicate how seriously they are regarded by the legislature.[4440]

[4436] *DPP v Esso Australia Pty Ltd* (2001) 124 A Crim R 200, [36]-[37].
[4437] *DPP (Vic) v Frewstal Pty Ltd* (2015) 47 VR 660, 671 [49], 674 [66]-[70] ('*Frewstal*').
[4438] Ibid 671 [47]; *Midfield Meat International Pty Ltd v The King* [2023] VSCA 106, [174] ('*Midfield Meat*').
[4439] *DPP (Vic) v Esso Australia Pty Ltd* [2001] VSC 263, [7]-[9] ('*Esso Australia*').
[4440] *DPP (Vic) v Redback Tree Services* [2017] VCC 1602, [18] ('*Redback Tree Services*'); *DPP (Vic) v Phelpsys Constructions* [2018] VCC 394, [53] ('*Phelpsys Constructions*').

Offences under the *OHSA* may be charged against both a company and an individual, even where the individual is the sole director of the company. In such a case, the liability and culpability of both are considered separately, especially where each is charged with different offences.[4441]

An offender must be punished according to the gravity of the breach of the duty owed and not for the result or consequences of the breach. This is because the occurrence of death or injury is not an element for most OH&S offences.[4442] Generally, the legislative scheme is risk-based and not outcome-based,[4443] and the fact that the victim died or suffered injury will only be relevant in so far as it demonstrates the degree of seriousness of the relevant threat to health or safety resulting from the breach.[4444]

The gravity of the breach is measured by:

- the seriousness of the breach itself (the extent of departure from the statutory duty); and
- the extent of the risk of death or serious injury which might result. This is assessed by:
    - the likelihood of the occurrence of an event as a result of the breach endangering the safety of employees or others; and
    - the potential gravity of the consequence of such an event, demonstrated by the actual consequences of the event.[4445]

The seriousness of the offending in other words is the 'measure of evidenced disregard' concerning the safety of employees in the circumstances.[4446]

Therefore, where the seriousness of the consequences of the breach is high but the breach is at the lower end of the scale (for example, as a result of its unforeseeability), the gravity of the breach will be taken to be at the lower end of the scale.[4447]

The next level of seriousness is where there is a lack of appreciation of the risk – risks that the offender should have been aware of and taken appropriate steps to deal with, but failed to do so either through inadvertence or negligence.[4448]

Finally, the gravest offending is where the employer may have wilfully disregarded employee safety by ignoring a known risk.[4449] Similarly, where the risk is self-evident or previously identified, a failure to have any systems in place to prevent or mitigate the risk, especially for no expenditure, increases moral

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[4441] *Orbit Drilling Pty Ltd v The Queen* (2012) 35 VR 399, 416 [68]-[69] ('*Orbit Drilling*'); *DPP (Vic) v Fergusson* [2017] VCC 1276, [15] ('*Fergusson*').
[4442] *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, [22] ('*Dotmar*'); *Frewstal* 686 [127].
[4443] *Frewstal* 662 [4]; *Midfield Meat* [174]. But note that *OHSA* s 32 requires serious injury for that offence. Moreover, note the contrast with offences in the *Environment Protection Act 1970* (Vic), as discussed in *DPP (Vic) v Hazelwood Power Corporation Pty Ltd (Sentence)* [2020] VSC 278, [150] ('*Hazelwood*').
[4444] *Frewstal* 686 [127]; *DPP (Vic) v New Sector Engineering Pty Ltd* [2020] VCC 400, [36] ('*New Sector Engineering*').
[4445] *Dotmar* [23]; *Frewstal* 686 [127]; *DPP (Vic) v Concord Group Pty Ltd* [2019] VCC 1846, [23] ('*Concord*').
[4446] *DPP (Vic) v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557 ('*Amcor*').
[4447] *DPP (Vic) v CLM Infrastructure Pty Ltd* [2017] VCC 192, [18] ('*CLM Infrastructure*').
[4448] *DPP (Vic) v WCA (Vic) Pty Ltd* [2013] VCC 980, [20] ('*WCA*'); *Fergusson* [20]; *Di Tonto v The Queen* [2018] VSCA 312, [28] ('*Di Tonto*').
[4449] *Dotmar* [24].

culpability.[4450]

An employer cannot allow employees to 'improvise' their own methods of work or rely solely on the experience and skills of its employees - it must take relevant steps to avoid risk.[4451] Where a company directs employees to carry out their work in a dangerous manner, this will significantly aggravate the offending.[4452]

The employer must also ensure that the person responsible for workplace safety is appropriate for that job. Wilful disregard of occupational health and safety by the person responsible for the issue aggravates the employer's offence,[4453] and the seriousness of the offence is not lessened due to an employee's foolish risks to their own safety.[4454]

31.2.1 – Foreseeability of risk

The question of foreseeability of risk is not dependant on whether a precise accident was foreseeable. Rather, an accident may provide evidence that informs whether the risk was reasonably foreseeable – the obligation to eliminate or reduce risk does not depend on the particular way in which the risk ultimately materialises.[4455]

The lack of previous incidents or reports about the current systems do not decrease the offence gravity, as it is the employer's responsibility to ensure safe systems and not the responsibility of employees to design the system or bring complaints about it.[4456] However, where an offender was explicitly put on notice about a potential risk such as through warnings by workplace inspectors, a previous workplace incident, or a previous safety check, disregarding that notice will aggravate the offence.[4457]

Employers must be alert to special or unexpected risks which exist in their industry. The failure to foresee such risks will not be exculpatory unless no further steps could reasonably have been taken. The exotic, unusual or unforeseen nature of the risk may be a factor in mitigation, especially activity that was outside the parameters of training, supervision and instruction received.[4458]

Alternatively, some risks may be self-evident, obvious or inherent in the work that the company undertakes, and therefore any failures to provide a safe working environment may be taken to be a

[4450] *DPP (Vic) v Australian Box Recycling Proprietary Limited* [2016] VCC 1056, [23] ('*Australian Box*').
[4451] *Redback Tree Services* [13]; *DPP (Vic) v Specialised Concrete Pumping Victoria* [2018] VCC 105, [18] ('*Specialised Concrete*'); *DPP (Vic) v W.F. Montague* [2018] VCC 1553, [49] ('*Montague*'); *DPP (Vic) v Mainline Developments Pty Ltd* [2020] VCC 47, [32] ('*Mainline Developments*').
[4452] *Dotmar* [26]; *Specialised Concrete* [18].
[4453] *R v Commercial Industrial Construction Group* (2006) 14 VR 321, 328 [43] ('*CICG*').
[4454] *DPP (Vic) v Dynamic Industries Pty Ltd & Irvine* (2009) 25 VR 75, 84 [48] ('*Irvine*').
[4455] *DPP (Vic) v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676, 694 [56] ('*Vibro-Pile*'); *DPP (Vic) v Hungry Jacks* [2018] VCC 1454, [27] ('*Hungry Jacks*').
[4456] *DPP (Vic) v Handcock* [2019] VCC 444, [34].
[4457] *DPP (Vic) v Coates Hire Operations Pty Ltd* (2012) 36 VR 361, 378 [68] ('*Coates*'); *Dotmar* [25]-[27]; *Redback Tree Services* [6] [13]; *Mainline Developments* [37]; *DPP (Vic) v Seascape Constructions Pty Ltd* [2020] VCC 1132, [36] ('*Seascape*'). Cf *New Sector Engineering* [58].
[4458] *DPP (Vic) v Yarra Valley Water* [2006] VSCA 279, [29]-[39] ('*Yarra Valley Water*'); *CLM Infrastructure* [18].

significant departure and a serious breach.[4459] Obvious defects in equipment can also constitute a very high departure from the statutory duty.[4460]

31.2.2 – Workplace Manslaughter

As workplace manslaughter is a new offence, there is not yet any guidance on how the gravity of this offence is assessed. The formulation of the offence strongly resembles negligent manslaughter and culpable driving causing death and therefore sentencing principles that apply to those offences may inform sentencing for this new offence.[4461]

31.3 – Circumstances of the offence

The circumstances of the offence are a relevant factor in determining the extent of a failure to ensure that employees are not exposed to risk to their health and safety, and thus to determining gravity and culpability.[4462]

31.3.1 – Responsible actor

Most offences under the *OHSA* are absolute liability offences,[4463] so liability is direct and does not rely on attributing an employee's conduct to the employer. However, while the origin of the failure is not relevant to liability, it is relevant in assessing the company's culpability.[4464]

For an incident where multiple offenders are involved (i.e. through a shared operation or sub-contracting), the OHS duties of each are unaffected by the failures of others. The appropriate sentence, however, will depend on the individual circumstances and how much control or involvement each offender had.[4465]

Where the individuals charged are senior employees of the company with operational control, the scope of their role and its impact on health and safety are relevant considerations. Employees with greater responsibility for the safety of their fellow workers are likely to receive higher sentences than other employees, whose conduct is more peripheral, but the court will consider the context and control of the individual's role and responsibilities.[4466]

31.3.2 – Duty and breach

31.3.2.1 – Generally

The *OHSA* requires employers to take steps which are reasonably practicable. As part of sentencing, it is

[4459] *DPP (Vic) v Bilic Homes Pty Ltd* [2016] VCC 810, [35]; *Phelpsys Constructions* [46]; *DPP (Vic) v DHHS* [2018] VCC 886, [23]-[24] ('*DHHS*'); *New Sector Engineering* [57].
[4460] *Phelpsys Constructions* [47]; *Mainline Developments* [36].
[4461] See 22.2.2 – Negligent manslaughter and 23.2.1 – Culpable driving causing death for information on how gravity is assessed for those offences.
[4462] *Dotmar* [22].
[4463] For example, section 21 of the *OHSA* requires employers to provide and maintain a safe working environment.
[4464] *CICG* [30]-[31].
[4465] *DPP (Vic) v Downer Edi Works Pty Ltd* [2017] VCC 2021 ('*Downer*'); *Hungry Jacks* [49].
[4466] *Fergusson* [18].

appropriate to consider the extent to which the offender fell short of this standard. For example, it is relevant whether the breach was the result of a failure to adhere to systems put in place by management or was a failure by management to establish adequate safety systems and procedures in the first place.[4467]

31.3.2.2 – Failure of employers to establish and maintain adequate safety systems

It is incumbent on employers to ensure the safety of their employees, and others in the workplace, regardless of the company's size or whether they are the principal or subcontractor.[4468] The *OHSA* deems this duty breached if the employer fails to:

1. provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;
2. make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;
3. maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;
4. provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;
5. provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.[4469]

While the *OHSA* does not require employers to ensure that accidents never happen, they must take reasonably practicable measures to eliminate or reduce the risk.[4470] In that sense, it is not the failure or incident that is key, but the company failing to do what was 'reasonably practicable'.[4471]

In environments where the risk of catastrophic injury or death is high, constant, and readily foreseeable, the legislative obligation of "so far as is reasonably practicable" must involve the creation of strict, rigorous and comprehensive standards which are then religiously maintained.[4472]

The safety systems will be considered in context to determine their adequacy – for example, the fact that a particular safety arrangement is not common industry practice will be relevant in assessing the extent of the company's failure to take reasonable precautions.[4473]

31.3.2.3 - Failure of workers to comply with safety systems

The employer will be responsible even when workers disregard or contravene formal safety systems. An employer cannot escape responsibility by claiming that they were incapable of controlling the behaviour of employees, especially where they allow a known disregard of safety procedures to continue.[4474] It will

[4467] *CICG* [31].
[4468] *DPP (Vic) v Toll Transport Pty Ltd* [2016] VCC 1975, [47] ('*Toll Transport*'); *Fergusson* [22]; *DPP (Vic) v JCS Fabrications Pty Ltd* [2019] VSCA 50, [23] ('*JCS Fabrications*'); *Seascape* [23].
[4469] *OHSA* s 21(2).
[4470] *JCS Fabrications* [25].
[4471] *Concord* [18]; *Coates* 377 [65].
[4472] *R v FRH Industries* [2010] VSCA 18, [75] ('*FRH Industries*'); *Toll Transport* [47].
[4473] *DPP (Vic) v Ricegrowers Limited* [2018] VCC 542, [18]-[20] ('*Ricegrowers*').
[4474] *Irvine* 83 [46]; *Coates* 376-77 [61]–[63].

not be a mitigating factor where the company was 'let down' by their employee.[4475]

An employer must do more than formally adopt a workplace safety system. The system must be actively implemented, through induction, monitoring and ongoing supervision, and compliance audits.[4476]

31.3.2.4 - Scale of harm and risk

Any person, regardless of whether they are an employee or simply someone present in the workplace, who is exposed to risk and the level of potential harm to them are both relevant considerations for a sentencing court.[4477]

The actual result of any incident (i.e., death or serious injury) is irrelevant to whether a person has committed an offence under the *OHSA*. It is also of very limited relevance to the gravity of an offence, and may only be used to illuminate the existence of the risk, the likelihood of the risk eventuating, and the gravity of the consequences should the risk be realised.[4478]

However, the death or serious injury of a person as a result of an *OHSA* breach may be a relevant sentencing consideration as an impact of the offence or an injury, loss or damage resulting directly from the offence.[4479] That said, because causation is not part of the offence, it may be difficult to determine, following conviction, whether a person suffered loss or damage as a direct result of the offending. For this purpose, it makes no difference whether the duty breached was a duty owed to employees or to others.[4480]

A court that uses injuries to assess the risks inherent in the offending must be careful to ensure there is a causal relationship between the offending and the injury. Investigations following the injury of a worker may reveal occupational health and safety breaches which were not causally responsible for the injury, or the employee's actions serving as an intervening act. As the assessment of causation must be established beyond reasonable doubt, if not established the death or injury cannot be used to sentence the offender.[4481]

Separately, an indicator of the scale of harm and risk will include the length of time of the breach – breaches that are not confined to a short time but are lengthy or ongoing constitutes a serious breach,[4482] as well as the vulnerability of the people likely to be exposed to the risk.[4483]

31.4 – Circumstances of the offender

For OHS offences, the objective seriousness of the offence takes precedence in the sentencing synthesis.

[4475] *Coates* 376 [59]; *Mainline Developments* [26].
[4476] *CICG* [48]; *DPP (Vic) v L Arthur Pty Ltd* [2013] VCC 1051, [17] ('*L Arthur*'); *Frewstal* 668 [32]-[33]; *Winnipeg Textiles* [17]-[19]; *Specialised Concrete* [18]; *Seascape* [31].
[4477] *Amcor* 565 [35]; *CICG* [61]; *Australian Box* [23].
[4478] *Irvine* 83 [44]; *Frewstal* 686 [127]; *New Sector Engineering* [36].
[4479] The Act ss 5(2)(daa), (db).
[4480] *Vibro-Pile* 723 [195]-[198].
[4481] *FRH Industries* [71], [75]; *Ricegrowers* [16]-[22].
[4482] *Mainline Developments* [35].
[4483] For example, *DHHS* [23]-[24] (health workers); *DPP (Vic) v De Kort* [2019] VCC 291, [12] ('*De Kort*') (Grade 6 school children).

Therefore, while it is still appropriate to consider the circumstances of the offender, these are of lesser significance than for other criminal offences.[4484]

Some common considerations include the offender's attitude towards workplace safety and their role in the offending.

31.4.1 – Remorse

Where breaches in safety had been identified, but previously ignored, rectification after the incident may be some evidence of remorse and rehabilitation.[4485] However, subsequent safety upgrades may be of limited relevance when taken with a considerable pre-incident disdain for safety. In that instance, the remedial work may also demonstrate that the relevant risks could have been easily avoided.[4486]

Some examples of remedial steps may include:

- independent reviews and audits;[4487]
- further training, maintenance and inspection procedures;[4488] and
- going above and beyond rectifications required by Worksafe.[4489]

While being of less importance, pleas of guilty and other conduct generally indicative of remorse remain relevant to the sentencing determination.[4490] Pleas of guilty retain their utilitarian value in saving the cost of a complicated trial and sparing injured workers or witnesses the trauma of giving evidence and reliving the circumstances of any injury.[4491] As with pleas generally, guilty pleas will have limited mitigating effect the later they are made.[4492]

No adverse finding should be made where the defendant company declines an interview with the authorities as is its right.[4493] However, the way that the company runs its trial, or committal and pre-trial, may be relevant in assessing the genuineness of apparent remorse.[4494]

Absence of genuine remorse may be found where the offender seeks to evade direct responsibility for the offending through qualifications, obfuscation or conditions in its defence,[4495] or through liquidation or phoenixing (i.e., shedding an existing corporate identity and trading anew),[4496] or litigating against

[4484] *Amcor* 565 [35]; *DPP (Vic) v Keilor-Melton Quarries Pty Ltd* [2018] VCC 2139, [20] ('*Keilor-Melton Quarries*').
[4485] *DPP (Vic) v AirRoad Pty Ltd* [2012] VCC 1960, [52] ('*AirRoad*'); *Toll Transport* [63]; *Downer* [129].
[4486] *Amcor* 565 [35]; *Orbit Drilling* 412-13 [55]; *Coates* 377 [64]; *Dotmar* [28]; *Toll Transport* [61]; *DPP (Vic) v Resource Recovery Victoria* [2015] VCC 472, [29] ('*Resource Recovery*'); *Mainline Developments* [38].
[4487] *DPP (Vic) v Melbourne Water Corporation* [2014] VCC 184, [19] ('*Melbourne Water*'); *DHHS* [28].
[4488] *L Arthur* [20]; *Melbourne Water* [19]; *DHHS* [28].
[4489] *Toll Transport* [60], [62]; *DPP (Vic) v Bradken Resources Pty Ltd* [2019] VCC 1053, [32] ('*Bradken Resources*').
[4490] *Yarra Valley Water* [46].
[4491] *Redback Tree Services* [14].
[4492] *Dotmar* [28]; *Seascape* [32].
[4493] *Toll Transport* [65].
[4494] *Ricegrowers* [25]-[29]; *Seascape* [33]-[34].
[4495] *Esso Australia* [45]-[47].
[4496] *Australian Box* [6]. Cf *Di Tonto* [29].

employees and failing to accept responsibility.[4497]

Conversely, actions by the company or the directors after the offending, such as ensuring employees have continued employment and covering debts to employees and contractors, can be taken to the offender's credit.[4498] The presence of senior executives at the hearing may also be a point in the company's favour.[4499]

The idea of a company, as a corporate identity, being remorseful is a difficult one, and a court should consider the actions of the company through its authorised representatives.[4500] Alternatively, the individual identity and the corporate identity can be taken separately where personal expressions of remorse fail to be translated into corporate reality.[4501]

31.4.2 – Prior convictions

Where the offender is a company, the sentencing judge may consider the conduct of the whole company rather than discrete divisions, but this must be considered in context – for example, historical convictions against previous entities will be of limited relevance,[4502] and the size of a company's operations and consequent exposure to risk may mean that its prior convictions must be viewed in context.[4503] It may also be relevant to consider the company's directors' prior convictions where the company was only recently incorporated.[4504]

Where the company has a good safety record through a lack of prior convictions, awards and other safety achievements, this can be taken into account as a mitigating factor.[4505]

31.4.3 – Size and community involvement

The scale of commercial operations does not affect the standard of care imposed under the *OHSA* or the culpability of offenders. Employee safety should be independent of the size of the employer. The commercial scale of the employer may, however, be relevant as to:

- the means of the offender, which will be relevant when selecting an appropriate fine.[4506] For example, a small family business or a sole operator will have less assets to repay a fine than a large corporation;[4507]
- the context of the breach and the extent to which others may have been exposed to significant risk;[4508]

[4497] *Esso Australia* [44], [47]-[48].
[4498] *WCA* [32]; *DPP (Vic) v Kenneally* [2019] VCC 658, [24] ('*Kenneally*').
[4499] *Melbourne Water* [19].
[4500] *Phelpsys Constructions* [41].
[4501] *Esso Australia* [43]. Cf *New Sector Engineering* [41].
[4502] *Ricegrowers* [33].
[4503] *Amcor* 563 [25]; *Downer* [114]; *Bradken Resources* [31].
[4504] *WCA* [30].
[4505] *Esso Australia* [29]-[30].
[4506] *Di Tonto* [30]-[31].
[4507] *Keilor-Melton Quarries* [20]; *Di Tonto* [30].
[4508] *Toll Transport* [64].

- the context of the company's criminal history;[4509] and
- the position of the offender and the flow-on effect for offence seriousness – for example, any breaches by a statutory body or government organisation must be seen in context in their role or position in the working environment.[4510]

Separately, the offending company's involvement in charitable or community works may be an indication of its character as a good corporate citizen,[4511] as well as other initiatives such as becoming carbon neutral,[4512] community advocacy or charitable initiatives.[4513] The directors' involvement in community works may also be taken into account in a limited way.[4514]

31.5 – Sentencing purposes

General deterrence is a significant sentencing factor for OHS offences.[4515] As Parliament views breaches of the *OHSA* seriously by virtue of the high maximum penalties,[4516] the court must ensure a level of penalty for a breach that is sufficient to compel attention to occupational health and safety issues to ensure prevention of future risks to health and safety.[4517] Where a system of work is 'hopelessly inadequate and vague', or where there is a cavalier attitude to safety, the need for strong punishment and denunciation will be increased.[4518]

In very rare situations, where an incident occurs that is already widely publicised in that small field, the event itself may act as a significant deterrent to potential further breaches.[4519]

Retribution and rehabilitation have very little role to play in sentencing a corporation. Specific deterrence is the means by which a corporation is to be hindered from engaging in contravening conduct.[4520] The offender's previous convictions for OHS offences may be relevant to determining the importance of specific deterrence,[4521] though isolated previous convictions may not indicate a persistent disregard for worker safety.[4522]

Alternatively, where the post-offence conduct indicates remorse and cooperation, specific deterrence will

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[4509] Ibid.
[4510] See, eg, *Downer* [126] (breaches by VicRoads significant oversight by the statutory body vested with wide powers in relation to construction and maintenance of road works); *DHHS* [30] (nature of the work of DHHS meant the Department should be acutely aware of what is required in order to protect employees from exposure to risk).
[4511] *L Arthur* [19]; *DPP (Vic) v ABD Group Pty Ltd* [2016] VCC 1450, [18]; *DPP (Vic) v SJ and TA Structural Pty Ltd* [2019] VCC 2016, [22] ('*TA Structural*').
[4512] *AirRoad* [53].
[4513] *Toll Transport* [68]; *Montague* [42]; *Hazelwood* [162]-[166].
[4514] *Keilor-Melton Quarries* [22].
[4515] *Amcor*, 565 [36]; *Irvine* 85 [52]; *Orbit Drilling* 414 [60]; *Coates* 379 [79]; *Vibro-Pile* 729-30 [233].
[4516] *Redback Tree Services* [18]. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2019, 3884 (Jill Hennessy, Attorney-General).
[4517] *Irvine* 85 [52]; *Orbit Drilling* 414 [60]; *Coates* 379 [79].
[4518] *Toll Transport* [46]; *Fergusson* [22].
[4519] *WCA* [22].
[4520] See, eg, *ACCC v ABB Transmission and Distribution* [2002] FCA 559, [17]; *ACMA v TPG Internet Pty Ltd* [2014] FCA 382, [63] (although in terms of antitrust laws).
[4521] *TA Structural* [32]-[33]; *Coates* 379 [77]-[78]; *Toll Transport* [53].
[4522] *Amcor* 563 [25].

be mitigated.[4523] But where the offending company failed to take remedial steps after a breach of duty, or where it failed to comply with improvement notices or reverted charges, the need for specific deterrence will be increased.[4524]

Liquidation does not automatically reduce the weight to be given to specific deterrence, given that a company is controlled by its directors who may operate in the industry in future. While there may be an element of legal fiction in deterring a company, there is still a need to deter those behind the company.[4525]

31.6 – Formulation of sentence

Where two or more breaches of a single provision in sections 21-32 of the *OHSA* arise out of the same factual circumstances, these may be rolled-up into a single charge, attracting a single penalty.[4526] This does not affect the maximum penalty for a single offence, though it will likely be relevant in fixing the appropriate penalty.[4527]

31.6.1 – Victim impact statements

As noted earlier,[4528] while OHS offences are generally risk-based and not outcome-based, a sentencing court must take into account any injury, loss or damage resulting directly from the offence.[4529] This means that a court is still obliged to consider the impact of the offending on victims, through victim impact statements, where it can be shown that the person has been harmed as a direct result of the offending.[4530]

31.7 – Imposition of sentence

Offenders for OHS offences may be sentenced to the same sanctions in the Act as offenders for other offences. The most common sanction is a fine, but in certain situations an adjourned undertaking may be imposed.[4531]

The *OHSA* also creates additional orders that may be imposed regardless of any other penalty – adverse publicity orders, orders to undertake improvement projects, and ordering a release on the giving of a health and safety undertaking. These are discussed below.

For those seeking specific instances of the different sanctions please see the Case Summaries and Worksafe table of sentencing outcomes.

31.7.1 – Conviction

Recording a conviction against a company may have adverse economic consequences. The conviction may

[4523] *Downer* [151]; *TA Structural* [32]-[33]; *Hazelwood* [155]-[158].
[4524] *Dotmar* [24]-[27]; *Fergusson* [19]; *Downer* [142].
[4525] *Phelpsys Constructions* [44]-[45].
[4526] *OHSA* s 33; *Coates* 379-70 [31]–[34]; *Irvine* 82 [40].
[4527] For more information on *OHSA* s 33, see *SKM Services Pty Ltd v Magistrates' Court of Victoria* [2019] VSC 460, [41]-[46].
[4528] See 31.3.2.4 – Scale of harm and risk.
[4529] The Act s 5(2)(daa), (db); *New Sector Engineering* [36]; *Seascape* [27].
[4530] *Vibro-Pile* 723 [195]; *Hungry Jacks* [30].
[4531] *DHHS* [33]-[36].

impact on the company's corporate reputation and place it at a disadvantage when it tenders for work. A court may consider these factors in fixing a penalty but should still record a conviction for serious offending.[4532]

The court also has scope to record a conviction against the company but not against the director of the company, depending on the mitigating factors.[4533]

31.7.2 – Fines

Fines are the principal penalty available under the *OHSA*. In sentencing for an OHS offence where a life has been lost, a judge should note that imposing a fine is not an assignation of monetary worth to the victim's life, an indication of the 'triviality of the offending', or about compensating the victim. Rather, it is a reflection of the risk-based offences in the *OHSA*.[4534]

Should the court decide to impose a fine, the court must consider the financial circumstances of the offender as far as practicable.[4535] It is not prevented from imposing a fine only because it has been unable to find out the financial circumstances of the offender.[4536] Information such as the company's assets, expenses or anticipated revenue will be relevant.[4537]

As general deterrence takes precedence in imposing a fine, a company's lack of financial viability is not the primary consideration in determining the level of the fine.[4538] Neither is an argument that that fines should be reduced by amounts spent on Occupational Health and Safety measures taken after the incident, as that should have been money spent on them all along.[4539] It is the symbolic importance of the amount of the fine, as a reflection of the gravity of the conduct, that must not be overlooked.[4540]

The court may order that a director of the company is jointly and severally liable for the payment of the fine where the court is satisfied that:

- the company will not be able to pay an appropriate fine; and
- immediately before the commission of the offence there were reasonable grounds to believe that the body would not be able to meet any liabilities that it incurred at that time.[4541]

However, the court cannot order a director be liable if the director had reasonable grounds for believing the company was solvent and took reasonable steps to ensure that the company would be able to pay its liabilities as and when they became due.[4542]

Fines may also be ordered against insolvent companies or companies approaching bankruptcy, as they

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[4532] *CICG* [59]; *DPP (Vic) v BPL Melbourne Pty Ltd* [2016] VCC 282, [19]. Cf *CLM Infrastructure* [18], [21].
[4533] *Kenneally* [28]-[33].
[4534] *L Arthur* [2]; *Fergusson* [51]; *Phelpsys Constructions* [13]-[14].
[4535] *Resource Recovery* [32].
[4536] The Act s 52.
[4537] *AirRoad* [58]; *De Kort* [18]-[19].
[4538] *Kenneally* [27]; *Seascape* [41].
[4539] *Resource Recovery* [31].
[4540] Ibid [32].
[4541] The Act s 55(1).
[4542] Ibid s 55(2).

will provide general deterrence even if the fine remains unpaid or it causes the company to become insolvent.[4543] The sentencing judge must ignore the fact that the company is in liquidation and the fine will never be paid, and consider the assets and financial prospects at time of trading.[4544] While the fine must reflect the need to take into account normal sentencing principles, specific deterrence will have little or no part to play.[4545]

While there would be scope for stays or payment by instalments to adapt to the offender's financial circumstances,[4546] this must not take precedence over the need for denunciation and general deterrence; a court should not allow the fine to be calculated so as to allow a company to absorb it as just another cost of doing business.[4547]

Separately, the court may also order separate penalties on a company and an individual offender (for example, a director) as co-offenders. The financial circumstances will be even more relevant where the director is the sole director and shareholder. In that situation, the court should consider:

- the total amount of fines in the aggregate;
- who will suffer the financial penalty;
- the financial situation of the individual and the company, and each of their capacity to repay the fine; and
- whether the company is likely to meet the fines imposed (or not, for example where a director intends to wind up the company in insolvency and recommence trading through a phoenix entity).[4548]

The fact that the company has a sole director is relevant to the quantum of penalty, but not the penalty itself.[4549]

The court may also impose an aggregate fine where two or more offences are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. This includes rolled-up or representative charges.[4550] The aggregate fine must not exceed the sum of the maximum fines that could be imposed in respect of each of those offences.[4551]

Aggregate fines may be imposed where it would properly reflect the totality of the offending,[4552] and the total amount is moderated to reflect the degree of overlap between the charges.[4553]

Conversely, a court may decide that it is more appropriate to impose separate penalties on each charge, even where the same circumstances give rise to multiple charges of breach of different statutory duties.

[4543] *Phelpsys Constructions* [55].
[4544] *Australian Box* [25]; *Concord* [22].
[4545] *Specialised Concrete* [24]; *Concord* [22].
[4546] *WCA* [35]-[36].
[4547] *Resource Recovery* [32].
[4548] *Di Tonto* [28]-[31].
[4549] *Orbit Drilling* 416 [69]; *Di Tonto* [29].
[4550] The Act s 51(3).
[4551] Ibid s 51(1).
[4552] *DPP (Vic) v Eliott Engineering Pty Ltd* [2014] VCC 266, [57]; *Resource Recovery* [36].
[4553] *DPP (Vic) v Nationwide Towing & Transport Pty Ltd* [2011] VSCA 291, [28]-[30]; *DPP (Vic) v City Circle Recycling Pty Ltd* [2015] VCC 480, [26].

As the different statutory duties are directed to the risk to different classes of persons, in some situations these should be recognised with individual penalties.[4554]

31.7.3 – Reinstatement and damages

Where an employer discriminates against an employee on a prohibited basis,[4555] the employer may be ordered to reinstate the worker or pay damages, in addition to any other penalty that is imposed.[4556]

31.7.4 – Adverse publicity orders

If a court convicts a person, or finds a person guilty, of an offence against the *OHSA* or the regulations, it may make an adverse publicity order in addition to, or instead of, any penalty or any other order.[4557]

This may be on its own initiative or on the application of the prosecutor,[4558] but may not be made unless the court is satisfied that the costs of complying with the order do not exceed the maximum penalty which may be imposed for the offence.[4559]

An adverse publicity order requires an offender to notify the public or specified persons (or class of persons) of:

- the offence,
- its consequences,
- any penalty imposed, and
- any other related matter

in the way and in the period specified in the order.[4560]

The offender must also give the Workcover Authority evidence of the action or actions taken by the offender in accordance with the order.[4561]

These orders are likely to operate in a similar manner to adverse publicity orders under the *Trade Practices Act 1974* (Cth) and the Australian Consumer Law.[4562] These achieve several objectives:[4563]

- protect the public interest by dispelling incorrect or false impressions caused by earlier advertising;

[4554] *New Sector Engineering* [62]. But see *Hazelwood* [146].
[4555] *OHSA* s 76.
[4556] Ibid s 78.
[4557] Ibid ss 135(1), (7).
[4558] Ibid s 135(2).
[4559] Ibid s 135(6).
[4560] Ibid s 135(1).
[4561] This must be done within 7 days after the period specified: *OHSA* s 135(3). Failure to do so, or dissatisfaction with the offender's actions, may lead to enforcement actions by the authority: at ss 135(3)-(4).
[4562] *Trade Practices Act 1974* (Cth) sch 1 pt 1 s 86D; *Competition and Consumer Act 2010* (Cth) sch 2 s 247.
[4563] *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, [49]-[51]; *ACCC v Jewellery Group Pty Limited (No 2)* [2013] FCA 14, [22]; *Director of Consumer Affairs Victoria v Wens Bros Trading Pty Ltd* [2019] FCA 39, [70] ('*Wen Bros*').

- alert the public that the company has engaged in the offence;
- specific deterrence to ensure there is to be no repetition of the contravening conduct
- general deterrence towards similar companies.[4564]

In that sense, this power is to be used protectively in the public interest and not punitively, and the scope of the orders will also be used to achieve that protective interest.[4565]

31.7.5 – Improvement projects

If a court convicts a person, or finds a person guilty, of an offence against the *OHSA* or the regulations, it may order that the offender undertake a specified project to improve OH&S in addition to, or instead of, any penalty or making any other order.[4566]

The order may specify conditions that must be complied with in undertaking the project,[4567] and must not be made where the costs of complying with the order would exceed the maximum penalty which may be imposed for that offence.[4568]

31.7.6 – Conditional release on health and safety undertaking

If a court convicts a person, or finds a person guilty, of an offence against the *OHSA* or the regulations, the court may adjourn proceedings for up to two years and release the offender on a health and safety undertaking.[4569] This is equivalent to a release on adjournment order,[4570] and such conditional release may be ordered in addition to any other penalties which may be imposed.[4571]

An undertaking must include three mandatory conditions, which are:

- to attend court on the date to which proceedings are adjourned to, and on any other time the court calls;
- not commit any offence against specified legislation or regulations during the period of the adjournment; and
- to observe any special conditions imposed.[4572]

The court may also impose special conditions on an offender who is an employer, that the offender:

- engage a consultant, who is approved in writing by WorkCover, to advise on or assist with occupational health and safety matters;

[4564] *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2014] FCA 1434, [37].
[4565] Such as towards naming the directors of the company or the specific penalty amount. *Wen Bros* [70]-[73].
[4566] *OHSA* ss 136(1), (4).
[4567] Ibid s 136(2).
[4568] Ibid s 136(3).
[4569] Ibid s 137(1).
[4570] Ibid s 138 (incorporating the provisions relating to variation and breach of an adjournment order contained in The Act ss 78-79).
[4571] *OHSA* s 137(7).
[4572] The legislation specified is the *OHSA*, the *Equipment (Public Safety) Act 1994* (Vic), the *Dangerous Goods Act 1985* (Vic), or regulations made under those Acts: *OHSA* s 137(2)(b).

- develop and implement a systematic approach to managing risks to health or safety that arise or may arise in the conduct of the offender's undertaking; and
- arrange an audit of the offender's undertaking in relation to health and safety by an independent person who is approved in writing by WorkCover.[4573]

[4573] *OHSA* s 137(3).

32 – Inchoate offences

32.1 – Penalties and current sentencing practices

32.1.1 – Victorian penalties

There are several inchoate offences which are part of substantive offence provisions in the *Crimes Act 1958* (Vic) ('*Crimes Act*'). Commonly charged offences are set out in the table below.

32.1.1.1 – Conspiracy

Offence	Legislation	Maximum Penalty	Applies to offences committed from
Conspiracy where a mandatory penalty is fixed[4574]	*Crimes Act 1958* (Vic) s 321C(1)(a)	The maximum penalty which applies to the primary offence	1 July 1984
Conspiracy where penalty is at large[4575]	*Crimes Act 1958* (Vic) s 321C(1)(b)	Level 4 - 15 years	1 September 1997
Conspiracy to commit murder or treason	*Crimes Act 1958* (Vic) s 321C(1)(ba)	Level 1 – life (or 'as fixed by the court')	1 September 1997
Conspiracy to commit an offence, or multiple offences, where maximum penalty set	*Crimes Act 1958* (Vic) s 321C(1)(c)	The maximum penalty which applies to the primary offence Where multiple offences – determined by reference to the accumulated maximum penalties	1 July 1984
Conspiracy where offence(s) triable summarily only	*Crimes Act 1958* (Vic) s 321C(1)(d)	Level 6 - 5 years or the maximum penalty which applies to primary offence (whichever is the greater)	1 September 1997
Conspiracy committed outside Victoria where the offence or offences are punishable by a term of imprisonment	*Crimes Act 1958* (Vic) s 321C(2)(a)	The maximum penalty which applies to the primary offence	1 September 1997
Conspiracy committed outside Victoria where the offence or offences are not punishable by a term of imprisonment	*Crimes Act 1958* (Vic) s 321C(2)(b)	Level 6 fine – 600 penalty units ('p.u.')	1 July 1984

[4574] Unless otherwise covered by another item in this table.
[4575] Unless otherwise covered by another item in this table. Life imprisonment is not 'a prescribed maximum penalty', so the operative maximum for conspiracy to commit any offence (other than incitement to commit murder or treason, which is covered by s 321I(1)(ba)) where the maximum penalty is life imprisonment will be 15 years imprisonment. See *Dimozantos v The Queen* (1992) 174 CLR 504.

Conspiring to commit certain drugs offences, including trafficking, cultivation, supply to a child, and possession	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 79	The maximum penalty which applies to the primary offence	18 December 1983
Conspiracy to cheat and defraud	Common law (penalty fixed by *Crimes Act 1958* (Vic) s 320)	Level 4 - 15 years	1 September 1997
Conspiracy to defraud	Common law (penalty fixed by *Crimes Act 1958* (Vic) s 320)	Level 4 - 15 years	1 September 1997

32.1.1.2 – Incitement

Offence	**Legislation**	**Maximum Penalty**	**Applies to offences committed from**
Incitement where a mandatory penalty is fixed[4576]	*Crimes Act 1958* (Vic) s 321I(1)(a)	The maximum penalty which applies to the primary offence	1 July 1984
Incitement where penalty is at large[4577]	*Crimes Act 1958* (Vic) s 321I(1)(b)	Level 4 - 15 years	1 September 1997
Incitement to commit murder or treason	*Crimes Act 1958* (Vic) s 321I(1) (ba)	Level 1 – life (or 'as fixed by the court')	1 September 1997
Incitement to commit an offence, or multiple offences, where maximum penalty set	*Crimes Act 1958* (Vic) s 321I(1)(c)	The maximum penalty which applies to the primary offence Where multiple offences – determined by reference to the accumulated maximum penalties	1 September 1997
Incitement where offence(s) triable summarily only	*Crimes Act 1958* (Vic) s 321I(1)(d)	Level 6 - 5 years or the maximum penalty which applies to primary offence (whichever is the greater)	1 September 1997

[4576] Unless otherwise covered by another item in this table.
[4577] Unless otherwise covered by another item in this table. Life imprisonment is not 'a prescribed maximum penalty', so the operative maximum for conspiracy to commit any offence (other than incitement to commit murder or treason, which is covered by s 321I(1)(ba)) where the maximum penalty is life imprisonment will be 15 years imprisonment. See *Dimozantos v The Queen* (1992) 174 CLR 504.

Incitement committed outside Victoria where the offence or offences are punishable by a term of imprisonment	*Crimes Act 1958* (Vic) s 321I(2)(a)	The maximum penalty which applies to the primary offence	1 September 1997
Incitement committed outside Victoria where the offence or offences are not punishable by a term of imprisonment	*Crimes Act 1958* (Vic) s 321I(2)(b)	Level 6 fine – 600 p.u.	18 November 1997
Inciting certain drugs offences, including trafficking, cultivation, supply to a child, and possession	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 80	The maximum penalty which applies to the primary offence	18 December 1983

32.1.1.3 – Attempt

Offence	Legislation	**Maximum Penalty**	**Applies to offences committed from**
Attempts where a penalty is specified by reference to a penalty Level in the table[4578]	*Crimes Act 1958* (Vic) s 321P(1)(a)	As set out in the table.	1 September 1997
Attempts where penalty is not specified by reference to a penalty Level in the table	*Crimes Act 1958* (Vic) s 321P(1)(b)	60% of the maximum penalty for the relevant offence	22 April 1991
Attempts where penalty is at large	*Crimes Act 1958* (Vic) s 321P(1)(c)	Level 6 - 5 years	1 September 1997
Attempt to commit murder or treason	*Crimes Act 1958* (Vic) s 321P(1A)	Level 2 – 25 years	15 August 1993
Attempts where the penalty for the offence is specified in another enactment and is lower than that specified in penalty in another Act is lower than the penalty provided by s 321(1)	*Crimes Act 1958* (Vic) s 321P(2)	The lower penalty specified in the other enactment.	24 March 1986
Attempting to commit an offence outside Victoria	*Crimes Act 1958* (Vic) s 321P(3)	The maximum penalty which applies in that place (a penalty exceeding life imprisonment is	24 March 1986

[4578] This applies (with all necessary changes made) to interstate penalties.

		taken to be a reference to life imprisonment)	
Attempting to fraudulently induce another person to invest money	*Crimes Act 1958* (Vic) s 191(1)	Level 4 - 15 years	1 September 1997
Attempt to commit certain indictable drugs offences, e.g., attempted cultivation, attempted possession, or attempted trafficking	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71-71AC, 72-72B, 73	The maximum penalty which applies to the primary offence	Various

32.1.2 – Commonwealth penalties

32.1.2.1 – Conspiracy

Offence	***Criminal Code Act 1995* (Cth)**	**Maximum Penalty**	**Applies to offences committed from**
Conspiracy	s 11.5	The maximum penalty which applies to the primary offence	1 January 1997

32.1.2.2 – Incitement

Offence	***Criminal Code Act 1995* (Cth)**	**Maximum Penalty**	**Applies to offences committed from**
Incitement where the offence incited is punishable by life imprisonment	s 11.4(5)(a)	10 years imprisonment	1 January 1997
… imprisonment for 14 years or more, but is not punishable by life imprisonment	s 11.4(5)(b)	7 years imprisonment	1 January 1997
… imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more	s 11.4(5)(c)	5 years imprisonment	1 January 1997
… imprisonment for less than 10 years	s 11.4(5)(d)	3 years or the maximum term of imprisonment for the offence incited, whichever is the lesser	1 January 1997

Incitement where the offence incited is not punishable by imprisonment	s 11.4(5)(e)	The maximum penalty units which apply to the offence incited	1 January 1997

32.1.2.3 – Attempt

Offence	***Criminal Code Act 1995* (Cth)**	**Maximum Penalty**	**Applies to offences committed from**
Attempt	s 11.1	The maximum penalty which applies to the primary offence	1 January 1997

32.1.3 – Current sentencing practice

32.1.3.1 – Conspiracy and incitement

A conspiracy will not inevitably attract a lesser sentence than the completed offence.[4579]

Convictions for incitement are relatively rare. Charges of incitement to murder are the most common. Some cases of incitement to murder will merit more serious punishment in all the circumstances than some cases of murder.[4580] Sentences for incitement to murder in the upper range of seriousness where the essential features of the offence are indistinguishable from conspiracy to murder should closely align with sentences for conspiracy to murder.[4581]

32.1.3.2 – Attempt

It has long been recognised that attempts will ordinarily attract lesser sentences than would be imposed if the offence concerned had been complete,[4582] even if there is no lower statutory maximum penalty provided for the attempt.[4583] This approach accords with the penalty scheme adopted in the *Crimes Act*.[4584]

Two reasons support this "conventional approach".[4585] Firstly, the harm caused by an attempt is usually less than that caused by the substantive offence.[4586] For example, treating attempted murder as seriously as murder has been described as 'an affront to common sense'.[4587] And an attempted aggravated sexual assault has been held not to be as serious as a completed offence.[4588] Secondly, punishing an attempt as

[4579] *DPP (Vic) v Fabriczy* (2010) 30 VR 632, 633 ('*Fabriczy*').
[4580] *R v Massie* (1999) 1 VR 542 553.
[4581] *Kalala v The Queen* (2017) 269 A Crim R 1, 22-23 [81]-[82] ('*Kalala*).
[4582] *R v Noble* (1994) 73 A Crim R 379, 381; *R v Nguyen* (Unreported, Victorian Court of Appeal, Phillips CJ, Hayne JA and Crockett AJA, 22 August 1995) 10-11; *McKeagg v The Queen* (2006) 162 A Crim R 51, 55, 60 ('*McKeagg'*); *FV v The Queen* [2006] NSWCCA 237, [60], [62] ('*FV*').
[4583] *McKeagg* 55, 60.
[4584] Section 321P (1)(a).
[4585] *R v BI (No 4)* [2017] ACTSC 71, [39]-[40].
[4586] *DPP (Acting) v Foster* [2015] TASCCA 2, [3].
[4587] *R v Irusta* [2000] NSWCCA 391, [47] ('*Irusta'*).
[4588] *FV* [62].

severely as a substantive offence may disincentivise offenders from voluntarily desisting from offending after the attempt is begun.[4589]

The significant exceptions to this approach are attempted drug offences and the offence of attempting to pervert the course of justice. Many substantive offences in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) are drafted to include attempted conduct without differentiation in penalty, demonstrating that attempted drug offences are considered to be as serious as completed offences.[4590] Where an offence is thwarted by the authorities' substitution of a benign substance for the drug, there will be little difference in culpability between an attempt and a completed offence.[4591]

32.2 – Gravity and culpability

Inchoate offences vary widely in seriousness and in criminality. It is difficult to make definitive statements about seriousness, given that the nature of an inchoate offence will be coloured by the type of substantive offence it embraces.[4592] Nevertheless, an attempt to commit a serious offence is a serious offence.[4593]

Parliament's view of the objective gravity of certain conspiracies can be seen where the maximum penalty fixed by statute is the same as that for the substantive offence.[4594] In contrast, the objective gravity of an attempt will not ordinarily be commensurate with conspiracy to commit that offence, given that the elements of the offences are different and the *Crimes Act* expressly fixes a lower maximum for an attempt than for the substantive offence. [4595] This is not the case for Commonwealth offences, as the *Criminal Code* imposes the same penalty for conspiracy, attempt and completed offences.

The essence of the crime of conspiracy is that a number of individuals plot together to achieve their unlawful purpose as a group.[4596] This element of joint effort distinguishes conspiracy from incitement and attempts. For the following reasons plotting is considered inherently dangerous, and more serious than if an individual were acting alone to plan and commit the offence:

- The likelihood of the crime occurring is increased by the involvement of multiple participants making a commitment to each other to carry it out.
- Several may achieve what an individual would find difficult or impossible.[4597]
- Other criminal plans may emerge from the group.
- A conspiracy involving a number of people acting at different times, different places, and in different ways is much more difficult to detect and halt.[4598]

[4589] *R v Falls* [2004] NSWCCA 335, [19] ('*Falls*').
[4590] *R v Schofield* (2003) 138 A Crim R 19, 33 ('*Schofield')*.
[4591] *Mokbel v The Queen* (2011) 211 A Crim R 37, 47; *R v Haidar* [2004] NSWCCA 350, [36]; *Tai v Western Australia* [2016] WASCA 234, [31].
[4592] *Raptis v R* (1988) 36 A Crim R 362, 364 ('*Raptis'*); *R v Taouk* (1992) 65 A Crim R 387, 390-391; *Kalala* 9 [23].
[4593] *Taouk* 390-391.
[4594] *R v AB (No 2)* (2008) 18 VR 391, 403.
[4595] See *Crimes Act* s 321P(1)(a); *Fabriczy* 638.
[4596] *Fabriczy* 637-38 [14]-[16].
[4597] *Fabriczy* 637 [16], citing *R v Shepherd* (1988) 37 A Crim R 303, 313.
[4598] *R v Elomar* (2010) 264 ALR 759, [34].

32.2.1 – Relationship between criminal objective and progress made

For conspiracies and attempts, the content of the conspiracy and the probability of success are two factors which influence the gravity of the offending.[4599]

The content of the conspiracy looks at the nature of the substantive criminal offence contemplated[4600] or attempted and the seriousness of the consequences that would follow if the substantive offence were completed.[4601]

The probability of success factor is described in various ways, including the distance which the conspirators have travelled towards their goal of achieving the illegal objective,[4602] the "real prospects" of achieving the objective,[4603] the "performance"[4604] or the "duration and reality"[4605] of the offence, which reveals the 'quality, the magnitude and the effectiveness' of the conspiracy itself.[4606]

In evaluating the probability of success, the court will also consider whether the offending was sophisticated or naïve, undertaken seriously or half-heartedly, competently executed or hopelessly mismanaged, as well as all other surrounding circumstances.[4607]

The improbability or impossibility of ultimate success is relevant to an assessment of the criminality of most conspiracies and attempts, with the exception of incomplete drug offending, where it commonly has very little weight.[4608] An inability to carry out the agreed plan because the conspirators lack the equipment, the means of obtaining it, or the intelligence to obtain it may reduce the criminality of the scheme.[4609] A withdrawal or a failure to carry the matter through from a very early stage may also constitute an offence of lesser seriousness, although each case must be assessed on its merits.[4610] A sophisticated attempt which almost succeeds is likely to attract a heavier sentence than a naïve and ill-prepared attempt predestined to fail. [4611]

[4599] *Raptis* 365; *Taouk* 390-391; *Savvas v The Queen* (1995) 78 A Crim R 538, 541-542, 544 ('*Savvas*'); *R v Kane* (1975) VR 658, 661 ('*Kane*'); *R v Hoar* (1981) 148 CLR 32, 38.
[4600] *Kane* 661; *Raptis* 364; *R v Roche* (2005) 188 FLR 336, [4].
[4601] *Taouk* 391.
[4602] *Raptis* 364.
[4603] *Taouk* 391.
[4604] *Raptis* 364.
[4605] *Kane* 661.
[4606] *R v Leith* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Lush and Fullagar JJ, 9 November 1977), 8 ('*Leith*').
[4607] Schofield 33.
[4608] *R v Spaull* [1999] VSCA 18, [11]; *Reid v Western Australia* (2012) 210 A Crim R 587, 594; *Berichon v The Queen* (2013) 40 VR 490, 499 ('*Berichon*'); *Zandi v The Queen* [2015] VSCA 24, [17]–[18].
[4609] *Raptis* 364.
[4610] *Falls* [19]; *Potts v The Queen* [2017] NSWCCA 10, [16].
[4611] *Taouk* 390-391; *R v Andreason* [2004] VSCA 169, [12] ('*Andreason')* (a 'crude and unsophisticated' conspiracy 'virtually certain to be discovered' by authorities); *Couloumbis v The Queen* [2012] NSWCCA 264, [37]-[38] (a haphazard 'shemozzle').

However, the criminality of the plan is not reduced by supervening factors which thwart completion, including police intervention,[4612] other crime prevention measures,[4613] mere good fortune,[4614] or where the conspirators bungle the execution.[4615]

The evaluation of the impact of the content of the conspiracy and the probability of success must be weighed in each case in the light of all of the circumstances.[4616] A hopeless attempt to commit a serious offence should not necessarily attract a lesser sentence than an attempt to commit a less serious offence that falls just short of completion.[4617] However, the difference between a well-planned and a poorly planned attempt diminishes as the seriousness of the substantive offence decreases.[4618]

In this respect, harm caused or avoided is relevant. Certain inchoate offences may be less serious offences than their completed analogue, as a completed offence will frequently cause loss and harm that does not occur in the case of an incomplete offence.[4619] However, offences such as attempts to commit a violent theft which instil terror in a victim will not be significantly less serious merely because the offender did not succeed in making off with any property or money.[4620]
In relation to incitement, the most important consideration the nature of the substantive offence incited.[4621]

32.2.2 – Factors going to culpability in conspiracy cases

In addition to the general factors of the content of the conspiracy and the probability of success, the following matters affect an individual's culpability in a conspiracy.

- The role, benefit and level of participation: an offender who is the instigator of the conspiracy,[4622] or who stands to derive greater benefit than the other co-conspirators[4623] will bear greater culpability. The individual's acts and declarations will inform but not determine the degree of criminality, as the sentence must reflect the organisational nature of the conspiracy and offender's role in it and should not be confined to examining the acts actually performed by offender.[4624] The level of involvement may vary between co-conspirators. For some conspiracies, the comparative financial betterment between co-conspirators is a reasonable guide to the relative degrees of participation.[4625]
- The duration of the conspiracy.[4626]

[4612] *Fabriczy* 639 [22].
[4613] *R v Sirillas* (2004) 8 VR 138, 142.
[4614] R v *McQueeney* [2005] NSWCCA 168, [26]; *C v Western Australia* [2006] WASCA 261, [22]; *R v Breen* [2008] VSCA 178, [31]-[36].
[4615] Raptis 364.
[4616] *Taouk* 390-391.
[4617] Ibid.
[4618] Ibid.
[4619] *Irusta* 16; *Falls* [19]; *Younan v The Queen* [2017] VSCA 207, [60].
[4620] See, e.g., *R v Vodopic* [2003] VSCA 172, [39]; *Le v The Queen* [2019] VSCA 299, [27].
[4621] *R v Boucher* (1995) 1 VR 110, 127; *Kalala* 9 [23].
[4622] *Farah v The Queen* [2019] VSCA 300, [54] (*'Farah'*).
[4623] *R v Franklin* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Crockett and Brooking JJ, 12 November 1984) 5.
[4624] *Fabriczy* 638, citing *Kane* 661; *Nguyen v R* [2016] VSCA 276, [36], citing *Savvas*; *Farah* [54].
[4625] *R v Cox* [2006] VSC 443, [35].
[4626] *R v Rosenthal* (1987) 28 A Crim R 375, 376-378.

- The degree of planning and sophistication - particularly where the offending is complicated and deliberately difficult to detect.[4627]
- Whether the offender persisted in the face of detection or police intervention,[4628] or ultimately desisted from offending prior to detection.[4629]

32.3 – Circumstances of the offence

32.3.1 – Meaning of 'victim'

The intended victim of an incomplete offence – or any person who would have been present had the intended offence been committed – will be victims for sentencing purposes upon learning of it, if they are relevantly affected by their subsequent knowledge of the planned crime.[4630]

32.4 – Circumstances of the offender

32.4.1 – Remorse

Remorse on the part of an offender who commits an inchoate offence takes the form of 'contrition for the prospective damage' that may have flowed from the actual commission of the substantive offence.[4631]

32.5 – Sentencing purposes

Normally, general deterrence is a primary sentencing purpose for conspiracy offences.[4632]

General deterrence, denunciation and just punishment are important sentencing considerations for incitement and attempt offences, although the weight to be given to these purposes will commonly be coloured by the substantive offence incited or attempted.

32.6 – Formulation of sentence

If the overt acts of the conspiracy offence are so closely related to the acts of the substantive offence as to make the offences one act or transaction, it may be appropriate to impose no sentence for the substantive offences.[4633] If the court does impose a separate sentence for substantive offences committed as overt acts of a conspiracy, those offences should not be treated as aggravated merely because they were committed as part of a conspiracy.[4634] Where separate sentences are imposed, the need to avoid double punishment may limit the sentence imposed on either the conspiracy or the overt acts. Alternatively, the court should identify the separate criminality of the conspiracy and the overt acts to avoid double punishment.

[4627] Ibid 378; *R v Quinn* (Unreported, Victorian Court of Appeal, Brooking and Batt JJ, and Vincent AJA, 10 October 1997) 43-45 ('*Quinn*').
[4628] *Farah* [54]; *Ngo v The Queen* [2021] VSCA 21, [63].
[4629] *R v Templer* (1999) 108 A Crim R 407, [20].
[4630] *Berichon* 495.
[4631] *Raptis* 366.
[4632] *R v Morgan* (1995) 82 A Crim R 518, 525, citing *Connell v The Queen (No 6)* (1994) 12 WAR 133; *Quinn* 35; *Andreason* [13].
[4633] *R v El-Kotob* (2002) 4 VR 546, [87].
[4634] *R v Gruber* [2004] VSCA 100, [19].

33 – Firearms offences

The *Firearms Act 1996* (Vic) (‘*Firearms Act*’) contains a spectrum of summary and indictable firearm offences in Victoria. These offences can be broadly categorised as possess, use, or carry offences, which distinguish between “prohibited person” [4635] and “non-prohibited person” [4636] offences; acquire/dispose offences; discharge offences; firearm prohibition order offences; manufacture offences; and, other offences relating to safety, alteration, administration, and storage.

This chapter focuses on sentencing for prohibited person possess, use, or carry firearms (‘prohibited person possess firearms’) offences, discharge firearm offences, and contravening a firearm prohibition order offences due to their prevalence in recent years. This chapter also considers sentencing for firearm offences in other legislation, such as imitation firearm offences in the *Control of Weapons Act 1990* (Vic) and importing firearm offences in the *Criminal Code Act 1995* (Cth) and *Customs Act 1901* (Cth).

33.1 – Penalties and current sentencing practices

33.1.1 – Victorian penalties

33.1.1.1 – Firearms Act offences

Offence	*Firearms Act 1996* (Vic)	Maximum penalty	Applies to offences committed on or after
Prohibited person possess, carry or use firearm			
▪ Firearm	▪ s 5(1)	▪ 1200 penalty units (‘p.u.’) or 10 years imprisonment	▪ 16 May 2012
▪ Silencer or any other prescribed item	▪ s 5(2)	▪ 480 p.u. or 8 years imprisonment	▪ 1 July 2003
Traffickable quantity of firearms			
▪ Possess traffickable quantity of firearms[4637]	▪ s 7C(1)	▪ 1200 p.u. or 10 years imprisonment	▪ 5 June 2019
▪ Acquire or dispose traffickable quantity of firearms without dealer’s licence	▪ s 101A	▪ 1200 p.u. or 10 years imprisonment	▪ 5 June 2019
Firearm prohibition order offences			
▪ Acquire, possess, carry or use firearm or	▪ s 112B	▪ 10 years imprisonment	▪ 9 May 2018

[4635] There are a number of circumstances in which a person may be treated as a prohibited person, they include: a person who is serving, or in the past 15 years has served, a term of imprisonment for an indictable offence or some drug and weapons offences, or served a term of imprisonment in another State or Territory, or a person who is subject to a final family violence intervention order, a personal safety intervention order, or a community-based order. See *Firearms Act 1996* (Vic) s 3 definition of ‘prohibited person’ (‘*Firearms Act*’).
[4636] Non-prohibited persons offences further distinguish between registered and unregistered firearms, as well as between longarms (separated into five subcategories) and handguns (separated into two subcategories). See *Firearms Act* s 3 for an exhaustive definition of these categories.
[4637] If a person is convicted or found guilty of this offence, they are not liable for an offence under ss 5(1), 6(1)-(6), 6A(1)-(3), 7(1)-(6), 7B(1)-(2). *Firearms Act* s 7C(2).

firearm related item while subject to firearm prohibition order			
▪ Dispose or give firearm to a person subject to a firearm prohibition order	▪ s 112C(1)	▪ 10 years imprisonment	▪ 9 May 2018
▪ Dispose or give firearm related item to a person subject to a firearm prohibition order	▪ s 112C(2)	▪ 3 years imprisonment	▪ 9 May 2018
Use, carriage, or discharge firearms offences			
▪ Possess or carry a loaded firearm in a public place or any other place with reckless disregard for safety	▪ s 130(1)-(1A)	▪ 10 years imprisonment	▪ 9 May 2018
▪ Use a firearm in a public place or any other place with reckless disregard for safety	▪ s 130(1B)	▪ 10 years imprisonment	▪ 9 May 2018
▪ Discharge firearm at a premises or vehicle	▪ s 131A(1)	▪ 15 years imprisonment	▪ 9 May 2018
▪ Discharge firearm at a premises or vehicle while carrying out serious indictable offence	▪ s 131A(2)	▪ 20 years imprisonment	▪ 9 May 2018

33.1.1.2 –Control of Weapons Act offences

Offence	***Control of Weapons Act 1990* (Vic)**	**Maximum penalty**	**Applies to offences committed on or after**
▪ Possess, use or carry a prohibited weapon[4638]	▪ s 5AA	▪ 240 p.u. or 2 years imprisonment	▪ 16 May 2012
▪ Non-prohibited person possess, use or carry an imitation firearm	▪ s 5AB(1)	▪ 240 p.u. or 2 years imprisonment	▪ 16 May 2012

[4638] A "prohibited weapon" is an imitation firearm or an article listed in Schedule 2 of the *Control of Weapons Regulations 2021* (Vic). *Control of Weapons Act 1990* (Vic) s 3 definition of "prohibited weapon".

▪ Prohibited person possess, use or carry an imitation firearm	▪ s 5AB(2)	▪ 1200 p.u. or 10 years imprisonment	▪ 16 May 2012
▪ Person under firearm prohibition order possess, carry or use an imitation firearm	▪ s 5AB(3)	▪ 1200 p.u. or 10 years imprisonment	▪ 9 May 2018

33.1.1.3 – Crimes Act offences

Offence	***Crimes Act 1958* (Vic)**	**Maximum penalty**	**Applies to offences committed on or after**
▪ Use firearm to commit indictable offence	▪ s 31A(1)	▪ 5 years imprisonment	▪ 3 June 2015
▪ Being armed with criminal intent	▪ s 31B(2)	▪ 5 years imprisonment	▪ 14 September 2015
▪ Discharge firearm reckless to safety of police or protective services officer	▪ s 31C(2)	▪ 15 years imprisonment	▪ 5 June 2019

33.1.2 – Commonwealth penalties

Offence	***Criminal Code Act 1995* (Cth)**	**Maximum penalty**	**Applies to offences committed on or after**
▪ Dispose or acquire firearm or firearm part across State borders	▪ s 360.2(1)	▪ 5,000 p.u. or 20 years imprisonment or both	▪ 2 April 2022
▪ Dispose or acquire 50 or more firearms or firearm parts across borders in 6-month period	▪ s 360.2(2)	▪ 7,500 p.u. or life imprisonment or both	▪ 2 April 2022
▪ Take or send firearm or firearm part across borders	▪ s 360.3(1)	▪ 5,000 p.u. or 20 years imprisonment or both	▪ 2 April 2022
▪ Take or send 50 or more firearms or firearm parts across borders in 6-month period	▪ s 360.3(1A)	▪ 7,500 p.u. or life imprisonment or both	▪ 2 April 2022

▪ Import prohibited firearm or firearm parts into Australia	▪ s 361.2(1)	▪ 5,000 p.u. or 20 years imprisonment or both	▪ 2 April 2022
▪ Import 50 or more prohibited firearms or firearm parts into Australia in 6-month period	▪ s 361.2(2)	▪ 7,500 p.u. or life imprisonment or both	▪ 2 April 2022
▪ Export prohibited firearm or firearm part out of Australia	▪ s 361.3(1)	▪ 5,000 p.u. or 20 years imprisonment or both	▪ 2 April 2022
▪ Export 50 or more prohibited firearms or firearm parts out of Australia	▪ s 361.3(2)	▪ 7,500 p.u. or life imprisonment or both	▪ 2 April 2022
Offence	***Customs Act 1901* (Cth)**[4639]	**Maximum penalty**	**Applies to offences committed on or after**
▪ Prohibited import of tier 2 goods[4640]	▪ s 233BAB(5)	▪ 2,500 p.u. or 10 years imprisonment or both	▪ 1 January 2005

33.1.3 – Current sentencing practices

33.1.3.1 –Prohibited person possess firearm

Current sentencing practice for prohibited person possess firearm offence generally follows the two categories of seriousness articulated in *Berichon v The Queen*.[4641] The first category is where the firearm possession is not associated with ongoing criminal activity. Sentences of a low order of imprisonment are usually appropriate for these, unless the criminal history of the offender warrants a more substantial sentenc. The second category is where the firearm possession is for a criminal activity or purpose, such as to provide security for a criminal activity or as a means of enforcement. This category will attract a more severe sentence.[4642] However, the categories are not a prescriptive framework that fetters sentencing discretion. The sentence to be imposed in each case must turn on particular circumstances of the offending and the offender.[4643]

The most common sentencing disposition is a term of imprisonment. Cases which fall into the less serious category normally attract sentences lower than two years' imprisonment. Cases in the more serious category generally attract a higher sentence, [4644] but care must be taken to avoid double punishment if there are other sentences imposed for offending related to the same firearm.[4645] In some cases where

[4639] If a person is punished for a traffick firearms offence under the *Criminal Code 1995* (Cth), they cannot be punished for the same conduct again under the *Customs Act 1901* (Cth). *Criminal Code* s 361.6(1).
[4640] "Tier 2 goods" are any goods provided under Schedule 7 of the *Customs Regulations 2015* (Cth) and includes firearms, firearm accessories, firearm parts, firearm magazines, ammunition and components of ammunition.
[4641] (2013) 40 VR 490 ('*Berichon*').
[4642] Ibid 490, 496.
[4643] *Kelly v The Queen* [2020] VCA 171, [44] ('*Kelly*').
[4644] *Berichon* 490, 497.
[4645] *Berichon* 490, 496; see also 1.4.1 – Double punishment below.

there are compelling mitigating circumstances, a combination sentence of imprisonment and a lengthy community corrections order may be appropriate.[4646] But where a possess firearm offence is charged with other serious offences, a combination sentence may not be in range.[4647]

33.1.3.2 – Other firearm offences

Firearm offences can be committed in wide-ranging circumstances and are often charged alongside other serious offences, such as drug trafficking, armed robbery, property offences and offences against the person.[4648] The circumstances and seriousness of offending can vary significantly.[4649] There is also great variability in the circumstances of an offender, such as their criminal history, whether they are a prohibited person or subject to a firearm prohibition order, or mitigating factors. Because of this, there are too many variables to discern clear trends in sentencing for firearm offences other than prohibited person possess firearms.[4650] Additionally, several firearm offences were introduced in 2018, including contravening a firearm prohibition order and discharging a firearm at a premises or vehicle with reckless disregard for the safety of another. There are limited cases to establish current sentencing practices for these firearm offences.

33.2 – Gravity and culpability

33.2.1 – Possession offences

Firearm possession offences are very serious. Prohibited person possess firearm/imitation firearm, possess traffickable quantity of firearms, and contravening a firearm prohibition order all carry a maximum penalty of 10 years imprisonment, representing the inherent seriousness with which Parliament views these offences. Possession creates an obvious risk of causing serious injury or death[4651] and this risk is heightened when the possession is associated with an ongoing criminal enterprise or other criminal conduct, even if there is no evidence of its use or threatened use.[4652]
The objective gravity of possession offences is primarily influenced by the *Berichon* categories of seriousness. Generally, a person who does not possess a firearm for a criminal purpose is considered less morally culpable.[4653] But courts needs to be mindful that the two *Berichon* categories are not fixed sub-categories which prescribe the manner in which a court must assess the gravity of the offending.[4654]

There are many factors which may elevate the seriousness of a possess firearm offence, even if it is not associated with an ongoing criminal purpose. Some of these factors include:

- an offender's criminal history, especially any prior firearms convictions[4655]

[4646] See e.g., *DPP (Vic) v Robinson* [2022] VC 230; *DPP (Vic) v Arsov* [2023] VCC 46, [69]-[70] ('*Arsov*').
[4647] *DPP (Vic) v Graoroski* [2018] VSCA 332, [41] ('*Graoroski*'); *Powell v The Queen* [2015] VSCA 93, [29] ('*Powell*').
[4648] Sentencing Advisory Council, *Firearms Offences: Current Sentencing Practices* (May 2019) x.
[4649] *Saracevic v The Queen* [2017] VSCA 212, [29].
[4650] *DPP (Vic) v El-Sayegh* [2022] VCC 506, [82] ('*El-Sayegh*').
[4651] *DPP (Vic) v Johnson-Portelli* [2021] VCC 140, [53]; *Graoroski* [38].
[4652] *Acciarito v The Queen* [2019] VSCA 264, [55] ('*Acciarito*').
[4653] See e.g., *DPP (Vic) v Mindelis* [2023] VCC 175, [30].
[4654] *Sultan v The King* [2022] VSCA 205, [39] ('*Sultan*').
[4655] *Berichon* 490, 499-500; *DPP v Basic* [2017] VSCA 376, [82] ('*Basic*'); *R v Graham* [2007] VSCA 252, [18].

- any circumstantial evidence that enables the conclusion that the firearm possession is for an unlawful activity[4656]
    - but in the absence of direct evidence that an offender had used firearms for a criminal purpose, courts should be cautious in drawing a conclusion that the possession was for a criminal purpose, unless the conclusion was the only reasonable inference that could be drawn from the circumstances.[4657] The fact that an offender fails to offer a credible explanation for possessing the firearm may not be sufficient to support an inference that they were possessed for a criminal purpose[4658]
- where the offender also possessed ammunition[4659]
- possessing a firearm with no lawful use will be viewed more seriously than possessing a firearm which can be used lawfully[4660]
    - courts have remarked that cut down firearms have only one realistic use – committing violent crimes – and even if its possession is not connected with a criminal purpose, an offender cannot expect much lenience.[4661]

The various possession offences share factors that are relevant to assessing gravity. Aside from the *Berichon* categories of seriousness, factors that may aggravate a firearm possession offence include:

- the number of firearms involved – the larger the number of firearms possessed, the greater the seriousness of the offending[4662]
- the nature of the firearms – modified firearms for ease of concealment and firing,[4663] home-made weapons[4664] and high-powered firearms that are capable of great lethality[4665] are considered more serious
- whether the weapon is loaded and/or the presence of ammunition[4666]
- where the firearm and ammunition are not kept in a secure location, are readily accessible and capable of being retrieved and discharged quickly[4667]
- the duration of possession – possession for a longer period may aggravate offending,[4668] but possession for a short period may not mitigate offending it if was by design to reduce the risk of being caught[4669]
- the status of the offender either as a prohibited person or the subject of a firearm prohibition order, and the nature and extent of their prior criminal history[4670]

[4656] *Berichon* 490, 496.
[4657] *Sultan* [44].
[4658] *Sultan* [47].
[4659] *Begg v The Queen* [2020] VSCA 183, [92]-[93] (‘*Begg*’).
[4660] *DPP (Vic) v Munro* [2019] VSCA 89, [17] (‘*Munro*’).
[4661] *Begg* [94].
[4662] See e.g., *Basic* [94], where the offender possessed numerous firearms to constitute a ‘substantial private arsenal’ and where the firearms were semi-automatic in nature.
[4663] *DPP (Vic) v Cragg* [2021] VCC 1896, [22] (‘*Cragg*’).
[4664] *DPP (Vic) v Gartside* [2022] VCC 115, [45] (‘*Gartside*’).
[4665] *DPP (Vic) v Kumas* [2021] VSCA 215, [57]-[58] (‘*Kumas*’).
[4666] *DPP (Vic) v Piscopo* [2021] VCC 698, [25]; *Cragg* [22]; *Gartside* [44]; *Salapura v The Queen* [2018] VSCA 255, [51]; *Graoroski* [35]; *Basic* [95].
[4667] *Kelly* [30]; *Graoroski* [36].
[4668] *Kelly* [43].
[4669] *Singh v The Queen* [2022] VSCA 93, [23].
[4670] *El-Sayegh* [82].

- the monetary value of the firearms may also be relevant.[4671]

Factors which are considered to be markers of less serious offending include where the firearm is not functional (i.e., where the firearm cannot be fired, not merely that it was unloaded) and where the offender did not possess ammunition.[4672]

There are also policy considerations relevant to assessing the gravity of each of the possession offences as discussed below.

33.2.1.1 – Prohibited person possess firearm

The gravity of prohibited person possess firearm reflects the purpose of the *Firearms Act* to ensure public safety and peace.[4673] The offence is designed to keep firearms out of the hands of people who cannot meet approved community standards of behaviour,[4674] such as those with prior criminal history, those who are subject to an intervention order, or those who operate in criminal enterprises. The criminal history of an offender and whether they are known to operate in criminal circles is particularly relevant to assessing the gravity of prohibited person possess firearm offence.[4675] Where an offender has no prior firearm convictions or history of violence and is a prohibited person for unrelated, minor offending (e.g., a previous intervention order), the firearm possession may be viewed less seriously.[4676]

33.2.1.2 – Possess traffickable quantity of firearms

Possess traffickable quantity of firearms does not distinguish whether the offender is a prohibited person or non-prohibited person. It is concerned with the prevalence of illegal firearms in the community and their potential for harm,[4677] the potential for commercial movement of illicit firearms in the market,[4678] the risks that attend the accumulation of weapons and the difficulty of detecting this offence.[4679] Its seriousness is underscored by Parliament reducing the quantity of traffickable firearms from 10 in 2003 to three in 2015 and then two in 2018.[4680] The number of firearms possessed over the threshold quantity corresponds to the seriousness of the offending.[4681]

33.2.1.3 – Possess imitation firearm

The seriousness of possess imitation firearm offences varies depending on whether an offender was a prohibited person or non-prohibited person. If the offender is a prohibited person, possessing imitation firearm has the same maximum penalty as the prohibited person possess firearm offence. This suggests that imitation firearms are treated with the same severity. However, the sentences imposed in cases

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[4671] Ibid.
[4672] *Powell* [26].
[4673] *Basic* [104]; *Firearms Act* s 1.
[4674] Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1006 (William McGrath); *Graoroski* [37].
[4675] *Graoroski* [38]; *Berichon* 490, 499-500; *DPP (Vic) v Thompson* [2022] VCC 311, [17].
[4676] *Powell* [27].
[4677] *Arsov* [69].
[4678] *Bruce v The Queen* [2022] VSCA 100, [41] ('*Bruce*').
[4679] *Djemal v The Queen* [2020] VSCA 25, [23].
[4680] The offence is found in *Firearms Act* s 7C. It was introduced by the *Firearms (Trafficking and Handgun Control) Act 2003*. The quantity of traffickable firearms was lowered by the *Firearms Amendment (Trafficking and Other Measures) Act 2015* and the *Firearms Amendment Act 2018*.
[4681] *Kumas* [57].

where both offences are charged suggest that courts treat the possession of an imitation firearm as less serious than possession of a firearm, despite the offences carrying the same maximum penalty.[4682]

Courts have noted that victims who are confronted with imitation firearms may understandably believe they could be shot and seriously injured or killed. Therefore, the fact that the firearm is incapable of being discharged may be of limited relevance in certain circumstances.[4683] On the other hand, if the possession was not connected to a criminal purpose or other offending, courts may view it less seriously.[4684]

33.2.1.4 – Contravening a firearm prohibition order

Firearm prohibition orders were introduced in 2018 to keep the community safe from firearm-related violence.[4685] The order can be made in the public interest by the Chief Commissioner of Police where they are satisfied that a firearm may be used to endanger the peace and safety of the public.[4686] The offence is particularly aggravated if an offender was served with the firearm prohibition order shortly before the offending. Deliberate defiance of an order put in place for public peace significantly increases an offender's culpability.[4687]

33.2.2 – Import firearms

Importing firearms and attempt to import firearms are Commonwealth offences under the *Customs Act 1901* and *Criminal Code Act 1995*. They are very serious offences. Importing tier 2 goods under the *Customs Act* attracts a maximum term of 10 years' imprisonment and import prohibited firearms under the *Criminal Code Act* attracts a maximum term of 20 years' imprisonment. There is an aggravated form of import prohibited firearm offence by quantity of firearms imported, with a maximum term of life imprisonment for 50 or more firearms imported within a 6 month period. The seriousness of firearm importation offences is due to recognition that firearms are a grave source of danger to society.[4688] Some comparison may be drawn between drug importation and firearm importation, although firearm importation is considered more serious because firearms are more durable than illegal drugs. Once a firearm is in the community, it can be used repeatedly and remains a lasting threat until seized.[4689]

Like possession offences, factors that can aggravate an importation offence include the nature and number of firearms involved and any accompanying ammunition.[4690] Some other factors relevant to assessing the gravity of an importation offence include:

- the offender's motives – e.g., the intention to sell illegal firearms on the black market, financial gain, etc.
- the degree to which the importation was planned

[4682] See, e.g., *McMillan v The Queen* [2020] VSCA 189, where the offender received a 2 years 3 months' sentence for prohibited person possess firearm charge and 1 year 9 months for a prohibited person possess imitation firearm charge.
[4683] *DPP (Vic) v Galluzlo* [2022] VCC 1638, [23].
[4684] *DPP (Vic) v Martin* [2022] VCC 1949, [35].
[4685] *DPP (Vic) v Louis* [2022] VCC 1785, [33] ('*Louis*').
[4686] *Firearms Act* s 112E.
[4687] *Kumas* [56]; *Bruce* [36].
[4688] *Munro* [16], referring to the comments made in the United Kingdom decision of *Avis v The Queen* [1997] EWCA Crim 3423.
[4689] *R v Falconer* [2017] VCC 1596, [68] ('*Falconer*'); *Day* [42] .
[4690] *Munro* [5], [92].

- the steps taken to disguise the offending and avoid detection, and the difficulty of detecting such offences.[4691]

Even if an importation offence would never be completed, an attempted importation is still a serious offence by reference to the above factors.[4692]

33.2.3 – Discharge firearm

Discharge firearm with reckless disregard for the safety of another is a serious offence with a maximum term of 15 years' imprisonment. The offence is aggravated if it occurred while carrying out an indictable offence, with a maximum term of 20 years' imprisonment. The high penalties for these offences recognise the potentially lethal consequences of firearm use, particularly the dangers to the community posed by the firing or carrying of a loaded firearm.[4693] The offence was introduced in 2018 as a response to the perceived increase in drive-by shootings. Before it was introduced, the offence would likely have been charged as reckless conduct endangering life or serious injury, which have maximum penalties of 10 years' and five years' imprisonment.[4694]

A key aggravating feature is where a firearm is discharged at another person, or at a premises or vehicle where other people might be present. Examples include where the bullet strikes the victim,[4695] or where the offender discharges the firearm into residential premises during hours when one can expect that there would be people present,[4696] or at a vehicle knowing or being able to infer that there are people inside.[4697] On the other hand, discharging a firearm where there is no one in the immediate vicinity who may be placed in danger may be viewed less seriously.[4698]

33.3 – Sentencing purposes

General deterrence is a paramount consideration for firearms offences.[4699] Specific deterrence may also be important where the offender has prior relevant convictions.[4700] Where an offending is particularly aggravated due to the number and/or nature of the firearms involved, denunciation, punishment and community protection will also be relevant.[4701]

33.4 – Formulation of sentence

33.4.1 – Double punishment[4702]

[4691] *Day v The Queen* [2019] WASCA 60, [42] ('*Day*').
[4692] Ibid [43].
[4693] Victoria, *Parliamentary Debates*, Legislative Council, 2 November 2017, 5662 (Gavin Jennings).
[4694] *DPP (Vic) v Taylor* [2019] VCC 2220, [50].
[4695] *DPP (Vic) v Henderson* [2021] VCC 652, [31].
[4696] *DPP (Vic) v Braine* [2022] VCC 798, [35] ('*Braine*'); *DPP (Vic) v Doodt* [2021] VCC 1584, [76]; *DPP (Vic) v Fiscalini* [2021] VCC 1523, [35] ('*Fiscalini*').
[4697] *DPP (Vic) v Khan* [2023] VCC 2221, [20]; *Diab v The King (No. 2)* [2023] VSCA 112, [19].
[4698] *DPP (Vic) v Yuksal* [2020] VCC 1701, [20].
[4699] *Bruce* [39]; *Munro* [9], [91]; *Kelly* [47]; *Braine* [55]; *Louis* [34]; *Falconer* [78]-[79].
[4700] *Kelly* [48].
[4701] *Basic* [88]; *Kelly* [45].
[4702] See also 3.4.7 – Sentencing Principles – Double Punishment – Weapons Offences.

Firearm possession offences are frequently charged alongside other offences. In some cases, the elements of a firearm possession offence overlap with the elements of another offence, such as armed robbery. In other cases, the firearm possession may be considered an aggravating factor of another offence, such as making a threat to kill.[4703]

Where an offender is charged with offending that is aggravated by using a firearm and for being a prohibited person in possession of a firearm, the possession charge should not be elevated to the more serious category (possession for a criminal purpose) because the firearm was used in the course of the other offending.[4704] To avoid double punishment, the sentence imposed for the possession charge should not include any penalty for the use or possession of the firearm in the other offending.[4705] The possession charge may only be elevated in seriousness if there is evidence to conclude that the possession was for some criminal purpose distinct from the other offending charged.[4706] Where there is distinct criminality, a modest cumulation imposed on the firearms charge would not be double punishment.[4707]

Alternatively, if a firearm possession charge is sentenced in the more serious category, the firearm possession cannot then be considered an aggravating factor of another charge.[4708] But courts should also have regard to the principle of totality. In circumstances where possessing a firearm materially adds to the overall criminality of an offending, it may be appropriate to impose a higher individual sentence and a higher order of cumulation on the firearm possession charge.[4709]

Double punishment is also likely to arise where there are multiple firearm charges concerning the same firearm; for example, possession and discharge, or possession and disposal of firearms, or where an offender contravenes a firearm prohibition order. In these cases, courts have cautioned against treating the firearm possession charge more seriously because the firearm was discharged in association with other criminal activity, as that other criminal activity will be subject to separate punishment.[4710] However, where separate firearms offences involve distinct criminality, and especially where the offender contravenes a firearm prohibition order, there is no double punishment in imposing a higher sentence for each of the firearms charges and ordering a degree of cumulation between the charges.[4711] In some cases, courts have sought to avoid double punishment by imposing an aggregate sentence on multiple firearm charges.[4712]

[4703] Sentencing Advisory Council, *Firearms Offences: Current Sentencing Practices* (May 2019) 58 [5.86].
[4704] *Atkinson v The Queen* [2021] VSCA 127, [30] ('*Atkinson*').
[4705] *R v Armistead* [2011] VSCA 84, [10]-[11].
[4706] *Berichon* 490, 496. See, e.g., *Acciarito*, where the sentencing judge erred in elevating both the sentence on a drug trafficking offence and a firearm possession offence even though there was no evidence the firearm was used in the drug trafficking operation.
[4707] *Atkinson* [33]; *Saner v The Queen* [2014] VSCA 134, [122]; *Kruzenga v The Queen* [2014] VSCA 10 [17]-[20].
[4708] *Acciarito* [61].
[4709] *De Luca v The King* [2023] VSCA 44, [53]-[57].
[4710] *Atkinson* [30]; *Fiscalini* [34].
[4711] *Kumas* [61]; *Braine* [57]-[58], [61].
[4712] See e.g., *Gartside* [63].

34 – Terrorism offences

This chapter covers terrorism offences and related post-sentence orders.
Terrorism offences are now governed almost exclusively by the *Criminal Code*[4713] following the states' referral of their legislative powers over such offences to the Commonwealth in 2002.

This chapter primarily deals with terrorism offences against Part 5.3 and Part 5.5 of the *Criminal Code*.[4714] Under Part 5.3, there are three broad categories: terrorist act (including preparatory act), terrorist organisation, and financing terrorism. Part 5.5 covers offences relating to foreign incursion and recruitment.

34.1 – Penalties and current sentencing practices

34.1.1 – Victorian penalties

34.1.1.1 – Document or information offence

Offence	***Terrorism (Community Protection) Act 2003* (Vic)**	**Maximum Penalty**	**Applies to offences committed from**
Providing documents or information facilitating terrorist acts	s 4B(1)	Level 5 – 10 years	16 April 2003

34.1.2 – Commonwealth penalties

34.1.2.1 – Advocating terrorism offence

Offence	***Criminal Code***	**Maximum Penalty**	**Applies to offences committed from**
Advocating terrorism	s 80.2C	5 years	1 December 2014

34.1.2.2 – Terrorist act offences (including preparatory acts)

Offence	***Criminal Code***	**Maximum Penalty**	**Applies to offences committed from**
Engaging in a terrorist act	s 101.1(1)	Life	6 July 2002
Providing or receiving training connected with terrorist acts knowingly	s 101.2(1)	25 years.	6 July 2002
… recklessly	s 101.2(2)	15 years.	6 July 2002

[4713] Schedule to the *Criminal Code Act 1995* (Cth).
[4714] A 'terrorism offence' also includes an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices) and Subdivision B of Division 80 (treason) of the *Criminal Code*, and an offence against Parts 4 and 5 of the *Charter of the United Nations Act 1945*: *Crimes Act 1914* (Cth) s 3 ('*Cth Crimes Act*'). These offences are outside the scope of the Manual.

Possessing things connected with terrorist acts knowingly	s 101.4(1)	15 years	6 July 2002
… recklessly	s 101.4(2)	10 years	6 July 2002
Collecting or making documents likely to facilitate terrorist acts knowingly	s 101.5(1)	15 years	6 July 2002
… recklessly	s 101.5(2)	10 years	6 July 2002
Other acts done in preparation for, or planning, terrorist acts	s 101.6(1)	Life	6 July 2002

34.1.2.3 – Terrorist organisation offences

Offence	***Criminal Code***	**Maximum Penalty**	**Applies to offences committed from**
Directing the activities of a terrorist organisation knowingly	s 102.2(1)	25 years	6 July 2002
… recklessly	s 102.2(2)	15 years	6 July 2002
Being a member of a terrorist organisation knowingly	s 102.3(1)	10 years	6 July 2002
Recruiting for a terrorist organisation knowingly	s 102.4(1)	25 years	6 July 2002
… recklessly	s 102.4(2)	15 years	6 July 2002
Involved in training with a terrorist organisation recklessly	s 102.5(1)	25 years	1 July 2004
Involved in training with a listed terrorist organisation[4715] recklessly	s 102.5(2)	25 years	1 July 2004
Getting funds to, from or for a terrorist organisation knowingly	s 102.6(1)	25 years	6 July 2002
… recklessly	s 102.6(2)	15 years	6 July 2002
Providing support to a terrorist organisation knowingly	s 102.7(1)	25 years	6 July 2002
… recklessly	s 102.7(2)	15 years	6 July 2002
Associating with a listed terrorist organisation on two or more occasions knowingly or recklessly	s 102.8(1)	3 years	16 August 2004
Associating with a listed terrorist organisation with prior conviction(s) for an	s 102.8(2)	3 years	16 August 2004

[4715] See 34.2.3 – Terrorist organisation offences for the meaning of a 'listed terrorist organisation'.

offence against s 102.8(1) knowingly or recklessly			

34.1.2.4 – Financing terrorism offences

Offence	*Criminal Code*	Maximum Penalty	Applies to offences committed from
Providing or collecting funds to facilitate or engage in a terrorist act	s 103.1(1)	Life	5 June 2002
Making funds available to, or collecting funds for, or on behalf of, another person to facilitate or engage in a terrorist act	s 103.2(1)	Life	15 December 2005

34.1.2.5 – Contravention offences

Offence	*Criminal Code*	Maximum Penalty	Applies to offences committed from
Contravening a control order	s 104.27(1)	5 years	15 December 2005
Interfering with one's monitoring device	s 104.27A(1)	5 years	30 November 2016
Interfering with another person's monitoring device	s 104.27A(2)	5 years	30 November 2016
Contravening a condition of an extended supervision order or an interim supervision order	s 105A.18A(1)	5 years	9 December 2021
Contravening a direction in relation to an exemption condition	s 105A.18A(2)	5 years	9 December 2021
Interfering with one's monitoring device	s 105B.18B(1)	5 years	9 December 2021
Interfering with another person's monitoring device	s 105B.18B(2)	5 years	9 December 2021

34.1.2.6 – Foreign incursion and recruitment offences

Offence	*Criminal Code*	Maximum Penalty	Applies to offences committed from
Entering foreign countries with the intention of engaging in hostile activities	s 119.1(1)	Life	1 December 2014
Engaging in a hostile activity in a foreign country	s 119.1(2)	Life	1 December 2014

Entering, or remaining in, a declared area in a foreign country	s 119.2(1)	10 years	1 December 2014
Engaging in conduct that is preparatory to the commission of an offence against s 119.1	s 119.4(1)	Life	1 December 2014
Accumulating weapons etc. intending that an offence against s 119.1 will be committed	s 119.4(2)	Life	1 December 2014
Providing or participating in providing military training to another person intending that an offence against s 119.1 will be committed	s 119.4(3)	Life	1 December 2014
Allowing military training to be provided to oneself intending that an offence against s 119.1 will be committed	s 119.4(4)	Life	1 December 2014
Giving or receiving goods and services intending to promote the commission of an offence against s 119.1	s 119.4(5)	Life	1 December 2014
Allowing use of buildings etc. to commit an offence against s 119.4	s 119.5(1)	Life	1 December 2014
Allowing use of vessels and aircraft to commit an offence against s 119.4	s 119.5(2)	Life	1 December 2014
Recruiting persons to join organisations engaged in hostile activities against foreign governments	s 119.6	Life	1 December 2014
Recruiting person to serve with an armed force in a foreign country	s 119.7(1)	Life	1 December 2014
Publishing recruitment advertisements recklessly	s 119.7(2)	10 years	1 December 2014
Publishing recruitment advertisements (otherwise)	s 119.7(3)	10 years	1 December 2014
Facilitating recruitment	s 119.7(4)	10 years	1 December 2014

34.1.3 – Current sentencing practice

Due to the relatively few terrorism cases, their utility in establishing an appropriate sentencing range is limited.[4716]

Where there was once a disparity between Victorian and New South Wales courts – with the latter tending to impose longer sentences for comparable terrorism offences, the gap has arguably closed due to an uplift in Victorian sentences.[4717] In 2017, the Victorian Court of Appeal said that 'having regard to the scourge of modern terrorism, and the development of more recent sentencing principles in this area, [the sentences imposed in *Benbrika*] seem to us to have been unduly lenient. No such sentences would have been imposed today'.[4718] Thus, sentencing practice discerned from pre-2017 cases should be approached with a degree of caution.

34.2 – Gravity and culpability

34.2.1 – Generally

The courts have been clear and unequivocal: terrorism offences are an inherently serious category of offending.[4719]

In sentencing a terrorism offender, the following considerations are relevant in assessing the objective gravity of the offence and the offender's culpability:

- the degree of planning, research, complexity, and sophistication involved in the offending, and the extent of the offender's commitment to carry out the terrorist act(s)
- the period of time involved, including the duration of the involvement of the particular offender
- the depth and extent of the radicalisation of the offender, as demonstrated by the possession of extremist material and/or the communication of such views to others
- the extent to which the offender has been responsible for indoctrinating or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination, be it actual or intended,[4720] and
- the maximum penalty for the particular terrorism offence.[4721]

An extended period of planning for an attack that is calculated to massacre civilians and create mayhem involves objective gravity and moral culpability of an 'extremely high order'.[4722] This is particularly so where the offender appreciates the wrongfulness of their actions.[4723] Aggravating features suggesting very high moral culpability include targeting a police officer, intending to commit the offence at a public event on a national holiday, and an offender's willingness to kill civilians.[4724]

[4716] *DPP (Cth) v MHK (a Pseudonym)* (2017) 52 VR 272, 293-294 [72] ('*MHK*').
[4717] Mark Weinberg, 'Sentencing Terrorist Offenders – The General Principles' (2021) 95(10) *Australian Law Journal* 766, 771-775.
[4718] *DPP (Cth) v Besim* [2017] VSCA 158, [121] ('*Besim*').
[4719] *R v Ali* [2020] VSC 316, [130]; *Abbas v The Queen* [2020] VSCA 80, [66] ('*Abbas*').
[4720] *R v Khalid* [2017] NSWSC 1365, [25]; *R v Kahar* [2016] 1 WLR 3156; *R v Khan (No 11)* [2019] NSWSC 594, [7] ('*Khan*'); *Benbrika v The Queen* (2010) 29 VR 593, 717 [564] ('*Benbrika*'); *R v Alou (No 4)* [2018] NSWSC 221 [165]–[171] ('*Alou*'); *R v Mohamed* [2019] VSC 498, [181].
[4721] *R v Elomar* (2010) 264 ALR 759, 779 [79] ('*Elomar*'), affirmed in *Elomar v The Queen* (2014) 316 ALR 206, 329 [640]-[641] ('*Elomar II*'); *DPP (Cth) v Fattal* [2013] VSCA 276, [228] ('*Fattal*').
[4722] *Abbas* [66]-[69].
[4723] *MHK* 291-92 [65].
[4724] *Besim* [118].

An offender's 'attitude to violence' – including their continued adherence to a violent ideology – is not ordinarily an aggravating factor. But the abandonment of an ideology of violence is a mitigating factor, to be established by the offender.[4725] Offence gravity may also be attenuated by the 'relative superficiality of the [offender's] ideological conviction'.[4726]

34.2.1.1 – Victims

Sentencing courts must consider the personal circumstances of any victim(s) of a terrorist offence, and any injury, loss, or damage they suffered as a result.[4727]

The number of actual or potential victims of a terrorist act is relevant, but not determinative of gravity.[4728] Irrespective of the number of victims, an assessment of harm necessarily takes into account the harm done to the Australian public and polity. And there can be no defined mathematical relation between the number of immediate victims and the degree of that broader, less tangible harm.[4729]

Individuals who witnessed aspects of a terrorist attack have been considered victims for the purposes of sentencing where they suffered psychological and emotional harm as a result of the offending.[4730]

34.2.1.2 – Conspiracy to commit terrorism offences

Conspiracy to commit a terrorism offence is more serious than the commission of the same offence by a single offender.[4731]

Beyond the criminality of each offender's individual acts, certain features of a terrorist conspiracy tend to indicate an 'added level of criminality'. For example:

- the formation (and entry into) of an agreement by a group of people to acquire materials for carrying out a terrorist act is, of its nature, likely to be more advanced than the sporadic individual acquisition of those materials
- the joint effort of a number of like-minded individuals is more likely to succeed than the isolated actions of an individual
- a number of people acting at different times, in different places, and in different ways is much more difficult to detect
- a conspiracy is much more difficult to shut down, because where one member of the conspiracy is detected doing some action, another person simply springs up in the first's place, and
- the overall extremist zeal of a group venture is more enduring, more fanatical, more determined, more resourceful, and ultimately likely to be more successful than an individual acting alone.[4732]

34.2.2 – Terrorist act offences

The offence of engaging in a terrorist act covers a broad spectrum of potential offending; from crimes of

[4725] Ibid [109].
[4726] *R v Bayda (No 8)* [2019] NSWSC 24 [113] ('*Bayda*').
[4727] *Crimes Act 1914* (Cth) ss 16A(2)(d)-(e) ('*Cth Crimes Act*').
[4728] *R v Shoma* [2019] VSC 367, [65] ('*Shoma*').
[4729] Ibid.
[4730] *Khan* [20]-23].
[4731] *R v Kruezi* [2020] QCA 222, [47] ('*Kruezi*'), citing *Elomar* 775–6 [64] and *Abbas* [60].
[4732] *Elomar* 775-76 [64].

mass murder at one end to far lesser crimes of property damage at the other.[4733] It is vital to look at all the circumstances of the individual offence.[4734]

The terrorist act offender's religious and ideological motivation, and intention to intimidate the government, distinguishes their acts from those committed in the pursuit of private ends, which come within established offences against the person. It is wrong therefore to sentence such an offender on the basis of a comparison drawn between a terrorist act offence and, for instance, the offence of attempted murder.[4735]

However, the division between the public and private spheres is not binary. While the knife attack carried out by the offender in *Shoma* was neither seen, nor intended to be seen, it was nevertheless done with the intent to advance an extremist cause and to intimidate the public. The absence of witnesses did not make the offending any less serious than a 'lone wolf' knife attack in public.[4736]

Moreover, the fact that a terrorist act was spontaneous or dreamed up only hours before its commission will not diminish its gravity where it was the product of longstanding, extremist views harboured by the offender.[4737]
It is an offence to aid, abet, counsel, or procure the commission of a terrorist act.[4738] The moral culpability of an adult aider and abettor who equips, and further encourages, a child to commit a terrorist act may be close to, if not at the same level as, that of the principal offender.[4739]

In gauging the gravity of a document-making offence, the following considerations may be relevant:

- the length and detail of the document
- whether the document was intended to result in violent attacks and incite other extremists to join the offender's cause and commit acts of violence
- the use of clandestine means to distribute the document via the 'dark web' or at extremist rallies
- the recruitment of other persons to assist in reviewing and editing drafts of the document, and
- the amount of time the offender spent working on the document.[4740]

That the ideas contained in a document are 'fanciful, immature rubbish', and were unlikely to have resulted in any particular terrorist act, may be of no consequence in mitigation.[4741]
Advocating a terrorist act is a serious offence because it heightens the probability of a terrorist act being committed on Australian soil.[4742] However, in carrying a maximum penalty of 5 years' imprisonment, it is one of the least serious terrorist offences prescribed by the *Criminal Code*.[4743] In assessing gravity, the following matters may be relevant:

[4733] *R v Mohamed* [2019] VSC 498, [81].
[4734] Ibid [82].
[4735] *Khan* [78].
[4736] *Shoma* [60].
[4737] *R v Mohamed* [2019] VSC 498, [86].
[4738] *Criminal Code Act 1995* (Cth) ss 11.2(2), 101.1(1) ('*Criminal Code*').
[4739] *Alou* [190]. Alou was 18 years and 2 months of age at the time of the offence. The court concluded that the 15-year-old principal offender could not have committed the terrorist act unless equipped with the loaded firearm provided by Alou.
[4740] *DPP (Cth) v Galea* [2020] VSC 750, [27] ('*Galea*').
[4741] Ibid [26].
[4742] *R v Jakovac* [2022] NSWDC 579, [88] ('*Jakovac*').
[4743] Ibid [89].

- the number of acts of advocacy
- the length of time over which the advocacy took place
- the use of social media to accelerate the spread of the message
- the circulation of graphic violent imagery and messages
- the offender's level of enthusiasm and encouragement in promoting terrorist acts
- the number of persons who subscribed to, and viewed, the offender's material
- whether the material was created by others or reposted by the offender,[4744] and
- specific reference to Australia in the advocacy.[4745]

34.2.3 – Terrorist organisation offences

A 'terrorist organisation' is an organisation that:

- is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act,[4746] or
- has been listed in regulations made pursuant to the *Criminal Code* ('listed terrorist organisations').[4747]

Listed terrorist organisations can be viewed here on the Australian National Security website.

The history of the terrorist organisation of which the offender was a member is relevant to the objective seriousness of the offence and the culpability of the offender.[4748]

The objective seriousness of the offence depends on whether the organisation:

- advocates or engages in the indiscriminate killing of civilians
- is well-organised and resourced at the time of the offence with an intention and capacity to carry out terrorist acts
- is geographically confined
- through its activities, presents a direct threat to Australia, and
- recruits children, engages in sexual violence or uses landmines. [4749]

In assessing objective seriousness, it is not appropriate for the court to evaluate the merits of the organisation's ideology.[4750] While the court can take into account the proved dangerousness of the organisation,[4751] the ideology of the organisation is a matter for the legislature in deciding whether to declare the organisation as a terrorist organisation.[4752]

Similarly, the court does not need to take into account any claimed commitment by the organisation to international humanitarian law but may instead look at what the organisation has done or is proposing to do. Even a claimed commitment to targeting only governmental or security forces may not meaningfully reduce the culpability of the organisation if it treats civilian bystanders as acceptable collateral.[4753] It is

[4744] Ibid [89]-[93].
[4745] *R v Uweinat* [2021] NSWSC 1256, [45] ('*Uweinat*').
[4746] *Criminal Code* s 102.1, par (a) of the definition of 'terrorist organisation'.
[4747] Ibid s 102.1, par (b) of the definition of 'terrorist organisation'.
[4748] *Benbrika* 715 [555]-[556].
[4749] *R v Lelikan* (2019) 101 NSWLR 490, 518-519 [122]-[126] ('*Lelikan*').
[4750] Ibid 518 [122], 519 [133].
[4751] *Benbrika* 715 [555], quoted in *Lelikan* 495 [18], 519 [126].
[4752] *Lelikan* 518 [122].
[4753] Ibid 518-519 [124]-[125].

not relevant that the organisation participates in a 'non-international' armed conflict within the meaning of the *Geneva Conventions*.[4754]

The history of the organisation is relevant to moral culpability because it is probative of its members' state of mind. For example, it is likely that an offender joins an established organisation such as Al Qaeda with 'eyes wide open'; that is, already committed to the organisation's terrorist philosophy and objectives. In contrast, an offender generally joins a 'rag-tag collection of malcontents' in a state of uncertainty or confusion after being seduced by a process of indoctrination. An offender of the latter kind may be less morally culpable than the former.[4755] But the criminal culpability involved in the membership of a terrorist organisation is always very serious, even where its activities go no further than acts preparatory to a terrorist act.[4756]

The membership of a terrorist organisation comprehends a broad range of conduct, spanning charismatic leadership to informal participation.[4757] It is relevant what level of knowledge an offender had of the organisation's objectives and methods, and the length of time that they remained a member.[4758] An offender whose involvement was that of a passive, sympathetic observer seeking to chronicle the struggle of the organisation has been characterised as towards the lowest order of seriousness.[4759] Belief in the rightness of the organisation's cause may not, of itself, affect moral culpability.[4760] However, where an offender's informal membership of a terrorist organisation is innately connected to personal trauma and intergenerational persecution, their moral culpability can be reduced.[4761] There may also be some mitigation where an offender's primary motivation in joining a terrorist organisation is to oppose and prevent a genocide.[4762]

34.2.4 – Preparatory terrorist offences

A person commits an offence if they do any act in preparation for or planning, a terrorist act, even if the terrorist act does not occur, and if the preparation or planning is done without a specific target, or for more than one terrorist act.[4763] These provisions are intended to bite early, long before preparatory acts mature into circumstances of deadly consequence for the community.[4764] The maximum penalty of life imprisonment is a salient indicator of the objective seriousness with which preparatory terrorist offences are to be regarded.[4765]

[4754] Ibid 518-519 [125].
[4755] Ibid 715 [556].
[4756] Ibid 715 [557].
[4757] *R v Lelikan (No 5)* [2019] NSWSC 494, [52] ('*Lelikan No 5*').
[4758] *Lelikan* 519, [128].
[4759] *Lelikan No 5* [56]. While this principle survived appeal, the New South Wales Court of Criminal Appeal found that the offender's writings and activities in travelling with guerrillas over an extended period of time revealed him to be more than a 'sympathetic chronicler' of events. *Lelikan* 520-521 [140].
[4760] *Lelikan* 519 [129].
[4761] *Lelikan No 5* [87], affirmed on appeal in *Lelikan* 519 [129].
[4762] *R v Betka* [2020] NSWSC 77, [37].
[4763] *Criminal Code* ss 101.6(1)-(2).
[4764] *R v Lodhi* (2006) 199 FLR 364, 373 [51] ('*Lodhi*'), affirmed on appeal *Lodhi v The Queen* (2007) 179 A Crim R 470 ('*Lodhi II*'); *Fattal* [164]–[165]; *Elomar* 779 [79]; *Elomar II* 265 [282]; *MHK* 286 [48]; *Ali* 473-474 [73]; *Besim* [111].
[4765] *Elomar* 779 [79].

As terrorist plots are often detected at their inception, it can be difficult to identify a particular victim who has suffered harm in a recognised sense.[4766] And the indefinite nature of preparatory acts means that the offence embraces a wide range of possible physical elements.[4767] That being so, an offender's culpability should not be measured purely by the steps and actions they have taken, but, additionally, by a proper understanding of the nature and extent of the terrorist act contemplated.[4768]

These twin features can be seen as tracking two 'axes of seriousness' along which the gravity of preparatory offences may be assessed, as follows:

1. 'Actions in contemplation', focussing on the offender's criminal objective, including both threats and other activities targeted at property, electronic systems, public health or safety and the physical well-being and lives of other persons, and
2. 'Acts actually done', which may include conversations, research, acquisition of equipment, strategic planning, recruitment of offenders and everything done in preparation or planning short of the terrorist act itself. [4769]

Logically, the most serious example of the offence will be far advanced along both axes.[4770] Identifying the seriousness of the terrorist act contemplated (first axis) is a sentencing consideration of fundamental importance, [4771] and other things being equal, the offending will be more serious if the planned terrorist act involved:

- the killing of persons, rather than causing of property damage
- deliberate killing, rather than the risk or possibility of people being killed, and
- the killing of many people, rather than one or a few.[4772]

As to culpability, little reductive weight will be given to the absence of a finally selected target.[4773] Preparing for, or planning, a terrorist attack on police or prison officers is a very grave offence, whether or not random members of the public are also targeted.[4774] In considering what would have happened, had the intended terrorist attack occurred, courts have been prepared to assess the offender's state of mind, so far as it can be ascertained, by reference to their actions and plea.[4775]

The preparatory acts (second axis) themselves should be assessed by reference to the general considerations (see 34.2.1 – Generally).[4776] Conduct reflecting 'considerable premeditation, determination and commitment'[4777] and 'diligent and methodical'[4778] planning over a period of time

[4766] Mark Weinberg, 'Sentencing Terrorist Offenders – The General Principles' (2021) 95(10) *Australian Law Journal* 766, 769.
[4767] *Ali* 473 [70].
[4768] *MHK* 286 [48].
[4769] *Ali* 473 [70]-[72]. The axes were applied in *The Queen v Halis* [2021] VCC 1277.
[4770] *Ali* 473 [72].
[4771] Ibid 473-474 [73].
[4772] Ibid 474 [75].
[4773] *R v Touma* [2008] NSWSC 1475, [121] (*'Touma'*).
[4774] *R v Hraichie (No 3)* [2019] NSWSC 973, [228] (*'Hraichie'*).
[4775] *R v Mulahalilovic* [2009] NSWSC 1010, [51].
[4776] *Ali* 474 [76].
[4777] *Elomar* 777 [68].
[4778] *MHK* 291 [63].

elevates dangerousness.[4779] And a preparatory offence is much more serious if, as at the date of arrest, the offender still intended to carry out the terrorist act, and would have done so but for being intercepted.[4780]

34.2.4.1 – Impossibility

A serious example of a terrorist offence with a high degree of criminality will not be diminished by incompetence, the ineffective nature of the conduct, a 'general lack of viability and sophistication' in the plan, a 'degree of impracticability', and/or ineptitude, clumsiness or 'amateurish conduct'.[4781]

34.2.5 – Financing terrorism offences

In considering the objective gravity of financing terrorism offences, the following factors may be relevant:

- the amount of money involved
- the identity of the terrorist organisation, and
- the conduct of the offender surrounding the commission of the offence.[4782]

In *Atai*, facilitating the movement of $5,000 thus enabling a person to travel to Syria to provide direct assistance to Islamic State was a serious example of making funds available to a terrorist organisation.[4783] Engaging in elaborate steps, over a lengthy period of time, magnifies criminality.[4784] Despite the 'relatively small' amount of money involved, the offender was regarded as playing a 'significant organisational role' where they used their contact in the Middle East to facilitate the person's travel, advised them on their journey, and followed up to ensure their safe arrival.[4785]

Where the activities of an undercover operation mean that there was no prospect of the funds reaching a terrorist organisation, the offence may still be one of substantial seriousness. A broad analogy is drawn with drug supply offences where the drugs do not reach the public. Although it is a relevant factor that the funds did not reach their destination, it remains a primary consideration that the offender intended to provide the funds and took no action to stop the transaction.[4786]

34.2.6 – Foreign incursion and recruitment offences

On 1 December 2014, the *Crimes (Foreign Incursion and Recruitment) Act 1978* (Cth) ('*CFIRA*') was repealed, and foreign incursion and recruitment offences were relocated, with increased maximum penalties, into Part 5.5 of the *Criminal Code.* The new maximum penalty of life imprisonment for most of these offences plainly reflects increased gravity.[4787] The purpose of the provisions is 'to ensure that Australia discharge[s] its international obligation to make criminal the activities of …. [those] who propose to engage in hostile activities in a foreign state and/or assist foreign fighters to do so'.[4788]

[4779] *Ali* 476 [82].
[4780] Ibid 476 [83].
[4781] *Fattal* [166], [178], [180]. See *Ali* 475 [78]; *Lodhi* 374 [54].
[4782] *Atai v The Queen* [2020] 286 A Crim R 1, 11 [46] ('*Atai*').
[4783] Ibid 15 [70].
[4784] Ibid 11-12 [48].
[4785] Ibid 11 [46].
[4786] Ibid 11-12 [48]-[49].
[4787] *R v Cerantonio [*2019] VSC 284, [78]-[80] ('*Cerantonio'*).
[4788] *Mohamed* [4]. Although *Mohamed* concerned offences against the *CFIRA*, this passage was cited with approval in *Cerantonio* at [78]-[80] in relation to offences against Part 5.5 of the *Criminal Code*.

Some statements of principle derived from *CFIRA* cases remain relevant in sentencing for offences under the *Criminal Code*[4789] – and vice versa,[4790] although the different penalty regimes must be borne in mind.[4791] For example, the following significant factors relevant to offence gravity were originally described in the *CFIRA* case of *Alqudsi*:[4792]

- the nature and extent of the services performed
- the intention with which they were performed, and
- their intended effect.[4793]

Other considerations held to be relevant in assessing objective seriousness and culpability include:

- the duration of the offending
- the extent of the planning and/or research involved
- the offender's level of commitment and enthusiasm
- the range of the offending conduct – whether it included activities such as reconnaissance, maintaining weapons, or performing armed guard duty
- whether the offender is personally involved in, or merely provides encouragement to others involved in, the overthrow of a government by force or violence
- the offender's level of awareness of the events going on around them
- whether the offender has pledged allegiance to a terrorist organisation or foreign fighting force
- whether the offender had direct (or indirect) contact with a terrorist or insurgency organisation
- any attempt/s to persuade or indoctrinate others
- whether the offence would have been committed if not for the involvement of an undercover police operation
- adherence to extremist religious thinking
- the offender's position/rank within a group of co-offenders, and
- the risk that the offender might return 'with enhanced capabilities which may be employed to facilitate terrorist or other acts' in Australia.[4794]

Gravity may be reduced where the offending is characterised by poor planning, especially if a plot is foredoomed to failure, or the likelihood of success extremely remote.[4795]
In light of their repositioning into the *Criminal Code*, foreign incursion offences are also included within the definition of a terrorism offence under the *Cth Crimes Act* s 3. However, they should not be regarded as a 'species of terrorism'.[4796] Moreover, a foreign incursion offender must not be sentenced as if they were convicted of a terrorist act offence;[4797] the fault element of these offences does not include any of the features required to prove a terrorist act (i.e., an intention to advance an ideological cause or to coerce or intimidate government).

It is uncertain to what extent designation as a terrorism offence has impacted the inherent gravity of foreign incursion offences. Clearly, the court may take into account the 'depth and extent' of an offender's

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[4789] See, e.g., *Cerantonio*; *Elmir v The Queen* (2021) 357 FLR 274 ('*Elmir*').
[4790] *R v Brookman (Sentence)* [2021] VSC 367, [51] ('*Brookman*'); *R v Succarieh* (2017) 266 A Crim R 420, 430-431 [53].
[4791] Ibid.
[4792] [2016] NSWSC 1227, [83] ('*Alqudsi*').
[4793] Ibid. These factors were subsequently endorsed in the *Criminal Code* cases of *Elmir* 285 [56] and *R v Taleb (No 5)* [2019] NSWSC 720, [105] ('*Taleb*'). Note, the form of the offence under the *CFIRA* referred to performing 'services' for people intending to enter a foreign country with intent to engage in hostile activities; that language does not exist for the *Criminal Code* offences.
[4794] *Cerantonio* [81]-[95]; *Brookman* [74]; *Taleb* [106]-[107].
[4795] *Cerantonio* [91].
[4796] *Elmir* 281-282 [34]-[39]. Cf. *DPP (Cth) v El Sabsabi* [2017] VSCA 160, [48] ('*El Sabsabi*'); *Brookman* [61].
[4797] *Elmir* 282-283 [40].

radicalisation in assessing the gravity of offences under the *Criminal Code*.[4798] However, it may be of relatively lesser significance that an offender subscribes to extremist ideology when offending against the *CFIRA*.[4799] As such, while an offender's statements about their 'beliefs in relation to killing in the name of Allah' or the 'creation of an Islamic caliphate' are to be properly synthesised in the sentencing discretion, they are not matters that elevate the objective seriousness of *CFIRA* offending.[4800]

34.3 – Circumstances of the offender

The *Cth Crimes Act* requires the court to take into account various circumstances of a Commonwealth offender, including:

- the degree to which the offender has shown contrition for the offence[4801]
- the offender's prospects of rehabilitation[4802]
- any plea of guilty,[4803] and
- the offender's age and mental condition.[4804]

As a general proposition, mitigating personal factors will be given substantially less weight in sentencing for terrorism offences than for other forms of offending.[4805]

It is open to a sentencing court to disregard an offender's respectful and co-operative conduct during the trial as a factor in mitigation.[4806] Conversely, the court is not obliged to consider any disruption caused by an offender as an aggravating factor.[4807]

That the offender might, at the conclusion of their sentence, be subject to a control order under div 104, or a continuing detention order under div 105A, is, at most, a marginal concern in sentencing.[4808] The potential for such orders does not operate as insurance against future risk to diminish the role of community protection or any other sentencing consideration.[4809]

Furthermore, a court should not infer hardship to the offender from the prospect that they might at the end of their term of imprisonment become the subject of a continuing detention order, absent specific evidence to that effect.[4810] The offender's awareness of the statutory regime in div 105A may equally provide them a beneficial incentive to pursue rehabilitation.[4811] Presumably, these principles apply to the prospect of an extended supervision order.

[4798] Ibid 284 [48], quoted in *Brookman* [62].
[4799] *Brookman* [61].
[4800] *El Sabsabi* [48].
[4801] *Cth Crimes Act* s 16A(2)(f).
[4802] Ibid s 16A(2)(n).
[4803] Ibid s 16A(2)(g).
[4804] Ibid s 16A(2)(m).
[4805] *Ali* 474 [74]; *MHK* 288 [55], 292 [66]-[67], 294 [73], citing *Lodhi II* 539 [274]; *Abbas* [62]; *Baladjam v The Queen* (2018) 341 FLR 162, 204 [263]; *Alou v The Queen* [2019] NSWCCA 231, [131] ('*Alou II*').
[4806] *Fattal* [194].
[4807] Ibid.
[4808] *DPP (Cth) v Besim (No 3)* (2017) 52 VR 303, 316-317 [47] ('*Besim No 3*'); *R v Benbrika* (2009) 222 FLR 433, 470-471 [242]-[244].
[4809] *Besim No 3* 317 [48].
[4810] Ibid 320 [61].
[4811] Ibid.

34.3.1 – Renunciation of extremist beliefs

A crucial question in establishing prospects of rehabilitation is the extent to which the offender adheres to any extremist views at the time of the offence and at sentencing.[4812] Successful rehabilitation is dependent, at least in part, on the renunciation of extremist beliefs.[4813] If those views are no longer held prospects of rehabilitation are stronger, and so it follows, a matter for which the court must make an allowance.[4814]

As with any factual matter in mitigation, the offender bears the onus of establishing on the balance of probabilities that extremist beliefs have been abandoned.[4815] In *Mohamed*, an offender who gave evidence at their plea hearing repudiating Islamic State and violent jihad was found to be 'genuinely on the path to de-radicalisation' with reasonable prospects of rehabilitation.[4816] A renunciation that is made publicly is especially compelling.[4817]

However, the ostensible transformation of an offender in the absence of contrition should be met with scepticism.[4818] In particular, courts are wary of reform that occurs in an environment in which the offender is sheltered from the influences that impelled them to offend.[4819] Of course, it is not necessary for the offender to convert to another religion to renounce any fanaticism inherent in an offence for which they are convicted.[4820]

34.3.2 – Plea of guilty

The utilitarian benefit of a guilty plea has no special mitigatory weight in the case of terrorist offences and falls to be assessed according to individual circumstances.[4821] The plea itself may be taken as a cautious indicator that a terrorist offender is in the course of relenting from their extremist beliefs.[4822] However, the closer a guilty plea is entered to trial, the more reluctant the court may be to infer an acknowledgement of wrongdoing or an expression of remorse.[4823] Moreover, where an offender has held 'explicit contempt' for Australian laws and people, a show of remorse might only be credible if it is given in oral evidence and tested in cross-examination.[4824]

Any sentencing discount for an offender who, in making admissions to police, boasts about their plans to commit terrorist acts, should be only modest.[4825]

[4812] *R v HG* [2018] NSWSC 1849, [106] ('*HG*'); *Elomar II*.
[4813] *HG* [106].
[4814] Ibid.
[4815] Ibid.
[4816] *Mohamed v The Queen* (2022) 367 FLR 482, 495 [67] ('*Mohamed*'). Here, the offender also received the benefit of having admitted guilt in the course of their testimony, all but forfeiting their right of appeal against conviction.
[4817] *Ali* 468 [43]-[47].
[4818] *MHK* 292 [67].
[4819] Ibid.
[4820] *Bayda* [82].
[4821] *Abbas* [64].
[4822] *Touma* [145]; *R v Sharrouf* [2009] NSWSC 1002, [74] ('*Sharrouf*'); *R v Ghazzawy* [2017] NSWSC 474, [73]; *Khalid v R* (2020) 102 NSWLR 160, 175 [93].
[4823] *R v Khaja (No 5)* [2018] NSWSC 238, [86]-[87].
[4824] Ibid [86]. See, e.g., *MHK* 292 [66].
[4825] *Hraichie* [267]–[269].

34.3.3 – Mental condition

A terrorist offender's mental condition is relevant on sentence insofar as it may:

- render the offender an inappropriate vehicle for general deterrence[4826]
- reduce the need for specific deterrence,[4827] and/or
- make more onerous the offender's conditions in custody.[4828]

Sentencing courts have sometimes taken into account a causal relationship between the offender's mental condition and their subscription to extremist beliefs. This relationship may be evident where a mental condition has 'materially contributed' to the offender's susceptibility to, and engagement with, militant ideas.[4829]

34.3.4 – Youth

Young offenders are capable of carefully planning terrorist attacks with foresight as to the consequences.[4830] So while youth is always a relevant consideration in mitigation,[4831] its weight can be diminished 'quite measurably' in sentencing for young terrorist offenders who have participated in, planned, and/or carried out actions of extreme violence.[4832] Put succinctly, in some cases, '[t]he protection of our society, and the upholding of its most fundamental values, necessitate that … general deterrence and denunciation must be given primacy above the ameliorating effect of youth'.[4833] This may call for moderation of the principle that rehabilitation is not only in the interests of the offender, but also the community.[4834]

In *Alou*, the fact that an offender was radicalised at 17 years of age did not establish a causal link between the offence and youth to reduce moral culpability.[4835] This may be contrasted with *Bayda*, where offending regarded as the manifestation of demonstrable immaturity, rather than deep fanaticism, entitled the offenders to 'significant consideration' for their youth.[4836]

34.4 – Sentencing purposes

The broad purpose of sentencing in terrorism offences is to prevent circumstances which increase the likelihood of terrorist acts occurring, to punish and denounce those who contemplate such acts, and to incapacitate those who prepare for or plan them so as to protect the community from the consequent

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[4826] *Taleb* [67]; *R v Pender* [2019] NSWSC 1814, [47].
[4827] *R v Kent* [2009] VSC 375, [41]; *Sharrouf* [61]; *Taleb* [62]-[63].
[4828] *Khan* [114].
[4829] *Bayda* [117]. Here, the offender's mental health conditions included depression, anxiety, emotional dysregulation, low self-esteem, low self-worth, anger issues, learning difficulties, and below average cognitive functioning. Ibid [103]. See also *Taleb,* where schizophrenia in its incipient stages had a significant impact on the offender's moral culpability. Ibid [46], [54], [58], [63].
[4830] See, e.g., *Alou II* [138].
[4831] See, e.g., *Bayda* [119]; *Cerantonio* [278]; *R v Biber* [2018] NSWSC 535, [114]. Some allowance for youth and attendant naivety was made in these cases.
[4832] *MHK* 289 [56]-[57], 294 [73]; *Besim* [116]; *IM v R* (2019) 100 NSWLR 110, 128 [54] ('*IM*'); *R v Khalid* [2017] NSWSC 1365, [109]-[116].
[4833] *MHK* 292 [66]; *Shoma* [54].
[4834] *MHK* 289 [57].
[4835] *Alou* [277]; *Alou II* [138].
[4836] *Bayda* [119].

danger.[4837] Accordingly, the sentence will usually reflect and give substantial weight to the purposes of denunciation, general deterrence, community protection, and just punishment.[4838] The nature of terrorism offences dictates that personal mitigating factors are given substantially less weight than for other forms of offending.[4839]

The fact that the offender intended to die during a terrorist attack will not reduce the weight to be given to specific or general deterrence.[4840]

Courts will denounce in the strongest terms preparatory terrorism offending and should signal that such crimes will be met with significant punishment, even where no harm comes of it.[4841]

Community protection looms large, especially where the offender has not resiled from their extremist views,[4842] because the court is not only concerned with future conduct of a recidivist nature, but with the perfection of the very crime for which the offender has been convicted.[4843] Because of the difficulty in detecting and preventing lone wolf terrorism attacks, community protection, along with punishment and both general and specific deterrence, are the focal points in sentencing for that variety of offending.[4844]

Conversely, the need for specific deterrence and community protection[4845] may be reduced where the offender has rejected extremist views and demonstrated some rehabilitation.[4846] In such cases, sentencing objectives might be achieved with a lower head sentence and non-parole period, given the 'vital public interest' in promoting the rehabilitation of would-be terrorists.[4847] Far from giving priority to the private interests of the offender, this reflects the court's concern with the community's interest in minimising the risk of re-offending, having regard to the objective seriousness of terrorism offences.[4848]

34.5 – Formulation of Sentence

To avoid either double punishment or a breach of the *De Simoni* principle, an offender's leadership of an terrorist organisation must be excluded from consideration when sentencing for the offence of being a member of the organisation, as there is a separate offence of directing the activities of a terrorist organisation in *Criminal Code* s 102.2.[4849]
Having regard to the principle of totality, and the circumstances of the offending, a substantial degree of concurrency may be warranted for overlap between a membership offence and a terrorism advocacy offence.[4850]

[4837] *Ali* 473-74 [73]; *MHK* 286 [48]; *Elomar* 779 [79]; *Lodhi* 373 [51].
[4838] *Abbas* [61]-[62], [69]; *Ali* 474 [74]; *Besim* [112]-[116]; *MHK* 287-88 [51]-[54], 294 [73]; *Elomar* 779 [77]-[79]; *Benbrika* 715 [557].
[4839] *Besim* [114]; *MHK* 288-89 [54]-[55].
[4840] *Besim* [112]; *MHK* 288 [53]. But see remarks in *Lodhi II* 490 [87]: '[D]eterrence in both respects may, in many cases, be entitled to less weight whenever it appears, as the example of suicide bombers suggests, that the force of an ideological or religious motivation is such that deterrence is unlikely to work'.
[4841] *Cerantonio* [134].
[4842] *Benbrika* 721 [591].
[4843] *Lodhi II* 494-494 [108].
[4844] *Shoma* [96]-[97].
[4845] *Bayda* [115].
[4846] *MHK* 283 [37].
[4847] *Mohamed* 484 [9], 495-496 [66]-[70].
[4848] Ibid 496 [60].
[4849] *Benbrika* 716-717 [563]. See also *R v Dakkak* [2020] NSWSC 1806.
[4850] *Uweinat* [94].

34.5.1 – Minimum non-parole period offences

When sentencing for a terrorism offence,[4851] the court must fix a single non-parole period of at least three-quarters of the head sentence pursuant to the *Cth Crimes Act* s 19AG ('three-quarters rule').[4852] This requirement also applies to attempt, incitement, or conspiracy to commit a terrorism offence.[4853]

A single non-parole period must be fixed in respect of all federal sentences the person is to serve or complete,[4854] regardless of whether the sentences are imposed at the same sitting.[4855] If the offender was subject to a recognizance release order ('RRO'), the non-parole period supersedes that order.[4856] When sentencing for a federal offence which is *not* a minimum non-parole period offence together with one (or more) minimum non-parole period offences, the three-quarters rule also applies to the first offence, but it is calculated by reference only to the minimum non-parole period offence or, if more than one, the aggregate of them.[4857]

A sentence of life imprisonment is taken to be a sentence of 30 years' imprisonment.[4858]

A court is not required to determine the period or minimum period which would have been required to be served but for the requirements of s 19AG before fixing the non-parole period.[4859] The court is not permitted to fix a non-parole period and work backwards to the corresponding head sentence. Rather, it must impose what it considers to be the proportionate head sentence and then fix the non-parole period in accordance with the three-quarters rule.[4860] An appropriate head sentence must not be ameliorated to compensate for or offset the effect of s 19AG.[4861] The three-quarters rule applies only if the offender is sentenced to imprisonment and does not affect the availability of other sentencing options.[4862]

34.5.1.1 – Child offender

When sentencing an offender who is under 18 years of age in relation to a minimum non-parole period offence, the court must apply the three-quarters rule unless it is satisfied that 'exceptional circumstances' exist to justify fixing a shorter single non-parole period.[4863]

[4851] See *Cth Crimes Act* s 3.
[4852] This provision applies notwithstanding that a court may otherwise have had the discretion to make or confirm an RRO, confirm a pre-existing non-parole period, or decline to fix a non-parole period. *Cth Crimes Act* s 19AG(5). Other 'minimum non-parole period offences' to which s 19A applies are offences against Division 80 (treason, urging violence and advocating terrorism) and ss 91.1(1), 91.2(1) (espionage) of the *Criminal Code*.
[4853] *Fattal* [202]-[212].
[4854] *Cth Crimes Act* s 19AG(2).
[4855] Ibid s 19AG(3)(b).
[4856] Ibid s 19AG(4).
[4857] Ibid ss 19AG(2), (3)(b). Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia – A Guide for Practitioners* (6th ed, 2023) at 185 [188] explains this with the following example. An offender is sentenced to 6 years' imprisonment for each of two terrorism offences, with 2 years of the sentence for the second offence cumulated on the first sentence, and 2 years' imprisonment for possession of a forged document (which is not a minimum non-parole period offence), with 1 year cumulated on the second terrorism offence. The TES is 9 years, but in applying the three-quarters rule, the forged document sentence is disregarded. The aggregate of the terrorism sentences is 8 years, so the statutory minimum NPP is 6 years.
[4858] *Cth Crimes Act* s 19AG(3)(a). The minimum non-parole period for a sentence of life imprisonment is therefore 22 years and 6 months per the three-quarters rule.
[4859] *Alou II* [138], [165]-[167], [182]-[183].
[4860] *Besim* [181].
[4861] *Lodhi II* 535-537 [255]–[262]; *Alou II* [181].
[4862] *Taleb* [85].
[4863] *Cth Crimes Act* s 19AG(4A).

In determining whether exceptional circumstances exist, the court must treat:

- the protection of the community as the paramount consideration, and
- the best interests of the person as a primary consideration.[4864]

34.5.2 – Warning requirements

When sentencing terrorism offenders, the court must give the offender a warning that an application may be made for a continuing detention order or an extended supervision order (see 34.6 – Post-sentence orders).[4865] The warning requirements apply to a court sentencing a person who has been convicted of:

- specified terrorism offences[4866]
- contravention of an extended supervision order / interim supervision order,[4867] or
- contravention of a control order.[4868]

The warning must state that an application may be made under div 105A of the *Criminal Code* for a continuing detention order, requiring the person to be detained in a prison after the end of their sentence, or an extended supervision order, imposing conditions on the person after the end of their sentence, and that contravention of a continuing detention order is an offence.[4869]

Where the offender has been convicted of a specified terrorism offence or contravention of an extended supervision order / interim supervision order, the court must state that the AFP Minister may apply for post-sentence orders before the end of the sentence for that offence, or any later sentence if the person is continuously detained in custody in a prison.[4870] Where the offender has been convicted of contravening a control order, the court must state that the application may be made before the end of the sentence for that offence.[4871] It may be noted in the warning that whether such orders are made would be determined by a court at the time of hearing any such application.[4872]
Failure to give a warning does not affect the validity of the sentence for the offence, nor does it prevent an application from being made for post-sentence orders.[4873]

34.6 – Post-sentence orders

Terrorist offenders who, if released into the community, would pose an unacceptable risk of committing a serious Part 5.3 offence, may be subject to the regime of post-sentence orders ('PSOs') under Division 105A.

There are two types of PSOs: a continuing detention order ('CDO') and an extended supervision order ('ESO').

[4864] Ibid s 19AG(4B).
[4865] Ibid s 105A.23.
[4866] Ibid ss 105.23(1)(a)(i), 105A.3(1)(a). See Chapter 34.6 – Post-sentence orders in relation to these offences.
[4867] *Criminal Code* s 105A.23(1)(a)(ii).
[4868] But only if the DPP informs the court that a warning must be given. *Criminal Code* s 105A.23(1)(b).
[4869] Ibid s 105A.23(1A)(a).
[4870] Ibid s 105A.23(1A)(b)(i).
[4871] Ibid s 105A.23(1A)(b)(iii).
[4872] *Galea* [65].
[4873] *Criminal Code* s 105A.23(2).

CDOs commit the offender to a further period of detention in a prison after the completion of their sentence.[4874] ESOs impose certain conditions on an offender after they are released into the community, and any contravention of them is an offence.[4875]

The maximum length of PSOs is 3 years,[4876] although successive orders may be made.[4877]

The Supreme Court[4878] may make PSOs in relation to an offender who will be at least 18 years old when their sentence ends[4879] and who is currently detained in custody in a prison[4880] serving a sentence for any of the following specified terrorism offences:[4881]

- an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices)[4882]
- a serious Part 5.3 offence[4883]
- an offence against Part 5.5 (foreign incursions and recruitment),[4884] or
- an offence against the repealed *CFIRA*.[4885]

An offender will also satisfy the preconditions for a PSO if they are currently subject to one, whether final or interim.[4886]

PSOs can be made on interim basis for a period of no more than 28 days[4887] in accordance with the procedures set out in ss 105A.9 and 105A.9A. The total period of interim PSOs in relation to an offender may be no more than 3 months for each type of order unless there are exceptional circumstances.[4888]

34.6.1 – Application

The AFP Minister (currently the Minister for Home Affairs) or their legal representative may apply to the court for a CDO or an ESO in relation to a terrorist offender.[4889] The application must not be made more

[4874] Ibid s 105A.3(2).
[4875] Ibid s 105A.3(3).
[4876] Ibid ss 105A.7(5), 105A.7A(4)(d).
[4877] Ibid ss 105A.7(6) (CDO), 105A.7A(5) (ESO).
[4878] Ibid ss 105A.7(1) (CDO), 105A.7A (ESO).
[4879] Ibid s 105A.3(1)(c).
[4880] A person is 'detained in custody in a prison' if they are detained in a jail, lock-up or remand centre, including under a continuing detention order or interim detention order, but not if they are in immigration detention. *Criminal Code* s 100.2(3B).
[4881] *Criminal Code* s 105A.3(1)(a). See ss 105A.3A(3)-(5), (7)-(10) in respect of other limited circumstances in which post-sentence orders can be made.
[4882] Ibid s 105A.3(1)(a)(i).
[4883] Ibid s 105A.3(1)(a)(ii). That is, an offence against Part 5.3 (terrorism offences) for which the maximum penalty is 7 imprisonment years or more. Ibid s 3.
[4884] Ibid s 105A.3(1)(a)(iii). Excluding an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements).
[4885] Ibid s 105A.3(1)(a)(iv). Excluding an offence against paragraph 9(1)(b) or (c) of *CFIRA* (publishing recruitment advertisements).
[4886] Ibid ss 105A.3A(2) (CDO), 105A.3A(6) (ESO).
[4887] Ibid ss 105A.9(5), 105A.9A(7)(c).
[4888] Ibid ss 105A.9(6), 105A.9A.
[4889] Ibid s 105A.5. A sunset provision provides that a PSOs cannot be applied for, affirmed, or made, after 7 December 2026. *Criminal Code* s 105A.25.

than 12 months before the end of a sentence of imprisonment for a specified terrorism offence,[4890] or the period in which any PSO (including an interim PSO) or confirmed control order is in force.[4891]

The AFP Minister must ensure that reasonable inquiries are made to ascertain facts known to any Commonwealth law enforcement, intelligence or security officer that would reasonably support a finding that neither type of PSO should be made in relation to the offender.[4892] There is no requirement to provide any particular risk assessment report prior to the commencement of proceedings.[4893]

34.6.2 – Appointment of expert

The court must hold a preliminary hearing to determine whether to appoint one or more relevant experts[4894] within 28 days of the offender receiving the application.[4895] The court may appoint one or more experts at either the preliminary hearing or a later time if it considers that doing so is likely to materially assist it in deciding whether to make a CDO or an ESO.[4896] The AFP Minister and the offender may each nominate experts.[4897]

The court must tell the offender that:[4898]

- they must attend the expert's assessment[4899]
- any information they give at the assessment is not admissible in evidence against them in any criminal or civil proceedings, except in proceedings under div 104 or div 105A (including appeal proceedings),[4900] and
- the assessment may be taken into account in proceedings to make, vary or review any PSO relating to them.[4901]

The expert assesses the offender and provides a report to the court, the AFP Minister, and the offender which addresses the offender's risk of committing a serious Part 5.3 offence.[4902]

34.6.3 – Determination

The court may make a CDO if:

- an application has been made for a CDO in accordance with s 105A.5
- having regard to the relevant considerations (see 34.6.3.1 – Relevant considerations), it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence, and
- there is no less restrictive measure available under Part 5.3[4903] that would be effective in preventing that unacceptable risk.[4904]

[4890] Ibid s 105A.5(2)(a).
[4891] Ibid s 105A.5(2)(b)-(c).
[4892] Ibid s 105A.5(2A). See s 105A.5(3) regarding the contents of the application.
[4893] *A-G (Cth) v Pender (Final)* [2022] NSWSC 1773, [133].
[4894] *Criminal Code* s 105A.6(1).
[4895] Ibid s 105A.6(2).
[4896] Ibid s 105A.6(3).
[4897] Ibid s 105A.6(3A).
[4898] Ibid s 105A.6(6).
[4899] Ibid s 105A.6(5).
[4900] Ibid s 105A.6(5A).
[4901] Ibid s 105A.6(9).
[4902] Ibid s 105A.6(4). See s 105A.6(7) regarding the contents of the expert's reports.
[4903] *Criminal Code* s 105A.7(1), Note 2 makes it clear that an ESO is an example of a less restrictive measure.
[4904] *Criminal Code* s 105A.7(1). The rules of evidence and procedure for civil matters apply when the court has regard to these matters. *Criminal Code* s 105A.7(1), Note 1.

While a 'measure' is a broad descriptor,[4905] the court is restricted to having regard to those measures available under Part 5.3 – that is, to control orders and ESOs. No strict boundary exists between measures relevant to the risk assessment and those that would be effective in preventing unacceptable risk; these analyses overlap.[4906] 'Less restrictive measures' captures measures which the court can be satisfied realistically *could* be in place, though the evidence does not necessarily establish *will* be in place.[4907]

'Unacceptable risk' is not defined in the *Criminal Code*, but it has been construed as a flexible concept calibrated to the nature and degree of the risk and adaptive to the circumstances of each particular case.[4908] Whether a risk is unacceptable requires consideration of both the likelihood of the risk eventuating, and the seriousness of the consequences if it does.[4909] The risk must carry a threat of harm to members of the community that is sufficiently serious as to make it unacceptable to the court.[4910] As the provision does not link unacceptable risk to any specific offence, it is sufficient to identify the risk as that of committing one or more serious Part 5.3 offences.[4911]

The AFP Minister bears the onus of satisfying the court of the relevant matters.[4912] If it is not satisfied, the court must turn its mind to whether it is appropriate to make an ESO instead[4913] and must seek the following information from the AFP Minister:

- the proposed conditions that would be sought for an ESO
- an explanation for why each of the conditions should be imposed, and
- if the AFP Minister is aware of any reasons why those conditions should *not* be imposed – a statement of facts.[4914]

For the court to be able to make an ESO, one (or more) of the following conditions must apply:

- an application has been made for an ESO in accordance with s 105A.5
- an application has been made for a CDO (as above), but the court is not satisfied to make a CDO,[4915] or
- the court has reviewed a CDO under s 105A.12 and is not satisfied as mentioned in s 105A.12(4)(a).

Then, the court may make the ESO if:

- having regard to the relevant considerations (see 34.6.3.1 – Relevant considerations) it is satisfied on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence, and

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[4905] *Minister for Home Affairs v Pender* (2021) 363 FLR 309, 321 [57] ('*Pender*').
[4906] Ibid 320-321 [55]-[57]; *Minister for Home Affairs v Benbrika (First review)* (2022) 366 FLR 32, 39-41 [25]-[38] ('*Benbrika (First review)*').
[4907] *Pender* 321 [58], approved in *Benbrika (First review)*, 40 [31]. But note, *Pender* was decided before amendments to the *Criminal Code* removed the words 'if the offender is released into the community' from s 105A.7(1)(b). The court is now required simply to consider whether an offender poses 'an unacceptable risk of committing a serious Pt 5.3 offence'.
[4908] *Minister for Home Affairs v Benbrika (No 2)* [2020] VSC 888, [400], quoting *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; *A-G v Sa'Adat Khan* [2022] VSC 507, [27] ('*Sa'Adat Khan*').
[4909] *Benbrika (First review)* 42-43 [49].
[4910] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 103 [47].
[4911] *Benbrika v Minister for Home Affairs* (2021) 365 FLR 209, 231 [79]; *Sa'Adat Khan* [28].
[4912] *Criminal Code* s 105A.7A(3).
[4913] Ibid s 105A.7(2)(b).
[4914] Ibid s 105A.7(2)(a). A statement of facts may exclude any facts that are likely to be protected by public interest immunity. Ibid s 105A.7(2)(a)(iii).
[4915] See *Criminal Code* s 105A.12 regarding the process for reviewing a post-sentence order.

- it is satisfied on the balance of probabilities that each condition (see 34.6.3.2 – Conditions) and the combined effect of all of the conditions, to be imposed upon the offender by the ESO is reasonably necessary and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk.[4916]

Once again, the AFP Minister bears the onus of proof.[4917]

The object of Division 105A – to protect the community from serious Part 5.3 offences – is a paramount consideration the court must consider when deciding whether each proposed condition is reasonably necessary, appropriate, and adapted.[4918]

An ESO must state:
- that the court is satisfied of the above matters
- the name of the offender
- the conditions, and any exemption conditions, it imposes
- the period during which the order is to be in force (no more than 3 years), and
- that the offender's lawyer may request a copy of the order.[4919]

If the court makes an ESO, any CDO that is in force immediately before the ESO begins is automatically revoked.[4920]

34.6.3.1 – Relevant considerations

In deciding whether to make a PSO, the court must have regard to:
- the object of Division 105A – that is, to protect the community from serious Part 5.3 offences
- the report/s of any relevant experts appointed by the court and/or the AFP Minister and the offender's level of participation in the assessment
- any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence
- any report relating to the extent to which the offender can reasonably and practicably be managed in the community that has been prepared by State or Territory corrective services or any other competent person or body
- any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in such programs
- the level of the offender's compliance with any obligations to which they have been subject while on parole, a PSO, an interim PSO, or a control order
- any prior convictions and findings of guilt in relation to any specified terrorism offence
- the views of the sentencing court at the time of sentencing for any specified terrorism offence
- whether the offender is subject to any order under a State or Territory law that is equivalent to PSO, and if so, the conditions of that order, and
- any other information about the risk of the offender committing a serious Part 5.3 offence.[4921]

[4916] Ibid s 105A.7A(1).
[4917] Ibid s 105A.7A(3).
[4918] Ibid s 105A.1.
[4919] Ibid s 105A.7A(4).
[4920] Ibid s 105A.7A(6).
[4921] Ibid s 105A.6B(1).

34.6.3.2 – Conditions

The court has a broad power to impose conditions on an ESO, constrained principally by the fact that it must be satisfied on the balance of probabilities that the combined impact of all conditions is reasonably necessary, and reasonably appropriate and adapted, to protect the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.[4922] A condition also must not mandate that an offender remain at specified premises for more than 12 hours within any 24 hour period.[4923]

The general rules contemplate a wide array of conditions; prohibiting, restricting and/or imposing obligations on the offender in respect of certain conduct and/or classes of conduct.[4924] Examples include conditions relating to:

- exclusion from specified areas, residing (or not being present) at a particular premises[4925]
- a prohibition on applying for travel documents[4926]
- non-communication with specified persons[4927]
- bans on the use of specified forms of technology (including the internet),[4928] and
- participation in treatment, rehabilitation, or intervention programs.[4929]

See s 105A.7B(3)(b) for examples of conditions relating to monitoring and enforcement.

The court may specify that certain conditions included in the ESO are exemption conditions. An exemption condition is a condition for which the offender may apply, in writing, to a specified authority, for a temporary exemption.[4930]

An ESO or an interim supervision order may be varied by consent, or otherwise, in accordance with the procedures set out in s 105A.9C and 105A.9D.

If the AFP Minister is satisfied that a condition of an ESO or interim supervision order is no longer necessary, or reasonably appropriate and adapted for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence, they may make an application to the court to remove or vary the condition.[4931] The offender may also make an application to vary or remove one or more conditions.[4932]

34.6.3.3 – Periodic review

The AFP Minister must, within 12 months of a PSO commencing,[4933] apply to the court for a review of the PSO.[4934] If the PSO has since been reviewed, then the next application must be made within 12 months of

[4922] Ibid s 105A.7B(1).
[4923] Ibid s 105A.7B(2A).
[4924] Ibid s 105A.7B(2).
[4925] Ibid s 105A.7B(3)(a)-(b).
[4926] Ibid s 105A.7B(3)(g).
[4927] Ibid s 105A.7B(3)(h).
[4928] Ibid s 105A.7B(3)(i).
[4929] Ibid s 105A.7B(3)(n).
[4930] Ibid s 105A.7C(2), (4).
[4931] Ibid s 105A.9B. See s 105A.9B(3) regarding the contents of the application.
[4932] Ibid s 105A.9B(1).
[4933] Ibid s 105A.10(1B)(a).
[4934] Ibid s 105A.10(1A).

the most recent review.[4935] If an application is not made within time, the PSO ceases to be in force at the end of the relevant period; that is, either 12 months after it began or 12 months after the most recent review.[4936] Via this process, the *Criminal Code* provides for mandatory yearly reviews to ensure that the conditions on ESOs remain reasonably necessary, and appropriate and adapted.

[4935] Ibid s 105A.10(1A)(b). See s 105A.12 regarding the process for reviewing a post-sentence order.
[4936] Ibid s 105A.10(4).