Chapter 1. Introduction

Introduction

[1.05]

If measured by the business of the courts, sentencing is the most important activity undertaken in the criminal jurisdictions of all levels of the court hierarchy. Australia-wide, in 2011–12 in all courts, 80 per cent of all defendants were proven guilty.[1] In the County Court of Victoria, approximately 71 per cent of defendants plead guilty.[2] Criminal appeals comprise over 68 per cent of all appeals to the Victorian Court of Appeal,[3] the majority of which are appeals against sentence either alone or combined with a conviction appeal. Although the substantive criminal law has historically been the focus of legal education and academic writings regarding the criminal justice system, in practice, sentencing law and practice occupies the most time and attention of courts and legal practitioners. Sentencing is the subject of constant, intense and often emotive media reporting. Traditionally considered as less worthy of the attention of appellate courts, the increasing number, length and complexity of pleas and appeals has elevated the sentencing process to a more prominent place in the criminal justice firmament.[4]

Sentencing is important not only because it consumes the majority of the resources of the courts, prosecution and legal aid agencies, but also because it affects the liberty, property and reputation of the individual.[5] Having made the decision to plead guilty, as the majority of defendants do, they are primarily concerned with the outcome of their case: whether they will be imprisoned, fined or have their liberty otherwise restricted. As the High Court has noted:[6]

> The process by which a court arrives at the sentence to be imposed on an offender

[1] Either by a plea of guilty or a finding of guilt by a court: Australian Bureau of Statistics, *Criminal Courts, Australia, 2011–12*, 4513.0 (2013).

[2] The 2011–12 *Annual Report of the Victorian Director of Public Prosecutions and the Office of Public Prosecutions* records that 88% of all matters prosecuted by the Office achieved guilty outcomes, either by plea or conviction. Guilty pleas were achieved in 74% of prosecutions, either before or at trial (p 8). Of the 2,154 sentences imposed by the County Court in 2011–12, 1,776 (82%) were resolved as a guilty plea either before or at trial and 378 (18%) followed conviction at trial: County Court of Victoria, *2011–2012 Annual Report* (2012) p 10.

[3] Sentencing Advisory Council, *Sentencing Appeals in Victoria: Statistical Research Report* (Sentencing Advisory Council, 2012) [4.8].

[4] Writing in 1863, Sir James FitzJames Stephen drew attention to the discrepancy that existed between the attention paid to detail during the trial, and the perfunctory manner in which the sentencing function was performed: "…without consultation, advice, or guidance of any description whatever". "Yet", he commented, "the sentence is the gist of the proceeding. It is to the trial what the bullet is to the powder": *The Punishment of Convicts* (1863) 7 *Cornhill Magazine* 189, reprinted in LJ Blom-Cooper (ed), *The Language of the Law* (Bodley Head, 1965) pp 63–64; see also M Kirby, *The Mysterious Word "Sentences" in s 73 of the Constitution* (2002) 76 *Australian Law Journal* 97.

[5] M Kirby, *The Mysterious Word "Sentences" in s 73 of the Constitution* (2002) 76 *Australian Law Journal* 97.

[6] *R v Olbrich* [1999] HCA 54 at [1] per Gleeson CJ, Gaudron, Hayne and Callinan JJ; (1999) 199 CLR 270.

> has just as much significance for the offender as the process by which guilt or innocence is determined.

The law of sentencing has developed to a state where it is probably as extensive, detailed and complex as that of the substantive law of crime. This is partly due to the increasing statutory regulation of sentencing, partly to the greater expectations of the nature and quality of the reasons expected from sentencers on passing sentence,[7] and partly due to the recognition that the statutory provisions relating to sentencing are increasing in number, and subject to constant amendment, often conflicting and complex.[8] This development has not gone unnoticed or uncriticised. In *Pearce v The Queen*, McHugh, Hayne and Callinan JJ observed:[9]

> … very importantly, it is highly undesirable that the process of sentencing should become any more technical than it is already. Nearly 30 years ago, Sir John Barry, in his lecture on "The Courts and Criminal Punishments" said:[10]
>
> [The criminal law] must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime.
>
> That remains true. "[E]xcessive subtleties and refinements" must be avoided.

Appealing as Sir John Barry's plea for simplicity and transparency in sentencing may be, this lengthy text is evidence of the fact that sentencing is more than a matter of just "common sense". Like the criminal law in general, while it must be grounded in societal values, that element is only one of many that comprises a just and fair system.

This third edition describes the law in Victoria governing the sentencing of offenders. Because persons who are guilty of crime in this State may have violated either State or federal law,[11] or both, the sentencing rules of both jurisdictions are described. There are many commonalities in sentencing across Australia, both statutory and at common law, so this edition draws extensively

[7] See [2.260] (reasons for sentence).

[8] See *Hillier v DPP (NSW)* [2009] NSWCCA 312 at [12]; (2009) 198 A Crim R 565.

[9] [1998] HCA 57 at [39]; see also *Burrell v The Queen* [2008] HCA 34 per Kirby J (attributing increasing complexity to the vigilance of the High Court for error, greater facilities for legal aid and the growing body of the law relating to the criminal law and sentencing); *Hillier v DPP (NSW)* [2009] NSWCCA 312; (2009) 198 A Crim R 565, per Hulme J (complexity and difficulties created by statutory checklists and provisions which create undue burdens on scarce resources).

[10] J Barry, *The Courts and Criminal Punishments* (Government Printer, 1969) pp 14–15.

[11] A useful guide to federal sentencing in Victoria is provided by the Commonwealth Director of Public Prosecutions' (CDPP) document *Federal Sentencing in Victoria*, which is updated regularly. It can be found on the CDPP's web site http://www.cdpp.gov.au as an attachment at the end of the section titled "Practice of the CDPP".

upon case law and legislation from other jurisdictions – particularly where they illuminate general sentencing principles, identify legal issues that may be inadequately covered by Victorian decisions, or provide points of contrast in terms of policy or interpretation.[12]

The book offers coverage of procedures and burden of proof rules at the sentencing stage of a criminal trial or hearing, the general sentencing principles enunciated by appellate courts, the statutory provisions that delineate each of the sentencing options available to Victorian criminal courts and mechanisms of appellate review of sentences. The sentencing power of military tribunals under federal law has not been covered,[13] nor the power of non-judicial bodies such as licensing or registration boards, professional associations, public service bodies, unions or sporting and other clubs to impose penalties on others, even though the sanctions may be quite severe.[14]

The announced sentence is the product of the interplay between legislative norms and judicial discretion, but its execution is under the control of agencies of the executive Government. However, over recent decades, the sentencing law is increasingly influenced by human rights and international laws. Constitutional considerations have also come to play a more significant role in the interpretation of penal legislation. Sentencing also reflects the influence of victims and the general public in shaping sentencing policy, political discourse and the day-to-day operations of courts, prosecution and correctional agencies. This opening chapter highlights the respective roles of the legislature, the judiciary, the executive, victims and the public in the sentencing process. It examines the foundations of sentencing – namely the concepts of guilt, conviction and sentence, the respective role of State and Commonwealth laws, and concludes with a review of various interpretative provisions particularly relevant to sentencing law.

Distribution of sentencing authority

[1.10]

Sentencing does not fall exclusively within the province of the criminal courts and too great a concentration on the judicial role in sentencing risks overlooking the other elements in the process. Formal sentencing authority is distributed between the legislature, the judiciary and the executive. Legislative policy and executive practice have an equally significant impact on the form of the sanction and the manner in which it is discharged. As the common law declines in importance in determining sentencing options, the legislature's role in defining and expanding possibilities has come to dominate the sentencing picture. And after sentence has been imposed,

[12] Where examples are drawn from other jurisdictions, they are illustrative only and the discussion is not intended to provide a complete and comprehensive statement of the law in those jurisdictions.

[13] See *Defence Force Discipline Act 1982* (Cth) Pt IV, Punishments and Orders; see also *Lane v Morrison* [2009] HCA 29; (2009) 239 CLR 230; *White v Director of Military Prosecutions* [2007] HCA 29; (2007) 231 CLR 570; *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518; *Hembury v The Queen* (1994) 73 A Crim R 1; G Kennett, *The Constitution and Military Justice After White v Director of Military Prosecutions* (2008) 36 *Federal Law Review* 231; M Groves, *Military Justice, Its Punishments and the Constitution* (2011) 35 *Criminal Law Journal* 265.

[14] *R v White; Ex parte Byrnes* [1963] HCA 58; (1963) 109 CLR 665; *Bodna v Deller & Public Service Appeals Tribunal* [1981] VR 183; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350.

the effect of the court's order may be modified by agencies of the executive Government.

The predominant legislative role in the sentencing process is to create a range of dispositive possibilities, to provide general guidelines in relation to their use and to define penalty limits for individual offences. Judges and magistrates continue to enjoy an extensive, though not unfettered, discretion to select the type of sanction and its duration. The executive branch of Government serves to provide the mechanisms for implementing these sentencing choices, as well as ameliorating the conditions of punishment, and redressing obvious error and injustice through the power to remit and pardon penalties.

Though the legislature, judiciary and the executive comprise the formal and traditional elements of the sentencing universe, over recent decades the traditional adversarial paradigm of criminal justice, which focused primarily on the State and the offender, has changed to take into account the interests, views and participation of victims of crime and of the community more generally.[15] Victims, for many centuries the "forgotten party" in the criminal justice system, have fought for and obtained financial support and compensation, counselling services and statutory recognition of their rights. Over recent years, victims' views have become legally recognised through mechanisms such as victim impact statements and victim representation on parole boards and similar release authorities. More recently developments such as family group conferences, sentencing circles and victim/offender mediation schemes have altered aspects of the criminal justice system to place the victim at the heart of the process.[16]

The community, more broadly, has an interest in sentencing. Indirectly, the community influences sentencing policy through the election of its parliamentary representatives. Between elections, it makes its views known through the media, through lobbying parliamentarians and sometimes through direct action on the streets, if the issue is sufficiently controversial or sensitive. Increasingly, community members are appointed to decision-making or policy bodies such as parole bodies or sentencing councils or commissions.[17]

Legislature

[1.15]

The legislature has a pre-eminent role in establishing the framework for sentencing decisions. The legislature assumes responsibility for basic policy determinations – not only of the maximum penalty appropriate to each offence, but also of the range and types of sentence to be available to the courts and the degree of discretion to be left to them in fixing the penalty in a particular case or in respect of particular classes or categories of offenders. It may establish subordinate sentencing authorities such as parole boards or special release authorities and define their powers and the extent of their discretion. In relation to sentencing options, it may articulate the criteria for their use, their nature and range, the degree of discretion provided to the decision-

[15] A Freiberg, *The Victorian Sentencing Advisory Council: Incorporating Community View into the Sentencing Process* in A Freiberg and K Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy* (Hawkins Press & Willan Publishing, 2008) pp 148–164; A Freiberg, *The Four Pillars of Justice* (2003) 36 *Australian and New Zealand Journal of Criminology* 223.
[16] See [3.125].
[17] See [3.125].

maker, the order of seriousness in relation to each other, and prohibitions on use or combinations of deployment.

Since the late 1980s almost all Australian jurisdictions have enacted specific laws that attempt to provide the courts with a comprehensive and coherent legislative and policy framework for sentencing and sentence administration.[18] These statutes are intended to guide and assist sentencers generally as well as bring together the various provisions relating to sentencing in one or two Acts for ease of reference, clarity and consistency. Despite the recommendations of the Australian Law Reform Commission, there is no separate Commonwealth sentencing statute that brings together all of the provisions that relate to sentencing, sentence administration and the release of offenders.[19]

The sentencing Acts of a number of jurisdictions contain broad objects clauses which set out the broad purposes of the Act.[20] Generally, they state that the purposes of the legislation are to:[21]

- promote consistency of approach in the sentencing of offenders;[22]
- promote flexibility in sentencing;[23]
- maximise the opportunity for imposing sentences that are constructively adapted to individual offenders;[24]
- provide fair procedures for imposing sentences and for dealing with offenders who breach the terms or conditions of their sentences;[25]
- prevent crime and promote respect for the law (and maintenance of a just and safe society[26]) by providing for sentences that:
    - are intended to deter the offender or other persons from committing offences of the same

[18] *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW) and *Crimes (Administration of Sentences) Act 1999* (NSW); *Sentencing Act* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1995* (WA) and *Sentence Administration Act 2003* (WA).
[19] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [2.1].
[20] The functions of such clauses are said to be to assist in the construction of the legislation, to act as aids in the drafting of the Act and to "promote public understanding of the law and enhance public confidence in the legal system"; Australian Law Reform Commission, *Same Crime, Same Time: Report Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [2.39] and [2.41].
[21] The wording varies between jurisdictions.
[22] *Sentencing Act 1991* (Vic) s 1(a); *Penalties and Sentences Act 1992* (Qld) s 3(c); *Sentencing Act 1997* (Tas) s 3(c).
[23] *Crimes (Sentencing) Act 2005* (ACT) s 6(d). Resolving the tension between consistency and flexibility is of the enduring problems of sentencing theory; JJ Spigelman, *Consistency and Sentencing* (2008) 82 *Australian Law Journal* 450.
[24] *Crimes (Sentencing) Act 2005* (ACT) s 6(c).
[25] *Sentencing Act 1991* (Vic) s 1(c)(i) and (ii); *Penalties and Sentences Act 1992* (Qld) s 3(d)(i) and (ii); *Sentencing Act 1997* (Tas) s 3(d)(i) – (iii).
[26] *Crimes (Sentencing) Act 2005* (ACT) s 6(a).

or a similar character;[27]

- facilitate the rehabilitation of offenders;[28]
- allow the court to denounce the type of conduct in which the offender engaged;[29]
- ensure that offenders are only punished to the extent justified by: the nature and gravity of their offences,[30] their culpability and degree of responsibility for their offences,[31] and the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances;[32]

- promote public understanding of sentencing practices and procedures;[33]
- provide sentencing principles to be applied by courts in sentencing offenders;[34]
- provide for the sentencing of special categories of offender;[35]
- provide a range of sentencing options;[36]
- set out the objectives of various sentencing and other orders;[37]
- ensure that victims of crime receive adequate compensation and restitution;[38]
- recognise the interests of victims of offenders;[39]
- provide a framework for the setting of maximum penalties;[40]
- provide for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders and, in appropriate circumstances, ensuring that protection of the community is a paramount consideration.[41]

The *Sentencing Act 1991* (Vic) offers a list of five purposes for which sentences can be

[27] *Sentencing Act 1991* (Vic) s 1(d)(i); *Sentencing Act 1997* (Tas) s 3(e)(i).
[28] *Sentencing Act 1991* (Vic) s 1(d)(ii); *Sentencing Act 1997* (Tas) s 3(e)(ii).
[29] *Sentencing Act 1991* (Vic) s 1(d)(iii); *Sentencing Act 1997* (Tas) s 3(e)(iii).
[30] *Sentencing Act 1991* (Vic) s 1(d)(iv)(A).
[31] *Sentencing Act 1991* (Vic) s 1(d)(iv)(B).
[32] *Sentencing Act 1991* (Vic) s 1(d)(iv)(C).
[33] *Sentencing Act 1991* (Vic) s 1(d)(v); *Penalties and Sentences Act 1992* (Qld) s 3(g); *Sentencing Act 1997* (Tas) s 3(f).
[34] *Sentencing Act 1991* (Vic) s 1(e); *Penalties and Sentences Act 1992* (Qld) s 3(e).
[35] *Sentencing Act 1991* (Vic) s 1(g).
[36] *Crimes (Sentencing) Act 2005* (ACT) s 6(b); *Penalties and Sentences Act 1992* (Qld) s 3(b).
[37] *Sentencing Act 1991* (Vic) s 1(h); *Sentencing Act 1997* (Tas) s 3(f).
[38] *Sentencing Act 1991* (Vic) s 1(h)(i).
[39] *Sentencing Act 1997* (Tas) s 3(h).
[40] *Sentencing Act 1991* (Vic) s 1(j).
[41] *Penalties and Sentences Act 1992* (Qld) s 3(b); *Sentencing Act 1997* (Tas) s 3(b).

imposed.[42] Both State and federal law specify some of the factors which a court must have regard to in sentencing.[43] In the *Sentencing Act 1991* (Vic) s 5(3) – (7), ss 7 and 109, and in the *Children, Youth and Families Act 2005* (Vic) ss 360 and 361, sentencers are provided with the legislatively preferred hierarchy of sanctions and a direction to observe the common law principle of parsimony, namely, that a court is "not to impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed".[44] The legislation also provides guidance in relation to the exercise of the discretion whether or not to record a conviction,[45] and includes directions regarding the use of indefinite sentences,[46] Youth Justice Centre and Youth Residential Centre orders,[47] community correction orders,[48] and dismissals, discharges or adjournments.[49] In some instances it has spelt out its policy on the relationship between particular sentencing orders, so that a court is now directed to give priority to restitution or compensation over a fine[50] and is obliged to take into account the total impact of a combination of financial sanctions.[51] The legislation also directs courts to have regard to the interests of victims[52] and to take account of different forms of forfeiture order made under the *Confiscation Act 1997* (Vic).[53] When forms of statutory sentencing guidance of this sort are

[42] *Sentencing Act 1991* (Vic) s 5(1) (just punishment, deterrence, rehabilitation, denunciation, community protection, or a combination of two or more of these purposes); see also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1995* (WA) s 6; see also Chapter 3[3.05].

[43] See *Sentencing Act 1991* (Vic) s 5(2); *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3, Div 1; *Sentencing Act* (NT) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1995* (WA) ss 7 and 8.

[44] *Sentencing Act 1991* (Vic) s 5(3); see also the similar principle that imprisonment is a last resort: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1995* (WA) s 6(4).

[45] *Sentencing Act 1991* (Vic) s 8; *Crimes (Sentencing) Act 2005* (ACT) s 17; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10; *Sentencing Act* (NT) s 8; *Penalties and Sentences Act 1992* (Qld) s 12; *Criminal Law (Sentencing) Act 1988* (SA) s 16; *Sentencing Act 1997* (Tas) s 9; *Spent Convictions Act 1988* (WA).

[46] *Sentencing Act 1991* (Vic) s 18B; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61; *Sentencing Act* (NT) s 65; *Penalties and Sentences Act 1992* (Qld) Pt 10; *Criminal Law (Sentencing) Act 1988* (SA) Pt 2, Div 3; *Sentencing Act 1995* (WA) Pt 14.

[47] *Sentencing Act 1991* (Vic) s 32; *Crimes (Sentencing) Act 2005* (ACT) s 133H; *Children (Criminal Proceedings) Act 1987* (NSW) s 19; *Youth Justice Act* (NT) s 83; *Youth Justice Act 1992* (Qld); *Young Offenders Act 1993* (SA) Pt 5, Div 10; *Youth Justice Act 1997* (Tas) s 79; *Young Offenders Act 1994* (WA) s 118A.

[48] *Sentencing Act 1991* (Vic) Pt 3A; *Crimes (Sentencing) Act 2005* (ACT) Pt 6.1; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8; *Sentencing Act* (NT) s 34; *Penalties and Sentences Act 1992* (Qld) Pt 5, Div 2; *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas) Pt 4; *Sentencing Act 1995* (WA) Pt 9.

[49] *Sentencing Act 1991* (Vic) s 70; *Crimes (Sentencing) Act 2005* (ACT) s 17; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10; *Sentencing Act* (NT) ss 10 and 12; *Penalties and Sentences Act 1992* (Qld) Pt 3; *Sentencing Act 1997* (Tas) Pt 8.

[50] *Sentencing Act 1991* (Vic) s 50(4); *Sentencing Act* (NT) s 17(4); *Criminal Law (Sentencing) Act 1988* (SA) s 53(2A)(b); *Sentencing Act 1997* (Tas) s 43.

[51] *Sentencing Act 1991* (Vic) s 53; *Sentencing Act* (NT) s 17(3); *Penalties and Sentences Act 1992* (Qld) s 48(3).

[52] *Sentencing Act 1991* (Vic) s 5(2)(da); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2); *Sentencing Act* (NT) s 5(2)(b); *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c) and 9(4)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(d).

[53] *Sentencing Act 1991* (Vic) s 5(2A) and (2B); *Sentencing Act* (NT) s 5(4); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k); *Sentencing Act 1995* (WA) s 8(3A).

introduced, courts sometimes object that they are being "over-governed".[54] However, the guidance offered within the legislative framework is couched in terms of such generality as to leave sentencers considerable flexibility in interpreting their meaning, and ample residual discretion in relation to the type and quantum of penalty. Australian federal and State sentencing legislation does not generally approximate the extremely specific and rigid legislative controls placed on judicial discretion under United States federal law[55] and that of some of the States in that country. However, some Australian jurisdictions have attempted to circumscribe the court's discretion through means such as statutory standard non-parole periods[56] or other forms of presumptive sentence.[57]

The legislature also plays a major role in sentencing by setting statutory maximum penalties. In Victoria, following a major review in 1989[58] and subsequent amendments, the State has a nine-level scale of maximum penalties. The maximum penalty scale is presented in Table 1.1.

Table 1.1. Victorian penalty scale, *Sentencing Act 1991* (Vic) s 109

[54] In *R v Young* [1990] VR 951, 954 the Victorian Court of Criminal Appeal referred to the substantial amount of legislation a sentencing judge must bear in mind, and complained that statutory instructions, generally speaking, "make the task of the sentencing judge more difficult, if for no other reason than that he must keep in mind a number of provisions which are not invariably clearly expressed".

[55] See for example, the United States federal sentencing guidelines, United States Sentencing Commission, http://www.ussc.gov.

[56] *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 4, Div 1A; see *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120.

[57] See [12.25].

[58] Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (Sentencing Task Force, 1989); see also RG Fox and A Freiberg, *Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties* (1990) 23 *ANZ Journal of Criminology* 165; RG Fox, *Order Out of Chaos: Victoria's New Maximum Penalty Structure* (1991) 17 *Monash University Law Review* 106; Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes, Preliminary Issues Paper* (Sentencing Advisory Council, 2010) Ch 6.

Penalty level	Maximum Prison Term	Maximum Fine Penalty Units
1*	Life	
2*	25 years	3,000
3*	20 years	2,400
4*	15 years	1,800
5*+	10 years	1,200
6*+	5 years	600
7**	2 years	240
8**	1 year	120
9**	6 months	60
10**	-	10
11**	-	5
12**	-	1
* *Indictable offences* *+ *Indictable offences triable summarily* ** *Summary offences*		

This scale has a number of notable features. First, it is expressed in terms of penalty levels, or penalty units, rather than the traditional prescription of a specific number of years of imprisonment or a specific dollar amount of a fine for each individual offence. Second, there is a nine-point scale for levels of imprisonment (or fines in addition to or instead of imprisonment) and a twelve-point scale where an actual fine level is specified. Third, reference to penalty levels in this maximum penalty scale is one of the means used to distinguish indictable from summary offences and to indicate which indictable crimes are triable summarily. Crimes punishable by levels 1 to 6 inclusive are indictable offences;[59] offences at levels 5 and 6 are indictable offences triable summarily,[60] and those remaining at levels 7 and below are summary offences. Fourth, the scale in *Sentencing Act 1991* (Vic) s 109 sets up a connection between levels of imprisonment and fine levels. Fines in Victoria are expressed in terms of "penalty units", which commenced at $100 but are adjusted annually for inflation.[61] The penalty scale in s 109 equates one month of imprisonment with 10 penalty units. This has standardised the fine–imprisonment, imprisonment–fine correlations which, prior to the 1991 Act, had shown no consistency at all.[62] Fifth, when corporate offenders are to be punished, they are subject to a maximum fine five

[59] *Sentencing Act 1991* (Vic) s 112(1) and (3).
[60] *Criminal Procedure Act 2009* (Vic) s 28.
[61] As at I July 2013, a Victorian penalty unit was worth $144.36. A Commonwealth penalty unit was worth $170.
[62] RG Fox, *Order out of Chaos: Victoria's New Maximum Penalty Structure*(1991) 17 *Monash University Law Review* 106, 107–109. On the relationship between statutory maxima and judicial sentencing practices see R Douglas, *When Parliament Barks, Do the Magistrates Bite? The Impact of Changes to Statutory Sentence Levels* (1989) 7 *Law in Context* 93.

times greater than that specified for natural persons.[63] Though the penalty scale was an important legislative initiative it is not generally applied to offences outside the *Crimes Act 1958* (Vic).

Apart from its role as a lawmaker, the legislature also has a unique power to directly punish offenders for contempt of its process. Though the law relating to contempt of Parliament has been the subject of much criticism on the ground of its vagueness and its capacity to be exercised arbitrarily, both the Victorian and Commonwealth Parliaments still retain this right. In theory the main sanction is imprisonment, but other sanctions include motions of censure or the requirement of an apology.[64] This power of Parliament to sentence is unlimited, subject possibly only to the limits on cruel or unusual punishments contained in the Magna Carta and the Bill of Rights.[65]

At the Commonwealth level, the sentencing powers of Parliament have been codified. The *Parliamentary Privileges Act 1987* (Cth) s 7 empowers a House of Parliament to impose a penalty of imprisonment for not more than 6 months for an offence against that House determined by that House to have been committed by that person, or to impose a fine on a natural person of not more than $5,000 and on a corporation of not more than $25,000. In the absence of statutory warrant, it is uncertain whether Parliament has the power to fine. If it had such a power at common law, it has now fallen into disuse.

Executive

[1.20]

The agencies of the executive Government are not only responsible for giving effect to sentences imposed by the courts, but also they have certain powers to modify them. In addition, the upper echelons of the executive Government are responsible for formulating policies in relation to the sanctions they are ultimately called upon to administer. In the normal course of events, once the sentencing judge is satisfied that an order that involves supervision or custody should be made, the responsibility for the offender's future passes to the executive. The court is effectively *functus officio*.[66] With regard to sentences that include a non-parole period, the judicial role involves the imposition of the head sentence and the non-parole period. The decision as to whether the prisoner should be released on the expiration of the non-parole period is one for the executive, namely the paroling authority.[67] Any recommendations it may make with regard to the nature or execution of a sentence are constrained by the resources available to the correctional or other

[63] *Sentencing Act 1991* (Vic) s 113D; *Penalties and Sentences Act 1992* (Qld) s 181B; *Sentencing Act 1995* (WA) s 40.
[64] *R v Richards; Ex parte Fitzpatrick and Browne* [1955] HCA 36; (1955) 92 CLR 157.
[65] EM Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press, 1966); D Pearce, *Contempt of Parliament – Instrument of Politics or Law?* (1969) 3 *Federal Law Review* 241; see also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10 (protection from torture and cruel, inhuman or degrading treatment).
[66] *R v O'Shea* (1982) 31 SASR 129, 234. Exceptions to this is the procedure in respect of the imposition of indefinite sentences, under which the court that imposed the sentence is required to review it (see [12.40]) and drug treatment orders in relation to which the court maintains a supervisory role (see [12.125]).
[67] *Crump v New South Wales* [2012] HCA 20 at [28] per French CJ; see also *Power v The Queen* [1974] HCA 26 at [6] per Barwick CJ, Menzies, Stephen and Mason JJ; (1974) 131 CLR 623; *Elliott v The Queen* [2007] HCA 51 at [5] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; (2007) 234 CLR 38.

authorities.[68] Responsibility for prisons, youth justice centres and youth residential centres, community correction orders and the parole service is shared by the Minister for Corrections (through the Department of Justice in relation to adult offenders) and the Minister for Community Services (through the Department of Human Services in relation to young offenders). It is possible for the executive to significantly affect the manner in which a sentence is executed. For a start, the experience of a custodial sentence served in a maximum security unit or a police lock-up is very different from that served in a minimum security facility. But apart from the executive's power to bring about variations in the quality of a prisoner's "lifestyle" in custody, it may also allow for the prisoner to be released on temporary leave of absence for limited periods through the issuing of a "custodial community permit".[69] Similarly, a young person ordered to be detained in a youth justice centre or youth residential centre may be transferred to a prison to serve the time there – notwithstanding that the court rejected prison as an appropriate sentence – and that there has been no material change in the offender's circumstances since they were before the court.[70] Prisoners under Commonwealth law may be released by the Governor-General on licence.[71] Monetary penalties can also be remitted or waived by Ministers of the Crown, or others, under numerous statutes. Of all the executive powers to modify sanctions, the most potent is that of the royal prerogative of mercy, which permits the pardoning of offenders, or the remission or respital of their sentences.[72] The exercise of executive power is not usually encumbered by the types of procedural safeguards recognised in judicial sentencing and has been subject to some criticism. In *South Australia v O'Shea*,[73] Deane J observed of the decision of an executive board:

> [I]t is manifest that a discretionary power to reject, on "political" grounds such as the state of public opinion, independent medical advice and the recommendation of a specialist board for the release on licence of a person detained under such an order lies ill with acceptable minimum safeguards of human liberty and dignity.

The explanation advanced for this state of affairs is either that executive discretion in sentencing only operates to the advantage of the accused, as it inevitably concerns the waiving of obligations imposed by courts, or that the presence of a judicial representative on the decision-making body (as in the case of Victoria's Parole Boards) is a sufficient guarantee that the interests of the offender will be taken into account and that, informally, the principles of natural justice will prevail. Both these justifications are suspect.[74] Even if a benefit accrues to the accused, other considerations apply in assessing the value of extensive use of executive powers to modify sentences.

---

[68] *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513; *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267.

[69] *Corrections Act 1986* (Vic) s 57; see also s 58E, for power of the Secretary of the Department of Justice to grant "emergency management days" in reduction of a prison sentence.

[70] *R v Harrop* [1979] VR 549. Generally the transfer takes place because there has been a material change: *Children, Youth and Families Act 2005* (Vic) s 467 (power to transfer where person cannot be properly controlled); see also [16.225].

[71] *Crimes Act 1914* (Cth) s 19AP.

[72] See [1.25].

[73] [1987] HCA 39; (1987) 163 CLR 378 at [5].

[74] B Naylor and J Schmidt, *Do Prisoners Have a Right to Fairness Before the Parole Board?* (2010) 32 *Sydney Law Review* 437.

Where a discretionary power has been vested in an executive body – including, in some instances, the Governor-in-Council[75] – that body must, in accordance with the requirements of procedural fairness,[76] exercise its power on proper grounds and must not take into account extraneous, discriminatory, unreasonable and irrelevant factors. While a decision-maker may develop criteria for the exercise of its powers through policies that it may develop, it must not fetter its discretion in such ways that it cannot use its lawful powers in the future.[77] In *Rendell v Release on Licence Board*,[78] a prisoner's application for release on licence by the New South Wales Release on Licence Board – a statutory body and not an advisory body – was refused partly on the ground that the Government had indicated that it would not be prepared to recommend to the Governor-in-Council the release of a life-term prisoner until the prisoner had served a minimum of 10 years in gaol. The Court of Criminal Appeal upheld the submission that the Board's discretion had miscarried because it was exercising its discretion at the behest of the executive and was applying general policy without consideration of the merits of the individual case. It stated:[79]

> A body upon whom Parliament has conferred a discretion must exercise that discretion in accordance with the legislation. The decision maker must not, for the purpose of the exercise of discretion, take into account extraneous or irrelevant considerations…

Although a tribunal may lawfully take into account the policies of elected Government, these policies have no legal or binding force. The court continued:[80]

> The primary rule is that the extent to which an independent body may reflect established government policy depends upon the charter of the body, the nature of its functions and the relevance to that charter and functions of the policy in question. There is no absolute rule that the body must ignore known government policy. On the other hand, it must not be so influenced by that policy that it fails to perform its own functions, as the statute contemplated.

The respective roles of the executive and the courts – where new information comes to the court

---

[75] *Pollentine v Attorney-General* [1995] 2 Qd R 412 (In exercising its power to determine whether a prisoner held under an indeterminate custodial sentence is to be released, Governor in Council must, in the absence of a clear contrary legislative intent, comply with common law requirements of procedural fairness); see also *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342. The content of what is required by way of procedural fairness will depend upon the particular statutory framework.

[76] *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252; except where explicitly excluded: see *Corrections Act 1986* (Vic) s 69(2) which specifically provides that the Parole Board is not bound by the rules of natural justice; see *Seiffert v Prisoners Review Board* [2011] WASCA 148.

[77] *Seiffert v Prisoners Review Board* [2011] WASCA 148 at [123] per Martin CJ.

[78] (1987) 10 NSWLR 499; followed in *R v Parole Board; Ex parte Palmer* (1993) 68 A Crim R 324 (where Parliament has conferred a discretion upon a Parole Board, the Board cannot refuse to exercise it on the basis of possible executive action).

[79] (1987) 10 NSWLR 499, 503; cf *R v Palmer* (1994) 72 A Crim R 555 (Ministerial role and discretion regarding release policy is different from that of the Parole Board, which has to consider each case on its merits; the Minister receiving the advice of the Board has an unfettered discretion to formulate policy in relation to release on parole in the public interest).

[80] (1987) 10 NSWLR 499, 505; see also *Bread Manufacturers of NSW v Evans* [1981] HCA 69; (1994) 180 CLR 404.

in relation to events that occur after the imposition of sentence, such as the illness of the offender or the need to protect them as a result of their assistance to authorities[81] – is a matter over which the courts have shown some ambivalence.[82] The generally accepted view is that, where there has been a supervening event and fresh evidence is before the appellate court that the sentence is imposing hardship upon the offender as a consequence of that event, it is the responsibility of the correctional authorities to take that into account.[83] However, there are a considerable number of cases where the courts have reduced the sentence on this account. In other cases it has been suggested that it might be appropriate for the executive to exercise the prerogative of mercy,[84] though this process may be long and arbitrary.[85]

Royal prerogative of mercy

[1.25]

The royal prerogative of mercy is the discretion possessed by the Crown to dispense with or modify punishments that common law or statute would otherwise require to be undergone.[86] This is independent of any statutory powers of remission or respital of sentence which, to some extent, may parallel the prerogative powers and which are exercisable by the sovereign's representative ministers of the Crown, or departmental heads.[87] While it has been doubted that the courts are competent to question the manner in which the royal prerogative is exercised in any particular case,[88] its ambit is subject to judicial definition. Under the doctrine of legislative supremacy, it can be abolished, restricted or regulated by statute: "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute".[89] Depending on whether the crime in question is one under federal or State law, the relevant vice-regal representative in whom the prerogative of mercy is vested is either the Governor-General of the Commonwealth or the Governor of the State. It is assumed, in both cases, that the power will be exercised only on the advice of Cabinet, but there is no express statutory requirement that this be so. There is a presumption, created by the *Acts Interpretation Act 1901* (Cth) s 16A, that statutory powers conferred on the Governor-General are to be exercised on the advice of the Federal Executive Council established under s 62 of the Constitution. However, this does not

[81] See [6.55] (assistance to authorities).
[82] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [16.11]–[16.13]; see also [6.125] (hardship to offender).
[83] *R v Munday* (1981) 2 NSWLR 177; *R v Dorning* (1981) 27 SASR 481; *R v Cartwright* (1989) 17 NSWLR 243; *R v Many* (1990) 51 A Crim R 54; *R v Eliasen* (1991) 53 A Crim R 391; *R v Maslen* (1995) 79 A Crim R 199; *Plumstead v The Queen* [1997] TASSC 62; (1997) 7 Tas R 206.
[84] *R v C* [2004] SASC 244; (2004) 89 SASR 270 (re post-sentence co-operation provided by the offender).
[85] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [16.13] citing the submission of the Law Society of South Australia.
[86] L Radzinowicz, *A History of English Criminal Law* (Stevens, 1948) vol 1, Ch 4. See also F Bresler, *Reprieve: A Study of a System* (Harrap, 1965); CH Rolph, *The Queen's Pardon* (Cassell, 1978); ATH Smith, *The Prerogative of Mercy, The Power of Pardon and Criminal Justice* (1983) *Public Law* 398.
[87] For example, executive powers to remit fines: [7.50].
[88] *Horwitz v Connor* [1908] HCA 33; (1908) 6 CLR 38; F Wheeler, *Judicial Review of Prerogative Power in Australia* (1992) 14 *Sydney Law Review* 432, 453. Cf *Pollentine v Attorney-General* [1995] 2 Qd R 412.
[89] *Burmah Oil Co v Lord Advocate* [1965] AC 75, 101; J Goldring, *The Impact of Statutes on the Royal Prerogative* (1974) 48 *Australian Law Journal* 434.

apply to the prerogative of mercy which is one of the reserve powers of the Crown and not statute-based.[90] Though the legislation may contain statutory provisions relating to the remission of penalties, or the attachment of conditions to an order for release of a prisoner pursuant to the royal prerogative of mercy, it has been customary to include in any general sentencing legislation a saving provision confirming the continued existence of the royal prerogative of mercy in its unfettered form.[91]

The Attorney-General may, on a petition for the exercise of the royal prerogative of mercy in relation to any conviction or sentence on indictment, under the *Criminal Procedure Act 2009* (Vic) s 327(1)(a), refer the matter to the Court of Appeal for its determination as on an appeal or, under s 327(1)(b) to the judges of the Supreme Court for their opinion.[92] The latter is wider in that it allows the judges to base their opinion on the plea for mercy on grounds that they, sitting as an appellate court, could not accept.[93] Though the reference is made by the Attorney-General, the petition must be properly addressed to the Governor.[94] The section expressly states that it does not affect the prerogative of mercy and the Crown retains its power to pardon any convicted person under the prerogative without reference to the judges of the Full Court. The prerogative is thus sometimes exercised following a Royal Commission or other form of enquiry that supplements or bypasses any advice tendered under *Criminal Procedure Act 2009* (Vic) s 327.[95]

The Governor's common law power to pardon or remit penalties under the prerogative of mercy is supplemented by statute. The Governor may release prisoners at any time, either on giving an undertaking (which may include conditions regarding good behaviour and supervision) or on parole, in the exercise of the prerogative of mercy.[9611] There is no requirement that before the Governor releases an offender on parole the matter be referred to the Parole Board. The Governor possesses statutory powers that enable him or her to mitigate, stay or compound proceedings for penalties. Also, apart from any other specific statutory authority that may exist permitting the remission of monetary penalties imposed under specific Acts, the Crown has a general power under the *Sentencing Act 1991* (Vic) s 108 to remit monetary penalties even

[90] The constitutional instruments by which the Sovereign assigns functions to a vice-regal representative are the letters patent constituting the office of Governor or Governor-General and the Royal Instructions.

[91] *Tait v The Queen* [1963] VR 547, 556 per Smith J. Such provisions are to be found in the *Sentencing Act 1991* (Vic) s 106; *Crimes Act 1914* (Cth) s 21D(2).

[92] In relation to Commonwealth offences it is the Attorney-General of the Commonwealth who has the right to refer a petition to a state court by virtue of *Judiciary Act 1903* (Cth) s 68(2); *R v Martens* [2009] QCA 351. The legislation does not set out any criteria upon which a decision by the Attorney-General whether to refer a matter to the Court of Appeal is to be made: see R Linsday, *Punishment Without Finality: One Year in the Life and Death of Alan Egan* (2009) 33 *Criminal Law Journal* 45, 47.

[93] *Re Ratten* [1974] VR 201; see also *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510; *Lawless v The Queen* [1979] HCA 49; (1979) 142 CLR 659. In *R v Murphy* [2002] SASC 299; (2002) 83 SASR 574 the petitioner had failed in an application for leave to appeal to the High Court against a decision of the South Australian Court of Criminal Appeal which had increased his non-parole period from 18 to 25 years. He submitted a petition for mercy to the Governor following which the Attorney-General, with the concurrence of the DPP, referred it to the Full Court as a fresh appeal. While in custody he was diagnosed with schizophrenia. The Court held that an appeal in such circumstances was similar to one where the High Court had allowed the appeal and remitted the matter to the Court of Appeal.

[94] *Davies v The King* [1937] VLR 150.

[95] AC Castles, *Executive References to a Court of Criminal Appeal* (1960) 34 *Australian Law Journal* 163, 171.

[96] *Sentencing Act 1991* (Vic) s 107; *Williamson v Inspector-General of Penal Establishments* [1958] VR 330; *R v Governor of Pentridge; Ex parte Arthur* [1979] VR 304.

though they are not directly payable to it.

Pardon

[1.30]

The prerogative of mercy may be exercised to pardon, remit or respite sentences, but not directly to commute them from one form of punishment to another. These terms have different meanings. A pardon is the "solemn act by which the Sovereign, either absolutely or conditionally, forgives or remits for the benefit of the person to whom it is granted the legal consequences of a crime he has committed".[97] Remission is the reduction of the amount of a sentence or penalty without changing its character. Respital or reprieve is the temporary postponement or suspension of the execution of a sentence[98] and the power to do so is also possessed by the trial judge.[99] Almost all sentences of a punitive character may be pardoned, including punishment imposed for contempt.[100] The effect of a free (unconditional) pardon is to relieve the offender of all penalties or forfeitures in consequence of the specific offence pardoned, but of no other prior offence.[101] The conviction itself, however, remains formally unreversed.[102] It is not the equivalent of an acquittal. A conditional pardon removes the penalty on condition that a lesser penalty is served. A pardon may be granted either before or during prosecution, in which case it may be pleaded in bar and thus bring the prosecution to an end, or after conviction, whereupon it may be pleaded in arrest of judgment or in bar of execution, thus resulting in the offender being discharged from punishment.[103] Pardons cannot be granted in advance of a crime being committed,[104] but may be

[97] *R v Milnes* (1983) 33 SASR 211, 237 per Legoe J citing *Bullock v Dodds* (1819) 2 B & Ald 258, 265; 106 ER 361, 364, 368; *R v Rudd* (1775) 1 Leach 115, 119; 168 ER 160, 162. A court cannot decree or pronounce a pardon: *R v Martens* [2009] QCA 351. An inquiry of the purposes of obtaining a pardon is confined to the question of conviction and cannot be sought in relation to questions of fitness to plead: *DPP (ACT) v Eastman* [2002] FCAFC 209; (2002) 118 FCR 360.

[98] P Brett, *Conditional Pardons and the Commutation of Death Sentences* (1957) 20 *Modern Law Review* 131.

[99] See [1.35].

[100] *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138. Two offences cannot be pardoned. First, at common law a common nuisance while it remains unabated (because the pardon may prejudice the rights of those injured by the nuisance), *Of Pardons* (1609) 12 Co Rep 30, 77 ER 1311; 2 Hawk PC; 3 Co Inst 236. Second, under the *Habeas Corpus Act 1679* 31 Charles II, cII, s 11 (see *Imperial Acts Application Act 1980* (Vic) Pt II, Div 2), the Crown cannot pardon the offence of sending a prisoner out of the jurisdiction to evade the protection of the writ of habeas corpus. At common law the Crown also could not pardon an offence against a penal statute and thus deprive the informer of their share of the penalty, but now the *Sentencing Act 1991* (Vic) s 108 enables it to remit, in whole or in part, any monetary penalty imposed under any Act as a penalty or forfeiture even though all or a portion of it is payable to parties other than the Crown, and to discharge from prison persons detained in default of such payment.

[101] *R v Harrod* (1846) 2 Cox CC 242.

[102] *Cuddington v Wilkins* (1615) Hob 67, 81–82, 80 ER 216, 231–232; *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561, 565; *R v Cosgrove* [1948] Tas SR 99; 4 *Blackstone Commentaries* 402. See also WL Stuart, *The King's Pardon* (1907) 4 *Commonwealth LR* 241; *Re Walsh* [1971] VR 33, 43. Pardon is not designed to control or undo the judicial or jury function of finding guilt, but only the executive action on sentence. Because the conviction itself survives a pardon, an appeal can be taken against it and an appellate court may, in an appropriate case, quash it: *R v Foster* [1984] 2 All ER 679. Quaere, whether a pardoned offence counts as a prior conviction on a later charge; cf *R v Milnes* (1983) 33 SASR 211, 217.

[103] A pardon is to be distinguished from an undertaking not to prosecute. The former can only be granted by and in the name of the Governor under the appropriate seal of state. It cannot be granted by the executive Government by

granted posthumously.[105] The royal prerogative may be used to release offenders from punishment without their consent, as they have no option but to accept unconditional pardons if granted within the legal authority of the Crown.[106] The situation is different with respect to conditional pardons. These are important in the absence of statutory powers of commutation, because they can be used to overcome the inability of the prerogative of mercy to be used to directly commute one form of punishment to another:[107]

> …commutation of punishment has long taken place under the form of conditional pardons. For the Crown, having by the prerogative the power of pardon, may annex to a pardon such conditions as it pleases. Thus, for offences for which the punishment was death, where it was not deemed advisable to carry the sentence of death into execution, the course, from an early period, was to grant a pardon on condition of the convict being transported to some settlement or plantation. But this could only be done with the consent of the felon. The Crown cannot compel a man, against his will, to submit to a different punishment from that which has been awarded against him in due course of law.

Nevertheless, the prisoner's consent is not required to the grant of pardon, but only to the performance of the conditions, compliance with which is essential to the validity of the pardon itself.

The position in relation to pardons for offences against federal law has been modified by statute. Under the *Crimes Act 1914* (Cth) s 85ZR, where someone has been granted a free and absolute pardon for any offence against federal law because they have been wrongly convicted of the offence,[108] the person is to be regarded throughout Australia, and by Australian federal and State authorities overseas, never to have been convicted of the offence. The person is relieved of any legal disabilities that accompany the conviction.[109] If a person has been granted a pardon for a reason other than having been wrongly convicted of the offence,[110] the conviction becomes

---

means of an "informal pardon". As a special plea it must be proved by the defendant on the balance of probabilities, see *R v Milnes* (1983) 33 SASR 211 and commentary (1984) 8 *Criminal Law Journal* 51.

[104] *R v Stead* (1992) 62 A Crim R 40.

[105] *R v Secretary of State for the Home Department; Ex parte Bentley* [1993] 4 All ER 442.

[106] P Brett, *Conditional Pardons and the Commutation of Death Sentences* (1957) 20 *Modern Law Review* 131, 139 citing *R v Boyes* (1861) 1 B & S 311, 121 ER 730; *Re Royal Prerogative of Mercy Upon Deportation Proceedings* [1933] SCR 269; 273 ("We do not think the authorities require us to hold that an unconditional pardon of an offence can take effect only upon acceptance by the grantee; and that, for example, a convict under the capital sentence can, in point of law, insist on being hanged, so that the only escape from such a result is by statute or by a colourable and unconstitutional exercise of the prerogative in granting successive reprieves"). In *Ex parte Lawrence* (1972) 3 SASR 361 it was likewise held that though a prisoner is under an obligation to submit to a sentence, he has no right to enforce its execution. This view was approved in *Censori v Governor of HM Prison, Morwell River* [1993] 1 VR 509.

[107] P Brett, *Conditional Pardons and the Commutation of Death Sentences* (1957) 20 *Modern Law Review* 131, 136–137 (Quoting the advice of law officers, Sir Alexander Cockburn and Sir Richard Bethell following an 1854 Government consultation).

[108] Or found guilty without recording a conviction: *Crimes Act 1914* (Cth) s 85ZM(1).

[109] *Crimes Act 1914* (Cth) s 85ZS.

[110] For example, on repeal of the particularly harsh law under which the person has been convicted, because of significant cooperation with law enforcement authorities or for political purposes such as the exchange of spies.

"spent" from the date of the pardon.[111] This means that although the federal conviction still stands, the person cannot legally be required to disclose that fact to anyone[112] and may lawfully claim that they have never been charged with or convicted of that offence.[113] The right of non-disclosure does not prevent a court taking account of the existence of prior spent convictions when making decisions in relation to sentencing.[114] Commonwealth law also provides for the reciprocal recognition of similar State and foreign schemes of pardoning for wrongful conviction, or limiting the use that can be made of spent convictions.

Reprieve

[1.35]

Reprieve is the withdrawal of a sentence[115] for an interval of time so as to suspend or delay its execution. It may be granted by the Crown in the exercise of the prerogative of mercy, or by the court empowered to order the sentence to be executed.[116] Either can come to the offender's aid if the other declines to do so, and each can proceed upon a different view of the facts of the particular case. The judicial discretion to grant a reprieve is a common law power independent of any statutory provisions that authorise a stay of execution pending an appeal or otherwise.[117] It derives from the court's obligation to do justice, as well as the control it retains over its judgments until they are completely satisfied:[118]

> It came into being when the appellate processes were very limited and highly technical … and it was used as a method of achieving justice within the law as it stood before the creation of the extensive appellate system that is now embodied in Part VI of the *Crimes Act 1958*, though the introduction of that system has not rendered it superfluous. At common law, a reprieve, by which the execution of a sentence for crime (which may or may not be capital) is suspended, may take place in one of three ways: (1) *ex mandato regis*, in the exercise of the royal prerogative of mercy; (2) *ex arbitrio judicis*, at the discretion of the Court to enable the offender to apply for an absolute or conditional pardon or commutation or mitigation of sentence; (3) *ex necessitate legis*, where some fact or circumstance is disclosed which entitles the offender to a delay in execution.

There has been some dispute regarding the continued existence of the judicial power to reprieve

---

[111] *Crimes Act 1914* (Cth) s 85ZM(2). Convictions leading to 30 months imprisonment or less may also be treated as "spent" through the effluxion of time (5 years for minors; 10 years for adults), unless further convictions are recorded.
[112] *Crimes Act 1914* (Cth) s 85ZV.
[113] *Crimes Act 1914* (Cth) s 85ZW. It is even lawful to deny the existence of a spent conviction on oath.
[114] *Crimes Act 1914* (Cth) s 85ZZH(c). See this section and succeeding ones for numerous other exclusions from the spent conviction scheme; see also [9.370].
[115] From *reprendre*, to take back.
[116] In Victoria this means not only the trial judge, but also the Full Supreme Court: *Ryan v Attorney-General (Vic)* [1967] VR 514, 519.
[117] For example, *Criminal Procedure Act 2009* (Vic) ss 264 and 309; *Criminal Procedure Act 2004* (WA) s 121; *Judiciary Act 1903* (Cth) s 72(2).
[118] *Ryan v Attorney-General (Vic)* [1967] VR 514, 517 per Barry J.

in Victoria[119] but it appears to be accepted that a trial judge or a Court of Appeal in its criminal jurisdiction does have such power. However, the Supreme Court, in its civil jurisdiction, has no power to restrain by injunction or otherwise, the execution of a sentence where the applicant is the subject of a judgment of the court in its criminal jurisdiction that is regular in substance and in form.[120] Though discussion of the judicial discretion to reprieve has usually taken place in the context of staying the execution of a death penalty, there is nothing in principle to deny its applicability to other forms of sentence where execution would have irrevocable consequences (eg destruction of seized items) and where the trial judge regards it as essential that their sentence temporarily ceases to be an authority that can be acted upon.

There exists a further common law power to stay proceedings, independent of the criminal law governing executions and reprieve. This was relied upon in 1962 by Chief Justice Sir Owen Dixon when the *Tait* case came before the High Court on an application for leave to appeal after the Victorian courts had denied they possessed power to reprieve. In granting a stay of execution – a mere 24 hours before the applicant was due to be hanged[121] – his Honour asserted that, independent of statute, superior courts (both federal and State) possessed an inherent jurisdiction to stay proceedings to preserve the subject matter of a case pending a decision.[122] This power is aimed solely at maintaining the status quo until appellate review is complete, and extends to controlling any action in execution of a sentence that would have the effect of stultifying the tribunal's ability to consider the case before it.[123] In *Ryan v Attorney-General (Vic)*, Barry J (with whom Monahan J agreed) expressed the concept in the following terms:[124]

> [It] is the duty of a superior court of general jurisdiction to preserve in existence the subject-matter of legal proceedings properly instituted in the Court, whether that subject-matter be a human being or any other object of legal significance, until the proceedings, including those of an appellate nature, have been completed, and that it necessarily follows from that obligation that the Court has an inherent power to make whatever order is required to restrain the destruction of the subject-matter of the proceedings.

Judiciary

[1.40]

Parliament's general practice is to prescribe maximum penalties, leaving it to the sentencer to fix a sentence appropriate to the circumstances of the case. If the function of Parliament is to make laws, the "function of the courts is to interpret those laws according to the intention of

[119] See *Tait v The Queen* [1963] VR 547, 550 (sentence of death); *Ryan v Attorney-General (Vic)* [1967] VR 514 (application for an injunction to prevent execution of sentence rejected as incompetent).
[120] *Ryan v Attorney-General (Vic)* [1967] VR 514.
[121] *Tait v The Queen* [1962] HCA 57; (1962) 108 CLR 620 at [2].
[122] A court of appeal has an inherent jurisdiction to make orders for the protection of property or persons pending the determination of an appeal to it, *Franov v Deposit & Investment Co Ltd* [1962] HCA 45; (1962) 108 CLR 460, and a trial court possesses a similar jurisdiction.
[123] C Howard, *Time and the Judicial Process* (1963) 37 *Australian Law Journal* 39, 43; JD Feltham, *The Common Law and the Execution of Insane Criminals* (1964) 4 *Melbourne University Law Review* 434, 471–473.
[124] [1967] VR 514, 515.

Parliament as disclosed by the language used, and to apply them in good faith to cases as they arise, in a way which gives effect to the intention of the Parliament".[125] The judicial function is exercised in two forums. Sitting at first instance, judges must determine the factual basis upon which sentence is to be imposed, isolate the relevant law and policy considerations, and apply them to the facts.[126] Exercising their appellate function, judges are required to correct error, and in appropriate cases to set appropriate standards of punishment.[127]

The primary sentencing task

[1.45]

Sentencing decisions in relation to individual cases are made by judges following a trial, or most commonly, a plea of guilty. Sentencers must have regard to the common law or statutory limits that define the options available to them and control the manner in which different options may be combined. But they are still left with considerable discretion to develop more detailed principles on a case-by-case basis within the framework allowed by the legislation. "Discretion" in the judicial context has been described by the High Court in the following terms:[128]

> "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

It is often said that sentencing is one of the most difficult and complex tasks that a judge must undertake. Buchanan JA has identified it thus:[129]

> The sentencing judge must find the facts which constitute and are relevant to the commission of the offence in order to determine the gravity of the offence and the part played by the offender. The judge must find the facts which explain why the offence was committed and which constitute the offender's reaction to it in order to assess the offender's culpability. The judge must identify and evaluate mitigating and aggravating circumstances attending the commission of the crime. The judge must find the facts relating to the antecedents and character of the offender. The judge must make a finding as to the nature and degree of harm to

[125] *R v Tio* (1984) 35 SASR 146, 147.
[126] Victorian Sentencing Committee, *Report: Sentencing* (VGPO, 1988) pp 214–215.
[127] See [17.10].
[128] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47 at [19] per Gleeson CJ, Gaudron and Hayne JJ (footnotes omitted); (2000) 203 CLR 194; see also *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 at [42].
[129] *R v MacNeil-Brown* [2008] VSCA 190; (2008) 20 VR 677 at [125]; see also observations of Kellam JA at [14].

> the victim of the crime. The judge must weigh circumstances such as a plea of guilty and prior convictions. In particular cases the sentencing judge must make findings as to matters such as the offender's state of health and the effect of imprisonment upon the offender's family and dependents. In other cases the judge must make findings as to the mental condition of the offender, the part which it played in the commission of the crime, and the likely effect of imprisonment upon the offender. In the light of those findings the judge must determine whether and to what extent considerations such as general and specific deterrence and denunciation are to be moderated. The judge must determine the offender's prospects of rehabilitation. In the light of the findings and bearing in mind the maximum penalty prescribed for the offence and current sentencing practices, the sentencing judge must determine how the objects set out in s 5(1) of the *Sentencing Act 1991* (Vic) are to be achieved.

The wide discretion[130] invested in a judge is used "to impose a sentence that is just and appropriate in all the circumstances of the particular case".[131] This discretion is regarded as being of "vital importance"[132] as it enables a sentencer to consider all of the relevant facts and circumstances particular to each case. The corollaries of this broad view of sentencing are that although there may be a range of appropriate sentences, there is no one correct sentence.[133] Although there might be recurring patterns of conduct or features, no two cases are exactly alike.[134] Judicial discretion, individualised justice and fair sentencing are regarded as being closely related.[135] Though the court's discretion is wide, it is not at large. Courts must sentence within the boundaries of the relevant legislation[136] and the common law.[137]

The decisions of trial judges are accorded significant weight by appellate courts because they have had the opportunity to assess the gravity of the crime, the demeanour of witnesses, the effect of the crime on the victim and have been able to view the defendant's behaviour at first hand, although these factors may have less force where the offender has pleaded guilty, as they

---

[130] Discretion should be "very wide"; see *House v The King* [1936] HCA 40; (1936) 55 CLR 499.

[131] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [5.21]; see also A Freiberg and S Krasnostein, *Statistics, Damn Statistics and Sentencing* (2011) 21 *Journal of Judicial Administration* 72 from which some of the following is drawn.

[132] *Lowndes v The Queen* [1999] HCA 29; (1999) 195 CLR 665 at [15]; *Everett v The Queen* [1994] HCA 49 at [4] per McHugh J; (1994) 181 CLR 295; *DPP v Martin* [2009] VSCA 316; *R v MacNeil-Brown* [2008] VSCA 190; (2008) 20 VR 677.

[133] *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610 at [46]; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [27]; *R v Young* [1990] VR 951; *Hudson v The Queen* [2010] VSCA 332 at [8]; *Bowen v The Queen* [2011] VSCA 67; *DPP v Martin* [2009] VSCA 316 at [20].

[134] *CW v The Queen* [2011] NSWCCA 45; *Russell v The Queen* [2011] VSCA 147; *Hudson v The Queen* [2010] VSCA 332 at [8]; *Furia v R* [2010] NSWCCA 326; *R v Bartel* [2008] SASC 289; *DPP v Arney* [2007] VSCA 126; *R v JO* [2009] NTCCA 4; (2009) 24 NTLR 129; *Western Australia v Akizuki* [2008] WASCA 267 (circumstances of sexual offences and offenders "are almost infinitely variable"); *Royer v Western Australia* [2009] WASCA 139.

[135] "[I]f justice is not individual, it is nothing": *Kable v DPP* (1995) 36 NSWLR 374, 394 per Mahoney ACJ.

[136] Courts will generally be bound by any relevant legislation, but when they exercise their power to punish for contempt of court they are not strictly bound by the provisions of the *Sentencing Act 1991* (Vic). However, they should take into account any provision which is not inconsistent with the contempt power: *Rich v Attorney-General (Vic)* [1999] VSCA 14; cf *Martin v Trustrum (No 3)* [2003] TASSC 80; (2003) 12 Tas R 131 (the inherent power of a court to punish a person for contempt is not inhibited by statute).

[137] J Edelman, *Judicial Discretion in Australia* (2000) 19 *Australian Bar Review* 285.

will in the majority of cases.[138]

Appellate role

[1.50]

The judiciary also has an appellate jurisdiction originally modelled on the *Criminal Appeal Act 1907* (UK).[139] Appellate courts have two primary functions: to correct errors and to provide guidance to lower courts. In relation to sentencing, they have a role in settling questions of law and in interpreting particular statutory provisions bearing on sentencing. Such decisions are binding to the same extent as any others pertaining to the substantive criminal law. But appellate courts also see their task as that of minimising disparities in sentencing standards (though still recognising "that perfect uniformity cannot be attained and that a fair margin of discretion must be left to the sentencing judge").[140] They have accepted, at least where error is manifest, that it is their duty to formulate principles to guide sentencers in the application of the discretion that the fixing of sentence requires.[141]

Courts' recommendations to the Executive

[1.55]

Generally a court's functions end once it has passed sentence.[142] Courts do not have the authority to direct correctional authorities as to where or how a sentenced offender should held or treated, nor can they determine when a person should be released from custody. These are matters for the Executive, as the New South Wales Court of Appeal has stated:[143]

> … as an Appeal Court, it is not its function, nor is it equipped, to fulfil a continuing supervisory role over the effect of imprisonment upon an individual. Such a matter involves essentially administrative considerations and remedial action involves essentially an exercise of administrative power that this Court does not possess. This Court exercises judicial power; it has no power or authority to give administrative directions regarding the treatment of prisoners. Nor has it power or authority by administrative order to change the character or concomitants of sentences or to bring about total or qualified release of persons in custody. That power and authority resides in the hands of the Executive

[138] *Whittaker v The King* [1928] HCA 28; (1928) 41 CLR 230, 249; *Skinner v The King* [1913] HCA 32; (1913) 16 CLR 336.
[139] See now *Criminal Procedure Act 2009* (Vic) Pt 6.3. See also *Criminal Appeal Act 1912* (NSW); *Criminal Code* (NT) s 407; *Criminal Code 1924* (Tas) s 400; *Criminal Appeals Act 2004* (WA). The origins of the United Kingdom legislation establishing a Court of Criminal Appeal are described by DA Thomas, *Constraints on Judgment*, Occasional Series No 4 (Institute of Criminology, 1979) pp 75–93. See also L Radzinowicz and R Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem* (1979) 127 *University of Pennsylvania Law Review* 1288, 1327–1340; A Freiberg and P Sallmann, *Courts of Appeal and Sentencing: Principles, Policy and Politics* (2008) 26 *Law in Context* 43.
[140] *Griffiths v The Queen* [1977] HCA 44 at [32] per Jacobs J; (1977) 137 CLR 293.
[141] *Police v Cadd* [1997] SASC 6187; (1997) 69 SASR 150; see also Chapter 15.
[142] However, courts may exercise a supervisory function over an offender where empowered by statute to do so.
[143] *R v Vachalec* [1981] 1 NSWLR 351 at 353–354; *R v Williams* [2005] VSCA 274.

> Government. Administrative miscarriage in the working out of a sentence cannot be remedied by this Court as it has no jurisdiction to enter the administrative field.

Recommendations that an offender should never be released from custody are recommendations only and have no binding effect.[144] Courts are not permitted to anticipate executive action in determining the length of a prison sentence.[145] Sometimes, courts may be made aware of the inadequate or harmful conditions under which a prisoner is being held[146] but they are able to do little other than draw such matters to the attention of the correctional authorities.[147] In *DPP v Moore*[148] for example, Lasry AJA was moved to note:

> … the respondent is a person who, given the consequences of his extremely adverse and deprived history, carries a risk of further violent offending whenever he be released. If ever there was a case for the prison authorities to ensure that concentrated treatment and assistance which could avoid that eventuality is rendered to a prisoner, this is such a case. Mr Moore's life in the future depends on him being expertly assisted to deal with his history and his impairments and also that he be invested with the motivation to take up the value of that assistance. If that does not occur in a manner commensurate with his need, there will, sooner or later, and regardless of the outcome of this appeal, be adverse consequences.

Where there is evidence of possible hardship to a prisoner due to the conditions of confinement, some courts have decreased the length of the term of imprisonment or the non-parole period or both.[149] However, as noted above, the courts are divided as to whether dealing with hardship is a judicial or executive function.[150]

Courts generally cannot direct the Executive to provide funds for particular programs or services. In most circumstances a court will impose a sentence, whether it is custodial or community-based, usually conditional, and assume or expect that the facilities will be provided as a matter of course. In some circumstances an offender will be directed to participate in a program, while in others they may be given an opportunity to participate. But if a program or service is unavailable due to funding constraints, the court cannot impose a condition or direct participation in a program that is not available because it does not exist, is geographically unavailable, is already at capacity or beyond the means of the offender.[151] In *Winters v Attorney-General (NSW)*[152]

---

[144] *Baker v The Queen* [2004] HCA 45 at [7]–[8] per Gleeson CJ and at [46]–[49] per McHugh, Gummow, Hayne and Heydon JJ; (2004) 223 CLR 513; *Crump v New South Wales* [2012] HCA 20 at [2] per French CJ.
[145] See *Sentencing Act 1991* (Vic) s 5(2AA) (court must not have regard to any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind).
[146] For example, fresh evidence may be placed before the court on an appeal against sentence.
[147] *R v SH* [2006] VSCA 83 (appellant had been assaulted in prison and suffered post-traumatic stress but had not received adequate medical or psychological care).
[148] [2009] VSCA 264 at [78]; see also comments of Neave and Redlich JJA at [30] ("We … note that it would be in the interests of the community and the respondent for such support to be provided while he is in gaol and particularly in the event that he is released on parole.")
[149] See for example, *R v Crowley* [2009] VSCA 176 (protective custody regime operated to deprive offender of counselling and psychiatric treatment which he required).
[150] See [1.20] and see also [6.125] (hardship to offender).
[151] *Winters v Attorney-General (NSW)* [2008] NSWCA 33 at [31] per Mason P.
[152] [2008] NSWCA 33.

Giles JA was of the view that courts should not make orders that they know are likely to be futile and should not "seek to compel indirectly what can not be compelled by a direct order".[153] Where the court is empowered to impose a condition that it "considers appropriate", the same limitations would appear to apply.[154] However, where a program requires funding, an unreasonable refusal to fund for a particular offender may be impugned as an abuse of process.[155]

The Courts

[1.60]

Sentences may be imposed at each of the three levels of the Victorian judicial hierarchy: the Magistrates' and Children's Courts, the County Court, and the Supreme Court. The last two may also entertain appeals against sentence by an accused or the prosecution.

Magistrates' Court

[1.65]

The overwhelming majority of sentencing orders are handed down in the Magistrates' Court. In 2011–12, the Magistrates' Court finalised 180,731 cases relating to between 90,000 and 100,000 people.[156] This amounts to around 90 per cent of all criminal cases.[157] The Court sits at 54 locations in Victoria. The maximum sentence that may be imposed by a Magistrates' Court for a single offence triable summarily is 2 years[158] while the maximum sentence of imprisonment for offences committed at the same time is 5 years.[159] Sentences for summary offences are limited to the prescribed maximum penalty, but the maximum term that can be imposed for a summary offence is 2 years even if the statute provides for a longer sentence.[160] The maximum fine will usually be specified by statute, but where that is not the case the maximum fine is defined by reference to the penalty scale in the *Sentencing Act 1991* (Vic) s 109 at a rate of 10 penalty units for each month of imprisonment.[161]

A Magistrates' Court may hear and determine summarily a charge for an indictable offence if the

[153] [2008] NSWCA 33 at [62].
[154] *Winters v Attorney-General (NSW)* [2008] NSWCA 33 at [122] per Hodgson JA; see also [14.15] (supervision orders).
[155] *Winters v Attorney-General (NSW)* [2008] NSWCA 33 at [69] per Giles JA; see also *State of NSW v Brookes* [2008] NSWCA 212 at [23].
[156] Magistrates' Court Victoria, *Annual Report 2011–2012* (2012) p 90.
[157] See generally RG Fox, *Victorian Criminal Procedure* (13th ed, Monash Law Book Co-operative, 2010) pp 94ff; Sentencing Advisory Council, *Sentencing Outcomes in the Magistrates' Court*, http://www.sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-statistics/court-statistics/magistrates%E2%80%99-court-sentencing-outcomes. Australia-wide, in 2011–12, 91% of all cases finalised by the criminal courts were finalised in the Magistrates' Courts, 6% in Children's Courts and 3% in the Supreme and District/County Courts: Australian Bureau of Statistics, *Criminal Courts, Australia, 2011–12*, 4513.0 (ABS, 2013).
[158] *Sentencing Act 1991* (Vic) s 113, though this is subject to contrary provisions.
[159] *Sentencing Act 1991* (Vic) s 113B.
[160] *Sentencing Act 1991* (Vic) s 113A. If the statute does not provide for a maximum penalty then the same limit applies: *Sentencing Act 1991* (Vic) s 113C.
[161] On penalty units see [7.70].

court considers the charge is appropriate to be so heard and the accused consents to a summary hearing.[162] In deciding whether to hear the charge, the court must have regard to the seriousness of the offence – including the nature of the offence, the manner in which the offence is alleged to have been committed, the apparent degree of organisation, the presence of aggravating circumstances, whether the offence forms part of a series of offences being alleged against the accused, the complexity of the proceedings for determining the charge, the adequacy of sentences available to the court having regard to criminal record of the accused, whether a co-accused is charged with the same offence and any other matter that the court considers relevant.[163]

Approximately 4 to 5 per cent of offenders sentenced in the Magistrates' Court are sentenced to imprisonment, around 50 to 55 per cent are fined, around 5 per cent are sentenced to a community correction order, around 22 per cent are sentenced to an adjourned undertaking or had charges discharged or dismissed, while the remainder receive other orders including wholly or partially suspended sentences or are placed on a criminal justice diversion plan.[164]

The Court is divided into a number of divisions, including a Drug Court division,[165] a Koori Court division,[166] a Family Violence Division,[167] a Neighbourhood Justice division,[168] and an Assessment and Referral Court List.[169] There is also a range of support services[170] that include the Court Referral and Evaluation for Drug Prevention and Treatment (CREDIT) Bail Support Program,[171] the Court Integrated Services Program (CISP),[172] the Koori Liaison Officer Program and the Koori Community Engagement Officer,[173] the Mental Health Court Liaison Service[174]

---

[162] *Criminal Procedure Act 2009* (Vic) s 29(1).

[163] *Criminal Procedure Act 2009* (Vic) s 29(2); see *DPP v Bratich* [2013] VSCA 53 for a discussion of these provisions.

[164] See Sentencing Advisory Council, *Sentencing Outcomes in the Magistrates' Court*, http://www.sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-statistics/court-statistics/magistrates%E2%80%99-court-sentencing-outcomes.

[165] *Magistrates' Court Act 1989* (Vic) s 4A.

[166] *Magistrates' Court Act 1989* (Vic) s 4D.

[167] *Magistrates' Court Act 1989* (Vic) s 4H.

[168] *Magistrates' Court Act 1989* (Vic) s 4M.

[169] *Magistrates' Court Act 1989* (Vic) s 4S.

[170] See generally, The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).

[171] This program, which has been operating in its current form since 2004, aims to provide access to a range of services for offenders who have been charged and bailed in order to assist them to successfully complete their bail period and reduce their offending behaviour in the long term. The program is a short-term measure (around 4 months) and does not require the person to plead guilty in advance of a hearing. Information about the CREDIT Bail Support Program is available through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).

[172] This program, established in 2006, aims to ensure that accused persons receive support and services and thereby to reduce their re-offending. It is available to persons on summons, bail or remand pending a bail hearing and does not require a person to plead guilty. Information about CISP is available through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013). See also Law Reform Committee, Parliament of Victoria, *Inquiry Into Access to and Interaction with the Justice System and Their Family and Carers* (2013) [7.2.3].

[173] The Koori Liaison Officer Program commenced in 2002 and operates as part of the CISP program. Its aim is to provide Koori people with services that will maximise their chances of rehabilitation through culturally appropriate

and the Youth Justice Court Advice Service.[175] Together, these divisions and programs which have developed over the past two decades represent a significant shift in the way that courts view their role in relation to criminal behaviour. Variously referred to as "problem-solving", "problem-oriented" or "solution-focused" courts or programs,[176] these procedures, interventions and forums represent a legislative and judicial recognition that certain individual and social problems require comprehensive approaches that move beyond the narrow confines of the law. Their major features are that they aim to provide early interventions, attempt to integrate services within a criminal justice framework, provide for a more active and continuing role for the judge, and rely upon contributions from a range of disciplines.[177]

With the development of these new forms of courts the judicial role has evolved. The traditional role of the judge has been to decide cases according to the relevant rules and to impose the appropriate sanction that will be carried out by the executive arm of Government. However, these courts have introduced new procedures and sanctions that require different skills of judicial officers. Chief Justice French, writing extra-judicially, has observed that although the judiciary is not a dispute resolution service:

> … the judicial process cannot be quarantined from underlying, interdependent, personal and social issues. A judicial process with no awareness of those underlying issues and unable to fashion outcomes informed by such awareness is likely to be ineffective in contributing to their long-term resolution. In this respect

---

and sensitive intervention. The Officer is a point of contact for Koori offenders who come before the courts and a link between the court and Koori communities. Information about the Koori Liaison Officer Program and the Koori Community Engagement Officer is available through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).

[174] This service commenced in 1994 and provides a court-based assessment and advice service whose aim is to provide advice to magistrates in relation to people who may have a mental illness appearing before their court. Information about the Mental Health Court Liaison Service is available through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).

[175] This service is available to people aged between 18 and 20 years who are appearing before any of the adult courts. It aims to divert young offenders from the adult criminal justice system by providing advice to both courts and accused persons, assessments in relation to a range of dispositions available to the courts for young offenders and case management of young people subject to bail or a deferred sentence. Information about the Youth Justice Court Advice Service is available through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).

[176] A Freiberg, *Problem-oriented Courts: Innovative Solutions to Intractable Problems?* (2001) 11 *Journal of Judicial Administration* 8; A Freiberg, *Problem-oriented Courts: An Update* (2005) 14 *Journal of Judicial Administration* 178; A Phelan, *Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part I* (2003) 13 *Journal of Judicial Administration* 98; A Phelan, *Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part II* (2004) 13 *Journal of Judicial Administration* 137; A Phelan, *Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part III* (2004) 13 *Journal of Judicial Administration* 244; J Payne, *Specialty Courts: Current Issues and Future Prospects*, Trends and Issues in Crime and Criminal Justice No 317 (Australian Institute of Criminology, 2006); L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009); MS King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) Chs 9 and 10.

[177] MS King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) Ch 1.

> drug courts, family violence courts, community courts, re-entry courts and mental health courts represent important developments.
>
> They reflect the view that a more comprehensive resolution of legal problems is possible than in the traditional judicial process, by the courts engaging with problems of substance abuse, family violence, mental health, housing, employment and relationship questions. Generally, the approach of these courts is not confined to a discrete disposition, but involves monitoring of participants, the assistance of a multi-disciplinary court team, promotion of notions of participant accountability and provision of a range of rehabilitation and community support services.
>
> The judges and magistrates who preside in these courts have an important role to play in promoting better outcomes for offenders, the legal system and the community. The particular challenge they face is to discharge the core judicial function described earlier but to do so with an awareness of the nature of the underlying problems and the steps to positive behavioural change.[178]

The skills required of judges sitting in these jurisdictions go beyond the traditional ones of legal analysis and include interpersonal skills such as listening and effective communication, transformational leadership and motivational skills as well as requiring a broader understanding of a number of the social sciences.[179]

Drug Court Division

[1.70]

The Victorian Drug Court was established as a division of the Magistrates' Court in 2002 and operates only in Dandenong, an outer south-eastern suburb.[180] Drug courts were developed in the belief that courts could become involved in treatment. Their major features are that they integrate drug-treatment services within a criminal justice case processing system, provide early intervention, use a non-adversarial approach, create a dominant and continuing role for the judge,

---

[178] R French, *Foreword*, in MS King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009); cf the views of the Supreme Court of South Australia on the role of the courts in deferring sentence for rehabilitative purposes expressed in *R v Thompson* [2012] SASCFC 149 at [27] per Gray J ("[the provision] …envisages the judiciary assuming a role in fostering rehabilitation which overlaps with the responsibilities of the executive government. This itself is exceptional").

[179] MS King, *Problem-solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership* (2008) 17 *Journal of Judicial Administration* 155; MS King, *The Therapeutic Dimension of Judging: The Example of Sentencing* (2006) 16 *Journal of Judicial Administration* 92; MS King and J Wager, *Therapeutic Jurisprudence and Problem-Solving Judicial Case Management* (2005) 15 *Journal of Judicial Administration* 28; DK Malcolm, *The Application of Therapeutic Jurisprudence to the Work of Western Australian Courts* (2007) 17 *Journal of Judicial Administration* 127; A Cannon, *Therapeutic Jurisprudence in Courts: Some Issues of Practice and Principle* (2007) 16 *Journal of Judicial Administration* 256; A Cannon, *Smoke and Mirrors or Meaningful Change: The Way Forward for Therapeutic Jurisprudence* (2008) 17 *Journal of Judicial Administration* 217; MS King, *Reflections on ADR, Judging, Non-adversarial Justice: Parallels and Future Developments* (2012) 22 *Journal of Judicial Administration* 76; A Cannon, R Doley, C Ferguson and N Brooks, *Antisocial Personality Disorder and Therapeutic Justice Court Programs* (2012) 22 *Journal of Judicial Administration* 85.

[180] *Sentencing Act 1991* (Vic) ss 18X to 18ZS; see [12.145].

use frequent substance abuse testing, require frequent contacts with the court, provide a comprehensive treatment and supervision program, and employ a system of graduated sanctions and incentives.[181]

The key mechanism for the Victorian Drug Court is the Drug Treatment Order (DTO), a sentencing order that can be imposed only where imprisonment is a real option.[182] The DTO, which has a maximum period of 2 years, consists of two parts – a treatment and supervision part and a custodial part. The treatment and supervision part consists of conditions that are designed to address the offender's drug or alcohol dependency and has a duration of 2 years. The custodial part is a term of imprisonment of up to 2 years that the court must impose upon the offender. This is the term of actual imprisonment that the offender would have received had they not been placed on a DTO, and need not correspond to the length of the treatment and supervision part of the order. It is intended to be proportionate to the nature and seriousness of the offence. The offender is not required to serve the custodial part of the DTO unless the court activates it upon breach or cancellation of the DTO. The court must be constituted by a magistrate who has been assigned to that Division by the Chief Magistrate and it must exercise its jurisdiction with as little formality and technicality, and with as much expedition as the requirements of the *Magistrates' Court Act 1989* (Vic) and the *Sentencing Act 1991* (Vic) permit.[183]

Drug courts also operate in New South Wales,[184] South Australia,[185] Western Australia[186] and Tasmania.[187] Their legal foundations and sentencing structures differ widely, some being bail-based and some being post-conviction sentence-based.[188] The Queensland Drug Court was abolished in 2012.

Koori Court Division

[1.75]

The Koori Court Division of the Magistrates' Court commenced operation in 2002 and operates

[181] A Freiberg, *Australian Drug Courts* (2000) 24 *Criminal Law Journal* 213; D Indermaur and L Roberts, *Drug Courts in Australia: The First Generation* (2003) 15 *Current Issues in Criminal Justice* 136; C Cappa, *The Social, Political and Theoretical Context of Drug Courts* (2006) 32 *Monash University Law Review* 145; J Payne, *Specialty Courts: Current Issues and Future Prospects*, Trends and Issues in Crime and Criminal Justice No 317 (Australian Institute of Criminology, 2006); New South Wales Law Reform Commission, *Sentencing*, Report 139 (NSWLRC, 2013) Ch 15.

[182] For a more detailed discussion of the Drug Treatment Order see [12.145].

[183] *Magistrates' Court Act 1989* (Vic) s 4A.

[184] *Drug Court Act 1998* (NSW); see also R Dive, *Judging in the Land of the Chaotic* (2011) 20 *Journal of Judicial Administration* 185.

[185] The South Australian scheme operates under its general bail legislation, *Bail Act 1985* (SA), which provides judicial officers with wide discretion in dealing with offenders brought before the courts.

[186] *Sentencing Act 1995* (WA) ss 33A – 33P.

[187] Tasmania has a Court Mandated Drug Diversion Program which has various categories of intervention: the first is a condition of bail (up to 12 weeks), the second is a condition of probation or suspended sentence (Sentencing into Drug Treatment) and the third is a sentencing option for those who would otherwise be subject to imprisonment for up to 18 months (Drug Treatment Order); *Sentencing Act 1997* (Tas) Pt 3A.

[188] *Drug Rehabilitation (Court Diversion) Act 2000* (Qld).

at a number of locations around the State.[189] The court deals with Aboriginal offenders who plead guilty and is required to exercise its jurisdiction with as little formality and technicality, and with as much expedition as the requirements of the *Magistrates' Court Act 1989* (Vic) and the *Sentencing Act 1991* (Vic) permit.[190] The Court is also directed to ensure that, so far as is practicable, proceedings are conducted in a way that will make them comprehensible to the accused, a family member of the accused and any member of the Aboriginal community who is present in court.[191] The Secretary of the Department of Justice may appoint a member of the Aboriginal community as an Aboriginal elder or respected person for the purpose of assisting the court.[192] The Court has no additional sentencing powers above those of the Magistrates' Court generally and the sentencing decision remains with the magistrate. Though Indigenous courts vary across the country, they have a number of common features:[193]

> All emphasise *improved communication* between legal authorities, offenders, victims, and community members, using plain language and reducing some legal formalities. All emphasise *procedural justice*, that is, treating people with respect, listening to what people have to say, and being fair to everyone. All suggest the value of *using persuasion and support* to encourage offenders to be law-abiding, and all assume that *incarceration should be used as a penalty of last resort*.

The procedures adopted by Koori Courts have been described in detail by the Court of Appeal in *R v Morgan*[194] which, while it refers to proceedings in the County Court, generally describes those followed in the Magistrates Court, though possibly with a little more formality:

> [24] Stage 2 is the sentencing conversation. This procedure is different from the usual plea hearing conducted in the County Court. The sentencing conversation is carried out as a discussion around a table. The Judge sits at the table with an Aboriginal elder or respected person on either side of him or her. Also seated at

[189] *Magistrates' Court Act 1989* (Vic) s 4D; see also Sentencing Advisory Council, *Sentencing in the Koori Court Division of the Magistrates' Court* (Sentencing Advisory Council, 2010); M Harris, *From Australian Courts to Aboriginal Courts in Australia: Bridging the Gap?* (2004) 16 *Current Issues in Criminal Justice* 26; B McAsey, *A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court* (2006) 10 *Deakin Law Review* 654; K Auty, *We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts* (2006) 1 *eLaw, Murdoch University Electronic Journal of Law, Special Series* 101; K Auty, D Briggs, K Thomson, M Gibson and G Porter, *The Koori Court: A Positive Experience* (2005) 79 *Law Institute Journal* 40; E Marchetti and K Daly, *Indigenous Courts and Justice Practices in Australia*, Trends and Issues in Crime and Criminal Justice No 277 (Australian Institute of Criminology, 2004); E Marchetti and K Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model* (2007) 29 *Sydney Law Review* 415; E Marchetti, *Indigenous Sentencing Courts*, Brief No 5 (Indigenous Justice Clearinghouse, 2009); E Marchetti, *Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Power Imbalances During the Sentencing Hearing* (2010) 43 *Australian and New Zealand Journal of Criminology* 263.

[190] *Magistrates' Court Act 1989* (Vic) s 4D(4).

[191] *Magistrates' Court Act 1989* (Vic) s 4D(5).

[192] *Magistrates' Court Act 1989* (Vic) s 17A.

[193] E Marchetti and K Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model* (2007) 29 *Sydney Law Review* 415, 428.

[194] [2010] VSCA 15; (2010) 24 VR 230 at [24]–[30]. A more detailed description can be found in Sentencing Advisory Council, *Sentencing in the Koori Court Division of the Magistrates' Court: A Statistical Report* (Sentencing Advisory Council, 2010) pp 15–19.

the table are the offender, the Koori Court officer, the corrections officer, the offender's legal representative and prosecutor. Each participant has the opportunity to participate in the sentencing conversation.

[25] The first part of the sentencing conversation concerns aspects of cultural significance and is repeated with every offender. The sentencing conversation begins with an acknowledgement of country. The Judge explains to the offender that the court respects Aboriginal people and culture and that the room has been smoked in keeping with tradition. The Judge introduces the participants or asks them to introduce themselves and explain to the offender their role in the process.

[26] The second part of the conversation deals with the law. The prosecutor provides a summary of the offending, details the maximum penalty applicable and makes submissions on penalty. The defence lawyer will then outline the offender's situation, placing before the Court the plea material, and make submissions about penalty. The offender is asked to speak to the court about their offending and about themselves. Family members, support persons, or counsellors are also invited to contribute to the conversation.

[27] The Aboriginal elders or respected persons may then speak to the offender. The elders or respected persons may provide information on the background of the offender and possible reasons for the offending behaviour. They may also explain relevant kinship connections and how a particular crime has affected the indigenous community, and may provide advice on cultural practices, protocols and perspectives relevant to sentencing. They may also speak to the offender about his or her behaviour and its effect upon the community.

[28] The victim will be offered the opportunity to be heard. The victim can attend the conversation and speak or a Victim Impact Statement may be read aloud in court at their request. (In the present case that did not occur.)

[29] During the sentencing conversation the Judge may ask the Koori Court officer about the availability of local services and programs appropriate to the offender. The corrections officer can also provide advice about indigenous programs offered by Corrections Victoria, either in custody or with the offender remaining in the community. The aim of this approach is to maximise the rehabilitation prospects of the offender.

[30] The Judge may discuss community and family considerations openly with the Aboriginal elders or respected persons and other participants at the table.

[31] Stage 3 is the sentence. The usual sentencing procedures are followed. The procedure is formal with the Judge sitting alone at the bench to deliver the sentence.

Participation in a sentencing conversation may be treated as a mitigating factor, though the

extent to which this will occur will vary from case to case.[195]

Neighbourhood Justice Division

[1.80]

The Neighbourhood Justice Division of the Magistrates' Court was established in 2007 in the suburb of Collingwood in the City of Yarra.[196] The Court is located within the Neighbourhood Justice Centre, which is a separate but related entity.[197] The court was established in order to simplify access to the justice system and apply therapeutic and restorative approaches in the administration of justice (both civil and criminal). Magistrates appointed to the court are expected to have knowledge and experience in the application and principles of therapeutic jurisprudence and restorative justice,[198] and the court is directed to exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of the relevant legislation allow.[199] The court must also try to ensure that, "so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to the parties to the proceeding".[200] In sentencing, the magistrate is subject to less stringent rules of evidence than may apply in the traditional courts and in considering the sentence to impose upon an accused person it may inform itself "in any way it thinks fit" including statements, reports or evidence given to him or her by a Neighbourhood Justice Officer, a community corrections officer, the Secretaries of the Departments of Health or Human Services, health services or community services providers, the victim of the offence, or any other person considered appropriate.[201]

The court has no special sentencing powers. It may utilise the normal range of conditional community correction orders to allow services to be provided and it can take advantage of the fact that the corrections staff are on-site.

A unique feature of the Neighbourhood Justice Centre approach is a formal "problem-solving process" that is available to criminal defendants.[2027] This involves assessments and meetings with various people, bodies and agencies that might be involved in helping to deal with an

[195] *R v Morgan* [2010] VSCA 15 at [40]. Participation in the Koori Court procedure may be regarded as rehabilitative in itself: *R v Miyatatawuy* [1996] NTSC 84; (1996) 6 NTLR 44. An important element of the process is that of "shaming" which is a part of traditional punishment and considered to be an effective sanction where the punishment is administered by Aboriginal elders: see *R v Morgan* [2010] VSCA 15 at [34]; see also Law Reform Commission of Western Australia, *Final Report: Aboriginal Customary Laws*, Project 94 (2006) p 30.

[196] *Magistrates' Court Act 1989* (Vic) s 4M. Its jurisdiction is generally confined to the municipal district: *Magistrates' Court Act 1989* (Vic) ss 4N and 4O.

[197] MS King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) Ch 9; S Murray, *Keeping it in the Neighbourhood? Neighbourhood Courts in the Australian Context* (2009) 35 *Monash University Law Review* 74; see also the Neighbourhood Justice Centre website, http://www.neighbourhoodjustice.vic.gov.au; Law Reform Committee, Parliament of Victoria, *Inquiry Into Access to and Interaction with the Justice System and Their Family and Carers* (LRC, 2013) [7.2.4].

[198] *Magistrates' Court Act 1989* (Vic) s 4M(5).

[199] *Magistrates' Court Act 1989* (Vic) s 4M(6).

[200] *Magistrates' Court Act 1989* (Vic) s 4M(7).

[201] *Magistrates' Court Act 1989* (Vic) s 4Q.

[202] The Centre aims to address underlying causes of offending; see Neighbourhood Justice Centre, http://www.neighbourhoodjustice.vic.gov.au/home/about+us/innovations/problemsolvingprocess.

offender's problems. The process is managed by the Neighbourhood Justice Centre Officer whose role it is to facilitate case management and coordinate services, and to provide a link between the court and the Centre's services. The process can take place pre- or post-sentence and can be initiated by any interested person including the police, the offender, their legal representative, the magistrate or an agency that is involved with the person.

Family Violence Court Division

[1.85]

The Family Violence Court Division was established in 2005 with the aim of making access to the court easier, promoting the safety of persons affected by violence, increasing the accountability of persons who have used violence against family members and encouraging them to change their behaviour, and to increase the protection of children exposed to family violence.[203] The courts operate in Ballarat and Heidelberg and are presided over by magistrates who have relevant knowledge and experience in dealing with matters relating to family violence.[204]

The Division has power to hear a range of matters arising from allegations of family violence, including applications for restraining orders and proceedings for breach of such orders, civil proceedings relating to personal injury, some family law matters, criminal proceedings, applications for restitution and compensation under the *Sentencing Act 1991* (Vic) as well as applications under the *Victims of Crime Assistance Act 1996* (Vic), in which case the court has the same powers as the Victims of Crime Assistance Tribunal.[205]

The court has power to order eligible persons to attend counselling, the specific purpose of which is to increase the accused's accountability for the violence used and to encourage them to change that behaviour.[206]

Assessment and Referral Court List

[1.90]

The Assessment and Referral Court List was established in 2010 in the Melbourne Magistrates' Court.[207] It functions not as a specialist sentencing court but as a venue for the processing of cases referred to it in relation to accused persons charged with criminal offences that are not

[203] More information on the Family Violence Court Division can be found through the Magistrates' Court website page on Court Support Services; see also Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013).
[204] *Magistrates' Court Act 1989* (Vic) s 4H(4).
[205] *Magistrates' Court Act 1989* (Vic) s 4I.
[206] *Family Violence Protection Act 2008* (Vic) s 129.
[207] *Magistrates' Court Act 1989* (Vic) s 4S; More information on the ARC List can be found through the Magistrates' Court website page on Court Support Services; see also The Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (Magistrates' Court of Victoria, 2013); see also *Criminal Law (Sentencing) Act 1988* (SA) s 19C (mental impairment and intervention program in courts of summary jurisdiction).

violent, serious violent or serious sex offences.[208] The list is founded upon the powers of the court to adjourn proceedings rather than on any specific sentencing powers of the court.[209] The aim of this, and similar programs, is to identify offenders with impaired mental or intellectual functioning early in the criminal justice process and provide speedy interventions that may address their offending behaviour.[210] In identifying the links between the criminal justice and mental health systems, Sulan J in *HT v Police*[211] observed:

> The program aims to assist a person with a mental impairment by providing that person with early assessment and intervention, facilitation of treatment, and a reduction of future offending behaviour. The program recognises that there must be an interrelationship between health and justice issues, and it facilitates bringing together the health and justice systems at an early stage to facilitate dealing with offenders who require intervention by health professionals to assist them with coping, and to assist them to avoid further contact with the criminal justice system.

In *R v McMillan*[212] Gray J discussed the relationship between the concepts of sentencing and diversion:

> The concept of diversion involves a realisation that traditional criminal sanctions are not effectively reducing the criminal activities of certain persons within the community. The aim is to divert or channel those persons out of the court process into programs with a rehabilitative treatment focus. This is with a view to their long-term rehabilitation and the prevention of further offending. The conventional criminal process will usually be stayed on the condition that the person enter an appropriate, approved treatment program. If satisfactory progress is made then the "criminal proceedings" may be discontinued or alternatively a lesser penalty may be imposed than would otherwise have been after the period of treatment has been effectively undertaken.

To be eligible for consideration by the Assessment and Referral Court List, accused persons

---

[208] As defined in *Sentencing Act 1991* (Vic) s 6B(1).

[209] See [10.105] (Referral to Assessment and Referral Court List).

[210] T Gotsis and H Donnelly, *Diverting Mentally Disordered Offenders in the NSW Local Court*, Research Monograph 3 (Judicial Commission of New South Wales, 2008); E Richardson and B McSherry, *Diversion Down Under – Programs for Offenders with Mental Illnesses in Australia* (2010) 33 *International Journal of Law and Psychiatry* 249; Australian Institute of Criminology, *Court-based Mental Health Diversion Programs*, Tipsheet No 20 (Australian Institute of Criminology, 2011); E Zafirakis, *Curbing the "Revolving Door" Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens* (2011) 20 *Journal of Judicial Administration* 8; M Hill, *Hobart Magistrates Court's Mental Health Diversion List* (2009) 18 *Journal of Judicial Administration* 178; L Lim and A Day, *Mental Health Diversion Courts: Some Directions for Further Development* (2011) 20 *Psychiatry, Psychology and Law* 36; C O'Shea and E Fritze, *A Helping Hand for the Vulnerable* (2011) 85 *Law Institute Journal* 56; M Edgely, *Solution-Focused Court Programs for Mentally Impaired Offenders: What Works?* (2013) 22 *Journal of Judicial Administration* 207; New South Wales Law Reform Commission, *People With Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (NSWLRC, 2012); Law Reform Committee, Parliament of Victoria, *Inquiry Into Access to and Interaction with the Justice System and Their Family and Carers* (LRC, 2013) [7.2.2] (regarding offenders with an intellectual disability).

[211] [2005] SASC 143 at [32]; (2005) 91 SASR 329.

[212] [2002] SASC 73; (2002) 81 SASR 540 at [60].

must have one or more of a mental illness, an intellectual disability, an acquired brain injury, autism spectrum disorder or a neurological impairment, including but not limited to dementia, which substantially reduces the person's capacity to take care or manage themselves or their social interaction or communication.[213] The accused person must consent to participate in the List and the Court must consider that the person would benefit from the problem-solving court process.[214]

The List works with the Court Integrated Services Program to provide case management support for persons referred to it by other courts, police, prosecutors, legal representatives or others. If a referral is not accepted, the accused will be referred back to the mainstream court. If it is accepted, the court will see the accused on a regular basis to discuss progress and if they plead guilty at the end of the program, they will be sentenced by the magistrate presiding in that court. If they plead not guilty they will be returned to the mainstream court for trial.

Special circumstances courts and lists

[1.95]

A person who has been issued with an infringement notice[215] which has not been paid and who has "special circumstances"[216] and can demonstrate that their judgment was impaired at the time of the offence may make an application to the Special Circumstances Registrar of the Infringements Court for a revocation of the fine. If the application is granted, the proceedings may be withdrawn, but if it is not, the matter may be listed for hearing in open court in the Special Circumstances List. To be heard in this List the person must plead guilty, in which case the Court will consider the special circumstances and determine the appropriate order, which may include a dismissal pursuant to *Sentencing Act 1991* (Vic) s 76, an undertaking to be of good behaviour or the re-imposition of the fine.[217]

Subsections 160(2) and (3) of the *Infringements Act 2006* (Vic) provide that a court may discharge fines in full or in part if satisfied that the offender has a mental or intellectual impairment or that other special circumstances apply, or that imprisonment in default would be excessive, disproportionate and unduly harsh. Section 160 requires a magistrate to consider the

---

[213] *Magistrates' Court Act 1989* (Vic) s 4T.

[214] In 2011–12 the List held 1,144 hearings; 154 referrals were received and 82 new participants were put on the program, Magistrates' Court of Victoria, *Annual Report 2011–2012* (2012) pp 96–97.

[215] See further [7.105].

[216] "Special circumstances" are defined as including a diagnosed mental illness (Alzheimer's disease, bipolar disorder, dementia, depression and anxiety, psychosis, schizophrenia and severe mood disorder), a neurological disorder (acquired brain injury, Huntington's disease, intellectual disability, muscular sclerosis, Parkinson's disease), a serious addiction to drugs, alcohol or a volatile substance, or homelessness: see *Infringements Act 2006* (Vic) s 65.

[217] See J Popovic, *Court Processes and Therapeutic Jurisprudence: Have We Thrown the Baby out with the Bathwater? eLaw, Murdoch University Electronic Journal of Law, Special Series* 60; B Midgley, *Achieving Just Outcomes for Homeless People through the Court Process* (2005) 15 *Journal of Judicial Administration* 82; T Walsh, *The Queensland Special Circumstances Court* (2007) 16 *Journal of Judicial Administration* 223; T Walsh, *Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court* (2011) 21 *Journal of Judicial Administration* 1. In 2010–11, 1,762 matters were finalised in the Special Circumstances List: see M Brown, G Lansdell, B Saunders and A Eriksson, *"I'm Sorry But You're Just Not That Special…": Reflecting on the "Special Circumstances" Provisions of the Infringements Act 2006 (Vic)* (2013) 24 *Current Issues in Criminal Justice* 375, 379.

possibility of dispositions under those subsections before making an order of imprisonment[218] in respect of unpaid fines; there is a duty on the part of a magistrate to inquire whether those subsections might apply.[219]

Children's Court

[1.100]

The Children's Court of Victoria operates under the *Children, Youth and Families Act 2005* (Vic).[220] It is separate from the Magistrates' Court and is presided over by a judge of the County Court. The criminal division of the court deals with offences committed by children and young persons (generally children under the age of 18) and in 2010–11 it sentenced 5,427 children.[221] It has jurisdiction over all charges other than various homicide offences. Charges are heard in open court though publication of certain details may be restricted, such as the name of the person.[222]

The Court has a Koori Court Criminal Division[223] and a Neighbourhood Justice Division[224] which sit separately. Both divisions operate on the same general principles as their adult counterparts.

County Court

[1.105]

The County Court is the main trial court for indictable offences and hears the majority of serious cases in the State. It has both an original[225] and appellate jurisdiction. The County Court and Supreme Court have the power to transfer proceedings for a charge for an indictable offence triable summarily to the Magistrates' Court or the Children's Court if the accused consents to the

[218] Under *Infringements Act 2006* (Vic) s 160(1).

[219] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37. Members of the Court disagreed as to when the duty to inquire arises. Tate and Osborn JJA held that the duty to inquire arises in every case and that the nature of the requisite inquiry would depend on the circumstances of each case. Nettle J held that the duty would not arise in every case but would depend rather on the circumstances of the case such as the presence and preparedness of representation.

[220] See RG Fox, *Victorian Criminal Procedure* (13th ed, Monash Law Book Co-operative, 2010) pp 102ff. More information about the Children's Court is available through its website: http://www.childrenscourt.vic.gov.au.

[221] Children's Court Victoria, *Annual Report 2010–2011* (2011) p 15; see Chapter 14 regarding sentencing of young offenders; see generally A Borowski and R Sheehan (eds), *Australian Children's Courts Today and Tomorrow* (Springer, 2013).

[222] *Children, Youth and Families Act 2005* (Vic) ss 523 and 534.

[223] *Children, Youth and Families Act 2005* (Vic) ss 517 – 520; A Borowski, *Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children's Koori Court of Victoria* (2010) 43 *Australian and New Zealand Journal of Criminology* 465; A Borowski, *In Courtroom 7 – The Children's Koori Court at Work: Findings from an Evaluation* (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 1110.

[224] *Children, Youth and Families Act 2005* (Vic) ss 520A – 520E; see also Chapter 14.

[225] It can hear and determine all indictable offences except treason, murder and attempted murder: *County Court Act 1958* (Vic) s 36A(1); see RG Fox, *Victorian Criminal Procedure* (13th ed, Monash Law Book Co-operative, 2010) pp 106ff.

transfer and the court considers that the charge is appropriate to be determined summarily, having regard to the matters in *Criminal Procedure Act 2009* (Vic) s 29(2)[226] or *Children, Youth and Families Act 2005* (Vic) s 356(3). In 2010–11 the County Court sentenced 2,350 offenders. The County Court hears appeals against sentences from the Children's Court and the Magistrates' Court by way of a rehearing by a single judge. In 2010–11 the court finalised 2,992 criminal appeals.[227]

In 2008 a Koori Court Division was established to deal with Koori offenders who plead guilty. The Court sits in a number of regional areas. In 2013 the Court began sittings in metropolitan Melbourne.[228]

Supreme Court

[1.110]

The Supreme Court is the superior court of record in the State with jurisdiction over all criminal offences.[229] Its trial division generally hears homicide cases as well as serious drug and sexual offences. In 2010–11 it dealt with 102 criminal matters, approximately half of which were pleas of guilty.[230] The Court of Appeal hears all appeals from the Trial Division of the Supreme Court and from the County Court. In 2010–11 it finalised 524 applications for leave to appeal and appeals.[231]

Judicial education

[1.115]

Sentencers are required to master a formidable amount of complex information. The need for formal judicial education has long been recognised[232] and there is now an extensive array of programs for serving and newly appointed judicial officers. In Victoria, the Judicial College of Victoria[233] was established to assist the professional development of judicial officers and to provide continuing education and training for them. The College runs regular seminars relating to sentencing and publishes the Victorian Sentencing Manual which provides a publically

[226] *Criminal Procedure Act 2009* (Vic) s 168; see also *DPP v Batich* [2013] VSCA 53 (transfer from County Court to Magistrates' Court where County Court no longer had power to suspend a sentence, but Magistrates' Court did). The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) inserted *Sentencing Act 1991* (Vic) s 27(2AB) to the effect that a suspended sentence cannot be imposed in relation to a significant offence transferred to it from a higher court. The Act was a direct response to the decision in *DPP v Batich* [2013] VSCA 53; *Nguyen v The Queen* [2012] VSCA 297.

[227] County Court of Victoria, *Annual Report 2010–2011* (2011) p 3; see further Chapter 17.

[228] *County Court Act 1958* (Vic) ss 4A – 4G. Its procedures have been described at [1.75].

[229] *Supreme Court Act 1986* (Vic); http://www.supremecourt.vic.gov.au; see RG Fox, *Victorian Criminal Procedure* (13th ed, Monash Law Book Co-operative, 2010) pp 108ff.

[230] Supreme Court of Victoria, *Annual Report 2010–2011* (2011) p 44.

[231] Supreme Court of Victoria, *Annual Report 2010–2011* (2011) p 30 (conviction and sentence appeals); see further Chapter 15.

[232] See P Sallmann, *Judicial Education: Some Information and Observations* (1988) 62 *Australian Law Journal* 981.

[233] *Judicial College of Victoria Act 2001* (Vic). More information about the Judicial College of Victoria is available through their website http://www.judicialcollege.vic.edu.au.

available online guide to sentencing in Victoria.[234] The courts themselves conduct their own internal professional development programs tailored to their own particular needs.

At the national level, the National Judicial College of Australia, which is an independent entity funded by the Commonwealth and some State and Territory Governments, provides an annual National Judicial Orientation Program for newly appointed judges of all Australian jurisdictions to provide them with the resources they need to meet the demands of their work. The program provides at least one session in the five-day program devoted to sentencing. The Phoenix Magistrates program provides a similar service for newly appointed magistrates. The College also runs a seminar and conference program which includes topics relating to sentencing and hosts the Commonwealth Sentencing Database which provides sentencing information in relation to Commonwealth offences, though it is not publically available.[235]

Victims

[1.120]

Though victim compensation schemes have been in effect in Victoria since the early 1980s,[236] over recent years the interests and views of victims have become a significant element in the sentencing landscape, in both political and legal senses. In relation to the former, victims' organisations are often heard to advocate for victims' rights, higher maximum penalties, more severe sentences, offender registration and notification laws, and mandatory sentences.[237] Victim impact statements, at first controversial, are now an accepted part of the sentencing process.[238] Sentencing legislation provides for the recognition of the harm done to the victim of crime.[239] Serious sex offenders' legislation provides that one of the purposes of the conditions of a supervision order imposed upon an offender is "to provide for the reasonable concerns of the victim or victims of the offender in relation to their own safety and welfare."[240] Victims' roles in the sentencing framework have been recognised and institutionalised through representation on Parole Boards[241] or Sentencing Advisory Councils.[242] In 2012 a Victims of Crime Consultative

[234] http://www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual. In New South Wales, the Judicial Commission of New South Wales, established in 1986, has express functions in the area of sentencing and judicial education: *Judicial Officers Act 1986* (NSW) ss 8 and 9. The Commission's principal functions are to assist the courts to achieve consistency in sentencing and to organise continuing education and training for judicial officers. The Commission publishes research relating to sentencing by way of research monographs, a sentencing bench book and a series of Sentencing Trends and Issues as well as operating the Judicial Information Research System (JIRS) which is an "online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system": see http://www.judcom.nsw.gov.au. It also runs a series of conferences, seminars and training programs.

[235] See http://www.njca.com.au.

[236] See *Criminal Injuries Compensation Act 1983* (Vic) replaced by the *Victims of Crime Assistance Act 1996* (Vic); see further Chapter 7.

[237] A Freiberg, *Twenty Years of Changes in the Sentencing Environment and Courts' Responses*, in VB Mallewsari (ed), *Criminal Justice and Sentencing: A Critical Study* (The Ifcai University Press, 2008) p 88.

[238] See *Sentencing Act 1991* (Vic) s 8K; see [2.230].

[239] *Sentencing Act 1991* (Vic) s 5(2)(daa), (da).

[240] *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 15(4) and 19.

[241] Though not required by legislation, victims of crime have been appointed to the Victorian Parole Board, but not only on account of their status as victims.

Council was established as a permanent reference group to enable victims to have an input into policy and to contribute to improving support services for victims of crime.[243]

Victims may be entitled by law to information about prisoners in custody or under various forms of orders through inclusion on a victim's register,[244] and to make submissions to the Parole Board for consideration by the Board in its decision whether or not to make a parole order[245] or a condition of a supervision order in relation to serious sex offenders.[246] Submissions relating to parole may include the victim's views as to the effect of the offender's release on that person and views on the terms and conditions of the release.[247] A number of jurisdictions have enacted victims' Charters of Rights which enact principles relating to the treatment of persons adversely affected by crime as well as the information to be provided to them about the investigation, prosecution, bail and court processes, and their rights to privacy, compensation, and financial assistance.[248]

The development of new forms of justice, such as restorative justice, that involve victims and the community more generally, have had the effect of de-centering the judicial role in sentencing. Restorative justice, which involves the restoration of victims, offenders and communities through various forms of mediated encounters between victims and offenders, has developed markedly since the early 1990s and is practiced in Victoria primarily in the youth justice system and, to a lesser extent, in the adult one.[249] Its growth has been partly due to an increasing dissatisfaction with the adversarial system as a means of dealing with conflict and partly due to a recognition of the fact that the criminal justice system alone is a poor means of responding to certain forms of crime.

There are two major strands to the concept of restorative justice. Restorative justice as "process" emphasises the fact that it is an attempt to bring together all the affected parties (offenders, families, victims and State agencies) to discuss the harm and agree to an outcome. This is achieved through conferences, healing circles, victim–offender mediation, sentencing circles and the like. Restorative justice as a set of values promotes healing or restoration over punishment

---

[242] *Sentencing Act 1991* (Vic) s 108F(1)(c) (one member must be a member of a victim of crime support or advocacy group) and (ca) (one must be a person who is involved in the management of a victim of crime support group or advocacy group and who is a victim of crime or a representative of victims of crime).

[243] The Committee is not a statutory body and is comprised of representatives of victims of crime, the judiciary, Victoria Police, the Office of Public Prosecutions, the Adult Parole Board, the Victims of Crime Assistance Tribunal and victim services agencies.

[244] *Corrections Act 1986* (Vic) ss 30A – 30C. Under s 30A(1A) and (1B) the Secretary to the Department of Justice must notify a person included on the register in respect of an offence for which a prisoner is serving a sentence of imprisonment of the release of the prisoner on parole at least 14 days before the release of the prisoner on parole.

[245] *Corrections Act 1986* (Vic) ss 74A and 74B; see also *Crimes (Administration of Sentences) Act 1999* (NSW) ss 142 and 147 (re serious offenders); *Correctional Services Act 1982* (SA) ss 77 and 85D; *Corrections Act 1997* (Tas) s 72; see also [14.45] (parole).

[246] *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 23, 94 and 95.

[247] See M Black, *Victim Submissions to Parole Boards: The Agenda for Research*, Trends and Issues in Crime and Criminal Justice No 251 (Australian Institute of Criminology, 2003).

[248] *Victims' Charter Act 2006* (Vic); see also *Victims of Crime Act 1994* (ACT); *Victims Rights and Support Act 2013* (NSW) (Containing the Charter of Victims' Rights, see Part 2, Division 2); *Criminal Offence Victims Act 1995* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Act 1994* (WA).

[249] MS King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) Ch 2; see also [16.120].

and deterrence which some have seen as forms of a wider concept – participatory justice. Participatory justice emphasises the reconstruction of relationships through dialogue and the importance of outcomes developed and agreed to by the disputants themselves.[250]

Restorative justice tends to be less retributive and outcomes tend to revolve around apology, personal compensation or restitution and community work. It is concerned with rehabilitation as much as punishment, and recognises the importance of process as well as outcome. It has become a powerful voice in criminal justice discourse providing a credible intellectual and emotional alternative to the dominant "law and order" paradigm.[251]

The public

[1.125]

The courts have long recognised that sentencing is of interest to parties other than the prosecution and the offender:[252]

> The principal object of the criminal law is to protect the safety and property of the people and the State. Members of the public, as well as the prosecution, have a vital interest in ensuring that those found guilty of crimes receive the sentences which are appropriate to their criminality.

Legislative provisions that articulate the aims of sentencing laws identify the public as an important audience, stating that one of their purposes is to promote public understanding of sentencing practices and procedures.[253] The idea of an amorphous entity such as "the public" or "the community" having a direct or indirect role in the sentencing framework may not be immediately obvious, yet on closer examination it becomes apparent that the public's influence on sentencing policies, practices and processes can be pervasive and profound. There are many ways in which the community or the public interacts with the judicial process.

The Victorian community has always been involved in the policy-making process.[254] Community views are sought by standing and *ad hoc* commissions and inquiries that invite public comment and that consult widely. "Community expectations" or "community views" are reflected by Parliament in the setting or amendment of maximum penalties and in the creation of new offences. The courts also take into account community concerns about the prevalence of

[250] A Freiberg, *Twenty Years of Changes in the Sentencing Environment and Courts' Responses* in VB Mallewsari (ed), *Criminal Justice and Sentencing: A Critical Study* (The Ifcai University Press, 2008) p 88.
[251] See also [3.125].
[252] *McL v The Queen* [2000] HCA 46 at [69] per McHugh, Gummow and Hayne JJ; (2000) 203 CLR 452.
[253] For example, *Sentencing Act 1991* (Vic) s 1(d)(v); *Penalties and Sentences Act 1992* (Qld) s 3(g); *Sentencing Act 1997* (Tas) s 3(f).
[254] The following material is drawn from A Freiberg, *The Victorian Sentencing Advisory Council: Incorporating Community View into the Sentencing Process*, in A Freiberg and K Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy* (Hawkins Press & Willan Publishing, 2008) p 148; see also A Freiberg, *The Four Pillars of Justice* (2003) 36 *Australian and New Zealand Journal of Criminology* 223; E Kerr, *Raising the Fourth Pillar: Public Participation in Australian Sentencing – A Comparative Perspective* (2012) 36 *Criminal Law Journal* 173; D Indermaur, *Engaging the Public in the Development of Public Policy* (2012) 1 *International Journal for Crime and Justice* 27.

offences, if they can be reliably established,[255] or attitudes about particular types of crime which may be inferred from the general experience of the courts and derived from expert or other evidence concerning the damage caused by that type of crime.[256] In *Stalio v The Queen* the Court of Appeal noted that community attitudes may be relevant in considering aspects of *Sentencing Act 1991* (Vic) s 5(2):[257]

> The consideration of the nature and gravity of the offence, the offender's culpability and degree of responsibility for the offence, the assessment of aggravating factors, the impact of the offence on the victim, the personal circumstances of the victim, and any injury resulting directly from the offence are all informed by the community's current understanding of and abhorrence for such offending.

Judges may also be asked to take into account possible community reaction to the release of dangerous offenders.[258]

Appellate courts have used the notion of "community expectation" in the context of Crown appeals against sentence. Crown appeals are sometimes instigated as a result of public or media concern about the imposition of a sentence at first instance.[259] While a court cannot ignore community concerns about crime, as Doyle CJ has said:[260]

> The judge can take account of public attitudes to the type of crime in question, and public concern about the prevalence of a type of crime or about its effects. In this general way public opinion is relevant. A sentencing judge can also have regard in a general way to a public expectation that serious crime will attract severe punishment. But it is not lawful for a judge to try to identify and then impose the sentence that the public expect. The judge must sentence according to law, not according to the public expectation. In any event, there is no way of knowing reliably what the public as a whole want or expect in a particular case.

One of the tests employed to determine the adequacy of the sentence imposed at first instance is whether it was so disproportionate to the seriousness of the offence as to "shock the public conscience"[261] and "undermine public confidence in the ability of the Courts to play their part in

---

[255] See also [4.205].

[256] *Powell v Tickner* [2010] WASCA 224 at [96] per Buss JA; see also *WCB v The Queen* [2010] VSCA 230 at [36]; *R v Wakime* [1997] 1 VR 242; *DPP v Riddle* [2002] VSCA 153 at [34]–[35]; *DPP v Toomey* [2006] VSCA 90 (re community abhorrence of sexual offences against children); *DPP v Gany* [2006] VSCA 148 (re offence of negligently causing serious injury: criminal negligence must be of a kind that shocks the conscience and requires some punishment at the hands of the criminal law); *DPP v McMaster* [2008] VSCA 102; (2008) 19 VR 191 (child homicide offences).

[257] [2012] VSCA 120 at [70]; see also Sentencing Advisory Council Victoria, *Community Attitudes to Offence Seriousness* (Sentencing Advisory Council, 2012).

[258] *Pollentine v Attorney-General* [1998] 1 Qd R 82; *Mott v Community Corrections Board* [1995] 2 Qd R 261.

[259] *R v JO* [2009] NTCCA 4; (2009) 24 NTLR 129.

[260] *R v Nemer* [2003] SASC 375; (2003) 87 SASR 168 at [15] (SASC); see also *R v Hitanaya* [2010] NTCCA 3 at [83].

[261] *R v Clarke* [1996] 2 VR 520, 522; *DPP v Brown* [2009] VSCA 314 at [23]. This phrase is also used in relation to the extent to which a discount may be given for a guilty plea in South Australia: *Criminal Law (Sentencing) Act*

deterring the commission of crimes".[262] This test is not at large and what the courts have in mind is "an assessment of the sentence by an objective, properly informed public, invested with an understanding of the relevant sentencing principles, cognisant of the circumstances of the case and aware of current sentencing practices".[263] However, it is conceptually problematic, as Peek J noted in *R v Jones*:[264]

> Although his Honour was no doubt intending to postulate a very high hurdle to be overcome, the phrase has since come to be used on occasions in a highly emotive fashion which may tend to blur rather than sharpen analysis. Thus Perry J, with whom Doyle CJ agreed, observed in *R v Sioziz*:[265]
>
> [20] In considering whether it is proper to give leave to the Crown to appeal against sentence, I am not sure that the expression "shock the public conscience" by reference to the sentence under appeal, should now be, or form part of, the appropriate test. There is much evidence to suggest that these days, the public conscience is easily shocked. It is an emotive expression which I tend to think ought no longer to be regarded as an appropriate test to apply in determining whether leave to appeal against sentence should be granted in favour of the Crown.

The problem of accurately determining the "community's views" on any issue, let alone sentencing, is a difficult one as is the problem of determining the appropriate weight to be given to these views in developing sentencing policy.[266] In South Australia the views of the "community", or a particular section of the community, can be provided to a sentencing court in relation to the effect of the offence before the court on people living or working in the neighbourhood in which the offence was committed, the community generally or on any particular section of the community through the use of "neighbourhood impact" or "social impact" statements which may be prepared and submitted by the Commissioner for Victims' Rights.[267] Relevant information may include expert's views regarding the harmful effects of drugs on individuals, the long-term consequences of drug abuse or the human and financial costs of road trauma.[268]

1988 (SA) s 10B(4)(a) (court must consider whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience).

[262] *Everett v The Queen* [1994] HCA 49 at [3] per McHugh J; (1994) 181 CLR 295; *DPP v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538; see also [17.105].

[263] *WCB v The Queen* [2010] VSCA 230 at [37]; see also *DPP v Gany* [2006] VSCA 148 at [23].

[264] [2010] SASCFC 58 at [134] referring to *R v Osenkowski* (1982) 30 SASR 212 per King CJ.

[265] (2004) 236 LSJS 88.

[266] In *DPP v Fucile* [2013] VSCA 312 at [102] the Victorian Court of Appeal took the view that the phrase "shock the public conscience" should no longer be used in this area of discourse because the "very notion of 'the public conscience' is itself of uncertain content, and its invocation sheds no light on the task which the appellate court must perform"; see also [17.105].

[267] *Criminal Law (Sentencing) Act 1988* (SA) s 7B; see A Webster, *Expanding the Role of Victims and the Community in Sentencing* (2011) 35 *Criminal Law Journal* 21; E Kerr, *Raising the Fourth Pillar: Public Participation in Australian Sentencing – A Comparative Perspective* (2012) 36 *Criminal Law Journal* 173, 180.

[268] Webster identifies five major problems with the use of community impact statements: (1) verification of the content of the statement; (2) they do not address the personal circumstances of any victim or victims; (3) there is ambiguity regarding the scope and meaning of the term "offences of the same kind"; (4) it is unclear how any

Public confidence

[1.130]

Public confidence in the administration of justice is said to be integral to the work of the courts. In broad terms it has been said that under the constitutional arrangements for the exercise of the judicial power of the Commonwealth, the conferral of powers or functions upon courts which are "apt or likely … to undermine public confidence in the courts exercising that power or function" is likely to be held to be invalid as contrary to Chapter III of the Constitution as incompatible with the exercise of the judicial power of the Commonwealth.[269] Public confidence in justice is integral to the democratic system. Lack of confidence in the courts may result in a shift of sentencing powers from the courts to the legislature. In *Markarian v The Queen*, McHugh J noted:[270]

> Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.

A similar sentiment was expressed by Vincent JA in the Court of Appeal when he identified the emotional and public dimensions of sentencing and the relationship between the courts' sentence, its effect on victims, and the perceptions and beliefs of members of the community. He stated:[271]

> The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and which may never be removed. Indeed, from the victim's perspective, an apparent failure of the system to recognize the real significance of what has occurred in the life of that person as a consequence of the

---

relevant information should affect the individual defendant's sentence; and (5) it is unclear what the causal link should be between the person's offending behaviour and the effect on the community; see A Webster, *Expanding the Role of Victims and the Community in Sentencing* (2011) 35 *Criminal Law Journal* 21.

[269] *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 at [88]–[90] per French CJ; see also *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

[270] [2005] HCA 25; (2005) 228 CLR 357 at [82].

[271] *DPP v DJK* [2003] VSCA 109 at [18]; see also *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267 at [118] per Kirby J; *DPP v FHS* [2006] VSCA 120 at [23]; *WCB v The Queen* [2010] VSCA 230 at [35].

commission of the crime may well aggravate the situation.

"Public confidence" in the courts has been said to be a reason to ensure consistency in punishment.[272] It is said to be corroded by a belief that sentencing is determined by idiosyncratic judging.[273] But on the other hand, it may be enhanced by clarity regarding how judges come to their decisions,[274] by greater specificity regarding the specific weight given to particular factors,[275] by giving reasons for their decisions,[276] and by transparency and honesty generally in the decision-making process.[277] Erosion of "public confidence" has been used, usually unsuccessfully, in the sentencing context to impugn laws relating to indefinite sentences[278] and the appointment of judicial officers to parole boards.[279]

"Public confidence", like "community" or "the public" are problematic concepts, more often invoked than they are clearly defined. In *Wainohu v New South Wales*[280] Heydon J questioned what was meant by the term "public confidence":

> [173] In *Wilson*'s case Gaudron J said[281] that "the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts", and said that that depends on the matters listed in the first passage quoted in the reasons for judgment of Gummow, Hayne, Crennan and Bell JJ. She also spoke in the third passage of what was a "risk to public confidence" and what "would diminish public confidence".[282]
>
> [174] The existence and meaning of tests turning on "public confidence"[283][15]

[272] See *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 at [1] per Mason J: "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community".

[273] *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [190] per Spigelman CJ.

[274] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [102] per Kirby J; *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [190] per Spigelman CJ.

[275] *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [190] per Spigelman CJ.

[276] See also [2.260] (reasons for decision).

[277] *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [267] per McClellan CJ at CL.

[278] *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51 (references to public confidence were made by Toohey J at [30], per Gaudron J at [26]–[27], per McHugh J at [20]–[22], [25] and [40] and per Gummow J at [34]–[35]); *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69.

[279] *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356.

[280] [2011] HCA 24; (2011) 243 CLR 181 (footnotes included and re-numbered).

[281] *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* [1996] HCA 18; (1996) 189 CLR 1 at 22.

[282] See above at [94].

[283] Was what Gaudron J said in *Wilson*'s case an aspect of the doctrine emanating from *Kable*'s case? *Kable*'s case was argued five months after *Wilson*'s case and decided three days after it. *Wilson*'s case did not mention *Kable*'s case, but *Kable*'s case mentioned *Wilson*'s case. In particular, in *Kable*'s case Gaudron J (at 107 and 108) referred to the "maintenance of public confidence" in the courts, citing *Wilson*'s case. If what was said in *Wilson*'s case is an aspect of the *Kable* doctrine, the references to damaging "public confidence" must not now be seen as a criterion of invalidity, merely an indication of it: see *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 95–96 [245].

> depend in part on what the "public" is. … Are selected journalists the public? Those who speak for trade unions and trade associations? Politicians? Lord Denning MR's "silent majority of good people who say little but view a lot"?[284] Or is it the case that to say of a provision that "it will damage public confidence in the courts" is merely a veiled way of saying "I dislike it", and that it must therefore be constitutionally invalid? Does "public confidence" have any more meaning than expressions like "social justice" or "value to society"?[285]
>
> [175] Another difficulty is that some are types of confidence which sections of the public have in public institutions which reflect credit neither on the sections of the public nor on the public institutions.[286] And it is often the duty of courts to resist conduct which would increase the confidence in them of some sections of the public. That is true of the courts in both their non-constitutional roles and their roles in administering constitutions. The function of the courts is often to protect individuals and minorities against the larger public.
>
> [176] Assuming these difficulties are put aside, what generates public confidence? What is a risk to public confidence? What diminishes public confidence? Each of these questions is an empirical question.

The problem of ascertaining "public confidence" or the "expectations of the community" arises in various contexts. In *Bukvic v Minister for Immigration and Multicultural Affairs*,[287] a case concerning visa cancellation decisions that required the decision-maker to consider "the expectations of the Australian community", Finn J said that:

> The provision does not require the decision maker to ascertain what the actual expectation of the Australian community would, or would be likely to be, in relation to a given case – an impossible task in any event. Against a stated standard, and having regard (a) to the character of the offences in question and (b) to a view the Government has of "community expectations" about the appropriateness of the offender being removed from Australia where offences are of a particular nature, the decision maker is required to make his or her own judgment as a matter of opinion as to whether the offences are of that nature. In making that judgment the decision maker is being asked to do no more than bring to bear his or her own knowledge and experience. The provision clearly does not envisage the gathering of evidence on the subject of the community's expectations in the given case. Rather it requires a judgment to be formed on the offences having regard to the stated criteria.[288]

---

[284] *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629 at 652.
[285] FA Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (1976) pp 78–100.
[286] *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at [245] n 391.
[287] [2001] FCA 517; (2001) 110 FCR 554 at [17].
[288] See also *Director of Public Transport v XFJ* [2011] VSCA 302. In this case, which concerned an application for a taxi licence by a person who had been charged with murder some 22 years previously but found not guilty on the ground of mental impairment, and in relation to whom there had been considerable adverse media coverage, Harper JA observed: "It may be that perceptions of community expectations about, and the need to maintain community confidence in, the taxi driver accreditation system, will be coloured by fear generated by media

Judges are sometimes required to consider the balance the public interest[289] with other considerations in legislation. In some contexts, particularly in relation to sex offenders, public feelings can run high and there may be pressure upon political and judicial decision-makers to make decisions on grounds other than the merits of the case. While political actors may make decisions with a view to electoral advantage, the courts are required to act in accordance with the rule of law. Speaking extra-judicially of the judicial method, Brennan CJ has said:[290]

> Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes, sometimes engendered by those with power, and when it protects the unpopular against the clamour of the multitude. But judicial method is concerned with the equal dignity of every person, his or her capacity to participate in the life of the community, to contribute to society and to share in its benefits; it is concerned with the powers entrusted to governments and the manner in which those powers are exercised. Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at a deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play. Judgments must be principled, reasoned and objective…

Public confidence is to a great extent influenced by what the public understands about sentencing[291] and part of the lack of confidence in the criminal justice stems from their understanding, or more commonly, their lack of understanding of how the system operates.[292] Myths and misconceptions abound and tend to be pervasive and persistent.[293] Research findings

---

headlines. Headlines designed to attract the public's interest rather than the public benefit might reasonably be expected to follow the success of the respondent's application. Such headlines, if they occur, will improperly play upon the fear of mental illness and its consequences. But a decision maker's apprehension of misleading headlines should never stand in the way of decisions otherwise properly reached" [83]. In *WCB v The Queen* [2010] VSCA 230 at [34] the Court of Appeal described the Courts as "the trustees of the power of the community to judge and, where appropriate, punish its members"; see also *Powell v Tickner* [2010] WASCA 224 at [7] per McClure P.

[289] The term "public interest" "is one of broad import. When used in a statute, the term classically imports a discretionary value judgment to be made by reference to undefined factual matters confined only by the subject matter, scope and purpose of the statute in question": *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at [20] per French CJ, Gummow and Crennan JJ citing *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at [13]; see also *Hogan v Hinch* [2011] HCA 4 at [31]–[32] per French CJ and [69] per Gummow, Heydon, Crennan, Kiefel and Bell JJ; (2011) 243 CLR 506; *Osland v Secretary, Department of Justice No 2* [2010] HCA 24; (2010) 241 CLR 320 at [13]; *Secretary, Department of Justice v LMB* [2012] VSCA 143.

[290] Cited in *Secretary, Department of Justice v LMB* [2012] VSCA 143 at [41] in the context of sex offender registration legislation; see also comments of Wheeler JA in *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69 at [37] in the context of continued detention legislation ("It is not … appropriate for a court to assume, in considering the validity of legislation, that a Minister would, in effect, refuse to recommend release where release was appropriate for 'no other reason than to gratify public clamour against release of a member of an "unpopular minority"'…").

[291] *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [190] per Spigelman CJ; see also C Jones and D Weatherburn, *Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public* (2010) 43 *Australian and New Zealand Journal of Criminology* 506.

[292] C Jones and D Weatherburn, *Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public* (2010) 43 *Australian and New Zealand Journal of Criminology* 506.

[293] K Gelb, *Myths and Misconceptions About Public Opinion and Public Judgment About Sentencing* (Sentencing Advisory Council, 2008); K Gelb, *More Myths and Misconceptions* (Sentencing Advisory Council, 2008); K

confirm that the public consistently overestimate rates of crime and underestimate the severity of sentences. Lack of confidence in the courts may also be a product of the public's perceptions of whether judges should reflect public opinion when they impose a sentence. It is a common finding of public opinion research that the public believes that judges do not do so.[294] It is also commonly found that the more information that the public has about the facts of a particular case, the more similar their views of the sentence will be to what the courts do.[295]

The role of community expectations in sentencing was explored in *WCB v The Queen*.[296] In this case the appellant, who had pleaded guilty to two sexual offences and sentenced to a total effective sentence of 9 years and 3 months, argued that the judge had erred by sentencing him on the basis that the "community would expect [the accused] to be sentenced for a lengthy period". The argument was that community expectation is not a relevant factor in sentencing under the *Sentencing Act 1991* (Vic) and even if it were, public opinion was uninformed. In the Court of Appeal, Warren CJ and Redlich JA referred to the work of the Victorian Sentencing Advisory Council that found that the community has little accurate knowledge of crime and the criminal justice system. The Court held that "informed and objective" community expectations are relevant to sentence, noting that inappropriate sentences could result in a lack of confidence that may, in turn, undermine the deterrent effects of punishment. However, in the instant case, the Court held that the sentencing judge was entitled to refer to community expectation because the reference to the community "carried an underlying assumption of an objective, fully informed community that understood the range of sentencing that would be appropriate in the circumstances".[297]

Juries

[1.135]

Richards, *Misperceptions About Child Sex Offenders*, Trends & Issues in Crime and Criminal Justice No 429 (Australian Institute of Criminology, 2011).

[294] K Gelb, *Predictors of Confidence: Community Views in Victoria* (Sentencing Advisory Council, 2011); K Gelb, *Purposes of Sentencing: Community Views in Victoria* (Sentencing Advisory Council, 2011); D White and A Knowles, *Predictors and Classification of Attitudes to Differing Sentencing Goals in an Australian Sample* (2013) 20 *Psychiatry, Psychology and Law* 157; CA Spiranovic, LD Roberts and D Indermaur, *What Predicts Punitiveness? An Examination of Predictors of Punitive Attitudes Towards Offenders in Australia* (2012) 19 *Psychiatry, Psychology and Law* 249.

[295] K Warner, J Davis, M Walter, R Bradfield and R Vermey, *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Trends & Issues in Crime and Justice No 407 (Australian Institute of Criminology, 2011). Some of these finding are summarised in *WCB v The Queen* [2010] VSCA 230 at [14]. On the public's sense of justice and personal mitigation see A Lovegrove, *The Sentencing Council, The Public's Sense of Justice, and Personal Mitigation* (2010) *Criminal Law Review* 906; A Lovegrove, *Putting the Offender Back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation* (2011) 11 *Criminology and Criminal Justice* 37; A Lovegrove, *The Pernicious Impact of Perceived Public Opinion on Sentencing: Findings from an Empirical Study of the Public's Approach to Personal Mitigation*, in J Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) p 188.

[296] [2010] VSCA 230; see also K Warner, *Sentencing Review 2009–2010* (2010) 34 *Criminal Law Journal* 385.

[297] *WCB v The Queen* [2010] VSCA 230 at [44]; see also *Inkson v The Queen* [1996] TASSC 13; (1996) 6 Tas R 1 at [50]; *Scolaro v Shephard (No 2)* [2010] WASC 271.

An indictable offence is one triable by a jury, though jury trials are now relatively rare.[298] Section 80 of the *Constitution* guarantees a trial by jury for indictable offences under federal law but there is no requirement that proceedings be brought on indictment.[299] A defendant has no right to a trial on indictment.[300] Unlike some jurisdictions in the United States, juries have no direct role in sentencing in Australia.[301] The role of the jury in sentencing Australia is indirect. In indictable offences it must decide whether the defendant is guilty or not, and the limits of the sentence that may be imposed will be determined by the offence of which the jury has found the defendant guilty.[302] In structuring offences, consideration of the allocation of responsibilities between judges and juries can be important. An example is the issue of provocation and homicide offences. In jurisdictions where provocation is a partial defence to murder, the jury decides whether the defendant is guilty of murder or manslaughter. The maximum penalties for these offences are usually different. However, if provocation is a sentencing factor only, then it will be for a judge to decide whether, how and to what extent to take it into account.[303]

The judge will be bound by the verdict of the jury, and the facts used by the judge as a basis for sentencing cannot be inconsistent with the jury's verdict. In some cases, matters relevant to sentencing may not be clear and it is an allowable, but not desirable, practice for a judge to ask questions of the jury about the basis of their verdict.[304]

A jury may, in returning its verdict, make a recommendation that the defendant be extended mercy. The status of such a recommendation has been explained by the High Court:[305]

> The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognised feature of our legal system. But a recommendation *simpliciter* is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all.

In *R v Tappy and Dewis*,[306] the Full Court regarded the jury's rider as "surplusage", pointing out

[298] Over 95% of all criminal cases are heard in courts of summary jurisdiction and of those that proceed on indictment, over 60% are resolved by pleas of guilty.
[299] See generally A Simpson and M Wood, *"A Puny Thing Indeed" – Cheng v the Queen and the Constitutional Right to Trial by Jury* (2001) 29 *Federal Law Review* 95; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [13.108]ff; *Smith v Pearce* (1971) 17 FLR 119; *Cheung v The Queen* [2001] HCA 67; (2001) 209 CLR 1.
[300] This interpretation of s 80 has led some to describe it as a "piece of tautological insignificance": and a guarantee of no substantive use: see comments of Kirby J in *Cheung v The Queen* [2001] HCA 67 [113]; (2001) 209 CLR 1.
[301] *Cheung v The Queen* [2001] HCA 67; (2001) 209 CLR 1 at [16] per Gleeson CJ, Gummow and Hayne JJ; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [13.112]; see also A Halphen, *A Public Voice in Sentencing?* (2003) 27 *Criminal Law Journal* 157.
[302] See further [2.70].
[303] A Freiberg and F Stewart, *Beyond the Partial Excuse: Australasian Approaches to Provocation as a Sentencing Factor*, in J Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011).
[304] See [2.80].
[305] *Whittaker v The King* [1928] HCA 28; (1928) 41 CLR 230, 240 per Isaacs J; see also *R v Harris* [1961] VR 236, 237; *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(s) (court may take into account any jury recommendation for mercy).
[306] [1960] VR 137, 139.

that the punishment was the province of the judge, not the jury. However, where the jury's guilty verdict is capable of being supported by more than one head of liability or more than one version of the facts, the trial judge is entitled to treat the recommendation for mercy as consistent with the view of the law or the facts that is most favourable to the prisoner.

The prospect of greater jury involvement in sentencing has been mooted by the then Chief Justice of New South Wales in order to increase public confidence in sentencing and to provide judges with a broader range of views as to an appropriate sentence by way of a process of consultation rather than direct involvement.[307] However, a subsequent review by the Law Reform Commission of New South Wales recommended against a great involvement by jurors in sentencing than they presently have.[308] The Commission's view was that greater involvement would create more inconsistency in sentencing, be impracticable and unfair, create difficulties in providing jurors with sufficient information to allow them to make an informed judgment, and create an unjustifiable distinction between summary and indictable offences. The Commission was also of the view that public confidence could be better enhanced by public education.

Sentencing Advisory Councils

[1.140]

In 2004, the Victorian Sentencing Advisory Council was established under the *Sentencing Act 1991* (Vic). The Council, now one of a number of similar bodies in Australia,[309] was established in response to the Government's request to find mechanisms to more adequately incorporate community views into the sentencing process.[310] The Council does so through its membership, its studies of public opinion and its extensive consultation processes.[311] The Council has a number of statutory functions:[312]

(a) to state in writing to the Court of Appeal its views in relation to the giving, or review, of a

[307] The Honourable JJ Spigelman AC, Chief Justice of New South Wales, *A New Way to Sentence for Serious Crime* (Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales, Sydney, 31 January 2005); see also E Kerr, *Raising the Fourth Pillar: Public Participation in Australian Sentencing – A Comparative Perspective* (2012) 36 *Criminal Law Journal* 173. On juries' views of sentencing see K Warner and J Davis, *Using Jurors to Explore Public Attitudes to Sentencing* (2012) 52 *British Journal of Criminology* 1; K Warner, *Jury Sentencing Survey*, Report to the Criminology Research Council (April 2010) p 19, http://www.criminologyresearchcouncil.gov.au/reports/0607-4.pdf; K Warner and J Davis, *Involving Jurors in Sentencing: Insights from the Tasmanian Jury Study* (2013) 37 *Criminal Law Journal* 246.

[308] NSW Law Reform Commission, *Role of Juries in Sentencing*, Report 118 (NSWLRC, 2007).

[309] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I; see also the NSW Sentencing Council website http://www.sentencingcouncil.lawlink.nsw.gov.au/sentencing/sent_council_index.html, the Tasmanian Sentencing Advisory Council website http://www.sentencingcouncil.tas.gov.au and the Sentencing Advisory Council of South Australia website http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia. The Queensland Sentencing Advisory Council was abolished in 2012; see also K Warner, *Sentencing Review 2008–2009* (2010) 34 *Criminal Law Journal* 16; New South Wales Law Reform Commission, *Sentencing*, Report 139 (NSWLRC, 2013) Ch 18.

[310] A Freiberg, *The Victorian Sentencing Advisory Council: Incorporating Community Views into the Sentencing Process*, in A Freiberg and K Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy* (Hawkins Press & Willan Publishing, 2008) p 148.

[311] See generally http://www.sentencingcouncil.vic.gov.au.

[312] *Sentencing Act 1991* (Vic) s 108C(1)(a) – (f).

guideline judgment;

(b) to provide statistical information on sentencing, including information on current sentencing practices, to members of the judiciary and other interested persons;

(c) to conduct research, and disseminate information to members of the judiciary and other interested persons, on sentencing matters;

(d) to gauge public opinion on sentencing matters;

(e) to consult, on sentencing matters, with government departments and other interested persons and bodies as well as the general public;

(f) to advise the Attorney-General on sentencing matters.

The Council is comprised of a Board of Directors of 14 persons – appointed by the Governor-in-Council on the recommendation of the Attorney-General – of varying backgrounds and experience including community issues affecting courts, academia, victims of crime support or advocacy groups, the policing, prosecution or defence of crime, or in the operation of the criminal justice system generally.[313] It was structured in this way in order to facilitate broad community input and provide a balance of views. Unlike Councils in some other jurisdictions, the Victorian Council does not contain existing or past judicial officers on it, although the criteria would allow it to do so under the rubric of "experience in the operation of the criminal justice system".

Commonwealth and State jurisdictions

[1.145]

Under Australian constitutional arrangements the administration of criminal justice is substantially, but not exclusively, a matter for the States.[314] Victoria thus possesses its own body of criminal law, the largest part of which is made pursuant to the authority granted to State Parliament by its own Constitution "to make laws in and for Victoria in all cases whatsoever".[315] The federal Government has no general investment under the Australian Constitution[316] of power to control the liberty of the subject or to impose punishment for disobedience of laws designed generally for the peace, order and good government of the Commonwealth.[317] Nor does the Constitution contain an express federal power to legislate with respect to criminal law.

[313] *Sentencing Act 1991* (Vic) s 108F.

[314] The Australian Law Reform Commission estimated that approximately 90% of criminal activity fell within the responsibilities of the States and Territories. It also estimated that in 2006 there were over 500 Commonwealth statutes containing criminal offences. On the expansion of federal criminal law see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [11.43].

[315] *Constitution Act 1975* (Vic) s 16; see also *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *Constitution Act 1889* (WA) s 2.

[316] Subsequent references to the "Constitution" are references to the *Commonwealth of Australia Constitution*.

[317] *Attorney-General (Cth) v Colonial Sugar Refining Company Ltd* [1914] AC 237, 255; *R v Sharkey* [1949] HCA 46; (1949) 79 CLR 121 at [8]–[9]; *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455.

Nonetheless, the Commonwealth Parliament does possess power to create penal offences in relation to any of the subjects upon which it is authorised by the Constitution to legislate. It has been argued that authority to enact criminal law and to provide for criminal punishments can be implied at common law from the very existence of the Commonwealth itself.[318] However, the primary source of federal power to create offences and impose sanctions is regarded as residing in the federal Government's constitutional power under s 51(xxxix) to make laws with respect to all "matters incidental to the execution of any power vested by this Constitution in … Parliament … the Government of the Commonwealth. … the Federal Judicature, or in any department or office of the Commonwealth". This incidental power must be read with some other head of power enumerated in the Constitution but, as long as the penal law is necessary and incidental to the execution and enforcement of a valid substantive law, it is within the competence of the Commonwealth Parliament to enact it: "Without the power of punishment for disregard, all laws would be capable of evasion and would thereby be ineffective and impotent".[319] The incidental power has, for example, been read in conjunction with the trade and commerce power[320] to justify both criminal and non-criminal sanctions under the *Customs Act 1901* (Cth).[321] This same combination is presumed to support penalties under Commonwealth marketing legislation,[322] civil and criminal penalties under the *Competition and Consumer Act 2010* (Cth),[323] and measures for breaches of federal shipping and aviation legislation.[324] So too with every other head of power in s 51 or elsewhere. The federal *Crimes Act 1914* (Cth), which seeks to protect many areas of Commonwealth interest, thus derives its validity not only from the incidental power and other s 51 heads such as the defence and external affairs powers,[325] but also from the executive power contained in s 61. The latter includes a reference to the Commonwealth's executive power extending to the execution and maintenance of the Constitution and the laws of the Commonwealth. In the *Communist Party* case[326] it was acknowledged that the incidental

[318] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at [25]–[26] per Dixon and [15] per Fullagar JJ.

[319] J Quick, *Legislative Powers of the Commonwealth and the States of Australia* (Law Book Company, 1919) p 93; *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425, 441 per Isaacs J See also *Stemp v Australian Glass Manufacturers Co Ltd* [1917] HCA 29; (1917) 23 CLR 226. Note that in s 53 of the *Constitution* it is assumed, but not enacted, that the federal Parliament possesses power to enact legislation imposing fines and pecuniary penalties. Such fines and penalties do not constitute the acquisition of property within s 51(xxxi) of the Constitution, *Re Smithers; Ex parte McMillan* [1982] HCA 76; (1982) 152 CLR 477 at [23].

[320] *Commonwealth of Australia Constitution* (Cth) s 51(i).

[321] *Lyons v Smart* [1908] HCA 34; (1908) 6 CLR 143; *Milicevic v Campbell* [1975] HCA 20; (1975) 132 CLR 307; *Re Smithers; Ex parte McMillan* [1982] HCA 76; (1982) 152 CLR 477.

[322] For example, *Export Market Development Grants Act 1997* (Cth) ss 103 and 104; *Primary Industries Levies and Charges Collection Act 1991* (Cth) s 15; *Wheat Export Marketing Act 2008* (Cth) Pt 2, Div 5 and Pt 8; and other tax offences which have their punitive provisions contained within Ch 2 of the *Criminal Code 1995* (Cth).

[323] Formerly known as the *Trade Practices Act 1974* (Cth). This also relies upon the corporations power: *Commonwealth of Australia Constitution* (Cth) s 51(xx).

[324] For example, *Navigation Act 2012* (Cth); *Air Navigation Act 1920* (Cth); *Crimes (Aviation) Act 1991* (Cth). These are also supported by the external affairs power: *Commonwealth of Australia Constitution* (Cth) s 51(xxix).

[325] *Commonwealth of Australia Constitution* (Cth) s 51(vi) and (xxix); *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121. The potential scope of the external affairs power as a vehicle for enacting federal criminal was expanded by the High Court's decisions in *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania* (1983) 158 CLR 1. The federal Government relies on the external affairs power to support the *Crimes (Biological Weapons) Act 1976* (Cth) and the *Crimes (Internationally Protected Persons) Act 1976* (Cth); see also *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 14.

[326] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.

power, when read with s 61, would be sufficient to empower the federal Parliament to "punish crimes against the Commonwealth and to make laws to aid the Executive Government in the execution of its authority to protect the Commonwealth against violence or acts that would directly lead to violence".[327] This goes so far as to support even a death penalty.[328]

Among the enumerated heads of power in the Constitution relevant in other ways to sentencing and disposal of offenders are s 51(xix) (aliens), s 51(xxvii) (immigration and emigration) and s 51(xxviii) (the influx of criminals), pursuant to each of which the Commonwealth may either deny criminals entry to the country or order their deportation;[329] s 51(xxiv) (the service and execution throughout the Commonwealth of the civil and criminal processes and the judgments of the courts of the States);[330] s 52(i), which grants the Commonwealth exclusive power to make laws (including criminal laws) to operate in places acquired by the Commonwealth for public purposes;[331] s 92, which has operated to strike down measures designed to prevent released prisoners passing from one State to another after discharge;[332] s 119, which allows the States to call for Commonwealth protection against domestic violence (though this section may not be sufficient warrant to support federal criminal offences and sanctions unless the State unrest itself disrupts some function within the Commonwealth authority);[333] and s 120, which imposes upon the States an obligation to make provision for detention in their prisons of persons accused or convicted of Commonwealth offences and provides for the punishment of such persons.[334]

Application of State sentencing laws to Commonwealth offences

[1.150]

The High Court has original jurisdiction in trials of federal indictable offences[335] and the Commonwealth Parliament is free to direct that only federal courts deal with breaches of Commonwealth law.[336] However, the forum for the trial and sentencing of persons offending

[327] [1951] HCA 5; (1951) 83 CLR 1 at [9] per McTiernan J.
[328] *Death Penalty Abolition Act 1973* (Cth) ss 4 and 5.
[329] *Migration Act 1958* (Cth) ss 5C and 501; see [9.340].
[330] *Service and Execution of Process Act 1992* (Cth) Pt 7. See also *Aston v Irvine* [1955] HCA 53; (1955) 92 CLR 353.
[331] *Worthing v Rowell & Muston Pty Ltd* [1970] HCA 19; (1970) 123 CLR 89; *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93.
[332] *R v Smithers; Ex parte Benson* [1912] HCA 96; (1912) 16 CLR 99.
[333] *R v Sharkey* [1949] HCA 46; (1949) 79 CLR 121 at [8] per Dixon J.
[334] *R v Turnbull; Ex parte Taylor* [1968] HCA 88; (1968) 123 CLR 28; see also *Lamshed v Lake* [1958] HCA 14; (1958) 99 CLR 132. The Commonwealth is not liable to the States for the expense of keeping federal prisoners.
[335] *Judiciary Act 1903* (Cth) s 30(c). This jurisdiction is based on the *Commonwealth of Australia Constitution* (Cth) s 76(ii) and possibly s 75(iii): *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425, 438 and 444. However, the High Court may remit the matter to another federal court or a State court: *Judiciary Act 1903* (Cth) s 44. The High Court might also have original criminal jurisdiction under the *Commonwealth of Australia Constitution* s 75(i) and (ii) insofar as offences concern a matter arising under any treaty or affect consuls or other representatives of other countries.
[336] Under the *Commonwealth of Australia Constitution* (Cth) s 71, the Commonwealth has power to create federal courts and, pursuant to this power, the *Federal Court of Australia Act 1976* (Cth) was passed to establish a Federal Court with original and appellate jurisdiction over specified federal matters. In its original jurisdiction, the court has

against Commonwealth law within a State is inevitably a State court invested with federal jurisdiction.[337] Such courts are required by the *Judiciary Act 1903* (Cth) s 68(1) to apply to persons charged with offences against Commonwealth law the same State laws and procedures[338] relating to arrest, custody, summary conviction, committal for trial, trial on indictment and hearing of appeals as they would normally apply to persons charged with offences against State law. Federal courts, however, cannot be invested with State jurisdiction.[339]

The fact that the local procedural law being picked up may vary from State to State is not a valid ground of objection to its application to a federal prosecution,[340] even if those differences are significant.[341] While there is no constitutional requirement that Commonwealth laws operate uniformly throughout Australia, the Commonwealth cannot legislate against the States in a discriminatory fashion.[342] Though it is generally considered desirable that, in the sentencing of offenders, like offenders be punished alike,[343] the High Court has recognised that sentencing law in Australia is necessarily applied on a State-by-State, Territory-by-Territory basis. It therefore accepts that sentencing practices may not be uniform from jurisdiction to jurisdiction, but may be

---

been invested with industrial, bankruptcy, trade practices and certain other areas of potential penal significance, eg *Customs Act 1901* (Cth) s 229A (forfeiture of drug proceeds). There has been no general investment of original jurisdiction over federal crime but in 2009 jurisdiction was given to the Court to try indictable cartel offences by jury: see *Federal Court of Australia Act 1976* (Cth) Pt III, Div 1, subdiv A; *Judiciary Act 1903* (Cth) ss 68A, 68B and 68C. In its appellate jurisdiction, the court may entertain appeals from judgments of State courts exercising federal jurisdiction, "other than a Full Court of the Supreme Court of a State": *Federal Court of Australia Act 1976* (Cth) s 24(1)(c). This jurisdiction only arises when specifically granted by some other Act. If it cared to do so, the Commonwealth could, in the interest of improving federal sentencing consistency, direct that all criminal appeals in matters of federal jurisdiction should lie from State courts below the level of the Full Supreme Court direct to the Federal Court instead of to the County and Supreme Courts, as at present.

[337] *Commonwealth of Australia Constitution* s 77(iii). This constitutional power has been exercised by *Judiciary Act 1903* (Cth) ss 39(2) and 68(2). The *Judiciary Act 1903* (Cth) s 39 refers to the exercise of federal jurisdiction by a State court within its ordinary limits as to locality, subject matter, etc. Apart from the general investment of jurisdiction under s 39(2), there is a specific investment under s 68(2) of the power to hear summary matters, commit for trial, and to try indictable offences against Commonwealth law in the States. In some jurisdictions some federal criminal matters are dealt with by magistrates who specialise in these matters: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [18.9]. The Federal Circuit Court has no jurisdiction to hear federal summary offences: *Federal Circuit Court of Australia Act 1999* (Cth) s 10. In 2011–12, 10,809 defendants were finalised in Australia's criminal courts with at least one federal offence. Of these, 977 were in the higher courts, 9,640 in the Magistrates' Court and 191 in the Children's Court. A total of 22% of these were heard in Victoria: see Australian Bureau of Statistics, *Federal Defendants in Australia, 2011–12*, 4515.0 (ABS, 2013).

[338] The word "procedure" includes powers under sentencing laws: *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 at [34] per Gummow J and Heydon J, with whom Callinan J agreed at [121]; see also Alsopp P in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 at [14]; (2010) 79 NSWLR 1.

[339] *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511. This situation has not been considered ideal in cases where there is an overlap between State and federal offences that relate to taxation, trade practices and corporations offences: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [8.30].

[340] *Williams v The King (No 2)* [1934] HCA 19; (1934) 50 CLR 551, 560 per Dixon J.

[341] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455, 467 at [23]–[24] per Mason CJ, Dawson and McHugh JJ (different prison regimes).

[342] For example, the Commonwealth cannot prescribe different maximum penalties for the same offence in different States: *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at [7] per Brennan J.

[343] See *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 at [1] per Mason J; see also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [3.29].

affected by local values and circumstances.[344] The policy choice is clear and settled, though still controversial. Gleeson CJ has stated that this:[345]

> … general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter.

Unlawful conduct may be regarded differently in different areas of Australia. This may be less so with federal crimes, where it is proper to assume that they are to be regarded as equally grave wherever committed in the nation. Sentences imposed elsewhere in Australia under the same federal law may be consulted in order to achieve a measure of consistency in what are regarded as proportionate penalty levels.[346] However, in relation to a State or Territory crime, consideration has to be given to the way in which the conduct is viewed locally.[347] This is particularly true where cultural boundaries are being crossed.[348]

The *Judiciary Act 1903* (Cth) s 68(1) does not expressly authorise the use of State sentencing options in the disposal of federal offenders. However, the references to summary conviction, trial on indictment and hearing of appeals are clearly apt to pick up both the procedural aspects of sentencing – such as the power to call for pre-sentence reports, the admission of victim impact statements and the right of the court to increase sentences on a prisoner's appeal – as well as the substantive rules such as those which allow the Crown to appeal against sentence.[349] In theory, the wording is also wide enough to allow a court exercising federal jurisdiction to make use of State laws governing the disposal of offenders upon conviction.[350] The application of any of these State laws to Commonwealth offenders is, of course, subject to exclusion or modification by federal laws defining the manner in which offences against the Commonwealth are to be dealt with.[351] Thus, State procedures allowing other offences to be taken into consideration at sentencing under *Sentencing Act 1991* (Vic) s 100 are excluded by virtue of the existence of similar provisions in the *Crimes Act 1914* (Cth) s 16BA expressly relating to federal offenders.

---

[344] *Veen v The Queen (No 1)* [1979] HCA 7; (1979) 143 CLR 458 at [3] per Aicken J; *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at [7] per Gibbs CJ and [4] per Brennan J; *Kruger v Commonwealth* [1997] HCA 27; (1997) 190 CLR 1; *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339; *R v Gee* [2003] HCA 12; (2003) 212 CLR 230; *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174.

[345] *R v Gee* [2003] HCA 12; (2003) 212 CLR 230 at [7]; cf dissent of Kirby J in *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 at [67].

[346] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at [34]. A Commonwealth sentencing database has been established to assist prosecutors and the courts to achieve consistency in sentencing: see [2.170].

[347] *Veen v The Queen (No 1)* [1979] HCA 7; (1979) 143 CLR 458 at [3]–[6] per Aicken J; *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at [7] per Gibbs J, [12]–[21] per Murphy J and [4] per Brennan J.

[348] For example, *Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561 at [25] per Brennan J and [11] per Deane J; see [5.70].

[349] *De Vos v Daly* [1947] HCA 12; (1947) 73 CLR 509; *Peel v The Queen* [1971] HCA 59; (1971) 125 CLR 447; *R v Walsh* (1984) 3 NSWLR 584.

[350] *R v Dolan* [1919] VLR 55, 60; *All-Cars Ltd v McCann* [1945] ALR 214, 215 per Dixon J.

[351] *Adams v Chas S Watson Pty Ltd* [1938] HCA 37; (1938) 60 CLR 545.

Similarly, State provisions relating to non-parole periods are not picked up by s 68(1).[352] The overlap between the provisions needs to be reasonably precise. A Commonwealth law that provides for aggregate sentences in relation to summary offences does not prevent the Commonwealth from picking up State aggregate sentencing laws in respect of indictable offences.[353] State laws that require a judge to state explicitly the extent of the discount for a guilty plea apply to Commonwealth offences by force of *Judiciary Act 1903* (Cth) s 79.[354]

Section 79 of the *Judiciary Act 1903* (Cth) also declares that applicable State laws are to be binding on all courts exercising federal jurisdiction within the State.[355] The section expressly includes State laws relating to procedure, evidence and the competency of witnesses. It too allows for the possibility that Commonwealth legislation may preclude a State court from relying on State law when dealing with a federal matter.[356] Section 80 of the *Judiciary Act 1903* (Cth) supports s 79 by providing that insofar as the laws of the Commonwealth are not applicable and not inconsistent with – or their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment – the common law in Australia and the statute law in force in the State is to be the operative law in all courts exercising federal jurisdiction within that State.[357] There is no doubt that substantive as well as procedural rights under State law may be picked up by s 79 and s 80 if neither the Constitution nor the laws of the Commonwealth address themselves to these matters.[358] A benevolent and facilitative approach is to be taken to the scheme and the general policy of the legislation.[359] However, over recent years the interpretation of the relevant provisions and their relationship has become more complex, leaving a number of issues unresolved.[360] It appears that in response to the increasing complexity, courts are prepared to take a broad view as to which of ss 68(1) or 79(1) apply to pick up and give operation to State sentencing laws in respect of federal offences.[361]

The courts distinguish between using State laws as a means of varying or avoiding sentences set

[352] *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174; *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520.
[353] *R v Bibaoui*[1997] 2 VR 600; (1996) VicSC 52; *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174.
[354] *Scerri v The Queen* [2010] VSCA 287.
[355] See generally G Hill and A Beech, *"Picking up" State and Territory Laws Under s 79 of the Judiciary Act – Three Questions* (2005) 27 *Australian Bar Review* 25.
[356] On the nature of a "matter" see *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [84]. One issue in that case was whether a guideline judgment was a matter that could be applied to a Commonwealth offence: see [1.195] (judicial power and "matters").
[357] There appears to be "little, if any, functional difference" between the phrases "so far as they are applicable" in *Judiciary Act 1903* (Cth) s 68(1) and "except as otherwise provided" in s 79(1): *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 at [7] per Gleeson CJ and [41] per Gummow J and Heydon J with whom Callinan J agreed at [121]; *Kelly v Saadat-Talab* [2008] NSWCA 213; (2008) 72 NSWLR 305 at [2]. Section 80 has no application where a court is not exercising federal jurisdiction: *Pantazis v The Queen* [2012] VSCA 160 at [26].
[358] *Archdall and Roskruge; Ex parte Carrigan and Brown* [1928] HCA 18; (1928) 41 CLR 128; *Goddard v Osborne* (1978) 18 SASR 481; cf *R v Kinal* [1978] Tas SR 91; *Commissioner of Stamp Duties (NSW) v Owens (No 2)* [1953] HCA 62; (1953) 88 CLR 168 at 170; *Austral Pacific Group Ltd (In liq) v Airservices Australia* [2000] HCA 39; (2000) 203 CLR 136; *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47; (2003) 217 CLR 30 at [65]; *Wilson v Alexander* [2003] FCAFC 272; 135 FCR 273 at [19].
[359] *R v Walsh* (1984) 3 NSWLR 584.
[360] G Hill and A Beech, *"Picking up" State and Territory Laws Under s79 of the Judiciary Act – Three Questions* (2005) 27 *Australian Bar Review* 25.
[361] *R v ONA* [2009] VSCA 146; (2009) 24 VR 197.

by federal law and the use of State laws as an aid to the enforcement of federal sentences. In the first situation, the High Court has held that if a Commonwealth Act has explicitly fixed a minimum penalty, neither a State Act nor any other federal Act (including the *Crimes Act 1914* (Cth)) can be invoked to mitigate the penalty.[362] In the second situation, the High Court is more willing to allow State law to aid the enforcement of federally imposed sentences. In *De Vos v Daly*,[363] the High Court held that there was some flexibility in the mode of enforcing fines, provided that the procedure adopted did not clash with any remedies procurable in the criminal jurisdiction under State law pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth). Section 15A(1)(a) of the *Crimes Act 1914* (Cth) now confirms that a State law can regulate the enforcement of fines (including time to pay, payment by instalments and default imprisonment), "so far as it is not inconsistent with a law of the Commonwealth".

The *Judiciary Act 1903* (Cth) s 80 envisages the possibility that the courts may have to look to the common law in Australia, or to State statutes, to provide the means of adequately punishing federal offenders. However, the necessity of doing so can only arise if the relevant Commonwealth law fails to indicate what sanction attaches to an infraction. Over the years the need for courts sentencing federal offenders to look to the common law or State statutes has diminished, and federal offenders are subject to the federal sentencing provisions found in *Crimes Act 1914* (Cth) Pt 1B. This offers numerous federal sanctions, not all of which have equivalents in State law. It also incorporates, by reference, a number of State sentencing options.[364] Children or young persons convicted of crimes against federal law may be dealt with according to State law.[365] However, the courts have a discretion whether or not to make use of the State or Territory sanctions. They may decline to do so and instead select one or more of the measures specified in the *Crimes Act 1914* (Cth), or in the legislation prohibiting the particular conduct in question. As there are no other special provisions for the sentencing of young offenders under Commonwealth law, sentencing is normally under the State or Territory law picked up under *Crimes Act 1914* (Cth) s 20C.[366] The entire panoply of State criminal law (including all State sentencing options) has been made to apply, by Commonwealth law, to Commonwealth places within the State[367] and to Commonwealth-controlled off-shore areas

[362] *All-Cars Ltd v McCann* [1945] ALR 214; see also *Darcy v Nikoloff* [1954] SASR 62; *R v Mirkovic* [1966] VR 371 (State parole provisions do not apply to federal offenders); *R v Otto* [1971] VR 844 (neither s 79 nor s 80 of the *Judiciary Act 1903* (Cth) applied to bring in State rules governing the order in which prison sentences were to be served when Commonwealth law has directly addressed itself to the question); *Kidd v The Queen* [1972] VR 728, 729; *R v Martin* (1983) 78 FLR 133; *R v Thomas* (1986) 41 SASR 566.

[363] [1947] HCA 12; (1947) 73 CLR 509.

[364] For example, community correction orders, *Crimes Act 1914* (Cth) s 20AB(1) and *Family Law Act 1975* (Cth) s 112AG; see also *Crimes Regulations 1990* (Cth) reg 6 which lists sentencing options prescribed for the purposes of s 20AB. On the inconsistency between State sentencing options and the disparity this produces in relation to federal offenders, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [7.116]ff.

[365] *Crimes Act 1914* (Cth) s 20C; see [16.35].

[366] See A Freiberg, RG Fox and M Hogan, *Sentencing Young Offenders*, Sentencing Research Paper No 11 (Australian Law Reform Commission, 1988) p 21; see also *R v Lovi* [2012] QCA 24 (where *Crimes Act 1914* (Cth) s 20C does not apply because of the offender's age, State law will be picked up by *Judiciary Act 1903* (Cth) s 68).

[367] The Commonwealth Parliament has exclusive power to make laws with respect to places acquired by the Commonwealth for public purposes: *Commonwealth of Australia Constitution* (Cth) s 52(i). State criminal law therefore does not apply to such areas within the State: *Worthing v Rowell & Muston Pty Ltd* [1970] HCA 19; (1970) 123 CLR 89; *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93. The effect of these decisions has now been reversed by Commonwealth–State legislative arrangements under which the federal Government has enacted that

adjacent to the State.[368] In sentencing for crime in these areas, the trial judge exercises federal, not State, jurisdiction under the "federalised" State law. Likewise, under the federal–State legislative arrangements establishing the Australian companies and securities scheme, offences against the *Corporations Law* and the *Australian Securities Law* are treated as though they were breaches of Commonwealth law.[369] Federal law thus applies for the purposes of sentencing offenders under this legislation. On the other hand, offences by corporations against the general criminal law of Victoria, or against statutes having only intra-state effect (eg local industrial, health and safety legislation), continue to be punishable under State law.

Inconsistency

[1.155]

Where there is inconsistency between State and federal law in the procedure set out for the prosecution or punishment of offenders, federal law prevails so far as federal offenders are concerned.[370] Likewise, where conduct constitutes an offence against both federal and State law, it cannot be prosecuted or punished under the State law if the Commonwealth has exhibited an intention to cover the field by its prohibition. The test is whether the Commonwealth legislation "states a relevant rule of conduct for persons convicted of offences against laws of the Commonwealth, evincing an intention to deal with that subject to the exclusion of any other law".[371] Under s 109 of the Constitution, the State law will be treated as inoperative.[372] The order of operation and the interaction between s 109 and *Judiciary Act 1903* (Cth) ss 79 or 68(1) is complex.[373] On one approach, first, a valid state law must be in operation that is relevant to a court that is exercising federal jurisdiction and it must be a law that is picked up by the court under the *Judiciary Act 1903* (Cth). Second, it must be in conflict with a law of the Commonwealth. Finally, if it is in conflict, s 109 applies. The central issue is whether there is in

---

State law is to apply to Commonwealth places within the State: *Commonwealth Places (Application of Laws) Act 1970* (Cth); *R v Loewenthal; Ex parte Blacklock* [1974] HCA 36; (1974) 131 CLR 338; *Tucs v Algie* (1985) 38 SASR (State licence disqualification laws apply in Commonwealth places); *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339 (it appears that the sentencing law applied in such places is State law picked up and applied by federal law: per Kirby J not deciding). See generally PH Lane, *The Law in Commonwealth Places* (1970) 44 *Australian Law Journal* 403; PH Lane, *The Law in Commonwealth Places: A Sequel*, (1971) 45 *Australian Law Journal* 138. Where State offences apply by virtue of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) s 5(3) provides that federal sentencing options no longer apply, only the State ones.

[368] *Crimes At Sea Act 2000* (Cth); *Crimes At Sea Act 1999* (Vic); C Saunders, *Maritime Crime*, (1979) 12 *Melbourne University Law Review* 158.

[369] *Corporations Act 2001* (Cth) ss 3 and 5; *Corporations (Victoria) Act 1990* (Vic) s 28.

[370] "Law" in this context means statutory law, not the common law: *Pantazis v The Queen* [2012] VSCA 160 at [10]; see also *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; (2008) 236 CLR 101 at [13]; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637, 666; *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [222].

[371] *R v Gregory* (1983) 3 NSWLR 172, 175, cited with approval in *Clixby v Weston* (1988) 15 NSWLR 35 (offences of theft under State and Commonwealth law not inconsistent).

[372] *R v Loewenthal; Ex parte Blacklock* [1974] HCA 36; (1974) 131 CLR 338; *Miller v Miller* [1978] HCA 44; (1978) 141 CLR 269; *R v Gregory* [1983] 3 NSWLR 172, see also *Interpretation of Legislation Act 1984* (Vic) s 6.

[373] *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at [38] and [76]; *Agtrack (NT) Pty Ltd v Hatfield* [2005] HCA 38; (2005) 223 CLR 251 at [61]–[63]; and see *R v ONA* [2009] VSCA 146; (2009) 24 VR 197 at [70]–[137] per Neave JA; *DPP v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 at [29] per Allsop P.

fact inconsistency or "actual contrariety".[374] However, in *R v ONA*,[375] Neave JA appeared to indicate that s 109 should be considered first in order to determine whether there was any inconsistency (in which case Commonwealth law would prevail) and only if there were not, would the question of the operation of *Judiciary Act 1903* (Cth) ss 68(1) or 79(1) arise.

A mere difference in penalties is not, of itself, a conclusive indication of the Commonwealth's intention to cover the field,[376] and federal legislation sometimes expressly declares that it does not intend entirely to cover an offence area.[377] Where conduct constitutes an offence under both a Commonwealth and a State Act, and the width of the federal law has not rendered the State prohibition inoperative, the offender may be prosecuted in either jurisdiction or both.[378] Finally, it should be noted that federal law can provide for the cancellation or suspension of any State-imposed sanction if the latter impedes the furtherance of federal purposes authorised under the Constitution.[379] The Commonwealth may also impose certain minimum standards on the States in relation to the execution of federal sentences.[380]

Interjurisdictional enforcement

[1.160]

The general principle of conflict of laws that the courts of one jurisdiction will not enforce the penal laws of another[381] is qualified under the Australian federal compact in a number of ways. First, s 51(xxiv) of the *Constitution* gives the Commonwealth power to make laws with respect to "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States". In reliance on this power, the *Service and Execution of Process Act 1992* (Cth) has been enacted to provide for the service of process, execution of warrant and enforcement of judgments and fines of the courts of one State in other States. Part 7 of the Act enables a court of a State or Territory to come to the aid of another in enforcing a fine (if needed by imprisonment in default) without having to return the offender to

[374] *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 at [7] and [40]; *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at [79]–[80]; *Kelly v Saadat-Talab* [2008] NSWCA 213; (2008) 72 NSWLR 305 at [4]–[11]; *DPP v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 at [38] per Allsop P. According to S Joseph and M Castan, *Federal Constitutional Law A Contemporary View* (Lawbook Co, 2001) Ch 7 (cited by Neave JA in *R v ONA* [2009] VSCA 146; (2009) 24 VR 197 at [92]; s 109 inconsistency can arise in three situations: (1) where it is impossible to simultaneously obey both laws, for example where one law requires the performance of an act, and the other forbids its performance; (2) where one law takes away a right conferred by another and (3) where Commonwealth legislation evinces an intention to "cover the field", leaving no area for the operation of State law.)

[375] [2009] VSCA 146; (2009) 24 VR 197.

[376] *Ex parte McLean* [1930] HCA 12; (1930) 43 CLR 472, 483 per Dixon J; *Jackson v The Queen* [1976] HCA 16; (1976) 134 CLR 42; *McWaters v Day* [1989] HCA 59; (1989) 168 CLR 289, 296 at [7].

[377] For example, *Competition and Consumer Act 2010* (Cth) s 131C; *Crimes (Aviation) Act 1991* (Cth) s 50(1).

[378] As to double punishment, see [2.325].

[379] *Storey v Lane* [1981] HCA 47; (1981) 147 CLR 549 (order under *Bankruptcy Act 1966* (Cth) s 60(1), permanently staying the enforcement of a sentence of imprisonment imposed under State law); see also *Re Lenske; Ex parte Lenske* (1986) 9 FCR 532.

[380] For instance, the prohibition on the use of corporal punishment for any person serving a federal sentence within the prison system: *Crimes Act 1914* (Cth) s 16D(1).

[381] *Huntington v Attrill* [1893] AC 150.

the jurisdiction in which the fine was imposed.[382] In theory, s 51(xxiv) of the *Constitution* could also be used to authorise similar arrangements for the out-of-State enforcement of other types of sentence, but the federal and State governments have not agreed to do so. Second, s 120 of the *Constitution* obliges States to make provision for the detention in its prisons of persons accused or convicted of offences against Commonwealth laws and for the punishment of persons convicted of such offences. Third, persons convicted of offences in Territories may be required to serve their sentences in a State under the *Removal of Prisoners (Territories) Act 1923* (Cth).[383] The situation is complicated by the requirement, in s 118 of the *Constitution*, that "full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State".

Nothing in the conflict of law rules, nor in the Constitution, precludes States and Territories from entering into formal or informal arrangements for the enforcement of each other's criminal judgments. For instance, the *Magistrates' Court Act 1989* (Vic) includes a section[384] giving effect to a scheme that enables fines summarily imposed in Victoria upon corporate offenders owning property interstate to be enforced against corporate property in the relevant State or Territory. The Act allows Victoria to reciprocate by enforcing interstate orders against corporate property within its jurisdiction.[385] This arrangement overcame inadequacies in the application of fine-enforcement provisions of the *Service and Execution of Process Act 1992* (Cth) to corporate entities. At any one time a significant number of Victorian offenders under community correction orders and parolees will be under supervision in another State, and like numbers of interstate offenders will be supervised in Victoria. These interstate supervisory arrangements are regulated by the *Community Based Sentences (Transfer) Act 2012* (Vic) that allows offenders serving community-based sentencing orders to transfer between participating jurisdictions.[386] Difficulties have arisen from time to time in apprehending offenders who violate orders in a manner that falls short of an offence against the receiving State's laws, but the arrangements are not regulated by legislation. Under the Victorian *Prisoners (Interstate Transfer) Act 1983* (Vic) and corresponding legislation in other States and the Commonwealth,[387] prisoners serving State or federal sentences may be transferred elsewhere in Australia to complete the sentence (including release on parole) in accordance with the law of the receiving State. This legislation is the result of an agreement between the federal and State Governments to facilitate the interstate movement of prisoners where this would promote their welfare or would allow for the trial of outstanding charges.[388] The *Parole Orders (Transfer) Act 1983* (Vic) is similarly part of a States

[382] See [7.235].
[383] *Turnbull; Ex parte Taylor* [1968] HCA 88; (1968) 123 CLR 28.
[384] *Magistrates' Court Act 1989* (Vic) s 98.
[385] See [7.230].
[386] See also for example, *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW); *Crimes (Sentence Administration) Act 2005* (ACT).
[387] *Prisoners (Interstate Transfer) Act 1982* (NSW); *Prisoners (Interstate Transfer) Act 1982* (Qld); *Prisoners (Interstate Transfer) Act 1982* (SA); *Prisoners (Interstate Transfer) Act 1982* (Tas); *Prisoners (Interstate Transfer) Act 1983* (WA); *Prisoners (Interstate Transfer) Act* (NT); Chapter 11 of *Crimes (Sentence Administration) Act 2005* (ACT); and *Transfer of Prisoners Act 1983* (Cth).
[388] *Prisoners (Interstate Transfer) Act 1983* (Vic) ss 7 and 12; see also *Children, Youth and Families Act 2005* (Vic) Sch 2 (Interstate Transfer of Young Offenders). See also *Prisoners (Interstate Transfer) Act 1982* (Qld) s 10A; *Prisoners (Interstate Transfer) Act 1982* (NSW) s 10A; *Prisoners (Interstate Transfer) Act 1982* (SA) s 10A; *Prisoners (Interstate Transfer) Act 1982* (Tas) s 8A; *Prisoners (Interstate Transfer) Act 1983* (WA) s 9A; *Prisoners (Interstate Transfer) Act* (NT) s 9A; *Prisoners (Interstate Transfer) Act 1983* (WA) s 9A.

and Territories agreement to permit parole orders made in one part of Australia to be registered and enforced in another State or Territory. The parolee is then able to move to the other State or Territory and is subject to supervision and the enforcement of the parole order as though it were made under local law. The international transfer of prisoners is facilitated by the *International Transfer of Prisoners Act 1997* (Cth). It, and matching State legislation,[389] applies to prisoners serving sentences under either State or Federal law and operates in relation to those countries with whom Australia has entered into reciprocal transfer relations. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) provides a legislative basis for Australia to enter into arrangements with other countries under which it may request and grant assistance in relation to criminal investigations and prosecutions including the temporary transfer of prisoners overseas to give evidence. The legislation can also be used to assist in the recovery of proceeds of crime through the international enforcement of orders for the forfeiture or confiscation of property and the recovery of pecuniary penalties imposed under the *Proceeds of Crime Act 1987* (Cth). The *International War Crimes Tribunals Act 1995* (Cth) contains similar provisions for prisoners to be transferred overseas to give evidence and to assist in investigations being conducted by international war crimes tribunals established under the auspices of the United Nations. It also contains machinery for the enforcement of forfeiture orders made by such tribunals. Quite apart from whether State or federal law can be drawn upon to actually enforce sanctions imposed elsewhere, the procedural arrangements at sentencing permit indictments and presentments to aver that the accused is a previously convicted person,[390] including having been convicted interstate or overseas.[391] This permits account to be taken of these priors at sentencing, particularly in relation to the offender's vulnerability to various types of disqualification.[392]

Sentencing and Constitutions

State Constitutions

[1.165]

State Constitutions generally grant authority to State Parliaments to make laws for "the peace, welfare and good government" of their jurisdiction "in all cases whatsoever".[393] They do not embody the doctrine of the separation of powers[394] and, subject to the considerations discussed

[389] For example, *International Transfer of Prisoners (Victoria) Act 1998* (Vic). See also *International Transfer of Prisoners (South Australia) Act 1998* (SA); *International Transfer of Prisoners (Queensland) Act 1997* (Qld), *International Transfer of Prisoners (New South Wales) Act 1997* (NSW), *Prisoners (International Transfer) Act 2000* (WA).

[390] *Criminal Procedure Act 2009* (Vic) s 245.

[391] As to proof of these convictions see *Evidence Act 1995* (Cth) Pt 4.3; *Evidence Act 2008* (Vic) s 178; *Rowe v Butcher* [1936] VLR 103. See also *Evidence Act 1971* (ACT) s 94; *Evidence Act 1995* (NSW) s 178; *Evidence Act* (NT) s 32; *Evidence Act 1929* (SA) ss 42 and 43; *Evidence Act 2001* (Tas) s 178; *Evidence Act 1906* (WA) s 47.

[392] The constitutionality of such provisions was upheld in *R v Clarke* (1929) 2 ALJ 407.

[393] *Constitution Act 1975* (Vic) s 16; see also *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 2. The following material draws extensively on A Freiberg and S Murray, *Constitutional Perspectives on Sentencing: Some Challenging Issues* (2012) 36 *Criminal Law Journal* 335.

[394] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638 at [22] per French CJ; see also *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at [9] per Brennan CJ, [27] per Dawson J, [13]–[18] per Toohey J, [15] per Gaudron J, [5]–[7] per McHugh J; *Kirk v Industrial Court (NSW)* [2010]

below relating to the ability of State courts to administer invested federal jurisdiction consistently with federal law, State legislation may alter the burden of proof and take away substantive and procedural rights in ways that may be "foolish, unwise or even patently unwise".[395] In theory, State legislatures have almost unlimited power.

Commonwealth Constitution

[1.170]

The Commonwealth Constitution gives the federal Parliament power to enact criminal laws relating to its enumerated powers, and the *Crimes Act 1914* (Cth) contains provisions relating to the sentencing of Commonwealth offenders.[396] State courts are invested with federal jurisdiction to try Commonwealth offences[397] and the various provisions of the *Judiciary Act 1903* (Cth)[398] direct the State courts to apply the same State laws regarding criminal procedure, evidence and the like unless there is a relevant Commonwealth law that expressly or impliedly covers the field.[399] There is no Bill of Rights attached to the Australian Constitution.

The High Court and the Constitution

[1.175]

Section 73 of the *Constitution* provides that: "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences". Although criminal law and sentencing appeals do not comprise a large proportion of the work of the court, the Court's supervision of sentences is regarded as making "a useful contribution to uniform and principled treatment of the decisions of Australia's courts affecting a most precious commodity in our society – the liberty and reputation of the individual punished and sentenced following a criminal conviction".[400] And although the Commonwealth Constitution does not contain a Bill of Rights, the Constitution is regarded as:[401]

HCA 1; (2010) 239 CLR 531 at [69]; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 293 ALR 450 at [57] per Hayne, Crennan, Kiefel and Bell JJ.

[395] *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at [41] per McHugh.

[396] *Crimes Act 1914* (Cth) Pt 1B; see generally Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006).

[397] *Commonwealth of Australia Constitution* (Cth) s 77(iii).

[398] *Judiciary Act 1903* (Cth) ss 68(1), 79.

[399] What is or is not a relevant federal law has been the subject of much litigation: for example, *Wong v The Queen* (2001) 207 CLR 584; 185 ALR 233 (compatibility of State sentencing guidelines with Pt 1B of the *Crimes Act 1914* (Cth); *DPP (Cth) v Bui* [2011] VSCA 61; *Baldock* [2010] WASCA 170; (2010) 269 ALR 674; *DPP v De La Rosa* [2010] NSWCCA 194; (2010) 273 ALR 324 (applicability of State laws removing sentencing double jeopardy to Commonwealth offences); *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 (aggregate sentences); *R v ONA* [2009] VSCA 146 (sex offenders registration laws).

[400] M Kirby, *The Mysterious Word "Sentences" in s 73 of the Constitution* (2002) 76 *Australian Law Journal* 97 at 108.

[401] *Weininger v The Queen* [2003] HCA 14; (2003) 212 CLR 629 at [54] per Kirby J.

> a central provision of the law. Countless cases show how it colours the meaning of other laws that the courts administer.

As Gleeson CJ noted in *Fardon v Attorney-General (Qld)*, laws must be considered in the light of their own constitutional context:[402]

> In the United States, the right to substantive due process is significant. In Canada, the Charter of Rights and Freedoms must be considered. In Australia, the Constitution does not contain any general statement of rights and freedoms. Subject to the Constitution, as a general rule it is for the federal Parliament, and the legislatures of the States and Territories, to consider the protection of the safety of citizens in the light of the rights and freedoms accepted as fundamental in our society. Principles of the common law, protective of such rights and freedoms, may come into play in the application and interpretation of valid legislation.

The High Court regards its role as the final appellate court in the Australian hierarchy as of profound importance[403] and is prepared to interpret its powers widely if it is necessary for it to exercise them to "cure a substantial and grave injustice".[404] As the final authority for determining the law applicable throughout the country, it is regarded as important that courts lower in the hierarchy faithfully follow the decisions of the Court, whatever reservations they may have about their correctness.[405]

Separation of powers

[1.180]

The doctrine of the separation of powers broadly requires that the power to legislate be exercised by the legislature, that the administration of the law be undertaken by the executive branch of Government, and that the function of interpreting the law and applying in the authoritative resolution of accusations or disputes be allocated to an independent judiciary.[406] State

---

[402] *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at [14] (footnotes omitted).

[403] *Crampton v The Queen* [2000] HCA 60 at [47] per Gaudron, Gummow and Callinan JJ; [113]–[121] per Kirby J ("the jurisdiction to prevent miscarriages of justice and fundamental errors of law should remain untrammelled by unduly protective procedural conceptions"); [145]–[164] per Hayne J ("[t]he constitutional conferral of appellate jurisdiction on this Court is to be construed amply and as 'implying the fullest authority to ascertain whether the judgment below ought, or ought not, to have been given'" citing *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 109 per Dixon J); (2000) 206 CLR 161.

[404] *Crampton v The Queen* [2000] HCA 60 at [57] citing *Craig v The King* [1933] HCA 41; (1933) 49 CLR 429. Parties are usually bound by the grounds of appeal submitted to an appellate court, but the Court may uphold an appeal on a ground for which leave had not been sought in the intermediate court.

[405] *Karim v The Queen* [2013] NSWCCA 23 at [63] per Allsop P; see also *Ravenor Overseas Inc v Readhead* [1998] HCA 17; (1998) 152 ALR 416 at [3]. The appellate role of the High Court is discussed further in Chapter 15.

[406] See R Edney, *Hard Time, Less Time: Prison Conditions and the Sentencing Process* (2002) 26 *Criminal Law Journal* 139; RS French, *Executive Toys: Judges and Non-judicial Functions* (2009) 19 *Journal of Judicial Administration* 5; S McDonald, *Involuntary Detention and the Separation of Judicial Power* (2007) 35 *Federal Law Review* 25; F Wheeler, *Due Process, Judicial Power and Chapter III in the New High Court* (2004) 32 *Federal Law Review* 205; C Wheeler, *Shifting Sands: Implications and the Constitution* (2007) 81 *Australian Law Journal* 544.

Constitutions do not require a separation of powers.[407] However, as the High Court ruled in *Kable v DPP (NSW)*, State courts, which exercise federal judicial powers, must uphold the institutional integrity of the courts.[408]

Though there are different views as to what *Kable* stands for,[409] the following propositions appear to apply: State legislation cannot abolish State supreme courts,[410] and State legislation should not confer on a State court a function which substantially impairs its role as a repository of federal jurisdiction[411] or which is repugnant to the judicial power of the Commonwealth[412] or which impairs the reality and appearance of independence.[413] "[C]ourts cannot be required to act at the dictation of the Executive".[414] Nor should a function impair or undermine public confidence in the courts exercising the judicial power of the Commonwealth[415] or procedural

[407] *Collingwood v Victoria (No 2)* [1994] 1 VR 652; see also A Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) p 747; G Taylor, *The Constitution of Victoria* (The Federation Press, 2006).

[408] *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

[409] See *Crump v New South Wales* [2012] HCA 20 at [31] per French CJ; (2012) 286 ALR 658; *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532; *Forge v ASIC* [2006] HCA 44; (2006) 228 CLR 45; *Baker v The Queen* [2004] HCA 45 at [82] per Kirby J; (2004) 223 CLR 513; *Silbert v DPP (WA)* [2004] HCA 9; (2004) 217 CLR 181; see also M Bagaric, *The High Court on Crime in 2010: Analysis and Jurisprudence* (2011) 35 *Criminal Law Journal* 5.

[410] *Crump v New South Wales* [2012] HCA 20 at [31] per French CJ; (2012) 286 ALR 658; *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at [12] per Gaudron J, [8] per McHugh J, [56] per Gummow J; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at [151]–[153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; (2009) 237 CLR 501.

[411] A law relating to the indefinite detention of an offender that places the decision whether or not to release an offender with the Executive does not directly or indirectly impugn the institutional integrity of the courts: *McGarry v Western Australia* [2005] WASCA 252 at [33] per Wheeler JA; (2005) 31 WAR 69; see also R Linsday, *Punishment Without Finality: One Year in the Life and Death of Alan Egan* (2009) 33 *Criminal Law Journal* 45; see also *R v Moffatt* [1998] 2 VR 229. In fact, it may be considered to be congruent with the Executive function to decide whether it is appropriate to release an offender into the community and the fact that the Executive may make its decision on "political" grounds does not render the law constitutionally invalid: *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69 at [37].

[412] A law that requires the appointment of a Supreme Court judge to the role of Chair of a Parole Board is not an impermissible attempt to confer administrative functions on a court and is not repugnant or incompatible with the exercise of the judicial power of the Commonwealth: *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356. Requiring a court not to take double jeopardy into account in prosecution appeals against sentence does not require a court to act in a manner that is repugnant to the judicial process: *R v Carroll* [2010] NSWCCA 55; (2010) 239 FLR 11.

[413] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [125] per Hayne, Crennan, Kiefel and Bell JJ; (2013) 295 ALR 638; see also *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [3], [81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; (2004) 218 CLR 146 at [3], [29]; *Forge v ASIC* [2006] HCA 44; (2006) 228 CLR 45; at [41], [64], [66]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at [10].

[414] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [125] per Hayne, Crennan, Kiefel and Bell JJ; (2013) 295 ALR 638; see also *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1; *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319. A court does not act at the dictation of the Executive if it is required to follow a policy that is expressed in primary or delegated legislation provided that the policy does not require the outcome of a particular matter before the court which leaves no discretion to the court: *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58; (2012) HCA 58.

[415] See [1.130] (public confidence).

fairness.[416]

Sovereignty of Parliament

[1.185]

The separation of powers principle is founded on the premise that there are proper and identifiable spheres of power for each of the organs of Government – Parliament, the courts and the Executive. The concept of sovereignty of Parliament is a key to understanding the limits to challenges to sentencing laws. Though the sovereignty of Parliaments is defined or limited by their Constitutions, in the absence of constitutional restrictions they may pass laws that limit the discretion of the courts and that may in other ways appear to some to be unduly restrictive or oppressive or unfair.[417] They are entitled to pass such legislation on sentencing matters as they wish, including changing the law in order to overturn a sentencing principle laid down by the High Court.[418]

In *Palling v Corfield*[419] the High Court set this out clearly:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned

[416] See [1.220] (procedural fairness).

[417] "Unfairness" is not a basis for a conclusion that legislation undermines the institutional integrity of a court: *Bakewell v The Queen (No 3)* [2008] NTSC 51; (2008) 22 NTLR 174; *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173; see also *Baker v The Queen* [2004] HCA 45 at [87] per Kirby J; (2004) 223 CLR 513 per (it is not the province of the courts to invalidate laws simply because they are regarded "as bad, unjust, ill-advised or offensive to notions of human rights").

[418] *R v Tilley* [1991] SASC 2910; (1991) 56 SASR 140.

[419] [1970] HCA 53; (1970) 123 CLR 52 per Barwick CJ; see also *R v Ironside* [2009] SASC 151; (2009) 104 SASR 54; *Attorney-General (SA) v Bell* [2013] SASCFC 88.

> the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.

The fact that Parliament may deny or limit a court's discretion by enacting mandatory or mandatory minimum sentences does not necessarily imply that it has undermined the principle of judicial independence.[420] The independence of the judiciary may be undermined if political pressure is exerted on judicial officers to decide individual cases on personal or political grounds, or if appointments to the bench are made on irrelevant criteria, but it remains the prerogative of Parliament to structure the distribution of sentencing power in any way it thinks fit, subject to any constitutional limitations. The complex and difficult relationship between the political and the judicial spheres was expressed by Allsop P in *Karim v The Queen*, a case that concerned the effect of mandatory penalties upon offenders involved in people smuggling:[421]

> For mandatory minimum sentences to be unconstitutional, a Constitutional constraint upon Parliament must be recognised that the assessment of a just and appropriate sentence is ultimately a judicial task, by the deployment of judicial method. The reconciliation of such a proposition with the authority of the Parliament to set societal norms involves deep questions of the relationship between Parliament's power and the inhering essence of law and judicial power. The source of an affirmative answer to the question of the existence of such constraint may lie in the rooted strength of the conception of equal justice and of the rejection of any power in Parliament to require courts to make orders that are arbitrary, grossly disproportionate or cruel by reference to inhering norms of fairness, justice and equality.

Allsop P has encapsulated the effect of the High Court's jurisprudence in *Palling v Corfield*[422] and *Fraser Henleins Pty Ltd v Cody*.[423] In his view they stand for the propositions:[424]

> … that mandatory sentencing provisions are within the authority of Parliament, that Parliament can provide for the mandatory sentence upon a condition or request effected by a third party, being a member of the Executive, that that legitimate condition or request includes the prosecutorial choice between two offences for the same conduct carrying differing sentencing regimes, one having a mandatory minimum penalty, that such a choice does not involve conferral of judicial power on the prosecution or any direction of the Court by the prosecution

[420] *Karim v The Queen* [2013] NSWCCA 23 at [78] per Allsop P; see also *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; (1945) 70 CLR 100; see also A Gray and G Elmore, *The Constitutionality of Minimum Mandatory Sentencing Regimes* (2012) 22 *Journal of Judicial Administration* 34; A Hemming, *The Constitutionality of Minimum Mandatory Sentencing Regimes: A Rejoinder* (2013) 22 *Journal of Judicial Administration* 224; A Trotter and M Gazozzo, *Mandatory Sentencing for People Smuggling: Issues of Law and Policy* (2012) 36 *Melbourne University Law Review* 553.

[421] [2013] NSWCCA 23 at [120] per Allsop P.

[422] [1970] HCA 53; (1970) 123 CLR 52.

[423] [1945] HCA 49; (1945) 70 CLR 100.

[424] *Karim v The Queen* [2013] NSWCCA 23 at [94]; distinguishing *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 on the grounds that providing prosecutors with a choice of offences and penalties does not amount to a direction to a court or an interference with its powers.

> and that such laws are valid even in circumstances where they operate with gross injustice.

Whether they like them or not, courts must apply the law as enacted by Parliament.[425] One aspect of the confidence that the public may have in the integrity of the courts is that they faithfully adhere to the laws enacted by Parliament, whatever a judge's private views are.[426] It will be regarded as a serious step for a court to hold that legislation is invalid, as the Constitution embodies the principle of parliamentary democracy.[427] The duty of the courts is interpret and apply the law[428] and the role of appellate courts is to determine whether there has been an error in its application. The "faithful adherence of the courts to the laws enacted by the parliament, however undesirable the courts may think them to be"[429] is regarded as essential to the maintenance of public confidence in the integrity of the judicial process and therefore to their role in the constitutional framework.

Courts should not interpret the law in a way that would "subvert a valid exercise of legislative power" or that would undermine the purpose and object of the legislation.[430] Each institution has its own role to play in the distribution of power under the Constitution and each is usually sensitive to the role of the other. Though the political and judicial spheres are defined, the boundaries are not always clear. In *Castlemaine Tooheys Ltd v South Australia* the High Court observed:[431]

> The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process. The resolution of that problem by the Court would require it to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of

[425] In *Karim v The Queen* [2013] NSWCCA 23 at [121] Allsop P would have concluded, in the absence of High Court authority, that the relevant laws were arbitrary, cruel and grossly disproportionate. In *Magaming v The Queen* [2013] HCA 40 Gageler J (dissenting) was of the view that *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; (1945) 70 CLR 100 should be re-opened and overruled on the ground that "a purported conferral by the Commonwealth Parliament on an officer of the Commonwealth executive of a discretion to prosecute an individual within a class of offenders for an offence which carries a mandatory minimum penalty, instead of another offence which carries only a discretionary penalty, amounts in substance to a purported legislative conferral of discretion to determine the severity of punishment consequent on a finding of criminal guilt and is for that reason invalid by operation of Ch III of the Constitution."

[426] *Nicholas v The Queen* [1998] HCA 9 at [37] per Brennan CJ; (1998) 193 CLR 173; see also *Kable v DPP (NSW)* [1996] HCA 24 at [42] per McHugh J; (1996) 189 CLR 51 (the effect that the personal views of judges as to what was appropriate were not relevant); see also *R v Wunungmurra* [2009] NTSC 24 at [25] (the fact that legislation may be unreasonable or undesirable and may result in disproportionate sentences is not a ground for refusing to apply it).

[427] *Baker v The Queen* [2004] HCA 45 at [87] per Kirby J; (2004) 223 CLR 513.

[428] *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173; *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575; *Byrnes v The Queen* [1999] HCA 38; (1999) 199 CLR 1.

[429] *Nicholas v The Queen* [2008] HCA 9 at [37] per Brennan CJ; (1998) 193 CLR 173; see also *R v England* [2004] SASC 254 at [44] per Doyle CJ; (2004) 89 SASR 316 ("the sentencing process as it is understood today, is not immutable by any means. Parliament is at liberty to change it. The wisdom and merit of those changes is a matter for Parliament").

[430] *R v Elliott* [2006] NSWCCA 305 at [75] per Spigelman CJ; (2006) 68 NSWLR 1.

[431] [1990] HCA 1; (1990) 169 CLR 436 at [40]; see also *R v Elliott* [2006] NSWCCA 305 at [78] per Spigelman CJ; (2006) 68 NSWLR 1.

> that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State.

A similar view was expressed by Keane J in *Magaming v The Queen*[432] in relation to the wisdom or otherwise of mandatory minimum sentences which had the potential to impose disproportionate punishment on offenders:

> The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.
>
> In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be.

Many laws have been challenged in the court that the appellants have considered to be "bad, unjust, ill-advised or offensive to notions of human rights".[433] However, while respecting the will of Parliament, courts have employed a variety of techniques to limit the scope of laws that they may regard as being in conflict with long-standing common law principles.[434] They may recognise the principle of legality and the fundamental common law right to personal liberty, which is also recognised in various human rights instruments.[435] Where there is an ambiguity in legislation the courts will prefer a strict construction that favours personal liberty.[436] They may draw upon the principle of proportionality to circumscribe provisions that permit courts to

---

[432] [2013] HCA 40 at [105]–[106].

[433] *Baker v The Queen* (2004) 223 CLR 513, [87] (per Kirby J); see for example,*Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51 (preventive detention laws); *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 (extended supervision orders); *R v KNL* [2005] NSWCCA 260; (2005) 154 A Crim R 268 (mandatory consequences of conviction of a child sexual offence); *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513; *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1 (subsequent legislation to give effect to judge's recommendation that offender should never be released); *Trenerry v Bradley* [1997] NTSC 82; (1997) 6 NTLR 175 (mandatory sentences).

[434] See A Freiberg, *Guerrillas in our Midst? Judicial Responses to Governing the Dangerous* in M Brown and J Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000); E Richardson and A Freiberg, *Protecting the Dangerous from the Community: The Application of Protective Sentencing Laws in Victoria* (2004) 4 *Criminal Justice* 81; J Goldsworthy, *The Limits of Judicial Fidelity to Law* (2011) 24 *Canadian Journal of Law and Jurisprudence* 305.

[435] On the common law right to liberty see *Attorney-General v Fardon* [2003] QSC 331 at [19] per Atkinson J; *Trobridge v Hardy* [1955] HCA 68 at [3] per Fullagar J; (1955) 94 CLR 147; *Yeo v Attorney-General (Qld)* [2011] QCA 170 at [54] per McMurdo P; (2012) 1 Qd R 276.

[436] *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352 at 358; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at [118] per Gleeson CJ; (2003) 211 CLR 476.

impose longer than proportionate sentences in relation to dangerous offenders or in relation to statutes that give the court a discretion to impose an indefinite sentence.[437] Where the court believes that the legislation represents an attack on fundamental human rights, it will strictly construe the language to give it the narrowest interpretation consistence with the statute and the preservation of those rights, and they will require clear and explicit language before they give effect to the law.[438]

Judicial versus legislative powers

[1.190]

Although the separation of powers principle requires that Parliaments legislate and that the courts exercise the judicial power, the line between them is not always clear. Part of the role of appellate courts is to identify and formulate general principles that are "ancillary to the disposal of the particular case before the court" and for this purpose they may need to go beyond what is strictly required for determining the instant dispute.[439] In the context of sentencing, the line between legislative and judicial powers has been highlighted in relation to the development of guideline judgments.[440]

The handing down of guideline judgments has been impugned on the ground, inter alia, that the promulgation of such judgments was an act of a legislative character and therefore inconsistent with the exercise of federal judicial power.[441] In *Wong v The Queen*, it was argued that a guideline judgment is quasi-legislative because:[442]

> …it amounted to the establishment of a new legal norm, having a legal effect wider than was necessary to determine only the controversy before the court, expressed in language which was prescriptive and prospective for all current and future cases and, moreover, with an effect that would bind persons who had been afforded no opportunity to make submissions relevant to the new norm.

Gaudron, Gummow and Hayne JJ considered that a guideline which identifies a range of results rather than a process of reasoning, passes from being a decision settling a matter before the court

---

[437] For example, *Chester v The Queen* [1988] HCA 62; (1988) 165 CLR 611; *R v Cowburn* (1994) 74 A Crim R 385; *R v Connell* [1996] Vic Rp 30; [1996] 1 VR 436; *R v Moffatt* [1998] 2 VR 229; *Baker v The Queen* [2004] HCA 45 at [66] per Kirby J; (2004) 223 CLR 513; cf *R v Wunungmurra* [2009] NTSC 24 at [25] per Southwood J (fact that legislation relating to indigenous offenders may distort the established sentencing principle of proportionality provides no basis for not interpreting it in accordance with its clear and express terms); see also C Macken, *Preventative Detention in Australian Law: Issues of Interpretation* (2008) 32 *Criminal Law Review* 71.

[438] *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427; *Trenerry v Bradley* [1997] NTSC 82; (1997) 6 NTLR 175.

[439] See discussion of this issue in A Freiberg and P Sallmann, *Courts of Appeal and Sentencing: Principles, Policy and Politics* (2008) 26 *Law in Context* 43; *Wong v The Queen* [2001] HCA 64 at [146] per Kirby J; (2001) 207 CLR 584.

[440] See for example,*Sentencing Act 1991* (Vic) s 6AA. Guideline judgments are judgments of a Court of Appeal which go beyond the facts of the particular case before the court to deal with variations of the offence and suggest types or levels of sentence appropriate to them; see also [17.15].

[441] *R v Whyte* [2002] NSWCCA 343 at [117] per Spigelman CJ; (2002) 55 NSWLR 252.

[442] *Wong v The Queen* [2001] HCA 64 at [142] per Kirby J; (2001) 207 CLR 584.

to a "decision creating a new charter by reference to which further questions are to be decided", and thus passes from the judicial to the legislative.[443] The distinction between the judicial and legislative functions is that:[444]

> …between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended results of future cases. Articulation of applicable principle is central to the reasoned exercise of jurisdiction in the particular matters before the court. By contrast, the publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court.

Callinan J did not decide this issue but he strongly doubted that:[445]

> …the formulation and application of guidelines can be a proper exercise of the judicial power of the Commonwealth. They appear to have about them a legislative quality, not only in form but also as they speak prospectively. Despite the qualifications that their makers express, they also do have, and in practice will inevitably come to assume, in some circumstances, a prescriptive tone and operation.

Kirby J was also somewhat agnostic as to whether guidelines were beyond the judicial function. In his view, much depended upon their form and the manner in which they were used: whether they were to be regarded as mere "sounding boards" or would be considered as binding. He suggested though that the growth in the use of guidelines in many jurisdictions (especially those in which the constraints of a federal Constitution were missing) was evidence of a desire to promote greater consistency and that their use should not be unduly limited. He noted that "[i]nnovation is not, as such, incompatible with the exercise of constitutional power, including federal judicial power".[446]

Judicial power and "matters"

[1.195]

Federal courts are generally confined to deciding "matters" such as "cases".[447] They generally do not give advisory opinions or resolve disputes that are not justiciable.[448] The judiciary should not encroach into areas reserved for the other branches of Government. In relation to guideline judgments, it has been held that where such a judgment relates to tariffs or numerical guidelines, it is prospective and produces no order or declaration. It is therefore not strictly a "matter" which is subject to appellate review by the High Court, and therefore a State appellate court hearing a federal case has "neither jurisdiction nor power to prescribe what sentences should be passed in

[443] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [80].
[444] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [82].
[445] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [165].
[446] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [144]. It remains open for determination whether certain forms of guideline could be valid if they contained no federal element.
[447] *Judiciary Act 1903* (Cth) s 68.
[448] *Waterside Workers' Federation of Australia v JW Alexander Ltd* [1918] HCA 56; (1918) 25 CLR 434.

future matters".[449]

In its most recent report on sentencing,[450] the Australian Law Reform Commission queried whether the giving of a sentence indication involved the exercise of federal judicial power.[451] It argued that while the imposition of a sentence was clearly an exercise of judicial power, a sentence indication – because it did not determine the rights of parties – might not be judicial. However, it concluded that a Chapter III court could exercise a non-judicial power where that power was incidental to the exercise of judicial power.[452]

Judicial power and equality

[1.200]

It is said that "equal justice under the law is one of the central concerns of the judicial power of the Commonwealth".[453] In *Nicholas v The Queen*, Gaudron J stated:[454]

> Judicial power is not adequately defined solely in terms of the nature and subject-matter of determinations made in exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and exercised by them in accordance with the judicial process …
>
> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It

[449] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584.
[450] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [15.11].
[451] Sentence indication is a mechanism by which a judicial officer can provide a defendant with an indication of the likely sentence before they decide whether to plead guilty or defend the charges: see Sentencing Advisory Council, Victoria, *Sentence Indication and Specified Sentence Discounts: Final Report* (Sentencing Advisory Council, 2007) p 73.
[452] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [15.13]–[15.21].
[453] *R v Ironside* [2009] SASC 151; (2009) 104 SASR 54; see also *Jimmy v The Queen* [2010] NSWCCA 60 at [255] per Rothman JA; (2010) 77 NSWLR 540. The requirement of equality before the courts is provided for in the *International Covenant on Civil and Political Rights, 1966* (ICCPR), Art 14.1; see also *Muir v The Queen* [2004] HCA 21; (2004) 206 ALR 189 per Kirby J (re whether applicant has the right to appear before the court on a special leave application); see also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2004* (ACT) s 8.
[454] [1998] HCA 9 at [73]–[74]; *Cameron v The Queen* (2002) 209 CLR 339. In *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at [20]–[21] she also stated that "All are equal before the law. And the concept of equal justice – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such – is fundamental to the judicial process"; see also *R v Ironside* [2009] SASC 151 per Gray J at [139]; (2009) 104 SASR 54.

> means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.

Consistency in punishment is regarded as a "reflection of the notion of equal justice" and a "fundamental element in any rational and fair system of criminal justice".[455] The constitutional meaning of equality in the sentencing context has been explored in two contexts: disparity between individual offenders and disparity between jurisdictions.

Disparity between offenders

[1.205]

Equality requires comparison between cases that are relevantly identical or similar.[456] The courts have recognised that where there are relevant differences between offenders – such as those based on age, prior convictions, culpability, prospects of rehabilitation and the like – sentencing outcomes may legitimately differ. Thus, different cases should be treated differently and like cases should be treated equally.[457] Sentencing that is capricious or arbitrary will breach the principle of equal justice. In *R v Ironside*[458] it was argued that providing a discount for a plea of guilty was discriminatory and constitutionally invalid because it unfairly punished a person who exercised their right to plead not guilty and to be tried. It was argued that the court could not be the vehicle by which the person could be treated unequally.[459] The argument was rejected by a majority of the Court[460] on the basis that there were valid and appropriate public policy grounds for differentiating between offenders who pleaded guilty and those who did not, namely the facilitation of the course of justice.[461] Similarly, in *R v B*[462] the South Australian Court of Criminal Appeal held that it was not unconstitutional to distinguish between adult and young co-offenders convicted of the same crime where one offender was subject to a law that required a court to impose a mandatory minimum sentence on the adult, but not upon the young offender, resulting in a very significant disparity of sentences.

Disparity between jurisdictions

---

[455] *Lowe v The Queen* [1984] HCA 46 at [1] per Mason J; (1984) 154 CLR 606. This raises broader issues relating to discrimination or disparity on the grounds of sex, race, ethnicity, language, religion and other grounds: see [5.70] (race, ethnicity and cultural background).

[456] *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584.

[457] See also *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at [2] per Gaudron and McHugh JJ.

[458] [2009] SASC 151; (2009) 104 SASR 54.

[459] [2009] SASC 151; (2009) 104 SASR 54 at [61]. Under the relevant South Australian legislation, a person who pleaded guilty would not be the subject of the application of a mandatory non-parole period.

[460] Doyle CJ and Kourakis J.

[461] *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339 at [14]–[15]. In *Cameron* the majority, Gaudron, Gummow and Callinan JJ, were of the view that the factors of remorse and facilitation of justice were proper grounds for distinguishing between co-offenders, but mere utilitarian considerations such as saving the State the expense of a trial were not. Kirby J was not prepared to decide this issue although he believed that utilitarian considerations were sufficient to ground a discount.

[462] [2013] SASCFC 24.

[1.210]

Since the creation of the federation there has been a tension between two alternative methods of dealing with federal offenders in the context of an absence of a federal criminal justice system. One option is to treat all federal offenders equally throughout the Commonwealth, relying on the State criminal justice systems to administer federal laws under the autochthonous expedient. The other is to allow State courts administering federal laws to apply the laws of the State in which they are sitting unless a valid federal law authorises a relevant difference.[463] In either case, a disparity will be created. In *Leeth v Commonwealth*[464] the High Court held that it was not discriminatory or unconstitutional to treat federal offenders differently depending upon which jurisdiction they were tried, even it if resulted in different outcomes.[465]

The principle of equality was raised in relation to the limitation of the right of an applicant for leave to appeal to a court to appear before the court where that limitation existed in one jurisdiction but not another. In *Muir v The Queen*[466] Kirby J (in dissent) argued that the refusal of the New South Wales correctional authorities to permit an applicant to appear by video link was unequal and discriminatory and as "contrary to Ch III of the Constitution and also to the statutory implication of equal treatment of parties before this Court contained in the *Judiciary Act 1903* (Cth) ss 35(2) and 35AA(2). In addition, it is arguably contrary to Australia's obligations under universal principles of human rights…".[467]

Disparity between offences and penalties

[1.215]

A legislature may create offences of essentially similar character but which carry significantly different penalties, one of which may be higher than another or carry mandatory or mandatory minimum penalties. The sentencing outcome may result in what may be considered to be unfairly unequal, excessive or unjust outcomes that may be determined by the exercise of the prosecutor's discretion, rather than that of the court. Such a disparity is not unconstitutional even though there may be no discernible or appropriate reason for the difference between the penalty levels.[468] Nor does the fact that the choice as to which of the offences to prosecute lies with the

[463] *Commonwealth of Australia Constitution* (Cth) s 77(iii); *Judiciary Act 1903* (Cth) ss 39(2), 68(1) and (2), 79 and 80; see G Hill, *"Picking up" State and Territory Laws Under s 79 of the Judiciary Act – Three Questions* (2005) 27 *Australian Bar Review* 25. There are separate provisions relating to the application of State law in Commonwealth places within a State: *Commonwealth Places (Application of Laws) Act 1970* (Cth).

[464] [1992] HCA 29; (1992) 174 CLR 455; see also *R v Gee* [2003] HCA 12; (2003) 212 CLR 230; *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174.

[465] Cf with the views of the Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [3.29] and observations of Basten JA in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 at [117].

[466] [2004] HCA 21; (2004) 206 ALR 189.

[467] [2004] HCA 21; (2004) 206 ALR 189 at [28].

[468] *Karim v The Queen* [2013] NSWCCA 23 at [60] per Allsop P; see also *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455; *Ex parte Coorey* (1944) 45 SR (NSW) 287; *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; (1945) 70 CLR 100.

Executive render the law unconstitutional as interfering with the judicial power.[469]

Judicial power and procedural fairness

[1.220]

Although the Constitution does not contain any explicit rights to procedural justice, there are a number of principles that are said to inhere in a court in the exercise of its "judicial power". The obligation to give reasons is one of the essential attributes of the judicial power.[470] The principle of a fair trial or, more generally, the requirement of natural justice or procedural fairness, is reflected in a wide range of substantive and procedural rules and practices,[471] and can be identified separately from the particular rules and principles.[472] Procedural justice is justified on the basis that its denial risks unsound conclusions, can generate feelings of resentment in the affected party and can undermine confidence in the decision-making process.[473]

In constitutional terms it is argued that lack of procedural fairness would be incompatible with the exercise of judicial power by a Chapter III court.[474] Although there is no concept of "due process" enshrined in the Constitution – and though courts have been reluctant to import this idea from other constitutional contexts[475] – in the High Court, French CJ has stated that:[476]

> Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the Constitution. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it. According to the circumstances, the content of the requirements of procedural fairness may vary.

---

[469] *Karim v The Queen* [2013] NSWCCA 23 at [78]; *Magaming v The Queen* [2013] HCA 40 at [20] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[470] *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181; see [2.260].

[471] See generally JJ Spigelman, *The Truth Can Cost Too Much: The Principle of a Fair Trial* (2004) 78 *Australian Law Journal* 29; see also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 (fair hearing).

[472] *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at [4] per Deane J.

[473] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [186] per Gageler J; see also *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [143]–[144]; *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at [4] per Gibbs J, [2] per Mason J and [2] per Dawson J.

[474] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at [37]; *International Finance Trust Co Ltd v NSW Commission* [2009] HCA 49; (2009) 240 CLR 319 per French CJ; *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at [30].

[475] *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [52] per French CJ.

[476] *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [54] per French CJ [141] per Heydon J (the centrality of hearings to the judicial process); see also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at [175] per Crennan J; *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 at [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

Similarly, in *Leeth v Commonwealth* Mason CJ, Dawson and McHugh JJ said:[477]

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case* …a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.

Despite these strong statements by the High Court, later observations – to the effect that the rules of procedural justice or fairness are not fixed or immutable, not abstract but practical, and must be understood in the context of relevant legislation and rules that govern a court's procedures in any particular case – have attenuated this principle.[478] Generally, procedural fairness involves the right to hear the allegations made, to know the evidence adduced in support of them and the right to challenge the evidence. A provision that requires a court not only to receive an *ex parte* application, but also to determine it *ex parte* if the Executive so desires has been held to be unconstitutional because it deprived the New South Wales Supreme Court of an important characteristic of judicial power.[479] On the other hand, provisions that permit a court to withhold information from one of the parties or to conduct proceedings in camera in order to avoid prejudice to the administration of criminal justice do not breach the requirements of procedural justice and do not necessarily impair the functioning of the court in contravention of Chapter III of the *Constitution*.[480] The essential question in such cases is whether the court acts fairly and impartially.

A fair trial might require the right to effective representation at sentencing although not at public expense,[481] the right to be present at trial and sentence,[482] the operation of the privilege against self-incrimination, and the right to due notice. In relation to sentencing, the principle has yet to be fully explored. It has been argued, for example, that the requirement in s 5(1)(a) of the *Sentencing Act 1991* (Vic) that a court impose a sentence in order to "punish the offender *to an extent and in a manner which is just in all of the circumstances*" [emphasis added] might be interpreted to allow or require a sentencing judge to take into account breaches of any of the offender's human rights in the course of the investigation, detention or trial under the *Charter of*

---

[477] [1992] HCA 29; (1992) 174 CLR 455 at [30].

[478] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [156] per Hayne, Crennan, Kiefel and Bell JJ; cf with Gageler J at [177] ("the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made."); see also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6 at [37]; (2003) 214 CLR 1; *RCB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest* [2012] HCA 47; (2012) 292 ALR 617.

[479] *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [54] per French CJ (striking down *Criminal Assets Recovery Act 1990* (NSW) s 10).

[480] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [89] per French CJ.

[481] *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292.

[482] See further [2.255] (presence of offender).

Human Rights and Responsibilities Act 2006 (Vic) s 32 which requires statutory provisions to be interpreted compatibly with human rights so far as it is possible to do so consistently with their purpose.[483] Undue delay may warrant a reduction in sentence apart from the requirements of the common law.[484]

Judicial power and retrospectivity

[1.225]

The general rule relating to retrospective laws is that:[485]

> A statute changing the law ought not, unless the intention appears with reasonable certainty, be understood as applying to facts or events that have already occurred in a way that affects rights and liabilities which the law had defined by reference to past events.[486] The presumption is that a statute is to be construed as having prospective operation only.[487] The presumption may be displaced by clear legislative expression.[488]

The extent to which retrospective laws are incompatible with the judicial power under Chapter III of the Constitution is unclear. Retrospective laws are generally considered to be contrary to human rights and international law and all jurisdictions contain statutory provisions that prohibit such laws.[489] The injustice of such laws, and the reason that they are inconsistent with the rule of law, is that they deny "a person's capacity to make an informed choice about how to conduct his or her affairs in a way which will either fall within, or outside of, the scope of the legislation".[490]

However, a distinction is drawn between increasing a maximum penalty and making its operation retrospective on the one hand, and enacting a provision that makes a past matter or transaction a legislative criterion for the operation of a subsequent regime on the other.[491] Thus it has been held that giving effect to a non-statutory judicial recommendation that an offender not ever be released by a later legislative provision was not a retrospective law, nor does it deny the person procedural fairness. In *R v Elliott*,[492] such a provision was held to be a constitutionally

---

[483] See generally S Evans and C Evans, *Legal Redress Under the Victorian Charter of Human Rights and Responsibilities* (2006) 17 *Public Law Review* 264. The Act is generally cited as the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[484] See for example, *R v Ellis* (1986) 6 NSWLR 603.
[485] *Nafi v The Queen* [2012] NTCCA 13 at [25] per Blockland J (footnotes renumbered).
[486] *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261 at 267; *McMillan v Pryce* [1997] NTSC 83; (1997) 115 NTR 19 at 23, significantly in relation to mandatory sentencing for minimum terms for "property offences".
[487] *Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188 at 194; *Geraldton Building Co Ltd v May* [1977] HCA 17; (1977) 136 CLR 379.
[488] *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425.
[489] See for example,*International Covenant on Civil and Political Rights, 1966*, Art 15.1; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.
[490] *Bell v Police* [2012] SASC 188 at [30].
[491] *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513; *Bakewell v The Queen (No 3)* [2008] NTSC 51; (2008) 22 NTLR 174; see further [2.320].
[492] *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1.

valid exercise of legislative power. In *Crump v New South Wales*[493] – a case that involved a number of New South Wales legislative provisions that affected the length of time that a prisoner would be required to serve before being eligible for parole, and that were enacted after the sentence on the prisoner had been passed – French CJ observed:[494]

> The distinction between the legal effect of a judicial decision and consequences attached by statute to that decision is apposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities. The power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the State.[495]

Similarly, provisions that affect the manner in which a judge exercises their sentencing discretion on the basis of prior offences are not considered to be retrospective.[496]

Judicial power and ad hominem laws

[1.230]

An *ad hominem* law is one that applies to a particular individual rather than being of general application.[497] The *Community Protection Act 1994* (NSW) purported to empower a court to make a preventive detention order in relation to one person, Gregory Kable. It was not a law of general application.[498] In *Nicholas*[499] Gaudron J said:

> If legislation which is specific rather than general is such that, nevertheless, it neither infringes the requirements of equal justice nor prevents the independent determination of the matter in issue, it is not, in my view, invalid.

Similarly, in *Leeth v Commonwealth* Mason CJ and Dawson and McHugh JJ said:[500]

> Of course, legislation may amount to a usurpation of judicial power, particularly in a criminal case, if it pre-judges an issue with respect to a particular individual and requires a court to exercise its function accordingly. It is upon this principle that bills of attainder may offend against the separation of judicial power. But a law of general application which seeks in some respect to govern the exercise of a

[493] [2012] HCA 20; (2012) 286 ALR 658.
[494] *Crump v New South Wales* [2012] HCA 20 at [36].
[495] Such changes may occur when there are changes in Government policy, or changes in Governments, or when notorious or emotive cases evoke political responses to respond to public demands for more severe sentences; see also *R v Shrestha* [1991] HCA 26; (1991) 173 CLR 48 at [10].
[496] *R v Carlton* [2009] QCA 241; [2010] 2 Qd R 340 (certain legislative provisions not to apply to certain offenders).
[497] The origin of such Acts can be traced back to Acts of Attainder commencing in the 14th century under which Parliament could identify offenders by name and determine guilt without regard to the laws of evidence. The result of such Acts included the forfeiture of the convicted person's property to the Crown: see A Freiberg and RG Fox, *Fighting Crime with Forfeiture: Lessons from History* (2001) 6 *Australian Journal of Legal History* 1.
[498] It was modelled on the *Community Protection Act 1990* (Vic), since repealed.
[499] [1998] HCA 9; (1998) 193 CLR 173 at [8].
[500] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 (footnotes and references omitted).

jurisdiction which it confers does not trespass upon the judicial function.

In *Kable v DPP (NSW)*,[501] the High Court held that *Community Protection Act 1994* (NSW) imposed on the Supreme Court such an extraordinary function and invested it with powers of such an exceptional nature as to make it appear that the court was acting at the behest of the executive, thus impairing public confidence in the impartial administration of judicial functions.[502]

The Crown as a defendant

[1.235]

Until the High Court's judgment in *Bropho v Western Australia*[503] substantially weakened the rule, it was an accepted principle that the "Crown is not bound by statute except by express mention or necessary implication".[504] This was taken to mean that general words in a statute are presumed to exclude the Crown unless the context provides compelling indications that the Crown was intended to be included. This presumption could be rebutted by the words of a statute. In *Cain v Doyle*,[505] the High Court held that a statute can impose criminal liability upon the Crown, though there is some uncertainty as to how specific the statutory language needs to be in order to achieve that purpose. Imprisonment of the Crown is no more of an issue than imprisonment of a corporation. Usually a fine is the alternative sanction allowed for corporate entities and, if none is prescribed, it is proper to interpret the provision as not applying to them. If the offence is fineable, the fact that the Crown would have to pay the sum to itself or could remit it does not make the exercise self-defeating:[506]

> The reality of the Crown paying a fine to itself is that one government department, with its own separate appropriation of funds and its own separate accounts, accounts for the fine to another government department. If the public accounts of government are to reflect the true costs and benefits of running each department then this seems an entirely proper procedure.

Where statutes are declared to bind the Crown, they will sometimes be found to contain an express proviso that nothing in the Act is intended to render the Crown liable to prosecution.[507]

---

[501] *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51.
[502] *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51. This was considered to be of particular importance by McHugh J; see also observations of Doyle CJ in *R v England* [2004] SASC 254; (2004) 89 SASR 316 at [63].
[503] [1990] HCA 24; (1990) 171 CLR 1; see also *Current Topics* (1990) 64 *Australian Law Journal* 527.
[504] *Bradken Consolidated Ltd v BHP Co Ltd* [1979] HCA 15; (1979) 104 CLR 107.
[505] [1946] HCA 38; (1946) 72 CLR 409. See also *Victorian Railways Board v Snowball* [1983] VR 689.
[506] P Hogg and P Monahan, *Liability of the Crown* (3rd ed, Thomson Canada, 2000) p 314.
[507] For example, *Commonwealth Electoral Act 1918* (Cth) s 4B; *Proceeds of Crime Act 1987* (Cth) s 11(2); *Whale Protection Act 1980* (Cth) s 5; *Biological Control Act 1986* (Vic) s 6(2); *Congestion Levy Act 2005* (Vic) s 7; *Police Integrity Act 2008* (Vic) s 4. In the absence of legislation to the contrary, the Crown cannot be prosecuted for contempt: *Crowther v State of Queensland* [2006] QCA 308; [2007] 1 Qd R 232.

Other sources of sentencing law

International law

[1.240]

The law governing sentencing in State and federal jurisdictions is domestic, and courts will be bound by the relevant legislative provisions and the common law. Though there are numerous international instruments that relate to corrections and sentencing to which Australia is a party,[508] none has the effect of enlarging a person's common law rights.[509] It has been argued, with limited effect and against forceful opposition,[510] that international law, especially in relation to human rights, "may assist, as a contextual element, in the interpretation of the Constitution, the construction of ambiguous legislation and the filling of gaps in the common law".[511]

Some Victorian judges have held that international human rights can be a "relevant consideration in the exercise of judicial powers and discretions"[512] even if the international instrument has not been incorporated into Victorian law and so cannot operate as a direct source of law.[513] In *DPP v TY (No 3)*[514] Bell J stated:

---

[508] For example, *International Covenant on Civil and Political Rights, 1966* and the Second Optional Protocol to that Covenant on the Abolition of the Death Penalty; and the following United Nations Conventions, Principles and Rules: *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*; *United Nations Convention on the Rights of the Child, 1989*; *Standard Minimum Rules for the Treatment of Prisoners, 1955*; *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988*; *Standard Minimum Rules for the Administration of Juvenile Justice, 1985* (the Beijing Rules); *Rules for the Protection of Juveniles Deprived of their Liberty, 1990*; *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, 1991*; *Standard Minimum Rules for Non-custodial Measures, 1990* (the Tokyo Rules); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985*.

[509] *R v Jones* [2006] VSCA 266 at [11]. In this case the appellant submitted an argument that the state of mental health facilities within the corrections system in Victoria did not meet international standards and therefore his mental illness made imprisonment more burdensome for him. This additional burden, based on the falling short of international standard, should, it was submitted, be taken into account in the exercise of the sentencing discretion. However, in oral argument, reliance on the international instruments was abandoned.

[510] *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 per McHugh J.

[511] M Kirby, *Ten Years in the High Court – Continuity and Change* (2005) 27 *Australian Bar Review* 4 (see footnotes 93 and 94 in article); see also *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at [133] per Kirby J; *Sinanovic v The Queen* [1998] HCA 40; (1998) 154 ALR 702 at [25] per Kirby J; *R v Togias* [2001] NSWCCA 522 at [33] per Spigelman CJ (international treaties and conventions to which Australia is a party, but which have not been incorporated into Australian law have been invoked in Australian legal reasoning as an appropriate influence on the development of the common law; to resolve an ambiguity in a statute and may also create a legitimate expectation about executive decision making); *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85; (2006) 15 VR 22 at [68]–[80]; see also W Lacey, *Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere* (2004) 5 *Melbourne Journal of International Law* 108; M Groves, *International Law and Australian Prisoners* (2001) 24 *University of NSW Law Journal* 17.

[512] *DPP v TY (No 3)* [2007] VSC 489 at [48] per Bell J.

[513] *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at [25].

[514] [2007] VSC 489 at [49]; see also *DPP v TY (No 2)* [2009] VSCA 226; (2009) 24 VR 705 at [88] in which the Court of Appeal approved of the Bell J's remarks; see also *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100 at [72]–[76] (while not a direct source of rights, the ICCPR "like other international instruments to which

> When can an international human right stated in an unincorporated convention be taken into account in the exercise of a judicial power or discretion? As a general proposition, I think it can be if the subject matter of the case before the court comes within its scope, which is a test of relevance; if taking the human right into account is not inconsistent with any applicable legislation, the operation of which such a convention obviously does not impair; and if doing so is not inconsistent with the common law (broadly defined), the content of which, equally obviously, such a convention does not alter.

There are a number of treaties that deal with the rights of children generally[515] and specifically,[516] and which make reference to sentencing principles and procedure.[517] These include that the best interests of the child be a primary consideration in decision-making; that, where appropriate, children be diverted from judicial proceedings; that sentencing be proportionate, with rehabilitation given particular emphasis; and that detention be used as a sanction of last resort. Ratification of international conventions does not mean that the rights there stated are enforceable in Australian court.[518] In the context of the *Crimes Act 1914* (Cth) s 16A(2)(p), which requires a court to have regard to the probable effect of any sentence or order on any of the person's family or dependants, some courts have noted that the *United Nations Convention on the Rights of the Child*, Article 3.1, requiring courts to have a primary consideration of the best interests of the child, does not override a national or State law and that under domestic law it will only be in exceptional circumstances that a sentence will be varied due to hardship to a third party such as a child.[519]

Although "any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations",[520] there are no sanctions for such breach other than public opprobrium. In 2010 the United Nations Human Rights Committee found that the preventive detention regimes in Queensland and New South Wales were in

---

Australia is a party…has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the Charter."); *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85, (2006) 15 VR 22, at [69]–[70] per Maxwell P (noting the Court's request for submissions dealing with the relevance of international human rights conventions and associated jurisprudence to the instant matter and encouraging practitioners to develop human rights-based arguments where relevant to a question in the proceeding).

[515] *International Covenant on Civil and Political Rights, 1966*; *International Covenant on Economic, Social and Cultural Rights, 1966*.

[516] *United Nations Convention on the Rights of the Child, 1989*; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990*; *United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990*.

[517] See discussion in Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (Sentencing Advisory Council, 2012) pp 61ff.

[518] In *R v Lovi* [2012] QCA 24 at [21] the Queensland Court of Appeal noted the ratification of the *United Nations Convention on the Rights of the Child, 1989*, and in particular Article 37(b) which states that "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". It held that the sentencing judge had erred in failing to "have regard to" this matter, amongst others.

[519] See [6.150]; see *R v Togias* [2001] NSWCCA 522 at [79] per Grove J; *R v Smith* (1998) 98 A Crim R 442 cf *Walsh v Department of Social Security* [1996] SASC 5795; (1996) 67 SASR 143; *Bates v Police* [1997] SASC 6430 per Perry J.

[520] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) [1.35].

violation of the *International Covenant on Civil and Political Rights, 1966* but this finding had no practical implications for the justice systems of those jurisdictions as the High Court had upheld the constitutionality of those provisions in *Fardon*'s case.[521]

Human rights

[1.245]

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) is an ordinary Act of the Victorian Parliament that may be repealed or amended in the same way as another piece of legislation.[522] The rights protected by the *Charter* derive primarily from the *International Covenant on Civil and Political Rights, 1966*. The main purpose of the Act is to promote and protect human rights by setting out the human rights that Parliament specifically seeks to protect and promote. To do so, it also aims at ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights and imposing an obligation on all public authorities to act in a way that is compatible with human rights. To facilitate those aims, it requires statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament, enables the Scrutiny of Acts and Regulations Committee to report on such compatibility, confers jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right, and requires the relevant Minister to respond to that declaration.[523] *Charter* rights are not absolute and the *Charter* specifically allows for human rights to be subject to such reasonable limitations "as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom".[524]

The *Charter* imposes obligations on all public authorities to act in a way that is compatible with

---

[521] See P Keyzer, *The United Nations Human Rights Committee's Views About the Legitimate Parameters of the Preventive Detention of Serious Sex Offenders* (2010) 34 *Criminal Law Journal* 283; P Keyzer, *The "Preventive Detention" of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions* (2009) 16 *Psychiatry, Psychology and Law* 1; I Freckelton and P Keyzer, *Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations* (2010) 17 *Psychiatry, Psychology and Law* 345. In *Yeo v Attorney-General (Qld)* [2011] QCA 170; (2012) 1 Qd R 276 at [63], McMurdo P, in relation to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) held that although Article 9(1) of the *International Covenant on Civil and Political Rights, 1966* (everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law) could "not overrule the clear and unambiguous requirements of the Act, the importance of the liberty of the subject both at common law and under international law is a factor relevant to the exercise of discretions under the Act". Muir JA reserved his views on the applicability of the Covenant in this case. McMurdo P noted the lack of response from Australia on the Human Rights Committee's finding, at [57].

[522] See also *Human Rights Act 2004* (ACT).

[523] *Charter of Human Rights and Responsibilities Act 2006* (Vic) Pt 3. See also *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) which requires the appointment of a Parliamentary Committee on Human Rights whose function it is to examine Bills, Acts and legislative instruments for compatibility with human rights as well as to inquire into any other matter relating to human rights, and report to both Houses of the Parliament on these matters.

[524] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). The factors taken into account include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

human rights. A court is not regarded as a "public authority"[525] but courts are obliged to interpret and apply the law in a way that is compatible with human rights.[526] In *Momcilovic v The Queen*, French CJ stated that *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) requires:[527]

> statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

Section 32 requires that the interpretive process take into account the right to equality,[528] liberty[529] and a fair hearing[530] under the *Charter*.[531] It has been applied to the interpretation of *Infringements Act 2006* (Vic) s 160 which provides for imprisonment in default of fine payment. However, where the ordinary meaning of a statutory provision is clear and can be discerned in accordance with the ordinary techniques of statutory interpretation, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) does not require that a court depart from that ordinary meaning.[532]

In *Taha*, Tate JA held that, under s 32 of the *Charter*, it was necessary to guard against arbitrary (in the sense of disproportionate) detention by construing s 160 to mean that magistrates were first required to consider whether an offender had a mental illness or intellectual disability or whether other special circumstances applied before imposing an order of imprisonment.[533] A construction placing a duty on the Magistrate was also required by s 8(3) of the Charter (equal protection of the law without discrimination) as leaving such offenders to raise these circumstances themselves would impose a requirement that would unreasonably disadvantage persons with an impairment.[534]

The obligation on the Government under *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 1(d) and 28 to provide statements of legislative compatibility with the Charter provides a useful index of the sentencing issues that have been considered as possibly infringing those human rights recognised by the Charter. The statements explain how the legislation engages the

---

[525] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(j).
[526] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); see S Evans and C Evans, *Legal Redress Under the Victorian Charter of Human Rights and Responsibilities* (2006) 17 *Public Law Review* 264.
[527] [2011] HCA 34; (2011) 245 CLR 1 at [51]; see also *Slaveski v Smith* [2012] VSCA 25 at [20].
[528] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).
[529] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21.
[530] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.
[531] *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [191] and [196] per Tate J.
[532] *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 at [85]; see also *Slaveski v Smith* [2012] VSCA 25; (2012) 34 VR 206; *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355.
[533] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [200] per Tate J.
[534] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [212] per Tate J.

rights in the Charter and, if rights are limited, how such limitation is justified.[535] These have included:

- *Recognition and equality before the law*, s 8: issues relating to whether providing indigenous persons with different sentencing options on the basis of race is discriminatory;[536]

- *Protection from compulsory medical treatment*, s 10(c): compulsory treatment programs for offenders in home detention[537] or on intensive correction management orders related to drugs and alcohol,[538] and the introduction of the community correction order treatment and rehabilitation condition;

- *Protection from cruel, inhuman or degrading punishment*, s 10: statutory minimum sentences;[539]

- *Right of a child convicted of an offence to age appropriate treatment*, s 23(2) *and right of a child charged with an offence to a procedure that takes account of his age and the desirability of promoting rehabilitation*, s 25(3): lesser sentence for a child who undertakes to assist authorities,[540] removal of restrictions on sentence appeals from the Children's Court;[541] and specified sentence discounts;[542]

- *Right to a fair hearing*, s 24: specified sentence discounts and indications,[543] consideration of oral statements made by Aboriginal elders or respected person at sentencing,[544] abolition of pre-parole home detention for existing sentences,[545] and issues relating to infringement notices;[546]

- *Presumption of innocence*, s 25; issues relating to infringement notices[547] and specified sentence discounts and indications;[548]

- *Right to have a sentence reviewed in accordance with law*, s 25(2): new requirements for

[535] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[536] See for example,*County Court Amendment (Koori Court) Bill 2008* (Vic); *Courts and Sentencing Legislation Amendment Bill 2012* (Vic).
[537] *Justice Legislation Amendment Bill 2010* (Vic).
[538] *Sentencing Amendment Bill 2010* (Vic).
[539] *Crimes Amendment (Gross Violence Offences) Bill 2012* (Vic). On the right to humane treatment when deprived of liberty in *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22, see *R v Kent* [2009] VSC 375 at [32] and *Moh v Pine* [2010] ACTSC 27 at [3]–[6] (relating to *Human Rights Act 2004* (ACT) s 19 which is equivalent to s 22 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and holding that it applied to the treatment of the offender by the court at sentencing, particularly where a sentence of imprisonment is imposed.)
[540] *Justice Legislation Amendment Bill 2010* (Vic).
[541] *Justice Legislation Amendment Bill 2010* (Vic).
[542] *Criminal Procedure Legislation Amendment Bill 2007* (Vic).
[543] *Criminal Procedure Legislation Amendment Bill 2007* (Vic); *Justice Legislation Amendment Bill 2010* (Vic).
[544] *County Court Amendment (Koori Court) Bill 2008* (Vic).
[545] *Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011* (Vic).
[546] For example, *Courts and Sentencing Legislation Amendment Bill 2012* (Vic).
[547] For example, *Courts and Sentencing Legislation Amendment Bill 2012* (Vic).
[548] *Criminal Procedure Legislation Amendment Bill 2007* (Vic).

leave to appeal against sentence;[549]

- *No retrospective penalty increase*, s 27: transitional arrangements for intensive corrections management orders,[550] modified penalties for common law exposure and willful damage,[551] and legislating to validate donation conditions attached to sentencing orders;[552]

- *The right not to be punished more than once*, s 26: removal of double jeopardy in Crown appeals against sentence;[553]

- *Right to liberty*, s 21(3): arrest with or without warrant of a person suspected on reasonable grounds of having breached a term or condition of parole and detained in custody pending a determination of the Parole Board.[554]

Though the possible application of the *Charter* is wide, in practice it has had relatively little direct practical effect upon sentencing law.[555] It has been argued that the power to impose a sentence in order to "punish an offender to an extent and in a manner which is just in all of the circumstances"[556] might be interpreted to allow or require a judge to take into account any breaches of any of the offender's human rights.[557] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27(2) provides that "A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed".[558] This provision refers to the maximum penalty only but does not apply to the type of penalty that might be imposed due, for example, to a change in the nature of the sanction that might be imposed.[559] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(1) requires that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(3) requires that an unconvicted accused person should be treated in a way that is appropriate to such a status. A person held in effective solitary confinement for a lengthy period while on remand in possible non-compliance with the *Charter* may have that fact taken into

[549] *Criminal Procedure Bill 2008* (Vic).
[550] *Sentencing Amendment Act 2010* (Vic).
[551] *Criminal Procedure Legislation Amendment Bill 2007* (Vic).
[552] *Justice Legislation Amendment Bill 2013* (Vic).
[553] *Criminal Procedure Bill 2008* (Vic).
[554] *Corrections Amendment (Breach of Parole) Bill 2013* (Vic).
[555] See FE Johns, *Human Rights in the High Court of Australia* (2005) 33 *Federal Law Review* 287. A review by the Law Institute of Victoria of the effect of the Charter found that of 209 reported (or otherwise made public) Victorian cases in which Charter issues were raised between September 2006 and June 2011, 2% related to sentencing, 3% to regulation of sex offenders and 10% to criminal procedure. A small number of cases related to the confiscation provisions: Law Institute of Victoria, Submission to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry and Review of the Charter of Human Rights and Responsibilities 2006 (Vic)* (30 June 2011) p 5.
[556] *Sentencing Act 1991* (Vic) s 5(1)(a).
[557] S Evans and C Evans, *Legal Redress Under the Victorian Charter of Human Rights and Responsibilities* (2006) 17 *Public Law Review* 264 at 279.
[558] See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27(3) (if a penalty for an offence is reduced after a person commits the offence, but before they sentenced, they are eligible for the reduced penalty); see also *WBM v Chief Commissioner of Police* [2010] VSC 219 at [67]–[68] (the meaning of "penalty" does not include sex offender registration despite the substantial effect registration may have).
[559] See *DPP v Leys* [2012] VSCA 304 (changes from a community-based order to a community correction order); see also *Sentencing Act 1991* (Vic) s 114.

account in sentence by way of mitigation.[560]

The right to equality before the law and to be free of discrimination[561] could be relevant to issues such as disparity on the grounds of race or gender and to broad questions of unjustifiable disparity,[562] though these arguments have been unsuccessful when advanced in a constitutional context.[563] The protection from cruel, inhuman or degrading treatment does not apply to corporal or capital punishment, or indefinite sentences.[564] Attempts to impugn mandatory sentencing regimes on these grounds have not found favour with the courts.[565] In *Karim v The Queen*, Allsop P observed that mandatory sentences have been unsuccessfully criticised as being contrary to:[566]

> … the prohibition on cruel, inhuman and degrading treatment or punishment and the inherent concept of gross disproportionality therein: Art 7 of the International Covenant on Civil and Political Rights (ICCPR) and Art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and *Vinter & Ors v United Kingdom* [2012] ECHR 61; the prohibition of arbitrary detention and the guarantee of a fair hearing: Art 9 of the ICCPR; the principle of equal justice: Art 14 of the ICCPR and Art 10 of the Universal Declaration of Human Rights; and the right to a review of sentence: Art 14 of the ICCPR.[567]

Section 17(2) of the *Charter*[568] states that "Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child". In Australia it has been generally held that hardship to others, including the children of offenders who are sentenced to custodial terms, is not a factor that a court should take into account except in exceptional circumstances.[569] In other jurisdictions the best interests of the

[560] *DPP v Tiba* [2013] VCC, 27 June 2013, at [31].
[561] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8, and see also [1.200] (judicial power and equality).
[562] See S Krasnostein and A Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You Are Going, How Do You Know When You've Got There?* (2013) 76 *Law and Contemporary Problems* 265; see also *Stalio v The Queen* [2012] VSCA 120 at [9], [34]–[35], [46]–[54] (while the requirement in s 5(2) of the *Sentencing Act 1991* (Vic) to have regard to "current sentencing practices" means practices at the time of hearing the instant offence – the principle of equal justice requires regard to be had to sentencing practices at the time the offence was committed if they demonstrably required the imposition of a materially lesser sanction for like offences than current practices would impose for the offence).
[563] See [1.200].
[564] *R v Carr* [1996] VicRp 43; [1996] 1 VR 585.
[565] See [1.200]; C Cunneen, *Mandatory Sentencing and Human Rights* (2002) 13 *Current Issues in Criminal Justice* 322; G Zdenkowski, *Limiting Sentencing Discretion: Has There Been a Paradigm Shift?* (2000) 12 *Current Issues in Criminal Justice* 58; N Morgan, *Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002* (2002) 26 *Criminal Law Journal* 293.
[566] [2013] NSWCCA 23 at [106].
[567] See also *WBM v Chief Commissioner of Police* [2012] VSCA 159 at [114] (arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought).
[568] See also *Human Rights Act 2004* (ACT) s 11(2).
[569] See [1.240] (international law); [6.150] (hardship to others).

child have been held to be a relevant factor in sentencing.[570] In *Aldridge v The Queen*[571] Refshauge J, on an application for bail of a person seeking leave to appeal from a sentence, noted that issues relating to the care of a child were matters that might amount to exceptional circumstances in relation to the granting of bail, although he made no finding on the direct application of such a principle in the circumstances.

Extended supervision and similar orders have been criticised on various grounds including possible lack of due process, lack of proportionality and finality, breach of rule of law principles, rules against double jeopardy and double punishment, the imposition of punishment without a finding of guilt and retrospective application of laws,[572] but legislation in Victoria and elsewhere has been found constitutionally valid.[573]

The making of suppression orders in relation to an offender's identity and whereabouts when they are under a supervision order may protect their right to privacy and reputation under *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13, but may be counterbalanced by the public's right to be protected.[574] Restrictions on performing forced or compulsory labour do not apply to persons under lawful court orders who are ordered to perform work in the community.[575] Similarly, prohibitions on restriction of movement do not apply to persons under lawful court orders such as bail, sentence or those made by a parole board.[576] Although the Adult Parole Board is specifically exempted from the *Charter*, it is an open question whether it must, in practice, refrain from imposing conditions which are incompatible with it.[577]

The Victorian Supreme Court has discussed civil compensation orders under Pt 4 of the *Sentencing Act 1991* (Vic) in the context of the right to human dignity expressed, inter alia, throughout the *Charter*.[578] *Charter* issues have also been raised in relation to the use of confiscation and related orders,[579] including challenges to the provisions of the civil forfeiture regime that require the forfeiture of property and the requirement that a court may consider any hardship that may be caused to any person[580] and, in passing, to the right to legal

[570] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; (2008) 3 SA 232; *S v The State* [2011] ZACC 7.
[571] [2011] ACTCA 20 at [34].
[572] See Sentencing Advisory Council, *Final Report – High Risk Offenders: Post-Sentence Supervision and Detention* (Sentencing Advisory Council, 2007) p 37ff.
[573] *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.
[574] *ARM v Secretary to the Department of Justice* [2008] VSCA 266; (2008) 29 VR 472 at [36] (VSCA); see *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) Pt 13 (restriction and sharing of information).
[575] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 11(3)(b); see discussion of the right to work in the context of sex offender registration laws that prevent certain offenders from working with children in *WBM v Chief Commissioner of Police* [2012] VSCA 159 per Bell J; *New South Wales Commission for Children and Young People* [2002] NSWIR Comm 101 at [165] per Haylen J; *Commission for Children and Young People v V* [2002] NSWSC 949; (2003) 56 NSWLR 476 at [38]–[40] per Young CJ in Eq.
[576] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12.
[577] This question was left open by Maxwell P and Weinberg JA in *RJE v Secretary to the Department of Justice* [2008] VSCA 265; (2008) 21 VR 526 at [56].
[578] *RK v Mirik* [2009] VSC 14; (2009) 21 VR 623, [5]–[6] and footnote [32] (VSC).
[579] See [9.55].
[580] *DPP v Ali (No 2)* [2010] VSC 503 (unsuccessfully invoking *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a) – a person's right not to have his or her family or home arbitrarily interfered with; s 17(1) – the entitlement of families to be protected by society and the State; and s 17(2) – the right of a child to such protection

representation.[581]

Guilt, conviction and sentence

[1.250]

The foundations of sentencing are built upon the three basic concepts of guilt, conviction and sentence. Both the meaning of these terms and their relationship to each other is uncertain and problematic.[582]

The successful conclusion of a criminal trial, from the prosecution's point of view, is marked by four features: first, an admission or jury finding of guilt; second, judicial acceptance of that finding by recording of a conviction; third, the announcement of the judgment (ie the sentence); and finally, its execution. It has long been thought fundamental to the protection of the rights of persons accused of crime that the sentencing powers of a court should not be exercised or executed without a prior formal judicial determination of guilt, usually manifested by the recording of a conviction.[583] However, as statutory sentencing options have proliferated and sentencing Acts have been enlarged to rationalise the sentencing system,[5843] there has been a tendency to weaken the orthodoxy of criminal justice that calls for conformity to the sequence: guilt, conviction, sentence and execution. In particular, the requirement of the recording of a conviction is becoming optional, or even being discarded. This decline in convention is part of a general move to husband limited correctional resources and enhance dispositional flexibility in the interest of individualising sentences. There is no "non-conviction" sentence at common law. The nearest equivalent was the common law bond,[585] and certain forms of release on a statutory bond available in the Magistrates' Court for summary offences. Many current statutory options do away with, or make optional, the formal conviction, and many carry the obligation to appear for sentence, or be subject to re-sentencing if the conditions of release are not complied with. The status of a court's finding is significant in relation to appeal, *autrefois acquit* and the application of higher penalty scales to second and subsequent offences. It also affects the

---

as is necessary in his or her best interests by reason of being a child). The Court held that the terms of the *Confiscation Act 1997* (Vic) were clear and could not be rewritten by the *Charter*. However, the *Charter* was not to be ignored: "The Charter rights form part of the body of law in Victoria. Without binding the Court as to how it should exercise its discretion, the Charter rights which are engaged in any particular case must form part of the relevant circumstances to be taken into account in the exercise of the discretion"; per Hargrave J at [45].

[581] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(d), see *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268.

[582] See RG Fox and A Freiberg, *Sentences Without Conviction: From Status to Contract in Sentencing* (1989) 13 *Criminal Law Journal* 297 at 298.

[583] *Maxwell v The Queen* [1996] HCA 46; (1996) 184 CLR 501.

[584] Although the *Sentencing Act 1991* (Vic) is intended to apply to the sentencing of all criminal offenders, it does not apply to punishment for contempt of court: see *Harris v Muirhead* [1993] 2 Qd R 527; *Nicholls v Director of Public Prosecutions (SA)* (1993) 61 SASR 31 (in South Australia, *Criminal Law (Sentencing) Act 1988* (SA) s 5 specifically provides that the Act does not affect the powers of a court to punish a person for contempt of court); cf *Her Majesty's Attorney-General in and for the State of New South Wales v Whiley* (1993) 31 NSWLR 314 (a sentence of imprisonment in NSW for a determined period for an established contempt of court is subject to the *Sentencing Act 1989* (NSW)); see also *Principal Registrar of the Supreme Court of New South Wales v Jando* [2001] NSWSC 969; (2001) 53 NSWLR 527.

[585] Abolished by *Sentencing Act 1991* (Vic) s 71.

availability of major ancillary sanctions such as orders for compensation, restitution or disqualification, which may depend on whether a defendant has been both convicted and sentenced.

Victorian sentencing legislation for adults and children directly addresses these issues. Commonwealth sentencing legislation does so to a lesser extent. Both the *Sentencing Act 1991* (Vic) and the *Children, Youth and Families Act 2005* (Vic) recognise that three separate steps may be required prior to the imposition of a sentence: a finding of guilt, the recording of a conviction, and the making of an order. Unlike the position at common law, it is the finding of guilt, rather than the conviction or the finality of the order, that forms the foundation for the courts' dispositive powers. These concepts apply equally to indictable and summary offences. The significance of the conviction as a sanction in its own right has been made more obvious. The *Sentencing Act 1991* (Vic) s 7 now catalogues the range of sentences available under State law indicating whether recording of a conviction is mandatory, optional or impermissible:[586]

> Section 7(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and subject to this Act –
>
> (a) **record a conviction** and order that the offender serve a term of imprisonment; or
>
> (b) subject to Part 5, **record a conviction** and order that the offender be detained and treated in an approved mental health service as a security patient (a hospital security order); or
>
> (c) **record a conviction** and make a drug treatment order in respect of the offender; or
>
> (d) …**record a conviction** and order that the offender serve a term of imprisonment that is suspended by it wholly or partly; or
>
> (e) in the case of a young offender, **record a conviction** and order that the young offender be detained in a youth justice centre; or
>
> (f) in the case of a young offender, **record a conviction** and order that the young offender be detained in a youth residential centre, or
>
> (g) **with or without recording a conviction**, make a community correction order in respect of the offender; or
>
> (h) **with or without recording a conviction**, order the offender to pay a fine; or
>
> (i) **record a conviction** and order the release of the offender on the adjournment of the hearing on conditions; or
>
> (j) **record a conviction** and order the discharge of the offender; or

[586] Emphasis added.

(k) **without recording a conviction**, order the release of the offender on the adjournment of the hearing on conditions; or

(l) **without recording a conviction**, order the dismissal of the charge for the offence; or

(m) impose any other sentence or make any order that is authorised by this or any other Act.

For child offenders, the *Children, Youth and Families Act 2005* (Vic) s 360(1) offers its own catalogue of sentences, including options not available to adults. Again, the significance of the discretion not to record a conviction is highlighted:[587]

> 360(1) If the Court finds a child guilty of an offence, whether indictable or summary, the Court may –
>
> (a) **without conviction**, dismiss the charge; or
>
> (b) **without conviction**, dismiss the charge and order the giving of an undertaking under section 363; or
>
> (c) **without conviction**, dismiss the charge and order the giving of an accountable undertaking under section 365; or
>
> (d) **without conviction**, place the child on a good behaviour bond under section 367; or
>
> (e) **with or without conviction**, impose a fine under section 373; or
>
> (f) **with or without conviction**, place the child on probation under section 380; or
>
> (g) **with or without conviction**, release the child on a youth supervision order under section 387; or
>
> (h) **convict** the child and make a youth attendance order under section 397; or
>
> (i) **convict** the child and order that the child be detained in a youth residential centre under section 410; or
>
> (j) **convict** the child and order that the child be detained in a youth justice centre under section 412.[588]

Guilt

[587] Emphasis added.

[588] The factors that may influence the exercise of the discretion whether or not to record a conviction are discussed further at [1.265].

[1.255]

A finding of guilt in respect of an offence charged is now the minimum prerequisite for the imposition of a sentence in respect of that charge. The tribunal of fact, which will ordinarily be a magistrate or jury, must be satisfied beyond reasonable doubt (or to such lesser standard of proof as may be prescribed by a statute for the particular offence) that the accused has committed the offence or offences charged. In the higher courts, the finding of guilt occurs at the moment that the accused, on arraignment, enters a plea of guilty to a charge for an offence or when the jury delivers a verdict finding the accused guilty of an offence.[589]

The finding of guilt is important not only because it forms the jurisdictional foundation for the sentence, but also because it settles some (though not necessarily all) of the facts upon which the sentence will be based. The minimum facts admitted in a plea of guilty may be insufficient for sentencing purposes.[590] Even where there has been a full hearing or trial and more information is before the court than on a plea of guilty, problems may arise. These are less acute in a Magistrates' Court where the fact-finder and sentencer are the same person. But in a trial on presentment or indictment before a jury, the sentencer does not necessarily know what view of the facts relating to the circumstances of the offence the jury took. A finding of guilt may be consistent with a number of different legal bases for the verdict. The sentence can only relate to the offence for which the finding of guilt has been obtained. This means that if the prosecution has accepted a guilty plea to a lesser number of offences or to less-serious versions of the offences originally charged, the sentence cannot be made on the basis of facts or circumstances alleged or implied in the original charge. Likewise, where an accused is acquitted of the offence originally charged, but found guilty of a lesser, included offence, the court may only sentence on the basis of facts proving the lesser crime.[591]

A finding of guilt without the recording of a conviction has the same effect as a conviction for the purposes of appeals against sentence, or proceedings for variation or contravention of sentence or proceedings against an offender for a subsequent offence or for the same offence.[592] While these provisions may preserve the right of an offender to plead previous conviction, it does not necessarily prevent a court dealing with a subsequent offence from having regard to the fact that the offender has been found guilty of an earlier offence.[593]

A finding of guilt must be distinguished from the entering of a conviction on the record. At common law, and under some statutory provisions, there was considerable confusion between

---

[589] *Criminal Procedure Act 2009* (Vic) s 253B. For the purposes of the *Sex Offenders Registration Act 2004* (Vic) s 4, a finding of guilt includes: (a) a court making a formal finding of guilt in relation to the offence; (b) a court accepting a plea of guilty from the person in relation to the offence; (c) a court accepting an admission made under and for the purposes of s 100 of the *Sentencing Act 1991* (Vic), or under equivalent provisions of the laws of a foreign jurisdiction; or (d) a finding in relation to the offence under s 17(1)(b) or (c) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* or under s 17(1)(c) of that Act in relation to an offence available as an alternative or a finding under that Act of not guilty because of mental impairment, or a finding under equivalent provisions of the laws of a foreign jurisdiction.

[590] See [2.55].

[591] See [2.65].

[592] *Sentencing Act 1991* (Vic) s 8(3).

[593] *DPP v NOP* [2011] TASCCA 15 at [25]; see also [5.10] (prior criminality).

the various stages of the trial. Notions of guilt and conviction were both conflated and separated, depending upon the purpose of the legislation in relation to the dispositional outcome.

Conviction

[1.260]

The recording of a criminal conviction is a significant act of legal and social censure.[594] It is a judicial act by which a person's legal status is officially and – subject to any provisions relating to expungement[595] – irretrievably altered.[596] The alteration effected by a conviction is a diminution of the offender's legal rights and capacities. These follow automatically from the fact of conviction and are not necessarily tied to the particular sanction that follows it.[597] In the earliest days, a person was said to be "convict", when a court, in a case of treason or felony, accepted a finding of guilt but had not yet passed judgment. The person thus came to be known as a convict and their personal property was automatically forfeited to the sovereign. After judgment, which was then normally a sentence ordering the forfeiture of the person's life, that person was said to be "attaint", which meant that the person's real property was forfeited and their remaining civil rights and capacities were extinguished. Numerous statutory provisions single out the fact of a conviction as the ground for some form of divestment of office, licence or right, but they are not global in their effect, as were the common law doctrines of forfeiture and attainder. Increasingly, a finding of guilt may suffice to trigger a disqualification or other collateral consequence of conviction.[598] This means that though, in modern times, the legal consequences of acquiring the status of a convicted person are less comprehensive, they are also less well known. Indeed they have a variable, almost random quality.[599]

Because they depend upon the attitude taken to the fact of a conviction by a multiplicity of local State and federal laws, as well as those of other countries, the adverse consequences of being a convicted person may be manifested in unexpected ways. These disabilities take the existence of a conviction as a reason for withdrawing occupational, employment and commercial rights or licences; electoral, political and civic rights; entitlements to migration or citizenship; the capacity to litigate or act as a juror; for withdrawal of any pension and inheritance rights; for the making of banning, disqualification and prohibition orders; or for being registered as a sex offender,

[594] "A conviction is a formal and solemn act marking the court's and society's disapproval of a defendant's wrongdoing": *R v McInerney* (1986) 42 SASR 111, 124; see also *Carnese v The Queen* [2009] NTCCA 8 at [16]; *DPP v Emmerson* [2012] NTSC 60 at [73] (declaration under confiscation legislation that a person is a drug trafficker, like a conviction for an offence, is stigmatic); RG Fox and A Freiberg, *Sentences Without Conviction: From Status to Contract in Sentencing* (1989) 13 *Criminal Law Journal* 297, 299–305.

[595] See for example, *Criminal Procedure Act 2009* (Vic) s 3: "conviction" does not include a conviction or finding of guilt by a children's court (whether in or out of Victoria) made more than 10 years before the hearing at which it is sought to be proved; see also *Children, Youth and Families Act 2005* (Vic) s 584(2).

[596] See [9.370].

[597] See also *R v P* [2007] VChC 3 at [31]; *R v M* [2008] VChC 4 at [31].

[598] Police will release information in relation to a person's criminal history on the basis of a finding of guilt; see [9.370] (relief from consequences of conviction).

[599] Though under Victorian law, a community correction order and a fine can be imposed following a finding of guilt only, they are not available in relation to Commonwealth offenders, which require conviction as a prerequisite; see *Crimes Act 1914* (Cth) s 20AB(1) (re community correction orders); *Crimes Act 1914* (Cth) s 19B (re fines); see also *Commissioner of Taxation v Doudle* [2005] SASC 442; (2005) 195 FLR 76.

being prohibited from working with children or being deported.[600] A conviction also carries the risk of enhanced punishment for any later crime, and the possible diminution of standing as a witness. It also represents a broader ethical statement or judgment of moral culpability which, in communal eyes, provides a declaration that the defendant is a person worthy of censure and punishment, or in need of some other form of State intervention in the interests of suppressing crime. For this reason, the very fact of conviction is properly regarded as a major act of condemnation and public stigmatisation and is, without more, treated as a sentence.[601] There is a "particular importance in the recording or non-recording of a conviction".[602] The fact of conviction itself can be taken into account in determining whether a sentence is regarded as manifestly inadequate or excessive.[603]

The question of what amounts to the legal act of conviction is not without its obscurities and its meaning will be influenced or determined by its statutory context.[604] The *Criminal Procedure Act 2009* (Vic) s 3 defines conviction as including "a finding of guilt by a court, whether or not a conviction is recorded".[605] In the absence of a statutory provision,[606] a guilty plea or equivalent verdict does not amount to a conviction. Something more is required. In *R v Tonks*[607] the Supreme Court said:[608]

> The review of the authorities … satisfies us that a plea of guilty does not of its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a "conviction", for the

[600] See Chapter 8.

[601] *Criminal Procedure Act 2009* (Vic) s 3. On the damaging effects of being convicted see B Steels, *Forever Guilty: Convict Perceptions of Pre and Post Conviction* (2009) 21 *Current Issues in Criminal Justice* 242. In the Northern Territory the court may "declare" a person to be a drug trafficker if they meet certain criteria set out in the *Misuse of Drugs Act* (NT) s 36A. Such a declaration has a similar stigmatic effect as a conviction and amounts to the imposition of punishment, even though proceedings under the Act are deemed to be civil: *DPP v Emmerson* [2012] NTSC 60.

[602] *DPP v Kose* [2006] VSCA 119 at [34] per Ashley JA.

[603] *DPP v Kose* [2006] VSCA 119; *DPP v Marks* [2005] VSCA 277.

[604] *Maxwell v The Queen* [1996] HCA 46; (1996) 184 CLR 501 at [9] per Dawson and McHugh JJ; *Miles v Police* [2009] SASC 181; (2009) 104 SASR 127.

[605] In *Police v Varma* [2013] SASCFC 72 at [19] the Court drew a distinction between a conviction and the recording of a conviction: "The phrase 'recording a conviction' is a reference to an act of a judicial officer formally pronouncing that a finding of guilt is to be recorded as a conviction. A finding of guilt amounts to a conviction. A decision then needs to be made as to whether to record that conviction."

[606] On the importance of considering specific statutory provisions see *Keys v West* [2006] NSWSC 136; (2006) 65 NSWLR 668; *Frodsham v O'Gorman* [1979] 1 NSWLR 683; *R v Collins* [1994] QCA 467; [1996] 1 Qd R 631.

[607] [1963] VR 121.

[608] [1963] VR 121, 127–128; see also *DPP (Vic) v McCoid and Parsons* [1988] VR 982; *Tudman v Flower* (1994) 73 A Crim R 321 (conviction in Magistrates' Court when Magistrate proceeded to hear plea in mitigation); *Maxwell v The Queen* [1996] HCA 46; (1996) 184 CLR 501 (conviction is the disposal of a case that results in the judgment of the court: per Dawson and McHugh JJ; conviction only occurs when the court does some act that indicates that it has determined guilt, or has accepted that the accused is criminally responsible: per Gaudron and Gummow JJ); *Police v Varma* [2013] SACSFC 72 ("convict" includes both a finding of guilt and an acceptance of a plea of guilty).

> latter term may be used in a particular context as meaning not merely conviction by verdict where no judgment is given, but conviction by judgment … but there must at least be a determination of guilt before there can be a conviction. There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilt.

The term "conviction" has been treated variously as denoting the jury's verdict of guilt,[609] a determination that an offence has been proved or a final adjudication of guilt,[610] the court's sentence or judgment,[611] the court's acceptance of the return of a guilty verdict of the offering of a guilty plea,[612] the acceptance of a plea of guilty and a remand for sentence,[613] occurring on the administration of the *allocutus*,[614] conviction (in the sense of a finding of guilt) and sentence (in the sense of a final disposal of the case),[615] and a "bare finding of guilt" for the purpose of an *ex parte* proceeding.[616] For the purposes of some legislation, such as that relating to confiscation orders, the term "conviction" is used as a legislative fiction – not for the purpose of creating a criminal record or imposing a criminal sanction, but for enlivening the jurisdiction of the court for the purposes of the confiscatory legislation which is essentially civil in nature.[617]

---

[609] *R v De Marchi* [1983] 1 VR 619.

[610] *Kinney v Green* (1992) 29 NSWLR 137 at 139, per Carruthers J.

[611] *R v Tonks* [1963] VR 121, 124; *S (An Infant) v Manchester City Recorder* [1969] 3 All ER 1230, 1246; *Re Stubbs* (1947) 47 SR (NSW) 329, 335; *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257 at [4]–[7] per Windeyer J; *R v Hannan; Ex parte Abbott* [1986] NTSC 22; (1986) 41 NTR 37, 39; *Muscat v Magistrates' Court* [1996] SASC 5551; (1996) 66 SASR 367.

[612] *Griffiths v The Queen* [1977] HCA 44; (1977) 137 CLR 293 at [24] per Barwick CJ and [11]–[13] per Aicken J; see also *Maxwell v The Queen* [1996] HCA 46; (1996) 184 CLR 501; *Elliott v The Queen* [2007] HCA 51; (2007) 234 CLR 38; *DPP (Cth) v Helou* [2003] NSWCA 301; (2003) 58 NSWLR 574. Though such acceptance might be expressed, more usually it is implicit in the subsequent imposition of sentence, or the calling for reports preparatory to such sentencing. For an example of implied non-acceptance, see *R v Hewitt; Ex parte Attorney-General (Vic)* [1973] VR 484, 488.

[613] Cf actual sentence; see *DPP (Vic) v McCoid and Parsons* [1988] VR 982 (remanding of an accused person for sentence, whether in custody or on bail, is an unequivocal indication that the accused has been found guilty); approved in *Della Patrona v DPP (Cth) (No 2)* (1995) 38 NSWLR 257 per Kirby P; see also *DPP (Cth) v Helou* (2003) 58 NSWLR 574; *Miles v Police* [2009] SASC 181; (2009) 104 SASR 127 (acceptance of the plea and "embarking on a consideration of the orders that should be made against the defendant").

[614] *R v Shillingsworth* [1985] 1 Qd R 537; *R v Verrall* [2012] QCA 310; [2013] 1 Qd R 587; see *Criminal Code 1899* (Qld) s 648. In Victoria, the administration of the *allocutus* has been abolished: *Criminal Procedure Act 2009* (Vic) s 253A. The common law procedure was described thus: "Administering the allocutus is the step in a criminal proceeding which occurs when, after a plea of guilty or a finding of guilt by the jury, the court asks the accused whether there is any reason why the court should not proceed to pass judgment according to law".

[615] For the purpose of *autrefois convict*: *R v Stone* [2005] NSWCCA 344; (2005) 64 NSWLR 413; *Keys v West* [2006] NSWSC 136; (2006) 65 NSWLR 668.

[616] Which can leave it open to the court to order that no conviction be recorded. The distinction is between conviction as a determination of a defendant's guilt rather than a conviction that finally disposes of the proceedings *Keys v West* [2006] NSWSC 136; (2006) 65 NSWLR 668 at [53] (order that a defendant be discharged "without conviction" pursuant to *Crimes Act 1914* (Cth) s 19(1)(d) can be made following an *ex parte* conviction); see also *Kinney v Green* (1992) 29 NSWLR 137 (automatic licence disqualification following an *ex parte* conviction cannot take place until defendant notified); see also *Re Attorney-General's Application (No 3 of 2002)* [2004] NSWCCA 303; (2004) 61 NSWLR 305 per Howie J (bare finding of guilt authorises issuing of a warrant to bring an offender before the court for sentencing).

[617] *Silbert v DPP (WA)* [2004] HCA 9; (2004) 217 CLR 181. Being civil orders these provisions are not antithetical to the provisions of Chapter III of the *Commonwealth of Australia Constitution* (Cth); see also [9.65].

Discretion whether or not to record a conviction

[1.265]

Where the form of the order allows the sentencer a discretion regarding whether or not to record a conviction, the *Sentencing Act 1991* (Vic) s 8 offers some guidance:[618]

> (1) In exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case including –
>
> (a) the nature of the offence; and
>
> (b) the character and past history of the offender; and
>
> (c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.
>
> (2) Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.

The general issue of the weight to be accorded to the recording of a conviction in the exercise of sentencing discretion arises frequently. In the Magistrates' Court of Victoria, between July 2009 and June 2013 for all offences, approximately 60 per cent of offenders received a conviction. In particular, 18 per cent of those who entered into an adjourned undertaking were convicted, and 61 per cent of those who were fined and 80 per cent of those who received a community-based order were convicted.[619]

In *R v Brown*,[620] the Queensland Court of Appeal observed in relation to a provision similar to *Sentencing Act 1991* (Vic) s 8 that it:[621]

> has brought about some significant changes in sentencing practice and as part of

[618] See also *Criminal Law (Sentencing) Act 1988* (SA) s 16; *Sentencing Act 1995* (WA) s 5(a) and *Spent Convictions Act 1988* (WA); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10; *Penalties and Sentences Act 1992* (Qld) s 12; *Sentencing Act 1997* (Tas) s 9; *Crimes (Sentencing) Act 2005* (ACT) s 17; *Sentencing Act* (NT) s 8. There is no equivalent directive in the *Children, Youth and Families Act 2005* (Vic), but similar concepts are picked up in the list of matters to be taken into account in sentencing a child under that Act. Thus s 362 makes specific reference to the impact on the child's education, training or employment and "the need to minimise stigma to the child resulting from a court determination"; *R v P* [2007] VChC 3 at [32]; *R v M* [2008] VChC 4 at [32]. In Tasmania, the *Youth Justice Act 1997* (Tas) s 49(4) specifies a number of criteria for a court to consider whether or not to record a conviction including the nature of the offence, the youth's age, any sentences or sanctions previously imposed and the impact the recording of the conviction will have on the youth's chances of rehabilitation or finding or retaining employment; see also [16.40]; A West, *Criteria for the Recording of a Conviction* (1993) 14 *Queensland Lawyer* 77.

[619] Personal communication, Geoff Fisher, Sentencing Advisory Council, 13 August 2013. In relation to the offence of breach of a family violence intervention order, 77% had a conviction recorded: Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (Sentencing Advisory Council, 2009) p 42.

[620] [1993] QCA 271; [1994] 2 Qd R 182, 184 per Macrossan CJ.

[621] The Queensland provision expressly mentions "age" as a factor, whereas the Victorian section does not.

> those changes has expressly conferred discretions in areas where they did not previously exist. In my opinion the deliberate legislative policy discernible behind this should not be impeded by over-rigid rules or by restrictive approaches drawn from the experience of an era when the discretions did not exist.

Macrossan CJ then provided some broad guidance for the courts in the interpretation of such a section:[622]

> Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) [*Penalties and Sentences Act 1992* (Qld)] say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion, nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight. It would, however, in my opinion, not be correct to say that because "age" finds mention, the principle that should be applied is that only youthful offenders should escape a recorded conviction or because "chances of finding employment" are mentioned, a person not likely to be seeking employment should never be spared or because "nature of the offence" is referred to, only those offences at the more trivial end of the sentencing scale should be regarded as qualifying. Indeed, an offender's previous unblemished character and his assumed desire to maintain his social well-being and community reputation may be able to be regarded as giving him fair claims to consideration in the matter, even if he is of mature age.

There is always a tension between the public interest inherent in a conviction being recorded and the beneficial effects of non-recording on an offender. In *R v Briese*, the Queensland Court of Appeal observed:[623]

> … the effect of such an order is capable of considerable effect in the community. Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the Immigration Department … For present purposes it is enough to note that the making of an order [to proceed without conviction] has considerable ramifications of a public nature, and courts need to be aware of this potential effect …
>
> On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation…

[622] *R v Brown* [1993] QCA 271; [1994] 2 Qd R 182, 185; see also *Fullalove* (1993) 68 A Crim R 486, 492 per Lee J.
[623] [1997] QCA 10; [1997] 1 Qd R 487, 490; see also *R v Stubberfield* [2010] SASC 9; (2010) 106 SASR 91; *Qadir v Rigby* [2012] NTSC 90; *Wilson v Malogorski* [2011] NTSC 27; *Verity v SB* [2011] NTSC 26.

A conviction, being "a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing"[624] is regarded as a component of the sentence and is to be accorded weight in considering whether or not the sentence is proportionate to the offence.[625] The more serious or blatant the crime, the less appropriate it is for the sentencer to decline to record a conviction.[626] Where the crime may be considered as "victimless" a non-conviction disposition may be considered.[627] Youth is a very significant factor in the decision whether or not to record a conviction. Sentencers are aware that to record a conviction against the young may, in the absence of expungement legislation, stigmatise them for the rest of their lives, or blight their possible future careers.[628] The *Children, Youth and Families Act 2005* (Vic) makes the same point in s 362(1)(d).[629] Older persons who have led previously blameless lives and for whom a conviction may cause severe distress and anxiety may also benefit from the discretion not to record one.[630] The discretion may be exercised where the defendant has nothing or little by way

[624] *R v McInerney* (1986) 42 SASR 111, 124.

[625] *Lanham v Brake* (1983) 34 SASR 578, 585; *R v Brown* [1993] QCA 271; [1994] 2 Qd R 182, 185 (non-recording of conviction may be grounds for appeal against inadequacy of sentence); *R v Sessions* [1998] 2 VR 304 (conviction regarded as amounting to a punishment for the purposes of double jeopardy rules); *DPP v Kose* [2006] VSCA 119 at [33].

[626] *R v Allinson* (1987) 49 NTR 38 (noting that in the relevant range of drug offences the courts in the Northern Territory had never declined to convict); *Graham v Bartley* (1984) 57 ALR 193, 196 (blatant social security fraud); *Carnese v The Queen* [2009] NTCCA 8 at [17]; *Hatzimihal v Wesphal* [2011] NTSC 61; cf *R v Brown* [1993] QCA 271; [1994] 2 Qd R 182 (conviction need not necessarily be recorded regarding an offence of dangerous driving causing death where death due to momentary inattention of young driver; Pincus J dissenting); non-conviction dispositions were upheld in *DPP (Cth) v Li* [2000] VSCA 76 (32-year-old businessman engaged in sales fraud amounting to $160,000); *DPP v Robinson* [2000] VSCA 190 (company director pleaded guilty to six counts of publishing a misleading statement as a director); *McAvaney v Quigley* (1992) 58 A Crim R 457 (assault occasioning actual bodily harm); *Hodgins v Police* [2008] SASC 176 (assault); *R v Stubberfield* [2010] SASC 9; (2010) 106 SASR 91 (assault); cf *DPP v North* [2002] VSCA 57 (conviction appropriate for offence of aggravated burglary); *R v Hoch; Ex parte Attorney-General (Qld)* [2001] QCA 63 (conviction appropriate for offences relating to indecent articles relating to child abuse where the offender had a history of working with children).

[627] *R v Stubberfield* [2010] SASC 9; (2010) 106 SASR 91.

[628] *Simmonds v Hill* (1986) 38 NTR 31 (conviction of 15-year-old on charges of small quantity of cannabis reversed on ground of effect on future career); In *Re C (A Minor)* (1988) 37 A Crim R 85, 95 (conviction of 13-year-old may blight remote chance of future employment opportunities); *R v Brown* [1993] QCA 271; [1994] 2 Qd R 182 (23-year-old with no prior record charged with dangerous driving causing death); *O'Hanlon v SA Police* (1994) 62 SASR 553 (conviction a handicap to getting a job); *R v SBR* [2010] QCA 94 (good prospects of rehabilitation of 15-year-old who digitally raped his sister); *R v MBQ; Ex parte Attorney-General (Qld)* [2012] QCA 202 (12-year-old found guilty of rape of 3-year-old girl; mental age of 9; personal circumstances of the offender and objective nature of the rape strongly militated against the recording of a conviction); *R v King* [2004] NSWCCA 444 (effect of conviction upon 19-year-old Aboriginal offender's future employment prospects outweighed any public interest in the recording of a conviction); see also *Newcombe v Police* [2004] SASC 26; *R v TX* [2011] QCA 68 (prima facie a conviction should not be recorded against a child): *R v B* [1995] QCA 231; *R v SBP* [2009] QCA 408 at [21]; *R v WAJ* [2010] QCA 87 at [14]. However, if the young offender has a prior record of serious offending, the discretion is less likely to be exercised in the offender's favour: *R v L* [2000] QCA 448. It is not only the young whose careers might be blighted; mature age students who are studying for new careers may have their futures affected by the recording of a conviction: *McGregor v Police* (1995) 66 SASR 269.

[629] Court required to take into account "the need to minimise the stigma to the child resulting from a court determination".

[630] *Carmichael v Faehrmann* (1990) 53 SASR 391 (63-year-old woman with no prior convictions convicted for minor shoplifting, suffering from depression); *Fullalove* (1993) 68 A Crim R 486 (49-year-old woman entitled to maintain record of no prior convictions, although she had been before courts previously for minor offences); see also *Hales v Adams* [2005] NTSC 86 at [17].

of a previous record,[631] or where the offending related to ill health, or where it would in itself be a significant additional penalty for a first offender.[632]

The effect of a conviction on the offender's ability to travel,[633] earn a livelihood, or future employment prospects is a factor that has always been acknowledged by the courts as relevant to sentence.[634] This is especially so in relation to legislatively regulated professions or occupations, which stipulate conviction as a bar to entry or continued membership.[635] This consideration may also weigh heavily in relation to occupations that require entrants to be of prior good character.[636] Where there is a statutory consequence of conviction, such as a sex offender registration law,[637] a court may exercise its discretion not to convict. Even though the fact of registration may not be directly regarded as relevant to the sentence, it may be relevant to the exercise of the discretion whether or not to record a conviction if it may affect the offender's social well-being under *Sentencing Act 1991* (Vic) s 8(1)(c).[638]

The recording of a conviction may be called for where the offender is of mature age and the requirements of general and special deterrence are being given weight,[639] especially in relation to breaches of regulatory or social legislation.[640] It may also be required where there may be some possibility in the future that the provisions of dangerous offender legislation may be invoked and a prerequisite conviction is required. There may also be circumstances where the victim of an offence might not feel vindicated if a conviction is not recorded.[641]

An offender who wishes a court to take into account any possible loss of employment either generally, or in a particular field, as a reason for not formally recording a conviction should, in the absence of agreement with the prosecution to that effect, call evidence to prove the loss, or the likelihood of prejudice.[642] Reliance on what counsel asserts to be the fact may not be sufficient if unaccompanied by documentary or oral evidence.

---

[631] *R v Stubberfield* [2010] SASC 9; (2010) 106 SASR 91.

[632] *McAvaney v Quigley* (1992) 58 A Crim R 457; *Morris v Beck* (1990) 54 SASR 540, 542; see also *Hales v Adams* [2005] NTSC 86; *Bridle v Verity* [2011] NTSC 107.

[633] *R v P* [2007] VChC 3 at [37] (effect of conviction on ability to obtain an American visa).

[634] *Hemming v Neave* (1989) 51 SASR 427 (conviction recorded, though causing loss of fishing licence).

[635] *Lanham v Brake* (1983) 34 SASR 578, 585–586 (lawyer); *Flavel v Borrett* (1991) 54 A Crim R 452 (company director); cf *O'Brien v Norton-Smith Pty Ltd* [1995] TASSC 78 (possible loss of tax agent licence was "fanciful in the circumstances"); see also *McQuestin v The Queen* [1993] TASSC 118; (1993) 2 Tas R 30 (automatic disqualification from being a company director).

[636] For example, for work in casinos, *Morris v Beck* (1990) 54 SASR 540; *Carnese v The Queen* [2009] NTCCA 8 (a significant factor that licence under private security legislation would be lost).

[637] See [9.290].

[638] *R v Rogers* [2013] QCA 192 (no conviction recorded in relation to a 20-year-old offender with no prior convictions convicted of a reportable offence who posed no risk to the community and who would be subject to a 3-year probation order because of the effect that it would have on his social well-being); *The Queen v CV* [2013] ACTCA 22 (court must consider prospects of rehabilitation of a young offender who posed no danger to the community and the adverse effects upon them if a conviction were recorded and the person registered as a sex offender).

[639] *R v Ashton* (1995) 83 A Crim R 8; *Hemming v Lukin* (1996) 67 SASR 248.

[640] *Piva v Brinkworth* [1992] SASC 3629; (1992) 59 SASR 468.

[641] *Attorney-General v Smith* [2002] TASSC 10 at [24]–[27]; *DPP v NOP* [2011] TASCCA 15.

[642] *Theodoros v Holmes* (1989) 50 SASR 373, 377; cf *Fullalove* (1993) 68 A Crim R 486 (in some circumstances court can infer that a recorded conviction will have an adverse impact on future prospects).

Sentence

[1.270]

It is rare to find a general, all-inclusive common law definition of what constitutes a sentence.[643] Legislative definitions have usually been created to settle the meaning of the term for such purposes as disqualification or the bestowal of rights of appeal, but it is clear that, as the range of sentencing options has expanded and become more flexible, so too has the meaning of "sentence".[644] The *Criminal Procedure Act 2009* (Vic) s 3 provides that "sentence" includes:[645]

(a) the recording of a conviction; and

(b) an order made under Part 3,[646] 3A,[647] 3B,[648] 3BA,[649] 3C,[650] 3D,[651] 4[652] or 5[653] of the *Sentencing Act 1991*, other than an order incidental to or preparatory to the making of the order; and

(c) an order made under section 11 of the *Sex Offenders Registration Act 2004* (Vic);[654] and

(d) an order made under section 84S[655] or 84T[656] of the *Road Safety Act 1986*;[657] and

(e) an order made under section 365, 367, 373, 380 or 387 of the Children, *Youth and Families Act 2005* made by the Supreme Court in its original jurisdiction or the County Court in its original jurisdiction.

This work therefore adopts an expansive conception of "sentence" and treats a sentence as being

---

[643] See RG Fox and A Freiberg, *Sentences Without Conviction: From Status to Contract in Sentencing* (1989) 13 *Criminal Law Journal* 297, 305.

[644] On the history and meaning of the word "sentence" see M Kirby, *The Mysterious Word "Sentences" in s 73 of the Constitution* (2002) 76 *Australian Law Journal* 97.

[645] See also *Penalties and Sentences Act 1992* (Qld) s 4 ("sentence" means any penalty or imprisonment ordered to be paid or served, or any other order made, by a court after an offender is convicted, whether or not a conviction is recorded); *Criminal Law (Sentencing) Act 1988* (SA) s 3.

[646] Custodial orders; see also *Winsor v Boaden* [1953] HCA 46; (1953) 90 CLR 345, 347 ("sentence" connotes "a judicial judgment or pronouncement fixing a term of imprisonment").

[647] Community correction orders.

[648] Fines.

[649] Dismissals, discharges and adjournments, justice plans, deferred sentences.

[650] Sentences imposed for contravening a sentence.

[651] Superannuation orders.

[652] Orders in addition to sentence such as restitution and compensation, costs, forfeiture and disqualification.

[653] Orders in relation to mentally ill offenders.

[654] Cf *S v Tasmania* [2007] TASSC 62; (2007) 16 Tas R 292 (reporting order under *Community Protection (Offender Reporting) Act 2005* (Tas) not a sentence for the purposes of appeal).

[655] Impoundment or immobilisation order.

[656] Forfeiture order.

[657] An order made under *Road Safety Act 1986* (Vic) s 28(1)(b) suspending a licence or disqualifying a driver is a sentence for the purposes of an appeal: *R v Novakovic* [2007] VSCA 145; (2007) 17 VR 21.

any dispositive order of a criminal court[658] consequent upon a finding of guilt, whether or not a formal conviction is recorded. This accords with the definition in the *Criminal Procedure Act 2009* (Vic) s 3, the *Magistrates' Court Act 1989* (Vic) s 3(1), *Children, Youth and Families Act 2005* (Vic) s 360 and the *Sentencing Act 1991* (Vic) s 7. Thus, the statutory concept of a sentence now encompasses measures imposed prior to the termination of the trial or hearing,[659] those which may not amount to a final disposal of the prosecution and those where a court may retain an ongoing role in the supervision of the offender.[660] For the purposes of appeal, the concept is sufficiently wide to include orders in addition to sentence – such as orders for restitution or compensation[661] – as well as the various types of hospital order,[662] some of which are, strictly speaking, orders made *instead* of sentence.[663] Of the 12 forms of sentencing order listed in s 7 of the *Sentencing Act 1991* (Vic), nearly half require the consent of the accused to the making of the order,[664] and four do not require the entry of a conviction.[665] "Sentence" does not include a declaration under s 6AAA of the *Sentencing Act 1991* (Vic) which requires a court to state the extent of the discount given in relation to a guilty plea,[666] nor a recommendation by a sentencing judge that a prisoner should never be released.[667]

Sentences and penalties

[1.275]

The ambiguity of the word "sentence" means that it is often confused with the term "penalty". Though their meanings overlap,[668] they are not synonymous. While a sentence is almost always a penalty, for many purposes, a penalty is not necessarily a sentence. A penalty may be imposed for the breach of a civil law or a contract or some other rule. Many provisions that impose a sanction such as a licence disqualification refer to the sanction as a "penalty" and it will depend

[658] However, see discussion of civil pecuniary penalties imposed by civil courts in breach of civil offences, see [7.40].
[659] For example, orders made on adjournment.
[660] See for example, Drug Treatment Order, *Sentencing Act 1991* (Vic) ss 18X to 18ZS; see also [12.145]. In 2013 the New South Wales Parliament created a new form of sentence, a "provisional sentence" for offenders under the age of 16 at the time of the offence sentenced for murder. The sentence is provisional as the court may not consider it appropriate to impose an ordinary sentence because the information available to it does not permit it to satisfactorily assess whether the offender has, or is likely to develop, a serious personality or psychiatric disorder, or serious cognitive impairment, such that the court cannot assess whether the offender is likely to re-offend or their prospects of rehabilitation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 60B; see also S Beckett, L Fernadez and K McFarlane, *Provisional Sentencing for Children* (New South Wales Sentencing Council, 2009).
[661] *Sentencing Act 1991* (Vic) Pt 4.
[662] *Sentencing Act 1991* (Vic) Pt 5.
[663] See *Sentencing Act 1991* (Vic) s 93(1).
[664] The ones that do not require the offender's consent are: immediate imprisonment, detention under a hospital security order, detention in a youth justice centre, detention in a youth residential centre, fine, absolute discharge and dismissal.
[665] Those for which the recording of a conviction is mandatory are: immediate imprisonment, suspended term of imprisonment, youth justice centre detention, release on adjournment and discharge.
[666] *Lunt v The Queen* [2011] VSCA 56; see also [6.20] and [17.40].
[667] *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513; *Elliott v The Queen* [2007] HCA 51; (2007) 234 CLR 38.
[668] See for example,*Criminal Law (Sentencing) Act 1988* (SA) s 3 ("sentence" is defined as "the imposition of a penalty").

upon the terms of the statute whether that sanction is considered to be part of the sentence for the purpose of determining whether a right of appeal exists or for determining whether the totality of the sanctions are proportionate to the offence.[669] Thus an order that a person be registered under the *Sex Offenders Registration Act 2004* (Vic) has been deemed to be a sentence for the purpose of appeal[670] but not a penalty for the purpose of the provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that prohibit the imposition of retrospective penalties.[671]

In distinguishing between "sentences", "penalties" and other sanctions, courts often differentiate between those dispositions that serve the underlying purposes of sentencing for a criminal offence – namely punishment,[672] deterrence, rehabilitation, denunciation and community protection generally – and those that are intended to be "protective" more broadly by restricting the offender's activities or facilitating further investigation or prosecution.[673] However, this distinction does not withstand close scrutiny, as the High Court observed in *Rich v Australian Securities and Investments Commission*:[674]

> [T]he supposed distinction between "punitive" and "protective" proceedings or orders suffers the same difficulties as attempting to classify all proceedings as either civil or criminal. At best, the distinction between "punitive" and "protective" is elusive. That point is readily illustrated when it is recalled that … account must be taken in sentencing a criminal offender of the need to protect society, deter both the offender and others, to exact retribution and to promote reform.

The fact that the additional sanction that is imposed is triggered by a criminal conviction is not necessarily sufficient to render the sanction a "sentence" or a "penalty" in strict terms. Because of the elusive nature of the distinction, the resolution of the question of the status of the sanction tends to be contextual rather than theoretical or conceptual. Any a priori classification of the nature of proceedings tends to invite error "because the classification adopted assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable".[675]

---

[669] *Miles v Police* [2009] SASC 181; (2009) 104 SASR 127; *Porter v Prestwood* (1983) 33 SASR 75; *Philp v Bonney* (1989) 50 SASR 531; *Janz v Woolven* (1990) 55 SASR 239.

[670] See *Criminal Procedure Act 2009* (Vic) s 3.

[671] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27(2); *WBM v Chief Commissioner of Police* [2010] VSC 219; (2010) 203 A Crim R 167.

[672] "Punishment" has been defined as "a determination of a wrongdoing of a public nature in consequence of which a sanction is imposed on a person to indicate the established wrong-doing and to provide deterrence to others by virtue of the sanction in the particular case": *R v Wigglesworth* [1987] 2 SCR 541 at 560, cited in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350 at [83] per Kirby J.

[673] *WBM v Chief Commissioner of Police* [2010] VSC 219. It is recognised that the broad term "protection of the community" in the sentencing legislation could theoretically cover this meaning of penalty as well.

[674] [2004] HCA 42; (2004) 220 CLR 129 at [32] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ (footnotes omitted).

[675] *Rich v ASIC* [2004] HCA 42; (2004) 220 CLR 129 at [35] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. On the conceptual difficulties of determining the nature of sanctions see: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (ALRC, 2002) [2.60]; K Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law* (1992) 101 *Yale Law Journal* 1795 at 1799. In *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at

The boundaries of sentencing

[1.280]

The definition of "sentence" compared with other forms of sanctions and penalties is crucial for a number of reasons. Apart from defining the scope of this text, determining the availability of appeal rights, when a court is *functus officio*, or the applicability of human rights provisions, the definition is constitutionally critical, as sentencing is a judicial power that can only be vested in a court under Chapter III of the *Constitution*.[676] A "sentence" may only be imposed by a court that must conform to the requirements of Chapter III courts under the Constitution.[677] The boundaries of what constitutes a sentence are fluid and uncertain; there have been a number of areas in which the question of what is or is not a sentence has been explored.

Bail

[1.285]

Bail is the legal process by which a person arrested and taken into custody on suspicion of committing an offence can be set free on conditions to appear at a later time to answer the charges.[678] Although the main purpose of granting bail is to ensure that an offender will attend the court when the charges are dealt with, conditions may be placed on bail which go beyond the traditional purposes and which relate to the offender's future offending behaviour.[679] Under various bail schemes, offenders are brought before a court following an arrest. If they are assessed as suitable for treatment, they are released on bail for a relatively short period following which they are returned to the court which can, on sentencing, take into account the offender's

---

[215]–[216] Callinan and Heydon JJ distinguished between various forms of non-punitive involuntary detention, noting the differences between punitive and protective legislation; see also *Attorney-General (Qld) v Francis* [2008] QCS 243 at [48] per Muir JA.

[676] *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350 at [82] per Kirby J; see also *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at [22] ("There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth"). In October 2013 the Queensland Parliament passed the *Criminal Law (Public Interest Declarations) Amendment Act 2013* (Qld) which provides that the Minister (for Justice and Attorney-General) may recommend to the Governor-in-Council that a declaration be made that a person detained or under a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) should be held in detention "in the public interest" in an institution, possibly indefinitely. This decision is an executive, not a judicial one, and is not subject to the usual powers of review or appeal. Nor do the criteria and processes usually required in making a decision affecting a person's liberties apply. The Act raises the question of whether this is, in effect, a judicial power. However, under State law, there is no separation of powers, subject to the principles set out by the High Court in *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

[677] See [1.180].

[678] *Bail Act 1977* (Vic); RG Fox, *Victorian Criminal Procedure* (13th ed, Monash Law Book Co-operative, 2010) pp 176ff.

[679] See for example,*Bail Act 1978* (NSW) s 36A (condition of bail that a person enter into an agreement to subject themself to an assessment of capacity and prospects for participation in an intervention program or other program for treatment or rehabilitation); see also A Freiberg and N Morgan, *Between Bail and Sentence: The Conflation of Dispositional Options* (2004) 15 *Current Issues in Criminal Justice* 220.

conduct and progress whilst on bail.

In Victoria, the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program, which commenced in 1998, is a bail-based scheme that aims to provide a short-term drug treatment program for alleged offenders who come before the court with drug problems.[680] The average length of the program is about 8 to 12 weeks, following which the person appears before the court for adjudication and possibly sentence. In some jurisdictions, Governments have established specialist courts or jurisdictions such as drug courts, mental impairment courts and others without enabling legislation, relying upon bail or similar powers to allow the court either to retain direct supervisory responsibility or to defer sentence pending treatment or other programs. These programs tend to obscure further the already blurred lines between guilt, conviction and sentence.

The extent to which the bail conditions resemble the more punitive aspects of a sentence and to which that fact is taken into account in the final disposition is problematic.[681] Authority is scant.[682] Where an accused has spent some of the time on bail in a form of restricted custody such as home detention, or under curfew,[683] a court may give them some credit, in a broad sense, if it considers it to be appropriate, but there is no obligation to do so as there is in relation to detention in a prison.[684] Where the person has spent time in a residential rehabilitation facility it is more likely that this will be taken into account. In *R v Delaney*, the New South Wales Court of Criminal Appeal stated:[685]

> If the applicant was participating in programs the conditions of which amounted to conditions of quasi-custody, then the applicant should not, in my opinion, be disentitled from obtaining a credit in sentencing, by reason of the circumstance that part of his motivation for undertaking the programs might have been to create a favourable impression at any sentencing hearing. The applicant's motive for undertaking the programs might be relevant in the assessment of the applicant's prospects of rehabilitation but in my view it is not relevant in determining whether he should be entitled to some credit in sentencing, on the basis that he has

[680] More information on the CREDIT program is available through the "Court Support Services" section of the Magistrates' Court of Victoria website; see also New South Wales (CREDIT); Queensland Magistrates Early Referral into Treatment (QMERIT); South Australia – Court Assessment and Referral Drug Scheme (CARDS). The New South Wales Bureau of Crime Statistics and Research has found that in terms of re-offending, accused who were referred to the CREDIT program were no less likely to re-offend as those who were not: N Donnelly, L Trimboli and S Poynton, *Does CREDIT Reduce the Risk of Re-offending?*, Contemporary Issues in Crime and Justice No 169 (NSW Bureau of Crime Statistics and Research, 2013); New South Wales Law Reform Commission, *Sentencing*, Report 139 (NSWLRC, 2013) [16.27]ff.

[681] R Edney, *Bail Conditions as a Mitigating Factor in Sentencing* (2007) 31 *Criminal Law Journal* 101. For these purposes it is necessary to distinguish between taking time served in custody or on bail into account, the offender's behaviour on bail and the conditions of bail themselves.

[682] R Edney, *Bail Conditions as a Mitigating Factor in Sentencing* (2007) 31 *Criminal Law Journal* 101 has identified and analysed the few cases and the following discussion is indebted to this research.

[683] *Pappin v The Queen* [2005] NTCCA 2.

[684] *R v Malesevic* [1999] SASC 321; *R v Bruce* (1998) 71 SASR 536; cf statutory credit for pre-trial detention [13.145].

[685] [2003] NSWCCA 342; (2003) 59 NSWLR 1 at [23] per James J at 6; see also *R v Campbell* [1999] NSWCCA 76; *R v Thompson* [2000] NSWCCA 362; *Truss v R* [2008] NSWCCA 325; *Hughes v The Queen* [2008] NSWCCA 48; *R v Anderson* [2012] NSWCCA 175.

already undergone a kind of punishment by being subjected to quasi-custody.

Where a person has complied with all of the conditions of bail or has made progress towards rehabilitation, a court is likely to consider those factors as relevant in deciding the type of sentence that may be imposed and its duration.[686] Successful completion of the bail term may point to better prospects of succeeding on a non-custodial order.

Pre-sentence orders

[1.290]

In some jurisdictions the courts have been empowered to allow accused persons to participate in treatment or rehabilitation programs for various periods of time or to impose a "pre-sentence order". Such an order is not a sentence but its conditions closely resemble those of a sentence.[687]

Power to bind over and keep the peace

[1.295]

There is a distinction between the punitive powers of courts which are dependent upon a finding of guilt or conviction and the preventive powers of the courts, which are not. The power to bind over to keep the peace, which has its origins in 1361,[688] depends neither upon a criminal conviction nor the passing of a sentence; it is power exercisable by the Magistrates' Court as a form of preventive justice.[689] In its current form it is found in *Magistrates' Court Act 1989* (Vic) s 126A which is concerned with controlling apprehended future offences of those still in the

[686] See for example, *Penalties and Sentences Act 1992* (Qld) s 9(2)(o) (when an offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course, the court may take into account the offender's successful completion of the program or course).

[687] See for example, intervention programs in New South Wales under the *Criminal Procedure Act 1986* (NSW) s 350 (for a period of up to 12 months, utilising bail conditions); pre-sentence orders in Western Australia under the *Sentencing Act 1995* (WA) s 33B (for a period of up to 2 years; the order may contain supervision, program or curfew requirements as well as standard conditions which resemble those of sentencing orders such as community-based orders); *Bail Act 1985* (SA) s 21B (intervention programs); *Bail Act 1992* (ACT) s 25(4)(d) (conditions of bail that a person participate in a program of personal development, training or rehabilitation). A pre-sentence order in Western Australia is not a sentence. Its purpose is to give an offender who is facing a term of imprisonment an opportunity to take steps to address their offending behaviour prior to the court proceeding to sentence: *Western Australia v Hatch* [2008] WASCA 162 at [6]–12]; *Western Australia v Jenkin* [2011] WASCA 171. It is founded upon a conviction; see A Freiberg and N Morgan, *Between Bail and Sentence: The Conflation of Dispositional Options* (2004) 15 *Current Issues in Criminal Justice* 220; MS King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) Ch 10; Law Reform Commission of Western Australia, *Court Intervention Programs – Consultation Paper* (Law Reform Commission of Western Australia, 2008); K Warner, *Sentencing Review 2002–2003* (2000) 27 *Criminal Law Journal* 325.

[688] The statute 34 Edw III, c1 (1361) allowed justices of the peace (or those exercising the powers of justices) to require anyone "that be not of good fame" to enter into a recognisance or surety of a certain sum to be of good behaviour and to keep the peace. The reference to "justices" is now to magistrates: *Magistrates' Court Act 1989* (Vic) s 117(2); *Devine v The Queen* [1967] HCA 35; (1967) 119 CLR 506 at [6].

[689] P Power, *An Honour and Almost a Singular One: A Review of the Justices' Preventive Jurisdiction* (1981) 8 *Monash University Law Review* 69; See also *R v Wright; Ex parte Klar* (1971) 1 SASR 103; *Laidlaw v Hulett* [1998] 2 Qd R 45.

community, rather than the punishment of detected past ones.[690] It was, and still is, rarely used as a means of maintaining the future peace. The person bound over promises to be of good behaviour for a certain fixed period on condition that they enter into a bond, with or without sureties. There may be no requirement to appear before the court again. A court may order that an accused who does not comply with an order be imprisoned until they do comply with it or for 12 months, whichever is the shorter.[691] The binding over power was also combined with the superior courts' common law power to postpone sentence.[692] This gave rise to what was known as a "common law bond", namely, the release of a convicted offender after binding the person over to appear for sentence when called upon and to be of good behaviour in the meantime.[693]

Preventative detention, control and other orders

[1.300]

There are a number of legislative provisions that provide for the involuntary detention of persons for their own safety or for the protection of the community, where a criminal act or conviction is not a prerequisite but where it might be a possibility. The effect on the offender may be punitive though that may not be a stated legislative purpose. In *South Australia v Totani*[694] Heydon J observed that there are many forms of preventive justice including binding over to keep the peace, bail conditions, apprehended violence orders, injunctions, restraining orders, habitual criminal legislation and others. Some jurisdictions have introduced prohibited behaviour orders, which are civil orders that require a finding of guilt or conviction as a prerequisite, and which empower a court to order such constraints upon the otherwise lawful activities of the person as it considers reasonable including constraint on movement, behaviour, communication or possession of specified things.[695] Breach of the order is a criminal offence punishable by a maximum of 5 years in the higher courts or 2 years in the Magistrates' Court or Children's Court.

Anti-terrorism legislation in Australia contains provisions that permit a person to be taken into custody and be detained for the purpose of preventing a terrorist act, or to have their movements and activities controlled for the purpose of protecting the public from a terrorist act.[696] Anti-criminal organisations legislation also contains provisions that control the activities of persons

---

[690] See also *Judiciary Act 1903* (Cth) s 81; *Bakker v Stewart* [1980] VR 17, 20.
[691] *Magistrates' Court Act 1989* (Vic) s 126A(4).
[692] *Griffiths v The Queen* [1977] HCA 44; (1977) 137 CLR 293 at [21]–[22].
[693] The "common law bond" was abolished by *Sentencing Act 1991* (Vic) s 71. See now *Sentencing Act 1991* (Vic) s 72 (release on adjournment following conviction). For a discussion of the history of the common law bond, see *R v McHutchison* (1990) 3 WAR 261, 268 and of the relationship between statutory bonds and common law bonds: *DPP (SA) v District Court (SA)* [1995] SASC 5354; (1995) 65 SASR 357; see also J Nicholson, *When Sentencing Becomes a Walk into the Future with the Offender: The Griffiths Remand – Compulsion in Rehabilitation* (2008) 33 *Criminal Law Review* 142.
[694] [2010] HCA 39; (2010) 242 CLR 1 at [374].

[695] *Prohibited Behaviour Orders Act 2010* (WA); see T Crofts and N Witzleb, *"Naming and Shaming" in Western Australia: Prohibited Behaviour Orders, Publicity and the Decline of Youth Anonymity* (2011) 35 *Criminal Law Journal* 34.
[696] *Criminal Code 1995* (Cth) Divs 104 and 105; C Macken, *Preventative Detention in Australian Law: Issues of Interpretation* (2008) 32 *Criminal Law Review* 71; P Fairall and W Lacey, *Preventive Detention and Control Orders Under Federal Law: the Case for a Bill of Rights* (2007) 31 *Melbourne University Law Review* 1072.

who are members of criminal organisations or engage in serious criminal activity or associate with such persons. These provisions may include orders prohibiting association with members of criminal organisations, orders prohibiting the person from being in certain places and orders requiring the removal of fortifications.[697] A preventative detention order is an executive order, while a control order can only be made by a court.[698] Neither requires a finding of guilt nor a conviction as a condition of their use.[699] These orders are not considered to be either penalties or sentences because their purposes are said to be preventive rather than punitive, even though they can adversely and substantially "affect the common law freedoms of individuals and the interests of the organisation"[700] subject to such orders.

In relation to a person with a severe substance dependence whose life or health is considered to be in danger, the *Severe Substance Dependence Treatment Act 2010* (Vic) permits a court to make an order for their detention and treatment at a treatment centre under a detention and treatment order for a period of up to 14 days in the first instance or until the criteria for the application of the order no longer apply.[701] Similarly, in relation to a person who has a mental disorder, acquired brain injury, intellectual impairment or a severe substance dependence and who has exhibited violent or dangerous behaviour that has caused serious harm to themself or some other person or who is behaving in a way which is reasonably likely to place them or some other person at risk of serious harm, the *Human Services (Complex Needs) Act 2009* (Vic) provides for the placing of a person under a "care plan" which may provide services such as health services, mental health services, disability services, drug and alcohol treatment services, and housing and support services in a co-ordinated manner in order to deal with that person's behaviour. A care plan cannot exceed 3 years in length.[702] These orders are neither sentences nor penalties.

Extended supervision orders

[1.305]

Legislation in most jurisdictions provides for the continuing detention or supervision of certain types of offenders who have served a custodial sentence but who are considered to present an unacceptable risk of harm to the community.[703] These orders can only be made by a court. But while a conviction is a prerequisite to the original order for imprisonment, it is not a necessary foundation for the further order, which is considered to be preventive rather than punitive. In

[697] See for example, *Serious and Organised Crime (Control) Act 2008* (SA); *Criminal Organisation Act 2009* (Qld); *Crimes (Criminal Organisations Control) Act 2009* (NSW).
[698] For a period of up to 12 months. *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307.
[699] *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at [208] per Hayne J; see also G Martin, *Control Orders: Out of Control? High Court Rules South Australian "Bikie" Legislation Unconstitutional* (2011) 35 *Criminal Law Journal* 116.
[700] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638 at [30] per French CJ.
[701] S Cooke, *The Severe Substance Dependence Treatment Act 2010 (Vic)* (2010) 18 *Australian Health Law Bulletin* 148.
[702] See also Chapter 13 in relation to other orders that may be imposed in relation to mentally disordered or intellectually disabled offenders.
[703] *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); and *Crimes (High Risk Offenders) Act 2006* (NSW).

Victoria such orders can be made for up to 15 years. Offenders may be detained in custodial facility which may not necessarily be a prison. Although not strictly a "sentence", the nexus between the original sentence and this form of highly restrictive post-sentence order warrants its inclusion in the chapter discussing custodial orders.[704]

Disciplinary proceedings

[1.310]

Penalties of various kinds may be imposed by professional, sporting or other bodies for infractions of their rules or as a result of criminal proceedings in the courts. These may take the form of fines, suspension and disqualification of licences, warnings, reprimands and the like, all of which may have serious consequences for the individual's reputation or ability to work. Though such penalties may be perceived as punitive, they are not sentences for the purpose of the criminal law because there has not been an adjudication of criminal guilt or the imposition of punishment in the sense understood by the criminal law.[705]

Civil penalties

[1.315]

Civil penalties are sanctions that are imposed by courts in non-criminal proceedings, following action taken by a Government agency such as the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission.[706] Civil penalties of various kinds have long been available in Australian legislation, for example in the *Customs Act 1901* (Cth), and are now found in the *Competition and Consumer Act 2010* (Cth), the *Corporations Act 2001* (Cth)[707] and others. Civil penalties are hybrid sanctions in that they resemble fines, albeit that a criminal conviction is not recorded. Their main purposes are deterrent rather than compensatory[708] and there are also retributive elements in the sentencing process that reinforce the need to attribute moral responsibility and to punish corporate offenders for their wrongdoing.[709] Because of these features and their close similarities to fines, civil

[704] See Chapter 14; see also P Keyzer, C Pereira and S Southwood, *Pre-emptive Imprisonment for Dangerousness in Queensland under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues* (2004) 11 *Psychiatry, Psychology and Law* 244; *R v England* [2004] SASC 254; (2004) 89 SASR 316.
[705] *R v White; Ex parte Byrnes* [1963] HCA 58; (1963) 109 CLR 665; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at [37]; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350.
[706] Australian Law Reform Commission, *Principled Regulation*, Report No 95 (ALRC, 2002); A Rees, *Civil Penalties: Emphasising the Adjective or the Noun?* (2006) 34 *Australian Business Law Review* 139; A Freiberg, *The Tools of Regulation* (The Federation Press, 2010).
[707] For example, *Corporations Act 2001* (Cth) ss 180 – 183, 588G; see also *Australian Securities and Investments Commission Act 2001* (Cth) Pt 2, Div 2, Subdiv G.
[708] C Beaton-Wells, *Recent Corporate Penalty Assessment Under the Trade Practices Act and the Rise of General Deterrence* (2006) 14 *Competition and Consumer Law Journal* 65.
[709] *ACCC v J McPhee and Son (Australia) Pty Ltd (No 5)* [1998] FCA 310; *ACCC v Pioneer Concrete* [2001] FCA 383; *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091; *ASIC v Ingelby* [2013] VSCA 49 per Weinberg JA at [2]–[6]. On the difficulties of drawing clear distinctions between civil and criminal penalties see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216

penalties are discussed in Chapter 7 (fines).

Forfeiture and confiscation orders

[1.320]

Forfeiture orders have a long history at common law and derive from doctrines such as deodand and attainder.[710] Customs and revenue statutes have long provided for various forms of penalties and forfeitures whose status as criminal or civil are ambiguous, with procedural and substantive elements of each, and with incapacitative, restitutive and penal aims.[711] In *DPP v Emmerson*[712] Southwood J observed, in relation to the effect of the *Misuse of Drugs Act* (NT), which created a non-conviction based confiscation regime:

> … the notion of punishment cuts across the division between the civil and the criminal law. Sanctions frequently serve more than one purpose. Civil proceedings may advance punitive as well as remedial goals, and, conversely, both punitive and remedial goals may be served by the criminal penalties. In his Second Reading Speech on 16 May 2002 when introducing the *Criminal Property Forfeiture Bill*, the Attorney General described the new scheme as a non-conviction civil based scheme with three objectives: (1) to deter those who may be contemplating criminal activity by reducing the possibility of gaining a profit from that activity; (2) to prevent crime by diminishing the capacity of offenders to finance future criminal activities; and (3) to remedy unjust enrichment of criminals who profit at society.[713] Two of those objectives are consistent with the objectives of sentencing a person for a criminal offence.

Confiscation legislation generally provides for conviction-based and non-conviction-based sanctions, and contains provisions for prosecutions and proceedings for the recovery of civil penalties that may be required to be proved to the civil standard. The term "confiscation order" is used generally to describe a range of orders that seek to deprive offenders of the proceeds of crime or property used in the commission of the crime or derived directly or indirectly from it. These sanctions fall within the field of sentencing when the legislature directs or permits them to be included in the judgment by which a criminal court disposes of guilty persons or where they may be taken into account by a court in looking at the totality of the sentences imposed. For this reason they are discussed in Chapter 9.

CLR 161 at [107] and [114] per Hayne J; *ASIC v Petsas* [2005] FCA 88 per Finkelstein J; *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 per Hayne J at [208].

[710] A Freiberg and RG Fox, *Fighting Crime with Forfeiture: Lessons from History* (2001) 6 *Australian Journal of Legal History* 1.

[711] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161.

[712] [2012] NTSC 60 at [76]; see also comments of the Court of Appeal: *Emmerson v DPP* [2013] NTCA 4 at [102] per Barr J endorsing the comments of the trial judge; see also [9.30].

[713] *Burnett v DPP* [2007] NTCA 7; (2007) 21 NTLR 39 at [21].